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ABOUT

The "*CADR Journal of Dispute Resolution (CJDR)"* is a biannual online Journal published by the Centre for ADR at National Law University Delhi. CJDR aims to publish truly interdisciplinary research papers on issues related to dispute resolution and settlement which are subject to the journal's double-blind review process involving distinguished academicians, practitioners and acknowledged authors. CJDR is a humble attempt on part of CADR to provide a platform for sharing up-to-date, high-quality and original research papers alongside contemporary and insightful reviews. In this Issue of the Journal, we present to you articles on various issues of contemporary relevance under the theme of *'Latest Trends in the Field of Alternative Methods of Dispute Resolution'*. We hope this Volume I Issue II of the Journal will be able to excite your mind to explore the realm of ADR further.

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CHALLENGES TO THE APPOINTMENT OF ARBITRATORS: A COMPARATIVE ANALYSIS OF THE TRENDS IN INTERNATIONAL COMMERCIAL ARBITRATION AND INTERNATIONAL INVESTMENT ARBITRATION

- ***Benaisha Hansotia and Riya Narichania****

ABSTRACT

International Commercial Arbitration and International Investment Arbitration have two main differences in their challenge procedure. These are; the time limit to raise a challenge against an arbitrator; and the test applied by tribunals to challenge the arbitrator. Investment arbitration and commercial arbitration have divergent takes with respect to the time limit for raising a challenge. While commercial arbitration provides for a specific period, investment arbitration refrains from providing such a limit. This provision under investment arbitration has prompted parties to file baseless challenges at any stage of proceedings, thus causing grave prejudice to the other party. Similarly, the tests applied by both to adjudge neutrality vary. Commercial arbitration uses the 'justifiable doubts' standard where doubts are considered justifiable if there is either a real apprehension of bias or a real possibility of bias. Investment arbitration uses the 'manifest lack of qualities' standard. The use of the term 'manifest' indicates that the arbitrator's lack of qualities must be conclusively established. Thus, the burden of proof to challenge an arbitrator is much higher in investment arbitration as compared to commercial arbitration. There is an urgent need for institutional arbitration facilities to deliberate on their challenge provisions and amend their rules to prevent the filing of frivolous challenges to hamper the flow of proceedings. This article aims to analyse the difference in the challenge procedure in International Commercial Arbitration and International Investment Arbitration and seeks to draw out the missing pieces in the provisions contained in International Investment Arbitration.

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1. INTRODUCTION

One *sui generis* feature of international arbitration is party autonomy, whereby a party has the freedom to choose its own decision makers.[1] The liberty given to parties to appoint arbitrators of their choice has often been abused by them. Parties have a predilection to appoint arbitrators who may lean in their favour. This, in turn, violates the principles of natural justice and pollutes the stream of justice. Subsequently, a plethora of doubts and suspicion arise in the mind of the other party. Therefore, with passage of time a system in international arbitration has evolved which provides for a procedure to challenge the appointment of the arbitrators on grounds of impartiality and independence within a stipulated time period.

As a general rule, challenges must be made at the earliest,[2] however the time limit requirements for filing a challenge differ vastly in International Commercial and Investment Arbitration. International Commercial Arbitration institutions provide for a fixed time limit to challenge an arbitrator on grounds of lack of impartiality and independence.[3] The failure of a party to file a challenge within the stipulated time limit implies a waiver of that right.[4] On the other hand, International Investment Arbitration does not expressly lay down an ascertained time limit to challenge the arbitrator.[5]

Most arbitral tribunals permit challenges to the appointment of arbitrators on the grounds of independence and impartiality. Independence and impartiality of an arbitrator is the focal point of arbitration proceedings, without which the final award would be vitiated.[6] The interpretation of the terms '*independence'* and *'impartiality*' across various commercial as well as investment arbitration tribunals are almost uniform; although the standards for proving the same might differ among various conventions or institutions. The two terms are often incorrectly presumed to be interchangeable in nature.[7] The concept of independence is

[1] Charles B Rosenberg, 'Challenging Arbitrators in Investment Treaty Arbitrations- A Comparative Law Approach' (2010) 27 Journal of International Arbitration 505.

[2] Federica Cristani, *The Law and Practice of International Courts and Tribunals* (Brill 2014) 160-162.

[3] Clyde Croft, Christopher Kee & Jeffrey Waincymer, *A Guide to the UNCITRAL Arbitration Rules* (CUP 2013) 143-146.

[4] UNCITRAL Arbitration Rules, art 30; SIAC Arbitration Rules 2016, rule 41.

[5] Cristani (n 2).

[6] Indu Malhotra, *Commentary on the Law of Arbitration* vol 1 (4th edn, Wolters Kluwer 2020) 513.

[7] Alan Redfern, Martin Hunter, Nigel Blackaby and Constantine Partasides, *Redfern and Hunter on International Arbitration* (5th edn, OUP 2009) 255.

concerned with the relationship between the arbitrator and either of the parties.[8] This term is entitled to an objective test.[9] On the other hand, impartiality is a subjective concept since it refers to the state of mind of the arbitrator on account of which he either favours one party and opposes the other.[10]

The success rate for the challenge differs between the 2 types of arbitration i.e., commercial and investment arbitration. It is believed that there is a low possibility of success of a challenge under the International Court of Arbitration ["ICC"] Rules, Singapore International Arbitration Centre ["SIAC"] Rules and United Nationals Commission on International Trade Law ["UNCITRAL"] Rules. However, there exists an even lower possibility of success under Investment Arbitration conventions such as International Centre for Settlement of Investment Disputes ["ICSID"]. Reasons for this will be explained subsequently in this article.

Challenge proceedings were extremely rare earlier.[11] However, due to the increased importance given to arbitration as a medium to resolve commercial and investment disputes, parties often explore possibilities of challenging the arbitrators' appointment where there is the slightest element of doubt as to their independence and impartiality.[12] This opens the floodgates to various challenge proceedings, most of which are groundless. Baseless and frivolous challenges cause serious prejudice to the other party in terms of legal fees, expenses, long drawn-out proceedings and uncertainty; this nullifies the *raison d'être* for entering into arbitration.[13]

This article aims to critically analyse and compare the procedure for challenge of an arbitrator under International Commercial Arbitration and International Investment Arbitration. It seeks to shed light on the need for institutional arbitration facilities to amend their procedural rules to ensure that parties are unable to use the challenge procedure as a delay or '*guerrilla tactic*'.[14] In Part II of this article, the authors will argue that International Investment Arbitration facilities ought to take a leaf out of the book from the International Commercial Arbitration regime when it comes to the time limit to file a challenge. In Part III of this

[8] ibid*; Compañía de Aguas del Aconquija S.A. & Vivendi Universal v Argentine Republic* (2001) ICSID Case No ARB/97/3, Decision on the challenge to the president of the committee (3 October 2001) paras 14 and 18.

[9] Gary B Born, *International Commercial Arbitration* (3rd edn, Kluwer Law International 2020) 1910.

[10] Born (n 9).

[11] Redfern, Hunter, Blackaby and Partasides (n 7) para 4.91.

[12] ibid.

[13] Born (n 9) 2034-2035.

[14] ibid.

article, the authors would like to draw the readers' attention to the inconsistencies and ambiguity in the challenge standards adopted under International Commercial and Investment Arbitration regimes.

2. TIME LIMIT TO CHALLENGE THE ARBITRATOR

Article 13 (2) of the UNCITRAL Rules states that a party who intends to challenge an arbitrator shall file his challenge by way of a written statement with the reasons for challenge either '*after becoming aware of the constitution of the arbitral* tribunal' or '*after becoming aware of any circumstance referred to in article 12(2),*'[15] The time limit under the UNCITRAL Rules are enforced strictly with tribunals granting leniency sparingly.[16]

Article 10.3 of the London Court of International Arbitration ["LCIA"] Rules provide for a shorter time frame of 14 days as compared to UNCITRAL Rules.[17] Similarly, SIAC Arbitration Rules also provide for a time limit of fourteen days.[18] The ICC Rules are less stringent with regard to the time period to raise a challenge as they provide for a thirty day time limit for either party to file a challenge.[19]

Several countries have taken inspiration from the practice in International Commercial Arbitration and have sought to imbibe the same in their legislation. France, Switzerland, Montenegro and India are few such examples. The Arbitration and Conciliation Act 1996 ["Indian Arbitration Act"] of India which has been drafted on the basis of the framework of the UNCITRAL Model Law, has an identical provision under Section 13 which provides for a fifteen day time limit to raise a challenge.[20]

However, some countries have abstained from incorporating this provision in their legislation, The United Kingdom's ["UK"] Departmental Advisory Committee in arbitration law decided against adopting provisions of ICC Rules and UNCITRAL Rules as they believed that the procedure was too formal and could enable parties to hoodwink the tribunal by creating artificial delays.[21] This decision, however, invited substantial criticism.[22]

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[15] UNCITRAL Arbitration Rules, art 13.

[16] Redfern, Hunter, Blackaby and Partasides (n 7) 312.

[17] LCIA Rules, art 10.

[18] SIAC Arbitration Rules 2016, art 15.

[19] ICC Rules of Arbitration, art 14.

[20] Arbitration and Conciliation Act 1996, s 13.

[21] Robert M Merkin, *Arbitration Law* (LLP 2004) para 10.26.

2.1 OBSERVANCE OF A FIXED TIME LIMIT UNDER INTERNATIONAL COMMERCIAL ARBITRATION

Article 13 of UNCITRAL Rules assumes that if the challenge has not made within the fifteen day period, the party has impliedly waived his right to challenge the arbitrator.[23] This provision has been explained under Article 30 of the UNCITRAL Rules.[24] A party is considered to have waived all objections regarding the provisions of the rules or of the arbitration agreement have not been complied with, if he '*proceeds with the arbitration without promptly stating his objection to such non-compliance*'.[25] In the case of *Island Territory of Curacao v. Solitron Devices, Inc.*, a Court opined that a failure to raise a timely objection regarding the arbitrators impartiality when such grounds were known to the party constituted a waiver of the right to challenge.[26]

The fifteen-day time period under the UNCITRAL Rules are inflexible, and untimely challenges are liable to be rejected at the threshold.[27] The fifteen day requirement under article 13(2) has a sound reasoning behind its mandatory nature.[28]A dishonest party may seek refuge under the challenge provision to temporarily delay, stall and disrupt proceedings.[29]A party may choose to initiate challenge proceedings at a time where utmost prejudice will be caused to the other party. Commentator David Caron has said that permitting anybody to raise a challenge at a belated stage is grossly unfair and a '*perversion of the arbitral process*'.[30]

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[22] ibid.

[23] Howard M Holtzmann and Joseph Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (Kluwer Law International 1989) 408.

[24] UNCITRAL Arbitration Rules.

[25] UNCITRAL Arbitration Rules, art 30.

[26] Island Territory of Curacao v Solitron Devices, Inc, 356 F Supp 1 (SDNY 1973); Redfern and Hunter (n 3) 316 and 347.

[27] Croft, Kee and Waincymer (n 3).

[28] David D Caron and Lee M Caplan, *The UNCITRAL Arbitration Rules: A Commentary* (2nd edn, OUP 2013) 257; Malhotra (n 2).

[29] Ibid.

[30] Caron and Caplan (n 28) 257.

According to some courts, the fifteen day time period begins from the day on which the party gained direct and clear knowledge i.e., actual knowledge of the facts which lead to justifiable doubts regarding an arbitrator's impartiality.[31] Some courts have opined that it is not necessary for a party to conduct due diligence and conduct investigations where the arbitrator was obligated to provide a disclosure.[32]

A German court has interpreted the phrase '*after becoming aware of*' as used in the ZPO i.e., German Code of Civil Procedure in a manner where the time period for challenging an arbitrator is triggered only when the challenging party acquired actual knowledge of the ground for challenge.[33] Even constructive knowledge has not been considered to be satisfactory enough to trigger the time limit.[34]

In the arbitration of *Vito G. Gallo v. Government of Canada* ["Gallo Arbitration"] the tribunal opined that if a party was permitted to invoke evidence of constructive knowledge, the arbitrators' duty of continuous disclosure would be rendered nugatory.[35] Furthermore, it is against the letter and spirit of the law to place the burden on the party to conduct their own due diligence as it would render the law i.e. Article 12 of the UNCITRAL Rules, a dead letter.[36] Although the challenge must be instituted within fifteen days of acquiring actual knowledge of the grounds for challenge, if the other party opposes the fact that the challenge was not instituted in a timely manner, they bear the burden to prove that the challenge was untimely. In the challenge proceedings of the Gallo Arbitration, the tribunal held that the burden of proving that the claimant had knowledge of relevant circumstances more than fifteen days prior to the institution of the challenge proceedings rested upon the respondent.[37] The challenge was dismissed as untimely under the UNCITRAL Rules as well as the ICSID Convention.

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[31] 28 Sch 24/99 (2000) OLG Report Berlin 14/2000 248; UNCITRAL, *2012 Digest of Case Law on the Model Law on International Commercial Arbitration* (United Nations Publication 2012) 69.

[32] Born (n 9) 2086.

[33] 28 Sch 24/99 (n 31); UNCITRAL (n 31).

[34] ibid.

[35] *Vito G Gallo v Government of Canada* (2007) PCA Case No 55798, Decision on the Challenge to Mr J Christopher Thomas, QC (14 October 2009) para 20, 24.

[36] ibid.

[37] Gallo (n 35).

2.2 NON-OBSERVANCE OF STRICT TIME LIMIT UNDER INTERNATIONAL INVESTMENT ARBITRATION

Rule 9(1) of the ICSID Convention mandates that a challenge of an arbitrator must be raised '*promptly*' before the arbitration proceedings come to an end.[38] Until the verdict of the challenge is decided, the arbitration proceedings continue to remain suspended.[39] Thus, the unchallenged arbitrators make their best attempt to decide the challenge expeditiously to continue with the proceedings.[40] Rule 27 of the ICSID Convention is analogous to Article 30 of the UNCITRAL Rules; it states that a party is automatically assumed to have waived its right to object to a violation of any rule if it has not raised its' objection in a prompt manner.[41]

ICSID Convention does not provide for a specific time limit for the challenge of an arbitrator. It makes no mention of any '*strict temporal requirements*' for the admissibility of raising a challenge.[42] Despite the absence of a fixed time limit, in investor state disputes, tribunals have been generally known to adopt a restrictive approach.[43]

The word '*promptly*' has remained undefined in the rules, leaving much room for interpretation. Some ICSID tribunals have, in the past held 53 days to not fall under the scope of '*promptly*'[44], whereas other liberal tribunals have held a longer period of 8 months to not fall under the definition of '*promptly*'.[45] Tribunals have held different timelines to not fall under the meaning of '*promptly*' due to the lack of clarity and uncertainty surrounding this rule. This lacuna will continue to plague investment arbitration until some explanation or clarification is furnished.

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[38] ICSID Convention, rule 9 (1).

[39] ibid.

[40] Meg Kinnear, 'Effectiveness of International Law', in American Society of International Law (ed), *Proceedings of the Annual Meeting*, (vol 108, CUP 2014) pp 412-416.

[41] ICSID Convention, rule 27; Redfern (n 7) 316.

[42] Cristani (n 2).

[43] ibid.

[44] *Suez, Sociedad General de Aguas de Barcelona, S A and Interagua Servicios Integrales de Agua, S A v Argentine Republic* (2003) ICSID Case No ARB/03/17 Decision on the proposal for the disqualification of Gabriella Kauffman Kohler (22 October, 2007).

[45] *Azurix Corp v The Argentine Republic*, ICSID Case No ARB/01/12 Decision on the Challenge to the President of the Tribunal, (February 25, 2005).

2.3 CRITICAL ANALYSIS AND RECOMMENDATIONS OF AUTHORS

Arbitrator challenges were scarce in investment arbitrations.[46] However, in the recent past there has been an astronomical increase in the number of challenges raised.[47] Most of these challenges are eventually unsuccessful due to their frivolous nature.[48] This demonstrates the significance of the mandatory time limit to file a challenge, without which proceedings would be inevitably side-tracked. The mandatory time limit as seen in International Commercial Arbitration serves as an impermeable mechanism to prevent the filing of challenges at a later period. The investment arbitration regime is in dire need of a more robust framework to adjudicate on the time limit to raise a challenge.

The UNCITRAL Rules contain a provision which states that parties must file the challenge within fifteen days after becoming aware of, either the constitution of the tribunal or after taking cognizance of any circumstances which affect the impartiality or independence of the arbitrator. The ICSID Convention has not accommodated for such a provision under Rule 9. The term '*promptly'* is subjective in nature. The absence of the definition of the word '*promptly'* has created a dichotomy of opinions with regard to the permissible timeline to admit a challenge. Since the triggering point for filing the application challenging the arbitrators' appointment remains unspecified, further uncertainty is brought about.

An insertion of the definition of the word '*promptly*' may help to mitigate the lack of uniformity and uncertainty that surrounds the time limit to challenge an arbitrator. In the past Courts have construed the term '*promptly*' to mean '*within a reasonable time in light of all the circumstances*'.[49] This definition appears to be apt for the ICSID Convention. Tribunals may interpret the term on a case to case basis and in cases with a similar factual matrix, they may use those cases as precedent while adjudicating on the challenge.

Alternatively, the ICSID Convention could also incorporate a provision similar to UNCITRAL Rules regarding a time limit for filing a challenge to prevent parties from taking undue advantage of the challenge provision and disturbing the sanctity of arbitral

[46] Chiara Giorgetti, 'The Arbitral Tribunal: Selection and Replacement of Arbitrators' *in* Chiara Giorgetti (ed), *Litigating International Investment Disputes: A Practitioner's Guide* (International Litigation in Practice, vol 8, Brill Nijhoff 2014) 145-172.

[47] ibid.

[48] Judith Levine, '"Late-in-the-Game" Arbitrator Challenges and Resignations' in *Proceedings of the Annual Meeting (American Society of International Law) The Effectiveness of International Law* (vol 108, CUP 2014) 419-423.

[49] *State v. $17,636.00 in U.S. Currency*, 650 So. 2d 900 (Ala. Civ. App. 1994); *State v. Chesson*, 948 So.2d 566, 568 (Ala. Civ. App. 2006).

proceedings. A definite time period to challenge an arbitrator will also help in ensuring that tribunals interpret the provisions in a similar manner globally to ensure equitable and uniform treatment. Furthermore, it will encourage parties to act expeditiously and file their challenges in a timely manner.

However, the authors acknowledge the fact that no party should be placed at a disadvantage if there is an inadvertent delay in filing the challenge proceedings. Investment disputes have exceedingly high stakes and the award passed by a biased arbitrator is vulnerable to challenge.[50] In such a situation, the filing of a challenge in an untimely manner could cause grave prejudice, especially in investor state disputes. If a provision regarding a timeline is to be inserted under investment arbitration rules, it may be of a directory nature.

The authors believe that a viable solution to deter parties from filing untimely and frivolous challenges would be to impose exemplary costs.[51] In a recent investor-state dispute, costs were imposed by the tribunal on a party on account of bringing forth a frivolous and unjustified challenge.[52] Tribunals must penalise unscrupulous parties who aim to prolong arbitral proceedings to set an example.

3. STANDARDS FOR ADJUDICATING ON A CHALLENGE PROCEEDING

Under Article 12 (1) of the UNCITRAL Rules, a challenge to disqualify an arbitrator can be initiated if circumstances exist which give rise to '*justifiable doubts regarding his independence and impartiality*.'[53] An identical standard has been adopted under the Article 10 of LCIA Rules[54] and Article 11 of the SIAC Arbitration Rules, 2017.[55]

Under the ICC Rules, an arbitrator maybe challenged on grounds of '*impartiality or independence or otherwise*'.[56] The use of the word '*otherwise*' casts the net far and wide and lays down an amorphous standard to challenge an arbitrator[57] since it allows the parties to

[50] United Nations Conference on Trade and Development 'Investor–State Disputes: Prevention and Alternatives to Arbitration' (New York and Geneva 2010) 23.

[51] Levine (n 48).

[52] ibid.

[53] UNCITRAL Arbitration Rules, art 12(1).

[54] LCIA Arbitration Rules, art 10.

[55] SIAC Rules 2016, art 11.

[56] ICC Rules of Arbitration, 2021, art 14.

[57]Karel Daele, *Challenge and Disqualification of Arbitrators in International Arbitration* (Kluwer Law International 2012) 243.

challenge the arbitrator on any grounds they deem fit.[58]

Under Article 57 of the ICSID Convention, a challenge to disqualify an arbitrator can be initiated if there is a '*manifest lack of the qualities*' enlisted under Article 14 (1) of Convention which also includes the qualities of independence and impartiality under its umbrella.

However, most of the above-mentioned rules or conventions have not provided a definite set of circumstances which could be referred to while deciding upon the arbitrator's neutrality. The International Bar Association Guidelines on Conflicts of Interest in International Arbitration ["IBA Guidelines"] have been frequently relied upon by commercial arbitration tribunals while deciding challenges to arbitrators.[59] The ICC Court has formulated its own non-exhaustive list inspired by the IBA Guidelines to lay down circumstances which may serve as grounds for disqualification.[60] In certain investment arbitrations challenges, parties have placed reliance on the IBA guidelines.[61] However, it is the authors' view that due to the high stakes involved in investment arbitration, the tribunals must meticulously examine and place emphasis on the facts of each case to decide the challenge, rather than mechanically apply guidelines which are non-exhaustive and not binding on the parties.[62]

The threshold for challenge under International Commercial Arbitration and International Investment Arbitration are at variance with each other.

3.1 STANDARD FOR CHALLENGING AN ARBITRATOR UNDER INTERNATIONAL COMMERCIAL ARBITRATION

The burden of proof for challenging an arbitrator in case of commercial arbitration is fairly low. The use of the term '*justifiable doubts*' lays down an objective standard to judge the

[58] ibid.

[59] *National Gird Plc v The Republic of Argentina* (2007) LCIA Case No UN 7949, Decision on the challenge to Mr. Judd R. Kessler (3 December, 2007); *ICS Inspection and Control Services Limited v. The Republic of Argentina* (2009) Decision on challenge to Mr. Stanimir A. Alexandrov (17 December, 2009).

[60] Loretta Malintoppi and Alvin Yap, 'Challenges of Arbitrators in Investment Arbitration Still Work in Progress?', in Katia Yannaca-Small (ed), Arbitration Under International Investment Agreements: A Guide to the Key Issues (2nd edn, Oxford University Press 2018) 163.

[61] *OPIC Karimum Corporation v The Bolivarian Republic of Venezuela* (2011) ICSID Case No ARB/10/14, Decision on the proposal to disqualify Professor Philip Sands, arbitrator (5 May, 2011); *Total S.A. v. Republic of Argentina* (2015) ICSID Case No ARB/04/01, Decision on the proposal to disqualify Teresa Cheng (26 August, 2015).

[62] IBA Guidelines on Conflicts of Interest in International Arbitration (2014) 3.

independence and impartiality of the arbitrator.[63] The test laid down to assess the independence and impartiality of an arbitrator under International Commercial Arbitration is from the viewpoint of a fair-minded, reasonable third person. A reasonable and fair minded third person has been interpreted to be a member of the public who (i) is not a legal practitioner; (ii) is neither completely ignorant about the law or the facts of the case; and (iii) is neither excessively suspicious, sensitive or complacent.[64]

At present, two different tests are being used by commercial arbitral tribunals in order to determine the existence of justifiable doubts i.e., (i) the '*reasonable apprehension test*' and (ii) the '*real possibility test*'. A third test formulated by the Courts in England known as the '*real danger test*' has been rendered defunct after the formulation of the '*real possibility test*'. The '*real danger test*' test failed to lay sufficient emphasis on the perspective of the general public as well as the aggrieved party. It eventually led to the examination of the facts of the matter solely from the perspective of the judiciary.

3.1.1 'Reasonable Apprehension' Test

Common law jurisdictions such as, Canada, Australia and South Africa have adopted the '*reasonable apprehension*' test.[65] Under this test, even the '*mere appearance of bias'* is sufficient grounds to challenge the arbitrator under Article 12.[66] The genesis of this test lies in the common law judgement of *R v. Sussex Justices, ex parte McCarthy*. In the aforementioned judgement, Lord Hewart opined that '*Justice must not only be done but must undoubtedly and manifestly be seen to have been done*'.[67]

The '*reasonable apprehension*' test analyses the justifiable doubts standards from the view point of a reasonable, fair-minded third person who is aware of the facts and circumstances of the case.[68] If such a person concludes that there is an appearance or likelihood that the arbitrator's decision might be influenced by factors other than the merits of the case at hand,

[63] Caron and Caplan (n 28) 208.

[64] *Johnson v Johnson* (2000) HCA 48, para 53; *Jung Science Information Technology Co Ltd v ZTE Corporation* (2008) HKCFI 606, para 52.

[65] Samuel Ross Luttrell, 'Bias challenges in International Arbitration: The Need for a 'Real Danger' Test' (DPhil thesis, Murdoch University 2008) 68.

[66] *Challenge Decision of 11 January 1995* (1997) vol XXII *YBCA,* paras 23 and 24; *Commonwealth Coatings Corp v Continental Casualty Co et al* (1968) 393 U.S. 145, para 9.

[67] *R v Sussex Justices, Ex Parte McCarthy* (1924) 1 KB 356.

[68] *National Gird Plc* (n 59); IBA Guidelines on Conflicts of Interest in International Arbitration (2014) 5.

the arbitrator can be disqualified.[69] The implementation of this perilously low standard would entail the threat of '*opportunistic or tactical challenges*'.[70] This would open doors for the '*black art of challenges'*[71]. *De minimis* challenges would be brought by parties simply as a tactic to delay and disrupt the proceedings or simply in order to get their dispute decided by an arbitrator who might be more inclined in favour of their view.[72]

3.1.2 'Real Possibility' Test

The origin of real possibility test can be attributed to the English judgement of *Porter v. Magill*. In this judgement, Lord Hope of Craighead held that the test for determining impartiality and independence is based on whether a fair-minded and informed observer, having considered the facts, would deduce that there was a '*real possibility*' that the arbitrator was prejudiced.[73]

The '*real possibility*' test has not yet gained universal acceptance. Although the '*real possibility*' test has been accepted and adopted by jurisdictions such as England[74] and Hong Kong[75], the courts of Canada[76] and Australia[77] have rejected the '*real possibility test*' and have retained the '*reasonable apprehension*' test.

The threshold laid down under the '*real possibility*' test is higher as compared to the '*reasonable apprehension*' test. Under the latter, mere suspicion of bias is sufficient grounds to initiate a challenge, whereas under the former, a real risk regarding the arbitrators' bias is required to be proved. The insertion of the word '*real*' before the word '*possibility*' imposes a higher evidentiary burden of proof on the claimant.[78] The addition of the word '*real*' warrants the consideration of rigid facts, evidence and external factors as compared to mere logical suspicion[79]

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[69] ibid.

[70] *Halliburton Company v Chubb* (2020) UKSC 48.

[71] Luttrell (n 65) 274.

[72] ibid.

[73] *Porter v Magill* (2002) 2 AC 357, para 103.

[74] ibid.

[75] *Deacons v White and Case Ltd Liability Partnership and Ors* (2003) 6 HKCFAR 322.

[76] *Mugesera v Canada (Ministry of Citizenship and Immigration)* (2005) 2 SCR 91.

[77] *Ebner v Official Trustee in Bankruptcy* (2000) HCA 63.

[78] Luttrell (n 65) 44.

[79] ibid.

Most institutional commercial arbitration centres such as LCIA, ICC and SIAC make use of the '*justifiable doubts*' standard with regards to challenge proceedings. This has instilled a sense of uniformity throughout International Commercial Arbitration.

3.2 STANDARD FOR CHALLENGING AN ARBITRATOR UNDER INTERNATIONAL INVESTMENT ARBITRATION

In contrast, under investment arbitration, the burden of proof for challenging an arbitrator is fairly high. The ICSID Convention uses the '*manifest lack of qualities*' standard to determine neutrality of the arbitrator.[80] The qualities required to be possessed by the arbitrator are enlisted under Article 14 (1) of the ICSID Convention. Article 14 (1) necessitates the arbitrator to possess the following 3 qualities- (i) high moral fibre, (ii) proficiency in the fields of law, finance, industry or commerce and (iii) faith in the arbitrator regarding his independence while making a judgement.[81] The chief criterion is competence in the field of law.[82]

The English and French version of the ICSID Convention makes reference only to the independence of the arbitrator under Article 14(1).[83] The Spanish version of the ICSID Convention makes mention of the quality of *'imparcialidad de juicio'*[84] i.e., full confidence of the parties in the arbitrator's impartiality of judgement. Universal practice in investment arbitration shows that while assessing the element of bias in an arbitrator, the investment arbitral tribunals have analysed both the qualities i.e., independence, as well as impartiality.[85]

The term '*manifest*' in Article 57 poses a threat of ambiguity and imposes a relatively high burden of proof on the claimant.[86] Professor Christoph Schreuer has noted that the term '*manifest*' implies '*something which can be discerned with little effort and without deeper*

[80] ICSID Convention, art 57.

[81] ICSID Convention, art 14.

[82] ibid.

[83] Maria Nicole Cleis, *The Independence and Impartiality of ICSID Arbitrators* (Brill vol 8 2017) 12-13.

[84] ICSID Convention (Spanish version), art 14.

[85] Suez (n 44) paras 28–30; M. Kinnear & F. Nitschke, *Disqualification of Arbitrators under the ICSID Convention and Rules, in Challenges and Recusals of Judges and Arbitrators in International Courts and Tribunals* (C Giorgetti edn, 2015); *Fábrica de Vidrios Los Andes, C A and Owens-Illinois de Venezuela, CA v Venezuela*, ICSID Case No ARB/12/21, Reasoned Decision on the Proposal to Disqualify L Yves Fortier, QC, Arbitrator (28 March, 2016) para 28.

[86] Christoph H. Schreur, Loretta Malintoppi, August Reinisch and Anthony Sinclair, *The ICSID Convention A Commentary* (2nd edn, Cambridge University Press 2009) 1202.

analysis'.[87] Several ICSID tribunals have interpreted the term '*manifest*' to be synonymous with the words '*obvious'* or *'evident*'.[88] Therefore, the manifest lack of qualities require the claimants to provide sufficient and objective proof or evidence regarding the arbitrator's lack of impartiality and independence. The use of the term '*manifest*' does not mean that an arbitrator undoubtedly lacks the above-mentioned qualities.[89] On the contrary, it means that the arbitrator's lack of qualities must be conclusively and distinctly established.[90]

The failure of the ICSID Convention to provide an exhaustive definition for the term '*manifest*' has paved way for varied interpretations of the standards of impartiality and independence of the arbitrators under investment arbitration.

3.2.1 The 'Highly Probable' Standard

In cases such as *Amco v. Indonesia*[91], *Tidewater v. Venezuela*[92] and *Universal Compression v. Venezuela*[93], the tribunals emphasised that the word '*manifest*' imposes a strict standard for disqualifying the arbitrator and equated the term '*manifest*' to the phrase '*highly probable*'.[94] The tribunals emphasised that mere apprehension of bias is not sufficient grounds to challenge an arbitrator's appointment.[95] It is imperative for the parties to provide concrete proof to substantiate their claims. This test raises further questions rather than providing answers. The term '*manifest*' has been equated to the phrase '*highly probable*'. However, the definition or the explanation of the phrase '*highly probable*' has not been provided for by these judgements,[96] leading to further ambiguity.

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[87] ibid, 938.

[88] Suez (n 44) para 34.

[89] *Universal Compression International Holdings, S L U v The Bolivarian Republic of Venezuela* [2011] ICSID Case No ARB/10/9, Decision on the proposal to disqualify Prof Brigitte Stern and Prof Guido Santiago Tawil, arbitrators (20 May, 2011) para 71.

[90] ibid.

[91] *Amco Asia Corporation and others v Republic of Indonesia* [1982] ICSID Case No ARB/81/1, decision on proposal to disqualify an arbitrator (24 June, 1982).

[92] *Tidewater Inc Tidewater Investment SRL Tidewater Caribe, C A Twenty Grand Offshore, LLC Point Marine, LLC Twenty Grand Marine Service, LLC Jackson Marine, LLC Zapata Gulf Marine Operators, LLC v The Bolivarian Republic of Venezuela* (2010) ICISID Case No ARB/10/5, decision on claimants' proposal to disqualify Professor Brigitte Stern, arbitrator (23 December, 2010).

[93] Universal Compression (n 89).

[94] Tidewater (n 92) para 39.

[95] Universal Compression (n 89).

[96] Daele (n 57) 238.

3.2.2 The 'Real Risk' Standard

In cases such as *Vivendi v. Argentina*[97] and *Bluebank v. Venezuela*[98], the ICSID Tribunals leaned towards the reasonable doubts test as used by tribunals which follow the UNCITRAL rules. The tribunals held that the facts leading to the appearance of bias in the arbitrator must be carefully considered and the arbitrator must be disqualified only if a '*real risk*' of bias based on the established facts could be apprehended by a reasonable, fair minded third person.[99] Mere speculation or suspicion cannot be relied upon in order to disqualify an arbitrator.[100] The threshold established in the *Vivendi* and *Bluebank* cases is a lenient threshold as compared to the concrete proof threshold established under *Amco* and *Tidewater*. This low threshold increases the success rate of arbitrator challenges and makes it easier to disqualify an arbitrator but at the same time increases the protection awarded to parties against biased arbitrators.[101] In the authors' opinion, this test somewhat resembles the real possibility test used frequently in International Commercial Arbitration. However, due to the high stakes involved in investment arbitration, there is a need to adopt a more stringent standard for the disqualification of arbitrators.

3.2.3 The 'Evident and Obvious' Standard

Challenge decisions such as *Fábrica de Vidrios Los Andes v. Venezuela* [102] and *Electrabel v. The Republic of Hungary*[103] assumed a middle ground and stated that the test for manifest lack of qualities entails that the lack of independence and impartiality must be '*evident and obvious*' from the consideration of a reasonable fair minded third person.[104] This standard is relatively more burdensome as compared to the real risk standard since it requires objective evidence in order to establish an arbitrator's bias.[105] However, the authors opine that the

[97] Vivendi (n 8) para 25.

[98] *Bluebank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela* (2013) ICSID Case No ARB/12/20, Decision on the parties' proposal to disqualify a majority of the tribunal (12 November, 2013).

[99] Vivendi (n 8) para 25; *SGS v Pakistan* (2002) ICSID Case No ARB/01/13, Decision on Disqualification of Arbitrator (19 December 2002), para 24.

[100] Daele (n 57) 223; *Saipem v Bangladesh* (2007) ICSID Case No ARB/05/7, Decision on Jurisdiction (21 March, 2007) para 47.

[101] Daele (n 57) 225.

[102] Fábrica (n 85).

[103] *Electrabel S.A. v Republic of Hungary* (2008) ICSID Case No ARB/07/19, Decision on the claimant's proposal to disqualify a member of the tribunal (25 February, 2008).

[104] Fábrica (n 85).

[105] Daele (n 57) 240.

'*evident and obvious*' standard is an abstract standard and lacks clarity and precision since the qualities of being '*evident and obvious*' are subjective and differ from person to person.

No concrete or definitive test has been decided till date to judge the manifest lack standard under ICSID. However, commentator Christoph Schreuer believes that the term '*manifest*' certainly implies a higher threshold to prove independence and impartiality as compared to the justifiable doubts standard under commercial arbitration.[106] The evidentiary and conclusive proof required under the manifest lack standard imposes a greater burden on the claimants as compared to commercial arbitration.

3.3 CRITICAL ANALYSIS AND RECOMMENDATIONS

Under International Commercial Arbitration, the mere appearance or possibility of bias would be sufficient to disqualify an arbitrator. On the other hand, the threshold in order to establish an arbitrator's lack of independence and impartiality is higher[107] under International Investment Arbitration due to the use of the term '*manifest*' as it demands concrete evidence. The rationale behind this is that the stakes of investment arbitration are extremely high since most of the matters involved are of public interest and such decisions could potentially have far reaching political and economic consequences.[108]

The authors concur with the opinion of commentators as well as various arbitral tribunals that the '*reasonable apprehension*' test used under commercial arbitration sets a dangerously low threshold for the disqualification of arbitrators.[109] It is common for lawyers to act as arbitrators, thus, quite often an arbitrator has to decide on an issue for consideration in which he has already assumed a particular stance in another case. The Courts of Hague have placed special emphasis on the fact that it is unsafe and erroneous to assume that an arbitrator lacks independence and impartiality and is not open minded simply because he has acted as a lawyer in another case where a similar issue was argued by him.[110] Such circumstances do not by default lead to the appearance of bias. Besides, the low threshold also encourages the parties to bring up frivolous challenges against arbitrators.

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[106] Schreur, Malintoppi, Reinisch and Sinclair (n 86) 1202.

[107] ibid.

[108] Noah Rubins and Bernhard Lauterberg, *Independence, Impartiality and Duty of Disclosure in Investment Arbitration* (2010) 1.

[109] Born (n 9).

[110] *The Republic of Ghana v Telekom Malaysia Berhad* (2004] HA/RK 2004.667 (5 November, 2004) para 11.

The commercial arbitration institutions and conventions could provide an exclusive definition of the phrase '*circumstances which give rise to justifiable doubts*'. The inclusion of an exhaustive definition would lead to the implementation of conclusive test to determine the arbitrators' neutrality. These institutions and conventions may consider adopting a non-exhaustive list system similar to the Red, Orange and Green lists adopted under the IBA Guidelines. The IBA Guidelines, although, non-binding, have been instrumental in deciding various arbitrator challenges.[111] Adoption of a list system which would enlist the circumstances leading to challenges against arbitrators may aid in eliminating the possibility of frivolous challenges.

The '*real possibility*' test lays down a reasonable standard for challenging an arbitrator on grounds of lack of impartiality and independence. The requirement of a higher evidentiary burden of proof as compared to mere apprehension curbs the possibility of frivolous challenges and the award being set aside on grounds of bias.[112]

The authors believe that it would be prudent for the ICSID Convention to incorporate the definition of the word '*manifest*' to prevent any misinterpretation by tribunals. This may assist tribunals to adopt a more uniform approach while adjudicating on a challenge proceeding, thus ensuring uniformity in the threshold used by these tribunals.

Upon analysis, the authors conclude that a suitable test which would interpret the standard of '*manifest lack of qualities*' would be one where *firstly*, an objective standard is used to assess an arbitrator's competence; *secondly*, in order for a challenge to the arbitrator to succeed, the claimants must establish facts conclusively which make it '*obvious and highly probable*' that an arbitrator is incompetent to exercise independent and impartial judgement[113] and *lastly*, claims based on mere speculation, inference or suspicion should be considered insufficient to disqualify the arbitrator.[114]

[111] National Gird Plc (n 59); ICS (n 59).

[112] Luttrell (n 65) 9.

[113] *Saint-Gobain Performance Plastics Europe v The Bolivarian Republic of Venezuela* (2013) ICSID Case No ARB/12/13, Decision on Claimant's Proposal to Disqualify Mr. Gabriel Bottini from the Tribunal under Article 57 of the ICSID Convention (27 February, 2013) para 78.

[114] Universal Compression (n 89).

4. CONCLUSION

From the above analysis the authors conclude that it is imperative for International Investment Arbitration facilities to clarify their stand with regards to their prescribed time limits for raising challenges to arbitrators. Both commercial as well as investment arbitration facilities need to clarify their stance regarding an appropriate standard to determine the impartiality and independence of arbitrators. These measures might aid in preventing the filing of frivolous challenges. Frivolous and malicious challenges to arbitrators pose a significant risk to the principle of finality.[115] The principle of finality must be given preference over the principle of correctness in some cases of international arbitration.[116]

The provision of a definite timeline to raise a challenge under International Commercial Arbitration is advantageous for the arbitrating parties as delays are curbed and proceedings flow continuously. The authors believe that it may prove beneficial for ICSID to deliberate on Rule 9 (1) of the ICSID Convention and consider defining the term *'promptly'* to eliminate the confusion that arbitrators face while adjudicating on time limit issues.

Upon a comparative analysis of the trends in the commercial as well as investment arbitration, the authors strongly opine that the usage of an extra-ordinarily low threshold i.e., '*the* reasonable apprehension test' would open doors for the unnecessary and frivolous challenges since trivial challenges would be brought by parties simply to delay and disrupt the proceedings. Contrary to this, the vague and ambiguous '*manifest lack of qualities standard*' sets a high bar resulting in various interpretations by tribunals, eventually creating chaos and confusion among the decision makers. The field of international arbitration yearns for a water tight and uniform test for challenging an arbitrator. The tests and standards laid down presently impose either an extra-ordinarily high or low threshold to disqualify arbitrators which are inconsistent across various jurisdictions and conventions. The need to find an appropriate and consistent test is long overdue. The insertion of appropriate amendments in institutional arbitration rules for commercial as well as investment arbitration will go a long way in eliminating frivolous challenges.

The challenge procedure is undoubtedly an indispensable provision in arbitration to ensure that the principles of natural justice are adhered to. However, the authors believe that unless there is a greater amount of regulation of challenge proceedings by way of legislation, parties

[115] *Positive Software, Inc v New Century Mortgage Corporation*, 476 F 3d 278 (5th Cir 2007).

[116] Christoph Schreuer and Rudolf Dolzer, *Principles of International Investment Law* (OUP, 2008) p 277.

will continue to take undue advantage of this provision. Providing for a fixed time limit to file challenge proceedings as well as striking a balance between the standards used in commercial arbitration and investment arbitration while adjudicating on such proceedings will certainly establish a stricter and more effective regime in International Commercial Arbitration and International Investment Arbitration.

EFFECTIVENESS OF MEASURES TO PREVENT INVESTMENT TREATY SHOPPING: CURBING ACCESS TO CERTAIN MALLS

- ***Ahan Mohit Gadkari****

ABSTRACT

In recent years, states have increasingly included explicit restrictions on treaty shopping in their investment treaties. As a result, newly signed investment treaties frequently include substantive ratione personae requirements, denial of benefits clauses, and anti-circumvention clauses. Along with these new drafting trends, arbitral tribunals have developed an implicit constraint in the form of the abuse of process doctrine to sanction the most flagrant forms of treaty shopping.

Treaty shopping in itself is permissible if the treaty does not have any restrictions barring it. However, measures such as those mentioned above, are undertaken to prevent misuse of the protection afforded to certain investors. The question is whether these measures have any efficiency? While these drafting trends and arbitral practice can help to mitigate some of the negative consequences of treaty shopping, this article argues that only a multilateral reform effort can truly prevent this practice from occurring.

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1. INTRODUCTION

The debate over investment treaty shopping via corporate structuring is more pertinent than ever today. When an investor engages in treaty shopping, they take proactive steps to gain access to an investment treaty that was previously unavailable.[1] The most frequently used technique for accomplishing this goal is corporate structuring,[2] which is the subject of this article. Through corporate structuring, an investor can establish a wholly new entity in a targeted jurisdiction or transfer shares between two already existing entities part of the same corporate chain.[3] This practice has generally been considered legal as long as the applicable investment treaty permits it and the company is restructured before the occurrence or foreseeable occurrence of a specific dispute. However, states have taken proactive steps to curb this practice in recent years through their treaty drafting practices. Unfortunately, these drafting efforts are accompanied by implicit limitations imposed by arbitral tribunals tasked with resolving jurisdictional issues involving corporate structuring.

These are not isolated efforts. They were taken at a time when many states are attempting to rebalance their investment treaties through more balanced protection standards. Additionally, the United Nations Commission on International Trade Law ("UNCITRAL") is currently debating a procedural reform of investor-state dispute settlement ("ISDS"). None of these efforts, however, will be fully effective unless treaty shopping practices are prioritized. Any attempt at recalibration may be thwarted by investors who restructure their enterprises to fall within the scope of an outdated investment treaty with unbalanced protection standards. As a result, systemic measures to discourage treaty shopping must be developed.

In Part A, the author introduces the topic and sets the scope of the paper. In Part B, the author discusses the general legitimacy of treaty shopping and the need for measures curbing treaty shopping. In Part C, the author will examine the efficacy of explicit limitations that are increasingly being incorporated into investment treaties. In Part D, the author will then discuss some implicit limitations that have been addressed in arbitral practice. In Part E, both types of constraints will then be combined to demonstrate that treaty shopping cannot be

[1] Jorun Baumgartner, 'Treaty Shopping in International Investment Law' 11 (OUP 2016).

[2] Dolzer & Schreuer (n 13).

[3] Zachary Douglas, 'The International Law of Investment Claims' 290 (CUP 2009); Javier García Olmedo, 'Recalibrating the International Investment Regime Through Narrowed Jurisdiction', 69 Int'l & Comparative L. Q. 301, 307–314 (2020); Hanno Wehland, 'Forum Shopping: Investment Arbitration', in *Max Planck Encyclopaedia of International Procedural Law* (OUP 2020), [1 ff].

effectively curbed without a concerted multilateral reform effort. Part F will then conclude and sum up the article.

2. NEED FOR ENQUIRY

Any discussion of the legitimacy of treaty shopping must begin with the recognition that such practise is not expressly prohibited in international investment law.[4] Corporate structuring does not have to conflict with the policy objectives of states when they negotiate investment treaties.[5] In general, states enter into investment treaties to strengthen domestic investor protection abroad and promote foreign investment in their domestic markets.[6] When it comes to attracting foreign investment, the ultimate source of the capital may be irrelevant to the host state.[7] Capital-importing countries frequently seek to attract foreign investors by offering preferential tax treatment, low employment costs, and other favourable regulatory conditions.[8] The conclusion of investment treaties that include a broad definition of corporate nationality may also serve as a comparative advantage in attracting foreign investment flows.

Thus, states could theoretically choose to protect foreign investors in general rather than limiting the benefits of a treaty to investors from specific countries. A liberal economist would argue that an international legal commitment to protect all investments made on a state's territory would benefit the state's domestic economy.[9] However, no investment treaty takes such a liberal stance. They all restrict the protection provided by international law to specific investors and investments. Moreover, the protections guaranteed by such treaties apply only to qualified investors on a reciprocal basis, not *erga omnes*.[10] Many states are averse to bearing sovereignty risks to benefit investors from free-riding home states that have

[4] Christoph Schreuer, *Nationality Planning, in Contemporary Issues in International Arbitration and Mediation* 17, 19 (Arthur Rovine ed., Brill 2013).

[5] UNCTAD, 'Investor–State Disputes: Prevention and Alternatives to Arbitration' (United Nations 2010).

[6] Jeswald Salacuse, 'The Emerging Global Regime for Investment', 51 Harv. Int'l L. J. 427, 436–444 (2010).

[7] Barton Legum, 'Defining Investment and Investor: Who Is Entitled to Claim?', 22 Arb. Int'l 521, 525 (2006); Stephan Schill, 'The Multilateralization of International Investment Law' 235 (CUP 2009); UNCTAD, 'Scope and Definition', UNCTAD Series on Issues in International Investment Agreements II, United Nations 93 (2011).

[8] Martin J. Valasek & Patrick Dumberry, 'Developments in the Legal Standing of Shareholders and Holding Corporations in Investor-State Disputes', 26 ICSID Rev. 34, 59 (2011); Zachary Elkins et al., 'Competing for Capital: The Diffusion of Bilateral Investment Treaties', 1960–2000, U. Illinois L. Rev. 265, 279 (2008).

[9] Kenneth J. Vandevelde, 'The Political Economy of Bilateral Investment Treaty', 92 Am. J. Int'l L. 621, 636–639 (1998).

[10] Baumgartner (n 1) 42–45.

not committed to the same level of protection.[11] As a result, because investment treaties promote foreign investment between two or more specific countries, rather than between all nations,[12] treaty shopping must be constrained.

However, reciprocity does not function as a traditional quid pro quo between investment treaty contracting parties. These treaties benefit not only the contracting parties but also host states and foreign investors.[13] States can specify the degree of reciprocity they wish to provide in their investment treaties by including or excluding certain restrictions on treaty shopping.[14] Thus, in the absence of explicit limitations in the applicable investment treaty, prospective corporate structuring has generally been deemed legitimate.[15] In the context of prospective corporate structuring, an enterprise acquires the nationality of a country to benefit from treaty protection in the event of future investment disputes.[16] One could argue that treaty shopping via prospective corporate structuring stimulates foreign investment flows, which many states desire.[17] An investor who chooses its home country (as well as the host state for its investment) based on the treaty protection available responds to the treaty's incentive. Numerous arbitral tribunals have even held that prudent investors should plan their investments in advance to take advantage of available treaty protection.[18] Thus, arbitral tribunals have limited the legitimacy of prospective treaty shopping to the presence of express limitations in the applicable investment treaty.[19] If the relevant treaty contains no restrictions, prospective corporate structuring is generally regarded as legitimate.

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[11] Vandevelde (n 9) 639.

[12] Robert Hunter, 'Is a Corporation's Entitlement to the Protection of an Investment Treaty a Question Solely of Form or Is it Also a Question of Substance?', in *The Determination of the Nationality of Investors Under Investment Protection Treaties* 37, 40 (ILA German Branch/Working Group ed., 2011); Douglas (n 3) 135.

[13] Rudolf Dolzer & Christoph Schreuer, *Principles of International Investment Law* 20 (2d ed., OUP 2012).

[14] Baumgartner (n 1) 47.

[15] *Mobil Corp., Venezuela Holdings, B.V., et al. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision on Jurisdiction (10 June 2010), [204]; *Renée Rose Levy & Gremcitel S.A. v. Republic of Peru*, ICSID Case No. ARB/11/17, Award (9 Jan. 2015), [184]; *Tidewater Inc., Tidewater Investment SRL, Tidewater Caribe, C.A., et al.v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Decision on Jurisdiction (8 Feb. 2013), [184]; *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent's Jurisdictional Objections (1 June 2012), [2.47].

[16] *Mobil Corp. v. Venezuela* (n 15) [204].

[17] Douglas (n 3) 190, 290; UNCTAD (n 6) 18.

[18] *Aguas del Tunari, S.A. v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction (21 Oct. 2005), [330]–[332]; Dolzer & Schreuer, (n 12) 52; Valasek & Dumberry, (n 8) 59.

[19] *Aguas del Tunari v. Bolivia* (n 18) [184]; *Tokio Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction (29 Apr. 2014) [52].

3. SPECIFIC LIMITATIONS ON CORPORATE STRUCTURING

Through (prospective) corporate structuring, various drafting techniques are available to limit treaty shopping.[20] To that end, the most appropriate tools are substantive *ratione personae* requirements (i) and denial of benefits ("DOB") clauses (ii). Separately, the current drafting trends for both mechanisms will be discussed (iii).

3.1 REQUIREMENTS FOR SUBSTANTIVE RATIONE PERSONAE

The investor's nationality is the deciding factor in determining whether they are covered by a particular investment treaty's personal scope of application. In the case of natural persons, nationality continues to be a meaningful criterion that does not change rapidly or frequently.[21] However, for corporate investors, the connection to a particular state is commonly reduced to a trivial formality that can be easily changed.[22] As a result, investment treaties define corporate nationality in various ways, including the place of incorporation, the location of the company's headquarters, the nationality of the controlling shareholders, and the presence of substantial business activities in the purported home state.

Historically, the place of incorporation has been the most frequently used criterion in investment treaties to define corporate nationality.[23] It benefits from being a predictable criterion, which provides a high degree of legal certainty.[24] However, if the place of incorporation is used as the sole criterion for determining corporate nationality, there is considerable room for treaty shopping.[25] It enables multinational corporations to obtain treaty protection simply by diversifying their nationalities and establishing subsidiaries and

[20] Björn Ebert, 'Forum Shopping in International Investment Law: Forum Planning, Forum Enhancement, and Facilitation of procedure: Assessments and Limits' 229 ff (Mohr Siebeck 2017).

[21] Schill (n 7) 199.

[22] Anthony Sinclair, 'The Substance of Nationality Requirements in Investment Treaty Arbitration', 20 ICSID Rev. 357, 362–367 (2005); Douglas (n 3) 316.

[23] Florian Franke, 'Der personelle Anwendungsbereich des internationalen Investitionsschutzrechts' 144 (Nomos 2013).

[24] Rachel Thorn & Jennifer Doucleff, 'Disregarding the Corporate Veil and Denial of Benefits Clauses: Testing Treaty Language and the Concept of Investor', in *The Backlash Against Investment Arbitration. Perceptions and Reality* 3, 7 (Michael Waibel et al. eds, Wolters Kluwer 2010); UNCTAD (n 7) 82 ff.

[25] Jörn Griebel, *Internationales Investitionsschutzrecht* 132 (C.H. BECK 2008); Gus van Harten & Martin Loughlin, 'Investment Treaty Arbitration as a Species of Global Administrative Law', 17 Eur. J. Int'l 121, 138 (2006).

affiliates in various jurisdictions.[26] Under the seat theory, a corporation is considered a national of the state in which it has its central administration or effective management.[27] In *Capital Financial Holdings Luxembourg v Cameroon*, the tribunal determined that a company's seat is its 'actual headquarters,' which can be determined by four factors: the location of the shareholders' general meetings; the location of the board of directors meetings; the location of the company's accounting; and the location of the company's and accounting documents.[28] Taking all of these factors into account, including a seat requirement in an investment treaty, creates an additional barrier to treaty shopping. Economically, it is improbable that businesses would establish their primary administrative headquarters in a state solely to obtain treaty protection.[29] However, there are exceptions: *Capital Financial Holdings versus Cameroon* determined that the investor's formal existence in Luxembourg was abusive due to its abrupt and artificial revival of activities following notification of the dispute.[30] This demonstrates that, while a seat requirement may impose an additional impediment, it does not entirely eliminate treaty shopping.

In *Barcelona Traction*, the International Court of Justice ("ICJ") held that the place of incorporation and the actual seat is the primary criteria for determining corporate nationality under international law.[31] However, some investment treaties go beyond these formal requirements by requiring the corporate investor and its home state to have a particular economic relationship.

One possibility is to include an additional control test that requires arbitral tribunals to determine the nationality of controlling shareholders.[32] Because this criterion is frequently used in lieu of incorporation location, it is easily avoided.[33] Even if the alternative control

[26] Ulrich Klemm, 'Investment Through Third Countries: State Practice and needs of Investors', 24 ICSID Rev. 528, 532 (2009); Panayotis M. Protopsaltis, 'The Challenge of the Barcelona Traction Hypothesis: Barcelona Traction Clauses and Denial of Benefits Clauses in BITs and IIAs', 11 J. World Inv. & Trade 561, 563 (2010).

[27] Jean-François Hébert, 'Issues of Corporate Nationality in Investment Arbitration, in Improving International Investment Agreements' 230, 237 (Armand de Mestral & Céline Lévesque eds, Routledge 2013).

[28] *Capital Financial Holdings Luxembourg S.A. v. Republic of Cameroon*, ICSID Case No. ARB/15/18, Award of the Tribunal (22 June 2017) [237].

[29] Hébert (n 27) 239; Sven Lange, *Denial-of-Benefits-Klauseln in internationalen Schiedsverfahren* 53 (Nomos 2016); Schill (n 6) 222.

[30] *Capital Financial Holdings v. Republic of Cameroon* (n 28) [356], [364 ff].

[31] *Case Concerning the Barcelona Traction, Light and Power Company, Ltd*., International Court of Justice, Judgment (5 Feb. 1970) [70].

[32] Schill (n 7) 222.

[33] Chieh Lee, 'Resolving Nationality Planning Issue Through the Application of the Doctrine of Piercing the Corporate Veil' in *International Investment Arbitration*, 9 Contemp. Asia Arb. J. 87, 98 (2016) .

criterion is applicable, it may be ineffective in preventing undesirable corporate structuring, given the high fungibility of capital today. For example, suppose control is defined primarily in terms of ownership of the company's shares. In that case, access to a particular treaty can easily be obtained by transferring the majority of the company's shares. Additionally, control is frequently challenging to establish, as multinational corporations' shareholders may be of diverse nationalities.[34] As a result, the majority of investment treaties do not use control to define corporate nationality.[35]

Finally, an economic activity requirement excludes shell companies that lack a sufficient economic connection to their home state from the scope of application of the respective investment treaty.[36] Incorporating an economic substance test requires an arbitral tribunal to look beyond an enterprise's legal structure and consider the materiality of its business activities in the ostensible home country.[37] Arguably, this is the most effective explicit limitation, given how frequently shell companies are used for treaty shopping purposes. Artificial commercial transactions often satisfy formal nationality requirements but fail an economic substance test.

3.2 DOB CLAUSES

DOB clauses have the potential to have the same effect as substantive *ratione personae* requirements.[38] Such clauses deny investors who have no real economic ties to the contracting state party in which they have incorporated the benefits of an investment treaty. As a result, a similar effect to that of an economic substance test is achieved.[39] In addition, by

[34] Stanimir Alexandrov, 'The 'Baby Boom' of Treaty-Based Arbitrations and the Jurisdiction of ICSID Tribunals: Shareholders as Investors and Jurisdiction Ratione Temporis', 4 L. & Practice Int'l Courts & Tribunals 19, 37 (2005).

[35] Markus Perkams, 'The Determination of Nationality of Investors in International Investment Agreements (IIAs) – Taking Stock of the Criteria Used in Modern Investment Law', in *The Determination of the Nationality of Investors Under Investment Protection Treaties* 13, 16 (ILA German Branch/Working Group ed., 2011); Ebert (n 22) 176 ff.; John Lee, 'Resolving Concerns of Treaty Shopping in International Investment Arbitration', 6 J. Int'l Dispute Settlement 355, 364 (2015).

[36] See Baumgartner (n 1) 112.

[37] *Limited Liability Company AMTO v. Ukraine*, SCC Case No. 080/2005, Final Award (26 Mar. 2008) [69]. As noted by the tribunal in *NextEra Energy v. Spain*, there is not yet a significant jurisprudence on the concept of 'substantial business activities'. *NextEra Energy Global Holding B.V. et al. v. Spain*, ICSID Case No. ARB/14/11, Decision on Jurisdiction, Liability and Quantum Principles (12 Mar. 2019) [260]; *Gran Colombia Gold Corp. v. Colombia*, ICSID Case No. ARB/18/23, Decision on the Bifurcated Jurisdictional Issue (23 Nov. 2020)[137].

[38] Lee (n 35) 366; Mathew Skinner et al., 'Access and Advantage in Investor- State Arbitration: The Law and Practice of Treaty Shopping', 3 J. World Energy L. & Bus. 260, 271 (2010).

[39] *Caratube Int'l Oil Co. LLP v. Republic of Kazakhstan*, ICSID Case No. ARB/08/12, Award (5 June 2012), [354]; Loukas A. Mistelis & Crina Baltag, 'Denial of Benefits Clauses in Investment Treaty Arbitration', Queen

excluding shell companies from the scope of the applicable investment treaty, DOB clauses may effectively prevent treaty shopping via corporate structuring.[40]

While DOB clauses operate on a case-by-case basis, substantive *ratione personae* requirements apply ex-ante to all investors seeking protection under the relevant investment treaty.[41] As a result, DOB clauses enable the host state to decide on an individual basis, for each investment, whether to extend or deny the treaty's benefits to the protected investor, provided that the clause's specific requirements are met. As a result, the effects of DOB clauses are not automatic but require the denying state to exercise them actively. While there is broad agreement among commentators[42] and in arbitral practise[43] on this point, due to the ambiguity of treaty language, it remains unclear when and how states must exercise their right to deny.

Certain investment treaties expressly require the denying state to notify the investor when exercising the right to deny.[44] Even in the absence of explicit language, some tribunals have interpreted such a notification requirement into the treaty text, stating that the investor must be informed before the state may [exercise its right to deny.[45] By contrast, other tribunals

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Mary School of Law Legal Studies Research Paper no. 293, 1 (2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3300618> accessed 18 Aug 2021; See Yas Banifatemi, 'Taking Into Account Control Under Denial of Benefits Clauses, in Jurisdiction in Investment Treaty Arbitration' 223 (Yas Banifatemi ed., JurisNet 2018).

[40] Lindsay Gastrell & Paul-Jean Le Cannu, 'Procedural Requirements of Denial-of-Benefits Clauses in Investment Treaties: A Review of Arbitral Decisions', 30 ICSID Rev. 78, 81 (2015); Ebert (n 20) 109.

[41] Gastrell and Le Cannu (n 40) 81; Hébert (n 26) 241 f.

[42] Ebert (n 20) 201; Mistelis & Baltag (n 39) 13; see Banifatemi (n 39) 246; Jordan Behlman, 'Out on a Rim: Pacific Rim's Venture Into CAFTA's Denial of Benefits Clause', 45 U. Miami Inter-Am. L. Rev. 397, 422 (2014).

[43] *Khan Resources Inc., Khan Resources B.V., & Cauc Holding Co. Ltd. v. Government of Mongolia*, UNCITRAL, Decision on Jurisdiction (25 July 2012) [419], [421]; *Plama Consortium Ltd. v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction (8 Feb. 2005) [155]–[157]; *Hulley Enterprises Ltd. (Cyprus) v. Russian Federation*, PCA Case No. 2005–03/AA226, UNCITRAL, Interim Award on Jurisdiction and Admissibility (30 Nov. 2009) [455]–[458]; *Yukos Universal Ltd. (Isle of Man) v. Russian Federation*, PCA Case No. 2005–04/AA227, UNCITRAL, Interim Award on Jurisdiction and Admissibility (30 Nov. 2009) [456]–[459]; *Veteran Petroleum Ltd. (Cyprus) v. Russian Federation*, PCA Case No. 2005–05/AA228, UNCITRAL, Interim Award on Jurisdiction and Admissibility (30 Nov. 2009) [512]–[515].

[44] See e.g., Central America-Republic of Korea FTA, Art 9.12(2), which reads '[t]he denying Party shall, to the extent practicable, notify the other Party before denying the benefits under this paragraph'.

[45] *Anatolie Stati, Gabriel Stati, Ascom Group S.A., & Terra Raf Trans Trading Ltd. v. Kazakhstan*, SCC Case No. V 116/2010, Award (19 Dec. 2013) [745]; *Khan Resources v. Mongolia* (n 43) [426]–[429]; *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, ICSID Case No. ARB/14/1, Award (16 May 2018) [234]–[236].

have held that it is sufficient for the denying state to communicate its decision during the arbitration proceeding's jurisdictional stage.[46] Additionally, some arbitral tribunals have determined that DOB clauses only apply prospectively,[47] while others have determined that they apply equally retrospectively.[48] In the first scenario, a host state would be able to deny the benefits of the investment treaty only in future disputes after exercising its right. The second scenario allows for a retroactive denial of investment treaty benefits, even after an investment dispute has arisen.

These distinctions are critical when evaluating DOB clauses as tools for preventing treaty shopping through corporate structuring. Only DOB clauses with a retroactive effect that can be invoked during the arbitration's jurisdictional stage are fully effective for this purpose.[49] Moreover, investors are not required to obtain formal government approval before investing in liberal investment regimes.[50] This means that, in the event of a prior notice requirement coupled with prospective effects,[51] states would be required to monitor all investment projects within their borders before exercising their right to deny.[52] Under such a restrictive reading, DOB clauses would be rendered virtually useless in addressing treaty shopping practices.[53] In sum, DOB clauses primarily serve as flexible tools for states to engage in treaty shopping by incorporating shell companies on an as-needed basis. However, substantive *ratione pers*onae requirements are more effective in the aggregate, given the uncertainty associated with the proper exercise of DOB clauses. Additionally, substantive *ratione personae* requirements provide investors with legal certainty from the start regarding

[46] *Empresa Eléctrica del Ecuador, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/05/9, Award (2 June 2009) [71]; *Ulysseas Inc. v. Ecuador*, UNCITRAL, Interim Award (28 Sept. 2010) [172 ff]; *Guaracachi America, Inc. & Rurelec PLC v. Plurinational State of Bolivia*, PCA Case No. 2011–17, UNCITRAL, Award (31 Jan. 2014) [376].

[47] *Plama v. Bulgaria* (n 42) [162]; *Masdar Solar v. Spain* (n 44) [239]; *Liman Caspian Oil B.V. & NCL Dutch Investment B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB/07/14, Award (22 June 2010) [225 ff].

[48] *Ulysseas v. Ecuador* (n 46) [173]; *Guaracachi v. Bolivia* (n 46) [376].

[49] *Baumgartner* (n 1) 117; *Douglas* (n 3) 470–472; *Hébert* (n 27) 244; *Sinclair* (n 22) 385; Tania Voon et al., 'Legal Responses to Corporate Manoeuvring in International Investment Arbitration', 5 J. Int'l Dispute Settlement 41, 54 ff (2014).

[50] Hébert (n 27) 244.

[51] See Banifatemi (n 39) 246–257.

[52] *Pac Rim Cayman v. El Salvador* (n 15) [3], [6]; Ebert (n 20) 207–209; Mark Feldman, 'Setting Limits on Corporate Nationality Planning in Investment Treaty Arbitration', 27 ICSID Rev. – Foreign Inv. L. J. 281, 301 (2012).

[53] Thorn & Doucleff (n 24) 26.

their eligibility for a particular treaty. By contrast, the host state determines whether a DOB clause is invoked or not in each case.

3.2.1 Current Trends in the Drafting Of Treaties

In current treaty drafting practice, states have increasingly included explicit restrictions on corporate structuring in investment treaties. In most investment treaties signed between 2018 and March 2021,[54] the requirement of substantial economic activities in the purported home state is included in the definition of corporate nationality.[55] In comparison to 2013, when approximately 40% of all investment treaties used the incorporation test as the sole criterion,[56] recent years have seen a marked shift in policy. Even the Netherlands[57] opted for a definition of corporate nationality based on substantive economic criteria in its 2019 Model Bilateral Investment Treaty ("BIT").[58] Additionally, in most newly signed investment treaties, contracting states negotiated DOB clauses targeting shell companies owned or controlled by investors from a third country or the host state.[59] By incorporating companies with the host state's nationality, these clauses also serve as an effective mechanism to combat the internationalisation of domestic disputes via the practice of 'round-tripping.'[60]

[54] UNCTAD, <https://investmentpolicy.unctad.org/international-investment-agreements> accessed 18 Aug. 2021.

[55] See e.g., Morocco-Japan BIT (2020), Art 1(b)(ii); EU-Vietnam Investment Protection Agreement (2019), Art 1.2(c); Australia-Uruguay BIT (2019), Art 1(a); Cabo Verde- Hungary BIT (2019), Art 1(2)(b); Australia-Hong Kong BIT (2019), Art 1(a); USMCA (2018), Art 14.1; United Arab Emirates-Uruguay BIT (2018), Art 1(b); EU-Singapore Investment Protection Agreement (2018), Art 1(5); Belarus-India BIT (2018), Art 1.6(b); Cambodia-Turkey BIT (2018), Art 1(2)(b); Belarus-Turkey BIT (2018).

[56] Franke (n 23) 144.

[57] See in general Roos Van Os & Roeline Knottnerus, 'Dutch Bilateral Investment Treaties, a Gateway to 'Treaty Shopping' for Investment Protection by Multinational Companies', SOMO 2011, <https://bibalex.org/baifa/Attachment/Documents/343802.pdf> accessed 18 Aug 2021.

[58] 2019 Netherlands Model BIT, Art 1(b)(ii) and (iii).

[59] Out of the forty-two investment treaties consulted by the author, forty-two contained a DOB clause. Examples are: Morocco-Japan BIT (2020), Art 20(1)(b); Armenia-Singapore BIT (2019), Art 3.24; Hong Kong-United Arab Emirates BIT (2019), Art 11(1)(b); Australia-Uruguay BIT (2019), Art 11(1)(a)(i); USMCA (2018), Art 14.14(a); United Arab Emirates-Uruguay BIT (2018), Art 17(2); Armenia-Korea BIT (2018), Art 14(2); Kazakhstan-Singapore BIT (2018), Art 18; Canada-Moldova BIT (2018), Art 18(1); Japan-United Arab Emirates (2018), Art 25(1); Central America-Republic of Korea FTA (2018), Art 9.12(2); Belarus-Turkey BIT (2018), Art 11(1); Armenia-Japan BIT (2018), Art 22(2).

[60] The term 'round-tripping' refers to the practice of transferring funds to a foreign state and then redirecting those funds into the investor's home state, internationalizing a dispute that is domestic in terms of economic substance. See M. Sornarajah, *The International Law on Foreign Investment* 328 (3rd ed., CUP 2010).

Additionally, several recent DOB clauses address the uncertainty surrounding their exercise by explicitly stating that they may be invoked at any time.[61] This drafting technique enables states to exercise their right to withhold benefits even after an investment dispute has arisen, with retrospective effect.

Notably, several recently signed investment treaties incorporate substantive *ratione personae* requirements alongside DOB clauses.[62] One example is the Comprehensive Economic and Trade Agreement ("CETA"), which requires substantial business activities or control to qualify as protected investors under Article 8.1 while also providing a right to deny treaty benefits under Article 8.16(a) if the enterprise is owned or controlled by a third-country investor. This dual restriction reflects a firm policy stance against treaty shopping. However, most enterprises managed or owned by a third-country investor will have been weeded out during the *ratione personae* jurisdictional requirements examination. As a result, the DOB clause in Article 8.16(a) CETA is likely to be infrequently invoked.[63] A DOB clause is more useful in investment treaties with a broad definition of protected investors, and mainly when the sole criterion for defining corporate nationality is incorporation.[64] These new trends in treaty drafting reflect states' desire to curtail treaty shopping through corporate structuring. By introducing substantive *ratione personae* requirements and DOB clauses, many states have demonstrated a strong interest in excluding shell companies from investment treaty protection. Nevertheless, in comparison to the new generation of investment treaties, most older treaties lack specific provisions addressing corporate structuring. Moreover, numerous arbitral tribunals have discussed the existence of additional implicit restrictions on the practice of investment treaty shopping in relation to these treaties.[65]

[61] See e.g., Hong Kong-United Arab Emirates BIT (2018), Art 11(1); Australia-Uruguay BIT (2018), Art 11(1)(a); Australia-Hong Kong BIT (2018), Art 14; Belarus-India BIT (2018), Art 35(i).

[62] UNCTAD (n 54).

[63] Celine Lévesque, 'Article 8.16, Denial of Benefits, in CETA Investment Law, Article-by- Article Commentary' (Marc Bungenberg & August Reinisch eds, forthcoming).

[64] Lange (n 29) 60 ff.

[65] *ADC Affiliate Ltd. & ADC & ADMC Management Ltd. v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award (2 Oct. 2006); *Tokio Tokelés v. Ukraine* (n 18); *Philip Morris Asia Ltd. v. Commonwealth of Australia*, PCA Case No. 2012–12, UNCITRAL, Award on Jurisdiction and Admissibility (17 Dec. 2015).

4. IMPLICIT LIMITATIONS OF CORPORATE STRUCTURING:

Without explicit limitations in the applicable investment treaty, respondent host states frequently assert that certain treaty shopping practices are implicitly restricted.[66] Various propositions have been advanced in this context, including implicit *ratione personae* requirements in the form of a 'genuine connection' or 'origin of capital' test (i) and the application of the doctrine of abuse of process (ii).

4.1 IMPLICIT REQUIREMENTS FOR RATIONE PERSONAE

Implicit *ratione personae* requirements are those that cannot be determined directly from the text of the treaty. One possible implicit requirement is the 'genuine connection' test, which has been developed in the context of natural person nationality under customary international law. In *ADC Affiliate versus Hungary*,[67] the respondent host state contended that, despite meeting the *ratione personae* requirements, the claimant was not a 'real' investor due to their lack of genuine ties to the purported home state.[68] The arbitral tribunal disagreed, concluding that the incorporation test outlined in the applicable investment treaty constituted *lex specialis*, superseding any principles of customary international law.[69] This conclusion is consistent with the *Nottebohm case*, in which the ICJ developed the 'genuine connection' test for natural persons in the context of diplomatic protection.[70] One could argue that the test is inadequate for defining the nationality of multinational corporations with intricate corporate structures.

The 'origin of capital' test is another possible implicit *ratione personae* requirement. Prof. Weil popularised this test in his Dissenting Opinion in *Tokio Tokelés v. Ukraine*.[71] He contended that the origin of capital was an implicit requirement of nationality, ensuring that only international, not domestic, disputes are brought under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("ICSID Convention"),

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[66] *Tokio Tokelés v. Ukraine* (n 19) [21]; *ADC Affiliate v. Hungary* (n 65) [335 ff.]; *Pac Rim Cayman v. El Salvador* (n 15) [2.16]–[2.20].

[67] *ADC Affiliate v. Hungary* (n 65).

[68] ibid [335 ff].

[69] ibid [357]. Similarly, *Saluka Investments B.V. v. Czech Republic*, UNCITRAL, Partial Award (17 Mar. 2006) [240 ff].

[70] *Nottebohm Case (Liechtenstein v. Guatemala)*, International Court of Justice, Judgment (6 Apr. 1955) [23]; see also *KT Asia Investment Group B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB/09/8, Award (17 Oct. 2013) [127].

[71] *Tokio Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Dissenting Opinion (29 Apr. 2004).

in accordance with the Convention's object and purpose.[72] According to Prof. Weil, ICSID tribunals would have jurisdiction over disputes involving both foreign and domestic capital. This proposition is equally problematic, given that public international law provides no legal basis for an 'origin of capital' requirement.[73] As a result, both propositions have been consistently rejected in investment treaty tribunals' arbitral practise.[74] One could argue that acknowledgement of implicit *ratione personae*.

The treaty text's requirements are inconsistent with the customary international law rules governing treaty interpretation codified in Article 31(1) of the Vienna Convention on the Law of Treaties ("VCLT"). Article 31(1) of the VCLT requires that treaty terms be interpreted in good faith and in accordance with their ordinary meaning. A reading of an incorporation test that incorporates additional *ratione personae* requirements would violate the term's ordinary meaning.[75] States may include substantive *ratione personae* requirements or DOB clauses in their treaties at their discretion.[76] If they opt out, this absence of express limitations must be interpreted as a broad definition of the corporate nationality preference. Otherwise, the use of explicit constraints would be meaningless, as their presence or absence would result in the same result.[77] Furthermore, states do not always agree on the same nationality test in all of their investment treaties. They may choose one or more tests in each treaty based on their respective negotiating positions.[78] As a result, the treaty text is the most reliable source of information about the contracting parties' intentions.

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[72] ibid [20].

[73] See Campbell McLachlan et al., *International Investment Arbitration: Substantive Principles* 193 (2d ed., OUP 2017).

[74] *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award (22 Sept. 2014), [252]; *KT Asia Investment v. Kazakhstan* (n 69) [129]; *Rumeli Telekom A.S. & Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award (29 July 2008) [326]; *The Rompetrol Group N. V. v. Romani*a, ICSID Case No. ARB/06/3, Decision on Respondent's Preliminary Objections on Jurisdiction and Admissibility (18 Apr. 2008) [83]; *Saluka v. Czech Republic* (n 69) [240 ff]; *Waste Management, Inc. v. United Mexican States,* (No. 2), ICSID Case No. ARB(AF)/00/3, Award (30 Apr. 2004) [85].

[75] *KT Asia Investment v. Kazakhstan* (n 70) [116]; *Hulley Enterprises Ltd. v. Russian Federation* (n 43) [415]. See Anastasios Gourgourinis, 'The Distinction Between Interpretation and Application of Norms in International Adjudication', 2 J. Int'l Dispute Settlement 31, 44 (2011).

[76] Douglas (n 3) 317; McLachlan et al. (n 73) 158.

[77] Douglas (n 3) 318.

[78] See *KT Asia Investment v. Kazakhstan* (n 70) [123].

The only interpretive rule that could provide a legal basis for recognising implicit *ratione personae* requirements is Article 31(1) VCLT's object and purpose of investment treaties.[79] One could argue that treaty shopping is incompatible with the concept of reciprocity or, in the case of 'round-tripping,' with the international nature of protected investments. However, as previously stated, the contracting parties' desired degree of reciprocity is not always the same. Additionally, a legal argument based solely on a teleological interpretation is relatively weak and difficult to reconcile with the other treaty interpretation rules outlined in Article 31(1) VCLT.

A subjective approach based solely on the contracting parties' presumed intentions creates legal uncertainty and runs the risk of overlooking the actual intent expressed in the treaty text.[80] In other words, even if the parties were unaware of the unintended consequences of broad definitions of protected investors and investments, arbitral tribunals are not empowered to remedy these treaty defects in violation of the express text.[81]

However, this does not mean that the treaty text is the sole standard for evaluating potential restrictions on corporate structuring. International investment law is not an insular body of law.[82] Other rules or principles of general international law may become relevant, provided they can be deduced from the applicable law and do not conflict with the treaty's express provisions. For example, implicit *ratione personae* requirements such as those discussed previously are not based on applicable law. In comparison, the abuse of process doctrine developed by a number of arbitral tribunals has been recognised as a general principle of law that can be used to curb treaty shopping.

[79] *Tokio Tokelés v. Ukraine*, Dissenting Opinion (n 70) [19 ff]; Markus Burgstaller, 'Nationality of Corporate Investors and International Claims Against the Investor's own State', 7 J. World Investment & Trade 857, 874 (2006); Franke (n 23) 164; M. Sornarajah, *Good Faith, Corporate Nationality and Denial of Benefits, in Good Faith and International Economic Law* 117, 12 ff. (Andrew Mitchell et al. eds, OUP 2015).

[80] *Wintershall Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/04/14, Award (8 Dec. 2008) [78]; Lars Markert, 'International Investment Law and Treaty Interpretation – Problems, Particularities and Possible Trends', in *International Investment Law and General International Law: From Clinical Isolation to Systemic Integration?* 53, 57 (Rainer Hofmann & Christian Tams eds, Nomos 2011).

[81] Valasek & Dumberry (n 8) 59.

[82] Campbell McLachlan, 'Investment Treaties and General International Law', 57 Int'l & Comp. L. Q. 361, 369 ff. (2008); Bruno Simma & Dirk Pulkowski, 'Two Worlds, But Not Apart: International Investment Law and General International Law', in *International Investment Law: A Handbook* 361 (Marc Bungenberg et al. eds, Nomos 2015).

4.2 ABUSE OF THE PROCESS DOCTRINE

4.2.1 Arbitration under Investment Treaties

The doctrine of abuse of process is an outgrowth of the principle of good faith.[83] According to this doctrine, a disputing party is prohibited from misusing procedural rights to obtain an illegitimate advantage.[84] Because the doctrine is well-established in both civil and common law jurisdictions, it is a general principle of law within the meaning of Article 38(1)(c) of the ICJ Statute.[85] Several international courts and tribunals have recognised it as a general principle of law or as customary international law under public international law.[86] The doctrine is equally applicable to disputes arising out of investment treaties.[87] Arbitral tribunals must apply general international law when interpreting investment treaties in accordance with the VCLT's Article 31(3) (c) principle of systemic integration.[88]

As a result, unlike implicit *ratione personae* requirements, the abuse of process doctrine is based on applicable law and can be used to curtail abusive investment treaty shopping in principle. At the same time, due to the high degree of discretion required in its application, the abuse of process doctrine should be reserved for exceptional circumstances.[89] To limit the high degree of discretion, the doctrine's applicability in the case of abusive investment treaty shopping should be defined as precisely as possible.

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[83] Robert Kolb, 'General Principles of Procedural Law', in *The Statute of the International Court of Justice: A Commentary* 794, 830 (Andreas Zimmermann et al. eds, OUP 2006); Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* 122 ff. (CUP 1953). The concept of abuse of process is a special application of the abuse of right doctrine. Whereas the latter refers to the abuse of any rights, the former is confined to the abuse of procedural rights. See Charles Kotuby & Luke Sobota, *General Principles of Law and International Due Process: Principles and Norms Applicable in Transnational Disputes* 110 (OUP 2017).

[84] Kolb (n 83) 830.

[85] Article 38(1)(c) of the Statute of the ICJ has been recognized to constitute an expression of the formal sources of public international law. See Alain Pellet, 'Article 38', in *The Statute of the International Court of Justice: A Commentary* 677, 700–703 (Andreas Zimmermann et al eds, OUP 2006).

[86] United States – Import Prohibition of Certain Shrimp and Shrimp Products, Appellate Body Report, WTO Doc WT/DS58/AB/R (6 Nov. 1998) [158]; *Fisheries Case (United Kingdom v. Norway)*, ICJ, Judgment (18 Dec. 1951) [142]; *Case Concerning Certain German Interests in Polish Upper Silesia* (The Merits), PCIJ, Judgment (25 May 1926) [30]. General principles of law can develop into customary international law over time. See Tarcisio Gazzini, 'General Principles of Law in the Field of Foreign Investment', 10 J. World Investment & Trade 103, 105 (2009).

[87] See *Abaclat et al. v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility (4 Aug. 2011) [646].

[88] See McLachlan (n 82) 369–372.

[89] Andreas Ziegler & Jorun Baumgartner, 'Good Faith as a General Principle of (International) Law', in *Good Faith and International Economic Law* 9, 36 (Andrew Mitchell et al. eds, OUP 2015).

4.2.2 Abusive Investment Treaties Shopping

Numerous arbitral tribunals have held that the abuse of process doctrine applies in retroactive corporate structuring cases. In contrast to prospective treaty shopping, these cases involve restructuring following the occurrence or emergence of a specific dispute. The pre-existence or foreseeability of a dispute is used to demonstrate that the investor structured their business to obtain treaty protection for a particular dispute. Once the respondent host state establishes a prima facie case of foreseeability, the investor has the opportunity to rebut the initial presumption of abuse by establishing that the restructuring was motivated by legitimate business considerations.[90] This approach is consistent with the notion of treaty shopping's general legitimacy.

International investment law recognises multinational corporations' complex corporate structures. What the abuse of process doctrine sanctions are fictitious transactions designed to manipulate the investment protection regime to exploit loopholes created by broad definitions of protected investors and investments.

As the tribunal noted in *Philipp Morris versus Australia*, the arbitral practice-developed criteria for determining abusive treaty shopping are broadly analogous.[91] As a result, arbitral tribunals decide whether the restructuring occurred after a dispute arose or became foreseeable.[92] In a subsequent step, it is determined whether the restructuring was carried out to obtain access to the protection provided by the relevant investment treaty, including its dispute settlement clause, in connection with a particular dispute.[93] However, apart from these two broadly analogous criteria, the precise parameters for establishing abusive treaty shopping remain unknown.[94]

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[90] Ebert (n 20) 315–317.

[91] *Philip Morris v. Australia* (n 65) [554].

[92] *Lao Holdings N. V. v. Lao People's Democratic Republic*, ICSID Case No. ARB(AF)/12/6, Decision on Jurisdiction (21 Feb. 2014) [83]; *Levy & Gremcitel v. Peru* (n 14) [185]; *Pac Rim Cayman v. El Salvador* (n 15) [2.99]; *Tidewater v. Venezuela* (n 15) [193].

[93] *Cementownia 'Nowa Huta' S.A. v. Republic of Turkey*, ICSID Case No. ARB(AF)/06/02, Award (17 Sept. 2009) [154]; *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award (15 Apr. 2009) [93]; *Pac Rim Cayman v. El Salvador* (n 15) [2.42].

[94] Ksenia Polonskaya, 'Frivolous and Abuse of Process Claims in Investor-State Arbitration: Can Rules on Cost Allocation Become Solution?', 11 J. Int'l Dispute Settlement 589, 597 (2020); Yuka Fukunaga, 'Abuse of Process Under International Law and Investment Arbitration', 33 ICSID Rev. 181, 182 (2018); Duncan Watson & Tom Brebner, 'Nationality Planning and Abuse of Process: A Coherent Framework', 33 ICSID Rev. 302, 320 ff. (2018).

One unresolved issue is whether the abuse of process doctrine applies only to foreseeable disputes or pre-existing ones. Certain tribunals made a distinction between lack of jurisdiction *ratione temporis* and the doctrine of abuse of process.[95] Under this dichotomy, a tribunal lacks *ratione temporis* jurisdiction where an alleged treaty violation occurred before the restructuring.[96] By contrast, if a dispute were foreseen at the time of the restructuring, the claim would be barred by the abuse of process doctrine. The underlying rationale for this distinction is that jurisdictional issues are resolved prior to admissibility issues in arbitral proceedings.[97] As a result, if a tribunal lacks jurisdiction *ratione temporis*, there is no need to address inadmissibility issues. However, some tribunals investigate the existence of an abuse in the case of pre-existing disputes.[98]

Another inconsistency exists with regard to the foreseeability test's standard of proof. While the tribunals in *Levy & Gremcitel versus Peru* and *Pac Rim versus El Salvador* determined that a 'specific dispute must be foreseeable as a very high probability,'[99] the tribunal in *Philip Morris versus Australia* required only a 'reasonable prospect... that a measure that could result in a treaty breach will materialise'.[100] However, these approaches have in common that they place a premium on the timing of corporate structuring to deduce the investor's intent from objective facts.[101]

However, different standards have been applied in relation to the investor's intent. Thus, for example, while the tribunal in *Cementownia versus Turkey* set a high bar, requiring that an investment be made solely for the purpose of gaining access to international jurisdiction,[102]

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[95] *Levy & Gremcitel v. Peru* (n 15) [182]; *Pac Rim Cayman v. El Salvador* (n 15) [2.104]; *Philip Morris v. Australia* (n 65) [529].

[96] See Jorun Baumgartner, 'The Significance of the Notion of Dispute and Its Foreseeability in an Investment Claim Involving a Corporate Restructuring', 18 J. World Inv. & Trade 201 (2017); see also Noah Rubins & Ben Love, 'Ratione Temporis', in *International Investment Law: A Handbook* 481, 488–490 (Marc Bungenberg et al. eds, Nomos 2015).

[97] Eric De Brabandere, 'Good Faith, Abuse of Process and the Initiation of Investment Treaty Claims', 3 J. Int'l Dispute Settlement 609, 613 (2012).

[98] See *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award (15 Apr. 2009) [144]; *Mobil Corp. v. Venezuela* (n 15) [205]; *Transglobal Green Energy, LLC & Transglobal Green Energy de Panama, S.A. v. Republic of Panama*, ICSID Case No. ARB/13/28, Award (2 June 2016) [118]; *Tidewater v. Venezuela* (n 15) [184].

[99] *Levy & Gremcitel v. Peru* (n 15) [185]; *Pac Rim v. El Salvador* (n 15) [2.99].

[100] *Philip Morris v. Australia* (n 65) [554]. The same approach was adopted by the tribunal in *Tidewater v. Venezuela* (n 15) [193].

[101] Baumgartner (n 96) 212; Voon et al. (n 49) 65; Watson & Brebner (n 94) 320. See Ebert (n 20) 314.

[102] *Cementownia v. Turkey* (n 93) [154]. See also *Phoenix v. Czech Republic* (n 92) [94].

other tribunals required only that the restructuring's 'principal'[103] or 'main'[104] purpose was to gain access to the relevant treaty's dispute settlement clause.

In conclusion, while the fundamental elements of 'foreseeability' and 'abusive intent' have gained widespread acceptance in arbitral practice, there are still some inconsistencies that future arbitral tribunals will need to address.[105] One way to increase legal certainty is to codify the abuse of process doctrine and its associated criteria. This is becoming more prevalent in recent investment treaties.

4.2.3 Codification of the Doctrine of Process Abuse

The doctrine of abuse of process is becoming more codified in the new generation of investment treaties. This trend can be seen, for example, in the investment chapters of several of the European Union's ("EU") negotiated economic partnership agreements. For instance, Article 3.27(2) of the EU-Vietnam Investment Protection Agreement broadly references the doctrine of abuse of process. Additionally, Article 3.47 contains an 'anti-circumvention' provision[106] that requires an arbitral tribunal to decline jurisdiction if the dispute arose or was foreseeable on a high probability basis.

The 2019 Netherlands Model BIT codifies the abuse of process doctrine through a DOB clause that refers specifically to corporate structuring undertaken with the primary objective of obtaining treaty protection in light of pre-existing or foreseeable disputes.[107] The same approach can be seen in the recent United Arab Emirates-Uruguay Bilateral Investment Treaty[108] as well as the Belarus-India Bilateral Investment Treaty.[109] As a result, the trend toward the codification of the abuse of process doctrine is not limited to the EU but extends to countries with various ideological backgrounds. This trend, one could argue, reflects states' widespread approval of the arbitral practice developed in recent years. Simultaneously, the

[103] *Philip Morris v. Australia* (n 65) [587].

[104] *Pac Rim v. El Salvador* (n 15) [2.42].

[105] Fukunaga (n 94) 182–185; Voon et al. (n 49) 67.

[106] Further examples can be found in the economic partnership agreements recently negotiated by the EU. For instance, Art 3.7(5) of the EU-Singapore Investment Protection Agreement addresses abusive treaty shopping. The EU-Mexico Investment Protection Agreement refers to the notion of abuse of process in s. X, Art. 2(3) and incorporates an 'anti-circumvention' clause in s. X, Art 16; CETA incorporates the abuse of process doctrine in Art 8.18(3).

[107] 2019 Netherlands Model BIT, Art 16(3).

[108] United Arab Emirates-Uruguay BIT, Art 17(1).

[109] Belarus-India BIT, Art 35(ii). In addition, there is a separate reference to 'abuse of process' in Art 13.3. Both provisions can equally be found in the 2015 India Model BIT.

aforementioned provisions specify whether they apply to pre-existing and foreseeable disputes. Additionally, they define the applicable standard of proof, resolving previous case law inconsistencies.

However, states have addressed treaty shopping not only through retrospective structuring but also through codifying the abuse of process doctrine. As discussed previously, newly signed investment treaties indicate a more expansive trend toward excluding all shell companies from their scope of application regardless of the existence of an abuse. Investors will gain direct standing under the majority of new investment treaties only if they engage in legitimate economic activities in the purported home state. This new drafting trend may diminish the importance of the abuse of process doctrine in relation to corporate structuring. Arbitral tribunals are not required to consider the existence of an abuse if it can be established directly that a company engages in no significant economic activity in the relevant home country.

5. WHETHER THE MEASURES UNDERTAKEN ARE CURBING TREATY SHOPPING?

As previously stated, treaty shopping has been deemed acceptable as long as the applicable investment treaty permits it, except for (abusive) retrospective corporate structuring. However, states have made a concerted effort in recent years to exclude certain corporate structures from the protection afforded by newly signed investment treaties. As a result, the recent trend in treaties indicates a strong policy preference against granting standing to shell companies. These efforts are bolstered by arbitral tribunals applying the abuse of process doctrine to cases involving retrospective corporate reorganisation. While both approaches may limit investors' ability to engage in corporate structuring to obtain treaty protection to a certain extent, they are ultimately insufficient to achieve the desired effect.

Restrictive treaty language on its own is insufficient to prevent abusive corporate structuring. As a result, investors may continue to opt for older investment treaties that include broad definitions of protected investors and investments, do not include a DOB clause, and do not include an anti-circumvention provision. Moreover, the fact that recent investment treaties include mechanisms to prevent treaty shopping may even serve as an incentive for investors to avoid those treaties entirely and instead opt for older ones. In theory, a single investment treaty defining protected investors broadly combined with an effective treaty shopping strategy would be sufficient to undermine states' recent efforts.[110] As a result, it becomes

[110] Fabian S. Eichberger, 'Die Grenzen der Zulässigkeit des 'nationality plannings' im Investitionsschutzrecht', 58 Archiv des Völkerrechts 307, 335 (2020).

clear that treaty shopping is a systemic issue that cannot be resolved in a piecemeal fashion.[111]

As a result, investment tribunals will continue to play a minor role in mitigating the effects of treaty shopping.[112] However, as developed in recent years, the abuse of process doctrine addresses only the most egregious forms of treaty shopping inconsistently. This is contrary to states' expressed intentions in recent investment treaties. The manner in which those treaties were drafted indicates that states do not intend to address retrospective corporate structuring alone but rather to impose stricter reciprocity requirements to prevent all manner of 'free riding' investors. If this is the intention of states, then the abuse of process doctrine is equally inadequate to address the issues raised by the numerous investment treaties that continue to lack explicit limitations on corporate structuring.

As a result, only a multilateral instrument ratified by a large number of states can provide a truly systemic solution. Indeed, by harmonising investment protection standards through a multilateral substantive framework, the need and incentive for treaty shopping would be eliminated entirely.[113] While there is currently no political will to advance such a common substantive instrument, states are presently deliberating at UNCITRAL on a multilateral procedural instrument on ISDS reform. Two models applicable to existing investment treaties are considered in this context to integrate the various reform options. Additionally, one of these models could be used to develop a broad-reaching, systemic solution to undesirable treaty shopping.

The first model is based on the Mauritius Transparency Convention,[114] and it entails incorporating certain standards into existing investment treaties via a single multilateral instrument.[115] Using this approach, states can agree on an economic substance test, a DOB clause, or an anti-circumvention provision that is then incorporated into existing treaties

[111] About the ineffectiveness of piecemeal reforms in international investment law, see Stephan Schill, 'Reforming Investor-Dispute Settlement: A (Comparative and International) Constitutional Framework', 20 J. Int'l Econ. L. 649, 652 (2017).

[112] In addition, arbitral tribunals will have to interpret the explicit limitations introduced in recently signed investment treaties, including the rather recent phenomenon of anti-circumvention clauses.

[113] Ebert (n 19) 476.

[114] United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (New York 2014).

[115] UNCITRAL, 'Possible Reform of Investor-State Dispute Settlement (ISDS) – Multilateral Instrument on ISDS Reform', Working Group III, A/CN.9/WG.III/WP.194, 16 Jan 2020, <https://undocs.org/en/A/CN.9/WG.III/WP.194> accessed 18 Aug 2021, 26–28.

without the need to renegotiate each individual instrument.[116] The second model is based on the OECD Multilateral Convention on Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting, which was adopted in 2016.[117] This model does not amend existing treaties; instead, it includes a number of optional provisions that contracting parties may choose to incorporate into their existing investment treaties. Thus, this approach would allow states to choose among the various mechanisms discussed in this article to curb treaty shopping based on their individual policy preferences.

6. CONCLUSION

States are sovereign over the treaties they enter into. As a result, they are free to include explicit prohibitions on treaty shopping in their investment agreements. The absence or presence of these restrictions reflects a policy preference for a more liberal or more restrictive approach to investment protection. This policy choice cannot be supplanted by arbitral tribunals' implicit *ratione personae* requirements incorporated into investment treaties. While there is no legal basis for implicit *ratione personae* requirements under public international law, the abuse of process doctrine has proven to be an effective tool for sanctioning the most egregious forms of treaty shopping derived from general international law. Moreover, states have confirmed the applicability of the abuse of process doctrine, as developed in arbitral practice, in recent investment treaties.[118]

However, recent investment treaties have taken this a step further by excluding all companies with no economic ties to the purported home state from their scope of application. This new drafting trend increases legal certainty and predictability but does not preclude artificial transactions from obtaining treaty protection on their own. The concurrent existence of prior investment treaties incentivises investors to choose those treaties and structure their investments accordingly.

While the use of process doctrine as an implicit constraint can partially offset the effects of retrospective corporate structuring, only a concerted multilateral effort by states can

[116] The abuse of process doctrine is currently being discussed at UNCITRAL in the context of multiple arbitral proceedings. See UNCITRAL, 'Possible Reform of Investor- State Dispute Settlement (ISDS) – Multiple Proceedings and Counterclaims', Working Group III, A/CN.9/WG.III/WP.193, 22 Jan. 2020, <https://undocs.org/en/A/CN.9/WG.III/WP.193> accessed 18 Aug. 2021, 24. See also John David Branson, 'The Abuse of Process Doctrine Extended: A Tool for Right Thinking People in International Arbitration', 38 J. Int'l Arb. 187 ff. (2021).

[117] UNCITRAL (n 114) 29 ff.

[118] See Charles Brower & Stephan Schill, 'Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?' 9 Chi. J. Int'l L. 471, 496 (2009).

effectively curb treaty shopping. The two models under consideration by UNCITRAL for reforming existing investment treaties can serve as a starting point for such a discussion. It is critical to address these issues at the multilateral level, as they indirectly determine the success of any reform effort (multilateral or bilateral).[119] Any attempt to rebalance investment protection standards will be successful only if treaty shopping becomes a primary focus of the multilateral reform process.

[119] García Olmedo (n 3) 360.

INTERPRETATION OF ARBITRATION AGREEMENTS: ASCERTAINING THE COMMON INTENTION TO ARBITRATE IN INTERNATIONAL COMMERCIAL ARBITRATION

- *Avani Laad*[*]

ABSTRACT

International Commercial Arbitration is a private form of dispute resolution arising out of a commercial contract between parties from different jurisdictions. The principle of party autonomy is the cornerstone of International Commercial Arbitration and allows the parties to have the liberty to lay down their own procedure as well as to determine the laws that would govern their disputes. Every legislation, both international and domestic, relies on the determination of the intention of the parties for the commencement of arbitration. While arbitration agreements entered into by the parties are universally accepted as an objective manifestation of the express intention of parties to arbitrate, there are many cases where the existence or the formation of the arbitration agreement itself is in question. How then, is something as elusive as the implicit intention of the parties to arbitrate inferred? Thus, this paper attempts to examine and critically analyze the different interpretative trends used by Courts and Tribunals to infer an agreement to arbitrate and the issues associated therewith, keeping in mind the unique nature of an arbitration agreement. The objective of this paper is to examine the principles, approaches and factors relied upon by Courts and Tribunals to presume the intention of the parties where it is not unambiguously demonstrable.

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1. INTRODUCTION

The consent of the parties is imperative for the commencement of International Commercial Arbitration. It is but the manifestation of their intentions, and very often both the words consent and intention are used interchangeably to describe this mutual will of the parties to resolve their disputes through arbitration. The intent of the parties is the "fundamental element" of arbitration[1] and can be of two types – express (actual) or presumed.

The New York Convention[2] and the UNCITRAL Model Law[3] both lay down the existence of an "agreement to arbitrate" as an important prerequisite for the commencement of arbitration. This "agreement to arbitrate" reflects the undertaking of the parties to refer their disputes to arbitration, and it lays down certain objective requirements that would manifest the declared intention of the parties. However, there are many cases where the formation of an arbitration agreement is disputed on account of lack of mutual consent of the parties and where the establishment of intention becomes necessary.[4] In such cases, the intention of the parties to arbitrate is not obvious and would have to be presumed by resorting to subjective means. Thus, the Courts and Tribunals presume the probable intention of the parties by applying different principles of construction and approaches to analyze both the text as well as the context - wording as well as conduct.

The instant paper is divided into five parts. The first part makes a distinction between express and presumed intent vis-à-vis an arbitration agreement, under the UNCITRAL Model Law and New York Convention. The second part examines the interpretation of the wording of an arbitration agreement, or the "text", for ascertaining intention of the parties. The third part then analyzes the relevance of pro or anti-arbitration approaches in interpreting this text of an arbitration agreement. Moreover, the fourth part focuses on the role and prevalence of the conduct of the parties, or the "context", in determining intention. Lastly, the fifth part summarizes the observations made and proposes recommendations in light of the same.

[1] Janet A. Rosen, 'Arbitration Under Private International Law: The Doctrines of Separability and Competence de la Competence', (1993)17 Fordham Int'l L.J. 599.

[2] Convention on the Recognition and Enforcement of Foreign Arbitral Awards (June 10, 1958) 21 U.S.T. 2517, 330 U.N.T.S. 3 (New York Convention), art II.

[3] UNCITRAL Model Law on International Commercial Arbitration, 1958, art 7.

[4] Gary B. Born, *International Commercial Arbitration* (2nd edn., Kluwer Law International 2014) 742.

2. ARBITRATION AGREEMENT AND INTENTION

An arbitration agreement is essentially an agreement between the parties that they have undertaken to refer some or all of their disputes to arbitration. It displays both contractual and jurisdictional characteristics.[5] The contractual aspect is by virtue of the 'agreement' that the parties undertake and which binds them to it. The jurisdictional aspect is by virtue of conferment of jurisdiction to an arbitral entity for dispute resolution as opposed to Courts. An arbitration is also sometimes addressed to constitute of a positive and negative obligation, - the positive obligation being the reference of disputes to Tribunals and the negative obligation being the non-subjection of the same to Courts.[6]

Both the New York Convention and the UNCITRAL Model Law include provisions detailing the constitution of an 'arbitration agreement'.[7] A perusal of those provisions indicates that by referring to an 'undertaking to arbitrate' it alludes to the consensual nature of arbitration and recognizes the consent of the parties as a cornerstone for arbitration. Further, it lays down certain objective methods that can be used to manifest an express consent to arbitrate or the intention of parties to arbitrate. However, the very requirement of an 'undertaking to arbitrate' displays the subjective characteristic of an arbitration agreement as it might not always be unambiguously demonstrable through objective means alone in certain cases.

For example, a signature is used as the most common means to signify assent to arbitration agreements and lucidly demonstrates the objective or express intention of the parties to abide by the provisions they have signed.[8] It is also regarded as the customary execution of an agreement to arbitrate.[9] However, in many cases, the signed documents are such that they do not clearly signify the intention to arbitrate within the words of the document. In other words, the clauses signed by the parties, on account of their ambiguity or vagueness, fail to reflect an 'undertaking to arbitrate' and thus become subject to disputes. This is an example of the cases where the Tribunals or Courts then resolve to establishing mutual intention through subjective means.

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[5] Julian D.M., Loukas A., Stefan M. Kroll, *Comparative International Commercial Arbitration* (Kluwer Law International 2003) 5-23.

[6] Gary B. Born, *International Commercial Arbitration* (3rd edn., Kluwer Law International 2021) 1349.

[7] Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, art. II; UNCITRAL Model Law on International Commercial Arbitration, art. 8.

[8] Born (n 4) 796.

[9] *Repub. of Ecuador v. ChevronTexaco Corp.*, 376 F.2d 334, 351 (S.D.N.Y. 2005).

The lack of signature on a putative arbitration agreement is also relied upon to deny consent to the agreement. Nonetheless, while signature on the agreement certainly clarifies the consent of the parties, it cannot be regarded as the only means of establishing consent. Parties may be bound by an arbitration agreement even in the absence of a signature.[10] The same is apparent in Article II and Article 7 of the New York Convention and UNCITRAL Model Law respectively, where other 'implied' means of establishing consent do exist, such as the exchange of communications between the parties or the conduct of the parties. Thus, here too the Courts and Tribunals look at the subjective intention of the parties by way of different means discussed subsequently.

Moreover, it is important to note that the presence of signature on a clear and unambiguous arbitration agreement may still not necessarily establish consent where the signature is obtained by wrongful means such as forgery or fraud and the consent given is not out of free will.[11] However, the same is more a question about the vitiation of consent as a way of invalidating the arbitration agreement after its presence has been established (and less about its the formation); thus is beyond the scope of the present paper. This paper is concerned with the invalidity related to the existence of the agreement as opposed to an agreement that might be voidable.

3. SUBJECTIVE INTENTION OF THE PARTIES – DECIPHERING THE TEXT AND CONTEXT

As discussed previously, the implied consent or presumed intention of the parties is determined in cases where the objective intention of the parties is obscure or subject to dispute. This determination or presumption of intention relies on a number of different methods, approaches and principles. Broadly these methods can be classified into two types – Firstly, by examining and interpreting the terms and wording of the putative arbitration agreement to determine the intention of the parties; Secondly, by looking at the conduct of the parties surrounding the agreement. More often than not, both of these approaches are used in tandem with each other and they consist of a mix of further sub-approaches or principles relied upon to reach a definite conclusion. Thus, a determination of intention involves perusal of both the text as well as the context.

[10] *Nat'l City Golf Fin. v. Higher Ground Country Club Mgt Co.*, LLC, 641 F.2d 196, 203 (S.D.N.Y. 2009).

[11] Born (n 6) 856.

4. INTERPRETING THE WORDS OF THE AGREEMENT – ASCERTAINING THE TEXT

This approach has the most relevance in cases where the determination of intent in a signed document is to be inferred. Interpretation of an arbitration clause is generally accepted to depend upon the wording of that clause.[12] Where the wording is vague or ambiguous in nature or is not adequate to fulfill the intentions of the parties, the same is interpreted carefully to infer the intent manifested in it. It could even be used for non-signed agreements entered into by way of written communications. These principles are actively used to interpret the agreement and presume the intent of the parties, the most common of which would be discussed herein.

4.1 ESSENCE OF THE AGREEMENT – REFUTING INTENTION ON GROUNDS OF UNCERTAINTY

A lot of times, the intention to arbitrate may be refuted by one party on grounds of uncertainty as regards other specifics or lack of mutual assent on such specifics. In such cases, by looking at the words of the agreement or the exchange of communications, Courts and Tribunals essentially attempt to identify whether the core of the agreement – that is, an undertaking to arbitrate – is manifested or not. Where the essence of the agreement is apparent, this intention to arbitrate will take precedence over the lack of other specifics. This core or essence could be generally demonstrated by the use of the word "arbitration" in the agreement, despite the absence of other terms elaborating upon the arbitration or specifying the details of the arbitration.[13] As is evidenced from the UNCITRAL Model Law and the New York Convention, the absence of specifics such as the number of arbitrators, place of arbitration, etc, are not grounds to refute formation of agreements[14] and the same has been highlighted in a number of cases, for example in the case of *M.M.T.C. Limited v. Sterlite Industries (India) Ltd.*, where the Supreme Court of India adjudicated that the validity of an arbitration agreement is not dependent upon the specification of the number of arbitrators.[15]

All that is required is the manifestation of an obligation to resolve certain disputes by way of arbitration. Thus, even where the word 'arbitration' is not explicitly mentioned within the

[12] *Manufacturer, Subsidiary v. Building Supplier*, Interim Award, ICC Case No. 7929, 1995.

[13] *Zurich Am. Ins. Co. v. Cebcor Serv. Corp*., 2003 WL 21418237, (N.D. Ill.).

[14] UNCITRAL, 2012 Digest of Case Law on the Model Law on International Commercial Arbitration (United Nations Publication 2012) <https://www.uncitral.org/pdf/english/clout/MAL-digest-2012-e.pdf> accessed 16 November 2020, 28.

[15] CLOUT case No. 177 [*M.M.T.C. Limited v. Sterlite Industries (India) Ltd., Supreme Court, India*, 18 November 1996].

agreement, if the words allude to a dispute resolution mechanism that exhibits characteristics that of an arbitration, it would comprise of an arbitration agreement.[16] Nonetheless, there are some cases where Courts and Tribunals have annulled the formation of an arbitration agreement on grounds of uncertainty, in view of reasons such as contradictory provisions leading to uncertainty, as carried out by the Swiss Federal Tribunal[17] or the English Court of Appeal.[18] However, these decisions have been deemed as anomalous among a general trend of reconciliation and enforcement of such cases.

The references to arbitral seats, or place of arbitration, or number of arbitrators are normally only ancillary in nature and thus do not hinder the formation of an arbitration agreement where a mutual intention is conspicuous from the words of the agreement. If the intention to arbitrate is unmistakable, then a slight error in precision does not affect the arbitration clause.[19] This is especially true in cases, where the intention of arbitration is disputed on account of pathological clauses. Therefore, if a putative arbitration agreement is displaying ambiguity in the intention of resorting to arbitration, vagueness in the form of lack of specifics is immaterial for rejecting the formation of an arbitration agreement.

So far as uncertainty of intention in communications is concerned, the inferences differ between circumstances and jurisdictions. Disputes arise where uncertainty is claimed on account of presence of differing provisions regarding arbitration in the written exchanges. In such cases, too, Courts attempt to identify the essence of the agreement as discussed above and may also rely on other factors and principles such as that of good faith, estoppel, etc, as discussed below.

4.2 PRINCIPLE OF GOOD FAITH

Good faith is the principle of 'fair and open dealing' between the parties to a contract and applies to their formation, negotiation, performance and interpretation. It presumes that the parties to a contract mean to deal with each other fairly and their intentions are presumed on the basis of the understanding reached by a reasonable person in good faith and in the same position. It has been held repetitively that a putative arbitration agreement must be construed on the principle of good faith and declarations of intent should be perceived from the

[16] *PT Tugu Pratama Indonesia v. Magma Nusantara Ltd*, (2003) 4 SLR 257 (Singapore High Ct.).

[17] Judgment of 17 January 2013, DFT 4A_244/2012 (Swiss Federal Tribunal).

[18] *Lovelock Ltd v. Exportles* (1968) 1 Lloyd's Rep. 163 (English Ct. App.).

[19] Born (n 4)775.

expectations of the parties in light of the circumstances surrounding their relationship.[20] This principle finds its place in all categories of cases where the common intent of the parties is under scrutiny, most commonly in cases where the scope of an arbitration agreement as regards the disputes it is subjected to is in question. It emphasizes on the importance of deciphering the true intention of the parties at the time of agreement by reconciling it with their declared intention.

In an arbitral case where both the scope as well as the existence of an arbitration agreement was in question as a result of a series of agreements where only one of such agreements contained an arbitration clause, reliance was placed on the principle of good faith to determine the mutual intention of the parties based on the wording of the agreement.[21] Further, domestic Courts have also actively turned to this principle in the interpretation of intention, as evident in a Swiss decision wherein it was held that the intention would be presumed in a manner harmonious to the understanding of parties in exercise of good faith.[22] In cases where the intention of the parties to arbitrate is ambiguous on account of the arbitration clause being pathological, such as in *ICC Award No. 10671*, good faith was applied to interpret the clause and infer the reasonable understanding of the parties to arbitrate.[23] Good faith has also been a source for other overlapping principles and is not only used for interpreting words but also the conduct of the parties. It acts as a behavioral standard governing the contractual relationship between the parties and corresponds to the contractual aspect of an arbitration agreement.

The application of good faith in International Commercial Arbitration, while sound, is not by itself sufficient to conclusively give effect to an arbitration agreement. It may be used in combination with other doctrines or approaches, such as the principle of effective interpretation, or the pro-arbitration approach. Since it is more of a behavioral standard, good faith is not generally applied as an express doctrine, but which nonetheless would underlie the construction of arbitration agreements in implying an intention of the parties. The basis for this emerges from the commercial nature of the agreement as well as the parties, who would be assumed to have contracted in good faith in the interest of their respective businesses.

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[20] Judgment of 21 November 2003, DFT 130 III 66 (Swiss Fed. Trib.).

[21] *Manufacturer, Subsidiary v. Building supplier*, Interim Award, ICC Case No. 7929, 1995.

[22] Judgment of 29 February 2008, 26 ASA Bull. 376, 379 (Swiss Fed. Trib.).

[23] ICC Award No. 10671, Clunet 2005, 1268 et seq.

4.3 *'Ut Res Magis Valeat Quam Perea' (Principle of Effectiveness) – Inconsistent or Internally-Contradictory Clauses*

'Ut res magis valeat quam pereat' is an important contract law doctrine which states that 'it is better for a thing to have effect than be rendered void'.[24] It is also applied in international commercial arbitration where the words of the putative arbitration agreement appear inconsistent or contradictory on their literal interpretation, endangering both its formation and validity. The most common example of such inconsistencies in arbitration agreement formation is when the agreement has mentions of both Courts as well as Tribunals for dispute resolution and where the parties are in disagreement about the intended dispute resolution forum. In all of such cases, an interpretation is sought that attempts to harmonize inconsistencies and give effect to the provisions therein by presuming the true intention of the parties.

Where competing arbitration and forum selection clauses exist in an agreement, an interpretation reconciling these provisions is generally sought by giving effect to the arbitration agreement and deeming the jurisdiction of Courts to exist narrowly either in a supervisory capacity as a reviewing body or for providing any judicial assistance.[25]

For example, in an English case where two clauses of a contract were contradictory owing to one of them directing arbitration and the other denoting jurisdiction of the English Courts for dispute resolution, the Queen's Bench Division Commercial Court construed the reference to English Courts as one denoting its supervisory jurisdiction to appoint and remove arbitrators, giving effect to the arbitration agreement instead of rendering it void.[26] Similarly, Arbitral Tribunals have also applied the principle of effective interpretation to reconcile conflicting clauses as in a 1993 ICC Case No. 5488, where the clauses of a construction contract had been in contradiction.[27] The Tribunal relied on the doctrine to conclude that the arbitration agreement has the general jurisdiction over disputes after the completion of work while the Courts would have a specific jurisdiction over disputes only during the performance of work. This doctrine has been recognized by arbitrators and Courts in various jurisdictions and is

[24] ICC Award No. 1434, Clunet 1976, 978 et seq.

[25] Born (n 4) 785.

[26] *Paul Smith Ltd v. H & S Int'l Holding Inc.* (1991) 2 Lloyd's Rep. 127 (QB) (English High Ct.).

[27] Award in ICC Case No. 5488, 1993.

regarded as a 'universally recognized rule of interpretation'.[28] It attempts to salvage the true intent of the parties which might have been distorted owing to the ignorance of the parties as to the mechanics of arbitration.[29]

The application of this doctrine is sound where an arbitration agreement has the risk of being rendered invalid on account of any ancillary or minute pathologies. This would also be in line with the pro-arbitration approach displayed in many jurisdictions, where pathological arbitration clauses are generally upheld, so long as the pathology does not cause hopeless confusion or uncertainty. In that sense, this doctrine is closely connected to the concept of "essence of the agreement", as discussed previously, as it helps in preserving this essence, by ensuring that it is not invalidated for frivolous reasons and that if the parties included a putative arbitration agreement, it must be their intention to arbitrate. That being said, however, this doctrine should not be applied to write an intention into the agreement where that intention is not otherwise even remotely demonstrable and there is no possibility of salvaging the arbitration agreement. Thus, the application of this doctrine requires circumspection so as to not cross the line between imputation of intention and insertion of intention.

4.4 *LEX SPECIALIS DEROGAT LEGI GENERALI (SPECIFIC OVER GENERAL)*

'Lex specialis derogat legi generali' is a general principle of legal interpretation that states that 'the specific law prevails over the general'. The same has also been frequently applied in arbitration in relation to contractual interpretation. For example, this principle of interpretation is useful in cases where there might be multiple contradictory or conflicting clauses within a contract and thus the intention to arbitrate is not conclusively certain. In such cases, the Courts and Tribunals look at the Agreement and give effect to the more specific provisions under them as opposed to the general one to determine intent.[30] Thus, in a case where the scope of the arbitration agreement was brought into question, the agreement was interpreted to determine the intention of the parties by giving precedence to the specific terms of the contract over the general ones and consequently the object of the dispute was inferred

[28] E. Gaillard & J. Savage (eds.), *Fouchard Gaillard Goldman on International Commercial Arbitration* (Kluwer Law International 1999) 270.

[29] E. Gaillard & J. Savage (eds.), *Fouchard Gaillard Goldman on International Commercial Arbitration* (Kluwer Law International 1999) 263.

[30] *Karnette v. Wolpoff & Abramson*, LLP, 444 F.Supp.2d 640, 646 (E.D. Va. 2006).

to be within the scope of the agreement.[31] A corollary to this is the decision is Monde Petroleum where a latter settlement agreement was given precedence over the dispute resolution clause in the original agreement, as it came second in time and was entered into in light of the specific circumstances.[32]

Thus, this doctrine, although more prevalent in treaty interpretation, is nonetheless founded on good reason and may be soundly applied to international commercial arbitration. Many arbitration agreements incorporate detailed steps as to the appointment of arbitrators, pre-arbitral procedure, etc., with prescribed timelines and persons stipulated therein. In such cases, the specificity within the putative arbitration agreement would indicate that the parties did particularly spend time on drafting the particular clauses, and consequently it ought to reflect the intention of the parties. However, the weight given to this doctrine in interpreting intention is relatively lesser, as the New York Convention has replaced this doctrine with the principle of effective interpretation, which requires that the prevailing clause would be the one that favours enforcement of the arbitration agreement, as opposed to being the more specific clause.[33]

4.5 Principle of Contra Proferentem – Is it applicable in determining Intention?

'Contra proferentem' is a contract law doctrine widely used to interpret ambiguous contractual clauses. This doctrine entails that an ambiguous clause be interpreted against the drafter or supplier (*proferens*) of such a clause[34] and is based on the premise that the drafter should not be allowed to take advantage of an ambiguity that they had been responsible for. While very commonly found within contractual interpretation, there is obscurity as to the scope and relevance of the doctrine in International Commercial Arbitration. The application of this doctrine as regards arbitration agreements and their formation especially, however, is somewhat seldom and it has been pointed out that this doctrine should be used to construct arbitration agreements only as a last resort.[35] This may be attributed to the fact that the doctrine does not on its own provide for a conclusive determination of the common intention

[31] Final Award in ICC Case No. 5946, XVI Y.B. Comm. Arb. 97, 102 (1992).

[32] *Monde Petroleum SA v. Westernzagros Ltd* (2016) EWHC 1472 (Comm).

[33] UNCITRAL, *UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards,* 293 (2016).

[34] UNIDROIT Principles of International Commercial Contracts, art. 4.6.

[35] Alan Scott Rau, 'Gap Filling by Arbitrators', ICCA Congress Series, Volume 18 98 (Kluwer Law International, 2015).

of the parties. It is not aimed at unearthing the true intentions of the parties to arbitrate.[36] The doctrine instead focuses on preventing a party from relying on intentional vagueness to obtain a benefit.[37] Nonetheless, it may play a supplementary role[38] in the discovery of the true intent of the parties by favouring an interpretation that does not rely on the ambiguity created in the putative arbitration clause as a cause of its invalidation. Consequently, the same has been applied by arbitral tribunals in the interpretation of unclear or pathological putative arbitration clauses.[39]

This doctrine can be considered as a concept under the general notion of good faith,[40] wherein this assumption of good faith between the parties precludes the drafter from relying on intentional ambiguities for a unilateral benefit.

While the above-discussed maxims help in inferring the intention of the parties from the wording of the agreement, Courts and Tribunals have also applied fixed standards of proof or approaches for the interpretation of putative arbitration agreements. These correspond to either a reduced standard of proof by approaching such agreements more favourably or a heightened standard by disfavouring arbitration and interpreting them restrictively. They are termed as pro-arbitration and anti-arbitration approaches respectively and mixed opinions exist on the question of which of these approaches, or if any at all, should be applied in interpreting arbitration agreements.

5. PRO V. ANTI – IN FAVOREM INTERPRETATION OR STRICT INTERPRETATION?

The standard of proof required for establishing the existence of a putative arbitration agreement has been a recurrent issue in the interpretation of such agreements, with no conclusive or universally agreed upon answer to the same.[41] The question of standard of proof is arbitration specific and corresponds with the jurisdictional character of an arbitration agreement. Both Courts and Tribunals as well as authorities differ in opinions in that regard.

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[36] Alan Scott Rau, 'Gap Filling by Arbitrators', ICCA Congress Series, Volume 18 98 (Kluwer Law International, 2015).

[37] Emmanuel Gaillard, 'Transnational Law: A Legal System or a Method of Decision Making?', (2001) 17 3 Arbitration International 59.

[38] Sykes Andrew, 'The Contra Proferentem Rule and the Interpretation of International Commercial Arbitration Agreements – the Possible Uses and Misuses of a Tool for Solution to Ambiguities', (2004) 8 Vindobona J. Int'l Comm. Arb. 65.

[39] *SA Alfac v. Société Imac importacão*, (2002) 2 Revue de l'Arbitrage 413, 414.

[40] Emmanuel Gaillard, 'Transnational Law: A Legal System or a Method of Decision Making?', (2001) 17 3 Arbitration International 59, 67.

[41] Born (n 4) 751.

While some believe in the application of the pro-arbitration or *in favorem* approach to interpretation, others prefer to apply an anti-arbitration approach that entails a strict interpretation.

5.1 STRICT INTERPRETATION – UNEQUIVOCAL EXPRESSION OF INTENTION

Authorities in support of a heightened standard of proof mostly rely on notions such as that of an arbitration agreement being an exception to the principle of jurisdiction of Courts and thus subject to a restrictive interpretation.[42] One award concluded that the consent of the parties to the arbitration agreement must be unequivocal and unambiguously demonstrable.[43] A similar finding was reached by the Italian Supreme Court in the case of *Krauss v. Bristol Myers*, where the existence of a putative arbitration agreement contained in exchange of documents was denied due to the lack of an unequivocal intention to arbitrate.[44] However, there is no mention of such a requirement in Article 7 of Model Law or Article 2 of the New York Convention and recent cases display a trend away from this view.[45] Further, cases that deal with ambiguous arbitration clauses also end up being inconsistent with this view. Furthermore, Born and Galliard have also rejected this approach as being archaic and inconsistent with the unanimous prevalence of arbitration as a natural means of resolving international business disputes.[46] Truly, a strict interpretation of a putative arbitration agreement does not serve any practical purposes in a world where arbitration is emerging as a normal and equivalent alternative to litigation that simplifies jurisdictional concerns over international business disputes. Thus, a strict or anti-arbitration approach must be rejected in present times.

5.2 LIBERAL INTERPRETATION – IN FAVOREM APPROACH

The principle of *in favorem validates* or *in favorem jurisdictionis* provides that arbitration agreements should be interpreted broadly, and accounts for a reduced standard of proof in determining the valid formation of an arbitration agreement. The basis for this approach lies on the growing preference and application of International Commercial Arbitration as a form

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[42] ICC case no 4392, 110 *Clunet* 907 (1983) 908.

[43] Award in Final ICC Case No. 7453, XXII Y.B. Comm. Arb. 107, 111 (1997).

[44] Judgment of 10 March 2000, *Krauss Maffei Verfahrenstechnik GmbH v. Bristol Myers Squibb*, XXVI Y.B. Comm. Arb. 816, 819 et seq. (Italian Corte di Cassazione) (2001).

[45] *Investissement Charlevoix Inc. v. Gestion Pierre Gingras Inc.*, Court of Appeal of Quebec, Canada, 21 June 2010, (2010) QCCA 1229 (CanLII).

[46] Born (n 4) 753; E. Gaillard & J. Savage (eds.), *Fouchard Gaillard Goldman on International Commercial Arbitration* (Kluwer Law International 1999) 260.

of dispute resolution.. Authorities in support of this approach further rely on the rule of presumptive validity of arbitration agreements found in the New York Convention or UNCITRAL Model Law. Moreover, US Courts have consistently reflected this approach in their decisions.[47] A US case, giving effect to the formation of a putative arbitration agreement, held that even the most minimal indication of an intent of the parties to arbitrate must be given full effect to.[48] The landmark UK case of *Fiona Trust v. Privalov*, also utilized this approach to come up with the one-stop presumption in favour of arbitration.[49] *It can be said that the In favorem approach is the jurisdictional parallel to the effective interpretation principle.*

Born accepts the applicability of a favourable standard of proof to be in consonance with the present scenario and deems it as the suitable approach. However, Galliard disfavors the application of this approach for the determination of the existence of a putative arbitration agreement, differentiating between validity and consent. He refutes both the pro and anti-arbitration approaches and instead advocates for a neutral standard of proof in the determination of consent.[50] The same has been affirmed by other commentaries.[51] Further, domestic courts have also displayed an inclination towards this approach.[52] This author considers this view as the most logical. There is a distinction between the existence and the validity of an arbitration agreement and where the existence is in question, a mere allegation as to there being an arbitration agreement by one party does not call for a presumption in its favour, as there is an equal right for the parties to also refer to courts.

An example of the application of a neutral standard of proof is the reconciliation of contradictory forum selection and arbitration clauses, wherein Courts generally give effect to both of them by referring to the jurisdiction of Courts in a supervisory capacity in connection to the arbitral process.[53] This holistic interpretation of such contracts is neither blithely restrictive nor blithely favourable, but corresponds to a logical and reasonable inference of

[47] *Mitsubishi Motors Corp v. Soler Chrysler Plymouth Inc*, 473 US 614, 105 S Ct 3346, 3355 et seq (1985).

[48] *Repub. of Nicaragua v. Standard Fruit Co*., 937 F.2d 469, 478 (9th Cir. 1991).

[49] *Fiona Trust & Holding Corp v. Privalov*, (2007) UKHL 40.

[50] E. Gaillard & J. Savage (eds.), *Fouchard Gaillard Goldman on International Commercial Arbitration* (1999) 257.

[51] J. Lew, L. Mistelis & S. Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International 2003) 151.

[52] *EEOC v. Waffle House, Inc*., 534 U.S. 279, 293 (U.S. S.Ct. 2002).

[53] 9 Bundesgerichtshof, Germany, VII ZR 105/06, 25 January 2007, <http://www.dis-arb.de/en/47/datenbanken/rspr/bgh-case-no-vii-zr-105-06-date-2007-01-25-id653> accessed 16 November 2020.

the parties' probable intention. Thus, for interpreting the intention to arbitrate, the standard of proof is neither inclined in favour of or in opposition of arbitration, and rather takes into consideration all the facts and circumstances of the case to logically infer the probable intention of the parties.

6. CONDUCT – ASCERTAINING THE CONTEXT

The concept of consent is multi-faceted in the sense that it covers not only express consent, but also consent by conduct.[54] This means that the intention of the parties to a putative arbitration agreement can also be impliedly inferred by examining their conduct during and subsequent to the contract.[55] The reliance on conduct to infer the intention of the parties is a common contractual principle, and an arbitration agreement, being a creature of contract, can equally be subject to it. Further, even Article 7 of the Model Law accepts the formation of an agreement to arbitration via conduct.[56] Many a times, recourse has also been taken to the substantive law governing the contract to determine the conduct of the parties as a manifestation of their consent, such as CISG. There are various situations wherein the conduct of the parties amounts to a manifestation of their intention to arbitrate.

For example, one party's performance of their obligations within the contract has been held in multiple jurisdictions to amount to a tacit acceptance of the terms of the contract, including the provision for arbitration. In the case of *Smita Conductors v. Euro Alloys*, the Supreme Court of India recognized an arbitration agreement even in the absence of signature on the written contract, on the basis of the conduct of one party in invoking certain clauses of the contract as amounting to an acceptance of its terms.[57]

Further, past dealings and industry practice have also been relied upon as evidence of parties' knowledge of the arbitration agreement on the basis that they must have reasonably known about it. This approach presumes that the parties are aware of the arbitration agreement as a matter of trade practice and hence can be inferred to have impliedly consented to it. As pointed out in a German case where the consent to an arbitration was questioned on grounds of it only being unilaterally explicit, the Court held that so long as the parties are active

[54] John Townsend, 'Non-Signatories and Arbitration', (1998) 3 ADR Currents 19 23.

[55] J. Lew, L. Mistelis & S. Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International 2003) 150.

[56] UNCITRAL Model Law on International Commercial Arbitration, 1985, art. 7(3).

[57] *Smita Conductors Ltd. v. Euro Alloys Ltd.*, Supreme Court, India, 31 August 2001, Civil Appeal No. 12930 of 1996.

businessmen in their fields, they are presumed to be aware of its typical trade practice. Since, an arbitration agreement was customarily and implicitly agreed between contracting parties on the basis of industry usage, the consent to it can be implied.[58]

The conduct of the parties can also demonstrate their intent of renewing an otherwise expired contract, even in the absence of a formal renewal. In a case where an agreement containing an arbitration clause, as per its terms, could be renewed upon mutual agreement, and where upon expiry of the same the parties' conduct nonetheless evidence a reliance on its conditions, it was held that it amounted to a renewal of the agreement including the arbitration clause.[59]

So far as the consent to an exchange of written communications containing an arbitration agreement is concerned, different jurisdictions have expressed differing opinions. The question here is whether an arbitration agreement proposed in this form can be concluded by way of tacit acceptance based on conduct. In other words, whether a party can acquiesce to an offer of arbitration, contained in written communications, through its conduct. In a case where an arbitration clause was included in the purchase confirmations sent by the buyer who contended that the performance of the seller on the basis of the confirmation amounted to consenting to the arbitration agreement, the Italian Court refuted the argument and held that conduct does not satisfy Article II of the New York Convention.[60] Swiss Courts have also emphasized on the presence of an affirmative consent to written communications.[61] In contrast, many jurisdictions have accepted the formation of an arbitration agreement over written communications based on conduct. In a case where the buyer accepted the delivery of goods and only objected to the arbitration clause in a written communication two months after such acceptance, it was held that the conduct in accepting the goods amounted acceptance of the arbitration clause.[62] This approach is consistent with the provisions of the New York Convention and Model Law, as the requirement of there being an 'express' consent of the contracting parties has not been laid out in either.

[58] Bundesgerichtshof [BGH], Germany, 3 December 1992, III ZR 30/91.

[59] Judgment of 3 May 1980, *Kabushiki Kaisha Ameroido Nihon v. Drew Chem. Corp*., VIII Y.B. Comm. Arb. 394, 397 (1983).

[60] Judgment of 28 October 1993, XX Y.B. Comm. Arb. 739 (1993).

[61] Judgment of 5 November 1985, *Tracomin SA v. Sudan Oil Seeds Co*., XII Y.B. Comm. Arb. 511, 512 (1987).

[62] Judgment of 26 June 1970, *Israel Chem. & Phosphates Ltd v. NV Algemene Oliehandel*, I Y.B. Comm. Arb. 194 (1976).

7. CONSENT BY CONDUCT OF NON-SIGNATORIES – A MODERN VIEW OF CONSENT

The emerging trend in modern arbitration also involves the inclusion of a third party as a party to an arbitration agreement between other parties. Courts and Tribunals do not restrict the arbitration agreement only to signatories, but, provided certain conditions are satisfied, also bind a non-signatory with the arbitration agreement. A strict contractual perspective may not be in favour of such inclusion as it ostensibly goes against the principle of privity of contract. From a jurisdictional perspective of an arbitration agreement also such inclusion may be contested to go against the principle of party autonomy regarded as fundamental to an arbitration agreement. Nonetheless modern case law showcases this approach. The basis for this approach lies in the presumption that the non-signatory had always intended to be bound by the arbitration agreement from the beginning, and their conduct during the lifetime of the arbitration agreement is considered to justify such an intention. The manifestation of intention or consent herein lies in the conduct as opposed to the signature of the parties. Thus, the consent of the non-signatory is implied herein. The most commonly used doctrine to bind non-signatories is the group of companies doctrine evolved in the Dow Chemical case.[63] Under this doctrine, where a non-signatory is a part of a group of companies with the signatory, and has taken part in either the negotiations, performance, or termination of the contract entered into by the signatory, the common intention of all the parties is presumed to include the non-signatory as a party to the arbitration agreement. Other principles applied for binding a third or, 'less-than-obvious' party to an arbitration agreement include apparent agency, veil-piercing, alter ego and estoppel. Most of these principles are not applied distinctly and Courts and Tribunals commonly apply a mix of overlapping elements and factors to adjudicate such cases.[64]

The practice of binding third parties to arbitration agreements has led many commentators to remark that there has been a 'marginalization' of consent. This is because, as pinpointed previously, it ostensibly goes against the concepts of party autonomy and privity of contracts. However, as highlighted by Bernard Hanotiau, there has not been a marginalization of consent but only an evolution of the concept of consent to a modern form and approach, that

[63] *The Dow Chemical Company and others v. ISOVER Saint Gobain*, ICC Case No. 4131, Y. Comm. Arb. 1984, 131 et seq.

[64] William W. Park, 'Non-Signatories And International Contracts: An Arbitrator's Dilemma', (2008) 2 Dispute Res. Int'l 84.

is practically consistent with the commercial realities of complex multiparty business transactions.[65]

The question is not of extending the arbitration agreement to third parties, but ascertaining the real parties to the agreement from the very beginning. Thus, it cannot be said that there has been a fundamental alteration of consent. Rather, it has merely been developed and adapted to complement the needs of the dynamic commercial scenario. Since conduct has invariably been widely used to determine the intention of the parties, the modern approach is no different as it essentially carries out the same process.

8. CONCLUSION

The foregoing analysis of the common principles relied upon by courts and tribunals for determining a common intention to arbitrate displays many observations. The current general approach as to the interpretation of arbitration agreements focuses on the text and the context for the determination of intention. The principles applied are general principles of contract formation tweaked to suit the specific cases before the Courts and Tribunals. However, an arbitration agreement is not a normal contract between two parties, as it involves a jurisdictional aspect insofar as it ousts the jurisdiction of courts. Thus, an arbitration agreement is unique in nature and a sole recourse to general contractual principles for its interpretation cannot be said to be sufficient. As is apparent, Courts and Tribunals struggle with many ambiguities as to the application of such principles and also tend to have differing views as to their application owing to its jurisdictional aspects. The same is also due to a lack of any uniform standard or criteria provided for the interpretation of such agreements, propelling Courts and Tribunals to deal on a case-to-case basis. This non-uniformity between jurisdictions as to the interpretation of arbitration agreements leads to problems in a globalized, integrated commercial world where international contracts are common, as there will be different conclusions reached in different jurisdictions. This also has an adverse effect on the credibility of arbitration as an alternative to litigation.

Moreover, oftentimes the differing principles relied upon by jurisdictions may be contradictory in nature, or involve many *res integra* situations. For example, where one Court may rely upon the principle of *contra proferentum* but the other may advocate the application of the *in favorem* approach for interpretation, there is an inherent conflict between the two

[65] Bernard Hanotiau, 'Consent to Arbitration: Do We Share a Common Vision?', (2011) 27 Arbitration International 539.

that causes uncertainties in situations where the drafter of a putative arbitration clause seeks to undergo arbitration. While the *in favorem* approach would support a reference to arbitration, the *contra proferentum* approach would resist the same as it applies against the drafter, thereby forming ambivalence in laws.

Since the usage of contractual principles differs in every jurisdiction and the lack of any prescribed standard provides discretion to the Courts and Tribunals, there is a need for there to be arbitration specific principles and uniformity across jurisdictions in that regard. In other words, there should be personalized provisions governing arbitration agreements that take into account its contractual and jurisdictional aspects and which are prescribed uniformly across jurisdictions. This may also settle the discourse on the acceptability of involving non-signatories as parties to an arbitration agreement to encourage a modern view of consent to enable arbitration for complex business transactions common in the present world.

Thus, the arbitration law must not remain static, rigid or obsolete, and should evolve to suit the needs of its users. A strict compliance with party autonomy must be done away with in line with the modern view proposed. This would also improve the credibility of arbitration among different parties, as there will be more certainty, convenience and flexibility. The multifaceted concept of consent in arbitration agreements should be encouraged and applied to personalize arbitration agreements and uniformize its application.

NEGOTIATION ETHICS: THE CASE FOR A CODE

- *Manjri Singh*[*]

ABSTRACT

The paper seeks to question the need for a code of ethics that is specific to negotiation. The author analyses the existing conduct rules applicable on lawyers, analysing the context in which these operate and the constraints they pose on lawyers in the negotiation setting. The arguments made for and against ethics for negotiation and the sufficiency of the present rules in light of the aims and objectives of negotiation as well as the diversity of bargaining styles are then examined. Having demonstrated that the varied nature of negotiation is distinct in fundamental characteristics from litigation and the general role of a lawyer as a counsellor, the benefits from a specific regulation laying down ethics for negotiation are discussed.

The core proposition of this paper is that the benefits of negotiation are maximized where there is a binding code of ethics with enforcement similar to those of the obligatory professional conduct rules. This option is contrasted and compared with soft regulation through the form of an advisory or guidance. Each of these methods is scrutinized for their moral, economic behavioural, practical and public policy implications. Supplementing this argument is that any code of ethics should make a distinction between matter concerning a legal right for which there is a straight-forward remedy through litigation and the numerous other contexts where a legal right is either not in question, or secondary to other important objectives.

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1. INTRODUCTION

The law is the instrument by which the sovereign determines order and the framework of expected behaviour. These in turn are relied upon to determine rights and entitlements of individuals. Since there may be a diverse number of ways these can be interpreted, the judicial system becomes the final referee and validator of one claim over the other, which is then enforced and accepted as universal. This largely winner takes all approach of adjudication has certain shortcomings, it takes away autonomy of decision making and outcome from the hands of the parties in dispute and hegemonizes one narrative over the other. Due to these, there has been a rise it out-of-court settlement mechanisms, including negotiation and mediation. It is the former that is the focus of this paper.

The sovereign does not relinquish all control over these private arrangements and they operate largely in the context of the broad outline provided by the law. As these legal rules can be complex and interpreted relying on case law, scholarship and methods of construction, special professionals take up the role of predicting entitlements as per the law and for that reason, are also included in most negotiations which implicate the law in some manner. However, the very object of negotiation is often to prevent a winner takes all outcome that is rendered in a judgment of the Court and for that reason is arguably less adversarial in nature. It is based on mutual acceptance which necessitates to some extent an accommodation of interests. The fundamentals and basic assumptions of these forms of dispute settlement are inherently different and therefore change the nature of the role that a legal professional is required to fulfil.

It is because of the role that lawyers and legal professionals play in influencing decisions about the most significant entitlements, that the question of ethics is often raised and debated in a more detailed manner than ordinary moral and ethical behaviour. The specialized knowledge that legal professionals have and the instrumentality of their role in the maintenance of order and justice result in a gamut of competing values that have to be uniquely addressed for lawyers. Such is this concern with ethics that most law courses usually include a course that teaches and counsels on ethics expected from legal practitioners. Yet, outside of the educational context, ethical behaviour is multi-faceted and real-life scenarios are intertwined with many other imperatives that affect behaviour out of which ethics are usually just one factor. Therefore, the debate continues, along with the release of certain institutional regulations or guidelines.

The paper makes an enquiry into the field of negotiation and ethics in this domain asking the question of the need for ethics in negotiation and the form that it should take. The first section examines ethics for legal professionals in general, the second section looks at types of negotiation and ethical practices pertaining to negotiation and the next section asks the question of whether ethics is required is negotiation. The fourth section submits a central argument regarding the need and form that ethical requirements in negotiation must take and the final section concludes.

2. EXPECTATIONS OF ETHICS FROM LAWYERS (GENERAL OVERVIEW AND LAWYER-CLIENT RELATIONSHIP)

There is a certain amount of regulation that governs the conduct of a legal professional in her practice and this will be discussed in this section. The objective is to determine the legal restraints on conduct by lawyers which apply in the context of regular advocacy and may also be applicable in the negotiation context. The section begins by discussing the framework in America, followed by the framework in India and finally some aspects of other legislations that may influence behaviour. The section concludes with an examination of mediation on the same criteria. Regulation applying to civil rules is looked at as criminal offences are largely not capable of settlement through negotiation.

Preliminary, to become a lawyer in America, a juris doctor degree is required after which there is a bar examination. The American Bar Association (hereinafter referred to as ABA), which was founded in 1878, provides accreditation to law schools, including providing standards for legal education and provides resources to legal professionals.[1] One crucial resource that has been created by the American Bar Association is the Model Rules of Professional Conduct.2 While these are not binding and each state adopts their own professional conduct rules, they are largely based on the ABA Model Rules of Professional Conduct (hereinafter referred to as Model Rules). These rules were adopted in 1983, and subsequently revised from time to time.[3] They replace the ABA Model Code of Professional

[1] 'About Us' (*American Bar Association*) <https://www.americanbar.org/about_the_aba/>.

[2] 'Model Rules of Professional Conduct – Table of Contents' (*American Bar Association*) <https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents/>.

[3] 'About the Model Rules' (*American Bar Association)* <https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/>.

Responsibility, 1969 and the Canons of Professional Ethics, 1908.[4] In addition to this, there may also be judicial precedent that may define further attorney-client privilege, malpractice and other such issues.

The Model Rules will be examined in order to provide an idea of the expectations from a lawyer practicing in America. In dealing with the contours of the lawyer-client relationship, the rules provide that the client is in the driving seat and will determine the means and objective of the representation.[5] Further the lawyer will not assist the client in the furtherance of criminal or fraudulent behaviour,[6] and the lawyer may withdraw where she is required to act in violation of the rules.[7] The confidentiality of information given by the client is protected by the rules, subject to disclosure only with express consent of the client or implied authorization,[8] and the information cannot be used to the disadvantage of such client.[9] Finally, as relates to the client, the lawyer is to avoid conflict of interest but is given the capacity to act as a neutral third party if so clarified to both parties.[10] In advising the client, the lawyer may refer to moral, economic, social and political factors in addition to the law.[11]

The lawyer is duty bound to bring meritorious claims and expedite litigation.[12] There is a prescription for honesty towards tribunals as well as opposing counsels, which then proscribes practices of making misleading statements, providing false evidence, making frivolous discovery requests amongst others.[13] Some of the rules also apply to non-adjudicative proceedings which are before a legislative body or agency.[14] Even when dealing with non-clients, unfair practices such as material omissions, false statements, delay of rights etc are prohibited.[15] Finally, violations by other lawyers are to be reported, including those relating to any form of misconduct.[16]The violation of the rules of conduct results in sanctions

[4] ibid.

[5]ABA Model Rules of Professional Conduct, Rule 1.2.

[6] ibid.

[7] ABA Model Rules of Professional Conduct, Rule 1.16.

[8] ABA Model Rules of Professional Conduct, Rule 1.6.

[9] ABA Model Rules of Professional Conduct, Rule 1.8(b).

[10] ABA Model Rules of Professional Conduct, Rule 2.4.

[11] ABA Model Rules of Professional Conduct, Rule 2.1.

[12] ABA Model Rules of Professional Conduct, Rule 3.2.

[13] ABA Model Rules of Professional Conduct, Rule 3.3 and 3.4.

[14] ABA Model Rules of Professional Conduct, Rule 3.9.

[15] ABA Model Rules of Professional Conduct, Rule 4.1 and 4.4.

and disciplinary action such as admonition, reprimands, suspension or right to practice law for a given period of time or disbarment.[17]

The lengthy examination of these rules underscores the following important rules of conduct applicable to a lawyer: a) the position of the client to make all important decisions on means and ends, b) refrain from material misrepresentations and omission of material facts, c) correct error or misunderstanding caused, and d) resign where criminal intention is sought to be furthered or there is dishonest conduct. There are material consequences following from the violation of these Rules. These are examined in the context of negotiation in the third section of this paper.

A similar analysis will be conducted for the Indian context. The Indian framework can be traced back to the Advocates Act, 1961 which governs legal practitioners. The Act establishes the Bar Council of India, and the State Bar Councils.[18] Section 49 gives the Bar Council of India the power to make rules and these include those pertaining to standards of professional conduct and etiquette to be observed by advocates. The disciplinary power of the State Bar Council and the Bar Council of India are given in Chapter V and provide that reprimand, suspension or removal of name from list of advocates may be ordered where there is professional misconduct proved.

In pursuance of this power, Chapter II, Part VI of the Bar Council of India Rules on standards of professional conduct form the base of legal professionalism that is expected in conducting matters in relation to the law.[19] The Preamble of this Chapter provides that the advocate has the role of an officer of the court and to uphold the interests of his client. The first section covers the advocates duty to the Court. Rule 4 states that the advocate will attempt to prevent the client from using sharp or unfair practices, and will refuse a client who continues with such improper conduct. The general attitude towards the Court will be one of respect and

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[16] ABA Model Rules of Professional Conduct, Rule 8.3 and 8.4.

[17] See e.g., 'State of New York Rules for Attorney Disciplinary Matters' (Westlaw) <https://govt.westlaw.com/nycrr/Document/Iee4fd1c7b14f11e6b16798a968a6bf07?viewType=FullText&originationContext=documenttoc&transitionType=CategoryPageItem&contextData=(sc.Default)>.

[18] Advocates Act 1961, s 3-4.

[19] 'Bar Council of India Rules' (Bar council of India) <http://www.barcouncilofindia.org/wp-content/uploads/2010/05/BCIRulesPartItoIII.pdf>.

dignity. The advocate is precluded from providing service in a matter in which he/she has pecuniary interest as per Rule 9.

Section II deals with the duty of the advocate to the client. Rule 15 prescribes that the advocate act in a fair and honorable manner to uphold the interests of his client including defending a guilty client regardless of personal opinion. Rule 20 provides that the advocate will act only on the instructions of the client, and Rule 24 prohibits abuse of advantage of the confidence of his client. Section III briefly touches upon the advocate's duty to opponents. Rule 34 prevents the advocate from directly negotiating with the opposing party except through the opposing advocate. Rule 35 provides that all legitimate promises should be carried out if made to the opposite party even if not reduced to writing. Section IV deals with duty to colleagues. Evidently, the prescribed rules of conduct under the Indian framework is much less onerous than that prescribed in America.

In contrast to the duty of candor owed to the court by an attorney in the American context, the closest provision in the Indian framework is Section 193 of the Indian Penal Code (IPC) which provides that falsifying evidence in a judicial proceeding is punishable by three to seven years of imprisonment.[20] Further Section 196, IPC states that using evidence which is known to be false will also be punished in the same manner.[21] Section 199, IPC covers false statements in declarations.[22] Finally, Section 126 of the Evidence Act, 1872 provides that professional communications are protected from disclosure unless is pursuance of an illegal purpose.[23] Section 129 of the Act likewise protects the client from disclosing communication with legal advisor. These last set of restrictions are a) primarily situate the liability with the client, rather than the advocate and b) largely apply only to proceedings before courts.[24]

There are no internationally accepted model rules of conduct, in the context of negotiation. At the time of writing this paper, there is no domestic set of rules for conduct in negotiation specifically in any jurisdiction. The lack of institutional support for negotiation can be contrasted with another method of alternative dispute resolution that has received much greater legislative attention and backing – mediation. Mediation, unlike negotiation, involves a neutral third party that acts as a mediator between the parties. Mediation has been formally

[20] Indian Penal Code 1860, s 193.

[21] Indian Penal Code 1860, s 196.

[22] Indian Penal Code 1860, s 199.

[23] Indian Evidence Act 1872, s 126.

[24] Indian Evidence Act 1872, s 129.

integrated as a voluntary option for parties which they may be bound to consider or the judge in adjudication proceedings may refer to mediation using discretion.[25] Due to the express recognition that is accorded to mediation and court direction, there is ordinarily an accompanying obligation to participate in good faith, the breach of which can lead to sanctions.[26] Further still, broad rules on procedure,[27] accreditation institutes for mediators[28] and codes of conduct for mediators[29] lend mediation additional legitimacy and prevent frustration of the entire process. Finally, the spirit of promotion of mediation has also found international embodiment in the United Nations Convention on International Settlement Agreements Resulting from Mediation (2018) of which Article 5(1)(e) and (f) make explicit reference to breach of mediator standards and impartiality and independence.[30] The focus of professional standards of conduct in mediation settings remain principally on the mediators to ensure productive outcomes and equal treatment of parties.

[25] Code of Civil Procedure 1908, s 89; Civil Procedure Rules, rule 1.4(2)(e); Council Directive 2008/52/EC on aspects of mediation in civil and commercial matters (2008) OJ L136/3. See also, 'Uniform Mediation Act' (Uniform Law Commission, 2003)

<https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=9b244b42-269c-769e-9f89-590ce048d0dd&forceDialog=0>.

[26] Federal Rules of Civil Procedure, rule 16; Civil Procedure Rules, rule 44.2; *Thakker v Patel* (2017) EWCA Civ 117.

[27] Civil Procedure Rules, rules 78.23 – 78.28.

[28] See e.g., American Arbitration Association and Civil Mediation Council.

[29] 'Model Standards of Conduct for Mediators' (*American Bar Association*, 2005) < https://www.americanbar.org/content/dam/aba/administrative/dispute_resolution/dispute_resolution/model_standards_conduct_april2007.pdf>; European Code of Conduct for Mediators, (*Academy of European Law*, 2004) <https://era-comm.eu/Language_Mediation/wp-content/uploads/2018/07/118DT101_docu.pdf>.

[30] United Nations Convention on International Settlement Agreements Resulting from Mediation (New York, 2018) <https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements>.

3. TYPES OF NEGOTIATION AND ETHICAL PRACTICES

This section is intended to describe the context in which the discussion on ethical practices is to proceed. Evidently, there are significant differences in the role, means and objective in a court proceeding a voluntary attempt to arrive at a settlement. However, in within the negotiation context, the styles of negotiation may vary and the exact stage and matter in which negotiation is taken up will influence behaviour and expectations. For this reason, this section is divided into three limbs, the first looks at the various negotiation styles, the second illustrates specific contexts that may further affect negotiation styles and finally, the paper draws on available literature to detail on certain ethical practices in the context of negotiation.

Negotiation styles can preliminarily be classified into two main approaches: competitive and co-operative.[31] The first category is the approach where the negotiator singularly minded seeks to maximize their gain or meet their demands which are seen as conflicting with those of the opposing party and in the latter category, often referred to as integrative, principle, problem-solving negotiation focuses on joint gain and meeting the interests of both parties.[32] A deeper analysis however is provided by Professor Holbrook in his article titled 'Using Performative, Distributive, Integrative, and Transformative Principles in Negotiation'.[33] He describes four negotiation styles: performative, distributive, integrative and transformative, each of which arise in differing factual circumstances. According to Prof. Holbrook, high-conflict negotiations led to the adoption of performative negotiation, the objective of which is to transform emotionally charged narrations of conflict stories into constructive dialogue and validate each parties' opinions. An effective negotiator in this context is respectful, mindful, intervenes less in the conversation and ensures adherence to ground rules.

Distributive negotiation is engaged in where the resources are assumed to be definite and limited, and there is a mutually accepted division of these resources to be arrived at. The aim of such a negotiation is to narrow the negotiation range and end at an agreement that allows the maximum surplus to the negotiating party. Integrative negotiation may often arise out of overlapping circumstances as distributive bargaining, but is aimed at arrived a mutually satisfying solution to a problem by taking an expansive view of interests and possibilities.

[31] Carrie Menkel Meadow, 'Legal Negotiation: A Study of Strategies in Search of a Theory' (1983) Am. B. Found. Res. J. 905.

[32] ibid.

[33] James R. Holbrook, 'Using Performative, Distributive, Integrative, and Transformative Principles in Negotiation' (2010) 56 Loy. L. Rev. 359.

The objective is to identify the problem and underlying interests and then generate options which satisfy these, ultimately agreeing on the one that allows both parties to benefit from the settlement. Transformative negotiation is where the relationship between the parties is more valuable than the issue before them, and the objective is largely to repair the damaged relationship. The point underlined here is that the principles of effectiveness in the negotiation will change depending upon the background factual matrix as well as the objective of the party (whether they value the relationship, or the outcome more).

Following on that note, individual bargaining styles also influence the manner in which negotiation style is opted for, and what the outcome results in. Blake and Mouton traced five behavioural classifications: competing, collaborating, compromising, accommodating and avoiding.[34] The first describes a high concern for the individual's goals and desires and limiting the opposing parties', the opposite of which is the accommodating approach which concerns itself with the other party's goals and desires without regard to the self. A balanced but high concern for both translates to a collaborative mode, and a balanced but moderate level of emphasis on both results in a compromising mode. Finally, the approach that seeks to avoid conflict altogether is the avoiding approach. Lawyers in a court proceeding function largely in a competitive environment and are educated in a similar environment. Therefore, the natural approach of lawyers would be self-concerning and thereby competitive. Professional conduct rules that emphasize on the duty to the client primarily and certain rules to be followed in this pursuit further entrench a competitive outlook and consequently, appropriate ethical behavior follows such a presumption.

As evidenced from the various contexts which affects negotiation style, legal negotiations often deal with a broader range of matters which more range of issues that are considered than those that are dealt with during adjudicatory proceedings before a court which are limited to legal points. Cases which concern an infringement of a legal right, or where there is a legal remedy to be pursued, are cases where negotiation intends to prevent litigation and in which the legal issue and framework plays a significant role. However, negotiations may also be in context of agreeing on a possible deal (such as a merger) in which there is no evident legal right to be decided on or remedy to be pursued in court. These are situations which are not addressed by the Court directly and in which the expectation of ethics also changes. Finally, in matters of divorce/alimony/custody which must take into account the needs of the

[34] R.R. Blake and J.S. Mouton, 'The Managerial Grid: The Key to Leadership Excellence' (Gulf Publishing Company, 1964).

different parties, as well as in cases where there is any hiccup in a commercial relationship, the objective of which is to resolve the misunderstanding and continue the relationship, the approach taken in Court is very limited in context of negotiation and understanding of ethical and good practices will accordingly change.

In this last part to this section, the author will detail on certain good practices and ethics that have been elaborated on in popular and outlier scholarship. In *Fashioning an Effective Negotiation Style: Choosing Between Good Practices, Tactics, and Tricks*, Hal Abramson contrasts good practices with tactics and tricks, indicating good practices as acceptable behaviour in negotiation and tricks as antagonizing and unacceptable behaviour with tactics falling along this spectrum depending on factors such as culture and context.[35] Good practices include asserting interests, presenting rational explanations for these interests, acting trustworthily and reliably, engaging with the information provided by the opposing party, use of objective standards and generating options. While the former are rather generic, his list of tricks give a more substantial insight of expected ethical behaviour. Tricks or unacceptable behaviour include lying about a material fact, insufficient settlement authority, irrevocable commitments designed to lock in certain positions or direct towards outcomes, misleading using intentional ambiguities and using the good cop/bad cop paradigm. He lists the following as tactics which are ambiguous in terms of their acceptability: exaggerating proposals, distorting bottom line, manipulating information such as BATNA, threatening to leave, false demands, and exploiting the reciprocity norm.

In this context, Paul J Zwier and Ann B. Hamric, in their article *The Ethics of Care and Re-Imagining the Lawyer/Client Relationship* reconsider the foundations of lawyer client relationship and propose an alternative model that is grounded in morals.[36] It shifts away from rights-based thinking, and is based on privileging interconnectedness over autonomy. It is especially relevant in family-based matters. The approach of a lawyer changes from 'problem solving' which encourages the lawyer to champion the client's rights who in turn acts as an autonomous decision maker. The ethics of care orientation however rejects impartiality as a moral standard of judgment, specially includes empathy, concern, responsiveness and responsibility in relationships. In terms of substantial divergences in process and outcome, the problem is approach in terms of the issue and not from the

[35] Hal Ambramson, 'Fashioning an Effective Negotiation Style: Choosing between Good Practices, Tactics and Tricks' (2018) 23 Harv. Nego. L. Rev. 319.

[36] Paul J. Zwier & Ann B. Hamric, 'The Ethics of Care and ReImagining the Lawyer/Client Relationship' (1996) 22 J. Contemp. L. 383.

perspective of the interests of the client, and then generate options and select the best option. The technique focuses on listening rather than questioning as a mode of information gathering, act as an intermediary amongst other specifics. The idea is to enlighten the clients of an approach that is not adversarial and right-based, and is accordingly limited to certain circumstances. This approach has been discussed to present an idea of different conceptualizations of ethics in a non-rights-based model.

4. ETHICAL RULES FOR NEGOTIATION

This section looks at the application of the professional rules of conduct to negotiation and seeks to support the position there is a need for negotiation specific conduct rules or ethics relying both on opinions of scholars and the author's own inputs. The section will look at general behaviour that the professional conduct rules require however, in relation to specific details, there will be reliance on the American Model Rules for the reason that they are more elaborate than those prescribed for the Indian context and for that reason, any comment/criticism of the American Rules will largely apply also to the Indian rules.

Even as professional conduct rules are designed to apply to different roles that a lawyer is expected to play, they are primarily designed from the aspects of stages approaching a litigation and during a court proceeding. This can be illustrated in many ways, specifically by showing how the rules fail to be appropriate in many negotiation contexts but preliminarily, the proposition can be substantiated by the stakeholders that the rules mention duties towards which include the client, and the Court and finally other lawyers to the extent of soliciting business. This means that in cases where there is no legal right concerned such as merger negotiations, the rules do not play a substantial role in determining acceptable behaviour unless the conduct amounts to fraud in violation of the principles of contract law.

Rule 1.2(a) which allows the client to determine the means and objective of the representation if applied literally to the negotiation context may allow the client to determine the strategy for negotiation, and the negotiation style will often be a direct reflection of the bargaining style of the client. Rule 1.8 prevents the lawyer from using the information of the client to their disadvantage. Disadvantage in the context of the preceding point, may be interpreted differently by the lawyer and the client, and prevent the lawyer from effectively pushing for integrative bargaining. Most importantly, the rules of candor with respect to misrepresentations, false statement of facts or law, false evidence are duties owed primarily

to the Court and even if they were interpreted to extend to opposing parties, these would be difficult to apply to the negotiation context. For example, distorting the bottom line, or not revealing a strategic weakness of the party may be considered false statement of fact or acceptable puffery. Candour in the Indian context is again limited to proceedings before the Court.

There are provisions in both the professional conduct rules examined that prevent direct negotiation or communication of the lawyer with the opposing client which may often be necessary to reach more productive outcomes in negotiation such as in the case of high-conflict matters or familial matters. The rule is entrenched in the belief of necessity of the lawyer to advise on a matter which will necessarily revolve on a legal right and the legal course of action. Further as the rules are in the context of the role of the lawyer in a litigation, the sanctions for misconduct are also in this context. Further, the lack of clarity in the division of authority between a lawyer and a client may still be workable in the litigation context where the lawyer is the primary agent and intermediary through which the client processes information and makes decisions, and where technicalities can be adequately dealt with by the lawyer, however in the negotiation context, the lack of division can result in further uncertainty in the negotiation and may even be regarded as a tactic by the other party, illustratively where a) lawyer has limited authority to settle affecting negotiations or where this fact has been deliberately not revealed during the negotiations, or b) lawyer's implied authority may be questioned as a strategy to extract an offer before bringing this to the client. The lack of division of authority may also affect the relationship between the client and the lawyer, and the lawyer's ability to conclude/arrive at a beneficial bargain for the client.

These professional conduct rules form the only source of legally binding restraints on behaviour in the negotiation setting. The lack of other sources of binding norms are telling in their absence. Further still, when contrasted with mediation, special institutional effort is made to regulate conduct which ultimately ensures that the parties' faith in the process is not lost and that mediation remains an effective choice for dispute resolution. Rules and codes of conduct for mediation as discussed in Section I confer the process with legitimacy which remains missing for negotiation.

The need for a separate code of ethics is highlighted in this preceding discussion which points at the unsuitability of the existing professional rules of conduct to the negotiation context. To conclude that discussion, it may be observed that the professional rules of conduct are considered more relevant to court proceedings than in negotiations. The need for rules to gain

currency and ensure the sanctity of the process is made evident by the measures taken in relation to mediation both domestically and internationally. The next limb of this discussion questions whether there should be a code of ethics for negotiations at all. This inquiry begins with the insights of Mark J Rankin, in his *article Legal Ethics in the Negotiation Environment: A Synopsis*.[37] Preliminarily, he observes that negotiations do not benefit from procedural and evidence related safeguards that court proceedings do. He argues that lawyers are expected to act ethically in civil disputes and if a large majority of these civil disputes are settled through negotiation (also encouraged by courts, illustratively see Section 89, Code of Civil Procedure, 1908) which has no requirements of ethical behaviour, then the system itself has no moral value (also makes having ethics redundant, if they applicable only to limited circumstances). The professional rules of conduct are as much as part of promoting justice as ensuring the administration of justice is seen as legitimate, and therefore ethics are required in negotiation contexts where the public is most likely to see lawyers in action. It will also make negotiation a more serious option to the client if there are restraints on unethical behaviour.

It is often argued that there should be flexibility in method allowed in negotiations, the objective of which is for the lawyer to pursue the client's interests. However, Rankin argues that pursuing of client's interest is based on an anachronistic and adversarial conception of representation and as the context changes from litigation to negotiation, there should be a change in the lawyer's role. Further, acting deceptively need not necessarily advance the client's interest as it may not be in the long-term interests of the client and also have negative consequences of a dishonest reputation being attached to the client. As a necessary corollary, there are commercial and moral advantages to acting ethically. It has also been argued that the lawyer's role is not just the representation of client's interest but also pursuing a just termination of the dispute which also affects the acceptability of dishonest behaviour during negotiations.[38]

On a practical level, there are two compelling reasons that the author proposes to consider a code of ethics in negotiation. Assuming that the instrumentality of negotiation to the legal system is recognized, there is an economic analysis linked reason to implement a code of ethics. This is because similar to the game theory, where honest conduct on part of one party and selfish conduct on part of another party leads to higher rewards to the second party, and

[37] Mark J. Rankin, 'Legal Ethics in the Negotiation Environment: A Synopsis' (2016) 18 Flinders L.J. 77.

[38] Alvin B. Rubin, 'A Causerie on Lawyers' Ethics in Negotiation' (1974) 35 La. L. Rev. 577.

where the present conduct rules which do not tackle such behaviour in the negotiation context, the cumulative result that deception by one party is harmful for the creation and division of surplus, efficient allocation of resources and building trust in the inexpensive system of negotiation when compared with a court proceeding. Secondly, even where all lawyers and negotiators agree on the necessity for ethics, in light of the inadequacy of the professional conduct rules, there remains ambiguity and subjectivity as to the acceptable ethical behaviour, a point that Hal Ambramson also makes when he states that parties may perceive tactics and tricks differently depending on cultural factors and more.

5. FORM OF ETHICS

The previous sections have sought to illustrate that there is a need for establishing standards of behaviour in the negotiation context because a) the present professional conduct rules do not deal with, and even act as a hinderance to effective co-operative negotiation and b) the lack of concern for ethics affects the efficiency of negotiation and its perceived usefulness as an option to the client. In this section, the author seeks to determine what form any ethics should take. The purpose is not to describe substantial provisions of any such code but to deal with a) whether ethics in this context should be in the form of guidelines (soft regulation) or in the form of binding law as with the professional conduct rules. Each of these approaches are looked at for their advantages and flaws. Finally, the author makes an argument of the broad structure that such an ethical code should take.

It has been argued thus so far that a code of ethics is required for a common understanding that transcends different subjective ideas of acceptable behaviour. One possible argument in that context may be that reputation as a fair negotiator results in the compliance with a published set of guidelines without their binding force. To bolster this argument, if the Hal Ambramson framework of good practices, tricks and tactics is adopted as a rough indication of what this code may contain, then the resulting style of negotiation promoted would be the co-operative negotiation style. As William Ury and Richard Fisher argue in their seminal book *Getting to Yes*, co-operative negotiation does not result in an unscrupulous party being able to take advantage of an ethical negotiator and the negotiation can be re-directed towards a productive and mutually satisfying outcome.[39]

[39] Roger Fish and William Ury, *Getting to Yes: Negotiating Agreements without Giving In* (Penguin Group, 1981)

This argument does hold weight. However, the counter to this is that ideas of reputation may not be enough of an incentive to follow recommendations of acceptable behaviour where there is a one-time negotiation pursued specifically in the context of a legal injury (legal right in question) which is unlikely to be occur again such as tortious injury, and other dealings with strangers. Further still, co-operative negotiation presumes that in order for an honest party to not be prejudiced by a dishonest negotiator, it is able to recognize and counter such behaviour which may not necessarily be the case. Often, negotiators may not be well-read or experienced and this would seriously disadvantage the honest party. In fact, the very existence of deceptive practices owes to the benefits of employing them over and above what can be accomplished otherwise.

Therefore, it may also be necessary to change the incentives and pay-off related to deceptive practices. As it stands currently, there is no such disincentive in the context of negotiation specifically because a) even the more elaborate professional conduct rules do not directly deal with deceptive practices in negotiation and are best subject to interpretation of a grey area, b) in the Indian context specifically, most rules of evidence and procedure are not just limited to the litigation context but also place the liability largely on the client, and finally c) the duty and financial self-interest of the lawyer in single-mindedly pursuing the client's interest creates incentive to follow dishonest practices where they reap awards. Soft regulation does not change these incentives and there is a need to bring these changes to encourage the taking up of the prescribed ethical practices on a uniform basis.

Another advantage of soft regulation is that it allows for flexibility in the negotiation process. The client can choose to take an active role without requiring an in-depth knowledge of evidentiary or procedural law, and imposition of ethical standards in a mandatory manner may affect this ability of the client to be the driver of the negotiation, especially as it may not be expected of them to know about the guidelines. As a counter argument, it is arguable that this flexibility is still retained in the same manner as negotiations without prescribed ethics because a) lawyers are part of the negotiation and may advise their client as they would for a legal issue, and b) the guidelines of ethics are applicable largely on the lawyer and not the client.

A disadvantage and consequently a benefit of adopting a hard law on ethics is that where the negotiation is one with parties of different cultures and countries, the mere recommendation of ethics or guidelines are unlikely to affect the behaviour of such parties because they fail to have the same legitimacy as those of hard law which prescribe the boundary in which parties

can operate. This disadvantage may be off set with the proper promotion of the guidelines and the large scale up take of these across the board but this remains a substantial issue.

Making ethics hard law has the advantage of placing both negotiation and litigation on an equal footing, impacting the perception and acceptability of this option, along with the seriousness with which it is treated in law. The counter to this is that an implication of this equivalence may result in a potential increase in the costs of negotiation. First, lawyers are likely to charge higher amounts where their negotiation work will require a study of guidelines against any strategy or statement to be made in the negotiation, and it may also result in higher discovery costs, preparation time as well as longer negotiation times. The author of this paper leans towards adoption of hard regulation especially owing to the lack of other safeguard and incentives to ensure compliance with any code of ethics along with the efficiency and allocation advantages that follow if both parties play by these rules.

On a concluding note, a binding regulation that seeks to prescribe acceptable and expected practices in negotiation has to be broader that the visualization in any present professional code of conduct. As pointed out before, negotiation deals with not just matters involving a legal right but also matters involving collaboration or commitment where no legal right is involved. This differentiation should also be reflected in the code of ethics, with additional restrictions on matters involving a clear legal right, and with more flexibility in matters not concerning legal rights to allow for commercial exigency, reasoning, judgment, and other social and emotional needs to be satisfied from the negotiation aimed to preserve the sanctity of negotiated settlement.

6. CONCLUSION

The research question of this paper was whether there is a need for a code of ethics that is specific to negotiation. The methodology followed was to begin by examining the binding standards of conduct for lawyers and contrasting this to the absence of any form of regulation in the negotiation context. The examination highlights that i) certain ethical constraints on lawyers are felt necessary, even in the presence of a neutral third party (judge) that finally makes the decisions, and ii) the standards' inadequacy to effectively accommodate negotiations within their scope. In lieu of any other authorities which may regulate lawyers participating in negotiations, the paper turns to scholarship to determine whether there is an agreement on the potential of ethics in negotiation to produce tangible benefits in the mass of

what has been written on negotiation approaches and tactics. The paper finds that there exists such a potential which can be realised through a code of ethics for negotiation. Having concluded as much, the framework of such a code is deliberated upon, in an attempt to provide a way forward. The proposition is in the form of a general argument, and is applicable to all jurisdictions but ultimately has the most relevance for India.

WHY ALWAYS SET ASIDE THE ARBITRAL AWARD WHEN IT CAN BE REMITTED? - REMITTAL OF ARBITRAL AWARDS: THE ROAD LESS TRAVELED

- ***Oshmi Jaiswal****

ABSTRACT

There are instances where Indian judiciary remands/remits an arbitral award to the tribunal under Section 34(4) of the Arbitration and Conciliation Act, 1996 (hereinafter referred as the "Indian Arbitration Act"). But, a continuous debate has been surrounded over its extent and on what grounds the judiciary can exercise the powers conferred upon it, and interfere with the arbitral proceedings.

The primary objective of this Article is to provide a comprehensive analysis of Section 34(4) of the Indian Arbitration Act in several aspects, considering the nature, the scope of powers conferred upon the Court, the pre-requirements for invocation, and curable grounds of challenges hereunder. The Article also examines the wide canvass of judicial pronouncements which while contributing in settling the controversy for the time being, has considered several facts and circumstances along with the position of law.

Furthermore, the author highlights the position of arbitration laws of other jurisdictions (namely, Singapore and United Kingdom) in comparison to Indian arbitration legislation, with respect to similar provisions which deal with setting aside and remission of arbitral awards.

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1. INTRODUCTION

With the international expansion of commercial arbitration, many countries worldwide like India and Singapore have adopted the Model Law (the "Model Law 1985") on International Commercial Arbitration of 1985 created by the United Nations Commission on International Trade Law (UNCITRAL), either entirely or in part. Whereas, countries like the United Kingdom have not enacted their arbitration legislation upon the Model Law 1985 but do have some provisions which are based on it. Article 34 of the Model Law 1985 lays down the provision for setting aside the award but at the same time to save the cost, time and parties' interest which has been spent on arbitration proceedings, it contained clause 4 which grants the power to a court to suspend setting aside proceedings.[1]

The provision facilitates the court to give another opportunity to the arbitral tribunal to resume the arbitration proceedings and rectify an arbitral award suffering from defects and challenged before the court. It also empowers the arbitral tribunal to take any other action as in its opinion would do away with the existing defects. And, it also act as a preventive as well as a curative measure thereby preventing the setting aside proceedings in the court.

Article 34(4) holds very great importance in the arbitration field because it could save the sole objective of the arbitration proceedings i.e., expeditious disposal of dispute with minimal judicial interference. The remittal of arbitral award is definitely a road less traveled, lesser explored by the major section of the legal fraternity including judges and lawyers, but there are instances where the Court took the road 'less travelled'.

The Indian Arbitration and Conciliation Act 1996 ("Indian Arbitration Act") , in significant part, is based upon the Model Law 1985. Under Section 34 of the Act provides that an arbitral award can be challenged before a Court through filing an application hereunder. Where the award is rendered/ delivered/ awarded by the arbitral tribunal and the party files an application under Section 34 for setting aside of the award, the Court has following course of actions under the Indian Arbitration Act where it may:

(i) dismiss the objections made and uphold the arbitral award; or

(ii) set aside the award under Section 34(2); or

[1] Model Law on International Commercial Arbitration of 1985 (the "Model Law 1985"), Article 34(4):

> *The Court, when asked to set aside an award, may, where appropriate and so requested by a party, suspend the setting aside proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will do away with the grounds for setting aside.*

(iii) apply Section 34(4) to adjourn the set-aside proceedings and remit the award back to the arbitral tribunal in order to provide it another chance to eliminate the existing grounds for challenge and rectify the defects in the award.

It is, however, pertinent to note that the powers conferred to the Courts under Section 34 don't include any power to modify the arbitral award.[2] The most recent judgement where the same view has been reiterated is *National Highways Authority of India v. M. Hakeem*[3],the Supreme Court clearly stated that under Section 34, a Court while hearing a challenge to an arbitral award in no way can modify or vary that award. The bench presided by Hon'ble Justices RF Nariman and BR Gavai clearly expressed in para 47 of the judgement, "*If one were to include the power to modify an award in Section 34, one would be crossing the Lakshman Rekha".*

2. SECTION 34(2) AND SECTION 34(4): THE TWO DICHOTOMY OF SECTION 34

Section 34 of the Indian Arbitration Act exhibits a dichotomy in the form of Sections 34(2) and 34(4). While Section 34(2) elaborates on the area of what course of action the Court could adopt while dealing with an application of setting aside made under it, Section 34(4) provides for the Court to remand back the issue to the Tribunal and directs what a tribunal could do after the issue has been remanded back to it.

Protecting party autonomy and keeping in mind the ultimate goal of whole arbitration process, the Indian legislature as well as the judicature has always strived to minimize the judicial interference with arbitration proceedings and awards granted thereto. Among many other classic judgements where the court clearly limited the scope of judicial intervention, one is *Angel Broking Ltd. v. Sharda Kapur*[4] wherein the raised matter of judicial interference by the courts in modifying arbitral awards and granting alternative/additional reliefs was directly addressed and judgement was delivered by the High Court of Delhi in the same line as in the *National Highways*[5], *McDermott International Inc.* v. *Burn Standard Co. Ltd.*[6] In

[2]*National Highways v. M. Hakeem* (2021) SCC OnLine SC 473; *McDermott International Inc. v. Burn Standard Co. Ltd.* (2006) 11 SCC 181; *Cybernetics Network Pvt. Ltd. v. Bisquare Technologies Pvt. Ltd.* (2012) SCC OnLine Del 1155; *Angel Broking Ltd. v. Sharda Kapur* (2017) SCC OnLine Del 8211.

[3]*National Highways v. M. Hakeem* (2021) SCC OnLine SC 473 ('*National Highways*').

[4]*Angel Broking Ltd. v. Sharda Kapur*, (2017) SCC OnLine Del 8211 ('*Angel Broking*').

[5]*National Highways* (n 3).

[6]*McDermott International Inc. v. Burn Standard Co. Ltd.* (2006) 11 SCC 181.

this case, it was observed that in no way under Section 34 the courts can provide any modification, variance or remittance in the arbitral awards. Additionally, the court is also not entitled to grant any additional or alternative relief which was earlier prayed in the arbitral proceedings and got denied.[7]

Similarly, several efforts have been made to limit the judicial intervention through narrowing down the interpretation of the specified grounds (such as party's incapacity, arbitration agreement's invalidity, arbitral award in contrast to Indian public policy, etc) mentioned in Indian Arbitration Act under Section 34(2) on the basis of which an arbitral award can be challenged. Under the provision, if an aggrieved party successfully establishes the challenge against the arbitral award based on specified grounds, the award will be set aside by the Court.

However, in accordance with the Principles of Natural Justice, the legislature also has provided an opportunity to the award holding parties to get the grounds for setting aside eliminated by making an application under Section 34(4) of the Indian Arbitration Act. Through this provision, Court acquires the authority to adjourn the proceedings pending before it under Section 34(2) and give the arbitral tribunal another chance to resume the arbitration proceedings, or take any other action that, in its opinion, will eliminate the existing grounds for setting aside the award. Hence, it can be rightly concluded that the legislative intention behind Section 34(4) is to make the award enforceable to avoid any wastage of time and money, after the arbitration tribunal has had its chance to correct any curable defects.[8]

2.1 SET-ASIDE OR ELIMINATE THE DEFECTS OF AN ARBITRAL AWARD?

Section 34(2) of the Indian Arbitration Act contains an exhaustive list of grounds which must be established by the parties challenging the award to get it set aside by the Court.[9] Section 34(2)(b) is comprised of the grounds which are substantive in nature and directly go to the root of the award. To substantiate, if an award pertains to any dispute having such a subject-matter which cannot be resolved through arbitration then it is clearly a defect that cannot be fixed just by elimination, notwithstanding an application under Section 34(4), and therefore, the Court must set aside such award. Furthermore, remanding the matter back to the arbitral

[7] *Angel Broking* (n 5).

[8] *Dyna Technologies Pvt. Ltd. v. Crompton Greaves Ltd* (2019) SCC OnLine SC 1656 ('*Dyna Technologies*').

[9] Arbitration and Conciliation Act 1996, s 34(2).

tribunal in such case is unintelligible and will cause grave injustice to the parties who will also have to bear unreasonable cost of arbitration again. Additionally, the ground of challenge based on a conflict with public policy is not capable of being rectified by the arbitral tribunal which itself only has issued the award contrary to public interest. Such contravening award is against the principle of morality and justice and adversely affects the administration of justice.[10]

The Supreme Court clearly stated in *Dyna Technologies Pvt. Ltd. v. Crompton Greaves Ltd*[11] that if an award is challenged on the basis of perversity in reasoning, then it is liable to be challenged solely on the grounds set out in Section 34 because award's perversity gets right into the root of the matter. This case while drawing a clear distinction between the "unintelligible" awards and "inadequacy" of reasons in award, delivered the scope of interference under Section 34. Furthermore, it observed that only the ordinarily "unintelligible" awards are to be set aside, subject to party autonomy to eliminate reasoned awards.[12] The "inadequate reasoned" awards are not set aside; that means if an award is in absence of any reasoning or has some gap in it which can be cured, then Section 34(4) must be utilized to avoid any detrimental effect on the very purpose of arbitration i.e. speedy trial with minimal judicial interference.[13]

3. NATURE & SCOPE OF SECTION 34(4) OF THE INDIAN ARBITRATION ACT

The Hon'ble Supreme Court ruled out a general mandate including the nature & scope of the conditions required to invoke Section 34(4) of the Indian Arbitration Act in *Kinnari Mullick & Ors. v. Ghanshyam Das Damani*[14]. The points which were highlighted in accordance to arbitration legislation are herein mentioned below:

i. In order to invoke Section 34(4), an application filed under Section 34(1) of the Indian Arbitration Act must first be made by a party to the arbitration.[15]

ii. In light of the principle of *functus officio*, a party must invoke Section 34(4) prior to the setting aside of the award by the approached Court. The Latin maxim "*functus*

[10]*Renu sagar Power Co. Ltd. v General Electric Co* (1994) AIR 860 (SC); *ONGC Ltd v Saw Pipes Ltd.* (2003) 5 SCC 705.

[11]*Dyna Technologies* (n 9).

[12]ibid.

[13]*Dyna Technologies* (n 9) [24], [35].

[14]*Kinnari Mullick & Ors. v. Ghanshyam Das Damani (2018) 11 SCC 328 ('Kinnari Mullick').*

[15]*ibid [16], [18].*

officio" states that the designated authority's jurisdiction/mandate ends once it has completed the responsibilities for which it was appointed. Similarly, the Court is deemed to become *functus officio* after the setting aside proceeding under Section 34 of the Indian Arbitration Act is completed.[16]Another important development which can be seen herein view of the same observation is that, though the arbitrators/arbitral tribunal becomes *functus officio* after rendering the award, remittal of award forms an exception to the principle of *functus officio* which states that mandate of the Tribunal ends with the rendering of the Arbitral Award.

iii. A party which is filing an application under Section 34(4) of the Indian Arbitration has to keep in mind that the application must be in writing.[17]

iv. If the award holding party fails to request the Court to suspend the setting aside proceedings under Section 34, the party is also barred from filing an application under Section 34(4).[18]

v. Under Indian Arbitration Act, the Court cannot take *suo motu cognizance of the* power conferred on it by Section 34(4).[19]

The Hon'ble Supreme Court also reiterated the dictum of *MMTC v. Vicnivass Agency*[20] in the abovementioned case while dealing with the purport of Section 34(4) of the Indian Arbitration Act. The judgement goes back to 2008, where the appeal was filed in Madras High Court which provided a comprehensive analysis of Section 34(4). Here, in this particular case the arbitrator failed to provide an opportunity to one of the party to the suit to present its case with respect to the other party's documents & affidavits, and the award was granted solely based on the same documents which were only produced after the completion of the arbitration proceedings. As a result, the aggrieved party challenged the award before the District Court under Section 34(4), where the trial was carried out for six months. The District Court while directing the arbitral tribunal to provide equal chance to both the parties, remanded the matter back to it for fresh consideration.

[16] *ibid* [16].

[17] *ibid* [15], [16].

[18] *Kinnari Mullick* (n 17) [16].

[19] ibid.

[20] *MMTC v. Vicnivass Agency* (2009) 1 MLJ 199 ('*MMTC'*).

Thereafter, in the appeal made before the High Court of Madras, the Court while endorsing the decision taken by the District Court in exercising its power under Section 34(4) observed that:

(i) The failure to grant one party the opportunity to challenge the other party's document is a *prima facie* cause for setting aside the award under Section 34(2)(a);

(ii) In accordance with remittal of award, it is necessary that the defect in the award or the ground so made out should be capable of elimination by the arbitrator/arbitral tribunal. Here, the ground (i.e., lack of opportunity to one party to present its case) is capable of elimination and can be rectified by the arbitrator who can do justice by giving the required opportunity to the aggrieved party to present its case; and

(iii) Since, the defect in the award can simply be cured by the arbitration tribunal itself, Section 34(4) can be invoked.[21]

However, it is to be noted that the Supreme Court recently held in *Radha Chemicals v. Union of India*[22] that, unlike Section 16 of the Indian Arbitration Act, 1940 (the "1940 Act"), Section 34(4) doesn't give the Court the power to remit the case to the arbitral tribunal for any fresh consideration.[23]

Thus, it can be concluded that the *MMTC*[24] case has widened the discretionary power to the arbitral tribunal contemplated under Section 34(4) of the Act. Not just that, the classic judgement also clarified the position of law in accordance with the current and antecedent legislation. It was of the opinion that the power under Section 34(4) of the Indian Arbitration Act is not the same as the power conferred on the Court by Section 16 of the 1940 Act i.e., as per the former, the Court can make a fresh award after reconsidering the previous award.[25] Unlike Section 16 of the 1940 Act, Section 34(4) of the Indian Arbitration Act defers to the arbitral tribunal's discretion instead of the Court's in determining the scope & extent of inquiry to be conducted in order to rule out grounds for setting aside the award.[26]

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[21] ibid.

[22] *Radha Chemicals v. Union of India* (UOI) (10.10.2018 - SC): MANU/SC/1630/2018.

[23] 'Section 34(4) of the Arbitration and Conciliation Act, 1996 – A Fly in the Ointment? (Part I) | India Corporate Law' <https://corporate.cyrilamarchandblogs.com/2020/05/section-34-4-of-arbitration-and-conciliation-act-1996-part-i/#_ftn2> accessed 8 July 2021.

[24] *MMTC* (n 23).

[25] ibid.

[26] *MMTC* (n 23) [21].

The following are the relevant observations in regard to the current legislation that the Madras High Court noted in the abovementioned case:

i. Section 34(1) of the Indian Arbitration Act specifies what course of action the Court could take while dealing with an application to set aside an award; while on the other hand, Section 34(4) depicts what the arbitral tribunal could do after the issue has been remitted back to it by the Court. Because there is no constraint on what the arbitral tribunal can do under Section 34(4), the arbitral tribunal may even refuse to do anything further and leave the case to the Court to determine under Section 34(2).[27]

ii. Section 34(4) is an enabling provision rather than a strict remand order, which implies that the arbitrator cannot be compelled by the Court to do something. The arbitral tribunal may not or may consider the additional evidence after resuming the arbitral proceedings. The primary subjective consideration of the arbitral tribunal after it has undertaken the venture is that it would eliminate the curable defects on the basis of which the award was to be set aside.[28]

4. REMITTAL OF ARBITRAL AWARDS: THE ROAD LESS TRAVELED

The remittal of arbitral award remained a road less travelled so far, lesser explored by the major section of the legal fraternity including judges and lawyers, but there are precedents where the Court took the road 'less travelled'. Under certain classic judgements, the judiciary in order to save time, efforts, and cost invested in arbitration proceedings by the arbitrator and parties both, has examined and categorized the grounds of challenge where defects stood curable under Section 34(4) and gave the arbitral tribunal an opportunity to resume the proceedings, in order to cure the defects.

The following are some instances where Courts have considered it appropriate to invoke Section 34(4) of the Indian Arbitration Act:

- In *Suresh Prabhu v. Bombay Mercantile Co-op. Bank Ltd. and Ors*[29]case, the arbitrator failed to frame an issue on the petitioner's particular contention based on which the jurisdiction of the tribunal can be ruled out. When the arbitral tribunal

[27]*MMTC* (n 23) [18].

[28]*MMTC* (n 23) [25].

[29]*Suresh Prabhu v. Bombay Mercantile Co-op Bank Ltd. & Ors.* (2007) 5BomCR 205 ('*Suresh Prabhu*').

neglected to address the objection in regard to its jurisdiction, a Single Judge of the High Court of Bombay exercised its power conferred by Section 34(4) and provided an opportunity to the tribunal to eliminate the defect by recording a finding on the issue whether the arbitral tribunal had no jurisdiction to entertain the dispute.

- In 2009, the *MMTC*[30]case where the Madras High Court exercised its power under Section 34(4) where a party was denied the opportunity to submit its case, i.e. to deal with a document relied on by the arbitration tribunal. The Court while remitting the award back to the tribunal for re-adjudication directed the arbitrator to act in accordance with the principle of natural justice, and now provide equal opportunity to both the parties to put their case.[31]

- It was held in *Geojit Financial Services Ltd. v. Kritika Nagpal*[32], by the Division Bench of the Bombay High Court that the power under Section 34(4) could be invoked if the arbitration tribunal ignored a particular issue on which the parties presented evidence and made arguments.[33]The Court further observed that since the issues and the points so read in claims and counter-claims are inter-linked and inter-connected, setting aside the award would delay the proceedings. But if matter is remanded back to the tribunal along with the special direction to dispose the matter, then it will eventually expedite the matter and save the time & money of both the parties.[34]

- The Court in the case *Dyna Technologies*[35]while distinguishing between the awards based on impropriety/perversity in reasoning and awards with inadequate reason held that 'unreasoned' award or a gap in reasoning was categorized as a curable defect to be eliminated by the arbitral tribunal under Section 34(4), contrary to 'unintelligible' award/'perversity' in reasoning, which could result in the award to be set aside.[36] The

[30]*MMTC* (n 23).

[31]ibid.

[32]*MMTC* (n 23).

[33]*Geojit Financial Services Ltd. v. Kritika Nagpal* (Judgement dated 25th June 2013 passed by the Bombay High Court in Appeal No. 35 of 2013 in Arbitration Petition No. 47 of 2009) ('*Geojit Financial Services*').

[34] ibid [17].

[35]*Dyna Technologies* (n 9).

[36]ibid.

reasoned awards are said to have reasoning which should be proper, intelligible and adequate.[37]

5. APPROACH OF OTHER COUNTRIES

In this section, the author highlights the position of Arbitration Laws of other jurisdictions, namely, Singapore and the United Kingdom, with special emphasis on the provisions involving remittal of arbitral awards. And, subsequently provides a comparative analysis of other jurisdiction provisions with that of Indian Arbitration legislation.

The Arbitration laws of Singapore have adopted the Model Law 1985 with some minor modifications in the International Arbitration Act (IAA) of 1994.[38] On the other hand, the English law (i.e., Arbitration law of the United Kingdom) has not adopted the Model Law 1985 but the English Arbitration Act of 1996 (the "English Arbitration Act") do have some provisions based on it.[39]

5.1 SINGAPORE

There are basically two pillars of arbitration legislation in Singapore; (i) the International Arbitration Act which is principally concerned with international arbitrations, and (ii) the Arbitration Act, 2001 (the "2001 Act") which applies to domestic arbitrations.[40]

Section 48(3) of the 2001 Act incorporating the Article 34(4) of Model Law 1985[41]states that-

> "*When a party applies to the Court to set aside an award under this section, the Court may, where appropriate and so requested by a party, suspend the proceedings for setting aside an award, for such period of time as it may determine, to allow the arbitral tribunal to resume the arbitration proceedings or take such other action as may eliminate the grounds for setting aside an award".*

[37]*Dyna Technologies* (n 9) [34].

[38]'Singapore International Arbitration Centre | UNCITRAL Model Clause' <https://www.siac.org.sg/model-clauses/uncitral-model-clause/71-resources/frequently-asked-questions> accessed 8 July 2021 ('SIAC').

[39]'Model Law | Practical Law' <https://uk.practicallaw.thomsonreuters.com/7-205-6044?transitionType=Default&contextData=(sc.Default)&firstPage=true> accessed 8 July 2021.

[40]'Arbitration Procedures and Practice in Singapore: Overview | Practical Law' <https://uk.practicallaw.thomsonreuters.com/3-381-2028?transitionType=Default&contextData=(sc.Default)> accessed 8 July 2021.

[41]SIAC (n 41).

Section 48(3) provides for remission of the arbitral award to the tribunal to provide it an opportunity to re-adjudicate/reconsider/resume the arbitral proceedings in order to cure the defect in arbitral award.[42] The provision is very much similar to the Indian provision i.e., Section 34(4) of Indian Arbitration Act.

To have a better understanding, let's consider some of the cases in which the Singaporean judiciary has discussed the remittal of arbitral award, as well as the circumstances in which it remitted/ set aside and the explanation it provided.

(i) *In Front Row Investment Holdings v. Daimler South East Asia*[43] case, the arbitrator failed to act in accordance with the principle of natural justice. Thus, in view of the same the Court set aside the arbitral award due to the breach of principle of natural justice and remitted the award to a newly constituted tribunal presided by a new arbitrator for fresh consideration and elimination of the defect present herein.[44]

(ii) At another such instance, in the matter of *Kempinski Hotels SA v. PT Prima International Development*[45], the Court deciding the matter under the International Arbitration Act had set aside the award passed by the arbitral tribunal, stating that the tribunal exceeded its jurisdiction and passed the decision that was out of the scope of matters submitted therein. But due to the fact i.e., the parties to the suit had their agreement that the arbitrator didn't become *functus officio*, the Court remitted the award back to the same arbitrator/arbitral tribunal after setting it aside. It further held that the award can be remitted back to the same arbitrator/ arbitral tribunal as long as it hadn't been disqualified from presiding over the hearing proceedings by the parties themselves.[46]

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[42]Arbitration Act 2001, s 48(3).

[43]*Front Row Investment Holdings v. Daimler South East Asia* (2010) SGHC 80 ('*Front Row'*).

[44]'Singapore Law on Arbitral Awards - Leng Sun Chan - Google Books' <https://books.google.co.in/books?id=uabFhTftv5gC&pg=PA209&lpg=PA209&dq=Kempinski+Hotels+SA+v.+PT+Prima+International+Development+and+Front+Row+Investment+Holdings+v.+Daimler+South+East+Asia&source=bl&ots=ska9FghCPy&sig=ACfU3U1HP4ftiqDy1Zmopi1NBoHQkFyO0A&hl=en&sa=X&ved=2ahUKEwiMlpjWw9XxAhWVbisKHal8BGoQ6AEwAnoECAIQAw#v=onepage&q=Kempinski Hotels SA v. PT Prima International Development and Front Row Investment Holdings v. Daimler South East Asia&f=false> accessed 9 July 2021.

[45]*Kempinski Hotels SA v. PT Prima International Development* (2012) SGCA 35 ('*Kempinski Hotels'*).

[46]ibid.

(iii) Unlike the above two judgements, the Singapore Court of Appeal in *AKN v. ALC* [47]decided to set aside the arbitral award and provided a very keenly reasoned judgement for its decision. The Singapore Court of Appeal observed that remission is an alternative remedy which can be invoked only before the award is set aside, and it must be utilized in the cases where the setting aside of an arbitral award is preventable.[48] Some major points observed by the Court are herein below:

- The Court relied on the dictum of *BLC and Ors v. BLB and Anor*[49], where it observed that Article 34(4) of the Model Law 1985 only allows the remission of an arbitral award to the same tribunal which has passed it. Hence, the Court cannot remit it to a newly constituted tribunal.[50]
- Operating in accordance with Article 34(4) of the 1985 Model Law, the Court may only direct the award to be reviewed. It cannot be remitted back after it had been set aside as the tribunal deems to become *functus officio* after it has passed the final award.[51]
- The Court also clarified that the decisions of *Front Row*[52]and *Kempinski Hotels*[53]do not at all support the proposition that the court has the authority to remit the award after it has been set aside. *Front Row*[54] was differentiated by the Court as a case involving a subsequent instruction to the parties to initiate new arbitration rather than a case of remission. Furthermore, the Court pointed out that the case was not even remanded to the same tribunal/arbitrator, so there was no question of remitting the award. Similarly, the Court categorized the *Kempinski Hotels*[55]as a case in which the parties themselves agreed that the arbitrator was not *functus officio*. However, the Court for providing more clarity

[47]*AKN v. ALC* (2015) SGCA 63 ('AKN').

[48]'Taking a Second Bite of the Cherry: When Is It Appropriate to Remit an Award Instead of Setting It Aside in Singapore? - Kluwer Arbitration Blog' <http://arbitrationblog.kluwerarbitration.com/2019/03/17/taking-a-second-bite-of-the-cherry-when-is-it-appropriate-to-remit-an-award-instead-of-setting-it-aside-in-singapore/> accessed 9 July 2021.

[49]*BLC and Ors v BLB and Anr* (2014) SGCA 4.

[50]ibid.

[51]*AKN* (n 50).

[52]*Front Row* (n 46).

[53]*Kempinski Hotels* (n 48).

[54]*Front Row* (n 46).

[55]*Kempinski Hotels* (n 48).

stated that if the *Kempinski Hotels*[56]decision is interpreted as standing for the contention that remission may be granted after the completion of setting aside proceedings, it is "incorrect and should be treated as overruled at this time."[57]

While looking at the abovementioned cases, the decision in *AKN v. ALC*[58] must be much welcomed as it abundantly cleared its stand on the powers vested in the Court by Article 34(4) of the 1985 Model Law. Similar to India, Singaporean judiciary has now well settled that remittal cannot be done after completion of setting aside proceedings and in no way can be sent to a new arbitral tribunal/arbitrator. Further, it opined that in any case, a broad interpretation would be at odds with the history and stated aim of Art 34(4), which states that remission should be viewed as a substitute for setting aside. The judiciary conclusively laid down that remission is a curative remedy that the court can exercise if it believes that it will be possible to avoid setting aside the award in specific circumstances.[59]

5.1.1 Indian Arbitration Act vis-à-vis Singaporean Arbitration Laws

Since the Indian Arbitration Act and the 2001 Act of Singapore are based on the Model Law 1985, Section 34(4) of the Indian Arbitration Act and Section 48(3) of 2001 Act of Singapore both spell out similar provisions for remission of arbitral awards. The judiciary of both the countries also has nearly laid down the similar observations such as-

- As per the legislative intent of Art 34(4) of the Model Law 1985, remission is a curative measure and should be viewed as a substitute for setting aside.
- No remittal of award is allowed after setting aside, as the tribunal deems to become *functus officio* after it has passed the final award.
- Remission is only allowed to the same tribunal which has passed it.

However, a distinction can be drawn out between the arbitration legislation of both the countries is on the basis of an expressed provision in the 2001 Act of Singapore which allows

[56]ibid.

[57]*AKN* (n 50).

[58]ibid.

[59]*AKN* (n 50).

the Court to remit the arbitral award for want of reasons. This power of Court emanates from Section 50(4) of the 2001 Act of Singapore.[60]

If an appeal is made against the award, and the Court is of the view that the award lacks the reasoning and proper justification for passing such a decision then under Section 50(4) in order to expedite the matter and avoid the delay in further proceedings, the Court can remit the award back to the tribunal instead of setting it aside for want of reasons.[61]By way of background, it should also be noted that unlike the Indian law, there is no automatic right of appeal to the Court of Appeal in Singapore, and the High Court has sole discretion on appeals.[62] Whereas, multiple appeal mechanisms in the Indian system during enforcement actions cause significant delay in the entire arbitration process, prompting international parties to decline arbitration in India. These are innovative provisions, and comparable measures should be incorporated into the Indian law.

Unlike the 2001 Act of Singapore, the Indian Arbitration Act doesn't have any such expressed provision which allows remission in the absence of reasoning in the arbitral award.

5.2 UNITED KINGDOM (ENGLAND AND WALES, NORTHERN IRELAND)

The arbitration in United Kingdom is governed by the English Arbitration Act of 1996 (the "English Arbitration Act"). In English law, the arbitral award can be challenged to set aside on the grounds of "serious irregularity" affecting the tribunal, the proceedings, or the award under Section 68 of English Arbitration Act.[63] The English Parliament has attempted to eliminate every ambiguity and as a result, it has defined eight circumstances/grounds that constitute a "severe irregularity" under Section 68(2). Furthermore, under Section 68(3) the Courts are empowered to take three courses of actions when a serious irregularity has

[60]2001 Arbitration Act of Singapore, *Section 50(4): If on an application or appeal it appears to the Court that the award —*

> *(a)does not contain the arbitral tribunal's reasons; or*
>
> *(b)does not set out the arbitral tribunal's reasons in sufficient detail to enable the Court to properly consider the application or appeal,*

the Court may order the arbitral tribunal to state the reasons for its award in sufficient detail for that purpose.

[61] ibid.

[62] Mr Aswini Patro and Pradip Kumar Sarkar, 'European Journal of Molecular & Clinical Medicine A Comparative Analysis Of Indian Arbitration Provisions With That Of Singapore: Special Emphasis On Enforcement Provisions'<https://ejmcm.com/pdf_3154_a068fac3519b82f6b5f652c1b4ad1051.html> accessed on 9 July 2021.

[63]Arbitration Act 1996, s 68.

occurred,[64] namely; remit the award, set aside the award, or declare it to be of no effect, either in its entirety or in part.[65]

There has been a point of differences between the approach adopted by Indian judiciary and English Court in almost similar circumstances where the English Commercial Court could have remitted the arbitral award but it still chose to upheld a challenge to the award and set aside it on the grounds of "serious irregularity" under Section 68. Such matters are herein given below:-

(i) In the matter of *Oldham v QBE Insurance*[66]*, the Court granted a challenge to an arbitral award on costs where the applicant was denied the opportunity to make submission as to costs.*

(ii) Furthermore, in the case of *P v D*[67], the arbitrator failed to deal with all the submitted issues based on party's contentions, specifically, he failed to frame an issue on the claimant's contribution claim in the proceedings; hence, the Court allowed the challenge to the defected award.

(iii) In *RJ and another v HB*[68] *case*, the Court set aside an arbitral award on the grounds of "serious irregularity". As in here, the arbitrator failed to provide the proper notice and a reasonable opportunity to the party to present its case on a new contention that basically affected the arbitral tribunal's decision and reasoning in the award.

In all of the abovementioned cases, the English Court took the 'long route' for the settlement by setting aside the awards on the grounds of "serious irregularity". The circumstances were such that the matter could have been remitted back to the tribunal for additional awards and curing the existing defect, but the parties and the judiciary were ignorant enough by directly resorting to the setting aside proceedings.

5.2.1 Indian Arbitration Act vis-à-vis English Arbitration Laws

Unlike the Indian judiciary, the English Court invoked Section 68 and set aside the award, even when it could have facilitated a speedy and amicable resolution of disputes, and saved cost and time by simply remitting the award back to the tribunal instead of setting it aside.

[64]ibid.

[65]ibid.

[66]*Oldham v. QBE Insurance (Europe) Ltd* (2017) EWHC 3045 (Comm).

[67]*P v D* (2017) EWHC 3273 (Comm).

[68]*RJ and another v HB* (2018) EWHC 2833 (Comm).

Highlighting the same concern, Hon'ble Justice Akenhead in the matter of *The Secretary of State for the Home Department and Raytheon Systems Ltd*[69], observed that remission of an award is the "default" remedy for a finding of serious irregularity, according to Section 68(3), and the Court should only set aside if remission would be "inappropriate". While setting aside the arbitral award on the ground of serious irregularity, he further stated that passage of time along with the costs of remitting the award back in comparison to the costs of new tribunal are very important considerations in determining whether or not remission is appropriate.[70]

Similarly just like the Indian law, the English Arbitration Act has also a room for remission of "unreasoned" awards to the tribunals to obtain reasons, except if the parties to the agreement have agreed to the contrary.[71]In *Islamic Republic of Pakistan v. Broadsheet LLC*[72], Moulder J pointed out that one of the main goals of the Arbitration Act was to limit the English judiciary's involvement in arbitrations and arbitral verdicts.[73] In view of the Arbitration Act's principles and aims, she believed that allowing challenges based on "inadequate reasons" would overburden the High Court's supervisory authority.[74] Section 68 was only intended to be used "to support the arbitral process, not to interfere with that process," according to the drafters.[75] Furthermore, Section 68 was actually planned as a long pause, only possible in severe instances where the tribunal has gone so wrong in its conduct of the arbitration that justice demands it be addressed, according to the court.[76] There were three main points in the Judge's reasoning; The Judge stated:-

[69]The Secretary of State for the Home Department and Raytheon Systems Ltd., (2015) EWHC 311 (TCC) and (2014) EWHC 4375 (TCC).

[70]'Remission or Set Aside for an Arbitral Award Where a Challenge for Serious Irregularity Is Made out before the English Courts? | Arbitration Notes' <https://hsfnotes.com/arbitration/2015/02/20/remission-or-set-aside-for-an-arbitral-award-where-a-challenge-for-serious-irregularity-is-made-out-before-the-english-courts/> accessed 9 July 2021.

[71]Arbitration Act 1996, s 52(4), s 68(2)(h).

[72] *Islamic Republic of Pakistan v Broadsheet LLC* (2019) EWHC 1832 (Comm), (2019) WLR(D) 402 ('*Islamic Republic').*

[73]*ibid* [42].

[74]ibid.

[75]Departmental Advisory Committee on Arbitration Law, "1996 Report on the Arbitration Bill" (1997) 13 *Arbitration International* 276. See also Andrew Tweeddale and Keren Tweeddale *Arbitration of Commercial Disputes: International and English Law and Practice* (OUP, Oxford, 2005) 280.

[76]ibid.

(i) *The juxtaposition of Sections 57 and 70(4) with Section 68 meant that "inadequate reasons" cannot be used to dispute an award under S.68.*[77]

(ii) *A party may seek to the tribunal to correct or issue an additional award under Section 57.*[78]

(iii) *If the English Court believes that the arbitral award passed by the tribunal lack reasons or reasoning are inadequate/insufficient, such that the court is unable to properly assess the merits of a challenge to the award under Section 68, Section70(4) confers the power on the Court to remit the award back to the tribunal to state its reasons appropriately and adequately.*[79]

Conclusively, Akenhead and Moulder JJ rightly pointed out that setting aside is the long way route due to which the party has to incur more unnecessary cost and time, apart from the one which has been already invested in the arbitration process itself. Moulder J also correctly interpreted the legislation and believed in providing the tribunal another chance to eliminate any defects in the award or provide additional reasons as well. But, the position of law pertaining to remittal of awards in United Kingdom is still not that much well settled as it is in India and Singapore. The judgement delivered by Moulder J is only another High Court judgement which is still not concrete, given the doctrine of *stare decisis* in English tradition. However, the holding by Akenhead and Moulder JJ was more of an *obiter dictum* which seemed persuasive and could form a building block in the development of the English Arbitration law pertaining to remission of awards.

6. CONCLUDING REMARKS

Following the foregoing discussion, we may be able to determine the scope of Section 34(4) of the Arbitration Act by summoning up the observations of the above-mentioned precedents. The Indian judiciary is proceeding parallelly with the Indian Arbitration Act's clear objective, i.e., limiting and narrowing down the judicial interference in arbitral proceedings. All the landmark judgements, namely, *National Highways*[80], *Suresh Prabhu*[81], *MMTC*[82], *Geojit*

[77] *Islamic Republic (n 77).*

[78] ibid.

[79] ibid.

[80] *National Highways* (n 3).

[81] *Suresh Prabhu* (n 32).

Financial Services[83], and *Dyna Technologies*[84] have analyzed the position of law with respect to Section 34(4). The opinions that may be carved out are that legislature has not vested any power on the Court to remand the matter back to the arbitration tribunal for any fresh consideration, except adjourn or suspend the setting aside proceedings for a limited time determined by the Court. Further, the Court is entitled to grant an opportunity to the arbitral tribunal to eliminate any curable defects on the basis of which set aside challenge has been raised.

It is well established that an arbitration tribunal lacks the authority to review its own award.[85] As a result, an arbitral tribunal cannot be authorized to review/rewrite the proper reasoned award which has been passed on merits under the pretext of being given an opportunity under Section 34(4) to do away with the grounds for setting aside the arbitral award. But, the MMTC judgement has laid an exceedingly broad discretionary power on arbitral tribunal itself to decide the extent of eliminating the grounds of objection which now can also be abused by the losing party, causing grave damage to the other party. Consider a case in which the court determines that the award is liable to be set aside because the arbitral tribunal failed to address a specific curable claim, but simultaneously, observes that the basic rational behind passing the same award is contrary to Indian law's fundamental policy. In such instance, invoking Section 34(4) may be completely unbefitting, because even if the arbitral tribunal cures the curable ground and considers the overlooked claim, the award would still qualify to be set aside because of its contrariness to fundamental policy.

Furthermore, the entire intention of Section 34(4) is to rectify the curable defect in the award, save the cost and time of the parties, avoid judicial intervention, and do not unnecessarily burden the Court. Due to the multiple appeal mechanism present in the Indian law, the erring parties directly resort to set aside proceedings. Such right of appeal adds more pressure on already overburdened Courts which cause enormous delay in the entire arbitration process shattering the sole arbitration's objective of expeditious disposal of the matter. The Indian

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[82]*MMTC* (n 23).

[83]*Geojit Financial Services* (n 36).

[84]*Dyna Technologies* (n 9).

[85]*State of Arunachal Pradesh v. Damani Construction Co.* (2007) 10 SCC 742.

legislation has provided the remittal provision as an alternative of the award being set aside due to curable deficiencies, so that the parties wouldn't have to "start from scratch" again. Remission is also more convenient than setting aside and an arbitration-friendly mechanism too.

Moreover, the lessons from foreign jurisdictions and provisions should be taken for consideration by the Indian arbitration. As pointed above, no automatic right of appeal in Singapore arbitration law. Such mechanism provide expeditious disposal of the matter and avoid unnecessary litigation by the erring party. Thus, Indian arbitration should consider and adopt such novel provisions for speedy trials. Whereas, the observations made by the English Court which calls the setting aside a 'long way' route, should be sincerely taken into consideration by the Indian judiciary as well.

SHOULD ORDERS REJECTING THE JURISDICTIONAL PLEA UNDER THE INDIAN ARBITRATION AND CONCILIATION ACT, 1996 BE APPEALABLE?

- ***Adya Jha*** [*] ***& Satya Jha*** [γ]

ABSTRACT

Similar to Article 16 of the UNCITRAL Model Law, Section 16 of the Indian Arbitration and Conciliation Act, 1996 provides that the arbitral tribunal has the power to decide upon its jurisdiction. However, while Model Law permits instant court review of arbitral tribunal's decision accepting its jurisdiction, the Act does not provide for such orders of the arbitral tribunal to be appealable. In terms of the Act, if a party is aggrieved by an order of the arbitral tribunal accepting that it has jurisdiction, it can only raise such jurisdictional issues in setting-aside proceedings under Section 34 of the Act. This may lead to jurisdictional issues attaining finality at a very belated stage, i.e., only after the arbitral award is rendered. Therefore, in order to ensure speedy and effective resolution of jurisdictional issues, this paper seeks to answer whether such orders should be made appealable under the current legislative framework.

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1. INTRODUCTION

Section 16(1) of the Arbitration and Conciliation Act, 1996 (*hereinafter* "the Act") empowers the arbitral tribunal to decide upon its jurisdiction, in line with the principle of *kompetenz-kompetenz*. Accordingly, the tribunal may either uphold a jurisdictional plea and decide that it does not have jurisdiction or reject such a plea and hold that it has jurisdiction. However, for the appeal mechanism provided in the Act for challenging such orders of the arbitral tribunal, the Act creates a distinction between both the outcomes of the plea raising jurisdictional challenges.

When a jurisdictional plea is raised under Section 16 of the Act, it can result in two scenarios- *first*, the tribunal accepts the plea and holds that it does not have jurisdiction, and *second*, the tribunal rejects such a plea and upholds its jurisdiction.

In the existing legal framework, in the first scenario, such an order is appealable under Section 37 of the Act.[1] If this appeal is rejected, the aggrieved party will evidently not have a remedy under Section 34 of the Act as the tribunal would cease to exist, and consequently, no arbitral award would be passed, which can be challenged at the stage of setting-aside proceedings under Section 34 of the Act.[2] Similarly, in the second scenario, while such an order is presently not appealable under Section 37 of the Act, the jurisdictional issues can be raised at the stage of setting aside proceedings under Section 34 of the Act. Therefore, at present, the Act only provides for a one-shot remedy in both situations, i.e., an appeal under Section 37 in cases of accepting the jurisdictional plea and a Section 34 remedy in cases of rejecting the plea raised under Section 16 of the Act.

Thus, the Act does not permit a court review of the arbitral tribunal's order accepting jurisdiction until after the passing of the final award. This is in contrast to the provisions of the UNCITRAL Model Law[3] (*hereinafter* "Model Law") which permits instant court review of tribunal's decision on jurisdiction.[4] In terms of Article 16(3) of the Model Law, if the tribunal decides that it has jurisdiction, any party may request the seat court to decide the question of jurisdiction as a preliminary question.[5] While the Act is broadly based on the

[1] The Arbitration and Conciliation Act, 1996, s37(2)(a).

[2] ibid s16(5) and s16(6).

[3] UNCITRAL, Model Law on International Commercial Arbitration, U.N. Doc. A/40/17, 24 I.L.M. 1302 (1985), with amendments adopted on July 7, 2006.

[4] ibid art. 16(3).

[5] ibid.

Model Law, it has not provided for a ruling of the tribunal upholding its jurisdiction to be subject to immediate review of the court. This is despite the fact that India expressed a view that *"a ruling by the arbitral tribunal that it has jurisdiction should be open to immediate court review"* during the discussions on the draft text of Model Law.[6]

In view of the above, the question that arises is if India should follow the Model Law approach and allow for such orders to be appealable under the Act. This article attempts to answer this question. It highlights the recourse available to a party in challenging such orders before the stage of setting-aside proceedings under Section 34 of the Act. Finally, this article suggests the need to make such orders appealable and also analyses the implications thereof.

2. IS THE RECOURSE TO WRIT REMEDY ENOUGH?

Article 227 of the Constitution provides for supervisory jurisdiction of High Courts over all Courts and tribunals in the territories in relation to which it exercises jurisdiction.[7] It is well-settled law that arbitral tribunals are also such tribunals that are amenable to writ jurisdiction of High Courts under Article 227 of the Constitution.[8] Consequently, a writ petition under Article 277 of the Constitution may be maintainable against orders passed by the arbitral tribunal in specific cases. However, the Courts have observed that usually, writ jurisdiction is excluded when there is an alternate remedy.[9] Accordingly, a writ petition against an order passed in terms of the provisions of Section 16(5) of the Act will face the challenge of availability of an alternate remedy in the form of setting-aside proceedings under Section 34 of the Act. However, this rule of exclusion of writ jurisdiction is a rule of discretion and not one of compulsion.[10]

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[6] UNCITRAL, *Analytical compilation of comments by Governments and international organizations of draft text of a model law on international commercial arbitration*, Report of the Secretary-General, U.N. Doc. A/CN.9/263 at 29 (1985).

[7] Constitution of India, 1950, art. 227.

[8] *Bhaven Construction v. Executive Engineer Sardar Sarovar Narmada Nigam Ltd. and Anr* Civil Appeal No. 14665 of 2015, para 24; *Surender Kumar Singhal v. Arun Kumar Bhalotia*, CMM 1272 of 2019, Hon'ble High Court of Delhi, decided on 25 March 2021, para 20.

[9] *Nivedita Sharma v Cellular Operators Association of India* (2011) 14 (SCC) 337, paras 15 and 16; *Whirlpool Corporation v. Registrar of Trademarks, Mumbai* (1998) 8 SCC 1, para 15; *Harbanslal Sahnia v. Indian Oil Corpn. Ltd* (2003) 2 SCC 107, para 7.

[10] Harbanslal Sahnia v. Indian Oil Corpn. Ltd (2003) 2 SCC 107, para 7; *M.P. State Agro Industries Development Corporation Limited v. Jahan Khan* (2007) 10 SCC 88, para 12.

Therefore, a party aggrieved by an order passed by the tribunal rejecting the jurisdictional issues raised under Section 16 of the Act may consider preferring a writ petition against such an order. In view of the same, it is imperative to analyse the scope and the extent of interference which is exercised by the High Courts under Article 227 of the Constitution against the orders of the arbitral tribunal.

In this regard, it is relevant to note the decision of the Hon'ble Supreme Court of India in *Deep Industries* v. *Oil and Natural Gas Limited*[11] ("Deep Industries"). In the said decision, a three-judge bench of the Apex Court was concerned with the question relating to Gujarat High Court's exercise of jurisdiction against the dismissal of an application under Section 16 of the Act by the arbitral tribunal. The Hon'ble Supreme Court reiterated that the scheme of Section 16 of the Act is such that when a Section 16 application is dismissed, the aggrieved party *"must await the passing of a final award at which stage it may be raised under Section 34".* Accordingly, it held that the Gujarat High Court had inverted the statutory scheme by entertaining the writ petition against the dismissal of a Section 16 application. The Court also laid down that "*entering into the general thicket of disputes between the parties does not behove a court exercising jurisdiction under Article 227, where only jurisdictional errors can be corrected*."

The aforesaid judicial pronouncement highlights the abject reluctance of courts to entertain a writ petition against the dismissal of a Section 16 application. However, the Court noted that Article 227 is a constitutional provision that remains untouched by the non-obstante clause of Section 5 of the Act. Accordingly, in the context of jurisdiction under Article 227 of the Constitution against judgments allowing or dismissing first appeals under Section 37 of the Act, the Supreme Court recognised the power of the High Courts to interfere under Article 227 of the Constitution and held that the High Courts should be circumspect in exercising such power and restrict its interference only to those orders passed by the arbitral tribunal, which are *"patently lacking in inherent jurisdiction."*[12]

The Court, however, did not elaborate upon the meaning of the phrase *"patently lacking in inherent jurisdiction",* the same was later clarified in *Punjab State Power Ltd.* v. *Emta Coal Ltd. & Anr*.[13] In the said case, the Hon'ble Supreme Court was seized of the question

[11] *Deep Industries v. Oil and Natural Gas* Limited (2019) SCC Online SC 1602, para 22.

[12] ibid para 17.

[13] *Punjab State Power Corporation Limited v. Emta Coal Limited and Anr Petition(s),* SLP (C) No(s).8482/2020, Hon'ble Supreme Court of India, decided on 18th September, 2020, para 4.

regarding the maintainability of the writ petition under Article 227 of the Constitution against an order passed by the arbitral tribunal dismissing the jurisdictional objections raised under Section 16 of the Act. While placing reliance upon its decision in *Deep Industries*, the Court observed that such orders could only be interfered with if they are *"so perverse that the only possible conclusion is that there is a patent lack in inherent jurisdiction."* It clarified that a patent lack of inherent jurisdiction would require no argument whatsoever, it must be the perversity of the order that must stare one in the face. Therefore, the interference of courts would be limited to orders which meet this high threshold of perversity.

In this regard, it is relevant to note that the expression "perverse" has many hues, and the Indian Courts have consistently held that perverse orders are such orders (a) that are not supported by evidence[14]; (b) which are *"not only against the weight of evidence but is altogether against the evidence itself"*[15]; (c) that no reasonable person could be said to have arrived at such a finding.[16] The said tests for determining perversity have recently also been applied by the Courts in the context of arbitral awards[17]. Thus, the standard for perversity appears to be extremely high, and until and unless such a standard is met by an order passed under Section 16 of the Act, the courts would be reluctant to interfere with such orders under writ jurisdiction.

The Hon'ble Supreme Court of India also addressed a similar issue in its recent decision of *Bhaven Construction v. Executive Engineer Sardar Sarovar Narmada Nigam Ltd*[18], wherein the Court noted that the power of the High Courts to interfere with arbitral proceedings under Article 226 and 227 of the Constitution needs to be exercised in "exceptional rarity." The Supreme Court clarified the term "exceptional rarity" by holding that such interference would be warranted in cases wherein (a) a party is left remediless under the Act; and (b) bad faith is shown by one of the parties.

In view of the aforementioned decisions, it is well settled that the Indian Courts would only interfere with orders passed by the arbitral tribunal in exceptional circumstances, given that the standard for meeting the threshold of such interference is extremely high.

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[14] *Gaya Din v. Hanuman Prasad* (2001) 1 SCC 501, para 15.

[15] *Parry's (Calcutta) Employees' Union v. Parry & Co. Ltd*. AIR 1966 Cal 31, para 58.

[16] *Triveni Rubber & Plastics v. CCE* AIR 1994 SC 1341, para 3.

[17] *PSA SICAL Terminals v. Board of Trustees, Port Trust Tuticorin* 2021 SCC OnLIne SC 508, para 45; *South East Asia Marine Engineering And Constructions Limited v. Oil India Limited* (2020) 5 SCC 164 para 15.

[18] *Bhaven* (n 8).

Even otherwise, in cases wherein the jurisdictional issues are intertwined with the substantive factual issues and determination of jurisdictional issues would require a review of the merits, the High Courts under its writ jurisdiction will not ideally interfere since such a determination may involve disputed questions of fact. It is not considered a function of the High Courts to enter into disputed questions of fact while exercising supervisory jurisdiction under Article 227 of the Constitution.[19] A disputed question of fact may be adjudicated in an Article 227 petition in exceptional cases when there exists an error apparent on the face of the record or if any other well-known principle of judicial review is found to be applicable.[20] The Hon'ble Supreme Court in *Jai Singh v. Municipal Corporation of Delhi*[21] held that principle of judicial review in the context of Article 227 would entail an order passed in "*grave dereliction of duty or in flagrant abuse of fundamental principles of law or justice.*" It further held that the power to re-appreciate evidence would only be justified *"where grave injustice would be done unless the High Court interferes."* Thus, even under this challenge to the writ jurisdiction, the aggrieved party will necessarily have to meet the high threshold of evidencing that there was an error apparent on the face of the record in the order passed by the tribunal or the tribunal abused fundamental principles of law or justice. A mere error of law will not be sufficient for the court to entertain the writ petition to adjudicate a disputed question of fact.

Therefore, it can be seen that the higher judiciary echoes the principle of minimal judicial interference in arbitration proceedings. The Courts have consistently stressed on the sparing usage of writ jurisdiction, which is a public law remedy. Consequently, unless and until the order of the arbitral tribunal passed under Section 16 of the Act, against which a writ is preferred, meets the high standard of patently lacking jurisdiction or causing grave injustice, the High Courts are not likely to interfere with such orders. It is also pertinent to note that even in cases where the high threshold is met, exercising writ jurisdiction is a rule of discretion and not a matter of right for the aggrieved party. Hence, it cannot substitute a statutory right in the form of an appeal mechanism. The next part discusses the importance of providing such an appeal mechanism in the Act.

19 *Sneh Gupta v. Devi Swarup* (2009) 6 SCC 194, para 41.

20 ibid.

21 *Jai Singh and Ors. v. Municipal Corporation of Delhi* (2010) 9 SCC 385, paras 15 and 16.

3. SHOULD INDIA FOLLOW THE MODEL LAW APPROACH?

As stated above, the Model Law allows for an immediate court review of an order passed by the tribunal upholding its jurisdiction. The approach is also followed in various pro arbitration jurisdictions such as Germany,[22] Singapore[23] and Australia.[24]

In contrast to the approach followed by Model law as also the various pro-arbitration jurisdictions, which allow for an immediate court review of an order passed by the tribunal upholding its jurisdiction, the Act only allows for raising such jurisdictional issues again in setting-aside proceedings under Section 34 of the Act. The same was done likely to uphold the principle of minimal judicial intervention and reduce the role of courts in arbitration proceedings. However, such an approach leads to jurisdictional issues attaining finality at a very belated stage, i.e., after the final award is rendered. It is pertinent to note that such issues strike at the very authority of the tribunal to pass the award. Thus, such defect must be treated as basic and fundamental and an award passed without jurisdiction is nullity.

Consequently, such issues should ideally attain finality at the earliest possible given that such issues go to the very root of the matter and challenge the very foundation of the arbitral tribunal's mandate and power to adjudicate upon the disputes in a matter.

Additionally, if such issues are decided at the stage of setting-aside proceedings under Section 34 of the Act and the court holds that the arbitral tribunal did not have jurisdiction to adjudicate upon the disputes, the same would result in wastage of time and expenses involved in the arbitration proceedings.

In the present legal framework, if an arbitral tribunal upholds its jurisdiction, passes an award and subsequently, the court decides against the tribunal's jurisdiction; the entire arbitration proceedings would be rendered futile. This would be at a stage when a substantial amount of cost and time would have been incurred in the said arbitration. As a result, the aggrieved party would only be able to approach the appropriate forum for resolving the disputes at a very belated stage, thereby defeating the very purpose of the Act to ensure speedy and effective resolution of disputes. Therefore, ensuring that jurisdictional issues raised under Section 16 of the Act attain finality at the earliest possible is in consonance with the primary of objective of objectives of resolution of disputes by arbitration—"*cost effective, economical*

[22] Tenth Book of the Code of Civil Procedure, s1040(3)

[23] International Arbitration Act, s10(3)

[24] International Arbitration Act 1974, s16 (3)

and quick."

In view of the aforementioned reasons, the policy of minimal judicial interference must not be applied in such a rigid manner such that the aggrieved party is forced to continue with arbitration proceedings and has no recourse until after the final award is rendered. Therefore, the parties should have the flexibility to approach the court against orders of the arbitral tribunal upholding its jurisdiction without waiting until the award is rendered by the arbitral tribunal. This would ensure speedy and effective resolution of jurisdictional issues. Additionally, this would also ensure legal certainty and efficient decision-making concerning jurisdictional issues. Accordingly, it is advisable to have an appropriate mechanism in the Act, allowing for an immediate court review of orders passed by the tribunal upholding its jurisdiction.

Thus, in order to bridge the gap and allow for such orders to be appealable, it is suggested that Section 37(2) of the Act should preferably be amended to allow for orders passed by the arbitral tribunal - rejecting the plea of lack of jurisdiction raised under Section 16 of the Act, to be appealable. The Act should also incorporate necessary provisions to ensure that such matters are decided expeditiously, given that the intent behind such an amendment is to ensure speedy and effective resolution of jurisdictional issues. Additionally, given that the purpose of providing the aforesaid appeal mechanism is for jurisdictional issues to attain finality at the earliest, Section 37(3) of the Act would ensure that no second appeal would lie from orders passed under Section 37(2) of the Act.

4. ADEQUATE SAFEGUARDS

It may also become relevant to address certain questions which would arise for consideration if such an appeal mechanism is provided in the Act.

4.1 Whether the Arbitration Proceedings Should Continue Pending Decision of the Court on Jurisdictional Issues?

First, the status of the arbitration proceedings when the court is deciding upon jurisdictional issues. It can be argued that the arbitration proceedings should continue whilst the court is deciding upon the jurisdictional challenge since the purpose behind expeditious disposal of jurisdictional issues is to ensure speedy and effective resolution of arbitration proceedings. On the other hand, it may be argued that if the court ultimately decides that the tribunal does not have jurisdiction to resolve the dispute, there would be a wastage of time and cost in

continuing with arbitration proceedings whilst such jurisdictional issue is being decided by the court. Arguably, both approaches can be justified, and there cannot be a blanket rule regarding the status of arbitration proceedings in such a case. Therefore, in such cases, an ideal approach would be to provide discretion to the arbitral tribunal to determine the status of arbitration proceedings whilst the court is deciding the jurisdictional issues. Accordingly, in line with Article 16(3) of the Model Law, the Act can provide that the arbitral tribunal "may" continue the arbitral proceedings while the court is deciding such an appeal.

4.2 WHETHER THE PROPOSED APPEAL MECHANISM SHOULD PRECLUDE THE REMEDY AT THE STAGE OF SETTING SIDE PROCEEDINGS?

Second, the other remedies which will be available to the party upon introduction of the proposed appeal mechanism under Section 37 of the Act.

Post the introduction of the proposed appeal mechanism, in the scenario where tribunal rejects a Section 16 plea and upholds its jurisdiction; an aggrieved party will now have a dual remedy: (a) in the form of appeal under Section 37 of the Act; and (b) at the stage of setting-aside proceedings under Section 34 of the Act.

This would lead to three primary problems. *First*, the aggrieved party, in a scenario where the tribunal accepts the plea and holds that it does not have jurisdiction, would only have one shot remedy before the Court under the Act, while the aggrieved party in the other scenario where will have a dual remedy under the Act. Therefore, in essence, the Act will treat the aggrieved parties differently despite them being situated in the same manner, i.e., being aggrieved by the arbitral tribunal's order on the jurisdictional plea. This differential treatment is not permissible under Article 14 of the Constitution.[25] *Second*, the provision of such a dual shot remedy will necessarily increase judicial interference in arbitration, which is against the ethos of the Act. *Third*, it would defeat the very purpose of introducing such appeal mechanism i.e. to resolve the jurisdictional issues expeditiously.

Accordingly, in order to counter the aforementioned problems, India should follow a balanced approach wherein, as a general rule, a party should be precluded from raising jurisdictional issues in setting-aside proceedings under Section 34 of the Act as it has already preferred an appeal under Section 37 of the Act. However, such a general rule should not be imposed as a blanket rule, and carving certain exceptions may become necessary. For instance, in cases wherein the parties can demonstrate discovery of a new fact that was not

[25] *Maneka Gandhi v. Union of India* (1978) 1 SCC 248, para 16.

raised in the appeal proceedings and could not have reasonably been in the knowledge of the parties, recourse in setting aside proceedings under Section 34 may be allowed. Therefore, parties should be allowed to take recourse in setting-aside proceedings under Section 34 of the Act only in exceptional circumstances – an assessment of which may be done on a case-to-case basis by the court. This approach would balance both the interests, i.e., of ensuring that jurisdictional issues attain finality at an early stage and ensure the correctness of decisions on such issues.

4.3 WHETHER THE REMEDY SHOULD BE MADE AVAILABLE AT THE STAGE OF SETTING SIDE PROCEEDINGS IF NO APPEAL IS PREFERRED AT AN EARLIER STAGE?

A final issue to be addressed in this context is a situation where a party does not prefer an appeal under Section 37 of the Act and chooses to directly raise the jurisdictional plea again in Section 34 proceedings. In this context, the paper proposes to discuss the approach of other jurisdictions in relation to Article 16(3) of the Model Law.

In many jurisdictions such as Hong Kong, Germany, and Australia, if a party fails to challenge an order of the arbitral tribunal concerning jurisdictional issues under Article 16(3) of the Model Law, the same precludes it from subsequently attempting to rely on jurisdictional issues in setting aside proceedings or enforcement proceedings.[26] Nata Ghibradze, who has examined the issue of "preclusion of remedies under Article 16(3) of Model Law" in detail, attributes this approach to the primary purpose behind Article 16(3) of the Model Law, which is to determine jurisdictional issues at an early stage with legal certainty.27 Interestingly, in contrast to the approach followed in the aforesaid jurisdictions, Singapore has allowed such a challenge to be raised later in setting-aside proceedings in cases wherein a party has not preferred an appeal under Article 16(3) of the Model Law in a certain specific factual scenario. Recently, this question of law was visited by the Court of Appeal in Singapore, albeit only in the context of non-participating respondents. In *Rakna Arakshaka Lanka Ltd.* v. *Avant Garde Maritime Services (Pte) Ltd*28 ("**Rakna**"), the Respondent, i.e., Rakhna Arakshaka Lanka Ltd. ("**RALL**"), did not participate in the arbitration proceedings since it protested against the arbitral tribunal's jurisdiction. In the proceedings challenging the arbitral tribunal's jurisdiction, the tribunal issued a preliminary award upholding its

[26] Nata Ghibradze, 'Preclusion of Remedies under Article 16(3) of the UNCITRAL Model Law' (2015) 27(1) Pace Int'l l. Rev. 345, 385-389.

[27] ibid.

[28] *Rakna Arakshaka Lanka Ltd v. Avant Garde Maritime Services (Pte) Ltd.* (2019) SGCA 33, para 74-77.

jurisdiction. However, RALL did not challenge this preliminary award but sought to set aside the final award once the same was rendered by the arbitral tribunal. In this light, the question that arose before the Court of Appeal was whether RALL could raise the jurisdictional challenge in setting-aside proceedings given that it had not raised it earlier under Article 16(3) of the Model Law. The Singapore Court of Appeal finally concluded that even if a non-participant respondent failed to avail the remedy under Article 16(3) of Model Law, it was not precluded from raising jurisdictional issues in setting-aside proceedings. Thus, while the aforesaid decision was in the context of a non-participant party, it seems to suggest that in certain exceptional circumstances, a failure to raise a challenge under the appeal mechanism provided under Article 16(3) of the Model Law would not preclude a party from raising jurisdictional issues later in setting-aside proceedings.

In light of the divergent views taken by various jurisdictions, it is suggested that generally, if an appeal against an order dismissing a Section 16 application is not made at the first instance under Section 37 of the Act, the party should be precluded from raising such jurisdictional issues at the stage of setting-aside proceedings under Section 34 of the Act. The underlying rationale of the approach is that a party who could have raised such an issue at an earlier stage but chose not to do so should not be ideally allowed to raise such issues in setting-aside proceedings later.[29]

The aforesaid approach would be in line with the observations of the Hon'ble Supreme Court in *Narayan Prasad Lohia* v. *Nikunj Kumar Lohia & ors.*[30] In the said decision, the Hon'ble Court considered if a party should be allowed to raise jurisdictional issues for the first time during setting-aside proceedings given that the same were not raised before the tribunal. In this regard, the Hon'ble Court observed that if a jurisdictional challenge is not raised under Section 16(2) before the arbitral tribunal, then such a party is deemed to have waived its right to raise such a challenge subsequently. In contrast to the aforesaid view, the Hon'ble Supreme Court in *M/s Lion Engineering Consultants* v. *State of Madhya Pradesh*[31] held that even if a party failed to raise a jurisdictional challenger under Section 16 (2) of the Act, such party may still be permitted to raise such a challenge during setting-aside proceedings under Section 34 of the Act. However, the aforesaid decisions were rendered in a slightly factual

[29] NG, Iris; NG, Melissa; SOH, Andre; and CHEN, Siyuan, 'Five recurring problems in international arbitration: The relationship between courts and arbitral tribunals' 2020 8 Indian Journal of Arbitration Law 19, 26-32.

[30] *Narayan Prasad Lohia v. Nikunj Kumar Lohia & Ors.* (2002) 3 SCC 572, para 16.

[31] *M/s Lion Engineering Consultants v. State of Madhya Pradesh*, (2018) 16 SCC 758, para 4.

scenario i.e., when a plea of jurisdictional challenge was raised for the first time only in the setting-aside proceedings. Moreover, given that both the decisions are rendered by a three-judge bench of the Supreme Court, it is unclear as to which decision holds ground. However, the author agrees with the view taken in the *Lohia* judgment in view of the aforesaid reasons.

However, taking from the *Rakna* approach, a party may be allowed to take recourse to setting-aside proceedings under Section 34 of the Act in cases where it can demonstrate that the recourse to the appeal mechanism was not effectively available to it.

5. CONCLUSION

In conclusion, although India's legal framework for commercial arbitration follows a pro-arbitration approach in line with the principle of minimal judicial interference, some modifications appear necessary to bring it in line with the Model Law approach. Introducing an appeal mechanism for orders passed by the arbitral tribunal upholding its jurisdiction under Section 16 of the Act while providing adequate safeguards to prevent excessive interference by courts – would ensure speedy and effective resolution of jurisdictional issues. The benefits of the approach are multi-fold. This will likely ensure legal certainty of jurisdictional issues at an early stage and prevent a situation where the award passed by the arbitral tribunal is nullity. As a consequence, this would prevent wastage of time and costs in arbitration proceedings in case the court decides that the tribunal does not have jurisdiction to adjudicate upon the disputes in the arbitration proceedings. In the proposed framework, the court should have the discretion to order continuation of arbitral proceedings pending decision on the issue of the tribunal's jurisdiction. Furthermore, a party should be precluded from raising jurisdictional issues in setting-aside proceedings under Section 34 of the Act if it has already preferred an appeal under Section 37 of the Act unless it can prove the existence of exceptional circumstances such as discovery of a new fact. However, in the event that a part chooses not to prefer the proposed right of appeal, it should not allowed to take recourse to setting-aside proceedings unless it can demonstrate that the recourse to the appeal mechanism was not effectively available to it.

ARBITRABILITY OF FRAUD - JUDICIARY'S CONTEMPORARY STANCE

- *Riddhima Lohia*[*]

ABSTRACT

Arbitrability of fraud is a legal issue that has been a victim to lack of clarity in legislations, vague worded judgements and diverging stances taken by various courts. Earlier, the courts did not trust arbitration's capabilities to handle such a dispute but the more recent judgements have discarded that view and taken a more pro-arbitration stance. The pro arbitration stance can be seen in the 2020 judgement of Avitel which settled the jurisprudence on this matter by laying down two tests to decide which disputes are arbitrable and which are not. While most of the literature has seen Avitel as the concluding chapter in the book of arbitrability of fraud, this paper will analyse the judgements and legislations that followed Avitel and examine the current stance taken by the judiciary. This paper will endeavour to discuss the evolution of case law on arbitrability of fraud, highlight the impact of the 2020 ordinance and elaborate on the contemporary stance taken by the courts.

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1. INTRODUCTION

Fraud can be defined as deceiving another person by lying to him or withholding necessary information with the intent of inducing him to enter into a particular contract.[1] Shifting focus to arbitrability, it is concerned with whether a type of a dispute can or cannot be settled by arbitration. When a dispute is held to be non-arbitrable, it falls within the jurisdiction of the courts. Further, as per Article 36(1)(*b*) of the UNCITRAL Model Law, a court can refuse enforcement if it finds that the subject-matter of the dispute is not capable of settlement under the law of the State.[2] Surprisingly, there is no clear definition of arbitrability in Indian legislations including the Arbitration and Conciliation Act, 1996 and the 2015 amendment to it. This confusion is only heightened when the issue of fraud is combined with it as no Indian legislation gives a clear answer to the issue of arbitrability of fraud.

However, the courts resort to other sections while deciding matters of arbitrability. Section 8 states that the courts have the power to refer the cases to arbitration if a valid arbitration agreement exists. Further, Section 34(2)(b) ensures that awards can be set aside if the subject matter is not arbitrable. Since, these section are not conclusive, the judiciary has taken differing stances on this topic. Despite two major legislations, at least 8 landmark decisions, and recommendations made by the Indian Law Commission, no legislative clarity existed until quite recently.[3]

2. EARLIER STANCE OF THE JUDICIARY

The case of *Russel v. Russel*[4] in 1880 was the first prominent case on the question of arbitrability of fraud. This case laid down the principle that if *prima facie* evidence supports the occurrence of fraud, then the court has the power to intervene and prohibit the matter from being referred for arbitration.[5]

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[1] Section 17 of the Contract Act, 1872

[2] Shuchi Sejwar and Arpit Lahoti, 'Arbitrability Of Fraud: Is The Anomaly Solved | SCC Blog' (*SCC Blog*, 2021) <https://www.google.com/amp/s/www.scconline.com/post/2021/02/27/arbitrability-of-fraud/%3famp> accessed 10 September 2021.

[3] Sarah Mir, 'The Tests For Determining Arbitrability Of Fraud In India: Clearing The Mist - Kluwer Arbitration Blog' (*Kluwer Arbitration Blog*, 2020) <http://arbitrationblog.kluwerarbitration.com/2020/10/06/the-tests-for-determining-arbitrability-of-fraud-in-india-clearing-the-mist/> accessed 10 September 2021.

[4] (1880) LR 14 Ch D 471

[5] Supra Note 3.

This case was followed by *Abdul Kadir Shamsuddin Bubere* v. *Madhav Prabhakar Oak*[6] in the year 1962. The Indian Supreme Court made two important observations.[7] *Firstly*, not every case which includes an allegation of fraud would lead to the arbitration proceedings being dissolved. The court will intervene only when the allegation of fraud was serious in nature. *Secondly*, the court said that the desire of the parties will be taken into consideration and seen as sufficient cause on whether the matter should go to arbitration or court. The matter will go to court when there are 'serious allegations of fraud' against a party and the said party is of the desire that the matter be tried in open court. The reasoning behind this is that the party who is charged with fraud should decide whether his character judgement should take place in a public or private forum. Thus, this decision followed Russel v Russel but also added some additional conditions. A limitation of this case is that it does not address what would happen if there is a serious allegation of fraud but the accused wishes to go to arbitration.

The next major case that discusses arbitrability of fraud is *N. Radhakrishnan v. Maestro Engineers*[8]. It held that when a suit involves serious allegations of fraud, the matter is not arbitrable because given the evidence-heavy nature of investigation courts will be more suited to solve the dispute. It is pertinent to note that even though this judgement followed the precedent set by the previous two cases, it was in violation of section 8 of the 1996 Act, which was extremely different from section 20(4) of the Arbitration and Conciliation Act, 1940 that was in place when the Supreme Court decided *Abdul Kadir*.[9]

This judgement was problematic for three main reasons. *Firstly*, it was in violation of section 8. Section 8 clearly states that if an arbitration clause exists in an arbitration agreement and that agreement is produced before the court, the court has to send the matter to arbitration. The mandatory language of Section 8 implies that under no circumstances, including cases with serious allegations of fraud, can the court refuse to refer the matter to arbitration if the agreement exists.[10]

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[6] (1962) AIR 406

[7] 'Does Fraud Vitiate Arbitration? Revisiting Arbitrability Of Frauds In India - Rgnul Student Research Review (RSRR)' (*RGNUL Student Research Review (RSRR)*, 2021) <http://rsrr.in/2021/02/07/arbitrability-fraud-india/> accessed 10 September 2021.

[8] (2009) (13) SCALE 403

[9] 'Analysing India's Problematic Jurisprudence' - Indian Journal of Arbitration Law Arbitrability of Fraud: 8 IJAL (2020) 141

[10] Ibid.

Secondly, it neither followed nor distinguished the Supreme Court judgement of *Hindustan Petroleum Corporation Ltd. v. Pinkcity Midway Petroleums*[11] which laid down the precedent that "if in an agreement between the parties before the civil court, there is a clause for arbitration, it is mandatory for the civil court to refer the dispute to an arbitrator."[12]

Thirdly, it displayed the lack of trust the judiciary had on the arbitration machinery. This is because the court said that courts are more competent to try matters concerning serious allegations of fraud as they have the required means to decide such a complicated matter.[13]

3. EVOLUTION OF THE JURISPRUDENCE

The following year in July 2010, the case of *Jamuna Transport Corporation v. Ghanshyamdas Baheti & Ors.*[14] was decided which was the first case to increase the threshold for courts' interference so that not every frivolous suit claiming fraud would result in the dissolution of arbitration proceedings. It laid down the principle that not every allegation questioning the physical existence of an arbitration agreement due to fraud would be admitted in court. The mere filing of a suit challenging the existence of an arbitration agreement due to fraudulent activities will not preclude the arbitral tribunal from carrying out the due procedure. It is only in cases where there is enough evidence of a seriously credible charge of fraud that makes the court question the validity of the arbitration agreement, would arbitration proceedings be set aside. This was done to avoid opening up the floodgates resulting in every knave to concoct a fraud claim just to postpone the arbitration proceedings.

Building on the previous precedents, a couple months later in September 2010, *Bombay High Court Building v/s St. Denis Street*[15] was decided by Bombay High Court. This case followed *N. Radhakrishnan v. Maestro Engineers* in holding that when there are serious allegations of fraud, requiring detailed examination of witnesses, it is not suitable to be decided using arbitration and have to be decided by courts. As stated above, this is a problematic view as it reflects the lack of faith judiciary has on the justice delivered during arbitration proceedings.

Furthermore, it also built on the *Abdul Kadir* case on the point that the choice of the parties should be taken into consideration when deciding the means of dispute resolution. This case

[11] (2003) 6 SCC 503

[12] Ibid

[13] Supra note 7

[14] (2010) (4) CHN (Cal) 488

[15]

held that the choice of the parties will be given due regard except when vital issues of fraud and public policy are raised, and when interests of third parties are involved. When these additional issues are added to the dispute, the court will independently decide whether the matter will go to a domestic tribunal in confidentiality or whether it will be decided by a court.

The next case is the decision of the Supreme Court in *Swiss Timing Ltd. v/s Commonwealth Games Organising Committee*[16]. Its first important aspect is that it criticised the decision in the Radhakrishnan case for the same reasons as stated above. Secondly, it stated that a dispute where fraud is alleged will only go to court if the arbitration agreement is vitiated. However, the judge also gave a caveat and said that the defence of the contract being void is now-a-days taken routinely with the motive to avoid/delay reference to arbitration and such ground needs to be summarily rejected unless there is clear indication that the defence has a reasonable chance of success.

Thirdly, the timing of alleging fraud is also of essence. If the allegation of fraud is never made before during the arbitration proceedings and is brought up for the very first time when the plea is taken in court, then the matter is more appropriate to be heard by the Arbitral Tribunal.

Fourthly, court *"also held that the lodging of a criminal case would not bar reference to an arbitration tribunal."*[17] However this judgement was not given the stature of binding precedent as it was delivered by single judge and Radhakrishnan was delivered by a division bench.

World Sport Group (Mauritius) Ltd. v. MSM satellite Pte Ltd,[18] went one step ahead of the previous case and held that unless the arbitration agreement is held to be *null and void*, or inoperative in nature, the allegations concerning fraud can be decided by the arbitral tribunal itself. In doing so, it specifically declined to accept the judgements in *Abdul Kadir Shamsuddin Bubere* v. *Madhav Prabhakar Oak* and *N. Radhakrishnan v. Maestro Engineers, 2009* which had rejected references to arbitration when there were serious issues of fraud involved. The court reasoned that the current matter concerns foreign arbitration while

[16] Supreme Court of India, Arbitration Petition No 34 of 2013

[17] Supra note 7

[18] (2014) 11 SCC 639

"*Abdul Kadir* and *N Radhakrishnan* were domestic arbitration cases. So, in deciding this dispute under Section 45 of the Act, it shall not rely upon domestic disputes." [19]

In the same year, the Law Commission's 246th Report was published which proposed an addition of S.16(6) which would give the arbitral tribunal power to pass an award even in matters consisting of allegations of fraud. This section would not disallow the parties from raising the issue of arbitrability before the arbitrator at the pre-award stage. Even if their arbitrability claim is denied, there would be an option of challenging the award in court even at the post-award stage, on the ground of conflicting with the public policy of India under Section 34(2)(b)(ii) of the 1996 Act.[20]

However, Indian Parliament decided not to incorporate the recommendation of the Law Commission. Later, the court interpreted this decision as the parliament leaving it to the courts to work out the fraud exception on a case-by-case basis. However, this is problematic "as it will lead to a "a case by case" determination of what constitutes fraud and will result in unnecessary judicial intervention and delay. This approach would harm the existing regime of arbitration to a considerable extent."[21]

Punjab National Bank vs Kohinoor Foods Limited[22], decided on 13 February 2015, added a layer of complexity to the jurisprudence on the wish of the parties which was established in the case of *Abdul Kadir*. It held that in addition to considering the wish of the parties, it is pertinent to consider the wish of a specific party – the accused. The judge said that "*Though I quite agree it is within the discretion of the Court to say, where one of the two partners desires it, that a dispute shall not be referred to arbitration, yet I must consider for a moment which of the two partners does desire to exclude arbitration. Does the party charging the fraud desire it, or the party charged with the fraud desire it?"* The court would not hold the desire of the person charging the fraud to be sufficient reason for the Court refusing to send the case to arbitration.

However, the accused's desire be tried by a public fora such as a court would be see as sufficient reason. Reason behind this is that the person alleging the fraud does not have his reputation at stake and could want a court trial to harm the accused's reputation. The accused

[19] Supra note 7

[20] Supra note 3

[21] Supra note 4

[22] Punjab High Court, Arb. Petition No. 534 of 2013

is the one whose reputation could be irreversible damaged by the court trial and the public glare associated with it and thus, his wish should be given priority.

Even after clarifying the courts' stance on whose desire would be considered sufficient ground, the court did not give it due regard. They instead held that since the allegations of fraud were of a serious nature, they ought to be determined by a civil court. This was done despite the fact that the person who had been charged with fraud sought to trigger the arbitration mechanism, the court did not oblige.

This case followed the Denis case but it made an additional clarification that the criteria of seriousness of the fraud alleged is given more importance than the criteria of whether the accused person wishes to be tried in court of in arbitration.

The 2016 case of *A. Ayyasamy v. A. Paramasivam and Ors*[23] held that once there was an arbitration agreement amongst the parties, the court had no discretion to deviate from compelling the parties to proceed for arbitration. This judgement upheld the precedent established by *Petroleum Corporation Ltd. v. Pinkcity Midway Petroleums* which was previously ignored in Radhakrishnan case. Additionally, it held that court would be allowed to intervene when the dispute involved internal matters of parties and affected public domain or when validity of Arbitration Agreement was questioned till such an extent that the root of the agreement or the validity of clause was being deliberated upon. These criteria made up allegation of 'serious fraud'. And when these elements were not at play, then the case was capable of being resolved through Arbitration.

In 2018, *Ameet Lalchand Shah vs Rishabh Enterprises*[24] applied the Ayyasamy judgement. It stated that only when serious questions of fraud are involved, the arbitration can be refused and they decided what a serious allegation was based on the definition given in Ayyasamy.

This case was followed by *Rashid Raza v. Sadaf Akhtar, 2019*[25]. It followed the previous two precedents and went one step further by laying down the two prolonged test to determine if an allegation was serious/complex enough to merit the court's intervention. The two-part test is that the arbitration agreement should be vitiated and the dispute should involve internal matters of parties and affect public domain. The legal backing of this judgement could have been found in the then existent Section 11(6A) of the 1996 Act, which was later removed.

[23] (2016) 10 SCC 386

[24] (2018) 15 SCC 678

[25] (2019) 8 SCC 710

The section restricted the scope of courts in declining references to arbitration and the role of courts were limited to examining whether a valid arbitration agreement existed. [26]

4. OUTLOOK ADOPTED IN 2020 AND 2021- HIGHER STANDARD FOR NON-ARBITRABILITY

The *Avitel Post Studioz Limited and Ors. v. HSBC PI Holdings (Mauritius) Limited and Ors.*[27] case held that when mere allegations of fraud simpliciter exists, the Hon'ble Supreme Court must not nullify the arbitration agreement as the arbitral tribunal could determine such issues. "The following two tests were emphasised by the Apex Court to determine what constitutes "serious allegation of fraud": 1. Whether the plea permeates the entire contract and above all, the agreement of arbitration, rendering it void?; or alternatively 2. Whether the allegations of fraud touch upon the parties' internal affairs inter se having no implication in the public domain?" [28]

Along with judicial pronouncements, there was significant development in the legislative domain on the theme of arbitrability of fraud. On 4th November 2020, Government of India passed the Arbitration and Conciliation (Amendment) Ordinance 2020. "The Ordinance introduces provisions to stay the enforcement of arbitral awards tainted by fraud, and deletes certain provisions from the Act relating to qualification and accreditation of arbitrators."[29] A proviso to section 36 was added which stated that if there is prima facie evidence of the fact that that the arbitration agreement or the making of the award was tainted with fraud or corruption, the court has the power to stay the award unconditionally pending disposal of the challenge under section 34 to the award. Here, the importance of prima facie evidence can be clearly seen. [30]

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[26] Supra note 7

[27] (2014) SCC OnLine Bom 929

[28] Vasanth Rajasekaran, 'The Evolving Jurisprudence Of 'Arbitrability Of Fraud' In India – Where Do We Stand? - Litigation, Mediation & Arbitration - India' (*Mondaq.com*, 2021) <https://www.mondaq.com/india/arbitration-dispute-resolution/1039916/the-evolving-jurisprudence-of-39arbitrability-of-fraud39-in-india-where-do-we-stand> accessed 10 September 2021.

[29] Nicholas Peacock and Nihal Joseph, 'Recent Developments In India-Related Arbitration' (*Lexology*) <https://www.lexology.com/library/detail.aspx?g=3de52544-7051-4d33-90e5-9b6b3f125cbc> accessed 10 September 2021.

[30] Nubee Naved and Samaksh Goyal, 'Fraud And Its Effect On Arbitral Awards In India: Have The Legal Developments Of 2020 Given Us A Clear Path?' (*Bar and Bench - Indian Legal news*, 2020) <https://www.barandbench.com/columns/fraud-effect-arbitral-awards-india-legal-developments-2020> accessed 10 September 2021.

This ordinance has a retrospective application as well. The explanation to the proviso stated that the amendment shall apply to all cases irrespective of whether court or arbitral proceedings had commenced before or after the Arbitration and Conciliation Act, 2015.

In December of 2020, the Supreme Court dealt with the case of *Vidya Drolia vs Durga Trading Corporation*[31]*, 2020.* The court took a clear stand on arbitrability of fraud. It stated that non-arbitrability depends on whether: (a) the dispute affects rights *in rem*, (b) it affects the rights of third parties, or requires central adjudication, (c) the subject matter has any relation to sovereign or public interest functions of the State, or (d) the mandatory law has expressly or implied barred any reference to arbitration.[32]

The first condition relating to rights in rem is in accordance with the 2011 case of *Booz Allen and Hamilton Inc. v. SBI Home Finance Ltd* which held that the disputes dealing with rights in personam were arbitrable whereas the rights in rem were not arbitrable as they have the potential to affect the society at large. [33]

These conditions are in addition to the main test of whether the arbitration clause has been vitiated. To determine the prima facie validity of the arbitration agreement, the court has to delve into questions of whether the examine the prima facie validity of an arbitration agreement includes only: a. Whether the arbitration agreement was in writing, whether the arbitration agreement was contained in exchange of letters, telecommunication, and whether the core contractual ingredients qua the arbitration agreement were fulfilled. If these questions result in an affirmative answer, the matter would go to arbitration, negative answer would send the matter to court and if the validity of the arbitration agreement could not be determined on a prima facie basis, the matter would again go to arbitration.

This judgement clarifies the matter of arbitrability of fraud and puts it into simple words. This is the most comprehensive judgement as it takes into account previous decisions and forms the perfect end to the evolution of the jurisprudent on arbitrability of fraud.

Shifting focus to the cases in 2021 regarding arbitrability of fraud, the next case is *M/S N.N. Global Mercantile Pvt. Ltd. vs M/S Indo Unique Flame Ltd., 11 January 2021*[34]. Supreme

[31] (2021) 2 SCC 1

[32] Sumit Chatterjee and Rajashri Seal, 'Vidya Drolia Case: Final Chapter In The Arbitrability Of Fraud Saga? - Indiacorplaw' (*Indiacorplaw.in*, 2021) <https://indiacorplaw.in/2021/01/vidya-drolia-case-final-chapter-in-the-arbitrability-of-fraud-saga.html/amp> accessed 10 September 2021.

[33] Supra note 3

[34] (2021) SCC OnLine SC 13

Court once again reinforced the position in contemporary arbitration jurisprudence that fraud is arbitrable. The only exception is when the fraud goes to the root of the arbitration agreement and renders the arbitration clause void. The exception aspect of this judgment was that it clarified that criminal aspect of fraud that result in penal consequences and sanctions can only be adjudicated by a court of law since it may result in a conviction which falls in the realm of public law.

The second major case of 2021 is *M/S Bihar Home Developers And Builders vs Shri Narendra Prasad Gupta*, 7 July 2021. The Patna High Court relied on previous cases of Ayyasamy, Avitel, Vidya and Global Mercantile and held that the civil aspect of fraud is arbitrable but the arbitration clause being vitiated would serve as an exception to the contemporary view on arbitrability.[35]

The final case this paper will discuss is *Weiss Technik India Private Limited vs Ms. Bollupalli Madhavilatha* which was heard by the Telangana High Court. It was held that fraud would not be considered non-arbitrable when there was "voluminous and extensive evidence and would be too complicated to be decided in arbitration,"[36] was held to be an archaic view which has become obsolete and deserves to be discarded. This is because the ground reality is that arbitral tribunals are required to traverse through volumes of material on a daily basis when dealing with cases involving in various kinds of disputes in oil, natural gas, or construction industry. This case went against the 2009 case of Radhakrishnan which held that serious allegations of fraud should not be arbitrable given the evidence-heavy nature of investigation, the courts will be more suited to solve the dispute. The Radhakrishnan case displayed the lack of trust the judiciary had on arbitration mechanism and the present case, reinstated that trust, and gave it the due respect in deserved. This is an excellent example of how the jurisprudence has evolved in the past decade.

5. CONCLUSION

Indian jurisprudence has evolved along the same lines as that of Singapore, an arbitration friendly jurisdiction. However, Indian courts can take a cue from Singapore courts as well in matters of nature of evidence. The Singapore High Court[37] ruled that an allegation of fraud made wit respect to arbitration proceedings must be supported by compelling evidence which

[35] Paragraph 20

[36] Paragraph 21

[37] *Beijing Sinozonto Mining Investment Co Ltd v Goldenray Consortium (Singapore) Pte Ltd [2014] 1 SLR 814*,

is more persuasive than that required in a claim for negligence because of the gravity and seriousness of the allegation

The jurisprudence on Arbitrability of fraud has seen a major transformation – from Russel where all fraud related cases were non-arbitrable to Avitel where the matters involve "public flavour to be kept outside the scope of arbitration. The issue of fraud has now to be observed from the facts of the case and then analysed to determine whether the particular frauds are Arbitrable or not."[38] The decision of Avitel is being followed by the courts now as can be seen in the recent cases of 2020 and 2021. The current stance of the judiciary can be understood from the following declaration made in *M/S N.N. Global Mercantile Pvt. Ltd. vs M/S Indo Unique Flame Ltd., 11 January 2021* -"the notion that allegations of fraud, forgery, or fabrication are non-arbitrable is a wholly archaic view and needs to be discarded."[39]

Although courts have done their best in dealing with arbitrability of fraud in 2021, it will be useful for the current stance to be embedded in the legislation so as to prevent future judges from deviating from this stance.

By setting a high standard for non-arbitrability, the judiciary has taken a pro-arbitration approach[40] and prefers to limit its interference in arbitration proceedings. This is in consonance with the "arbitration-unfriendly" outlook taken by the court in recent years. Other matters which saw such maturity on the part of Indian Courts are narrow scope of intervention in execution of foreign awards and limited scope of public policy applicable to foreign awards. These instances show significant effort being taken by the judiciary to put India on the map as a pro-arbitration jurisdiction. In my opinion, this pro-arbitration stance taken recently is much better than the earlier stance as it limits the interference in arbitration proceedings, reduces occurrences of people concocting false claims of fraud to delay arbitrations and will go a long way in making India the hub of arbitration.

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[38] Saumya Vanwari, 'Arbitrability Of 'Fraud': Journey From 'Blanket Exclusion' To 'Public Flavour' (*Latest Laws*, 2021) <https://www.latestlaws.com/articles/arbitrability-of-fraud-journey-from-blanket-exclusion-to-public-flavour/#_ftnref12> accessed 10 September 2021.

[39] Supra note 16

[40] Supra note 24



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