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For any Queries, please reach out to,

Damodaram Sanjivayya National Law University, Visakhapatnam

NYAYAPRASTHA, Sabbavaram, Visakhapatnam-531035 Andhra Pradesh, INDIA

Phone: +91 8924 248216

Email: dsnluvsp@gmail.com

Website: https://dsnlu.ac.in/

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VICE-CHANCELLOR'S MESSAGE

It gives me immense pleasure to present the inaugural edition of the Journal on Arbitration and Allied Fields (JALAF). I am thrilled to see the level of scholarship and critical analysis on display in this edition. The articles featured in JALAF offer valuable analysis, with a particular emphasis on transparency, accountability, and party autonomy, aiming to deepen the reader's comprehension of arbitration law and its practical application.

This journal marks a significant milestone in our university's ongoing commitment to advancing scholarship and fostering meaningful academic and professional discourse in the ever-evolving field of arbitration. I would like to take this opportunity to congratulate the writers, editors and management of the journal on successfully bringing this publication. My special appreciation to the Core Committee for their able leadership. I wish them all the very best for the future and hope that this journal will be useful edition to the existing literature on the subject and also serves the needs of the scholars and practitioners in the field of law. I look forward to all future editions of the Journal.

Prof. Dr. Surya Prakasa Rao,
Chairperson, Centre for Alternate Dispute Resolution (CADR) Vice Chancellor,
Damodaram Sanjivayya National Law University (DSNLU)

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Mr. Sahil Kanuga is a Partner at Cyril Amarchand Mangaldas, specializing in White Collar Crime & Dispute Resolution. He serves on the AAA–ICDR Asia Advisory Committee and also a member of SIMC's Specialist Mediator Panel (India). He was recognised as a 'Recommended Lawyer' in Dispute Resolution by Legal 500 APAC 2024. He has co-authored several articles, including for SIAC India Edition.

Prof. Steve Ngo is the Founding President of the Beihai Asia International Arbitration Centre, Singapore. As an international arbitrator, academic and arbitration specialist, he has vast experience in the industry covering Asia and beyond. He also has extensive experience in designing and delivering professional training programmes and postgraduate courses on arbitration across Asia. He has written and published extensively on arbitration and dispute resolution in various national and international publications.

Mr. Tariq Khan is the Head of International Arbitration at M&Co. Legal, UAE, and former Registrar of the International Arbitration and Mediation Centre (IAMC). Featured in the Forbes Legal Powerlist 2020–2021 and BW Legal 40 Under 40, he is recognized by SCC Online as an arbitration expert. He has authored several books, including a commentary on Indian arbitration law, and has over 50 publications. He also teaches arbitration as guest faculty at leading Indian law schools.

Dr. Kabir Duggal is an attorney at Arnold & Porter, New York, specializing in international arbitration and public international law. He is recognized as a "Chartered Arbitrator" by both CIArb and AIADR. He has been listed as a Global Leader and Thought Leader in International Arbitration by Who's Who Legal since 2021. He teaches at Columbia Law School and serves as Managing Editor of The American Review of International Arbitration. He has co-authored several books on investment arbitration and has received the Burton "Law360 Distinguish Legal Writing Award" for his scholarly writings.

Mr. Harshad Pathak works as a Consultant (International Arbitration) with Mayer Brown, Paris. He acted as counsel in arbitral proceedings pursuant to the ICSID Convention, UNCITRAL Arbitration Rules, SIAC Rules, ICC Arbitration Rules, VIAC Rules of Arbitration and Mediation, among others. He has authored several articles published in platforms including Manchester Journal of International Economic Law, IISD ITN Quarterly, among others.

Mr. Rahul Donde is the founder of Rahul Donde Dispute Resolution and specializes in international commercial and investment arbitration, serving as arbitrator, counsel, tribunal secretary, and assistant. He got recognised by Who's Who Legal, Legal 500, and Expert Guides and was ranked among the "most highly regarded" non-partners in EMEA (WWL Arbitration 2023). He has authored works for several international publications, including Routledge (UK).

Ms. Manini Brar has acted as counsel, advisor to the Government of India on matters of international investment law. She founded Arbridge Chambers & Solicitors at New Delhi. Currently, Manini is a Board Member of the Indian Women in International Arbitration practitioner's group, Global Steering Committee member of the Young Arbitral Women Practitioners Group, an empanelled arbitrator with the Singapore International Arbitration Centre (SIAC reserve panel), and the Thailand Arbitration Centre (THAC).

INDEX

Short Articles

Case Comment

EDITORIAL NOTE

Arbitration remains a dynamic and ever-evolving field, continually adapting to the shifting demands of international commerce and dispute resolution. Through these years, we have witnessed key landmark developments and reforms that have profoundly reshaped arbitration practice, both in India and globally. This inaugural issue of 'Journal on Arbitration Law and Allied Fields' (*JALAF)* features a carefully curated selection of articles that not only reflect the breadth and complexity of these changes but also highlight the progressive nature of arbitration law. By engaging with pressing contemporary issues across domestic and international arbitration, the journal seeks to bridge the nuanced intersection between academic inquiry and real-world application, underscoring the vital role arbitration plays in modern legal practice

It is a privilege to have distinguished members of the legal community generously contribute their time and expertise to advance legal scholarship by supporting student-led initiatives. We take pride in the presence of some of the most esteemed figures in the field of arbitration as our Board of Advisors. We are deeply grateful to these globally renowned jurists, practitioners, scholars, and thought leaders who, through their invaluable guidance, continue to enrich the vision and direction of this Journal.

This inaugural edition of the *Journal on Arbitration Law and Allied Fields* aims to explore contemporary issues in domestic and international arbitration and study the dynamic confluence of the academic and transactional world presented by this field of law. The meticulously picked articles for this journal indicate this wide paradigm and demonstrate its ever-evolving nature.

We extend our sincere gratitude to our esteemed peer-review board for their time, insight, and meticulous evaluation of submissions. Finally, we congratulate and thank all the authors who entrusted us with their scholarly work. While not all submissions could be published, each manuscript demonstrated unique merit and collectively enriched the ongoing discourse and academic culture in the field of arbitration law.

This inaugural edition is not merely the beginning of a publication, it is the initiation of a dialogue. A dialogue committed to advancing the understanding of arbitration law and enriching its practice through rigorous, accessible, and forward-looking scholarship.

We are committed to supporting the practitioners and students of arbitration law in their ongoing journey of learning and vigilance. In line with this commitment, this issue features a collection of articles that offer incisive analysis of the most pressing contemporary issues shaping the field of arbitration in India. The contributions explore contemporary issues in commercial and investment arbitration, procedural innovations, comparative jurisprudence, and the interplay between arbitration and areas such as public international law, technology, and regulatory frameworks.

This edition begins with long article, '*Unstamped Arbitration Agreements in India: A Doctrinal and Comparative analysis post-NN GLOBAL'* examines the doctrinal shifts post-*NN Global,* analysing their impact on the validity and enforceability of arbitration agreements in India. It advocates aligning India's arbitration regime with international standards to uphold party autonomy and ensure procedural consistency.

'Role of Arbitration in Curbing the Enigma of International Anti-Competitive Activities: A Private Enforcement Mode' highlights the cross-border anti-competitive activities and enforcement challenges, especially concerning the LDCs and DCs and advances a set of explicit policy suggestions primarily directed toward anti-trust regulatory mechanisms and the arbitral proceedings for fair and efficient redressal of disputes.

'Mediation in Airport Concession and Infrastructure Disputes' explores the use of mediation in resolving disputes in airport concession agreements and infrastructure projects. It examines best practices, policy gaps, and offers practical insights to enhance dispute resolution in the aviation sector. Lastly, emphasizes the need for multi-stage dispute resolution process embedded with concession contracts can address issues between contracting parties and stakeholders.

'Arbitrating Construction Contracts: Subcontracts, Multiparty Challenges, and the Third-Party Beneficiary Doctrine' highlights the uncertainty of third-party beneficiary doctrine in construction

arbitration in India though it has been widely recognizing in foreign countries. The article examines the validity and concerned complexities surrounding the multi-party arbitration in construction disputes.

'Examining Online Arbitration with Special Emphasis on Confidentiality and Privacy: Emerging Trends and Issues' addresses the confidentiality and privacy requirements in arbitration and how major jurisdictions have addressed it. It also looks into challenges and solutions, and how changes on policy level can be incorporated in order to protect privacy and confidentiality in online arbitration.

'Role of Sovereign Immunity in International Arbitration' examines the application of Doctrine of Sovereign Immunity to commercial transactions by analysing its types and judicial approaches to arbitration involving private and state entities.

In *'Navigating Delays in Arbitration: Perspectives on Condonation of Delays in Appeals Under Arbitration and Conciliation Act, 1996'* underscores the need for consistency in arbitration timelines to uphold its goal of swift dispute resolution. It examines the interplay between the Arbitration and Conciliation Act and the Limitation Act, judicial interpretations of delay condonation, and the scope of extending an arbitrator's mandate under Section 29A.

The short article, *'Impleadment of Non-Signatories by Arbitral Tribunals: A Shift in Modus Operandi'* traces the shift in jurisprudence from *Chloro Controls* to *Ajay Madhusudan*, highlighting the gradual empowerment of tribunals over courts in matters of non-signatory impleadment. The paper critically analyses this transition through key rulings and its implications for procedural fairness and India's pro-arbitration stance.

Next in, *'From Centrotrade to the Draft Arbitration and Conciliation (Amendment) Bill, 2024: Do We Need Appellate Arbitral Tribunals?'* suggests on the evolving concept of appellate arbitration, particularly in light of Section 34A of the Draft Arbitration and Conciliation (Amendment) Bill, 2024, and acknowledges the need to incorporate the two-tier arbitration clause from its vide recognition by Honourable Supreme Court in Centrotrade II.

In *'Judicial Interference in Determining the Existence and Validity of Arbitration Agreements in India'* critically examines the extent of judicial intervention in determining the existence and evaluating of arbitration agreements by court in India in light of Magic Eye Developers case.

'Re-Evaluating the Legality of Unilateral Arbitrator Appointment Clauses in Public Sector Agreements' examines the evolving legal stance on unilateral arbitrator appointments and their impact on PSUs in India, particularly after the Supreme Court's prohibition of such clauses. Analyses the shift from the 126th Law Commission Report's through principles of fairness and impartiality, offering institutional alternatives to balance PSU autonomy with neutral arbitration.

The Case comment on *'Examining the scope of curative jurisdiction in arbitration: The contentious case of DMRC v. DAMEPL and its implications for arbitration in India*' critically examines the use of curative jurisdiction in challenging arbitral awards, focusing on its implications for the finality of arbitration and the risk of excessive judicial intervention and ongoing tension between 'upholding arbitral finality' and 'ensuring complete justice', assessing whether the Supreme Court's ruling strikes the right balance.

We hope these 12 articles proves to be engaging and a prolific read and improves the quality of literature on arbitration available to the student community and legal fraternity. We look forward to receiving feedback from our readers.

Editorial Board,

Journal on Arbitration Law and Allied Fields *(JALAF)*

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UNSTAMPED ARBITRATION AGREEMENTS IN INDIA: A DOCTRINAL AND COMPARATIVE ANALYSIS POST-NN GLOBAL

- *SPANDANA REDDY BOMMU*[1]

ABSTRACT

"Stamping Requirements and the Validity of Arbitration Clauses: Examining the Indian Legal Landscape" is a comprehensive study on the challenges of enforcing unstamped arbitration agreements in India, crucial for understanding the balance between statutory requirements and practical arbitration. The paper explores the interplay between the Arbitration and Conciliation Act and the Indian Stamp Act, analyzing critical Supreme Court and High Court rulings, including SMS Tea Estates and NN Global, to trace the evolving judicial interpretations impacting arbitration agreements. The analysis culminates in targeted reforms to enhance India's arbitration framework, reinforcing its role in the global economy. Fundamental principles, such as the doctrine of separability and the Kompetenz-Kompetenz principle, are evaluated in the context of procedural compliance and arbitration autonomy.

The paper further contrasts India's practices with international standards by analyzing the flexible approaches adopted in jurisdictions such as the United Kingdom, the United States, Pakistan, and China. By highlighting these divergences, it critiques India's stringent adherence to stamping requirements and underscores the need for procedural reforms to enhance efficiency. The key recommendations include granting arbitral tribunals the authority to address procedural issues, such as stamping, and aligning India's arbitration framework with global best practices. These reforms are envisaged to establish India as a premier arbitration hub, strengthening its position in the international economic landscape.

***Keywords**: Alternative Dispute Resolution, Indian Stamp Act, Unstamped Agreements, Legal Analysis, Comparative Jurisprudence*

[1] 5th year BBA-LLB, Symbiosis Law School, Hyderabad, Gmail: bommuspandanareddy@gmail.com.

I. INTRODUCTION

Alternative Dispute Resolution (**ADR**), comprising mechanisms such as Mediation, Arbitration, Conciliation, and Negotiation, has assumed a critical role within the contemporary legal framework, offering structured and efficient pathways for dispute resolution outside conventional litigation. The adoption of ADR has grown considerably in recent years, primarily attributed to its time- and cost-efficiency, particularly in commercial dispute resolution. This paper focuses on a pivotal challenge in Indian arbitration jurisprudence: the enforceability of arbitration clauses in unstamped agreements, an issue reignited by the Supreme Court's 2023 NN Global Constitution Bench judgment (3:2 split). The judgment underscores a doctrinal divide between procedural adherence (treating stamping as a jurisdictional prerequisite) and arbitral autonomy (permitting tribunals to address stamping deficiencies later). While existing scholarship predominantly analyzes pre-2023 precedents such as SMS Tea Estates and Garware, this study bridges a critical gap by examining how the unresolved tension in NN Global undermines arbitration's efficacy. It advocates for reforms harmonising India's framework with international standards such as the UNCITRAL Model Law, emphasizing party autonomy while ensuring statutory clarity in stamping requirements.

Section 7 of the Arbitration and Conciliation Act 1996 delineates the parameters for an arbitration agreement, stipulating that such an agreement must be in writing, either as a clause within a broader contractual arrangement or as an independent document.[2] Notably, Section 7 allows for the inference of an agreement to arbitrate through an exchange of statements of claim and defence, provided there is no dispute over the intent to arbitrate. This provision emphasizes the necessity for a documented arbitration agreement to substantiate the parties' intention to resolve disputes

[2] Arbitration and Conciliation Act 1996, s 7

through arbitration. It grants exclusive jurisdiction to the arbitral tribunal, thereby minimizing the scope for judicial intervention.[3]

Concurrently, the Indian Stamp Act 1899 requires agreements to be adequately stamped to attain admissibility as evidence in judicial proceedings. This statutory mandate extends to contracts containing arbitration clauses, presenting an additional layer of complexity concerning the enforceability of arbitration agreements embedded within unstamped or insufficiently stamped instruments. The Indian judiciary has explored this issue in cases such as *SMS Tea Estates Pvt. Ltd. v. Chandmari Tea Co. Pvt. Ltd*., where the Supreme Court ruled that arbitration agreements within unstamped contracts are inadmissible as evidence until the appropriate stamp duty is paid, underscoring the procedural importance of stamping for enforceability.[4]

Additionally, as recognized by the Arbitration Act, the doctrine of separability upholds the notion that an arbitration clause operates independently of the primary contract's validity. This principle is designed to preserve the parties' intent to arbitrate disputes, ensuring that an arbitration clause may remain enforceable even if the main contract is deemed invalid or terminated due to specific unmet conditions. The Supreme Court in *National Agriculture Cooperative Marketing Federation (India) Ltd. v Gains Trading Ltd.,* affirmed this doctrine, noting that the arbitration clause stands autonomous from the contract's substantive terms.[5] However, in cases where an arbitration clause is part of an unstamped agreement, as explored by the judiciary, the separability principle does not render the clause enforceable independently until the primary agreement is duly stamped.

This paper conducts a comprehensive analysis of pivotal judicial decisions addressing the enforceability of unstamped arbitration agreements, explicitly examining their intersections with the Indian Contract Act and the doctrine of separability. Further, it evaluates whether an arbitration agreement may be rendered enforceable without registration as the Registration Act 1908 mandated. By delving into these issues, the paper seeks to advance a nuanced understanding of

[3] A Shrivastava, 'Garware Wall Ropes and Indo Unique: The Road Ahead in Treatment of Arbitration Clauses Contained in Unstamped Instruments' (2021) 3 *Indian Arbitration Law Review* 66
[4] *SMS Tea Estates (P) Ltd. v. Chandmari Tea Co. (P) Ltd*. (2011) 14 SCC 66 (India)
[5] *National Agriculture Cooperative Marketing Federation (India) Ltd. v Gains Trading Ltd.*, (2007) 5 SCC 692 (India)

arbitration enforceability in India, offering insights that may guide legislative reform and enhance consistency in the application of arbitration law.

II. JUDICIAL ANALYSIS: ENFORCEABILITY OF UNSTAMPED ARBITRATION AGREEMENTS

Section 11 of the Arbitration and Conciliation Act elucidates the powers conferred on a court to appoint arbitrators.[6] Section 11(6A) has been inserted in the Act through a 2015 amendment wherein it restricted the powers of the Court only to examine the existence of the arbitration agreement by the 246th Law Commission Report.[7] It can be observed that this amendment was brought after the Apex Court transgressed its power by expanding the scope of enquiry and intervention by a court while appointing the arbitrators[8] to ensure the objectives of the Act are underpinned.

A. SMS Tea Estates: Enforceability and Stamping Compliance

In *SMS Tea Estates (P) Ltd. v. Chandmari Tea Co. (P) Ltd,* the Supreme Court first addressed the enforceability of arbitration clauses in unstamped agreements.[9] In this case, a two-judge bench of the Supreme Court of India unequivocally held that under Section 11 of the Arbitration and Conciliation Act, an arbitrator cannot be appointed when the arbitration clause forms part of an unstamped agreement. The Court explained that Section 35 of the Indian Stamp Act prevents an unstamped document from being admissible as evidence, precluding judicial action based on such an agreement.[10] Furthermore, the Court asserted that the judiciary must impound any document found to be inadequately stamped. Once the required stamp duty and any applicable penalty are paid, the document may become admissible, and an arbitrator may subsequently be appointed.

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[6] Arbitration and Conciliation Act 1996, s 11
[7] Law Commission of India, 246th Report, *Amendments to the Arbitration and Conciliation Act, 1996* (Indian Law Com No 20, 2014)
[8] *SBP & Co. v. Patel Engg. Ltd.*, (2005) 8 SCC 618 (India)
[9] *SMS Tea Estates (P) Ltd. v. Chandmari Tea Co. (P) Ltd*. (2011) 14 SCC 66 (India)
[10] Indian Stamp Act 1899, s 35

Consequently, the bench remitted the case to the lower court to determine whether the stamp duty had been duly paid and, if so, to proceed with the appointment of an arbitrator.

The Court also examined the validity of an arbitration agreement contained within an unregistered instrument, raising additional questions regarding admissibility and enforceability in cases where registration requirements are not met. The bench answered in affirmative by relying on Section 49 of the Registration Act, which includes a proviso that authorizes a court to undertake an unregistered document as evidence in case of a collateral transaction, thereby leaving the Court to act upon an unregistered arbitration agreement for referring disputes to arbitration.[11]

This ruling exemplifies the judiciary's cautious approach to balancing procedural compliance with the autonomy of arbitration agreements. The decision underscores India's procedural ethos by emphasizing the need for stamping before proceeding with arbitration, which contrasts with international norms prioritizing the intent to arbitrate. The SMS Tea Estates decision reflects India's unique emphasis on procedural formalities as a precondition for enforceability, directly linking stamping requirements to an agreement's validity in the eyes of the judiciary. In comparison, jurisdictions like the United Kingdom and the United States maintain a more flexible approach, where procedural flaws in the main contract do not directly affect the arbitration clause's enforceability.

The Court's limited engagement with the doctrine of separability contrasts with international norms, where procedural flexibility often supports arbitration's autonomy. This decision was made before the 2015 amendment, which later limited the scope of judicial inquiry at the pre-arbitral stage to the mere existence of an arbitration agreement[12]. Therefore, the Court exercised broader powers at the time, examining issues beyond the arbitration agreement's mere existence, a stance that would be restricted under the current legal framework.

B. Garware Wall Ropes: Procedural Adherence Post-2015 Amendment

Garware Wall Ropes Ltd. v. Coastal Marine Constructions &Engg. Ltd[13] was another case adjudicated along the lines of the enforceability of an unstamped agreement. The court's stance did

[11] Registration Act 1908, s 49
[12]The Arbitration and Conciliation (Amendment) Act 2016
[13]*Garware Wall Ropes Ltd. v. Coastal Marine Constructions &Engg. Lt.,* (2019) 9 SCC 209 (India)

not defer from what was observed in SMS Tea and held that it should remain the same even after Section 11(6A)[14] was inserted in the Act. The bench decided on this issue on two principles:

a) *Firstly*, the separability of arbitration agreements.

b) *Secondly*, the interpretation of section 11(6A) of the arbitration act and the extent of judicial scrutiny permitted under this provision.

The Supreme Court, while dealing with the primary issue, took a restrictive approach by confining the separability doctrine only to Section 16 of the Act[15] and elucidating that separability would come into existence only after the tribunal was formed. Further, the bench also opined the independent existence of an arbitration agreement can be recognized only in certain circumstances wherein the arbitration agreement within the unstamped agreement does not fall under. However, in earlier instances, the same court acknowledged applying the separability doctrine to Section 7 of the Act.[16] It recognized it as the bedrock of arbitration law under common and civil law jurisdictions.

Secondly, while addressing the second issue, the court thoroughly examined the 2015 amendment. It determined that the primary objective of the amendment was to curtail the extent of judicial intervention in arbitration proceedings, an issue previously highlighted in the rulings of *SBP & Co. v. Patel Engineering Ltd.*[17] and *National Insurance Co. Ltd. v. Boghara Polyfab Pvt. Ltd*.[18] In these cases, the judiciary acknowledged that excessive court involvement could compromise the efficiency and intended autonomy of the arbitration process. Consequently, the 2015 amendment sought to restrict judicial oversight to preserve the integrity of arbitration. However, the court clarified that the amendment did not intend to undermine the foundational principles established in the SMS Tea Estates judgment; therefore, the doctrine of unenforceability for arbitration agreements contained within unstamped contracts remained affirmed.

[14]Arbitration and Conciliation Act 1996, s 11(6A)
[15]Arbitration and Conciliation Act 1996, s 16
[16] Arbitration and Conciliation Act 1996, s 7
[17]*SBP & Co. v. Patel Engineering Ltd*. (2005) 8 SCC 618
[18]*National Insurance Co. Ltd v BogharaPolyfab Pvt. Ltd* (2009) 1 SCC 267

In the present case, the Apex Court looked into Section 2(h) of the Indian Contract Act 1872,[19] wherein an agreement will become a contract only if it is enforceable. Subsequently, the bench interpreted that the Stamp Act obligates an instrument to be duly stamped to validate and make it enforceable in the court of law, and this leads to a conclusion that an arbitration agreement that is embodied in a primary unstamped agreement will also not be enforceable and once again negating the principle of the doctrine of separability.

The court also reinforced the same position in the *Vidya Drolia*case, establishing that the validity of an arbitration agreement is contingent upon meeting particular mandatory legal prerequisites, such as the payment of stamp duty.*[20]* The arbitration agreement is deemed invalid if the parties involved in the dispute do not fulfil these requirements.

This stance underscores the Indian judiciary's commitment to procedural compliance as a foundational element of enforceability. However, subsequent cases, such as Gautam Landscapes, indicate a subtle shift, where the judiciary has begun to explore more nuanced applications of the doctrine of separability. This evolving approach reflects India's cautious adaptation to international arbitration norms, balancing procedural adherence with the intent to arbitrate.

C. Gautam Landscapes: Unstamped Agreements And Judicial Innovation

The Bombay High Court, through a full judge bench, however, gave a different analogy in the case *Gautam Landscapes Pvt Ltd v. Shailesh S Shah* while reviewing Section 9[21] and Section 11[22] of the Act, which deals with granting of interim reliefs and appointment of an arbitrator in the case of an unduly stamped instrument respectively.[23]

The bench relied on the judgment of the *Firm Ashok Traders case.*[24] It enunciated that the right to grant interim relief does not arise from a contract, and the court's power to appoint an arbitrator will remain unaltered even if the agreement is unstamped. The primary criterion for seeking

[19] Indian Contract Act 1872, s 2(h)
[20] *Vidya Drolia & Ors. v Durga Trading Corporation*. (2020) AIRONLINE SC 929 (India)
[21] Arbitration and Conciliation Act 1996, s 9
[22] Arbitration and Conciliation Act 1996, s 11
[23] *Gautam Landscapes Pvt Ltd v. Shailesh S Shah*., AIR 2019 Bombay 149 (India)
[24] *Firm Ashok Traders v. Gurumukh Das* Saluja (2004) 3 SCC 155

interim relief under the specified provision is the existence of an arbitration agreement, ensuring that the core principle of arbitration is upheld.

Notably, the Bombay High Court has considered the rationale in the *Boghara, SMS, Polyfab*, the Law Commission Report[25], and the reasons and objects of the 2015 Amendment, which led to introducing Section 11(6A) in the Act.[26] The court adopted a wide-ranging interpretation of the legislative policy, focusing on the key objective of reducing court involvement as outlined in Section 11 of the Act. This principle was firmly established in the Law Commission Report, unlike the Supreme Court, where a restrictive view was examined and adjudged that Section 11(6A) does not affect SMS, as the Law Commission Report did not make any reference.

The researcher opines that the court had taken a step in the right direction by defining post-2015 Amendment, the court's power is restricted to examine the existence of an arbitration agreement between the parties and any query regarding the enforceability of the arbitration agreement in an unstamped instrument shall be adjudicated by the arbitral tribunal under the rule *Kompetenz-Kompetenez*, which grants the arbitral tribunal the authority to determine its jurisdiction, including the validity and enforceability of the arbitration agreement. This principle allows the tribunal to decide on preliminary jurisdiction issues without requiring immediate judicial intervention, thereby supporting arbitration's autonomy.

D. NN Global 1: Shifting Perspectives on Arbitration Enforceability

In January 2021, a three-judge bench of the Supreme Court, in *NN Global Mercantile Pvt. Ltd. v. Indo Unique Flame Ltd. (NN Global-1),* questioned the legal stance previously observed in *Vidya Drolia*and adjudicated that an arbitration agreement cannot be invalidated solely because the primary agreement is not duly stamped.[27] The Court's reasoning was based on the view that, when considered independently, an arbitration agreement does not require stamping, as the Stamp Act mandates stamping only for 'arbitral awards' without explicitly including arbitration agreements within its scope.

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[25] Law Commission of India, *Report No. 246, Amendments to the Arbitration and Conciliation Act, 1996* (Indian Law Com No 20, 2014)
[26] ibid.
[27] *NN Global Mercantile Pvt. Ltd. v. Indo Unique Flame Ltd. (NN Global-1)* (2021) 4 SCC 379 (India)

The Court's interpretation underscores a marked shift from previous rulings by emphasizing the separability doctrine, whereby an arbitration clause operates independently of the primary contract. By doing so, the Court acknowledged that procedural defects such as non-stamping in the main contract should not necessarily prevent the arbitration clause from being enforceable. This approach indicates the judiciary's growing alignment with global pro-arbitration trends, where the autonomy of the arbitration agreement is upheld despite procedural shortcomings in the main contract. The *NN Global-1* judgment reflects an evolving judicial willingness to recognize arbitration as a distinct entity, reducing barriers to enforceability.

This decision represents a significant departure from prior rulings. It reflects a progressive interpretation aligned with international arbitration standards, which often separate the validity of arbitration agreements from the formalities of the main contract. The bench's approach in *NN Global-1* underscores a willingness to prioritize legislative intent, particularly the incorporation of the *Kompetenz-Kompetenz* principle, which supports minimal court intervention by limiting judicial inquiry to the mere existence of an arbitration agreement. The *Kompetenz-Kompetenz* principle grants the arbitral tribunal the authority to determine its jurisdiction, including issues of validity and enforceability, thereby fostering arbitration autonomy.

The researcher views this decision as a positive stride towards reinforcing arbitration's autonomy in India. By suggesting that an arbitration agreement embedded in an unstamped contract may still be enforceable, the Court aligns with a pro-arbitration stance, thereby reducing procedural barriers that previously hindered arbitration. However, the referral of this matter to a constitutional bench highlights the complexities surrounding the interplay between procedural formalities (such as stamping) and substantive justice within arbitration law. This referral also underscores the ongoing tensions within Indian arbitration jurisprudence as courts continue to balance respecting formal requirements under Indian law with the need for an efficient and accessible arbitration process. The researcher opines that the outcome of the constitutional bench's review will likely shape the future landscape of arbitration in India by either solidifying this pro-arbitration perspective or reinstating a more restrictive approach, thus directly impacting the effectiveness of the arbitration framework.

E. NN Global-2: Revisiting Arbitration Enforceability

On 25th April 2023, the Supreme Court rolled back to square one while deciding the bone of contention in *N.N. Global Mercantile Pvt. Ltd. v. Indo Unique Flame Ltd.* **(NN Global-2**).[28] In a 3:2 majority upheld by Justice Aniruddha Bose, Justice Kurian Joseph and Justice CT Ravikumar, the court decided an unduly stamped arbitration agreement would be unenforceable and void. The majority opinion in the court held that under Section 11 of the Arbitration and Conciliation Act, 1996, the court possesses the authority to examine the existence of an arbitration agreement and the power to scrutinize its validity before making any appointments. The court relied on these two principles, as discussed below.

The court ruled that under Section 35 of the Stamp Act, an unstamped arbitration instrument is unenforceable and cannot be considered evidence, aligning with Sections 2(j) and 2(g) of the Contract Act[29], which deem unenforceable contracts void. Additionally, in interpreting Section 11(6A), the majority opinion was that enforceability applies to the entire contract, not just the arbitration agreement. This interpretation limits judicial intervention without disregarding existing laws like the Stamp Act.

The dissenting opinion given by Justice Hrishikesh Roy and Justice Ajay Rastogi recapitulates the majority view expressed in the 2021 judgement by which a distinction was drawn between 'scrutinizing' the existence of an arbitration agreement in the pre-arbitral stage as viewed in Section 11(6A) and 'validity' of the same as in Section 16 by an arbitration tribunal. The minority indicated stamping can be considered a correctable flaw that the tribunal can look into later.[30]

Nonetheless, on 26th September 2023, a panel of five judges reevaluated *NN Global 2*, acknowledging its broader consequences. Consequently, they escalated the matter to a seven-judge bench. The matter was renamed *"In Re: The Interplay between arbitration agreements under the Arbitration and Conciliation Act 1996 and the Indian Stamp Act 1899*" for further deliberation. The researcher will analyze this judgment in the following chapter.

F. Supreme Court Verdict: Separability And Validity Of Unstamped Arbitration Agreements

[28] *NN Global Mercantile Pvt. Ltd. v. Indo Unique Flame Ltd. (NN Global-2)* (2023) 7 SCC 1
[29] Indian Contract Act 1872, s 2(j), s 2(g)
[30] N.N. Global Mercantile (P) Ltd. v. Indo Unique Flame Ltd., (2023) 7 SCC 1.

In Re: The Interplay between arbitration agreements, the judgement given by a seven-judge bench of the Apex Court passed a unanimous decision concluding the unstamped arbitration agreements to be inadmissible according to the Indian Stamp Act; however, it is not *void ab initio*. In this judgment, the court focused on the separability principle, which states that an arbitration agreement should be separated from the main contract in which it is contained. This separation allows the parties to refer their disputes before an arbitral tribunal and save time. Thus, separability intends to give due importance to the parties' true intention and ensures that an arbitration clause survives the repudiation of a contract. Further, the court also held that the Arbitration Act 1996, a particular law, is over and above the Stamp Act and the Contract Act.

Thus, the minority opinion in the *NN Global 2* case was upheld in the present matter, and the court finally held that agreements that are not stamped or inadequately stamped are not void. However, they may be inadmissible in evidence under Section 35 of the Stamp Act.[31] However, while writing a concurring opinion, Justice Sanjiv Khanna held that non-stamping has a curable effect. Hence, the courts must examine whether the arbitration agreement exists.

This judgment signifies a pragmatic shift within Indian arbitration jurisprudence, recognizing non-stamping as a procedural defect rather than an absolute impediment to arbitration. By treating non-stamping as a curable deficiency, the court underscores an emerging balance between procedural adherence and the fundamental objective of arbitrating. This approach aligns India’s stance more closely with international arbitration norms, as seen in jurisdictions like the United Kingdom and the United States, where procedural technicalities are mitigated to uphold the intent of the parties to arbitrate.

III. GLOBAL PERSPECTIVE ON THE ENFORCEABILITY OF UNSTAMPED ARBITRATION AGREEMENTS

The Indian Supreme Court's recognition of the separability of arbitration clauses, affirming their independent existence, aligns with positions taken by many countries. This concept, though not

[31] Indian Stamp Act 1899, s 35

new to India, was notably referenced in the *Gautam Landscapes case*[32] by the Bombay High Court and the *Indo-Unique*[33] case by the Apex Court. These cases underscored the importance of the separability doctrine, drawing on international precedents in arbitration. While these instances marked the doctrine's initial recognition in India, its application in some countries predates adopting the UNCITRAL Model Law.

United Kingdom: Under English Law, Section 7 of the United Kingdom's Arbitration Act, 1996 elucidates that an arbitration agreement is a separate contract if the arbitration clause is laid down within that agreement;[34] hence, the arbitration agreement will not become ineffective merely on the ground that the primary agreement is void. The primary purpose behind such a doctrine is to treat the two agreements entirely distinct.

The ruling by the Court of Appeal in the case of *Harbour Assurance v. Kansa General International Insurance* reinforces the idea that an arbitration agreement can remain valid even if the main contract is found invalid, provided that the arbitration clause is not directly contested.[35] This reflects the English courts' strong pro-arbitration stance, where the intent to arbitrate is given paramount importance. By separating procedural issues in the main contract from the arbitration clause, English law preserves the autonomy of arbitration and ensures its enforceability, irrespective of technical deficiencies.

This stance highlights a pro-arbitration policy where the English courts prioritize the intent to arbitrate, safeguarding arbitration clauses from procedural issues that could compromise their enforceability. For an arbitration agreement to be valid and enforceable, it must be documented in writing, though it does not have to be signed or stamped. Such flexibility allows parties to arbitrate disputes efficiently without being hindered by procedural complexities that often arise in international commercial transactions. The UK's approach exemplifies a firm commitment to arbitration's autonomy, setting a precedent India references but does not fully adopt in light of its strict procedural adherence.

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[32] *Gautam Landscapes (P) Ltd. v. Shailesh S. Shah* (2019) SCC OnLine Bom 563
[33] *N.N. Global Mercantile (P) Ltd. v. Indo Unique Flame Ltd*. (2021) SCC Online SC 13 (India)
[34] Arbitration Act 1996, s 7(UK)
[35] *Harbour Assurance v. Kansa General International Insurance*, [1993] 1 Lloyd's Rep. 455 (CA)

United States of America (USA): In the case of *Buckeye Check Cashing, Inc. v. Cardegna et al*., the U.S. Supreme Court highlighted that under federal arbitration law, an arbitration clause within a contract is to be treated as distinct from the contract's other clauses.[36] This decision underscores a fundamental principle in the USA: to evaluate the validity of an arbitration clause, it must be considered independently, separate from the main body of the contract. This ensures that procedural challenges or disputes related to the main contract do not automatically affect the arbitration clause's enforceability. The autonomy of arbitration clauses has been consistently upheld in U.S. courts, reinforcing the role of arbitration as an efficient and independent mode of dispute resolution. This approach ensures that challenges to other contract parts do not automatically invalidate the arbitration agreement.

The U.S. Supreme Court, by reinforcing this doctrine, aligns its approach with a pro-arbitration policy that maintains the enforceability of arbitration clauses irrespective of other contract-related disputes. The U.S.'s consistent adoption of this principle reflects its broader commitment to reducing judicial interference and promoting arbitration as a streamlined dispute resolution process. The U.S. approach to separability strengthens the validity of arbitration by enabling it to proceed despite defects in the primary contract. This stance encourages efficiency and autonomy in arbitration proceedings.

Other Jurisdictions: In Pakistan and China, the enforceability of unstamped arbitration agreements is upheld by significant court rulings. In *Union Insurance Company of Pakistan v Hafiz Muhammad Siddique,* Pakistan's Supreme Court stated that while unstamped agreements are inadmissible as evidence, they do not invalidate the contract. This reflects a balanced approach, where procedural deficiencies do not override the intent of the parties to arbitrate.[37] The decision highlights Pakistan's effort to prioritize arbitration's effectiveness while addressing procedural formalities at a later stage.

Similarly, in *China's Luck Treat Ltd. v. Shenzhen Zhong Yuan Cheng Commercial Investment Co., Ltd*.[38], the separability principle was emphasized, affirming that an arbitration clause remains valid

[36]*Buckeye Check Cashing Inc. v Cardegna et al*. [2006] US SC 440
[37] *Union Insurance Company of Pakistan v Hafiz Muhammad Siddique*, PLD 1978 S.C 279
[38] Luck Treat Ltd. v. Shenzhen Zhong Yuan Cheng Commercial Inv. Co., (2021) Yue 03 Min Chu No. 123 (Shenzhen Intermediate People's Ct.).

and enforceable regardless of the main contract's stamping or signing status.[39] This decision reinforces China's pragmatic stance on arbitration, aligning with its growing position as a critical global hub. By prioritizing the intent of parties to resolve disputes through arbitration, China reduces procedural barriers that could otherwise delay or invalidate the arbitration process. China's stance reflects a pragmatic approach to arbitration, where formal requirements do not obstruct the underlying arbitration agreement.

Pakistan and China's flexible approach contrasts with India's emphasis on stamping requirements, highlighting a global trend to minimize procedural barriers in arbitration. These international practices provide valuable insights for India as it refines its arbitration framework, balancing procedural adherence with arbitration autonomy. Jurisdictions like the UK and the USA demonstrate how minimal procedural hindrances can enhance arbitration's efficiency and encourage global commercial parties to rely on arbitration. These countries prioritize the parties' intent to arbitrate, even when procedural issues exist in the main contract, thereby promoting a pro-arbitration environment.

India's strict approach to stamping creates a distinct contrast with the global trend of procedural flexibility in arbitration. Although Indian courts have recognized the separability doctrine, they link procedural formalities, such as stamping, directly to the enforceability of arbitration agreements. While protective of procedural integrity, this approach raises questions about its compatibility with international standards, prioritizing reducing judicial interference.

India's stance suggests a potential area for reform to align more closely with jurisdictions favouring minimal procedural hindrance, allowing arbitration to function as a streamlined and autonomous process. By addressing procedural formalities through legislative reforms and granting arbitral tribunals more authority to resolve issues like stamping, India could reduce delays and enhance its appeal as a global arbitration hub.

[39] Tyler Atkinson, *Guiding Case No. 196: Supreme People's Court Adopts a Liberal Approach to Arbitration While Leaving Room for Unexplored Situations*, SINOTALKS, May 31, 2023.

IV. REFORMS FOR INDIA'S ARBITRATION LANDSCAPE

The Supreme Court in *In Re: The Interplay* stated that though an improperly stamped agreement is not admissible in evidence, it cannot be declared void outrightly. Moreover, the Court also observed that the arbitration agreement requires separate consent from the parties to resolve disputes through arbitration; this was the court's separability principle.[40] The court has mentioned that the arbitration agreement should be separated from the main contract to determine the validity of the same.

The Indian Supreme Court's extension of the *Kompetenz-Kompetenz* principle empowers arbitral tribunals to handle cases involving improperly unstamped arbitration agreements, as per Sections 33 and 35 of the Stamp Act. This move aims to minimize judicial intervention and align India with international arbitration standards. However, this approach presents challenges, such as potential delays caused by parties stamping agreements to postpone proceedings. Additionally, the increased responsibility on arbitral tribunals to address issues with insufficiently stamped agreements could lead to overburdening. This shift places significant responsibility on the tribunals, impacting the arbitration landscape in India.

The extension of the *Kompetenz-Kompetenz* principle reflects a significant evolution in Indian arbitration law, positioning arbitral tribunals at the forefront of procedural compliance issues. Yet, the practical application of this principle underscores a delicate balance between reducing judicial intervention and maintaining procedural integrity. This evolution calls for further consideration of procedural safeguards supporting arbitral tribunals in managing such expanded responsibilities effectively, ensuring that India's arbitration landscape remains efficient and resilient.

V. CONCLUSION

The evolution of Indian jurisprudence concerning the enforceability of unstamped arbitration agreements reflects the judiciary's ongoing struggle to balance procedural compliance with the fundamental intent to arbitrate. Landmark cases from *SMS Tea Estates* to *NN Global* underscore a

[40] P Singha, *Enforceability of an Unstamped Arbitration Agreement*, (2022)3 JCLJ 127

trajectory toward recognizing the autonomy of arbitration clauses through the doctrine of separability, albeit with caution. The Supreme Court's recent judgments, particularly *In Re: The Interplay between arbitration agreements* and the Indian Stamp Act, have affirmed that while unstamped agreements may be inadmissible in evidence, they are not void ab initio. This nuanced approach suggests a shift toward aligning Indian arbitration law with global standards, allowing arbitration agreements to stand independently of procedural flaws in the main contract, contingent upon fulfilling legal formalities.

In contrast to international jurisdictions such as the United Kingdom, the United States, and even neighbouring countries like Pakistan and China, India's strict approach to stamping reflects its unique procedural ethos. While global norms favour minimal judicial intervention and emphasize the intent to arbitrate, India has historically prioritized procedural integrity, directly linking stamping with enforceability. However, by gradually embracing doctrines like *Kompetenz-Kompetenz* and separability, India has laid the groundwork for a more autonomous arbitration landscape. The acknowledgement that arbitral tribunals can remedy procedural defects like non-stamping without undermining the arbitration agreement marks a promising shift.

Prospectively, this transition holds significant implications. The judiciary's continued endorsement of pro-arbitration principles will likely foster greater confidence among commercial parties and enhance India's standing in the global arbitration community. Nonetheless, challenges remain regarding the admissibility of unstamped agreements as evidence. Empowering arbitral tribunals to address procedural issues like stamping would streamline processes, reduce judicial intervention, and align India more closely with global arbitration standards. A decisive judicial or legislative intervention to resolve this ambiguity would pave the way for a streamlined arbitration framework, further reducing delays and promoting efficiency. As India refines its approach, the enforcement of arbitration agreements is poised to benefit from increased procedural flexibility, solidifying arbitration's role as a vital mode of dispute resolution. Ultimately, legislative clarity and empowerment of arbitral tribunals are fundamental reforms that could position India as a global arbitration hub, fostering confidence among international parties.

ROLE OF ARBITRATION IN CURBING THE ENIGMA OF INTERNATIONAL ANTI-COMPETITIVE ACTIVITIES: A PRIVATE ENFORCEMENT MODE

- *YASHASWI KUMAR & LAKSHAY SUKHIJA*[1]

"*People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices*."

Adam Smith

ABSTRACT

Globalization has led to the integration of domestic economies into a global framework, fostering economic growth and interconnectivity among nations. Small and Developing countries face significant challenges in addressing cross-border anti-competitive activities due to limited resources and regulatory oversight. This paperanalyses and delvesdeep into the role of arbitration in private enforcement actions against transnational competition law disputes, emphasizing its potential to provide an efficient and coherent mechanism for resolving such disputes. This paper examines the disparity between national jurisdictions and offers an effective mechanism for resolving disputes that impact the global market.It presents an in-depth assessment of the way arbitration can transform how competition law disputes are handled in an interconnected world economy. The authors build upon the role of arbitration in settling offshore antitrust disputes of a private nature. Through detailed findings, we conclude that in*ternational arbitration offers a flexible and adaptable approach to adjudicating competition law disputes, particularly beneficial for smaller countries with less-developed legal systems. Embracing arbitrability of anti-trust issues can help address enforcement concerns and establish a deterrent effect on future collusive practices.*

[1] 4th year B.A.LL.B(Business Law Hons.), National Law University, Jodhpur, Gmail: yashaswi.kumar@nlujodhpur.ac.in & lakshay.sukhija@nlujodhpur.ac.in

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I. INTRODUCTION

Globalization has advanced the cause for integration of domestic economies into a worldwide framework, accelerating economic growth, investment opportunities, and deeper interconnectedness of nations. The proliferation of competition within markets has concurrently led to a rise in anti-competitive behaviours, potentially impeding the growth facilitated by trade liberalisation efforts. Competition law serves as the foundation of trade and economy in the country, fostering a competitive environment and promoting good business practices. International Cartels have now become commonplace in the global market and have significantly impacted the countries at the receiving end. These Cartels are, in many cases, all-encompassing and deeply affect the market environment for the domestic stakeholders of countries. Investigating international cartels poses a challenging and cumbersome task for competition authorities due to the complexities of coordinating across multiple jurisdictions and navigating differing legal frameworks. In developing countries, the adoption of 'transposed' competition policies from economies like the US and the EU often overlooks their unique institutional and market complexities, such as fragmented markets, political pressures, corruption, and poverty.[2] There has been a long-standing regulatory gap that has resulted in the flourishing of these collusive practices especially in least-developed countries **("LDCs")** and developing countries **("DCs")** due to the lack of a robust enforcement environment in these countries along with a passive acceptance of the benefits by the host state. These countries also lack the requisite resources, know-how, and infrastructure to fix the menace of international cartels. Connor from the American Antitrust Institute estimates that, from 1990 to 2016, identified private international cartels affected global sales surpassing $51 trillion globally.[3] The projected global overcharges surpassed $1.5 trillion.[4] Presently, there exists a deficiency in obligatory international agreements aimed at safeguarding

[2]Hoekman, B. and Holmes, P. (1999)'Competition policy, developing countries, and the World Trade Organisation', Policy Research Working Papers [Preprint]. doi:10.1596/1813-9450-2211.
[3] Connor JM, 'The Private International Cartels (PIC) Data Set: Guide and Summary Statistics, 1990-July 2016 (Revised 2nd Edition)' [2016] SSRN Electronic Journal.
[4] Ibid.

the interests of entities and consumers from international cartels. The prevailing agreements operating within the frameworks of organizations such as the United Nations, World Trade Organization, Organisation for Economic Co-operation and Development etc., are advisory in nature. The absence of a standardized agreement to address cartels on a global scale, encapsulating a significant number of participating countries, gives rise to diverse challenges in conducting cartel investigations.[5]

In this paper, Part II highlights the cross-border anti-competitive activities and enforcement challenges, especially concerning the LDCs and DCs. It pinpoints several critical deficiencies within this regulatory framework, leading to enforcement gaps and allowing transnational anti-competitive practices to thrive. In Part III, the paper then focuses on the pivotal role that arbitration could play as a means of dispute resolution in the private enforcement mechanism of cross-border competition law disputes. The essay is restricted to private enforcement actions without delving into the role of arbitration in public enforcement actions. Finally, Part IV advances a set of explicit policy suggestions primarily directed toward anti-trust regulatory mechanisms and the arbitral proceedings for fair and efficient redressal of disputes.

II. ANTI-COMPETITIVE INTERNATIONAL CARTELS

A. Meaning of Cross-Border Cartels and its Scope

The cartel, also referred to as a syndicate, includes a formal agreement between numerous manufacturing businesses and others of the same sort to control certain aspects, such as territory, pricing, and marketing. "International cartels are agreements which avoid some or all form of competition and consist of parties which are business enterprises domiciled under more than one government and are trading across national frontiers."[6]

[5]Danilovskaia AV, 'International Framework for Countering Cartels: Theoretical and Practical Problems' (2021) European Proceedings of Social and Behavioural Sciences.

[6] Cohen R and Edwards CD, 'Control of Cartels and Monopolies. an International Comparison.' (1968) 78 The Economic Journal 929.

The Resolution by "The UN Conference on Restrictive Business Practices" under the aegis of the United Nations Conference on Trade and Development ("**UNCTAD**" *herein after*) defines these as "formal, informal, written, or oral agreements that restrict the access to markets or restrict competition in other ways, have or may have a negative impact on international trade, and corresponding with one of the forms of restrictive business practices."[7] There is a growing international consensus on the detrimental effects of hardcore cartels, which are often characterised by horizontal agreements among competitors focused on fixing prices, manipulating bids, imposing output quotas, and segmenting markets. Since 1998, the Council of the 'Organisation for Economic Cooperation and Development'("**OECD"** *herein after*) has accepted a guideline on effective counter-actions against aggressive cartels. It refers to "an anti-competition agreement, a concerted anti-competition practice, or anti-competition arrangements between competitors involving price fixing, unfair bidding (tender fix-up), imposing production restrictions or quotas, or market sharing through the distribution of customers, suppliers, territories, or trade areas."[8] Levenstein and Suslow in their study found that "international cartels did use various techniques, ranging from the threat of retaliatory price wars, use of common sales or distribution agency (i.e. vertical foreclosure), and patent pooling, that effectively blocked developing country competitors' entry into the relevant international product markets."[9]

The understanding of 'cartel' within national legislation exhibits divergence as well. It is essential to discern two fundamental components often cited in defining this concept: 1) the coordination of actions among economic entities, and/or 2) bidding agreements. Another concern is the standard of assessment of 'public danger' and the difference in the categorization of such cartels as creating criminal liability or civil liability.

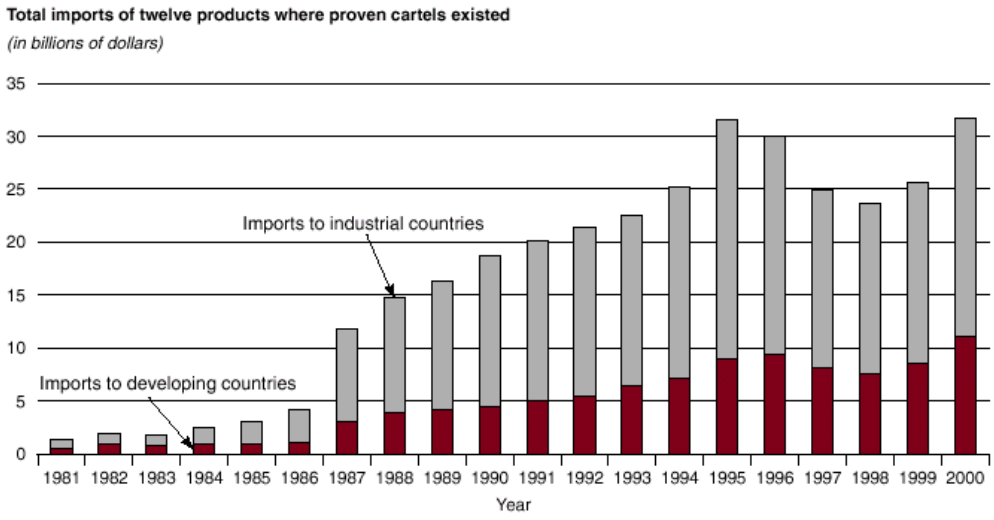
B. Types of Anti-Competitive Practices

[7] Domke M, 'The United Nations Draft Convention on Restrictive Business Practices' (1955) 4 International and Comparative Law Quarterly 129.
[8] Stockmann K, 'United Nations Conference on Trade and Development: The Effects of Anti-Competitive Business Practices on Developing Countries and Their Development Prospects' (2010) 8 Zeitschrift für Wettbewerbsrecht 101.
[9] Levenstein M, Suslow V and Oswald L, 'International price-fixing cartels and developing countries: A discussion of effects and policy remedies' (2003).

Competition law relies heavily on the prohibition of restrictive agreements, which can have a significant impact on market operations. These agreements can be classified as either horizontal or vertical. **Horizontal agreements** occur between businesses that operate at the same level in the supply chain, such as manufacturers, retailers, or patent owners. While these agreements are not inherently illegal, they can sometimes lead to competition issues if the market share, pricing or output is fixed by the parties. Vertical agreements, on the other hand, occur between businesses at different levels of production or distribution in a given market.

C. Ill-Effects of A Cross-Border Cartel

Figure 1. Rising Cartel Affected Imports



Source: "Global Economic Prospects 2003, World Bank"

The advent of globalization and liberalization across many developing nations has led to the influx of foreign products and enterprises. Transnational corporations ("**TNCs"**) have ventured into markets of developing countries or intensified their operations within these regions through domestic arrangements and acquisitions. Consequently, these less developed economies may be targeted as fertile ground for major capitalist multinational corporations (**"MNCs"**) to engage in

anti-competitive practices and disrupt market dynamics.[10] Prominent corporations dominating vital sectors with limited competition face ample opportunities to dictate prices and maximise profits. Cartels are thus established as mechanisms for jointly controlling prices and production with industry competitors. However, these cartels undermine the integrity of healthy competition, adversely impacting market dynamics and consumer welfare. The ultimate impact of a Transnational Cartel is much more than domestic Cartels. Firstly, because they artificially inflate prices more than comparable domestic arrangements.[11] Secondly, it amounts to the extraction of wealth from the impacted state to the state harbouring the violators. Such actions violate pricing principles, which ideally should be anchored in market-driven values. The report examining the economic impact of cartels in several countries confirmed that cartels can have enormous economic effects.[12] On average, the impact on affected sales relative to GDP varies from 0.01% to 3.74% across countries during the period studied. The highest impact was observed in South Africa in 2002, reaching up to 6.38%.[13]

D. Enforcement Challenges and Shortcomings for Ldcs and Dcs

Over the previous three decades, more than 120 jurisdictions have passed domestic competition legislation.[14] However, the sheer existence of a competition law is not necessarily enough to provide a fair playing field for investors, particularly in emerging nations. According to the UNCTAD expert report, "While developed countries have been very successful in prosecuting international cartels, however, the vast majority of developing countries have not. Only a handful of developing countries seem to actively fight international cartels."[15] Only five nations - Brazil,

[10] Jones A, Sufrin B and Dunne N, *EU Competition Law* (7th edn, Oxford University Press 2019) ch 1.
[11] Connor JM and Bolotova Y, 'Cartel Overcharges: Survey and Meta-Analysis' (2006) 24 International Journal of Industrial Organization 1109.
[12]Ivaldi M and Jenny F (Impact of cartels in low-income countries | PEDL)<https://pedl.cepr.org/content/impact-cartels-low-income-countries-0> accessed 1 September 2024.
[13]Ivaldi M and KHIMICH A, 'Measuring the Economic Effects of Cartels in Developing Countries' (UNCTAD) <https://unctad.org/Topic/Competition-and-Consumer-Protection/Research-Partnership-Platform/Economic-Effects-of-Cartels> accessed 1 September 2024.
[14] Liu H and FTC S at the, 'International Competition Network 2020 Virtual Annual Conference' (Federal Trade Commission, 6 October 2020) <https://www.ftc.gov/news-events/events/2020/09/international-competition-network-2020-virtual-annual-conference> accessed 1 September 2024.
[15]UNCTAD, 'Intergovernmental Group of Experts on Competition Law and Policy' (UNCTAD) <https://unctad.

Chile, Mexico, the Republic of Korea, and Turkey - have followed in the footsteps of traditionally industrialized countries by becoming active enforcers of transnational cartels. For example, many African countries are at the nascent stage of the adoption of competition laws. The Common Market for Eastern and Southern Africa Competition Commission, consisting of 21 member states across Africa, commenced operations in 2013, necessitating the notification of all cross-border transactions to the commission. Despite handling over 100 merger cases since its establishment, the commission has not yet reached decisions on any cartel cases as of 2020.[16]

The following are the major enforcement challenges faced by the countries.

(i). Extraterritoriality and evidence-gathering:

The term 'extraterritorial jurisdiction' describes the 'competence of a State to make, apply and enforce rules of conduct in respect of persons, property or events beyond its territory'. In light of the usual inaction of hosting states regarding outbound anti-competitive behaviour and the absence of mechanisms at the global level to address it, states affected by such conduct are compelled to handle market harm through the application of domestic laws. "Extraterritorial jurisdiction is provided for by means of recognition of in-forum effects of foreign conduct as a sufficient nexus for the sake of jurisdictional assertions."[17]

Due to the US's pursuit of extraterritoriality in this area, jurisdiction over foreign organisations has been a practice in competition law for many years. Despite significant international resistance, the US has persisted in this approach, ultimately contributing to the gradual acceptance, marked by increased utilization and diminishing objections, of a novel jurisdictional principle known as the '***effects doctrine'***. This principle empowers states to extend jurisdiction over foreign entities whose anti-competitive practices have economic ramifications within their territory, irrespective of the culprit's location or the conduct itself. However, it is critical to remember that *'the effects concept'*

org/topic/competition-and-consumer-protection/intergovernmental-group-of-experts-on-competition-law-and-policy> accessed 1 September 2024.

[16] Steyn P, 'African Competition Law Developments in 2018 and the Outlook for 2019 - in-House Community' (In, 13 March 2019) <https://www.inhousecommunity.com/article/african-competition-law-developments-2018-outlook-2019/> accessed 1 September 2024.

[17] Martyniszyn M, 'Extraterritoriality in Competition Law: Changing Frictions' [2023] Research Handbook on Extraterritoriality in International Law 389.

is prescriptive in nature; it does not permit the execution of any actions of power on a foreign land, such as evidence collecting or other investigation or enforcement operations.

Two different tests have emerged within the European Union to determine jurisdiction over foreign entities. The first test, known as "the implementation test", grants jurisdiction if the foreign entity's conduct outside the EU takes place within the EU. The second test, called "the effects test", allows jurisdiction if the investigated conduct produces significant and predictable effects within the jurisdiction. If the conduct has immediate, substantial, and foreseeable effects, it may be subject to this test.[18] In India, the expansion of jurisdiction beyond national borders was not considered until the enforcement of the Competition Act 2002.[19]

Despite possessing investigatory authority, competition agencies contend with constraints such as enforcement capacity limitations and hurdles in imposing remedies on non-resident parties.

(ii). Lack of mutual benefits and incentive overdependence on developed countries:

The core of competition legislation in most states lies in the prohibition of anticompetitive actions that harm their domestic markets, reflecting the primary purpose of such laws. However, conduct causing harm solely to foreign markets, thus resulting in outbound competitive harm, is rarely penalized or outlawed. Many domestic competition laws permit arrangements that lead to competitive disadvantages abroad. For instance, the 1982 'Foreign Trade Antitrust Improvement Act' in the US narrowed the scope of the Sherman Act, mainly to shield American sellers from legal challenges arising from their activities overseas. There is a 'passive acceptance' of any conduct distorting competition outside the host country and thus law enforcement remains silent when these actions are known to the state-hosting violators. When conduct causing harm abroad remains legal, it enables individuals engaged in transnational commerce to cultivate skills that could eventually lead to competitive harm in domestic markets. Addressing such harm subsequently becomes costly and challenging. Normatively, this sends conflicting messages to the

[18] *Gencor Ltd v Commission of the European Communities* (Case T-102/96, [1999] ECR II-753).
[19] Sudhakar PD (Presentation on - overview of competition law and policy, 14 November 2008) <http://164.100.58.95/sites/default/files/presentation_document/10_cii,mar06_20080710111440.pdf?download=1> accessed 1 September 2024.

public, eroding trust in the law. However, in monetary terms, the hosting state is largely benefited due to wealth generation. Canada for instance, holds the position of the world's primary producer of potash, with more than 95 percent of its production distributed through an export cartel.[20]

Another point of concern is that the trickle-down enforcement mechanism usually followed by these countries is grounded on faulty assumptions of the 'omnipresence of cartels' throughout the globe. Not all transnational violations carry significant consequences in major economies to prompt robust enforcement and cessation of harmful conduct. For instance, the 'American Soda Ash Export Cartel' ("**ANSAC"**) violated EU competition law in 1990, yet it persisted with its operations after reorganizing its operations in the EU and continued business as usual in other markets.[21]

III. COMPETITION LAW AND ARBITRATION

In the context of cross-border anti-competitive practices, arbitration is a promising alternative to strengthen private enforcement mechanisms in competition law disputes. Unlike traditional litigation, which frequently faces jurisdictional limitations, procedural complexities, and delays, arbitration offers a flexible, efficient, and neutral forum for resolving disputes, which is especially helpful for least-developed and developing countries (LDCs and DCs), which frequently lack the resources, expertise, and strong legal frameworks to effectively address international cartels.

A. International Arbitration and Competition Law

International arbitration is a unique way of resolving disputes that combines aspects of both civil and common law procedures. One of its key features is that parties have a say in how their dispute will be resolved. Arbitration is typically used for commercial disputes, although what counts as an arbitrable dispute can vary from country to country. Despite its advantages, competition law disputes have traditionally not been handled through arbitration due to their complex nature and

[20] Jenny F, 'Export Cartels in Primary Products: The Potash Case in Perspective' [2012] TRADE, COMPETITION, AND THE PRICING OF COMMODITIES <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2064686#paper-citations-widget> accessed 1 September 2024.

[21] Martyniszyn M, 'Competitive Harm Crossing Borders: Regulatory Gaps and a Way Forward' (2021) 17 Journal of Competition Law & Economics 686.

the fact that they often involve issues of public interest.[22]. In most Western jurisdictions, national laws allow private enforcement of antitrust claims, thereby permitting the resolution of such disputes through arbitration.[23] While some countries, such as the US, have been more permissive in enabling arbitration to handle the majority of technical concerns, others have abstained from extending arbitration to complex conflicts.[24] Over time, arbitration has emerged as the major and favoured forum for consensual conflict settlement.

B. Approach in Various Countries

Historically, Arbitration has been avoided by competition law enforcement agencies due to technical complexities and public interest concerns surrounding these disputes.[25] Competition law is concerned with market competitiveness and how it affects consumer welfare. It is deemed to be the legal framework of a public nature involving public interest. The same however, is not true and private enforcement through private law remedy is also included as a purpose of competition law, as the law, although to protect public interests, safeguards aggrieved private entities who have suffered harm and aims to restore and compensate them through the execution of remedies such as damages and injunctions. Western nations have mostly national legislation that enables the private enforcement of antitrust claims, and such claims have since been settled in arbitration. Since the seminal Mitsubishi decision by the United States Supreme Court, courts and commentators have generally accepted that the importance of a competition law issue to the resolution of a dispute does not exclude arbitration.[26] Arbitration has gradually evolved as the primary and preferred forum for resolving consensual conflicts. If antitrust issues were rendered not arbitrable, there would be a great deal of room for tactical manoeuvres meant to undermine the

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[22] Team CC, 'Arbitrating Competition Law Disputes in India' (Competition Law, 14 February 2022) <https://competition.cyrilamarchandblogs.com/2017/12/arbitrating-competition-law-disputes-india/> accessed 1 September 2024.

[23] *See Mitsubishi Motors,* 473 U.S. at 614 (upholding arbitrability of antitrust claims under arbitration agreement requiring American plaintiff to arbitrate against Japanese defendant in Japan).

[24] Abhisar Vidyarthi, 'Arbitration, Competition Law and Second Look Doctrine: An Indian Perspective' (2019) 6 RGNUL Fin & Mercantile L Rev 53.

[25] Team, C.C. (2022) Arbitrating competition law disputes in India, Competition Law. Available at: https://competition.cyrilamarchandblogs.com/2017/12/arbitrating-competition-law-disputes-india/ (Accessed: 31 March 2024).

[26] Radicati Di Brozolo, L.G. (2011) 'Arbitration and competition law: The position of the courts and of Arbitrators', Arbitration International, 27(1), pp. 1–26. doi:10.1093/arbitration/27.1.1.

arbitration agreement's desired outcomes, considering the broad applicability of competition law in a wide range of disputes.[27]

(i). USA Approach:

US courts historically disapproved employing arbitration in competition cases as the Sherman Act aims to further the nation's interests in a competitive market.[28] In the late twentieth century, the tide shifted, and the US Supreme Court began to consider arbitrating competition law concerns. The seminal case '*Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth'* conferred legitimacy upon the arbitration of transactions found to contravene U.S. antitrust laws. In this case, the Supreme Court, while upholding the arbitrability of competition law issues, emphasized that the arbitrators were dealing with complicated problems and that arbitrators with knowledge of competition law might be chosen to decide competition disputes.[29] The Court cited its decision in *Sherk v. Alberto-Culver Co.*[30], which stressed a strong preference for upholding freely negotiated choice of forum clauses. A pivotal element of the opinion was Justice Blackmun's dicta, widely recognized as the ***'second look doctrine'***.[31]

(ii).EU Approach:

In the European Union, the case of '*Eco Swiss China Time Ltd v. Benetton International NV'*,[32] decided by the European Court of Justice **("ECJ")**, is seen as crucial for determining if competition law claims can be settled through arbitration. The court stated that certain competition laws are essential for the EU's tasks and internal market functioning, making them part of public policy. As a result, national courts must protect these laws and reject any arbitration awards that go against a country's public policy. The Eco Swiss case before the ECJ implicitly but unmistakably endorsed the possibility of arbitration under the European Commission's competition law. Thus, disputes arising from horizontal or vertical collusion or abusive behaviour can be submitted for arbitration, provided there is an existing arbitration agreement.

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[27] OECD (2011) Arbitration and competition 2010, Series Roundtables on Competition Policy. Available at: https://www.oecd.org/daf/competition/49294392.pdf (Accessed: 31 March 2024).
[28] American Safety Equipment Corp. v. J.P. Maguire, 391 F.2d 821 (2d Cir. 1968).
[29] *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc*., 473 U.S. 614 (1985).
[30] *Scherk v. Alberto-Culver Co*., 417 U.S. 506 (1974).
[31] Ibid.
[32] *Eco Swiss China Time Ltd v Benetton International NV* (C126/97) EU:C:1999:269 (1 June 1999).

(iii).Approach of Asia-pacific countries:

The first category comprises a 'pro-group' that supports the arbitrability of competition law claims either through legislative measures or court rulings. For example, in New Zealand, a case recognized arbitrability by citing the Mitsubishi judgment in the US.[33]

The second category, known as the 'anti-group', includes governments that appear to have rejected the arbitrability of antitrust claims, either by legislation or judicial judgments. For example, in Mainland China, despite the lack of an express clause prohibiting the arbitrability of such claims, the Supreme People's Court denied it.

The third category, known as the 'obscure group', consists of jurisdictions where there is no existing case law regarding arbitrability, and legislation does not explicitly deny it. This category includes several Asian jurisdictions, such as Hong Kong, Japan, Singapore, and South Korea. In the case of India flexibility is provided to use an arbitral process but limitations are also there. Indian courts have ruled that an arbitral tribunal adjudicates disputes strictly within the confines of contractual provisions and does not address matters related to abuse of dominance. The Tribunal lacks the authority, competence, and ability to conduct an investigation into allegations of abuse of dominant position. In light of the foregoing, conflicts concerning abuse of dominance were deemed non-arbitrable.

IV. PRIVATE ENFORCEMENT OF COMPETITION CLAIMS ARBITRATION AS THE NEED OF THE HOUR

Private enforcement serves two key purposes: "(1) compensating the victims and (2) strengthening deterrence."[34]A 'competition law claim' is a private remedy pursued by an individual seeking damages or an injunction for anti-competitive harms directly or indirectly affecting them. The nature of claims could be divided into transactional action or non-transactional action. While the former relates to a situation where there is a pre-existing contractual arrangement between the

[33]*Attorney General, New Zealand v. Mobil Oil New Zealand Ltd.,* 2 N.Z.L.R. 64d (1989).
[34] Team CC, 'Arbitrating Competition Law Disputes in India'.

parties, the latter relates to tortious claims without there being any contractual relationship between the parties involved.[35]

Since LDCs and DCs face significant challenges in combating anti-competitive behavior, international arbitration presents an effective dispute resolution tool for private enforcement. It bypasses bureaucratic hurdles and ensures that extra-legal considerations remain irrelevant to the aggrieved party. Many nations allow for the private enforcement of competition rules. While some countries restrict private enforcement to actions that "follow-on" from a successful government enforcement action, "stand-alone" private proceedings are also allowed in the US, EU, and UK.[36] DCs and LDCs should strive to adopt the approach of 'pro-arbitration' of competition law claims. Such an approach will effectively augment the enforcement of competition law disputes promoting economic freedom and ensuring a level playing field for small and medium-size enterprises. Secondly, it will lessen the burden on domestic regulatory authority and also could act as a catalyst in detecting various large-scale cartels and collusive practices. Lastly, due to latent opportunities, the alleged infringers would also be deterred from engaging in such an activity due to the risk of fines and compensation. It is generally accepted that disputes of a 'commercial nature' are arbitrable[37] and competition law claims are more often than not linked to a commercial transaction between two or more entities. However, when a state establishes regulations specifying its exclusive jurisdiction over competition law issues, parties cannot override the jurisdiction of the state's courts through choice of forum agreements.[38] A criticism that the tribunal may not be well-equipped with such a specialized nature of disputes involving the exercise of pubic responsibility does not hold any water as the state of domestic courts of these underdeveloped countries is even worse as compared to the arbitral tribunal. In contrast to a regulatory authority, an arbitral tribunal plays a critical role in resolving antitrust disputes. Private parties attempt "to secure relief and end misconduct," but public regulators seek to "effectuate enforcement policies, establish precedent,

[35] BASEDOW, J. (2007) Private Enforcement of EC Competition Law. Alphen aan den Rijn: Kluwer law international.
[36]Cabral L and others, 'Michael D. Hausfeld' (Concurrences, 31 May 2019) <https://www.concurrences.com/en/auteur/michael-d-hausfeld> accessed 10 September 2024.
[37] UNCITRAL Model Law on Int'l Commercial Arbitration art. 1(1)(2006).
[38] Weller M, 'Danov, Mihail: Jurisdiction and Judgments in Relation to EU Competition Law Claims' (2013) 77 RabelsZeitschrift für ausländisches und internationalesPrivatrecht 419.

explain new learning, earn broad compliance, and re-establish market competition."[39] The tribunal only deals with inter-parties matters and thus party autonomy must form the basis of the jurisdiction of the tribunal in antitrust cases. However, there are also barriers to successful private enforcement, including the intricacy of damages claims, the use of broad guidelines that fail to adequately consider the unique characteristics of antitrust cases, and the relationship between public and private antitrust enforcement. Jurisdictions should make sure that the resources and expertise of the competition authorities are used to support private enforcement, and that public and private enforcement are coordinated.

V. ARBITRAL MECHANISM AND RECOMMENDED GUIDELINES FOR TRIBUNAL

A. Multiparty Arbitration and Joinder of Third Parties

In most cross-border cases, due to the collusive nature of anti-trust activities, multiple parties of different countries may be necessary for evidence gathering and have vested interests in the outcome of the dispute. A pertinent question arise when the tribunal have to implead such third parties who are not originally part of any contractual agreement, since a tribunal's jurisdiction is based on party consent, its authority is generally limited to contractual parties. The non-joinder of such parties however could be tantamount to non-enforceability of the arbitral award due to unequal treatment of parties in the arbitration. The tribunal in such a case must pave the way for the joinder/inclusion of such parties following the prima facie nexus between the parties and inadvertent links between them. Further, the group of company's doctrine may also be helpful in such cases for the tribunal.[40] The Joinder of additional parties must not result in a change in the choice of mandatory law unless the tribunal at its discretion considers that in all likelihood an award might be issued against such respondent.

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[39] Blanke, G. (2011) EU and US Antitrust Arbitration: A handbook for practitioners. Alphen aan den Rijn: Kluwer Law International.

[40] Ferrario P, 'The Group of Companies Doctrine in International Commercial Arbitration: Is There Any Reason for This Doctrine to Exist?' (Journal of International Arbitration, 1 October 2009) <https://kluwerlawonline.com/journalarticle/Journal+of+International+Arbitration/26.5/JOIA2009035> accessed 10 September 2024.

B. Choice of law and principles to be followed

The applicable law will typically encompass the determination of the *lex arbitri* governing procedural and substantive aspects of the dispute.[41] The ruling on the 'choice of law' aspect often constitutes an essential component of the tribunal's application of judicial reasoning, as the application of foreign law has emerged as a basis for the 'public policy exception'. This is because applying foreign law can sometimes conflict with local public policy, especially if it weakens the intended deterrent effect of the law. This conflict can lead to the use of the "public policy exception" to reject the foreign law. In exceptional circumstances where the application of all potential rules would substantially yield the same result, the issue of mandatory law is not to be decided. For example, in the EU an arbitrator, potentially considered as an 'undertaking', is duty bound not to enforce violations of EU competition law through an award that does not comply, as this could lead to liability for involvement in unlawful cartel activities or aiding in circumventing EU competition law regulations.

Due to a conflict between multiple mandatory laws an arbitral tribunal tasked with selecting which antitrust law to apply in multiparty arbitration must strive to harmonize the potentially conflicting mandates of different jurisdictions of "(1) the law of the arbitral seat, (2) the laws of the most likely jurisdiction where enforcement against respondent parties would be sought, (3) the laws of the jurisdiction of any of the claimant parties against which a counterclaim based in antitrust law has been raised, and potentially (4) the law of the jurisdiction of the additional party to be joined."[42] This approach is suitable for countries with well-established legal systems. However, in countries with less developed legal frameworks, there's a need for universal competition rules tailored to their specific needs. These rules should be fixed but flexible enough to accommodate the interests of smaller and less legally developed nations. A set of competition rules established by a

[41] Theobald A, 'Mandatory Antitrust Law and Multiparty International Arbitration' (Penn Carey Law: Legal Scholarship Repository) <https://scholarship.law.upenn.edu/jil/vol37/iss3/5/> accessed 10 September 2024,
[42] Ferrario P, 'The Group of Companies Doctrine in International Commercial Arbitration: Is There Any Reason for This Doctrine to Exist?' (2009) 26 Journal of International Arbitration 647.

framework institution can serve as a foundational framework, providing guidance and consistency in enforcement.

C. Coordination with public enforcement actions

Even in cases of arbitration, cooperation, and coordination with regulatory authorities investigating these cartels is necessary. The tribunal for gathering evidence may refer to the regulatory authorities in the affected and the host countries for providing sensitive information regarding the parties involved, the amount of sales, the different countries in which they operate, etc. An allegation of anti-competitive behaviour and its effects may be supported by data and findings from earlier public enforcement proceedings.

D. Minimalist approach to review

Courts take different approaches, with commentators divided into 'maximalist' and 'minimalist' schools of thought. The maximalist view argues that strict scrutiny of arbitral decisions is necessary to prevent competition law violations and ensure effective policy enforcement. The minimalist viewpoint is based mainly on the premise that arbitrators' solutions and their ability to interpret competition law professionally should be given significant credence. It is suggested that there should be no opportunity for the systematic misuse of arbitration to evade competition law. An exhaustive examination is not necessary to ensure the efficacy of private enforcement. Upholding the arbitrators' decision, except in cases of blatant violation of fundamental principles, does not equate to relinquishing the state's ultimate responsibility to ensure proper enforcement of competition law.[43] It is highly recommended that courts adopt the minimalist review mechanism depicting their inclination towards the 'sanctity' of arbitral award and reposing confidence in the arbitral tribunal decision-making capabilities.

[43] Li Y-Z and Li Y-Z, 'Harmonizing Arbitration and Competition Law Disputes: Pursuing Consistency in Adjudication' (American Review of International Arbitration, 23 June 2023). <https://aria.law.columbia.edu/harmonizing-arbitration-and-competition-law-disputes/> accessed 10 September 2024.

VI. CONCLUSION

The rise of international cartels poses significant challenges to global markets, particularly for least-developed and developing countries that lack the resources, infrastructure, and regulatory frameworks to effectively combat anti-competitive practices. Limited resources and weak regulatory oversight may create opportunities for international cartels to flourish. While public enforcement mechanisms often fall short due to trickle-down enforcement mechanism having jurisdictional complexities, resource constraints, and political pressures. International arbitration emerges as a valuable tool offering an efficient and structured avenue for private actions against large-scale cartels. Many Western countries including the United States and the European Union have allowed arbitration as a mode of dispute resolution in international anti-competitive activities affecting the market players.

One of the key advantages of arbitration is its flexibility and adaptability to diverse legal systems and cultural norms. Unlike traditional litigation, which is constrained by national laws and procedures, arbitration allows parties to choose their arbitrators and customize the dispute resolution process to suit their needs and preferences. This flexibility is particularly beneficial for smaller countries with less-developed legal systems, as it enables them to access international expertise and resources to adjudicate complex competition law disputes. By adopting a pro-arbitration approach, LDCs and DCs can enhance their enforcement capabilities, deter future collusive practices, and ensure a level playing field for domestic stakeholders. In developing and least developed countries (DCs and LDCs), the tribunal, when selecting the lex arbitri applicable to the proceedings, must refer to institutional competition rules rather than relying on a fragmented and inconsistent legal framework.

Despite its numerous advantages, arbitration faces challenges and limitation in competition law enforcement. One of the most challenging problem is ensuring that arbitral verdicts can be

enforced, especially when they conflict with national competition laws or public policy reasons. The arbitrators have to make decisions on complex issues revolving around choice of law, joinder of parties etc. for which there is no straitjacket formula. To address these issues, a minimalist review approach, harmonized competition rules, and effective coordination between arbitration tribunals and regulatory authorities are recommended. The paper has attempted to objectively recommend best practices which the tribunal may reasonably follow but at the end of the day, it is the 'prudence' and 'diligence' of tribunal members that matters. Overall, international arbitration can play a pivotal role in private enforcement actions for competition law disputes, especially in smaller countries with limited resources and legal infrastructure. The States are encouraged to embrace arbitrability of anti-trust issues to alleviate the concerns of under-enforceability and to establish a deterrent effect on future collusive practices.

MEDIATION IN AIRPORT CONCESSION AND INFRASTRUCTURE DISPUTES

- *RISHABH TOMAR*[1]

ABSTRACT

Mediation is gaining more attention as the method of solving various aviation disputes, especially regarding airport concessions and the construction of additional facilities from airports. The contracts governing airport concessions are complex and contain relations between airport authorities, airlines, investors, and government agencies. Communications can quickly turn into conflict because of differences regarding payment schedules, project cycle, regulatory requirements, and problematic procedures. Since the aviation industry is an international and constantly evolving industry, mediation has a particular advantage over other forms of legal conflict resolution outlined later in the article. This article is a discussion of the use of mediation to address disputes in airport concession agreements and infrastructure projects. It reviews the benefits of mediation over an adversarial process which includes confidentiality of the process, speed, and the maintenance of the business relations. The article examines potential case eventualities for implementing mediation to airport-associated disputes. A review of the literature identifies best practices for imposing mediation effectively. Additionally, it provides a review of the existing literature and the current policy landscape in identifying directions for improvement of mediation practice to more effectively fulfil the needs of the aviation industries. Lastly, this article seeks to study and explain how mediation can strengthen the framework for the resolution of disputes in the airport industry to produce practical information that will be useful to mediators, legislatures, regulators, and industry players.

Keywords: *Mediation, Aviation, Airport, Alternative Dispute Resolution (ADR), Public Private Partnerships (PPPs).*

[1] Assistant Professor at Chandigarh University, Mohali, Gmail: tomar.rishabh1996@gmail.com

I. INTRODUCTION

A. OVERVIEW

Aviation has remarkable social-economic importance in relation to transport of goods and people, tourism, commerce and other facets of life. Airport facilities are considered as core logistics centres through which passengers and commodities transit from one region to another. However, as the requirement for aviation transportation prevails, there are demands for extended as well as upgraded airports all the more appropriate. As a result, airport construction and the handling of airport concession arrangements are essential sub-sectors of the aviation industry. Privatisation often includes long-term agreements among governments or airport authorities and personal investors or operators for growing airport facilities, assuring returns at the private partners' monetary costs. These are immensely multi-layered, involving multiple actors such as state, non-state actors, airlines and passengers, with respective stakes on the proper operation of an airport.

Airport concession agreements are an essential tool in financing growth and development of infrastructure but they lead to disputes because of the complexity in dealing with such projects. There are different causes of dispute: scope of changed and increased costs, disagreements in construction schedule, environmental/safety regulation concerns and revenue sharing formula. Such issues can greatly slow down airport development, affect service delivery, and adversely sour the relations between stakeholders, which contributes to potential future problems for the airport and the aviation industry at large.

For many years, conflicts arising out of relationships in aviation and infrastructure projects have been solved by litigation or arbitration processes, which may take a long time, be expensive, and often wartime. However, there exists a new ADR technique that is referred to as mediation, but it presents more of the obtainable and elastic resolutions. mediation can be used to settle disputes objectively without acrimonious processes, which usually results in faster and more substantial relationship preservation. Consequently, mediation in the framework of airport concession and infrastructure problems can be a reasonable solution to eliminate difficulties resulting from the multiparty contractual relations.

B. PURPOSE OF THE ARTICLE

Specifically, this article aims to examine the use of mediation for addressing disputes concerning airport concession agreements and infrastructure projects. The purpose of this article is to explore the concept of mediation as a useful technique for the settlement of disputes in the aerospace industry, based on a review of the literature and a case analysis of successful benchmarks. In addition, the article will define critical research and practice areas that require further development to enhance the mediation frameworks within this important subsector of the aviation industry.

C. LITERATURE REVIEW

Aviation industry specifically and airport concession and infrastructure dialogue has also encouraged the common use of mediation as an effective way of resolving disputes other than litigation and arbitration. Review of the scholarly and practitioner sources shows that there is emerging appreciation of mediation as a usable and preferable method of dispute resolution in the large and intricate environments including airport projects.

Some papers review the literature and examine the role of mediation in addressing conflicts between airports, airlines, investors and/or other parties engaged in airport concession. As Weitzman and Goodhart (2020) have pointed out, mediation minimizes the level of conflict in a dispute while enabling the concerned parties to retain business-like relations as may be expected when the parties engage in multiple flight operations in the years to come.[2] Their work also insists on the importance of this because mediation is an informal process which entails innovative, satisfactory resolution of disputes, to both parties which cannot be achieved through litigation or arbitration. Similar to mediation, there is evidence in Smith & others (2021) that mapping can have the effect of shortening the time that takes to resolve a dispute, unlike long-drawn legal processes which are characteristic of extended airport concessions.[3]

However, difficulties of applying mediation in the context of aviation are widely researched. Since they undertake projects to develop new international airports or expand existing ones, this system

[2] John Weitzman and Andrew Goodhart, 'The Role of Mediation in the Aviation Sector: A Study on Dispute Resolution Effectiveness' (2020) 9(3) Aviation Economics Journal 210.
[3] Helen Smith, Kevin Brown and Laura Edwards, 'Mediation in Airport Concession Disputes: Challenges and Benefits' (2021) 46 Journal of Air Transport Management 19.

faces a major challenge in that the projects are usually transboundary, thereby being susceptible to problematic inter jurisdictional relations. Indeed, as pointed out by Henderson (2019) in the mentioned types of cases mediation may encounter challenges such as, contrasting legal environments, expectations of cultures, and numerous and complicated regulatory frameworks existing in different jurisdictions.[4] This is especially true of airports that come under bilateral agreements as well as airports that are owned multi-nationally.

The literature also provides various prospects for enhancing and developing the processes connected with mediation. A great deal of possibility exists to address the disputes arising out of financing of airports, issues related to the environment, and other operational issues. Moreover, as observed by Lee (2022), the emerging trend of PPPs (Public Private Partnerships) for airport development establishes conditions under which mediation can be used to support the efficient management of financial contribution, schedule, or compliance disputes.[5] Furthermore, to widen the opportunities to access mediation and to increase their effectiveness due to the COVID-19 pandemic, the members note the inclusion of the digital platforms for online mediation and dispute resolution as observed by Murray (2020).[6]

Thus, the collected literature emphasizes that mediation at the moment can consider itself a quite viable way of addressing disputes in the aviation industry. However, there still exists such a problem as the jurisdictional divide, therefore, there can be found the opportunities for the further harmonization and optimization of the processes connected with the mediation, including in the frames of setting up PPPs.

II. IDENTIFIED GAPS AND AREAS FOR IMPROVEMENT

Nevertheless, mediation is not often used in airport infrastructure disputes and has several unsearched areas in the academic literature and in practice. Another is the general absence of systematic methods or guidelines applicable to mediation within the sphere of aviation. Especially

[4] Richard Henderson, 'Challenges in Cross-Border Mediation in Aviation Infrastructure Projects: A Comparative Approach' (2019) 14(2) Journal of International Dispute Resolution 143.
[5] Thomas Lee, 'Public-Private Partnerships and Dispute Resolution: The Role of Mediation in Airport Infrastructure' (2022) 32(1) Aviation Law Review 68.
[6] James Murray, 'Digital Transformation of Dispute Resolution in Aviation' (2020) 6(4) International Journal of Online Dispute Resolution 101.

where the process differs from arbitration or litigation that contain more prescribed rules which are far less likely to be unclear. Therefore, the procedure can be highly different in terms of jurisdictions and projects, which results in disparity in the efficiency of the outcomes.[7]

Further evidence shows that in these concession agreements, mediation clauses are either absent or are ineffectual, or else they are not legally watertight.[8] Such shortcomings in legislation may result in delays as to the commencement of the mediation process and reduce the ability of stakeholders to rely on this type of ADR. Due to the nature of the infrastructure projects in airport industries it is recommended that there is the formulation of appropriate and enforceable mediation clauses that would suit the industry.[9]

One of the most profound gaps is the dearth of studies on the combination of mediation with other modes of dispute resolution including the arbitration. Scholars have, nevertheless, established that these areas of measures are compatible; however, there are limited available studies on an efficient combination of these methods in the airport infrastructure project.[10] The concept that has emerged is the need to enhance policy that would support multiple-level conflict-solution approaches.

Lastly, there is a need for enhancing training providers of mediators in aviation disputes. Most airport concession disputes contain complex legal questions such that the mediators appointed must come with legal background and airport concession knowledge. It therefore becomes important for policy makers to develop special certification on mediation exclusively for persons entailing airport infrastructure related mediations so as to ensure that the whole process is more refined and productive.

III. UNDERSTANDING AIRPORT CONCESSION AND INFRASTRUCTURE AGREEMENTS

[7] John Brown and Lucy Green, *Mediation in Construction and Infrastructure Disputes: A Global Perspective* (Cambridge University Press 2022).
[8] Maria Hernandez, 'Mediation Clauses in Airport Concession Agreements: An Analysis of Trends and Challenges' (2023) 15(1) International Journal of Aviation Management 22.
[9] Laura Feldman and Timothy Rose, 'Dispute Resolution in Airport Concessions: The Role of Mediation' (2021) 35(4) Journal of Aviation Law and Policy 47.
[10] Xiao Wang and Yi Zhang, 'Integrating Arbitration and Mediation in International Aviation Disputes: Lessons Learned from Recent Case Studies' (2024) 58(2) Journal of Dispute Resolution 115.

A. DEFINITION AND STRUCTURE OF AIRPORT CONCESSION AGREEMENTS

An airport concession agreement on the other hand is defined as a legal relationship between a public authority, usually a government or an airport authority and an individual or corporate entity, that affords the later rights in the management and operation or investment in certain facilities of the airport. These agreements encompass shop opening, parking space, airport lounges and occasionally terminal operation. They therefore often contain corporate finance aspects, key performance indicators, regulatory compliances and business operating models.[11] Corporate finance elements in agreements regularly consist of clauses on capital structure, dividend policies, and investment mechanisms. Key Performance Indicators (KPIs) including Return on Investment (ROI), Earnings Before Interest and Taxes (EBIT), and Debt-to-Equity Ratio are essential for assessing monetary health. Regulatory compliance guarantees adherence to legal guidelines just like the UK Companies Act 2006[12] and EU Market Abuse Regulation (MAR).[13] Recent cases, including *Financial Conduct Authority v Arch Insurance (UK) Ltd* (2021)[14], highlights the significance of compliance in economic agreements. These factors offer depth, making sure stakeholders apprehend the monetary and legal implications of corporate agreements. Airport concession agreements are intended to achieve effective operation of the airport and considering the interest of the public and the partners at the same time.

B. KEY STAKEHOLDERS INVOLVED

These faculties of airport concession consist of airport, airline, investor and government on the airport concessions. The airport authority is the governmental body charged with the responsibility of the coordination of the existing physical facilities and running of the airport Activities in line with safety, security and other national requirements. Airlines are strategic counterparts because they rely on the airport facilities to carry out passengers and cargo handling, making their concerns relevant to issuance of concessions. The other user is the investors, normally private firms and or consortiums which provide capital for infrastructure development, management or use in exchange

[11] Alexander Kemp and Katherine Thorne, 'Airport Concession Agreements: A Framework for Collaboration and Risk Management' (2020) 34(2) Transport Law Review 76.
[12] UK Companies Act 2006.
[13] EU Market Abuse Regulation (MAR) 2014.
[14] *Financial Conduct Authority v Arch Insurance* (UK) Ltd (2021) UKSC 1.

for the right to manage and control the operations and a proportion of the profits. Last but not the least, the government intervention (state or central) oversees the agreements to make their outcome favourable to the general public needs of service quality, cost and safety.

C. COMMON LEGAL ISSUES AND SOURCES OF DISPUTES

Problems usually arise from various operational, financial and regulatory issues in airport concession agreements. Main causes of conflict include time related issues such as delayed construction of infrastructure works. Airport enlargement or enhancement often experience construction hold-ups, and this affects the capacity of the private party to meet the expected revenue.[15] Another concern area is compliance whereby concessionaires are subjected to local, national and international regulations relating to safety, environmental and security/terrorism. Lack of compliance to these standards leads to penalties, shutdowns, or/and conflict between clients, contractors, and installers.[16] Another common cause of conflict is financial irresponsibility and financial expectations and forecasts and revenue splits. Misunderstandings about profits or unreasonable cost or performance levels may result in extensive legal disputes.[17] Moreover, it may cause conflict of interest concerning contract expectations between airport authorities and concessionaires when parts of contracts are vague or when the operational responsibilities change.

III. MEDIATION AS A DISPUTE RESOLUTION MECHANISM

A. EXPLANATION OF MEDIATION AS A FORM OF ALTERNATIVE DISPUTE RESOLUTION (ADR)

Mediation is an out of court process where the parties to a dispute voluntarily allow an independent third person to assist them in their efforts to resolve their differences. Hailing from the family of the ADR methods, mediation offers a way different from litigation which is normally expensive, lengthy and more often public. Unlike other related processes where a third party makes a decision for the two disputants, mediation allows the two parties to search for solutions for their problems.

[15] ibid 10.
[16] Paul Meyer, 'Legal and Financial Challenges in Airport Infrastructure Projects' (2021) 29(1) Aviation Infrastructure Review 58.
[17] Lucas Biedenkapp and Johan Pijnenburg, 'Managing Airport Concessions: The Role of Financial Oversight and Dispute Resolution Mechanisms' (2021) 52(4) Journal of Transport Management 120.

Consequently, this is a more efficient approach that is utilized in many fields like the aviation and infrastructure sector, because many disagreements tend to arise due to the size of projects and their nature.

B. KEY CHARACTERISTICS OF MEDIATION

Several defining characteristics make mediation an attractive method for resolving disputes:

1. **Flexibility:** Mediation is particularly flexible in terms of process and result. The parties have oversight of the negotiations with regard to pace and structure and the mediator is also in a position to integrate the process according to the requirements of the particular conflict.[18] Due to legal formalities, which must be complied with at the time of litigation, it becomes extremely difficult to come up with innovative approaches that are best suited to the parties in a given litigation.
2. **Confidentiality:** Confidentiality is considered to be one of the strongest advantages of mediation among different methods of conflict resolution. However, while court sessions are in the open, mediation sessions are closed and any information disclosed cannot be tendered in a court of law. This serves a great purpose in encouraging communication between the parties mainly because the fear of reputational damages is addressed hence beneficial to those industries where business relations are long-term such as aviation and infrastructure industries.
3. **Neutrality:** Mediation is done with a third party that is not in any way involved with the parties to the conflict. Such a position will make sure that the mediator is not taking sides, but is there to help both parties come to a positive end. This is especially the case in the aviation and infrastructure industries because there are a vast number of parties with multiple points of view.

C. COMPARISON WITH OTHER DISPUTE RESOLUTION MECHANISMS

Mediation is distinct from both litigation and arbitration in several key ways:

[18] Giuseppe De Palo and Jonathan Ingham, 'Mediation and Dispute Resolution in the Aviation Sector' (2023) 25(2) Journal of Dispute Resolution 123 <https://doi.org/10.1080/1234567890> accessed 11 December 2024.

Litigation: Legal action is a procedure by which two or more parties make presentations to a judge or jury for a decision in a court of Justice. As a general rule, it is lengthier, costly, confrontational than mediation. The result is determined by a court which therefore may result in a 'winner takes it all' scenario, which is not healthy for business dealings. On the other hand, mediation aims at a win-win arrangement, this is because it has been supported by it.

Arbitration: Arbitration is a process that is resolved by an impartial arbitrator who decides on it after listening to the two warring parties. As compared to litigation, arbitration is even more versatile and, at the same time, private than litigation and, at the same time, does not differ greatly in its formalism and costs from it. Mediation, therefore, tends to be more efficient and enables the consideration of freer, party-driven, non-binding, options.[19] Also, mediation can turn into arbitration since it is often used before a case is taken to the arbitration stage to make the parties compromise.

IV. BENEFITS OF MEDIATION IN THE AVIATION AND INFRASTRUCTURE SECTORS

Mediation is particularly advantageous in the aviation and infrastructure industry given the concerns with high risks, numerous and often conflicting interests involved in these industries. Some of the key benefits include:

1. **Cost and Time Efficiency:** Mediation is usually more cost effective and time effective than either litigation or arbitration. In the aviation and infrastructure industries, such as where time lost may result in a great number of losses, mediation is more effective as it reduces time wastage and keeps projects running.
2. **Preservation of Business Relationships:** Most of the controversies that arise in these areas ensue out of business relations that may extend for several years, which may include that of government with contractors, and service providers. Through mediation, such relations are able to be safeguarded through the creation of a friendly environment since litigation as a mode of dispute resolution seeks to incorporate animosity.

[19] Yan Zhang and Emily Goh, 'The Role of ADR in Global Infrastructure Disputes: Mediation as a Preferred Option' (2022) 40(4) Global Legal Review 75 <https://doi.org/10.1136/glr.2022.0204> accessed 12 December 2024.

3. **Increased Control Over the Outcome:** For instance, in mediation, the parties have the ability to determine the result hence making the solution more suitable for them. This is especially true in large infrastructure projects where the participant may earmark certain technical or operational issues that are not easily solved by a judge or an arbitrator.
4. **Adaptability to Complex Disputes:** Another advantage for using mediation in ADR is that they can usually deal with complex issues where many parties may be involved, as may be the case in concession agreements relating to an airport or in contracts for airport infrastructure. With its help, it is possible to solve not only financial or operational problems but also such factors as regulatory, environmental or strategic ones.[20]

V. CASE STUDIES OF MEDIATION IN AIRPORT CONCESSION DISPUTES

A. REVIEW OF RELEVANT CASE STUDIES

Several case studies show that mediation works well for handling controversies connected with airport concession contracts and the construction of infrastructure facilities. A particular case was the Berlin Brandenburg Airport (BER) construction project dispute arising from contractual disputes between contractors and the authority. Those contractors used mediation to bring them closer to the airport authority where a compromise was made whereby construction continued with regard to monetary issues.[21] Another case was London Heathrow Airport where the airport owners and ground handling services providers had differences in many operational matters such as management of the work force and terms of contract. Thus, after coming to a mutual meeting of the minds, both parties agreed to a long-term solution instead of going to court.[22]

Also, in Changi Airport Singapore, some disagreements between the authorities and private investors on upgrade of structures were resolved. Through the mediation process, the stakeholders

[20] Samuel Kilpatrick, 'Effective Dispute Resolution in Infrastructure Projects: The Role of Mediation' (2021) 19(1) International Journal of Infrastructure Law 87 <https://doi.org/10.1093/infralaw/ijil.2021.0045> accessed 14 December 2024.
[21] Michael Kohlmann and Alexander Eilert, 'Resolving Construction Disputes: The Case of Berlin Brandenburg Airport' (2020) 45(3) Construction Law Review 89.
[22] Liam Greene, 'Mediation in Airport Concession Disputes: A Global Perspective' (2018) 34(2) International Journal of Dispute Resolution 125.

of the airport were able to harmonise their interests and goals, to identify fund-directed priorities where they required resolution without being drawn into litigation, and where this was constructive in maintaining the airport's status as an international hub and gateway.[23]

These cases indicate how mediation, being one of the ADR tools applied, can handle both financial and operational issues in infrastructure projects with numerous players.

B. ANALYSIS OF OUTCOMES: EFFECTIVENESS, EFFICIENCY, AND SATISFACTION WITH MEDIATION

The analysis of mediation in airport concession disputes has generally revealed quite positive results concerning its efficacy and efficiency. In the case of the Berlin Brandenburg Airport mediation facilitated speed in that it took less time to resolve the issue than it would take for one to take the issue to court contributing to further delay of the project. The stakeholders expressed themselves as satisfied with such a decision since it allows them to speak freely without turning to a court trial. Likewise, Heathrow Airport attained efficiency in handling operation disputes leading to improved operation flow. The application of mediation was especially useful when dealing with different relations between the airport authority and contractors, which is important for the sustainable cooperation in infrastructural endeavours. Although some of the cases described some minor issues in terms of conflict of interest of all the parties, the satisfaction with the mediation process appeared to be rather high especially when considering the quality of avoiding long time-consuming legal battles and minimizing the impact on airport business.

C. LESSONS LEARNED FROM CASES

The conclusions derived from the case studies include some important insights into the application of mediation to airport concession disputes. First, the earlier mediation is applied—starting from the appearance of the conflict, it diminishes the prospects of deterioration and the consequent project delays. For instance, early mediation in Heathrow demonstrated that few operational interruptions occurred hence timely mediation reduced the extent of interruption. Second, this paper will address how clarity in contractual terms regarding dispute resolution will further

[23] Henry Tan, 'Mediation in Large-Scale Infrastructure Projects: A Case Study of Changi Airport' (2020) 12(1) Asia-Pacific Mediation Review 45.

improve the mediation process. As evidenced by the Changi Airport dispute, the words in mediation clauses explicitly define the expectations and simplification of procedures adopted in a dispute. Third, because of the many significant issues surrounding aviation and infrastructure projects, having an experienced neutral mediator who grasps its issues is necessary for the mediation process. Last of all, the effectiveness of mediation depends upon the agreement of all the parties to maintain the advancement of such an approach which was observed at the Berlin Brandenburg Airport where cooperation resulted in the achievement of a long-term resolution.

VI. BEST PRACTICES FOR MEDIATION IN AIRPORT INFRASTRUCTURE DISPUTES

Arbitration is essential in the conflict resolution of airport infrastructure projects because there are myriad parties who have diverse stakes. Mediation therefore needs to be considered and effected in a specific way in order to achieve the intended results.

A. STRATEGIES FOR IMPLEMENTING EFFECTIVE MEDIATION

To effectively mediate airport infrastructure projects, one has to choose a competent and impartial mediator that appreciates the various factors associated with the projects. Early intervention is key: It is suggested that conflicts should be recognized at the early stage so that measures can be taken to curtail them. This indicates that mediation should be first introduced as soon as the party has reached a dispute situation but before adopting the conflicting course of action. There should be a proper procedure, which is followed: pre-mediation conferences that are necessary in order to identify prospective problems and disputes of the parties. Calm and realistic appraisals of power by both the worker and the employer are also paramount to the achievement of a positive end result.

B. ROLE OF MEDIATORS, LEGAL ADVISORS, AND STAKEHOLDERS

A mediator is forbidden from making decisions for the parties involved but he has to help the parties reach a consensus. The genuine mediator assists the parties to identify and compare their best interests and look for ways in which they can agree. Lawyers, though do not directly engage

in the mediation process, they can play an important role in everything that happens because they can make sure that any agreement that has been reached during the mediation process can be implemented legally and satisfactorily for the client. Airport authorities, contractors, and airlines must be involved proactively during the entire process. One of the advantages of inviting its members is that solutions provided are always very viable since this will include all the practicable repercussions of the dispute resolution.

C. IMPORTANCE OF CLEAR CONTRACT CLAUSES FOR MEDIATION

Definite contract provisions which specifically call for mediation seem peculiar to guarantee the success of the mechanism. These clauses should set out how to get to mediation and within what time frame, who does what and how the mediator will be chosen. They have the effect of raising the expected chances of early and efficient settlement and contribute to that reduction in the 'clogging up' of the legal process which is one of the main reasons for the growth of that American phenomenon, the 'litigation explosion'. Also, the provisions concerning confidence aim at safeguarding some information which is so vital in airport infrastructure projects where information is oftentimes sensitive.

D. COLLABORATIVE APPROACHES: INVOLVING ALL STAKEHOLDERS EARLY

The interest-based model for mediation, in which all parties are encouraged to participate as willing parties in a conflict to seek a solution, is the best approach. It fosters openness of matters and enables the early point out of issues before they turn into major issues in an organization. Besides, engaging all the stakeholders in the process means that more operating sub-goals of the organization are likely to be considered, thus sincere compromises and solutions may be found easier. This is especially important where the relationship between the two companies is not well established; early involvement establishes goodwill and cooperation replacing the latter with problem solving oriented strategies.

The following is a set of best practices that if followed will ensure that mediation may be very effective in handling airport infrastructure disputes hence avoiding costly and time-consuming litigation.

VII. CONCLUSION

In this article, the writer examined how mediation forms a practical form of dispute resolution with regard to airport concession agreement and infrastructure projects. Key aspects pointed out are concerns with the airport concessions which is a process that involves airport proprietors, airline companies, investors and other governmental infrastructures. These problems may be in the form of project related problems such as delays or failure to launch, financial problems or difficulty in compliance with certain regulations. Mediation, an acceptable type of ADR, offers the facility for dealing with such disputes in a more relaxed manner, economically, and expeditiously, with emphasis on cooperation rather than antagonism.

In connection with infrastructure of airport, mediation has various advantages. Its anonymity fosters the free sharing of information between counterparties while its negotiability makes it possible to provide solutions that are typically more suitable for the dynamic, chronic nature of airport concessionary relations. Mediation also aids the preservation of business relations as is vital within the aviation industry since cooperation among different stakeholders is usual.

However, there are certain deficiencies in the given area in the application of mediation. Among these are absence of well-defined processes and procedures, and few identifiable research evidence regarding best practices for airport concession facilities. Future studies should therefore aim at establishing checklists for airport related mediations, exploring the potentials and limitations of mediation with regard to various legal systems and analysing the mediations long-term success in resolving disputes without prejudicing business relationships.

To the policy and the concerned industry members thus there is huge potential for improvement in streamlining of the contractual relations in the aviation industry by ensuring a culture of mediation and its adoption as the means of amicable resolution of the disputes. Aviation industry clients and stakeholders should seek specialized legal professional mediation training for the specific industry type so as to enhance legal mediation professional services, hence minimizing and resolving conflicts successfully, sustainably and harmoniously in airport infrastructure projects.

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ARBITRATING CONSTRUCTION CONTRACTS: SUB-CONTRACTS, MULTIPARTY CHALLENGES, AND THE THIRD-PARTY BENEFICIARY DOCTRINE

- RISHI SARAF[1]

ABSTRACT

Today, the construction sector faces numerous challenges stemming from national and international institutions, ranging from policy changes, delay in completion of projects, payment issues to force majeure events and economic sanctions. To deal with these challenges, parties enter into construction contracts which are embedded with amicable dispute resolution methods such as arbitration.

Construction Arbitration is widely accepted; however, it has its own set of limitations, one of them being the issue of multiparty arbitration. Multiparty Arbitration involves allowing certain third parties, notably non-signatories to an arbitration agreement, to participate in arbitration proceedings. In recent times, construction contracts have become increasingly complex, involving multiple parties, from employer, main contractor to subcontractors each with different sets of rights and liabilities. In case of disputes between the two, whether the third party which is also involved in the construction project can be added to the arbitration remains a question.

In the context of India, which is witnessing significant growth in the construction sector, the issue of multiparty arbitration is prevalent. While a recent Supreme Court judgment upholds the "Group of Companies doctrine", its applicability in construction arbitration remains limited. The author of this paper argues for the need to apply the third-party beneficiary doctrine in Indian Arbitration jurisprudence, especially in the context of the construction

[1] 5th Year B.A.LLB, National Law University, Odisha, Gmail: 20ba073@nluo.ac.in.

disputes. The third-party beneficiary doctrine allows the court to add non-signatory parties to the arbitration based on the intent of the parties as determined by the executed contract.

This doctrine is widely utilized in countries such as Canada, the US, and Switzerland in the construction sector, facilitating amicable resolution of arbitration disputes.

Keywords: *Multi-party Arbitration, Third Party Beneficiary doctrine, Non-signatory, Construction Arbitration*

I. INTRODUCTION

The Construction & Infrastructure sector is key to any economy in the world, and India is no exception. Currently, the Indian Construction Industry is one of the fastest-growing industries, significantly contributing to the country's growth. It is expected that by 2031, India would become the third-largest economy globally. However, this achievement would only be possible if India spends USD 1.4 trillion of its GDP on infrastructure projects. The Indian Government recognizes the importance and role played by infrastructure, thereby funding large projects involving significant players worldwide.[2]

While the growth in this sector is promising, the increase in the number of unresolved disputes is worrisome. It is rational to assume that the increase in the sector would lead to an increase in disputes, which sometimes become inevitable. However, an efficient dispute resolution mechanism ensures that growth does not halt, and the economy keeps progressing.[3]

India is not known for an efficient resolution mechanism. Litigation takes years, and the backlog of court cases is at an alarming stage. The introduction of ADR Mechanisms, such as arbitration, has provided some relief to potential investors, corporate giants, and other stakeholders. Today, arbitration is one of the most preferred modes of ADR Mechanism, involving a third private party

[2] *Infrastructure Construction Market - Growth, Trends, Covid-19 Impact, And Forecasts (2024 - 2029),* https://www.mordorintelligence.com/industry-reports/infrastructure-sector (last visited 24th March 2024).

[3] Rajat Singla, *India is set to Become the Third Largest Construction Dispute Market,* Expert Witness Journal, https://masinproject.com/wp-content/uploads/2023/04/India-is-Set-to-Become-the-43.pdf (last visited 24th March 2024).

to act as an umpire in resolving disputes, currently the most well-accepted mode of dispute resolution across all sectors of the economy.

When discussing the construction industry, it faces several challenges regarding arbitration. From ambiguity over arbitration clauses to the lack of technical experts and the complexity involved in construction projects, arbitration poses unique challenges. In a NITI Aayog report, it was found that it takes more than 5 years for disposal of an arbitration in this industry due to various challenges faced by this industry.[4] One such challenge pertains to multiparty arbitration, which is discussed in this paper. Modern construction projects involve more than one party and more than one arbitration agreement. The situation may involve an employer, main contractor, and subcontractor, where disputes may arise.[5] Will the arbitral tribunal have the power to include the third party for efficient dispute resolution? This paper aims to explore such questions.

Although the Supreme Court recently upheld the Group of Companies Doctrine, allowing non-signatories or third parties to be added as parties to arbitration, its applicability to construction arbitration needs further examination. Thus, this paper delves into construction arbitration in India, specifically addressing multi-party arbitration within this context. It also analyses Indian and foreign jurisprudence, discussing the need for a flexible approach while suggesting the introduction of the third-party beneficiary doctrine.

The third-party beneficiary doctrine provides that if a contract is made to benefit someone who is not directly part of the contract, that person can still sue if the contract is broken. Essentially, A third-party beneficiary is a person who is not a contracting party of a contract but can still receive the benefits from the performance of that contract.[6] When this doctrine is applied to the arbitration regime, it allows for the third party who has received the direct benefit of a contract that contains

[4] NITI Aayog Press Note 'Initiatives to revive the Construction Sector', http://niti.gov.in/writereaddata/files/press_releases/Initiatives%20to%20revive%20the%20Construction%20Sector.pdf (last visited 24th March 2024).

[5] Dr. Matthew Secomb, *Navigating through construction disputes in India*, https://www.whitecase.com/insight-our-thinking/navigating-through-construction-disputes-india (last visited 24 March 2024).

[6] Matthew R. Carter, *Arbitration clauses in the context of thirdparty beneficiary claims: An issue ripe for corporate consideration and Illinois Supreme Court review*, Trial Briefs, https://www.winston.com/a/web/112093/7Y2suw/carter-article3.pdf (last visited 24 March 2024).

an arbitration clause to be added to the arbitration proceeding.[7] This doctrine has been applied for decades into the construction sector in foreign countries. However, its applicability is still a question mark in Indian arbitration jurisprudence. The authors in this paper would try to argue the same.

II. ARBITRATING CONSTRUCTION CONTRACTS: UNDERSTANDING DISPUTE RESOLUTION IN THE CONSTRUCTION SECTOR

The Construction Contracts are essentially agreements designed specifically with the needs of the construction sector in mind. These contracts typically include an arbitration clause providing for the peaceful settlement of disputes. "*Accounting Standard (AS) 7, applicable for accounting periods on or after 01.04.2021, defines a construction contract as a contract specifically negotiated for the construction of an asset or a combination of assets that are closely interrelated or interdependent in terms of their design, technology, and function, or their ultimate purpose or use*."[8]

Construction projects involve large sums of money and resources. The complexities involved in these projects make them vulnerable to disputes that may arise due to a variety of reasons, such as delays in completion, force majeure events, termination of contracts, frustration of contracts, rise in prices, and ambiguities in work clauses. At different stages of the project, various kinds of disputes may arise, and parties cannot always approach courts for resolution due to numerous reasons, such as the never-ending litigation process, the complexities involved in the construction project, or the costly litigation. Therefore, these disputes are initially attempted to be resolved through arbitration as the preferred mode of resolution mechanism.[9]

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[7]*Extension of Arbitration Agreements to Non-Signatories: An International Perspective*https://www.indialawjournal.org/archives/volume4/issue_3/article_6.html#:~:text=While%20very%20similar%20to%20estoppel,be%20contracting%20for%20themselves%20only (last visited 24 March 2024).

[8]Accounting Standard (AS) 7, Ministry of Corporate Affairs, Govt of India https://www.mca.gov.in/Ministry/notification/pdf/AS_7.pdf.

[9] Anand Kumar Maurya, *ARBITRATING CONSTRUCTION DISPUTES IN INDIA*, Journal of Alternate Dispute Resolution (Volume 2 Issue 3 – ISSN 2583-682X Quarterly Edition | July- September 2023) 10.55662/JADR.2023.2302.

Arbitration is the most preferred method for resolving disputes, offering numerous advantages to the parties, including party autonomy, a time-bound process, cost-effectiveness, and no prescribed lengthy procedures. Parties simply need to include an arbitration clause in their contracts to opt for arbitration.

In India, the Arbitration and Conciliation Act, 1996, governs arbitration law. This Act is based on the UNCITRAL model law on arbitration, and its key provisions include regulations related to the appointment of arbitrators and methods of appeal. The Act has been amended several times, in 2015, 2019, and 2021, to fulfil its objective of providing amicable resolution of disputes.

If we talk about construction arbitration, as the term suggests, involves the usage of ADR mechanisms of arbitration in the construction sector. The growth of both of these is interdependent and crucial for any country's economy. In the preceding paragraphs, we have already discussed the importance of the construction sector and the rigorous dispute resolution mechanisms. While there's no separate legislation dedicated to construction arbitration, basic construction arbitration in India operates under contract law, with the Arbitration and Conciliation Act, 1996, providing the governing framework.[10]

III. CHALLENGES AND DYNAMICS OF MULTIPARTY DISPUTES IN CONSTRUCTION PROJECTS

Construction projects often involve significant financial investments, reaching millions or even billions of rupees, and typically entail the participation of multiple parties at various stages of contract completion. These parties include subcontractors, independent contractors, and agents, each with distinct sets of rights and liabilities, giving rise to independent contracts and agreements.[11]

Major construction projects involve multiple parties and interrelated contracts typically encompassing the employer, project in charge company, consultant, workers, and subcontractors,

[10] Ibid.

[11] Dr. Chandana Jayalath, *Why Multi-Party Arbitration Should Have a Satisfactory Regime in International Construction*, CM Guide Construction Claims & PM Consultant (last visited 25 March 2024) https://www.cmguide.com.au/archives/3225#.

each with their own set of responsibilities and roles. Disputes among these parties often invoke various contracts, many of which include arbitration clauses for dispute resolution.

In scenarios where a contract involves the employer, main contractor, and subcontractors, each party operates under different sets of rights and liabilities stemming from separate contracts. Despite the lack of direct accountability between the employer and subcontractors, failures or breaches of contract can impact other parties involved. For instance, if a subcontractor causes a delay in completing their portion of the project, it can subsequently delay the main contractor's work, affecting the overall project timeline and potentially leading to disputes between the main contractor and subcontractor, as well as between the employer and main contractor, often leading to arbitration proceedings. In such cases, although the arbitral tribunal deals with a common subject matter, separate tribunals may need to be established. However, it could be more beneficial if the tribunal recognizes the shared subject matter and consolidates the proceedings to determine the party responsible for the delay in project completion.

Another situation arises with back-to-back contracts, where the completion of one contract is contingent upon the other. When one party breaches its contract, it adversely affects the other party, which may lack a direct contractual relationship with the party at fault. In such instances, convening all relevant parties for dispute resolution, either at the tribunal's discretion or at the request of one party, proves to be more effective.[12]

IV. NAVIGATING THE LEGALITY OF MULTIPARTY ARBITRATION: GOING BEYOND THE GOC DOCTRINE

In the previous section, we explored the challenges faced by the construction sector regarding the involvement of multiple parties in a construction project and the complexities related to dispute settlement. This section proposes a solution to such multi-party contractual disputes through Multi-party Arbitration, while delving into the validity and intricacies associated with it.

[12] Stavros Brekoulakis & Ahmed EI Far, *Subcontracts and Multiparty Arbitration in Construction Disputes*, Global Arbitration Review (Last visited 25 March 2024) https://globalarbitrationreview.com/guide/the-guide-construction-arbitration/fifth-edition/article/subcontracts-and-multiparty-arbitration-in-construction-disputes.

Multiparty arbitration, as the name suggests, involves two or more parties in the arbitration process. This arrangement is typically achieved through consent, wherein all parties agree to participate in arbitration to resolve disputes. However, the concept of consent in international arbitration law is not always straightforward.

Some countries only recognize explicit consent, whereby a third party can be added to arbitration only with the consent of all parties involved. Others apply implicit consent theories to add third parties to arbitration proceedings.

Additionally, today, various arbitral institutions worldwide provide for rules that allows for addition of third parties in the arbitration proceedings. This is done based on the consent of primary parties. For instance, Article 22(1)(x) of the London Court of International Arbitration (LCIA) Rules of 2020 empowers the arbitral tribunal to allow third parties to participate in arbitration if both the third party and the applicant party consent to it.[13]

The ICC Rules also allow for the joinder of a third party, such as a subcontractor, if a request is made to the Secretariat before the confirmation of the tribunal, and the request must indicate the legal basis for the joinder.[14] Moreover, article 7.3 of the Chartered Institute of Arbitrators Rules and Industry Model Arbitration Rules gives the tribunal the power to consolidate arbitral proceedings involving the same parties and common subject matter.[15]

However, the real problem arises when consent cannot be determined and the parties fail to agree on the same. In such a situation, the tribunal is left with no option but to identify consent from the arbitration agreement based on the implied consent theory. The implied consent theory provides that when the agreement is silent upon third parties' consent to be bound by the arbitration agreement, it can be presumed based on a variety of factors such as the language of the contract, the outcome of the dispute, the subject matter of the dispute, etc. This theory involves the usage

[13] Article 22(1)(x), London Court of International Arbitration (LCIA) Rules of 2020, https://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2020.aspx .

[14] Article 10, ICC Rules, https://iccwbo.org/dispute-resolution/dispute-resolution-services/arbitration/rules-procedure/2021-arbitration-rules/.

[15] Article 7.3, Chartered Institute of Arbitrators Rules https://www.ciarb.org/media/9147/the-chartered-institute-of-arbitrators-regulations-june-2017-230420.pdf.

of doctrines such as agency, third-party beneficiary, assignment, and the group of companies' doctrine, among others, where consent is implied to invoke multi-party arbitration.[16]

More recently, the GoC doctrine has been comprehensively discussed by the Supreme Court, providing clarity on one aspect of multi-party arbitration. In the case of ***Cox & Kings Ltd. v. SAP India (P) Ltd.***, the Supreme Court recently affirmed the applicability of this doctrine in Indian jurisprudence. While the recent judgment largely focuses on the GoC doctrine, there are some significant observations made with regard to the wide interpretation given to the definition of a party provided under section 7 of the Arbitration Act.[17]

The Court observed that the term party includes both signatory and non-signatory, and whether the non-signatory can be added as a party or not can be determined by various factors such as surrounding circumstances, commonality of subject matter, record of the agreements, and performance and discharge of contracts. [18]The relevant paragraphs in this regard are-

"120. In case of multiple parties, the necessity of a common subject matter and composite transaction is an important factual indicator. An arbitration agreement arises out of a defined legal relationship between the parties with respect to a particular subject matter. Commonality of the subject matter indicates that the conduct of the non-signatory party must be related to the subject matter of the arbitration agreement. ***For instance, if the subject matter of the contract underlying the arbitration agreement pertains to distribution of healthcare goods, the conduct of the non-signatory party should also be connected or in pursuance of the contractual duties and obligations, that is, pertaining to the distribution of healthcare goods****. The determination of this factor is important to demonstrate that the non-signatory party consented to arbitrate with respect to the particular subject matter."*

"121. In case of a composite transaction involving multiple agreements, it would be incumbent for the courts and tribunals to assess whether the agreements are consequential or in the nature of a follow-up to the principal agreement. ***This Court in Canara Bank (supra) observed that a***

[16] Ankit Konwar, *Multi-Party Arbitration and Consolidated Arbitration: Legality of The Concept in India*, Issue 3 Volume 1, Indian Journal of Projects, Infrastructure and Energy Law.
[17]*Cox & Kings Ltd. v SAP India (P) Ltd.,* (2023) SCC OnLine SC 1634.
[18] Ibid.

composite transaction refers to a situation where the transaction is interlinked in nature or where the performance of the principal agreement may not be feasible without the aid, execution, and performance of the supplementary or ancillary agreements.*"*[19]

"231 An agreement to refer disputes to arbitration must be in a written form, as against an oral agreement, but need not be signed by the parties. ***Under Section 7(4)(b), a court or arbitral tribunal will determine whether a non-signatory is a party to an arbitration agreement by interpreting the express language employed by the parties in the record of agreement, coupled with surrounding circumstances of the formation, performance, and discharge of the contract. While interpreting and constructing the contract, courts or tribunals may adopt well-established principles, which aid and assist proper adjudication and determination.*** *The Group of Companies doctrine is one such principle"*[20]

The aforementioned paragraphs rightly suggest that, while interpreting and construing contracts, courts may adopt well-established principles to ensure the proper adjudication of disputes. Thus, a third party may be joined in arbitration through the application of these principles, provided there is a common subject matter and a composite transaction involving multiple agreements, along with the discharge and performance of the contract. The factors outlined in the judgment are not confined to any particular doctrine and may be applied to other doctrines, such as that of a third-party beneficiary.

There are also other case laws suggesting that multi-party arbitrations are possible in cases where a multiplicity of proceedings can cause conflicting decisions and injustice to the parties since disputes arise out of the same or interlinked contracts. In the case of ***P.R. Shah, Shares & Stock Brokers (P.) Ltd. v. B.H.H. Securities Private Limited and Ors***, the Hon'ble Court held that:

"19. *If A had a claim against B and C, and there was an arbitration agreement between A and B but there was no arbitration agreement between A and C, it might not be possible to have a joint arbitration against B and C. A cannot make a claim against C in an arbitration against B, on the ground that the claim was being made jointly against B and C, as C was not a*

[19] Ibid., [120] & [121].
[20] Ibid., [231].

party to the arbitration agreement. But if A had a claim against B and C and if A had an arbitration agreement with B and A also had a separate arbitration agreement with C, there is no reason why A cannot have a joint arbitration against B and C. Obviously, having an arbitration between A and B and another arbitration between A and C in regard to the same claim would lead to conflicting decisions. In such a case, to deny the benefit of a single arbitration against B and C on the ground that the arbitration agreements against B and C are different, would lead to multiplicity of proceedings, conflicting decisions and cause injustice. It would be proper and just to say that when A has a claim jointly against B and C, and when there are provisions for arbitration in respect of both B and C, there can be a single arbitration."[21]

The cases such as ***Jaiprakash Associates Ltd. vs. Micro and Small Enterprises Facilitation Council &Anr.***[22] and ***Gammon India Ltd. &Anr. vs. National Highways Authority of India***[23] have also recognized the problem of multiple proceedings in arbitration.

"8. In fact, relying upon Gammon India Ltd. v. NHAI [Gammon India Ltd. v. NHAI, 2020 SCC OnLine Del 659] wherein it has been held that in case of multiple disputes arising out of the same or interlinked contracts, endeavour should be made that all such separate claims and disputes are adjudicated upon by the same Arbitral Tribunal so as to avoid multiplicity of proceedings and confusion"[24]

"28. Multiple arbitrations before different Arbitral Tribunals in respect of the same contract is bound to lead to enormous confusion. The constitution of multiple Tribunals in respect of the same contract would set the entire arbitration process at naught, as the purpose of arbitration being speedy resolution of disputes, constitution of multiple tribunals is inherently counter-productive."

"29. Typically, in construction contracts, the claims may be multiple in number but the underlying disputes about breach, delays, termination etc., would form the core of the disputes for almost all claims. As is seen in the present case, parties have invoked arbitration thrice, raising various claims before three different Tribunals which have rendered three separate Awards. Considering

[21] *P.R. Shah, Shares & Stock Brokers (P.) Ltd. v B.H.H. Securities Private Limited and Others* (2012) 1 SCC 594, [19].
[22] *Jaiprakash Associates Ltd. v Micro and Small Enterprises Facilitation Council &Anr.,* LPA 565/2023.
[23] *Gammon India Ltd. &Anr. v National Highways Authority of India*, (2020) SCC OnLine Del 659, [28],[29].
[24] Jaiprakash Associates, (n 22) [8].

that a previously appointed Tribunal was already seized of the disputes between the parties under the same contract, the constitution of three different Tribunals was unwarranted and inexplicable. A situation where multiple Arbitral Tribunals parallelly adjudicate different claims arising between the same parties under the same contract, especially raising overlapping issues, is clearly to be avoided."[25]

Another caselaw, ***Tomorrow Sales Agency (P) Ltd vs SBS Holdings Inc***, the Delhi High Court ruled that the non-signatories to the arbitration agreement can invoke the arbitration as a beneficiary or may be bounded by the same.[26]

Thus, it has been clarified that Indian Arbitration Jurisprudence has recognized the problem of multiparty arbitration and is not against the idea of non-signatory parties or third parties being added as parties to the arbitration. However, so far, only the GoC doctrine has gained acceptance by the Indian Courts recently affirmed by the Supreme Court. While there is a possibility that other doctrines such as Veil-piercing or Alter-ego, Agency, Estoppel and Third-Party Beneficiary may gain acceptance and can be applied.[27]

V. APPLYING THE DOCTRINE OF THIRD-PARTY BENEFICIARY IN CONSTRUCTION ARBITRATION

The Third-party beneficiary doctrine provides that in certain circumstances a non-signatory who has received benefits under the main contract is entitled to demand performance of those benefits. Following the same line, the party who has received the direct benefit from the contract which contains an arbitration clause is also allowed to arbitrate the dispute.[28]

This doctrine can play a crucial role in the context of construction arbitration since as we have already discussed how construction contract involves multiple parties including employer, contractor and sub-contractors. Suppose in a given scenario, where there is a construction project

[25] Gammon India (n 23), 28,29.
[26] *Tomorrow Sales Agency Private Limited v SBS Holdings, Inc. & Others* (2023) SCC OnLine Del 3191.
[27] Cox and Kings, (n 17) 231.
[28] YAZAN (ATIEH ALLAH) BAKHET AL MAAITEH, *Joining Non-Signatory Third Parties to Arbitration Agreement with Particular Reference to Construction Disputes: Comparative Study Between England and Jordan* (Lessons to Learn) (Faculty of Business and Law April 2023).

undertaken by Party A as the owner, Party B is the main contractor hired by Party A, and Party C is a subcontractor hired by Party B to perform specific tasks. In this scenario, the doctrine of third-party beneficiaries can be applied to include Party A, the main contractor, in the arbitration proceedings between Party B and Party C, the subcontractor. Even though Party A is not a signatory to the subcontract agreement, its interests in the project as being the beneficiary and the common subject matter of the disputes justify its inclusion in the arbitration process.

Another situation could be when the dispute is between the employer and the main contractor while the sub-contractor undertakes the specific work. Suppose a property developer (the employer) enters into a contract with a construction company (the main contractor) to build a commercial building. As part of the project, the main contractor engages a plumbing company (the subcontractor) to handle all plumbing installations.

Within the contract, there are detailed specifications outlining the scope of work, including plumbing installations. The contract clearly states that the construction company is responsible for ensuring all subcontractors, including the plumbing company, comply with project requirements. While the contract may not explicitly mention the plumbing company, it is evident that their involvement is crucial to the successful completion of the project. The main contractor's ability to meet project deadlines and quality standards depends on the subcontractor's performance, implying an intended benefit for the subcontractor.

In this scenario, the subcontractor (plumbing company) is identified through a thorough examination of the contract terms, which indicate an explicit intention to engage subcontractors and confer benefits upon them. The subcontractor's role in the project is integral, as evidenced by the contractual obligations placed on the main contractor regarding subcontractor performance. As such, the subcontractor qualifies as a third-party beneficiary with rights that warrant their inclusion in arbitration proceedings concerning disputes arising from the project.[29]

Similarly, recent legal precedents support the application of the third-party beneficiary doctrine in construction arbitration. For instance, in the case of ***Husky Oil Operations Limited v Technip***

[29] Subcontracts and Multi-party Arbitration (n 12).

Stone & Webster Process Technology,[30] the Canadian Court of Kings bench of Alberta found the construction owner bound by a subcontract arbitration clause based on the principle that a non-party taking up a contractual or other right also takes up the associated burdens (i.e. the obligations or liabilities connected to the right). The Court also interpreted the definition of all disputes to cover ancillary disputes covering third parties as well.[31]

Likewise, the American Jurisprudence, particularly the New Jersey Courts, has upheld the Third-Party Beneficiary Doctrine in construction arbitration disputes, recognizing the rights of non-signatory parties. The Court held that the Owner acts as a beneficiary in cases of construction contracts where a dispute involves subcontractors and the main contractor and can be added as a non-signatory party in an arbitration proceeding.[32]

"Nonsignatories of a contract ... may compel arbitration or be subject to arbitration if the nonparty is an agent of a party or a third party beneficiary to the contract."[33]

In the case of ***Mississippi Fleet Card v. Bilstat, Inc****.,* the US Court held the following in the context of third-party beneficiary doctrine:

"(1) that the terms of the contract are expressly broad enough to include the third party either by name or as one of a specified class and (2) the said third party was evidently within the intent of the terms so used, the said third party will be within its benefits if (3) the promise had, in fact, a substantial and articulate interest in the welfare of the said third party in respect to the subject of the contract."[34]

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[30]*Husky Oil Operations Limited v Technip Stone & Webster Process Technology Inc* (2023) ABKB 545 CanLII

[31] Third-Party Beneficiary of a Contract Bound by Mandatory Arbitration Clause, https://www.fieldlaw.com/News-Views-Events/222202/Third-Party-Beneficiary-of-a-Contract-Bound-by-Mandatory-Arbitration-Clause (last visited 25 March 2024).

[32] Christopher G Hill, *The New Jersey Construction Triangle – Compelling Arbitration Without a Contract Provision Between Subcontractor and Owner/Developer* (August 22, 2014) https://constructionlawva.com/jersey-construction-triangle-compelling-arbitration-without-contract-provision-between-subcontractor-ownerdeveloper/ (last visited 25 March 2024).

[33]*Mutual Benefit Life Insurance Co. v Zimmerman*, 783 F. Supp. 853, 865-66 (D.N.J. 1992), aff'd, 970 F.2d 899 (3d Cir. 1992); *Garfinkel v Morristown Obstetrics & Gynecology Assoc*., 333 N.J. Super. 291, 308 (App. Div. 2000), rev'd on other grounds, 168 N.J. 124 (2001); *Jansen v Salomon Smith Barney,* 342 N.J. Super. 254, 261 (App. Div.), certif. denied, 170 N.J. 205 (2001).

[34]*Mississippi Fleet Card, LLC v Bilstat, Inc.,* 175 F. Supp. 2d 894 (S.D. Miss. 2001)

Furthermore, the third-party doctrine has been recognized in jurisdictions like Switzerland, emphasizing the importance of express consent from third parties in arbitration proceedings. Legal scholars, including Gary Born, have also advocated for the doctrine, highlighting its reliance on the initial intent of signatory parties and the potential inclusion of third parties as beneficiaries.[35]

If we consider India, despite these legal developments, there has been limited application of the third-party beneficiary doctrine as an exception to the doctrine of privity and it has never been clearly applied in the context of construction arbitration.[36] The Indian judiciary has, however, recognized the doctrine of the third-party beneficiary in cases such as ***Bhujendra Nath v. Sushamoyee Basu***[37] and ***Pandurang v. Vishwanath***, [38] as an exception to the doctrine of privity. In these cases, the Court held that third party can enforce the agreement as a beneficiary even though they are not a party to the agreement. The term "beneficiary" has been extended to include intended beneficiaries, which must be determined from the intent of the parties executing the agreement.[39]

While some cases discussed this doctrine such as ***Shapoorji Pallonji and Co v Rattan India Pvt Ltd***,[40] however, fails to provide clarity on usage of it in the context of arbitration.[41]

27. There are also cases where third party beneficiaries of a contract may be compelled to arbitrate. Similarly, in cases such as assignment or succession, the assignees or successors interest may be compelled to arbitrate although, they were not original signatories to the arbitration agreement.[42]

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[35] Matthew R. Carter, *Arbitration clauses in the context of thirdparty beneficiary claims: An issue ripe for corporate consideration and Illinois Supreme Court review* Trial Briefs, (May 2016 Volume 61 issue 8) https://www.winston.com/a/web/112093/Carter-article3.pdf.

[36] THIRD-PARTY BENEFICIARIES VIS-À-VIS THE INDIAN CONTRACT LAW, 1872 https://lawessential.com/all-blogs/f/third-party-beneficiaries-vis-%C3%A0-vis-the-indian-contract-law 1872?blogcategory=Miscellaneous (last visited 25 March 2024).

[37] AIR 1936 Cal 66.

[38] AIR 1939 Nag 20.

[39] Treatment Of "Doctrine Of Privity" By Indian Judiciary https://www.mondaq.com/india/contracts-and-commercial-law/243778/treatment-of-doctrine-of-privity-by-indian-judiciary (last visited 25 March 2024).

[40] *Shapoorji Pallonji and Co v. Rattan India Pvt Ltd* (2021) SCC Online Del 3688.

[41] India: Can Confirming Parties Be Compelled To Arbitrate? https://www.mondaq.com/india/arbitration--dispute-resolution/1344190/can-confirming-parties-be-compelled-to-arbitrate (last visited 25 March 2024).

[42] (2021) SCCOnline Del 3688.

In the case of ***Zonal General Manager, IRCON Int Ltd. v Vinay Heavy Equipment***[43], the Indian Supreme Court had an opportunity to deal with the intricate relationship formed between the Employer, Contractor, and Sub-Contractor to ascertain whether two distinct but interrelated arbitration proceedings can be consolidated to be adjudged by a single Arbitrator/Arbitral Tribunal. However, the application of the third-party beneficiary doctrine was never raised before the Court. Therefore, the Court, applying the doctrine of privity, declined to consolidate the multi-party proceedings, upholding the doctrine of privity of contract.[44]

Similarly, the Hon'ble High Court of Delhi in the ***Laxmi Civil Engineering Services Ltd. & Ors. v GAIL (INDIA) LTD***. also dealt with a similar issue pertaining to the interpretation and treatment of contracts that can be construed or adjudged within a single arbitration proceeding. The Court, although recognized accepted that non-signatories can be added to arbitration. However, in a given case, rejected the contention of the petitioner on the basis that there exist separate contracts between the contractor and subcontractors and cannot be termed as a single composite transaction.[45] In these cases, the application of the doctrine of the third-party beneficiary was not explicitly addressed. Therefore, it is imperative for the Courts to reconsider the applicability of the third-party beneficiary doctrine in construction arbitration. Clarification on its scope and application by courts and legislatures would provide much-needed guidance in resolving multiparty disputes efficiently and fairly within the construction industry.

VI. CONCLUSION

The author of this paper has argued for the application of the third-party beneficiary doctrine in the context of multi-party arbitration. While Indian jurisprudence has taken a significant step in removing ambiguity regarding the use of the Group of Companies doctrine, the construction arbitration sector has not yet benefited from it. Construction projects typically involve a multitude of parties, including architects, designers, workers, subcontractors, main contractors, and project owners. It is often impractical to ensure that all these parties are signatories to a single contract.

[43] (2015) 13 SCC 680.
[44] Ibid.
[45] *Laxmi Civil Engineering Services Ltd. & Ors. v GAIL (INDIA) LTD.,* ARB.P. 175/2020.

Consequently, disputes may arise that require the involvement of more than just the signatory parties.

The application of the third-party beneficiary doctrine could facilitate the inclusion of these non-signatories in arbitration proceedings if it can be established that the main contract is intended for the benefit of third parties, or if the party in question seeks to be added to the arbitral proceedings. Upholding the intent of the parties forming the contract, the third-party beneficiary doctrine considers various factors such as the commonality of the dispute, performance of the contract, composite transactions, and the relationship between the parties. Thus, this doctrine holds potential benefits for construction arbitration, especially in cases involving non-signatory parties.

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EXAMINING ONLINE ARBITRATION WITH SPECIAL EMPHASIS ON CONFIDENTIALITY AND PRIVACY: EMERGING TRENDS AND ISSUES

- *ANSHI JOSHI*[1]

ABSTRACT

Ever since the COVID-19 pandemic happened, several activities have shifted to an online mode, resulting in a completely different approach towards functionality in operations. Legal system and legal processes have not been immune to this shift, and over the time, various components can now be pursued in an online mode. This shift has also been a contributor to newer conversations about accessibility to justice processes. Alternative Dispute Resolution (ADR) methods are considered to play an important part in ensuring access to justice and making dispute resolution easier. Online arbitration is one of the more recent trends in the Online Dispute Resolution (ODR) systems, where arbitrations are being conducted either in fully online or hybrid modes. However, with online arbitration, there are certain challenges associated, the biggest one being the sustenance of confidentiality and privacy requirements attached to arbitration. Confidentiality is a pivotal feature of arbitration, and is one of the primary reasons for being the preferred mode of dispute resolution in high stake disputes. Hence, maintaining confidentiality and privacy are a major challenge in the path of online arbitrations. This paper explores the confidentiality and privacy requirements in arbitration and how major jurisdictions have addressed it. It also looks into challenges and solutions, and how changes on policy level can be incorporated in order to protect privacy and confidentiality in online arbitration.

Keywords: *Online Arbitration, Confidentiality, Privacy, Online Dispute Resolution*

I. INTRODUCTION

[1] Assistant Professor of Law, PIMR, Department of Law, Indore, Gmail: anshi_joshi@pimrindore.ac.in.

Arbitration is a method of dispute resolution in which parties agree to submit their conflicts to a neutral third party, known as an arbitrator, who then makes a binding decision. Arbitration is

used in a wide range of contexts, including business disputes, transnational disputes, labour negotiations, and international trade. One of the key benefits of arbitration is the confidentiality and privacy in proceedings. It can conveniently be used to resolve disputes without worrying about reputational or commercial impact of the proceedings, and impending losses, if any.[2] After the COVID-19 pandemic, a lot of functions have shifted to online mode, ranging from telemedicine to online grocery shopping. ODR has also been boosted during the period of pandemic, as due to physical limitation, an alternate mode was needed to provide a platform for dispute resolution. Despite all the historic, life-altering events in the world, international trade and commerce adapted and continued flourishing. Among many means of ODR, online arbitration has been gaining popularity among parties. In an online arbitration, parties may join the proceedings remotely and all the requirements of the arbitral proceedings are fulfilled online. It is a new endeavour and the arbitration fraternity is still deliberating on how to optimally conduct online arbitration, as it comes with many challenges.[3] One such challenge is maintaining confidentiality and privacy of the arbitration. With technological advancement, privacy is getting a layer thinner every day. In arbitration, where confidentiality is of utmost importance to the parties, any breach of confidentiality can result in huge losses in both financial and non-financial ways. Therefore, it is essential to see how confidentiality and privacy that a physical, traditional arbitration offers can be maintained in an online arbitration. This paper focuses on the confidentiality and privacy considerations and their application in online arbitration. The first part lays down the groundwork for research. The second part discusses an overview of online arbitration and presents a comparison between traditional and online arbitration. The third part focuses on the importance of confidentiality and how it impacts online arbitration. The fourth part outlines the legal framework surrounding confidentiality in various jurisdictions and how different institutions and their rules,

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[2] Nasser Ali Khasawneh, Maria Mazzawi, 'Arbitration and the Advent of New Technologies' (*Global Arbitration Review*, 17 October 2023) <https://globalarbitrationreview.com/guide/the-guide-telecoms-arbitrations/second-edition/article/arbitration-and-the-advent-of-new-technologies> accessed 26 November 2024.

[3] Chenoy Ceil, 'Dimensions of Online Arbitration in India' (SSRN, June 6, 2012), <https://ssrn.com/abstract=2078896> accessed 21 December 2024.

along with international instruments, are adapting to online arbitration and its confidentiality requirements. The fifth part briefly discusses the technological challenges and solutions for maintaining confidentiality in online arbitrations. The final chapter presents the conclusion.

II. TRADITIONAL MODE OF ARBITRATION V. ONLINE ARBITRATION

An online arbitration is one in which all aspects of the proceedings are conducted online. Online arbitrations can have hearings via video conferencing, but in the majority of cases, parties simply upload their evidentiary documents, respond to the arbitrator's queries, and receive a decision from the arbitrator. Due to their asynchronous character, online mediation and online arbitration share a number of benefits, including lower costs and greater flexibility.[4] As arbitrations rely less on the parties' interactions and more on evidentiary written submissions, the disadvantage of online arbitration not having face-to-face interactions is less significant. The COVID-19 pandemic has disrupted every aspect of our lives, including the legal system. With the closure of courts and legal institutions, there has been a significant backlog of cases, leaving many people without access to justice. However, this crisis has also highlighted the need for alternative dispute resolution mechanisms such as online arbitration. Online arbitration is a process of resolving disputes using online platforms, where parties agree to have their dispute settled by an impartial arbitrator.[5] This process is typically faster, more cost-effective, and less formal than traditional court proceedings. With the pandemic forcing people to work from home, online arbitration has become even more important. One of the main advantages of online arbitration is its accessibility, as the basic need for online arbitration is only a computer device and an internet connection. This means that individuals and businesses can continue to resolve their disputes, even if they are in different countries or unable to travel. With online arbitration, parties can participate in the process from anywhere in the world, as long as they have access to a computer and an internet connection.[6] It allows individuals and businesses in remote or underserved areas to participate in the dispute

[4] Derrick Yeoh, 'Is Online Dispute Resolution the Future of Alternative Dispute Resolution' (*Kluwer Arbitration Blog*, 28 March 2018) <https://arbitrationblog.kluwerarbitration.com/2018/03/29/online-dispute-resolution-future-alternative-dispute-resolution/> accessed 25 November 2024.
[5] *ibid 3*.
[6] Joseph W. Goodman, 'The Pros and Cons of Online Dispute Resolution: An Assessment of Cyber-Mediation Websites' (2003) 2 Duke Law & Tech. Rev. 1-16 <https://scholarship.law.duke.edu/dltr/vol2/iss1/2>.

resolution process, and make it accessible. Online arbitration may also be cost-effective than traditional court proceedings. Parties can save money on travel and accommodation expenses, as well as legal fees. This is particularly important for small businesses and individuals who may not have the resources to pay for expensive court proceedings.[7] Online arbitration can play a significant role in overcoming the digital divide in dispute resolution. In traditional dispute resolution methods, people have to physically appear in court, which can be a significant barrier for those who live in remote or underserved areas. This can also be a challenge for those who have mobility issues or those who cannot afford to take time off work to attend court proceedings.[8] Furthermore, online arbitration can also be more flexible and accommodating for those who have disabilities or other special needs. For instance, parties can request accommodations such as sign language interpretation or closed captioning during the proceedings, which can make the process more accessible for everyone.

However, there are also some challenges associated with online arbitration. One of the main challenges is ensuring that the process is fair and transparent. Parties must have confidence in the arbitrator and the process, and there must be safeguards in place to prevent any bias or unfairness. Another challenge is ensuring that the process is secure and confidential.[9] Parties must be able to trust that their information will be protected and that the process will not be compromised by hackers or other security breaches. Another major challenge that an online arbitration may pose is that in areas where the internet is not steadily or abundantly available, participation can become difficult for the parties.[10]

The COVID-19 pandemic has highlighted the need for alternative dispute resolution mechanisms such as online arbitration. Online arbitration is faster, more cost-effective, and less formal than

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[7] *ibid 5*.
[8] Susan Schiavetta, 'Online Dispute Resolution, E-Government and Overcoming the Digital Divide' (*20th BILETA Conference: Over-Commoditised; Over-Centralised; OverObserved: the New Digital Legal World?,* April 2015), <https://www.bileta.org.uk/wp-content/uploads/Online-Dispute-Resolution-E-Government-and-Overcoming-the-Digital-Divide.pdf> accessed 27 November 2024.
[9] Noam Ebner and John Zeleznikow, 'Fairness, Trust and Security in Online Dispute Resolution' (2015) 36(2) Journal of Public Law and Policy 143-160 <https://digitalcommons.hamline.edu/jplp/vol36/iss2/6>.
[10] Ankona, 'Advantages and Disadvantages of ODR' (*VIA Mediation Centre Blog*, 2021) <https://viamediationcentre.org/readnews/OTE1/Advantages-and-Disadvantages-Of-ODR> accessed 29 November 2024.

traditional court proceedings. However, there are also challenges associated with online arbitration, such as ensuring fairness, transparency, security, and confidentiality. As we move towards a post-pandemic world, it is important to explore the potential of online arbitration to provide access to justice for all. However, the difference of modalities between online and traditional arbitration is also a factor to be considered.

Online arbitration requires specific technology such as video conferencing software, electronic signatures, and secure communication channels. Offline arbitration typically requires less technology, although it may still involve the use of presentation equipment and document management software.[11] The technological logistics in an online arbitration are intense, and requires infrastructure for every stage of the proceedings, such as claims-counterclaims, evidence-taking, cross-examination, requests related to awards, etc. Offline arbitration, on the other hand, requires physical infrastructure such as rooms, printed materials, computers, sitting arrangements, etc.[12]

Online arbitration provides greater accessibility to parties, witnesses, and arbitrators, as it eliminates the need for travel and can be conducted from any location with an internet connection. Individuals with limited resources, disabilities, or health challenges can also participate in proceedings, as online arbitration eliminates travel obligations and facilitates easier scheduling.[13] Offline arbitration can be less accessible for parties who live in remote areas or have difficulty traveling. Online arbitration requires effective communication between parties and arbitrators through the use of technology. Offline arbitration may involve more face-to-face communication, which can lead to greater interpersonal relationships and better understanding between parties.

Online arbitration has the potential to be less expensive than offline arbitration due to several factors. Offline arbitration involves travel costs for parties and witnesses to the physical location of the arbitration, which can be significant. Conversely, online arbitration can be conducted from any location with an internet connection, reducing or eliminating travel costs. Offline arbitration

[11] *ibid 9*.
[12] Dushyant Chauhan and Charu Bajaj, 'A Step Towards the Future: Online Dispute Resolution' (2022) 2(2) IJIRL, 1-14.
[13] David Allen Larson, 'Digital Accessibility and Disability Accommodations in Online Dispute Resolution: ODR for Everyone' (2019) 34 Ohio St. J. on Disp. Resol. 431.

also requires a physical facility, which can be expensive to rent or lease, while online arbitration eliminates this requirement. Online arbitration can also be more efficient, as it eliminates the need for administrative staff to manage the physical facility and related logistics.[14] However, online arbitration may also involve certain costs that may not be present in offline arbitration, such as technology costs, cybersecurity costs, and fees charged by third-party dispute resolution platforms. Ultimately, the overall cost of arbitration may be impacted by various factors, such as the complexity of the dispute, the experience and compensation of the arbitrator, and the duration of the arbitration.[15] Online arbitration also requires robust cybersecurity measures to ensure that the arbitration is secure and confidential.[16]

Online arbitration usually requires the use of electronic evidence, which may include emails, electronic documents, and electronic signatures. Many platforms use dedicated, specialised tools for collecting evidence, and offline arbitration may involve more traditional evidence such as physical documents and witness testimony.[17] For record-keeping, online arbitration typically involves the use of electronic records, which can be more easily stored, searched, and shared. Cloud based storage is also utilised for the same. Offline arbitration may involve more paper-based records, which can be rather difficult to manage and consumes much more storage infrastructure.[18]

Confidentiality and Privacy are fundamental expectations in arbitration. Confidentiality is recognised under several rules, statutes, etc. as an obligation for the parties and the arbitrators. Online arbitration may require additional privacy measures to ensure that confidential information is not shared or compromised. It requires measures against hacking, interception, data leakage, unauthorised access to the virtual arbitration space, limiting contact between any conflicting parties and arbitrators, etc.[19] Offline arbitration may involve more physical security measures to

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[14] Karolina Mania, 'Online Dispute Resolution: The Future of Justice'(2015) 1(1) Int'l Comp. J. 76-86, <https://www.sciencedirect.com/science/article/pii/S2351667415000074>.
[15] Deepak Verma et al, 'Online Dispute Resolution' *Digital Communication Management*, (InTech 2018), <doi:10.5772/intechopen.76032>.
[16] *Ibid*.
[17] Aafreen Choudhary and Dhruv Srivastava, 'Virtual Hearings in Arbitration: Mirage or Reality?' (*SCCOnline Blog*, 28 October 2021) <https://www.scconline.com/blog/post/2021/10/28/virtual-hearings-in-arbitration/> accessed 6 December 2024.
[18] Antonov Jaroslav Valerievich, 'Electronic Arbitration: Legal Issues' (2017) 43(3) Revista Romana de Arbitraj 27-37 <https://ssrn.com/abstract=3293908>.
[19] Leah Wing, 'Ethical Principles for ODR' (2016) 3 IJODR 12.

protect confidential information, and confidentiality and privacy obligations usually extend to oral and written exchange and participation in proceedings.

III. CONFIDENTIALITY AND PRIVACY IN ARBITRATION: RECOGNITION AND CHALLENGES

A. Importance of Confidentiality and Privacy in Arbitration

Confidentiality and privacy are crucial aspects of arbitration, and they play a vital role in ensuring that the arbitration process is fair, impartial, and efficient. Confidentiality and privacy help to protect the parties involved in the dispute, maintain the integrity of the arbitration process, and promote a collaborative approach to dispute resolution.

Confidentiality: Confidentiality is a fundamental principle of arbitration that protects the parties' privacy and allows them to be more open and honest about the dispute' protecting the information shared in the process. Parties are often more willing to reveal information that could be damaging to their case in a confidential setting, which can lead to a more efficient and effective resolution of the dispute. If confidentiality is not maintained, it may discourage parties from participating in the arbitration process, or they may withhold information that could have been useful in resolving the dispute.[20] A "confidentiality clause" is typically provided for in arbitration agreements, which require the parties to maintain the confidentiality of all information and documents relating to the dispute. These agreements typically prohibit parties from disclosing any information related to the dispute to third parties, including the media. Failure to comply with these provisions can result in severe consequences, such as fines or even the invalidation of the award.[21] Confidentiality in arbitration is essential for safeguarding reputations and preventing adverse consequences of public exposure.Parties can be more candid in presenting evidence and making arguments without the

[20] Tariq Khan, 'The Who, Why and When of Confidentiality in Arbitration Proceedings' (2021) 4 *SCC OnLine Blog Exp,*<https://www.scconline.com/blog/post/2021/01/21/the-who-why-and-when-of-confidentiality-in-arbitration-proceedings/> accessed 08 December 2024.
[21] *ibid 19*.

fear of public scrutiny. This helps to ensure that the decision reached is based on a fair and impartial assessment of the evidence presented.[22]

However, it is important to note that confidentiality is not absolute in arbitration. There are situations where disclosure of certain information may be necessary. For example, if the arbitrator determines that it is necessary to disclose certain information to prevent harm to the public or a third party, then confidentiality may be waived. Similarly, if a party seeks to enforce or challenge an award in court, certain information may be required to be disclosed as part of the court proceedings.[23]

Privacy: Privacy is another critical aspect of arbitration that protects the parties from unwanted publicity and shielding their participation from public scrutiny. Unlike court proceedings, arbitration hearings are typically closed to the public, meaning that the proceedings are not available for public scrutiny. This provides parties with greater control over the dissemination of information related to the dispute and reduces the risk of reputational harm.[24] Privacy in arbitration is particularly important because it allows the parties to avoid the negative consequences that can arise from public exposure. Parties can be more candid in presenting evidence and making arguments without the fear of public scrutiny. This helps to ensure that the decision reached is based on a fair and impartial assessment of the evidence presented.[25] Unlike confidentiality, privacy usually is not expressly provided for in arbitration agreements, however, the confidentiality clause requires the parties to maintain the privacy of all information and documents relating to the dispute. These agreements typically prohibit parties from disclosing any information related to the dispute to third parties, including the media.[26] Depending on the nature of dispute, a

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[22] Mahasweta M., 'Sanitizing Arbitral Awards: Transparency v. Confidentiality'(*RMLNLU Law Review Blog*, 1 February 2018) <https://rmlnlulawreview.com/2018/02/01/sanitizing-arbitral-awards-transparency-v-confidentiality-2/> accessed 08 December 2024.

[23] AIAC Editor, 'Confidentiality in Arbitration: Fundamental Virtue or Mere Illusion' (*AIAC Blog*, 10 October 2013) <https://www.aiac.world/news/189/CONFIDENTIALITY-IN-ARBITRATION:-Fundamental-Virtue-or-Mere-Illusion?> accessed 08 December 2024.

[24] Michael Collins QC, 'Privacy and Confidentiality in Arbitration Proceedings' (1995) 11(3) Arbitration International 321–336 <https://doi.org/10.1093/arbitration/11.3.321>.

[25] Kevin J. Hamilton and Harry H. Schneider Jr., 'Confidential Arbitration Agreements for High-Profile Clients and Senior Executives' (2016) 43(1) The Cutting Edge (Fall 2016) 39-42 <https://www.jstor.org/stable/26402016>.

[26] Marlon Meza-Salas, 'Confidentiality in International Commercial Arbitration: Truth or Fiction' (*Kluwer Arbitration Blog,* 23 September 2018) <https://arbitrationblog.kluwerarbitration.com/2018/09/23/confidentiality-in-international-commercial-arbitration-truth-or-fiction/> accessed 12 December 2024.

rather robust confidentiality agreement with a specific clause on privacy may be adopted by the parties. At the same time, due to the private nature of arbitration, a great extent of privacy is considered implied as soon as one chooses arbitration.

It is important to note that despite arbitration being recognised as a private mode of dispute resolution, privacy, in its usual sense, is not absolute in arbitration. There are situations where disclosure of certain information may be necessary. Also, not all jurisdictions accept privacy as a fundamental attribute of arbitration. Usually, various jurisdictions adhere only to the confidentiality norms and do not extend the obligation to a separate privacy norm for arbitration. Resultantly, depending on the circumstances, if the arbitrator determines that it is necessary to disclose certain information to prevent harm to the public or a third party, then privacy may be waived. Similarly, if a party seeks to enforce or challenge an award in court, certain information may be required to be disclosed as part of the court proceedings.[27]

Maintaining confidentiality and privacy in arbitration presents certain challenges. One of the challenges is how to balance the parties' need for privacy with the public's right to access information. While arbitration is a private process, the public has a legitimate interest in understanding the resolution of disputes that may impact public policy or consumer protection. To address this challenge, some arbitration institutions have adopted rules that require the disclosure of certain information related to the dispute, such as the name of the arbitrator and a summary of the decision.[28]

B. Confidentiality and Privacy Considerations in Online Arbitration

While confidentiality and privacy are important in all forms of arbitration, online arbitration presents a unique set of challenges. In-person hearings offer a certain level of control over the environment and can limit access to the hearing to only those who have a legitimate interest in the proceedings. However, in an online hearing, the parties are not physically present in the same location, and the potential for unauthorised access and breaches of confidentiality is greater.

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[27] *ibid 25*.
[28] Nobumichi Teramura, Leon Trakman, 'Confidentiality and privacy of arbitration in the digital era: pies in the sky?' Arbitration International (2024) 40(3) Arbitration International <https://doi.org/10.1093/arbint/aiae017> accessed 15 December 2024.

One of the biggest challenges of online arbitration is the need to secure the online platform used to conduct the hearing. Many online platforms are not designed with the level of security necessary to protect confidential information and prevent unauthorised access. Moreover, the parties may not have access to the same level of security software or technology, which can create disparities in the level of protection afforded to each party.[29]

Another issue that online arbitration faces is the lacunae in the use of video conferencing technology. While video conferencing allows for remote participation in the hearing, it also presents certain risks to confidentiality and privacy. For example, parties may be concerned about the potential for their video or audio feed to be hacked or intercepted, or for others in the room with them to hear sensitive information discussed during the hearing. The use of video conferencing may make it more difficult to detect non-verbal cues and body language, which can be important in understanding the credibility of a witness or the tone of a party's argument.[30]

Online arbitration also comes with the potential for cyberattacks and data breaches. As online hearings become more common, there is a growing risk of cybercriminals targeting online platforms used for arbitration. A successful cyberattack could compromise the confidentiality of the arbitration proceedings, including leakage of any sensitive information about the parties and their dispute. Additionally, cybercriminals may target the parties themselves, attempting to gain access to their devices or networks to obtain sensitive information about the arbitration or anything associated with it.[31]

To address these challenges, many arbitration institutions have developed guidelines and best practices for conducting online hearings. For example, the Schezhen Court for International Arbitration (SCIA) has developed a set of rules for online arbitration that includes model

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[29] David Singer, 'Arbitration Privacy and Confidentiality in the Age of (Coronavirus) Technology' (2020) 38(7), Alternatives to the High Cost of Litigation 107 <doi: 10.1002/alt.21849>.

[30] Joan Kessler, 'The Significance of Non-verbal Communication in Mediation and Arbitration',(*Mediate.com – JAMS ADR BLOG*, 13 August 2021), <https://mediate.com/the-significance-of-nonverbal-communication-in-mediation-and-arbitration/>, accessed 13 December 2024.

[31] Pierre Bienvenu and Benjamin Grant, 'Data Protection and Cyber Risk Issues in Arbitration', (2019) 9(13) Norton Rose Fulbright International Arbitration Report 18-21, <https://www.nortonrosefulbright.com/-/media/files/nrf/nrfweb/knowledge-pdfs/emea_15747_newsletter__international-arbitration-report-_issue-13.pdf?revision=6271a007-2aa1-4f13-a15e-0d3251677fdb&revision=5248722391447387904> accessed 15 December 2024.

arbitration clauses, recommendations for the use of secure online platforms, the use of encryption to protect communications, and the requirement for parties to sign confidentiality agreements.[32] The American Arbitration Association (AAA) has also developed guidelines for procedural aspects of online arbitration that address issues such as the use of secure video conferencing technology, the requirement for parties to maintain confidentiality, model drafts of clauses and orders, and the use of technology to facilitate the exchange of documents and evidence.[33]

Despite these guidelines, however, challenges to confidentiality and privacy in online arbitration remain. For example, there may be issues with enforcing confidentiality agreements, especially if a party is located in a jurisdiction that does not recognize confidentiality clauses or enforce such agreements. Additionally, parties may not always be aware of the potential risks to their confidentiality and privacy when participating in an online hearing, which can make it difficult to ensure that they take the necessary precautions. Online arbitration is becoming increasingly popular, especially in the wake of the COVID-19 pandemic, which has made in-person hearings challenging. Online arbitration presents a unique set of challenges, such as how to secure online platforms to prevent unauthorised access to the hearing, how to ensure that the parties have access to necessary technology to participate in the hearing, and how to ensure that the parties maintain confidentiality during the online hearing.[34]

Confidentiality and privacy are essential aspects of the arbitration process. They help to ensure that the parties involved in the dispute are protected, maintain the integrity of the arbitration process, and promote a collaborative approach to dispute resolution. Confidentiality and privacy allow parties to be more candid in presenting evidence and making arguments, which can lead to a more efficient and effective resolution of the dispute.[35] While maintaining confidentiality and privacy presents certain challenges, arbitration institutions have developed guidelines and rules to

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[32]SCIA, *Shenzhen Court of International Arbitration Online Arbitration Rules, 2021* <http://www.scia.com.cn/files/fckFile/file/SCIA%20Online%20Arbitration%20Rules.pdf> accessed 17 December 2024.
[33]American Arbitrators Association, '*AAA-ICDR Model Order and Procedures ForA Virtual Hearing Via Video Conference*', 2021 <https://go.adr.org/rs/294-SFS-516/images/AAA270_AAA-ICDR%20Model%20Order%20and%20Procedures%20for%20a%20Virtual%20Hearing%20via%20Videoconference.pdf> accessed 18 December 2024.
[34]*Supra* note 37.
[35]*Supra* note 35.

address these challenges and ensure that the arbitration process remains fair, impartial, and efficient.

IV. LEGAL FRAMEWORK FOR CONFIDENTIALITY AND PRIVACY IN ONLINE ARBITRATION

A.Confidentiality and Privacy in Arbitration under U.K., U.S.A and Indian Laws

Different jurisdictions have adopted different approaches to address confidentiality in arbitration, and these approaches can be broadly divided into three categories. The first category includes countries where there is an implied recognition of confidentiality in arbitration, such as England. The second category includes countries where confidentiality needs to be explicitly inserted, such as the United States of America (U.S.A). The third category includes countries which have integrated arbitral confidentiality in their statutory or regulatory framework, such as Hong Kong.[36] Till 2019, India belonged to the first category and impliedly recognised confidentiality, as it followed the Model Law and also heavily relied on common law as developed in England. From 2019 onwards, India has become a part of the third category, and recognised confidentiality as a statutory obligation in arbitration.[37] Most arbitral institutions have included confidentiality as an ethical obligation for their arbitrators, and several have incorporated it in their code of conduct for arbitrators as a binding obligation. The evolution of law in confidentiality in arbitration in United Kingdom (U.K.), U.S.A, and India is discussed as follows:

U.K.: The law and practice of confidentiality in commercial arbitration in England are primarily developed through case laws. There are several cases that have specifically set the tone for confidentiality in arbitration under U.K. laws. The idea of confidentiality in arbitration proceedings was first accepted by the U.K. courts in 1880, where the court explained: "*as a rule, people enter*

[36] Richard C. Reuben, 'Confidentiality in Arbitration: Beyond the Myth' (2006) 54(1) U. Kan. L. Rev. 1255.
[37] Harshit Kumar Mishra, 'Confidentiality in the Indian Arbitration Act – A Half-Hearted Attempt?' (IRALR, 9 December 2020) <https://www.iralr.in/post/confidentiality-in-the-indian-arbitration-act-a-half-hearted-attempt> accessed 18 December 2024.

into these contracts with an express view of keeping their quarrels from the public eye, and of avoiding discussion in public, which must be painful one, and which surely might be an injury even to the successful party in the litigation, and most surely would be to the unsuccessful."[38]

In *Dolling-Baker v. Merrett*, the court noted that privacy provided by arbitration is the most essential distinguishing feature of this process. It was held here that there exists an inevitable implied duty of confidentiality. The court made sure to not "*disclose or use for any other purpose any documents prepared for and used in the arbitration save with the consent of the other party, or pursuant to an order or leave of the court*."[39] They considered that the disclosure in arbitration is acceptable if it is required for fair disposal of the action. In *Hassneh Insurance v. Steuart J Mew*, the court extended the application of implied duty of confidentiality to arbitral awards, and noted that violating the confidentiality would amount to opening the door of arbitration to third parties.[40] In *Ali Shipping Corp v. Shipyard Trogir*, the court held that "the obligation of confidentiality arises as an essential corollary of the privacy of arbitration proceedings." The court determined that breaking confidentiality, if at all required, should be assessed through the lens of certain exceptions and applying such exceptions to the facts and circumstances, instead of formulating a general rule for all. The Court of Appeal stated five exceptions to the implied duty of confidentiality: *"(i) the consent of the party who initially produced the material, (ii) an order of the Court, (iii) the leave of the Court, (iv) for the protection of the legitimate interests of a party to the arbitration, and (v) where the 'public interest' calls for disclosure."*[41] Further, the court formulated a reasonable necessity test to determine the application of aforementioned exceptions. The reasonable necessity test provides that "*it is sufficiently necessary to disclose an arbitration award in order to enforce or protect the legal rights of a party to an arbitration agreement only if the right in question cannot be enforced or protected unless the award and reasons are disclosed to a stranger to the arbitration agreement. The making of the award must therefore be a necessary element in the establishment of the party's legal rights against the stranger*".[42] Recently, in *Emmott v. Michael Wilson,* the English Court of Appeal developed two exceptions to confidentiality. First, "disclosure

[38]*Russell v. Russell* (1880) 14 Ch. D.471, 474 (Ch).
[39]*Dolling-Baker v. Merrett* [1990] 1 W.L.R. 1205.
[40]*Hassneh Insurance Co. of Israel v Stuart J Mew* [1993] 2 Lloyd's Rep 243.
[41]*Ali Shipping Corporation v. Shipyard Trogir* (1998) 2 All. E.R. 136.
[42]*ibid 40*.

could be allowed when it is reasonably necessary to protect the legitimate interest of an arbitrating party. Second, disclosure could be appropriate where the obligation of non-disclosure and the duty of confidentiality are being used to mislead foreign courts".[43]

U.S.A.: Under the Federal Arbitration Act, there is no provision explicitly recognising confidentiality as a part of the arbitration process. However, there are a few case laws through which American courts have brought the concept of confidentiality and privacy into words. The understanding of confidentiality that exists in the U.S.A is quite different from what it is in England. In England, the approach that is followed is known as the implied duty of confidentiality approach, which means that confidentiality is an innate part of arbitration, and there is no need to include it expressly in the agreement.[44] The U.S.A., on the other hand, follows the express duty of confidentiality approach, where there is no implied understanding of confidentiality, and parties need to include a confidentiality clause on the arbitration agreement, or the rules under which arbitration is being conducted must recognise it.[45] In *United States v. Panhandle Eastern Corporation*, the court held that there is no general, implied obligation of confidentiality, and such obligation requires an express agreement in its favour to exist.[46] In *Contship Container Lines v. PPG Industries,* the court elaborated on the application of the duty of confidentiality in arbitration. The U.S. court gave two exceptions in the *Contship* case where irrespective of any implied duty, the disclosure can be compelled. The first when the document is relevant and second when the disclosure is necessary for fair disposal of matter. These cases present that U.S. courts preserve their supremacy over arbitral proceedings and refuse to be bound by the practices of other jurisdictions.[47]

India: The Arbitration and Conciliation Act, 1996 is based on the United Nations Commission on International Trade Law (UNCITRAL) Model Law and has modelled most of its provisions the same way they are developed in the Model Law. The 1996 Act, however, follows a different approach, and divides the Act into domestic arbitration, international commercial arbitration, and

[43]*Emmott v. Michael Wilson and Partners* [2008] EWCA Civ 184.
[44]*Supra* note 30.
[45]*ibid 43*.
[46]*United States v. Panhandle Eastern Corp.* 681 F. Supp. 229 (D. Del. 1988).
[47]*Contship Container Lines, Ltd. v. PPG Industries, Inc*. 442 F.3d 74 (2d Cir. 2006).

conciliation. Conciliation here is a process similar to mediation, where the Act attempts to regulate its proceedings and outcomes while enforcing basic requirements such as equality of parties and confidentiality.[48] With the enactment of the Mediation Act, 2023, the process of conciliation has effectively become obsolete.[49] Nevertheless, the statutory mandate of confidentiality remains firmly embedded within the provisions of the Mediation Act.[50] Before 2019, confidentiality was not recognised explicitly as an independent element of arbitration. The 1996 Act contained section 75, which was limited to confidentiality of conciliation proceedings and did not extend to arbitral proceedings.[51] In 2017, the Justice Srikrishna Committee Report recommended that *"...a new provision may be inserted in Part I of the ACA providing for confidentiality of arbitral proceedings unless disclosure is required by legal duty, to protect or enforce a legal right, or to enforce or challenge an award before a court or judicial authority.*"[52] Pursuing this recommendation, Section 42-A was inserted in the 1996 Act, which read: "*Notwithstanding anything contained in any other law for the time being in force, the arbitrator, the arbitral institution and the parties to the arbitration agreement shall maintain confidentiality of all arbitral proceedings except award where its disclosure is necessary for the purpose of implementation and enforcement of award*."[53] This insertion in the Act puts India up with the jurisdictions which expressly recognise confidentiality as an integral part of the arbitral proceedings. However, the language used in section 42-A is limiting, and covers only the arbitral proceedings. In Hong Kong, the statutory confidentiality obligation extends to both arbitral proceedings and court proceedings connected to the arbitration.[54] The Indian provision does not indicate such broad scope. On a strict reading of the provision, it may be argued that it only covers ordinary course of arbitral proceedings, and does

[48] Vikash Kumar Bairagi, 'Critical Analysis of the Conciliation Proceedings under the Arbitration And Conciliation Act, 1996', (MONDAQ, 18 February 2021), <https://www.mondaq.com/india/arbitration--dispute-resolution/989064/critical-analysis-of-the-conciliation-proceedings-under-the-arbitration-and-conciliation-act-1996> accessed 19 December 2024.
[49] The Mediation Act 2023, s 61. (India)
[50] The Mediation Act 2023, s 22. (India)
[51] The Arbitration and Conciliation Act 1996, s 75. (India)
[52] Justice B.N. Srikrishna, *Report of The High-Level Committee To Review TheInstitutionalisationOf Arbitral Mechanism In India,* 2017), <https://legalaffairs.gov.in/sites/default/files/Report-HLC.pdf> accessed 20 December 2024.
[53] The Arbitration and Conciliation Act 1996, s 42-A. (India)
[54] Saumya Sinha, 'Confidentiality Concerns in Arbitration Disputes: Implementation of Confidentiality in Courts of Law' (*ARIA Law Blog*, 16 October 2022), <https://aria.law.columbia.edu/confidentiality-concerns-in-arbitration-disputes-implementation-of-confidentiality-in-courts-of-law/> accessed 18 December 2024.

not cover exceptional circumstances such as parallel arbitral proceedings, or challenges to the validity of the tribunal.[55] Several commentators have criticised this approach and comment that a confidentiality clause needs to be expansive.[56] Since the provision is fairly new and there are not any notable instances where the provision needed to be invoked, it is still subject to further development and interpretation.

B. Confidentiality Provisions under Major Arbitral Institutions and their Rules

UNCITRAL: UNCITRAL was created by the United Nations General Assembly through one of its resolutions. The establishment of the legal framework for international trade was motivated. The advancement of international law has been facilitated through the development and dissemination of legislative and non-legislative measures pertaining to commercial law. The procedural rules for arbitral proceedings are comprehensively provided by the UNCITRAL Arbitration Rules. The regulations in question have been mutually accepted by the involved parties and are commonly implemented in both ad hoc and institutional arbitration proceedings.[57]Numerous arbitration statutes, including Indian Arbitration and Conciliation Act, 1996 have been influenced by the UNCITRAL Model Law and Rules. Interestingly, many commentators have described confidentiality as a 'myth' under the UNCITRAL regime due to its lack of explicit provisions. However, it can be inferred that Article 34(5) acknowledges an implied confidentiality of the award, as it mandates the consent of both parties for its public disclosure.[58] Since there is no guiding provision for confidentiality, UNCITRAL leaves on the jurisdictions to incorporate confidentiality norms as per their national laws. Specifically, in the context of ODR, there is an express inclusion of confidentiality, which is contingent on the *lex arbitri*. Under Clause 11 of the UNCITRAL Technical Note on Online Dispute Resolution, it is stated that "*the ODR*

[55] Prarthana Nanda and Prashant Mishra, 'Pitfalls of Section 42A: Analysing the Confidentiality vs. Transparency Discourse in the Indian Arbitration Regime' (*USLLS ADR BLOG*, 26, July 2022) <https://usllsadrblog.com/pitfalls-of-section-42a-analysing-the-confidentiality-vs-transparency-discourse-in-the-indian-arbitration-regime/> accessed 20 December 2024.
[56] Saloni Shukla, 'The Role of UNCITRAL in the World of ADR' (*VIA Mediation Centre Blog*) <https://viamediationcentre.org/readnews/MTE1Mg==/The-Role-of-UNCITRAL-in-the-World-of-ADR> accessed 21 December 2024.
[57] *ibid 55*.
[58] Model Law on International Commercial Arbitration 1985 (United Nations Commission on International Trade Law [UNCITRAL]) UN Doc A/40/17, Annex I, July 21, 1985, art 34(5).

administrator may wish to publish anonymized data or statistics on outcomes in ODR processes, in order to enable parties to assess its overall record, consistent with applicable principles of confidentiality."[59] Further Clause 53 provides that "*it is desirable that ODR proceedings be subject to the same confidentiality and due process standards that apply to dispute resolution proceedings in an offline context, in particular independence, neutrality and impartiality."*[60] Therefore, even if there is no express recognition of confidentiality under the UNCITRAL Model Law, there is no express denial either.

LCIA: London Court for International Arbitration (LCIA) is a prominent arbitral institution. The LCIA functions within a hierarchical framework consisting of three tiers: The Company, the Arbitration Court, and the Secretariat. The principal functions of the LCIA entail designating tribunals, adjudicating disputes related to arbitration, and overseeing expenses.[61] With regards to confidentiality, Article 30 of the LCIA rules contains provisions pertaining to confidentiality. The provision stipulates that every facet of the proceedings must be maintained in strict confidentiality.[62] The confidentiality of the awards, as well as any accompanying materials and documents, is to be maintained and shall not be made available to the public. A disclosure may only be made in accordance with legal obligations, for the purpose of safeguarding legal entitlements, or for the purpose of pursuing or contesting a legal judgment. The provision stipulates that the discussions and deliberations of the arbitral tribunal shall be kept private and limited to its members. It is the policy of the LCIA to refrain from publishing any award or any portion thereof unless and until all parties involved in the arbitration and the Arbitral Tribunal have provided their express written consent.[63]

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[59] UNCITRAL Technical Notes on Online Dispute Resolution 2016, Cl. 11, <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/v1700382_english_technical_notes_on_odr.pdf> accessed 22 November 2024.
[60] UNCITRAL Technical Notes on Online Dispute Resolution, 2016, Cl. 53.
[61] LCIA, INTRODUCTION, <https://www.lcia.org/lcia/introduction.aspx#:~:text=The%20LCIA%20is%20one%20of,under%20any%20system%20of%20law> accessed 22 November 2024.
[62] The LCIA Arbitration Rules 2014 (Revised 2020) art 30.
[63] The London Court of International Arbitration Notes for Parties 2014 (Revised 2020), Sec. 19 <https://www.lcia.org/adr-services/lcia-notes-for-parties.aspx> accessed 22 November 2024.

LCIA works through an online filing process. Through various amendments to its rules in the year 2020, LCIA has recognised electronic filing and request for arbitration as the primary modes of communication.[64] Further, commencement of arbitration is also marked from the date of electronic receipt of the request.[65] Various procedures under these Rules, such as expedited formation of an Arbitral Tribunal[66] and appointment of an emergency arbitrator,[67]are also to be done electronically. It also permits for electronic signing of an arbitral award. For the conduction of arbitral proceedings, the Rules and the Guidance Note for Arbitration are both silent. However, in either of the documents, there is nothing which prevents the parties and the tribunal from resorting to online proceedings. One of the pointers in the Guidance Note to Arbitration suggests the tribunal to act in a way which minimizes delays and expenditure for the parties.[68] Such a clause may be perceived as a clause supporting online arbitration under the LCIA mechanism, given the benefits that it provides.

With respect to the LCIA Rules, one special provision in addition to the confidentiality clause is the data protection clause. It provides that at the early stages in arbitration, the tribunal, in consultation with the parties and the LCIA, may determine special mechanisms for data protection, whether physical or electronic. The tribunal can adopt data processing techniques in compliance with the relevant data protection legislations. Further, if any directions for the protection of data have been issued by the LCIA, then such directions will be binding on both the parties and the tribunal.[69]

ICC Court of Arbitration: The ICC International Court of Arbitration, also known as the ICC, is recognised as one of the biggest arbitration institutions globally. The ICC has been providing assistance in resolving complex international commercial and business disputes with the aim of promoting trade and investment since the year 1923. The (ICCplays a crucial role in dispute

[64] The LCIA Arbitration Rules 2014 (Revised 2020), art 4.3.
[65] The LCIA Arbitration Rules 2014 (Revised 2020), art 1.4.
[66] The LCIA Arbitration Rules 2014 (Revised 2020), art 9A.
[67] The LCIA Arbitration Rules 2014 (Revised 2020), art 9B.
[68] The London Court of International Arbitration Notes for Arbitrators 2014 (Revised 2020), Section 6, Part 6.5, Clause 38 <https://www.lcia.org/adr-services/lcia-notes-for-arbitrators.aspx#1.%20INTRODUCTION> accessed 20 November 2024.
[69] The LCIA Arbitration Rules 2014 (Revised 2020), art 30A.

resolution through ADR. The institution's rules are properly applied to aid individuals in resolving disputes.[70] Furthermore, it provides aid to arbitrators in overcoming procedural hindrances in conducting the arbitral proceedings. The ICC endeavours to enhance its operational efficiency and cost-effectiveness. The prioritisation of confidentiality in order to safeguard the involved parties and uphold their right to justice is one of the many reasons why it is the preferred arbitral institution for many. The ICC Rules are globally utilised for the purpose of resolving disputes.[71] As per the ICC Rules of Arbitration, Appendix I, Article 6, confidentiality of the proceedings is protected. Article 6 states that "*the work of the Court is of a confidential nature which must be respected by everyone who participates in that work in whatever capacity. The Court lays down the rules regarding the persons who can attend the meetings of the Court and its Committees and who are entitled to have access to materials related to the work of the Court and its Secretariat*."[72] Another provision that deals with confidentiality is Article 22(3) of ICC, which states that "*upon the request of any party, the arbitral tribunal may make orders concerning the confidentiality of the arbitration proceedings or of any other matters in connection with the arbitration and may take measures for protecting trade secrets and confidential information.*"[73] Both these provisions stipulate that the court's work must remain confidential in nature.

In 2021, amendments were brought to the ICC Rules which acknowledged the role of technology and its integration in arbitration. It started with the most basic elements of initiation of an arbitration. Under Articles 4 and 5, communication and transmission of requests for arbitration and acceptance or rejection of such requests now also includes electronic means.[74] Further, after consultation with the parties, the arbitral can determine that the hearing may be conducted remotely or online.[75] Further, in order to enhance the transparency in the arbitration process and the

[70] Mikael Schinazi, 'The Ages of International Commercial Arbitration and the Development of ICC Arbitration System'(*ICC Digital Library*, 2019) <https://library.iccwbo.org/content/dr/ARTICLES/ART_00698.htm?l1=Bulletins&l2=ICC+Dispute+Resolution+Bulletin+2020+No.+2> accessed 23 November 2024.
[71] *ibid 69*.
[72] The International Chamber of Commerce Arbitration Rules and Procedure, 2021 < https://iccwbo.org/dispute-resolution/dispute-resolution-services/arbitration/rules-procedure/2021-arbitration-rules/#block-accordion-26> accessed 23 November 2024. (ICC Arbitration Rules)
[73] The ICC Arbitration Rules, art 22(3).
[74] The ICC Arbitration Rules, art 4 and 5.
[75] The ICC Arbitration Rules, art 8.

composition of the tribunal, now a party can be provided with the reasons for the decision of the tribunal upon request, subject to rules and guidelines framed by the parties.[76]

C. International Instruments Concerning Confidentiality in Online Arbitration

1. Seoul Protocol on Video Conferencing in International Arbitration:

Seoul Protocol is a set of basic guidelines for conducting arbitration through video conferencing platforms. It is a brief document which addresses technological and logistical needs of an arbitration conducted online. It provides that the arbitration platform should be well equipped for the parties to present their case, the venue should be accessible for a smooth conduction of online proceedings, presence of observers and on-call technical support during the proceedings, preparation and tech-check of the platform for proceedings, uploading protocol for documents and screen-sharing etc.[77] It does not address confidentiality concerns in online arbitration, and only covers the aspect related to recordings. It provides under Article 8 that: "*No recordings of the video conference shall be taken without leave of the Tribunal. Any recordings of the video conference shall be circulated to the Tribunal and the Parties within 24 hours of the end of the video conference.*"[78]

D. The ICCA-NYC Bar-CPR Protocol on Cybersecurity in International Arbitration

The CPR Protocol is a joint cybersecurity protocol between International Council for Commercial Arbitration, New York City Bar Association, and International Institute for Conflict Prevention and Resolution. It focuses on data protection and information security in arbitration, and includes maintaining confidentiality as one of the facets of cybersecurity. It recognises that the arbitration today is changing its mode, and due to the highly digitized nature of modern arbitrations, the Protocol focuses on cybersecurity, which concerns the means employed to maintain the confidentiality, integrity, and availability of digital information. It defines confidentiality as a set

[76] The ICC Arbitration Rules 2021, Appendix II, art 5.
[77] Jiyoon Hong and Jong Ho Hwang, 'Safeguarding the Future of Arbitration: Seoul Protocol Tackles the Risks of Videoconferencing' (*Kluwer Arbitration Blog*, 6 April 2020) <https://arbitrationblog.kluwerarbitration.com/2020/04/06/safeguarding-the-future-of-arbitration-seoul-protocol-tackles-the-risks-of-videoconferencing/> accessed 27 November 2024.
[78] Seoul Protocol on Video Conferencing in International Arbitration 2020, art 8.

of rules or restrictions that limits access to certain information. It also maintains that there are ethical and professional guidelines for the arbitrators and parties involved to maintain confidentiality and preserve the integrity of the arbitral process.[79]

E. ICCA/IBA Joint Task Force on Data Protection in International Arbitration Proceedings

This task force has created a roadmap for navigating data protection in international arbitration, and acknowledges confidentiality as an essential obligation for both physical and online arbitration. As per the roadmap developed herein, confidentiality and data protection go together under international arbitration. The duty of confidentiality extends to the tribunal, parties, their lawyers and legal teams, and other non-parties involved with the arbitration, or working for any of the parties or the tribunal.[80] For the tribunal, the confidentiality obligation can be imposed either directly through the arbitration agreement, or indirectly through the arbitration institutional rules and lex arbitri. Arbitrators and parties are expressly subject to the duty of confidentiality, but this duty can also be extended to non-party personnel such as the tribunal secretary, employees of arbitrator's law firm/ chamber/ university, secretary, paralegal, arbitration institution, arbitration institution staff, counsels, registrar, accountants, Court members, depending on the sensitivity of the matter and exposure of information.[81] While legal frameworks establish the groundwork for confidentiality, technological measures play a crucial role in addressing practical challenges in online arbitration.

V. TECHNOLOGICAL INTERVENTIONS CONCERNING CONFIDENTIALITY AND PRIVACY ISSUES IN ONLINE ARBITRATION

[79] THE ICCA-NYC BAR-CPR PROTOCOL ON CYBERSECURITY IN INTERNATIONAL ARBITRATION, 2022 <https://drs.cpradr.org/rules/protocols-guidelines/icca-nyc-bar-cybersecurities#:~:text=The%20purpose%20of%20the%20ICCA,measures%20for%20individual%20arbitration%20matters> accessed 27 November 2024.
[80] THE ICCA REPORTS NO. 7: THE ICCA-IBA ROADMAP TO DATA PROTECTION IN INTERNATIONAL ARBITRATION, 2022 <https://www.arbitration-icca.org/icca-reports-no-7-icca-iba-roadmap-data-protection-international-arbitration> accessed 27 November 2024.
[81] *ibid 79*.

In the rapidly evolving landscape of the digital age, the need for technological solutions and robust data and confidentiality protection mechanisms in online arbitration is paramount. Online arbitration, along with offering convenience, efficiency, and accessibility to parties involved, also brings along unique challenges that must be addressed to ensure a fair and secure process. Technological solutions play a crucial role in online arbitration by providing tools for seamless communication, privacy protection, document sharing, and virtual hearings. These solutions facilitate the exchange of information and evidence between parties and arbitrators, streamlining the entire arbitration process. Data and confidentiality protection mechanisms are important in online arbitration to safeguard sensitive information and maintain the integrity of the process.[82] Tools like encryption, firewalls, access controls, and secure servers can be implemented to prevent unauthorised access or data breaches. There are a number of challenges which parties may face in terms of confidentiality and privacy in an online arbitration, as discussed below.

Hacking and Use of Spyware: Disputes in arbitration are generally high value, and are commercially significant for the parties involved. On a basic or general remote platform such as a video conferencing tool, it is possible for hackers to access the platform and manipulate the proceedings, or simply enter the proceedings and break the confidentiality of the process. In commercial disputes, information and documents shared are usually high value and sensitive, and are of great importance to competitors, investors, journalists, government agencies, even the opposite party in the dispute. With such high stakes involved, there may be entities who would like to interfere with, or alter the outcome of the arbitration.[83] During the proceedings, documents containing sensitive information may be shared, which if hacked, can cause massive losses to the parties. Hacking is a real concern in online arbitrations, and there are cases already where awards have come under scrutiny due to allegations of hacking. In 2021, a Sao Paulo court stayed an ICC award which was challenged on the grounds of cyber hacking till the time the investigation was conducted. In this dispute, the defendant has challenged the award claiming that the claimant had

[82] *Supra* note 79.
[83] C. Sanderson, 'Tribunal challenged over alleged cyber-attack in Brazil pulp case' (*Global Arbitration Review*, 21 April 2021) <https://globalarbitrationreview.com/article/brazilian-pulp-award-survives-hacking-allegations> accessed 28 November 2024.

used illegal spyware on their email communication, which Sao Paulo police detected. Although, ultimately the challenge was dismissed and award was enforced, this case gives us insight into some of the modes of cyberattacks that might occur in online arbitrations.[84] Therefore, protecting the proceedings from being hacked is an essential concern. Therefore, protective software and other cybersecurity measures should be adopted on an individual and organisational level.

Incompatibility of platforms to share data: In contemporary times, email has become a commonplace mode of communication, and in professional setups, it becomes the primary mode of exchanging information between two contracting parties. Email is not highly secure, as it is possible to easily plant spyware or malware through an email. Further, email accounts may be hacked or leaked or cracked, giving the non-parties or outsiders access to the contents of the email. Therefore, parties may choose more secure platforms for exchanging documents and information, such as email encryption, private cloud services, and peer to peer communication (P2PC).[85] For arbitration to be conducted successfully, a platform needs to have several features such as conferencing, document sharing and presenting, breakrooms or private chambers for confidential discussions, evidence and witness management tools, tools for administrative assistance. The platform is required to provide protection not only during the proceedings, but also after the proceedings till the award is delivered and enforced, and matter is truly completed.[86] Moreover, exclusive protection for each dispute is needed, meaning that a party or a tribunal using the platform can only access materials uploaded and provided in their own case and no other matters. An award drafting and management tool for tribunals can provide an added layer of privacy for the pre-award stage.

Unauthorised Access: Whenever confidentiality and privacy in arbitration are concerned, a major question that comes up is who are the "parties" and "non-parties" in an arbitration. In an online arbitration, broadly there will be two facets of enforcing confidentiality: first, who are the third parties who may be allowed access to the arbitration, and secondly, who all will be bound by the

[84] *ibid 82.*
[85] David Smith, 'What Are the Top Secure Data Transmission Methods?' (*Pentasecurity*, 23 October 2020), <https://www.pentasecurity.com/blog/top-secure-data-transmission-methods/> accessible on 29 November 2024.
[86] *ibid 82*.

confidentiality obligation, whether or not they participate in the arbitration proceedings.[87] In response to these questions, one might argue that all the parties and their subsidiaries which are directly concerned with the dispute, respective legal teams, the tribunal, and the administrative/IT assistance personnel may be given access to arbitral proceedings, and consequently, be bound by the confidentiality obligation laid down in the arbitration agreement. Since an arbitration agreement comes into play at a pre-arbitral stage, it can be used to determine the scope of confidentiality and include the entities to whom such obligations will apply.[88] Further, in online arbitration, there needs to be surveillance to ensure that there are no outsiders or unauthorized personnel present during the proceedings, and tools enabling to remove any intruder at any point of time. Moreover, there are various AI based identity verification mechanisms now available which can be used to check authorisation.[89] However, all these mechanisms are costly to adopt, and may not be easily accessible for a small-scale arbitration, or to parties in developing countries, among others.

Challenges to verification of physical presence of third parties: Delocalisation is a basic characteristic of online arbitrations. Usually, online proceedings where parties join remotely are conducted in two ways: first, where each individual joins from an independent device and present in their own capacity, and identified in the same way (e.g., Arbitrator_Jane Doe). Another form is where each party comes together physically in one space, and then joins collectively. For instance, if the claimant is in India, and the defendant is in South Korea, the entire claimant delegation will be physically gathered at one place and then join the proceedings virtually through a single device. Similar mode of operation will be adopted by the Respondents and the Arbitral Tribunal.[90] In such arbitration proceedings, it is quite difficult to verify the presence of each and every individual present during the proceedings. A question may arise that what if an unauthorised person is discreetly or stealthily present in the room from where parties are joining the proceedings. To

[87] Esther van del Huevel, 'ODR as A Solution to Cross Border E-Disputes' (*OECD Expert Research Series*, 2000) <https://www.oecd.org/digital/consumer/1878940.pdf> accessed 19 December 2024.
[88] Farzaneh Badiei, 'Online Arbitration Definition and Its Distinctive Features' (2010) 648 ODR CEUR Workshop Proceedings 89-93 <https://ceur-ws.org/Vol-684/paper8.pdf> accessed 19 December 2024.
[89] Mahnoor Waqar, 'The Use of AI in Arbitral Proceedings'(2022) 37(3) OSJDR 344-365.
[90]Tiffany J Lanier, 'Where On Earth Does Cyber-Arbitration Occur?: International Review Of Arbitral Awards Rendered Online' (2000) 7(1) ILSA J. Int'l & Comp. L pp. 1-14 <https://nsuworks.nova.edu/ilsajournal/vol7/iss1/1> accessed 10 December 2024.

address these concerns, verification procedures should be adopted by parties to mark the attendees and confirm the presence. For this purpose, a GPS based real-time digital login can be used, as done in various attendance applications.[91]

Protection against unauthorized recording and sharing of proceedings: Another concern pertaining to the privacy of online arbitration is the unauthorized capturing of screenshots or screen-recordings and their subsequentsharing.Platforms must incorporate safeguards to prevent unauthorized recording or screenshots during proceedings, with punitive measures agreed upon by all parties. Toprevent this, dedicated arbitration platforms should be developed and promoted, ensure that parties the confidentiality and privacy they expect in an arbitration. Many jurisdictions, including the European Union have dedicated ODR platforms that fulfil the basic expectations of the parties and make dispute resolution easier.[92]

Protection of Documents and Evidence: In arbitration, the tribunal relies on documents and evidence submitted by the parties to make a decision. Therefore, it is necessary that the documents filed and uploaded are protected and are not easily accessible to third parties. In the endeavour of protecting the documents, the local data privacy law and its interpretation and compliance also comes into play.[93] To ensure data privacy, methods such as encryption, password protection, using digital signatures and having a robust data protection and management system with accessibility. As suggested in the CPR Protocol, means such as use of secure digital folders depending on the need of the document, immediate warning issuance for unintended, accidental, or unauthorised recipients to not open the file, using both file-level and full-disk encryption can be utilized.[94]

Detailed and technologically up-to-date confidentiality clauses: Adoption of arbitration for commercial disputes started with integration of a simple arbitration clause in the main contract and has reached a stage today where there are dedicated and elaborate arbitration agreements addressing every minor detail that may be relevant to a present or future dispute. With the passage

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[91] Gabrielle Kaufmann-Kohler and Thomas Schultz, 'The Use of Information Technology in Arbitration' (JUSLETTER, 5 December 2005) <https://lk-k.com/wp-content/uploads/The-Use-of-Information-Technology-in-Arbitration.pdf> accessed 12 December 2024.
[92] *ibid 90*.
[93] *Supra* note 24.
[94] *Supra* note 85.

of time, changes in modus operandi are required in the field of dispute resolution as well. This requires adoption of virtual platforms and digital means, and exploring the discrepancies that may occur in an online arbitration. For conducting an arbitration successfully in a remote setup, it is a must that the arbitration agreement includes clauses covering different fields.[95] For online arbitration, specialised confidentiality agreements and strict protocols for handling and storing data should be established. Arbitrators, parties, and service providers must adhere to strict ethical guidelines and professional standards to ensure the confidentiality of the proceedings and the data involved.[96] An arbitration agreement for online arbitrations may include following clauses, in addition to the standard clauses:

- Choice of platform(s), and with this clause, user agreement of the platform chosen may be enclosed with the arbitration agreement.
- Logistics of hardware and software to be used.
- Persons authorised to access the arbitral platform and proceedings.
- Confidentiality expectations and privacy norms.
- Applicable data privacy law and its compliance standards.
- Prohibitions such as no recording or clicking screenshots of the proceedings, not contacting the tribunal privately without informing the other party etc.
- Penalty on breach of confidentiality and privacy.
- Time limits for storage of documents on the platforms.

VI. CONCLUSION

ODR has been a path breaking innovation in the field of dispute resolution. It has changed the way dispute resolution was traditionally imagined, and has overcome the barriers of physicality. While

[95] Timothy St. John Ellam, Nicole Fitz-Simon, and Britt Morrow, 'Remote Arbitration Hearings: Advantages, Challenges and Participant Considerations' (*Financier World Wide*, December 2020) <https://www.financierworldwide.com/remote-arbitration-hearings-advantages-challenges-and-participant-considerations> accessed 08 December 2024.

[96] Belen Olmos Giupponi, 'Chapter 3 "Virtual" Dispute Resolution in International Arbitration' in Shaheeza Lalani and Steven G. Shapiro, *The Impact of Covid on International Disputes*, 2022 (Brill-Nijhoff 2022) 62-83 <https://doi.org/10.1163/9789004514836_005>.

online arbitration is becoming popular and more and more institutions are adopting it every day, it is important to ensure that basic tenets of arbitration are not compromised for the sake of convenience. Confidentiality is a key feature of arbitration, and it is one of the core reasons why parties choose arbitration over litigation. Therefore, it is the responsibility of the stakeholders of the arbitration community that confidentiality and privacy that arbitration offers is not jeopardized at the hands of cyber miscreants. In today's time, cyber law has reached new heights. With the new technological advancements, comes newer ways to create cyber nuisance. In arbitration, where often sensitive information and documents are handled and deliberated behind closed doors,he use of computer screens reduces the physical security traditionally associated with in-person proceedings. If a platform does not have multiple layers of firewalls and security protocols, it becomes fairly easy to hack the contents of the arbitration, or disrupt the process.

Online arbitration poses a unique set of challenges. There might be additional members present during the proceedings with a party without the knowledge of others.The conference details may be leaked, allowing unauthorized individuals to gain access to the proceedingsThe documents shared by the parties may get hacked and leaked, or held as ransom against parties' confidentiality and privacy. Further, a party or a third person present may record the proceedings or its parts and circulate it to the detriment of other parties. Moreover, for evidence and witnesses, circumstances may occur where the parties may be forced to break the confidentiality.[97] To mitigate these risks, arbitration institutions and parties must take steps to ensure the security of online platforms and the protection of confidential information. This may include the use of advanced security measures such as multi-factor authentication and encryption, as well as the implementation of strict access controls and monitoring protocols. Additionally, parties must be educated about the potential risks of online arbitration and the steps they can take to protect their confidentiality and privacy. Finally, legislative steps need to be taken to acknowledge the existence and operation of online arbitration, and provisions to protect the basic structure of arbitration may be introduced.

[97] *ibid 95*.

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ROLE OF SOVEREIGN IMMUNITY IN INTERNATIONAL ARBITRATION

- *SHIVANGI MATHUR*[1]

ABSTRACT

In an increasingly globalised society, there is a rise in interactions and transactions not only between different States but also between individuals from different States. There has also been a corresponding increase in disputes that arise from these transactions. In such situations, there arises the issue of jurisdiction which shall apply to these disputes. To deal with such jurisdictional issues, various independent and impartial bodies have been established that administer dispute resolution mechanisms for amicable resolution. Now, in such a scenario, if a State exercises its Sovereign Immunity to protect itself from the procedures of law, the rights of the private entity will be prejudiced as it will not be able to seek any recourse against the other party which is a State entity. Therefore, certain exceptions have been laid down through customs, usages, treaties, international conventions and domestic laws. One such exception is commercial transactions and properties. This paper in particular concerns itself with disputes that arise out of commercial transactions and attempts to analyse the basis of the Doctrine of Sovereign Immunity, its types and whether it applies to commercial transactions. It will also try to analyse the different approaches and decisions that have been given by various courts with respect to commercial transactions between a private and a State entity in an arbitration procedure.

I. INTRODUCTION

"State sovereignty is being redefined by the forces of globalisation and international cooperation". This was stated in 1999 by the then Secretary General of the U.N., Kofi Annan. This statement has become increasingly relevant with globalisation and the development of international trade and transactions as a key component of the global market. States are steadily becoming more involved

[1] 5th year BBA.LLB, Guru Gobind Singh Indraprastha University, Delhi, Gmail: shivangim0407@gmail.com

in transactions with each other, and even private entities have started contracting with States and State entities, which is evident from the data of the International Chamber of Commerce Arbitration, which reported a 25% increase in arbitration proceedings in 2023 as compared to the past year. 890 cases being registered in 2023 is the third-highest number of cases that have been registered with the International Chamber of Commerce in a year.[2] Out of this amount, 16% of the cases involved a State or a State-owned entity. [3] This rise in Arbitration proceedings can be attributed to various factors, one of which could be the waiver of State Immunity by the State and State-owned entities; this is because Arbitration proceedings are generally considered as an exception to the Doctrine of Sovereign Immunity.[4] Thus, parties that involve State and State-owned entities would prefer to go for arbitration as it usually implies that the parties have waived their State immunity to the institution of a suit, and most likely to the enforcement of the arbitral award as well.

One of the basic principles of Public International Law is the Sovereignty of the State, and according to this principle, the jurisdiction of one Sovereign cannot be infringed by the other. This Doctrine has evolved through various historical epochs and societal shifts. At one point in time, the Absolute Theory was followed, and the same was expressed by Chief Justice Marshall in the landmark judgment of *Schooner Exchange v McFaddon*[5]. According to him, there are no exceptions to a State's jurisdictional immunity and therefore the rule was absolute.

However, according to Hugo Grotius[6], who is also known as the father of International Law, the exercise of sovereignty must be reasonable. In fact, Sovereign Immunity has also been blamed as a contributing factor to World War I and II, as no State had the legal authority to keep check of

[2] Audrey, 'ICC Releases Preliminary 2023 Arbitration and ADR Statistics - ICC - International Chamber of Commerce' (ICC, 26 June 2024) <https://iccwbo.org/news-publications/news/icc-releases-preliminary-2023-arbitration-and-adr-statistics> accessed 13 September 2024.
[3] International Chamber of Commerce 2023 Statistics 'ICC Dispute Resolution' (ICC, 2024) https://iccwbo.org/wp-content/uploads/sites/3/2024/06/2023-Statistics_ICC_Dispute-Resolution_991.pdf> accessed 29 March 2025.
[4]Clive M. Schmitthoff, 'The Claim of Sovereign Immunity in the Law of International Trade' (1958) 7 INT. COMP. LAW Q< http://www.jstor.org/stable/755276 >.
[5]*Schooner Exchange v. McFaddon* [1812] 11 U.S. 116.
[6] Winston Nagan & Joshua Root, 'The Emerging Restrictions on Sovereign Immunity: Peremptory Norms of International Law, the U.N. Charter, and the Application of Modern Communications Theory' (2013) UF LAW FAC. PUBL.< https://scholarship.law.ufl.edu/facultypub/589 >

another sovereign's actions. Adolf Hitler used this doctrine as a legal justification for war, according to Nazi ideology[7]:

> *"there was the implicit claim that there were no rules from the law of war that could constrain the prerogatives of the sovereignty."*

After World Wars I and II, the world realised that there needed to be certain exceptions to the Doctrine of Sovereign Immunity and as a result of this, the United Nations ("U.N.") System was created. It sought to redefine sovereignty by limiting the powers of the individual States and transferring them to a collective international system while also imposing certain restrictions on their exercise of sovereignty. For instance, the U.N. Charter has transferred powers to the United Nations Security Council by allowing only it to legally authorise the use of force for purposes other than self-defence.[8] There are a few situations that are widely accepted as exceptions to the doctrine of sovereign immunity such as: Human Right Violations, Commercial transactions, Employment Contracts, Actions in Torts, Fiscal Matters, State-owned or operated ships engaged in Commercial (Non-Governmental) Services etc.

This doctrine has become especially important in the current international landscape as the Sovereign actors are not only key stakeholders in significant global economic events but also play a vital role in the achievement of global goals such as climate change and sustainable development.

II. WHAT IS A SOVEREIGN STATE?

To understand State Immunity, it is first important to understand what a State is. According to the Montevideo Convention on the Rights and Duties of States, 1933[9] the conditions for statehood are as follows:

1. A permanent population
2. A defined territory
3. Government
4. A capacity to enter into relations with other states

[7] ibid 391.
[8] Charter of the United Nations, 1945, art. 42.
[9] Montevideo Convention on the Rights and Duties of States, 1933, art. 1.

This criteria however does not mean that the political existence of a State can be denied if it is not recognised by the other states. Even without the recognition, a State has the right to defend its integrity and independence, to ensure its conservation and to legislate and administer upon its interests so as to organise itself.[10] The effect of recognition of a State by another State only signifies the acceptance of the personality of the former State along with all the rights and duties imposed by it by international law.[11]

The Principle of Sovereignty is embodied in Articles 4 and 8 of the Convention. Article 4 states that all the States are juridically equal, i.e., they enjoy the same rights and can exercise the same in equal capacity. The exercise of their rights depends on their mere existence as a person under international law while Article 8 provides that no State has the right to interfere with the internal or external matters of another State. Though most of the conditions are generally considered essential for a jurisdiction to be considered a 'State'; the conditions provided in the Montevideo Convention are just one of the ways in which a 'State' can be defined and there is no uniform rule that applies throughout the world.

In India, the Constitution of India[12] declares it as a 'Sovereign, Socialist, Secular, Democratic Republic'. The term 'Sovereign' is used to emphasise the fact that India is not dependent upon any outside authority, i.e., it is both internally and externally sovereign. It means that though India is a member of the Commonwealth of Nations, the membership itself does not act as a restriction on its Sovereignty. Sovereign State actors may not just be limited to the nation itself but may also include national banks, state agencies, state-owned agencies, international organisations etc.

Thus, in general parlance, a Sovereign State implies a State which has declared itself to be a sovereign and will therefore not be subject to the jurisdiction of the national courts, laws or orders of another Sovereign without its consent.

III. WHAT IS SOVEREIGN IMMUNITY?

[10] ibid, art. 3.
[11] ibid art. 6.
[12] Constitution of India, Preamble.

The doctrine of Sovereign Immunity is a well-settled principle in the domain of Public International Law. As discussed above, there is no uniform definition of what amounts to a Sovereign State; similarly, there is also no completely uniform approach as to what Sovereign Immunity implies and what its consequences will be. There are however certain approaches to Sovereign Immunity that are commonly followed, and these are[13]:

A. ABSOLUTE AND RESTRICTIVE APPROACH

Under the 'absolute' approach, a sovereign actor enjoys complete immunity from having any legal action taken against them or from having their assets seized or enforced by the court of another sovereign actor, even in matters that are commercial in nature. However, unlike the 'absolute' approach, in the 'restrictive' approach, the sovereign actor enjoys immunity only in relation to those actions of the state that involve the exercise of sovereign power. Under the restrictive approach when the State exercises a contractual right in accordance with the contractual framework and governing law, its actions are generally considered to be commercial in nature (*acta jure gestionis*) and thus do not enjoy immunity. But if the state's conduct is found to be only in breach of contract and not in breach of the treaty, the state enjoys immunity, provided that action must be attributable to the State, and must also be the result of exercise by the State-party of sovereign authority. The key determining factor is whether the state acted in an official governmental capacity *(acta jure imperii)*.

B. SUIT AND ENFORCEMENT IMMUNITY APPROACH

Under the 'suit' or 'jurisdictional' immunity, the sovereign actor and its instrumentalities enjoy immunity from having a suit instituted and adjudicated against it, by a court or arbitral tribunal of another state. On the other hand, the 'enforcement' immunity goes further than jurisdictional

[13] Clive M. Schmitthoff, *supra* note 3.

immunity and operates to prohibit a successful party from enforcing a judgment or arbitral award against the assets owned by the sovereign actor.[14]

The type of immunity enjoyed by a sovereign actor differs from State to State, for instance, if we look at the United Kingdom, the United States of America and Hong Kong; the UK and the USA have adopted a restrictive approach while Hong Kong has adopted an absolute approach. Also, the UK and the USA allow certain exceptions to state immunity, i.e., the sovereign actors will not be able to exercise this doctrine to protect themselves in the following cases:

1. When disputes are submitted to Arbitration
2. When written consent is obtained while seeking enforcement of judgment or arbitral award.
3. In the case of Commercial activities

However, Hong Kong does not allow these exceptions.[15]

IV. WHAT IS A COMMERCIAL TRANSACTION AND WHY IS IT EXEMPTED?

One of the earlier instances of commercial transactions being recognised as an exception to Sovereign Immunity took place in the *Charkieh* case of 1873[16]. With increasing commercial interaction and cross-bordered movement of goods, services, people and capital for commercial purposes, the High Court of Admiralty in this case sought to distinguish between a war vessel and a vessel that was performing merchandising function even though it was flying the flag of the Imperial Ottoman Navy. In *Ulen & Co. v. Bank GospodarstwaKrajowego (National Economic Bank)*[17]also, The Supreme Court of New York held that the immunity from jurisdiction finds its basis in the historical principle that no court has the power to command the king. Sovereign Immunity is based on the implied consent of all the sovereign entities, as a matter of comity, to a

[14]Winston Nagan & Joshua Root, *supra* note 5, 406.
[15] Baker McKenzie, 'The State of State Immunity' (2023) IFSWF <https://www.bakermckenzie.com/en/-/media/files/insight/topics/sovereigns/baker-mckenzie-state-of-immunity.pdf>
[16]*The Charkieh* [1873] LR 4 A & E 59.
[17]*Ulen & Company, Appellant, v. Bank GospodarstwaKrajowego* (National Economic Bank), [1942] 36 AM. J. INT. LAW 695.

partial relinquishment of the full jurisdiction that each naturally possesses within its own territory. However, a corporation that has been established for achieving commercial purposes in which the government has an interest, irrespective of whether it has been constituted by a domestic or foreign government does not enjoy the same immunity as a sovereign entity.

So, generally, where a State employs a State-owned trading corporation having a private law character as its agent, it cannot use the plea of immunity. However, the issue that arises in such cases lies in the confusion that surrounds the determination of the character of the entity. There have been attempts by various Courts and judicial experts to define what exactly amounts to a 'commercial' transaction. One of them is distinguished on the basis of what amounts to a 'sovereign' act, i.e., one that cannot be performed by an individual. However, the application of this test by American Courts led to questionable results, for instance, the conclusion that the rental of a house for the embassy or the purchase of bullets for the army are private acts[18]. Another test focused on *jure imperii*, according to which all the activities undertaken to achieve a public end are *jure imperii* and therefore covered under the scope of immunity. This is also considered to be a faulty test as it implies that the court is engaging in the projection of personal beliefs regarding the proper realm of state operation, as well as due to the theoretical premise that the modern sovereign always acts in the furtherance of public purpose.[19]

The United Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration, 1985, does not provide a strict definition of what is strictly construed as 'commercial' but a reference to the footnote to Article 1 states that it must be interpreted in a wide manner. This footnote was inserted so as to avoid any technical difficulty that may arise while determining which transactions should be governed by a specific body of 'commercial law' that may exist in certain legal systems [20] and includes all the matters arising from relationships that have a commercial nature irrespective of whether they are contractual or not. Commercial relationships inter alia include transactions for the supply or exchange of goods and services,

[18]*Heaney v Government of Spain* [1971] 445 F.2d 501.
[19] Columbia Law Review. 1086, *Sovereign Immunity of States Engaged in Commercial Activities* [1965].
[20] Patrick Oliver Ott, *UNCITRAL – United Nations Commission On International Trade Law*, *in*A CONCISE ENCYCLOPEDIA OF THE UNITED NATIONS 692 (Helmut Volger ed., 2010), https://brill.com/view/book/edcoll/9789047444541/Bej.9789004180048.i-962_122.xml (last visited Apr 27, 2024).

commercial representation or agency, exploitation agreement or concession, carriage of goods and passengers by any means of transport, investment, financing, banking & insurance etc.

This non-restrictive approach has been inculcated by many countries in their judgments. For instance, the Indian Supreme Court in the case of *Comed Chemicals Ltd. v. C.N. Ramchand*[21] relied upon the definition of 'commercial' provided in the Model Law and interpreted it to include all 'commercial relationships' as opposed to connections based on marriage, family, culture, society, or politics. In this instance, the court determined that a consultancy service agreement comes under the purview of a 'commercial relationship'. It also relied on a previous case[22] wherein it was stated that since a contract is a commercial document it must be interpreted in a manner that gives effect to it rather than invalidating it. A 'common-sense' approach must be adopted instead of conforming to the strict rules of interpretation so as to prevent an overly narrow, pedantic, or legalistic interpretation that might hinder its intended purpose.

States usually restrict their ability to enter into arbitration agreements with private actors through self-imposed restrictions via the legislative provisions in force in the domestic law system. The States impose these restrictions primarily because of the reason that the State should be subject to any dispute resolution mechanism that is not under the control of the State and may therefore give decisions against its interest. Another reason could be due to the preconceived bias that the decisions given by arbitral tribunals are likely to favour big private players from industrialised countries.

According to Myres S. McDougal, an American scholar in the field of International Law, the concept of absolute Sovereign Immunity is reminiscent of the time when personal sovereigns were considered to be above the law. On the other hand, a reasonable understanding of Sovereign Immunity stems from the mutual interest of the States in ensuring that there is no interference with each other's fundamental governmental functions.[23] He also noted that States have started

[21] *Comed Chemicals Ltd. v. C.N. Ramchand* [2009] 1 SCC 91
[22] *Union of India v. D.N. Revri& Co.* [1976] 4 SCC 147
[23] Myres S. McDougal and Robin-Eve Jasper 'The Foreign Sovereign Immunities Act of 1976: Some Suggested Amendments' [1981]

engaging in commercial transactions that are essential for their functioning by entering into transactions with private parties from other States. Since this is the scenario, continuous reliance on State Immunity has introduced an element of lawlessness into transactional activities which subsequently leads to arbitrariness and unfairness to the private players as it deprives them of their reasonable expectations and the recourse to law that should ideally be available to them for the protection of such expectations.

V. UNITED NATIONS CONVENTION ON THE JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY, 2004

The UN Convention on the Jurisdictional Immunities of States and their Property, 2004, is the first multilateral instrument to establish a uniform approach in dealing with matters regarding state or sovereign immunity from suits in foreign courts. It took the International Law Commission 27 years of labour to come up with this convention. However, it still has not come into force as it has only been ratified by 24 of the requisite 30 states. 28 countries have become signatories to this convention, some of which are Italy, Russia, India, the UK, etc.[24] One of the notable signatories of the convention is the People's Republic of China which had previously always maintained an absolutist approach to state immunity. Thus, it is evident that this Convention if it comes into force, will mark a substantial shift from the practices that are currently in place regarding state immunity.

The Preamble of this Convention states that the

> *"jurisdictional immunities of States and their property are generally accepted as a principle of customary international law"*

So, according to this statement, the Doctrine of Sovereign Immunity is a well-accepted principle though there may be substantially different approaches by various nations.

[24]United Nations Treaty Collection <https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=III-13&chapter=3&clang=_en#:~:text=The%20above%20Convention%20was%20adopted,Nations%20Headquarters%20in%20New%20York.> Accessed 29 March 2025.

The Convention provides for a comprehensive regime which is mainly restrictive in nature. It also provides certain exceptions wherein the Doctrine of Sovereign Immunity cannot be exercised. These include claims arising from[25]:

1. Commercial transactions
2. Personal injury and damage to property
3. Contracts of employment
4. Ownership, possession and use of property
5. Intellectual and industrial property
6. State-owned or operated ships engaged for matters other than government non-commercial purposes
7. Situations where a Sovereign actor consents to becoming a subject of a certain jurisdiction.
8. Certain matters pertaining to arbitration proceedings

The Convention provides that a sovereign actor enjoys immunity so long as they are engaged in activities that are official or sovereign, i.e., *acta jure imperii*., *acta jure imperii*[26], but if the claims are arising out of commercial transactions they are treated as private entities, i.e., *acta jure gestionis*. To ensure there arises no doubt as to what constitutes a commercial transaction, the Convention also provides a definition for the same. A Commercial transaction means:[27]

i. Any commercial contract or transaction involving the purchase of goods or provision of services;
ii. Any agreement for a financial arrangement such as a loan or other financial transaction, including any obligation of guarantee or indemnity for such a loan or transaction;
iii. Any other contract or transaction of a commercial, industrial, trading or professional nature, excluding contracts for employing individuals.

[25] UN Convention on Jurisdictional Immunities of States and Their Property, 2004, Part III.
[26] David P. Stewart, 'The UN Convention on Jurisdictional Immunities of States and Their Property' [2005] 99 AM. J. INT. LAW 1945 <https://doi.org/10.2307/3246098>.
[27] UN Convention on Jurisdictional Immunities of States and Their Property, 2004, art. 2(1)(c).

When ascertaining whether a transaction or contract is commercial or not, regard should be made first to the nature of the contract or transaction. However, the purpose of it should also be taken into consideration in situations where the parties have agreed or if it is a usage of the State of the forum, that the purpose is a relevant factor in determining the non-commercial nature of the contract or transaction.[28] Article 10 of the Convention provides a general rule that a State can engage in a commercial transaction with a foreign entity, whether a natural or juridical person and if according to the relevant rules of private international law, the dispute arising from the commercial transaction falls under the jurisdiction of a court of another State, the State entity cannot invoke the doctrine of sovereign immunity to protect itself from the applicable jurisdiction in any legal proceeding arising from the commercial transaction.

However, this rule does not apply in situations where the commercial transaction is between two States or where the parties have expressly agreed otherwise. The immunity of the State remains unaffected when a State enterprise or entity having an independent legal personality is involved in a legal proceeding that arises out of a commercial transaction. This Convention is however not devoid of shortcomings. This convention provides for only a partial codification of State Immunity, only with reference to particular activities to which a State will not enjoy immunity from civil jurisdictions. Thus, it has been criticised for addressing the question of jurisdiction in a piecemeal fashion.[29]

VI. INTERNATIONAL COMMERCIAL ARBITRATION

An increasing number of disputes are being referred to arbitration, which could be attributed to various factors such as freedom to choose the arbitration forum, the arbitrator and the fact that the procedural requirements of traditional court proceedings are cumbersome for the parties and are likely to drag out the dispute resolution process. However, that being said, international law is inherently soft in nature and so the execution of the decision obtained through arbitration proceedings which are known as arbitral awards, is not always an easy task.

[28] ibid art. 2(2).
[29] David P. Stewart, *supra* note 25, 210.

While private actors have no restrictions on the submission of disputes to arbitration, States and sovereign entities may have certain constraints imposed upon them by constitutional or legislative provisions.

One of the biggest hurdles to the enforcement of arbitration agreements is the Doctrine of Sovereign Immunity in which a sovereign actor prevents the enforcement of arbitral award. Therefore, there arises a need for the national courts and legislature to strike a balance between the doctrine and the arbitral award. The Courts have the responsibility to decide whether the foreign states have immunity, and if they do whether the immunity is regarding supervisory or enforcement jurisdiction.

Different countries have different approaches to the State's capacity to enter into an arbitration agreement. For instance, the USA has adopted a **restrictive** approach, i.e., it cannot enter into an enforceable arbitration agreement with a private player unless it has obtained explicit authorisation from its legislature via a statute. Unlike the USA, countries like England, and those that are covered under the European Convention and UNCITRAL Model on International Commercial Arbitration, 1985 such as India have adopted a **permissive** approach to State's Capacity to Arbitrate. This approach aims to remove or overcome the domestic barriers that may hamper a State's capacity to enter into arbitration agreements.[30]

VII. PLEA OF SOVEREIGN IMMUNITY IN INTERNATIONAL COMMERCIAL ARBITRATION

State immunity can act as a barrier to the private players who enter into commercial transactions with the State as it may limit the ability of the private entities to ensure that their interests are secured in case any dispute arises. This is because States tend to prioritise the security of their interests and assets from immediate and future claims. Therefore, the plea of Sovereign Immunity often becomes a point of contention as it allows States to avoid their obligations which prevents the other party from obtaining fair compensation.

[30] Winston Nagan & Joshua Root, *supra* note 5.

Ideally once a State has entered into a valid arbitration agreement, it should not be allowed to invoke its immunity to avoid being named as the respondent in the proceedings before an arbitral tribunal. This obligation finds its basis in the international law principle of *pacta sunt servanda*. To ensure the same, some legal systems have put in place certain legislations and conventions which prevent the State from avoiding its obligation. For instance, the European Convention on State Immunity provides that where a State has agreed in writing to refer a dispute to arbitration that has arisen or is likely to arise out of a civil or commercial matter, the State cannot avoid the jurisdiction of a court of another State on the territory or according to the law to which the arbitration proceedings are subject to, by claiming immunity, unless the arbitration agreements provide for otherwise.[31]

In the USA, the Foreign Sovereign Immunities Act (as amended) also provides certain situations wherein a foreign state cannot exercise jurisdictional immunity[32] which include commercial activities and enforcement of arbitral agreements and awards. The USA Courts through their judgments have refused to accept the waiver of sovereign immunity where a State has already consented to arbitration and there is no substantial connection to the USA.[33] In furtherance of this, the USA Courts have also laid down the "minimum contacts test" in the case of *International Shoe Co. v. Washington*[34]. This test ensures that more emphasis is put on fairness rather than physical control during jurisdictional. This marked a significant shift in the exercise of personal jurisdiction by the American Courts and was in alignment with the Fourth and the Fifteenth Amendments to the Constitution of the United States which focus on due process and justice. According to this test, the fact that a party is located out of state does not take away the jurisdiction of that state

[31] European Convention on State Immunity, 1972, art. 12(1).
[32] Foreign Sovereign Immunities Act, 28 U.S.C. § 1605(a), (1976).
[33] Tai-Heng Cheng et al. 'State Incapacity & Sovereign Immunity in International Arbitration' [2014] SINGAPORE ACADEMY OF LAW JOURNAL <https://journalsonline.academypublishing.org.sg/Journals/Singapore-Academy-of-Law-Journal-Special-Issue/e-Archive/ctl/eFirstSALPDFJournalView/mid/513/ArticleId/1047/Citation/JournalsOnlinePDF#:~:text=If%20a%20party%20to%20the,covered%20by%20the%20arbitration%20agreement>
[34] *International Shoe Co. v. Washington* [1945]326 U.S. 310.

provided there has been a "minimum contact" with the state.[35] A party need not be physically present in the state to maintain minimum contact, it is sufficient if it has:

1. Purposefully availed itself of the privilege of undertaking activities within the forum state.
2. If the contact of the party is of such nature that it is the basis of, or related to, the claims of the other party.
3. When the acts of a party are so substantial that requiring it to defend a lawsuit—regardless of whether the claim is connected to those activities—would be reasonable.[36]

According to the USA Courts, for a State agency to be entitled to sovereign immunity, they will consider:

4. Whether the legislations and precedents recognise the entity as an extension of the state.
5. The origin of the entity's financial support.
6. The degree of the state agency's local autonomy.
7. Whether the entity focuses more on addressing local issues rather than those affecting the entire state.
8. The entity's ability to sue and be sued in its own name.
9. The entity's right to hold and use property.[37]

As for the United Kingdom, in *A Company Ltd v. Republic X*[38], the Queen's Bench Division (Commercial Court) held that while considering whether a clause amounts to a waiver of

[35] Terrence Lee Goodman 'Minimum Contacts and Contract: The Breached Relationship' [1983] WASHINGTON AND LEE LAW REVIEW <https://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=2683&context=wlulr> Accessed 0n 29 March 2025.

[36] Constitution Annotated: Analysis and Interpretation of the U.S. Constitution < https://constitution.congress.gov/browse/essay/amdt14-S1-7-1-4/ALDE_00013035/>

[37] Dewi Susanti Siagian, 'Sovereign Immunity in Commercial Transaction Under International Law' [2023]INDONESIAN JOURNAL OF INTERNATIONAL LAW<https://scholarhub.ui.ac.id/cgi/viewcontent.cgi?article=1565&context=ijil>

[38] *A Company Ltd v. Republic X* [1990] 2 Lloyd's Rep 520 (QB Comm).

immunity, the Court must consider the context of the case. In this case, the concerned transaction was of a commercial nature and therefore the clause should be construed like a commercial contract according to the principles of construction of commercial courts. If the intent of the clause is clearly to put the State and a private individual on the same footing, then no question of sovereign immunity in respect of the State or its property would arise in connection with the State's obligations to the plaintiffs under the agreement.

There may also be a situation where a private entity has successfully instituted an arbitral trial, but it cannot seek compensation through the seizure of assets. This is because there are variations in how different States handle execution against the commercial assets of a foreign sovereign. It may allow, or it may pass domestic laws that prevent such execution. National courts may also pass laws whose jurisdiction does not apply to certain disputes and provide the State entity with immunity from enforcement. However, despite the variations in the domestic laws of different States, the general rule is that a State cannot conclude an arbitration agreement while also maintaining absolute immunity from a foreign court that may be required to enforce the agreement.

VIII. CASE LAWS

A. VICTORY TRANSP., INC v. COMMISARIA GENERAL DE ABSTICIMIENTOSY TRANSPORTES[39]

In this case, a dispute arose between the Spanish Ministry of Commerce and a Shipping company regarding damages to a ship discharging cargo in Spain. Despite the fact that the agreement between them contained an arbitration clause, the Spanish Branch claimed sovereign immunity and lack of jurisdiction. This appeal lied against the decision of the District and Circuit Court which denied the claim of immunity and referred the dispute to arbitration in New York as specified in the agreement.

[39] *Victory Transp., Inc. v. Commisaria General de Absticimientos y Transportes* [1963] 336 F.2d 354 (2d Cir. 1964).

The issues that arose in this case were two-fold; can the Spanish branch of the Ministry of Commerce evade the arbitration clause by claiming sovereign immunity? And can the activities involved be categorised as private commercial actions or actions in furtherance of a political purpose?

The Court in this case demarcated the acts of an entity into three categories.

1. Firstly, the acts which are prima facie acts that are strictly political or public in nature, such as:
    a. Internal administrative acts, such as the expulsion of an alien.
    b. Legislative acts, such as nationalisation.
    c. Acts concerning the armed forces.
    d. Acts concerning diplomatic activity
    e. Public loans.
2. Secondly, those acts which have been "recognised and allowed" by the State Department to be protected by the Sovereign Immunity of a State
3. Thirdly, those acts regarding which the State is silent.

Thus, where international law deems certain activities so central to the functioning of the government they must be deemed as 'political' and are covered under the immunity. Where international law does not have customs or usages for other activities but the State Department has specified them as 'political' activities they will be covered under immunity, because it is the Department which holds the primary responsibility for shaping foreign policy and it might base its recommendation on information that courts are not privy to, including facts that courts would deem irrelevant and facts that courts would lack the expertise to handle even if their relevance were acknowledged. But where even the State Department is silent as regards the immunity of the vessel (as was in this case), it is the responsibility of the Court to apply the restrictive doctrine and determine the nature of the activity. [40] This case represents one of the first instances wherein the theory of restrictive sovereign immunity was chosen over the 'absolute immunity'

[40] Sovereign Immunity of States Engaged in Commercial Activities, *supra* note 18.

B. SEDELMAYER v. RUSSIAN FEDERATION[41]

In this case, the assets of Franz J. Sedelmayer, a German national had been confiscated by the Russian authorities and this dispute has been submitted to an arbitral tribunal sitting in Stockholm in accordance with a bilateral investment agreement between Germany and Russia. The tribunal in 1998 gave a decision in favour of the German national directing the Russian Federation to compensate Sedelmayer. This award was challenged by Russia, but it was unsuccessful. Sedelmayer in 2004 sought execution of the arbitral award but the Swedish Enforcement Authority declared that the property had immunity from execution. After the conflicting opinions of the Swedish district courts and the Court of Appeal, the case was finally decided by the Supreme Court.

The issue that arose, in this case, was whether a multiunit building in Stockholm that had been an office for the Russian trade mission till the 1970s but was later not notified as official premises, was subject to immunity from execution. The Supreme Court considered Article 19(c) of the United Nations Convention on Jurisdictional Immunities of States and Their Property, 2004 which provides an immunity to property that is 'specifically in use or intended for use by the State for other than non-commercial purpose' from any measures of constraint, such as attachment, arrest or execution. The Court refused to interpret this provision as an immunity to all property used for 'government non-commercial purposes'.

It was observed:

> *The expression ["in use . . . by the State for other than government non-commercial purposes"] must be held to entail that immunity from enforcement can be claimed at least as concerns property that is used for the official functions of a state. The expression should not, however, be considered to mean that there is immunity from enforcement merely for the reason that the property in question is owned by the state and used by it for non-commercial purposes.*

[41] *Sedelmayer v. Russian Federation* [2005] Case No T 525-03.

The Court rejected the traditional division between commercial and non-commercial activities as the sole determinant for immunity. It distinguished between activities directly related to official functions, such as providing housing for personnel with diplomatic immunity, and activities falling under commercial or private law realms. The Court emphasised the importance of linking commercial and private law activities, stating that non-commercial private law activities alone don't automatically grant immunity to state-owned property. Thus, the Supreme Court of Sweden ruled that state immunity doesn't prevent the enforcement of a court decision regarding real estate in Sweden owned by the Russian Federation, which is partly used for diplomatic and other official functions.

C. REPUBLIC OF INDIA V. CCDM HOLDINGS[42]

In this case, CCDM Holdings (Devas) and Republic and India (Antrix), which is the commercial arm of the Indian Space Research Organization, a government body entered into an agreement which was terminated by the latter, as a result of which three distinct proceedings were initiated; a commercial arbitration before the ICC tribunal, and two investment arbitrations, one under the India-Mauritius BIT and one under India-Germany BIT.

The present case is concerned with the enforcement of the arbitral award obtained under the India-Mauritius Bilateral Investment Treaty (BIT) against India. The enforcement was sought under the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards which was incorporated in the Australian law vide International Arbitration Act 1974. India contended the enforcement of the award by invoking the ground of sovereign immunity.

The Full Court ruled in favour of India as it held that the arbitral award in the present case could not be enforced as India had made a reservation when it had acceded to the New York Convention, stipulating its application solely to disputes considered "commercial" under Indian law. The Full Court in this case agreed with the decision of the Delhi High Court in previous judgments[43]

[42] *Republic of India v. CCDM Holdings, LLC & Ors*. [2025] FCAFC 2.
[43] *Union of India v. Vodafone Group PLC United Kingdom*, 2018 SCC OnLine Del 8842.

wherein it was held that investment arbitrations are not 'commercial' arbitrations. The Delhi High Court Thus, the reservation was only limited to waiver of sovereign immunity in commercial disputes. According to the Delhi High Court, investment arbitration is substantially different from commercial arbitration as the former is based on State guarantees and assurances and is not commercial in nature. It also held that:

> *"The roots of Investment Arbitrations are in public international law, obligations of State and administrative law."*

This case highlights two important aspects. Firstly, investment arbitrations are not considered to be 'commercial' in nature, rather they arise from State obligations and are hence protected by Sovereign Immunity. Secondly, the ruling of the Australian Full Court signifies the implications of sovereign immunity and treaty reservations while enforcing an international arbitral award.

IX. CONCLUDING REMARKS

The Doctrine of Sovereign Immunity plays a crucial role in shaping the international commercial arbitration scenario especially when it comes to disputes involving State and its entities. While the doctrine is necessary for ensuring the independence of a country and for upholding the principle of non-interference, its application in commercial transactions can pose undue challenges for private entities if they wish to bring a claim against a State and can therefore lead to unjust and unfair treatment. On the other hand, it also ensures that the State is protected from frivolous disputes and litigation.

Therefore considering the growing number of arbitration cases involving State entities, it is the need of the hour to strike a balance between respecting State sovereignty and ensuring that private parties have recourse to equitable remedies. Most States have adopted a certain approach that emerges from the various judicial pronouncements given by the courts and arbitral tribunals. For instance, in the recent case of Republic of India v CCDM Holdings, the Australian Full Court upheld the decision of the Delhi High Court and took the view that investment arbitration does not

amount to commercial arbitration, despite the fact that there is no specific law governing international investment arbitration in India. Other states as well, such as the USA and the UK, have various laws, treaty obligations and judicial tests such as minimum contact test, nature of activity test etc. which regulate the extent of protection offered to State actors. However, this unilateral approach is not sufficient as it leads to non-uniformity.

Keeping in mind the importance of this doctrine and the increasing transactions between private and State entities, it becomes important for the parties to equip themselves with knowledge about this subject matter. Because there is no uniform law or convention, the application of the doctrine of sovereign immunity in commercial transactions depends upon the jurisdiction in which it is sought to be enforced and the content of the agreement between the parties.

While the United Nations Convention of Jurisdictional Immunities of States and Their Property, 2004 is a step towards achieving a global framework, there still exists a discrepancy in how State immunity is exercised, especially with respect to enforcement of arbitral awards. In conclusion, there is still much to be done to achieve a harmonised international framework to create a fairer system. States, private entities, and legal institutions must continue to work towards a balanced approach that safeguards the interests of both sovereign actors and private participants, ensuring justice, fairness, and the smooth conduct of international commercial relations.

NAVIGATING DELAYS IN ARBITRATION: PERSPECTIVES ON CONDONATION OF DELAYS IN APPEALS UNDER ARBITRATION AND CONCILIATION ACT, 1996

- *DEBARUN MUKHERJEE*[1]

ABSTRACT

The Arbitration & Conciliation Act, 1996 is the substantive and procedural guide to the process and structure of arbitration in India. While the binding nature of an award is inherent in the concept of arbitration, appeals play an important part in ensuring fairness and justice in any dispute resolution process. Section 37 of the aforesaid Act provides a mechanism for modifying errors and ensuring that arbitral awards do not suffer from a prima facie error in law. This appellate oversight fosters confidence in the arbitration mechanism as an effective and reliable alternative to litigation. By allowing parties to challenge and review decisions, appeals and contribute to the development of consistent and predictable arbitral jurisprudence, enhancing the overall legitimacy and acceptance of arbitration as an effective and reliable alternative to litigation. Despite the Act's objective to ensure swift dispute resolution, the absence of a clearly defined limitation period for filing appeals before a competent authority has raised significant concerns about potential delays and misuse. The balance between accommodating genuine delays and upholding the principle of expeditious justice is crucial for maintaining the integrity and efficiency of the arbitration process. This article highlights the need for consistency within the arbitration framework to prevent the dilution of its primary objective of timely dispute resolution. Judicial precedents suggest that extensions for filing appeals are granted sparingly and only in exceptional cases where the applicant demonstrates bona fide intent and absence of negligence.

Keywords*: Extension of Mandate, Sufficient Cause, Condonation of Delays, Judicial Intervention*

I. INTRODUCTION: OVERVIEW OF ARBITRATION IN INDIA

[1] 5th year BBA LL.B, Bharati Vidyapeeth University, Pune, Gmail: debarunmukherjee.25@gmail.com

The Arbitration and Conciliation Act, 1996 (‘**A&C Act**’) as a comprehensive law on arbitration, is still nascent, with many contentions, contradictions, and practical difficulties yet to be resolved. One such contention is related to the condonation of delays in filing appeals against an arbitral award. From the bare reading of the Act, it becomes apparent that the general perspective is to resolve disputes between the parties as quickly and efficiently as possible. For similar reasons, specific time limits are prescribed in the Act itself for numerous provisions, for instance, timelines under Section 29A[2] which describes the arbitrator’s mandate. Subclause (1) of the Section stipulates that the awards of an arbitral tribunal must be made *“within 12 monthsfrom the date of completion of proceedings”*. However, there is a possibility of extension of such time by the consent of the parties under sub-section (3)[3]; which provides a further extension of 6 months, which makes a total of 18 months (i.e. 12 months + 6 months) upon the consent of the parties. There is further provision in sub-section (4) which provides that if the award is not made within the period or the extended period; the mandate of the arbitrator shall terminate unless the court extends the period. Furthermore, Section 23(4) of the A&C Act[4], parties must submit their Statement of Claim and Defence (SOC/SOD) within six months after the arbitrator or arbitrators receive written notice of their appointment. This shows that the Act allows for flexible time limits and that courts often try to speed up arbitration processes.

The Act incorporates the Limitation Act, 1963 as well, suggesting that its timelines apply to arbitration matters, leading to varying judicial interpretations regarding the appropriate limitation period for appeals. Several judicial precedents indicate that extensions are granted sparingly, only in “exceptional cases” where the applicant demonstrates bona fide intent and absence of negligence. Also, the appellant must prove consistency within the A&C Act's framework to ensure that delay condonation aligns with the primary objective of speedy dispute resolution.

Section 37 of the Act[5] specifies the provisions for appeals, but it does not provide any time limits for filing them or the timeframe within which an aggrieved party must submit an appeal. This absence of clear deadlines for appeals under Section 37 of the A&C Act raises concerns about potential misuse, as it may allow parties to exploit this loophole to delay proceedings indefinitely.

[2] Arbitration and Conciliation Act 1996, s. 29A(1).
[3] Arbitration and Conciliation Act 1996, s. 29A(3).
[4] Arbitration and Conciliation Act 1996, s. 23(4).
[5] Arbitration and Conciliation Act 1996, s. 37.

This Section outlines the appeal process against orders passed under the Act, yet it does not specify a limitation period. Instead, Section 43[6] of the Act integrates the Limitation Act, 1963, suggesting that the timelines prescribed by the Limitation Act shall apply to arbitration matters. This interplay between the A&C Act and the Limitation Act has led to varying judicial interpretations regarding the appropriate limitation period for appeals, which is thoroughly discussed in this article. **Part I** of thepaper lays the existing statutory timeframes related to appeals under the A&C Act and highlights the interplay between the Act and the Limitation Act;**Part II** of this article shall provide an overview of the statutory provisions related to various circumstances and grounds under which courts can condone delays by the Appellants to file appeals against any arbitral awards for set aside or otherwise, we shall also delve into the interpretation of the term 'sufficient cause' for such condonation; **Part III** of the article highlights the arbitrator's mandate under Section 29A of the Act and whether such mandate can be extended post-award. **Part IV** of this article discusses the contentions and diverging opinions of the courts regarding the extension of arbitrator's mandate under Section 29A. **Part V** concludes this article in the light of the observations made.

II. APPEALS AND CONDONATION OF DELAYS UNDER A&C ACT, 1996

A. OVERVIEW OF STATUTORY PROVISIONS ON EXTENSION OF ARBITRATOR'S MANDATE

Section 29A[7] of the Act was modified in 2019 to institute timeliness in arbitration proceedings by setting a 12-month period for completion from the time the tribunal enters reference. This was later altered to 12 months from the completion of pleadings. Under sub-section (3), parties can mutually agree to extend this timeline by a further six months. When the extended period lapses, parties may apply to the court for a further extension as per Section 29A(4). If no such application is made, the mandate of the arbitrator is intended to terminate, barring intervention by the court. Despite the clarity Section 29A(4) provides regarding an extension, it does not explicitly state if applications can be made post the expiration of the mandate. This omission has led to varied

[6] Arbitration and Conciliation Act 1996, s. 43.
[7] Arbitration and Conciliation (Amendment) Act 2019, s. 6.

judicial extensions that can still be sought after expiry, weighing procedural timelines against fair dispute resolution.

In the course of delving into the perspectives of different High Courts of the country, it is interesting to note that several have ruled in favour of permitting extensions under Section 29A(4) when applications are filed post-expiry. These judgments prioritize the cause of delay and the current stage of the arbitration proceedings. For instance, in *Wadia Techno-Engineering Services Ltd. v. Director General of Married Accommodation Project* (2023)[8], the Delhi High Court held that an application for extension could be granted even after the mandate expired. Here, final arguments were underway, and delays were largely attributed to requests from the respondent rather than any fault of the arbitrator or the claimant. Thus, the court took a pragmatic approach to ensure the proceedings continued to their logical end.

In *Barasat Krishnagar Expressways Ltd. v. NHAI* (2023)[9], the Delhi High Court extended the tribunal's mandate despite objections, after having noted the efforts put in by both the parties and the tribunal in furtherance of the strenuous endeavour of compiling and reviewing extensive pleadings and evidence. Here, the court balanced procedural efficiency with substantive justice, emphasizing the importance of finalizing disputes on the merits rather than dismissing them over time lapses. Similarly, the Madhya Pradesh High Court in *Rajesh Kaila v. Union of India* (2022)[10] allowed an extension request that was made post-expiry, given that the delay stemmed from the COVID-19 pandemic and the proceedings were at the final argument stage. This ruling highlights how courts may consider external, uncontrollable factors that impact timelines, recognizing that such situations necessitate flexibility in mandate extensions.

In a recent case, *Nikhil H. Malkhan& Ors. v. Standard Chartered Investment and Loans (India) Limited* (2021)[11], the Bombay High Court disagreed with the stricter interpretation advocated by the Calcutta High Court in the case of *Rohan Builders (India) Pvt. Ltd. v Berger Paints (2023)*[12]. The Bombay High Court held that limiting the court's power to extend mandates only when

[8][2023] DHC 3457.
[9] [2023] DHC 000401.
[10] [2022] MPHC 2855.
[11] [2023] Arbitration Petition (Lodging) No. 28255.
[12] [2023] CAL HC 328.

applications are made pre-expiry would undermine the objective of final dispute resolution, thus favouring a more functional interpretation of Section 29A(4).

B. WHERE CONDONATION CAN BE GRANTED IN EXCEPTIONAL CASES

The Limitation Act applies to appeals under Section 37 if the applicant satisfies that there was sufficient cause. Section 5 Limitation Act[13] read with Order XXI of the Code of Civil Procedure (CPC), 1908[14] applies to appeals under the A&C Act if the applicant satisfies that there was sufficient cause. The interpretation of "Court" under Section 29A[15] refers to the principal civil court having original civil jurisdiction as established by the apex court in *Chief Engineer (NH) PWD (Roads) v. M/s. BSC & C and C JV (2024)*[16]. The Supreme Court held on numerous occasions that the Limitation Act's prescribed period for appeals applies when the A&C Act does not specify a period. Furthermore, the Commercial Courts Act[17] influences this determination by prescribing a 60-day limitation period for appeals in commercial disputes of specified value.

In the case of *Consolidated Engineering Enterprises v. Irrigation Department (2008)*[18], the appellants sought to challenge an arbitral award under Section 34 of the 1996 Act after such award was passed by the arbitral tribunal. There was a delay in filing this application, and the appellants sought condonation of this delay by invoking Section 14 of the Limitation Act, 1963[19], which allows for the exclusion of time spent in pursuing another proceeding in good faith and with due diligence. The Apex Court held that where the Limitation Act prescribes a period of limitation for appeals or applications to any Court, and the A&C Act does not prescribe any period of limitation, then the limitation prescribed in the Limitation Act will be applicable.

Following the enactment of the Commercial Courts Act, 2015, Section 10[20] of the Act stipulates that Commercial Courts have the power to adjudicate upon all applications and appeals arising out

[13] Limitation Act 1963, s. 5.
[14] Code of Civil Procedure, 1908, Order XXI.
[15] Arbitration and Conciliation Act 1996, s. 29A(5).
[16] *Chief Engineer (NH) PWD (Roads) v. M/s. BSC & C and C JV,* Special Leave to Appeal (C) No(s). 10544/2024.
[17] Commercial Court Act 2015, s.13.
[18] (2008) 7 SCC 169.
[19] Limitation Act 1963, s.14.
[20] Commercial Court Act 2015, s.10.

of arbitrations, except for international commercial arbitrations, provided the dispute involved is commercial in nature and is of the specified value. As defined under Section 2(1)(i)[21], this specified value must not be less than INR 3,00,000. Additionally, Section 13(1A)[22] The Act mandates that appeals under Section 37 of the Arbitration and Conciliation Act (A&C Act) shall be brought before the Commercial Court and must be filed within 60 days.

C. WHERE CONDONATION CAN BE GRANTED FOR BONA FIDE REASONS AND WITHOUT NEGLIGENCE OF THE PARTIES

Extensions for filing appeals under the A&C Act prescribes a period of sixty or ninety days under Article 116 and 117 of the Limitation Act[23] and Section 13(1A) of the Commercial Courts Act[24] depending upon the facts and circumstances of a case. However, it is to be noted that such extensions are granted only where the appellants can demonstrate that such delays are Bona Fide and have no ulterior motive of delaying justice. The applicant must also demonstrate the absence of negligence. This provision is based on the principle "*equity must come with clean hands*"[25]. This stringent requirement ensures that only those who have acted in good faith and without any negligence are afforded the opportunity for an extension. Merely citing administrative or procedural delays is insufficient unless accompanied by substantial and convincing explanations. The judiciary places a high threshold on proving bona fide actions and the absence of negligence to maintain the integrity and efficiency of the arbitration process, preventing abuse of the extension provisions and ensuring that justice is both timely and fair.

In*Government of Maharashtra (Water Resources Department) v. Borse Brothers Engineers & Contractors Pvt. Ltd. (2021)*[26] **,** two High Courts dismissed appeals filed by the Government, refusing to condone delays in filing appeals under Section 37 of the Act, beyond 120 days. The High Court of Madhya Pradesh deviated from the precedent set by the Supreme Court in *N.V.*

[21] Commercial Court Act 2015, s. 2(1)(i).
[22] Commercial Court Act 2015, s. 13(1A).
[23] Limitation Act 1963, Art. 116; Limitation Act 1963, Art. 117.
[24] Ibid [21].
[25]*Ramjas Foundation and another vs. Union of India and others*, (2010) 14 SCC 38.
[26]MANU/SC/0195/202.

International (2019)[27], citing a conflict with the larger bench decision in *Consolidated Engg. Enterprises v. Irrigation Deptt (2008)*[28] Consequently, the High Court condoned a delay of fifty-seven days by applying Section 5 of the Limitation Act, 1963. The Supreme Court disagreed with the argument that the limitation on a civil court's initial power extends to the appellate court. This context involved a civil suit decree for a monetary sum, considering compensation under Section 357(5) of the CPC, 1973[29], which includes appellate courts. Therefore, the limitation of power principle for civil courts was not applicable here.

Doctrine of Unbreakability:

The doctrine of unbreakability refers to the principle that certain time limits for taking legal actions are strict and cannot be extended under any circumstances. This doctrine emphasises the finality and certainty of these limits to ensure the prompt resolution of disputes and prevent indefinite delays. Under Section 34(3) of the Arbitration and Conciliation Act[30], the doctrine of unbreakability means that the prescribed time limit for filing an application to set aside an arbitral award is strict and cannot be extended, except for a limited additional period specified in the Act. This ensures that there is a clear and definite cut-off point after which the award becomes final and binding, promoting efficiency and finality in arbitration proceedings.

The Supreme Court deemed the reliance on the judgment in *P. Radha Bai v. P. Ashok Kumar (2019)*[31] insufficient regarding the doctrine of unbreakability in Section 34(3) of the Arbitration Act. The Court held that the language of Section 34(3) constitutes an "express exclusion" of Section 17 of the Limitation Act. This exclusion is also necessarily implied when considering the scheme and objectives of the Arbitration Act. Once a party receives an award, the limitation period under Section 34(3) begins, and Section 17 of the Limitation Act does not aid the objecting party.

[27] *M/S N.V. International v. State of Assam*, 1996 GAULT 3 451.
[28] Appeal (civil) 2461 of 2008
[29] Code of Civil Procedure 1973, s. 357(5)
[30] Arbitration and Conciliation Act 1996, s. 34(3).
[31] *P. Radha Bai v. P. Ashok Kumar* (2019) 13 SCC 445.

The Apex Court recently overruled *N.V. International*[32] *(Supra)* on these grounds, finding it was wrongly decided and that the doctrine should not apply to appeal provisions without a definitive cut-off. Given the goals of the Arbitration Act and the Commercial Courts Act for speedy resolution, the Court held that delays beyond ninety, thirty, or sixty days for appeals under Section 37 of the Arbitration Act, Sections 116 and 117 of the Limitation Act, or Section 13(1A) of the Commercial Courts Act, respectively, should only be condoned in exceptional cases. Such condonation requires the party to have acted in good faith and without negligence, while also considering the opposing party's acquired rights through equity and justice.

D.WHERE CONDONATION CAN BE GRANTED ON EQUITY AND JUSTICE

Equity and justice play a critical role in determining whether to condone delays in arbitration appeals. The courts must balance the rights acquired by the opposing party against the reasons for the delay. When considering condonation, the principles of equity ensure that neither party is unfairly prejudiced by the extension or the refusal of such an extension. For instance, if the delay has resulted in substantial rights being vested in the opposing party, this weighs heavily against condonation. Conversely, if denying condonation would result in an unjust outcome due to genuine and unavoidable circumstances faced by the applicant, equity may favour an extension.

The courts have emphasized that condonation should not undermine the objectives of the A&C Act, which seeks to ensure the speedy resolution of disputes. The Supreme Court of India has highlighted that while the term "sufficient cause" under Section 5 of the Limitation Act is elastic, it must be interpreted in the light of the statute's goal of expeditious dispute resolution. Therefore, condonation is typically granted only in exceptional cases where the delay is minimal and does not significantly prejudice the opposing party's rights.

Determination of the applicable period of limitation for appeals filed under Section 37 of the Act was the primary issue in the case of *Union of India v. Varindera Constructions Ltd. (2020)*[33]**.** There is ambiguity about whether the limitation period should be governed by the 90-day period prescribed in Article 116 of the Limitation Act, 1963, or the 120-day period suggested by previous

[32] Ibid [26].
[33] *Union of India v. Varindera Constructions Ltd.* (2020) 2 SCC 111.

Supreme Court rulings. Additionally, the influence of the Commercial Courts Act, which prescribes a 60-day limitation period for appeals, further complicates this determination. The appeal was dismissed by the High Court on the grounds of delay, applying the 90-day limitation period for appeals to the High Court as prescribed in Article 116 of the Limitation Act, 1963

In balancing these factors, the courts also consider the broader implications for the arbitration system, striving to maintain a consistent and predictable approach. This ensures that while justice and equity are served on a case-by-case basis, the overall integrity and efficiency of the arbitration process are upheld. In another significant case of *State of Haryana v. Chandra Mani & Ors* (1996)[34]., the Supreme Court outlined that while it is essential to adopt a liberal approach towards condonation of delay, it should not be at the cost of equity and justice. The court stressed that condonation should be granted only when there is sufficient cause, and it should be ensured that such delays do not cause substantial injustice to the opposing party.

E. WHERE THERE IS CONSISTENCY WITHIN THE FRAMEWORK OF THE ARBITRATION ACT

Maintaining consistency within the framework of the A&C Act is essential for the effective and fair resolution of disputes. The interpretation of limitation periods, specifically for appeals under Section 37, must align with the overarching principles of the A&C Act to ensure predictability and uniformity in arbitral proceedings. The Supreme Court, in the case of *N.V. International (Supra)*[35], initially held that any delay beyond 120 days in filing appeals under Section 37 should not be condoned. This ruling aimed to provide a clear and definitive cut-off to enhance the efficiency and expediency of arbitration.

However, this interpretation was later overruled by the *Maharashtra Water Resources Department (2020)*[36] case where the Supreme Court recognized that the rigid application of the 120-day limitation period could potentially lead to unjust outcomes, particularly where genuine reasons for

[34] 1996 AIR 1623; 1996 SCC (3) 132.
[35] Ibid [26].
[36] *Government of Maharashtra & others (Water Resources Department) v. M/s Borse Brothers Engineers & Contractors Pvt. Ltd.* Civil Application No. 421 of 2020.

delay exist. Consequently, it was held that Section 37, when read in conjunction with Section 43 of the A&C Act and Section 29(2) of the Limitation Act, allows for the application of Section 5 of the Limitation Act. This enables courts to condone delays if the applicant can demonstrate 'sufficient cause'.

The case of *Chintels India Ltd. v. Bhayana Builders Pvt. Ltd (2021)*[37]. further reinforced this approach by highlighting that condonation of delay should not undermine the primary objective of the A&C Act, which is to provide a speedy resolution of disputes. The court ruled that delays could be condoned in exceptional circumstances, ensuring that the appeal provisions do not impose an unyielding deadline that disregards the principles of fairness and justice.

F. WHERE CONDONATION CAN BE GRANTED WHEN DELAYS ARE TRIVIAL

Condonation of delays in the context of arbitration is typically an exception rather than the rule, particularly when the delays are short. Courts are more inclined to condone short delays if genuine and unavoidable circumstances cause them.

The single Judge of the High Court dismissed the application for condonation of delay in an application filed under Section 34 of the Arbitration Act, 1996 to set aside an award and consequently dismissed the Section 34 application itself. The Single judge of High Court held that Sub-section (3) of Section 34, by use of the words 'but not thereafter', as interpreted in *Union of India v. Popular Construction Co.(2001)*[38] restricts the power otherwise vested in Court to condone the delay beyond thirty days, the same also creates a ground of time bar for refusing to set aside the award and was part of the self-contained code for setting aside of the award; thus, refusal to set aside an award on the ground of the said time bar, would be a refusal within the meaning of Section 37 and making it appealable under Section 37.

In *Chintels India Ltd. vs. Bhayana Builders Pvt Ltd. (2021)*[39],a Single Judge Bench of the High Court rejected the application for condonation of delay in filing an application under Section 34 of the Arbitration Act, 1996, to challenge an award, and consequently dismissed the Section 34

[37] *Chintels India Ltd. v. Bhayana Builders Pvt. Ltd.,* AIR 2021 SC 1014.
[38] 2001 (8) SCC 470.
[39] Ibid [36].

petition. The Judge concluded that Sub-section (3) of Section 34, as interpreted in *Union of India v. Popular Construction Co.*[40] *(2001)*, limits the court's power to condone delays beyond thirty days. This provision establishes a time bar for setting aside an award and is part of the self-contained procedure for challenging an award. Therefore, the refusal to set aside the award based on this time bar constitutes a refusal under Section 37, making it appealable under that section.

In another instance, *State of Nagaland v. Lipok AO & Ors. (2005)*[41], the Supreme Court condoned a short delay of a few days, acknowledging that the delay was due to administrative reasons and was not attributable to negligence or deliberate inaction. The discretion granted under Section 5 of the Limitation Act, 1963 was not to be clarified or interpreted in a way that would turn it from an issue of discretion to a strict legal rule The court emphasized the importance of considering the overall context and the reasons for the delay while deciding on condonation applications.

III. POST-EXPIRY EXTENSION OF ARBITRAL TRIBUNAL'S MANDATE UNDER S.29A

The modern interpretation of Section 29A requires the application for extending the arbitrator's mandate for passing an arbitral award read with Section 29A(4) and 29A(5) is maintainable even after the expiry of the twelve-month or the extended six-month period. However, such extension applications will be guided by the principles of sufficient cause as discussed earlier.

The Apex Court while interpreting Section 29A of the Arbitration and Conciliation Act, 1996, particularly regarding post-expiry extensions of an arbitrator's mandate, has significantly clarified the boundaries and flexibility of the provision. In a recent ruling, the court emphasized that an application for an extension, even after the initial twelve-month period (with a possible six-month extension), is permissible if "sufficient cause" is shown. The criterion of sufficient cause means that an extension is not granted automatically; rather, the court holds the discretion to examine the necessity of the extension and may impose specific terms to ensure compliance. This discretionary power has been underscored in various High Court rulings as well, including in *Oil and Natural*

[40] Ibid [37].
[41] *State of Nagaland v. Lipok AO & Ors*, (2005) 3 SCC 752.

Gas Corporation Ltd. v. Schlumberger Asia Services Ltd. (2006)[42], where the Bombay High Court upheld that demonstrating sufficient cause is crucial to extending the tribunal's mandate.

The interpretation of "terminate" under Section 29A(4) was also pivotal. The court observed that "terminate" does not render the tribunal permanently incapable of issuing an award; rather, it implies a conditional termination that can be reversed if the court intervenes with an extension. This approach was also reflected in *Ashok Kumar Gupta v. M.D. Creations* (2023)[43], where the Calcutta High Court ruled that even if the mandate is technically terminated, it can be revived upon judicial extension under the language "either prior to or after the expiry of the period." This interpretation allows parties to file an application for extension at any time, ensuring that procedural delays do not automatically disrupt the arbitration process.

Moreover, the court acknowledged that arbitration proceedings should continue while an extension application is pending. This principle, upheld in *Simplex Infrastructures Ltd. v. NHAI (2024)*[44] by the Delhi High Court, prevents undue delay and keeps the arbitration on track, avoiding the potential freeze that could harm the process's efficiency. The court also underscored legislative intent, rejecting a restrictive reading of Section 29A that would compel parties to rush to court for extensions even when some flexibility would better serve justice. The decision aligns with the pragmatic interpretation taken in *Som Datt Builders Ltd. v. State of Kerala* (2017)[45], where the Kerala High Court noted that inflexible time constraints could obstruct arbitration by adding unnecessary procedural hurdles.

Finally, the ruling emphasized the role of the court as the ultimate authority in granting extensions under Section 29A(5). The arbitral tribunal does not hold this power, and it must refrain from issuing an award if an extension request is pending before the court. Even if an award is issued prematurely, the court can invoke Sections 29A(6) to 29A(8) to address resulting complications. This hierarchy was similarly acknowledged by the Madras High Court in *M/s. Consolidated Construction Consortium Ltd. v. Hitro Energy Solutions* (2022)[46], affirming that the court's intervention is paramount. Through this flexible and justice-oriented interpretation of Section 29A,

[42]*Oil and Natural Gas Corporation Ltd. v. Schlumberger Asia Services Ltd* [2006] (3) ARBLR610 (DELHI).
[43]*Ashok Kumar Gupta v. M.D. Creations C.O*. 2545 of 2022.
[44]*Simplex Infrastructures Ltd. v. NHAI,* [DEL HC] Arbitration Petition 10/2024.
[45]*Som Datt Builders Ltd. v. State of Kerala Civil Appeal No*. 3089 of 2006.
[46]*M/s. Consolidated Construction Consortium Ltd. v. Hitro Energy Solutions*, Civil Appeal No 2839 of 2020.

the Supreme Court has crafted a balanced framework that supports procedural timelines without compromising the arbitration process's integrity. This ruling ultimately enables extensions post-expiry, supporting efficiency while preventing technical lapses from undermining substantive justice.

IV. DIVERGING OPINIONS: PERSPECTIVES ON EXTENSION OF ARBITRATOR'S MANDATE IN SECTION 29A APPLICATIONS

The 2019 Amendment to the A&C Act in Section 29A was to institute stricter timelines in arbitration proceedings by setting a 12-month completion period from when the tribunal enters reference. This was later shifted to 12 months from the completion of pleadings. Under sub-section (3), parties can mutually agree to extend this timeline by a further six months. When the extended period lapses, parties may apply to the court for a further extension as per Section 29A(4). If no such application is made, the mandate of the arbitrator is intended to terminate, barring intervention by the court. Despite the clarity Section 29A(4) provides regarding an extension, it does not explicitly state if applications can be made post the expiration of the mandate. This omission has led to varied judicial extensions can still be sought after expiry, weighing procedural timelines against fair dispute resolution. Diverging into several High Court's perspectives, several have ruled in favour of permitting extensions under Section 29A(4) when applications are filed post-expiry. These judgments prioritize the delay's cause and the arbitration proceedings' current stage. For instance, in *Wadia Techno-Engineering Services Ltd. v. Director General of Married Accommodation Project* (2024)[47], the Delhi High Court held that an application for extension could be granted even after the mandate expired as the final arguments were underway, and delays were largely attributed to requests from the respondent rather than any fault of the arbitrator or the claimant. In *Barasat Krishnagar Expressways Ltd. v. NHAI*[48] (2023), the Delhi High Court extended the tribunal's mandate despite objections, noting the significant effort invested by both parties and the tribunal in compiling and reviewing extensive pleadings and evidence. Here, the

[47] Ibid [7].
[48] Ibid [8].

court balanced procedural efficiency with substantive justice, emphasizing the importance of finalizing disputes on the merits rather than dismissing them over time lapses.

A. RULING OF THE CALCUTTA HIGH COURT IN ROHAN BUILDERS CASE

The Calcutta High Court made a nuanced observation regarding the term "arbitrator's mandate" in the case of *Rohan Builders (India) Pvt Ltd v. Berger Paints India Ltd* (2023)[49]. This decision appears to shift away from the usual understanding of condoning delays under Section 29A. It established that an application for an extension of time under Sections 29A(4) and 29A(5) of the Arbitration and Conciliation Act can only be considered if it is filed before the existing mandate of the arbitrator or tribunal expires.

The Hon'ble High Court placed its rationale on the legislative intent behind the use of the term 'terminate' in Section 29A(4), which implied that the tribunal's mandate to make the award finally ended once the 12-month period plus 6-months has expired. The High Court while disposing off the extension application, opined that the mandate of the tribunal cannot remain 'suspended' once the statutory period has ended, unless an application for extension is filed. Consequently, when the mandate is terminated, the tribunal becomes *functus officio*, as per the law. The Hon'ble High Court ruled that parties must apply for an extension of the tribunal's statutory mandate before it terminates. Allowing parties to submit a time extension application after the mandate has ended would undermine the purpose of having a statutory timeline for making the award.

B. SUPREME COURT'S VIEW: LIBERAL INTERPRETATION ON POST-EXPIRY EXTENSION OF ARBITRATOR'S MANDATE

The Supreme Court while reconsidering its opinion, did not accord to the impugned order of the High Court. The Supreme Court while opting for a diverging view held that an application to extend the time for passing an arbitral award can be filed even after the expiry of the 12-month or extended 6-month period. The court clarified that Section 29A allows extension beyond the

[49]*Rohan Builders (India) Pvt Ltd v. Berger Paints India Ltd*, [2024] INSC 686.

stipulated timeframe rejecting a strict interpretation of the word 'terminate' and substituting it with 'suspend'. The court emphasized that arbitration proceedings should be flexible and not overly constrained by procedural timelines. The bench's departure from a strict interpretation ensures the process remains practical, giving courts the flexibility to grant extensions even after the arbitral mandate has technically ended.

To fully appreciate the Supreme Court's interpretation of its authority to extend the time limit under Section 29A of the Arbitration and Conciliation Act, 1996, it is essential to examine the historical progression of this provision. Under the earlier Arbitration Act of 1940 ("1940 Act"), Section 28(1) specifically empowered courts to extend the time for making an arbitral award, even if the original period had expired or the award had already been issued. This flexibility was reinforced by Section 28(2), which allowed parties to mutually extend the time for issuing an award. Notably, until Section 29A was introduced, there was no set timeline for arbitral awards under the Act. The 2015 Amendment introduced a time limit for delivering awards, establishing an initial period of 12 months with a possible extension of six months.

While overturning the High Court's decision in *Rohan Builders* (supra), held that the term "terminate" in Section 29A(4) implied the legislature's intent to end the tribunal's mandate upon the lapse of the specified period. This view, based on the 176th Law Commission Report, suggested that strict adherence to the timeline was mandatory. In contrast, the Supreme Court aligned with the more flexible approach seen in *Ashok Kumar Gupta v. M.D. Creations (2023)*[50], another decision by the Calcutta High Court, asserting that "terminate" supports party autonomy. The Court argued that using "suspension" instead of "terminate" would have created impracticalities in procedural implementation, emphasizing that the legislature aimed to preserve tribunal autonomy without creating rigid limitations.

The court observed that "terminate" does not render the tribunal permanently incapable of issuing an award; rather, it implies a conditional termination that can be reversed if the court intervenes with an extension. This approach was also reflected in *Ashok Kumar Gupta(supra)*, where the Calcutta High Court ruled that even if the mandate is technically terminated, it can be revived upon the judicial extension under the language "either prior to or after the expiry of the period".

[50] Ibid [42].

Moreover, the court acknowledged that arbitration proceedings should continue while an extension application is pending.

V. CONCLUSION: THE WAY FORWARD

The determination of the limitation period for appeals under Section 37 of the A&C Act involves varying judicial interpretations. Initially, the limitation period was set at 90 days based on the general provisions of the Limitation Act. However, later interpretations suggested aligning the limitation period for Section 37 appeals with the 120-day period applicable to Section 34 applications under the A&C Act to maintain consistency within the Act's framework. The primary purpose of the A&C Act is to expedite dispute resolution by providing quicker remedies, bypassing some of the rigid procedures of civil courts. While the Act incorporates flexibility, condonation of delays in procedural aspects contradicts its objective of speedy justice. Therefore, condonation of delays should be construed strictly and less liberally to uphold the primary purpose of the Act. To ensure the A&C Act achieves its goal of swift dispute resolution, courts must scrutinize Section 37 applications rigorously, allowing condonation of delays only for genuine cases. This approach helps balance the need for timely justice with the necessity of considering exceptional circumstances that might justify delays. By maintaining this balance, the integrity and efficiency of the arbitration process can be preserved, aligning with the overarching objective of the A&C Act. To conclude, maintaining a balance between condoning genuine delays and upholding the principle of expeditious justice is essential for the integrity of the arbitration process. Clear guidelines and consistent judicial interpretations are necessary to prevent misuse and ensure timely dispute resolution.

SHORT ARTICLES

IMPLEADMENT OF NON-SIGNATORIES BY ARBITRAL TRIBUNALS: A SHIFT IN MODUS OPERANDI

- *VRINDA GAUR*[1] *& A.S. VAMSI KRISHNA*[2]

ABSTRACT

The pronouncement of the Supreme Court in the Cox and Kings v Sap India Pvt Ltd ruling has settled the dust circling the dilemma of whether a non-signatory can be bound by an arbitration agreement. Notwithstanding this, an additional question that was glanced upon by the bench was whether the ultimate authority would be the Referral Court or the Arbitral Tribunal, which would look into the matter of joinder of the non-signatory to the proceedings, wherein the exclusive jurisdiction was bestowed upon the Arbitral Tribunal. Despite laying down this position of law, the court did not delve into the nitty-gritty of law authorising the Arbitral Tribunal with such power of joinder of parties. Following this, the Supreme Court in its latest ruling in Ajay Madhusudan Patel v Jyotrindra S. Patel has judiciously delineated the legal justifications for authorising the Arbitral Tribunals rather than the Courts to determine the question of joinder of non-signatories to arbitration proceedings. Considering the efforts to make India a pro-arbitration regime, this ruling stands as a testament and reinforces the practice of minimum judicial intervention and speedy resolution of disputes via Arbitration. Through this narrative, the authors seek to delineate the jurisprudential evolution concerning impleadment of non-signatories, tracing its roots from Chloro Controls India (P) Ltd v Severn Trent Water Purification Inc to the present. The authors further analyse the rationale behind shifting this authority of impleadment from the courts to the arbitral tribunals taking into account the principles of Kompetenz-Kompetenz, minimal judicial intervention and procedural efficiency in arbitral proceedings. Furthermore, the paper seeks to scrutinize the implications of this jurisprudential shift, particularly with respect to concerns surrounding procedural fairness, arbitrary decision making and principles of natural justice. Lastly, the paper elucidates the far-reaching ramifications of the Supreme Court's ruling in Ajay

[1] 4th year BA LL.B, Dr. Ram Manohar Lohia National Law University, Lucknow, Gmail: vrindagaur176@gmail.com
[2] 4th year BA LL.B, The Rajiv Gandhi national Law University, Patiala, Gmail: asvamsi21@gmail.com
asvamsi21@gmail.com

Madhusudan in advancing India's pro-arbitration regime while emphasizing the need for balanced safeguards.

INTRODUCTION

Recently, in *Ajay Madhusudan Patel vs Jyotrindra S. Patel* ("*Ajay Madhusudan*"),[3] the Supreme Court of India ("SCI") significantly broadened the powers of Arbitral Tribunals ("AT") to include within its purview the power to implead non-signatories to the arbitral proceedings. This marks a notable shift in the judicial stance, where initially the referral courts held the exclusive authority to decide on the joinder of non-signatories. The *Ajay Madhusudan* decision follows the landmark ruling of *Cox and Kings v Sap India Pvt Ltd.* ("*Cox & Kings*"),[4] where the Court had partially affirmed the AT's power to join non-signatories, in the limited context of the Group of Companies doctrine. In this context, an AT could lift the corporate veil to bind non-signatory entities– such as parent companies, subsidiaries, and joint ventures, provided that they were materially connected to the successful execution of the arbitral proceedings.

However, the issue of joinder of non-signatories is not limited to the Group of Companies doctrine, but rather extends to a variety of situations involving *inter alia* third-party beneficiaries, guarantors, subrogation, and legal succession.[5]*Ajay Madhusudan* has vested ATs with authority to deal with the broader range of non-signatories, an upgrade from the *Cox & King's* limited ambit. While the decision is seemingly harmonious with India's pro-arbitration stance, it raises concerns about the potential arbitrariness of quasi-judicial bodies wielding powers typically reserved for civil courts. In view of recent developments, the authors aim to explore the underlying reasons for this shift in judicial perspective and undertake a critical examination of the implications stemming from the arbitral tribunal's expanded powers of impleadment.

[3]*Ajay Madhusudan Patel v Jyotrindra S Patel* [2024] SCC OnLine SC 2597.
[4]*Cox & Kings Ltd v SAP India (P) Ltd* [2024] 4 SCC 1.
[5]*Arupri Logistics (P) Ltd v Vilas Gupta* [2023] SCC OnLine Del 4297.

I. EXAMINING THE POSITION PRE-AJAY MADHUSUDAN

Prior to considering the legality of an AT's power to implead non-signatories, it is important to note that the very power to implead non-signatories to an arbitral tribunal crystallised in the SCI's decision in *Chloro Controls India (P) Ltd. v. Severn Trent Water Purification Inc.* ("Chloro Controls"). Herein, the Court held that the joinder of a non-signatory to the arbitral proceeding was possible, provided that the non-signatory is a necessary party to the arbitration. To determine necessity, the SCI evolved a test which would examine factors such as the relationship between the non-signatory and the signatory, the commonality of the subject matter, the composite nature of the transactions, and whether the ends of justice would be served by referring to the non-signatory.[6] The limitation of the ruling was that the responsibility of carrying out this test was entrusted solely to the referral Courts, which have been vested with the power of impleadment and referral of parties under S. 8 & S. 45 of the Arbitration and Conciliation Act, 1996 ("Arbitration Act").[7]

However, the Court failed to recognise that the *Chloro Controls* test involved factors that required a clear understanding of the parties' intent, factual matrix of the dispute and the relevant common practices followed in the dispute; that seem better suited to be dealt by ATs. Furthermore, the reserved approach taken by the SCI adversely affected the ability of an AT to decide questions with respect to its jurisdiction since the matter of which parties are necessary to the proceeding was left to the judiciary. This affected the fundamental precept of arbitration *Kompetenz-Kompetenz* i.e., that the AT has the authority to determine its jurisdiction. Thus, post-*Chloro Controls*, the question arose whether ATs should be allowed to exercise the powers of a referral court to implead a non-signatory. The defence of the *Chloro Controls* reservation has been led under the following two heads-

A. LACK OF IMPLEADMENT POWER UNDER THE ARBITRATION ACT

[6] *Chloro Controls India (P) Ltd v Severn Trent Water Purification Inc* [2013] 1 SCC 641.
[7] Arbitration and Conciliation Act 1996, ss. 8 & 45.

One of the key arguments against ATs exercising this power is the absence of any explicit authority under the Arbitration Act. In *Abhibus Services India Pvt. Limited & Ors. vs. Pallavan Transport Consultancies Services Ltd.*, the Madras High Court ("MHC") held that the Arbitration Act does not provide any referral powers to the AT.[8] It was clarified by the Court that the principle of *Kompetenz-Kompetenz* crystallised under S. 16 of the Arbitration Act would not govern the joinder of a non-signatory since the competence of the AT to decide its jurisdiction only comes into existence after the parties have been impleaded, and the extent of its powers are limited to the parties which have consented to the arbitration either expressly or, in the case of non-signatories, referred by the court.[9] The court reasoned that allowing ATs to freely implead third parties could lead to an "unfettered and undefined exercise of power,"[10] which might open the door to arbitrariness in decision-making. This judicial reluctance to expand the powers of arbitral tribunals arises from concerns that arbitral tribunals may lack the necessary safeguards to prevent potential misuses.

B. RESTRICTED INTERPRETATION OF AT'S IMPLEADMENT POWER BY THE INDIAN COURTS

Order 1 Rule 10 of the Civil Code of Procedure,[11] gives court the power to add, delete, or substitute parties to a dispute. In *V.G. Santosham v. Shanthi Gnanasekaran*, the MHC held that an AT could not use its nature of a civil court to encroach upon this power since these are inherent powers of the Courts which is applicable only to Civil proceedings and could not be transposed to arbitrations.[12] The distinction between a civil court and an AT is created due to the nature of arbitration being limited to the "circle of consent"[13] i.e., applicable only to the parties which have agreed to arbitrate, which precludes the power to implead any other non-consenting party. Thus, the Court held that the AT lacks the jurisdiction to adjudicate upon the matter of impleadment. This position was reiterated in *Arupri Logistics (P) Ltd. v. Vilas Gupta*, where it was held that "(t)ravelling beyond the scope of the Act is impermissible and if such an exercise is made, then

[8] *Abhibus Services India (P) Ltd v Pallavan Transport Consultancies Services Ltd* [2022] SCC OnLine Mad 796.
[9] Arbitration and Conciliation Act 1996, s 6.
[10] *Abhibus Services India* (n 6) 131.
[11] Code of Civil Procedure 1908, order 1 r (10).
[12] *V.G. Santhosam v Shanthi Gnanasekaran* [2020] SCC OnLine Mad 560.
[13] *Sudhir Gopi v Indira Gandhi National Open University* [2017] SCC OnLine Del 8345.

the same would result in exercise of excess jurisdiction and finally the Arbitrator would be functioning as a Civil Court, which is not intended under the provisions of the Arbitration Act."[14]

However, both the above issues stem from a common denominator- the apprehension of ATs gaining excessive powers leading to arbitrariness in decision-making. The legal issues themselves are not a bar to entrusting ATs with this right. This is clear from the *Cox & Kings* decision where the SCI clarified that the discretion to implead non-signatories within the context of a Group of Companies, fell to the ATs. This is since ATs are better-positioned to understand whether the three tests laid out in *Chloro Control*[15] i.e., commonality, composite transactions and meeting the ends of justice are fulfilled or not, thus making a non-signatory party to the arbitration. Judicial discretion and subsequent intervention not only could potentially hinder the arbitration process but also cross the red line of judicial meddling in the merits of each dispute. In the forthcoming section, the authors shall outline the reasons why an AT is better suited for assessing these disputes and identifying the necessary parties, in light of the *Ajay Madhusudan* ruling along with other potential case laws delivered by the High Courts.

III. EXPANDING THE TRIBUNAL'S JURISDICTION OVER NON-SIGNATORIES

In light of the various conflicting rulings of the High Courts concerning the AT's jurisdiction to implead non-signatories, it is imperative to examine the reasons for this judicial change of heart. The argument for empowering tribunals is two-fold, first, tribunals are better equipped to discern whether a non-signatory is a necessary party since they have both the authority and the special knowledge required to delve into the factual matrix of the dispute; and second, the Arbitration Act has been reinterpreted to find that matters involving the necessity of parties is an essential element within the AT's jurisdiction under S. 16 of the Act.[16]

[14] *Arupri Logistics (P) Ltd v Vilas Gupta* [2023] SCC OnLine Del 4297.
[15] *Chloro Controls India (P) Ltd v Severn Trent Water Purification Inc.* [2013] 1 SCC 641.
[16] Arbitration and Conciliation Act 1996, s 16.

A. THE AT IS BETTER SUITED TO ASSESS THE IMPLEADMENT OF NON-SIGNATORIES

When assessing whether a non-signatory should be joined to the arbitral proceeding, the *Chloro Controls* test requires that the adjudicating authority examine a complex set of facts which include *inter alia* the non-signatory's relationship with the parties and its conduct, the subject matter of the dispute, the nature of the transactions between the non-signatory and parties, and the level of involvement of the non-signatory in the dispute.[17] Thus, to answer the question of joinder of a non-signatory, the adjudicating authority must have the authority and the capability to sift through the facts to find the answer. However, this gives rise to a predicament since it is now settled law that Courts do not have the authority to involve itself in a deep examination of the facts during referral.[18] In *Magic Eye Developers (P) Ltd. v. Green Edge Infrastructure (P) Ltd.*,[19] the SCI held that the scope of examination of the facts during referral are extremely narrow and are limited to assessing the existence and validity of the arbitration agreement, and the non-arbitrability of the dispute. When posed with the question of the joinder of a non-signatory, the existence of an arbitration agreement between the parties and the non-signatory is not under contention but rather, the question is whether a non-signatory would be a necessary or veritable party for the successful execution of the arbitration. The limited scope of examination of facts is the manifestation of the fundamental precept of arbitration- minimum judicial intervention.

In *Indraprastha Power Generation Company Ltd v. Hero Solar Energy Private Limited*, the Delhi High Court concluded that the statutory inability of Courts to delve into the facts precluded judicial intervention in matters of impleadment of a non-signatory.[20] Even if the Court were authorised to examine the facts, it would still not be as efficient as an AT, which is constituted of arbitrators well-versed in the subject matter of the dispute and more capable of unravelling the complexities of the factual matrix to determine the necessity of the non-signatory.[21] In *Cardinal Energy & Infra Structure (P) Ltd v Subramanya Construction & Development Co. Ltd* ("Cardinal Energy"), the

[17] *Chloro Controls India* (n 4) 73.
[18] *Cox & Kings* (n 2) 166.
[19] *Magic Eye Developers (P) Ltd v Green Edge Infrastructure (P) Ltd* [2023] 8 SCC 50.
[20] *Indraprastha Power Generation Co Ltd v Hero Solar Energy (P) Ltd* [2024] SCC OnLine Del 6080.
[21] *Vidya Drolia v Durga Trading Corpn* [2019] 20 SCC 406.

Bombay High Court clarified that a referral court is merely a facilitator of arbitration proceedings and cannot act as a repository from which the appointed tribunal draws power/ authority for the effective discharge of functions.[22] Thus, if tribunals required prior permission of the referral court to perform an essential function—the involvement of all necessary parties, it would adversely affect the efficiency of the arbitration process.

B. THE REINTERPRETATION OF THE JURISDICTION OF AN AT UNDER THE ARBITRATION ACT

An AT derives its jurisdiction from S. 16 of the Arbitration Act, which empowers the tribunal to rule on its own jurisdiction. However, pre-*Ajay Madhusudan*, ATs were barred from ruling on the issue of joinder of a non-signatory since it was held that the jurisdiction of the AT under S. 16 is only limited to the parties that consented to arbitrate and cannot rule over any non-signatories. However, this position has evolved due to a more expansive interpretation of the AT's *Kompetenz-Kompetenz.*, the SCI held that the issues regarding the determination of parties to an arbitration would fall within the purview of the AT's jurisdiction.[23] In *Cox & Kings*, the Court reasoned that determination of parties to the arbitration goes to the very root of the jurisdiction of an AT and any action otherwise would defeat the very point of *Kompetenz-Kompetenz*, which is minimum judicial intervention. This aligns with international jurisprudence, as seen in the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules 2021,[24] the International Chamber of Commerce (ICC) Arbitration Rules 2021,[25] and the Singapore International Arbitration Centre (SIAC) Rules 2016,[26] all of which explicitly empower the tribunal to implead non-signatories into the proceedings. The inclusion of relevant non-signatories is necessary for the AT to adjudicate the dispute fairly and judicial intervention hinders the effectiveness of the speedy resolution.

IV. LOOKING AHEAD

[22] *Cardinal Energy & Infra Structure (P) Ltd v Subramanya Construction & Development Co Ltd* [2024] SCC OnLine Bom 964.
[23] *Cox & Kings* (n 2) 175; *Uttarakhand Purv Sainik Kalyan Nigam Ltd v Northern Coal Field Ltd* [2020] 2 SCC 455.
[24] UNCITRAL Arbitration Rules 2021.
[25] International Chamber of Commerce, Arbitration Rules 2021.
[26] Arbitration Rules of the Singapore International Arbitration Centre 2016.

The recent ruling of the Apex Court is a welcome move as it restores the fundamental practice of upholding minimum judicial intervention and faster resolution of disputes. Given the commercial realities of contractual transactions and business structures—where numerous parties are engaged through interconnected contracts —and the well-settled principle that the nomenclature of an agreement is not determinative of its character,[27] it is not unreasonable to consider the possibility of a third party, not part of the main contract, being a vital party for the effective execution of the terms and obligations of the initial contract. Furthermore, other situations may arise where a third party veritable in the fulfilment of the terms of the contract may during its execution, incur a substantial interest or claim. In such scenarios, if the interested party is compelled to go back to the referral court for a joinder to the dispute, it is likely to delay arbitration proceedings and increase litigation cost of the concerned stakeholders.

However, while entrusting ATs with the authority to implead non-signatories has clear commercial advantages, a greater degree of caution is warranted, especially when court intervention in such matters is proposed to be waived. Tribunals must exercise restraint and limit the joinder of non-signatories to exceptional circumstances only, strictly adhering to the principles of joinder of non-signatories established by the SCI. Furthermore, notifying the non-signatory of its impleadment and allowing them to raise objections against the AT's jurisdiction are fundamental principles of natural justice that must be diligently observed. However, these concerns should not raise apprehension about wrongful impleadment by ATs, especially in light of the Cardinal Energy ruling, where the court affirmed that the provisions of the 1996 Act do not preclude a later-stage challenge to such impleadment before a court.

In conclusion, the expanded authority afforded to Arbitral Tribunals signifies a significant step towards aligning Indian arbitration practices with global standards. Nonetheless, it remains essential to uphold rigorous oversight to safeguard against potential misuse of this power. Striking a balance between judicial oversight and the autonomy of these tribunals will be crucial in determining the effectiveness and reliability of the arbitration process.

[27] *Sasan Power Ltd v North American Coal Corpn (P) Ltd* [2016] 10 SCC 813.

FROM CENTROTRADE TO THE DRAFT ARBITRATION AND CONCILIATION (AMENDMENT) BILL, 2024: DO WE NEED APPELLATE ARBITRAL TRIBUNALS?

- *SRIJAN NETI*[1]

ABSTRACT

Appellate arbitration, a concept that has sparked much debate, weaves a compelling narrative in the contemporary arbitration landscape. Arguably regarded as offering parties the coveted "second bite at the cherry," this mechanism is rooted in the principle of party autonomy, enabling the inclusion of two-tier arbitration clauses in agreements, or opting for appellate institutional mechanisms recognized in statutory frameworks such as the Draft Arbitration and Conciliation (Amendment) Bill, 2024. Section 34A of the Draft Bill notably empowers arbitral institutions to establish appellate tribunals, while the Supreme Court's landmark judgment in M/s Centrotrade Minerals & Metal Inc. v. Hindustan Copper Ltd. has cemented the validity of two-tier arbitration clauses. This paradigm shift underscores a dynamic evolution in arbitration practices, balancing the finality of awards with enhanced scrutiny mechanisms. By examining the evolution, benefits, challenges, and global trends shaping appellate arbitration, this note provides a nuanced exploration of its potential and a few suggestions for its future integration into the proposed statutory framework.

I. INTRODUCTION

Appellate arbitration, or two-tier arbitration, is not a novel concept globally. While saving time and costs is often one of the underlying objectives of opting for arbitration, parties may also want increased scrutiny of the award, its correctness, and the possibility of challenging an award in a subsequent appeal.[2] One way to ensure this is by incorporating an appeal procedure in the dispute

[1] 5th year B.B.A; L.L.B.(Hons.), Symbiosis law School, Pune, Gmail: srijanneti@gmail.com

[2] Shivansh Jolly, 'Supreme Court of India Upholds Validity of Appellate Arbitration Clauses' (*Kluwer Arbitration Blog*, 16 February 2017) < https://arbitrationblog.kluwerarbitration.com/2017/02/16/supreme-court-india-upholds-validity-appellate-arbitration-clauses/ > accessed 2 December 2024.

resolution process, either by way of party agreement or by selecting the relevant institutional rules. The former is made possible in India as the Supreme Court recognised arbitration clauses providing for appellate procedures in the landmark case of *M/s Centrotrade Minerals & Metal Inc. v. Hindustan Copper Ltd* ("**Centrotrade II**").[3] The two-tier arbitration clause therein initially provided for arbitration in India under the rules of the Indian Council of Arbitration. In case of 'disagreement' with the 'arbitration result', it also provided parties with a right to appeal to a second arbitration in London in accordance with the International Chambers of Commerce ("**ICC**") Rules of Arbitration. Subsequently, when the foreign award was sought to be enforced in India, challenges to set aside an award failed to meet the narrow threshold under the Arbitration and Conciliation Act, 1996 ("**Act**") and the appellate award was enforced.

Even apart from such procedures resulting from party agreements to two tier-arbitration clauses, major arbitral institutions including the American Arbitration Association (AAA), International Institute for Conflict Resolution and Prevention (CPR), Judicial Arbitration and Mediation Services (JAMS), Arbitrators' and Mediators' Institute of New Zealand (AMINZ), European Court of Arbitration ("**ECA**"), and even a Novel Appellate Arbitration Model (NAAM) proposed by scholars,[4] introduced rules on institutional appellate arbitration. Interestingly, the Draft Arbitration and Conciliation (Amendment) Bill, 2024 ("**DraftBill**"), under the proposed Section 34A, now expressly permits arbitral institutions to provide for appellate arbitral tribunals to entertain applications made to set aside an arbitral award.[5] Essentially, this development may allow parties to increase the standard of judicial review by opting for rules that permit an appeal procedure. However, the extent of change will be limited to the number of arbitral institutions introducing these rules.

Coming back to *Centrotrade II,* the use of two-tier arbitration under the rules of a single institution was implicitly accepted.[6] By corollary, when it comes to proceedings under the auspices of more

[3] (2017) 2 SCC 228.
[4]AxaySatagopan, 'Conceptualizing a Framework of Institutionalized Appellate Arbitration in International Commercial Arbitration' (2018) 18 Pepp. Disp. Resol. L.J 325, 348–350.
[5] Inviting Comments on the draft Arbitration and Conciliation (Amendment) Bill, 2024 (*Ministry of Law and Justice*, 18 October 2024) < https://legalaffairs.gov.in/sites/default/files/Draft_AC_%28Amendment%29_Bill_2024_and_Tabular_Statement_dated_18.10.2024.pdf > ("Draft Bill").
[6]*Centrotrade* (n 2) para 37.

than one institution, there should be nothing that prevents the use of two-tier arbitration. Even using multiple institutional rules, as in *Centrotrade II,* suggests that appellate arbitration clauses are permissible as the legal validity of such a procedure has been upheld.[7] However, difficulties may arise while using these so-called 'Frankenstein' clauses as well.[8] They may not always be workable, lead to increased litigation, and prolong the initial award's enforcement – criticisms that are often levied against any right of appeal in arbitration.

Additionally, while the Draft Bill is silent on appeal procedures in *ad-hoc* proceedings; at least theoretically, such a possibility exists and was acknowledged in *Centrotrade II* to have nothing wrong because of party autonomy.[9] Though arguments against this possibility tend to rely on the need for arbitral finality in international commercial arbitration,[10] authors recognise that arbitral finality may be a double-edged sword.[11] In order for arbitral finality to be effective, certain assumptions must be drawn that (1) arbitrators must be impeccable in their decision making or (2) the disputes are small enough to not warrant increased scrutiny.[12] Based on the 2006 and 2015 Queen Mary Surveys on International Arbitration, an increase in the percentage of respondents favouring an appeal mechanism can be spotted.[13] However, the increase may still be too small to derive any conclusions about the existence of a demand for appellate mechanisms.[14] In this background, it was surprising to many that the Draft Bill sought to provide such a procedure, especially when the T.K. Viswanathan committee's recommendations, in the wake of which the Draft Bill was released, did not include the introduction of appellate arbitral tribunals.[15]

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[7] *Centrotrade* (n 2).
[8] Iris Ng and others, 'Five Recurring Problems in International Arbitration: The Relationship Between Courts and Arbitral Tribunals' (2019) 8(2) IJAL 19, 22.
[9] *Centrotrade* (n 2) para 42.
[10] Cameron David Hassall and others, 'Chapter 8: Appellate Review in International Commercial Arbitration' in Neil Kaplan and others (eds), *International Arbitration: When East Meets West – Liber Amicorum Michael Moser*, (Kluwer 2020) 95, 96-97.
[11] Paul Bennett Marrow, 'Chapter 28: A Practical Approach for Expanding the Review of Commercial Arbitration Awards- Using an Appellate Arbitrator' in American Arbitration Association, '*AAA Handbook on Commercial Arbitration*' (Juris Arbitration, 2016) 325, 326.
[12] Hassall (n 8) 97-98.
[13] ibid.
[14] ibid.
[15] T.K. Viswanathan Committee, '*Report of the Expert Committee to Examine the Working of the Arbitration Law and Recommend Reforms in the Arbitration and Conciliation Act 1996*' 7 February 2024 < https://www.livelaw.in/pdf_upload/report-of-the-expert-committee-members-on-arbitration-law-2-526205.pdf >.

Given this context, in this note, the author seeks to analyse the contemporary discourse on appellate arbitration with specific reference to the Draft Bill. **Part II** of this note will trace the evolution of appellate arbitration with appropriate references made to worldwide developments. Assuming the Draft Bill is enacted as it stands, **Part III** will contemplate possible challenges in the use of appellate arbitral tribunals while **Part IV** will provide suggestions on these appellate mechanisms including possible amendments.

I. TRACING THE EVOLUTION OF APPELLATE ARBITRATION

The success of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 ("**New York Convention**") and its *laissez-faire* approach to limit judicial scrutiny is one of the reasons for the finality of arbitral awards and the increase in arbitration's popularity.[16] The absence of an appeal mechanism in the New York Convention's text made it the constitution for international commercial arbitration and brought forth the apparent paramountcy of arbitral finality.[17] However, authors may overemphasize the need for arbitral finality by basing it on the aforementioned assumptions that are not necessarily valid. Even the Analytical Commentary on the Draft Text of a Model Law on International Commercial Arbitration notes that Article 34(1) does not prohibit recourse to a second arbitral tribunal, where such appeal within the arbitration system is envisaged.[18] In fact, two-tier arbitration clauses are common in international commercial arbitration.[19] Challenges made through an appeal to another arbitrator are also reportedly allowed in national legal systems such as Japan, Italy, and the Netherlands, if the parties have expressly provided for it.[20]

Even in India, the jurisprudence on two-tier arbitration is not in its nascent stage. Several decisions on appellate mechanisms have already ensured that the possibility exists.[21] However, the demand for a right to appeal to an arbitral tribunal arguably came into the spotlight only after *Centrotrade*

[16]Ojaswa Pathak, 'The Advisability of Appellate Arbitration: Proposing an Efficient Institutional Framework' (2021) 10(1) IJAL 144, 144-145.
[17] ibid.
[18] A/CN.9/264, paras 83–84.
[19] Gracious Timothy Dunna, 'Supreme Court in Centrotrade 2016: Too Quick to Nod at the Validity of the Two-Tier Arbitration Clause?' in Lawrence Boo and Gary B. Born (eds), (2018) 14(1) Asian Int. Arb. J 55, 58.
[20] ibid.
[21] ibid 62-65.

II. In the context of that case, it has been noted previously that a contractual right of appeal to an arbitral tribunal is distinct from a statutorily recognised right and that appellate remedies cannot exist out of private consent.[22] While this argument is based upon the accurate notion that appeals are substantive remedies born out of a statute that holds water, the Draft Bill introduces a statutory procedure and offers a previously unavailable recourse. Yet, the provision opens a Pandora's box of challenges in enforcing arbitral awards. Assuming the Draft Bill is passed without modifications, the author analyses a couple of these challenges that may arise in the appeal mechanism proposed.

II. POSSIBLE CHALLENGES

For any appellate procedure to be implemented into the existing statutory scheme of arbitration, an appealable issue must be clearly defined. The scope of appellate jurisdiction for an appellate arbitral tribunal has been limited under the Draft Bill to setting aside procedures. In addition, there may be a risk of parallel proceedings when clear procedures for balancing scrutiny and finality are not in place.

A. WHAT CONSTITUTES AN APPEALABLE ISSUE – SECTION 34 PLAGIARISED?

In terms of appellate institutional mechanisms, Section 34A of the Draft Bill limits the scope of review by appellate arbitral tribunals to applications for setting aside an arbitral award.[23]Analysing the setting aside procedure, while it is true that proceedings in court are an option, no substantive review on merits exists and the decisional sovereignty of an arbitrator may be considered a 'divine right'.[24] It has been argued that appellate mechanisms may be better suited for adjudication of merits as opposed to setting aside proceedings in court.[25]

However, with the scope substantially limited to applications under Section 34, it seems the legislature does not want to offer parties with a chance to relitigate the merits of their dispute in

[22] Sameer Sharma, 'The fate of two-tier arbitration in India and the Indian Supreme Court's judgement in Centrotrade v HCL: a pyrrhic victory' (2022) 25(1) Int. A.L.R. 26, 31.
[23] Draft Bill (n 4) 60.
[24] Pathak (n 15) 148-149.
[25] ibid.

another forum and offer a proverbial second bite at the cherry. In terms of the scope of an appealable issue, foreign arbitral institutions have adopted varying degrees of review.[26] In fact, we can see that the scope of review in appellate mechanisms can vary from being limited to narrow grounds as in the case of Section 34A or being as wide as affording a *de novo* review to the appellate tribunal as per the ECA.[27] The effectiveness of the procedure may further be doubted by the fact that Section 34(A)(2) of the Draft Bill obligates the appellate arbitral tribunal to follow such procedure as may be specified by the Arbitration Council of India and not necessarily the contractually agreed mechanism of the arbitral institution.[28]

Even apart from the statutory mechanisms, a contractual right of appeal may invite its own share of ambiguities. While the foreign arbitration in *Centrotrade II* upheld jurisdiction and went on to pass an award, the arbitration clause therein used the phrase "*disagreement with the arbitration result in India*".[29] Though the terms 'disagreement' and 'arbitration result' were interpreted by the Supreme Court in a way to enforce the so-called result, the author is of the opinion that two-tier arbitration clauses inviting interpretation by courts are not serving their purpose in the first place.

B. IMPACT ON THE FIRST AWARD AND A POSSIBILITY OF PARALLEL PROCEEDINGS: WILL THE COURT DELEGATE ITS JUDICIAL FUNCTION?

One way in which the arbitration clause in *Centrotrade II* ensured enforceability was by noting that the second award would be 'binding' on both parties.[30] One author notes in this regard that unless parties intend and mutually agree to be bound to an award, there is no scope for an admixture of awards.[31] Although this is accurate, the *Centrotrade II* judgment has also been subject to criticism for applying the doctrine of merger to the Act without considering that it is a self-contained code with a single procedure for setting aside an arbitral award.[32] In effect, the doctrine of merger makes the first instance decision null unless the appellate decision confirms it, in which case the former merges with the latter. This has important ramifications for the first award. While

[26] ibid 152-153.
[27] ibid.
[28] Draft Bill (n 4) 60.
[29] *Centrotrade* (n 2) para 3.
[30] Dunna (n 18) 65-66.
[31] ibid.
[32] Sharma (n 21) 31-36.

the positives include improved quality and writing of the award, both to avoid an appealable issue and to provide a basis to the appellate tribunal for the decision reached,[33] increased scrutiny may give rise to additional costs and time. This may be the case when, pending appointment of an appellate tribunal, the initial award holder proceeds for enforcement under Section 36 leading to parallel setting aside proceedings. Especially with Section 36(2) stating that filing an application to set aside an arbitral award does not automatically make it unenforceable, attempts to derail the process are likely. Additionally, the proviso to Section 34(1) of the Draft Bill prohibits any application to the court for setting aside an arbitral award when the parties have agreed to take recourse to an appellate arbitral tribunal. Although this approach might seem to uphold arbitral finality even in a two-tier process, its effectiveness is debatable due to several countervailing factors, including challenges in arbitral appointments, ambiguity in arbitral institutional rules, and the apparent absence of judicial oversight essential to ensure the perception of justice being served.

III. WAY FORWARD

One way to address the concerns raised above could be to permit parties to appeal, subject to contractually agreed timelines or, in their absence, a default period after which setting aside proceedings under Section 34 can be initiated in court.[34] While an author previously proposed this approach in the absence of statutory provisions for two-tier mechanisms, such as those in the Draft Bill, the suggestion could ensure a balance if further supported by appropriate amendments to Section 36. Particularly, it is suggested that Section 36 be amended to ensure that time limits are fixed in a way that contractually agreed procedures are given primacy, even more so than any recourse to court. A stay may be granted against a first instance award when the court finds *prima facie* that a two-tier arbitration clause exists, and an appeal has been filed in time. Rather than Section 36(2) operating in a way that the award holder has a right to enforce the award in court despite the availability of recourse to a separate forum, i.e., the appellate tribunal, it should operate to ensure finality while ensuring parallel proceedings are minimized.

[33] S. I. Strong, 'Chapter 3: Legal Reasoning in International Commercial Disputes: Empirically Testing the Common Law- Civil Law Divide' in Antonio Crivellaro and Mélida Hodgson (eds), '*ICC Dossier No. 18: Explaining Why You Lost: Reasoning in Arbitration*' (2020) 18 Dossiers of the ICC Institute of World Business Law 41, 46.
[34] Sharma (n 21) 43-44.

IV. CONCLUSION

The introduction of appellate arbitration mechanisms marks a significant development in the Indian arbitration landscape, reflecting a nuanced approach toward balancing party autonomy and arbitral finality. By permitting appellate arbitral tribunals under Section 34A of the Draft Arbitration and Conciliation (Amendment) Bill, 2024, the legislature has sought to address the growing demand for enhanced scrutiny of arbitral awards and to reduce pending litigation on setting-aside proceedings. However, the framework's effectiveness hinges on careful calibration to avoid prolonged timelines, increased costs, and jurisdictional ambiguities.

While the *Centrotrade II* judgment legitimized two-tier arbitration clauses and paved the way for contractual appellate mechanisms, the Draft Bill's statutory endorsement necessitates robust institutional rules and streamlined procedures to ensure clarity and enforceability. The challenges of defining appealable issues, addressing the interplay between the first and second awards, and minimizing the risk of parallel proceedings underline the need for a thoughtful implementation strategy.

Moving forward, aligning the appellate arbitration framework with global best practices, fostering institutional capacity, and introducing safeguards against misuse will be crucial to achieving a balance between scrutiny and finality. By doing so, appellate arbitration can serve as an effective tool for parties seeking fairness and accuracy without undermining the efficiency that has made arbitration a preferred mode of dispute resolution.

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JUDICIAL INTERFERENCE IN DETERMINING THE EXISTENCE AND VALIDITY OF ARBITRATION AGREEMENTS IN INDIA

- *THANKAM JIM*[1]

ABSTRACT

This paper explores the issue of judicial intervention when determining the existence and validity of arbitration agreements in India. It critically examines recent judgements and legislative reforms, illustrating India's developing arbitration environment. The paper examines the kompetenz-kompetenz principle, the influence of Section 11(6A) of the Arbitration and Conciliation Act of 1996, and important Supreme Court cases such as Magic Eye, Duro Felguera, Vidya Drolia, Mayavati Trading, Uttarakhand Purv, and N.N. Global. It evaluates the significance of these developments for arbitral parties' autonomy and the role of arbitral institutions.

I. INTRODUCTION

Arbitration is a dispute resolution mechanism that offers parties an alternative to adjudication by courts and other public forums established by law.[2] When two or more parties agree to resolve their issues before an Arbitral Tribunal, they engage in a one-of-a-kind contractual arrangement with advantages and disadvantages. This arrangement, known as an arbitration agreement, as defined under Section 7 of the Arbitration and Conciliation Act, 1996,[3] expresses the parties' mutual willingness to resolve disputes through arbitration as their preferred method, creating an alternative to conventional court proceedings. This paper addresses the issue of judicial intervention in determining the existence and validity of arbitration agreements in India. Judicial interference in arbitration agreements is called for to ensure the validity of the agreement,

[1] 4th year Law Student, National University of Juridical Sciences, Kolkata, Gmail: thankam222057@nujs.edu
[2]Hong Kong International Arbitration Centre, 'What is Arbitration?' (*HKIAC*) < https://www.hkiac.org/arbitration/what-is-arbitration > accessed 29 October 2023.
[3] Arbitration and Conciliation Act 1996, s 7.

resolve jurisdictional challenges, and appoint arbitrators when needed.[4] Courts may also intervene to provide interim measures, enforce arbitral awards, and address challenges based on public policy concerns.[5] The extent of judicial interference varies across jurisdictions, with some legal systems favouring minimal intervention in line with a pro-arbitration stance. International conventions, such as the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, commonly known as the New York Convention, also regulate the enforcement of arbitral awards across borders.[6] In this context, India has been trying increasingly to position itself as a potential global arbitration hub, seeking to align its legal framework with international best practices.

The paper begins with the fundamental issue of whether Indian courts should evaluate arbitration agreements decisively, as demonstrated by the *Magic Eye Developers* case.[7] We analyse the history, significant legislative changes, the *Kompetenz-Kompetenz* principle, the 'prima facie' test, and the recent legislative trend towards institutional arbitration. We also discuss the difficulty of balancing party autonomy and judicial scrutiny and the importance of a well-defined appeals procedure. The paper concludes by emphasising the importance of this delicate balance for India's future arbitration.

II. JUDICIAL DETERMINATION V. KOMPETENZ-KOMPETENZ SPARKED BY THE MAGIC EYE DEVELOPERS CASE

The question of whether Indian courts should definitively assess the existence and validity of arbitration agreements is often discussed by courts as well. The Supreme Court's recent decision in *Magic Eye Developers Ltd. v. M/s Green Edge Infrastructure Pvt. Ltd.*[8] sparked concerns by

[4] Sanjeev K Kapoor and Saman Ahsan, 'Challenging and Enforcing Arbitration Awards: India' (*Global Arbitration Review*) < https://globalarbitrationreview.com/insight/know-how/challenging-and-enforcing-arbitration-awards/report/india > accessed 29 October 2023.
[5] ibid.
[6] Hong Kong International Arbitration Centre, 'What is Arbitration?' (*HKIAC*) < https://www.hkiac.org/arbitration/what-is-arbitration > accessed 29 October 2023.
[7] *Magic Eye Developers Ltd v M/s Green Edge Infrastructure Pvt Ltd* (2023) 8 SCC 50.
[8] ibid.

holding that courts should conduct a full-fledged adjudication while determining a Section 11[9] petition under the Arbitration and Conciliation Act, 1996.

The case has established that during the adjudication of a Section 11 petition, courts are required to definitively and conclusively ascertain the validity of an arbitration agreement.[10] This implies that when exercising authority under Section 11 of the Act, the court must conclusively determine the existence and validity of the arbitration clause and its binding nature on the parties rather than conducting a preliminary or tentative evaluation. This conflicts with the principle of *Kompetenz-Kompetenz*, which grants arbitral tribunals the primary authority to rule on their own jurisdiction, including the issue of the existence and validity of arbitration agreements.[11] The present Arbitration Act expressly accepts the principle of *Kompetenz-Kompetenz* in Section 16.[12]

In its 246th Report, the Law Commission suggested revisions to Sections 8[13] and 11[14] of the Act to remove the uncertainty around this subject.[15] It recommended the introduction of Section 11(6A)[16] because of the complications created by cases such as *SBP & Company v. Patel Engg. Ltd* and *National Insurance Co. Ltd. v. Boghara Polyfab (P) Ltd*.[17] The "prima facie" test was also established by these revisions, under which the court would determine the existence of an arbitration agreement during the appointment of an arbitrator.[18] However, the judgement of validity would ultimately be left to the arbitral tribunal as per Section 16.[19]

III. LEGISLATIVE AMENDMENTS AND THE PRIMA FACIE TEST

[9] Arbitration and Conciliation Act 1996, s 11.
[10] ibid.
[11] Gautam Bhatia, 'Section 11 of the Arbitration and Conciliation Act of 1996: The Jurisprudence of the Supreme Court and Implications for the Jurisdiction of an Arbitral Tribunal' (2009) 21(2) National Law School of India Review 65.
[12] Arbitration and Conciliation Act 1996, s 16.
[13] Arbitration and Conciliation Act 1996, s 8.
[14] Arbitration and Conciliation Act 1996, s 11.
[15] Law Commission of India, *Amendments to the Arbitration and Conciliation Act 1996, Report No. 246* (Law Com No 20, 2014) < https://cdnbbsr.s3waas.gov.in/s3ca0daec69b5adc880fb464895726dbdf/uploads/2022/08/2022081615.pdf > accessed 29 October 2023.
[16] Arbitration and Conciliation Act 1996, s 11(6A).
[17] *SBP & Company v Patel Engg Ltd* (2005) 8 SCC 618; *National Insurance Co Ltd v BogharaPolyfab (P) Ltd* (2009) 1 SCC 267.
[18] Law Commission (n 14).
[19] ibid.

With the introduction of Section 11(6A) in the Arbitration & Conciliation Act, 1996,[20] through the 2015 amendment, the evolution of arbitration law in India took a significant turn.[21] This provision was included to clarify the role of the judiciary in establishing the existence and validity of arbitration agreements.[22] However, its ambiguous language allowed for several interpretations. Section 11(6A) aimed to simplify the process of appointing arbitrators by emphasising the importance of courts establishing a prima facie case regarding the existence of an arbitration agreement.[23] The term 'prima facie' meant that the court's role was to ensure that the claim was not frivolous.[24]

The Supreme Court's interpretation of Section 11(6A) evolved over time, significantly impacting the judicial role in arbitration disputes. In the *Duro Felguera* case, the Supreme Court held that post-amendment, courts are only required to verify the existence of an arbitration agreement without delving into additional considerations.[25] The court emphasised that the legislative intent behind Section 11(6A) is to reduce judicial intervention during the appointment of arbitrators, and this intent should be upheld, respecting the policy to minimise court involvement at this stage.[26]

This approach aimed to speed up the appointment of arbitrators while also promoting the arbitration process; however, in the case of *United India Insurance Co. Ltd. v. Hyundai Engineering & Construction Co. Ltd.*, a departure from the prima facie principle was established.[27] In this case, the Court refused to appoint an arbitrator due to the non arbitrability of the dispute.[28]

[20] Arbitration and Conciliation Act 1996, s 11(6A).
[21] Abhipsa Baral, 'Role of Court in Prima Facie Deciding on the Validity of Arbitrational Agreement under Section 8' (2022) 4(1) Indian Journal of Law and Legal Research 1.
[22] Arbitration and Conciliation Act 1996, s 11(6A).
[23] ibid.
[24]Gauhar Mirza and Hiral Gupta, 'Existence and Validity of an Arbitration Clause: A Deep Dive into the Changing Perspective on the Court's Intervention at the Pre-Arbitral Stage: Part 2' (*Cyril AmarchandMangaldas*, 23 August 2023) < https://disputeresolution.cyrilamarchandblogs.com/2023/08/existence-and-validity-of-an-arbitration-clause-a-deep-dive-into-the-changing-perspective-on-the-courts-intervention-at-the-pre-arbitral-stage-part-ii/#_edn2 > accessed 29 October 2023.
[25] ibid.
[26] ibid.
[27]*United India Insurance Co Ltd v Hyundai Engineering & Construction Co Ltd* (2018) 7 SCC 607.
[28] ibid.

This deviation called into question the consistency of judicial decisions regarding the scope of judicial scrutiny during the appointment stage.[29]

IV. THE VIDYA DROLIA CASE AND OMISSION OF SECTION 11(6A)

The *Vidya Drolia* case was crucial in reaffirming the prima facie test and clarifying the judicial approach to arbitration. This decision reiterated that if the validity of an arbitration agreement cannot be ascertained prima facie, the dispute shall be resolved by arbitration.[30] It endorsed the "when in doubt, refer" concept, finding a balance between preserving party autonomy and engaging the judiciary in circumstances involving the legitimacy of an arbitration agreement.[31] Moreover, the Court clarified, in the *Mayavati Trading* case,[32] that Section 11(6A) of the Act would continue to guide the courts on the scope of their jurisdiction at the pre-arbitration stage.

The 2019 Amendment further shifted the legislative landscape by omitting Section 11(6A) from the Arbitration & Conciliation Act, 1996.[33] The removal of this clause signified a fundamental shift in India's legislative attitude to arbitration.[34] The Supreme Court emphasised this in the *Mayavati Trading* case.[35] that Section 11(6A) was limited to determining the existence of an arbitration agreement. The Court's ruling successfully restrained judicial intrusion and was consistent with the *Kompetenz-Kompetenz* principle.[36] By doing so, it reinforced India's pro-arbitration stance while streamlining the process of appointing arbitrators.

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[29] Saurabh Seth, 'Judicial Interference in Determining the Existence and Validity of an Arbitration Agreement' (*Bar and Bench*, 20 July 2023) < https://www.barandbench.com/law-firms/view-point/judicial-interference-in-determining-the-existence-and-validity-of-an-arbitration-agreement > accessed 29 October 2023.
[30] *Vidya Drolia and others v Durga Trading Corporation* (2021) 2 SCC 1.
[31] ibid.
[32]
[33] Arbitration and Conciliation (Amendment) Act 2019, cl. 3.
[34] Vijay Srivastava and Deeksha Dabas, 'The Analysis of Party Autonomy & Arbitrability in Tenancy Disputes: In Special Reference to Vidya Drolia v. Durga Trading Corporation Case' (2021) 4(3) International Journal of Law Management & Humanities 5977.
[35] *Mayavati Trading Pvt Ltd v Pradyuat Deb Burman* (2019) 8 SCC 714.
[36] ibid.

V. KOMPETENZ-KOMPETENZ DOCTRINE, "WHEN IN DOUBT, DO REFER," AND THE STAMPING ISSUE

The *Kompetenz-Kompetenz* doctrine, often known as competence-competence, is a key principle that gives arbitral tribunals the authority to decide their own jurisdiction, including the validity of arbitration agreements.[37] This concept is essential for limiting judicial intervention in the arbitration process. The Supreme Court accepted the legislative aim of limiting judicial intervention in the case of *Uttarakhand Purv Sainik Kalyan Nigam Ltd*.[38] and affirmed the doctrine of *Kompetenz-Kompetenz.* When parties raised preliminary objections, the Court emphasised the necessity of restricting judicial interference.[39] This doctrine empowers arbitral tribunals to conclusively determine their own jurisdiction, including adjudicating all jurisdictional challenges and ruling on the validity and existence of the arbitration agreement itself. There are exceptions to this rule, such as when an arbitration agreement is obtained by fraud or deception or when parties engage in a draught agreement during talks before the final contract is executed.[40]

The *Vidya Drolia* case reaffirmed the "when in doubt, refer" approach, establishing a compromise between limited judicial intervention and ensuring that matters involving dubious arbitration agreements be sent to arbitration.[41] This strategy respects the autonomy of the parties while using the judiciary if needed.

The *N.N. Global* case raised a new issue with unstamped or inadequately stamped arbitration agreements. In this case, the Supreme Court was to decide by a 3:2 majority whether such agreements might be considered enforceable for the purpose of selecting an arbitrator under Section 11(6) of the Act.[42] The majority opinion took a strict legal approach and ruled that an arbitration agreement in unstamped or inadequately stamped agreements is void in law.[43] This

[37] Harshad Pathak and Pratyush Panjwani, 'Assimilating the Negative Effect of *Kompetenz-Kompetenz* in India' (2013) 2(2) Indian Journal of Arbitration Law 24.
[38] *Uttarakhand Purv Sainik Kalyan Nigam Ltd v Northern Coal Field Ltd* (2020) 2 SCC 455.
[39] ibid.
[40] Bhatia (n 10).
[41] *Vidya Drolia and others v Durga Trading Corporation* (2021) 2 SCC 1.
[42] *N.N, Global Mercantile P Ltd v M/s Indo Unique Flame Ltd & Ors* (2021) 4 SCC 379.
[43] ibid.

stance underlined the importance of adhering to the Stamp Act and was consistent with the tendency to minimise court intervention in the arbitration procedure.[44]

In contrast, the minority opinion in the case of *N.N. Global* saw stamping as a flaw that could be rectified and called for stamping issues to be handled by arbitration organisations.[45] This approach advocated a more flexible stance toward judicial intervention in cases involving unstamped arbitration agreements.

VI. HARMONISING PARTY AUTONOMY AND JUDICIAL OVERSIGHT

Recent modifications to India's arbitration legislation present a significant challenge of balancing party autonomy with the need for judicial scrutiny. Several major developments have defined the growth of arbitration in India, transforming the way the arbitration process functions in the nation. This approach aims to reduce court participation in arbitrator appointments while encouraging the institutional arbitration process. However, striking this balance is difficult as the problems and possibilities are inextricably linked.

Navigating the Appeal Dilemma in Legislative Reform:

A major concern is the lack of a defined appeals system under Section 11 orders. Since there is no opportunity for appeal, "prima facie" conclusions are decisive, raising issues about potential injustice and inefficiency. This further creates challenges in establishing an appellate framework that balances fairness and efficiency with party autonomy. The overarching purpose is to ensure appropriate judicial oversight, intervening only when necessary without unduly delaying proceedings. At the same time, maintaining consistency in assessing the validity and existence of arbitration agreements is crucial to ensure predictability and prevent conflicting decisions.

[44] Nihit Nagpal and Anuj Jhawar, 'Don't Be Stamped Out: Unstamped Arbitration Agreement Becomes Invalid' (*Live Law*, 13 June 2023) < https://www.livelaw.in/law-firms/law-firm-articles-/indian-stamp-act-nn-global-2023-supreme-court-kompetenz-kompetenz-adr-230550 > accessed 29 October 2023.
[45] *N.N, Global Mercantile P Ltd v M/s Indo Unique Flame Ltd & Ors* (2021) 4 SCC 379.

Streamlining the Process with Safeguards by Institutionalising Arbitration:

The Amendment Act of 2019[46] has accelerated the institutionalisation of arbitration by allowing for a more streamlined arbitrator nomination procedure and less judicial interference. This change, however, is not without its difficulties. It is crucial to ensure that the advantages of institutional arbitration, such as faster appointments and access to competent arbitrators, are fully utilised. Simultaneously, measures must be in place to address concerns about institutional biases as well as the financial burden of institutional fees. Maintaining diversity in the pool of arbitrators is also critical to ensuring equal access to justice.

Defining the Parameters of the Kompetenz-Kompetenz Doctrine:

Another aspect of this delicate balancing is the *kompetenz-kompetenz* theory. Giving arbitral tribunals the authority to judge on their own jurisdiction raises problems and furthers the question of whether judicial involvement is essential to ensure fairness and justice. Courts play an important role in determining whether a dispute is arbitrable or if party consent is required. Finding the correct legal balance is critical to preserving party autonomy while safeguarding all parties' legal rights and interests. Clear limitations and criteria for judicial intervention must be established to retain the nature of arbitration as an alternative conflict settlement tool.

VII. CONCLUSION

India's arbitration framework stands at a pivotal juncture, where the delicate balance between party autonomy and judicial oversight will determine its future efficacy as a preferred dispute resolution mechanism. Recent legislative amendments and jurisprudential developments reflect a concerted shift toward reinforcing arbitral independence, yet this evolution presents complex challenges requiring systematic resolution.

The current framework exhibits significant gaps, such as the absence of an appellate mechanism for Section 11 determinations, where the conclusive nature of prima facie assessments risks perpetuating inequitable outcomes. Legislative intervention must institute a balanced appeals process that reconciles judicial oversight with party autonomy, ensuring intervention remains exceptional rather than routine. Additionally, inconsistencies between Sections 8 and 11 regarding

[46] Arbitration and Conciliation (Amendment) Act 2019.

judicial scrutiny of arbitration agreements demand harmonisation to minimise superfluous judicial interference while upholding agreement integrity.

The 2019 Amendment Act's push toward institutional arbitration marks progressive steps in reducing court dependency on appointments yet introduces logistical concerns, including accessibility costs and the need for diverse arbitrator representation to maintain legitimacy. While the *kompetenz-kompetenz* principle empowers tribunals to rule on their jurisdiction, its application requires clearer statutory delineation to prevent either excessive judicial encroachment or unchecked arbitral overreach.

India's arbitration framework must evolve and be guided by legislative precision in defining judicial intervention scope, procedural efficiency through streamlined timelines, and equitable access via cost-effective mechanisms. By anchoring reforms in transparency, efficiency and fairness, India can solidify its position as a global arbitration hub. The ultimate objective remains a self-sustaining ecosystem that respects party autonomy while safeguarding against procedural delays, thereby enhancing dispute-resolution efficacy and reinforcing India's international arbitration standing. This transformation must be orchestrated astutely to encapsulate arbitration's essence as an effective alternative dispute resolution mechanism within India's legal landscape.

RE-EVALUATING THE LEGALITY OF UNILATERAL ARBITRATOR APPOINTMENT CLAUSES IN PUBLIC SECTOR AGREEMENTS

- *TARUN TRIPATHI & HIMANI THAREJA*[1]

ABSTRACT

This paper critically examines the legislative and judicial developments on unilateral arbitrator appointment clauses and their impact on Public Sector Undertakings (PSUs) in India. It analyzes the shift from the 126th Law Commission Report's advocacy for arbitration to the Ministry of Finance's 2024 guidelines discouraging it, set against the backdrop of the Supreme Court's landmark ruling prohibiting unilateral appointments. The paper explores the principles of fairness, equality, and impartiality underpinning this decision, juxtaposing it with earlier precedents and international perspectives on unconscionability. By evaluating statutory safeguards under Indian law and proposing institutional alternatives, it offers insights into balancing PSU autonomy with the need for impartial arbitration.

I. INTRODUCTION

The 126th Law Commission Report of India recommended that Public Sector Undertakings ("PSUs") actively utilize arbitration for dispute resolution, but developments, including guidelines issued by the executive and recent observations made by the Supreme Court, have shifted this perspective[2]. In June 2024, the Ministry of Finance issued guidelines advising PSUs to avoid arbitration[3], citing long-standing challenges in the arbitral process. This shift has been compounded by a recent Supreme Court ruling prohibiting the unilateral appointment of arbitrators. This evolving stance reflects the growing complexities and challenges faced by PSUs in arbitration.

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[1] Tarun Tripathi is a practicing Advocate in Supreme Court, Gmail: tarun.personal01@gmail.com & Himani Thareja is currently pursuing LLM at National Law University, Delhi, Gmail: himanithareja5@gmail.com

[2] Law Commission of India, 126th Report on Government and Public Sector Undertaking Litigation Policy and Strategies (Law Commission of India 1988).

[3] Ministry of Finance, Department of Expenditure, Procurement Policy Division, Office Memorandum No. F. 11212024-PPD (3 June 2024).

In India, unilateral arbitration clauses may grant one party exclusive discretion to initiate arbitration or litigation, or allow only one party to appoint the arbitrator, both of which can be deemed invalid due to lack of mutuality and impartiality[4]. These clauses are criticized by courts for undermining fairness and equality, creating an imbalance of power in dispute resolution[5]. Hon'ble Justice Nariman suspected that such clauses may irreparably prejudice the independence of an arbitral proceeding[6]

The debate on unilateral appointment clauses has seen conflicting approaches by various courts across the country. Until recently, PSUs were permitted to constitute arbitral tribunals from a curated panel of arbitrators[7]. This practice is ingrained in internal rules of various institutional arbitrations catering to PSUs[8]. However, it emphasized that ineligible individuals must not participate in the appointment process[9] and expressly barred parties with vested interests from influencing such appointments.[10] These judgments regulated the utilization of unilateral clauses by the PSUs. The Hon'ble Supreme Court's recent ruling pronounced on the 8th of November in the Railway Electrification case marked a pivotal shift by invalidating such clauses entirely[11]. The court declared such clauses to be vires of fundamental principles of equality and fairness. Practitioners argue that the ruling may further deter PSUs from embracing arbitration as a preferred mode of dispute resolution(ADR)mechanisms, given their already cautious approach towards alternate dispute resolution[12].

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[4] SCC Online, 'To Appoint or Not to Appoint: A Critical Study of Unilateral Appointment of Arbitrators under the Arbitration Act, 1996' (*SCC Online Blog*, 14 March 2022) https://www.scconline.com/blog/post/2022/03/14 /a-critical -study-of-unilateral-appointment-of-arbitrators-under-the-arbitration-act-1996/accessed 31 March 2025.
[5]*Perkins Eastman Architects DPC v HSCC (India) Ltd* (2019) 9 SCC OnLine SC 1517.
[6] ibid.
[7]*Voestalpine Schienen GMBH vs. DMRC* (2017) 4 SCC 665 (India).
[8] Indian Council of Arbitration, 'Rules of Arbitration and Conciliation' (as amended on and with effect from 17 January 2022) https://icaindia.co.in/pdf/Rules%20of%20Arbitration%20and%20Conciliation_As%20amended %20on%20and%20with%20effect%20from%2017%20January%202022.pdf accessed 31 March 2025.
[9]*TRF Ltd. v. EnergoEngg. Projects Ltd*., (2017) 8 SCC 377.
[10] Perkins (n 3).
[11]*Railway Electrification v. M/s ECI SPIC SMO MCML* 2024 INSC 857.
[12] PSL Advocates & Solicitors, 'The Sealed Fate of Unilateral Arbitrator Appointment Clauses in Public-Private Contracts in India: Analysis of the Constitution Bench Judgment in Central Organisation for Railway Electrificationv M/s ECI SPIC SMO MCML (JV)' *(Lexology*, 12 November 2024)https://www.lexology.com/library /detail.aspx?g=8296e05b-3e04-47a9-abdd-2863bef295dc accessed 26 December 2024.

II. PSUS HAVE ALREADY BEGUN TO KEEP ARBITRATION AT ARM'S LENGTH: IS THE HON'BLE SUPREME COURT BROADENING THIS DIVIDE?

The Ministry of Finance's ("MoF") June 2024 guidelines urged PSUs, as much as possible, to refrain from employing arbitration as a means of dispute resolution[13]. The guidelines suggest that arbitration should not be the default dispute resolution mechanism and recommend considering mediation or litigation, especially for disputes exceeding certain monetary thresholds[14]. PSUs have made significant contributions to the arbitration landscape of India. It was suggested by the Solicitor General Tushar Mehta that the Railways, are involved in numerous arbitration cases, collectively amounting to thousands of crores[15]. As previously mentioned, there have been notable policy recommendations encouraging PSUs to pursue arbitration.

One of the key reasons mentioned in MoF's guidelines to dissuade PSUs from arbitration has been 'impropriety of arbitrators'[16] Despite adopting the practice of maintaining panels of arbitrators, PSUs continue to face challenges in form of delays as well as resultant costs, as noted by the MoF[17]. The Railway Electrification Case presented a suitable opportunity for the Supreme Court to address these concerns[18]; however, its findings which restrict PSUs influence on appointing arbitrators may further exacerbate the apprehensions of the public sector. An already burdened public sector with catena of pending arbitrations will now be deprived of the sole incentive to arbitrate, which is their control over appointment of arbitrator.

III. THE EVOLVING TRAJECTORY OF UNILATERAL CONTRACTS IN INDIA'S LEGAL LANDSCAPE

[13] Ministry of Finance (n 2).
[14] ibid.
[15] Perkins (n 3).
[16] Ministry of Finance (n 2).
[17] ibid.
[18] Central Organisation for Railway Electrification v. ECI SPIC SMO MCML (JV) 2024 SCC OnLine SC 3219.

On November 8, 2024, the Supreme Court of India delivered a landmark judgment, where a five-judge *(Hereinafter referred to as CORE or CORE case)* held that the arbitration clauses that allow one party to unilaterally appoint a sole arbitrator or mandate the selection of arbitrators from a panel curated exclusively by one party are invalid[19]. This decision, grounded in the principles of equality and impartiality enshrined in the Arbitration and Conciliation Act, 1996 (hereinafter "the Act"), also held that such clauses violate Article 14 of the Constitution by undermining the equal treatment of parties. The Court unequivocally extended this principle to public-private contracts, including those involving PSUs, thereby establishing a more balanced arbitration framework. However, it also underscores the practical challenges PSUs face in safeguarding public funds and ensuring contractual efficiency.

The evolution of this principle can be traced to conflicting judicial precedents. In *Voestalpine Schienen GmbH v. Delhi Metro Rail Corporation Ltd.* (2017)[20], the Court upheld arbitration clauses requiring parties to select arbitrators from a panel curated by one party, reasoning that a "broad-based panel" (made by PSUs) could ensure fairness. However, this reasoning was refined in *TRF Ltd. v. Energo Engineering Projects Ltd.* (2017)[21] and *Perkins Eastman Architects DPC v. HSCC (India) Ltd.*(2019)[22]. In *TRF*, the Court invoked the principle of *qui facit per alium facit per se* (one who acts through another acts himself) to hold that a person statutorily ineligible to act as an arbitrator under § 12(5) of the Act could not nominate another arbitrator. *Perkins* extended this logic to invalidate clauses allowing one party unilateral control over the appointment process, as such arrangements compromised the independence and impartiality of the arbitrator.

In contrast, in *Central Organisation for Railway Electrification v. ECI-SPIC SMO MCML (JV)* (2019)[23]*(hereinafter referred to as CORE 2019),* the Court upheld a clause allowing a PSU to curate a list of arbitrators from which the opposing party had to choose. The Court deemed this arrangement balanced, asserting that the opposing party retained some choice. However, this view

[19] ibid.
[20] Voestalpine (n 5).
[21] TRD (n 6).
[22] Perkins (n 3).
[23] *Central Organisation for Railway Electrification v ECI-SPIC SMO MCML (JV)* [2019] SCC OnLine SC 1419.

was questioned in *Union of India v. Tantia Constructions Ltd.* (2021)[24] wherein a three-judge bench disagreed with the reasoning in *CORE 2019,* asserting that once an appointing authority is incapacitated, it cannot validly appoint an arbitrator. This judgment emphasized that even in cases where one party has the right to suggest names, the appointing authority's authority must be genuine and not compromised. The Court referred the matter to a larger bench, recognizing the need for clarification on the broader issue of the validity of appointment clauses where one party controls the appointment process. The divergent approaches necessitated a larger bench to resolve the inconsistency.

The five-judge bench in the *CORE* case meticulously analyzed the principles underpinning the Act, including party autonomy, independence and impartiality of arbitrators, and equality of treatment in arbitral proceedings[25]. Drawing from § 12(5), which disqualifies individuals with direct or indirect interests (either financial or professional) in the dispute from serving as arbitrators, the Court emphasized that equality and impartiality must extend to the stage of appointment. It also underscored the significance of § 18, which enshrines the principle of equal treatment and the right to a fair hearing, holding that it applies across all stages of arbitration, including the appointment process. Clauses that allow one party to unilaterally appoint arbitrators or control the selection process, the Court noted, create an inherently exclusionary mechanism, depriving the other party of equal participation.

The Court also addressed the unique, one-sided nature of public-private arbitrations, particularly contracts involving PSUs[26]. While recognizing the utility of PSUs maintaining panels of qualified arbitrators, the Court clarified that mandating the opposing party to choose arbitrators from such panels disrupts the procedure fairness in the arbitration process. Moreover, the Court noted that arbitration clauses in public-private contracts cannot escape the scrutiny of constitutional principles, given the public interest dimension inherent in government contracts. Clauses granting unilateral appointment powers to government entities were found to be arbitrary and violative of

[24] *Union of India v Tantia Constructions Ltd* (2021) ibclaw.in 245 SC.
[25] Railway Electrification (n 8).
[26] ibid.

Article 14, as they allowed one party to influence the arbitration proceedings to the detriment of the other.

Justice Hrishikesh Roy, while agreeing with the majority on the importance of equality in the arbitration process, expressed concerns about the application of constitutional principles to the arbitration framework[27]. He questioned whether public law principles, such as the right to equality under Article 14, should apply to arbitration clauses, arguing that arbitration is primarily governed by contract law. Justice P.S. Narasimha, on the other hand, opined that the legality of unilateral appointments should be determined on a case-by-case basis, especially when parties have waived objections under § 12(5) of the Arbitration Act. Justice Narasimha expressed reservations about applying the equality principle to the appointment stage, as § 18 of the Act pertains to the conduct of arbitral proceedings rather than the appointment of arbitrators. He also argued that calling unilateral appointments unconstitutional would render the waiver provision in § 12(5) ineffective. Notably, in earlier cases like *Banwari Lal Kotiya v. P.C*[28]*. Aggarwal*, while consent for arbitration was deemed necessary, the Court clarified that such consent could be implicit if already provided by the agreement or sanctioned by statutory rules, regulations or by-laws.

While the Constitution bench judgment acknowledged the utility of maintaining panels of qualified arbitrators, especially for PSUs, it made it clear that such panels should not skew the balance of power in favor of one party. It was emphasized that any arbitration process must ensure that both parties have an equal say in the appointment of arbitrators. Justice P.S. Narasimha, in his dissent, argued that unilateral appointment clauses should not be deemed invalid without case-specific examination and that the principles of § 18, concerning equal treatment, should apply only to the conduct of arbitral proceedings and not to the appointment process itself. Similarly, Justice Hrishikesh Roy expressed reservations about applying public law principles to private arbitration, suggesting that the contractual nature of arbitration agreements should be respected.

Although the judgment underscores the importance of fairness, transparency, and impartiality in arbitration proceedings, it also introduces practical challenges for PSUs, which often manage high-

[27] ibid.
[28] *Banwari Lal Kotiya v PC Aggarwal* (1985) 3 SCC 255.

stakes disputes involving public funds. The ruling could deter PSUs from opting for arbitration due to concerns about delays and limitations on their ability to protect public interests. Requiring PSUs to turn to third-party institutions or courts for arbitrator appointments may increase procedural inefficiencies, potentially undermining arbitration's role as a swift and effective dispute resolution mechanism.

Nonetheless, the Court's recent precedent marks a pivotal moment in India's arbitration framework. By reinforcing the principles of equality and impartiality, it ensures that arbitration clauses adhere to constitutional values and the principles of natural justice. The decision also signals a shift toward institutional arbitration as a preferred alternative, offering greater neutrality and reliability.

IV. RECOMMENDATIONS: LESSONS FROM JUSTICE ROY'S VIEW ON UNCONSCIONABILITY AND PRACTICES IN OTHER JURISDICTIONS

Justice Hrishikesh Roy, in his partial dissent, touched upon the concept of unconscionability within the framework of arbitration agreements. He noted that clauses lacking fairness and meaningful choice, especially those mandating unilateral appointments, could be deemed unconscionable under Indian law. Referring to § 23 of the Indian Contract Act, he emphasized that such clauses violate public policy by undermining the independence and impartiality of arbitral tribunals. "*However, he argued that determining unconscionability should be context-specific and not warrant a blanket invalidation of all unilateral clauses*[29]*."*

An arbitration clause is unconscionable if it is unfair and unenforceable due to both procedural issues, like being hidden or non-negotiable, and substantive issues, such as one-sided terms or excessive costs. Courts typically require both elements to invalidate the clause.

A. **UNITED STATES**

[29] Railway Electrification (n 8).

In the United States, the enforceability of unilateral arbitrator appointment clauses has been a contentious issue, often evaluated through the lens of unconscionability. This legal doctrine may render contract terms unenforceable when they are excessively one-sided or oppressive. U.S. courts have exhibited varying stances on such clauses.

Some courts have upheld such clauses. In *Willis v. Nationwide Debt Settlement Group*[30], the U.S. District Court for the District of Oregon ruled that a unilateral appointment mechanism was not inherently unconscionable. The court reasoned that the agreement provided safeguards to ensure an independent arbitrator, and there was no evidence to presume bias based solely on the appointing party's control.

US courtsconsiders unilateral clauses as a tension between party autonomy, which allows parties to design their arbitration processes, and the need to ensure fairness and impartiality in dispute resolution. The enforceability often depends on the specific facts of each case and the applicable state laws[31].

B.VIEWS OF PROFESSOR JAN PAULSSON, UNIVERSITY OF MIAMI SCHOOL OF LAW ON UNILATERAL ARBITRATOR APPOINTMENT CLAUSES

Professor Jan Paulsson, a distinguished scholar and renowned expert in international arbitration, delivered a seminal lecture at the University of Miami School of Law in April 2010[32], where he critiqued the practice of unilateral arbitrator appointments as a moral hazard and proposed safeguards to address the risks it poses to mutual trust and the legitimacy of the arbitral process.

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[30] *Willis v Nationwide Debt Settlement Grp* 878 F Supp 2d 1208 (D Or 2012).

[31] Himanshu Raghuwanshi and Krishnanunni U, 'Unilateral Arbitrator Appointments in the US – A Tussle Between "Unconscionability" & "Party Autonomy"' (*Blog*, 22 February 2021)https://aria.law.columbia.edu/unilateral-arbitrator- appointments-in-the-us-a-tussle-between-unconscionability-party-autonomy/ accessed 26 December 2024.

[32] Andrew Battisson & Cheryl Teo, 'The Call to Remove Unilateral Appointments: Seven Years On' (YSIAC, 3 July 2017).

Paulsson suggests that unilateral arbitrator appointments should not be entirely invalidated because there are adequate safeguards to address concerns about bias or partiality. These safeguards include rules requiring arbitrators to disclose potential conflicts of interest and allowing parties to challenge and remove arbitrators if their impartiality is in question. Arbitration awards can also be contested under section 34 of the Indian Arbitration and Conciliation Act if the tribunal acts unfairly or if a party is denied its right to be heard[33]. Moreover, the other members of the tribunal act as an additional safeguard, monitoring any improper conduct by a party-appointed arbitrator. The professor further proposes formalizing procedures within arbitration rules to allow tribunal members to report misconduct. This approach ensures fairness and impartiality while preserving the benefits of party autonomy in arbitration.

C. SOLUTION: SHIFTING ONUS ON THE CONTESTING PARTY TO PROVE ALLEGATIONS OF BIAS UNDER § 12(5) OF THE ACT, 1996

Shifting the onus to the contesting party under § 12(5) of the Act acts as a safeguard by empowering parties to challenge unilaterally appointed arbitrators. It requires the contesting party to substantiate allegations of bias based on the arbitrator's relationship with the appointing party, as specified in the Seventh Schedule. This provision ensures transparency and impartiality, as it explicitly disqualifies ineligible arbitrators while mandating disclosure of any conflicts of interest. By allowing challenges grounded in legitimate concerns of partiality, it discourages misuse of unilateral appointment clauses and strengthens the credibility of arbitration proceedings.

V. CONCLUSION

The prohibition of unilateral arbitrator appointment clauses marks a significant shift in India's arbitration jurisprudence, reinforcing the principles of fairness, impartiality, and equality. This shift aligns with American jurisprudence as well as with the global best practices but also creates practical challenges, particularly uncertainty for PSUs, which manage high-value disputes

[33] ibid.

involving public funds. The Supreme Court's judgment ensures that arbitration processes adhere to constitutional principles, addressing long-standing concerns of bias and inequality. However, it simultaneously limits the autonomy of PSUs, complicating their ability to safeguard public interests and potentially deterring them from opting for arbitration as a dispute resolution mechanism.

To strike a balance, it is essential to establish mechanisms that preserve the independence and impartiality of arbitration without disproportionately restricting the autonomy of PSUs. In addition to the recommendations suggested in the preceding segment of this article, PSUs should consider institutional arbitration. Institutional arbitration frameworks, which offer neutral arbitrator appointment processes, can serve as a viable alternative. These frameworks should be adopted widely to mitigate delays and enhance the credibility of arbitration.

CASE COMMENT

EXAMINING THE SCOPE OF CURATIVE JURISDICTION IN ARBITRATION: THE CONTENTIOUS CASE OF DMRC V. DAMEPL AND ITS IMPLICATION FOR ARBITRATION IN INDIA

- *CHIRANTAN PAUL*[1]

ABSTRACT

In recent years, there has been a rise in challenges to arbitral verdicts and many of these challenges frequently amount to nothing other than veiled criticisms of the arbitral tribunal's conclusions. The courts are prohibited from entertaining such arguments by the fundamental principle of minimal judicial interference, which governs the relationship between the courts and arbitral tribunals. The recent Supreme Court judgment in the case of Delhi Metro Rail Corporation (DMRC) v. Delhi Airport Metro Express Private Ltd.(DAMEPL)[2] *has received a significant amount of criticism and extensive commentary from legal scholars and practitioners*[3]*. The ruling highlighted the challenges and ambiguities over the use of curative jurisdiction as the fifth level of judicial scrutiny. This paper examines the complexities of curative petitions, their application on arbitral awards and their broader impact on domestic arbitration, encompassing a wide array of intermingled arguments in support and against this judgment, with the implication of this judgment for future commercial arbitration in India. Overall, this paper concludes that the application of curative jurisdiction should stringently be restricted to matters where the arbitral award contains clear perversity and patent illegality which resulted in a serious miscarriage of justice, since allowing such curative petitions may encourage unnecessary litigation of awards, hence, avoiding any precedent that the court may regret.*

Keywords: *Curative Petition, Constitution, Gross Miscarriage of Justice, The Arbitration and Conciliation Act, 1996, Arbitral Award.*

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[1] 4th year B.A.LLB(Hons) in Faculty of Law, Banaras Hindhu University, Gmail: paulchirantan1993@gmail.com

[2] *Delhi Metro Rail Corporation (DMRC) v Delhi Airport Metro Express Private Ltd.* (2024) 6 SCC 357.

[3] Vasanth Rajasekaran, Harshvardhan Korada, 'Deciphering the Supreme Court's Verdict on DMRC v. DAMEPL — The "Cure" to Longstanding Legal Battle' (*Scc Times*, 6 May 2024) <https://www.scconline.com/blog/post/2024/05/06/deciphering-supreme-court-verdict-dmrc-damepl-cure-to-longstanding-legal-battle/.> accessed 19 September 2024.

I. INTRODUCTION

The concept of curative petition was first expounded in the case of *Rupa Ashok Hurra* v. *Ashok Hurra*[4] in 2002. It is an extraordinary measure devised by the Supreme Court of India ("SCI") to recheck or revise its own decision in the review petition using its constitutional power vide Article 142,[5] Article 129,[6] and Article 137,[7] of the Indian Constitution to remove perversities in its earlier judgment and render complete justice. In the *Union of India* v. *Union Carbide Corporation,*[8] the SCI clarified further the parameters of its curative competence. While dismissing the curative petition in this instance, the court noted that in cases where there has been a flagrant injustice, fraud, or the concealment of important information, a curative petition may be granted. The introduction of curative petitions has led to their increased use as a fifth stage of judicial intervention, contrary to the principle that such measures should be reserved for cases of gross miscarriage of justice. Some legal scholars vouch for the idea of delivering complete justice through such exceptional measures, while others endorse the minimal interference of courts with arbitral awards. This controversial case furthers the idea of the former and thus, has been a subject of great criticism from the latter. This research paper endeavours to explore this judgment in-depth and bring forth the fine line between exercising the authority of the court to prevent a grave miscarriage of justice and the minimal judicial interference with arbitral awards.

II. CONTEXTUALIZED FACTUM OF THE CASE

The dissension in this particular case revolves around a concession agreement between Delhi Metro Rail Corporation ("DMRC") and Delhi Airport Metro Express Private Limited ("DAMEPL"), a special purpose vehicle incorporated by a consortium comprising of Reliance Infrastructure Limited and Construcciones Y Auxiliar de Ferrocarriles SA, Spain for rendering

[4]*Rupa Ashok Hurra v Ashok Hurra* (1997) 4 SCC 226.
[5]The Constitution of India, 1950 art 142.
[6]The Constitution of India, 1950 art 129.
[7]The Constitution of India, 1950 art 137.
[8]*Union of India v Union Carbide Corpn.*2023 SCC OnLine SC 264.

metro rail connectivity between New Delhi Railway Station and the Indira Gandhi International Airport and other cardinal routes across Delhi.

The agreement provided DAMEPL with exclusive rights, license and authority to execute the project of construction, operation and maintenance of the Airport Metro Express Line("AMEL") of Delhi Metro while DMRC was responsible for land acquisition and building of civil structures. DAMEPL was required to complete the work in two years, and thereafter, to maintain AMEL until August 2038.

The timeline of the events that took place which led to the arbitration proceedings has been stated below in seriatim:-

1. From February 2010, operation of the Airport Metro Express link started following the Commissioner of Metro Rail Safety's (CMRS) safety clearance.
2. DAMEPL requested a postponement of the concession price in April 2012, citing DMRC's delays in granting access to the stations. While AMEL has been operating flawlessly since February 23, 2011, according to DAMEPL, retail activity has not increased. DAMEPL requested that DMRC postpone the concession charge that DAMEPL must pay in order to show their support for this unique public-private cooperation.
3. DAMEPL further raised the issue of defects in the line and indicated its intention to stop operations, averring that the line was unsafe for operation.
4. The metro rail service on this line was halted on 8th of July 2012. Further on 9th July 2012 DAMEPL sent a letter to DMRC outlining a "non-exhaustive" list of eight flaws that, in their words, interfered with their ability to fulfil their duties under the 2008 Agreement. The notification said that poor construction and deficient designs were to blame for the flaws, which had a "material adverse effect" on the performance of the obligations by it to operate and manage the metro line. It was further averted on the part of DAMEPL to cure the defects within a period of 90 days failing which the 2008 agreement could be terminated by DAMEPL.
5. On 8 October 2012, DAMEPL terminated the 2008 agreement by issuing a notice, stating that the defects were not cured within the "cure period" and hence they were entitled to terminate the agreement as per the terms of clause 29.5.1 of the concession agreement.

6. As a ramification of this, DMRC commenced conciliation proceedings under clause 36.1 of the 2008 agreement. But, the conciliation did not succeed and thereafter DMRC initiated arbitration proceedings under clause 36.2 of the 2008 agreement.
7. By the 30th of June 2013 DAMEPL stopped operation and handed over the line to DMRC. From 1st July 2013, DMRC commenced AMEL operation.
8. In August 2013, the arbitral tribunal was constituted and on the 11th of May 2017, the three-member tribunal unanimously gave its verdict in favour of DAMEPL.
9. The tribunal found severe structural defects, noting that 72% of 367 girders had cracks and about 80 exhibited twists. It criticized DMRC's inspection as inadequate and stated that failure to address these defects during the cure period compromised both the project and public safety.
10. In addressing the Section 34 application,[9] the High Court's Single Judge maintained the judgment, noting that no intervention was necessary as long as the award was reasonable and plausible in light of the evidence presented to the Tribunal.
11. The Division Bench of the High Court, exerting its authority under Section 37 of the Arbitration Act,[10] partially set aside the award on the grounds of patent and perverse illegality. The Arbitral award didn't deliberate clause 29.5.1(i) of the concession agreement regarding the duration of the cure period and neither speed restrictions were averred as the reason for such termination.
12. In appeal,[11] the Supreme Court put aside the decision of the division bench and restored the arbitral award, expounding that the date of termination was unambiguous, and even in the unlikely event that an alternative interpretation of the contract's terms was feasible, the tribunal alone was qualified to create it. Thus, the award was not perverse.
13. The issues that arose for consideration were:-

    i. Whether the curative petition is maintainable?

[9]The Arbitration and Conciliation Act,1996 (26 of 1996) s 34.
[10]The Arbitration and Conciliation Act,1996 (26 of 1996) s 37.
[11]*Delhi Metro Rail Corporation Ltd. v Delhi Airport Metro Express Pvt. Ltd.* 2024 SCC OnLine SC 522, ¶16.

ii. Whether this court was justified in restoring the arbitral award which had been set aside by the Division Bench of the High Court on the ground that it suffered from patent illegality?

III. SCOPE OF INTERFERENCE OF COURTS WITH ARBITRAL AWARDS: AN ANALYSIS

The author aims to present both sides of the argument—whether the court wrongly overturned the award or correctly exercised its authority. The cardinal point of debate between the two factions stems from the proposition "***Principle of finality of arbitral awards versus Rendering complete justice***".

The Supreme Court in this case stated that it could entertain a curative petition to correct a serious miscarriage of justice. And this argument has been favoured by various judicial precedents. In *Supreme Court Bar Association vs. Union of India &Anr.*[12] clarifying the extent of the curative character of the authority granted to the Supreme Court under Article 142,[13], it averred that, "*The Supreme Court's plenary powers, as defined by Article 142 of the Constitution are inherent to the Court and are not restricted by the statutes that specifically grant it those powers. However, they do supplement those specific powers. In order to provide full justice between the parties, these powers also exist outside of the legislation. These powers are supplemental in nature and have a very large amplitude. Therefore, the Supreme Court may use its plenary jurisdiction as a last resort whenever it is just and equitable to do so. This includes ensuring that the parties to a case follow the law, resolving disputes amicably, and applying the law's requirements for justice. It functions as a vital tool in the hands of the Supreme Court to avoid* ***"clogging or obstruction of the stream of justice"*** *and is an essential supplement to all other powers".*

It was noted by the Supreme Court in this case that it may entertain a curative petition to

i. Prevent abuse of its process;

[12] *Supreme Court Bar Association vs. Union of India &Anr.* (1998) 4 SCC 409 [412].
[13] The Constitution of India, 1950 art 142.

ii. To cure a gross miscarriage of justice.[14]

It stated the vice of perversity and patent illegality as grounds for annulment of arbitral awards. It determined that the award was blatantly unlawful, perverse, and unreasonable because it disregarded the crucial CMRS certification evidence while determining the termination's legitimacy in addition to ignoring the terms of the termination clause. Further, it disregarded the statutory certification and declared it irrelevant without providing any justification.

As a result, the award was clearly unlawful based on the criteria used in the *Associate Builders Case*[15] and *Ssangyong Engineering & Construction Co. Ltd. vs. NHAI*,[16] as this called into question the sacredness of the contract between them. Hence, the Supreme Court set aside the arbitral award on the grounds of patent illegality under section 34(2A) of the Arbitration Act.[17] Thus, one may argue that the Supreme Court may use its inherent authority to revisit its decisions in order to guard against procedural abuse and correct serious judicial errors.

Another pertinent argument in favour of the Supreme Court is that it has upheld the public interest by preventing the state from suffering twice: First, due to an improper arbitration procedure that was followed by a prolonged legal battle, and again by being burdened with a sizable award. It stated "*By setting aside the judgment of the Division Bench, this court restored a patently illegal award which saddled a public utility with an exorbitant liability*". This combined with the argument that Section 34[18] and 37[19] of the Arbitration and Conciliation Act, 1996 has provided the court of law with limited or myopic opportunity to intervene in an arbitral ruling by setting a high threshold for the same. Further, Section 37[20] of the Act simply gives the appellate court the authority to determine whether the lower court properly used its authority under Section 34[21]; it does not permit the court to conduct a comprehensive review of the award on its merits.

[14]*Rupa Ashok Hurra v Ashok Hurra* (1997) 4 SCC 226 [416].
[15]*Associate Builders v Delhi Development Authority* (2015) 3 SCC 49.
[16]*Ssangyong Engineering & Construction Co. Ltd. v NHAI* (2019) 15 SCC 131.
[17]The Arbitration and Conciliation Act,1996 (26 of 1996) s 34(2A).
[18]The Arbitration and Conciliation Act,1996 (26 of 1996) s 34.
[19]The Arbitration and Conciliation Act,1996 (26 of 1996) s 37.
[20]ibid.
[21]The Arbitration and Conciliation Act,1996 (26 of 1996) s 34.

Finally, the Supreme Court in its concluding remarks expounded that, "*In order to prevent the filing of a second review petition under the pretense of a curative petition, the next step is to define the conditions that must be met in order for this Court to accept such a case. It is standard procedure that the Court will not hear an application to reconsider an order of this Court that has become final upon the dismissal of a review petition unless there are very compelling reasons to do so.*", which in view of the Supreme Court fulfills dual objectives:-

i. Cures gross miscarriage of justice.

ii. Doesn't open the floodgates for filing a second review petition in the guise of a curative petition.

Thus, the proponents in favour of the Supreme Court's rationale may further argue that the Supreme Court is vested with such inherent power under Article 142[22] and such ***ex debito justitiae*** exercise of power is to cure any mistake brought to the attention of it, thus rendering complete justice[23].

But to the awe and shock of legal practitioners and scholars, an error of such minute amplitude, with little to no real significance, was what curative jurisdiction intended to correct. The ruling emphasizes how unclear and flexible the boundary is between giving the arbitral tribunal the last word in interpreting contracts and valuing evidence and getting involved in the process when the interpretation of the clause might not be one that the court finds appealing to its judicial conscience.

The Indian Supreme Court defends curative petitions as necessary for ensuring justice. However, some legal scholars argue that a well-reasoned tribunal judgment should not be overturned after five stages of judicial review under the pretext of curative jurisdiction.[24] This shouldn't be used as an additional layer of judicial intervention after multiple rounds of judicial review. And this is more true than before, after the repeated emphasis by the Indian Supreme Court on the necessity of an pro-arbitral award policy, in order to establish India as a center for arbitration.[25].

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[22]The Constitution of India, 1950 art 142.

[23]*A.R. Antulay v R.S. Nayak &Anr.* (1988) 2 SCC 602 [656].

[24] Prince Todi, Yavipriya Gupta, 'The DMRC Case – Assessing Exercise of Curative Jurisdiction in Annulment of Arbitral Award' (*IndiaCorpLaw*, 1 June 2024) < https://indiacorplaw.in/2024/06/the-dmrc-case-assessing-exercise-of-curative-jurisdiction-in-annulment-of-arbitral-award.html> accessed 1 September 2024.

[25] 'Time for India to promote a culture of commercial arbitration: CJI DY Chandrachud' (*Bar and Bench*, 7 June 2024) <httpshttps://www.barandbench.com/news/time-for-india-to-promote-a-culture-of-commercial-arbitration-cji-dy-chandrachud> accessed 1 September 2024.

Further, section 35[26] of the Arbitration and Conciliation Act, 1996 expounds on the status of the finality of arbitral awards. It held, "*An arbitral award shall be final and binding on the parties and persons claiming under them*". In fact, one of the principal intent behind pursuing arbitration is to reach an arbitral award, which carries within itself the legal force of finality. So that it brings a final and legally enforceable resolution of the conflict.

The *travaux préparatoires* of the Arbitration and Conciliation Act, 1996 demonstrate that the decision to forgo a revision mechanism was made on purpose. The purpose is needed for speedy and final settlement of disputes and the legislative objective is to respect arbitral rulings unless the award debtor can demonstrate a strong case based on one of the limited procedural grounds stated in section 34 of the Arbitration Act.[27] Hence, the Arbitration Act itself affords few grounds for overturning an arbitral award.

Further, it is pertinent to note that while the Supreme Court felt that there would be gross injustice if a public utility were burdened with a significant liability, it stands as a weak justification for using the unique powers of Article 142 to nullify commercial arbitration verdicts made against the government. It will open a hornet's nest if the public exchequer argument is used to settle disagreements in business contracts where the state is a party. Since the state will be more certain that it would eventually receive court relief in high stakes conflicts, it will have less motivation to operate rationally as a business actor in such transactions. This could discourage private companies even more from collaborating with the government on intricate and expansive initiatives.[28]

The Indian government's recent guidelines for arbitration and mediation in domestic public procurement contracts, issued in June 2024, highlight the country's evolving dispute resolution landscape.[29] These guidelines emphasise the importance of speed, convenience, and finality in

[26]The Arbitration and Conciliation Act,1996 (26 of 1996) s 35.
[27]The Arbitration and Conciliation Act,1996 (26 of 1996) s 34.
[28] Madhav Goel,Anjali Sharma, 'The Debate Over Supreme Court's Curative Intervention in Arbitration' (*IndiaCorpLaw*, 6 July 2024) < https://indiacorplaw.in/2024/07/the-debate-over-supreme-courts-curative-intervention-in-arbitration.html> accessed 1 September 2024.
[29]Department of Expenditure, 'Guidelines for Arbitration and Mediation in Contracts of Domestic PublicProcurement - reg.' (2024) <https://doe.gov.in/files/circulars_document/Guidelines_for_Arbitration_and_Mediation_in_Contracts_of_Domestic_Public_Procurement.pdf> accessed 6 March 2025.

arbitration, while also addressing the specific challenges that government entities face. The Indian government's recent guidelines for arbitration and mediation in domestic public procurement contracts, issued in June 2024, highlight the country's evolving dispute resolution landscape. These guidelines emphasise the importance of speed, convenience, and finality in arbitration, while also addressing the specific challenges that government entities face. They also indirectly discourage the government from using arbitration to resolve disputes in public procurement.

The Supreme Court's decision in DMRC vs. DAMEPL, combined with recent guidelines on arbitration and mediation, has undeniably reshaped the Indian arbitration landscape. While the judgment's intention—to correct gross miscarriages of justice—is admirable, it has also raised concerns about the future of arbitration in India. This case emphasises a critical point: the fine line between necessary judicial oversight and overreach.

The new government guidelines, which emphasise mediation as well as arbitration's speed and finality, are a positive step forward. However, they also subtly discourage the use of arbitration in public procurement, indicating a preference for other methods. This could be interpreted as a response to the unpredictability created by judicial interventions such as those in the case of DMRC vs. DAMEPL.

If it is to become a global arbitration hub, it must strike a delicate balance between ensuring justice and accountability while preserving the autonomy that makes arbitration appealing. The future of Indian arbitration is dependent on this balance.

IV. CONCLUSION

While both sides of the argument appear to have strong justifications for the same, a more nuanced approach is required to reach a reasonable solution in the instant matter. The Supreme Court has already used its curative jurisdiction in a number of cases involving arbitration, particularly to change awards and this was done to cure grave miscarriage of justice. Further, it may also be

argued that courts may construe grounds subjectively on a case-by-case basis, for example, "patent illegality" under section 34(2A) of the Arbitration Act.[30]

Concerns arise from the court's departure from minimal judicial interference, annulling an award issued by experts after multiple reviews. This raises questions about the consistency of arbitration in India, particularly given legislative efforts to establish the country as an international arbitration hub.[31]

Although this case stems from a domestic arbitration, its implications may discourage investors and businesses from engaging with India.[32] The Supreme Court's decision raises concerns about striking the right balance between finality in high-value disputes and judicial oversight.

[30]The Arbitration and Conciliation Act,1996 (26 of 1996), s 34(2A).
[31]Rishabh Gandhi, 'Beyond the Verdict: The Long-Term Impact of DMRC vs. DAMEPL on Indian Arbitration' (*Bar and Bench*, 6 July 2024) <https://www.barandbench.com/law-firms/view-point/beyond-the-verdict-long-term-impact-of-dmrc-vs-damepl-indian-arbitration> accessed 2 September 2024.
[32]Kartikey Mahajan,Prerna Jain, 'Finality Of Domestic Awards - (Indian) Supreme Court Sets Aside Arbitral Award At 5th Level Of Scrutiny' (*Lexology*, 6 May 2024) <https://www.lexology.com/library/detail.aspx?g=68a1e818-ff90-4faa-a2d0-68ee5a680a84> accessed 1 September 2024.