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FOREWORD

On behalf of Shardul Amarchand Mangaldas & Co (SAM), I would like to extend my sincerest congratulations to the Editorial Board of the RGNUL Financial and Mercantile Law Review (RFMLR) and to the Rajiv Gandhi National University of Law, Punjab (RGNUL) for the successful conclusion of the RGNUL-SAM Conclave on Arbitration in Practice, 2021. I am happy to write the foreword for this Issue that is comprised of research of bright young students, selected after extremely rigorous scrutiny by Editors at RFMLR, professionals at SAM and Faculty Members of RGNUL.

In contemporary times, arbitration has become an indispensable part of the legal system in the world, including in India with its ever-expanding reach and many benefits. The popularization of commercial arbitration in both the Indian as well as the international set-up has acted as an impetus for foreign trade, investment and cross-border transactions. It has also expedited the hitherto traditional and long drawn process of litigation domestically and internationally. Shardul Amarchand Mangaldas & Co, as one of the leading law firms in India for international and domestic arbitration, was proud to collaborate with RFMLR for the purpose of expatiating and stimulating research on contemporary issues regarding the practical aspects of arbitration in India. The event was conducted with Singapore International Arbitration Centre (SIAC) as an Associate Partner, and Bar and Bench as the Media Partner.

The RGNUL SAM Conclave on Arbitration in Practice, 2021 was organised over two days - July 17 and 18, 2021, and comprised of two sessions: The Paper Presentation Session, and The Expert Panel Discussion

on the practical aspects of arbitration. I am pleased to note that this two-day virtual event proved to be extremely enriching and insightful for all participants.

The Paper Presentation Session witnessed enthusiastic participation from law students from across India who proffered and presented novel, innovative and practical solutions for issues faced by all stakeholders in arbitration.

The Expert Panel Discussion brought together leading arbitration experts from SAM, and other leading industry experts in the field of arbitration who shared practical insights into the evolving opportunities and persisting hurdles likely to shape arbitration in the coming years. The topics covered during the Expert Discussion such as selection of arbitrators, delays in adjudication, expert witnesses, court intervention and inflation of claims, shed light and initiated discourse on the practical themes of arbitration which are generally left unaddressed.

This Issue is a sincere attempt towards capturing a detailed discourse on genuine roadblocks faced by the industry. The cutting-edge research demonstrated by the authors through their comprehensive papers will prove to be seminal in furthering the aim of providing practical insights into the evolving field of arbitration. We hope the topics discussed under this Issue would be instrumental in bridging the lacunae of literature focusing on the practical aspects of arbitration, and would be of immense help to students and professionals interested or working in the field of arbitration.

I would like to congratulate the Editorial Board on the smooth conduction of the Conclave. I would also like to convey my gratitude and

regard to the Hon'ble Vice Chancellor, faculty of RGNUL, the team of SAM and all participants who have been involved in this special issue on Arbitration in Practice. We look forward to collaborate with RFMLR and collectively move towards disseminating legal knowledge and furthering the discourse on various issues in the legal landscape.

Best Wishes.
Mr. Tejas Karia
Partner, Head-Arbitration
Shardul Amarchand Mangaldas & Co

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I. THIRD-PARTY FUNDING IN ARBITRATION: INTERNATIONAL LANDSCAPE AND THE ROAD AHEAD FOR INDIA

- Naman Devpura[*]

ABSTRACT

With the ever-increasing burden upon parties for dispute settlement added with the economic crisis due to the ongoing COVID-19 pandemic, arbitration in India today actively requires third-party funding mechanisms at place. In this light, this paper builds upon the concept of third-party funding and its benefits for a suffering economy such as India. The paper explores the legality of third-party funding agreements in light of the legal doctrines of maintenance and champerty. From analysing the historical significance of these doctrines to the modern-day jurisprudence from leading jurisdictions, the paper makes the case that third-party funding should ideally be insulated from the umbrella of these doctrines. The paper then traces the legislative and judicial approaches to third-party funding in India and discusses the underlining legal uncertainty and future prospects. While focusing on the model adopted by Singapore and Hong Kong, the paper discusses the practical and ethical considerations associated with third-party funding such as disclosure requirements, confidentiality, and control by a third-party funder. Upon the need for regularisation of third-party funding in arbitration, the paper lays down the implications for approaching the regularisation of third-party funding in India and cementing its prospects as a global leader in dispute resolution through arbitration.

[*] The author is a fourth-year student of B.B.A. LL.B. (Hons.) at Gujarat National Law University, Gandhinagar.

I. INTRODUCTION

"That there is no such thing as a free lunch remains a debatable statement. But that there is no such thing as a free arbitration is not."[1]

With the rapid rise in cross-border transactions, the scope of arbitration has mounted extensively. However, exorbitant costs and prolonged proceedings have followed the erstwhile efficacy and popularity of Arbitration as an effective dispute resolution mechanism.[2] As a fundamental characteristic for arbitration in practice is to provide an open and equal access for the parties involved, all persons with meritorious claims should have access to justice through arbitral proceedings.[3] Therefore, for parties with limited financial resources, third-party funding provides a theoretical chance to bring such claims.[4]

Third-party funding can be defined as a mechanism through which all or part of the costs of a dispute resolution process is financed by a third party in return for a percentage of the damages awarded.[5] Fundamentally, a third-

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[1] Yves Derains, Foreword, ICC DOSSIERS (May 21, 2021), https://library.iccwbo.org/content/dr/DOSSIERS/Doss_0017_FWD.htm?l1=Dossiers&l2=Third+party+Funding+in+International+Arbitration.

[2] ALAN REDFERN ET. AL., REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION 10 (Oxford University Press 2009).

[3] LISA BENCH NIEUWVELD, THIRD-PARTY FUNDING IN INTERNATIONAL ARBITRATION 13 (2nd ed., Wolters Kluwer 2017).

[4] Campbells Cash and Carry Pty Ltd v. Fostif Pty Ltd, (2006) HCA 41 144.

[5] R. Harfouche et. al., *Third-Party Funding: Incentives and Outcomes,* GLOBAL ARB. REV. 10 (2013).

party funder bears the cost associated with the arbitration proceedings with an aim to benefit from a suitable award from the dispute resolution. Third-party funding can immensely benefit the parties in reducing legal budgets, taking the arbitration costs off-balance sheet, mitigating risks associated with outcome and focusing on other business priorities.[6]

Further, third-party funding can also contribute to a decline in frivolous claims.[7] This is majorly due to the preliminary investigations undertaken by such funders for weighing the merits and risks of the claim.[8] From the perspective of third-party funders, the determination of viable claims is taken on various factors such as jurisdictional issues, counter claims, the relationship between the parties, quantum of the claim and risks associated with enforcing an award.[9]

The ongoing pandemic has insistently affected economies across the world with far-reaching consequences. India's projected growth rate has been reduced to 1.2% in 2020 while the world economy is expected to drop cumulatively output amounting to 8.5 trillion in 2020 and 2021.[10] This economic turmoil has triggered a wave of unprecedented disputes arising

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[6] Noiana Marigo et. al., *How can third-party funding help businesses during the pandemic?*, FRESHFIELDS (May 21, 2021).
https://passle-net.s3.amazonaws.com/Passle/5832ca6d3d94760e8057a1b6/MediaLibrary/Document/2020-08-31-06-03-33-256-Third-partyfundingpost.pdf.

[7] Eric De Brabandere & Julia Lepeltak, *Third Party Funding in International Investment Arbitration*, 7 GROTIUS CENTRE FOR INT'L LEGAL STUDIES Working Paper No. 2012/1, (2012).

[8] *Id.*, at 10.

[9] STEPHEN JAGUSCH, THE LEADING ARBITRATORS' GUIDE TO INTERNATIONAL ARBITRATION 211 (3rd ed., Juris Publishing 2014).

[10] UNITED NATIONS, WORLD ECONOMIC SITUATION AND PROSPECTS REPORT, 2020 https://www.un.org/development/desa/dpad/wp-content/uploads/sites/45/WESP2020_FullReport.pdf.

from sovereign stringent measures against the pandemic and contractual agreement disruptions.

In these circumstances, third-party funding is certainly significant to foster dispute resolution while allocating responsibility for questions of insurance, business interruption and force-majeure doctrine.[11] Given their non-recourse nature, third-party funding agreements are being viewed as a risk-free product for the companies which provide ready access to capital for pursuing legitimate claims.[12] Further, by enforcing the recovery of assets without undermining the liquidity, these agreements can transform the arbitration "from an expense into a cash-generating asset," a much-needed change in the current pandemic.[13]

These agreements can further mitigate the risk associated with prolonged arbitral proceedings as the uncertainty over outcomes rises and is added with higher cash flow requirements.[14] However, given the relatively longer due diligence carried out by the funders, the claimants can be forced to explore other options such as ad hoc agreements. These options, although

[11] Joanna Bourke, *Market report: Burford Capital could benefit if Covid-19 legal disputes stack up*, EVENING STANDARD (May 28, 2020), https://www.standard.co.uk/business/market-report-burford-capital-could-benefit-if-covid19-legal-disputes-stack-up-a4426076.html.

[12] Ben Sanderson, *Litigation funding: a financial solution to the pandemic*, LEXOLOGY (May 28, 2020), https://www.lexology.com/library/detail.aspx?g=e74258a1-3001-4cde-b11f-b6fd7a5bc33f.

[13] Dana MacGrath et. al., *Third-Party Funding and COVID-19*, KLUWER ARBITRATION (May 28, 2020), https://www.kluwerarbitration.com/document/KLI-KA-Scherer-2020Ch10?_ga=2.112853444.1941180986.1622299558-420699169.1621541253.

[14] Megan Betts, et. al., *The Impact of the COVID-19 Pandemic on Third Party Funding and Security for Costs in International Commercial Arbitration*, KLUWER ARBITRATION BLOG (May 28, 2020), http://arbitrationblog.kluwerarbitration.com/2020/07/30/the-impact-of-the-covid-19-pandemic-on-third-party-funding-and-security-for-costs-in-international-commercial-arbitration/.

being relatively easier and flexible, may expose the parties to security for costs order.[15]

II. THE DOCTRINES OF MAINTENANCE AND CHAMPERTY

The utmost objection and constraint to the practice of third-party funding finds its roots in the English law doctrines of maintenance and champerty.[16] While the former can be defined as intermeddling with an ongoing dispute by third parties with no interests,[17] the latter means a particular variety of maintenance where the third-party providing such maintenance draws from the proceeds of the suit or litigation.[18] As has been defined by the United States Supreme Court, "maintenance is helping another prosecute a suit; champerty is maintaining a suit in return for a financial interest in the outcome."[19]

By these definitions, third-party funding agreements seem to be exactly the category of agreements to be avoided by these doctrines. However, the primary rationale for which the doctrines were formulated no longer applies as the balance of purity of justice and interests of vulnerable litigants for which the doctrines were formulated[20] itself contradicts when the

[15] *Id.*
[16] Hong-Lin Yu, *Can Third Party Funding Deliver Justice in International Commercial Arbitration?*, 20(1) INT'L ARB. L. REV. 20 (2017).
[17] R.L MEENA, TEXBOOK ON CONTRACT LAW INCLUDING SPECIFIC RELIEF (1st ed., Universal Publishing 2008).
[18] Jern-Fei Ng, *The Role of the Doctrines of Champerty and Maintenance in Arbitration*, 76 ARB. 2 (2010).
[19] Re Primus, 436 U.S. 412 (1978).
[20] Giles v. Thompson, (1993) 3 All ER 321.

access of justice is jeopardized.[21] To understand this argument in a better capacity, it is pertinent to trace the history of these doctrines.

A. Historical Context

The deliberation on the issue of third-party funding dates back to ancient Greece where parties were assisted by sycophants in vexatious litigations, a practice which was followed in Rome which saw the rise of 'calumniator' or third party which brings actions in name of another with no interests whatsoever.[22] The problems associated with such concerns saw its peak in English courtrooms, where outside attorneys and lords were feared for manipulation of decisions and were banished to enter the same.[23]

This enormous outside support in terms of finance was viewed as a tool which perverts the judicial process of law into an engine of oppression.[24] In the later era, this practice was extensively used by feudal lords who would underwrite suits against their opponents and also demand a share in the property.[25] Thus, through these numerous and ever-expanding principalities, maintenance and champers were declared as crimes against public justice.[26] This led to the birth of modern-day doctrines of maintenance and champerty which remained viable in the medieval ages and seeped into common law jurisdictions.

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[21] Gulf Azov Shipping Co. Ltd. & Others v. Idisi & Others, (2004) EWCA 292.
[22] Max Radin, *Maintenance by Champerty*, 24 CALIF. L. REV. 56, 48-68 (1935).
[23] *Id.*, at 56.
[24] WILLIAM BLACKSTONE, THE COMMENTARIES OF SIR WILLIAM BLACKSTONE, KNIGHT ON THE LAWS AND CONSTITUTION OF ENGLAND. (American Bar Association 2009).
[25] Radin, *supra* note22, at 60.
[26] *Id.*, at 61.

B. Modern Treatment

The recent years have seen a swift change in the international perception concerning these doctrines, with numerous jurisdictions such as Australia,[27] England,[28] the United States,[29] Canada,[30] and France[31] finding these doctrines inapplicable to the practice of third-party funding in arbitration.

1. Australia

The landmark judgment of Australian High Court in *Campbells Cash and Carry Pty Ltd v. Fostif Pty Limited (Fostif)*[32] cemented the prospects of third-party funding, wherein the same was held to be not contrary to the public policy or abusive of the due process of law. It was noted that it is a "fundamental human right to have equal access to independent courts and tribunals."[33] Further, the court reasoned that without the funding by the third-party, a client would fail to stand a theoretical chance of bringing up the case and likewise the presence of third-party funding should not be discarded.

This was followed by the passing of various legislations abolishing the crimes of champerty and maintenance while making Australia the home to a sophisticated third-party funding market.[34]

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[27] David S. Abrams & Daniel L. Chen, *A Market for Justice: A First Empirical Look at Third Party Litigation Funding*, 15 U. PA. J. BUS. L. 1080, 1075-1083 (2013).
[28] David Neuberger, *From Barratry, Maintenance and Champerty to Litigation Funding*, HARBOR LITIG. FUNDING (2013).
[29] Lisa, *supra* note 3.
[30] *Id.*
[31] *Id.*
[32] Campbells Cash and Carry Pty Ltd v. Fostif Pty Limited (Fostif), (2006) 229 CLR 386.
[33] *Id.*
[34] Maintenance, Champerty and Barratry Abolition Act, 1993, § 3,4 & 6, (Australia).

2. England and Wales

In England, the offence of maintenance was abolished through various legislations.[35] The Law Commission has justified this stance on three reasons:[36]

- That there is only a little room left for the operation of tortious claims as litigation is already being funded through legal aid, insurers, association, unions and other parties who may be justified in funding such claims.
- That both the torts required proof of damage, which is impossible to establish given the proof of non-continuation of proceedings without the funder would have to be established.
- That judicial pronouncements had already regarded these torts as archaic, empty shells and virtually useless.

The prospects for third-party funding were paved by landmark decisions Including *R (on the application of Factortame and others) v. Secretary of State for Transport, Environment and the Regions (No. 2),*[37] which explained that only the funding arrangements which undermine the ends of justice should be prohibited.

The judgment in *Arkin v. Borchard Lines Ltd & Others,*[38] which noted that public policy needs to evolve with time, marked the beginning of third-party funding in England. Similarly, in the case of *Del Webb Comtys.*,

[35] Criminal Law Act, 1967, § 13 (United Kingdom).
[36] Law Commission, *Proposals for the reform of the Law Relating to Maintenance and Champerty* (1966) at 9.
[37] R (on the application of Factortame and others) v. Secretary of State for Transport, Environment and the Regions (No. 2), (2002) EWCA Civ 932.

Inc. v. Partington,[39] it was held that - "an outsider's involvement in a lawsuit does not constitute champerty or maintenance merely because the outsider provides financial assistance to a litigant and shares in the recovery."

3. Singapore

Singapore is one of the recent jurisdictions to have abolished these doctrines in order to pave way for third-party funding in arbitration.[40] The leading case law is *Re Vanguard Energy*,[41] where the High Court upheld the funding of an insolvent company for pursuing its claims by its shareholders for part of the proceeds from its litigation and found the same to not be champertous.

The Parliament of Singapore abolished the doctrines of maintenance and champerty as common law torts for international arbitration,[42] and the same was followed for domestic arbitration.[43] Further, various guidelines for practitioners and institutional rules have been followed for better facilitation and adoption of the practice in Singapore.[44]

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[38] Arkin v. Borchard Lines Ltd & Others, (2005) EWCA Civ 655.
[39] Del Webb Comtys., Inc. v. Partington, 652 F.3d 1145, 1156 (9th Cir. 2011).
[40] Ronnie King & Rob Palmer, *Third Party Funding of Arbitration in Singapore and Hong Kong: A Comparison*, ASHURST (Mar. 26, 2021), https://www.ashurst.com/en/news-and-insights/legal-updates/third-partyfunding-of-arbitration-in-singapore-and-hong-kong-a-comparison/.
[41] Re Vanguard Energy, (2015) SGHC 156.
[42] Civil Law (Third Party) Regulations, 2017.
[43] Quentin Pak, *Singapore Expands the Permissibility of Third-Party Legal Finance*, BURFORD CAP. (May 30, 2021), https://www.burfordcapital.com/blog/singapore-expands-the-permissibility-ofthird-party-legal-finance/.
[44] Matthew Secomb and Adam Wallin, *Singapore*, THE THIRD PARTY LITIGATION FUNDING LAW REVIEW, 125 (2017).

4. Hong Kong

Hong Kong is another recent Asian jurisdiction to have abolished these doctrines. In one of its leading cases of *Cannonway Consultants Limited v. Kenworth Engineering Limited*,[45] Justice Kaplan has reasoned that parties approaching arbitration are in less need to be protected by public policy. The Honk Kong Law Reform Commission delved into the public consultation for allowing third-party funding in arbitration seated in Hong Kong, which was finally legislated in 2017 without the distinction for international or domestic arbitration.[46]

5. Latin America

The case for civil-law jurisdictions is fairly different, with predictions for investments in billions in upcoming years for Latin American countries themselves.[47] This is supported with demand for third-party funding for most sectors in the legal industry in such jurisdictions[48] added with high costs in civil engineering, procurement and construction matters.[49] As has been pointed out, the non-existence of these doctrines has led to the growth of a balanced market in Europe.[50]

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[45] Cannonway Consultants Limited v. Kenworth Engineering Limited, [1997] ADRLJ 95.
[46] Arbitration and Mediation Legislation (Third Party Funding) (Amendment) (2017) Cap. 609.
[47] Donald Hayden & Mark Migdal, *The Rise of Third-Party Funding in International Arbitration*, DAILY BUS. REV. (2017).
[48] Zachary Krug & Helena Eatlock, *Snapshot on Litigation Finance in Latin America*, KLUWER ARB. BLOG (May 24, 2020), http://arbitrationblog.kluwerarbitration.com/2018/09/24/snapshot-onlitigation-finance-in-latin-america/.
[49] *Id.*
[50] George R. Barker, *Third-Party Litigation Funding in Australia and Europe*, 8 J. L. ECON. &POL'Y451-522 (2012).

It can be clearly pointed out that the current trend in most jurisdictions is to encourage access to justice rather than restrict the same on archaic rules.[51] The context for international arbitration proceedings is similar and the doctrines of champerty and maintenance have clearly not deterred jurisdictions from allowing third-party funding.[52] As further opined by the International Centre for Settlement of Investment Disputes in the case of *Giovanni Alemanni v. The Argentine Republic*,[53] third-party funding is now an established practice within national jurisdictions and within international arbitration that there lie no grounds for objection in itself.

Thus, the erstwhile doctrines of maintenance and champerty have been diluted to a larger extent in numerous jurisdictions given their hindrance in the access to justice in the modern period. These findings clearly justify the advent and stronghold of third-party funding in not just arbitration-related matters but the legal industry itself. It is, therefore, pertinent for India to stand up with its international counterparts and explore the concept in practice, in length and breadth, especially in the present pandemic scenario.

[51] Sherina Petit & Daniel Jacobs, *Maintenance and Champerty: An End to History Rules Preventing Third-party Funding?,* NORTON ROSE FULBRIGHT INTERNATIONAL ARBITRATION REPORT 9 (2016).

[52] Zachary Krug et. al., *Getting the Deal Through: International Arbitration*, WOODSFORD LITIG. FUNDING (Dec. 28, 2017),

III. INDIA'S POSITION ON THIRD PARTY FUNDING

A. Legislative Approach

The concept of third-party funding, although a well-established practice in foreign jurisdictions, does not hold absolute legal certainty in the Indian legal landscape. However, the concept is not alien to the Indian jurisprudence, as the earliest recorded instances of *pactum de quota litis* or agreements comprising third-party funding in India date back to the 1800s, before the formal codification of contract law.[54]

The power to secure costs for litigation is statutorily recognized by various states of Maharashtra, Madhya Pradesh, Uttar Pradesh, and Gujarat.[55]

Further, the court can allow the plaintiff to transfer or agree to transfer a share or interest in the property suit to a person who is not a party to the suit for financing the claim.[56] This clearly outlines a general definition of third-party funding in litigation. However, as there is no express provision for its applicability in arbitration matters, the legality of such agreements would be posed for analysis under the anvil of reasonableness, legality and equity under the contractual law[57] and public policy considerations.[58]

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https://gettingthedealthrough.com/area/94/article/29199/litigationfunding-2018-international-arbitration/.

[53] Giovanni Alemanni v. The Argentine Republic, ICSID Case No. ARB/07/8 128.

[54] Marc Galanter, *The Common Law in India*, 10(3) THE AMERICAN JOURNAL OF COMPARATIVE LAW, 292–294 (1961).

[55] The Code of Civil Procedure, 1908, Order XXV Rule 1, Allahabad, Andhra Pradesh, Madras, Madhya Pradesh and Orissa High Court Amendments (India).

[56] The Code of Civil Procedure, 1908, Order XXV Rule 3, Bombay, Dadra and Nagar Haveli, Goa, Daman and Diu, and Madhya Pradesh High Court Amendments (India).

[57] Indian Contract Act, 1872, § 23 (India).

B. Judicial Approach

The judicial stance on this dates back to the early 19th century where an unreported decision by Peel J had discarded the applicability of English prohibitions on maintenance and champerty to India.[59] This is followed by an upturn in the decision of *Grose & Anr v. Amirtamayi Dasi*[60] which upheld these doctrines of champerty and maintenance and found these agreements to void as inconsistent with the public policy.

The reasoning that these doctrines were specifically formulated for English subjects can be seen from the decision of *Pitchakutti Chetti v. Kamala Nayakkan*[61] where Scotland CJ upheld the non-applicability of the doctrines of maintenance and champerty to Indian natives. The underlying argument suggested the formulation of such doctrines for the prevention of oppression of the King's subject by vexatious litigation from judicial officers. This was upheld in the celebrated decision of the Privy Council in *Ram Coomar Condoo v. Chandra Canto Mukerjee*.[62] This decision clarified that third-party agreements would not be per se opposed to public policy and were to be treated at par with other contracts.[63] Weighing with this argument to provide access to justice to indigent parties, this reasoning was followed in the various decisions, such as *Sri Raja Vatsavaya Venkata Subhadeayyamma Jagapati Bahadur Garu v. Sri Poosapati Venkatapati Raju Garu & Ors.*,[64]

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[58] Pannalal Gendalal & Anr v. Thansingh Appaji & Anr, AIR 1952 Nag 195.
[59] M. P. Jain, *The Law Of Contract Before Its Codification*, JOURNAL OF THE INDIAN LAW INSTITUTE 188 (1972).
[60] Grose & Anr v. Amirtamayi Dasi, (1869) 4 Beng LR 1.
[61] Pitchakutti Chetti v. Kamala Nayakkan, (1862-63) 1 Mad HCR 153.
[62] Ram Coomar Condoo v. Chandra Canto Mukerjee,1876 SCC OnLine PC 19.
[63] *Id.*
[64] Sri Raja Vatsavaya Venkata Subhadeayyamma Jagapati Bahadur Garu v Sri Poosapati Venkatapati Raju Garu & Ors, AIR 1924 PC 162.

and *Shankarappa Kotrabasappa Harpanhalli v. Khatumbi Kom Jamaluddinsab Nashipudi & Ors*.[65]

The principle in *Ram Coomar Coondoo* was further crystallized in the decision of *Lala Ram Swarup v. The Court of Wards*,[66] wherein such agreements were considered to be not *ipso facto* unenforceable and other decisions where profound emphasis was given on the access to justice argument.[67]

In the recent decision of *Bar Council of India v. A.K. Balaji*,[68] the Supreme Court acknowledged that there exists no restriction of third-party funding in India except such funding which is carried out by attorneys. The court also noted that foreign jurisdictions such as the United Kingdom and the United States of America are open to the concept of third-party funding and legal financing agreements.[69]

C. Legal Uncertainty

India's stance, as has been identified by various jurists, is unclear but not contrary to the adoption of third-party funding. The analysis in a catena of case-laws points to a practical issue with a large proportion of funding, the same could be violative of public policy and could be struck down.[70] More

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[65] Shankarappa Kotrabasappa Harpanhalli v. Khatumbi Kom Jamaluddinsab Nashipudi & Ors, AIR 1932 Bom 478.
[66] Lala Ram Swarup v. The Court of Wards, (1940) 42 Bom LR 307.
[67] Rattan Chand Hira Chand v. Askar Nawaz Jung (Dead) by LRs & Ors, (1991) 3 SCC 67; Pannalal Gendalal & Anr v. Thansingh Appaji & Anr, AIR 1952 Nag 195.
[68] Bar Council of India v. A.K. Balaji, AIR 2018 SC 1382.
[69] *Id.*
[70] Payal Chawla & Aastha Bhardwaj, *Saving Arbitration from Arbitration Cost". Is Third Party Funding the Answer?*, BAR & BENCH (May 19, 2021), https://barandbench.com/savingarbitration-costs-third-party-funding/.

elaborately, this legal uncertainty can affect a party in arbitration proceeding seated in India in the following manner:[71]

- Where the claimant is the funded party, the opposite party may seek an injunction on the arbitration on the grounds of abuse of process of law.
- Where the funded party may require assistance from the Indian courts, the same may be declined to the funded party given their involvement in third-party funding as opposed to the public policy.
- Where the arbitral award is issued in favour of the funded party, the opposite party may seek to set aside the award on the grounds of the same being the product of a funded arbitration as opposed to the public policy.

These risks require the issue to be settled for the parties involved in both domestic and international arbitration seated in India. Clearly, with proper regulations in place, third-party funding can be the game-changer for the Indian arbitration landscape. As had been identified by a Report by a High-Level Committee chaired by Justice (Retd.) B. N. Srikrishna, legislative amendments for regulation will be a significant growth factor for India as an arbitration hub.[72]

[71] Kabir Singh, Sam Luttrel and Elan Krishna, *Third-party funding and arbitration law-making: the race for regulation in the Asia-Pacific*,KLUWER ARBITRATION BLOG (23 May, 2021), http://arbitrationblog .kluwerarbitration.com/2016/07/14/third-party-funding-and-arbitration-law-making-the-race-for-regulation-in-the -asia-pacific/.

D. Future Prospects

In the light of India's poor ranking in contract enforcement[73] in addition to high judicial inference and backlog,[74] the legislators' efforts for leveling the platform with substantial reforms such as the 2021 amendments,[75] the advent of commercial courts and specialized insolvency mechanisms are welcoming and suitable for India's arbitration landscape. Under this backdrop, third-party funding can substantially contribute to India's objective to attain the status of a global arbitration hub.

First, third-party funding can assist in the reduction of the monetary burden on parties due to the cost-heavy resolution in India.[76] This may further benefit the parties, already affected by the pandemic, to bring up or defend meritorious claims which otherwise would fail for being unaffordable.[77] This also serves the purpose of building confidence in the public at large for supporting such valid and meritorious claims while deferring the vexatious claims.

Second, the advent of third-party funding in Indian seated arbitration would assist in the realization of its objective for increased access to private justice as well as contribute to public policy.[78] Access to justice has been

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[72] DEPT. OF LEGAL AFFAIRS, REPORT OF THE HIGH LEVEL COMMITTEE TO REVIEW THE INSTITUTIONALISATION OF ARBITRATION MECHANISM IN INDIA (2017).
[73] WORLD BANK, DOING BUSINESS (2018).
[74] Manav Kapur, *Judicial Interference and Arbitral Autonomy: An Overview of Indian Arbitration Law* (2009) 2 CONTEMPORARY ASIA ARBITRATION JOURNAL 325.
[75] The Arbitration And Conciliation (Amendment) Act, 2021.
[76] LAW COMMISSION OF INDIA, REPORT NO. 246 ON AMENDMENTS TO THE ARBITRATION AND CONCILIATION ACT 1996, 2014.
[77] Meenal Garg, *Introducing third-party funding in Indian Arbitration: A tussle between conflicting policies*, 6(2) NLUJ LAW REVIEW 71 (2020).
[78] *Id.*

recognized as a fundamental right enshrined in Articles 14 and 21 of the Indian Constitution.[79] The above stated factors of heavy enforcements costs and judicial backlogs have already posed a hindrance for achieving these thresholds. These reasons solidify the requirement to introduce third-party funding in India.

IV. PRACTICAL AND ETHICAL ISSUES

Although the utility of third-party funding in arbitration is undeniable, there are various considerations regarding its mechanism and acceptance globally. These issues are pertinent for the practical development of third-party funding and are analyzed from the perspective of recent regulations and advisory governing third-party funding in Singapore and Hong Kong.

A. Disclosure Requirements

The need for disclosure of third-party funding agreements has been identified as an essential practice for assessing the conflicts of interest and promotion of a full and fair discussion of cost-related matters.[80] In both Singapore and Hong Kong, the disclosure of funding agreements has been given significance.

In Singapore, the relevant requirements can be traced to the amendments in conduct rules applicable to the legal practitioners for disclosing the existence of a third-party funding agreement and the identity

[79] Anita Khushwaha v. Pushap Sudan, (2016) 8 SCC 509.

[80] Lisa A. Rickard, *TPLF Transparency: A Proposed Amendment to the Federal Rules of Civil Procedure*, U.S. INSTITUTE FOR LEGAL REFORM (May 26, 2021), https://www.instituteforlegalreform.com/ resource/tplf-transparency-a-proposedamendment-to-the-federal-rules-of-civilprocedure

of the funder to the parties and the tribunal.[81] Further, such disclosures are to be made at the commencement of the proceedings or as soon as practicable, when such agreements are entered into after the proceedings have begun.[82]

As per Singapore's Ministry of Law, these amendments envisage the best practices and global standards also reflected from the guidelines of the International Bar Association.[83]

On a similar note, Hong Kong's Law Reform Commission has established a similar practice, however, the obligation lies with the funded party itself.[84] Hong Kong has mandated the disclosure requirements before the proceedings commence or within 15 days after the agreement is made in case the proceedings have already commenced.[85] Further, a written notice has to be furnished at the end of such an agreement.[86] The detailed requirements of the disclosure of third-party agreements can be found in the Arbitration Rules of HKIAC.[87]

Further, reference can be drawn from the case of *EuroGas Inc. and Bellmont Resources Inc. v. The Slovak Republic*,[88] where the claimants were asked to reveal the identity of the funder. The urgency for regulatory norms regarding disclosure can be drawn from the case of *Ecuador v. Chevron*,[89]

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[81] Rule 49A, Legal Profession (Professional Conduct) Rules, 2015.
[82] Rule 49A(1), Legal Profession (Professional Conduct) Rules, 2015.
[83] Public Consultation on the Draft Civil Law (Amendment) Bill 2016.
[84] THE LAW REFORM COMMISSION OF HONG KONG, REPORT—THIRD PARTY FUNDING FOR ARBITRATION (2017).
[85] The Arbitration Ordinance, 2014, § 98U (Hong Kong).
[86] The Arbitration Ordinance, 2014, § 98V (Hong Kong).
[87] HKIAC Administered Arbitration Rules, 2018, Rule 44 (Hong Kong).
[88] EuroGas Inc. and Bellmont Resources Inc. v. The Slovak Republic, ICSID Case Nr. ARB/14/14.
[89] Chevron Corporation and Texaco Petroleum Corporation v. The Republic of Ecuador, UNCITRAL, PCA Case No. 2009-23.

which revealed the various issues concerning conflict of interest which could affect the impartiality of the award.

Interestingly, disclosing the terms of the agreement has been discarded in the case of *South American Silver Ltd. (Bermuda) v. The Plurinational State of Bolivia*,[90] which required only disclosure of the identity of the party for transparency. The confidentiality of the financing agreement draws its importance from the commercially sensitive information which may serve as a tactical advantage for the opposing party.[91]

B. Confidentiality

Another practical concern is the confidentiality of the arbitral proceedings, which is a significant aspect, and was also recognised by the 2019 amendments to the arbitration law in India.[92] While executing the funding agreement, it would be unavoidable for the receiving party to disclose certain information concerning the proceedings to the funder for due-diligence and evaluation of the claim.[93]

A response to this issue can be located in Honk Kong's legislation which carves out the exception for the confidentiality obligation and allows disclosure to a third party for seeking funding.[94] However, the regulation makes a caveat that no such information can be communicated unless the

[90] South American Silver Ltd. (Bermuda) v. The Plurinational State of Bolivia, UNCITRAL PCA Case 2013-15.
[91] Oliver Gayneret. al., *Singapore And Hong Kong: International Arbitration Meets Third Party Funding*,40(3) FORDHAM INTERNATIONAL LAW JOURNAL1033 (2017).
[92] The Arbitration and Conciliation Act, 1996, § 42A (India).
[93] Mick Smith, *The Mechanics of Third-Party Funding Agreements: A Funder's Perspective* in THIRD PARTY FUNDING IN INTERNATIONAL ARBITRATION (Kluwer Law International, 2012).
[94] The Arbitration Ordinance, 2014, § 98T (Hong Kong).

same is specifically for professional advisory on financing-related matters,[95] and reaffirms the duty to observe confidentiality of the proceedings.[96]

In Singapore, the Law Society recommends the party to include certain terms in the financing agreement for protecting confidentiality and privilege before the funding of the claim.[97] A similar context can be found in the SIArb guidelines[98] restricting the third party to seek disclosure of information from the funded party's legal practitioner.

C. Control by Third-Party Funders

Another concern is the control that may be exerted by the funder over the arbitral proceedings. This is one of the issues where the regulators from both jurisdictions have remained silent. While the active involvement can be argued as a 'value addition' to the proceedings, the concern can be mitigated at the drafting stage of such an agreement.[99]

In Hong Kong, it is recommended that the third-party agreement stipulates the third-party funder to not seek influence on the funded party or its legal representative.[100] Similarly, Singapore's Law society requires the agreement to set out the level of involvement of the third-party.[101]

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[95] The Arbitration Ordinance, 2014, § 98T(2)(c) (Hong Kong).
[96] THE GOVERNMENT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION, PRESS RELEASE: CODE OF PRACTICE FOR THIRD PARTY FUNDING OF ARBITRATION ISSUED (2018).
[97] THE LAW SOCIETY OF SINGAPORE, GUIDANCE NOTE 10.1.1 29 (2017).
[98] SIARB, GUIDELINES FOR THIRD PARTY FUNDERS 5.2 (2017).
[99] REPORT OF THE ICCA-QUEEN MARY TASK FORCE ON THIRD-PARTY FUNDING IN INTERNATIONAL ARBITRATION, 28 (2018).
[100] THE GOVERNMENT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION, *supra* note 97.
[101] THE LAW SOCIETY OF SINGAPORE, *supra* note 98.

D. Security for Costs

This is another issue that is left open in various jurisdictions. The issue draws its importance in the form that whether the existence of a third-party agreement allows the respondent party to obtain an order for security of costs.[102] Tribunals, in this regard, have applied a high threshold in granting these orders[103] and considered third-party funding, not a conclusive ground for furnishing such orders.[104] Majorly, these orders have found relevance in special circumstances where the party had a history of non-compliance.[105] A potential solution in this regard can be the incorporation of an after the event policy in the financing agreement for covering the costs of the claimant in case the claim is unsuccessful.[106]

V. THE WAY FORWARD

For gracing the usefulness of third-party funding, there is a need for legislating the reform with clarity on the scope and definition of the third-party funding. With the nascent of third-party funding, a light-touch approach can arguably be the correct approach, to begin with in India. As has been accepted in both Hong Kong[107] and Singapore,[108] such an approach gives the necessary breathing space for the regulators, tribunals, as well as

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[102] Megan Betts et. al., *The Impact of the COVID-19 Pandemic on Third Party Funding and Security for Costs in International Commercial Arbitration*, KLUWER ARBITRATION BLOG (May 36, 2021), http://arbitrationblog.kluwerarbitration.com/2020/07/30/the-impact-of-the-covid-19-pandemic-on-third-party-funding-and-security-for-costs-in-international-commercial-arbitration/.

[103] Commerce Group Corp. and San Sebastian Gold Mines, Inc. v. Republic of El Salvador (ICSID Case No ARB/09/17.

[104] South American Silver Limited v. Plurinational State of Bolivia, PCA Case No 2013-15.

[105] RSM Production Corporation v Saint Lucia, ICSID Case No ARB/12/10.

[106] Eskosol S.P.A. in Liquidazione v Italian Republic, ICSID Case No ARB/15/50.

[107] THE LAW REFORM COMMISSION OF HONG KONG, *supra* note85.

[108] Public Consultation, *supra* note 84.

parties. The fundamental aspect of this approach can be identified as giving "precedence to party autonomy and flexibility, with disclosure as the central tenet."[109] The following implications can be further useful for such an approach:

A. Elimination of doctrines of champerty and maintenance

In consonance with the analysis in the present paper, it can be effectively reasoned that concern of deluging non-meritorious claims and obstruction of justice associated with these doctrines do not hold water in modern times.[110] Instead, third-party funding promotes meritorious claims while shifting the costs in a secondary legal market.[111] As an immediate conclusion, elimination of these doctrines will only promote access to justice and equal participation. A decision in this area can be taken either by legislative means (Hong Kong and Singapore) or through judicial means (Australia and United States).

B. Reforming the relationship between third-party funders, clients and attorney

The complexity of the relationship between the client and the third-party funder has been a critical issue in the discussion of third-party funding.[112] Given the fact that the part of the claim of the client is now shared with the third-party funder, the disclosure requirements and

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[109] *Id*.
[110] Marc Galanter, *The Turn Against Law: The Recoil Against Expanding Accountability*, 81 TEX. L. REV. 285, 291 (2002).
[111] *Third Party Litigation Funding and Claim Transfer*, RAND CORP. (May 23, 2021), http://www.rand.org/events/2009/06/02.html.
[112] VICKI WAYE, TRADING IN LEGAL CLAIMS: LAW, POLICY &FUTURE DIRECTIONS IN AUSTRALIA, UK& US (2008).

confidentiality become some of the major practical issues underlining third-party funding. The fragmentation of the relationship between the funder-client-attorney, may further lead to conflicts of interest between the parties and lead to breakage of the attorney-client privilege given the client communications with the third-party funder who would be inclined to such communications for monitoring the investment.

Similar to the insurance industry, the expansion of the common interest doctrine of putting both the client and funder in the position of co-clients can solve this issue.[113] Also, the funder should be treated as fiduciaries of the client and the common law duties of zeal and loyalty should be extended to the funders.[114] As in other jurisdictions,[115] India can benefit from transparency requirements pertaining to attorney-funder relationship, as well as confidentiality requirements concerning attorney client communication.[116] Further, the scrutiny and review by courts similar to that in cases of class action suits can be significant in this context.[117]

C. The Financing Agreement Design and Consumer Protection

As in the cases of insurance contracts, important measures can be adopted in the third-party financing agreements to avoid moral hazards and

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[113] Lance Cole, *Revoking Our Privileges: Federal Law Enforcement's Multi-Front Assault on the Attorney-Client Privilege (and Why It Is Misguided)*, 48 VILL. L. REV. 469, 511 (2003).
[114] Eli Wald, *Loyalty in Limbo: The Peculiar Case of Attorneys' Loyalty to Clients*, 40 ST. MARY'S L.J. 909 (2009).
[115] *Jurisdiction guide to third party funding in international arbitration*, PINSENT MASONS (May 23, 2021),https://www.pinsentmasons.com/out-law/guides/third-party-funding-international-arbitration
[116] Model Rules of Professional Conduct, 2010, Rule 1.6 (United States).
[117] Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 WM. & MARY L. REV. 33 (2000); N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 55 (1982).

prevention of collusion for promoting the effectiveness of the practice.[118] Important caveats concerning confidentiality, control of proceedings and conflicts of interest can save the authenticity of the arbitral award while being economic for both the funder and client. Specific reporting and disclosure requirements in this regard can further protect the parties to the agreement from potential breaches and misinformation.

VI. CONCLUSION

"*If football were played without rules but with massive stakes and rewards, how would we condemn those playing the man instead of playing the ball?*"[119]

Reflecting on legislations in Singapore and Hong Kong as a watershed in the evolution of third-party funding, it is well-established that it is now an internationally recognized practice[120] and development that is here to stay.[121] With its regularization and legal certainty, India can travel the same road and benefit from enormous growth of arbitration practice and commercial development in the area, while fulfilling India's dream as an international hub in arbitration. With a light-touch approach, India can gradually address the issues and difficulties and promote ethical practices in the industry, thus, balancing its drawbacks against the greater benefits.

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[118] A. Smith, *Institutions and Entrepreneurs in American Corporate Finance*, 85 CALIF. L. REV. 1 (1997).
[119] S. Menon, *Some Cautionary Notes for an Age of Opportunity*, CHARTERED INSTITUTE OF ARBITRATORS INTERNATIONAL ARBITRATION CONFERENCE (2013).
[120] Bernardo M. Cremades et. al., DOSSIER X: THIRD-PARTY FUNDING IN INTERNATIONAL ARBITRATION (International Chamber of Commerce 2013).
[121] John Fellas, *Third-Party Funding: The Award of Costs and Security for Costs*, FINANCES IN INTERNATIONAL ARBITRATION: LIBER AMICORUM PATRICIA SHAUGHNESSY (Kluwer Law International 2019).

Albeit various developments such as setting up of the International Arbitration Centre at New Delhi,[122] India's approach to arbitration has been fairly criticized, added with its struggle in winning the confidence of domestic and international clients, given the poor contract enforcement and huge judicial backlog. The ongoing pandemic has further devastated the economy with reduced cash flow and higher risks for parties. Evidently, third-party funding makes a greater case for bringing the international best practices to the table while easing the heavily-mounted pressure on the market. It would, thus, not be an overstatement that the practice of third-party funding sits at the door will soon be the game-changer for dispute resolution practice in India.

[122] New Delhi International Arbitration Centre Act, 2019 (India).

II. CONFLICTS OF INTEREST PLANTED BY PARTIES FOR DERAILING ARBITRAL PROCEEDINGS

- Vivek Krishnani and Rajat Sinha[*]

ABSTRACT

A common, yet less discussed, issue is that of strategic challenges to arbitrator appointments that are aimed solely at delaying the issuance of the arbitral award or even the grant of the relevant remedy post that. This is because any challenge or motion against an arbitrator is capable of not only disrupting the arbitral process but also permanently affecting a time-sensitive remedy. For the purpose of giving birth to potential challenges, some parties tactically employ certain methods for planting a conflict of interest for the tribunal or one of its members and at the same time, retain their right to challenge arbitrator appointments. In this paper, the authors have discussed such methods and conducted an analysis to lay down certain approaches for identifying these dilatory tactics, which can be a difficult task. Eventually, an assessment of the approaches has led the authors to their concluding remarks.

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I. INTRODUCTION

The arbitral process depends on the integrity, independence, and impartiality of the arbitrators in a given proceeding. Thus, while a good faith challenge to an arbitrator's appointment is considered as an essential and fundamental right of all parties,[1] sometimes the parties challenge the arbitrators merely to derail arbitral proceedings in bad faith.[2]

A party's tactics to delay ongoing proceedings are often motivated by the parties' inclination to frustrate a time-sensitive remedy, particularly when their case is weak,[3] or to reverse an unwanted decision.[4] Such legal tactics, which could be termed as 'dilatory tactics,'[5] are made possible because the standard to challenge an arbitrator is quite low and one doesn't need to prove actual corruption or bias.[6] In fact, even the appearance of bias is sufficient in this regard.[7] Thus, such tactics allow a weaker party in a given case to significantly delay the outcome of the dispute.

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[1] Herike Rice Mills v. State of Punjab, 1997 SCC OnLine P&H 1367 [hereinafter *Herike Rice Mills*].
[2] Günther J. Horvath, *Guerrilla Tactics in Arbitration, an Ethical Battle: Is There Need for a Universal Code of Ethics?*, in NIKOLAUS PITKOWITZ, ALEXANDRE PETSCHE, ET AL. (EDS.), AUSTRIAN YEARBOOK ON INTERNATIONAL ARBITRATION 303 (2011) [hereinafter *Horvath*].
[3] Patrick M. M. Lane, *Dilatory Tactics: Arbitral Discretion* in J VAN DEN BERG, PERMANENT COURT OF ARBITRATION AND INTERNATIONAL COUNCIL FOR COMMERCIAL ARBITRATION (EDS), IMPROVING THE EFFICIENCY OF ARBITRATION AGREEMENTS AND AWARDS: 40 YEARS OF APPLICATION OF THE NEW YORK CONVENTION (Kluwer Law International, 1999) [hereinafter *Lane*].
[4] *Id.*
[5] Horvath, *supra* note 2.
[6] Lane, *supra* note 3.
[7] Perenco Ecuador Ltd v. Ecuador, Decision on Challenge to Arbitrator of 8 December 2009, PCA Case No. IR-2009/1, ¶43.

Indian courts have expressed concerns with respect to dilatory tactics in arbitration[8] and this issue is no longer *res integra*. Additionally, the Rules of Domestic Commercial Arbitration and Conciliation formulated by the Indian Council of Arbitration provide that parties to a dispute "shall avoid any kind of dilatory tactics and shall make maximum/best/all possible efforts for an expeditious resolution of the dispute."[9] Furthermore, this has been extensively discussed by the academia as well.[10] However, this paper analyses specific delay-causing strategies wherein parties plant conflicts of interest for arbitrators with the underlying purpose of delaying the issuance of the award of the tribunal.

To put this in context, we may refer to the case of *V. Balakrishnan v. Capital First Limited*,[11] which was heard by the Telangana High Court. In this case, the Respondent had appointed an arbitrator who belonged to the same firm as their legal representative and this relationship was disclosed neither by the party nor by the arbitrator.[12] After around four years, the Court found that the Respondent abused its power to appoint an arbitrator by nominating an ineligible arbitrator who evidently had a conflict of interest.[13]

The facts of the foregoing case highlight how a party created a conflict of interest and managed to significantly delay the effective outcome

[8] *See e.g.* Denel v. Lord Gordon Slynn, (2010) 4 Arb LR 264 [hereinafter *Denel*].
[9] Indian Council of Arbitration, Rules of Domestic Commercial Arbitration and Conciliation, ICA Code of Conduct, §3.9.
[10] *See e.g.* Gourav Mohanty & Shruti Raina, *Use of Costs on Indemnity Basis to Combat Dilatory Tactics in Arbitration- Advocating the Hong Kong Approach*, 3(1) INDIAN JOURNAL OF ARBITRATION LAW 101-128 (2014) ["**Mohanty & Raina**"].
[11] V. Balakrishnan v. Capital First Limited, 2019 SCC OnLine TS 1290 [hereinafter *V. Balakrishnan*].
[12] *Id.*, ¶49.
[13] *Id.*, ¶57.

of the arbitration by appointing an arbitrator who belonged to the same firm as their legal representative and not disclosing this relationship.

The authors wish to highlight that arbitral parties have, besides appointing ineligible arbitrators, indulged in creation of conflicts of interest by using other methods. However, such methods have not been a subject of discussion in judgments rendered by Indian courts even though they severely impact arbitral practice. This segment of the paper seeks to highlight some of these strategies which are often ignored and not extensively written about, *viz.* subsequent appointments, initiation of unilateral contact with an arbitrator and creation of 'issue conflicts' by parties without waiving the right to challenge the arbitrator's appointment (emphasis added).

II. SUBSEQUENT APPOINTMENTS MADE BY PARTIES

This segment analyses two of the most common appointments made by arbitral parties that are capable of creating conflict of interest for an otherwise properly constituted tribunal.

A. Creation of Conflict of Interest by Change in a Party's Legal Representatives

Subsequent appointment or change in the composition of legal representatives after the constitution of an arbitral tribunal could have the effect of creating a conflict of interest with an appointed arbitrator. To understand this better, in this segment, we discuss pertinent decisions rendered by the International Centre for Settlement of Investment Disputes ("ICSID") and how their approaches are relevant for commercial arbitrations as well. It may be stated that the authors have, in this segment, resorted to the

analysis of ICSID decisions owing to the unavailability of Indian cases or commercial arbitration awards in this respect. Such an analysis may be relevant even in the context of Indian domestic arbitration because the ICSID awards discussed in this segment apply the relevant International Bar Association ("IBA") Guidelines, which have been embraced by India[14] as well.

1. ICSID Jurisprudence with respect to Legal Representatives

At the outset, reference may be made to the Order Concerning the Participation of Counsel in *Hrvatska v. Slovenia* ("Hrvatska").[15] In this case, one of the parties had altered its legal team during the proceedings in a manner which created a potential conflict of the arbitrator with one of the lawyers.

In this regard, the tribunal had noted that while parties are generally entitled to select their legal team,[16] "a party cannot amend the composition of its team in such a manner that it creates apprehensions of lack of impartiality or independence of an arbitrator."[17] This observation was based on Article 56(1) of the ICSID Convention and it was stated by the Tribunal, in no ambiguous terms, that "the overriding principle is that of the immutability of properly constituted tribunals."[18]

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[14] Bharat Broadband v. United Telecoms Ltd., AIR 2019 SC 2434 [hereinafter *Bharat Broadband*]; HRD Corporation v. GAIL Ltd., (2018) 12 SCC 471 [hereinafter *HRD Corporation*].
[15] Hrvatska Elektroprivreda, D.D. v. The Republic of Slovenia, Order Concerning the Participation of Counsel (6 May 2008), ICSID Case No. ARB/05/24.
[16] *Id.* ¶24.
[17] *Id.* ¶26.
[18] *Id.* ¶25.

Subsequently, in another ICSID case, namely *Rompetrol v. Romania*,[19] a tribunal discussed the findings in the *Hrvatska* case. The Tribunal opined that the principle of immutability of properly constituted tribunals, read with the right to have an impartial and independent tribunal, does not, as a general rule, take priority over a party's right to present its case.[20] In fact, it was stated that "it would be the tribunal's duty to find a way of bringing them into balance, not to assign priority to either over the other."[21] That being said, the Tribunal acknowledged that the decision in *Hrvatska* was heavily based on the fact that there was a "late announcement of the new appointment" and concluded that it makes for a good precedent for cases involving failure to make disclosure of potential conflict of interest in a timely manner.[22] Therefore, the principle of "immutability of properly constituted tribunals" is certainly a dominant principle with respect to subsequent appointment of legal representatives as per ICSID jurisprudence.

2. Extension of the ICSID Approach to Commercial Arbitration

While the principle of "immutability of properly constituted tribunals" is specifically provided for in the ICSID convention only, to extend this to commercial arbitration, the authors rely on the IBA Guidelines on Party Representation in International Arbitration ["Party Representation Guidelines"].[23] These Guidelines have been recognised as reflective of best

[19] The Rompetrol Group N.V. v. Romania, Decision of the Tribunal on the Participation of a Counsel, ICSID Case No. ARB/06/3 [hereinafter *Rompetrol v. Romania*].
[20] *Id.* ¶21.
[21] *Id.*
[22] *Id.* ¶25.
[23] International Bar Association, *IBA Guidelines on Party Representation in International Arbitration* [hereinafter *Party Representation Guidelines*].

practice in international arbitration.[24] Pertinently, Guidelines 5 and 6 provide that after the constitution of a tribunal, if a party appoints a representative whose relationship with an arbitrator might create a conflict of interest, the tribunal may order exclusion of such party representative.[25]

Additionally, rules of some popular arbitral institutions indicate towards the need to preserve properly constituted tribunals, specifically, in such cases. For instance, Article 18.4 of the LCIA Rules provides that any intended change in a party's legal representatives may be disallowed if such a change could compromise the composition of the Arbitral Tribunal.[26] Therefore, the principle of immutability of properly constituted tribunals may be applied to commercial arbitration as well.

B. Subsequent Appointment of Expert Witness

The Party Representation Guidelines explicitly exclude an "expert" from the ambit of "party representative."[27] This may *prima facie* suggest that the Guideline with respect to subsequent appointment of legal representatives may not be extended to the appointment of experts. However, the authors opine that the Party Representation Guidelines provide sufficient basis for disallowing subsequent appointment of those experts who create a conflict of interest for an arbitrator. This is because these Guidelines direct party representatives to, generally, "not engage in activities designed to

[24] Tom Cummins, *The IBA Guidelines on Party Representation in International Arbitration - Levelling the Playing Field?*, 30(3) ARBITRATION INTERNATIONAL 429–456 (2014).
[25] Party Representation Guidelines, *supra* note 23, Guidelines 5-6.
[26] London Court of International Arbitration (LCIA) Arbitration Rules, 2014, Article 18.4 [hereinafter *LCIA Arbitration Rules*].
[27] Party Representation Guidelines, *supra* note 23, Definitions.

produce unnecessary delay."[28] This general requirement may be construed as requiring a party representative to refrain from appointment of an expert who has a problematic relationship with one of the arbitrators because such an appointment is capable of frustrating the formation of the tribunal or delaying the issuance of the award.

An instance that explains how parties could plant a conflict of interest specifically through appointment of an expert witness can be found in the case of *Bridgestone v. Panama*.[29] The case concerned the question of removal of an expert witness owing to his potential bias in the matter. Admittedly, the Tribunal noted that it is "quite common for lawyers to have their preferred experts"[30] and did not rule in favour of the exclusion of the party-appointed expert.[31] However, it extensively discussed[32] the issue of such a conflict which evidences that subsequent appointment of an expert, much like that of a legal representative, is capable of creating a conflict of interest and derailing the arbitral proceedings.

III. SUBSEQUENTLY ENTERING INTO A THIRD-PARTY FUNDING AGREEMENT

While third-party funding ("TPF") in arbitration is not explicitly allowed by any law, third party litigation funding has been found to be permissible by the Supreme Court in *Bar Council of India v. AK Balaji*.[33]

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[28] Party Representation Guidelines, *supra* note 23, Preamble.
[29] Bridgestone Licensing Services, Inc. and Bridgestone Americas, Inc. v. Republic of Panama, Tribunal's Ruling on Claimants' Application to Remove the Respondent's Expert as to Panamanian Law, ICSID Case No. ARB/16/34.
[30] *Id.*
[31] *Id.* ¶39.
[32] *Id.*, ¶¶22-39.
[33] Bar Council of India v. AK Balaji, AIR 2018 SC 1382, ¶35.

Specifically with respect to arbitration, the *High Level Committee to Review the Institutionalisation of Arbitration Mechanism in India* has noted that TPF is one of the measures that contributes towards the growth of jurisdictions as arbitration hubs.[34] Additionally, TPF has become more desirable since the outbreak of COVID-19, which has impacted the financial capability of many businesses to pursue arbitral proceedings or continue with the existing ones for resolution of their disputes.[35]

In this light, it may be noted that TPF, although having its own benefits, has raised multiple issues in arbitral practice. One such issue is that TPF gives rise to potential conflicts of interest where an arbitrator, his colleagues, or his law firm have a relationship with the third-party funder.[36] This has also been recognised by the IBA Guidelines on Conflict of Interest in International Arbitration ["Conflict-of-Interest Guidelines"], which have been relied upon in Indian cases as well.[37] Pertinently, as per these Guidelines, third-party funders "may be considered to be the equivalent of the party" because they have a "direct economic interest" in the award.[38] Pertinently, because of this, if an arbitral party signs a TPF agreement after

[34] Justice B.N. Srikrishna et al., *Report of the High Level Committee to Review the Institutionalisation of Arbitration Mechanism in India* (30 July 2017) GOVT. OF INDIA, available at: https://legalaffairs.gov.in/sites/default/files/Report-HLC.pdf, 43.

[35] Krrishan Singhania & Alok Vajpeyi, *Third Party Funding of Arbitration Disputes in India – Regulation Required*, CONSTRUCTION TIMES (29 September 2020), available at: https://constructiontimes.co.in/third-party-funding-of-arbitration-disputes-in-india-regulation-required/.

[36] Ashurst, *Third Party Funding in International Arbitration*, ASHURST QUICKGUIDES (21 February 2020), available at: https://www.ashurst.com/en/news-and-insights/legal-updates/quickguide---third-party-funding-in-international-arbitration/.

[37] Bharat Broadband, *supra* note 14; HRD Corporation, *supra* note 14.

[38] International Bar Association, *Guidelines on Conflict of Interest in International Arbitration*, Explanation to General Standard 6(b) [hereinafter *Conflict-of-Interest Guidelines*].

the constitution of the tribunal, it is capable of creating a conflict of interest and derailing the arbitral proceedings.

IV. INITIATION OF UNILATERAL CONTACT WITH ONE OF THE ARBITRATORS

Another reported tactic for creating a conflict of interest is that of initiating unilateral contact with one of the arbitrators. This is strongly discouraged in arbitration practice worldwide[39] owing to the consequences that could result. In this respect we may discuss the *Mission Insurance* case, which was widely reported owing to its controversial factual situation.[40] Therein, an arbitrator was found spending two nights in a hotel room with one of the lawyers, the client of whom eventually succeeded in the case.[41] This contact between a party and an arbitrator, in the absence of the other party, led to the frustration of the proceedings because the challenge to the arbitrator's independence and impartiality was upheld.[42]

It may be noted that situations like the one in the *Mission Insurance* case demonstrate a close personal friendship between an arbitrator and a counsel of a party and, consequently, fall within the Orange List[43] of the Conflict-of-Interest Guidelines. Situations within the Orange List may give rise to doubts as to the arbitrator's impartiality or independence and

[39] *See e.g.* LCIA Arbitration Rules, *supra* note 26, Annexure, ¶6.
[40] Richard B. Schmitt, *Suite Sharing*, WALL STREET JOURNAL (14 February 1990) *cited in* William W. Park, *Arbitrator Bias*, SCHOLARLY COMMONS AT BOSTON UNIVERSITY SCHOOL OF LAW, available at: https://scholarship.law.bu.edu/faculty_scholarship/15?utm_source=scholarship.law.bu.edu%2Ffaculty_scholarship%2F15&utm_medium=PDF&utm_campaign=PDFCoverPages, 13.
[41] *Id.*
[42] *Id.*
[43] Conflict-of-Interest Guidelines, *supra* note 38, Entry 3.3.6.

therefore, a disclosure is warranted in such situations.[44] In fact, failure to disclose would create a conflict of interest that gives rise to a potential challenge.[45]

V. CREATION OF ISSUE CONFLICTS

The authors, herein, highlight another peculiar method of planting conflicts of interest, namely, creating issue conflicts.

It may be stated that an "issue conflict" means that the arbitrator has a predisposition with respect to an issue being considered in the arbitration and the same raises justifiable doubts as to the arbitrator's independence and impartiality.[46] Generally, an arbitrator's publicly expressed opinions by way of academic articles, awards rendered, etc., are scrutinised for identifying potential issue conflicts.[47] In this regard, the Conflict-of-Interest Rules distinguish between those opinions which are intended specifically towards the case at hand and those which are expressed on the general legal issue which is being considered in the case. While the former amounts to an Orange-List conflict[48] and warrants a disclosure, the latter merely falls within the Green List[49] and a disclosure is not necessary for the same.[50]

The authors wish to highlight that, in practice, arbitral parties create issue conflicts after the appointment of arbitrators by raising new issues

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[44] *Id.*, *Practical Application of the General Standards*, ¶3.
[45] *Id.*
[46] Hernando Díaz-Candia, *"Issue Conflict" in Arbitration as Apparently [un]seen in 2011 by a U.S. Court in STMicroelectronics vs. Credit Suisse Securities*, 5(1) ARBITRAJE: REVISTA DE ARBITRAJE COMERCIAL Y DE INVERSIONES 287, 287-288 (2012).
[47] *Id.*
[48] Conflict-of-Interest Guidelines, *supra* note 38, Entry 3.5.2.
[49] *Id.* Entry 4.1.1.
[50] *Id.*, *Practical Application of the General Standards*, ¶6.

which can create the possibility of a challenge. To understand how parties could create issue conflicts and plant a conflict of interest, we may look into the *CC Devas* case,[51] where this question was indirectly addressed by President Tomka. In that case, the Respondent wished to rely on the concept of "essential security interests" for its submissions on merits. Pertinently, in its preliminary submissions, the Respondent argued that the challenged arbitrators had strong predispositions with respect to issue concerning "essential security interests."[52] Thereafter, the Presiding Arbitrator noted that the intention of the respondent to raise this particular issue after the arbitrator's appointment "seemed credible, [and] not just a pretext to mount the present challenge" [emphasis added].[53] This, in itself, suggests that parties may, as a dilatory tactic, create issue conflicts by raising irrelevant issues after the constitution of the tribunal.[54]

VI. DEALING WITH SCENARIOS POTENTIALLY INVOLVING THE USE OF DILATORY TACTICS

In the previous segments, the specific kinds of conflicts of interest planted by parties to derail arbitral proceedings have been discussed. To deal with such alleged dilatory tactics, the authors opine that, primarily, two approaches might assist an adjudicator: *first*, a general approach that could be applied to all cases; and *second*, application of tests that are specific to the nature of the issue.

[51] CC/Devas (Mauritius) Ltd. v. India, PCA Case No. 2013-09, ¶¶57-58.
[52] *Id.* ¶55.
[53] *Id.* ¶57.

A. The General Approach

Essentially, the general approach requires the balancing of some broad countervailing interests. Indian law, like most others, recognises a party's fundamental right to challenge an arbitrator's appointment in good faith[55] and at the same time, discourages dilatory tactics[56] and emphasises on a speedy resolution.[57] When a party creates a conflict of interest and retains their right to challenge the arbitrator, allowing such retention will create the possibility of a challenge against the arbitrator(s) and significantly delay the proceedings. Accordingly, in such cases, one party argues that the right to challenge an arbitrator's appointment is fundamental and must not be waived, while the other party argues that non-waiver of this right might hamper efficiency and speedy resolution.

For balancing these considerations against one another, an adjudicator would essentially delve into the facts and circumstances of the given case. This is a general approach and since Indian courts have never directly addressed the issue of planting of conflicts of interest as dilatory tactics, this general approach is all that can be discerned from Indian case law. This approach, evidently, creates too much room for subjectivity and discretion and is therefore, capable of causing uncertainty.

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[54] CHIARA GIORGETTI, CHALLENGES AND RECUSALS OF JUDGES AND ARBITRATORS IN INTERNATIONAL COURTS AND TRIBUNALS 239 [Brill, 2015].
[55] Arbitration & Conciliation Act, 1996, §12; Herike Rice Mills, *supra* note 1.
[56] Denel, *supra* note 8.

B. Specific Tests

Specific tests infuse some objectivity in the task of identifying whether a conflict of interest has been created deliberately or the party has in good faith reserved their right to challenge. This approach involves tracing down the specific facets of the broader principles which stand in conflict in a particular case. For instance, in the *Hrvatska* case, while there was a conflict between the fundamental right to be heard and the need to preserve the integrity of the tribunal, the Tribunal identified the conflict between more specific facets, i.e., the right to be represented by the counsel of one's choice and protecting the immutability of properly constituted tribunals for ensuring speedy resolution.[58]

For another illustration, we may look at subsequent appointment of experts and the test in *R v. Mohan* which is specifically applicable to such cases. As per this test, a court or tribunal needs to balance the potential risks and benefits of admitting the expert and his testimony.[59] This test, if applied to the issue being discussed here, would require that the weight and relevance of an expert's testimony be assessed in light of the degree of the potential conflict of interest. Similarly, in respect of the alleged creation of issue conflicts, relevance of the issue raised would be a specific test, as previously discussed.

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[57] Government of Maharashtra v. M/s Borse Brothers v. Engineers and Contractors, Civil Appeal No. 995 of 2021 (SUPREME COURT OF INDIA).
[58] Rompetrol v. Romania, *supra* note 19, ¶16.
[59] R v. Mohan, [1994] 2 SCR 9 (Canada).

Such tests are more specific to the kind of conflict being discussed and are capable of increasing the extent of objectivity and certainty in the adjudication of a challenge.

VII. CONCLUSION

In the Indian context, the issue of creation of conflicts of interest has been adequately addressed neither by the Arbitration and Conciliation Act nor by the administrative rules of prominent arbitral institutions in India. While the arbitration laws of other jurisdictions also have similar limitations, this issue is being recognized as a concern in the international context. This is evidenced by the likes of LCIA Rules[60] and the ICSID Convention,[61] which both seek to avoid creation of conflicts of interest after the constitution of an arbitral tribunal. In this light, the authors recommend that arbitral tribunals in India must draw inspiration from these widely accepted instruments and approach such issues in a manner that upholds the cardinal principles of arbitration.

To effectively deal with issues of parties' creation of conflicts of interest, tribunals are recommended to follow a four-step approach.

First, in the initial phase of arbitral proceedings itself, the tribunal must elaborately lay down the code of conduct that the parties must abide by. It would be in the interest of the efficient conduct of proceedings should the parties and the tribunal reach an agreement at the outset regarding what

[60] LCIA Arbitration Rules, *supra* note 26, Article 18.4.
[61] Convention on the Settlement of Investment Disputes Between States and Nationals of Other States 1966, 575 UNTS 159, Article 56(1).

conduct is unacceptable and the consequences of non-compliance with the parties' code of conduct.[62]

Second, during the proceedings, whenever the tribunal anticipates a dilatory tactic of the kind discussed in this article, it must clearly warn the suspected party about the potential consequences of such tactics. Additionally, the tribunal may consider applying the specific tests for the relevant kind of conflict being anticipated, as discussed in the preceding segment.

Third, after sufficient warnings have been provided to the suspected party, the tribunal may grant relevant interim measures to the other party for the preservation of the claimed remedy from the vices of a potential delay. Considering the purpose of creation of conflicts is generally to frustrate the claimed remedy, such interim measures would go a long way in protecting the other party's rights in such situations.[63]

Fourth, in the event that the tribunal has been unable to mitigate the losses caused by the *mala fide* tactics, it may impose costs on the party responsible for such tactics[64] and compensate the other party. In this regard, it must be noted that the tribunals are empowered to take into account the conduct of the parties as per almost all Indian institutional rules.[65] Pertinently, such measures have been strongly advocated for dealing with

[62] Horvath, *supra* note 2, 304-305.
[63] Nishith Desai Associates, *Interim Reliefs in Arbitral Proceedings: Powerplay Between Courts and Tribunals*, NISHITH DESAI ASSOCIATES (31 January 2020), available at: http://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research_Papers/Interim_Reliefs_in_Arbitral_Proceedings.pdf.
[64] Mohanty & Raina, *supra* note 10.

such tactics in other jurisdictions as well. For instance, in *Jaks Island Circle Sdn Bhd v. Star Media Group Bhd*, the Malaysian High Court found a party's failure to proceed diligently with the arbitration to be relevant while assessing the damages to be awarded.[66]

Additionally, even if there have been no or insignificant resultant losses, the tribunal must consider explicitly criticising the counsels representing the suspected party for their unprofessional conduct. Such criticism, which affects the perception of the counsel among other counsels and business parties,[67] has often found place in Indian judgments[68] and is certainly capable of deterring future indulgence in such dilatory tactics.

The authors firmly believe that arbitral tribunals and counsels shall greatly benefit from the foregoing approach and tackle the bad-faith creation of conflicts of interest by arbitral parties.

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[65] *See e.g.* Delhi International Arbitration Centre (Arbitration Proceedings) Rules 2018, Article 33.4(C); Mumbai Centre for International Arbitration Rules 2016, Article 32; Nani Palkhivala Arbitration Centre Rules 2005, Explanation 3(a) to Article 24(r).

[66] Foo Joon Liang & Raina Lee Pay Wen, *Failure to Proceed Diligently with Arbitration Relevant in Assessment of Damages*, KLUWER ARBITRATION BLOG (28 January 2020), available at: http://arbitrationblog.kluwerarbitration.com/2020/01/28/failure-to-proceed-diligently-with-arbitration-relevant-in-assessment-of-damages/.

[67] Lucy Ferguson Reed, '*Chapter 2, §2.04: Sanctions Available for Arbitratorsto Curtail Guerrilla Tactics*', in GÜNTHER J. HORVATH & STEPHAN WILSKE (EDS), GUERRILLA TACTICS IN INTERNATIONAL ARBITRATION 101 (Kluwer Law International, 2013).

[68] V. C. Rangadurai v. D. Gopalan and Ors., 1979 SCR (1) 1054, ¶35; V. Balakrishnan, *supra* note 11, ¶52.

III. ASSESSING THE PROSPECTS OF AD-VALOREM CHARGES TO CURB INFLATED AND FRIVOLOUS CLAIMS IN ARBITRATION

- Balapragatha M & Shreyas Kafle[*]

ABSTRACT

The sheer number of frivolous and inflated claims raised in an arbitral proceeding, pose significant challenges. The frivolous and inflated claims affect the credibility of arbitration as an efficient dispute resolution mechanism by causing delay and wastage of parties' resources. Various jurisdictions have evolved multiple mechanisms to curb such claims. However, the complexity in defining what constitutes a 'frivolous and inflated' claim, creates hurdles in developing an effective and efficient mechanism. This article will address this complexity and will evaluate the efficacy of the ad valorem method, along with various other mechanisms, in curbing frivolous and inflated claims. To evaluate the mechanisms in the Indian regime, the article draws comparisons to methods followed by other arbitral institutions.

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I. INTRODUCTION

The challenge posed by frivolous and inflated claims in arbitral proceedings has gained significant traction.[1] It has become habitual for parties to raise frivolous, exorbitant or inflated claims with a *malafide* intention to bleed the other party dry and to delay the process,[2] and this constitutes a serious menace to the administration of justice by consuming time and clogging the infrastructure.[3] Productive resources that could be deployed to handle important causes are dissipated in responding to claims raised merely to maliciously benefit from the delay. In many instances, the process of dispensing justice is misused by the unscrupulous to the detriment of the legitimate. The courts have taken due note of this issue and are of the opinion that "liberal access to justice does not mean access to chaos and indiscipline."[4]

Frivolous claims result in delay by forcing the opposing party to invest time, money and other resources to defend these claims and raise counter claims. On the other hand, inflated claims/counter claims compel the opposing party to appoint experts or employ other means to disprove such claims/counterclaims. Though it is a common practice to bifurcate arbitral

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[1] ICC, *ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic*,(2020),<https://iccwbo.org/content/uploads/sites/3/2020/04/guidance-note-possible-measures-mitigating-effects-covid-19-english.pdf>; Michael McIlwrath, Olga Radnaev & María Viscasillas, *ICC To Name Sitting Arbitrators And Penalize Delay In Issuing Award*,KLUWER ARBITRATION BLOG KLUWER ARBITRATION BLOG (2021), <http://arbitrationblog.kluwerarbitration.com/2016/01/06/icc-to-name-sitting-arbitrators-and-penalize-delay-in-issuing-awards/>.

[2] Cynthia Tang & Gary Seib, *HKIAC and ICC Take Steps to Tackle Costs and Delay*, INTERNATIONAL ARBITRATION GLOBAL ARBITRATION NEWS, (2021), <https://globalarbitrationnews.com/hkiac-and-icc-take-steps-to-tackle-costs-and-delay-in-international-arbitration-2016-03-14/>.

[3] Dnyandeo Sabaji Naik v. Pradnya Prakash Khadekar, (2017) 5 SCC 496.

[4] M/S Icomm Tele Ltd. v. Punjab State Water Supply 2019 SCC 391.

proceedings into jurisdictional and merits phases, frivolous claims often lead to the tribunals trifurcating the arbitral process into jurisdictional, merits and quantum phases.[5] The last phase is often the outcome of parties raising inflated and frivolous claims, which necessitates the determination of the actual quantum of claims. While arbitration has triumphed over litigation as a speedier and less expensive form of dispute resolution,[6] the proliferation of frivolous and inflated claims with an intention to cause delay renders the essence of arbitral proceedings futile.

Justice Bowen specified that "*I have found in my experience that there is one panacea which heals every sore in litigation and that is costs*."[7] This holds true in arbitral proceedings as well. The prevailing costs regime of an arbitral institution has a significant impact on the nature and magnitude of claims brought up by the parties.[8] Therefore, a cost system can be designed to create disincentives against raising frivolous claims and mitigate spiralling.[9] Arbitrators' fees are usually part of the costs award and an *ad valorem* method sets the fees proportionally to the sum of the claims in

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[5] Jeffery Commission & Rahim Moloo, *The Splitting of Issued Separate Determination (Bifurcation/Trifurcation): Procedural Issues in The International Investment Arbitration*, (OUP 2018); ICSID DICTIONARY, *Bifurcation - ICSID Convention Arbitration*, <https://icsid.worldbank.org/services/arbitration/convention/process/bifurcation>

[6] Temitayo Bello, *Why Arbitration Triumphs Litigation*, SSRN (2019) <https://ssrn.com/abstract=3354674>

[7] Copper v. Smith (1884) 26 Ch. D. 700 (CA)

[8] JEFFREY WAINCYMER, PROCEDURE AND EVIDENCE IN INTERNATIONAL ARBITRATION, 210 (2012).

[9] *Id*;*See also* Sanjeev Kumar Jain v. Raghubir Saran Charitable Trust (2012) 1 SCC 455; Bill Michelson, *Costs: An Effective Tool to Address Frivolous Claims* (2021), <https://www.grllp.com/blog/Costs-An-Effective-Tool-to-Address-Frivolous-Claims-19>.

dispute.[10] This would mean that higher the parties' claims, the higher the arbitrator(s) fees. Through this article, the authors evaluate the efficacy of the *ad valorem* method, along with various other mechanisms, in curbing frivolous claims.

In Part A: the article will attempt to define frivolous and inflated claims. It will analyze the various characteristics of frivolous and inflated claims which would aid in the process of developing comprehensive mechanisms to curb them. In Part B: the existing mechanisms in the Indian arbitration regime will be analyzed. The intent of this enquiry is to appraise their characteristics in contrast to the *ad valorem* method. In Part C: the potential of *ad valorem* charges to curb frivolous claims will be evaluated. In Part D: the article will undertake an enquiry on other international mechanisms to curb frivolous claims.

PART A

II. DEFINING FRIVOLOUS AND INFLATED CLAIMS

At the outset, it must be noted that the terms inflated and frivolous claims would be used interchangeably during the course of the article unless an explicit distinction is made. Inflated claims are claims that are overstated beyond actual value.[11] The difficulty lies in developing a standard to distinguish a meritorious claim from a frivolous one. Often, arbitrator(s) would have to act as a gatekeeper by evaluating claims on different degrees

[10] Claudia T. Salomon & Shreya Ramesh, *A Primer on International Arbitration Cost*, (2019), <https://www.lw.com/thoughtLeadership/byline-primer-international-arbitration-costs>.

[11] Burnett, Cathleen. *Frivolous Claims By the Attorney General*, 25(2) SOCIAL JUSTICE184–204. (1988).

of legal merit and identify the distinction.[12] Professor Charles Yablon divided the 'world of claims' into three parts: a) successful claims b) frivolous claims, which shouldn't have been brought up, and c) unfounded claims, which have sufficient merit to be brought up but are not enough to succeed.[13] This categorization can be benefitted from, if we add another layer of differentiation i.e. claims brought up in bad faith with an intention to delay, cause harm to the other party and manipulate a given legal system to get an unwarranted advantage. Professor Yablon's identification of a 'frivolous claim' is similar to that of 'claims manifestly without legal merit' as recognised by the International Centre for Settlement of Investment Disputes (hereinafter referred as "ICSID").[14] Such claims are susceptible to preliminary objections by parties.[15]

Even with these distinctions, it is not an easy exercise to categorize claims in an arbitral proceeding. A claim could be dismissed by the arbitrator(s) but need not be frivolous. This is evident from the fact that there are majority and minority awards in an arbitral proceeding, as there could always be two or more plausible views to determine the 'kind' of claims.[16]

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[12] ANDRÉS RIGO SUREDA, INVESTMENT TREATY ARBITRATION: JUDGING UNDER UNCERTAINTY56 (2012); *see for example* Diane Desierto, *Arbitral Controls and Policing the Gates to Investment Treaty Claims against States in Transglobal Green Energy v Panama and Philip Morris v Australia*, EJIL (2016), <https://www.ejiltalk.org/arbitral-controls-and-policing-the-gates-to-investment-treaty-claims-against-states-in-transglobal-green-energy-v-panama-and-philip-morris-v-australia/>

[13] C Yablon, *The Good, the Bad, and the Frivolous Case: An Essay on Probability and Rule11*, 44 UCLA L REV 65 (1996).

[14] ICSID Secretariat, *Possible Improvements of the Framework for ICSID Arbitration*, ICSID (2006), <https://icsid.worldbank.org/en/Documents/resources/Possible%20Improvements%20of%20the%20Framework%20of %20ICSID%20Arbitration.pdf>.

[15] *Id.*

[16] Michele Potestà & Marija Sobat, *Frivolous claims in international adjudication: a study of ICSID Rule 41(5) andof procedures of other courts and tribunals to dismiss claims*

The issue is complicated further when we acknowledge the vaguely drafted standards in arbitration law and the lack of structural features, such as *stare decisis* or appellate body, which could promote certainty in interpretation and application.[17] For instance, the *Fair and Equitable Treatment* standard in investment arbitration is constantly evolving,[18] which makes it arduous for arbitrator(s) to categorize any claims invoking this standard as either 'meritorious' or 'frivolous'. This predicament doesn't arise just in the *prima facie* evaluation for dismissal of a frivolous claim, but also in the award drafting phase when the decision to award costs based on the nature of claims raised is taken. Given this abstract process of categorization, it is important to consider whether an ideal mechanism to curb frivolous claims should be devoid of the need to make such distinctions.

PART B

III. EXISTING MECHANISMS TO CURB FRIVOLOUS CLAIMS

This part will analyse the existing mechanisms to curb frivolous claims in India, available under the Arbitration and Conciliation Act, 1996 (hereinafter "Arbitration Act") and as has been propounded by the courts.

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summarily, (2012), <https://lk-k.com/wp-content/uploads/potesta-sobat-frivolous-claims-jids-2012.pdf>

[17] W. Michael Reisman, *Canute Confronts the Tide: State vs. Tribunals and the Evolution of the Minimum Standard in Customary International Law*, 109 PROCEEDINGS OF THE ASIL ANNUAL MEETING: CAMBRIDGE UNIVERSITY PRESS, 233 (2015); Baetens Freya, *Judicial Review of International Adjudicatory Decisions: A Cross-Regime Comparison of Annulment and Appellate Mechanisms*, 8 JOURNAL OF INTERNATIONAL DISPUTE SETTLEMENT, 230 (2017).

[18] MEG KINNEAR, THE CONTINUING DEVELOPMENT OF THE FAIR AND EQUITABLE TREATMENT STANDARD237 (Andrea Bjorklund, et al. eds.,2009).

A. Exemplary costs:

The imposition of exemplary costs is used as an instrument to weed out and to prevent the deluge of frivolous cases.[19] Section 31A was inserted in the Arbitration Act through the Arbitration and Conciliation (Amendment) Act, 2015 (hereinafter, "Arbitration (Amendment) Act 2015"), and is the reflection of Section 6A that was recommended by the Law Commission in its 246th report.[20] The section vests the power with the concerned court or tribunal to award costs in any proceeding, and the court or the arbitral tribunal has the authority to decide: i) which party must pay the cost, ii) quantum of costs to be paid, and iii) timeline for the payment of costs. The explanation attached to Section 31A defines costs as 'reasonable costs' which generally brings under its purview, arbitrator(s) fees, legal fees, and any other fees that may be incurred during the proceeding. Section 31A(2) enumerates the factors to be considered "if (emphasis added) the court or arbitral tribunal decides to make an order as to payment of cost," while Section 31A(3) allows the arbitrator(s)/courts to make an order for payment of costs if the party "had made a frivolous counterclaim leading to delay in the disposal of the arbitral proceedings*"* and a wider discretion is also bestowed to order costs on the basis of "the conduct of all the parties.*"*

However, the provisions bestow absolute discretion in the hands of the arbitrator(s)/courts to decide whether a particular matter is suitable for

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[19] Valentina Renna, *Report on ArbitrationCosts*, (2012) <https://www.ispramed.com/wp-content/uploads/2012/09/Report-on-Arbitration-Costs1.pdf>; Marianne Stegner, *Costs in Arbitration*, 2 Y.B.INT'L ARB. 85 (2012).

[20] Law commission of India, *Report 246- Amendments to the Arbitration and Conciliation Act 1996* (2014) <https://lawcommissionofindia.nic.in/reports/report246.pdf>; United Nations, *Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its fortieth session* (2021) <https://undocs.org/en/A/CN.9/WG.III/WP.206>.

imposing costs. In our view, the discretionary nature of this judicial tool gives rise to concerns over its efficacy in disincentivizing frivolous and inflated claims.

In the case of *State of J&K v. Dev Dutt Pandit*,[21] the Supreme Court opined that parties who inflate their claims out of proportion shouldn't benefit from the costs award, even if they are the successful party.[22] In *Steel Authority of India v. Shyam Sundar Choudhury*,[23] the arbitrator(s) issued Rs. 1.2 lakhs award on costs in favour of the respondent, owing to the delay caused by the claimant. The claimant initially raised a claim for Rs. 23.38 lakhs which was ultimately lowered down to Rs. 1.28 lakhs on principal sum and Rs. 75,000 on account of interest.[24] The costs award was challenged at the Calcutta High Court under Sections 30 and 33 of the Arbitration Act, 1940,[25] and the court issued a fresh costs order amounting to only Rs. 20,000 against the claimant and the arbitrator's cost on the award was set aside.[26] The court noted that there are 'no certain standards' to issue costs.[27] Such lack of standards could give rise to a varied magnitude of costs being issued, as in this case, and lower the capabilities of this mechanism to curb frivolous claims.[28] In *Sheetal Maruti Kurundwade v. Metal Power Analytical Pvt. Ltd and Ors*,[29] an unsubstantiated petition was filed under Section 9, 12(3) and 12(5) of the Arbitration Act and it was contended that the appointment of the arbitrator was in violation of the provisions of the act. The petition was

[21] State of J&K v. Dev Dutt Pandit, AIR 1999 SC 3196.
[22] Mohinder Pal Singh v. Northern Railway (2008), 1 Arb LR 363, 368.
[23] Steel Authority of India v. Shyam Sundar Choudhury, AIR 2005 Cal 305.
[24] *Id.*
[25] *Id.*
[26] *Id.*
[27] *Id.*
[28] *Id.*

dismissed "wholly without foundation in fact or law."[30] However, the court did not direct the petitioners to bear costs for raising such frivolous claims.[31] Though all the above-discussed cases involved frivolous or inflated claims by parties, the approaches taken up by the courts in issuing costs were non-uniform, which raises concerns on the potential of this mechanism to deter frivolous claims.

The new costs regime was introduced with an intent to deter frivolous claims in arbitral proceedings.[32] However, as noted before, the subsisting wide discretion provided to the arbitrator(s)/courts could result in the identification of frivolous claims in an overly narrow set of circumstances. Further, arbitral proceedings function under the pressure of parties' expectations, and therefore, drastic categorisation and imposition of costs by the arbitrator(s) could impact their future appointments. This could discourage the arbitrator(s) from issuing awards on cost against a claim 'without legal merit'. If the arbitrator(s) don't use their due discretion to provide for costs, then the parties are left only with the recourse to courts under Section 34 of the Arbitration Act. This results in judicialization of the arbitration process, which would in turn raise costs for the parties. As a result, this mechanism is unlikely to generate an *ex-ante* deterrence against

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[29] (2017) 3 AIR Bom R 68.
[30] *Id. See also* Voestalpine Schienen Gmbh v. Delhi Metro Rail, 2017 SCC Online SC 172; Salma Dam Joint venture v. Wapcos Limited, 2019 SCC OnLine SC 1464.
[31] *Id.*
[32] Law Commission of India, s*upra* note 20.

the filing of frivolous claims and thus, future reforms should aim at providing a more predictable framework to address these issues.[33]

B. Pre-deposit requirement:

Though not enumerated under a statute, parties sometimes specify a pre-deposit requirement in the agreements they enter into. Such a requirement mandates the party initiating an arbitration proceeding to deposit in advance a certain sum, proportional to the claims raised.[34] The arbitration clause in *M/s Icomm Tele Ltd. v. Punjab State Water Supply*,[35] required a claimant to deposit 10% of the amount claimed, with the arbitrator before the commencement of the proceeding. The purpose of the 10% deposit, as mentioned in clause 25(vii) of the agreement, was to avoid frivolous claims.[36] However, the court was of the opinion that it is a well-settled principle of Indian law that a frivolous claim could be dismissed with exemplary costs,[37] and held that the requirement to deposit 10% of the claim had no nexus with discouraging frivolous claims as the deposit was to be made for all claims, frivolous or otherwise.[38] The court also emphasized the fact that even if the claimant were to be successful, they still may not be able to claim a refund of the entire deposit.[39] This made the clause not only

[33] K Polonskaya, F*rivolous Claims in the International Investment Regime: How CETA Expands the Range of Frivolous Claims that May be Curtailed in an Expedient Fashion,* 17 ASPER REV INT'L BUS. & TRADE L 1, (2017).
[34] Lakshya Gupta, *Clauses in an Arbitration Agreement: Are Arbitration Agreements Justiciable?*, KLUWER ARBITRATION BLOG (2019) <http://arbitrationblog.kluwerarbitration.com/2019/06/14/pre-deposit-clauses-in-an-arbitration-agreement-are-arbitration-agreements-justiciable/>
[35] M/s Icomm Tele Ltd v. Punjab State Water Supply, 2019 SCC 391.
[36] *Id.*
[37] *Id.*
[38] *Id.*
[39] *Id.*

excessive and disproportionate but also arbitrary. It said that often a deposit of 10% of a large claim would be more than the court fees which parties would have incurred if they chose litigation. The Court held that such pre-deposit clauses discourage parties from taking up arbitration and leads to 'clogging' of the court system.[40] The court's decision is significant in bringing up another factor to be kept in mind while formulating mechanisms to curb frivolous and inflated claims, which is ensuring that such a mechanism doesn't affect the essential features of the ADR process.

PART C

IV. AD VALOREM AS MECHANISM TO CURB FRIVOLOUS CLAIMS

Under the *ad valorem* method, the arbitrators' fees are set by reference to the sum of the claims in dispute.[41] In practice, this means that the fees will amount to a percentage of the amount in dispute. The *ad valorem* standard ensures greater transparency and predictability in the determination of arbitration costs. It is because by resorting to a schedule of fees already set out, the parties know beforehand the cost of the proceedings. Many arbitral institutions including the International Chamber of Commerce (hereinafter as "ICC"), the China International Economic and Trade Arbitration Commission, the Arbitration Institute of the Stockholm Chamber

[40] *Id.*
[41] Claudia T. Salomon & Shreya Ramesh, *A Primer on International Arbitration Costs* (2019) <https://www.lw.com/thoughtLeadership/byline-primer-international-arbitration-costs>.

of Commerce and the Cairo Regional Centre for International Commercial Arbitration employ the *ad valorem* method.[42]

Following the recommendation of the Law Commission, the Arbitration (Amendment) Act, 2015 inserted sub-section (14) to Section 11 of the Arbitration Act, which gives High Courts the power to frame rules for determining the fees of an arbitral tribunal. The courts must take into consideration the rates specified in the model schedule of fees for domestic arbitration as set out in Schedule IV of the Arbitration Act.[43] Schedule IV of the Arbitration Act resembles the *ad valorem* method but the model provision is 'not mandatory,'[44] as it is subject to the agreement entered into by the parties.[45] Further, it may not be used in *ad hoc* arbitrations.[46] Though many individuals have argued for mandating Schedule IV for determining arbitrator(s) fee in domestic arbitrations, they are with an intention to mitigate the risks created by the unqualified deference to party autonomy in fixing tribunal fees.[47] The focus of this article, however, would be to evaluate the *ad valorem* merely on its capabilities to act as an efficient and

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[42] Renna, *supra* note 19.
[43] Section 11(14), Arbitration Amendment Act, 2015.
[44] Paschimanchal Vidyut Vitran Nigam Ltd. v. IL&FS Engineering & Construction Company Ltd 2018 SCC OnLine Del 10831; G. S. Developers & Contractors Pvt. Ltd. v. Alpha Corp Development Pvt. Ltd. & Anr, 2019 SCC OnLine Del 8844.
[45] National Highways Authority of India v. Gammon Engineers and Contractor Pvt. Ltd 2019 SCC OnLine SC 906.
[46] *Id.*
[47] Indranil Deshmukh, *Arbitrator Fees in India: In a Fix? India Corporate Law* (2021), CYRIL AMARCHAND BLOGS, <https://corporate.cyrilamarchandblogs.com/2019/10/arbitrator-fees-in india/#:~:text=In%202015%2C%20in%20accordance%20with,rates%20specified%20in%20the%20model>; Devika Sharma & Devika Sharma, *Fee Schedule of Arbitral Tribunal: Focusing on the Sole Arbitrator's Fee,* SCC BLOG (2021) https://www.scconline.com/blog/post/2020/06/11/fee-schedule-of-arbitral-tribunal-focusing-on-the-sole-arbitrators

sufficient mechanism to curb frivolous claims. For the purpose of subsequent analysis, Schedule IV would be used to exemplify a commonly followed *ad valorem* method.

An *ad valorem* mechanism provides clarity and certainty unlike Section 31A of the Arbitration Act as it creates *ex-ante* deterrence. Given the fixed percentage of the fee against the claims raised, it doesn't fall within the discretion of the arbitrator(s). Further, it makes the differentiation of a frivolous or inflated claim from a meritorious one, irrelevant, hence diluting the issues caused by the wide discretion bestowed on the arbitrator(s). As most international institutions follow *ad valorem* charges, it aids in creating uniformity in structural features and progresses India's goal to become an arbitration hub by promoting its acceptance globally.

However, the mechanism also has its deficiencies. As *ad valorem* follows a 'cost follows events model,'[48] the mechanism may not be equipped to penalize the winning party for the harm and distress they caused to the losing party by raising frivolous claims. Through our analysis, it is evident that an efficient mechanism must both, act as a deterrent and provide compensation to the affected party. Though the mechanism meets the first limb of requirement, it doesn't fulfil the latter as *ad valorem* charges pertain to arbitrators' fees which may benefit the arbitrator(s) but not the parties affected by frivolous claims. Further, given that the arbitrator(s) remuneration is directly related to the quantum of claims raised, the arbitrator(s) could be incentivized to unnecessarily elongate the proceedings

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fee/#:~:text=Keeping%20in%20mind%20that%20the,sole%20arbitrator%20INR%2037%2C50%2C000.

[48] Salomon, *supra* note 10.

for private gains. This may compromise the impartiality of arbitrator(s). Even if the arbitrator(s) don't indulge in such activities, it may still cause suspicion of impartiality in the minds of the parties.[49]

It wouldn't be accurate to argue that this mechanism is devoid of uncertainty and ambiguousness, as, for instance, Schedule IV doesn't define 'amount in dispute' against which an *ad valorem* percentage for the arbitrators' fee is charged. In *Delhi State Industrial Infrastructure Development Corporation Ltd. v. Bawana Infra Development (P) Ltd*,[50] the court clarified after an extensive review of the international best practices that the phrase 'sum in dispute' would include the sum-total of both the claims and the counter-claims. However, few arbitral institutions include set-off claims too, in calculating aggregate value and some follow other modes of calculation.[51] Further, the claims submitted at the beginning of the proceedings may be subject to subsequent review (for instance, due to a change in the economic value of the claims submitted by the parties), which may not be taken into consideration by this method.[52] Therefore, this method too is not denuded from uncertainty which challenges its potential to act as an *ex-ante* deterrence against frivolous claims. Contrastingly, the time-based method of calculation of costs, which calculates the arbitrators' fees by reference to an hourly or a daily rate at which the arbitrator(s) will be compensated for time spent working on the case, doesn't require the

[49] Shivani Khandekar & Divyansh Singh, *Independence and Impartiality of Arbitrators: Are We There Yet?*, KLUWER ARBITRATION BLOG,<http://arbitrationblog.kluwerarbitration.com/2017/11/14/independence-impartiality-arbitrators-yet/>

[50] Delhi State Industrial Infrastructure Development Corporation Ltd. v. Bawana Infra Development (P) Ltd.,2018 SCC OnLine Del 9241

[51] Renna, *supra* note 19.

[52] *Id.*

evaluation of 'amount in dispute.'[53] Further, this mechanism may not act as a sufficient deterrence for high profile parties with deep pockets who have a substantial amount of resources at their disposal and would be indifferent to the threat of paying higher arbitrators' fees.

Additionally, as noted in *M/S ICOMM Tele Ltd v. Punjab State Water Supply*,[54] the essential feature of an ADR mechanism includes being economical, which can't be sacrificed for the sake of creating a deterrence against frivolous claims. According to a study conducted by the ICC, the main 'cost driver' in an arbitral proceeding is the arbitrators' fees.[55] Several other studies and statistics have shown that costs were a particularly critical issue, as arbitration is often considered to be more costly than other available alternatives.[56] An exorbitant *ad valorem* rate would discourage parties from availing arbitration. On the other hand, a low *ad valorem* rate may not act as a sufficient deterrent for parties to not raise frivolous claims.

PART D

V. INTERNATIONAL PRACTICES

We will briefly discuss practices adopted by various international institutions, as appreciating and analyzing these mechanisms aids in evolving

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[53] Dawn Chardonnal, *ICC Court releases practices on fees and administrative expenses - ICC - International Chamber of Commerce ICC - International Chamber of Commerce* (2021)ICC<https://iccwbo.org/media-wall/news-speeches/icc-court-releases-practices-on-fees-and-administrative-expenses/>

[54] M/S ICOMM Tele Ltd v. Punjab State Water Supply, 2019 SCC 391.

[55] ICC Arbitration Rules, 2021 <https://iccwbo.org/dispute-resolution-services/arbitration/>.

[56] Renna, *supra* n. 19; Law Commission of India *Supra* n. 20; Union of India v. Singh Builders Syndicate, (2009) 4 SCC 523.

and adapting the best practices and broadens the horizon for Indian legislators.

A. ICC

The ICC uses the *ad valorem* method to calculate the fees of the arbitrator(s).[57] Further, the ICC is also given powers to issue a higher fee than the fixed scale in exceptional circumstances.[58] Article 38 of ICC Rules bestows the institution with powers to make decisions on any costs and order the parties to pay such costs.[59] Further, the rules don't subscribe to the principle of 'cost follow event,' as the arbitral tribunal has the power to issue cost even against the winning party. Article 38 mandates the institution to take into consideration relevant factors, including the conduct of the parties and the extent to which the parties have tried to make the arbitration procedure expeditious and cost-effective.

B. The London Court of International Arbitration

The London Court of International Arbitration (hereinafter, "LCIA") follows an hourly pay scale, in which the costs are determined by the amount of time spent by the arbitrators in a particular proceeding.[60] The hourly fees can't exceed £500 except in special circumstances. Article 28 mandates the arbitrator(s) to issue an award on costs.[61] Though Article 28.4 of the LCIA Rules is based on the 'costs follow the event' rule, and it is also within the

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[57] *Id.*
[58] *Id.*
[59] Article 38, ICC Arbitration Rules, 2021.
[60] LCIA, Rules of Arbitration, <https://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2020.aspx>
[61] *Id.*

arbitrator's power to decide the appropriate method of distribution and proportions of costs to every party.

C. Hong Kong International Arbitration Centre

The Hong Kong International Arbitration Centre (hereinafter as "HKIAC") provides the party with the flexibility to choose between the *ad valorem* regime or the hourly regime.[62] However, if the parties fail to choose a method, HKIAC will by default apply an hourly rate. While the forms differ, both the ICC and HKIAC mandate their arbitral institutions to pass an order on costs and the relevant factors to be considered include identification of frivolous and inflated claims by parties.[63]

VI. CONCLUSION

Through our analysis, we have identified various elements that have to present in an efficacious mechanism to curb frivolous claims. *Firstly*, the mechanism should both act as a deterrent, and compensate the affected parties. *Secondly*, it should set out uniform, unambiguous and certain standards for evaluating and categorizing claims. *Thirdly*, it shouldn't be affected by arbitrator's bias or impartiality. *Lastly*, it shouldn't set out cumbersome procedures and in turn result in further delay. The costs regime employed by an arbitral institution is fundamental towards curbing frivolous claims. While Section 31-A of the Arbitration Act empowers the arbitrator(s) or the courts in India to pass orders on costs, it is insufficient as it is merely a discretionary power and not a mandatory order. Schedule IV of the Arbitration Act adopts an *ad valorem* method of determining the arbitrators'

[62] HKIAC,Rules of Arbitration, < https://www.hkiac.org/arbitration/rules-practice-notes>
[63] *Id.*

fees and the article analyzed the advantages and disadvantages of adopting this method to curb frivolous claims.

Taking into consideration the merits and demerits of both these mechanisms, the Indian regime could adopt the *ad valorem* method which follows a reasonable rate and also convert Section 31A of the Arbitration Act into a mandatory provision as opposed to it being discretionary in the hands of the arbitrator(s). Renowned institutions like the ICC, LIAC, HKIAC, follow the *ad valorem* approach and make it mandatory for the arbitrator(s) to pass awards on costs by factoring in the frivolous claims raised by parties. Through an *ad valorem* mechanism, parties will be disincentivized to make frivolous claims *ex-ante.* Furthermore, the mandate on arbitrator(s) to pass awards on costs could fulfil the requirement of compensating the affected party and punishing the unscrupulous party. This practice will also bring the Indian regime in line with international legal practices and could receive global recognition.

IV. LEGAL EFFECT OF PROCEDURAL ORDERS IN ARBITRATION PRACTICE: IMPLICATIONS ON PROCEDURE AND OUTCOME

- Anchit Jasuja and Preksha Mehndiratta[*]

ABSTRACT

Under most domestic laws and arbitral institutional rules, arbitral tribunals have been given the responsibility of making procedural decisions relevant to the arbitration process. These decisions are usually given by the arbitral tribunal in the form of a procedural order, which, unlike an award, are not challengeable in the courts. Traditionally procedural orders were seen as non-consequential minor procedural decisions having no major impact on the outcome of the arbitration. However, this traditional sense of procedural orders has undergone a major shift over the past decade due to courts viewing certain procedural orders as binding documents with major consequences for the outcome and procedure of the arbitration process. Combined with new tools such as the power of contempt of arbitral tribunals in jurisdictions such as India and the proliferation of imposition of costs on non-compliant parties, arbitral tribunals have acquired the teeth to make the non-compliance of a procedural order consequential for the non-compliant party. In light of the shift from the traditional sense of procedural orders, this article looks at the different forms of procedural orders through the lens of the legal effect they produce to enable stakeholders in an arbitration proceeding to apprehend the consequences of procedural instruments.

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I. INTRODUCTION

The procedural flexibility of an arbitral tribunal is one of the fundamental characteristics of international arbitration. Parties can choose to shape the procedure as per their agreements and in absence of any party agreement, arbitral tribunals can determine procedure on a case-by-case basis, unlike courts, which are bound by predetermined domestic procedural laws. The use of procedural orders is one of the most effective methods available with an arbitral tribunal to shape and guide the arbitration process. Arbitral tribunals can choose procedural orders to decide on any procedural matters, from minor procedural issues to set the flow of the arbitration process.[1]

Procedural orders were considered to be valuable tools for streamlining the arbitration process but were not seen as having a significant effect on the outcome of the arbitral proceedings. However, this changed when the Frankfurt Court of Appeal in *Flex-n-Gate v. GEA*[2] ("Flex-n-Gate") held that in certain cases, the non-compliance of the award with a previous procedural order was enough to set aside the award. The decision of the court changed the way the legal effect of a procedural order was seen in arbitration proceedings and resulted in authors suggesting methods of escaping the "Frankfurt Trap."[3] After a slew of decisions by different courts, each

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[1] Rolf Trittmann, *When Should Arbitrators Issue Interim or Partial Awards and or Procedural Orders?*, 20 J. INT'L ARB. 255, 259 (2003).

[2] Oberlandesgericht[Court of Appeal] Feb. 17, 2008, 26 Sch 13/10*available at* https://uk.practicallaw.thomsonreuters.com/Link/Document/Blob/I5b54f0f41ef511e38578f7ccc38dcbee.pdf?targetType=PLC-multimedia&originationContext=document&transitionType=DocumentImage&uniqueId=08d2fe7d-722a-49ff-9e25-d4f384661190&contextData=(sc.Default). [hereinafter*Flex-n-Gate*].

[3] Gerhard Wagner & Maximilian Bülau, *Procedural Orders by Arbitral Tribunals: In the Stays of Party Agreements?*, 11 GER. ARB. J. 6, 11 (2013).

contradicting the other, the legal effect that a procedural order produces for the parties and the arbitral tribunal has remained largely uncertain.

This paper analyzes the legal effect of procedural orders upon the parties and the arbitral tribunal, the approach taken by different courts in different jurisdictions to decide the legal effect of each type of procedural order and discusses the effect of non-compliance of a procedural order by a party.

II. DIFFERENTIATING LEGAL CONSEQUENCES OF A PROCEDURAL ORDER

A. Difference between a Procedural Order and an Award

A procedural order is issued by an arbitral tribunal to give out directions regulating the conduct of parties in arbitration and broadly involves a decision meant to manage the arbitration proceedings.[4] Formally, they have no bearing on deciding the dispute between the parties, but are only used to determine the procedure of the arbitration process.

Courts have characterized the procedural order to be treated as an award in substance, only when it resolves the claims and decides the rights of parties in finality,[5] rendering it capable of being enforced as an award under the New York Convention.[6] This is consistent with the approach of not enforcing a procedural order as an award if that procedural order does not

[4] KolawoleMayomi&BusolaBayo-Ojo, *Is it a Mere Procedural Order?*,Mondaq (Oct. 10, 2018), https://www.mondaq.com/nigeria/arbitration-dispute-resolution/744358/is-it-a-mere-arbitral-procedural-order.

[5] Publicis Communication v. Publicis S.A. True North Communications Inc., 206 F.3d 725 (7th Cir. 2000).

ultimately resolve the dispute between parties due to its "interlocutory and procedural nature."[7] Therefore, courts look at the nature of the procedural order to determine whether it is enforceable as an award or not, especially when 'award' remains undefined in key instruments such as the New York Convention and The United Nations Commission on International Trade Law ("UNCITRAL") Model Law on International Commercial Arbitration.[8]

This approach of 'substance over form' was used by the Swiss Federal Tribunal when an arbitral tribunal rejected a challenge to the appointed arbitrator for lack of impartiality through a procedural order.[9] In the challenge against the award, the Swiss Federal Tribunal held that irrespective of the label of the decision, the procedural order qualified as an interim award because it determined jurisdiction and composition of the arbitral tribunal.

English courts have observed that decisions of arbitral tribunals which determine the substantive rights and liabilities of parties would add most weight to the decision being construed as an award.[10] Furthermore, the courts also consider other factors such as the clarity in the description of the decision of the tribunal,[11] the formality of the language employed, the degree

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[6] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 10 June 1958, 330 U.N.T.S. 3.

[7] Resort Condominiums International Inc. v. Ray Bolwell and Resort Condominiums Pty. Ltd. *(Qld.)* [1995] XX Y.B. Com. Arb. 628 (Austl.).

[8] UNCITRAL MODEL LAW, G.A. Res. 40/72, 40 U.N. G.A.O.R. Supp. (No. 17), U.N. Doc. A/40/17 (June 21, 1985), revised in 2006, G.A. Res. 61/33, U.N. Doc. A/61/33 (Dec. 4, 2006), available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html [hereinafter UNCITRAL Model Law].

[9] TribunaleFederale [TF] [Federal Supreme Court] Apr. 30, 2018, Decision 4A_136/2018 (Switz.).

[10] ZCCM Investment Holdings PLC v. Kansanshi Holdings PLC, [2019] EWHC 1285 (Comm) (Eng.).

[11] K v. S., [2019] EWHC 2386 (Comm) (Eng.).

of the detail of the reasoning in the decision, and the intention of the tribunal while deciding whether a decision is an award or a procedural order.[12]

Thus, the arbitral tribunal is given the authority to conduct the proceedings "in such manner as it considers appropriate,"[13] there seems to be a consensus among courts that it is the content and not the nomenclature of a decision that determines the nature of an arbitral decision.[14]

B. Difference between a Procedural Order and a Party Agreement

In the absence of an agreement between the parties as to the procedure to be adopted in the arbitration proceedings, the UNCITRAL Model law allows the tribunal to set its procedure.[15] To allow parties to set the procedure of the arbitral tribunal, the UNCITRAL Model Law does not differentiate between an *ex-ante* agreement or a *post-ante* agreement.[16] This can be seen in the draft commentary of the model law where the drafters rejected a proposal to limit the party autonomy to decide procedure only in *ex-ante* agreements.[17] Thus, the UNCITRAL Model Law allows a high degree of party autonomy in deciding the procedure of the arbitration which cannot be deviated from by the arbitral tribunal even if the implementation of the agreement becomes impracticable.[18]

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[12] *Id.*
[13] UNCITRAL MODEL LAW, art. 19(2)(1).
[14] Courd'appel [CA] [Regional Court of Appeal] Braspetro Oil Services (Brasoil) v. Great Man-Made River Project, July 1, 1999, 18(2) ASA BULL. 2/2000, 376 (Fr.).
[15] UNCITRAL Model Law, art. 19.
[16] Wagner &Bülau, *supra* note 3 at 11.
[17] HOWARD M. HOLTZMANN& JOSEPH E. NEUHAUS, A GUIDE TO THE UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION: LEGISLATIVE HISTORY AND COMMENTARY 565 (Wolters Kluwer 1995).
[18] Wagner &Bülau, *supra* note 3 at 11.

This discussion of procedural agreements becomes important when differentiating a procedural order and a party agreement. While procedural orders can be made unilaterally by the arbitral tribunal, such procedural orders are generally avoided in favour of procedural orders which are agreed to by the parties to the arbitration. Most commentators suggest building party consensus on procedural orders to smoothen the arbitration process.[19] However, this may lead to a situation where an agreement between parties is reached in the disguise of a procedural order. For example, in *Flex-n-Gate*, a procedural order was circulated among the parties for comments and approval. Once comments were submitted, the procedural order was modified and approved by the parties. The German court held that since the procedural order had been agreed to by the parties, it constituted a party agreement that could not be deviated from by the arbitral tribunal. However, the Svea Court of appeal in *URETEK Worldwide Oy v. Doan Technology Pty Ltd.*[20] held that even if a procedural order reflects the contents of a telephonic conference between the parties, the procedural order does not become a party agreement and remains an administrative decision by the tribunal. Thus, procedural orders which have been agreed upon by the parties are not universally seen by courts as party agreements and can be viewed as administrative decisions depending upon the level of involvement of the parties.

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[19] NIGEL BLACKABY ET. AL, REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION 370 (Oxford Univ. Press, 5th ed. 2009); GARY B.BORN, INTERNATIONAL ARBITRATION: CASES AND MATERIALS 754 (Wolters Kluwer 2011);
EMMANUEL GAILLARD & JOHN SAVAGE, FOUCHARD GAILLARD GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION 663 (Wolters Kluwer 1999); JEFFREY WAINCYMER, PROCEDURE AND EVIDENCE IN INTERNATIONAL ARBITRATION 445 (Wolters Kluwer 2012).

[20] Hovrätt [HovR] [Court of Appeal] Dec. 16, 2015, Case No. T.975-15 (Swed.).

Arbitral institutional rules also provide for a 'terms of reference' which is seen as a special form of consensual procedural order.[21] These terms of reference provide a procedural framework for the arbitration proceedings and have to be signed by both, the arbitrators and the parties after which it is passed by the arbitral tribunal. Most notably, the International Chamber of Commerce ("ICC") Arbitration Rules 2017 provides the arbitral tribunal with the power to make the terms of reference after receiving representations from the parties[22] and authorize the arbitral tribunal to establish the procedural timeline of the case according to the terms of reference.[23] Some authors argue that because the arbitral tribunal is required to sign off on the terms of reference, it is a multilateral agreement between the parties and the arbitral tribunal.[24] Thus, if a deviation from the terms of reference is made by the arbitral tribunal, it is not a case of the arbitral tribunal misinterpreting a party agreement, rather it is a case of the arbitral tribunal violating its own contractual obligations towards the parties which would open the door for a suit for damages to be filed against the arbitrators for breach of the terms of reference.[25]

[21] Wagner &Bülau, *supra* note 3 at 6.
[22] INTERNATIONAL CHAMBER OF COMMERCE, ARBITRATION RULES (2017), art. 23 [hereinafter *ICC Arbitration Rules 2017*].
[23] ICC Arbitration Rules 2017, art. 24.
[24] Richard Kreindler& Timothy J. Kautz, *Agreed Deadlines and the Setting Aside of Arbitral Awards*, 15 ASA BULL. 576, 593 (1997).
[25] *Id.*

III. BINDING NATURE OF PROCEDURAL ORDER ON THE ARBITRAL TRIBUNAL

A. Unilateral Procedural Order

The procedural orders which are passed by the tribunal without an agreement between the parties on the tribunal's own volition can be referred to as unilateral procedural orders. Unlike consensual procedural orders, there seems to be no explicit obligation on an arbitral tribunal to conform to such procedural orders. Arbitrators have wide discretion in deciding the procedure of the arbitration with the only limitations being the conformity of the procedural orders to natural justice, due process, and party agreements.[26] This procedural flexibility with the arbitral tribunals is one of the cornerstones of the arbitration process as it allows the arbitral tribunal to effectively deal with different situations without being bound by strict procedural rules.[27] To allow for such procedural efficiency, institutional rules such as Article 22(1) of the ICC Arbitration Rules allow the tribunal to *"*make every effort to conduct the arbitration expeditiously and cost-effectively having regard to the complexity and value of the dispute.*"*[28] Despite the procedural flexibility that arbitral tribunals have, there are still situations where an award of the arbitral tribunal may be set aside due to non-compliance of the arbitral tribunal to a previous unilateral procedural order.

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[26] William W. Park, *The 2002 Freshfields Lecture - Arbitration's Protean Nature: The Value of Rules and the Risks of Discretion*, 19 ARB. INT'L. 279, 281 (2003).
[27] Adams Rajab Makmot-Kibwanga, *Arbitral Discretion and Procedural Autonomy*, GRIN, https://www.grin.com/document/454738 (last visited May28, 2021).
[28] ICC Arbitration Rules 2017, art. 22(1).

Such a situation arose in the case of *Neuro Vive Pharmaceutical AB v. Ciclo Mulsion AG*[29] where the arbitral tribunal had passed a procedural order which contained a finding on the parties' intention behind a provision regarding the payment of royalties. The procedural order further mentioned that the finding of the tribunal on the intention of the parties was final and not subject to change except by an advanced notice to the parties. The arbitral tribunal did not issue any such notice but still adopted a different finding on the intention of the parties in the final award. The Swedish Supreme Court called this a 'procedural irregularity' and set aside the award, reasoning that the non-compliance of the arbitral tribunal to its procedural order constituted the arbitral tribunal violating its own procedure.[30] Under Section 68 of the English Arbitration Act,[31] this criterion of procedural irregularity is clothed as 'serious irregularity' and is a ground for challenging arbitral awards.[32]

On the other hand, when the procedural framework of the arbitration has been set by a party agreement, the court would not see deviance from a previous unilateral procedural order as a 'procedural irregularity' due to the principle of deference to the arbitrator's interpretation of the party agreement such as in case of deviation from the arbitral timetable.[33] In such

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[29] HögstaDomstolen [HD] [Supreme Court] Apr. 30, 2019, Case No. T 796-18 https://www.arbitration.sccinstitute.com/views/pages/getfile.ashx?portalId=89&docId=3784013&propId=1578 (Swed.).

[30] Joel DahlquistCullborg, The Role of the Swedish Supreme Court in International Arbitration, 2019 BELG. REV. ARB. 469, 476.

[31] Arbitration Act 1996, § 68 (Eng.).

[32] FabricioFortese&LottaHemmi, *Procedural Fairness and Efficiency in International Arbitration*, 3 GRONINGEN J. INT'L L. 110, 122 (2015).

[33] Klaus Peter Berger & J. Ole Jensen, *Due Process Paranoia and the Procedural Judgment Rule: A Safe Harbour for Procedural Management Decisions by International Arbitrators*, 32 ARB. INT'L 415, 423 (2016).

circumstances, the arbitral tribunals generally deviate from previous procedural orders unless the request for deviance from the procedural timetable is a clear dilatory tactic.[34]

In this regard, an arbitral tribunal goes ahead to call this discretion in procedural matters as an inherent power of the tribunal.[35] Even though the extent of discretion to deviate from procedural timetables in procedural orders is generally not questioned by courts due to such decisions being characterized as case management decisions,[36] still courts have sometimes called for arbitral tribunals to strictly stick to previous procedural orders in the interest of efficiency.[37] To enable this efficiency, courts do not generally set aside awards for deviance from procedural orders during the arbitration process.[38]

B. Consensual Procedural Order

Considering that in international commercial arbitration, procedural orders are rarely made with a top-down approach,[39] the decision in *Flex-n-Gate* has the effect of viewing virtually all procedural orders 'approved' by parties as party agreements. This construction of procedural orders as party agreements virtually extinguishes the procedural discretion that is guaranteed to arbitral tribunals by some institutional rules. The court in *Flex-n-Gate* also

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[34] JULIAN D.M. LEW ET. AL., COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION¶ 21-64 (Wolters Kluwer 2003).
[35] LAURENCE CRAIG ET. AL., INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION 274-276 (Oceana Publications, 2nd ed. 1990).
[36] Pacific China Holdings Ltd (In Liquidation) v. Grand Pacific Holdings Ltd. [2012] 4 H.K.L.R.D. 1 (H.K.).
[37] M/s. Centrotrade Minerals and Metals Inc. v. Hindustan Copper Ltd., Unreported Judgement (2020).
[38] Berger & Jensen, *supra* note 33 at 434.
[39] Wagner &Bülau, *supra* note 3 at 11.

had before it, the issue of the bindingness of terms of reference and was drawn up under Article 23 of the ICC Arbitration Rules.[40] The court held that any deviation from the terms of reference also constitutes a deviation from a party agreement. To substantiate its analysis, the court pointed out that the draft terms of reference, just like the procedural order, had been circulated to the parties for inviting modification proposals that were incorporated in the final terms of reference. Due to this exercise of shaping the terms of reference and the fact that the terms of reference are signed by the parties, the terms of reference constitute a valid party agreement that cannot be deviated from by the arbitral tribunal.

Since the terms of reference are signed by the parties, there is likely an intention by the parties to create a legally binding agreement when signing on the terms of reference. Deciding on the bindingness of the terms of reference, the Swiss Federal Tribunal held that the deviation of the arbitrator from the terms of reference for accepting a memorial submitted after the deadline as per the terms of reference was not a ground to set aside the award.[41] However, it has to be noted that the court did not comment on the validity of such a deviation, but rather relied on the principle of limited judicial interference in the interpretation of a party agreement by the arbitral tribunal.

Unlike the Swiss Federal Tribunal, the French Court of Cassation in *SOFIDIF*[42] went into a discussion on the terms of reference of an ICC

[40] ICC Arbitration Rules 2017, art. 23.
[41] TribunaleFederale [TF] [Federal Supreme Court] Mar. 24, 1997 15 ASA BULL. 316 (Switz.).
[42] Cour de cassation [Cass.] [Supreme Court for Judicial Matters] 1e civ. Mar. 8, 1988, Bull, Civ. I, No. 64 (Fr.).

arbitration. The terms of reference provided for bifurcation of the case into issues of jurisdiction and merits, but the arbitral tribunal in a later procedural order deviated from this bifurcation. The court found that the latter procedural order did not violate the terms of reference since the terms of reference did not explicitly prohibit the arbitral tribunal from deciding others issues when rendering a partial award on the issue of jurisdiction. Thus, the court preferred an interpretation of the party agreement which would result in the arbitral award not being set aside. It seems implicit from such decisions that a substantial deviation from the terms of reference may result in the award being set aside.

There are limited situations where an arbitral tribunal may exercise discretion even if a party agreement exists which has laid down the procedure. Under Article 17(2) of the UNCITRAL Arbitration Rules, the arbitral tribunal is allowed to modify the time prescribed for inviting the views of the parties allowing the arbitral tribunal to apply its discretion in place of the party agreement.[43] Similarly, under Article 22.1 of the London Court of International Arbitration Rules 2014, the arbitral tribunal has similar powers.[44] While these powers were subject to a contrary agreement of the parties in the previous rules, the present rules do not allow the parties to exclude this discretionary power of the arbitral tribunal by a party agreement.[45] In cases where the arbitration rules provide for discretionary powers of the arbitral tribunal to supersede a party agreement, arbitral

[43] General Assembly Resolution 31/98, *UNCITRAL Arbitration Rules*, A/RES/31/98 (15 Dec. 1976).
[44] LONDON COURT OF INTERNATIONAL ARBITRATION, LCIA ARBITRATION 22.1 (2014).
[45] Fortese & Hemmi, *supra* note 33 at 120.

tribunals can exercise such discretion and even ignore party agreements.[46] This recent phenomenon has been described as shifting the balance of power from parties to the tribunal.[47]

Still, in exceptional circumstances, the arbitral tribunal may exercise discretionary power completely in contravention to the party agreement within a procedural order. However, it has been argued that such discretionary power should only be exercised when the arbitration agreement allows for discretionary powers of the arbitrator.[48] The seminal decision on such an exercise of discretionary power is *Larsen v. The Hawaiian Kingdom*,[49] where the arbitral tribunal denied issuing an interlocutory order for the framing of an issue that was agreed upon by both parties. Relying on Article 32 of the UNCITRAL Rules, the arbitral tribunal reasoned that the power to decide the procedure under the rules lies with the tribunal.[50] The justification behind such an order was that the parties always have the right to withdraw the case from the arbitral tribunal constituted under institutional rules.

When an English Court in *Pacol Ltd. v. Joint Stock Co. Rossakhar*[51] had to decide an application to set aside an award similar to the order in *Larsen*, the court concluded that deviating from the party agreement in such a case would make the award liable to be set aside. Courts have emphasized

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[46] *Cf.* DAVID D. CARON & LEE M. CAPLAN, THE UNCITRAL ARBITRATION RULES: A COMMENTARY 48 (Oxford Univ. Press, 2nd ed. 2013).
[47] MAXI SCHERER ET. AL., ARBITRATING UNDER THE 2014 LCIA RULES. A USER'S GUIDE 245 (Wolters Kluwer 2015).
[48] GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 1755 (Wolters Kluwer 2nd ed. 2009).
[49] Lance Paul Larsen v. The Hawaiian Kingdom, 1999-01 (PCA Case Repository 2001).
[50] JEFFREY WAINCYMER, PROCEDURE AND EVIDENCE IN INTERNATIONAL ARBITRATION 445 (Wolters Kluwer 2012).

that the discretionary power of the arbitral tribunal does not allow it to depart from the terms of an explicit procedural agreement.[52] Still, in certain exceptional circumstances, if the institutional arbitration rules acknowledge discretion of the tribunal in procedural matters, then the tribunal may be justified in deviating from a procedural agreement disguised as a procedural order, especially when the agreement has become inappropriate or would lead to an absurd result.[53]

IV. EFFECTS OF NON-COMPLIANCE OF PROCEDURAL ORDERS

A. Power to enforce procedural orders

There are several methods through which arbitral tribunals may tackle non-compliance with procedural orders. In cases of unreasonable procedural behaviour which includes non-compliance with the procedural orders, the arbitral tribunal can choose to impose costs on any party based on its observations.[54] Provisions such as Guideline 26 of the International Bar Association Guidelines on Party Representation in International Arbitration[55] and Rule 29 of the Judicial Arbitration and Mediation Services[56] give arbitral tribunals the discretionary power to take into account the party's actionable misconduct when apportioning the costs of the arbitration at the end of

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[51] [1999] 2 All ER 778 (Comm) (Eng.).
[52] Berger & Jensen, *supra* note 33 at 424.
[53] GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 1755 (Wolters Kluwer 2nd ed. 2009); JEFFREY WAINCYMER, PROCEDURE AND EVIDENCE IN INTERNATIONAL ARBITRATION 386 (Wolters Kluwer 2012).
[54] JASON FRY ET. AL., THE SECRETARIAT'S GUIDE TO ICC ARBITRATION ¶ 1488 (International Chamber of Commerce 2012).
[55] INTERNATIONAL BAR ASSOCIATION, IBA GUIDELINES ON PARTY REPRESENTATION IN INTERNATIONAL ARBITRATION 26 (2013).
[56] JUDICIAL ARBITRATION AND MEDIATION SERVICES, JAMS COMPREHENSIVE ARBITRATION RULES & PROCEDURE 29 (2014).

proceedings. Peremptory orders are also employed as a tool by the arbitral tribunal against non-compliant parties to show cause for failure to comply with existing procedural orders.[57] The English Arbitration Act goes a step further and Section 42 even provides a party with the option to apply in court for the enforcement of a peremptory order.[58]

Additionally, the penal provision for contempt of an arbitral tribunal may also be invoked in the relevant jurisdiction. For instance, Section 27(5) of the Indian Arbitration and Conciliation Act 1996 states that:

> [P]ersons failing to act in accordance with such process, or making any other default, or refusing to give their evidence, or guilty of any contempt to the arbitral tribunal during the conduct of arbitral proceedings, shall be subject to the like disadvantages, penalties and punishments by order of the Court on the representation of the arbitral tribunal as they would incur for the like offences in suits tried before the Court.[59]

The Supreme Court in *Alka Chandewar v. Shamshul Ishrar Khan*[60] held that the scope of Section 27(5) includes non-compliance of any order given by an arbitral tribunal to be referred to an appropriate court for proceeding against such non-compliance under the Contempt of Courts Act, 1971.[61]

More notably, Article 25 of UNCITRAL Model Law states that if a party commits procedural defaults such as a failure to produce documentary evidence or to appear at hearings, then the arbitral tribunal may make the

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[57] Mayomi&Bayo-Ojo, *supra* note 4.
[58] Arbitration Act 1996, § 42 (Eng.).
[59] Arbitration & Conciliation Act, § 27(5), No. 26 of 1996, Act of Parliament, 1996.
[60] 2007 (13) SCC 220.
[61] Contempt of Courts Act, No. 70 of 1971, Act of Parliament, 1971.

award based on the evidence before it and give no weight to any other evidence.[62] The Chartered Institute of Arbitrators Guide on Managing Arbitration and Procedural Orders, 2015 contemplates that if a party fails to comply with a procedural order or frustrates the proceedings, then, in some instances the arbitral tribunal may have to exercise its power to impose sanctions on the uncooperative party for the proceedings to end in a timely and orderly manner.[63] However, such a power should only be used after issuing warnings and explaining the reasons for the same.[64]

Perhaps the most significant way in which non-compliance of procedural order can have a bearing on the party is an adverse award against the party. There have been cases where courts have held that it was well within the scope of the discretion of the arbitral tribunal if it refuses to hear a new claim when a party tries to amend its statement of claim without corroborating evidence[65] or refuses to consider a counterclaim submitted only a week before the arbitration hearing[66] or excludes additional legal authorities submitted by a party after the cut-off date, because of it being a 'case management decision.'[67]

Thus, courts consider it a key principle to give substantial reverence to the arbitral tribunal's procedural decisions.[68] This principle affords the arbitral tribunal wide discretion to determine a suitable procedure and ensure

[62] UNCITRAL Model Law, art. 25.
[63] CHARTERED INSTITUTE OF ARBITRATORS, MANAGING ARBITRATIONS AND PROCEDURAL ORDERS 14 (2015).
[64] *Id.*
[65] Grosso v. Barney, 2003 WL 22657305.
[66] Peters Fabrics Inc v. Jantzen Inc., 582 F. Supp 1287, 1292.
[67] Berger & Jensen, *supra* note 33 at 423.
[68] On Call Internet Services Ltd v. Telus Communications Co., [2013] BCAA 366 (Can.).

fair, expeditious, economical and final determination of the dispute[69] due to which enforcing a procedural order on a non-compliant party is the prerogative of the arbitral tribunal.

B. Limits to consequences for non-compliance

There exist certain limitations on the power of the arbitral tribunal to act on non-compliance with a procedural order. These limitations are in the form of the obligations on arbitral tribunals to observe a minimum standard of due process.[70] This requirement of due process has become an international standard in itself as Article V(1)(b) of the New York Convention[71] and Article 18 of the UNCITRAL Model Law, provides that an award may be set aside if such due process rights are denied to the party. Unlike the public policy exception to the enforcement for foreign awards, which varies from one state to another, the due process rights are universal and must be followed irrespective of the jurisdiction.

It is worth mentioning that the right of the party to present its case can go only so far that an opportunity of fair hearing is accorded to it and not be extended to how the case is heard. This interpretation was adopted by the Supreme Court of Indian in *Vijay Karia*[72] in interpreting Section 48 of the Arbitration and Conciliation Act which allows for the challenges of a foreign award if a party "was otherwise unable to present his case."[73]The analytical commentary on Article 18 of UNCITRAL Model Law clarifies that the

[69] Brandeis (Brokers) Ltd v. Black, [2001] 2 All ER (Comm) (Eng.).
[70] NIGEL BLACKABY ET. AL, REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION 798 (Oxford Univ. Press, 5th ed. 2009).
[71] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Jun. 10, 1958, 330 U.N.T.S. 3.
[72] Vijay Karia v. Prysmian Cavi E Sistemi SRL, 2020 SCC OnLine SC 177.

meaning of "full opportunity to present his case" cannot be stretched to mean that an arbitral tribunal "must sacrifice all efficiency to accommodate unreasonable demands by a party"[74] because otherwise dilatory tactics can be employed by a party to obstruct proceedings through methods such as unwarranted objections or new evidence on the eve of the award.

Even then, it is difficult to reach a middle ground when due process rights of the parties might be at odds with procedural efficiency. In a situation where deviance from a procedural order is requested by a party, the arbitral tribunal may either allow such deviance which may prolong the arbitration process, or deny such deviance which could result in a compromise of the parties' right to present his case. Since the parties' right to be heard is not absolute and does not include unreasonable and dilatory procedural requests,[75] therefore, a balance needs to be created for effective use of procedural orders between the time and cost-efficiency of proceedings borne by the parties and the role of the arbitrator as guardians of due process.

V. CONCLUSION

The procedural order has now become consequential to the entire arbitration process. The traditional approach of immunity to the procedural orders from judicial interference and interpretation is fading away.

Either way, the scrutiny and consequences of procedural orders have increased the responsibility of the arbitral tribunal to handle emerging issues

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[73] Arbitration & Conciliation Act, § 27(5), No. 26 of 1996, Act of Parliament, 1996.
[74] U.N. Secretary General, Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration, UN Doc A/CN.9/264, 46 (Mar. 25, 1985).
[75] FRANZ T. SCHWARZ & CHRISTIAN W. KONRAD, THE VIENNA RULES: A COMMENTARY ON INTERNATIONAL ARBITRATION IN AUSTRIA ¶20-70 (Wolters Kluwer 2009).

wisely. Arbitrators should communicate the intention behind a procedural order as clearly as possible along with the consequences arising from the non-compliance of that order. Further, to avoid procedural orders being construed as party agreements by courts, the arbitral tribunal and parties must be cautious and explicitly mention which procedural orders are agreed upon by the parties and are intended to have the effect of a party agreement.[76]

In an arbitration process, it is the primary responsibility of the arbitral tribunal to ensure that the procedural orders do not pave the way for the "dark side of arbitral discretion"[77] by deviating from any pre-determined procedural limits and at the same time be wary of unnecessary procedural requests while honouring the party agreement. It is ultimately the responsibility of the courts to carefully balance judicial non-interference and procedural discipline of the parties and the arbitral tribunal in a quest to ensure both, efficiency and procedural justice.

[76] Wagner &Bülau, *supra* note 3 at 15.
[77] Park, *supra* note 26 at 286.

V. ACCREDITATION OF ARBITRATORS: A SYNONYM FOR QUALITY IN INDIA?

- Anoushka Ishwar[*]

ABSTRACT

With the boom of global trade and commerce, arbitration as a dispute resolution mechanism witnessed immense growth and development, which in turn then benefitted the economies of several countries. The symbiotic relationship between international commerce and arbitration can be likened to a closed circle, each constantly gratifying and benefiting the other. India, slow to recognise this cause and effect relationship, has been playing catch up ever since by making attempts to improve the arbitration blueprint of the country. Recognised as a problem area by state leaders as well, the government set out to improve the domestic institutional arbitration ecosystem in order to facilitate India's arbitration journey. Despite recommendations by an illustrious committee, the government embarked on a series of unfortunate amendments to the Arbitration Act in the past year. This article attempts to address one of these many problematic steps taken by the legislature – considering accreditation and eligibility synonymous. The article recognises the importance of quality adjudicators for the success of any adjudication mechanism and therefore, analyses the pivotal question the legislature failed to ask when blindly embarking with the 2019 Amendment Act – whether accreditation can actually improve the quality of arbitrators. The author traces the journey up to this point, and highlights the context surrounding the discussion on accreditation within India. Thereafter, it aims to provides a clear distinction between the concepts of eligibility and accreditation and presents key takeaways for the government to explore in order to conclusively resolve the issue of poor quality of arbitrators.

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I. INTRODUCTION

The legislature's recent amendments to the Arbitration & Conciliation Act, 1996 ("Arbitration Act") can only be characterised as misadventures. The havoc wreaked by the introduction of Section 43J of Amendment Act of 2019 was rectified in November 2020 by the promulgation of an Ordinance before the aforementioned section could be even notified.[1] Much to the legal community's pleasure, the Arbitration and Conciliation (Amendment) Ordinance 2020 substituted Section 43J and did away with the heavily condemned corresponding Eighth Schedule of the Act.[2] The unamended Section 43J provided that the qualifications, experience and norms for accreditation of arbitrators will be as specified in the Eighth Schedule of the 2019 Amendment.[3] The Eight Schedule, as it stood before the recent amendment, prescribed an exhaustive list of qualifications which an individual would need to possess in order to "qualify as an arbitrator" in India. These qualifications were of an advocate, a chartered accountant, a cost accountant, a company secretary, a government officer possessing either a law degree, or an engineering degree, or having administrative experience, or any individual with educational qualification at degree level with ten years of experience in scientific or technical streams.[4] Thereafter, the substituted version of Section 43J, introduced in the 2020 Ordinance, simply stated that forthcoming regulations shall govern the qualifications, experience, and norms required for accreditation of

[1] Ministry of Law & Justice, F.No. H-11018/2/2017-Admn.-III(LA) (Notified on August 30, 2019).
[2] The Arbitration and Conciliation (Amendment) Ordinance, 2020, § 4 (November 4, 2020).
[3] The Arbitration and Conciliation (Amendment) Act, 2019, § 43J.
[4] *Id*. Eighth Schedule.

arbitrators.[5] The last notch on the unpleasantness that was the debate of accreditation and eligibility of arbitrators in India was by way of the Arbitration and Conciliation (Amendment) Act, 2021. It gained parliamentary assent a few months back in March 2021, and was deemed to come into force in November 2020 itself.[6] It reinforced the steps taken by the 2020 Ordinance, omitting Schedule VIII, and reiterating the substitution of Section 43J.[7]

Although, one can seemingly assume that the vigorous discussion on accreditation that arose in the past two years has been packed away neatly, this could not be further from the truth. Section 43J in its current form is far too vague and bestows unfettered discretion on the Arbitration Council of India ("ACI"), the designated governing body under the Act, for the creation of accreditation standards for arbitrators to practice in India. While the Indian populace might be far too accustomed to broad and unclear legislations, the consequences nonetheless tend to be devastating and must be prevented whenever possible. When given an opportunity, the legislature in the erstwhile Schedule VIII incorporated a set of nine orthodox and conservative standards of measuring the eligibility of arbitrators for accreditation. These standards imposed heavy reliance on age, government service, and domestic professional degrees, equating them to the quality of an arbitrator. The legislature had also seemingly barred recognition of foreign arbitrators violating perceived notions of neutrality, under both, the

[5] Arbitration and Conciliation Ordinance 2020, § 3.
[6] The Arbitration and Conciliation (Amendment) Act, 2021, § 1(2).
[7] *Id*.§ 3.

Arbitration Act and the principles of international arbitration.[8] Hence, while this was met with widespread criticism both domestically and beyond,[9] an important question was lost in the mix – whether accreditation can actually improve the quality of arbitrators? Before the government engages any further on this topic through the aforementioned regulations, it is crucial for it to answer this question, understand the accompanying nuances and thereafter, chart the path ahead.

This article with the aim of resolving this question, has been split into two halves. Part I of the paper attempts to set the context in which accreditation became a topic of discussion in India and the misnomers committed in equating two mutually exclusive concepts of accreditation and eligibility of arbitrators. Part II of the paper focuses on whether and how accreditation can in fact resolve the quality issue that plagues India's arbitration institutions, and presents key takeaways for the legislature to implement in the forthcoming regulations.

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[8] Lalive, *On the Neutrality of the Arbitrator and of the Place of Arbitration*, *in* SWISS ESSAYS ON INTERNATIONAL ARBITRATION 23, 24 (C. Reymond & E. Bucher eds. 1984); GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 1868 - 1875 (Kluwer Law International 3d ed.2021).

[9] Ajar Rab, *Accreditation of Arbitrators in India: A New License Requirement?* KLUWER ARBITRATION BLOG (Oct. 11, 2018) http://arbitrationblog.kluwerarbitration.com/2018/10/11/accreditation-of-arbitrators-in-india-a-new-license-requirement/; Subhiksh Vasudev, *The 2019 amendment to the Indian Arbitration Act: A classic case of one step forward two steps backward?* KLUWER ARBITRATION BLOG (Aug. 25, 2019), http://arbitrationblog.kluwerarbitration.com/2019/08/25/the-2019-amendment-to-the-indian-arbitration-act-a-classic-case-of-one-step-forward-two-steps-backward/.

PART I

II. THE CONUNDRUM OF ACCREDITATION AND ELIGIBILITY

In order to comprehensively capture the importance of accreditation of arbitrators, the underlying intentions of the High Level Committee ("Srikrishna Committee") formulated to review and improve institutional arbitration within India must be realised. The Srikrishna Committee conducted an extensive survey with the required stakeholders in order to appropriately fulfil its mandate.[10] Respondents reported largely similar reasons for why institutional arbitration in India had stagnated, at the crux of which lied the issue of quality of arbitrators. The survey participants provided a host of reasons for their preference of international arbitration institution over the domestic ones, most of which revolved around the poor quality of arbitrators and the visible lack of technical and contemporary knowledge they possessed.[11] It was noted that most of the institutions exercised a special bias towards retired judges ignoring the need for younger and more adept individuals.[12] This is not unfounded. In the recurring annual survey conducted by Queen Mary University, School of Arbitration in collaboration with White & Case LLP in 2015, the international arbitration community reiterated the importance the quality of panelled arbitrators has in the choice of an institution.[13] The perceived neutrality and expertise an

[10] Press Release, Press Information Bureau, Comments invited on the working paper of the High LevelCommittee to review the Institutionalisation of Arbitration Mechanism in India by 7 April 2017 (March 16, 2017), http://pib.nic.in/newsite/PrintRelease.aspx?relid=159370.
[11] MINISTRY OF LAW & JUSTICE, REPORT OF THE HIGH LEVEL COMMITTEE TO REVIEW INSTITUTIONALISATION OF ARBITRATION MECHANISM IN INDIA (2017) 32[hereinafter Srikrishna Committee Report].
[12] *Id*.at 32, 53.
[13] Queen Mary University of London and White & Case LLP *2015 International Arbitration Survey: Improvements and Innovations in International Arbitration'* (2015), 22,

arbitrator exhibits have been considered key instigators in the choice of an arbitration institution.[14] Further, in the case of *Reliance Industries Ltd. & Ors. v. Union of India,*[15] the Supreme Court of India discussed the relationship of neutrality vis-a-vis nationality, placing reliance on the writings by several eminent scholars and practitioners of international arbitration. It espoused the importance of a neutral appearance in order to guarantee independence and impartiality of the tribunal, despite the legal position not explicitly requiring the same. Several luminaries of arbitration have touched upon the requirement of neutrality to ensure the international image of arbitration and its value as an efficient adjudication mechanism is upheld.[16]

It was the aftermath of these survey responses which led to the Srikrishna Committee identifying accreditation of arbitrators as a key recommendation under the report. The Committee recognised that accreditation was possible in two ways, by a professional body of arbitrators or account of membership on a panel / list of arbitrators of an arbitral institution. This understanding of accreditation is one of the vital pointers of the fact that the Committee was functioning under the overarching context of institutional arbitration. Accreditation is any process by which any arbitrator acquires education qualification, or expertise, and thereby recognition for its

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https://www.whitecase.com/sites/whitecase/files/files/download/publications/qmul-international-arbitration-survey-2015_0.pdf [hereinafter QMUL White & Case 2015 Survey].

[14] Elvira Gadelshina, *What plays the key role in the success of an arbitration institution?*FINANCIER WORLDWIDE (2013), https://www.financierworldwide.com/what-plays-the-key-role-in-the-success-of-an-arbitration-institution#.YLpfcagzZPY.

[15] Reliance Industries Ltd. &Ors. v. Union of India (2014) 7 SCC 603.

[16] LALIVE, *supra* note 8 at 23, 24.

skill as an adjudicator.[17] Therefore, it cannot be qualified by any set process and comprises a continuous system of learning and development.[18] By its very nature, accreditation cannot amount to a mandatory process, because it is not akin to eligibility of an arbitrator. Failure to understand this, was the reason the legislature embarked on the long-winded goose chase the Arbitration Act witnessed in the past year.

The possibility of imposing licensing and regulatory requirements has been long explored in the arbitration community in a domestic and global context, to always be rejected.[19] The rejection being based on the fact that such restrictive criteria would run afoul of the fundamental cornerstone of arbitration, party autonomy. Arbitration as a dispute resolution mechanism owes its success to the deeply rooted theme of flexibility and free will, which if taken away would render it no better than the ill ridden judicial system. It would especially allow countries to impose invisible barriers of entry, creating a favourable environment for the monopoly of national arbitrators stifling growth and development.[20] India attempted to commit this very error with the introduction of Schedule VIII in the 2019 Amendment. By misaligning accreditation and eligibility, it violated the basic principles of arbitration and turned back the clock on the development of 'India as a seat of global arbitration'. National regulators do indeed have the power to impose certain eligibility requirements, however, these must only be limited to the contractual power of the individuals, that is, of sanity and age of

[17] Loukas A. Mistelis, *Chapter 7: ADR in England and Wales: A Successful Case of Public Private Partnership, in*,GLOBAL TRENDS IN MEDIATION (SECOND EDITION), 173(Nadja Alexander ed., 2006).
[18] Doug Jones, *Acquisition of Skills and Accreditation in International Arbitration*,22 ARB. INT'L, 275,287 (2006).
[19] BORN, *supra* note 8 at 2105 - 2204.

majority.[21] References for this can be established by analysing domestic arbitration laws of other countries, such as Saudi Arabia and Vietnam.[22] Both countries have prescribed eligibility requirements for arbitrators to practice within their country.[23] However, these requirements are simply of legal competence and basic education qualifications, not limited to any specific profession. Therefore, standards for eligibility of arbitrators must be the bare minimum, thereby rendering them essential.

On the other hand, standards for accreditation are not essential but rather recommendatory, for although it improves the overall experience of arbitration; the parties have the power to choose otherwise. A mandatory requirement of accreditation does not substantially improve the status quo of institutional arbitration but adversely harms the condition of ad hoc arbitrations. This effect would have been completely contrary to the goals of the Indian leaders to establish and develop 'an arbitration ecosystem.' Instead of improving progress towards the positive reconstruction of institutional arbitration within India, the 2019 Amendment Act would have led to the creation an unfriendly and restrictive arbitration environment.

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[20] *Id*.
[21] The Indian Contracts Act, 1872, § 11.
[22] Royal Decree No M/34, dated 24/5/1433 AH (corresponding to 16/4/2012 AD), Article 14 (Saudi Arabia); THE LAW ON COMMERCIAL ARBITRATION NO. 54/2010/QH12, Article 20 (Vietnam).
[23] *Id*.

PART II

III. IS ACCREDITATION THE ANSWER TO INDIA'S QUALITY ISSUE?

To answer the question posed throughout this paper, it is resoundingly in the affirmative. However, it cannot be achieved in the manner the government currently envisages it. There are three key takeaways the government must acquaint itself with before releasing the accreditation regulations under Section 43J of the Act.

Firstly, the legislature or the ACI must not dictate the qualifications or standards for accreditation of arbitrators. This is simply because both cannot be considered a neutral body. The Srikrishna Committee Report clearly mentioned the requirement of establishing a neutral non-governmental multiple stakeholder body for the governance of institutional arbitration within India.[24] The body that was manifested within Part IA of the 2019 Amendment Act is a far shot from this, and has been subjected to its own share of criticism.[25] The composition of the council as mentioned within Section 43C does not paint a picture of neutrality and unbiased perspective. Outside of government officials, the section seemingly limits the membership to individuals possessing legal faculties.[26] The composition, coupled with the fact that the legislature in the past resorted to deeply conservative notions of seniority and service in order to determine qualifications, further diminishes the faith of acquiring a well-suited

[24] Srikrishna Committee Report, *supra* note11, at 49.
[25] Chahat Chawla, *Legislation Update: India*, 14 ASIAN INT'L. ARB. JOURNAL,215, 220 (2018).
[26] AmendmentAct, 2019, § 43C.

unbiased list of standards. Therefore, either the legislature or the ACI, is not adequately equipped to comprehend the needs of all sectors, especially complex, technical, and commercial ones. All arbitration institutions are not full service, rather some limit the provision of their resources to certain areas of trade or industry.[27] Only practitioners from that particular field of expertise will be able to appropriately gauge their needs and requirements, which then can translate to a tailored set of accreditation standards. A blanket set of standards by a disengaged body shall do more harm than good for it will deprive the parties of an arbitrator with specific experience and qualifications.

Secondly, the regulations should pay heed to the foremost recommendation made by the Srikrishna Committee in its report. The report states distinctly that the governing body should simply recognise the professional institutions and bodies providing accreditation to arbitrators.[28] While this has been incorporated within Section 43D(2)(b) as one of the duties and functions of the ACI, its power within the forthcoming accreditation regulations should also be limited to the same. The reasoning for this is that internationally, only few independent organisations have evolved and received recognition for developing standards for the certification of qualified, well-trained arbitrators. Their standards have been elevated to become synonymous with international best practice norms for training and selecting arbitrators. The Srikrishna Committee paid heed to a few of these institutions and the stringent yet diverse criteria they had

[27] CONSTRUCTION INDUSTRY ARBITRATION COUNCIL (CIAC), http://www.ciac.in/ (last visited June 4, 2021); INDIAN INSTITUTION OF TECHNICAL ARBITRATORS, http://www.iitarb.org/about-us.html (last visited June 4, 2021).
[28] Srikrishna Committee Report, *supra* note11 at 56-57.

adopted for certifying their members. These criteria reflected a holistic understanding of arbitration proceedings and included professional education, attendance of arbitration hearings, qualifying examinations, peer interviews / assessments by a panel of approved arbitrators, and Continuous Professional Development ("CPD") requirements.[29]

In order to expound further upon the specialised expertise of these organisations to decide accreditation of arbitrators, one can take a look at the standards followed by globally renowned institutions such as the Chartered Institute of Arbitrators ("CIArb"), the Singapore Institute of Arbitrators ("SIArb"), or the Resolution Institute ("RI"). Their membership consists of arbitrators, mediators, and other professionals from specialist fields. The CIArb has been hailed with establishing the gold standard of certifying arbitrators in its panel on account of its rigorous training and development programs.[30] These aforementioned organisations have several ascending categories of memberships, taking into consideration the member's experience, qualifications and exposure. In order to procure any membership level, individuals are required to attend hours of specialised training courses covering a variety of subjects, attempt examinations, and demonstrate proof of their experience and/or qualifications.[31] The level of scrutiny is so rigorous, that for example at CIArb, more than half of the applications tend to fail the first around.[32] Despite having achieved the membership status,

[29] Srikrishna Committee Report, *supra* note11 at55-56.
[30] JONES, *supra* note18, at 286.
[31] SIARB, http://siarb.org.sg/index.php/membership/categories (last visited June 4, 2021); *Policy for the Registration of Practising Arbitrators*, RESOLUTION INSTITUTEhttps://www.resolution.institute/documents/item/2306 (last visited June 4, 2021); CIARB, https://www.ciarb.org/membership/routes-to-membership/ (last visited June 4, 2021).
[32] JONES, *supra* note18, at287.

most of these institutions impose mandatory CPD requirements upon the arbitrators in order to improve, update and keep them in touch with contemporary and global developments.[33] Hence, it is beguiling that the legislature and a new-born governing body would assume its prowess to establish norms over these well-established institutions. If ACI, in line with the recommendations, simply engages its power to recognise these accreditation institutions, it would serve the same purpose and rather prove more beneficial to domestic arbitration institutions.

Furthermore, when these international requirements are juxtaposed with that of a domestic institution like Indian Institute of Arbitration & Mediation ("IIAM"), the underlying problems which have led to the current quality issue can be witnessed. For accreditation by IIAM, an individual is required to endure barely twenty four hours of training, a stark contrast from the aforementioned stringent standards.[34] Furthermore, the levels of accreditation at IIAM have not been fleshed out. Hence, instead of taking matter of setting accreditation standards into their own hands, the ACI should concentrate on reviewing and improving the policies of such domestic institutions.

Thirdly, instead of establishing norms of accreditation, the ACI through its functions under Section 43D(2) and the forthcoming regulations must review, recommend and reform the standards applied by domestic arbitration institutions in the empanelment of its arbitrators. The ACI under the Amendment Act, 2019, in line with the recommendations of the

[33] *Supra* note31.
[34] *IIAM Accreditation System for Neutrals & Professionals & Qualifying Assessment Programs*, IIAM https://www.arbitrationindia.com/pdf/iiam_qap.pdf (last visited June 4, 2021).

Committee, has the power to grade arbitral institutions based on a number of yardsticks. Within these, if the standards employed for empanelment are included it could positively reflect on the quality of arbitrators engaged and a consequential reform in institutional arbitration. Without an internal change in the policies of these institutions, it will not be possible to overhaul the institutional arbitration set up in India. For example, let us consider the two most well recognised arbitration institutions within India, the Mumbai Centre for International Arbitration ("MCIA") and Delhi International Arbitration Centre ("DCIA").

The MCIA, on one hand, does not maintain a panel of arbitrators rather withholds the discretion to choose arbitrators based on the facts and circumstances of the case.[35] While such a format has its own merits, for parties do seem to appreciate the flexibility in the appointment of arbitrators,[36] it can also portray to potential clients a lack of standardisation and transparency. This method of appointment is followed by both International Chamber of Commerce ("ICC") and London Centre of International Arbitration ("LCIA"), generally acknowledged as two of the most successful arbitration institutions of the world. However, the format followed is not as simple as leaving it to the institution's discretion. When opportunity arises for the ICC Court to make appointments, it is based upon the proposal by a National Committee or Group, previously selected by the Court.[37] As for the LCIA, the Secretariat makes a recommendation to the

[35] *MCIAFAQ*, https://mcia.org.in/faq/ (last visited June 4, 2021).
[36] QMUL White & Case 2015 Survey, *supra* note13, at 20-22.
[37] Belinda McRae, *Survey: Arbitral Institutions Can Do More to Foster Legitimacy. True or False?* 18 ICCA CONGRESS SERIES 667, 709(2015).

LCIA Court post perusal of its database of arbitrators.[38] Despite adopting a flexible model, both institutions recognise the significance of transparency in the appointment of arbitrators.[39] Accordingly, the methods followed by the institutions are generally available in their publications, training programs and other materials,[40] something that visibly lacks on behalf of the MCIA. Hence, if domestic institutions adopt such a flexible method of appointment, the ACI must nonetheless ensure sufficient transparency.

On the other hand, although the DCIA chooses to maintain a panel of arbitrators, the standards it employs are borrowed word to word from the erstwhile Schedule VIII of the Amendment Act, 2019 and have despite its omission, not yet been amended.[41] The DCIA witnessed more than an approximate of five thousand hearings in 2018 itself, a number which grows steadily. These grounds for empanelment, similar to its original document, lead to either biased or unsuited appointment of arbitrators, disgruntling parties, and thereby defeat the process of comprehensive adjudication. The parties in turn choose not to designate these institutions as the governing bodies of their arbitration proceedings, and rather opt for ad hoc arbitrators which allows for procedural flexibility. The ACI can remedy this situation by taking a chapter from the books of premier arbitration institutions that

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[38] *Id.*

[39] *Id.*, at 711 – 712.

[40] *LCIA Notes for Parties*, LCIA, §8https://www.lcia.org/adr-services/lcia-notes-for-parties.aspx#8.%20APPOINTMENT%20OF%20ARBITRATORS(last visited June 4, 2021); *Note to Parties and Arbitral Tribunals on The Conduct Of The Arbitration Under The ICC Rules Of Arbitration* (2021), ICChttps://iccwbo.org/content/uploads/sites/3/2020/12/icc-note-to-parties-and-arbitral-tribunals-on-the-conduct-of-arbitration-english-2021.pdf(last visited June 4, 2021).

[41] *DIAC EMPANELMENT RULES, 2020*, DIAC, Rule 1http://dacdelhi.org/DataFiles/CMS/file/Public%20Notice-Empanelment%20of%20Arbitrators%20with%20annexure.pdf(last visited June 4, 2021).

maintain panels, such as the Singapore International Arbitration Centre ("SIAC"). SIAC requires its panelled arbitrators to possess tertiary educational qualifications, experience as an arbitrator and membership from recognised accreditation institutions like CIArb. It is to be noted that Indian parties are the topmost foreign contributors to SIAC's caseload with the number being as high as 485 parties in 2019.[42] Therefore, there is something to be said regarding what domestic arbitration institutions can take away from SIAC's methods. The ACI by leveraging its power of grading these institutions can adopt a process of continuous checks and balances on the standards adopted by these domestic arbitral institutions. This approach shall, while allowing the cornerstone of flexibility to be retained, improve quality of arbitrators available within these institutions.

IV. CONCLUSION

Accreditation cannot be employed as a one stop solution for the deeply imbibed availability and quality issues in India's arbitration blueprint. The process of accreditation only when coupled with continuous training, development and exposure of arbitrators, can eventually improve the quality of arbitrators available within our domestic borders. The issues that have contributed to the present stagnation of institutional arbitration within India cannot be simply charted up to poor governance, misunderstandings, and lack of resources and infrastructure. There exists an ingrained animosity and distrust towards arbitration institutions within India on account of the anti-arbitration stance frequently adopted by judicial and governmental bodies. It

[42] SIAC,SIAC ANNUAL REPORT (2019) https://www.siac.org.sg/images/stories/articles/annual_report/SIAC%20Annual%20Report%202019%20(FINAL).pdf.

can only be resolved with mutual co-operation and respect between the government and the various stakeholders involved in the arbitration process. For governmental bodies, this entails respecting the core principles of arbitration and providing flexibility and autonomy within the process. On the other hand, for institutions and organisations, it entails shredding age-old notions of experience and qualifications and imbuing new blood into the field. The goal of relegating India as a seat of arbitration requires active steps of community engagement, improvement within domestic laws, arbitration-friendly structures and mechanisms, and transparency. Only this will allow India to produce the all-rounded quality arbitrators for which it is looking.

VI. UNTYING THE GORDIAN KNOT OF DELAYS IN POST-PLEADING ARBITRATION STAGES: A SUGGESTIVE ANALYSIS

- Renuka Mishra and Avishek Mehrotra[*]

ABSTRACT

Arbitration as an alternate form of dispute resolution has been widely accepted and recognised, and its increased use is a mark of its advantages over traditional methods of dispute resolution. Primarily, the final settlement of disputes in a time-bound and cost-effective manner with the added advantage of party autonomy has attracted parties to arbitration. This being said, specifically in the Indian context, the purpose of arbitration seems to have been belittled by inter alia, exorbitant delays. The same is owed to multi-fold reasons spread across various stages. In this paper, the authors focus on the delays caused during the post-pleading stages. For the purpose of delving into the intricacies of the issues involved and subsequent resolution, the authors have focused on the contributors involved in arbitration proceedings to which such delays are attributable, namely – arbitrator(s), parties and the courts. Thereafter, the authors have referred to certain provisions, aimed at minimizing delays in proceedings in their present form. While doing so, the strengths and fallacies in these provisions have been pointed out besides providing suggestions for aiding the purpose of these provisions. The same has been done while keeping sight of the fundamentals of arbitration as a method of dispute resolution. Lastly, the authors have given their concluding remarks on the topic.

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I. INTRODUCTION

Arbitration is a form of alternative dispute resolution mechanism which has taken significant prominence amongst disputing parties as a preferred forum of redressal over traditionally established courts. In India, arbitration is governed by the Arbitration and Conciliation Act, 1996[1] (hereinafter, "the Act"). Its popularity is evidenced by the fact that most parties entering into contractual arrangements include an arbitration clause as their preferred mode of dispute resolution. This can be primarily attributed to its cost-effective, time-bound, and procedurally flexible nature along with the characteristic of maintaining party autonomy and confidentiality in the matter. Paradoxically, the primary advantages that arbitration offers over other forms of dispute resolution have been the main reasons for its disparagement. Instead of acting as a forum for the final settlement of a dispute, arbitration has rather become a pre-step to litigation. The parties incur heavy costs and invest excessive time in arbitral proceedings, which more often than not, lack finality. This results in undermining the purpose behind the introduction of arbitration as an 'alternate' method of dispute resolution by belittling it to just a 'pre-litigation' step.

The gravity of the situation is attributable to several factors, which occur throughout the course of arbitral proceedings. The present article focuses on the unnecessary delays that occur after the completion of pleadings in an arbitral proceeding. The delay in arbitration proceedings cannot be seen as a secluded issue is rather a causation of several other consequences. For instance, a delay would inevitably increase the cost incurred by the parties including the fees payable to arbitrators, lawyers, the

expenses attributable to witnesses (due to adjournments). Further, the third-party funders are either deterred from funding the concerned party or may have to wait for an extended period of time to recover their funds.

The stages post-pleadings consist mainly of collection of evidence, examination of witnesses, making of the award, appeal and enforcement of the award. For the purpose of delving into the intricacies of the issues involved and subsequent resolution, the authors have focused on the different contributors involved in an arbitration proceeding to which such delays are attributable, namely – arbitrator(s), parties and the courts.

II. DELAY CAUSED BY ACTIONS OF ALL CONTRIBUTORS

A. Arbitrator(s)

The role of arbitrator(s) is imperative in the course of arbitral proceedings. They guide the entire process and help the parties reach an amicable settlement. However, various factors have contributed to the role of arbitrator(s) being associated with multiple delays in the proceedings. One of the foremost factors, which has caused a delay in the proceedings is the fact that the majority of arbitrator(s) lack knowledge of the technicalities which are involved in the disputes.[2] As a result, the arbitrator(s) take excessive time to understand the dispute, which in turn, impacts the timely passage of the award. Albeit, there isn't any *malafide* intention on the part of the arbitrator(s), this delay does adversely impact the overall process and the underlying parties to the dispute. Additionally, parties tend to appoint retired

[1] Arbitration and Conciliation Act, 1996, No. 26, Acts of Parliament, 1996 (India).

[2] *Accelerating Arbitration*, INDIAN INFRASTRUCTURE, (June 2019), https://indianinfrastructure.com/2019/06/02/accelerating-arbitration/, (last visited May 10, 2021).

judges as arbitrator(s) who because of being accustomed to proceedings of court end up using the same procedures during the arbitration proceedings.[3] This highlights the ardent need to appoint people having expertise and experience related to the subject matter of the dispute as well as the nitty-gritty of arbitration proceedings, as arbitrator(s).

The arbitration award can be challenged on the ground of being in violation of "due process,"[4] and this leads to arbitrator(s) being way too lenient with the parties with respect to the deadlines.[5] This again leads to the arbitration proceedings extending much beyond their prescribed deadlines. Thus, both the arbitral tribunal and courts (while hearing appeals), should look into the facts of the case to ensure that the parties do not fail to comply with the deadlines without reasonable cause. Additionally, in cases where the tribunal does not allow for such extensions, the same should not be treated as a violation of 'due process' if the delay can be attributed to the misconduct of the parties. The second proviso to Section 24 of the Act which provides for the imposition of exemplary costs on the parties to the proceedings on failure to provide sufficient cause for seeking adjournments,[6] should also be strictly implemented to prevent such instances from occurring.

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[3] *Using fast track arbitration for resolving commercial disputes*, NORTON ROSE FULBRIGHT, (March 2018), https://www.nortonrosefulbright.com/en/knowledge/publications/981af4b9/using-fast-track-arbitration-for-resolving-commercial-disputes, (last visited May 12, 2021).

[4] Hari Om Maheshwari v. Vinitkumar Parikh, (2005) 1 SCC 379 (17).

[5] Centrotrade Minerals and Metals Inc v. Hindustan Copper Ltd, AIR 2020 SC3613.

[6] Arbitration and Conciliation Act, 1996, No. 26, Acts of Parliament, 1996 (India), §24 Second Proviso.

B. Parties and Counsel

For an arbitration proceeding to be completed in a timely manner, it is crucial that the parties extend their full cooperation.[7] There is a tendency among the parties to not cooperate in the proceedings by failing to comply with the timelines decided for the proceedings and completion of documentation.[8] A number of times, this is done with an objective to make the opposing party willing to compromise on their terms.[9] These practices of the parties are termed as 'guerrilla tactics.'[10] A similar issue had arisen in the case of *Centrotrade Minerals and Metals Inc v. Hindustan Copper Ltd,*[11] wherein the respondents failed to cooperate throughout the proceedings. The respondent continued to be involved in dilatory tactics in order to delay the course of proceedings by not submitting documents on time and constantly failing to abide by the deadlines even when the same were extended for them. Consequently, the respondent also managed to get an injunction from the Court to stay the proceedings which resulted in further delay.

Parties often resort to submission of unnecessary documents as evidence which leads to substantial time being taken up in their study for determining their admissibility.[12] The parties also tend to appeal against the

[7] Benjamin Davis, *The Case Viewed by a Council at the ICC Court's Secretariat, Fast Track Arbitration: Different Perspectives*, 8 ICC Bulletin, (1992).
[8] Jayesh Pandya and Anr. v. Subhtex India Ltd., 2019(11) SCALE528.
[9] Dr. Andreas Respondek, *Minimizing delays in International Arbitration Proceedings,* SINGAPORE INSTITUTE OF ARBITRATORS, (June 2014), https://www.rflegal.com/upload/document/rechtsanwalt-thailand-minimizing-delays-in-international-arbitration-proceedings.pdf, (last visited April 29, 2021).
[10] *Id.*
[11] AIR 2020 SC 3613.
[12] Irene Welser and Christian Klausegger, *Fast Track Arbitration: Just fast or something different*,CERHAHEMPEL,(2009),https://www.cerhahempel.com/fileadmin/docs/publications/Welser/Beitrag_Welser_2009.pdf, (last visited May 23, 2021).

arbitral award for the mere reason that the award was against them.[13] This was also observed by *Lord Mustill* in his address to the International Council of Commercial Arbitration, wherein he stipulated that:

> Nowadays things are quite different. In so many large international arbitrations the defendant will do everything to postpone the award; at and before hearing; the parties will deploy all conceivable and some inconceivable procedural devices to gain an advantage; the element of mutual respect is lacking; and the loser, rather than paying up with fortitude will try either to have the award overset, or at least have its enforcement long postponed.[14]

This has been possible because of the appeal against arbitral awards being permitted on the grounds of "public policy," the ambit of which continues to remain unsettled due to the multiple ways in which it has been interpreted.[15]

It must be noted that the common thread for all the aforementioned issues is the non-cooperation between the disputing parties. A proportional relationship has been observed between party cooperation and timely settlement of the dispute via arbitration. Therefore, the authors suggest for the inculcation of certain statutory provisions that would propel cooperation between the parties. A three-fold methodology can be adopted to ensure cooperation between the parties:

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[13] Fali S. Nariman, *Finality in India: The Impossible Dream*, 10 AI, 373 (1994).
[14] *Id.*
[15] Arthad Kurlekar and Gauri Pillai, *To be or not to be: the oscillating support of Indian Courts to arbitration awards challenged under the public policy exception*, 32 AI, 179-198 (2016).

- **Where both the parties do not cooperate:** The arbitrator(s) shall impose a cost on the parties for such intentional non-cooperation. Such cost should be 10% of the claim amount which should further be divided among the parties by the arbitrator. Such division should be made in proportion keeping in mind the conduct of the parties during the arbitration along with the stake of the respective parties in the dispute being adjudicated. Additionally, the arbitrator while imposing such costs should record the reasons in writing which will ensure unbiased and rational exercise of power.
- **Where the claimant does not cooperate:** The cost imposed in such instances shall be dependent on the outcome of the matter. If the claim is successful, 10% shall be deducted from the award rendered as a fine for intentional non-cooperation. Alternatively, where the claim is unsuccessful, 10% of the award demanded shall be imposed as a cost for intentional non-cooperation and use of dilatory tactics.
- **Where the respondent does not cooperate:** Similar to a claimant, the cost in such cases shall also depend upon the outcome. If the respondent is successful, they will have to pay a fine equivalent to 10% of the claim amount on account of intentional non-cooperation. Whereas, in case of failure, in addition to the award, an additional cost of 10% of the award rendered shall be borne by them.

Notably, the purpose of these suggestions is to create a deterring effect on the parties from wilfully getting involved in dilatory tactics and to encourage cooperation between them. It would be pertinent to mention herein that by the implementation of the said suggestions, the fundamentals of arbitration law shall remain intact. The timelines shall be decided by the

parties themselves and only intentional non-cooperation to purposefully delay the proceedings shall invite imposition of such costs or fines. Further, wherein the opinion of the arbitrator(s) is that there is non-cooperation, they shall record their reasons for holding this viewpoint. The final beneficiaries of these suggestions shall be the parties themselves who would inevitably save on time and cost caused due to long-drawn proceedings.

Besides the delays caused due to non-cooperation, the language decided by the parties or the arbitral institution may also result in delays during the proceedings. Where the proceedings are conducted in multiple languages, it requires time to be invested in translating the documents in the decided languages.[16] This problem gets aggravated in cases where the witness is unable to give his testimony in the language of the proceedings.[17] Thus, it is crucial that the parties try to reach a consensus on one language that should be used throughout the proceedings to save time provided it does not result in impeding either of the parties in representing their claims.

C. Courts

The judiciary has shown complete apathy in the urgent disposal of arbitral matters that come up for challenge. Several stages of appeal provided under the Act, do not seem to be in consonance with the objective of time-bound resolution. While the legislature has taken steps to make the arbitral proceedings time-bound by allocating stringent time limits,[18] the judiciary has failed to decide challenges to appeal in a time-bound manner. Often there

[16] Stephan Wilske, *Linguistic and language issues in International Arbitration: Problems, Pitfalls and Paranoia,* 9 AAJ, 159-196 (2016).
[17] TEJAS KARIA, ARBITRATION IN INDIA 369(Walter Kluwer 2021).

is an excessive time gap between two hearings. Further, the excessive discretion for admitting appeals exercised by judges and abundant scope for interpretation has also not helped the cause.

1. Appeal before the Courts

As mentioned above, challenges to arbitral awards are done by the parties as a matter of routine. The wide arena provided for challenges is a stark reality and has kept the judiciary constantly involved in disputes that are subject to arbitration. The parties can challenge an award under Section 34 on various grounds provided therein.[19] Further, the party aggrieved by the decision of the appellate Court can raise further objections under Section 37,[20] wherein even refusal to grant interim relief during arbitration proceedings has been made subject to challenge. Albeit an appeal against an order under Section 37 is prohibited, but the right to appeal to the Supreme Court is given to the parties.

The exorbitant delays caused in appeals can be seen in a study showing that on an average, lower courts take 24 months to decide a challenge under Section 34, while the High Courts have taken 12 months, and the Supreme Court took 48 months. From the time of challenge to execution, the average time span stands at 2508 days.[21] These stats show the irony of arbitration being referred to as time-bound means of dispute resolution. The grant of such a right has been used by the losing party mostly

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[18] Arbitration and Conciliation Act, 1996, No. 26, Acts of Parliament, 1996 (India), §29A, 34(6).
[19] Arbitration and Conciliation Act, 1996, No. 26 Acts of Parliament, 1996 (India), §34.
[20] Arbitration and Conciliation Act, 1996, No. 26Acts of Parliament, 1996 (India), §37.

as a dilatory tactic. Timely completion of proceedings and appeals are conflicting in nature but must coexist. Needless to say, the mechanism of appeal is quintessential for safeguarding the interest of the parties. Therefore, what is needed is restriction of appeal to a limited number of stages through the formulation of *de novo* procedures.

The authors suggest the constitution of an appellate body for deciding challenges to arbitral awards. Such a body would comprise of judicial and non-judicial members, with the former being retired High Court Judges and the latter having sufficient experience and familiarity with the arbitration procedures. The body would be a substitute and not a supplementary authority for the subordinate and High Courts, vested with the sole jurisdiction to adjudicate on challenges post arbitral awards. Further, Special Leave to Appeal ("SLP") may be granted to the parties by the Supreme Court provided the award rendered appears to be *prima facie* illegal. However, the acceptance or rejection of appeal must be decided by the Court within a period of 30 days. Further, the final disposal of the matter shall also be done in an expeditious manner.

The authority will be a substitute and not a supplementary authority because under the existing system, multiple stages of appeal have been provided, and each stage adds up to some delay in the final settlement of the dispute. Especially when it comes to the involvement of the higher judiciary, due to the existence of a great number of pending cases, there are several adjournments in the hearing process, which delay the enforcement of the

[21] Bibek Debroy and Suparna Jain, *Strengthening Arbitration and its enforcement in India-Resolve in India,* NITI AAYOG, https://smartnet.niua.org/content/a5d63f47-ca26-4661-bec9-342a432d20c9, (last accessed April 28, 2021).

awards. A substitute authority for the High Courts, which will be dedicated to arbitration matters, will not only alleviate the delays caused but also relieve the High Courts from some of its burden. Further, allowing an appeal to the Apex Court only through SLPs would ensure limited and genuine appeals to be heard by the Court.

Albeit the appointment of the technical member in such authority might raise concerns of excessive intervention by the executive, the same is a mere apprehension and we cannot deny the fact that numerous tribunals with administrative members appointed by the executive have continued to give unbiased decisions. Further, an added consequence of setting up a substitute authority can be the added administrative and logistical costs associated with the same. However, the numerous advantages (as discussed above) along with the rising reliance on arbitration for the resolution of disputes surpass the costs incurred.

2. Judicial interpretation and delays

Section 5 of the Act excludes the intervention of the Courts during any stage of proceedings unless specifically provided under the Act.[22] The same is done with the aim to reduce delays caused due to the involvement of the judiciary. However, over the course of time, judicial interpretation of the Act has contributed to considerable delays under two scenarios. *Firstly*, where judicial interpretation of arbitration provisions results in a non-arbitration friendly approach. An instance of the same can be found in the interpretation of Section 34(3) by the Apex Court. The Court while deviating

[22] Arbitration and Conciliation Act, 1996, No. 26, Acts of Parliament, 1996 (India), §5.

from its earlier approach,[23] has made the refusal to condone the delay under the said provision subject to challenge under Section 37 of the Act.[24]

Secondly, where the textual language of the provision makes it a tedious task for the judiciary to interpret the same, resulting in a diverse set of interpretations and the creation of an everlasting ground for the parties to challenge the award rendered. The same is evidenced in the interpretation of 'public policy' as a ground for challenge under Section 34 for domestic awards and Section 48(2) for foreign awards. The phrase has been subject to different interpretations from initially including "fundamental policy of India", "the interest of India" and "justice and morality,"[25] to later adding "patent illegality"[26] within its ambit. Although after the 2015 amendment to the Act, the Courts have refrained from such wide interpretations,[27] the position laid down in the Renusagar case was recently reiterated in *Government of India v. Vedanta Limited.*[28] The all-encompassing nature of public policy and its interpretation by the Courts goes contrary to the aim of limiting/reducing the supervisory role that the courts play, which is one of the objectives of UNCITRAL Model Laws on which the Act is based.

Owing to the wide interpretations, the scope of posing and admitting appeals is increased, leading to delays. The role of the legislature, as well as the judiciary, becomes imperative to avoid such scenarios. While the legislature

[23] Radha Bai v. P. Kumar, AIR 2018 SC 5013.
[24] Chintels India Ltd. v. Bhayana Builders Pvt. Ltd., AIR2021SC1014.
[25] Renusagar Power Co Ltd v. General Electronic Co,(1994) Supp. 1SCC 644 (hereinafter, Renusagar case).
[26] Oil and Natural Gas Corporation Ltd. v. Saw mills,(2003) 5 SCC 705.
[27] Venture Global Engineering LLC and Ors v. Tech Mahindra Ltd. and Ors., (2008)4SCC190, Sutlej Construction v. The Union Territory of Chandigarh, [2017] 14 SCALE 240(SC).
[28] AIR 2020 SC 4550.

should draft such provisions which provide a minimum scope of deviation from the provisional text, the judiciary as far as possible must adopt an approach that is 'pro-arbitration,' to facilitate the fulfilment of objectives for which arbitration has been adopted as a method of dispute resolution. The Courts must give narrow constructions to terms so that the scope available for challenging the award and resultant judicial intervention is reduced. The Indian judiciary can follow the interpretative approach to public policy as done by UK Courts. Contrary to the broad interpretation in India, to constitute a violation of public policy in the UK,[29] the only considerations required are illegality or injury to the public good or enforcement offensive to the public on whose behalf the State exercises power.

III. APPRAISAL AND ANOMALIES IN THE EXISTING PROVISIONS AIMED AT FAST-TRACKING ARBITRAL PROCEEDINGS

The legislature has made several attempts at reducing the time delays caused during arbitration proceedings. For this purpose, significant changes have been made through the 2015 Amendment Act and the 2019 Amendment Act.[30] Such amendments were targeted at reducing delays either by way of proposing strict statutory time-limit or by minimising the court's role during arbitration proceedings.

[29] Deutsche Schachtbau-und TiefbohgresellschaftmbH v. Ras Al Khaimah National Oil Co, Shell International Petroleum Co Ltd, [1987]3WLR1023.

[30] Arbitration and Conciliation (Amendment) Act, 2016, No. 3, Acts of Parliament, 2016; Arbitration and Conciliation (Amendment) Act, 2019, No.33, Acts of Parliament, 2019.

Under Section 27 of the Act, the assistance of the Court can be resorted to in taking evidence.[31] In doing so, the Court in its own wisdom can order evidence 'to be directly provided to the arbitral tribunal.' The rationale behind the provision is to expedite the process of arbitration by faster evidence collection, the reason being the absence of any power vested in the arbitral tribunal to summon witnesses or ensure their attendance.[32] However, antithetical to the purpose, the process causes certain delays. One of the primary reasons for the delays being the discretion vested in the Courts while deciding upon such an application.[33] This causes delays in passing an order and consequently in taking evidence. Without directly amending the said provision, the assistance of the court required for taking evidence has been practically done away with by an amendment brought to Section 17.[34] The arbitral tribunal has now been given the authority to enforce its own order in the same way as that of a civil court.[35] Despite the progressive step, in the opinion of the authors, a lot more can be done to expedite the evidence collection process.

It is suggested that by providing for video-conferencing as a general norm (to the extent of feasibility), the number of physical hearings can be reduced drastically, and this will further reduce the time taken in evidence collection and testimony. A reference can be made to Article 8 of the Expedited Arbitration Rules laid down by the London Chamber of Arbitration and Mediation ("LCAM"), which is relevant in this regard. To

[31] Arbitration and Conciliation Act, 1996, No. 26, Acts of Parliament, 1996 (India),§27.
[32] National Insurance Company Limited v. M/S SA Enterprises, Review Petition No. 51 of 2015, Delhi High Court.
[33] Silor Associates v. Bharat Heavy Electrical Ltd., 213 (2014) DLT 312.
[34] Binsy Susan and Adarsh Ramakrishnan, *Court's Assistance in Conduct of Arbitral Proceedings*, 6 IJAL 144 (2018).

expedite the evidence collection process, more often than not the parties should prefer document-based proceedings, while the hearing, if necessary, may be conducted precisely on telephone or video-conferencing. Further, any documentary evidence submitted by the parties or expert must not exceed a fixed number of pages than is necessary, except when the same is allowed by the tribunal.

With a similar purpose, Section 29A of the Act was incorporated.[36] In its present form, a time span of 12 months from the date of completion of pleadings is provided to render an award, which is extendable by 6 months when mutually agreed to by the parties and can further be extended by the Court on 'sufficient cause' being shown by the parties. However, it has been a cause of several untoward consequences. The consequence relevant for the present discussion is the requirement to approach the courts when a party wants to extend the proceedings beyond the period of 18 months. The inclusion of a court in this process to determine *sufficient cause* for permitting extension causes unnecessary delay in the arbitration proceedings. Heed must also be paid to the fact that the provision undermines the principle of party autonomy with the only exception of 6 months extension. Further, the confidentiality of the case is also compromised when the parties are required to place details of the arbitration proceedings before the court. The sensitive details of the proceedings become vulnerable to public exposure as a part of the Court record. This is contrary to the privilege of confidentiality envisaged under Section 42A of the Act.[37]

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[35] Arbitration and Conciliation Act, 1996, No. 26, Acts of Parliament, 1996 (India), §17.
[36] Arbitration and Conciliation Act, 1996, No. 26, Acts of Parliament, 1996 (India), §29.
[37] Arbitration and Conciliation Act, 1996, No. 26, Acts of Parliament, 1996 (India), §42 A.

Ensuring the time-boundness of an arbitral proceeding cannot come at the cost of other objectives that arbitration stands for. The impugned provision has left considerable scope for delays as well as posed hindrance to other avenues that arbitration provides to the parties. If we see the provision vis-a-vis the provisions in other jurisdictions, in the latter, the inherent nature of party autonomy has not been compromised for avoiding time delays. Under the Belgian Arbitration Act, Article 1713, does not impose any time limit upon the arbitrator(s) but leaves it upon the parties to determine the same.[38] However, in the absence of an agreement between the parties and passage of more than 6 months, the President of the Court of first instance, shall determine the time period on the application of either party. The provision draws a balance between party autonomy and the time-bound nature of the proceedings. India can draft a provision on similar lines, with a slight alteration to minimise judicial intervention in the time period for an extension. The same can be decided by an arbitral institution on the application of one of the parties. Also, while deciding upon the time limit, the institution must take into account the complexity of the issues, the number of arbitrator(s) and witness(es), and the volume of the material placed on record.

IV. CONCLUDING REMARKS

If India wants to debunk its image as a place where arbitration is merely a step prior to litigation, a robust arbitration framework following strict timelines along with providing ample scope for party autonomy is an

[38] Aayush Mehta and Samkit Jain, *Decoding time bound Arbitration in India: A closer look at Sec 29 A*, NUALS Law Journal (12 April 2020, 10:30 am), https://nualslawjournal.com/2020/04/12/decoding-time-bound-arbitration-in-india-a-closer-look-at-section-29a/, (last visited May 7, 2021).

ardent need. Making India arbitration-friendly by overcoming the above anomalies will also prove to be economically beneficial for the country. Foreign nationals will find it easier and will be encouraged to invest and conduct business in India owing to its time-bound and cost-effective dispute redressal mechanism. Albeit, the legislature, as well as the judiciary, have made constant efforts to make India an arbitration-friendly country, there still exist considerable lapses in the path of achieving that goal.

The aforementioned analysis highlights multiple facets during the post-pleading stage in an arbitration proceeding, which lead to excessive delays in the completion of proceedings. The delays caused have in effect undermined the purpose behind the introduction of arbitration. Thus, it is crucial that immediate measures are taken to do away with the current trends of delay and align the arbitration proceedings with its objective. The suggestions of the authors discussed during the course of analysis can help in improving the situation and in reaching the desired objective. The formation of the Arbitration Council of India ("ACI") through the 2019 Amendment, can prove to be an important step in this regard. The same should be made operative at the earliest. Additionally, on a general note, the practice of clubbing arbitration proceedings in cases involving similar questions of facts and/or law can help to significantly reduce the time of arbitration proceedings.

VII. EXPERT WITNESSES AND QUANTIFICATION OF DAMAGES IN DOMESTIC ARBITRATION: CAN HOT-TUBBING SERVE AS A POTENTIAL PANACEA?

- Krati Gupta and Raj Shekhar[*]

ABSTRACT

Quantification of damages is considered as an essential aspect of arbitration, with the parties employing all their resources to prove breach of contract and making a strong case for themselves. Even in cases of where contractual clause for liquidated damages exist, the exact nature of damages which include other subjective losses are difficult to be proved before the arbitral tribunal due to lack of documented evidence to support quantification of damages. Presently, to arrive at a reasonable quantum of compensation, the arbitrators have to rely upon the principle of honest guesswork. However, the same has proved to be problematic and there have been cases where such quantification have been overturned by courts due to them being "perverse". The panacea to the problem seems to lie in implementation of an effective regime for utilisation of expert witness and evidences in domestic arbitration. Unfortunately, owing to the legislative vacuum surrounding the expert witness based quantification of damages, the resolution of the conundrum at hand seems to be a distant dream. The foregoing paper attempts to analyse the various existing approaches to expert witness by a comparative analysis of the current trends and developments in this area. Further, it pitches forth an alternative and a more streamlined approach to implementing expert witness in domestic arbitration, which to till this date suffers and fails to get the benefit of expert witnesses.

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I. INTRODUCTION

Arbitration is a private dispute resolution mechanism which has proved to be an efficacious alternative to the regular litigation route. However, India is considered a non-arbitration-friendly jurisdiction owing, *inter alia,* to the length, costs and inefficiency of arbitration proceedings. In light of these considerations, efforts and regular amendments are being made to ameliorate the arbitral framework of the country by incorporating international best practices and procedures. It needs to be emphasised that in order to transform India into a global hub for arbitration, we need to introduce reforms to attract foreign arbitrations in the country and prevent Indian parties from choosing foreign seats of arbitration. For this to happen, India needs to deliver "effective arbitration work at lower cost"[1] and adopt time-efficient and cost-effective procedures.

Quantum of the arbitration award constitutes a fundamental part of any claim for damages as well as the most important aspect of arbitration for the disputing parties. The Oxford English Dictionary defines damages as "a

[1] Bibek Debroy & Suparna Jain, *Strengthening Arbitration and its Enforcement in India – Resolve in India*, NITI AAYOG, 17 (2016), http://niti.gov.in/writereaddata/files/document_publication/Arbitration.pdf.

sum of money claimed or awarded in compensation for a loss or an injury."[2] According to Black's Law Dictionary, damages include "money claimed by, or ordered to be paid to, a person as compensation for loss or injury."[3] In simple words, damages represent monetary compensation that an aggrieved claimant party is entitled to receive from the respondent party. As often noted, disputing parties employ all their resources to prove breach of contract but fail to make a strong case for quantification of damages. Even if there is a contractual clause for liquidated damages, the exact nature of damages such as loss of profits, loss of business value, loss arising from damage to goodwill, interest cover on damages and such other subjective losses are difficult to be proved before the arbitral tribunal due to the lack of documented evidence to support their case for quantification of damages. To address this conundrum in domestic arbitration practice, the best bet for arbitral tribunals to arrive at a reasonable quantum of compensation has been to rely upon the principle of honest guesswork that has been accepted by the Indian courts.

However, it is a settled fact that correct estimation of damages in technical matters would inevitably require expert witness testimony. Though the practice of expert witnesses is followed in domestic arbitration yet given the lengthy, traditional procedure of taking expert testimony, the exorbitant fee charged by professional experts and allegations of adversarial bias often discourage parties to utilise the benefits of expert witnesses in domestic arbitrations.

[2] *Damage*, Oxford English Dictionary (24th ed. 2011).
[3] *Damage*, Black's Law Dictionary (10th ed. 2014).

II. THE PRINCIPLE OF HONEST GUESSWORK IN ASSESSMENT OF DAMAGES: ORIGIN, APPLICATION AND EVOLUTION

The roots of the honest guesswork principle were laid as early as 1977 in *Mohd. Salamatullah v. State of Andhra Pradesh*,[4] wherein it was held by the Supreme Court of India that the estimation arrived at by the trial court based on facts and presented evidence cannot be substituted by an alternate guess of the appellate court. In *A.T. Brij Paul Singh v. State of Gujarat*,[5] the Supreme Court dismissed the necessity of evaluating minute details while estimating the loss of profits. In *A.K. Sinha*v *v. MTNL*,[6] the Delhi High Court adjudicated upon a plea challenging the arbitral award under Section 34[7] of the Arbitration and Conciliation Act, 1996 (hereinafter "the Arbitration Act"), wherein the arbitral tribunal had not awarded loss of profits for breach of contract. The Court while relying upon *Mohd. Salamatullah* and *A.T. Brij*, affirmed that honest guesswork can be made to assess the damages; however, such estimation should be based on substantial evidence adduced by the parties.

A domestic arbitral award based on the estimation skills of the arbitrator can be set aside only under Section 34(2A)[8] of the Arbitration Act, if it is found to be 'patently illegal.'[9] In absence of any definite mechanism for computation of damages, the arbitrators have been entrusted with a

[4] Mohd. Salamatullah v. State of Andhra Pradesh, AIR 1977 SC 1481.
[5] A.T. Brij Paul Singh v. State of Gujarat, AIR 1984 SC 1703.
[6] A.K. Sinha v. MTNL, OMP No.457/2008 (DEL HC).
[7] Arbitration and Conciliation Act, 1996, § 34, No. 26, Acts of Parliament, 1996 (India).
[8] Arbitration and Conciliation Act, 1996, § 34 (2A), No. 26, Acts of Parliament, 1996 (India).

responsibility to arrive at the closest approximation of the quantum of damages to be awarded through meticulous application of their estimation skills and knowledge of the dispute at hand.[10]

However, due to the lack of reliable data and limited industry knowledge of the arbitral tribunal, a rational and fair estimate of the quantum of damages can often be elusive. This can lead to gross divergence from industry practices and perverse arbitral awards as noted in *M/s. SMS Ltd. v. Konkan Railway Corporation Ltd.*[11] In this case, the Court while setting aside the arbitral award held that the notional proportionate loss formula arrived at by the arbitral tribunal for quantification of damages imputed incorrect variables to its parameters and such a formula was 'unknown' and 'perverse.'[12]

With reference to the indefiniteness inherent in the process of quantification of damages through honest guesswork principle, the words of Prof. Jan Paulsson, the President of International Council for Commercial Arbitration, about the arbitral practice on indirect expropriation are aptly relevant and highlight the elusive nature of correct prediction.

> There is no magical formula, susceptible to mechanical application that will guarantee that the same case will be decided the same way irrespective of how it is presented and irrespective of who decided it. Nor is it possible to guarantee that a particular analysis will endure overtime; the law evolves and so do patterns of economic activity

[9] Oil & Natural Gas Corporation v. SAW Pipes, (2003) 5 SCC 705.
[10] J. LOOKOFSKY & K. HERTZ, TRANSNATIONAL LITIGATION AND COMMERCIAL ARBITRATION: AN ANALYSIS OF AMERICAN, EUROPEAN, AND INTERNATIONAL LAW 392 (DJF PUB, 2 ED., 2004).
[11] M/s Sms Ltd v. Konkan Railway Corporation Ltd, O.M.P. (COMM) 279/2017.
[12] *Id.*

> and public regulation. In a phrase, perfect predictability is an illusion.[13]

Thus, the main objective behind domestic arbitration is to arrive at a fair and rational approximation of damages incurred by the claimant, even though it might inevitably entail hypothesis and speculation.[14] The lack of exactitude inherent in the quantification of damages is the prime reason that arbitrators should actively engage qualified expert witnesses in the arbitration process who are well versed with the evolving industry practices and paradigms.

III. EXPERT WITNESS IN ARBITRATION

Arbitral tribunals require expert assistance to help them in computation and determination of quantum of damages especially in complex and technical issues, where arbitrators lack the relevant expertise. The crucial role of damage experts in dispute resolution is aptly elaborated in *G. L. Sultania v. Securities and Exchange Board of India:*[15]

> It appears to us that the appellant expects this Court to act as an expert itself. This, we are forbidden from doing […] As noticed in Miheer H. Mafatlal [v. Mafatlal Industries Limited[16]][…], valuation of shares is a technical and complex problem which can be appropriately left to the consideration of experts in the field of accountancy. So

[13] J Paulsson, *Indirect Expropriation: Is the Right to Regulate at Risk?*, 3 TRAN. DIS. MGMT. (2006).
[14] Derek A. Soller, *New York Appellate Division, First Department, reverses Supreme Court decision vacating ICC arbitration award for "Manifest Disregard of the Law"*, WOLTERS KLUWER(May 30, 2021, 09:56 PM), http://arbitrationblog.practicallaw.com/new-york-appellate-division-first-department-reverses-supreme-court-decision-vacating-icc-arbitration-award-for-manifest-disregard-of-the-law/.
[15] G. L. Sultania v. Securities and Exchange Board of India, Appeal (Civil) 1672 of 2006.
[16] Mafatlal v. Mafatlal Industries Limited, (1997) 1 SCC 579.

> many imponderables enter the exercise of valuation of shares.[17]

The substantial complexity of the industries involved in today's commercial disputes requires an expert to ensure maximum possible certainty when estimating the quantum of damages and present the findings before the arbitral tribunal. The evaluation of economic harm requires an expert to perform a wide array of economic analysis on various industry parameters to address the interplay of such parameters. Later, these case-specific facts and findings are expressed in the form of an expert report which is subject to cross-examination by the parties to the dispute. Experts are often called upon as witnesses to give their opinion on technical subjects and thereby assist the tribunal in settling the dispute. It is pertinent to note that examination of witnesses is a permissible arbitration practice and includes the cross-examination of expert witnesses. Even though the Arbitration Act excludes the applicability of the Indian Evidence Act, 1872[18] (hereinafter 'the Evidence Act'), its principles related to expert evidence are still applicable to arbitration proceedings as held in *Pradyuman Kumar Sharma and Ors. v. Jaysagar M. Sancheti and Ors.*[19] Therefore, the admissibility of expert testimony in arbitration proceedings is conventionally analogous to the practice of taking expert opinion as given under Section 45[20] to Section 51[21] of the Evidence Act.

[17] Duncans Industries Ltd. v. State of U.P. and Ors., (2000) 1 SCC 633.
[18] Arbitration and Conciliation Act, 1996, § 19(1), No. 26, Acts of Parliament, 1996 (India).
[19] Pradyuman Kumar Sharma and Ors. v. Jaysagar M. Sancheti and Ors., Arbitration Petition No. 300 of 2012.
[20] Arbitration and Conciliation Act, 1996, § 45, No. 26, Acts of Parliament, 1996 (India).
[21] Arbitration and Conciliation Act, 1996, § 51, No. 26, Acts of Parliament, 1996 (India).

It is a settled law that the opinion of the expert is considered a statement of fact and cannot be relied upon unless the expert is examined. As per the provisions of Section 26[22] of the Arbitration Act, the opportunity to cross-examine the expert is given to all the parties to the dispute. The two ways of invoking expert witnesses in domestic arbitration are through (a) party-appointed expert witnesses and (b) tribunal-appointed expert witnesses.[23]

IV. PARTY APPOINTED EXPERT WITNESS VERSUS TRIBUNAL APPOINTED EXPERT WITNESS: BATTLE OF EXPERTS AND THE QUEST FOR QUANTIFICATION OF DAMAGES

It is a settled understanding in law that it is permissible for an arbitrator to take the assistance of experts in technical matters, in so far as such assistance is necessary for the discharge of his duties.[24] The arbitral tribunal appoints an expert witness when the parties to the dispute so request or when the circumstances make it absolutely indispensable in the opinion of the tribunal. However, a potential drawback is too much reliance by the arbitral tribunal on the assessment of the quantum of damages presented by the sole appointed expert.

As per Dr. Pablo Spiller, who has testified as an expert in more than 150 arbitrations over more than two decades, the presence of the counterparty expert places a degree of pressure on each expert to ensure that

[22] Arbitration and Conciliation Act, 1996, § 26, No. 26, Acts of Parliament, 1996 (India).
[23] Xu Zihihe, *The Use of Expert Witness in Arbitration*, KLUWER ARB. BLOG (May 30, 2021, 10:12 PM), http://arbitrationblog.kluwerarbitration.com/2020/04/29/the-use-of-expert-witness-in-arbitration-from-the-perspective-of-shiac/.
[24] *Juggoboundhu Saha* v. *Chand Mohan Saha*, AIR 1916 Cal 806 (DB).

their damages analysis is sound and impervious to criticism.[25] The incentive to prove the other expert wrong leads each side to undertake considerable efforts to produce credible supporting or countering evidence, thereby adding value to the overall damage assessment process. As a matter of fact, in the absence of any other contrasting/corroborating opinion, the credibility of the sole tribunal-appointed expert is significantly low. Therefore, the use of tribunal appointed-expert is an unpopular practice in arbitration and the trend is towards party-appointed experts.[26]

In a majority of arbitration cases, parties want to retain their autonomy over the presentation of their cases. Therefore, parties usually appoint their own experts who, though expected to retain independence, often representing the case of their respective appointing parties tend to function as their "hired guns"[27] (given that they are paid by the respective appointing parties). In cases where the arbitrator has little or no knowledge about industry practice, differing (or, sometimes, contrasting) reports of equally competent party-appointed experts, especially with regards to the mechanism for quantification of damages, can lead to uncertainty and confusion for arbitrators while presenting the arbitral award.

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[25] Alexander Barnes, *Tricky Technical and Quantum Matters for Rising Arbitrators: RAI's Conversation with Dr. Pablo T. Spiller*, KLUWER ARB. BLOG (May 30, 2021, 10:12 PM), http://arbitrationblog.kluwerarbitration.com/2021/05/15/tricky-technical-and-quantum-matters-for-rising-arbitrators-rais-conversation-with-dr-pablo-t-spiller/.

[26] Victoria Clark, *Walking the Line: Independence and the Party-Appointed Expert*, THOMSON REUTERS ARB. BLOG (May 30, 2021, 10:19 PM), http://arbitrationblog.practicallaw.com/walking-the-line-independence-and-the-party-appointed-expert/.

[27] Douglas Thompson, *Are Party-Appointed Experts a Waste of Time?*, GLOBAL ARBITRATION REVIEW, https://globalarbitrationreview.com/article/1033933/are-party-appointed-experts-a-waste-of-time.

Impartiality is another major consideration that is broached by the opposing party each time an expert is appointed by another party. Even though party-appointed experts are expected to practise utmost independence and impartiality,[28] there are no guidelines as to whether an expert who is or has been in any relationship with the appointing parties or their counsels can be appointed or not. Further, the re-appointment of the same expert by the appointing party is also an unaddressed issue. Conclusively, the adversarial allegiance of the experts towards their appointing party is always suspected.

In international arbitration, the International Bar Association's Rules on Taking of Evidence[29] (hereinafter "IBA's Rules on Taking of Evidence") and the Chartered Institute of Arbitration Protocol[30] (hereinafter "CIArb Protocol") are the primary guidelines to ensure the independence of party-appointed experts. However, in domestic arbitration regime, the independence and impartiality of party-appointed experts is further compromised due to the absence of clear guidelines regarding the procedure for introducing expert witness and enforceable code of ethics for experts. The partisanship of 'adversarial' party-appointed experts and the traditional, time-consuming one-by-one procedure for taking expert evidence defeats the prime purposes of arbitration i.e., impartiality and speedy settlement of disputes. As a result, even in matters of crucial importance, parties often refrain from invoking the services of expert witnesses that often leads to a

[28] Victoria Clark, *Walking the Line: Independence and the Party-Appointed Expert*, THOMSON REUTERS ARB. BLOG (May 30, 2021, 10:19 PM), http://arbitrationblog.practicallaw.com/walking-the-line-independence-and-the-party-appointed-expert/.

[29] PETER ASHFORD, THE IBA RULES ON THE TAKING OF EVIDENCE IN INTERNATIONAL ARBITRATION (CAMBRIDGE UNIVERSITY PRESS 2013).

lack of utilisation of complete benefits of the party-appointed expert witnesses in domestic arbitration.

V. WITNESS CONFERENCING/HOT TUBBING: A NOVEL APPROACH

Despite concerns of independence and impartiality, party-appointed experts are considered to be of seminal importance in the process of assessment of the quantum of damages. Thorough cross-examination of the opposing experts is the best way for arbitrators to gauge the divergence in opinions of the opposing experts and to come to an amicable mechanism for assessment of damages, often through "joint expert reports" as the case maybe.

The traditional mechanism of cross-examination of experts by a legal counsel does not highlight the weak premises or any flawed reasoning in the expert's opinion owing to the lack of industry knowledge by the counsels themselves. As a result, it becomes a daunting task for the tribunal to fully appreciate the nuances of the diverging opinions or inherent biases under the traditional mechanism of expert witness examination. Further, the prolonged time period involved in taking expert testimonies during arbitral proceedings makes it difficult for the tribunal to follow. The turn-by-turn cross-examination of the opposing experts on the same technical points requires

[30] Chartered Institute of Arbitrators, *Protocol for the Use of Party-Appointed Expert Witnesses in International Arbitration*, CHA. INST. ARB. 1, 4-9 (May 30, 2021, 10:22 PM), https://www.ciarb.org/media/6824/partyappointedexpertsinternationalarbitration.pdf.

multiple sessions. Such a procedure is lengthy, time-consuming and costly for the parties who are often unwilling to even resort to it in the first place.[31]

In order to alleviate the inherent bias and to correct any misinformation provided by the opposing experts that might be missed during cross-examination, evidence of the two opposing experts are taken concurrently in a procedure known as witness conferencing colloquially referred to as the 'hot-tubbing.'[32] This novel procedure of witness examination provides an opportunity to the arbitral tribunal to hear and juxtapose the testimonies of both the experts while allowing the experts of one party to examine the testimony of the opposing expert.[33] This issue-by-issue confrontation of the experts helps the arbitrator to evaluate the opposing claims and critically ascertain the inherent bias of the "hired gun" expert that could have escaped due to the traditional method of cross-examination. This process considerably relieves the arbitrators of the tension of evidence gathering and allows the experts to effectively assist them in arriving at the closest estimation of the quantum of damages taking into due consideration the industry standards and acceptable practices. It is further aided by the fact that most of the concerns and opposing interests are expected to be addressed during the brain-storming process of concurrent expert evidence taking.

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[31] Lord Justice Jackson, *Concurrent Expert Evidence: A Gift from Australia*, UK JUDICIARY (June 24, 2021, 11:00 AM), https://www.judiciary.uk/wp-content/uploads/2016/06/lj-jackson-concurrent-expert-evidence.pdf.

[32] Manish Aryan & Varun Sharma, *The Advent of Hot-Tubbing in India*, MONDAQ (June 24, 2021, 11:20 AM), https://www.mondaq.com/india/disclosure-electronic-discovery-privilege/825870/the-advent-of-hot-tubbing-in-india.

[33] Li Tingwe, *The Use of Expert Witness in Arbitration from the Perspective of SHIAC*, KLUWER ARB. BLOG (May 30, 2021, 10:24 PM), http://arbitrationblog.kluwerarbitration.com/2020/04/29/the-use-of-expert-witness-in-arbitration-from-the-perspective-of-shiac/.

VI. WITNESS CONFERENCING: AN INTERNATIONAL PERSPECTIVE

Recognising the inefficiency of traditional methods of expert witness examination, several legal systems have adopted the hot-tubbing method[34] in order to examine expert testimony more inquisitorial and less adversarial. The procedure of hot-tubbing was first introduced in the Australian Trade Practices Tribunal[35] in the 1990s and eventually achieved enough popularity to be included in the revised Federal Court Rules of 1998 ("FCR").[36] Justice Peter McClellan has been the driving force behind bringing the practice of concurrent expert evidence into the mainstream.[37] This practice has since then been adopted in several legal systems. Some of the international practices in hot-tubbing are discussed below.

A. United Kingdom

The 1996 report presented by Lord Woolf highlighted that the traditional method of expert evidence led to unnecessarily high cost and lengthy litigatory process and suggested plugging the loopholes of expert partisanship and inherent bias.[38] Resultantly, reforms were incorporated in

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[34] Alasdair McPaline, *Hot-tubbing in International Arbitration: Do We Need a Protocol?*, THOMSON REUTERS ARB. BLOG (May 30, 2021, 10:35 PM), http://arbitrationblog.practicallaw.com/hot-tubbing-in-international-arbitration-do-we-need-a-protocol/.

[35] Jublee Guha, *Hot–Tubbing: A Concurrent Evidence Procedure in Intellectual Property Suits*, MONDAQ (May 30, 2021, 10:35 PM), https://www.mondaq.com/india/patent/868040/hot-tubbing-a-concurrent-evidence-procedure-in-intellectual-property-suits.

[36] Federal Courts Rules SOR /98-106 Federal Courts Act (Austl.).

[37] *Id.*at 32.

[38] STA Law Firm, *Lord Woolf's Reforms and Civil Procedure Rules 1998*, MONDAQ (May 30, 2021, 10:35 PM), https://www.mondaq.com/uk/civil-law/705694/lord-woolf39s-reforms-and-civil-procedure-rules-1998.

the shape of the Protocol for the Instruction of Experts to Give Evidence in Civil Claims prepared by Civil Justice Council.[39] The protocol is silent on concurrent expert evidence but encourages the use of "single joint experts"[40] and joint reports.

B. Canada

Canada has introduced expert hot-tubbing through its Competition Tribunal Rules[41] (hereinafter "CCT") for use in antitrust proceedings. The CCT rules contemplate concurrent presentation of expert testimony. They specify that tribunals' discretion to have multiple experts who may "comment on the views of other experts on the panel [and] pose questions to [those] other expert witnesses."[42]

C. United States of America

Similar to Canada, the United States of America has explored the hot tub in antitrust suits. The Task Force on Economic Evidence appointed by the American Bar Association's Section of Antitrust Law in its 2006 Report,[43] deliberated upon concurrent expert evidence procedure. Despite a distinctly adversarial legal system wherein expert testimony is mostly court imposed, the U.S practitioners have turned their gaze towards the hot tub

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[39] *Protocol for the Instruction of Experts to give Evidence in Civil Claims 2005*, (Eng.), http://www.justice.gov.uk/courts/procedure-rules/civil/pdf/practice_directions/pd_part35.pdf.
[40] *Id.* at § 17.
[41] Competition Tribunal Rules, SOR/2008-141 (Can.).
[42] *Id.* at Rule 48.2.
[43] American Bar Association, Final Report of Economic Evidence Task Force 10 (Aug. 1, 2006), https://www.americanbar.org/content/dam/aba/administrative/antitrust_law/v8/report_01_c_ii.pdf.

realising the benefits of concurrent expert testimony in reconciling the differences in expert opinions.

The practise of hot tubbing is widely used in international arbitrations. IBA's Rules on Taking of Evidence and the CIArb Protocol for the Use of Party-Appointed Expert Witnesses in International Arbitration too envisage witness-conferencing.[44] Despite recognised popularity in international arbitrations, hot tubbing in the Indian arbitration regime is still in nascent stages, if not completely alien to the domestic legal system. Rule 6 of the Delhi High Court Rules[45] incorporates hot-tubbing for commercial suits. Highlighting the benefits of hot-tubbing procedure over the traditional sequential examination of witnesses, Justice Ravindra Bhat while deciding *Micromax Informatics Ltd. v. Telefonaktiebolget Lm Ericsson*,[46] stated that disputes involving "examination of expert evidence should adopt the hot-tubbing procedure."[47]After the 2015 Amendment to the Arbitration Act,[48] requiring time-bound disposal of arbitration disputes, hot-tubbing is of critical importance in resolving divergent expert opinion on quantification damages in an efficient manner. Incorporation of hot-tubbing procedure in arbitration law of the country can even be of seminal importance in making India a preferred choice of seat for international arbitration disputes.

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[44] PETER ASHFORD, THE IBA RULES ON THE TAKING OF EVIDENCE IN INTERNATIONAL ARBITRATION (CAMBRIDGE UNIVERSITY PRESS 2013), *Protocol for The Use of Party-Appointed Expert Witnesses in International Arbitration*, CHARTERED INST. OF ARBITRATORS (May 30,2021, 10:58 PM), http://www.ciarb.org/information-and-resources/The use of party-appointed experts.pdf.

[45] Delhi High Court (Original Side) Rules, 2018 (India).

[46] Micromax Informatics Ltd. v. Telefonaktiebolget Lm Ericsson, FAO (OS) (Comm) 169/2017 & C.M. Appl.4963/2018.

[47] *Id.*

[48] Arbitration and Conciliation (Amendment) Act, 2015, § 29A, No. 3, Acts of Parliament, 2016 (India).

VII. ADDITIONAL SUGGESTIONS: TOWARDS A MORE EFFICIENT RESOLUTION

In a traditional common law system, each opposing party expert works independently to produce an expert report highlighting *inter alia* the mechanism and estimated quantum of damages. Witness conferencing or hot tubbing allows the arbitral tribunal to precisely understand the points of disagreement between the expert witnesses and work towards their reconciliation to secure an amicable resolution of the dispute at hand. However, in cases where the opposing experts are so biased that they are fundamentally incompatible and disagree on the complete mechanism of damage quantification, hot-tubbing might not be sufficient to resolve these patent differences.

Moreover, the neutrality of expert witnesses, which is the central pillar of fair and reasonable estimation of the amount of damages, is often jeopardised due to the involvement of party selected quantum experts leading to an increased burden on arbitrators to search for the truth and arrive at the closest estimation of the compensation amount. In light of these issues, additional suggestions for addressing them are discussed below.

A. Rules/Protocol/Code of Ethics for Party Appointed Expert Witnesses

Given that party-selected experts are paid by the appointing party, they tend to represent its interest in the arbitration procedure. Appropriate rules/code of conduct for selection of party-appointed experts ensuring complete disclosure requirements with regards to previous association with the appointing party and submission of a statement of independence by the respective expert witnesses can help in alleviating impartiality concerns.

B. Tribunal appointed expert/Advisor/Expert-Arbitrator in addition to party-appointed expert witness

In certain disputes, joint expert reports are not possible as a result of complete incompatibility of party-appointed experts (due to adversarial bias) or non-reconciliation of quantum of damages. Arbitrators with limited knowledge of industry practices are often torn apart between the divergent opinions of the equally competent party-appointed experts so much so that the quest for closest approximation becomes elusive. In such cases, the tribunal-appointed expert or advisor or expert-arbitrator can assist in providing a neutral perspective to the issue in conflict.

C. Specialist Arbitration Centres

Lack of industry knowledge is one of the key reasons for incorrect quantification of damages by arbitrators. Therefore, in the longer run, arbitrators need to gain industry knowledge in order to be better capable of arbitrating such disputes. This process is facilitated by specialist arbitration centres that provide a roster of specialist experts well versed with industry practices. For example, the Court of Arbitration for Sports (CAS) administers sport-related arbitrations, the *Chambre Arbitrale Maritime de Paris* administers maritime arbitrations, and the WIPO Arbitration and Mediation Centre caters to intellectual property disputes. Another example of such a bar is the International Bar Association Arbitration Committee which focuses on laws, practices and procedures relating to arbitration of transnational disputes. In the Indian context, the recently enacted Insolvency and Bankruptcy Code, 2016 also provides for specialised “Insolvency Professionals” and “Insolvency Professional Agencies” who are enrolled

with the Board. Conclusively, similar to these illustrations, "specialist arbitrators" are necessary to handle specific industry-related domestic arbitration disputes.

VIII. CONCLUSION AND THE WAY FORWARD

The Indian arbitration regime needs to keep at pace with international standards to transform its image into an arbitration friendly country. Given the importance of expert witnesses in the estimation of damages especially through the novel approach of hot-tubbing in taking expert testimony, the government needs to formulate detailed guidelines for the inclusion of witness conferencing procedure in domestic arbitration practices similar to those in the United Kingdom[49] and Canada.[50] In addition to this, a formalised code of professional ethics for expert witnesses is essential for the independence of party-appointed expert witnesses. Tribunal-appointed experts often assist in harmonising the divergent opinions of party-appointed experts; however, the limited availability of qualified experts who charge an exorbitant fee for each session, might pose potential challenges for domestic arbitrations. Therefore, in the longer run, the creation of expert arbitrators trained in industry practices would be helpful in resolving this issue.

While incorporating the aforementioned suggestions, it is pertinent to ensure that blind reliance on expert witnesses is avoided through the introduction of the *Daubert* standard– as established in the 1993 US Supreme Court decision, *Daubert v. Merrell Dow Pharmaceuticals Inc.*[51]

[49] Amendment to Civil Procedure Rules (CPR), 1998,Practice Direction (PD) 35, ¶ 11 (Eng.), https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part35/pd_part35.
[50] Competition Tribunal Rules, SOR/2008-141, Rule 48.2 (Can.).
[51] Daubert v. Merrell Dow PharmaceuticalsInc.,509 U.S. 579 (1993).

that lays down general factors for scientific evidences. Thus, arbitrators can benefit from the practice of being explicit and can reject expert evidence on the grounds that they lack a scientific basis. Incorporation of the *Daubert* standard in domestic arbitration would ensure that arbitrators do not shy away from giving their opinion regarding the expert witness and his scheme for quantification of damages. This stands true even when the tribunal has lost faith in an expert and is required to state its observation explicitly.

In conclusion, it is to be understood that it is ultimately for the court of law to decide as to how much weightage should be given to the expert's opinion for final quantification of damages, given that it is the prerogative as well as the duty of the arbitrator to take all possible steps in order to arrive at the closest correct estimation of quantification of damages. Arbitration is a dynamic field and India is constantly striving to become a globally credited arbitration-friendly country as reflected in 2015[52] and 2021[53] amendments to the Arbitration Act. Realisation of this objective would require a thorough examination of the highlighted issues and their effective redressal to keep pace with the evolving dimensions of domestic arbitration.

[52] Arbitration and Conciliation (Amendment) Act, 2015, No. 3, Acts of Parliament, 2016 (India).
[53] Arbitration and Conciliation (Amendment) Act, 2021, No. 3, Acts of Parliament, 2021 (India).

VIII. REINFORCING PARTY AUTONOMY IN THE INDIAN ARBITRAL LANDSCAPE

- Aachman Shekhar[*]

ABSTRACT

This essay examines if party autonomy can be extended to the selection of arbitral counsel and their fee arrangements within the Indian arbitral framework. To do so, it analyses the relevant statutory provisions and the jurisprudence that has been developed with respect to non-advocates representing parties, and the use of international arbitral practices such as Third-Party Funding and Contingency Fee Agreements in India. It then addresses the stakeholders' reservations against the integration of these practices. In conclusion, it advocates for reinforcing party autonomy in the appointment of arbitral counsel to make India a more attractive destination for arbitration.

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PART - 1

I. INTRODUCTION

Party autonomy is the cornerstone of arbitration since it allows the parties to select and tailor the procedure of their arbitration according to their specific needs and wishes, unimpeded by possibly conflicting legal practices and traditions.[1] Accordingly, parties to an arbitration are free to choose the rules of procedure, governing law, arbitrators, seat, venue, language, and almost everything else related to the arbitration.[2] It is common knowledge that parties to international arbitration agreements choose the seat of their arbitration by assessing how deeply party autonomy is entrenched in a particular domestic arbitral framework – jurisdictions with higher standards of party autonomy are often chosen over other jurisdictions.[3] Hence, nations which intend to become more attractive for international arbitrations have to necessarily reinforce party autonomy throughout their arbitral framework;[4] and India is no different in this regard.

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[1] Gary B. Born, *Arbitration and the Freedom to Associate* (03 January 2009),38(7) GEORGIA J. OF INTERNATIONAL & COMPARATIVE L.7 (2009-10); Christopher Lau & Christin Horlach, *Party Autonomy – The Turning Point*, 4 DISPUTE RESOLUTION J.121 (2010); Jamshed Ansari, *Party Autonomy in Arbitration: A Critical Analysis*, 6(6) RESEARCHER 47, 53 (2014).

[2] *Id.*; Okuma Kazutake, Party Autonomy in International Commercial Arbitration: Consolidation of Multiparty and Classwide Arbitration, 9(1) ANNUAL SURVEY OF INTERNATIONAL & COMPARATIVE LAW 189 (2003).

[3] Sagi Peari & Saloni Khanderia, Party Autonomy in the Choice of Law: Some Insights from Australia, LIVERPOOL LAW R. 1, 2 (2021); Amelia Boss, The Jurisdiction of Commercial Law: Party Autonomy in Choosing Applicable Law and Forum Under Proposed Revisions to the Uniform Commercial Code, 32(4) THE INTERNATIONAL LAWYER: SYMPOSIUM ON JURISDICTION AND THE INTERNET 1067 (1998).

[4] *Id.*; See Léonard Stoyanov, *Switzerland to Become More Attractive for International Arbitration*, KLUWER ARBITRATION BLOG (May 18, 2018), http://arbitrationblog.kluwerarbitration.com/2017/05/18/switzerland-to-become-more-attractive-for-international-arbitration/.

In its attempt to become the hub of international arbitration, India has done a good job by buttressing party autonomy throughout its arbitral code.[5] However, it seems to have missed out on an important piece of the puzzle – extending party autonomy to the selection of arbitral counsel and the resulting fee arrangements. Indian laws, as they stand today, place certain restrictions on the parties' freedom to choose who represents them in an arbitration and how they pay their arbitral counsel, through the Advocates Act[6] and the Bar Council of India Rules[7] respectively. Such restrictions are detrimental to the development of arbitration in India.

Interestingly, the Bombay High Court, through its judgment in *Jayaswal Ashoka Infra v. Pansare Lawad Sallagar*, held that a non-advocate can represent a party in an Indian-seated arbitration.[8] It also held that the contingent fee agreement entered between such a non-advocate and his client is valid.[9] Hence, the Court has ushered in a new wave of party autonomy in the Indian arbitral framework by doing away with statutory restrictions on parties' freedom to select their counsel and choose the legal fee arrangement that they deem most fit. This essay seeks to explore if such autonomy fits

[5] See PASL Wind Solutions Pvt. Ltd. v. GE Power Conversion India Pvt. Ltd, Supreme Court Civil Appeal No. 1647 of 2021 (India); State Trading Corporation of India v. Jindal Steel and Power Limited and Ors., Supreme Court Civil Appeal No 2747 of 2020 (India); Reliance Industries v. Union of India, (2014) 7 SCC 603 (India); Pam Developments Private Limited v. State of West Bengal, (2019) 8 SCC 112 (India); Gary Born et al, *Recent Amendments to Arbitral Laws: India and Singapore*, WILMERHALE INSIGHTS & NEWS (December 15, 2020),https://www.wilmerhale.com/en/insights/client-alerts/20201215-recent-amendments-to-arbitral-laws-india-and-singapore.

[6] The Advocates Act, 1961, No. 25, Acts of Parliament (India), [hereinafter*The Advocates Act*].

[7] Bar Council of India Rules (As Amended Up To 30th September, 2009), available at http://www.barcouncilofindia.org/wp-content/uploads/2010/05/BCIRulesPartItoIII.pdf[hereinafter*Bar Council of India Rules*].

[8] Jayaswal Ashoka Infrastructure Pvt. Ltd. v. Pansare Lawad Sallagar, 2019 (5) MHLJ 689 (India).

within the larger Indian legal landscape by examining the applicable legal provisions and arbitral jurisprudence.

In Part 2 of this essay, the author examines the relevant statutory provisions and the jurisprudence that has developed with respect to non-advocates representing parties within the Indian arbitral framework. It is thereby submitted that there is nothing within the Indian legal framework that explicitly prevents representation by non-advocates in Indian arbitrations and that the parties should have the freedom to choose their representatives without any superfluous qualification requirements. Part 3 of this essay addresses the reservations against permitting advocate-less representation in Indian arbitration.

In Part 4 of this essay, the principle of party autonomy is extended to fee arrangements between parties and their counsel in Indian arbitrations. It is submitted that international arbitral practices such as Third-Party Funding and Contingency Fee Agreements will likely become a feature of Indian arbitrations soon. The author argues for a balanced approach during such an integration. The essay concludes with a call for reinforcing party autonomy in the appointment of arbitral counsel to make India a more attractive destination for arbitration.

[9] *Id.*

PART-2

II. ADVOCATE-LESS REPRESENTATION IN INDIAN ARBITRATION

Under the Arbitration and Conciliation Act, 1996,[10] parties can appoint individuals without any formal legal training as their arbitrators (provided there exists no conflict of interest between the parties and the arbitrator) since there are no qualification requirements to be appointed as an arbitrator.[11] Recently, the erstwhile Eighth Schedule of the Act, which introduced certain qualification and accreditation requirements for arbitrators, was omitted by the Arbitration and Conciliation (Amendment) Ordinance, 2020.[12] Hence, parties have full autonomy in choosing their arbitrators under the Act. In a similar vein, the Act does not lay down any qualification requirements for an arbitral counsel too – which theoretically means that the Act does not restrict the ability of the parties to choose their arbitral counsel, by not restricting party autonomy in this regard.

However, Indian arbitral representation has been the exclusive domain of advocates enrolled under the Advocates Act, for all intents and purposes, despite the absence of any qualification requirements.[13] Consequently, only those individuals who fulfil the stringent qualification requirements of Section 24 of the Advocates Act ("Persons who may be

[10] The Arbitration and Conciliation Act, 1996, No. 26, Acts of Parliament (India), (hereinafter, *The Arbitration & Conciliation Act* and/or *The Act*)
[11] See § 12, The Arbitration and Conciliation Act.
[12] The Arbitration and Conciliation (Amendment) Ordinance, 2020.
[13] See § 33, The Advocates Act.

admitted as advocates on a State roll") have been entitled to represent parties in Indian-seated arbitrations.[14]

This situation makes one ponder as to why should the parties' freedom to choose their counsel in an arbitration be restricted when no such restrictions exist on their freedom to choose their arbitrators. Why should the parties' range of choices be only limited to enrolled advocates when they may have access to better options for representing them in an arbitration? The parties should be able to choose specialists in the subject matter of their particular dispute, such as accountants, engineers, medical officials etc., who by virtue of their subject-specific training be able to provide better arbitral representation.

With these questions in mind, the Indian judiciary seems to be warming up to the idea of a broader pool of arbitral counsel which extends beyond advocates enrolled under the Advocates Act. Notably, the Supreme Court in *Bar Council of India v. A.K. Balaji* held that foreign lawyers are not barred from conducting international arbitration proceedings and/or providing legal advice.[15] Taking this one step further, the Bombay High Court in *Jayaswal Ashoka Infra* held that representation before an arbitral tribunal cannot be deemed to be representation before a court and hence, arbitral representation cannot be deemed to be the exclusive domain of advocates enrolled with the Bar Council of India under the Advocates Act.[16] Understandably, these judgments have been the subject of much criticism

[14] § 24(1), The Advocates Act.
[15] Bar Council of India v. A.K. Balaji and Ors., (2018) 5 SCC 379.
[16] *Supra* note 8.

among legal circles since it disturbs enrolled advocates' hegemony over arbitral representation.[17]

In the following sub-sections, the author demonstrates why the approach adopted by the Bombay High Court is the way forward to foster India's status as a pro-arbitration jurisdiction and should be upheld by the Supreme Court in deciding the appeals against this judgment.

A. Regulatory Framework

As noted above, the Arbitration & Conciliation Act does not provide any particular class of individuals with the 'exclusive right' to represent parties in an arbitration. The Act does not even lay down any specific qualifications for arbitrators. The closest possible legal provision conferring such an exclusive right on a class of individuals can arguably be Section 33 of the Advocates Act ("Advocates alone entitled to practice").[18] It is often argued that this section, given its broad wording, bars non-advocates from practicing before arbitral tribunals, or "in any court or before any authority or person".[19]

However, *per contra*, Section 32 ("Power of Court to permit appearances in particular cases") creates an exception to Section 33 by

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[17] See Pradeep Nayak, Sulabh Rewari & Vikas Mahendra, *Arbitration procedures and practice in India: Overview*, THOMSON REUTERS PRACTICAL LAW(Feb. 1, 2021),https://uk.practicallaw.thomsonreuters.com/9-502-0625?transitionType=Default&contextData=(sc.Default)&firstPage=true;James J Nedumpara et al, *Reforms in the Non-Litigious Services Sector: A Roadmap for Growth*, CENTRE FOR TRADE & INVESTMENT LAW, https://ctil.org.in/cms/docs/Papers/Publish/publish1.pdf;Bhavana Sunder et al, *Entry Restricted Casually: The Supreme Court of India's Judgment on the Entry of Foreign Lawyers in India*,ASIAN DISPUTE REVIEW (July 2018).

[18] *Supra* note 13.

[19] *Id.*

empowering the particular authorities with the discretion to permit any person to appear before them in any particular case.[20] Therefore, the courts, authorities and persons mentioned under Section 33 read with Section 32 of the Advocates Act, have an unqualified discretion to allow non-advocates to appear before them in any matter. Hence, it is reasonable to say that there are no regulations preventing a non-advocate from representing a party in an arbitration. The arbitral tribunals can use their discretionary power under Section 32 to allow for such representation without having to fulfil any set criteria. In a commensurate manner, this approach can be extended to requests for *prose* representation in arbitral proceedings too.[21]

Parties have been provided with a similar kind of autonomy under other Indian statutes as well, most notably the Consumer Protection Act, 2019.[22] Under this Act, the Consumer Dispute Redressal Forums have been established to provide speedy and cost-effective justice.[23] While appearing before these forums, the parties do not need to engage advocates to represent them and can do so themselves or through their authorized representatives, with or without any formal legal training.[24] Such representation helps parties save time and legal fees.

Consumer forums and arbitral tribunals are similar in the sense that both are quasi-judicial bodies that have been established to enable parties to secure their rights *in personam* in a cost and time-effective manner. Hence,

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[20] § 32, The Advocates Act.
[21] Constantine N. Katsoris, *Representation of Parties in Arbitration by Non-Attorneys*, 22(3) FORDHAM URBAN LAW JOURNAL (1995). Drew A. Swank, *The Pro Se Phenomenon*, 19(2) BRIGHAM YOUNG UNIVERSITY JOURNAL OF PUBLIC LAW (2005).
[22] The Consumer Protection Act, 2019, No, 35, Acts of Parliament (India), (hereinafter*The Consumer Protection Act*).
[23] *Id.*

parties are likely to have similar considerations when appearing before an arbitral tribunal given that most parties opt for arbitration for its efficiency in the first place.[25] Consequently, such representation should also be allowed in Indian arbitrations to make them faster and cheaper. This can also increase the influence that parties yield over their respective arbitral strategies. Cumulatively, these factors will go a long way in making Indian arbitrations more party-centric and the overall arbitral framework more attractive.

B. Broad-basing Arbitration

The Supreme Court in *Voestalpine Schienen Gmbh v. Delhi Metro Rail Corporation Ltd.* held that arbitral panels must be broad-based to ensure that the parties can choose arbitrators with the technical know-how required to competently adjudicate the issue at hand.[26] Accordingly, it was suggested that arbitral institutions also have professionals such as engineers, accountants, government employees, architects, medical officers, etc. in addition to those with formal legal training.[27] Having a broad-based panel goes a long way in ensuring that the selected arbitral tribunal is able to identify and appreciate the finer/technical dimensions of a particular dispute.[28]

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[24] *Id.*;See Department of Consumer Affairs, FAQs on Consumer Protection Act 2019.
[25] Christopher R. Drahozal& Stephen J. Ware, *Why do Businesses Use (or Not Use) Arbitration Clauses?*,OHIO STATE JOURNAL ON DISPUTE RESOLUTION, Vol. 25(2), pp. 433 – 476, (2010); Ali K. Qtaishat, *Choice of Law in International Commercial Arbitration*, INDIAN LAW JOURNAL,https://www.indialawjournal.org/archives/volume3/issue_3/article_by_ali.html.
[26] Voestalpine Schienen GmbH v. Delhi Metro Rail Corporation Ltd., (2017) 4 SCC 665 (India).
[27] *Id.*
[28] *Id.*

Applying the same logic to arbitral counsels, it is submitted that the parties should be able to choose their counsel based on the nature of the dispute and/or the composition of the tribunal to ensure that they get the best possible representation. For instance - it might be beneficial fora party if an engineer can represent them in a construction dispute; a UK-based lawyer can represent them in a dispute relating to English tax laws; a Chartered Financial Analyst can represent them in an international transfer pricing dispute, so on and so forth. In all of these scenarios, nothing bars the parties from employing multiple arbitral counsels for a given matter and they can very well seek the services of enrolled advocates along with non-enrolled advocates depending upon the nature of the work.

PART-3

III. CHALLENGES TO ADVOCATE-LESS ARBITRAL REPRESENTATION

A. The NTT Challenge

The Supreme Court's judgment in *Madras Bar Association v. Union of India (also known as the NTT Case)* is often used by critics of the submitted position of the author, to argue that persons who have no formal training in law cannot be allowed to represent parties before tribunals.[29] The Supreme Court held that non-law practitioners cannot be permitted to address arguments on behalf of parties before a tribunal which is empowered to determine questions of law.[30] Here, the term 'tribunal' assumes great

[29] Madras Bar Association v. Union of India & Anr., (2014) 10 SCC 1 (India).
[30] *Id.*

significance in determining whether or not this decision will be applicable to representation before arbitral tribunals.

It is important to note that the *NTT judgment* was concerned with the National Tax Tribunals, which by virtue of their function are public fora.[31] In arriving at its decision, the Court utilized the instrumental definition of 'tribunal' that was adopted by the Supreme Court in the NCLT Case.[32] As per the definition adopted in the NCLT case, a tribunal is a permanent and independent body set up by the legislature to decide a *lis* between the parties in the context of a specific jurisdiction vested upon it by a statute, and which is not a part of the regular judicial system.[33]

On the other hand, arbitration tribunals are private fora that are set up by arbitration agreements between parties and not through any statutory/legislative instrument.[34] They are not confined to any specific jurisdiction and can deal with any issue arising between the parties related to an arbitration agreement, provided that the subject matter of such disputes is capable of settlement through arbitration under the law.[35] Hence, arbitral tribunals cannot be deemed to be 'tribunals' under the instrumental definition adopted in the *NTT case*. Accordingly, the Supreme Court's ruling in the *NTT case*, barring non-lawyers from representing parties before tribunals

[31] See The National Tax Tribunal Act, 2005, No. 49, Acts of Parliament (India).
[32] Union of India v. Madras Bar Association, (2010) 11 SCC 261.
[33] *Id*; Alok Prasanna Kumar and Rukmini Das, *State of the Nation's Tribunals: Introduction and Part 1: Telecom Disputes Settlement and Appellate Tribunal*, VIDHI CENTRE FOR LEGAL POLICY(2014),http://www.vidhilegalpolicy.in/140618_State%20of%20the%20Nation's%20 Tribunals%20- %20TDSAT.pdf.
[34] Vidya Drollia& Ors. V. Durga Trading Corporation, (2019) 20 SCC 406 (India). A. Ayyasamy v. A. Paramasivam& Ors., (2016) 10 SCC 386 (India).
[35] *Id*; State Trading Corporation of India v. Jindal Steel and Power Limited & Ors., Civil Appeal No. 2747 of 2020 (India).

empowered to determine questions of law, will not be applicable on representation before arbitral tribunals.

B. Advocates are Better Representatives

It is often argued that enrolled advocates make for better arbitral representatives considering their extensive knowledge of the Arbitration & Conciliation Act, as well as the other Indian procedural and substantive laws.[36] While it is true that legal training can be helpful to present one's case, enrolled advocates certainly cannot lay an exclusive claim over the skills of effective representation.[37] Knowledge and tact, and not legal qualifications, are the true prerequisites for being an effective arbitral counsel.[38] Accordingly, various professionals, including accountants, engineers, medical officers, and even law graduates, possess these attributes and can use it to represent their clients effectively. It can also be said that these professionals may be better suited than advocates to represent parties in certain subject-matter intensive disputes. It should be left to the parties to freely choose the representative most suited for their arbitrations.

Nevertheless, some form of inequality between the competencies of parties' representatives is inevitable, irrespective of the existence of an enrollment requirement. However, this is not an aberration but is a feature of all litigations and arbitrations, where representatives of vastly differing competencies often go head-to-head. Therefore, it is submitted that the

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[36] Jason E. Meason & Alison G. Smith, *Non-Lawyers in International Commercial Arbitration: Gathering Splinters on the Bench*, 12(1) NORTHWESTERN JOURNAL OF INTERNATIONAL LAW & BUSINESS (1991); See Kellie Pantekoek, *Do I need a Lawyer for Arbitration?*,FINDLAW (May 4, 2020),https://www.findlaw.com/adr/arbitration/do-i-need-a-lawyer-for-arbitration-.html.

[37] *Id.*

minute possibility of inequality of arms should not override or limit party autonomy in selecting counsel, especially in the context of arbitration. All parties want the best possible representation and will hence, benefit from the unrestricted autonomy in choosing their counsel.

It is highly likely that representation by advocates may diminish the flexibility of the arbitral process and reduce it to a litigation-like rigmarole, given their inclination towards traditional legal practices and procedures.[39] Such a scenario may severely undermine the concerned party's interests.

C. Issues of Enforceability

In principle, a party's decision to go ahead with an advocate-less representation should not be grounds for annulment or non-recognition of an award. Nonetheless, in highly complex cases, a party's lack of representation by enrolled advocates may raise issues of enforceability under Section 34(2)(a)(i) of the Arbitration & Conciliation Act ("party was under some incapacity").[40] Moreover, the issue of tribunals sympathizing with the parties represented by non-advocates may also raise questions of bias. However, such issues can be effectively dealt with if the arbitral tribunal uses its discretion under Section 32 of the Advocates Act judiciously to identify if the circumstances of the dispute necessitate representation by an enrolled advocate and advise the parties accordingly.[41]

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[38] *Id.*

[39] Colin Ong, *Case Strategy and Preparation for Effective Advocacy*, GLOBAL ARBITRATION REVIEW (Oct. 01 2019),https://globalarbitrationreview.com/guide/the-guide-advocacy/fourth-edition/article/case-strategy-and-preparation-effective-advocacy.

[40] § 34(2)(a)(i),The Arbitration & Conciliation Act.

[41] See Amiya Kanti Das & Anr. v. Shefalika Ash, Calcutta High Court, GA No. 966 of 2019 (India).

Further, the tribunals can actively ensure that the parties are making informed choices while selecting their counsel and should consciously try to step out of the shoes of either of the parties during the arbitral proceedings to minimize the inequality of arms between parties. Subsequent to this, whatever inequality exists will be the product of deliberate choices made by the parties and will hence, not be bad in law.

PART-4

IV. THIRD-PARTY FUNDING AND CONTINGENCY COUNSEL FEE ARRANGEMENTS IN ARBITRATION

Historically, third parties were prohibited from funding an unconnected party's litigation under the doctrines of champerty and maintenance.[42] These doctrines have evolved from their medieval origins and are now based on public policy ground of protecting the purity of justice.[43] However, in the current era of encouraging access to justice, these concerns are widely considered to be out of date. As a result, rules against champerty and maintenance have been relaxed in most leading jurisdictions including England, Canada, Singapore, Australia and the USA.[44] These relaxations have led to the steady growth of third-party funding and contingency fee arrangements in international arbitrations.[45] The growing use of such

[42] *The Practice, A Brief History of Litigation Finance*, 5(6) LITIGATION FINANCE – HARVARD LAW SCHOOL (2019).
[43] Lord Neuberger, *From Barretry, Maintenance and Champerty to Litigation Funding*, GRAY'S INN SPEECH(May 08, 2013), https://www.supremecourt.uk/docs/speech-130508.pdf; In re Trepca Mines Ltd, (No 2) [1963] 1 Ch 199.
[44] See Dean Lewis, *Jurisdiction guide to third party funding in international arbitration*, PINSENT MASONS OUT-LAW GUIDE(May 07, 2021), https://www.pinsentmasons.com/out-law/guides/third-party-funding-international-arbitration;*Supra*note 43.
[45] *Id.*

litigation financing arrangements suggests that they are the new normal for arbitrations.[46]

In this regard, India finds itself in a peculiar position. Vestiges of colonial rules and practices continue to bind Indian advocates to the confines of champerty and maintenance. However, no such restriction can be said to exist for non-advocates. Given that non-advocate representation is increasingly becoming a reality in Indian arbitrations, this differential treatment for advocates and non-advocates must be rectified. Accordingly, the following sub-sections seek to identify the best way forward in regulating arbitral representation under the Arbitration and Conciliation Act.

A. Third-Party Funding – The new normal?

The principles behind Third-Party Funding ("TPF") are not alien to the Indian legal "market."[47] Many case files, especially assets that are subjects of litigation, are bought and sold in the unorganized sector.[48] To this effect, Order XXV Rule 1 of the Civil Procedure Code, as amended by the states of Maharashtra, Karnataka, Gujarat, and Madhya Pradesh, recognizes the right of the plaintiffs to transfer a suit property to obtain litigation financing. Hence, TPF is not *per se* prohibited in India, with the only restrictions on it being the principles of champerty and maintenance contained in the BCI rules.[49] This position was clarified and reiterated by the

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[46] See Swargodeep Sarkar, *Third Party Funding in International Arbitration: New Challenges and Global Trends*, 3(1) INTERNATIONAL JOURNAL OF LEGAL SCIENCES AND INNOVATION (2020).

[47] AmitaKatragadda et al, *Third Party Funding in India*, CYRIL AMARCHAND MANGALDAS (2020) https://www.cyrilshroff.com/wp-content/uploads/2019/06/Third-Party-Funding-in-India.pdf .

[48] *Id.*

[49] Rule 18, 20, 21, 22,Bar Council of India Rules.

Supreme Court in *Bar Council of India v. AK Balaji* by holding that that "*(t)here appears to be no restriction on third parties (non-lawyers) funding the litigation and getting repaid after the outcome of the litigation*."[50] As a result, arbitral representatives have been dichotomized into those who can enter into TPF agreements (non-advocates) and those who cannot (advocates).

While this dichotomy may be good in law, it is *prima facie* inequitable and prejudicial to the interests of the members of the Indian Bar. On one hand, advocates should not be discriminated against by being the only group being denied the right to enter into TPF agreements for arbitrations. On the other hand, non-advocates cannot be bound by the rules of an exclusive professional preserve or "club" which they are not members of, as was observed by the Supreme Court in the matter of *G, A Senior Advocate of the Supreme Court.*[51] It is submitted that this dichotomy is one of the primary reasons why TPF has not been able to pick up steam in the Indian arbitral landscape.

As has been observed elsewhere and demonstrated by Hong Kong's success with its TPF Code, the advantages of TPF in arbitration can far outweigh its disadvantages, provided appropriate regulations are put into place.[52] Even the High-Level Committee to review the Institutionalisation of

[50] *Supra* note 15.
[51] In Re. Mr 'G' a Senior Advocate of the Supreme Court, (1955) 1 SCR 450 (India).
[52] Meenal Garg, Introducing third-party funding in Indian Arbitration: A tussle between conflicting policies, 6(2) NLUJ LAW REVIEW 71 (2020);See Carolina Carlstedt, And then there were three … Third Party funding in Hong Kong, THOMSON REUTERS PRACTICAL LAW ARBITRATION BLOG (01 February 2019),http://arbitrationblog.practicallaw.com/and-then-there-were-three-third-party-funding-in-hong-kong/.

Arbitration Mechanism in India has favoured the introduction of TPF in Indian arbitration in its report.[53]

In a bid to bridge this gulf, the Supreme Court has held that is up to the Bar Council of India and the Central Government to draft a code of conduct for non-advocates representing parties in arbitrations.[54] Accordingly, these authorities now have the power to amend their rules to allow for TPF in arbitrations. They can choose to either allow all categories of representatives to partake in TPF agreements for arbitrations, continue restricting only advocates from engaging in such agreements [which is highly inequitable], or prevent everyone from doing so [which hampers party autonomy].

Although weighing the individual merits and demerits of TPF agreements in arbitration is beyond the scope of this essay, the international consensus is that allowing TPF in arbitrations bolsters party autonomy without raising most of the ethical concerns associated with such agreements.[55] Hence, it is submitted that the concerned authorities should allow for TPF arrangements in arbitrations by introducing a robust code for the same at the earliest. It is also clarified that till the time such a code is enacted, non-advocates are free to enter into TPF agreements for arbitrations.

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[53] Department of Legal Affairs, *Report Of The High Level Committee To Review The Institutionalisation Of Arbitration Mechanism In India*, GOVT. OF INDIA, https://legalaffairs.gov.in/sectiondivision/report-high-level-committee-review-institutionalisation-arbitration-mechanism-india.

[54] *Supra* note 15.

B. Contingent Fee Agreements – A shift from *status quo*?

The legal position on contingent fee agreements is crystal clear with regards to advocates appearing before courts. Simply put, contingency fee contracts between advocates and clients are not allowed in India since they are against the ethics of the profession.[56] As officers of the courts, advocates should not have any vested interest in the subject matter of their cases so as to prevent them from engaging in unethical practices.[57] Hence, all such agreements are deemed void under Section 23 of the Indian Contract Act ("What considerations and objects are lawful, and what not")[58] and Rule 20 of the BCI Rules ("Contingency fees").[59]

However, in *Jayaswal Ashoka Infrastructures,* the Bombay High Court held that a contingent fee agreement entered into by a non-advocate to represent his client before an arbitrator would not render such an agreement void.[60] The Court also held that representation before an arbitrator could not be considered as representation before the 'Court' under the Arbitration & Conciliation Act and the Civil Procedure Code.[61] Furthermore, the Delhi High Court in *Spentex Industries Ltd. v. Quinn Emanuel Urquhart & Sullivan LLP* held that foreign lawyers/law firms can charge a contingency fee for representing a party in an India-seated arbitration since they are not

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[55] *Supra* note 50. Seemasmiti Pattjoshi &Puranjoy Ghosh, *Third Party Funding Mechanism and Judicial Attitudes and Responses in International Commercial Arbitration*, 29(1) INTERNATIONAL JOURNAL OF ADVANCED SCIENCE AND TECHNOLOGY5645 (2020).
[56] See Shubhangi Maheshwari, Allowing Lawyers charge Contingency Fees: Impact on The Indian Services Market, 2 GNLU JOURNAL OF LAW & ECONOMICS 79 (2019).
[57] *Id.*
[58] § 23, Indian Contract Act, 1872.
[59] Rule 20, Bar Council of India Rules.
[60] *Supra* note 8.
[61] *Id.*

governed by the Advocates Act.[62] Two positions emerge out of these decisions; a) non-advocates can enter into contingent fee agreements since they are not regulated by the Advocates Act or the BCI rules, and b) advocates can also enter into contingent fee agreements for arbitrations since arbitral tribunals are not 'Courts.'[63]

It is to be seen if the Supreme Court upholds the second position in deciding the appeals against the Bombay HC judgment. One thing becomes increasingly clear though that there is no bar on non-advocates from entering into contingent fee agreements, considering the Supreme Court's holdings in *AK Balaji* and *G, A Senior Lawyer*.

Furthermore, it is submitted that allowing advocates to enter into contingent fee agreements for arbitrations is the way forward to maximize the welfare of all stakeholders involved. Since various categories of disputes have been deemed non-arbitrable and have been reserved exclusively for public fora, the likelihood of abuse of contingency fee arrangements is minimal in the Indian context.

Justice Raveendran had once noted that, "it is necessary to find an urgent solution…. to save arbitration from the arbitration cost." It is the author's sincere belief that TPF and Contingency Fee Arrangements are those solutions.

[62] Spentex Industries Ltd. v. Quinn Emanuel Urquhart & Sullivan LLP, CS (OS) 568/2017 (India).
[63] *Id*.;supra note 8.

V. CONCLUSION

Since 2015, India has been working towards becoming the 'hub' of international arbitration, by streamlining its arbitral code to make it more consistent with the prevailing approaches in international arbitration. Achieving this feat requires that the framework embraces, accepts, and entrenches party autonomy throughout the entirety of the arbitral process.[64] A fundamental element of this autonomy is the ability to choose one's representatives and all efforts must be made to ensure that this choice is not impeded by superfluous qualification requirements. Hence, the Indian arbitration community should embrace the judgment in *Jayaswal Ashoka Infra v. Pansare Lawad Sallagar* and ensure that party autonomy is given priority over advocates' existing monopoly over arbitral representation.

In *A. Ayyasamy v. Parmasivam & Ors.*, Justice D.Y. Chandrachud opined that the Arbitration and Conciliation Act should be implemented in a manner that is consistent with the prevailing approaches in international arbitration.[65]As a result, international arbitral fee arrangements such as TPF and Contingency Fee agreements are slowly making inroads into the arbitral framework of the country. In light of these developments, the impetus on party autonomy must be balanced with the interests of the Bar to ensure a smoother and equitable transition. Tasked with this balancing act, the BCI and the Central Government are currently faced with two options; either to embrace the changing scenarios in international arbitration and reap long-term dividends or to stick with the status quo to protect the short-term

[64] Mia L. Livingstone, Party Autonomy in International Commercial Arbitration: Popular Fallacy or Proven Fact?, 25(5) JOURNAL OF INTERNATIONAL ARBITRATION 529 (2008).
[65] A. Ayyasamy v. Parmasivam & Ors., (2016) 10 SCC 386 (India).

interests of particular members of the Bar. The author believes that it is high time that India embraces appropriately balanced versions of these popular tools to achieve its objective of becoming a leading arbitration hub.

India, through its legislature and judiciary, has continually taken a pro-arbitration and pro-party autonomy stance for a better part of the decade. Hence, the author remains hopeful that Indian institutions will usher in the required changes to reinforce party autonomy within the arbitral framework by making suitable amendments to the concerned statutes and opening doors for new market entrants in arbitral representation.

IX. CONFIDENTIALITY CONCERNS IN ARBITRATION DISPUTES: MEASURES NEED TO BE ADOPTED TO ASSURE CONFIDENTIALITY TO PARTIES IN INDIA

- Naina Agarwal[*]

ABSTRACT

Confidentiality or non-disclosure of an arbitration agreement is amongst the various advantages of arbitration which makes parties prefer it over litigation. A clause to this effect is featured in the legislations of various nations all over the world, though in a varied fashion. Various institutional rules also facilitate this assurance of maintaining confidentiality. India too, via a recent Amendment to its Arbitration Act, tends to promise this attribute of confidentiality to the parties. However, the provision has not been drafted suitably as it does not define the extent of the confidentiality clause and the circumstances under which the said clause will become non-operational. This paper is an attempt to analyze whether India is sufficiently committed to providing the parties with a requisite amount of confidentiality and also suggests measures through which the confidentiality clause can be effectively utilized in a Court of Law.

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I. INTRODUCTION

Globally, arbitration has been accredited as the transcendent form of dispute resolution among businessmen and governments for their economic and commercial transactions.[1] Arbitrability in corporate affairs like sale and purchase, mergers and acquisitions, investment, insurance, insolvency and bankruptcy, infrastructure and project finance, capital market and other business transactions has been serviceable in facilitating and promoting trade culture around the world as it unraveled the encumbrances of dispute resolution by courts. Fortunately, inefficiencies, tediousness and high costs involved in the traditional court system,[2] could ideally be replaced with the efficient, amicable, exclusive, certain, neutral, economical, and expeditious arbitration process. Non-interference of local courts and the likelihood of outcome is also ascertained in dispute resolution.[3] The involvement of parties themselves in the process gives rise to creative and realistic business solutions.[4]

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[1] Husain M. Al-Baharna, *International Commercial Arbitration in Perspective*, 3 ARAB L. QUARTERLY 1(1988).
[2] *Id.*, at 3.
[3] Philip R. Wood, *Arbitration or Courts in Financial and Corporate Agreements*, NLS BUS. L. REV. 1 (2015).
[4] Debi S. Saini, *Alternative Dispute Resolution- What it is And How it Works by P.C. Rao and William Sheffield*, 41 JILI 296 (1999).

Additionally, investors and businessmen cite the standard of confidentiality and privacy which is guaranteed in an arbitration, to choose it over litigation because sometimes mere filing of a complaint has the potential to malign ones' public reputation and future career prospects.[5] For example, a filmmaker would not like to have public disclosure of the proceedings for a breach of copyright licensing agreement; an official of a consumer-oriented company would not want provocative allegations of misconduct to be released in the public; a company would necessarily avoid the public scrutiny of its trade secrets and affairs; private investors would not like to have divulgence of their investment strategies or disputes. Therefore, privacy and confidentiality majorly affect the choice of parties to prefer arbitration over litigation.[6] These are indispensable features of arbitration and are considered to be its hallmarks.[7]

It is also important to note that privacy differs from confidentiality as it mandates only the exclusion of strangers from the arbitration process. Confidentiality, on the other hand, puts an obligation upon the parties for the non-disclosure of the arbitration process to the public, in relation to, the content of the proceedings, evidence and documents, addresses, transcripts of the hearings or the awards.[8] Parties come to arbitration not only for privacy but also for guaranteed and assured confidentiality in the proceedings.[9]

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[5] Kevin J. Hamilton and Harry H. Schneider Jr., *Confidential Arbitration Agreements for High-Profile Clients and Senior Executives*, 43 ABA 40 (2016).
[6] Shubham Kaushaland Vijay Purohit,*Arbitration And Conciliation (Amendment) Act, 2015 : Making India An Arbitration Friendly Seat*, 3 RSRR 22 (2016).
[7] Alexis C. Brown, *Presumption Meets Reality : An Exploration of the Confidentiality Obligation in International Commercial Arbitration*, 16 AM. U. INT'L. REV. 971 (2001).
[8] Gu Weixia, *Confidentiality Revisited: Blessing or Curse in International Commercial Arbitration?* 15 AM. J. INT'L ARB. 2 (2005).
[9] *Id.*

Although a global concord to consider privacy as an inherent and quintessential part of arbitration has been established, confidentiality remains indecisive and dubious in arbitration. Notwithstanding jurisdictions like Hong Kong and Singapore which statutorily recognize this duty of confidentiality in arbitration, covering all aspects of it, jurisdictions like America and Australia do not consider it to be inherent in arbitration and hence, grant no statutory recognition. Nevertheless, scholars and academicians agree that there is either an implied or an explicit duty on the existence of confidentiality in all arbitration agreements.[10] It is argued that confidentiality didn't get an explicit recognition as privacy because it was thought that confidentiality was a direct and obvious consequence of privacy itself, and an explicit mention would be redundant. Additionally, some scholars base this obligation of confidentiality on the principle of good faith, and that non-disclosure is inherent to this principle. Accordingly, more and more arbitration legislations throughout the world have been including the said provision for confidentiality.

In India, the recent disclosure of the arbitration dispute of the Amazon-Future group reignites the debate on the issue of confidentiality, asking whether this could be enforced in a Court of Law. The paper, therefore, seeks to analyze the extent and scope of non-disclosure or confidentiality as practised in India and other jurisdictions (Part I) and also would be listing out solutions that would be desirable in facilitating confidentiality concerns in a Court of Law (Part II).

[10] Brown, *supra* note 7.

PART I

II. RECOGNITION OF CONFIDENTIALITY CLAUSE IN DIFFERENT ARBITRATION FRAMEWORKS.

A. Nations statutorily recognize the duty of confidentiality.

As has been mentioned earlier, statutory recognition of confidentiality clauses varies significantly across the nations. Countries like Canada, China, Costa Rica, Denmark, Iran, Italy, Japan and the United States do not have any statutory provision recognizing confidentiality. Conversely, countries like Australia,[11] Singapore,[12] Spain, New Zealand,[13] Hong Kong, France,[14] and Scotland,[15] statutorily recognize this duty of confidentiality. Some countries like Hong Kong also sustain it to enforce in a Court of law. Moreover, in countries like England and France, an implied accountability duty of confidentiality has been recognized through judicial decisions.[16]

B. Conventions and recognition of confidentiality.

There are three major conventions governing arbitration *viz.*, the New York Convention, the European Convention, and the Panama Convention. None of these recognizes the duty of confidentiality in their articles. However, the absence of recognition of such duty in these conventions can be explained because the purpose of these conventions is not to frame rules

[11] Australian International Arbitration Act, 1974, art. 23.
[12] Singapore International Arbitration Act, 1994, § 22.
[13] New Zealand Arbitration Act, 1996, art. 14.
[14] French Code of Civil Procedure, 1981, art.1469.
[15] Scottish Arbitration Act, 2010, Schedule 1 Rules 26 and 27.
[16] C. Dolling Baker v. Merett, (1990) 1 W.L.R. 1205; Nafimco v. Foster Wheeler Trading Company,AG [2003] Rev Arb 143.

for the arbitral process, and the lack of consensus among nations on this issue would not permit such recognition.

C. Arbitration institutions facilitating the clause for confidentiality.

Acknowledging the importance of confidentiality in international commercial arbitration, various arbitration institutions (international as well as national) have incorporated provisions to that effect in their respective institutional rules. International institutions like the London Court of International Arbitration ("LCIA"),[17] the World Intellectual Property Organization ("WIPO"),[18] the Commercial Arbitration and Mediation Center for the Americas ("CAMCA") Mediation and Arbitration, and the International Centre for the Settlement of Investment Disputes ("ICSID"), explicitly recognize the duty of confidentiality in their respective rules. However, the degree of appreciation of the obligation of non-disclosure differs. For example, WIPO rules include a comprehensive recognition, whereas CAMCA casts this duty of confidence only upon arbitrators and institutional administrators and not upon the parties.

Similarly, institutions like the American Arbitration Association ("AAA"),[19] the Japanese Commercial Arbitration Association ("JCAA"),[20] the Hong Kong International Arbitration Center ("HKIAC"),[21] the Singapore International Arbitration Centre ("SIAC"),[22] and the China International

[17] London Court of International Arbitration Rules, 2014, art. 30.
[18] World Intellectual Property Organization Rules, 2002, art. 73-75.
[19] American Arbitration Association Rules, art. 34.
[20] Japanese Commercial Arbitration Association Rules, 1997, Rule 42.
[21] Hong Kong International Arbitration Center Rules, 2008, Rule 39(1).
[22] Singapore International Arbitration Centre Rules, 2007, art. 34.

Economic and Trade Arbitration Commission ("CIETAC"),[23] also realize the rule of non-disclosure although in a dissimilar fashion.

D. Judicial recognition of the duty of confidentiality.

Various judicial decisions, although heterogeneous around the world, agree that non-disclosure or confidentiality form an inextricable characteristic of arbitration. In the English case of *C. Dolling Baker v. Merett*,[24] Lord Parker acknowledged the implied duty of confidentiality in arbitration. A French Court also upheld this implied duty of non-disclosure in *Nafimco v. Foster Wheeler Trading Company*.[25] In Sweden, this duty exists in the form of good faith, as in *A.I. Trade finance Inc v. Bulgarian Foreign Trade Bank Ltd*,[26] it was held that the disclosure of information in the framework of the arbitral proceedings should be considered as a violation of good faith.

III. CONFIDENTIALITY IN INDIAN ARBITRATION REGIME.

In India, arbitration is governed by the Arbitration and Conciliation Act, 1996. Section 42A, inserted through an amendment in 2019,[27] obliges parties, arbitrators and the arbitral institution to "maintain the confidentiality of all arbitral proceedings except award where its disclosure is necessary for the purpose of implementation and enforcement of award." The provision was added on the recommendations of Justice B.N. Srikrishna Committee,

[23] China International Economic and Trade Arbitration Commission Rules, 2004, art. 43(1), 44(2).
[24] C. Dolling Baker v. Merett, (1990) 1 W.L.R. 1205.
[25] Nafimco v. Foster Wheeler Trading Company, AG [2003] Rev Arb 143.
[26] A.I. Trade finance Inc v. Bulgarian Foreign Trade Bank Ltd, Case No. Y 1092-98, SVEA Court of Appeal.
[27] Arbitration and Conciliation (Amendment) Act, 2019, No. 33, Acts of Parliament, 2019.

which was constituted to suggest measures to increase the pace of arbitration in India. However, the language of the provision is drafted so poorly that ambiguity arises as to the magnitude of this duty. Moreover, it doesn't include the circumstances where this duty can be evaded legally. Issues such as whether the existence of arbitration itself should also not be disclosed, whether witnesses would also have to comply with this duty or whether this duty is absolute in nature have also not been answered. If these issues are not expressly addressed, desired results will not be achieved.

Confidentiality in arbitration is not given adequate importance in India, and institutions don't majorly recognize this obligation. The establishment of the New Delhi International Arbitration Centre (NDIAC) is expected to bring in a positive framework for appreciating the confidentiality, secrecy and privacy of the arbitrable matter. Judicial recognition is also limited in this aspect. Though in *Shailesh Dhairyawan v. Mohan Balkrishna*,[28] the Supreme Court assigned confidentiality as one of the attributes of arbitration, but not much has been elaborated upon this mandate.

The following part lists out measures that will help India to enforce the non-disclosure rule in a Court of Law.

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[28] Shailesh Dhairyawan v. Mohan Balkrishna, (2016) 3 SCC 619.

PART II

IV. HOW TO ENFORCE CONFIDENTIALITY IN A COURT OF LAW?

A. Statutory recognition of the duty of confidentiality in definite terms.

A provision clearly mentioning the extent of confidentiality and the parties who are subjected to it should be included in the statute. Extent here implies clarity on confidentiality of the arbitration itself, the documents, transcripts and other written and unwritten material, and the arbitral award.

1. Confidentiality of existence of arbitration itself.

Sometimes, mere disclosure of ongoing arbitration proceedings may disrupt the public image to such an extent that even the existence of the entity becomes difficult. For example, a proceeding related to the breach of a copyright licensing agreement against a filmmaker may prove to be fatal for the whole production house. Therefore, arbitration has become an acclamatory spot for Indian filmmakers,[29] as their reputation remains unharmed. Unproven accusations of misconduct against a consumer-oriented company may also prove to be virulent for all its future transactions, and in such situations, the confidentiality of the arbitration itself is worthwhile.

This has been recognized in the Scottish Arbitration Rules,[30] WIPO Rules,[31] HKIAC Rules,[32] and the SIAC Rules.[33] Undeniably, the

[29] Meghna Agarwal and Nishtha Gupta, *The Scope of Copyright in the Indian Film Industry,* 1 IJAL 46 (2012).
[30] Scotland Arbitration Act, 2010, Rule 26(4)(a) and (b).
[31] *Supra* note18, art. 73(a).

confidentiality of the arbitration itself directs the secrecy of all information associated with it, including, the parties involved, the cause of action, the relief prayed, the amounts involved, etc.

However, an absolute provision to this effect is unattainable, especially for public listed companies. These companies are required by law to furnish their annual reports and accounts, disclosing all information that is likely to have an impact on their share value. For example, the SEBI Listing Obligations and Disclosure Requirements Regulation, 2015,[34] mandates public listed companies to disclose certain information to enable investors to track the performance of the company. Similarly, under the Companies Act, 2013, a company is required to disclose material information by way of the board of directors' report and the annual returns on its website.[35] To address this issue, it has been suggested that disclosure be dependent upon the test of amount of the dispute and the likelihood of success.[36] If the possibility of success is on the higher side, and if the claim involved is minimal, even the confidentiality of the existence of the arbitration can be maintained.

2. Confidentiality of material information pertaining to Arbitration.

Non-disclosure of material information produced during the arbitration process has reached a global consensus and it should be maintained to the maximum extent possible.[37] This is because here, non-

[32] *Supra* note21, art. 39(1).
[33] *Supra* note 22, art. 34(3).
[34] Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015.
[35] Companies Act, 2013, §133, No. 18, Acts of Parliament, 2013.
[36] *Supra* note 8, at 22.
[37] *Id.*, at 12.

revealing is required to maintain trade secrets, trade partners, policies, accounts, transactions and other business-related privileged information.

This obligation has extensively been statutorily recognized and reflected under the rules of various arbitral institutions. In New Zealand, for instance, the Arbitration Act, 1996 commands that in every arbitration agreement, the parties and the arbitral tribunal shall not disclose confidential information.[38] Similarly, Rule 26 of Schedule 1 to the Scottish Arbitration Act, 2010 provides that disclosure of confidential information tantamounts to breach of an obligation of confidence. Institutional rules such as Article 30(1) of LCIA Rules, Article 74(a) WIPO Rules, Article 41(1) of DIAC Rules, and Article 40(2) of JCAA Rules directly prohibit the disclosure of any material with regards to arbitration.

3. Confidentiality of the Award.

The concealment of the arbitral award also needs to be considered while deliberating upon the extent of confidentiality. Generally, it is conceded that confidentiality extends to all orders and decisions of the tribunal. Accordingly, various institutional rules direct in their respective rules to not publish the awards without the consent of the parties. For example, Scottish Arbitration Rules (Rule 26(4) (c)),[39] AAA Rules (Rule 27(4)),[40] Milan Rules (Article 8(2)),[41] LCIA Rules (Article 30(3)),[42] and

[38] *Supra* note 13, §14 B.
[39] *Supra* note15, Rule 26(4) (c).
[40] *Supra* note 19, Rule 27(4).
[41] Milan Chamber of Arbitration Rules, 2020, Article 8(2).
[42] *Supra* note *17*, Article 30(3).

HKIAC rules (Article 39(3)),[43] notably prohibit the publication of the award without the parties' authorization.

Therefore, India too needs to statutorily recognize the mandate of non-publishing of arbitral awards without the parties' consent. However, it is argued that such stipulation would trouble Section 43K of the Arbitration Act, wherein the Arbitration Council of India is instructed to maintain an electronic depository of arbitral awards. To eliminate this complication, the publication of a properly redacted award could be espoused. A redacted award omits the names of the parties, the arbitrators and any such information which is covered by the confidentiality obligation. The whole purpose of the publication of redacted awards is to facilitate research and study even in the absence of parties' consent.

Additionally, not only tribunals but also the courts should uphold the non-disclosure of the arbitral award unless the circumstances requisites. For example, the New Zealand Arbitration Act (Section 14 F),[44] and the Scottish Arbitration Act,[45] prohibits even the courts from publishing confidential information in certain circumstances. The special committee on arbitral reforms also recognized that there are some jurisdictions wherein confidentiality is preserved even in the courts which can also be followed in India.

[43] *Supra* note 21, Article 39(3).
[44] *Supra* note 13, § 46 F.
[45] Scottish Arbitration Act, 2010.

4. Applicability

A definite and unequivocal provision on who can be compelled to guard confidentiality is also needed. India needs to impose this duty not only on the arbitrators, arbitral institutions and the parties, but also upon persons who are acting on behalf of the persons involved in the arbitral proceedings. In countries like Peru, this onus of confidentiality is imposed upon the parties, the secretary, the arbitral institution and every person participating in the arbitral proceedings.[46] The German Arbitration Institute (DIS) Rules also obligate the persons acting on behalf of the parties to maintain confidentiality.[47] Similarly, Scottish Arbitration Rules require the parties and tribunal to take reasonable steps to prevent unauthorized disclosure of confidential information by the tribunal, any arbitrator or a party.

5. Conditions for Disclosure

The law in India should categorically discuss the circumstances under which a party would be redeeming itself from this mandate of maintaining confidentiality. The statutes in New Zealand, Scotland and Australia may assist to draft such limitations on the said clause of confidentiality. Chiefly, the clause should be subjected to any other agreement to the contrary, thereby giving primacy to parties' choice. For example, Section 14 of Arbitration Law of the Dubai International Financial Centre,[48] and Article 15 of the Peruvian Legislative Decree of 2008.[49]

[46] Legislative Decree No. 1071 of 2008, art. 51.
[47] The German Arbitration Institute Rules, 2018, art. 43(1).
[48] Dubai International Financial Centre Rules, 2007 § 14.
[49] Peruvian Arbitration Act, 2008, art. 15.

Secondly, the disclosure should be made only when there is a legal duty to do the same. As has been discussed earlier, the Companies Acts and the governing rules of SEBI thrust a legal duty on public listed companies to reveal all the information which is likely to have an impact on their share value. A legal duty also arises in light of a court order.

Thirdly, other limitations include disclosure in the interest of justice, and to foster public and private interest. Herein, a duty to disclose arises if a State or State entity is a party to the arbitration. For example, in *Esso Australia Resources v. Plowman*,[50] it was stated that when a state is a party to an arbitration agreement because of which consumers are directly impacted, then it is the very right of individuals to be aware of the happenings related to it. Accordingly, India too needs to incorporate some exceptions on this duty of confidentiality in arbitration agreements.

6. Stating the effect of non-compliance.

Lastly, a provision containing the duty of maintaining confidentiality should also include consequences of non-compliance which would ensure its effective adherence.

B. Recognition of Confidentiality by the Arbitral Institutions.

Apart from a statutory recognition under the Act, rules of arbitration institutions in India should also explicitly contain a provision with respect to confidentiality in definite terms. As discussed above, the establishment of the NDIAC is expected to bring in a positive framework for appreciating the confidentiality, secrecy and privacy of the arbitrable matter.

[50] Esso Australia Resources v. Plowman, (1995) 183 CLR 10.

C. Redaction and destruction of confidential information.

Redacting and destructing confidential information is another way of maintaining the secrecy of confidential material. Redaction refers to the process of editing the documents in such a way that only the required information for the purpose of the proceedings is presented. Destruction of the documents after their use would also prevent them from falling into the public domain.

D. Exclusion of Strangers

Additionally, all strangers (like spouses, business partners, media) should be excluded from the hearings and conduct of the arbitration.

E. Meeting New Challenges of online hearing.

The unprecedented Covid-19 pandemic has majorly affected litigation and arbitration, as the traditional method of dispute resolution requiring physical presence of the parties has been replaced with the process of online hearing. Virtual hearings, however, set new challenges to maintain confidentiality and privacy in an arbitration agreement. Issues of security and data privacy are interlinked with online hearings. Such issues can be resolved to a certain extent by adhering to *ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the Covid-19 Pandemic.*[51]

The Note states that the parties shall first consult with the tribunal in order to establish whether the hearing will remain confidential and make

[51] *ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic*, ICC (Apr. 09, 2020), https://iccwbo.org/content/uploads/sites/3/2020/04/guidance-note-possible-measures-mitigating-effects-covid-19-english.pdf.

confidentiality commitments binding. From a more practical standpoint, the Note also prescribes that the parties determine the confidentiality terms for recording the hearing. Thus, the clause of consequences of non-compliance in the statute should clearly recognize the breach of confidentiality in online hearings too.

V. CONCLUSION

Undoubtedly, confidentiality is a major attribute of arbitration agreements. Various legislations and arbitration institutions around the world adhere to this mandate, however, in a varied fashion. Confidentiality in arbitration is not given adequate importance in India, though recently in 2019, through an amendment, a clause to this effect has been added into the Arbitration Act. The language used in the provision, however, is so vague that various related issues remain unanswered. The purpose of the Act to make India a hub of arbitration and to make it as efficient as its rivals in Asia namely Hong Kong and Singapore, cannot be achieved with the clause in its present form.

Therefore, the paper has facilitated some of the measures which can be adopted to ameliorate the condition. Firstly, India needs a confidentiality clause in clear and definite terms, specifying the extent and limitations, to have a practical implication of the same. Then, the same must be recognized in various arbitrations institutions too. Measures such as redaction and destruction of confidential information have also been suggested. The implementation of all these measures will bring India at par with its rivals and it can soon become a global hub of arbitration.