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BOOK REVIEWS

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BOOK REVIEW

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FOREWORD

It is our distinct privilege to present Volume 13.1 of the *Indian Journal of Arbitration Law* ["**IJAL**"]. Staying true to the journal's commitment to strike a balance between scholarly and practical insights, this edition features contributions from leading practitioners alongside esteemed academicians, offering insightful perspectives on the evolving landscape of arbitration.

Arbitration undisputedly continues to cement its role as a preferred mode for dispute resolution especially for commercial matters and recent developments in the field of arbitration signal India's increasing commitment to best practices.

The arbitration regime in India has been abuzz with new developments as more and more High Courts weigh in on the Act, and interpret it. Furthermore, the government's proposed amendments to the Arbitration and Conciliation Act, 1996, signal an effort to promote institutional arbitration, codify emergency arbitration, and minimize judicial intervention. These proposed amendments are aimed at boosting investor's confidence and making India an arbitration-friendly jurisdiction.

Furthermore, prominent rulings from the Supreme Court as well as various High Courts have tried to clear the ambiguities concerning arbitration and settle the law. The Supreme Court in *Central Organization for Railway Electrification* v. *ECI SPIC SMO MCML (JV)* reaffirmed the invalidity of unilateral appointment clauses and in *Arif Azim* v. *Micromax Informatics FZE* clarified the distinction between the seat and venue of arbitration. This marked significant milestones in India's arbitration landscape. We are also awaiting a landmark decision of the Supreme Court, *Gayatri Balasamy* v. *ISG Novasoft Technologies Limited*, which is going to decide on the power of the courts to modify an arbitral award under Sections 34 and 37 of the Arbitration and Conciliation Act, 1996.

The launch of the Arbitration Bar of India ["**ABI**"], with the Attorney General as the Patron-in-Chief, signals renewed commitment to foster ADR methods and reduce courts' burden. ABI's core mission is to promote excellence, integrity, and innovation in arbitration practices. Establishment of ABI promises a structured framework for arbitration practitioners and align it with leading arbitration hubs such as Singapore and London.

The Government's commitment towards arbitration can likewise be ascertained through the funds allocated to improve the infrastructure of arbitration and promote ADR through the Union Budget 2024-2025. These budgetary allocations are expected to support initiatives aimed at strengthening domestic arbitral institutions and facilitating greater adoption of arbitration in commercial disputes. However, the recent guidelines issued by the Ministry of Finance, *Guidelines for Arbitration and Mediation in Contracts of Domestic Public Procurement*, advise against opting for arbitration as an alternative dispute mechanism in domestic public procurement contracts in disputes less than 10 crores. The decision in *DMRC* v. *DAMPEL* wherein the Supreme Court used its curative jurisdiction to annul an award has also muddled certain positions that were considered settled.

Run up to this edition also saw a competitive streak amongst Generative AI tools with political undertones as DeepSeek (a Chinese startup) upended the cost structures that were initially determined by Western companies. With reference to arbitration, these tools — if integrated into the workflow — have the potential to reduce costs and automate certain tasks. As regulators catch up, it would be interesting to see how arbitral institutions adopt these tools.

Against this backdrop, the *Centre for Advanced Research and Training in Arbitration Law* ["**CARTAL**"] is set to host the 9th CARTAL Conference on International Arbitration at National Law University, Jodhpur, from March 22-23 this year. The structure has been revamped to combine the conference with a paper presentation. The theme for this year is *Reconciling Tradition with Innovation: Future Proofing the Dispute Resolution Processes*. The

panel discussions shall deal with emerging technologies and institutional arbitration, keeping in mind the contemporary landscape. We expect this to further academic research and enable budding scholars. Furthermore, with the generous patronage of Prof. Gary B. Born and WilmerHale, we conducted yet another successful edition of the *Gary Born Essay Competition*. Two winning entries have also been featured in this issue.

This edition of IJAL features four articles, two notes and two book reviews, each addressing critical aspect of arbitration and providing a fresh perspective on the emerging issues in arbitration.

Tanya Kalyanvala in "*Ethics In International Arbitration: Can There Be Unity In Diversity? Anti-suit Injunctions at Crossroads – Navigating Unique Jurisdictions*" puts forth a 'Five Point Proposal' for a new and uniformly applicable system for ethical regulation in international arbitration while also critiquing existing models.

Anirudh Sundar in "*Arbitration Timelines In Flux: Interpreting The Intent Of Section 23(4)"* addresses contrasting High Court decisions on the same point of law and argues that the legislative intent was to give the provision a mandatory effect.

Dr. Marisport A. and Basundhara Das in "*Exploring The Potential Of Islamic Arbitration: Insights For India From The West*" analyse the legitimacy of a religious dispute resolution process across common law jurisdictions in family law matters with a focus on India.

Prof. Prakhar Narain Singh Chauhan and Shubhaankar Ray in "*The Elephant In The Room — Pathological Clauses — Interpretation, Intervention & Court Practices*" compare thresholds for referring parties to arbitration across major jurisdictions with Indian practice when encountered with pathological arbitration clauses.

Chaitanya Chaturvedi in "*Taxation Turbulence: The Controversy Of Arbitration In International Tax Disputes*" advocates for the incorporation of institutional arbitration provisions into international tax models. It identifies disparities in tax-awards by different tribunals which span over a range of taxation issues.

Lahar Jain in "*Electing Your Forum: A Checklist Before Approaching An Investment Tribunal In An International Tax Dispute*" addresses potential areas of conflict in international tax disputes concerning admissibility and jurisdictional issues.

Apart from the aforementioned articles and notes, we also feature book reviews penned by Prof. (Dr.) Ajar Rab and Jake Lowther.

These contributions reflect the depth and breadth of contemporary arbitration scholarship, offering valuable insights into issues ranging from ethics in international arbitration to arbitration in international tax disputes.

We are grateful to the authors for investing their trust in IJAL. Their impeccable analysis will certainly inform students, and practitioners alike for years to come. We are also grateful to our **Patron and Vice Chancellor, Prof. (Dr.) Harpreet Kaur**, for her effective leadership and guidance to the Centre. Our **Faculty Chairperson, Prof. Sarthak Mishra**, has also been instrumental in helping shape this edition, and the workings of the Centre. We are also grateful to our distinguished **Board of Advisors** for their unwavering support. It would also be appropriate to thank the **Editorial Board**, our **Managing Editor**, **Sanidhya Sanhwal**, and our **Executive Editor**, **Yash Joshi**, for maintaining the highest benchmark and prioritizing quality work.

As we prepare for our next issue, we would love to hear if you have any feedback for us.

Nandini Arya & Raunak Rai Maini
Editors-in-Chief

Indian Journal of Arbitration Law
National Law University, Jodhpur

ETHICS IN INTERNATIONAL ARBITRATION: CAN THERE BE UNITY IN DIVERSITY

*Tanya Kalyanwala**

Abstract

The jury has perpetually been out on whether or not international arbitration requires a uniform system of ethics. The prospect of a uniform ethical framework is often rejected for being needless, and overriding the 'consent based' nature of the arbitration process. However, by analysing the failings of the presently operating ethical mechanisms, and also the prospect of a 'uniform code of ethics', this article puts forth a 'Five Point Proposal' for a new, and uniformly applicable system for ethical regulation in international arbitration. Unlike the proposition of a 'uniform code', this article through its proposal does not aim to supersede, but in fact, to harmonize various existing mechanisms thereby constructing an effective and achievable framework for ethics in international arbitration.

I. Introduction

American poet Maya Angelou observed that – "*The needs of a society determine its ethics*". In this vein and true to its proactive character, the international arbitration community has been highly responsive in catering to its ethical needs. Be it various soft laws, institutional ethics codes and empirical studies, *'ethics'* in international arbitration has witnessed a sea change in the attention it has garnered, both theoretically and practically. The evolution of its development is best summarized from its original description as "*an ethical no man's land*"[1] to more recently being compared to a "*cluttered teenager's*

* Tanya Kalyanvala is a Dual Qualified (India and England & Wales) International Arbitration Lawyer.

1 Catherine A Rogers, *Fit and Functional in Legal Ethics: Developing a Code of Conduct for International Arbitration*, 23 MICH J. INT'L L. 341 (2002).

bedroom".[2] Lord Goldsmith however, in his keynote speech at the International Chamber of Commerce ["**ICC**"] United Kingdom Annual Arbitrators Forum in 2013 remarked that "*[e]thics in international arbitration has generated much debate but relatively few answers*".[3] More than a decade later, though the answers attempted have multiplied, a concrete ethical framework is yet to be achieved.

Ethics in international arbitration has been the subject of two schools of thought. The *first*, treating ethical issues as theoretical or infrequent at best, thereby undeserving of any action.[4] The *second*, by contrast, recognize ethics as a cause of great concern, thereby warranting the development of a uniform ethics code.[5] All or any progress made on the ethics front in international arbitration is thus a reflection of these starkly differing approaches.

In an attempt to strike the right balance between these approaches, this article at the outset evaluates the ethical issues faced by the prime members of the arbitration cast. This sets the stage for assessing the existing mechanisms governing these issues and examining whether a *'uniform code of ethics'* does in fact prove the most viable solution. In rejecting the said proposition, the article puts forward a *'Five Point Proposal'* that introduces

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2 Douglas Thomson, *From No Man's Land to a Teenager's Bedroom*, GLOBAL ARBITRATION REVIEW (Sept. 17, 2014), *available at* https://globalarbitrationreview.com/article/1033712/from-no-man%E2%80%99s-land-to-a-teenagers-bedroom.

3 Sebastiano Nessi, *Creation of a Global Arbitration Ethics Council: the Swiss Arbitration Association declares that the time has not yet come*, THOMSON REUTERS PRACTICAL LAW ARBITRATION BLOG (Nov. 10, 2016), *available at* http://arbitrationblog.practicallaw.com/creation-of-a-global-arbitration-ethics-council-the-swiss-arbitration-association-declares-that-time-has-not-yet-come/.

4 Cyrus Benson, *Can Professional Ethics Wait - The Need for Transparency in International Arbitration*, 3 DISP RESOL. INT'L 78 (2009); Paula Hodges, *The Proliferation of "Soft Laws" in International Arbitration: Time to draw the Line?*, AUSTRIAN YEAR BOOK ON INTERNATIONAL ARBITRATION 205 (2015).

5 *Id.*

the application of certain existing and new mechanisms for a comprehensive and uniform ethical framework. Lastly, this article stresses on the importance of conclusively dealing with this subject not merely to achieve "*ethics for ethics' sake*" but also to defeat the risk of increased external intervention resulting from failing to resolve these issues *within the community*.

II. Regulating Ethics in International Arbitration: Much ado about nothing or time for a change?

With the diverse nationalities and cultures of all its participants coupled with an interplay of various legal systems and rules, international arbitration characterizes a *'fusion'* of the highest order. Despite this inherent diversity, the need for uniformity on material issues has been successfully catered to through the development and widespread acceptance of instruments like the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards ["**New York Convention**"] and the United Nations Commission on International Trade Law ["**UNCITRAL**"] Model Law on International Commercial Arbitration ["**Model Law**"].[6] With an active outlook towards the regulation of ethics in the field in more recent times, the promulgation of a '*uniform code of ethics'* quite naturally became the next theme for harmonisation. However, those thought leaders that consider ethical concerns as non-existent, demand empirical proof showcasing the prevalence of such unethical conduct, and the inadequacy of the present system of ad hoc case-by-case remedies for tackling the same.[7] Thus, reviewing the prevalence of the *'ethical dilemmas'* of the chief members of the arbitration cast as a first step, sets the stage right for this discussion.

A. Arbitrators

[6] Issac J Buckland, *A Comparative Approach to Consistent Ethical Standards in International Commercial Arbitration*, 85 ARB. INT'L J. ARB., MEDIATION AND DISP. MGMT. 230 (2019).

[7] Jarred Pinkston, *The Case for Arbitral Institutions to Play a Role in Mitigating Unethical Conduct by Party Counsel in International Arbitration*, 32 (2) CONN J. INT'L L. 177, 182 (2017).

It is often exclaimed that an arbitration is only as good as the arbitrators.[8] For issues of arbitrator ethics, the emphasis largely if not entirely rests upon three virtues - the *'independence', 'impartiality'* and *'neutrality'*[9] of arbitrators and the complications arising from a breach thereof. The incidence of *'challenge to arbitrators'* based on a breach of these standards is best demonstrated by the recent statistics produced by various arbitration institutions.

London Court of International Arbitration ["**LCIA**"]**:** The LCIA has made available online in two batches, digests of several LCIA cases tried between the period of October 2010 and July 2017 and August 2017 and December 2022, wherein the respective arbitrators were challenged *inter alia* on grounds of lack of independence and impartiality.[10] Of the 32 challenge cases between 2010 and 2017, only six were successful and one was partially successful.[11] Further, of the 24 challenge cases between 2017 and 2022, only two were upheld while the rest were rejected.[12] Of the five challenges received in 2023, two were rejected, two are still pending and the arbitrator resigned in the fifth case.[13]

ICC: The number of arbitrator challenges recorded by the ICC Court in recent years on grounds of lack of impartiality or independence or otherwise is as follows:

Year	*Number of Challenges recorded*	*Number of successful Challenges*

8 Ugo Draetta*, What Does "Ethics In Arbitration" Really Mean?*, 1 EUR. INT'L ARB. REV. 57 (2012).

9 *Id.*

10 *Challenge Decision Database*, LONDON COURT OF INTERNATIONAL ARBITRATION (Feb. 12, 2025), *available at* https://www.lcia.org/challenge-decision-database.aspx.

11 *Id.*

12 *Supra* note 10.

13 *2023 Annual Casework Report,* LONDON COURT OF INTERNATIONAL ARBITRATION (Feb. 12, 2025), *available at* https://www.lcia.org/LCIA/reports.aspx.

2020[14]	92	5
2021[15]	45	5
2022[16]	52	3
2023[17]	46	8

Stockholm Chamber of Commerce ["**SCC**"]***:*** The recent statistics of arbitrator challenges recorded by the SCC are as follows:

Year	*Number of Challenges recorded*	*Number of successful Challenges*
2020[18]	17	2
2021[19]	17	6
2022[20]	3	1

14 *ICC Dispute Resolution 2020 Statistics*, INTERNATIONAL CHAMBER OF COMMERCE (Feb. 12, 2025), *available at* https://nyiac.org/wp-content/uploads/2021/09/ICC-Dispute-Resolution-2020-Statistics.pdf.

15 *ICC Dispute Resolution 2021 Statistics*, INTERNATIONAL CHAMBER OF COMMERCE (Feb. 12, 2025), *available at* https://jusmundi.com/en/document/pdf/publication/en-2021-icc-dispute-resolution-statistics.

16 *ICC Dispute Resolution 2022 Statistics*, INTERNATIONAL CHAMBER OF COMMERCE (Feb. 12, 2025), *available at* https://jusmundi.com/en/document/pdf/publication/en-2022-icc-dispute-resolution-statistics.

17 *ICC Dispute Resolution 2023 Statistics*, INTERNATIONAL CHAMBER OF COMMERCE (Feb. 12, 2025), *available at* https://iccwbo.org/wp-content/uploads/sites/3/2024/06/2023-Statistics_ICC_Dispute-Resolution_991.pdf.

18 *SCC Statistics 2020,* THE ARBITRATION INSTITUTE OF THE STOCKHOLM CHAMBER OF COMMERCE (Feb. 12, 2025), *available at* https://sccarbitrationinstitute.se/wp-content/uploads/2024/12/statistics-scc-2020.pdf.

19 *SCC Statistics 2021,* THE ARBITRATION INSTITUTE OF THE STOCKHOLM CHAMBER OF COMMERCE (Feb. 12, 2025), *available at* https://sccarbitrationinstitute.se/wp-content/uploads/2024/12/scc-statistics-2021.pdf.

20 *SCC Statistics 2022,* THE ARBITRATION INSTITUTE OF THE STOCKHOLM CHAMBER OF COMMERCE (Feb. 12, 2025), *available at* https://sccarbitrationinstitute.se/en/statistics-

2023[21]	6	1

These statistics reveal that while the frequency of such cases remains consistent overtime, their success rate is considerably low. The feeble success rate of such challenges often becomes a plausible argument to counter any regulation for arbitrator ethics. Further, amongst the more recent case bringing into question the standards of arbitrator integrity is *Halliburton Company* v. *Chubb Bermuda Insurance Limited* ["**Halliburton**"]. Here, the courts had to determine, whether the arbitrator's failure to disclose his appointment by one of the parties in a related matter constituted an *'actual bias',* thereby warranting his removal. The court of first instance[22] and appeal[23] both rejected the challenge to the arbitrator – the non-disclosure was considered as an *'inadvertence'*, the same being insufficient for conclusively inferring *'bias'*. On further appeal, the Supreme Court also rejected the challenge, but noted that *'a breach of the duty of disclosure may give rise to an appearance of bias'*.[24] The importance of decisively resolving these questions was highlighted by the permitted intervention of leading arbitration institutions such as the LCIA, the ICC, the Chartered Institute of Arbitrators ["**CIArb**"], the London Maritime Arbitrators Association and the Grain and Feed Trade Association which all made submissions on these issues. Thus, in the absence of a more stringent regime for disclosures, grounds such as *'inadvertence'* run a greater risk of becoming tactical defences for non-disclosure. The same has been positively affirmed by the recent

2022#:~:text=The%20SCC%20appointed%2050%20arbitrators,and%20the%20already%20appointed%20arbitrators.

21 *SCC Statistics 2023,* THE ARBITRATION INSTITUTE OF THE STOCKHOLM CHAMBER OF COMMERCE (Feb. 12, 2025), *available at* https://sccarbitrationinstitute.se/en/statistics-2023.

22 Halliburton Company v. Chubb Bermuda Insurance Limited, [2017] EWHC 137 (Comm) (Eng.).

23 Halliburton Company v. Chubb Bermuda Insurance Limited, [2018] EWCA Civ 817.

24 Halliburton Company v. Chubb Bermuda Insurance Limited, [2020] UKSC 48.

case of *Aiteo Eastern E & P Company Limited* v. *Shell Western Supply and Trading Limited and Others*[25] ["**Aiteo**"]. Here, the Claimants sought to remove an arbitrator for *'apparent bias'* due to her failure (attributed to inadvertence) to timely disclose her professional engagements with the law firm representing the opposing party, post her appointment in the present case. The ICC Court upheld the challenge and removed the said arbitrator. Resultantly, the Claimants questioned the regularity of the four partial awards rendered by the said tribunal and approached the English Hight Court for setting aside the said awards. While a challenge to three of the said awards failed, the English High Court remitted one of the awards to the newly constituted tribunal for reconsideration. Concerns about arbitrator ethics also extend to how such matters are determined. The same was highlighted by the Queen Mary University of London and White & Case LLP's 2015 survey ["**2015 QMUL Survey**"], which identified the *"lack of transparency"* in institutional decision-making for arbitrator challenges as a significant issue.[26] Thus, the consistent recurrence of such challenges, transparency concerns in deciding them and a lack of clarity in standards of ethics for arbitrators has reinforced the growing need for regulation in this sphere.

B. Counsel

Issues of counsel ethics in international arbitration have usually been summarised through two slogans: a perceived need to "*level the playing field*" and an onslaught of "*guerrilla tactics*".[27] In the absence of anything set in

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25 Aiteo Eastern E & P Company Limited v. Shell Western Supply and Trading Limited and Others, [2024] EWHC 1993 (Comm).

26 Queen Mary University of London and White & Case LLP, *2015 International Arbitration Survey: Improvements and Innovations in International Arbitration*, 26, *available at* https://www.qmul.ac.uk/arbitration/media/arbitration/docs/2015_International_Arbitration_Survey.pdf.

27 Felix Dasser, *Equality of Arms in International Arbitration: Do Rules and Guidelines Level the Playing Field and Properly Regulate Conduct? – Can They? Will They? Should They? The Example of the IBA Guidelines on Party Representation*, *in* INTERNATIONAL ARBITRATION AND THE RULE OF LAW: CONTRIBUTION AND CONFROMITY, ICCA CONGRESS SERIES NO. 19 (Andrea Menaker ed. 2017).

stone for accepted counsel practices in international arbitration, it is often difficult to distinguish genuine cultural differences from intentional unethical manoeuvres. An example of this would be the International Centre for Settlement of Investment Disputes ["**ICSID**"] case of *Hrvatska Elektroprivred, d.d.* v. *Republic of Solvenia*.[28] In this case, shortly before the commencement of hearings, the Respondent proposed to appoint an additional barrister. The said appointment was challenged by the Claimant on the ground that the additional barrister worked at the same barristers' chambers as the chairman of the tribunal thus casting a shadow on the chairman's independence and impartiality. The said challenge ultimately failed, owing to the common understanding and cultural uniqueness of barristers' chambers in England, where lawyers often conduct matters independently despite working for the same banner. Such unique cultural disparities and professional practices often contribute to confusion and a delay in the proceedings through unnecessary challenges. For instance, in one of his cases, Mr. Cyrus Benson (arbitration lawyer) observed that the opposing lawyers were supplying information to one of the party-appointed arbitrators which was in turn used by that arbitrator for questioning the witness.[29] Though alarmed by this at first, it was ultimately found that *ex parte* communication with arbitrators was an ethical and permissible practice as per the local laws of the seat. Though not a case of outright ethical misconduct, this is an ideal example of ethical disparities stemming from uneven counsel practices thus resulting in lawyers playing by different rules. Further, in an informal survey conducted by arbitration practitioners Edna Sussman and Solomon Ebere, to ascertain the form and recurrence of the often-debated guerilla tactics, it was found that 68 percent of the 81 Respondents affirmed that they had experienced such tactics in course of

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[28] Hrvatska Elektroprivred, d.d. v. Republic of Solvenia, ICSID Case No. ARB/05/24.

[29] Cyrus Benson, *The IBA Guidelines on Party Representation: An Important Step in Overcoming the Taboo of Ethics in International Arbitration*, 1 THE PARIS JOURNAL OF INTERNATIONAL ARBITRATION 47 (2014).

their practice.[30] The most commonly reported practices *inter alia* involved abuse of document production, creating conflicts, delay tactics, last-minute surprise, frivolous anti-arbitration injunctions and other actions from the court, frivolous challenges to arbitrators, witness tampering and various other strategies to frustrate an orderly and fair hearing. Operating in a grey area, many of these practices, while not statutorily punishable, and also acceptable in certain jurisdictions, are nevertheless unethical and hinder the arbitration process.[31] While issues of arbitrator ethics have been distinctly defined and quantified in terms of reported cases and statistics, those for counsel ethics are harder to identify due to the complex and confidential nature of international arbitration.

C. Expert and Fact Witnesses

In the United States of America ["**USA**"], Australia and Canada it is the parties who appoint, compensate and are also permitted to communicate with expert witnesses before the proceedings.[32] On the other hand, in Germany and France the experts are appointed directly by, and function as an ancillary to the primary decision-maker.[33] Thus the cultural difference here, stems from the *'appointing authority'* i.e. the counsel/parties or the tribunal as the authority appointing the expert, and the scope of the experts' functions based on the same. Further, there exists a lack of consensus on whether the standard of neutrality and independence for party-appointed experts should be lower than that of tribunal-appointed experts. In a recent survey conducted on expert evidence in international arbitration, 51 percent of the respondents agreed that party-appointed experts are essentially *'hired-*

30 Edna Sussman & Ebere Solomon, *All's Fair in Love and War – Or Is It? Reflections On Ethical Standards For Counsel in International Arbitration*, 22 (4) AMERICAN REV. INT'L ARB. 611, 613 (2011).

31 Günther J. Horvath, Stephan Wilske, Harry Nettlau & Niamh Leinwather, *Categories of Guerrilla Tactics*, *in* GUERRILLA TACTICS IN INTERNATIONAL ARBITRATION 3 (Günther J. Horvath and Stephan Wilske ed, Kluwer Law International 2013).

32 CATHERINE A. ROGERS, ETHICS IN INTERNATIONAL ARBITRATION 140 (1st ed. OUP 2014).

33 *Id.*

guns' or *'advocates in disguise'*.[34] Thus, it is important that the disparities in practices relating to experts be addressed. An example of such disparities muddling the role of an expert was witnessed in the ICSID case of *Société Ouest-Africaine des Bétons Industriels (SOABI)* v. *La République du Sénégal*.[35] Applying German tradition, the expert in this case was appointed by the Tribunal. However, considering that some elements of USA procedures were also invoked, one of the parties was permitted to engage in extensive *ex parte* communication with the expert. Despite the same, the other party (Respondent) was precluded the opportunity of cross-examination since the expert was officially *'tribunal appointed'*. In practice though, the expert had acted as a party-appointed expert, thereby raising serious doubts as to his impartiality and neutrality. Another example questioning the extent of an expert's role was seen in the case of *CME Czech Republic B.V.* v. *The Czech Republic*.[36] Here, a party-appointed expert on Swedish arbitration law was condemned for having crossed an ethical line by assuming the role of a *de facto* co-counsel participating in the arguments. Such cultural differences extend to the conduct of fact witnesses as well. For instance, in England & Wales there applies both disciplinary guidelines and case law expressly prohibiting witness coaching.[37] The criminal trial case of *R* v. *Momodou*[38] upheld, that any coaching beyond simply familiarizing the witness with court procedure was unlawful – a principle that was subsequently extended to all and not just criminal cases.[39] On the other hand, in the USA, extensive

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34 Cosmo Sanderson, *Hired guns: BCLP survey puts spotlight on experts*, GLOBAL ARB. REV. (Oct. 1, 2021), *available at* https://globalarbitrationreview.com/hired-guns-bclp-survey-puts-spotlight-party-appointed-experts.

35 Société Ouest-Africaine des Bétons Industriels (SOABI) v. La République du Sénégal, ICSID Case No. ARB/82/1.

36 CME Czech Republic B.V. v. Czech Republic, UNCITRAL, Dissenting Opinion of Arbitrator JUDr. Jaroslav Hándl, (Sept. 13, 2001).

37 The Bar Standards Board Handbook (England & Wales) 2024, rules. 9.3 & 9.4; Solicitors Regulation Authority (SRA) Code of Conduct (England & Wales) 2024, arts. 2.1 & 2.2.

38 R v. Momodou, [2005] EWCA Crim 177.

39 Ultraframe (UK) Ltd v. Fielding, [2005] EWHC 1638 (Ch).

witness guidance is in fact recognized as an obligation owed to the client.[40] Under these circumstances, the standard of ethics applying to different fact witnesses in the same case could be unequal and remains intertwined with the legal traditions of the lawyers concerned.

In the absence of any conclusive guidance on how the various ethical irregularities as analysed above, are to be dealt with, such issues continue to hamper the conduct of proceedings and subsequently also threaten the enforceability of awards by posing as grounds for challenge. Thus, rather than dismissing any corrective action based merely on the quantum of such cases, an increased emphasis needs to be laid on the detriment these issues create, not just for the case at hand, but also for the legitimacy of international arbitration in general. With an increased focus on the conduct of investment arbitration and enlarged scope of matters that are now subject to international arbitration, especially matters of larger public concern like human rights[41] and climate change disputes,[42] the global impact of arbitral awards is expanding. Additionally, a vast number of arbitrations now functioning in a digital terrain have led to an increased responsibility for arbitrators to upkeep considerations of due process, address issues of unevenness in accessing technology by parties and watch out for instances of *'guerrilla tactics'* through an abuse of technology.[43] Thus, in order to address the procedural hurdles created by such issues and more importantly to preserve the legitimacy of the arbitral process, it is essential to develop a

40 Natasha Singh, *Nothing but the Truth: Limits on Witness Preparation in International Arbitration*, ASIAN DR. 48, 50 (2024).

41 The Hague Rules on Business and Human Rights Arbitration, 2019.

42 International Chamber of Commerce (ICC) Commission on Arbitration and ADR, *Resolving Climate Change Related Disputes through Arbitration and ADR,* (Nov, 2019), *available at* https://iccwbo.org/wp-content/uploads/sites/3/2019/11/icc-arbitration-adr-commission-report-on-resolving-climate-change-related-disputes-english-version.pdf.

43 *32nd Annual ITA Workshop and Annual Meeting: Ethical Challenges with Virtual Arbitral Proceedings,* THE CENTRE FOR AMERICAN AND INTERNATIONAL LAW, *available at* https://www.cailaw.org/Institute-for-Transnational-Arbitration/Events/2020/ita-workshop.html.

framework ensuring the highest integrity among all the participants in international arbitration.

III. A Uniform Code of Ethics: The challenges of tailoring a one-size that fits all

The existing ethical disorder, as sought to be corrected is mainly attributed to the diversity of legal traditions predominant in international arbitration. French philosopher Albert Camus believed that "*Integrity has no need for rules*". In the earlier arbitration age with a handful of professionals and a limited variety of matters, this philosophy was successfully adhered to. However, a magnification of the scope and practice of international arbitration and an extreme commercialisation of its nature gradually triggered a departure from this philosophy. Accordingly, devising a *'uniform code of ethics'* has been the most popular solution to overcoming the shortcomings of the plethora of existing mechanisms.[44] However, despite its ardent popularity, the prospect of a *'uniform code of ethics'* has remained confined to dialogue and is miles away from fruition. Indicative of the reasons thereof, the next part of this article analyses why this proposition is flawed.

A. Difficulty in uniformly defining ethics

The ethical principles of each state are inspired by a shared understanding of its locally accepted moral, cultural, social and legal values. Thus, bringing about a synthesis of the ethical principles of every state would require the merging of all these values. Further, the ethical conduct of participants in an adjudication proceeding often finds its place in the public policy rules of various states.[45] Accordingly, uniformly classifying certain practices as

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[44] Doak Bishop, *Ethics in International Arbitration*, Keynote Address at the ICCA Congress Rio, (May. 26, 2010), *available at* https://www.arbitration-icca.org/media/0/12763302233510/icca_rio_keynote_speech.pdf; *Supra* note 30; *Supra* note 57.

[45] Toby Thomas Landau & Romesh Weeramantry, *A Pause for Thought*, *in* INTERNATIONAL ARBITRATION: THE COMING OF A NEW AGE? 486 (Albert Jan Van den Berg ed., ICCA Congress Series No. 17, Kluwer Law Int'l 2013).

'ethical' which is later found to be opposed to the public policy of the place/court of enforcement would create new road blocks for enforcement of awards. To avoid such issues, the public policies of various states in this context would also need to be harmonised. Thus, achieving a uniformity of the highest level would require applying the conflict of law rules on multiple counts further adding to the complexity of this herculean task. With a constant evolution in the value system of different states, achieving and upholding a common standard for *'ethics'* is thus both difficult and impractical.

B. Never-ending process of codification

An integration of the ethical rules of the majority states professing international arbitration, would require the drafting committee to have representatives of all such states. However, in the recent past, the international arbitration community has witnessed new regions acquiring prominence in the field.[46] Accordingly, it is possible that the code would require constant revisiting and amendments to accommodate the ethical considerations of these new entrants. The prospect of reopening settled provisions each time such amendments are required would be unfeasible, cause confusion and make the codification a never-ending process.

C. Unreasonably high standards of ethics

A merger of the ethical values of majority states would result in ethical principles of an unreasonably high standard.[47] Thus, for instance, if in the spirit of equity and fairness the Uniform Code barred witness preparation by lawyers, a mandatory adherence to such rules where both lawyers in fact belong to jurisdictions permitting witness preparation, would needlessly deprive them of such rights. To remedy this, parties could avoid compliance with certain rules of the Code based on their respective legal traditions.

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46 Queen Mary University of London and White & Case LLP, *2021 International Arbitration Survey: Adapting arbitration to a changing world*, at 9 (2021) (*hereinafter* "2021 QMUL Survey"), *available at* https://www.qmul.ac.uk/arbitration/media/arbitration/docs/LON0320037-QMUL-International-Arbitration-Survey-2021_19_WEB.pdf.

47 *Supra* note 27, 10 & 11.

However, this elective approach would defeat the purpose of a uniform code and could subsequently pose as grounds for challenge to awards based on a non-uniformity in its application.

D. Problem of adoption and enforcement

Even if a Uniform Code is achieved, the greatest challenge would lie in its application. For such a code to be the supreme authority and overriding of national ethical rules, it would require ratification by national authorities. Interestingly, the 2015 amendment to the Indian Arbitration Act[48], provided for the inclusion of the three lists of the International Bar Association ["**IBA**"] Guidelines on Conflicts of Interest in International Arbitration ["**IBA Guidelines on Conflicts of Interest**"] as a Schedule to the national law in recognition of the standards of independence and impartiality for arbitrators. While an inclusion of such guidelines in national arbitration laws could guarantee a certain degree of ethical uniformity, such amendments would also impact the states' domestic operations for arbitration. The prospect of such additional strictures to locally seated arbitrations might hinder the favourability of this approach. Moreover, a simultaneous adoption of such rules by all states cannot be guaranteed. The ratification of a Uniform Code through a Convention akin to the New York Convention or Model Law though a considerable option, again remains difficult in reality. This is because until all states were to ratify or sign up to such a proposed Uniform Code, the inconsistency on this front will persist and achieving uniform ethical regulation will continue to be deferred.

Similar to this proposition, a former President of the Swiss Arbitration Association had suggested the creation of a transnational body – the 'Global Arbitration Ethics Council' ["**GEC**"] for regulating counsel ethics in international arbitration.[49] The possible challenges as identified for the

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48 The Arbitration and Conciliation Act, 1996, No. 26, Acts of Parliament, 1996, § 12(1)(a), § 12(1)(b), sch. 5, 6 (India).

49 Stephan Wilske, *Sanctions against Counsel in International Arbitration – Possible, Desirable or Conceptual Confusion*, 8 CONTEMP. ASIA ARB J. 141 (2015).

GEC were principally similar to those associated with a uniform code, and ultimately the idea was shelved for being a premature endeavour.[50] Thus, the inevitable challenges associated with its formulation and enforcement has rendered the *'uniform code'* to be an improbable solution.

IV. Not a uniform code but a uniform approach: A *Five Point Proposal* for Ethical Regulation in International Arbitration

There exist a vast number of national laws, institutional rules, soft laws and scholarly recommendations presently catering to the ethical needs of the arbitration community. However, it is the inadequacy of these avenues that explains both the constant ethical tangles discussed earlier, as also the proposition for a *uniform code*. Thus, the question to consider is: *For ethics in international arbitration, could there ever be unity in diversity?* While *'unity'* in terms of a uniform code might not be a realistic solution for reasons mentioned above, a harmonious ethical framework for international arbitration is arguably achievable. The *Five Point Proposal* put forth below, thus analyses the shortcomings of the present scheme for ethical regulation while simultaneously proposing a way forward.

A. Who is to bell the cat? - Arbitral Institutions as the Gatekeepers of Ethics

The present scheme for ethics administered by a vast number of entities namely (i) national courts and state bar authorities, (ii) arbitration tribunals and (iii) arbitration institutions depict the typical scenario of "*too many cooks spoiling the broth*". In order to achieve a more functional ethical regime in international arbitration, this fragmented approach must be replaced with a single governing authority. Through evaluating the suitability of arbitration institutions *vis-à-vis* arbitral tribunals and also state authorities', the next part of this article contends that arbitration institutions prove best suitors for the role.

i. Locus standi

[50] *Supra* note 3.

State bar associations and national courts either lack the authority, or are seen as showing little interest in regulating extra-territorial ethics, thus rendering their authority ineffective for regulating the conduct of counsels or witnesses in international arbitration.[51] Though initially contested, it is now widely accepted that tribunals can sanction lawyers for ethical misconduct, ensuring a smooth conduct of the proceedings.[52] However, tribunals assuming such authority is often met with criticism for overstepping their contractual duty which is that of dispute adjudication and not ethical policing.[53] It is fearing challenges to awards on such grounds, that arbitrators are often sceptical to exercise these powers. In contrast to national authorities and tribunals, arbitral institutions have a direct nexus with all the participants in the arbitral process, thus the issue of *locus standi* in institutions assuming this role would not arise. The main concern with this approach, is that lawyers are not legally bound to institutions as they are to national courts and bar associations. However, institutions enjoy a unique autonomy in conducting arbitral proceedings, and the same could be extended to institutional ethical regulation and sanctioning as well. Thus, with the practice of international arbitration functioning largely within an institutional sphere, the participants would *ipso facto* be bound by such ethical regulation. Though this proposition has faced its share of criticism,[54] with the instances of ethical irregularities jeopardising the legitimacy of the arbitration process, it is now very much in the commercial interests of arbitration institutions to take an active role in addressing these issues.[55]

ii. *Permanence and prominence of position*

With each case involving a fresh set of participants, the most constant factor in institutional arbitration is the role of arbitration institutions.

51 *Supra* note 7.
52 *Supra* note 49.
53 *Id.*
54 *Supra* note 49.
55 *Supra* note 7.

Further, the popularity and recurrent selection of certain institutions by parties highlights their continued significance in the field. Given that counsels/arbitrators are bound to have a continued association with these institutions, sanctions by institutions will yield better results at creating a deterrence to errant behaviour, rather than sanctions administered by national authorities.

iii. Uniformity

Certain states favour a more pro-arbitration policy than others.[56] Consequently, the decision making of various national courts on matters of ethical issues in international arbitration, also differs. Further, the domestic standards applied by these national authorities might not be commensurate to the international standards and practices for ethics in arbitration. In jurisdictions where statutorily laid down ethical rules do not operate extra-territorially, the confusion remains as to which rules or laws are to be applied by these national entities when determining ethical claims in international arbitration proceedings. Thus, with each institution administering a single set of ethical guidelines, all these inconsistencies could easily be overcome.

iv. Independence and Neutrality

It is often apprehended that national courts and state bar authorities may not be inclined to punish their nationals at the instance of foreign parties in international proceedings. Further while examining the suitability of arbitrators in taking on this role, the Chief Justice of Singapore – Mr. Sundaresh Menon points out that "*arbitrators are slow to condemn the conduct of their colleagues save for egregious breaches*".[57] This has been affirmed by the fact, that of the 25 arbitrator disqualification proposals submitted to co-arbitrators in cases before the ICSID, 21 were rejected while four were

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56 *Supra* note 46.

57 Sebastian Perry, *Policing Ethical Conduct: Menon and Paulsson debate regulation*, GLOBAL ARBITRATION REV. (Jun. 6, 2013), *available at* https://globalarbitrationreview.com/article/1032457/policing-ethical-conduct-menon-and-paulsson-debate-regulation.

referred to the Chairman of the Centre's administrative council.[58] The struggle with arbitrators determining such issues is further aggravated when deciding challenges to their own mandate. An example of this is the *Halliburton* case[59] where one party insisted on the resignation of the Chairman and the other opposed it, placing the arbitrator in a precarious position of balancing their interests. To keep afloat, institutions must be favoured by all the participants alike, and thus, unlike the above-mentioned stakeholders, institutions operate neutrally to upkeep their commercial appeal and reputation. Accordingly, institutions are best able to operate an ethical system balancing the interests of all parties equitably.[60]

v. *Preservation of confidentiality*

Another challenge often contemplated with state authorities determining grievances of ethical misconduct is, compromising on the confidentiality of cases.[61] Given that arbitration institutions already form a part of the confidential circuit operating amongst all the partakers, the need for preserving confidentiality as an impediment to trying such ethical issues would be a difficult argument to win.[62]

vi. *One - stop shop*

With the advent of progressive measures like the appointment of *'Emergency Arbitrators'* forming part of institutional rules,[63] the need for parties to step out of the confines of institutions is effectively reduced. Institutions like the ICC, Singapore International Arbitration Centre ["**SIAC**"] and Hong Kong International Arbitration Centre ["**HKIAC**"] also provide mediation services that effectively cater to situations, wherein parties are to follow a hybrid dispute resolution mechanisms exhausting mediation or conciliation

58 *Id.*
59 *Supra* note 24.
60 *Supra* note 7.
61 *Id.*
62 *Supra* note 49.
63 ICC Arbitration Rules 2021, art. 29 & Appendix V; LCIA Arbitration Rules 2020, art. 9B.

as a precursor to or in conjunction with arbitration.[64] Similarly, rather than the chaos, costs and time associated with having multiple ethical checkpoints for different participants, an in-house i.e. institutional ethical regulation would be of greater convenience to the parties.

vii. Better expertise in drafting such rules

Being the administrators of international arbitration proceedings, institutions are better suited for developing and administering an appropriate set of ethical rules that are both effective and consistent with the respective procedural rules. The *'Code of Conduct for Arbitrators in International Investment Dispute Resolution'*[65] jointly drafted by ICSID and UNCITRAL, is an excellent recent example of efforts towards consolidating the best practices for addressing and resolving issues of ethical conduct particular to investment disputes.

viii. Default adherence

Unlike the *'opt-in'* choice as granted by soft law, with ethical rules forming a part of the applicable institutional arbitration rules e.g. the Annex to the LCIA Rules i.e. General Guidelines for Parties' Legal Representatives' ["**LCIA Annex**"] which applies mandatorily to all LCIA cases, adherence to an ethical framework will no longer be a matter of choice, consequently guaranteeing better ethical regulation and redressal of cases.

In addition to the above, institutions continue to remain the only visible participant in the otherwise closed-door environment of international arbitration. An additional benefit of institutions assuming this role, is that their *'visibility'* might help alleviate concerns of lack of transparency and

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64 ICC Arbitration Rules 2021, Appendix IV Case Management Techniques, rule (h) Settlement of disputes; Singapore International Mediation Centre, *SIAC-SIMC Arb-Med-Arb Protocol*, *available at* https://siac.org.sg/arb-med-arb-ama-protocol; HKIAC Administered Arbitration Rules, 2024, art. 13.11.

65 ICSID & UNCITRAL, *Code of Conduct for Arbitrators in International Investment Dispute Resolution* (February 2024), *available at* https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/2318944_coc_arbitrators_e-book_eng.pdf.

accountability often surrounding international arbitration. An instance of such regulation, is found at the HKIAC which provides for an internal mechanism wherein, the Secretariat can receive complains against arbitrators which is then determined by the Appointments Committee. Based on the findings of the said Committee, the errant arbitrator may be sanctioned by censure, suspension or removal from the institution's panel of arbitrators.[66] Similarly, other arbitral institutions could also constitute *'Disciplinary Committees'* to directly tackle complaints against arbitrators, counsels or experts. A potential impediment to institutions assuming this role, is the added administrative costs in determining such matters. However, it is worth noting, that the provisions governing challenges and removal of arbitrators of most institutional rules provide for instrumentalities of the institutions itself, i.e. the SCC Board of the SCC, the LCIA Court of the LCIA and the ICC Court of the ICC, etc. to weigh in on such decisions.[67] Hence, if the prospect of a separate disciplinary committee proves too cumbersome, the said wings of the institutions could be further empowered to determine such cases. It is all these factors that thus render institutions the closest and most suitable means to achieving a uniform ethical ecosystem.

B. Adoption of the IBA Guidelines on Conflicts of Interest as a part of the institutional rules

Majority of the national arbitration laws and leading institutional arbitration rules have enshrined provisions upholding an arbitrator's duty to act independently and impartially.[68] This is routinely achieved by obtaining a statement of disclosure from the arbitrator at the outset, and remains an

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66 *Complaints Against Arbitrators*, HKIAC, *available at* https://www.hkiac.org/arbitration/arbitrators/complaints.

67 SCC Arbitration Rules 2023, art. 19(5); LCIA Arbitration Rules 2020, art. 10; ICC Arbitration Rules 2021, arts. 14 and 15.

68 The English Arbitration Act, 1996, § 33(a); The Swedish Arbitration Act, 2019, § 8; The LCIA Arbitration Rules 2020, art. 5.3.

ongoing obligation throughout the proceedings.[69] An adherence to these ethical standards is paramount, as a breach thereof constitutes valid grounds for vacating an award as per most national laws.[70] Additionally, various arbitration institutions such as the SIAC, HKIAC, American Arbitration Association ["**AAA**"] amongst others have constituted *'Codes of Conduct'* regulating the behaviour of arbitrators functioning within their auspices.[71] Despite prescribing a standard to ascertain arbitrator conduct, most of these instrumentalities often prove ineffective for their broad-brush approach in defining arbitrator integrity. These ill-defined and vague provisions have given rise to many arbitrator challenges, namely the recent French case of *Avax* v. *Tecnimont*[72] and the ICSID case of *AWG Group Limited* v. *Argentina*.[73] In the former case, the arbitrator failed to disclose the complete extent of his law firm's connection with one of the parties and in the latter, the arbitrator allegedly failed to conduct the requisite due-diligence before accepting an official capacity at an international bank holding shares in the Claimant's company. Though the challenge proceedings failed in both cases, they nevertheless highlighted serious concerns regarding the extent of disclosures and the duty of arbitrators to be cognizant thereof.

Unlike the national and institutional provisions, the IBA Guidelines on Conflicts of Interest ["**Guidelines**"] constitute a more in-depth reference point in determining issues of conflicts and disclosures for arbitrators. The

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69 The ICC Arbitration Rules 2021, art. 11; SCC Arbitration Rules 2023, art. 18.

70 The English Arbitration Act, 1996, § 68(2)(a); U.S Federal Arbitration Act, 9 U.S.C § 10.

71 *Code of Ethics for an Arbitrator*, SIAC, *available at* https://siac.org.sg/code-of-ethics-for-an-arbitrator; *Code of Ethical Conduct*, HKIAC, *available at* https://shorturl.at/yP2cx; *The Code of Ethics for Arbitrators in Commercial Disputes*, AAA, *available at* https://www.adr.org/sites/default/files/document_repository/Commercial_Code_of_Ethics_for_Arbitrators_2010_10_14_0.pdf.

72 Hannah Darbès, *Technimont saga ends following rejection of AVAX appeal (French Supreme Court)*, THOMSON REUTERS PRACTICAL LAW (Jan. 9, 2019), *available at* https://uk.practicallaw.thomsonreuters.com/w-018-4278?transitionType=Default&contextData=(sc.Default)#co_anchor_a302997.

73 AWG Group Limited v. The Argentine Republic, ICSID Case No. ARB/03/19; Republic of Argentina v. AWG Grp. Ltd., No. 16-7134, (D.C. Cir. 2018).

most prominent feature of these Guidelines is its *'three lists'* i.e., the Red List (waivable and non-waivable), the Orange List and the Green List each prescribing detailed factual scenarios with situations constituting conflicts of interests and warranting disclosures by arbitrators. Sixty percent of the respondents of the 2015 QMUL Survey[74], found the said Guidelines to be effective. But, the main drawback, is that these Guidelines are *'non-binding'* unless explicitly adopted by the parties.[75] Another factor hindering the application of these Guidelines, is that while courts recognize their persuasive value in analysing conflicts of interest, the priority preference is granted to national laws.[76] Thus, for instance in the English case of *W Limited* v. *M SDN BHD*[77] where the Claimant sought to challenge two arbitral awards placing strong reliance on the said Guidelines, the English Court refused to consider the same as there was no conflict perceived as per the applicable English law. A further restricted approach in its application, was observed in a case before the Swiss Federal Supreme Court which endorsed that "*[i]t should not be forgotten that although these guidelines represent a useful tool (in determining conflicts of interest), they do not have the force of law. Consequently, the particular circumstances of a case and the relevant case law will remain the determining factor in deciding a question of conflicts of interest*".[78] Thus, despite being increasingly relied upon[79], the discretionary approach towards its application by national courts and institutions has rendered these Guidelines ineffective in providing a decisive solution to these issues.

This article envisions, that a mandatory adherence to these Guidelines as a part of the institutional rules would (a) ensure a more thorough standard for independence and disclosures as opposed to the existing subjective

74 *Supra* note 26, at 40.
75 Peter Halprin & Stephen Wah, *Ethics in International Arbitration*, 2018 J DISP RESOL. 87 (2018).
76 *Id.*
77 W Limited v. M SDN BHD, [2016] EWHC 422 (Comm).
78 *Supra* note 75.
79 *Supra* note 26.

discretion in arbitrator disclosures, and also (b) eliminate the presently existing disharmony in its application by national courts and institutions. Even with a binding application of these Guidelines, each case would still need to be determined by its own facts, however, this does defeat the fact that a formal adoption of distinct standards for arbitrator ethics is indeed the need of the hour.

C. Institutional rule mandating determination of applicable Counsel Practices as part of the Procedural Order No. 1

Most jurisdictions intentionally reject the application of their ethical rules to foreign lawyers appearing in locally seated international arbitrations.[80] But, is a lawyer in international proceedings still bound by his own domestic ethical rules? In determining the practices followed by lawyers on this issue, the survey conducted by the IBA Task Force in 2008 ["**IBA survey**"] on Counsel Conduct revealed that "*63% respondents believed they were subject to their home jurisdiction's rules; 27% were uncertain, but followed their home rules as an abundant precaution; meanwhile, 10% either had no opinion or did not believe they were subject to their home jurisdiction's rules*".[81] The statistics thus suggest, that despite the lack of an explicit ruling by national bar associations on this subject, lawyers practicing in international arbitration believe they are in a *'no strings detached'* situation to their respective national ethical rules. Acting accordingly, lawyers from diverse cultures, professing different procedural practices has generated an *'unlevelled playing field'* and given rise to the so-called guerilla tactics. In the interest of levelling the playing field, party representatives must often depart from their own practices and mirror those of their opponent. However, that would require knowing each other's practices which might not be simple to assume, especially if the lawyer in question is dually qualified (i.e. civil law and common law). Indicative thereof, results of the IBA survey also confirmed that 87 percent of the respondents were either never, or only seldom sure of the ethical norms

80 *Supra* note 32, at 2.
81 *Supra* note 32.

governing their opponent.[82] Several soft laws and institutional codes have attempted to fill in these gaps by providing guidance for counsel conduct in international arbitration. Some examples of such efforts include the IBA Guidelines for Party Representatives in International Arbitration ["**IBA Party Representative Guidelines**"], the LCIA Annex and the IBA Rules on Taking of Evidence in International Arbitration ["**IBA Evidence Rules**"]. Despite these positive endeavours towards constituting a definitive framework for counsel ethics, the said guidelines have often been criticized *inter alia* for being too vague, lacking authoritative language, failing to address issues of guerilla tactics, having a feeble regime for sanctions and, in certain cases for creating ethical loopholes.[83] For instance, Paragraph 5 of the LCIA Annex stipulates that a party representative should refrain from concealing any documents that is *'ordered to be produced by the tribunal'*. Thus, if the tribunal does not order production, but a document is still crucial to the integrity of the proceedings, Paragraph 5's language may lead party representatives to believe, there is no ethical obligation for production until the document is *'tribunal-ordered'*.[84] Further, a combined reading of Guidelines 20 and 24 of the IBA Party Representative Guidelines provides that lawyers may communicate with and assist witnesses/experts in preparing their statements/reports subject to the principle that these statements/reports be independent. Similarly, Article 4(3) of the IBA Evidence Rules also permits party representatives to communicate with witnesses. However, lawyers hailing from jurisdictions barring witness communications, might find it problematic to follow these provisions for the fear of disciplinary action by their domestic bar authorities. In this sense, the problem of inequality of arms remains unresolved.

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82 *Supra* note 32.

83 Christina Bustos, *Empty Rhetoric: The Failings of the LCIA's Ethical Rules for Legal Counsel and Alternatives*, 7 Y.B. ARB. & MEDIATION 307 (2015).

84 *Id.*

The diverging counsel practices that often set the stage for questions of counsel ethics are unique to every case. Therefore, rather than levelling the entire field through the prospect of a uniform code, it would be more feasible to level the hearing room instead.[85] This article proposes that the common practices followed by the lawyers in a proceeding, should be identified and established at the outset as part of the Procedural Order No. 1.[86] This would help minimize the chances of subsequent conflicts, save time, and also limit the possibility of *'guerrilla tactics'*. Another means to this end, would be the adoption of the *'Checklist of Ethical Standards for Counsel in International Arbitration'*[87] as proposed by Mr. Cyrus Benson's which determines procedural mandates such as communication with the arbitrators and witnesses, document disclosures, etc. or other possible areas of differences, that the counsels could deliberate over and agree upon at the outset. To ensure the same, this article further proposes, that this stipulation be included in the institutional rules thereby guaranteeing its application. Though arbitrators might be wary of assuming this role for the fear of challenges to awards on such grounds, tribunals are already seen to be making such decisions as a part of determining the procedural conduct.[88] Moreover, making this an institutionally mandated practice would help ease the *'due process paranoia'* faced by arbitrators and could over time eliminate the misuse of such grounds for challenges. This custom-made framework for counsel ethics thus provides both a uniformity of practice whilst accommodating the particular requirements of the case.

D. Sanctions enforced by institutions

It is indeed noteworthy that the international arbitration community has, in recognition of its ethical consciousness, imposed upon itself a positive regime of *'self-regulation'* (through the various soft laws and institutional codes as enumerated above). However, this regime for *'self-regulation'*

85 *Supra* note 27.
86 S*upra* note 4.
87 *Id.*
88 S*upra* note 4.

remains devoid of any concrete elements of *'self-sanction'*. The nationalized system for sanctions presently applicable to the participants of international arbitration, fails mainly because it operates in an outer realm thus rendering it ineffective in creating any deterrence value within the community. Also, with an increasing number of lawyers being qualified across different jurisdictions it is questionable as to who the sanctioning authority/bar should be. Party representatives in international arbitration are not necessarily lawyers, and may also be industry specialists like engineers, accountants, IP specialists, etc. Thus, another major impediment of relying on state bar authorities to regulate counsel ethics, is that such non-lawyers would remain outside the purview of these organizations.[89] Various national laws and institutional rules extend immunity to arbitrators and institutions from actions of disgruntled parties.[90] This supreme protection, with limited corresponding sanctions has contributed to the growing criticism for the lack of accountability in international arbitration.[91] The few attempted measures of *'self-sanction'* by the community have also mostly been unproductive. For instance, the Code of Professional and Ethical Conduct of the CIArb applies to all its members at all times, irrespective of the institution or seat of the arbitration.[92] Upon receipt of a complaint of a member's unethical conduct in an arbitration proceeding, CIArb's disciplinary tribunal is empowered to impose sanctions, that *inter alia* include reprimanding the member, levying costs and suspension or expulsion from membership.[93] Given that the sanctioning authority here (CIArb) has a prominent presence in the field, such sanctions may prove to

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89 *Supra* note 7.

90 The English Arbitration Act, 1996, § 29; ICC Arbitration Rules 2021, art. 41; LCIA Arbitration Rules 2020, art. 31.1.

91 Susan D. Franck, *The Liability of International Arbitrators: A Comparative Analysis And Proposal For Qualified Immunity*, 20 N.Y.L. SCH. J. INT'L & COMP. L. 1 (2000).

92 S*upra* note 4.

93 Chartered Institute of Arbitrators (CIArb), *How CIArb Investigates Complaints of Misconduct Against its Members* (2015), *available at* https://www.ciarb.org/media/4155/complaints-handling-booklet.pdf.

be more impactful. However, owing to the confidential nature of international arbitration such cases are seldomly reported, resulting in a questionable application of these strictures.

Further, nationalized ethical regulations that are considered too stringent may be deemed to breach the public policy of other states because of their overreach in comparison to other domestic ideas of *'due process'*.[94] Thus, with sanctions imposed by institutions operating exclusively within the international arbitration sphere, issues of such regulations conflicting with the public policy of various states would not arise.[95] Considering the above, and the fact that arbitration practitioners mostly function within an institutionalised framework, an internal system for sanctions would be more effective.

Tribunals already regularly engage in admonishing parties or imposing costs sanctions for procedural bad faith.[96] The sanctions thus contemplated herein, are aimed at more severe forms of ethical breaches and include *'shaming or reputational sanctions'* that would indeed carry the highest deterrence value. Another more serious form of sanction, also commonly practiced in the USA[97] could be barring the particular counsel/arbitrator whose misconduct has been proved from appearing before the institution for a limited period. Being blacklisted by an institution would create a more impactful deterrence for counsel/arbitrators, as it directly impacts their reputation in the client community.[98] The same practice could also be implemented for expert witnesses. The most serious form of sanction, as already in force by the AAA involves a permanent bar from practicing before the institution. The AAA has a well-known *'one-strike-you're-out'* policy. Accordingly, an arbitrator whose award is challenged for improper non-disclosure will not be nominated in fresh cases until the challenge is

94 *Supra* note 57.
95 *Id.*
96 *Supra* note 40, at 49.
97 *Supra* note 49.
98 *Id.*

pending. Even where the final decision upholds the award, the AAA makes a separate determination on whether the arbitrator's status on its roster is to be activated or not.[99]

Further, both the 2015 and 2018 QMUL Surveys recognise the lack of effective sanctions in the arbitral process as the *second worst* characteristic of international arbitration.[100] Accordingly, the proposition herein is aimed at adding an element of *'serious consequence'* for misconduct which is lacking in the current regime and that could most effectively be implemented by arbitral institutions.

E. Collective adoption of the Proposal by all arbitration institutions

Initially, it was expected that the formal ethical regulations as adopted by some institutions e.g. the LCIA Annex, would represent an institutions' commitment towards ethical conduct and quality assurance giving it a competitive edge, and thereby prompting other institutions to take similar steps.[101] It was believed that this competition would result in a-race-to-the-top, as for achieving ethical regulation.[102] However, it has been a decade since the LCIA Annex was promulgated, and other institutions have by far not felt the need to follow suit. Inversely it was once remarked that the overwhelming popularity of the ICC could be partly attributed to the absence of any strict ethical norms within its framework.[103] Thus, if only a few institutions adopt this proposal, it is likely that institutions prescribing fewer strictures maybe preferred, thereby rendering these efforts futile. The progressive changes witnessed in the arbitration community by the

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99 *Supra* note 32.

100 Queen Mary University of London & White & Case LLP, *2018 International Arbitration Survey: The Evolution of International Arbitration*, 29 (2018), *available at* https://www.qmul.ac.uk/arbitration/media/arbitration/docs/2018-International-Arbitration-Survey---The-Evolution-of-International-Arbitration-(2).PDF; *Supra* note 26.

101 Catherine A. Rogers, *The Vocation of the International Arbitrator*, 20 AM. UNIV. INT'L L. REV. 957 (2005).

102 *Id.*

103 *Supra* note 83.

widespread adoption of initiatives like *'Equal Representation in Arbitration'* and the *'Campaign for Greener Arbitrations'* by most leading arbitration institutions[104] positively reinforces that, for such changes to become *'the norm'* a unanimous acceptance thereof is inescapable. Accordingly, a universal acceptance of this proposal is crucial for its success and thus the *'unity in diversity'* here is achievable if all institutions were to unanimously adopt this proposal.

While this proposal focuses on an institutionalized regime for ethical regulation, the same could also apply to *ad hoc* arbitrations. The 2021 QMUL Survey recognized the UNCITRAL Arbitration Rules as the most popular regime for *ad hoc* arbitration.[105] Thus, through an incorporation of the principles of the *Five Point Proposal* in the UNCITRAL Arbitration Rules and other leading arbitration rules, this proposal could regulate ethics for *ad hoc* arbitrations as well. With no significant measures required for its formulation or implementation, the only logistical challenges anticipated for this proposal, is the limited administrative costs and efforts in its application. Diversity of legal rules and culture is an inevitable feature of international arbitration. However, the question of *'yours'* or *'my'* rules could be resolved through devising an *'ours'*. Thus, in pursuance of such a uniformly applicable solution, the *Five Point Proposal* contends that the approach towards ethical regulation in arbitration, is due for a much-needed shift in focus from a *'uniform code'* to a more achievable institutionalized framework. In the absence of such a uniform process for implementation, and a lack of punitive measures, any efforts in this regard will continue to be ineffective and merely add to the multitude of existing mechanisms.

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104 The Equal Representation in Arbitration Pledge, *Equal Representation In Arbitration* (2015), *available at* http://www.arbitrationpledge.com/organisations; The Green Pledge, *The Campaign For Greener Arbitrations* (Sept. 4, 2024), *available at* https://www.greenerarbitrations.com/institutional-supporters#63063551f085851420973e2f.

105 *Supra* note 46.

V. The Perpetual Tug of War: Regulation v. Freedom in International Arbitration

The spirit of *'party autonomy'* at its heart, and freedom from excessive regulation has enabled international arbitration to keep up its appeal as the most popular means of international dispute resolution.[106] However, with the passage of what Gary Born termed *'its golden age'*,[107] international arbitration today is eclipsed with suspicions as to its legitimacy. Of the various factors endangering its supremacy, the absence of a structured ethical regime is recognised as one.[108] Those opposed to ethical regulation argue that arbitration being a creature of consent, imposing an "*overriding layer of ethical regulation*" would hurt this consent-based model.[109] Perhaps, this notion coupled with an inherent distaste towards any form of regulation in international arbitration has defeated efforts for a harmonised framework for ethics. However, the existing conflicting ethical rules, non-transparency in proceedings and vast majority of cases having both an increased public scrutiny and global impact have all created an instability in the system, contributing to a future crisis of confidence.[110] The present system of international arbitration functions as a public-private mechanism, with the involvement of state authorities strived to be kept at a minimum. However, the increased incidence of state entities as party to both investment and commercial arbitrations could cause greater intervention by such state authorities for filling in these ethical gaps.[111] For instance, in

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106 Jane Wessel & Gordon McAllister, *Towards a Workable Approach to Ethical Regulation in International Arbitration*, 10 CAN. INT'L. LAWYER 5 (2015).

107 Alison Ross, *Born takes "Game of Thrones" message to Freshfields*, GLOBAL ARBITRATION REVIEW (Nov. 16, 2018), *available at* https://globalarbitrationreview.com/article/1067197/-game-of-tribunals-%E2%80%93-winter-is-coming-warns-born.

108 Michelle Grando, *Challenges to the Legitimacy of International Arbitration: A Report from the 29th Annual ITA Workshop*, KLUWER ARBITRATION BLOG (Sept. 19, 2017), *available at* https://shorturl.at/6R5Yb.

109 *Supra* note 106.

110 *Supra* note 44.

111 *Supra* note 32, at 5 & 6.

2016, an amendment to Article 257 of UAE's Penal Code threatened arbitrators with imprisonment for a violation of their ethical obligations.[112] This severe sanction was met with great scepticism by the arbitration community.[113] The 2018 amendment to Article 257 remedied the situation by precluding arbitrators from prosecution for such breaches.[114] Additionally, an increased incidence of judicial intervention, as seen in cases such as *Halliburton* and *Aiteo* is subjecting ethical regulation in international arbitration to both excessive scrutiny and a risk for external regulation.

The main challenges associated with the *Five Point Proposal* as discussed above are miniscule. *Per contra*, leaving these ethical concerns unaddressed is more likely to subject international arbitration to unfavourable external regulation as discussed in the examples above. These negative future contingencies are probably, what Gary Born implied as *'the winter'* that is soon descending upon international arbitration.[115] However, he also affirmed that this winter could be averted through requisite action by the arbitration community. By analogy, it can be concluded that constructing a functional model for ethics in international arbitration is essential both from an efficiency of proceedings standpoint and also to secure its legitimacy and autonomy as a means of international dispute resolution.

VI. Conclusion

The status of ethics in international arbitration is best described through the cliché, "*[y]ou can love it, you can hate it, but you can't ignore it.*" As a reflection

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112 Sadaff Habib, *Anticipated revision to Article 257 of the UAE Penal Code*, KLUWER ARBITRATION BLOG (Jan. 28, 2018), *available at* https://arbitrationblog.kluwerarbitration.com/2018/01/28/anticipated-revision-article-257-uae-penal-code/.

113 *Id.*

114 Natalie Roberts, Peter Anagnostou & Henry Quinlan, *Article 257 of UAE Penal Code amended to exclude arbitrators from prosecution*, THOMSON REUTERS PRACTICAL LAW, *available at* https://uk.practicallaw.thomsonreuters.com/w-017-8046?transitionType=Default&contextData=(sc.Default).

115 *Supra* note 107.

thereof, this article emphasised the need for conclusively dealing with the issue of ethical regulation in international arbitration.

In justifying deliberate action therefor, the article enumerated a wide number of practical instances and statistics disproving the view that ethical irregularities in international arbitration are mainly theoretical. Further, in examining the possible solutions to this end, the article negated the prospect of a *'uniform code of ethics'* for being far-fetched and inadequate for settling these issues. The *Five Point Proposal* introduced herein, with its practical approach and enforceable nature proposed a more realistic scheme for ethical regulation with arbitration institutions as the driving force for the same. As was reasoned, with institutions assuming this role, a functional, flexible, feasible and uniform ethical regime for international arbitration is achievable. The said proposal also caveated that its success largely depends on its collective acceptance by arbitration institutions.

Lastly, the *'tussle between regulation and freedom'* was recognised as an impediment to ethical regulation in international arbitration. Highlighting the threat of increased state intervention through leaving this call unheeded, the article reemphasised the necessity for prompt and tangible ethical regulation in international arbitration. Heeding the words of American activist Jane Addams that, "*[a]ction indeed is the sole medium of expression of ethics*", this article generates an action plan enabling the arbitration community to deliver suspicion and obstacle free results.

ARBITRATION TIMLINES IN FLUX: INTERPRETING THE INTENT OF SECTION 23(4)

Anirudh Sundar[†]

Abstract

*The Arbitration and Conciliation Act of 1996 ["**1996 Act**"] despite its strong promises, faced various challenges leading to excessive interventions by the judiciary and frivolous appeals which led to even longer delays – the very lacunae this Act was meant to combat. In response, the amendments in 2015 and again in 2019 brought in a host of changes. The key amendments introduced time limits for arbitration proceedings, found under Section 23(4) and Section 29A of the Act. Section 23(4) imposes a six-month limit for pleadings and Section 29A imposes a twelve-month limit for passing arbitral awards after the completion of pleadings. However, these provisions have led to interpretive differences among high courts. The Delhi High Court ruled that these time limits were mandatory, whereas the Calcutta High Court ruled them to be directory reasoning that there is an absence of any explicit consequences for non-compliance with these time limits. This paper argues that the Calcutta High Court erred in its ruling, as the intent behind the insertion is to curtail excessive delays and the intention of the legislature ought to be given weight. By a harmonious interpretation of Sections 23, 25 and 29A, it can be construed that Section 23(4) is mandatory in nature.*

I. Introduction

The 1996 Act was modelled on the United Nations Commission on International Trade Law Model Law on International Commercial Arbitration ["**Model Law**"]. The 1996 Act came into effect when India

† Anirudh Sundar is a 4th year Law Student from Tamil Nadu National Law University.

opened its door for foreign investments to revive the economy through liberalisation. The purpose of arbitration as a form of dispute resolution is to sidestep the tenuous and overtly expensive litigation process prevalent in this country. It would not be out of line to note that arbitration is the default setting for resolving commercial disputes.[1] It was not without challenges, and criticisms against arbitration in India reached their zenith with various issues cropping up, be it the extensive judicial intervention over proceedings where the seat is outside India[2] or recalcitrant parties approaching courts with frivolous appeals against the arbitral awards.[3] Such protracted delays observed in the proceedings go against the initial intent to establish a dispute resolution mechanism that does not suffer from the same shortcomings as litigation.[4] The award issued by a three-member International Chamber of Commerce ["**ICC**"] blamed the Indian government for not providing White Industries with '*effective means*' of asserting claims and enforcing rights, highlighting the embarrassing state of Indian arbitration.[5] It was the unanimous opinion of the world that the Act needed reforms and amendments to ensure that it functions as intended.

The government heeded, and the Law Commission, in its 246th Report published in 2014, proposed various amendments to solve the prevalent issues concerning arbitration in India. Considering the recommendations, the government passed the Arbitration and Conciliation (Amendment) Act 2015 ["**2015 Amendment Act**"]. By the insertion of Section 29A,[6] it was apparent that one of the key focus of the amendment was to ensure that the proceedings had an expiry date. It was not enough. Then came the B.N.

1 Harpreet Kaur, *The 1996 Arbitration and Conciliation Act: A Step Toward Improving Arbitration in India*, 6 HASTINGS BUS. L.J. 261 (2010).

2 Bhatia International v. Bulk Trading S.A & Anr., (2002) 4 SCC 105.

3 Aditya Sondhi, *Arbitration in India - Some Myths Dispelled*, 19 NAT'L L. SCH. INDIA REV. 188 (2007).

4 Venture Global Engineering v. Satyam Computer Services Ltd. & Anr., (2010) 8 SCC 660.

5 Patricia Nacimiento & Sven Lange, *White Indus. Aus. Ltd. v. Republic of India*, 27 ICSID REV. - FOREIGN INVESTMENT L.J. 274 (2012).

6 Arbitration and Conciliation (Amendment) Act, No. 3 of 2016, § 15.

Srikrishna Committee Report, based on which the Arbitration and Conciliation (Amendment) Act 2019 ["**2019 Amendment Act**"] was passed to cure the defects created by the 2015 Amendment Act. To solve the existing problems, the amendments inadvertently created new ones.

Section 23(4), as the B.N. Srikrishna committee suggests, places a deadline for the pleadings to be completed, and the amended Section 29A states that the arbitral award must be passed within 12 months after the completion of pleadings.[7] Prima facie, it seems to be the solution to prolonged arbitrations, but it raised an important issue pertaining to the interpretation of Section 23(4). There are two diametrically opposite High Court judgments on how to interpret Section 23(4). The Delhi High Court was of the opinion that the timeline established under Section 23(4) and Section 29A must be followed, failure to which, the procedures ought to be terminated as these provisions are '*mandatory*' in nature.[8] At the same time, the Calcutta High Court ruled that Section 23(4) is not mandatory but rather '*directory*' in nature, as the statute is silent about the consequences of its non-compliance.[9] It is interesting to note that the Supreme Court refused to entertain the Special Leave Petition arising from the order of the Calcutta High Court.[10] There is an interpretative gap due to contrary rulings from these high courts on the nature of Section 23(4).

An attempt to understand and ascertain Section 23(4) requires a thorough understanding of Sections 23, 25 and 29A, as they are woven together by an intricate thread. This article attempts to answer whether the nature of Section 23(4) is that of a mandate or a direction, which necessitates this article to examine the Law Commission and the B.N. Srikrishna Report, along with the amendments that followed the said reports. In addition, this article will analyse the impugned provisions, along with the judgments of

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7 *Id.* § 5.

8 Raj Chawla & Co. Stock & Share Brokers v. Nine Media & Information Services Ltd., (2023) SCC On Line Del 520.

9 Yashovardhan Sinha v. Satyatej Vyapaar (P) Ltd., (2024) SCC OnLine Cal 5386.

10 Yashovardhan Sinha v. Satyatej Vyapaar (P) Ltd., (2024) SCC OnLine Cal 5386 at 902.

the High Court, and finally attempt to ascertain the nature of the Section with the help of judicial precedents and principles of interpretation.

II. Problems created by the solution

A. 246th Law Commission Report

Long and arduous are adjectives primarily associated with litigation. In theory, arbitration is not supposed to be plagued with the same defects as litigation to ensure it stays efficacious. Curtailing delays in the arbitral process was one of the primary considerations of the lawmakers while drafting the 1996 Act.[11] In 2010, the Ministry of Law and Justice issued a consultation paper to study and undertake amendments to the 1996 Act.[12] An expert committee was set up, and various experts in the field of arbitration were invited to analyse the shortcomings of the process in India and to overcome those defects. One of the primary focus of the report was that the high costs and unreasonable delay have made arbitration no different than litigation, with the intent and object of the 1996 Act being defeated.[13] Article 14 of the Model Law insists that arbitrators carry on the proceedings without any unreasonable delay, but since there was no statutory time limit, the word unreasonable is interpreted liberally.[14]

Various high courts have emphasised the detrimental effects of unreasonable delay. In *Harji Engineering Works* v. *Bharat Heavy Electricals Limited* ["**Harji Engineering Works**"], the Delhi High Court set aside the award due to unreasonable delay.[15] It noted that the massive gap between

11 LAW COMM'N OF INDIA, REPORT NO. 246, AMENDMENTS TO THE ARBITRATION AND CONCILIATION ACT 1996 (Gov't of India 2014).

12 *Id.*

13 *Supra* note 11.

14 United Nations Comm'n on Int'l Trade Law Model Law on International Commercial Arbitration [*hereinafter* "Model Law"] art. 14 (1985).

15 Harji Engineering Works v. Bharat Heavy Electricals Limited, 2008 (4) Arb. LR. 199 (Delhi).

the final hearing and the passing of the award results in the arbitrator forgetting important arguments raised, which inadvertently questions the accuracy of the award.[16] The same court, in *Peak Chemical Corporation* v. *National Aluminium Co. Ltd.* ["**Peak Chemical Corporation**"], opined that "*it is not considered expedient to simply set aside the impugned Award on the sole ground of delay in the pronouncement of the Award.*"[17] Subsequent developments indicate that the courts have found it insufficient to set aside an award, with the sole ground being unreasonable delay, acknowledging that delay in the process should be solved.

Ironically, the report did not propose substantial amendments to curtail unreasonable delays; rather, it proposed to add the word "*expeditious*" in the preamble and to add a proviso to Section 24 of the 1996 Act, requiring arbitrators to refrain from granting unnecessary adjournments except when necessary.[18] Taking the baton from the report, the 2015 Amendment Act brought many solutions to the existing problems, all the while creating more problems. Section 15 of the 2015 Amendment Act inserted Section 29A into the principal Act, which imposed a time limit of 12 months from the date the arbitral tribunal enters upon reference.[19] An additional six months could be granted if there is mutual consent between the parties.[20] The court can grant more extensions only if it finds sufficient cause to do so.[21] The insertion of Section 29A opened a new can of worms. Granted that curtailing the delays was the need of the hour, but the rigid approach taken by the government was not without any disapproval. By forcing the parties to come to court if a dispute cannot be resolved by arbitration within the prescribed 18 months, the provision unreasonably restricted parties from

16 Harji Engineering Works v. Bharat Heavy Electricals Limited, 2008 (4) Arb. LR. 199 (Delhi).

17 Peak Chemical Corporation v. National Aluminium Co. Ltd., 2012 SCC OnLine Del 759, 29.

18 *Supra* note 11.

19 *Supra* note 6.

20 *Id.*

21 *Supra* note 6.

deciding the nature of the arbitration according to their needs and the dispute.[22] Fixing time limits and requiring courts to supervise and monitor arbitrations are not conducive to the arbitration framework in India.

Moreover, court control and supervision over arbitration is neither in the interest of the growth of arbitration in India nor in tune with the best international practices in the field of arbitration, and is antithetical to the principle of minimal judicial intervention.[23] The mandate to stick to the timeline might raise questions about the award's quality and enforceability as well.[24] In addition, the termination of the arbitrator's mandate due to delay would force the parties to spend more time and money to resolve the dispute.

B. The 2019 Amendment Act

Fixing a time limit in a country with widespread ad hoc arbitrations received mixed responses. It was welcomed as it would curtail lengthy ad hoc arbitrations, yet by providing incentive and disincentive to the tribunal, Section 29A raised questions regarding the practicality of finishing complex arbitrations in 12 months.[25] Hence, more reform was necessitated to ensure that the carrot-and-stick measure, implemented through Section 29A, did not muddle the proceedings.[26] To mitigate this problem, a high-level committee headed by Justice B.N. Sri Krishna submitted a report. A section of the report was dedicated to correcting the ambiguities created by the

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22 Sanjeevi Seshadri, S. *29A of the New Indian Arbitration Act: An Attempt at Slaying Hydra,* KLUWER ARBITRATION BLOG *(Feb. 2, 2016*), *available at* https://arbitrationblog.kluwerarbitration.com/2016/02/02/s-29a-of-the-new-indian-arbitration-act-an-attempt-at-slaying-hydra/.

23 *Id.*

24 Leah Elizabeth Thomas, Consequences of Undue Delay in Passing Arbitral Awards and Imposition of Timelines as a Solution, 6 NLIU L. REV. 72 (2017).

25 V. Chillakuru & N. Thacker, *The Asia-Pacific Arbitration Review 2017-India*, GLOBAL ARBITRATION REVIEW (2017).

26 Deva Prasad M & Suchithra Menon C, *The Arbitration and Conciliation (Amendment) Act, 2015 and Judicial Interventions*, ECONOMIC & POLITICAL WEEKLY (2016).

2015 Amendment Act. The report noted how the insertion of Section 29A restricts party autonomy, and more importantly, many international arbitral institutions have expressed their displeasure and criticised the imposition of timelines.[27] Hence, the committee recommended that the timeline to pass the award should start after the pleadings, and a time of 6 months may be provided to complete the latter.[28]

Nevertheless, more ambiguities were created to solve the problems of the 2015 Amendment Act. The report was utterly silent on the date from which the time for pleadings ought to be computed. Secondly, the report does not clarify whether an extension can be granted beyond the six months to file pleadings. Furthermore, the questions of whether the 12-month time limit would be paused during an extension and whether an amendment to the pleadings under Section 23 is allowed after six months were not addressed.[29] In order to resolve the rigid timeline imposed under Section 29A, the report added yet another hurdle, with no clarifications on the application of the six-month period. Moreover, since the suggestions were agreeable to the government, with the passing of the 2019 Amendment Act, arbitration proceedings have become more ambiguous than before.

Section 5 of the 2019 Amendment Act states thus: "*the statement of claim and defence under this section shall be completed within a period of six months from the date the arbitrator or all the arbitrators, as the case may be, received notice, in writing, of their appointment.*"[30]

Section 29A was amended by way of Section 6 of the 2019 Amendment Act, which effectively mandated that the arbitral tribunal pass an award

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27 Manini Brar, *Implications of the New Section 29A of the Amended Indian Arbitration and Conciliation Act, 1996*, 5 INDIAN J. ARB. L. 45 (2017).

28 JUSTICE B.N. SRIKRISHNA, HIGH LEVEL COMM. TO REVIEW THE INSTITUTIONALISATION OF ARB. MECHANISM IN INDIA (Gov't of India 2017).

29 Vyapak Desai, Kshama A. Loya & Ashish Kabra, *Arbitration in India: The Srikrishna Report – A Critique*, 20(1) ASIAN DISPUTE REV. 4 (2018).

30 *Supra* note 7.

within 12 months from the date of completion of pleadings.[31] While the intent is appreciated, the same defects that were observed in the earlier amendments in terms of restriction in party autonomy and the tribunal's inability to be the master of their proceedings persist, with one crucial and conveniently unanswered question on the nature of Section 23(4).

III. Decoding the provisions

Before attempting to decode the nature of Section 23(4), a brief understanding of Sections 23, 25, and 29A becomes imperative, as they are tightly woven. Chapter V of the impugned Act outlines the manner in which the arbitration proceedings ought to be conducted.[32] Section 23(1) lays down the procedure in which the statement of claims and the statement of defence ought to be stated.[33] Section 23(2) allows parties to submit documents that are relevant to their statements.[34] Section 23(2A) allows the respondents to submit a counter-claim or a set-off, subject to the arbitration agreement.[35] Section 23(3) gives the parties the power to amend or supplement their claims or defence, provided that the tribunal does not find it inappropriate.[36] Finally, the contentious 23(4) stipulates that the pleadings must be done within six months from the date the arbitrator receives notice, in writing, of their appointment.[37] The importance of Section 23 cannot be stressed enough as it fulfils the Principles of Natural Justice. The Supreme Court emphasised the importance of *audi alteram partem* in arbitration proceedings, and this provision fulfils that obligation.[38]

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31 *Id.* § 6.
32 Arbitration and Conciliation Act, No. 26 of 1996, ch. V.
33 *Id.* § 23(1).
34 *Supra* note 32, § 23(2).
35 *Supra* note 32, § 23(2A).
36 *Supra* note 32, § 23(3).
37 *Supra* note 32, § 23(4).
38 Sohan Lal Gupta v. Asha Devi, (2003) 7 SCC 492.

Provisions related to pleadings are meant to provide each party with an intimation of the case pleaded by each other to ensure that such pleadings are understood and countered.[39] In addition, it helps determine the issues involved and prevent any deviation from the course outlined in the pleadings.[40] Furthermore, it is well-established that both parties are entitled to know the opponents' case.[41]

A. Pleadings under Section 23(1)

> "*Within the period of time agreed upon by the parties or determined by the Arbitral tribunal, the claimant shall state the facts supporting his claim, the points at issue, and the relief or remedy sought, and the respondent shall state his defence in respect of these particulars unless the parties have otherwise agreed as to the required elements of those statements*." [42]

Breaking it down, the parties have the autonomy to choose a time before which they must submit the statements of claim and defence, and non-compliance would necessitate an action under Section 25, which will be discussed later. Nevertheless, the certainty in this regard is that the tribunal must adhere to the timeline agreed upon by the parties under Section 23(1), and the failure of the parties requires the tribunal to take necessary action under Section 25.[43] Section 23(1) emphasises the importance of '*Party Autonomy*'.

B. The problem: Section 23(4)

The nature of this provision is under scrutiny due to its indiscernible nature. This provision results from the 2019 Amendment Act, following the

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39 1 M. SRICHARAN RANGARAJAN, TREATISE ON ARBITRATION LAW & PRACTICE – A CRITICAL COMMENTARY ON PART I OF THE ACT OF 1996 (OakBridge 2023).

40 Manphul Singh v. Surinder Singh, (1973) 2 SCC 599.

41 Krishan lal gupta v. Dujodwala Industries, (1976) SCC Online Del 28.

42 *Supra* note 33.

43 Shivhare Roadlines v. Gammon India Ltd., (2013) SCC OnLine MP 10762.

recommendation of the B.N. Srikrishna Committee Report.[44] The 176th Law Commission Report noted that the arbitrators could not control the pace at which the proceedings were conducted, which resulted in unnecessary delays.[45] In the 246th Report, the Commission acknowledged the delays and noted: "*litigating in courts in India is a time-consuming and expensive exercise, and justice usually eludes both parties to an action. It is in this context that one must examine 'arbitration' as a method of dispute resolution that aims to provide an effective and efficient alternative to traditional dispute resolution through court*."[46] The 2015 Amendment Act inserts Section 29A, which mandates that an award must be passed within 12 months from the date the arbitrator enters upon reference.[47] Since the desired results were not expected through the 2015 Amendment, the Parliament amended Section 29A, along with the insertion of Section 23(4).

According to Section 23(4), "*the statement of claim and defence under this section shall be completed within a period of six months from the date the arbitrator or all the arbitrators, as the case may be, received notice, in writing of their appointment*."[48] The efficacy of this provision was called into question, as one of the practical difficulties this rigidity might entail is that it restricts the level of control an arbitrator could exercise, especially in proceedings involving multiple parties.[49] The complexity makes it practically impossible to complete the

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44 JUSTICE B.N. SRIKRISHNA, HIGH LEVEL COMM. TO REVIEW THE INSTITUTIONALISATION OF ARB. MECHANISM IN INDIA (Gov't of India 2017).

45 LAW COMM'N OF INDIA REPORT NO. 176, ARBITRATION AND CONCILIATION (AMENDMENT) BILL, 2001 (Gov't of India 2001).

46 *Supra* note 11.

47 *Supra* note 6.

48 Arbitration and Conciliation Act, No. 26 of 1996, § 23(4).

49 Subhiksh Vasudev, *The 2019 Amendment to the Indian Arbitration Act: A Classic Case of One StepForward, Two Steps Backward*, KLUWER ARBITRATION BLOG (Aug. 25, 2019), *available at* https://arbitrationblog.kluwerarbitration.com/2019/08/25/the-2019-amendment-to-the-indian-arbitration-act-a-classic-case-of-one-step-forward-two-steps-backward/.

pleadings within six months.[50] It also restricts the parties' autonomy as the liberty to fix a timeline under Section 23(1) is curtailed.

C. Consequences under Section 25

Titled '*Default of a Party*,'[51] this provision is part and parcel of Section 23, as it provides for consequences when the parties do not file a statement of claim and defence. Section 25(a) stipulates that the arbitral tribunal has the power to terminate the proceedings if the claimant does not submit the statement of claims per the timeline agreed under 23(1) without any sufficient cause.[52] It is pertinent to note that the Supreme Court opined that it is well within the power of the tribunal to recall an order under 25(a) if the defaulting party shows sufficient cause, making it different from termination under Section 32.[53] To challenge such termination by the arbitrator, the aggrieved party can file a petition under Article 227 of the Indian Constitution.[54]

Section 25(b) states that if the respondent of the proceeding fails to submit their statement of defence per sub-section (1) of section 23, the tribunal shall continue the proceedings without treating that failure as an admission of the allegations raised by the claimant and shall have the discretion to treat the right of the respondent to file a statement of defence to be forfeited.[55] The phrase "*and shall have the discretion to treat the right of the respondent to file such statement of Defence as having been forfeited*"[56] was recommended by the Law Commission in its 246th Report and was inserted in the 2015 Amendment Act.[57]

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50 *Id.*

51 *Supra* note 6.

52 Arbitration and Conciliation Act, No. 26 of 1996, § 25(a).

53 SREI Infrastructure Finance Ltd. v. Tuff Drilling Private Ltd., (2018) 11 SCC 470.

54 Union of India v. Indian Agro Marketing Co Operative Ltd., CM(M) 424/2021 (Delhi HC May 2, 2022).

55 Arbitration and Conciliation Act, No. 26 of 1996, § 25(b).

56 *Id.*

57 Arbitration and Conciliation (Amendment) Act, No. 3 of 2016, § 13.

As per Section 25(c), if a party fails to appear at an oral hearing or produce documentary evidence, the tribunal *may* continue the proceedings and make the award based on the evidence submitted.[58] This provision did not find a place under the Arbitration and Conciliation Act, 1940, which resulted in parties taking unreasonable time and stalling the proceedings.[59] Hence, this discretionary power is granted to the arbitrator, which is made evidentiary as Section 25(c) uses *may* as opposed to *shall*.[60] Hence, as long as the arbitrator acts fairly and provides reasonable opportunities to the defaulting party, the arbitrator cannot be held accountable, and the statute allows the arbitrator the power to pass an award ex parte.[61] However, it must also be noted that the arbitrator must not act hastily in such a situation and that such discretion must be exercised after repeated non-compliance by the party at default.[62]

D. The final limit under Section 29A

Section 29A was expected to be the solution to a long and arduous arbitration process that was plagued with unreasonable delays. It states:

> "*(1) The award in matters other than international commercial arbitration shall be made by the Arbitral Tribunal within a period of twelve months from the date of completion of pleadings under sub-section (4) of section 23.*"[63]

The inherent contradiction of Section 29A is that it goes against party autonomy and minimum judicial intervention.[64] By way of this insertion, the core principles have taken a back seat, and the notion of speedy resolution has been given primacy, which is yet another objective of the

58 Arbitration and Conciliation Act, No. 26 of 1996, § 25(c).
59 *Supra* note 39.
60 *Supra* note 58.
61 *Supra* note 39.
62 Magma Leasing Ltd v. Gujarat Composite Ltd, (2007) (1) RAJ 182 (Cal).
63 The Arbitration and Conciliation Act, No. 26 of 1996, § 29A.
64 *Supra* note 39.

1996 Act. The use of the word '*shall*' has made it sufficiently clear that this is a mandate and not a directory, and the approach taken by the courts in resolving cases concerning Section 29A has made it evident that it is mandatory in nature.[65] Yet, the objective of the speedy resolution was not met due to inconsistent interpretation of Section 23(4).

IV. The interpretative dilemma

A. The bipolarity of high courts

Arbitration has always been perceived as less rigid and stringent than litigation. More often than not, arbitrators exercise leniency during the proceedings when the requests of the parties are reasonable, as the autonomy of the parties is held in high regard. The Law Commission has insisted in its report that such leniency has resulted in unreasonable delays, and one of the solutions to that was fixing the time limit to complete pleadings.[66] However, Section 23(4) is ineffective due to the ambiguities surrounding its nature. With diametrically opposite ratios from two different high courts, the interpretation of this provision is complicated, to say the least. The Delhi High Court, in *Raj Chawla & Co. Stock & Share Brokers* v. *Nine Media & Information Services Ltd*, opined that Section 23(4) is a mandate and not a direction.[67] In this case, the arbitrator entered upon reference in 2018, yet the Statement of Claims was filed only in 2021. The Court held that the tribunal must abide by the one-year time limit laid down in Section 29A, which must begin six months after the arbitrator entered upon reference.[68] The judgment also noted that a failure to complete pleadings in six months ought to attract the consequences mentioned in

65 Tata Sons (P) Ltd. v. Siva Industries & Holdings Ltd., (2023) 5 SCC 421.
66 *Supra* note 11.
67 *Supra* note 8.
68 *Id.*

Section 25 and that not abiding by it would defeat the spirit of the Act and the Amendment.[69]

A year later, in 2024, the Calcutta High Court held a contrary view in *Yashovardhan Sinha HUF* v. *Satyatej Vyapaar Pvt. Ltd* ["**Yashovardhan Sinha HUF**"].[70] The reasoning given by the court is extensive and relied on various Supreme Court judgments to classify Section 23(4) as merely a directory provision. The court noted,

> "*the law is well settled that ordinarily when the expression 'shall' is used, it is mandatory in nature, but even after the use of the expression 'shall' if the statute is silent about the consequences of the non-compliance of such provision, it cannot be held that the provision is mandatory. Consequences of not adhering to the time limit prescribed in Section 23(4) of the Act have not been provided in the Act.*"[71]

Since neither section 23(1) nor section 25 has been amended to include a consequence to the non-compliance of section 23(4), the court held that it was the intention of the legislature to leave this open to interpretation so as to not encroach on the discretion of the arbitrator and the autonomy of the parties.[72] The court relied upon *Salem Advocate Bar Association* v. *Union of India*, wherein the Supreme Court noted that the mere use of '*shall*' does not make a provision mandatory, as the intention of the legislation ought to be taken into consideration, as rules of procedures must not defeat the cause of justice.[73] The court also relied on *New India Assurance Company Limited* v. *Hilli Multipurpose Cold Storage Private Limited*, wherein the Supreme Court held the contested provisions of the Consumer Protection Act to be directory, as there were no penal consequences to the non-compliance, and a harmonious construction of the provisions indicated that the impugned

69 *Supra* note 8.
70 *Supra* note 9.
71 *Id.*
72 *Supra* note *9*.
73 Salem Advocate Bar Association v. Union of India, (2005) 6 SCC 344.

provision ought to be directory.[74] Notably, in the case of *Kailash* v. *Nankhu*, the timeline contemplated in Order 8 Rule 1 CPC, for filing written statements was held to be directory. Even though the latter is couched in a negative form, since it does not specify any penal consequences flowing from the non-compliance, the court held it to be directory.[75]

When the decision of the Calcutta High Court was appealed to the Supreme Court, it was rejected, and no rationale was given in the written order.[76] This begs the question of whether the Supreme Court accepted the rationale of the Calcutta High Court or whether the dismissal was not correlated. Regardless, it is interesting to note that the Calcutta High Court relied on two judgments that emphasised the '*intent*' of the legislature and a '*harmonious construction*' of the provisions while determining its nature. This is ironic, as applying those principles would contradict the ruling of the court. Before presenting the arguments, it is imperative first to undertake a thorough analysis of the principles involved.

B. Determination: a mandate or a direction

There is no universal rule or test to determine whether a particular provision is that of a direction or a mandate, except the fact that the language of the provision alone is not sufficient to determine the nature; rather, various factors ought to be taken into consideration.[77] As Lord Campbell pointed out, "*no universal rule can be laid down as to whether mandatory enactments shall be considered directory only or obligatory with an implied nullification for disobedience. It is the duty of courts of justice to try to get at the real intention of the legislature by carefully attending to the whole scope of the statute to be considered.*"[78] The Supreme Court, in various judgments, has opined that the courts must

74 New India Assurance Company Limited v. Hilli Multipurpose Cold Storage Private *Limited*, (2020) 5 SCC 757.

75 Kailash v. Nankhu, (2005) 4 SCC 480.

76 *Supra* note 10.

77 JUSTICE G. P. SINGH, PRINCIPLES OF STATUTORY INTERPRETATION (Lexis Nexis 15th ed. 2021).

78 Liverpool Borough Bank v. Turner, (1861) 30 LJ Ch 379.

consider the nature and design of the statute and the possible consequences of construing the provision as mandatory or directory, and the impact it shall have on other provisions. Most importantly, the courts must ascertain whether the object of the legislation will be defeated or furthered.[79] If the intent of the legislation gets defeated by holding the provisions as directory, it ought to be construed as mandatory.[80] At the same time, if holding the provision as mandatory causes inconvenience to the innocent, it inadvertently defeats the purpose of the enactment and hence must be construed as directory.[81] Granted that the phraseology should not be given primacy, the use of prohibitive and negative words is indicative of the fact that the provision is mandatory, and rarely would it be directory.[82]

The fundamental difference between mandatory and directory is the effect it shall have. Failure to comply with a mandatory provision would render the proceedings illegal or void, whereas non-compliance with a directory provision would not invalidate the proceeding.[83] Hence, when the consequences of non-compliance are provided by the statute, it ought to be construed as a mandate.[84] All the judgments are unanimous in the fact that the prime objective must be to determine the intent of the legislation. The Supreme Court, in *Hari Vishnu Kamath* v. *Ahmad Ishque*, opined that the rules that are in existence to determine the nature of a provision are only to aid the interpreter in ascertaining the true intention behind the enactment, as it is the ultimate factor, and it depends entirely on the context, and a mere use '*shall*' or '*may*' is not indicative of its nature.[85]

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79 *Supra* note 77.
80 Seth Bikharaj Jaipuria v. UOI, AIR 1962 SC 113.
81 *Supra* note 75.
82 N. S. BINDRA, INTERPRETATION OF STATUTES (Lexis Nexis 13th ed. 2022).
83 State v. NS Gnaneswaran, (2013) 3 SCC 594.
84 Rajsekhar Gogoi v. State of Assam, (2001) 6 SCC 46.
85 Hari Vishnu Kamath v. Ahmad Ishque AIR 1955 SC 233.

V. Resolving the conflict

The Calcutta High Court in *Yashovardhan Sinha HUF*[86] held Section 23(4) to be directory as the law did not prescribe any consequence for non-compliance, but the court completely discarded the intention of the legislature.[87] The reasoning of the Calcutta High Court is partly flawed, as it approaches the provisions of the 1996 Act in a very restrictive manner without taking its complementary provisions into consideration.

A. The intent of the Parliament

Legislative intent of Section 23(4) is clear as day. The 2015 Amendment Act added Section 29A to curtail unreasonable delays.[88] When it failed to meet the objectives, the B.N. Srikrishna Report suggested that a time limit of six months '*may*' be imposed for pleadings.[89] Partially discarding the suggestion, the 2019 Amendment Act employed the word '*shall*,' which gives the provision a mandatory nature.[90] Both the Law Commission Report and the B.N. Srikrishna Committee Report had the objective of suggesting amendments to restrict the time it takes for an arbitration proceeding to attain finality, and by adding sub-section 4 in Section 23, the legislature has expressed its intent for this provision to be mandatory, and not that of a direction. Additionally, the Supreme Court in *TATA Sons (P) Ltd.* v. *Siva Industries & Holdings Ltd* ["**TATA Sons (P) Ltd.**"] reaffirmed that Section 29A is a mandatory provision. The extract is reproduced below:

86 *Supra* note 9.
87 *Supra* note 85.
88 *Supra* note 6.
89 JUSTICE B.N. SRIKRISHNA, HIGH LEVEL COMM. TO REVIEW THE INSTITUTIONALISATION OF ARB. MECHANISM IN INDIA (Gov't of India 2017).
90 *Supra* note 7.

> "*The mandatory nature of the provisions of Section 29A(1) and their application to all arbitrations conducted under the Act, domestic or international commercial, was evident from the use of the word 'shall'.*"[91]

Due to Section 29A being mandatory, consequentially, Section 23(4) ought to be construed as mandatory as well. The court, in *Ram Autar Singh Bhadauria* v. *Ram Gopal Singh* ["**Ram Autar Singh Bhadauria**"] noted that if two provisions complementary to each other contain the word "*shall*," and if the intention of the legislature is apparent for one of the provisions to have a mandatory nature, the same construction must be placed on the other.[92] It ought to be inferred that the legislature intended for the impugned provision to be a mandate and not a direction.

B. The punishment

Calcutta High Court erred in holding that there are no consequences prescribed for the non-compliance of Section 23(4).[93] A harmonious construction of Sections 23 and 25 provides for the consequence of non-compliance. A statute ought to be read as a whole, and the provisions in the statute must be construed together to avoid inconsistency.[94] Prior to the 2019 Amendment Act, the parties had the liberty to set the timeline to submit both the statements of the claim and the defence. If a party does not adhere to the timeline established, Section 25 imposes consequences. Failure to communicate the statement of claim could terminate the procedure,[95] and if the statement of defence is not communicated, the arbitrator can consider the right to submit the defence to be forfeited.[96] In

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91 *Supra* note 65.
92 Ram Autar Singh Bhadauria v. Ram Gopal Singh, AIR 1975 SC 2182.
93 *Supra* note 9.
94 *Supra* note 77.
95 *Supra* note 9.
96 *Id.* § 25(b).

both the scenarios, discretion is vested in the arbitrator. With the advent of Section 23(4), an upper limit has been set.

Section 23(4) has not negated sub-section 1 but rather ensured that the timeline established by the parties cannot exceed six months.[97] All that the Amendment did was to ensure that the parties cannot submit the pleadings beyond six months; rather, the agreed-upon time under Section 23(1) must be within six months. The Amendment has not negated Section 25 either. Setting an upper limit ensured that there was a line that could not be crossed by the parties, but they were free to roam anywhere within the line. With the insertion of sub-section 4, it must be interpreted that the arbitrator has no choice but to terminate the proceeding if the statement of claim has not been communicated within six months. It is further argued that the power of recall under Section 25 cannot be exercised by the arbitrator if the six-month period is exceeded,[98] as allowing recall would negate the timeline set under Section 23(4).

In simpler terms, under Section 23(1), parties are free to decide on a timeline, but the timeline cannot exceed the upper limit set by sub-section 4.[99] Under Section 25, the arbitrator has the power to impose a penalty if the timeline established under Section 23(1) is not complied with, but a failure to adhere to the mandate under Section 23(4) ought to result in either a termination under Section 25(a) or forfeiture under Section 25(b). The use of "*shall*" in sub-clause (a) of Section 25 must be construed as mandatory to ensure it is in line with the mandate established under Section 23(4) and Section 29A.[100]

97 *Supra* note 9, § 23(4).
98 *Supra* note 9, § 25.
99 *Supra* note 9, § 23(4).
100 *Supra* note 9, § 29A.

VI. Conclusion

The statement "*he's a little confused, but he got the spirit*" aptly encapsulates this situation. While the swift resolution of disputes is a crucial aspect in the formulation of the 1996 Act, it remains an unachievable goal. The intention of the 246th Law Commission Report and the B.N. Srikrishna Committee Report was in the right place, but the execution created more problems than anticipated. There was no discernible balance between party autonomy and the efficacy of arbitration due to the advent of the new amendments. Both the Delhi and the Calcutta High Courts were not completely wrong in their rulings, as the courts have a responsibility to clear the air when the law is ambiguous. However, in this scenario, there is not just a diametrically opposite ruling, but also a conflict with the intent.

Enough emphasis was placed on the autonomy of parties, both by the Model Law and numerous judicial precedents. A volatile question remains – whether holding the provision mandatory would inadvertently violate the spirit of arbitration? Even though the legislature intended to mandate the completion of pleadings, doing so would rip the fabric of arbitration proceedings, as it could inadvertently lead to rushed awards and could make the proceedings ineffective. From a practical standpoint, this could lead to more delays and even misconduct, as not ascertaining the nature of Section 23(4) would result in an inconsistent application of the same. It can also be construed that the lack of definitive interpretation is beneficial, as the arbitrators could extend the six-month timeline and show leniency, and no sanctions can be imposed as there is no right answer. It could always be argued that the Supreme Court did not straighten things out, as doing so might result in rigidity in the proceedings.

There are two perspectives to consider here: one is a moral argument, and the other is a legal argument. The legal argument attempts to interpret and ascertain whether Section 23(4), within the existing legal framework, ought to be mandatory or directory. The moral argument revolves around whether

holding Section 23(4) as mandatory or directory could derail the spirit of the Act. The legal argument results in holding Section 23(4) as mandatory, as the legislature had the intention of fast-tracking arbitrations, and a harmonious construction of Section 23 and Section 25 would provide the consequences of non-compliance. At the same time, holding Section 23(4) as mandatory could result in more convulsions, as parties would be inclined to approach the high courts under Article 227 to get relief, and if the arbitrator condones the delay, it again results in judicial intervention. Moreover, the argument that Section 23(4) curtails party autonomy holds merit, as this provision effectively limits the ability of the parties to determine the procedural rules governing the proceeding. However, such restrictions are permissible under Section 19(2), which stipulates that procedures agreed upon by the parties are subject to the provisions under Chapter V. Nonetheless, it would be reasonable to assert that the introduction of Section 23(4) has derailed the arbitration process in India.

This paper is not a critique of Section 23(4) but rather a discussion of the judgments delivered by both the Delhi and the Calcutta High Court. As mentioned earlier, it is logically coherent to hold that Section 23(4) is mandatory. Unless there is a definitive ruling from the Supreme Court or a clarification from the legislature, the high courts are free to interpret Section 23(4) in the manner they deem fit, and all that would do is put arbitrators in a position to choose the nature of the provision, which inadvertently leads to chaos. Till a clarification is issued by the Supreme Court, it is rational to deem Section 23(4) as mandatory, as it speaks to the intention of the legislature.

EXPLORING THE POTENTIAL OF ISLAMIC ARBITRATION: INSIGHTS FOR INDIA FROM THE WEST

Dr. Marisport A. & Basundhara Das†*

Abstract

In recent years, opening any newspaper often leads to sighting of headlines concerning Islamic arbitration of family disputes, with organisations like the Jamiat Ulama-i-Hind trying to convince Muslims to approach designated Islamic bodies for arbitration of family matters, and the political right denouncing them as a parallel legal system. Amidst such polarised discourse, it becomes imperative to inspect the legitimacy of these institutions and most importantly, the impact that they have on the women approaching them for justice. The purpose of this article is to perform a detailed investigation of existing practices of Islamic Arbitration in various common law countries, delving into the importance and legal validity of religious dispute resolution, challenges encountered and the prospective solutions. The primary goal is to make a significant contribution to the ongoing debate in India about the use of religious arbitration in family law disputes, by carefully examining its legal validity and social repercussions. This article attempts to illuminate best practices from various jurisdictions while cautioning against potential pitfalls. By diving into these complex processes, the authors hope to provide analytical viewpoints that promote harmonious coexistence and mutual respect for both community rights and individual liberty within a diverse society.

* Dr. Marisport A. is an Assistant Professor of Law, Gujarat National Law University.

† Ms. Basundhara Das is a student pursuing B.A. LL.B. (Hons) at National University of Juridical Sciences.

I. Introduction

In pluralistic societies, religious communities frequently face the challenge of preserving their cultural identities in the face of secular legislation that may contradict their traditional values. When these communities feel that secular legislation no longer effectively expresses their traditional values and that this condition will continue, they seek alternate channels beyond the boundaries of secular legal systems to address disputes.[1] The opportunity to seek these alternate channels of dispute resolution is supported by provisions in arbitration laws in different jurisdictions that allow parties to select the specific forum and governing law for their disputes. This means they can opt for religious scholars and laws to guide the resolution process if they prefer. However, because religious arbitration operates independently of state legal systems, protecting individual rights of the parties becomes critical. The absence of official monitoring raises concerns about potential breaches of individual rights, particularly those of women, in these private forums. This emphasises the importance of properly managing the balance between conserving cultural identities and upholding individual rights, especially considering gender equality under secular and liberal legal regimes.

The compatibility of diverse religious conceptions with liberal values, especially in Islam, has sparked widespread debate globally.[2] The judiciary in postcolonial multicultural nation-states is responsible for navigating this complicated landscape, attempting to blend legal universalism with legal pluralism. Currently, there is an increasing demand in India – largely from political groups supported by the majority – to outlaw Islamic arbitration institutions,[3] whereas scholars of Sharia call for minimising government

1 Michael J. Broyde, *Faith-Based Private Arbitration as a Model for Preserving Rights and Values in a Pluralistic Society*, 90 CHI. KENT L. REV. 111, 113 (2015).

2 Jessie Brechin, *A Study of the Use of Sharia Law in Religious Arbitration in the United Kingdom and the Concerns That This Raises for Human Rights*, 15 ECCLES. LAW J. 293, 299 (2013).

3 PTI, *Muslims Should Relocate to Nations Where Shariat Laws Are in Force: Yogi Adityanath*, THE ECONOMICS TIMES (Apr. 18, 2016).

intervention in the family life of Muslims by encouraging them to opt for Islamic Arbitration.[4] Even though religious arbitration has been a widely discussed topic in the west, there is a significant lack of scholarly examination regarding the procedure of religious arbitration in the Indian context, and it frequently faces misinterpretation. Scholars like Katherine Lemons, Anindita Chakrabarti, and Sabiha Hussain are some of the few scholars who have conducted case studies on the practice.[5] In such a scenario, this paper attempts to conduct a jurisprudential analysis of the practice and its impact on women who undertake it.

II. Arbitration in Islamic jurisprudence

The concept of alternative dispute resolution has longstanding roots in Islam. Sharia, the foundational legal framework, consists of two essential components; regulations pertaining to worship of Allah (*ibadat*), and regulations governing civil matters.[6] The terms *tahkim* and *sulh*, which are of Arabic origin, are commonly used to refer to the process of arbitration. *Tahkim*, literally meaning the appointment of an arbitrator (*hakam*) and the delegation of authority to render judgment, is central to Islamic jurisprudence.[7] In *Mejelle*, the civil code of the Ottoman caliphate, it has been defined as the process where two conflicting parties agree to appoint a third person as a judge to settle their disputes.[8] The legitimacy of arbitration in Islam is reinforced by several Quranic verses, including Verse

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4 PTI, *Approach designated bodies for arbitration in family matters, don't let govt interfere: Jamiat to Muslims,* DECCAN HERALD (Oct. 07, 2023).

5 Katherine Lemons, *Sharia Courts and Muslim Personal Law in India: Intersecting Legal Regimes,* 52 LAW AND SOCIETY REVIEW (2018); Anindita Chakrabarti & Suchandra Ghosh, *Religion-based 'Personal' Law, Legal Pluralism and Secularity: A Field View of Adjudication under Muslim Personal Law in India,* 10 OXFORD JOURNAL OF LAW AND RELIGION (2021); Sabiha Hussain, *Shariat Courts and Women's Rights in India* (2007).

6 Aseel Al-Ramahi, *Sulh: A Crucial Part of Islamic Arbitration* (2008), https://www.lse.ac.uk/law/working-paper-series/2007-08/WPS2008-12-Al-Ramahi.pdf.

7 Mahdi Zahraa & Nora Hak, *Tahkim (Arbitration) in Islamic Law within the Context of Family Disputes*, 20 ARAB LAW Q, 2 (2006).

8 An-Nisa 4:35, QURAN.COM, https://quran.com/4?startingVerse=35.

35 of *Surah an-Nisa*, which states that if one is apprehensive of discord between spouses, one must appoint representatives from each side. If reconciliation is sought by both husband and wife, Allah will facilitate it between them.[9] This clearly underscores the necessity of utilising arbitration to address marital conflicts prior to considering divorce. It is important to stress that arbitration in Islamic tradition is not isolated from efforts to reconcile the disputing parties. In fact, it functions simultaneously and harmoniously with efforts towards reconciliation.[10] Currently, the practice of arbitration based on Sharia principles is seen in several legal systems, especially in the fields of finance, banking, and family conflicts.[11] This practice is evident through both legal and extra-legal methods, observed in countries with constitutions based on the Holy Quran as well as those with secular constitutional frameworks.

III. Islamic arbitration of marital disputes in the United Kingdom

The parties to an arbitration can establish their own procedures for the arbitration process by drafting an arbitration agreement, according to Section 4(2) of the Arbitration Act 1996,[12] ["**UK Act**"] the United Kingdon ["**UK**"] statute governing arbitration. In addition, the statute specifies that any applicable law that the parties agree upon will be the substantive law to be used for the arbitral proceedings. The UK Act also goes on to provide that choosing a law that is not the law of England and Wales or Northern Ireland as the applicable law for arbitral proceedings shall be tantamount to an agreement by parties about the matter.[13] These clauses legally permit the use of religious laws such as Sharia as choice of substantive law for arbitration in the UK. Furthermore, as specified in the landmark UK

9 Arif A. Jamal, *ADR and Islamic Law: The Cases of the UK and Singapore*, *in* RESEARCH HANDBOOK ON ISLAMIC LAW AND SOCIETY 120 (Nadirsyah Hosen 2018).

10 Zahraa and Hak, *supra* note 7.

11 Ahmad Q. Farah & Rasha M. Hattab, *The Application of Shari'ah Finance Rules in International Commercial Arbitration,* 16 UTRECHT L. REV. (2020).

12 Arbitration Act 1996 § 4(2), (UK).

13 Arbitration Act 1996 § 4(5), (UK).

Supreme Court judgement *Jivraj* v. *Hashwani*, arbitral agreements might specify that arbitrators must belong to a specific faith group.[14] In that judgement, the Court interpreted Section 1 of the UK Act and ruled that any provision requiring an arbitrator to adhere to a specific religion is pertinent to upholding the parties' liberty to determine the manner in which their disputes are to be settled. Because of this, it follows that Sharia-based religious arbitration can take place in the UK without any legal obstacles.

In 2008, Lord Phillips, a former Chief Justice, declared that "*there is no reason why principles of Sharia Law, or any other religious code should not be the basis for mediation or other forms of alternative dispute resolution*."[15] This statement appeared to be an endorsement of religious arbitration and caused much furore in British legal and political circles. At this juncture, it is very important to note that it is religious councils themselves, along with various scholars, who have interpreted the UK Act to allow religious arbitration. The UK government has never recognised the validity of their rulings.[16]

A. Sharia courts and the Muslim arbitration tribunal

Over the last two decades, the phenomenon of organisations called 'Sharia Courts' have garnered a lot of attention in the UK. Since Sharia courts are not part of the country's official judicial system and its rulings are not a part of the *corpus juris* of the state, the term 'court' is misleading in this context.[17] These organisations can be better defined as councils, whose purpose is to oversee religious law and arbitrate conflicts when individuals approach them. In the UK, one might come across an average of 85 such councils; some operating with less formal protocols, while others adhere to more

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14 Jivraj v. Hashwani [2011] UKSC 40, [2011] WLR 1872

15 *Muslims want Equality before British Law*, MUSLIM COUNCIL OF BRITAIN (Jul. 4, 2008), *available at* https://mcb.org.uk/muslims-want-equality-before-british-law/.

16 David Torrance, *Sharia Law Courts in the UK* (2019), *available at* https://researchbriefings.files.parliament.uk/documents/CDP-2019-0102/CDP-2019-0102.pdf.

17 *Supra* note 7.

formalised and published protocols.[18] The majority of Sharia councils meet in mosques, and the body of the council is composed of religious scholars, or *Imams*, who are responsible for leading prayers.[19]

The three most common and contentious types of cases heard by British Sharia courts are those involving inheritance, child custody, and divorce.[20] As a result, most social and legal issues related to Islamic arbitration have arisen in the field of family law, and in response to the idea that private Islamic entities may take over some of the responsibilities that have traditionally been handled by civil courts.[21] Although some Islamic scholars have advocated for formal linkages between law courts and Islamic Sharia councils, these councils currently lack binding legal authority. According to a 2007 empirical study, Sharia Councils dealt primarily with marital dissolution and divorce but the religious scholars who took part in the study stressed that Muslim women are not forced or coerced into seeking a divorce through them. Rather, it was emphasised that the responsibility lies with the individual to reach out to a Shariah Council for help and assistance, if needed1.[22]

In 2007, a Muslim lawyer founded an organisation called the Muslim Arbitration Tribunal ["**MAT**"] at the Hijaz College Islamic University in Nuneaton, Britain. MAT aimed to provide a dispute resolution forum for

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18 Priyanjali Narayan, *With 85 Sharia courts, UK becomes western capital for Islamic rulings,* INDIA TODAY (Dec. 23, 2024).

19 Natalya Golovanova, *Sharia Courts in The UK: A Parallel Legal System or Religious Arbitration?,* 3 J. OF FOREIGN LEGISLATION AND COMP. L. 23 (2017).

20 Maria Reiss, *The Materialization of Legal Pluralism in Britain: Why Shari'a Council Decisions Should Be Non-Binding,* 26 ARIZONA J. OF INTERNATIONAL & COMPARATIVE L., 743 (2009).

21 John R. Bowen, Keynote Address, *How Could English Courts Recognize Shariah?,* 7 U. ST. THOMAS L.J. 411 (2010).

22 Samia Bano, *Islamic Family Arbitration, Justice and Human Rights in Britain*, 1 ELLAW JOURNALS LAW SOCIAL JUSTICE AND GLOBAL DEVELOPMENT JOURNAL (LGD), 15 (2007).

Muslims outside of conventional courts. Founder Faiz-ul-Aqtab Siddiqi claimed that the UK Act conferred legal jurisdiction upon MAT.[23]

Administered arbitration requires an institution to be appointed to oversee the arbitration process. This institution will provide the parties with a number of services, including access to a roster of potential arbitrators, assistance with administrative procedures and accounting, and the creation of charges for arbitrators' compensation, among other things.[24] Having drafted the "*Procedure Rules of Muslim Arbitration Tribunal*," which contains rules pertaining to all of the above aspects and which disputing parties are obligated to follow when submitting their matter to the MAT,[25] arbitration by the same can be considered to be an example of administered arbitration. Section 58 of the UK Act, which establishes the finality and binding nature of an award declared by the tribunal in accordance with an arbitration agreement,[26] and Section 4, which permits the parties to choose the law to regulate the arbitration process, are intended to govern the awards proclaimed by MAT.[27] The official website of MAT emphasises this feature, stating every MAT decision is enforceable through the current enforcement mechanisms since it functions inside the English and Welsh legal framework.[28] All decisions rendered by it are in conformity with one of the recognised schools of Islamic sacred law and therefore Muslims have a chance to resolve their disputes in a way that is consistent with Islamic sacred law while feeling assured that the decision will be legally binding and enforceable. Consequently, its rulings are legally binding and effective, just

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23 Why MAT?, MUSLIM ARBITRATION TRIBUNAL, https://web.archive.org/web/20150926234743/http://www.matribunal.com/why-MAT.php.

24 Emanuele Odorisio, *The Muslim Arbitration Tribunal (MAT).*, 11 COMP. L. REV. 79 (2020).

25 Procedure Rules of Muslim Arbitration Tribunal, MUSLIM ARBITRATION TRIBUNAL, *available at* https://web.archive.org/web/20150926234608/http://www.matribunal.com/rules.php.

26 Arbitration Act 1996 § 58, (UK).

27 Arbitration Act 1996 § 4, (UK).

28 Why MAT?, *supra* note 23.

like those of any other English law tribunal. It should be noted that the assertions that MAT's decisions are legally enforceable and binding are purely theoretical and rest on its own interpretation of the UK Act. No court has ever confirmed or implemented a Sharia law award that the Tribunal has made.

While Sharia councils and MAT are separate organisations, they both reflect a larger trend –members of the same religion are increasingly looking to religious precepts to control certain parts of their life.

IV. Islamic arbitration of marital disputes in Canada

Faith-based arbitration was made possible in Canada by the Arbitration Act of 1991 ["**Canadian Act**"], which gave private parties the freedom to determine how to resolve a dispute.[29] The Canadian Act did not explicitly set restrictions on the subject matter of arbitrations; thus, parties were free to arbitrate on issues like child support, custody, and access as well as other things like their children's ethical and religious upbringing. In fact, private agreements were considerably more prevalent than court-mandated decrees when it came to custody and access.[30] When the statute came into force in 1992, Jewish and Christian organisations established arbitration panels that rendered decisions consistent with their religious beliefs. So long as these arbitrations did not break any current Canadian laws, they were all enforceable.[31]

However, when Muslim attorney Syed Mumtaz Ali declared in 2003 that he had founded the Islamic Institute of Civil Justice to arbitrate cases in

29 Arbitration Act, R.S.O. 1991 (Can.)

30 Natasha Bakht, *Family Arbitration Using Sharia Law: Examining Ontario's Arbitration Act and Its Impact on Women*, 1 MUSLIM WORLD J. OF HUM. RIGHTS, 5 (2007).

31 Anna C. Korteweg, *The Sharia Debate in Ontario: Gender, Islam, and Representations of Muslim Women's Agency*, 22 GENDER & SOCIETY, 434 (2008).

accordance with Islamic principles, it stirred up public debate.[32] The government hired Attorney General Marion Boyd in June 2004 to look into the problems of using private arbitration to settle family and inheritance disputes and how it affects weaker parties. The danger that Muslim arbitration institutions will reverse the "*many years of hard work, which have entrenched equality rights in Canada, to the detriment of women, children, and other vulnerable people*" was voiced by a number of interest groups.[33] These interest groups believed that Islamic law on family problems was intrinsically gendered unequal and that Muslim women's capacities were severely restricted by Islam. However, Boyd said in her report that religious arbitration was authorised by the Canadian Act and ought to be allowed going forward based on what she referred to as "*Islamic legal principles*."[34] Simultaneously, Boyd invoked a societal duty to guarantee that women would have the ability to contest unjust verdicts in any kind of arbitration. Certain religious organisations made the case for religious adjudications following the Boyd Report. Following a flurry of public discussion, Premier Dalton McGuinty issued an uncompromising statement imposing a ban on religious arbitration.[35] Furthermore, the Ontario government had said that it would make sure that the province's legal system remains unaltered and that no binding family arbitration proceedings will take place in Ontario under any legislation or regulations that discriminate against women.

In order to mandate that family arbitrations be conducted "*in accordance with Ontario law or the law of another Canadian jurisdiction*," the province amended

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32 Laureve Blackstone, *Courting Islam: Practical Alternatives to a Muslim Family Court in Ontario*, 31 BROOK. J. INT'L L. (2005).

33 *Supra* note 31, at 436.

34 Marion Boyd, *Dispute Resolution in Family Law: Protecting Choice, Promoting Inclusion: Executive Summary* (2004).

35 *Ontario Premier rejects use of Shariah law*, CBC NEWS (Sep. 9, 2005), *available at* https://shorturl.at/5IHf0.

its Family Law Act and the Canadian Act.[36] The amendment stated that if family arbitration proceedings were not conducted solely in compliance with the laws of Ontario or another Canadian jurisdiction, the ruling would not be recognised as a family arbitration award and would not be legally enforceable.[37] Consequently, Sharia arbitration came to an end in Canada.

V. Evaluating religious arbitration of matrimonial disputes – unveiling the sacred, the secular and the social consequences

A. Inducing cultural sensitivity in a multicultural society

For religious families whose everyday existence revolves around their faith, entrusting private disputes to revered religious authorities might be an essential component of their worldview.[38] An independent think tank called Policy Exchange released research in 2007 that stated 28 per cent of British Muslims want to live according to Sharia law and 86 per cent of them believed that their faith constituted the cornerstone of their existence.[39] Societies with a great degree of social, cultural, and religious diversity, such as the UK society, are pluralistic in character.[40] Conflicts between the identity and interest assertions made by state legislation and those made by ethnic minorities may arise in such pluralistic societies.[41] According to Prakash Shah's book *Legal Pluralism in Conflict: Coping with Multicultural variation in Law*, the primary issue facing contemporary legal systems is how to balance the need for uniformity with the acceptance of variation among various societal groups. He proceeds to argue that people of diverse racial and religious backgrounds have distinct perspectives on the law and, as a result, have different needs and call for different outcomes in different

36 Family Law Act, R.S.O. 1990 (Can.) § 1(b).
37 Family Law Act, R.S.O. 1990 (Can.) § 2.2 (1)(b).
38 Barbara Atwood, *Religious Arbitration of Family Disputes*, 42 AMERICAN BAR ASSOCIATION.
39 MUNIRA MIRZA, ABI SENTHILKUMARAN & ZAIN JA'FAR, *Living Apart Together: British Muslims and the Paradox of Multiculturalism*, 46 (2007).
40 Akram Khan, *Ethnic Diversity Makes Britain's Culture Great. It Would Be a Disaster If We Lost It*, THE GUARDIAN (Jul. 10, 2019).
41 Bano, *supra* note 22.

circumstances.[42] The domain in which self-regulation is most prevalent among ethnic minorities is family and kinship, and as such, it is the domain that frequently clashes with the established legal system.[43] The common law, while taking into consideration the specific contexts of disputes, falls short in recognising the cultural and behavioural norms of litigants by relying on the *reasonable man* standard for judgments. This legal framework remains restrictive and overlooks the cultural and theological foundations guiding ethnic communities in resolving their disputes.[44]

According to assimilationists, ethnic minorities should adopt the norms of mainstream society and keep their cultural identity within their private lives.[45] But ethnic communities frequently oppose this devotion to mainstream culture and offer their own solutions. Numerous major disputes amongst Asians in the UK never make it to the official legal system. Marriages, including polygamous, unregistered and child marriages, talaqs, and other divorces, are arranged in accordance with the rules of Muslim law and customs.[46] Religious communities understand that they are all minority groups, and that secular legislation does not currently, nor will it in the near future, broadly represent their traditional beliefs. Whether widely acknowledged or not, this reality is prompting religious communities to seek alternatives beyond the limitations of secular law, turning to private dispute resolution to safeguard their communities.[47] Encouraging communities to follow their religious laws in the intimate domain within the family unit upholds the equality of all ethnic groups within the state and

42 PRAKASH SHAH, LEGAL PLURALISM IN CONFLICT: COPING WITH CULTURAL DIVERSITY IN LAW 173 (2016).

43 *Id.*

44 Bano, *supra* note 22.

45 Ihsan Yilmaz, *Muslim Law in Britain: Reflections in the Socio-Legal Sphere and Differential Legal Treatment*, 20 JOURNAL OF MUSLIM MINORITY AFFAIRS 354 (2000).

46 *Id.*

47 Broyde, *supra* note 1.

gives them access to justice via frameworks that are consistent with their values and beliefs.

Courts and lawmakers are not tasked with crafting and enforcing a set of legal rules tailored to the practices of specific religions. This is because culture and individual identity are both intricate, challenging to delineate, and constantly evolving. Therefore, according to Ann Laquer Estin, the answer is to develop more expansive legal concepts that provide people more opportunity to express their cultural or religious identity and work through the consequences of their decisions.[48] This approach is evident in arbitration laws with clauses enabling individuals to select the legal framework governing their arbitration. By granting this choice, individuals can adhere to their religious laws without requiring the state to formally establish these laws. They serve the core objective of religious and cultural pluralism, which is to enable people to express and uphold their identities and beliefs within the context of their family connections, which are typically more value-driven.

B. Concerns regarding human rights and democratic principles

The first argument put up by critics of religious arbitration posits that women face disadvantages stemming from both religious legislation and societal perspectives on gender dynamics within religious contexts. They contend that legal regimes that sustain such forms of inequality ought to be prohibited.[49] Within the context of Sharia, there are a number of rules that, at first glance, show features indicative of gender bias against women. For example, in Islam, men are allowed to marry more than one woman, but women are not allowed to do the same.[50] Another instance is of the practice known as *talaq-e-bidat* which permits men to unilaterally divorce women

48 Ann Estin, *Embracing Tradition: Pluralism in American Family Law*, 63 MD. L. REV. (2004).

49 Caryn Litt Wolfe, *Faith-Based Arbitration: Friend Or Foe? An Evaluation Of Religious Arbitration Systems And Their Interaction With Secular Courts*, 75 FORDHAM L. REV. (2006).

50 Man Baker, *Polygyny in Islam: A Call for Retrospection*, 50 BRITISH J. OF MIDDLE EASTERN STUDIES, 397 (2023).

without providing them with any notice.[51] Estine observes that within conventional family legal frameworks, women are especially susceptible to oppression. They encounter increased limitations concerning their ability to marry, transmit nationality or membership to their offspring, pursue divorce, manage their finances, and secure custody rights.[52] Shachar suggests that state policies aiming to facilitate inclusivity and equity between minority groups and the broader society, while well-intentioned, could inadvertently enable the systematic mistreatment of individuals within these accommodated minority communities. In some instances, this mistreatment might be so significant that it effectively cancels out the rights of these individuals as citizens.[53] Hence, resorting to faith-based approaches to resolve family conflicts can further render women more vulnerable by converting them into unequal participants in family law matters. Although this argument may be valid, restricting women from choosing to be influenced by their religion in the most personal aspects of their lives not only diminishes their autonomy but also provides a moral framework rooted in Orientalist principles.

Moreover, as seen in Ontario, it perpetuates the notion of a white-saviour. The 2003–2006 Sharia debate in Ontario prominently featured the archetype of the '*imperilled Muslim woman*' who required rescuing from the '*dangerous Muslim man'*.[54] Sharmeen Khan asserts that the portrayal of Muslim women as being concealed behind a veil and restricted from public engagement unless authorised by their husbands had engrossed certain feminists in Canada, leading to a determination towards safeguarding women who wear the burqa.[55] The portrayal of Islam as

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51 *Explained: Difference between Talaq-e-Hasan and Triple Talaq*, TIMES OF INDIA (Aug. 30, 2022).

52 Estin, *supra* note 48.

53 Ayelet Shachar, *The Puzzle of Interlocking Power Hierarchies: Sharing the Pieces of Jurisdictional Authority*, 35 HARV. C.R. C.L. L. REV. (2000).

54 Natasha Bakht, *Were Muslim Barbarians Really Knocking on the Gates of Ontario?: The Religious Arbitration Controversy - Another Perspective*, 40 OTTAWA L. REV. (2005).

55 Sharmeen Khan, *Racism, Feminism, and the Sharia Debate*, BRIARPATCH (Nov. 2005).

barbaric was reinforced due to the fact that numerous such depictions originated from individuals inside the Muslim community.[56] Nevertheless, a portion of the concerns expressed by different parties were valid.

Canadian feminist organisations played a crucial role in revealing numerous problematic aspects of the Canadian Act, which was primarily designed for commercial purposes but could also be applied to family law, where historical evidence has demonstrated that women, regardless of their culture or religion, are often vulnerable.[57] A comprehensive examination of the Canadian Act reveals that it did not mandate arbitrators to possess any specific legal expertise. Yet the rulings rendered by these arbitrators might be submitted to a court and carried the weight of legal authority.[58] The parties involved in arbitration had the ability to contractually waive their rights to appeal, resulting in the elimination of a crucial instrument for judicial control. The choice to engage in arbitration did not necessarily have to be taken immediately after the dissolution of the relationship. Consequently, an arbitration agreement could be included in a marriage contract long before any decision to engage in arbitration was actually made, creating a situation where genuine consent might be merely an illusion.[59] The Canadian Act did not effectively enforce and finance the provision of independent legal counsel before the execution of an arbitration agreement, therefore eliminating a crucial mechanism for guaranteeing a well-informed determination. It lacked a provision for record keeping, so impeding the gathering and analysing of data pertaining to the effects of family arbitration on women. Its mentions of equality and

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56 Tabassum Fahim Ruby, *The Question of Muslim Women's Rights and the Ontario Shari'ah Tribunals: Examining Liberal Claims*, 34 FRONTIERS: A JOURNAL OF WOMEN STUDIES 134 (2013).

57 Bakht, *supra* note 54.

58 Arbitration Act, R.S.O. 1991 (Can.).

59 *The Arbitrariness of Ontario's Arbitration Act: Examining the Impact on Women*, NATIONAL ASSOCIATION OF WOMEN AND THE LAW, *available at* https://nawl.ca/the-arbitrariness-of-ontarios-arbitration-act-examining-the-impact-on-women/.

fairness mostly served as procedural assurances, with minimal influence on the substantive equality of arbitral rulings.[60]

C. Guarding Rights: Implementing Safeguards to Address Concerns of Violation

Enforcing a complete prohibition on religious arbitration for matrimonial issues through a strictly secular approach assumes that secular laws provide equal treatment for all.[61] Yet, as the authors have highlighted, the main flaw in this stance is its failure to recognise that certain individuals lead their lives in accordance with their faith more than others and perceive secularism as a limitation. To strike a balance between cultural freedom and individual agency, legislation governing arbitration should incorporate stringent safeguards. Thus, Boyd writes in her report that it is imperative for arbitration panels to establish and communicate standardised and comprehensive rules of procedure.[62] This is because the implementation of similar rules and procedures serves to establish unambiguous expectations during the proceedings and aids in safeguarding the interests of vulnerable parties. It is required for parties to obtain independent legal advice in order to make a well-informed decision regarding the arbitration forum they wish to choose.[63] If religious law is selected, it is necessary to obtain an Independent Legal Advice Certificate. This certificate should clearly indicate that the lawyer consulted is certain that the parties have adequate information to comprehend the nature and ramifications of selecting religion law.[64] In order to enhance the autonomy of women and safeguard them against any form of coercion or misrepresentation, it is imperative to validate the arbitration agreement prior to the initiation of the arbitration hearings, even if the marriage agreement previously executed by the

60 Bakht, *supra* note 54.
61 Boyd, *supra* note 34.
62 Boyd, *supra* note 34.
63 *Supra* note 21.
64 *Supra* note 23.

involved parties included a provision for arbitration.[65] The members of the arbitration tribunal must provide certification confirming the voluntary nature of each party's participation in the arbitration process. In cases when religious organisations express a desire to provide religious arbitration services to their members, it would be appropriate for a prospective arbitrator to complete specialised training in this regard.[66] This training requirement could potentially enhance the recognition of legitimacy and significance of arbitration as a procedural mechanism.

Integrating these protective measures into arbitration laws and regulations presents a better alternative to abolishing religious arbitration entirely, thereby safeguarding the rights of women.

D. Enforcement of Arbitration Awards passed by Muslim Religious Councils

The term "*arbitral award*" denotes a decision rendered by an arbitration tribunal during an arbitration proceeding. An arbitral award is regarded as being on par with a court judgement, hence conferring legal enforceability upon the involved parties. The rigorous process of arbitration is rendered ineffective if the resulting award lacks enforceability. The enforcement of arbitral awards is facilitated by various methods within arbitration legislations. For example, the UK Act, under section 66, stipulates that an award issued by the tribunal according to an arbitration agreement can, with the court's permission, be enforced similarly to a court judgment or order with equivalent effect.[67] According to the UK Act, this provision confers legal validity upon arbitrations carried out by religious organisations. MAT confirms this stance on its website affirming that as it functions within the boundaries set by the legal systems of England and Wales, any rulings made by it will be legally binding in accordance with the prevailing legislation of

65 Zahraa and Hak, *supra* note 7.
66 Atwood, *supra* note 38.
67 Arbitration Act, 1996, § 66, (UK).

the country.[68] In a 2015 interview, Faiz-ul-Aqtab Siddiqi asserted that any award issued by MAT would have binding legal effect on the parties involved.[69] Furthermore, it could be enforced in either a County Court or a High Court, depending on the disputed amount.[70] Decisions made by a tribunal established by MAT can be subject to appeal on several grounds, including appeals based on legal points.[71] Nevertheless, the actual implementation of de jure rights to appeal and enforce awards has not yet materialised, as there has not yet arisen a circumstance where the execution of an award has become imperative. Faiz-ul-Aqtab Siddiqi attributes this to a commendable history of successful outcomes.[72] The UK government has unequivocally declined to grant legitimacy to Sharia councils, even as alternative methods of resolving disputes.[73] Therefore, there is still uncertainty regarding the potential enforcement of a decision made by religious tribunals by British civil courts in such circumstances.

VI. Possibility of Islamic religious arbitration of marital disputes in India - insights from the west

A. A jurisprudential analysis of the validity of religious arbitration in India

The legal framework governing arbitration in India is set forth by the Arbitration and Conciliation Act of 1996. ["**Indian Act**"][74] When examining the feasibility of religious arbitration for marriage disputes in India, it is crucial to consider two provisions outlined in the Indian Act. Section 28 of the legislation stipulates that in cases of arbitration that are

68 Muslim Arbitration Tribunal*, supra* note 25.

69 Yvonne Prief, *Restricted Access Muslim Legal Practice in the United Kingdom: The Muslim Arbitration Tribunal*, *in* LEGAL PLURALISM IN MUSLIM CONTEXTS 49 (2019).

70 Bakht, *supra* note 30.

71 Arbitration Act 1996, § 69 (UK).

72 Prief, *supra* note 69.

73 Torrance, *supra* note 16 at 5.

74 Arbitration and Conciliation Act, 1996 (India).

not international commercial arbitration, the resolution of the dispute under it shall be determined according to the relevant substantive law prevailing in India at the time, as deemed appropriate for the specific dispute under consideration.[75] In the context of matrimonial conflicts therefore, personal laws in force in the country shall be the law applicable for arbitration. Significantly, in contrast to other religious communities, there exists no formalised legal framework governing Muslim family affairs. The Muslim Personal Law (Shariat) Application Act of 1937 is not a comprehensive legal code; instead, it serves as a declaratory statute stating that issues such as marriage, divorce, maintenance, dower, and guardianship involving Muslim individuals will be governed by Muslim Personal Law (Sharia).[76] As a result, Sharia law, interpreted by different Islamic sects and schools of thought, becomes the primary legal framework for addressing marital conflicts.

Moreover, according to Section 11(2) of the Indian Act, parties are allowed to freely decide on any method for selecting the arbitrators.[77] If the parties are unable to do so, they have the option to petition the Supreme Court or High Courts to choose arbitrators on their behalf, taking into account any qualifications specified by the parties' agreement.[78] Due to lack of any prohibitory clauses, the qualifications can be of a religious nature. Thus, religious leaders or *qazis* can serve as arbitrators and apply Sharia law as the substantive law while deciding on Islamic matrimonial cases. An arbitral award is considered to be final and binding and unless the parties have made an application for setting aside the arbitral award under section 34 of the Act, the award shall be enforceable in the same manner as if it were a decree of the court.[79]

75 Arbitration and Conciliation Act, 1996, § 28 (India).
76 Muslim Personal Law (Shariat) Application Act, 1937 (India).
77 Arbitration and Conciliation Act, 1996, § 11(2) (India).
78 Arbitration and Conciliation Act, 1996, § 11(5) (India).
79 Arbitration and Conciliation Act, 1996, § 36(1) (India).

However, if the jurisprudence on the matter is to be considered, the Indian judiciary on multiple occasions have attempted to decide upon the question of arbitrability of disputes. In the 2011 case of Booz-Allen & Hamilton Inc vs Sbi Home Finance Ltd. & Ors[80] the Supreme Court established a broad guideline for determining which issues are amenable to arbitration. It said that whereas disagreements over more general legal rights that impact everyone (rights in rem) must be resolved by courts or public tribunals, disagreements about personal rights (rights in personam) can typically be arbitrated.

According to the Court, a right in rem is a right that is applicable to everyone and is connected to a certain object or legal status (like citizenship), whereas a right in personam is a right against a specific individual. As a result, the Court determined that while rights in personam are amenable to arbitration, rights in rem are not. The Court provided instances of non-arbitrable issues, including matters related to marriage, such as divorce, child custody, and restitution of conjugal rights. However, it clarified that this rule is not absolute and may have exceptions.

B. Dar-ul-Qaza - Seats of Islamic arbitration

The issue, even though legally seemingly settled, has drawn controversies over the last few years. Concerns have been raised in popular media both on Islamic arbitration resulting in a parallel legal system as well as the encroachment of women's civil liberties.[81] In India, Islamic arbitration centres are popularly called *Sharia Courts* or *dar-ul-qaza*. In a study conducted by the American think-tank Pew Research Centre in 2021, findings indicated that 74 per cent of Muslims in India expressed support for the existence of *dar-ul-qazas*, which deal with family disputes such as inheritance

[80] Booz Allen Hamilton v. SBI Home Finance (2011) 5 SCC 532.

[81] Faisal Fareed, *Sharia Courts Divide Opinion Even among Muslims – but They Are Not a Parallel Justice System*, SCROLL (Jul. 13, 2018).

or divorce cases, alongside the secular court system.[82] *Dar-ul-qaza* which literally translates to "*house of decisions*" are maintained by various religious organizations where religious judges called *qazi-e-shariat* arbitrate on cases using Sharia as the substantive law. Two of the most popular religious organisations which run *dar-ul-qazas* are the All India Muslim Personal Law Board ["**AIMPLB**"] and the *Imarat-e-Sharia*, running around 70 and 54 centres respectively.[83] The *Imarat-e-Sharia's* official site states that its purpose is to resolve disputes among Muslims related to inheritance, marriage, divorce, and waqfs, among other matters, in accordance with Shariat laws. The aim is to provide an alternative to the expensive and time-consuming procedures of the traditional courts in the country, thereby benefiting the Muslim community. Disputes are resolved swiftly and harmoniously.[84] This assertion is in line with the principles of time and cost efficiency from which the need of arbitration is derived.

In August 2022, reputed Indian daily, the Hindu, interviewed Anzar Alam Qasmi, the chief *qazi* responsible for deciding issues of marriage and divorce at its Patna headquarters. Mr. Qasmi reportedly stated that in 2021–22 the centre resolved 572 cases with almost all of them being cases of *Khula* (a woman's inalienable right to instant divorce). Having analysed data from all *Imarat-e-Sharia* centres in Bihar and Jharkhand for 2021–22, the report concluded that there were nearly five thousand cases of khula resolved in total. Mr. Qasmi said, "*Many cases of khula are resolved within an hour or two. Up to 70 per cent cases are settled with two months. Only a handful take six months or more, when the man does not respond to the notices sent to him*."[85] The jurisdiction of *dar-ul-qazas* encompasses the resolution of various separation based claims on non-compliance with the order of *dar-ul-qazas* for spousal

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82 Neha Sahgal, Jonathan Evans, Ariana Monique Salazar, Kelsey Jo Starr & Manolo Corichi, *Religion in India: Tolerance and Segregation*, PEW RESEARCH CENTRE, (Jun. 29, 2021).

83 Darul Quaza, IMARAT SHARIA BIHAR, ODISHA & JHARKHAND, PULWARI SHARIF PATNA, https://www.imaratshariah.com/darulqaza.php.

84 *Id.*

85 Ziya Salam, *More Muslim Women Are Opting for Khhula, Their Right to 'Instant Divorce',* THE HINDU (Aug. 27, 2022).

maintenance, *haqq-e-hazanat* (the mother's right to raise her children), *mehr,* alimony and maintenance claims, return of dowry items, disputes regarding the protection of minors' interests, issuance of marriage certificates, as well as authorisation of nikahs.[86] The *dar-ul-qazas* only handle non-criminal cases.[87] In addition to delivering judgements, deliberate attempts are made to promote the emotions of brotherhood, unity, and mutual affection and fondness between the parties involved in disputes. Over the course of more than a century, the headquarters of *Imarat-e-Sharia* in Patna has resolved more than twenty thousand cases, while a similar number of cases have been concluded at the Sub-*dar-ul-qaza* in various districts of Bihar, Jharkhand, and Orissa.[88]

Islamic clerics and scholars actively persuade the Muslim demography to set up and opt for *dar-ul-qazas* while solving their disputes. In the 2005 presidential address at the AIMPLB Bhopal conference, Sayyed Muhammad Rabe Hasani Nadvi, the president of AIMPLB, asserted that *dar-ul-qazas* were essential due to the limited likelihood of obtaining Sharia-based verdicts from judges in state courts. He strongly emphasised the necessity of establishing *dar-ul-qazas* across the country and objected to Muslims bringing their conflicts before non-Muslim judges, a practice that he contended was inconsistent with the mindset and principles of Sharia. He expressed that establishing distinct *dar-ul-qazas* is a method to guarantee that "*the Sharia is implemented by individuals with the highest level of expertise in it*".[89]

86 Sabiha Hussain, *Shariat Courts and Women's Rights in India* (2007).

87 Katherine Lemons, *Sharia Courts and Muslim Personal Law in India: Intersecting Legal Regimes*, 52 L. SOC. REV. 603 (2018).

88 Quaza, *supra* note 83.

89 Yoginder Sikand, *A Flawed Model*, OUTLOOK (May 12, 2005).

C. Are *Dar-Ul-Qazas* a parallel justice system - the Vishwa Lochan Madan case

The most contentious question with regard to Sharia arbitration in India is whether these Arbitration Centres constitute a parallel justice system in the country.

In reaction to the formation of *dar-ul-qazas* and the stance taken by the AIMPLB, Advocate Vishwa Lochan Madan filed a Public Interest Litigation requesting the swift dissolution of all Sharia Courts in India, including *dar-ul-qazas*. He also asked the Supreme Court to instruct the central government and the states to take necessary actions to dissolve these courts. He, as the petitioner, requested the Court to issue an order preventing these organisations from interfering with the marital status of Indian Muslim nationals, making any judgements, comments, or decrees, i.e., *fatwas*, and resolving marital issues among Muslims. In addition, the petitioner requested the Court to instruct the AIMPLB and Darul Uloom to refrain from training or appointing *qazi*s, *naib-qazis*, or *muftis* for any form of judicial duty. The petition accused the two organisations of meddling with the nation's legal framework and implementing parallel Islamic laws that ran counter to the Constitution. It requested instructions to prevent the board from establishing a separate Muslim judicial system or *nizam-e-qaza*.[90] The stand of the Union of India, which was one of the defendants, was that *fatwas* are regarded as advisory in nature and do not carry legal obligations for Muslims. In addition, *dar-ul-qazas* do not handle criminal justice issues. Instead, it acts as an arbitrator, mediator, negotiator, or conciliator in civil conflicts among Muslims, including those pertaining to familial issues. The Union of India considered *dar-ul-qazas* to be an alternate method of resolving disputes, with the goal of swiftly, amicably, and cost-effectively resolving problems outside of established courts.[91] Crucially, *dar-*

[90] Jeffrey Redding, *Secularism, the Rule of Law, and 'Shari'a Courts': An Ethnographic Examination of a Constitutional Controversy*, 57 ST. LOUIS UNIV. SCHL. OF L. J. (2013).

[91] Vishwa Lochan Madan v. Union of India, (2014) 7 SCC 707, 7.

ul-qazas does not possess the power to enforce its rulings, hence ensuring that it does not contradict or function parallel to the Indian judicial system. This assertion is accurate as the enforcement of arbitral awards falls within the purview of the courts and cannot be executed by the *qazis*, who serve solely as arbitrators. Arbitrators lack the authority to enforce their awards.

The Apex Court bench accepted the defendants' contentions and refused to impose a ban on *dar-ul-qazas*. The verdict explained that the opinions or *fatwas* made by *Dar-ul-Qaza* are not considered as the official resolution of a dispute by a legally authorised judicial institution. A *qazi* or *mufti* does not possess the authority or competence to impose their views or Fatwa through any form of coercion.[92]

The authors contend that it is inappropriate to classify a *dar-ul-qaza* as an Islamic court. They operate as arbitration bodies without any actual or claimed judicial powers or jurisdiction. Hence, labelling these councils as a *parallel system* is erroneous, contrary to what many within and outside the Muslim community might mistakenly believe.

In the Vishwa Lochan case, the judgment primarily centred on the infringement of rights resulting from the issuance of *fatwas*. The Division Bench unanimously held that *dar-ul-qazas* do not form a part of the corpus juris of the state and that fatwas issued by them have no legal backing. The Court reiterated the contention of the Union of India that *dar-ul-qazas* are arbitration centres, but did not delve into the question of their congruence with the Indian Act, hence creating opportunities for further confusion. It is imperative that a constitutional bench of the Supreme Court clearly ruled out the nature of *dar-ul-qazas* to be private dispute resolution bodies, and examined whether they facilitate the formation of arbitration tribunals on a case-to-case basis, based on the agreement entered into by the parties. The Court should have also explicitly clarified whether, upon reaching finality,

92 Bowen, *supra* note 21.

and in the absence of any stay on execution granted by the court under section 36(3) of the Indian Act, the holder of the award can approach the appropriate executing court to enforce the award passed by a *dar-ul-qaza* as though it were a court decree. Questions of this nature must be unequivocally cleared.

Moreover, Sharia courts ought to amend their terminology to more precisely depict their function as arbitration centres. In the UK, this is exemplified by the MAT, which expressly identifies itself as an arbitration centre, maintaining consistency and transparency in its designation. Faizur Rehman, secretary general, of the Chennai-based Islamic Forum for the Promotion of Moderate Thought explained that in spite of Supreme Court not banning *dar-ul-qazas* in 2014 and hence upholding the fact that they are not parallel judicial system, there are perpetual cries that demand a ban of these arbitration centres because the confusions stem from the name. He recommends that hence, the board should discontinue the use of the term *dar-ul-qaza* and instead adopt the term *dar-ul-sulah*, which translates to arbitration centre in Arabic.[93] It would provide clarity regarding the true nature of Muslim legal institutions in India and alleviate the need for *ulama* to justify the discrepancies in the names and roles of certain existing establishments.

D. Ruling out Islamic arbitration - Muslim Personal Law regressive and patriarchal?

Should *dar-ul-qazas* operate exclusively as arbitration centres and adhere to Section 11(8), their jurisdiction would be limited to the application of prevailing substantive law in India.[94] Currently, in India, Islamic Law is uncodified, barring a few legislations like the Muslim Women (Protection of Rights on Marriage) Act, 2019 which banned *triple talaq*.[95] Consequently,

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93 Faizur Rahman, *Muslim Personal Law Board Must Stop Calling Arbitration Centres "Sharia Courts",* THE WIRE (Jul. 16, 2018).

94 Arbitration and Conciliation Act, 1996, § 11(8) (India).

95 Muslim Women (Protection of Rights on Marriage) Act, 2019 (India).

even civil courts will employ the uncodified Sharia law when adjudicating family disputes involving Muslim parties. Therefore, if it is argued that Sharia law is regressive and patriarchal, the remedy lies not in outlawing *dar-ul-qazas* but in codifying Sharia law and eliminating overtly discriminatory provisions. There is an urgent necessity to reassess Muslim personal law, particularly marriage, divorce, and guardianship laws, and imposing a ban on *dar-ul-qazas* does not address that objective.

While it is undeniable that Sharia law is often used as a pretext to keep women in subservience, it is also important to acknowledge that it takes into account not just religious teachings but also rational thinking and consensus shaped by societal conventions and values. Due to these differences, Sharia is not uniformly applied in the Islamic world.[96] Hence the solution of codifying Sharia for Indian Muslims, in consonance with the provisions of the Constitution, such as the right to equality under article 14, right to live with dignity under Art 21 etc., would constitute a long-term solution. If cases are brought before civil courts, judges may interpret Sharia law liberally, but given the heavy burden on the judiciary, not every case can be promptly addressed. Currently, a staggering 4,44,10,610 cases are pending in district and *taluk* courts.[97] If the judiciary attempts to administer justice to Indian Muslim women on a case-by-case basis, it would not be nearly as efficient as abolishing all patriarchal and regressive provisions through a comprehensive amendment to codify the law. Simply declaring seats of arbitration that apply such laws unconstitutional is not the solution.

E. Navigating party autonomy and protecting rights of women in Sharia courts

In order for *dar-ul-qazas* to function as arbitration and mediation centres, they must adhere to all the obligations that arbitration tribunals are required

96 Hussain, *supra* note 86.

97 Najib Shah, *The Burden of Pendency*, DECCAN HERALD (Sep. 28, 2023).

to follow. Although the particular challenges presented by religious arbitration systems may differ between Indian and Western legal frameworks, the viable solutions are largely same. It is essential to guarantee that any woman who seeks assistance from the *dar-ul-qazas* does so voluntarily and without any form of pressure or manipulation. Similar to the MAT, the regulations governing the tribunals established within *dar-ul-qazas* to arbitrate matters should be transparently disclosed in the public domain, and strict adherence to these rules must be ensured. "*Courts cannot interfere in personal laws*," is a statement often reiterated by bodies like the AIMPLB[98] but that does not mean that religious arbitration tribunals should be shrouded in darkness and rampant injustice shall be carried out.

Sabiha Hussain in her paper presented in a national seminar organised by the Centre for Women's Development Studies, New Delhi, talks about the experiences of the women who went to *dar-ul-qazas* in Muzaffarpur and Patna. When conversing with women who approached *fask-e-nikah* courts, they expressed their belief that the process of seeking divorce and resolving matters related to maintenance, *mehr*, and other matrimonial rights would be faster more cost-effective, and, most importantly, aligned with the teachings of the Quran. Nevertheless, their expectations were misguided. One of the women expressed that addressing the *qazi* was exceedingly challenging, not due to her lack of evidence or the validity of her request for *fask*, but mostly because of the disdainful manner in which the maulana addressed her. He exhibited a highly critical and prejudiced attitude towards her. Furthermore, the biased manner in which questions were posed and the undue pressure exerted solely on women to adapt were prejudicial. Women highlighted the fact that without a female jury, they were unable to provide the visible evidence of the injuries inflicted on their bodies, which served as the basis for their filing of the case for *fask*. They also alleged that the other party's failure to appear on the scheduled dates, the court's lack of diligence in enforcing maintenance payments, and the non-compliance

98 Shailaja Neelakantan, *Muslim Law Board: Courts Can't Interfere in Personal Law*, THE ECONOMIC TIMES (Sept. 2, 2016).

with Islamic principles regarding *mehr* and dowry were all issues of concern.[99]

This instance, underscores the immense importance of framing regulations to govern the working of *dar-ul-qazas*. Standards of service varies from one centre to the other and they are by and large localised. Local *dar-ul-qazas* are approached by mostly rural women with limited access to justice. The need of the hour is therefore to ensure that these arbitration centres adhere strictly to the provisions of the Indian Act as well as are regulated to ensure that fairness is maintained.

An independent review into the application of Sharia Laws in England and Wales was conducted by religious and legal scholars and presented before the UK parliament. The report included three key recommendations, one of which was setting up of a body by the state with a code of practice for Sharia councils to accept and implement.[100] This recommendation was dismissed as not viable by the UK parliament because it would require the State to legitimize the Sharia councils as part of the judicial establishment. However, it is important to recognise that in the Indian context, *dar-ul-qazas* cannot be banned from conducting arbitration in accordance with Sharia unless the substantive law governing Muslim family disputes is amended along with an amendment to the Indian Act that would restrict parties from choosing their arbitrators. Moreover, such a ban would likely drive councils underground, making miscarriages of justice all the more prevalent.

In order to ensure the welfare of women who approach *dar-ul-qazas*, perhaps a viable option is creation of a body that serves the function of regulating them. The body should, at the very least, make it mandatory for all such arbitration centres to register themselves so as to maintain transparent public records. Regulation of the profession must be focussed

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99 Hussain, *supra* note 86.

100 Mona Siddiqui, Anne-Marie Hutchinson, Sam Momtaz & Sir Mark Hedley, *The Independent Review into the Application of Sharia Law in England and Wales* (2018).

on, as the quality of arbitrators determine the quality of awards. Codes of conduct must be published by each *dar-ul-qaza* which aligns as closely as possible to the Indian Act and provides ways of ensuring that each party is treated equally and given an opportunity to present their case. The body should also ensure that all arbitrators at the *dar-ul-qazas* undergo training to equip them with the knowledge of procedures of admission of evidence, conduction of examination of evidence and to sensitize them about power imbalances in family dynamics. Furthermore, the decisions rendered by *dar-ul-qazas* must compulsorily be in writing and reasons for the decision must be provided. The safeguards in the Indian context cannot truly be substantive since the law governing Muslims in the family sphere itself is Sharia.

Hence, we need to focus our attention towards procedural safeguards that protect parties against duress, coercion and misrepresentation and provide a just and fair award. As long as every award is rendered in consonance with the principles of justice, *dar-ul-qazas* ought to function as vibrant centres dedicated to delivering justice to those who seek recourse through them.

THE ELEPHANT IN THE ROOM – PATHOLOGICAL CLAUSES – INTERPRETATION, INTERVENTION & COURT PRACTICE

Prof. Prakhar Narain Singh Chauhan & Shubhaankar Ray†*

Abstract

Recognition and positive enforcement of pathological clauses by courts is a contentious issue with counterparties disputing its existence and interpretation. This paper assesses the thresholds in global practices for referring parties to arbitration. It analyses pathological clauses vis-à-vis Article II (3), United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958) ["NYC"] and traces the practice of recognising pathologies across acclaimed arbitration hubs. It categorises pathologies into simple pathologies (e.g. incorrect arbitral institution, arbitrator etc.) and complex pathologies wherein the intent to arbitrate also remains contentious. The existence of different approaches in the selected jurisdictions towards pathology; their pro-arbitration or interventionist approach and the consistency in interpretation of pathological clauses is the fulcrum of the research. More so, the divergent interpretations drawn by the Indian courts in interpreting and recognising pathological clauses is being tested on the international benchmarks.

I. Introduction

Interpreting arbitration agreements lies at the helm of arbitral jurisprudence. The fate of a proceeding depends upon how an agreement is worded and interpreted. It may be a simple clause referring to resolution

* Prakhar Chauhan is an Associate Professor at Jindal Global Law School. The author is grateful to Ms. Richa Borthakur and Mr. Prithvi Garlapati (Jindal Global Law School) for their research assistance and feedback.

† Shubhaankar Ray is an Associate at Cyril Amarchand Mangaldas.

of disputes, subject to institutional rules, or a municipal legislation, or both, applicable to different aspects of the arbitral process. The manner in which it is worded, choice of laws by the parties, preference of seat etc. are means to achieve dispute resolution – they essentially are the manifestation of the intent of the parties to arbitrate. Courts and arbitrators alike may be tasked with ensuring the wish of the parties to be carried out as expressly stipulated under the agreement. Requirements such as writing, or being contained in a series of documents etc., have been prescribed under the NYC and a gamut of other instruments including municipal laws and may act as an aid to gather intention. However, what is not prescribed, is a universal format for arbitration clauses (rightly so), which can be just as universal as either of the requirements.

Arbitration clauses may often lack specificity, the extent of ambiguity may touch upon a wide range of issues: such as the clause mentioned above, reference to a non-existent institution, a named arbitrator who is no longer available, or clauses which refer the dispute to a third person associated with the cause without using the term 'arbitration', 'arbitrator', 'dispute' or simply states 'out of court settlement' or resolution. These clauses while conforming to the formal requirements, hinder deducing intention (whether arbitration at all?) or are vexed with inherent deficiencies at times. For instance, "*all disputes to be resolved by arbitration"*, is a valid arbitration clause, and so is, "*any dispute arising out of or in connection with the performance or interpretation of this agreement shall be settled by arbitration seated in London, presided over by a sole arbitrator mutually appointed by the parties, under the Arbitration Act 1996*." What is central in the latter clause is the specificity with which the intention is to be carried out as opposed to the former which leaves room for further assistance.

Approaching the court in cases where an arbitration agreement exists may run contrary to the intent, however despite being in writing, if the mode of settling disputes is unclear, the court has to assist. Such clauses are commonly called 'pathological clause'. Although they indicate the intention

of the parties to resolve their disputes, however, effectuating them in the way they are worded may not be feasible. The role of the courts in such cases, when approached, is concerned with a) investigating intent to arbitrate; and b) effectuating intent (if established) given ambiguities; while restraining itself to not go beyond what the parties would have intended and impose its own version.

Before delving into a comparative analysis, the paper attempts to establish the finer differences between pathological clauses themselves. The paper maps the role of courts while referring parties to arbitration under pathological clauses in the Indian context on the touchstone of global best practices. It investigates the existence of uniformity in approach of the courts while doing so, by assessing clauses in which parties have either been referred or refused to resort to arbitration.

II. Interpreting Pathological Clauses

Arbitral jurisprudence favours 'positive' or an enabling interpretation of arbitration clauses, where party autonomy reigns supreme.[1] It is incumbent upon the courts to refer parties to arbitration despite certain shortcomings in the clause unless found invalid. From positive interpretation of arbitration clauses stems another discussion on presumptive validity of arbitration clauses. Born highlights the presumptive validity of arbitration clauses at great lengths.[2] Role of the NYC in achieving enforceability of arbitration agreements has been noteworthy, as it is incumbent upon signatories to 'recognise' written arbitration agreements and refer parties to arbitration.[3]

1 JULIAN LEW, LOUKAS MISTELIS & STEFAN KRÖLL, COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION (1st ed. 2003).

2 GARY BORN, INTERNATIONAL ARBITRATION: LAW AND PRACTICE 1 (3d ed. 2021).

3 Gary Born, *The Right to Arbitrate: Historical and Contemporary Perspectives*, 17 ASIAN DISP. REV. 56, 56–91 (2015).

The idea of positive interpretation or pro-arbitration is essentially to further the will of the parties to arbitrate. A pro-arbitration jurisdiction is one where the policies and practices advance arbitration's purpose.[4] Bermann puts across a non-exhaustive list of 12 indicators which when cumulatively create factors to assess arbitration-friendliness. Out of those the following are important indicators for the purposes of this paper:

a) *to what extent does it ensure consent to arbitrate and enhance the scope for party autonomy?*

b) *to what extent does it effectuate the likely intentions or expectations of the parties?*

c) *to what extent is it consistent with the lex arbitri or the institutional rules chosen by the parties?*

d) *to what extent does it, consistent with party intent, enable the tribunal to exercise sound discretion and flexibility on matters of arbitral procedure?* [5]

In cases of disagreements over existence or interpretation of arbitration clauses, parties have resorted to courts under the relevant legislation. Courts assessing the case of the parties and then referring them to arbitration is also a pro-arbitration and positive move. Bermann interestingly highlights the opinion of a New York Court when it held that entertaining an application for interim relief in an arbitration violates the obligation to refer the parties to arbitration under Article II (3) of the NYC.[6] The challenges with respect to form requirements as enunciated under Article II (1) and II (2) of the NYC may pave way for party autonomy. An assessment of the NYC and referring parties to arbitration has been undertaken in the later

4 George A. Bermann, *What Does It Mean to Be 'Pro-Arbitration'?*, 34 ARB. INT'L 341, 341–53 (2018), *available at* https://scholarship.law.columbia.edu/faculty_scholarship/2880 [hereinafter "A. Bermann"].

5 *Id.*

6 A. Bermann, *supra note* 4 at 344.

portion to identify the role of courts while interpreting the NYC, as their power in principle emanates from II (3).

The expression 'pathological arbitration agreement' is ascribed to the Frenchman Frédéric Eisemann's iconic article *La clause d'arbitrage pathologique* from 1974 .[7] According to Eisemann, an agreement is pathological in drafting if it does not support the four essential functions of an arbitration agreement.[8] Whether caused by haste, clumsiness or ignorance of the drafter, defective or 'pathological' arbitration clauses have aroused the curiosity of legal authors.[9] It must be borne in mind that not all *defects* render an arbitration clause devoid of any effect. Some of these imperfections may be resolved through positive interpretation. It would be worth noting that "*notwithstanding the severe defects of many of the clauses, the fortuitous – but unpredictable – assistance of state courts, able institutions and imaginative arbitrators, could still make them work*".[10]

The Swiss Federal Tribunal had refused in a case, to enforce an arbitral clause which allowed arbitration "*through the American Arbitration Association or to any other American court*" for the reason that the arbitration agreement was not adequately clear such that it would prohibit beyond doubt both the jurisdiction of the state courts under both Article II (3) and Swiss law.[11] Instances such as these exhibit that pathology can arise from agreements

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7 Frédéric Eisemann, *La Clause d'Arbitrage Pathologique*, *in* COMMERCIAL ARBITRATION: ESSAYS IN MEMORIAM EUGENIO MINOLI 129, 129–61 (1974).

8 Referenced by Benjamin G. Davis, *Pathological Clauses: Frederic Eisemann's Still Vital Criteria*, 7 ARB. INT'L 365, 365–88 (Dec. 1991): "*The first, which is common to all agreements, is to produce mandatory consequences for the parties, (2) The second, is to exclude the intervention of state courts in the settlement of the disputes, at least before the issuance of the award, (3) The third, is to give powers to the arbitrators to resolve the disputes likely to arise between the parties, (4) The fourth, is to permit the putting in place of a procedure leading under the best conditions of efficiency and rapidity to the rendering of an award that is susceptible of judicial enforcement"* (emphasis supplied).

9 JEAN-FRANÇOIS POUDRET, SÉBASTIEN BESSON, STEPHEN BERTI & ANTON K. PONTI, COMPARATIVE LAW OF INTERNATIONAL ARBITRATION (2d ed. 2007).

10 Insigma Tech. Co. Ltd. v. Alstom Tech. Ltd., [2009] SGCA 24 [38].

11 Holding AG, Mgmt. SA v. Investments NV, 4A_279/2010 (Switz.).

referring to non-existent arbitral institutions, arbitral rules or arbitrators or indefinite arbitration agreements. Additionally, Singaporean courts which have a reputation for exhibiting their leniency in enforcing arbitration agreements, through the *Insigma Technology Co Ltd* v. *Alstom Technology Ltd.* ["**Insigma**"][12], have persuaded the International Chamber of Commerce to amend its rules to clarify that "*[t]he [ICC] Court is the only body authorized to administer arbitration under the [ICC] Rules*". In *Insigma*, the court validated a 'hybrid' clause which read: "*Any and all such disputes shall be finally resolved by arbitration before the Singapore International Arbitration Centre in accordance with the Rules of Arbitration of the International Chamber of Commerce* …"[13] Regardless of the amendment, the Singaporean High Court in *HKL Group Co Ltd* v. *Rizq International Holdings* ["**HKL**"], [14] upheld a clause which provided that disputes shall be "*settled by the Arbitration Committee at Singapore under the rules of The International Chamber of Commerce.*" Majority of courts strive to enforce arbitration agreements, likewise, recovery proceedings were initiated before a Ukrainian court which held that there was only one identifiable arbitral institution in Vienna and that the agreement could not be interpreted to mean otherwise, despite the arbitration clause in the contract being in favour of 'the International Arbitral Centre of the Austrian Federal Economic Chamber in Vienna.'[15]

Arbitration agreements may also lack specificity. As long as the essential requirement of agreeing to arbitrate is present, incidental terms can be implied by national courts too where one court stated that, "*[..]as general principle that Courts should uphold arbitration, by striving to give effect to the parties intention to submit disputes to arbitration, and not allow any inconsistencies or uncertainties in the wording or operation of the arbitration clause to thwart that*

12 Insigma Tech. Co. Ltd. v. Alstom Tech. Ltd., [2009] SGCA 24.
13 Insigma Tech. Co. Ltd. v. Alstom Tech. Ltd., [2009] SGCA 24 [4].
14 HKL Grp. Co. Ltd. v. Rizq Int'l Holdings Pte Ltd., [2013] SGHCR 5 [1].
15 TECHCOM GmbH v. Public Joint Stock Co. Dnipro Metallurgical Plant, Cent. Econ. Ct. Appeal, *available at* https://reyestr.court.gov.ua/Review/81842534.

intention."[16] Blank clauses which do not specify either the seat or method of arbitrators' appointment are generally considered indefinite and void.

III. Court Practices in Positive Interpretation of Pathological Clauses

Courts have been proactively reading down drafting errors in favour of the parties. For instance, the evolution of the English practice from *Heyman* v. *Darwins* ["**Heyman**"][17], where the interpretation of terms "*any dispute shall arise*" and "*or anything arising hereout*" was discussed at length, to, *Fiona Trust & Holding Corp* v. *Privalov* ["**Fiona Trust**"][18] which was permissive and valued the intent of the parties over the language chosen.[19] A brief discussion of a set of judgements will establish how courts have positively interpreted arbitration agreements, despite challenges to scope or wordings.

In *Heyman*, the arbitration agreement read as, "*[I]f any dispute shall arise …provisions herein contained or anything arising hereout the same shall be referred for arbitration in accordance … statutory modification thereof.*" The Respondents appealed against a non-grant of stay under Section 4 of the Arbitration Act 1889. Lord McMillan inter alia held that even if an injured party acquiesces to total breach and accepts the repudiation, they are still entitled to insist on having the damages assessed by arbitration, notwithstanding the other party's repudiation.[20]

The celebrated *Fiona Trust,* emanated from an anti-arbitration injunction which sought that parties should not be referred to arbitration as the contracts containing the arbitration clauses were obtained through fraud. Lord Hoffmann on the purpose of an arbitration clause held, "*[I]f one accepts*

16 Marnell Corrao Assocs. Inc. v. Sensation Yachts Ltd., (2000) 15 PRNZ 608 [61].
17 Heyman v. Darwins Ltd., [1942] A.C. 356.
18 Fiona Trust & Holding Corp. v. Privalov, [2007] UKHL 40.
19 Rodrigo Digón, Karim Mehiz & Tony Cole, *Judicial Interpretation of Standard Clauses in* THE CAMBRIDGE HANDBOOK OF JUDICIAL CONTROL OF ARBITRAL AWARDS 99, 99–118 (2020).
20 Heyman v. Darwins Ltd., [1942] A.C. 356 [357].

that this is the purpose of an arbitration clause, its construction must be influenced by whether the parties, as rational businessmen, were likely to have intended that only some of the questions arising out of their relationship were to be submitted to arbitration and others were to be decided by the national courts." The House of Lords emphasised that technical distinctions like 'arising out of' and 'arising under' should be read down to permit arbitration as it was the agreed means of resolving disputes between the parties.[21]

In *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp*[22] where a dispute arose in the context of referring parties to arbitration under Section 4 of the Act, 1925,[23] the arbitration agreement provided for referring disputes to an architect hired by the Respondent post which arbitration may be resorted to. The issue involved parallel Court proceedings and compelling parties to arbitrate. If litigation is stayed and the party is not referred to arbitration, the other party will have to approach the court under Section 4 – a pointless and wasteful burden on the supposedly summary and speedy procedure prescribed by the Arbitration Act.

A body of cases exist where the agreement is not clear in terms of conveying the intent. The challenge with such clauses is the very execution let alone identification of intent. By way of introduction, opinion of the courts in often discussed cases of *David Wilson Homes Ltd* v. *Survey Services Ltd & Anor* ["**David Wilson**"][24] and *Lucky-Goldstar International (H.K.) Limited* v. *Ng Moo Kee Engineering Limited* ["**Lucky-Goldstar**"][25] have been briefly assessed to establish the pro-enforcement approach in such cases.

In *David Wilson*, the court had to assess whether the non-use of the word 'arbitration' would be considered as an arbitration clause. It revolved around the interpretation of a clause in an insurance policy, which stated

21 Fiona Trust & Holding Corp. v. Privalov, [2007] UKHL 40 [7].
22 Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1 (1983).
23 Federal Arbitration Act, 9 U.S.C. § 4 (1925).
24 David Wilson Homes Ltd. v. Survey Servs. Ltd. & Anor, [2001] 1 All E.R. 449.
25 Lucky-Goldstar Int'l (H.K.) Ltd. v. Ng Moo Kee Eng'g Ltd., [1993] 2 HKLR 73 [405].

that any disputes would be referred to a Queen's Counsel of the English Bar. The court determined that this clause constitutes a valid arbitration agreement under the Arbitration Act, 1996. Despite the absence of explicit terms such as 'arbitration' or 'arbitrator', the court concluded that the clause clearly intended for disputes to be resolved by a Queen's Counsel in a binding manner. The court rejected the argument that the reference was for expert advice or a non-binding opinion. Consequently, the proceedings were stayed in favour of arbitration.[26]

In *Lucky-Goldstar*, dispute resolution clause read as, "*Claims: Any claims by the buyer of whatever nature arising under this contract shall be made by cable within thirty (30) days after arrival of the merchandise at the destination specified in the bills of lading. Full particulars of such claim shall be made in writing and forwarded by registered mail to the seller within fifteen (15) days after cabling. The buyer must submit with such particulars sworn surveyors' reports when the quality or quantity of merchandise delivered is in dispute. Any dispute or difference arising out of or relating to this contract, or the breach thereof which cannot be settled amicably without under delay by the interested parties shall be arbitrated in the third country, under the rules of the third country and in accordance with the rules of procedure of the International Commercial Arbitration Association. The award shall be final and binding upon both parties*".

The plaintiff brought a motion for damages alleging that the arbitration agreement referred the parties to an unspecified country, a non-existent set of rules and a non-existent organisation thereby making it null and incapable of being performed. The court while referring the parties to arbitration held that the parties intended to arbitrate and the modalities can be chosen by the parties themselves. Hence, the court opined that the parties were fortunately placed such that they were able to choose a nation whose arbitration laws and practises aligned with their preferences.

[26] David Wilson Homes Ltd. v. Survey Servs. Ltd. & Anor, [2001] 1 All E.R. 449.

Additionally, the countries had to be mindful that the chosen country had ratified the New York Convention.[27]

Singapore courts have established an appropriate balance between intervention and support. Generally, they display an appreciation of upholding arbitrations unless a case clearly warrants judicial recourse. The courts attempt to give effect to an arbitration clause if it finds that there was an intention to arbitrate, though the clause may have been vaguely drafted. *Insigma* (despite the controversy it garnered) and *HKL*[28] (are remarkable examples where courts found that the parties intended to arbitrate their disputes and upheld their clauses, even when they referred to non-existent arbitral institutions or appeared to require one arbitral institution to administer the rules of another. *Insigma* may not be the ideal example to draw for appreciating simple pathologies as it reconciled two disjunct arbitral institutions and rules with each other – while still enforcing an otherwise unenforceable clause however the role of the courts may be noteworthy in such a scenario.

The Singapore High Court in *K.V.C Rice Intertrade Co Ltd* v. *Asian Mineral Resources Pte Ltd and another* ["**K.V.C**"][29] advanced their pro-arbitration policy by enforcing a bare intention to arbitrate when the arbitration agreement was "*devoid of details*." This judgment may still be different from judgments rendered in *Insigma* and *HKL* as these do not provide a blanket endorsement of hybrid arbitration clauses. Particularly, both decisions considered the chosen institution's willingness to administer the arbitration under the ICC Rules to be of paramount importance. Singapore courts will give primacy to the decision of the parties to arbitrate and to resolve the various pathologies using the principle of effective interpretation, hence giving meaning to simple and often '*curable*' pathologies.

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27 Lucky-Goldstar Int'l (H.K.) Ltd. v. Ng Moo Kee Eng'g Ltd., [1993] 2 HKLR 73.

28 HKL Grp. Co. Ltd. v. Rizq Int'l Holdings Pte Ltd., [2013] SGHCR 5.

29 K.V.C Rice Intertrade Co. Ltd. v. Asian Mineral Res. Pte Ltd. & Anor., [2017] SGHC 32.

According to Burke, diverging from the 'plain and ordinary meaning of the New York Convention', French law as compared with the New York Convention, does not permit national courts to perform an inquiry of referral to arbitration in the cases where the arbitral tribunal has already been seized of the arbitration and the scope of exceptions as laid down in French law ("*manifestly null and void an unenforceable*") is much narrower than the scope as defined in Article II (3) ("*null and void, inoperative or incapable of being performed*").[30] A question remains which is that whether it would be permissible that the national legislature of a Contracting state sets such a different standard than the New York Convention. If in the case the national law made the enforcement of arbitration agreements or arbitral awards cumbersome than as envisaged by the Convention, the answer would be in the negative. It is also not always allowed for the national legislature to enact lenient standards than the Convention. Such a delineation stems from the pro-enforcement bias of the convention, which entails that less favourable legislations would be overridden by the Convention.[31]

IV. Pathology from a Global Perspective

In the context of the USA, discussions around pathology have largely been cantered around *US Laboratorios Grossman*.[32] In the case, the parties entered into an agreement providing for arbitration "*in accordance with the rules and procedures of the Pan-American Arbitration Association.*" It was contended that parties intended arbitration under the rules and procedures of the Inter-American Commercial Arbitration Commission, which is an organization created by the Pan American Union. Counter contention to this was that the agreement to arbitrate was conditioned upon arbitration being

30 Ipek, M., *Interpretation of Article II(3) of the New York Convention*, 23(3) MARMARA ÜNIVERSITESI HUKUK FAKÜLTESI HUKUK ARAŞTIRMALARI DERGISI 683 (2017) *available at* https://dergipark.org.tr/tr/pub/maruhad/issue/36611/414867 [hereinafter "Ipek"].

31 *Id.*

32 Matter of Lab. Grossman, Forest Lab., 31 A.D.2d 628 (N.Y. App. Div. 1968).

conducted in Mexico. The court held that in the absence of a 'viable' organisation in the agreement the court may refer the matter to the most suitable tribunal in these circumstances. As per Frank, the dominant purpose of the agreement was to be assessed whether it was one of arbitration or a rule of procedure.[33] If the pathology is deeply rooted within the agreement, it shall lapse. For the purposes of the present discussion, the clause could be one of simple pathology where intent to arbitrate was not disputed, however, it is not denied that the investigation of the court was much more than a simpler discussion around a non-existent institution owing to the counter-contentions of the parties in terms of construing intent.

Subsequently, the *Ballast Nedam Group*, case brought forth a combination of difficulties.[34] The dispute between a contractor and a company was an optional clause, which as seen in the Indian context had been decided very differently.[35] In the instant situation, the dispute at the option of the company could either be decided under Saudi law or through an ICC arbitration. The disputed clause stated that the choice of arbitration by the company shall bind the arbitrator to apply substantive laws of the Commonwealth of Virginia to interpret the contract, with its seat in Paris.

The Court concluded that the parties agreed to resolve all substantive disputes (other than those involving local matters to be governed by Saudi law) by arbitration under the rules of the International Chamber of Commerce. To reach such a decision, the Court had to hear parole evidence on the clause -- not a procedure generally adopted for an arbitration clause. Whether a state court with a less strong federal policy in favour of arbitration would decide the same way or go only so far is a question that should concern all drafters envisaging such language. The dictum of the

33 Mark Frank, *Interpretation of Pathological Arbitration Agreements: Non-Existing and Inaccessible Elements*, 20 PEPP. DISP. RESOL. L.J. 5 (2020) [hereinafter "Frank"].

34 Ballast Nedam Groep, N.V. v. Comput. Scis. Corp., 859 F.2d 149 (4th Cir. 1988).

35 Jagdish Chander v. Ramesh Chander & Ors., 2007 (5) SCC 719.

court also highlights an interesting nexus between the pro-arbitration approach and rectification of pathology. Although the clause provided for a unilateral and unidirectional dispute resolution, the extent of intervention in the opinion of the authors categorises it as one of complex pathology.[36]

In *D.R Horton Inc.* v. *Green*, the arbitration clause dispute arose from a construction defect controversy between the Homebuyers and Horton under home purchase agreements providing for mandatory arbitration.[37] The agreement provided for arbitration under the rules of the American Arbitration Association's Construction Industry Rules, applicable statutes being the Nevada Revised Statute Chapter 38 and/or the Federal Arbitration Act. Not seeking arbitration before pursuing legal action by the buyer would entitle the seller for liquidated damages of $10,000.

The district court determined that the arbitration clause was procedurally deficient and unconscionable because it failed to indicate that by agreeing to binding arbitration, the Homebuyers were giving up significant rights under Nevada law. The appellate court while affirming the district court's determination as the agreement apart from being procedurally deficient and unconscionable was one-sided and failed to advise the homebuyers that significant rights would be waived by agreeing to arbitration. It was noted that absence of language disclosing potential costs, fees etc. standing alone may not invalidate the arbitration agreement. However, in conjunction with other if one may call them as pathologies, the agreement was unenforceable.

In *Kruppa* v. *Benedetti & Anor*,[38] the dispute resolution clause was an interesting mix of 'Swiss arbitration' and exclusive jurisdiction clause in the event of a dispute parties shall 'endeavour' to resolve the matter through Swiss Arbitration failing which English courts shall have non-exclusive jurisdiction. The clause was not held to be an arbitration clause because it

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36 Ballast Nedam Groep, N.V. v. Comput. Scis. Corp., 859 F.2d 149 (4th Cir. 1988).
37 D.R. Horton, Inc. v. Green, 96 P.3d 1159 (Nev. 2004).
38 Kruppa v. Benedetti & Anor., [2014] EWHC 1887 (Comm).

mandated parties to 'endeavour' to resolve disputes through arbitration which was different from an agreement to arbitrate. It was observed that if the dispute has to be referred to arbitration the award shall be binding and no second stage would arise. As per the clause the only obligation upon the parties was to endeavour to resolve and not resort to arbitration, which has not been set out expressly in the clause. It was held, "*The requirement to submit finally to a binding arbitration is absent and would, on the face of the clause, be inconsistent with its terms because of the two-stage process envisaged*".[39]

In *Jivraj* v. *Hashwani* ["**Jivraj**"],[40] the issue hinged on whether parties to an arbitration agreement in a commercial contract can stipulate that the tribunal is to be drawn from members of a particular religious group, in this case the Ismaili community. The agreement stated that in the event of a dispute a three-member tribunal shall be appointed while each arbitrator being a respected member of the Ismaili Community and the third arbitrator being the President of H.H Aga Khan National Council for the United Kingdom, seated in London. The principal question which arose before the English Supreme Court was whether the arbitration agreement became void with effect from December 2, 2003 under the Employment Equality (Religion or Belief) Regulations 2003, on the ground that it constituted an unlawful arrangement to discriminate on grounds of religion when choosing between persons offering personal services.

In the event of the dispute, Mr. Hashwani had appointed Sir Anthony Colman as an arbitrator, which was objected to by initiating proceedings before the Commercial Court. The Court of first instance held that arbitrators are not employed within the meaning of regulations and for the requirement of arbitrators being members of the Ismaili community constituted a genuine occupational requirement, hence, proportionately applied within the regulation. The court of appeal however reversed this finding and found that the arbitrators fell within the term employment

39 Kruppa v. Benedetti & Anor., [2014] EWHC 1887 (Comm) [14].
40 Jivraj v. Hashwani, [2011] 1 All E.R. (Comm) 33.

within the regulation. The Supreme Court unanimously reversed the findings of the court of appeal primarily holding that there is "*a clear distinction between those who are, in substance, employed and those who are independent providers of service who are not in a relationship of subordination with the person who receives the service.*"[41] It was further held that the arbitrator's function and duties require him to rise above the protection of interests of the parties.

From the perspective of understanding pathology, usually clauses with named arbitrators have been considered as pathologies which are easily curable. However, in the context of this paper, *Jivraj* poses a slightly different question – whether an arbitration agreement is rendered unworkable if a party to it appoints arbitrators outside the agreed terms and whether the interference of the courts by reinstating the arbitrator essentially frustrate the agreement of the parties and technically rewrite it? These questions are important from the standpoint of pathology, because if re-writing of the agreement was possible, pathology would not have existed. It is difficult to categorise *Jivraj* as a case of simple or complex pathology, yet it is essential in deducing to what extent can the court intervene to restore what the parties had initially consented to.

The German Federal Supreme Court held in a case (Federal Court of Justice Decision, 14.7.2011)[42] that an arbitration agreement that references a non-existing arbitration institution is not per se unenforceable. Ironically, the defective clause was part of an agreement between lawyers for the sale and transfer of a law practice: The parties to the agreement in dispute had made reference to a 'Lawyers Arbitration Tribunal' (Anwaltsschiedsgericht) to be constituted in accordance with the rules of the Cologne Bar Association (Rechtsanwaltskammer K) – neither such tribunal/rules exist. The fact that the parties erroneously mentioned a non-existing arbitration institution does not render the arbitration agreement 'inoperative or incapable of being

41 Jivraj v. Hashwani, [2011] 1 All E.R. (Comm) 33 [27].
42 Beschluss des III. Zivilsenats vom 14.7.2011 - III ZB 70/10.

performed' within the meaning of Sec. 1032 German Code of Civil Procedure. In line with previous discussed case law, the Federal Supreme Court held that it is for the court to decide whether, by way of contract interpretation, the non-existing institution can be substituted by another arbitral institution or arbitral process[43].

Further, Dr. Kroll mentions an instance where the Higher Regional Court in Hamm refused a challenge to the validity of the arbitration agreement for the reason that it was tiered and reference to an invalid institution.[44] As per the arbitration agreement, disputes shall be settled 'in accordance with the laws of Conciliation & Arbitration of the Geneva Chambers of Commerce' failing which it shall be submitted 'to the final decision of the arbitrators of the Geneva Court of Justice'. At outset, within the confines of this paper, it seems to be a simple pathology. The main objection to the clause was that it was one of forum selection in favour of the Swiss Courts. The court upheld the award of the arbitrator upon being challenged on the grounds of Art. V (1)(a) of the New York Convention.

Although, Germany is a pro arbitration jurisdiction, he states that German Courts have a 'tendency' to interpret ambiguous clauses in favour of other forms of dispute resolution.[45] An interesting criticism of the judgement comes where the decision does not impart a clear reasoning behind the reference to Geneva Chamber of Commerce and the Geneva Court of Justice.[46] Another instance which he (Kröll) cites is an ICC arbitration agreement seated in Geneva, where the contract was governed by German Law and German Courts had non-exclusive jurisdiction. In this case the

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43 Peter Bert, *When Lawyers Get It Wrong: Arbitration Clause Appointing a Non-Existing Arbitration Institution*, DISPUTE RESOLUTION GERMANY (23 October, 2011) *available at* https://www.disputeresolutiongermany.com/2011/10/federal-supreme-court-on-arbitration-clause-appointing-a-non-existing-arbitration-institution/.

44 Stefan Kröll, *"Pathological" Arbitration Agreements Before German Courts – Short Notes on the Occurrence of a Recent Decision by the Higher Regional Court Hamm*, 6 INT'L HANDELSRECHT 255 (2006) [hereinafter "Kroll, 2006"].

45 *Id.*

46 *Supra* note 44.

arbitration was construed to be the primary dispute resolution clause and rightly so, however, practical considerations with respect to German Courts deciding ancillary issues may give rise to other problems.[47]

Australian courts have from time to time have held that they would uphold arbitration agreements where there is clear intention to refer disputes to arbitration even when the arbitration clause appears to be pathological. This can be seen to be evident in cases such as *Robotunits Pty Ltd.* v *Mennel*[48] where Robounits had filed a suit in the Supreme Court of Victoria against Mennel seeking the return of $270,000 made in payments which were made without any legal or equitable basis. Mennel then filed an interlocutory application seeking a stay of the proceeding and for the issue to be referred to arbitration. The Shareholders agreements between the parties which contained the arbitration agreement read as follows: "*Each party irrevocably and unconditionally submits to arbitration in accordance with the arbitration guidelines of the Law Institute of Victoria*." Here it was observed that the arbitration guidelines of the Law Institute of Victoria, were fictitious nevertheless, the court had held that because of the use of strong words such as 'irrevocably and unconditionally' in relation to submission to arbitration, the clause could be effective.

Further in the case of *AGL Energy Limited* v. *Jemena Gas Networks (NSW) Ltd.*[49], the Supreme court of New South Wales declined to invoke the provisions of section 8(1) of the Commercial Arbitration Act 2010 (NSW) to refer the dispute to arbitration. The underlying contention between the involved parties revolved around AGL's assertions of losses purportedly stemming from Jemena's untimely completion of meter reading and failure to timely communicate the gas quantity taken at each delivery point, as stipulated in their agreements. Commencing on May 12 2017, AGL initiated

47 *Supra* note 44.
48 Robotunits Pty Ltd. v. Mennel, [2015] VSC 268.
49 AGL Energy Ltd. v. Jemena Gas Networks (NSW) Ltd., [2017] NSWSC 765 (Austl.).

legal proceedings against Jemena in the New South Wales Supreme Court. In response, on May 22, 2017, Jemena moved under section 8(1) of the Act, seeking arbitration referral. AGL contended that clause 30.5(a) did not constitute an arbitration agreement under section 7(1) of the Act, thus precluding the court from making an arbitration referral.

Jemena's primary argument centred on the proposition that clause 30.5(a), by expressly conditioning recourse to arbitration upon post-mediation efforts, inherently implied the parties' eventual resort to arbitration. Drawing parallels with the cases such as *Manningham City Council* v. *Dura (Australia) Constructions Pty Ltd.* ["**Manningham**"][50] and *Mulgrave Central Mill Company Ltd* v. *Hagglunds Drives Pty Ltd.* ["**Mulgrave**"],[51] where contracts allowed disputes to be referred to 'arbitration or litigation', Jemena asserted that similar to those case, clause 30.5(a) should be recognized as an arbitration agreement. The court in *Manningham* and *Mulgrave* held that the contracts containing such language constituted arbitration agreements, and an election for arbitration would supersede an election for litigation, even if the arbitration election occurred subsequently.

While this decision may initially appear contrary to the pro-arbitration stance commonly adopted by Australian courts, a nuanced analysis is essential. Each purported arbitration clause must undergo thorough scrutiny to ascertain the parties' explicit intention to submit disputes to arbitration. As illustrated by the precedents of *Manningham* and *Mulgrave*, when such intention is manifest, the courts will uphold it.[52]

French courts adhere to a policy of enforcing arbitration agreements when it is evident that the parties intended to resolve their dispute through arbitration. Consistent with this established approach, in January, 2010, the

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50 Manningham City Council v. Dura (Austl.) Constr. Pty Ltd., [1999] 3 V.R. 13.

51 Mulgrave Cent. Mill Co. Ltd. v. Hagglunds Drives Pty Ltd., [2002] 2 Qd R 514.

52 George Mallis & Anthony Fourie, *Case Note: AGL Energy Ltd. v. Jemena Gas Networks*, AUSTL. DISP. CTR., *available at* https://disputescentre.com.au/wp-content/uploads/2017/09/AGL-Case-Note.pdf.

president of the Paris First Instance Court in the case of *Samsung Electronics* v. *Qimonda AG*[53] upheld an arbitration clause deemed 'pathological' and utilized his authority to assist the parties in forming the arbitral tribunal. Acknowledging an initially flawed ICC arbitration clause that deviated from two fundamental aspects of the institution's rules, the court recognized its validity as an ad hoc arbitration clause. The decision rendered by the president of the Paris First Instance Court, serves as an exemplification of the French Courts' commitment to enforcing arbitration agreements, particularly in instances where challenges arise in constituting the arbitral tribunal, as long as the parties' intention to submit their dispute to arbitration remains unequivocal.

Further, in 2012, the Paris Court of Appeal in the case of *SAS ADB* v. *REO Inductive Components AG*,[54] had upheld the execution of an arbitral award rendered in Solingen, Germany, despite challenges raised by the appellant. The appellant argued against enforcement, asserting that the award's validity was compromised due to an allegedly deficient arbitration clause and a language barrier arising from the German language used in the arbitration proceedings.

The involved parties in the dispute were REO Inductive Components AG (REO), a German electronic components producer; NV ADB SA (NV ADB), a Belgian entity in a technical cooperation contract with REO; and ADB SAS (ADB), a subsidiary of NV ADB, engaged in an electronic components delivery contract with REO. Dissatisfied with the arbitral award that ordered payments to REO, ADB contested the decision, contending that the arbitration clause was null and void due to its reference to the obsolete German Arbitration Commission (DAS). Despite the cessation of the DAS in 1992, the arbitration proceeded under the rules of

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53 Samsung Elecs. v. Qimonda AG, Tribunal de Grande Instance (TGI) Paris, 22-1-2010, 10/50604, 571 (Fr.).

54 S.A.S A.D.B v. REO Inductive Components AG, Cour d'appel de Paris, Chambre Civile, Section 1, No. 10/23578 (20 Mar. 2012).

the German Institute of Arbitration (DIS), formed through the amalgamation of the German Arbitration Committee and the German Arbitration institute. The Court of Appeal, adopting a flexible approach, determined that the DIS, as the successor to the DAS, could legitimately exercise jurisdiction based on a clause invoking the DAS Rules, thereby preserving the validity of the arbitration clause.[55]

Singaporean courts have established an appropriate balance between intervention and support, displaying an appreciation for upholding arbitrations except in very remarkable cases where judicial recourse is clearly warranted. In the case of *HKL*,[56] the arbitration clause in the agreement between the parties which read as, "*Any dispute shall be settled by amicable negotiation between two Parties. In case both Parties fail to reach amicable agreement, all dispute out of in connection with the contract shall be settled by the Arbitration Committee at Singapore under the rules of The International Chamber of Commerce of which awards shall be final and binding both parties. Arbitration fee and other related charge shall be borne by the losing Party unless otherwise agreed*", included 'Arbitration Committee' which was a non-existent entity. The Singaporean High court held that enforceability of a pathological arbitration clause is contingent upon the nature and extent of its defects. The evaluation of the degree of pathology invites considerable debate and contemplation. The court elucidated its position, asserting a general predisposition to "*give effect to that clause, preferring an interpretation which does so over one which does not*." In instant case, the court noted that despite inadvertent reference to a non-existent entity, the factual context revealed a clear intention on the part of the parties to engage in arbitration.

In *P.T. Tri-M.G. Intra Asia Airlines* v. *Norse Air Charter Limited,*[57] there were two distinct dispute resolution clauses in the agreement both of which are

55 Brian Green, *Paris Court of Appeal Upholds Validity of Arbitration Clause Referring to Arbitration Institution That No Longer Exists*, ARBITRATION NOTES (May 22, 2012).

56 HKL Grp. Co. Ltd. v. Rizq Int'l Holdings Pte Ltd., [2013] SGHCR 5 [1].

57 P.T. Tri-M.G. Intra-Asia Airlines v. Norse Air Charter Ltd., [2009] SGHC 13.

stated as Clause 15: "*All disputes under this Agreement shall be submitted for resolution by arbitration pursuant to the Rules of conciliation and Arbitration of the International Chamber of Commerce in effect as of the date any dispute arose*." And Clause 22 states: "…*the courts of The Republic of Singapore shall have jurisdiction to hear and determine any suit, action or proceedings and to settle any disputes which may arise out of or in connection with any Governing Document…"* the court held in the instant case held that the clause 15 and clause 22 can be reconciled by reading clause 22 as a submission to the Singapore Court's supervisory jurisdiction over the arbitration, while citing a case with a similar factual matrix where it was held that the jurisdiction clause was to be interpreted as a reference to the law governing the arbitration i.e., the curial law.

In *Insigma,*[58] the arbitration clause read as: "*[…]Any and all such disputes shall be finally resolved by arbitration before the Singapore International Arbitration Centre in accordance with the Rules of Arbitration of the International Chamber of Commerce…"* . This foretold an impending crisis. The Court of Appeal asserted that the Arbitration Agreement failed to meet the criteria for a 'pathological clause', asserting that its certainty and feasibility were restored by the Singapore International Arbitration Centre ["**SIAC**"] applying the ICC Rules to the arbitration. This interpretation may be regarded as partially or wholly misguided. The *Insigma* case prompted the International Chamber of Commerce to revise its rules explicitly stating that "*[t]he [ICC] Court is the only body authorized to administer arbitration under the [ICC] Rules*" – a noteworthy development in its historical context.

The court in *TMT* v. *The Royal Bank of Scotland*,[59] took an atypical trajectory when an arbitration agreement specifying an inappropriate arbitral institution was deemed impracticable. Exhibiting a more intricate pathology, the High Court, faced with a clause stipulating that any dispute should be referred to arbitration under the rules of the relevant exchange

58 Insigma Tech. Co. Ltd. v. Alstom Tech. Ltd., [2009] SGCA 24.
59 TMT v. Royal Bank of Scotland, [2017] SGHC 2.

or another organization as directed by the exchange, refrained from granting a stay. The clause further required the parties' agreement on the designated organization, which, according to the court's analysis, mandated the identification of a 'relevant exchange'. However, in the case at hand, no such exchange was specified by the involved parties. The court dismissed the notion of a clearing house being interchangeable with an exchange, asserting that such an interpretation would necessitate substantial revision of the clause. Consequently, the court categorized this as a 'complex' pathology, diverging from simpler, remediable pathologies.

In the case of *K.V.C.*,[60] the arbitration clause between the parties read as*: "The Seller and the Buyer agree that all disputes arising out of or in connection with this agreement that cannot be settled by discussion and mutual agreement shall be referred to and finally resolved by arbitration as per Indian Contract Rules".* The Singaporean High Court in this instance, endeavoured to facilitate the arbitration process by assuming the role of a default appointing authority, alongside the SIAC, under the Singapore International Arbitration Act. This initiative was taken despite the presence of bare arbitration clauses in each of the two contracts, which notably omitted specifications regarding the place or governing law for arbitration and referred to non-existent rules. Furthermore, these contracts lacked provisions delineating the number of arbitrators or the mechanisms for constituting the arbitral tribunal.[61] In contrast to the TMT case, the High Court in this instance explored avenues for operationalizing a bare arbitration agreement. While the Model Law does not explicitly address the scenario of the SIAC President appointing an arbitral tribunal in cases where the place of arbitration remains undetermined, the court interpreted it in a manner that did not preclude such an approach.

V. Pathology under the New York Convention

60 K.V.C Rice Intertrade Co. Ltd. v. Asian Mineral Res. Pte Ltd. & Anor., [2017] SGHC 32.

61 Andrew Henderson, Eunice Chua & Yuko Homma, *"Bare" Arbitration Clauses and the Extent to Which the Singapore Court May Assist*, ARBITRATION NOTES (Mar. 9, 2017).

Article II (3) and Article 8(2) of the UNCITRAL Model Law provide that an arbitration agreement need not be recognized and enforced if it is 'null and void', 'inoperative', or 'incapable of being performed'. Pathological clauses may in turn be interpreted in consonance with these Articles. Thus, a nuanced understanding of the terms (i) 'null and void' and (ii) 'inoperative' and 'incapable of being performed' is imperative to better appreciate pathological clauses:

A. Scope of the term 'null and void'

The term 'null and void' permits defences based on unconscionability, fraud, mistake, lack of capacity and illegality. Article II (3) of NYC is silent with regards to the specific legal standard for determining whether an arbitration agreement is null and void. Some courts consider that the issue is to be determined under the applicable municipal law, either the *lex fori*[62] or the law applicable pursuant to the conflict-of-laws rule contained in Article V (1)(a) of NYC.[63]

A key question under Article II (3)'s 'null and void' exception is whether it allows a full trial of invalidity issues before a court or only their preliminary, *prima facie* determination. The text of the provision is ambiguous in this regard, which may allow for either interpretation.[64] In practice, Courts have applied an international standard of contract law defences. In accordance with longstanding case laws, United States courts have ruled upon the 'null and void' ground pursuant to "*standard breach-of-contract defences that can be*

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62 Piero Bernardini, *Arbitration Clauses: Achieving Effectiveness in the Law Applicable to the Arbitration Clause*, *in* IMPROVING THE EFFICIENCY OF ARBITRATION AGREEMENTS AND AWARDS: 40 YEARS OF APPLICATION OF THE NEW YORK CONVENTION 1 (Kluwer Law Int'l 1999).

63 Insurance Co. X v. Co. Y, 5C.215/1994/lit.

64 EMMANUEL GAILLARD & JOHN SAVAGE, FOUCHARD, GAILLARD, GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION (1st ed. 1999).

applied neutrally on an international scale, such as fraud, mistake, duress, and waiver".[65] The null and void exception has generally been construed fairly narrowly by the courts of most countries.[66] This is because of the *pro-enforcement bias of the Convention*, which leads most commentators to conclude that 'the invalidity of the arbitration agreement should be accepted in manifest cases only'.[67]

Categories that would qualify for cases of 'null and void' can be listed in a non-exhaustive list which would include, lack of consent due to misrepresentation, fraud, incapacity to agree, duress and undue influence. Misrepresentation and fraud are defined as 'intentional material misstatement or coercion' committed by one of the parties in order to convince the other party to conclude an arbitration agreement. Integral to this delineation is the necessary demonstration of wrongful intent by the inducing party towards the counterparty of the agreement.[68] Another essential aspect of fraud includes the causal relationship between the purported fraudulent act and the formation of the arbitration agreement. According to the severability doctrine, this causal relationship must especially pertain to the arbitration agreement, rather than encompassing the entirety of the principal contract.[69] Further, 'incapacity to agree' would be defined as an impediment of a party to enter into a binding arbitration agreement as a matter of law. Duress refers to the cases where one of the parties induced the other party to enter into the arbitration agreement by coercion.[70] Finally, the defence of undue influence, is described as the

65 Allen v. Royal Caribbean Cruise Ltd., No. 08-22014-CIV, 2008 WL 5095412, 6 (S.D. Fla. Dec. 2, 2008), aff'd, 353 F. App'x 360 (11th Cir. 2009).

66 ALBERT JAN VAN DEN BERG, THE NEW YORK ARBITRATION CONVENTION OF 1958: TOWARDS A UNIFORM JUDICIAL INTERPRETATION 1 (1981) [hereinafter "Berg"].

67 Berg, *supra* note 59.

68 Ipek, *supra* note 30.

69 *Id.*

70 *Id.*

influence or dominion, which destroys the free agency of the testator, and substitutes in the place thereof the will of another.[71]

B. Scope of the terms 'inoperative' and 'incapable of being performed'

Inoperative arbitration agreements are considered to have become ineffective, by the time a request is made to direct parties to arbitration, despite the agreement's initial validity. Therefore, an arbitration agreement which has been rendered inoperative would not be applicable to the involved parties or the subject dispute at the referral stage. Instances such as waiver, novation, revocation, repudiation or termination of the arbitration agreement, would render an arbitration agreement inoperative.[72] While one commentator considers the waiver defence to fall under the 'inoperative' exception in Article II (3) of NYC,[73] The United States Court of Appeals for the First Circuit has classified it under the null and void exception.[74] Courts generally assess the standard of 'inoperability' under the broader expression 'null and void, inoperative or incapable of being performed' without any further distinction. However, relevant case laws suggest that the word 'inoperative' covers situations where the arbitration agreement has become inapplicable to the parties or their dispute.[75]

The Federal of court of Australia, in the case of *Re Bakri Navigation Company Limited* v. *Ship "Golden Glory" Glorious Shipping SA*,[76] opined that "*the expression 'inoperative' has no accepted meaning in English law, but it would seem apt*

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71 Ipek, *supra* note 30.

72 *Id.*

73 GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION: COMMENTARY AND MATERIALS 1 (Kluwer Law Int'l 2001).

74 Ledee v. Ceramiche Ragno, 684 F.2d 184, 187 (1st Cir. 1982). *See also* I.T.A.D. Assocs., Inc. v. Podar Bros., 636 F.2d 75 (4th Cir. 1981).

75 Golden Ocean Grp. Ltd. v. Humpuss Intermoda Transportasi TBK Ltd. & Anr., [2013] EWHC 1240 (Comm).

76 Re Bakri Navigation Co. Ltd. v. Ship "Golden Glory" Glorious Shipping SA (Owners Of), [1991] FCA 235 (Austl.) [52].

to describe an agreement which, although not void ab initio, has for some reason ceased to have effect for the future. Further, there are three situations where an arbitration agreement could be envisaged as 'inoperative'. First, where the English court has ordered that the arbitration agreement shall cease to have effect, or a foreign court has made a similar order which the English court will recognise. Second, there may be circumstances in which an arbitration agreement might become 'inoperative' by virtue of the common law doctrines of frustration, discharge by breach etc. Third, the agreement may have ceased to operate by reason of some further agreement between the parties".

Further, the Supreme court of British Columbia in Canada,[77] while answering whether an arbitration agreement is inoperative because of a class action proceeding is preferred, observed that 'inoperative' would mean that the agreement, in law has ceased to have effect for the future or is for some reason no longer enforceable. Reasons for such unenforceability could be frustration, discharge by breach or subsequent agreement of the parties, or a declaration by the court.

The term 'incapable of being performed' refers to impossibility and similar defences. The 'incapable of being performed' provision is generally understood as relating to situations where the arbitration cannot effectively be set in motion.[78] Such a situation is elicited when the party submitting the agreement is not capable of performance [can] demonstrate that even given the willingness of both parties to perform it, the agreement cannot be performed. The instances when an arbitration agreement can be 'incapable of being performed' arise from either the impossibility to achieve the intended purpose of the arbitration agreement within the given circumstances, or from the achievement of its purpose.[79] Physical impediments to the arbitration proceedings include cases where the

77 Seidel v. Telus Commc'ns Inc., 2008 BCSC 933 (Can.).

78 Stefan Kröll, *The "Incapable of Being Performed" Exception in Article II(3) of the New York Convention*, *in* ENFORCEMENT OF ARBITRATION AGREEMENTS AND INTERNATIONAL ARBITRAL AWARDS – THE NEW YORK CONVENTION PRACTICE 1 (2008) [hereinafter "Kroll, 2008"].

79 Ipek, *supra note* 30.

designated arbitrator is unable to fulfil their duties, actions undertaken by either party during the referral stage, hindrances in constituting the arbitral tribunal, political conditions at the arbitration venue, and logistical difficulties in accessing the arbitration venue.[80] Further, legal barriers could arise from changes in domestic legislation or from the dispute's non-arbitrability at the chosen arbitration venue. These factors are exhaustive, and ambiguities exist within the 'incapable of being performed' provision, which result in varying interpretations across jurisdictions, such as the financial incapacity of one of the involved parties.[81] However, taking a broader interpretation, no party should be allowed to rely on its own obstructive behaviour to evade obligations freely entered into by concluding an arbitration agreement, thus making the test for non-obstructing party whether the arbitration proceedings can be effectively set into motion even without the cooperation of the other party.[82]

The lack of literature on the judicial or legislative scope of the term 'incapable of being performed' has led to reliance on multiple (almost similar) interpretations taken by courts. Since all three terms have seemingly blurred boundaries, it has been ideated that the notions 'null and void' and 'inoperative' cover cases where the parties have either never entered into a valid arbitration agreement as it had been void ab initio or the originally valid arbitration agreement ceased to have effect as it was for some reason terminated. Thus, the finding that an arbitration agreement is 'merely' incapable of being performed does not exclude *ipso jure* that the agreement may become relevant in future disputes.[83]

A Russian court held an arbitration agreement to be 'incapable of being performed' within the meaning of Article II (3) of the Convention because it was not a standard arbitration clause pursuant to the UNCITRAL Rules

80 Ipek, *supra note* 30.
81 *Id.*
82 Kroll, 2008, *supra note* 78.
83 *Id.*

and it was therefore impossible to conclude that the parties had agreed on those Rules.[84]

Could those be construed as complex pathologies? Is there a universal standard arbitration clause?

In a case where the arbitration agreement designated a non-existent arbitral institution, a United States court nevertheless compelled the parties to arbitration pursuant to Article II (3) of the Convention and the Federal Arbitration Act. The court reasoned that the UNCITRAL Arbitration Rules referred to in the arbitration agreement provided for a method for constituting an arbitral tribunal in the absence of a prior agreement by the parties and dismissed the plaintiff's claims that the agreement was incapable of being performed.[85]

Some courts have pro-arbitration stances and many jurisdictions favour the enforceability of arbitration agreements by using the principle of effective interpretation provided by Article 4.5 of the 2016 UNIDROIT Principles.[86] More often than before, most courts are trying to enforce arbitration agreements. Courts will often apply liberal rules of interpretation while interpreting such clauses; when a court held that an arbitration clause had declined jurisdiction, this could not prevent the CAS from accepting jurisdiction if proper interpretation of the clause was made. A problematic clause has to be supplemented in way that will ensure its effectiveness and the Court, interestingly, reasoned that, had the Parties known that FIFA would decline jurisdiction ultimately, they would have chosen the CAS

84 ZAO UralEnergoGaz v. OOO ABB Electroengineering, Ninth Arbitrazh Ct. Appeal, Russian Fed'n, 24 June 2009, No. A40-27854/09-61-247.

85 Travelport Glob. Distribution Sys. B.V. v. Bellview Airlines Ltd., 12 Civ. 3483 (DLC).

86 UNIDROIT Principles of 2016, art. 4.5 (2016), *available at* https://www.unidroit.org/english/principles/contracts/principles2016/principles2016-e.pdf.

instead, which made it possible to uphold the validity of the clause as the CAS had done[87].

VI. The Indian Approach

Indian Courts have shown a remarkable pro-arbitration approach post *Bharat Aluminium* v. *Kaiser Technical Services* ["**BALCO**"].[88] Like Singapore (separate legislations), India has dedicated portion for domestic and international arbitration within the same legislation, however, India is a work-in-progress.

This part looks at the Indian practice of referring parties to arbitration. It has been divided into 4 sub parts. The first part assesses the existence of arbitration clauses, be it for referring parties or for appointing arbitrators. The second sub part deals with the threshold of referring parties to arbitration under Section 8 of the Act, both before and after the 2015 amendments. Third sub part discusses thresholds of referring parties to arbitration under an International Commercial Arbitration under Section 45. The last sub part shall look at cases which stem from pathological clauses (although not specifically recognising pathology).

A. The NYC in India

India was one of the first signatories to the Convention and various pronouncements have reiterated its relevance and effects. For instance, in *Shin-Etsu Chemical Co. Ltd.* v. *Aksh Optifibre Ltd. and Ors.,*[89] ["**Shin-Etsu**"] the divergent opinions of Justice Sabharwal and Justice Srikrishna highlight the level of adherence with the NYC. However, Article II (3) NYC and Article 8 of the Model Law do not prescribe any threshold for assessment of the arbitration clause while referring parties to arbitration. Imparting

87 Arrêt du Tribunal fédéral Suisse, 4A_430/202 [6].
88 Bharat Aluminium Co. v. Kaiser Tech. Servs., (2012) 9 SCC 648.
89 Shin-Etsu Chem. Co. Ltd. v. Aksh Optifibre Ltd. & Ors., (2005) 7 SCC 234.

thresholds are jurisdictional practices, for instance Germany and Italy provide for a detailed review of an arbitration agreement.[90] Contrasting views can be observed between India and Singapore. In the Indian context, the existence of the agreement conforms with Art II (1) of NYC, which has been replicated by Section 7 of the Act; irrespective of the threshold, written requirements etc still persist. It is on this nexus, the portion assesses how a pathological clause would be treated on thresholds. As stated in the preceding sections, it complies with formal requirements, but it would be noteworthy to what gauge the extent to which courts would go to infer the intent.

Reliance by the Supreme Court on NYC has yielded notable decisions. *Chloro Controls* v. *Severn Trent Water Purification* for instance, specifically recognises that part II of the Act encourages commercial arbitration in India by incorporating the provisions of the NYC.[91] The *BALCO* judgement,[92] while overruling the *Bhatia and Venture Global* judgements, examined the past annulment of an award by the Supreme court on the ground that the parties had chosen Indian Law to govern their dispute. This, according to them, ignored the spirit underlying the NYC which embodies a consensus to encourage consensual resolution of complicated and sensitive international commercial disputes.[93] In *Vijay Karia* v. *Prysmian Cavi E Sistemi*,[94] the court observed that the wording of Section 48 of the Act and of Article V of the NYC is similar. The latter sets out the threshold available to member States to refuse enforcement of a foreign award with its objective being to retain the discretion of the states to refuse enforcement of the award. This view has also been accepted by courts in the United States. In *Chromalloy* v. *The Arab Republic of Egypt*,[95] an

90 Fabien Bachand, *Does Article 8 of the Model Law Call for Full or Prima Facie Review of the Arbitral Tribunal's Jurisdiction?*, 22 ARB. INT'L 463, 463–76 (2006).

91 Chloro Controls (I) P. Ltd. v. Severn Trent Water Purification Inc., (2013) 1 SCC 641.

92 Bharat Aluminium Co. v. Kaiser Tech. Servs., (2012) 9 SCC 648.

93 Bharat Aluminium Co. v. Kaiser Tech. Servs., (2012) 9 SCC 648.

94 Vijay Karia v. Prysmian Cavi E Sistemi SRL, (2020) 11 SCC 1.

95 Chromalloy Aeroservices v. Arab Republic of Egypt, 939 F. Supp. 907 (D.D.C. 1996).

Egyptian award, which was set aside by an Egyptian court, was enforced notwithstanding Article V(1)(e) of the NYC. (although Chromalloy has not been followed by other judgments and may not be the best example).

Further the cases of *Union of India* v. *Janki Prasad Agarwal*,[96] and *ITC Classic Finance* v. *Grapco Mining and Co Ltd.,*[97] come to contradictory outcomes and many other instances mentioned previously, depicting inconsistent standards. It is not denied that the standard under Section 7 cannot be a guide, but it has not been able to assist the courts in cases of unworkability or incapability of being performed, noting that Section 7 has not been amended. Discussions hinge on validity or legality, 'vague agreements', what needs to be noted is, that vagueness too has been cured by the courts to mean an arbitration agreement, going by the majority opinion in *Shin-Etsu*.[98]

Setting standards and thresholds of assessments is important from the perspective of lower courts (not a court of record) where the Section 8 applications are pursued, India-seated foreign arbitrations are also possible.[99] It is out of question to recommend a standard clause to be uniformly adopted as it is contrary to party autonomy, however maximum opportunity should be given to the arbitrator to assess whether an arbitration is viable or not. Pathological clauses do not involve simple questions of legality or validity, rather of intent in twisted forms.

B. Existence of the Arbitration Agreement

This part assesses clauses which were considered/not considered to qualify as arbitration clauses and the factors impacting the qualification.

96 Union of India v. Janki Prasad Agarwal, (1984) ALL WC 206.
97 ITC Classic Fin. v. Grapco Mining & Co. Ltd., A.I.R. 1997 (Cal.) 397.
98 Shin-Etsu Chem. Co. Ltd. v. Aksh Optifibre Ltd. & Ors., (2005) 7 SCC 234.
99 Section 8 falls under Part I and hence applicable to all India-seated arbitrations.

An often-discussed judgement in the context of identification of arbitration agreements is *Jagdish Chander* v. *Ramesh Chander* ["**Jagdish Chander**"],[100] where the court was approached for appointment of an arbitrator, based on a clause which made arbitration optional. In *Jagdish Chander,* the Indian Supreme Court held that the clause which provided that "*disputes shall be referred for arbitration if the parties so determine*" did not give rise to a binding agreement to arbitrate because the essential ingredient of consent of two parties involved in the dispute was missing. The court while emphasising on the word '*or shall be referred to arbitration*' held that an agreement or a clause in agreement if requires further consensus to refer parties to arbitration then it shall not be considered as an arbitration agreement. The focus of the court was essentially on the existence of the arbitration agreement under Section 7 of the Act. *(Can it be considered as a pathological clause?).* The focus of the Court was essentially on the existence of the arbitration agreement under Section 7 of the Act.

In the present context and also on what is to follow, the decision of the Punjab and Haryana High Court in *Ram Lal-Jagan Nath* v. *The Punjab State and Ors.* is noteworthy.[101] The alleged arbitration clause read as *"In matter of dispute the case shall be referred to the Superintending Engineer of the Circle, whose order shall be final."* The court held that absence of the words 'arbitration' or 'arbitrators' is immaterial as the parties have clearly indicated that the dispute shall be referred to the Superintending Engineer whose decision shall be final. A reference to *Re Carus* v. *Wilson* and *Greene* ["**Re Carus**"][102] was made distinguishing the facts of the present case. It was held that *Re Carus* was a case of dispute prevention rather than dispute settlement and the appointment of the umpire was to determine the prices of the goods, however, the case at hand was one of arbitration.

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100 Jagdish Chander v. Ramesh Chander & Ors., 2007 (5) SCC 719.
101 Ram Lal-Jagan Nath v. Punjab State & Ors., Civil Revision No. 189 of 1964.
102 Re Carus v. Wilson & Greene, (1886) 18 QBD 7.

A contrasting opinion, was witnessed in *Mallikarjun* v. *Gulbarga University* ["**Mallikarjun**"],[103] where an identical arbitration clause existed. The court considered the clause to be an arbitration agreement, stating *inter alia* that the agreement postulated present or future differences and contained an agreement between the parties to settle the difference by a private tribunal, namely the Superintending Engineer. Since the parties also agreed to be bound by the decision of the tribunal, they were *ad idem*.[104]

Interestingly the task of the nominated authorities was to categorically redress the concerns of the parties to the contract for supervisory purposes, with the exception of *Mallikarjun*. The courts can be credited with enquiring into the intent of the parties given neither the word arbitration, nor disputes was mentioned. What was amply clear was an intention to refer identified disputes to the nominated authorities and their decisions being final.[105] The above judgements although conforming to the writing requirements were not considered as valid arbitration clauses. In situations like *Smt. Rukmanibai Gupta* v. *Collector Jabalpur And Ors.*[106] where the word arbitration or arbitrators was not used but a reference to a third person with respect to a dispute, difference or doubt was prescribed, the clause was held to be an arbitration agreement.

In *K.K. Modi* v. *K.N. Modi* [107] the dispute resolution clause stated that all disputes and clarifications related to the implementation of the contract shall be referred to the Chairman, IFCI, or his nominees, whose decision shall be final and binding. The Supreme Court while laying down qualifications of an arbitration clause emphasised on the writing requirement.[108] It was held that the clause did not empower the Chairman

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103 Mallikarjun v. Gulbarga Univ., (2004) 1 SCC 372.
104 Mallikarjun v. Gulbarga Univ., (2004) 1 SCC 372, ¶10.
105 Chloro Controls (I) P. Ltd. v. Severn Trent Water Purification Inc., (2013) 1 SCC 641.
106 Smt. Rukmanibai Gupta v. Collector Jabalpur & Ors., A.I.R. 1981 SC 479.
107 K.K. Modi v. K.N. Modi, 1998 A.I.R. SC 1297.
108 K.K. Modi v. K.N. Modi, 1998 A.I.R. SC 1297, ¶20.

to judicially determine any dispute rather merely facilitated the agreement's implementation.

Is this in conformity with *Re Carus*?

In other cases,[109] a clause, "*Common processing contract disputes, the parties should be settled through consultation; consultation fails by treatment of to the arbitration body for arbitration or the court"* was considered an arbitration clause. In the opinion of the authors, it is a pathological clause, however, the court remarked that the clause referred to arbitration or court and appointed an arbitrator. This is different from the previous situation (Jagdish Chander) where the word '*or*' led to an interpretation which required further consent. The court's opinion in both the cases may seem justified (on a case-by-case basis), but no standard may be deduced.

A related question which can be put here is whether all the above clauses would qualify as pathological? If yes, then what is the general threshold in India with respect to referring parties to arbitration and have the Indian courts recognised pathological clauses? Even on being considered pathological, they may not fall within the usual category of clauses with named arbitrators and incorrect institutions, but rather pose a different nature of complex pathology.

Following from the investigation of intent, an assessment into the limit of investigation is imminent, i.e. the question of threshold.

In international arbitration, with minor divergence from Article II(3) NYC, Section 45 has retained the words "*null and void, inoperative or incapable of being performed,"* as against Section 8. (applicable to domestic arbitration) In international arbitrations, the Supreme Court has consistently maintained a non-interventionist approach.

[109] Zhejiang Bonly Elevator Guide v. Jade Elevator Components, (2018) 9 SCC 774 [4].

Shin-Etsu emphasised on a *prima facie* assessment of the arbitration clause under Section 45.[110] However, the minority opinion held that adopting a liberal approach would tantamount to adding words in the legislation which were not included originally. It was held that the court before which the award were to be challenged would be bound by res-judicata as the issues of validity of the arbitration agreement which is a ground for challenging the award have already been decided. A trial by the court looking into the arbitration agreement would vitiate the purpose of an agreement, merely because of ambiguity in the legislation which does not prescribe a threshold. The prima facie approach has been followed in a number pronouncements, for instance, in *Jes & Ben Groupo Pvt. Ltd* v. *Hell Energy Magyarorzag KFT*,[111] *Olive Healthcare* v. *Lannett Company Inc.*[112] amongst others.

There is a lack of clear approach of the Indian courts for referring parties to arbitration under pathological clauses. Cases of simple pathology, named arbitrator, non-existent institutions etc have been referred to arbitration, however, in certain cases as indicated above, the clause was not considered to be an arbitration clause in itself.

In *C.M. Karanji and Co.* v. *Indo China Trading Co. Ltd.*,[113] reference was made to '*local chambers of commerce*' to arbitrate, the court allowed the matter to be referred. Whereas in *Jyoti Brothers* v. *Sree Durga Mining Company*[114] apart from reference to a non-existent forum, the clause stated that the dispute 'can' be referred to arbitration. This court held that under the clause, further consent would be required to go for arbitration.[115] In *Teamco Private Ltd.* v. *T.M.S. Mani*[116] the parties were to elect their arbitrators in case of a dispute,

110 Shin-Etsu Chem. Co. Ltd. v. Aksh Optifibre Ltd. & Ors., (2005) 7 SCC 234.
111 Jes & Ben Grp. Pvt. Ltd. v. Hell Energy Magyarorzag KFT, CS(COMM) 257/2019.
112 Olive Healthcare v. Lannett Co. Inc., Writ Petition No. 10475 of 2011.
113 C.M. Karanji & Co. v. Indo China Trading Co. Ltd., 1951 SCC OnLine Cal 308.
114 Jyoti Bros. v. Sree Durga Mining Co., A.I.R. 1956 (Cal.) 280.
115 Jagdish Chander v. Ramesh Chander & Ors., 2007 (5) SCC 719.
116 Teamco Pvt. Ltd. v. T.M.S. Mani, 1967 A.I.R. (Cal.) 168.

whose decision would be binding. It was held that the arbitration agreements are vague, uncertain and cannot be identified with certainty hence the request refer was declined.

In a case where '_' (blanks) were inserted for insertion of a name, the court held that not construing the agreement as one to arbitrate will frustrate the purpose of arbitration on a hyper-technical ground.[117] However, in similar situations, where the appointing authority was left blank, the Calcutta High Court, held the clause to be vague as it was not clear as to who would appoint the arbitrator.[118] Vagueness was further discussed in *Kanpur Agra Transport Corporation* v. *United India Insurance Co.*[119] where the 'Manager' of the company was to be appointed as an arbitrator, the court found the clause to be vague as the identity of the manager was unclear as the appellant had several branches.

In *Enercon (India) Ltd and Ors.* v. *Enercon GMBH and Ors.*,[120] the arbitration clause stated that in case of a dispute an attempt to resolve the same shall be through mutual consultation failing which within 30 days from the commencement of discussions, any party may refer the dispute to an arbitral tribunal. The courts were required to aid the arbitral process and not otherwise.[121] The court clarified that with *"a seemingly unworkable clause,"* it would be the duty of the court to make the clause workable within the permissible limits of the law.[122] Finally, it was held that the court was well within its rights to set right an obvious omission without actually reconstructing the clause.[123]

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117 Union of India v. Janki Prasad Agarwal, (1984) ALL WC 206.
118 ITC Classic Fin. v. Grapco Mining & Co. Ltd., A.I.R. 1997 (Cal.) 397.
119 Kanpur Agra Transp. Corp. v. United India Ins. Co., A.I.R. 1990 Cal 59.
120 Enercon (India) Ltd. v. Enercon Gmbh, (2014) 5 SCC 1.
121 Enercon (India) Ltd. v. Enercon Gmbh, (2014) 5 SCC 1, ¶77.
122 Enercon (India) Ltd. v. Enercon Gmbh, (2014) 5 SCC 1, ¶83.
123 Enercon (India) Ltd. v. Enercon Gmbh, (2014) 5 SCC 1, ¶85.

When the issue was the appointment of arbitrators in accordance with the rules of Singapore Chamber of Commerce,[124] the court held that the most reasonable reference would be to understand the reference to the Singapore Chamber of Commerce as to the Singapore International Arbitration Centre because the former was not an arbitration institution.

VII. Conclusion

The above discussions highlight the contrasting opinion of courts when it comes to interpreting pathological clauses in cases of complex pathology. As noted by Davis,[125] Eisemann proposed four criteria for ascertaining pathology, viz. mandatory consequences of the agreement, exclusion of intervention by municipal courts, giving powers to arbitrators to resolve the disputes and establishing a procedure under best conditions of rapidity and efficiency. He also categorises pathology into lesser and greater pathologies. He maintains greater pathologies pose difficulties to the extent of being unsurmountable in their application. Another opinion by Frank,[126] categorises pathologies into curable and incurable. From a U.S. perspective, he relies upon the dominant purpose test where primary intention is settlement of disputes by arbitration rather than procedural rules.

As categorised into cases of Eisemannic pathology and complex pathology, the attempt is not to declare the former as redundant, rather, to observe, how through judicial pronouncements, the latter has been attempted to be reconciled. In cases of complex pathology, the primary challenge is the recalcitrant party may want the arbitral process to be scuttled by approaching the courts by seeking a declaration that the agreement is incapable of being performed or unworkable. The courts too have an obligation to refer parties to arbitration with varying degrees of

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124 Pricol Ltd. v. Johnson Controls Enterprise Ltd., (2015) 4 SCC 177.

125 Benjamin G. Davis, *Pathological Clauses: Frederic Eisemann's Still Vital Criteria*, 7 ARB. INT'L 365, 365–88 (Dec. 1991).

126 Frank, *supra* note 33.

investigation into the intent, also influenced by a pro-arbitration approach. However, it is important to note that despite a positive enforcement regime a non-consenting party shall never be forced to arbitrate.

According to the author and in line with the above opinions, the extent of pathology could be determined by its curability keeping intact the dominant purpose to arbitrate. Supplementing a non-existent institution with an existing one etc. are instances where the intent of the parties could be supplemented by the courts. Complexity arises in cases where the degree of rectification to be carried out transforms the whole agreement to one which although becomes workable, but in the present form could never have been consented to by the parties. In complex cases, without foregoing the generality of the four criteria laid down by Eisemann, the last category, i.e. establishing a procedure under best conditions of rapidity and efficiency may be the dominant test. This is to ensure that a tribunal assesses the unworkability and may or may not continue with the arbitration.

The validity of arbitration agreements lies at the heart of all arbitral jurisprudence, with intention being the touchstone. The referral under Article II (3) of the NYC is mandatory and cannot be left to the discretion of the courts. The only exception is when the arbitration clause is null and void, inoperative, or incapable of being performed. Thus, when faced with ambiguous or vague clauses, questions surrounding the validity of the clause arise. It is imperative to recognise that just as an arbitration clause cannot have a prescribed format, pathology too cannot be confined to a few instances. Pathology is a defect of the clause.

In India, there seems to exist a dichotomy in how the court reacts to the absence of words such as arbitrator compared to the use of the word dispute, which needs a uniform interpretation. It may be complex or simple. Divergence of approach to identify an arbitrator from a supervisor or facilitator needs coherence, where Norse Air can be helpful.[127] It has been

[127] Frank, *supra* note 33.

observed that Indian courts seem to falter when it comes to complex pathologies. A discussion and development of consistent precedents around the words 'unworkable' or 'incapable of being performed' is warranted and hence, an analysis from an international perspective is warranted. Is divergence in treating pathologies owed to absence of common standard from the very beginning?

ELECTING YOUR FORUM: A CHECKLIST BEFORE APPROACHING AN INVESTMENT TRIBUNAL IN AN INTERNATIONAL TAX DISPUTE

*Lahar Jain**

ABSTRACT

*With no overarching 'international tax tribunal', tax-payers are presented with three possible forums to resolve their tax disputes under treaties: domestic courts, the Mutual Agreement Procedure ["**MAP**"] under tax treaties, and investment tribunals. After having established that domestic courts are ill-equipped, and tax treaties are under-developed to grapple with such disputes, investment tribunals may be the best bet. However, electing a forum must always be a case-to-case determination. International tax disputes present investment tribunals with a unique challenge of obtaining their jurisdiction from Bilateral Investment Treaties, ["**BIT**"] but having to decide claims under a different substantive law, the tax treaty. This gives rise to the twin-problem of having to align jurisdiction and admissibility at every step of the process. This note acts as a strategic guide for foreign tax-payers to assist them to pick the right forum. It presents a checklist of five considerations to analyse the appropriateness of a case in relation to the forum chosen. The recent decision in Lonestar v. Korea ["**Lonestar**"], coupled with other cases, is instructive with regard to how a case must be argued and pleaded. This note demonstrates how a small change in strategy can be the difference between the claim succeeding or not succeeding.*

I. Introduction

* Lahar Jain is a Law Clerk to Hon'ble Justice Satish Chandra Sharma, Supreme Court of India.

Under the international tax regime today, there exist only three realistic avenues for international tax-payers to dispute their tax claims. A taxpayer can either (i) litigate before the domestic courts of the host country; (ii) raise a dispute under the applicable tax treaty, if any; or (iii) raise a dispute under the applicable BIT, if any. While these three forums do adjudicate upon claims based on their differing jurisdictions and applicable standards of review, they can be considered largely substitutable in terms of being possible forums for parties to dispute their tax claims. It is quite intriguing that there exists no consensus in the international community with regard to the most beneficial forum that a tax-payer may approach. Some scholars argue that there is tremendous potential for tax treaties to develop an arbitration platform for investors, especially using the Organisation for Economic Co-operation and Development ["**OECD**"] Model.[1] Others argue that investment tribunals are a neutral platform, where investors can dispute abusive taxes against the host country.[2]

This note seeks to frame a checklist that investors may consider before electing to approach an investment tribunal for relief against disputed tax measures. The note heavily relies upon the recent decision in *Lone Star*[3]*,* supplemented by other cases to formulate a checklist of five considerations that have a direct bearing upon forum election. While most of the available literature primarily focuses on the broad advantages of arbitration in this context, it is crucial to drive home the point that choosing a forum is a subjective case-by-case determination, with no overarching objective

1 *See* Alireza Salehifar, *Rethinking the Role of Arbitration in International Tax Treaties*, 37(1) JOURNAL OF INT. ARB. 87 (2020); Michael Lennard, *Transfer Pricing Arbitration as an Option for Developing Countries*, 42(3) INTERTAX 179 (2014); Alban Zaimaj, *Dispute Avoidance and Resolution*, *in* RAFFAELE PETRUZZI & KAROLINE SPIES, TAX POLICY CHALLENGES IN THE 21ST CENTURY 285 (Linde Verlag Publ'n 2014).

2 *See* William W. Park, *Tax and Arbitration*, 36 ARBITRATION INTERNATIONAL 157 (2020); Matthew Davie, *Taxation-Based Investment Treaty Claims*, 6(1) JOURNAL OF INTERNATIONAL DISPUTE SETTLEMENT 202 (2015).

3 LSF-KEB Holdings SCA and others v. Republic of Korea. ICSID Case No. ARB/12/37, Award (30 August, 2022).

winner. As investors flock to investment tribunals targeting larger award settlements, their case may be unripe or unfit for the forum chosen. This is primarily due to the fact that the question of appropriate forum can only be answered by considering factors such as relief, enforcement, applicable law, and the disputed measure.

Section II of this note argues that a foreign tax-payer must consider arbitrating under the applicable BIT as their starting point in electing forums. It analyses the respective advantages and disadvantages of domestic litigation, and the MAP under tax treaties respectively. It extracts a strategy elucidating when the investor must necessarily litigate their dispute, as compared to when they should directly opt for arbitration. **Section III** of this note formulates a checklist of five considerations: (i) applicable standard of review; (ii) definitional concerns with "tax"; (iii) effect of carve-outs in BITs; (iv) expropriation and abuse takings; and (v) evidentiary concerns; for investors to consider before determining the appropriate forum.

II. Landscaping the starting point of dispute resolution

Multinational companies benefit greatly by setting up subsidiaries in countries that have favourable tax norms. Tax planning remains to be a legitimate aim upon which corporate structures are built and operated.[4] However, with tax planning comes the simultaneous effort of states attempting to curb tax avoidance practices. This is what makes tax disputes unique; as they touch upon issues of fiscal policy and sovereignty. States have always been sceptical of arbitrating tax disputes, zealously protecting their sovereign prerogative of internally dealing with all revenue-related matters.[5]

It comes as no surprise that states prefer and have equipped their domestic courts to directly address taxpayer concerns. Any tax dispute between an

4 McDowell & Co. Ltd. v. CTO, (1985) 3 SCC 230, 45.
5 William, *supra* note 2, at 162.

investor and the host country is generally governed by internal laws, along with the applicable double tax avoidance agreement ["**DTAA**"]; which collectively make up the substantive law governing the dispute. For instance, the Income Tax Act ["**ITA**"] automatically incorporates DTAAs into the domestic laws of India.[6] The applicable DTAA and the ITA simultaneously apply to foreign investors in a manner where the ITA will be applicable only if it is more beneficial to the taxpayer.[7]

At best, domestic courts can serve as one of the stops on the way for relief in larger tax disputes. Tax payers do not trust courts in foreign jurisdictions to reach a just, fair and reasonable outcome.[8] In India, courts are largely deferential towards government policy, especially in fiscal matters; and hence, adopt a more conservative stance on striking down policy measures which may even conflict with international taxation norms.[9] In *Lonestar*, Korean courts at all levels exhibited this deferential attitude against striking down the application of the 'Substance over Form Rule' .[10] Also, in most cases, tax-payers will have to approach the lowest courts of the country to make the primary assessment in disputes. These courts may not be the best equipped to interpret DTAAs in line with international law principles.

However, litigating before domestic courts first, may be necessary before approaching an investment tribunal, in light of the 'exhaustion of local remedies' principle.[11] Certain BITs, including the India Model BIT,[12] require investors to pursue local remedies before resorting to investment arbitration. Domestic litigation also provides the tax-payer with a

6 Income Tax Act, 1961, § 90(1).
7 *Id.*, § 90(2).
8 ZVI D. ALTMAN, DISPUTE RESOLUTION UNDER TAX TREATIES 5 (IBFD, 1st ed. 2005).
9 RK Garg v. Union of India, (1981) 4 SCC 675.
10 LSF-KEB Holdings SCA and others v. Republic of Korea. ICSID Case No. ARB/12/37, Award ¶392-419 (30 August, 2022).
11 Martin Dietrich Brauch, Exhaustion of Local Remedies in International Investment Law, IISD Best Practices Series (2017).
12 Model Text for the Indian Bilateral Investment Treaty, Art.15.1 (2016).

substantive and fact-intensive review of the impugned assessment, which is critically missing from the other two types of forums. An investment tribunal merely acts as a reviewing court and does not perform the function of fact-finding as against the domestic court.[13] It is also more convenient, cost-effective, and does not preclude the possibility of electing any other remedy. However, in light of *Lonestar*, certain caveats must be considered.

In *Lonestar*, the primary submission against the admissibility of the Claimant's tax claim was that the Claimant had elected to domestically litigate and was barred from arbitrating before the tribunal as it amounted to a waiver.[14] The applicable BIT had a clause governing election of relief and waiver, which stated that Claimant would waive their right to a local remedy to the extent that the tribunal is determining that particular issue.[15] The Tribunal held that the claim was admissible as the waiver clause only required Claimant, "*to waive its right to initiate local court proceedings before it submits its request for arbitration, but does not require it to discontinue cases pending already*…".[16] Hence, it is crucial to understand the applicable BIT even before approaching domestic courts, as it has a direct bearing upon admissibility.

Several countries are now heavily promoting dispute resolution under the applicable tax treaty.[17] As most countries follow either the OECD or the United Nations ["**UN**"] Models for their own DTAAs, it provides for dispute resolution through a negotiation-based MAP.[18] In the late 2000s, both conventions introduced mandatory *ad hoc* arbitrations if the MAP

13 Helnan International Hotels AIS v. Arab Republic of Egypt, ICSID Case No. ARB/05/19, Award 106 (3 July 2008).

14 LSF-KEB Holdings SCA and others v. Republic of Korea. ICSID Case No. ARB/12/37, Award 411 (30 August, 2022).

15 Korea-Luxembourg BIT, Art. 8 (2011).

16 LSF-KEB Holdings SCA and others v. Republic of Korea. ICSID Case No. ARB/12/37, Award 418 (30 August, 2022).

17 Alireza, *supra* note 1 at 96; David Ramos Muñoz, *Tax arbitration and its issues: from fiction to reality, to surrealism*, 21 SPAIN ARBITRATION REVIEW 5 (2014).

18 OECD Model Tax Convention, Art. 25; UN Model Tax Convention, Art. 25.

fails.[19] While this development is welcomed, an investor still has much to aspire.[20] It is true that an investor is empowered to raise a dispute as per Article 25 of the model conventions.[21] However, it still remains to be a State v. State dispute, as the primary participant in MAP and the subsequent arbitration are state parties. This entire process is heavily influenced by political considerations, and is quite susceptible to horse trading of one case for another.

Even if an investor convinces their government to raise a dispute under MAP, the negotiation that follows is state-driven and highly political. Consequently, an investor must wait two years before arbitrating only the *unresolved* issues.[22] Clearly, if MAP results in a settlement, whether fair or unfair, the investor must accept the same. Even if the investor reaches the stage of arbitration, the state continues to be the primary party, allowing the investor to merely *participate* in the arbitration. The investor has no control of their claim the minute it arises. Therefore, dispute resolution remains to be the Achilles' heel of DTAAs even today.

While several authors have argued for a supranational arbitration institution to be set up by organisations that specialise in such disputes[23], that day may never come. Unequal bargaining power between the global north and south, coupled with the fact that these disputes touch upon crucial aspects of fiscal policy,[24] strongly suggests that one must not count on arbitrating before an 'international tax tribunal'. Therefore, bearing in mind the few caveats as already discussed, it is strongly urged that, an investor must first consider approaching an investment tribunal for larger tax claims. The next section

19 *Id.*, Art. 25(5).
20 Alireza, *supra* note 1, at 90.
21 *Supra* note 18.
22 *Supra* note 19.
23 Alireza, *supra* note 1, at 95.
24 Michelle Andrea Markham, *Arbitration and tax treaty disputes*, 35(4) ARBITRATION INTERNATIONAL 1 (2019).

formulates a checklist to assess the admissibility and strength of a tax claim before such a tribunal.

III. A Checklist for Foreign Tax-payers

BITs contain several substantive rights and obligations undertaken by host states, which would largely cover all state action affecting the investor, including taxation. Investor-state arbitrations provide a neutral and unbiased platform for investors to directly bring disputes against the state. These tribunals specialise in simultaneously reviewing the impugned acts under domestic as well as international laws, and hence, provide a good platform to resolve complicated tax disputes. However, states like to protect their fiscal independence from coming under fire by an external adjudicatory authority. Therefore, recent BITs are cognizant of the increasing disputed tax arbitrations, and have incorporated several changes to prevent such exposure.[25] Therefore, forum election is crucial and is informed by the twin-considerations of the applicable BIT and the *type* of disputed tax measure. It is suggested that investors peruse the following considerations in order to ascertain the strength of their claim.

A. What is the applicable standard of review?

There are two possible ways to dissect and understand the applicable standard of review. One way is to say that it depends upon the obligation alleged to be violated, with special reference to the language contained in the BIT. For instance, the Model India BIT prescribes that states are in violation if they commit a 'fundamental breach of due process'.[26] This standard obliges state parties to follow fair, just and transparent procedures.[27] Tribunals have held that they will not sit as courts of appeal

25 The Global Minimum Tax and Investment Treaties: Exploring Policy Options, UNCTAD (November, 2023).

26 *Supra* note 12, Art. 3.1(i).

27 International Thunderbird Gaming Corporation v. The United Mexican States, ¶200, UNCITRAL Award (2006).

against the impugned act, but rather check for *fundamental* and *glaring* irregularities in procedure.[28]

The other way is to broadly categorise actions of the legislature, executive and judiciary. In *Lonestar*[29], the Tribunal noted that the Secured Overnight Financing Rate ["**SOFR**"] was incorporated into legislation *vide* Korea's Framework Act on National Taxes[30]. Further, the SOFR was consistently applied by the judiciary of Korea in several cases.[31] A formal standard of review was adopted as against the legislative act, to the extent that the Tribunal was largely deferential towards the same.[32] While tribunals have held that states cannot take shelter under their domestic laws to violate their international obligations[33], the Tribunal in *Lonestar* held that the assessment to check the *appropriateness* of this rule under the DTAA is beyond its competence. Interestingly, it did so in a circular manner. It held that, "*domestic anti-abuse measures are to be considered part of the domestic rules set by domestic tax laws which determine the facts that give rise to a tax liability; such anti-abuse measures are not addressed in tax treaties and, as a consequence, no conflict can arise.*"[34] Therefore, while tribunals are equipped to determine violations of DTAAs under the BIT, it may be difficult to dispute the applicability of certain principles themselves.

B. Does the impugned act classify as a "tax" measure?

States often enact measures which may walk, talk and speak like a "tax", except they may not classify as one. Ecuador's 'Law 42' is a perfect example

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28 *See* Robert Aziniaxn et al. v. Mexico, ICSID Case No. ARB (AF)/97/2, ¶99; Alps Finance and Trade AG v. Slovak Republic, UNCITRAL Award [Redacted], ¶ 249–50 (2011).

29 LSF-KEB Holdings SCA and others v. Republic of Korea. ICSID Case No. ARB/12/37, Award 392 (30 August, 2022).

30 Korea's Framework Act on National Taxes, Article 15.

31 *Id.*, at 392-395.

32 *Supra* note 30, at 410.

33 ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary, ICSID Case No. ARB/03/16, Award (2006).

34 LSF-KEB Holdings SCA and others v. Republic of Korea. ICSID Case No. ARB/12/37, Award 410 (30 August, 2022).

of this.[35] Under this law, the State was allowed to "participate" in revenues from companies selling oil at super profits. Investors took Ecuador to arbitration against this measure; and the primary question for determination was whether it amounted to a "tax" in the first place. The three tribunals constituted in *Occidental Petroleum Corporation and Occidental Exploration and Production Company* v. *Ecuador* ["**Occidental II**"][36], *Perenco Ecuador Ltd* v. *The Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)* ["**Perenco**"][37], and *Burlington* v. *Ecuador* ["**Burlington**"][38] took divergent views on the applicability of domestic law or international law in determining the issue.[39] The *Occidental II* Tribunal considered domestic Ecuadorian law to adjudicate upon the factual question of whether Law 42 qualifies as a tax.[40] This is a similar approach to the one adopted by the *Lonestar* Tribunal, where certain determinations are left to the state, as they form the 'factual matrix' necessary to assess the measure itself.

The *Burlington* Tribunal adopted a stronger and more consistent approach, in the author's opinion. It considered the applicable tax treaty, which also formed a part of domestic law, in order to determine if the measure would constitute as a 'tax'.[41] Tribunals possess the jurisdiction to conduct a substantive review of state action to determine adherence to the BIT. The approach of the *Perenco* Tribunal is instructive in this regard. The Tribunal *first* determined whether Law 42 violated the production sharing contract between the State and the investor; and *second,* tested this violation against

35 Ecuador Law 2006-42 ("Law 42").

36 Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Ecuador, ICSID Case No ARB/06/11, Award (2012).

37 Perenco Ecuador Ltd v. The Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador), ICSID Case No ARB/08/6 (Decision on Remaining Issues of Jurisdiction and on Liability of 2014).

38 Burlington v. Ecuador, ICSID Case No ARB/08/5 (Decision on Liability of 2012).

39 William, *supra* note 2, at 184.

40 Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Ecuador, ICSID Case No ARB/06/11, Award (2012), 457.

41 Burlington v. Ecuador, ICSID Case No ARB/08/5 (Decision on Liability of 2012), 163.

the applicable BIT.[42] It is crucial for investors to study the measure at hand in light of domestic laws and the applicable DTAA. Subsequently, in light of any ambiguity, investors must carefully draft their pleadings with the above considerations in mind.

C. Does the applicable BIT have any 'carve-outs' for tax-related measures?

As states are progressively getting more and more concerned with letting tribunals adjudicate upon tax matters, BITs have been amended to bring in carve-outs with respect to taxation.[43] Carve-outs can be partial or complete, where the former excludes certain obligations (like expropriation or fair and equitable treatment) from being applicable to tax measures, and the latter excludes all taxes from the purview of the tribunal. It is possible that measures which actually expropriate or are 'abusive takings' are dressed up as legitimate tax measures to avoid BIT scrutiny through carve-outs.

It is quite common for BITs to have a multi-layer carve-out. For example, the Energy Charter Treaty ["**ECT**"] excludes all rights and obligations from applying to taxation measures.[44] However, it enumerates specific provisions which will apply to such measures, i.e., discrimination and expropriation. The non-discrimination provision further excludes itself from being applicable to income, capital taxes, and collection measures. BITs are becoming more detailed and complex as a means for states to shield themselves from review. It is crucial to undertake a detailed review of the applicable BIT in order to assess the carve-outs that are applicable, if any.

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42 Perenco Ecuador Ltd v. The Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador), ICSID Case No ARB/08/6 (Decision on Remaining Issues of Jurisdiction and on Liability of 2014), 409.

43 *See* Indian Model BIT 2016, Art. 2.4(ii); India-UK BIT 1994, Art.3(b); Energy Charter Treaty 1994, art.21., Dec. 17, 1994, 2080 U.N.T.S. 95.

44 *Id.,* Energy Charter Treaty, art. 21.

The *Yukos Universal Limited (Isle of Man)* v. *The Russian Federation* ["**Yukos**"] arbitration against Russia's tax measures is one instance, not to be missed, in this regard.[45] In *Yukos*, the Russian tax authorities imposed substantial taxes for alleged fiscal evasion which ultimately rendered Yukos bankrupt. Before the Tribunal, Russia argued that Article 21,[46] which contained the carve-out, would be applicable to the impugned measures and hence, beyond the jurisdiction of the Tribunal. However, in a landmark ruling, the Tribunal held that such a carve-out would only come to the aid of a state if its measure is a bona-fide exercise of its tax powers, and not if it is actually a disguised taking. The Tribunal continues to have jurisdiction in respect of malafide or abusive taxing measures which would not qualify under the aforementioned provision.

Such an approach, which has also been subsequently followed, essentially renders a carve-out largely toothless. To explain further, tribunals do not automatically remove themselves from adjudicating upon measures termed as 'taxes', but rather, only classify those measures as 'taxes' that are legitimate. Essentially, a measure like Law 42 or the Russian taxes would not even qualify as a 'tax', as they violate treaty obligations on the face of the record. This means that there is no measure which could violate the BIT *but* is also protected under the carve-out, rendering the carve-out inconsequential.

Therefore, investors can still bring taxation claims before an investment tribunal, even if there exists a carve-out in the BIT.

D. When can a tax qualify as expropriation or an abusive taking?

The hardest determination for tribunals is to walk the line of differentiating legitimate fiscal measures from abusive ones. The reason for this is that

45 Hulley Enterprises Limited (Cyprus) v. The Russian Federation, PCA Case No AA 226, Award (2014); Yukos Universal Limited (Isle of Man) v. The Russian Federation, PCA Case No AA 227 (2014); Veteran Petroleum Limited (Cyprus) v. The Russian Federation, PCA Case No AA 228 (2014).

46 Energy Charter Treaty, art. 21.

taxes by their very nature are uncompensated takings. It is also legitimate for states to determine their own fiscal policy and increase their tax base. This, coupled with the fact that DTAAs are political arrangements mired with ambiguities, does not make it easy for the tribunal to separate the chaff from the grain.

In the case of indirect expropriation, the 'sole effects' doctrine or the 'substantive deprivation' test has generally been an accepted standard.[47] As per this standard, the investor must prove a devastating or fundamental deprivation of its rights over its assets. While this may seem as a neutral and objective standard, its application by most tribunals has not been convincing. In *EnCana Corporation* v. *Republic of Ecuador* ["**Encana**"],[48] the issue at hand was similar to *Lonestar*. *Encana* argued that the actions of the Canadian government to withhold VAT refunds amounted to expropriation. The majority in *Encana* negatived this claim by holding that the company had not been substantively deprived of its rights. However, the extreme consequences of such a standard can be witnessed in the Tribunal's decision in *Burlington*[49]. Through 'Law 42' the government laid claims on 99% of super profits earned by oil companies. This frustrated the purpose behind doing business for the companies involved. Even then, the Tribunal held that the 'substantial deprivation' test had not been fulfilled, as the Claimants still had control and rights over the assets they owned. The *Perenco* Tribunal arrived at the same conclusion.[50]

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47 Pope & Talbot v. Government of Canada, UNCITRAL Award on the Merits of Phase 2, ¶110 (2001).

48 EnCana Corporation v. Republic of Ecuador, LCIA Case No. UN3481, UNCITRAL Award (2006).

49 Burlington v. Ecuador, ICSID Case No ARB/08/5 (Decision on Liability of 2012), 114, 254, 337.

50 Perenco Ecuador Ltd v. The Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador), ICSID Case No ARB/08/6 (Decision on Remaining Issues of Jurisdiction and on Liability of 2014), 672.

The dissent in *Encana* presents a more hopeful and sound approach to abusive taxes.[51] The dissent agreed with the majority that the corporation had not been substantively deprived of its rights. However, it considered the contrast – the effect it had on the revenue stream in relation to the investment. It held that while the investment was substantially intact, the tax had substantively affected the revenue of Encana, which amounted to expropriation. It is important for tribunals to understand that it is only in rare cases that a 'tax' will be held to be expropriation if the standard remains to be one linked to the investment.[52] Even 'Law 42' of Ecuador was not able to fulfil this standard, even though the tax imposed laid claims on 99% of income. However, taxes that substantively affect revenue, or asset creation are also expropriation, as they render doing business futile.

Some tribunals have attempted to solve this lacuna by developing the 'effects plus' doctrine.[53] This doctrine allows the tribunal to look at other factors, along with the effect of the impugned measure, when determining a claim of indirect expropriation. In *Link-Trading Joint Stock Company* v. *Department for Customs Control of the Republic of Moldova* ["**Link-Trading**"],[54] the Tribunal held that if a fiscal measure is held to be an 'abusive taking', the same would be expropriation. In *Tza Yap Shum* v. *Republic of Peru* ["**Tza Yap Shum**"],[55] the Tribunal again recorded that expropriatory character can be established if the measure is "*confiscatory, arbitrary, abusive, or discriminatory*". It is difficult to accept such a holding as it conflates the standard for expropriation with 'abusive acts', 'arbitrariness' and 'violation of due process'. As the substantial deprivation test still holds the field in cases of expropriation, investors should frame their pleadings to be geared

51 EnCana Corporation v. Republic of Ecuador, LCIA Case No. UN3481, Partial Dissenting Opinion (2005).

52 William, *supra* note 2, at 106.

53 Prabhash Ranjan, *Investor-state dispute settlement and tax matters: limitations on state's sovereign right to tax*, 31(1) ASIA PACIFIC LAW REVIEW 219 (2013).

54 Link-Trading Joint Stock Company v. Department for Customs Control of the Republic of Moldova, UNCITRAL Final Award (2002).

55 Tza Yap Shum v. Republic of Peru, ICSID Case No. ARB/07/6, Award (2011).

towards proving the devastating effects of the impugned measure. The dissent in *Encana* can prove to be particularly useful.

E. What kind of evidence do you have at your disposal?

Timing is an often overlooked, but crucial factor to consider when bringing a tax-claim against a state. An anticipatory tax or a tax whose effects haven't been realised can result in the failure of the case. Further, the value of any claim comes down to the kind of evidence available at the claimant's disposal; especially considering the fact that tribunals are not fact-finders. The first important type of evidence to consider is domestic court rulings on the same disputed measure. If the investor has litigated before domestic courts, then that decision becomes a crucial piece of evidence that the tribunal considers. In *Lonestar*, the suitability of SOFR was determined merely by relying upon the observations made by the domestic courts of Korea. The Tribunal observed that the Claimant's arguments against SOFR "*were properly analysed by the Korean courts to whom the Claimants had remitted the questions and the Claimants' objections were rejected for reasons with which the Tribunal agrees*".[56] Further, it is important to understand that international taxation law is a specialised field in which the arbitrators may not be experts. Most disputes under tax treaties deal with complex cases of transfer pricing or permanent establishments. It can be a good strategy to engage experts in the field to assist and instruct the tribunal in the law. In fact, the *Lonestar* Tribunal heavily relied upon experts to decide the tax-related issues.

IV. Conclusion

Investment tribunals have now become adept at dealing with tax-related concerns of foreign investors. Tax treaties present a new but similar challenge to tribunals, as complex issues of interpreting applicable principles and their suitability come before it. This note has argued that

[56] LSF-KEB Holdings SCA and others v. Republic of Korea. ICSID Case No. ARB/12/37, Award (30 August, 2022), 469.

investment arbitration has all the tools required to be able to grapple and decide these issues. Foreign tax-payers must however be careful before electing to approach any forum. A determination on a disputed taxable event can have several consequences, including the operation of *res judicata*, relief, enforcement, and limitation. Moving forward, the international tax regime will encounter multi-party disputes involving several states due to the transfer pricing regime and the rise of digital conglomerates operating across several jurisdictions. While it is yet to be witnessed if tribunals are capable of dealing with such disputes, the aforementioned considerations nonetheless remain instructive.

TAXATION TURBULENCE: THE CONTROVERSY OF ARBITRATION IN INTERNATIONAL TAX DISPUTES

Chaitanya Chaturvedi[*]

Abstract

*The increasing number of reforms in the international taxation regime, opens a floodgate of novel nature disputes, particularly arising from the evolving nature of taxation as nations gear up against the threats posed by multinational enterprises ["**MNEs**"] and their tax-evading practices. A particularly contested position arises herein, with respect to the role accrued on to arbitration as a dispute resolution method. The question arises as, in the realm of international tax governance, the fiscal sovereignty of nations intersects with the rights and obligations of taxpayers, particularly MNEs and transnational entities. This note delves into the intricacies of tax arbitration, examining its role in resolving disputes within the framework of Double Taxation Treaties ["**DTTs**"] and Bilateral Investment Treaties ["**BITs**"]. While reiterating the critique of prevailing preference for Mutual Agreement Procedure ["**MAP**"] over arbitration in Organization for Economic Development ["**OECD**"] and United Nations ["**UN**"] Models, the note concerns itself with interpretational disparities, sovereignty challenges, and the impact of global tax reforms like anti-Base Erosion Profit Shifting ["**BEPS**"] initiatives onto the overall arbitration landscape within international legal order. Emphasizing the need for standardized interpretation rules in tax arbitration, the paper advocates for the incorporation of institutional arbitration provisions into international tax models. The paper identifies peculiar disparities in tax-awards by different tribunals which span over*

[*] Chaitanya Chaturvedi is a 3rd year student at National Law University, Delhi.

a range of tax issues. With upcoming tax reforms in mind, the note seeks to resolve a glaring disparity concerning interpretational standards visible throughout popular tax-arbitral awards and also attempts to fit the transnational taxation shortcomings into the conceptual framework proposed.

I. Introduction

Fiscal sovereignty of a nation decides its various endeavours. A huge part of this fiscal sovereignty is ensured by diligent taxpayers in the form of MNEs, transnational entities, and private persons. While it may be convenient for a nation to tax entities subject to its jurisdiction, in a wider set of international trade, this convenience often translates into conflict over taxation emerging from commercial transaction disputes, investor state disputes, and even income-tax disputes.[1] Permeating global boundaries, taxation rights of a nation become a matter of international concern as the stakes balance the interests of a nation vis-à-vis the risks faced and rights guaranteed to the taxpayer. The OECD Model provision[2] and UN Model Double Tax Convention[3] postulated the dispute resolution methodology for such tax governance disputes emanating from double taxation treaties and non-taxation risks in the form of the two-step resolution consisting of a Mutual Agreement Procedure ["**MAP"**] and subsequent arbitration. However, a point of controversy arises here as arbitration through the amendment of 2008 in OECD Model and through amendment of 2011 in UN Model was added as a rather ancillary method for resolution of tax disputes,[4] especially in the UN Model where the nature

1 William W Park, *Tax and Arbitration*, 36 ARBITRATION INTERNATIONAL 157 (2020).

2 OECD, Model Tax Convention on Income and on Capital 2017 *(Full Version)* (OECD Publishing, 2019) *available at* https://doi.org/10.1787/g2g972ee-en.

3 UN Department of Economic & Social Affairs, United Nations Model Double Taxation Convention between Developed and Developing Countries, ST/ESA/PAD/SER.E/213 (2017).

4 Ehab Farah, *Mandatory Arbitration of International Tax Disputes: A Solution in Search of a Problem*, 9(8) FLORIDA TAX REV. 703 (2009).

of such arbitration is not compulsory. In the political background, while this nature and limited scope of inclusion of arbitration has been criticised in the academic community, the States fervently oppose mandatory and binding arbitration clauses due to rather obvious reasons such as protecting their fiscal sovereignty.

II. Peculiarities in Tax Disputes

Taxation of investors and foreign entities in a nation present a distinct set of challenges to the international tax community.[5] To overcome these, countries enter into DTTs to prevent multiple taxation or no taxation of the same transaction. Tax disputes therefore present a distinct class of disputes due to their peculiar intersection of a State's right with that of the taxpayer, particularly because the basis of such rights can be distinctly placed in either the contracts entered into by sovereigns or the treaty in which such investor-state dispute is based. Each of these categories, postulates a different situation of jurisdiction, construction, determination of facts, interpretation and liability. However, given the currently prevailing method in the OECD Model and the UN Model favouring MAP over arbitration, the resolution is prone to being biased and heavily dependent on the stability of host country and the competent authority itself.[6] Tax disputes more often than not, are a problem to be tackled in absence of a binding yet flexible policy.[7] This note endeavours to look into obstacles which stand in the face of arbitration of tax disputes especially pertaining to the need of standardized interpretation rules for tribunals, as the international tax standards move towards a global minimum tax and anti-

5 *Id.*

6 Michelle Markham, *The Timely Resolution of Mutual Agreement Procedure Disputes- Secrets of Success?*, BULLETIN FOR INTERNATIONAL TAXATION 213 (2023).

7 Richard J Vann, *A Model Tax Treaty for the Asian-Pacific Region*, 45 BULLETIN FOR INTERNATIONAL FISCAL DOCUMENTATION 99 (1991).

BEPS[8] reforms. The need for a specific interpretation system also arises as a result of the emerging challenges which these reforms posed along with the existing obstacles faced by the parties in enforcement of awards. Due to the interplay of multiplicity of factors emanating from international law, municipal law, treaty interpretation, contractual obligations, and factual determination, this note argues that the standardization of guidance into procedural nuances can go a long way in not just enhancing the quality of awards rendered but also in overcoming technicalities in application of substantive law.

Pertinently, before we look into the core of the problems, a prima facie need of the hour emerges that this standardization must be undertaken as a part and parcel of amended mandatory institutional arbitration provisions in the OECD and UN Models, at least elevating arbitration as an alternative to MAP. This counts in due to the specific problems pointed out with ad hoc arbitral tribunals emanating from their lack of accountability and responsibility[9] in construction of fundamentals in law as well as the development of law in question. Another issue comes into light with regard to the principle of party autonomy[10], essentially implying that the existence of ad-hoc tribunals and their subsequent functioning is attributable to the parties themselves. This may even be applicable to the level of discretion and interpretive standards conferred on those tribunals, which in turn increases the difference in quality of awards rendered through institutional arbitration and those through ad-hoc arbitral tribunals. Inconsistency in tax matters is bound to create problems in the face of the already existing overlaps in substantive municipal law and therefore the aim should be to standardize the procedure and methodology.

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8 OECD, OECD/G20 Inclusive Framework on BEPS Progress report (OECD Publishing, 2023).

9 3 IVAR ALVIK, CONTRACTING WITH SOVEREIGNTY - STATE CONTRACTS AND INTERNATIONAL ARBITRATION, 31 (Hart Publishing Ltd 2011).

10 *Id.*

III. Issues Identified with Tax Arbitration

The primary motive for dispute resolution entities in tax disputes is to balance out the rights and risks. A major concern which arises when arbitration is brought into the realm of tax disputes is the effective transfer of decision making into private hands regarding matters which exclusively concern the State and its fiscal sovereignty.[11] The Court of Justice in the European Union ["**CJEU**"], recently in its decision concerning *Slovak Republic* v. *Achmea B.V.* ["**Achmea**"],[12] rendered intra-European Union ["**EU**"] arbitration as against the EU law citing its inherent opposition to the principle of autonomy. The principle of autonomy in EU law situates itself in the interpretational autonomy of EU law conferred upon itself. It means that the effectiveness and consistency of EU law is protected, encompassing its uniform interpretation with exclusive jurisdiction to CJEU to provide its authoritative interpretation.[13] This effectively entitles the EU courts to enjoy political and legal prowess over its legislations. However, in the treaty-based claims, arbitrability is not exclusively related to municipal law, rather the compatibility of municipal law with international law is taken as an important facet. Similarly, the German Federal Court in its decision of 2023 concerning two pending arbitrations *Mainstream Renewable* v. *Germany*[14] and *RWE* v. *the Netherlands*[15] ruled the inadmissibility of intra-EU arbitrations under the Internation on the ground that EU law prevails over international treaties given its supranational nature and legal effect. In doing so, the federal court relied on the EU law

11 Diane M Ring, *What's at Stake in the Sovereignty Debate?: International Tax and the Nation-state*, 49 VIRGINIA J. OF INT'L L. (2008).

12 Slovak Republic v. Achmea, *B.V.* C-284/16, C.J.E.U. (2018).

13 Treaty on European Union, art 19, C 326/13, (1992).

14 Mainstream Renewable Power Ltd and Ors v. Federal Republic of Germany, ICSID Case No. ARB/21/26 (2022).

15 RWE AG and RWE Eemshaven Holding II BV v. Kingdom of the Netherlands, ICSID Case No. ARB/21/4 (2024).

principle of the "*duty of cooperation*"[16] of EU Member States. Do these hierarchies of laws follow the same rigidity when dealing with taxation matters? And does this hierarchy prevail over principles of party autonomy? Yet, the emerging question arises as to whether the municipal laws of a political entity can be distinguished through application of arbitration based on the region where such DTTs are undertaken? Is this a peculiar EU situation or can similar arguments be undertaken in the context of sovereignty? These cases present a wide picture of the core issue related to interpretation which plagues tax-arbitration. The EU, considering that investment arbitration necessarily involves a rather privatized form of interpretation accorded to the EU law, argues primarily on the constructed form of incompatibility between BIT arbitrations and EU law.

Arbitration faces a nuanced challenge with interpretation, navigating a dichotomy between domestic and international standards. It questions the extent to which borrowing legal facts aligns with sovereignty, especially for States indirectly involved through taxpayers. Relating to the interpretation, a plethora of related obstacles come to the fore, including the scope of discretion adopted in such interpretation, treatment of facts, etc. This problem of interpretation does not seem to be limited to just the domestic law of host country but also extends to interpretation of the DTTs and BITs themselves. A detailed analysis of instances of interpretational lapses is undertaken in the following section where we sneak into the tribunal awards to look into differing trends of interpretive methodologies. This attempt is to recognize the legitimacy and enhancement of the rational legal logic behind an award which is imbibed through harmonization in interpretation of the domestic tax jurisprudence, tax-treaty and the BIT and other in consonance with the recognized standards of international law as a mandatory practice in resolution tax disputes. This note also looks into

16 Treaty on European Union, art 4, No. 30615, UNTS 1757 (Concluded on 7th February, 1992, Registered by Italy on 28th December, 1993)

the need for such harmonization in a postulation of tax-reforms and strategies adopted by countries.

IV. Analysis

A. Specific case of the Substance Over Form Doctrine

The arbitration award rendered in *LSF-KEB Holdings SCA and others* v. *Republic of Korea* ["**Lone Star**"][17] is one of its kind, as it upheld the compatibility of substance over form doctrine ["**SOFD**"] with the DTT, upholding its application by the Korean domestic courts. It becomes important to note herein that the SOFD is a highly interpretive concept depending on the jurisdiction. The type of interpretation, wherein a tribunal doesn't just stand in a vacuum of pre-determined texts but designates facts as crucial as the accreditation of burden of proof which both the parties have to face.[18] This interpretation also stands to determine the legitimacy of denial of benefits under an International Investment Agreement ["**IIA**"].[19] The Tribunal comprehensively took into view the domestic jurisprudence regarding the principle and undertook an in-depth study of the expert witnesses' view which was cumulative of OECD commentaries[20] as well as weighing of the States' individual position into the interpretation of the DTT.[21] A simple reframing of the core issue would be whether the denial of benefits to taxpayers was arbitrary, violating the country's obligation of fair and equitable treatment. Undoubtedly, a country has certain obligations grounded in fairness, equity and good faith towards the treatment of taxpayers. A pertinently problematic aspect of this decision, however, concerned the interpretation in application of the SOFD.[22] The

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17 LSF-KEB Holdings SCA and others v. Republic of Korea, ICSID Case No. ARB/12/37, (2022).

18 Blazej Kuzniacki, *The Compatibility of the Substance over Form Doctrine with Tax and Investment Treaties: A Case Study of Lone Star v the Republic of Korea,* ICSID REV. 1 (2024).

19 *Id.*

20 OECD, Commentaries on the Articles of the Model Tax Convention (2010).

21 *Supra* note 15.

22 *Supra* note 16.

Lone Star Tribunal, through its decision adopted an oversimplified interpretation of OECD, to determine compatibility between Korean SOFD and the BIT.[23] This stand is problematic given the interpretation exercise was not only necessary to be applied to Korean jurisprudence of the SOFD but also the DTTs. Absence of guidance from the Vienna Convention on Law of Treaties ["**VCLT**"][24] and its rules of interpretations of international treaties, notably listed down, a case whose text and ratio of may not in itself be wholly useful as a precedent having force of law from the highest legal standard of interpretation. A potential but important question is also raised here — that if the interpretation by the *Lone Star* Tribunal had applied the interpretation focusing also on the international law and an in-depth analysis of the OECD commentaries,[25] would this decision alter the course of determination of facts and their categorization and hence their further utility towards the determination of the decision of the tribunal? Does it also imply the change in nature of definitional tenets of "*facts*" as determined by the tribunal? Or does it simply imply an enhanced quality of award having no substantial impact on the actual content? The inclination is towards the latter. In the *AMCO* v. *Indonesia*[26] case, it was established that in situations where there are no pertinent laws of the host state concerning a specific matter, efforts must be made to identify the relevant international laws. Moreover, if there are applicable laws of the host state, they should be compared with international laws, with the latter taking precedence in case of any conflict. Therefore, international law holds full applicability, and to classify its role as merely "*supplemental and corrective*" appears to be a negligible distinction. Nonetheless, the Tribunal asserts that its primary duty is to assess every legal claim in the case against Indonesian law initially, and then against

23 *Supra* note 16.

24 United Nations, Vienna Convention on the Law of Treaties, 1155 UNTS 331, (23 May 1969).

25 *Supra* note 18.

26 Amco Asia Corporation and others v. Republic of Indonesia, ICSID Case No. ARB/81/1 (1984).

international law. This also means that a standard of determination, which is inconsistent with international standards renders the municipal law, which is an established fact for an arbitration tribunal,[27] as incorrect.

B. The arguments of Sovereignty

Firstly, another reason to press for the inclusion of interpretive tools in international law is to provide a safeguard against the sovereignty argument of the States' domestic right to taxation. International law provides the backing to tax tribunals by way of interpretation. This argument presents a rather interesting nuance, where an arbitration tribunal looks into the essential nature of the acts of the State in question (Korean Financial Regulator in the case of *Lone Star*)[28] in its determination of the benign (or malignant) nature of an action undertaken by the State in exercise of its fiscal sovereignty. Corresponding with the CJEU ruling[29], another set of argument arises when we question the validity and acceptability of such determination by any sovereign State, especially when such determination comes from a private entity. This is precisely the string which connects us to the proposed removal of ad-hoc arbitration from international tax-disputes arbitration. When we consider the OECD[30] and UN[31] model tax treaties, the form of arbitration provided therein is residuary and applied on an ad-hoc basis. In the face of residuality attached, it is important for these model treaties to leverage arbitration into an institutional set-up, making it binding and involuntary. The primary motive is to provide an institutional backbone to a rather fluid arbitration proceeding. This backbone is necessary for acceptance of arbitration as a method of dispute resolution that does not challenge a State's sovereignty over its taxes. Rather,it

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27 2 MICHEAL LANG & JEFFREY OWENS, ARBITRATION IN TAX MATTERS (Institute for Austrian and International Tax Law European and International Tax Law and Policy Series 2015).

28 *Supra* note 16.

29 *Supra* note 10.

30 *Supra* note 3.

31 *Id.*

harmonizes the sovereignty of the State with international law in a fashion where the state parties, much like the Convention on the Recognition and Enforcement of Foreign Arbitral Awards,[32] and a treaty-based arbitration claim, are ready to accept the authority without having to sacrifice a chunk of their own fiscal autonomy to an essentially privately interpreted system of arbitral awards.

Secondly, these model provisions while prescribing MAP as the primary method of dispute resolution, also make a specific distinction between unresolved cases and unresolved issues making provision for referring to arbitration only those issues which have remained unresolved post the MAP.[33] Given that the substance to be referred to arbitration is curtailed to a great extent in this case, what is actually being referred to the arbitration tribunal is the half of a whole. This can be potentially problematic when we see tax issues, intrinsically interrelated in a dispute, especially considering the narrow division of line between facts[34] for the perusal of awards. In a rather uncomplicated and rhetoric instance, if a tribunal works into interpretation of legal facts and tax facts intrinsically pertaining to definition, it would be imperative for the tribunal to go into details of previous MAP and maybe even hold a contradicting opinion based on interpretational differences. To illustrate, in a case pertaining to issues of categorization of a transaction and fair and equitable treatment of taxpayer under the BIT, if the MAP successfully resolved the first issue, the arbitral tribunal will only deal with the second issue, in which the tribunal can either choose to adopt an interpretation intrinsically followed by the host state for the sake of consistency or apply a contrasting construction based on its findings. Now, even if this is considered a far-fetched possibility, a rather foreseeable result would be unsatisfactory and there would be overlapping

32 UNCITRAL, The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 330 UNTS 38 (1958).

33 *Supra* note 4 & 25.

34 *Supra* note 16.

of multiple legal interpretations, particularly creating issues for enforceability in the host jurisdiction.

C. Breadth of the Tribunal Awards

In the case of *Yukos Universal Limited (Isle of Man)* v. *The Russian Federation* ["**Yukos**"],[35] the Tribunal constituted by the Arbitration Institute of the Stockholm Chambers of Commerce, in a first of its kind, declared an award against Russia while deciding on the claims of expropriation on merits. The Tribunal opined that the "*bad faith taxpayer*" doctrine is primarily governed by the Russian Constitution,[36] and to some extent by statutory provisions.[37] A prominent question in the series of legal battle related to this case was concerned with legitimacy of state action. Determining the bona fide nature of a taxation action and a procedural determinant of the nature of its actions puts many questions as to the methodology adopted by the Tribunal in accruing the exercise of sovereign power by the State as legitimate or illegitimate.[38] In this context, it is pertinent to note that the Tribunal in its decision took a detailed view of the VCLT[39] and that in further decision regarding conferring the liability with respect to attrition, the Tribunal took a comprehensive look into not just the treaty-based or contract based obligations on the Russian state, but also the International Principles of State Responsibility.[40] This interpretive borrowing worked specifically on harmonizing the text of the Energy Charter Treaty ["**ECT**"][41] with

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35 Yukos Universal Limited (Isle of Man) v. The Russian Federation PCA Case No. 2005-04/AA227 (2014).

36 Yukos Universal Limited (Isle of Man) v. The Russian Federation PCA Case No. 2005-04/AA227 (2014).

37 *Supra* note 1.

38 W Michael Reisman, *International Arbitration and Sovereignty*, 18 ARBITRATION INTERNATIONAL 231 (2002).

39 *Supra* note 22.

40 United Nations, Responsibility of States for Internationally Wrongful Acts, A/56/49(Vol. I)/Corr.4, (2001).

41 Energy Charter Treaty, 2080 UNTS 100 (signed in December 1994, entered into legal force in April 1998).

internationally accepted interpretive rules, especially when matters of fact were also related to the statements given by the Russian political personalities and the subsequent use of the impugned statements by the taxpayer as that of the State as a whole.[42] Further the Tribunal also took into consideration treaties with absence of a claw-back provision or limited claw-back provision to aid in its interpretation.[43] Contrary to the *Lone Star* award, in this case, the arbitral tribunal provided significant insights into the interpretation and application of the ECT while confirming its provisional application on all party states. Additionally, the Tribunal clarified that denial of benefits under the ECT requires explicit actions by States and cannot be inferred from unrelated agreements. In conclusion, the Tribunal's rulings as a whole reaffirmed the importance of honouring treaty obligations and applying consistent standards in interpreting treaty provisions.

V. What is the Necessity for Standard Interpretation in Tax Arbitration: Enforceability And Application-based Issues

Different tax treaties are drafted in uniquely different manners, providing a distinctive scope for interpretation and implementation by the drafting style, domestic methods of construction and jurisprudence. Similarly, the enforcement process of these awards especially in the host state also comes with different implications given the argument of sovereignty encompasses the absolute right of a State to levy taxes in accordance with its municipal laws. The enforceability of the award in the host jurisdiction is also heavily dependent on the acceptance of interpretation of the its municipal law. In the face of it, tribunals therefore cannot adopt different standards for interpretation of laws from across the jurisdiction. The variables for determining the compatibility of State or investor actions with DTTs, BITs, internal tax laws and international principles, therefore, need to be consistent throughout the process. Multiplicity of variables of interpretation doesn't only jeopardize the quality of the award but also puts

42 *Supra* note 38.
43 *Supra* note 1.

a fair objection on the enforceability of interpretation essentially against the spirit of law of the land.

An example of anxious host states, moving against the enforcement of the tribunal awards could be seen in the case of *Cairn Energy PLC and Cairn UK Holdings Limited* v. *The Republic of India*,[44] wherein India vehemently opposed the enforcement of the USD 1.2 Billion award against it in the Dutch courts. The main contention arises from the allegedly flawed interpretation of the scope of India-United Kingdom BIT[45] leading to a misconstrued jurisdiction.[46] India contends that the claim in dispute particularly relates to violation of the Indian Income Tax Laws which are not arbitrable. In a similar fashion, enforcement in *Yukos*[47] presented a series of arguments by the Russian state for the grant of state immunity in the London courts. This enforcement proceeding followed by those in the English Court of Appeal also provide an insight into multiplicity of law and precedents complicating the issues in hand and delaying the enforcement ultimately. The construction of this argument regards a deeply entrenched problem of arbitrability of domestic legislations with respect to claims made in exercise of sovereign functions.

A matter of concern arises here mainly due to the model clauses of OECD and UN.[48] The model clauses provide for ad-hoc arbitration post MAP proceedings.[49] In case of varied and layered claims on jurisdictions, the

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44 Cairn Energy PLC and Cairn UK Holdings Limited v. The Republic of India PCA Case No. 2016-7 (2020).

45 Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of India for the Promotion and Protection of Investments, India-United Kingdom, TS 1995 27, (14 March 1994).

46 Kuźniacki, Weeghel*, Cairn Energy: when retroactive taxation not justified by prevention of tax avoidance is unfair and inequitable*, 39 ARBITRATION INTERNATIONAL 125 (2023).

47 *Supra* note 35.

48 Yariv Brauner, *International tax treaty dispute resolution, the mutual agreement procedure, and the promise of mandatory arbitration for developing countries*, *in* RESEARCH HANDBOOK ON INTERNATIONAL TAXATION (Elgar 2020).

49 *Id.*

necessity of interpretation arises as compatibility between domestic jurisprudence and arbitral interpretation is tested. In its reference to the VCLT, the *Occidental Petroleum Corporation and Occidental Exploration and Production Company* v. *Republic of Ecuador (II)* ["**Occidental**"][50] Tribunal noted that, even in case of differential treaty based and contract-based claims, a common ground in matters of interpretation could be found due the Ecuadorian domestic jurisprudence. This impact of reciprocity provides an incentive into application of consistent legal interpretation. Similarly, the cases of *Occidental*[51] and *EnCana Corporation* v. *Republic of Ecuador* ["**EnCana**"][52] show how differential outcomes in tax-arbitration ensue on an identical set of facts due to the textual understanding and further interpretation of tax terms. Nevertheless, a common ground for contention lies in the interpretive value of application clauses with respect to taxation measures, the matters of interpretation become a key contestation for States against enforcement, in the case of occidental this being the argument against Tribunal's interpretation of "*matters of taxation*" and their arbitrability. Both the parties distinctly adopted interpretations which were poles apart.[53] The key outcome being a general understanding of compatibility in defining aspects of awards, borrowed from the core of international law.

Various tribunals have created interpretive approaches that differ from those outlined in the VCLT, or at the very least, place greater emphasis on certain factors over others.[54] Adopting VCLT's interpretive guide in a way benefits the tribunals with respect of concerns from the host state, because the domestic courts have obligation to interpret the treaties in accordance

50 Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador (II*)* ICSID Case No. ARB/06/11 (2006).

51 Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador (II*)* ICSID Case No. ARB/06/11 (2006).

52 EnCana Corporation v. Republic of Ecuador*,* LCIA Case No. UN3481, (2006).

53 Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador (II*)* ICSID Case No. ARB/06/11 (2006).

54 David Sloss, *Domestic Application of Treaties' in Duncan Hollis*, *in* THE OXFORD GUIDE TO TREATIES 367 (Oxford University Press 2012).

with the VCLT. However, the aim is not to merely provide with the hard fast rules/ standards for every exercise to a tribunal, it is rather to make standards which provide a clear-cut guideline onto interpretive standing on the incompatible aspects of domestic and international tax law. This evolves into providing for a guide into insights of international customary law, doctrines, and principles for the matter and usage of arbitration and tax-dispute resolution.

VI. Further Challenges to Arbitrability: Taxation Concerns with respect to the Pillar 2 reforms

The contestations in an international tax-dispute do not only consist of determination of layers of facts[55] and claims of gross misconduct by state entities/MNEs, but also consists of a huge arena for interplay of minor overlaps and developments in the international tax law regime. Initiatives like the anti-BEPS[56] and Pillar 2 (P2) reforms[57] introduced by the OECD, point at increasing complexity in the nature of future tax-arbitrations. The implementation of the Global Anti-Base Erosion rules ["**GloBE**"],[58] which are based on the OECD P2 Model Rules, by a significant number of States and jurisdictions has raised concerns about its potential impact on international investment protection under IIAs. IIAs form a good chunk of tax disputes arising out of investor-state relationships. These rules operate through a complex mechanism involving three interlocking rules: the Qualified Domestic Minimum Top-Up Tax ["**QDMTT**"], the Income Inclusion Rule ["**IIR**"], and the Undertaxed Profits Rule ["**UTPR**"].[59] In an effort to mitigate challenges to the QDMTT, the OECD has issued

55 *Supra* note 18.

56 OECD, OECD/G20 Inclusive Framework on BEPS Progress report (11 October 2023).

57 *Id.*

58 OECD & G20, T*ax Challenges Arising from Digitalisation of the Economy – Global Anti-Base Erosion Model Rules (Pillar Two)*, Inclusive Framework on BEPS (20 December 2021).

59 OECD, *Minimum Tax Implementation Handbook (Pillar Two)*, OECD/G20 Base Erosion and Profit Shifting Project (2023).

guidance aimed at discouraging legal challenges through sources external to the GloBE rules.[60] This guidance suggests that any attempt to challenge the QDMTT through judicial or administrative proceedings, based on constitutional grounds or specific agreements with the government, will not reduce the tax liability of multinational enterprises ["**MNEs**"] to zero in other States. Instead, such challenges would result in inevitable taxation under the IIR and UTPR. While the OECD's guidance seeks to ensure compliance with the GloBE rules, it may inadvertently raise issues of shared responsibility under international law, pressuring States to comply with these rules, even if it leads to violations of IIAs. This step greatly undermines the role of arbitration as a whole in the resolution of tax disputes arising out of conflicted transfer-pricing concerns. The BEPS Discussion Draft[61] notes that the implementation of MAP arbitration has fallen short of expectations and explores potential adjustments to the OECD Model arbitration provision to increase its attractiveness to governments. The need for standardized tax-arbitration procedure thus emerges again demanding the applicability of such procedure as a strong, reliable, and viable alternative.

Yet another important facet of these reforms also postulates a tripartite dispute emerging from the disagreements as to the individual tax concerns of two countries (or maybe many countries and a taxpayer). This nature of dispute includes even more clashes in interpretation along with the potential subversion of the Individual tax-payers representation in the dispute by its own home state given the technicality in discretion provided to its home state.[62] The doctrine of diplomatic protection, leaves the option of the investor to pursue claim against another country at the discretion of its home state. This may wreak the entire basis of awards and transform the nature of arbitration itself if invoked legitimately by home states, in

60 *Supra* note 1 & 27.

61 OECD, Revised discussion draft BEPS ACTION 7: Preventing the Artificial Avoidance of PE Status (15 May 2015).

62 *Supra* note 38.

protection of its own taxation regime and in advocacy for the benefits arising out of P2 reforms. In fact, as held by the Permanent court of International Justice:

> "*International law does not prevent one State from granting to another the right to have recourse to international arbitral tribunals in order to obtain the direct award to nationals of the latter State of compensation for damage suffered by them as a result of infractions of international law by the first State.*"[63]

VII. Conclusion

In conclusion, navigating the complexities of international tax disputes amidst taxation turbulence poses significant challenges, particularly in terms of arbitration's role. These disputes, which intersect with the fiscal sovereignty of States and the rights of taxpayers, call for a nuanced approach to resolution. The current preference for MAP over arbitration in the OECD and UN Models raises concerns about fairness and the efficacy of resolution mechanisms. As we progress towards global minimum tax standards and BEPS reforms, the importance of standardized interpretation rules in tax arbitration cannot be overstated.

Addressing these challenges necessitates improved guidance and standardization in tax arbitration procedures, including the incorporation of institutional arbitration provisions into the OECD and UN Models. This would establish a stronger framework for resolving tax disputes while safeguarding the interests of both States and taxpayers. Furthermore, it is crucial to tackle the emerging issues stemming from Pillar 2 reforms and ensure that arbitration remains a viable and efficient means of resolving international tax disputes within the increasingly intricate global tax landscape.

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[63] Factory at Chorzow (Germany v. Polland), Judgment, 1927 P.C.I.J. (ser A), No 9 (July 26).

UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS: AN ARTICLE-BY-ARTICLE COMMENTARY, SECOND EDITION, WOLTERS KLUWER BY PROF. (DR.) ECKART BRÖDERMANN

Prof. (Dr.) Ajar Rab[†]

The growth and the predominance of international arbitration in cross-border transactions needs no introduction. Commercial parties prefer a neutral, harmonised, and consistent law for dispute resolution. In this context, the need for a consolidated law on international contracts was felt in early 1970. However, it was not until 1994 that the first edition of the UNIDROIT Principles of International Commercial Contracts ["**UPICC**"] was published. They were then substantially revised in 2016 (fourth edition). While many in the international legal community see the UPICC as common ground, the UPICC serves many other purposes, such as being a vital tool for contract drafting, negotiations, and risk management.

Many academic debates, articles, books, and case law exist attempting to identify the right approach and test to determine the governing law of a contract. Most of such debates and time spent in litigation can be avoided if the counsel, parties, and arbitrators see the actual value of the UPICC without limiting it to the realm of soft law. Instead, a more open-minded approach recognising the UPICC as a set of contractual rules designed to harmonise contract law, providing clarity and consistency, would immensely benefit the legal and business community.

The author had the privilege to read the first edition (2018) of the articulate and practical commentary on the UPICC by Prof. (Dr.) Eckart J.

† Dr. Ajar Rab is the Founding Partner at ANR LAW LLP, Dehradun.

Brödermann[1] while researching for their book on drafting contracts.[2] Much like the experience of Professor Brödermann, the author was introduced to the UPICC as counsel in a matter. However, it was only after reading the first edition that the author was fascinated by the UPICC. Thus, witnessing the launch of the second edition published by Wolters Kluwer was indeed an honour. With much enthusiasm and interest, the author read the second edition and suggests that anyone connected to international trade and commercial contracts must read and have the book's second edition in their library.

The book follows the scholarly writing style of civil law but makes ample references to historical materials, case law, and alternative interpretations of the 211 articles contained in UPICC. Even though the book is written from a practical perspective, it serves as valuable guidance for academicians and legislators. The most striking feature of the book is the meticulous attention paid to the comparative analysis between common law and civil law.[3] The new chapter on 'Specific Kinds of Contracts' in the form of a checklist is particularly useful for anyone engaged in cross-border transactions relating to sales, services, and construction contracts, especially long-term contracts, which addresses key concerns of quality, delay, passing of risk, risk management, and other vital areas.

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1 ECKART J. BRÖDERMANN, UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS: AN ARTICLE-BY-ARTICLE COMMENTARY (Wolters Kluwer 2nd ed. 2018). The first edition received 35 book reviews in 19 jurisdictions as well as in 8 international journals. *C.f.* ECKART J. BRÖDERMANN, UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS: AN ARTICLE-BY-ARTICLE COMMENTARY (Wolters Kluwer 2nd ed. 2023).

2 AJAR RAB, DRAFTING CONTRACTS: ADVANCED PRINCIPLES (WITH COMPARATIVE GUIDANCE ON UNIDRIOT PRINCIPLES OF INTERNATIONAL CONTRACTS AND CONVENTION ON INTERNATIONAL SALE OF GOODS (CISG)) (Eastern Book Company 2024).

3 For example, the reference to the German concept of *Nachfrist*. ECKART J. BRÖDERMANN, UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS: AN ARTICLE-BY-ARTICLE COMMENTARY 392 (Wolters Kluwer 2nd ed. 2023).

The experience and expertise of Prof. Brödermann (as an academic and a practitioner) shines through thoroughly in the new edition with comprehensive references to arbitral awards, academic literature, legislative materials, country reports, and case law. The use of tables to create timelines for legislative history allows the reader to follow the development of the UPICC without being overwhelmed by historical weight. Particularly useful is the glossary of Latin and French terms and the organised presentation of the preparatory work of the UNIDROIT.

One of the many notable achievements of the book is the detailed articulation in addressing practical questions with brief yet distinguished headings. For example, in a single sentence, the author succinctly summarises the heart of contract management, "*Who owes What to Whom When and under Which conditions and with Which limits of liability*".[4]

Another example is the practical solution to a conflict between standard terms and non-standard terms with reference to "common sense",[5] which not only reflects the insightful and vast experience of the author but serves as a valuable tool for any practitioner in drafting or interpreting international commercial contracts from a commercial and practical point of view. The book makes relevant comparisons and draws from literature and case law on the Convention of International Sale of Goods ["**CISG**"] and manages to present them with articulate temperance. The author offers 'A General Note of Caution' reminding readers, especially lawyers, to be mindful of fundamental cultural differences and perceptions of 'what is done' or 'normal state of the art', depending on the jurisdiction.[6]

The book accurately captures instances of a trend towards global adoption of the UPICC. It deeply reflects on how the UPICC can play a more significant role, not only in dispute resolution but in negotiations and drafting contracts, serving as a template or even drawing logical coherence

4 *Id.* at 281.
5 *Supra* note 3 at 141.
6 *Supra* note 3 at 19.

in commercial matters. Such an approach is largely missing from the current jurisprudence on commercial issues in India and many other jurisdictions. Instead of borrowing from common law precedents, a reference to the UPICC and the extensive work of experts, the fruit of much research, thought and debate[7] by the courts would provide a desired boost to commercial jurisprudence and its harmonisation with global standards.

[7] 20 ERIC CLIVE, COMMENTARY ON THE UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS (PICC)251-252 (OUP Oxford 2015).

BOOK REVIEW: ALAN M. ANDERSON AND HERMAN VERBIST (EDS), *EXPEDITED INTERNATIONAL ARBITRATION: POLICIES, RULES, AND PROCEDURES*, (KLUWER LAW INTERNATIONAL, 2024)

Jake Lowther[†]

Abstract

The question of efficiency in international arbitration remains ever at the forefront of debate, with many concerned about its "judicialisation", and increases in time and cost. One method to improve efficiency in response to this criticism is by the application of specific rules on expedited arbitrations. This article is a book review of Expedited International Arbitration: Policies, Rules, and Procedures. It provides arbitration practitioners with a comprehensive and practical analysis of expedited arbitration procedures, under various rules and from a diverse range of qualified international perspectives.

I. Introduction

International arbitration has emerged as the preferred method of dispute resolution in global business. Among the reasons for arbitration's success, in addition to party autonomy, privacy, and confidentiality, have been its efficiencies in time and cost. However, there are concerns that arbitration has come to "*resemble the judicial process it was intended to replace, especially in terms of speed, costs, and efficiency*."[1] Indeed, the editors consider international commercial arbitration to be "*ill.*"[2] The author does not necessarily agree

† Jake Lowther is dual qualified lawyer (Sweden and Australia) and is currently a Specialist Counsel at the SCC Arbitration Institute.

1 ALAN M. ANDERSON & HERMAN VERBIST, EXPEDITED INTERNATIONAL ARBITRATION: POLICIES, RULES AND PROCEDURES, "Overview" (Kluwer Law International 2024).

2 *Id.*, "Introduction", p. 1.

with this assertion but agrees that more can be done to maintain efficiency and safeguard its future.[3]

Mindful of these concerns, the Stockholm Chamber of Commerce ["**SCC**"] strives to ensure the efficiency and expeditiousness of cases administered under the SCC Rules. Since 1998, the SCC Rules have included specific Rules for Expedited Arbitrations.[4] According to the SCC's statistics,[5] in the past five years, at least 30% of cases have been administered under the SCC Expedited Arbitration Rules. Moreover, to facilitate party autonomy and maximise flexibility, the SCC has also developed so-called "*combined clauses*", providing *inter alia* for the SCC Expedited Arbitration Rules to apply as the parties' first choice. However, should one of the parties request the application of the SCC Arbitration Rules, the SCC Board decides the applicable rules based on the complexity, amount in dispute, and other circumstances of the case.[6]

This book, *Expedited International Arbitration: Policies, Rules, and Procedures*, represents a thorough yet practical analysis of the expedited arbitration procedure from a diverse range of qualified international perspectives. The following parts of this review will set forth the contents of the book before making concluding remarks.

II. Expedited International Arbitration: (Re)discovering Traditional Advantages of the Arbitral Process

3 Unless otherwise stated, the views and opinions expressed in this chapter are the author's own.

4 SCC Arbitration Institute, *SCC Rules* (2024), *available at* https://sccarbitrationinstitute.se/en/resource-library/scc-rules.

5 SCC Arbitration Institute, *SCC Statistics* (2024), *available at* https://sccarbitrationinstitute.se/en/about-scc/scc-statistics-0.

6 SCC Arbitration Institute, *Dispute Resolution Clause – English* (2024), *available at* https://sccarbitrationinstitute.se/en/dispute-resolution-clauses/dispute-resolution-clause-english.

Ylli Dautaj sets the tone from the first chapter. He considers the fundaments of arbitration and its so-called "*judicialisation*", presenting a call to arms to "*rediscover*" the original advantages of international arbitration, in particular time and cost efficiency, through the uptake of expedited arbitration. The author agrees with Dautaj that doing so "*will improve the arbitral experience*" and consequently, increase the "*global standing*" of arbitration.

III. Expedited Arbitration in Action: Is the Practice Making Perfect?

For arbitration practitioners, expedited arbitration is no recent development. In the second chapter, Jonas C. Hinrichsen, Reza Shahrokhi, and Erin Cronjé consider the efficacy of the expedited arbitration mechanisms based on the data accumulated to date. They conclude that expedited arbitration has "*emerged as a viable solution to address the inefficiencies inherent in traditional international arbitration.*"[7]

IV. Stopping the Arms Race: Page Limits in International Arbitration

Joshua B. Simmons and Natalia Szlarb address in the book's third chapter the question of page limits. In their view, expedited arbitration rules should "*lead the way*" in establishing presumptions of page limits, to ensure the mechanism achieves its goals of efficiency and justice.

V. The Strain Between Efficiency and Due Process in Expedited Arbitration: A Fertile Ground to Challenge the Award?

In the book's fourth chapter, Shahrizal M. Zin considers whether the expedited features of the arbitration procedures have compromised party autonomy and due process. Addressing issues of the enforcement and

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7 Jonas C. Hinrichsen, Reza Shahrokhi & Erin Cronjé, *Expedited Arbitration in Action: Is the Practice Making Perfect?*, *in* ALAN M. ANDERSON & HERMAN VERBIST, EXPEDITED INTERNATIONAL ARBITRATION: POLICIES, RULES AND PROCEDURES 57 (Kluwer Law International 2024).

challenge of an expedited arbitration award, Zin argues that "*balancing efficiency and due process is the way forward*" and the tribunal must, acting fairly and impartially, ensure each party has a reasonable opportunity to present its case.

VI. The Advent of Accelerated Arbitral Procedures: Public Policy Considerations in the Enforcement of Arbitral Awards

The book's fifth chapter continues the theme of enforcement concerns. Yasaschandra Devarakonda homes in on public policy considerations in accelerated procedures, with reference to the United Nations Commission on International Trade Law ["**UNCITRAL**"] expedited arbitration rules and reflections on the future of expedited arbitration.

VII. The UNCITRAL Expedited Arbitration Rules: A Critical Review

Continuing the UNCITRAL theme, Herman Verbist and Alan M. Anderson in the book's sixth chapter analyse the UNCITRAL Expedited Arbitration Rules in details, including their "*opt-in*" nature with an "*out*" mechanism. The chapter then turns to the work of UNCITRAL Working Group II to develop a model clause for "*highly expedited arbitration*". In the authors' view, the developments at UNCITRAL demonstrate the international arbitral community's ongoing interest in expedited arbitration.

VIII. A Neglected Blueprint: The LMAA's Small Claims Procedure

In the book's seventh chapter, author James Clanchy examines existing procedures in "*disintermediated arbitration*", i.e., an arbitration without the involvement of an institution's secretariat, and in particular the Small Claims Procedure of the London Maritime Arbitrators Association ["**LMAA**"]. In Clanchy's view, such procedures can be faster and less expensive, and their success deserves further attention from the UNCITRAL Working Group II.

IX. ICC Expedited Arbitration Proceedings: Review and Analysis

The eighth chapter of the book sees authors Juan Felipe Merizalde and Juan Pablo Gómez provide a comprehensive analysis of the International Chamber of Commerce's ["**ICC**"] Expedited Arbitration Rules, as well as thoughts on possible reforms of expedited arbitration. The author agrees with Merizalde and Gómez's assessment that expedited arbitration will not suit every dispute, and that parties should carefully consider its suitability when drafting their dispute resolution clauses.

X. The Australian Approach to Expedited Arbitration: Exploring the 2021 ACICA Rules

In the book's ninth chapter, Guillermo García-Perrote, Ella Wisniewski, and Daniel O'Neil consider the antipodean approach to expedited arbitration, including the applicable ethical considerations for participants. The chapter also includes a useful comparison of the expedited arbitration rules adopted by the leading Asia-Pacific arbitral institutions. The authors conclude that the expedited arbitration rules of the Australian Centre for International Commercial Arbitration ["**ACICA**"] "*strike the right balance between maximizing efficiency and safeguarding the procedural integrity of arbitral proceedings*".[8]

XI. Expedited Arbitration under ICSID Institution Rules 2022 and What It Means for Investors

Switching focus to investment arbitration, Venetia Argyropoulou in the book's tenth chapter analyses the 2022 International Center for Settlement of Investment Disputes ["**ICSID**"] arbitration rules. The chapter considers the ICSID expedited arbitration rules from the perspective of the investor, assessing procedural efficiency and whether due process is maintained. The

[8] Guillermo García-Perrote, Ella Wisniewski & Daniel O'Neil, *The Australian Approach to Expedited Arbitration: Exploring the 2021 ACICA Rules*, *in* ALAN M. ANDERSON & HERMAN VERBIST, EXPEDITED INTERNATIONAL ARBITRATION: POLICIES, RULES AND PROCEDURES 204 (Kluwer Law International 2024).

author concludes with several unanswered questions, including whether the new rules will provide parties with an efficient mechanism or give rise to new challenges.

XII. A Comparative Analysis of Expedited Arbitration Rules in ICSID and UNCITRAL for Investor-State Disputes

Carlos Eduardo Torres Giraldez continues the investment arbitration focus in the eleventh chapter, comparing the ICSID and UNCITRAL expedited arbitration rules. The chapter concludes in line with its predecessors, i.e., that while expedited arbitration may be useful in expediting the resolution of certain investment cases, its suitability will depend on factors such as the dispute's complexity, party consent, the balance between speed and fairness, and "*the availability of necessary resources and expertise*".[9]

XIII. Balancing Efficiency and Party Autonomy in Expedited Procedures: Assessing Reforms under the ICC and Swiss Rules

In the book's twelfth chapter, author Yassine Sangaré turns the reader's attention to Europe and the question of party autonomy. The chapter compares the ICC's expedited arbitration rules with those of the Swiss Arbitration Centre, focusing on the balance between party autonomy and efficiency, particularly in the context of enforcement.

XIV. Expedited Arbitration as a Competitive Factor of Arbitration Institutions: A Comparative Analysis of ISTAC, DIS and ICC

In the thirteenth chapter of the book, Esra Yildiz Üstün continues the comparative theme, considering the expedited procedures under the rules of the German Arbitration Institute ["**DIS**"], the ICC, and the Istanbul

[9] Carlos Eduardo Torres Giraldez, *A Comparative Analysis of Expedited Arbitration Rules in ICSID and UNCITRAL for Investor-State Disputes*, *in* ALAN M. ANDERSON & HERMAN VERBIST, EXPEDITED INTERNATIONAL ARBITRATION: POLICIES, RULES AND PROCEDURES 235 (Kluwer Law International 2024).

Arbitration Centre ["**ISTAC**"]. The application of each set of expedited rules is based on the amount of money in dispute, however, Üstün points to the limits of this approach, particularly where this amount is in dispute, and that other factors should also be considered.

XV. ICSID's Mediation Rules and Procedures: An Initiative Towards an Expedited and Equitable Resolution of Investor-State Disputes

The author of the book's fourteenth chapter, Srilal M. Perera, adopts a different approach and considers the use of mediation, such as under the ICSID rules, as a means to expedite the resolution of investment disputes. In Perera's view, mediation can provide the parties with expedient and cost-efficient "*win-win*" results, and that, despite the lack of data, there appears to be an increasing demand for mediation in the context of investment disputes.

XVI. Expedited Arbitration and Arb-Med in the Far East (Macau)

Continuing the mediation theme, Hugo Luz dos Santos in the book's fifteenth chapter discusses arbitration-mediation ["**Arb-Med**"], the role of the decision maker, and the effect of cultural differences, particularly in Asia. A party's cultural background is of "*paramount importance*" when it comes to selecting the method of dispute resolution, and dos Santos advocates for tailoring mediation styles depending on the culture(s) involved.

XVII. Examining the Practice of Expedited Arbitration in China: Strengths, Difficulties, and Prospects

Yuan Fang in the book's sixteenth chapter maintains the Asia focus, this time with a comparison of the expedited procedures of Chinese arbitral institutions, such as Beijing Arbitration Commission/Beijing International Arbitration Center ["**BAC/BIAC**"] and China International Economic and Trade Arbitration Commission ["**CIETAC**"]. Fang highlights the need for

local arbitral institutions to ensure party adherence to time limits, as well as for institutions and the legislature to make efforts to promote expedited arbitration as a means of enhancing efficiency.

XVIII. The Development of Expedited Arbitration in the Offshore Space: An Examination of Expedited Arbitration in the British Virgin Islands, Bermuda, and the Cayman Islands

In the seventeenth chapter of the book, authors Peter Ferrer, Marcia McFarlane, and James Petkovic turn to the Caribbean and the expedited arbitration regimes of the British Virgin Islands ["**BVI**"], Bermuda, and Cayman Islands, with BVI and its International Arbitration Centre emerging as a model for other offshore jurisdictions to emulate.

XIX. Expedited Arbitration Rules: When Are They Applied?

Authors Rose Maria Sebi, Rahul Kr. Kanoujia, and Parnika Rai in the book's penultimate chapter guide the reader through expedited arbitration under the rules of the ICC, Singapore International Arbitration Centre ["**SIAC**"], Hong Kong International Arbitration Centre ["**HKIAC**"], the Mumbai Centre of International Arbitration ["**MCIA**"], Delhi International Arbitration Centre ["**DIAC**"], and UNCITRAL. The authors note *inter alia* that parties are seeking a process with fewer procedural steps, shorter time limits, and reduced costs and increasingly choosing to apply expedited arbitration rules to their disputes.

XX. Expedited International Arbitration in the MENA Region

In the book's final chapter, Can Eken and Tariq Mahmood round off the discussions with a detailed analysis of expedited arbitration rules of the Middle East and North Africa ["**MENA**"] region. The authors note that the region's institutions closely follow international practice, with Bahrain Chamber for Dispute Resolution ["**BCDR**"], Saudi Center for Commercial Arbitration ["**SCCA**"], Dubai International Arbitration Centre ["**DIAC**"],

Casablanca International Mediation and Arbitration Centre ["**CIMAC**"], and ISTAC all offering expedited procedures. However, the authors note room for improvement where such procedures have not yet been adopted, e.g., the Qatar International Centre for Conciliation & Arbitration ["**QICCA**"], the Cairo Regional Centre for International Commercial Arbitration ["**CRCICA**"], and the Lebanese and International Arbitration Center of the Beirut Bar Association ["**LIAC-BBA**"], in particular because of the volume of small to medium sized disputes.

XXI. Concluding Remarks

A wise arbitration practitioner once anonymously said that the parties to an arbitration expect "*a good result, rendered fast, and in a reliable manner*". In the author's view, the SCC Expedited Arbitration Rules certainly deliver on this promise. However, as many authors in this book conclude, expedited arbitration does not suit every dispute. The SCC's mantra is for the parties to choose "*the right tool, for the right dispute*".[10] This may include mediation, small claims procedures, or even "*non-expedited*" arbitration. The administration of complicated cross-border disputes may even demand a certain "*judicialisation*". Hence the broad consensus to avoid the application of expedited procedures based solely on the "*amount in dispute*".

Thus, *Expedited International Arbitration: Policies, Rules, and Procedures* provides a thorough and interesting deep dive into expedited arbitration and beyond. It is recommended to anyone interested in international arbitration and in safeguarding its role as an efficient, reliable method of resolving commercial and investment disputes, in support of international trade and commerce.

[10] Jake Lowther, Lorenzo Nizzi & Samuel Hörberg Delac, *Costs of arbitration and apportionment of costs under the SCC Rules* (SCC Arbitration Institute, October 2024) *available at* https://sccarbitrationinstitute.se/wp-content/uploads/2024/12/report_costs_of_arbitration_final.pdf.