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EXPRESSIONS OF THE EMERGENCY ARBITRATOR: ORDER OR AWARD? LEGISLATIVE PERSPECTIVES

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Abstract

*Emergency Arbitration ["**EA**"] has gained significant traction in global arbitration framework. While the procedure has come to be established in the rules of multiple arbitral institutions, national legislations seem to be lacking. Often discussed questions are the nature of the expression by the Emergency Arbitrator ["**EAr**"] and enforceability thereof essentially needs backing up. This article examines the jurisprudence of EA in various jurisdictions to determine how national courts have considered questions of finality of the award/order, urgency considerations, and the kind of reliefs that may be sought and granted. Through this analysis, we assess how legislative support in recognising EA in the relevant municipal legislation helps in the recognition and enforcement of such expressions.*

I. Introduction

EA secures an urgent interim relief before the constitution of the arbitral tribunal and without approaching national courts.[1] There are many aspects that need to be investigated in EA, specifically with respect to enforcement, and swiftness *inter alia*. However, a bigger question is its recognition, either at the stage of being invoked or at the stage of being enforced. Through the

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1 Grant Hanessian & E. Alexandra Dosman, *Songs of Innocence & Experience: Ten Years of Emergency Arbitration*, 27 AM. REV. INT'L ARB. 216 (2016).

years, several arbitral institutions have made provisions for appointing an EAr. Initially, before the term '*EA*' was recognised, the International Chamber of Commerce ["**ICC**"] introduced its optional pre-arbitral referee procedure; World Intellectual Property Organisation ["**WIPO**"] brought the WIPO Emergency Relief Rules;[2] International Center for Dispute Resolution ["**ICDR**"] was the first to bring out a default procedure for EA in 2006 by way of the ICDR Rules.[3] Subsequently, institutions such as the Singapore International Arbitration Centre ["**SIAC**"], the Hong Kong International Arbitration Centre ["**HKIAC**"] and the Stockholm Chamber of Commerce ["**SCC**"] incorporated provisions pertaining to EA. Certain jurisdictions too have incorporated EA provisions in their national legislations. Singapore by amending the Singapore International Arbitration Act, 2012 and Hong Kong by passing the Arbitration (Amendment) Ordinance in 2013 have incorporated provisions in the national legislations, facilitating enforcement of decisions rendered by the EAr. Other examples include Bolivia (Bolivian Law on Conciliation and Arbitration 2015) and New Zealand (New Zealand Arbitration Act 1996).

EA should be conducted swiftly and should not pre-judge the merits of the case.[4] It is established in the rules of various Institutes that an application for EA must be made on an *inter-partes* basis such that both sides should have the opportunity of presenting their respective cases.[5] The EAr on one hand is a representative of the arbitral tribunal,[6] and an officer of the institution on the other. In such cases the EAr may be willing to defer

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2 *Supra* note 1, at 216.

3 International Centre for Dispute Resolution Rules, 2021, art. 37 (*hereinafter* "ICDR Rules").

4 SCAI Arbitration Rules 2012, art. 26(3) & art. 43; Paris Arbitration Rules 2013, art. 4.7.

5 ICC Rules of Arbitration 2012, Appendix V, art. 5(2) (*hereinafter* "ICC Rules"); The BAC Arbitration Rules, art. 63(4); United Nations Commission on International Trade Law (UNCITRAL), Model Law on International Commercial Arbitration, 1985 U.N.G.A. Res. 40/72 (Dec. 11, 1985), as amended by U.N.G.A. Res. 61/33 (Dec. 18, 2006), art. 18 (*hereinafter* "UNCITRAL Model Law"); The CEPANI Rules 2013 Art. 26(9).

6 Ben Giaretta, *Analysis: Emergency Arbitration - What's the future?* 4, THE RESOLVER, (CHARTERED INSTITUTEOF ARBITRATORS (CIARB); KLUWER LAW INTERNATIONAL, 12 – 14 (2017).

substantive decisions to the arbitral tribunal itself.[7] If not from an institutional perspective, the applicable procedural law would define the relationship of the EAr with the tribunal, depending on which the award/order would be subjected to challenge in the national courts.[8]

Closely associated with incorporation in municipal legislations and institutional rules, are diverging opinions on dealing with enforcement of reliefs given by an EAr. Depending on the nature of relief which is sought, an expression of the EAr may be categorised as an order/award. In this light, the paper outlines the difference between *'order'* and *'award or decree'* (terms used to denote the finality and nature of an expression by an adjudicatory authority) and analyses whether the decision of an EAr can be categorised as an order or award for recognition and enforcement. There are different approaches followed by jurisdictions and arbitral institutions when it comes to implementation.

First, this article it delineates situations in which an EA may arise by analysing the pre-requisites to be fulfilled while invoking EA and emphasises the thresholds for urgency which need to be fulfilled while triggering the mechanism. *Second*, it attempts to understand the nature of a decision rendered by an EAr. This section brings forth a single explanation amongst the multitude of views regarding the enforcement of an EAr's decision. *Third*, it looks at how enforcement of orders/awards have been dealt with by different jurisdictions and sheds light on the various statutory amendments and/or judicial decisions brought about in order to incorporate EA within the legislations of various countries.

This article is divided into three parts. The first part gives an overview of the article. The second part talks about interim measures, laying the foundation for the legal discourse the article seeks to ignite. It further deals

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7 *Id.*

8 *Supra* note 4.

with the interplay of EA within the larger realm of interim measures and hence deals with proposition one and two. This section is further divided into four sub-parts; urgency, courts or EA for interim measures, nature and enforcement of decisions rendered by an EAr— order or award, and tracing finality in municipal law respectively. The last part deals with the third proposition. It is further divided into three sub-parts, the first dealing with arbitral institutions, the second dealing with recognition of an EA within various jurisdictions through multiple channels like statute or court decisions. This sub-part also includes jurisdictions which do not recognise EA. The third sub-part deals with enforcing EA awards/orders.

II. Interim measures & EA

The advent of EA is rooted in the principles of interim measures. Interim measures are temporary reliefs intended to safeguard the rights of the parties until the arbitral tribunal issues an award.[9] The first mention of interim measures in the context of arbitration can be seen in the United Nations Commission on International Trade Law [**"UNCITRAL"**] Working Group, where it was stated that "*the arbitral tribunal may, at the request of a party, order interim measures for conserving, or maintaining the value of, the goods forming the subject-matter in dispute, such as their deposit with a thirdperson or the sale of perishable merchandise*…."[10] The Working Group identified a general formula of measures as opposed to a specific list.[11]It observed that interim measures include measures of conservation of the subject matter and measures in respect of evidence as well as pre-award attachments. Municipal legislations and institutional rules alike have recognised and codified the right to seek interim reliefs in arbitration. Interim measures are *"intended to operate as holding*

9 INDU MALHOTRA, O.P. MALHOTRA ON THE LAW & PRACTICE OF ARBITRATION & CONCILIATION 478 (3d. ed. 2014).

10 United Nationals Commission on International Trade Law (UNCITRAL), Report of The Working Group on International Contract Practices on the work of its Sixth Session, A/CN.9/245, Sept. 22, 1983, ¶ 70, *available at* https://undocs.org/en/A/CN.9/245.

11 *Id.* at ¶86.

orders, pending theoutcome of the arbitral proceedings"[12] and can be of various kinds ranging from injunctions, attachment of property etc.

Article 17 of the UNCITRAL Model Law on International Commercial Arbitration, 1985 ["**Model Law**"] allows parties to seek interim relief of any kind unless otherwise agreed by the parties. Article 17A of the Model Law (as amended in 2006) lays down the dual requirement for a party seeking interim relief.

Judicial developments too have elaborated interim measures and laid down conditions for them to be granted. For example, in *Channel Tunnel Group Ltd.* v. *Balfour Beatty Construction Ltd*,[13] it was held, that the purpose of interim measures is to reinforce the powers of the arbitrators and not to encroach upon them.

It is important to understand the nature of an interim relief, as it may have ramifications, starting from a classification as an order or award. In *Braspetro Oil Services Company* v. *The Managementand Implementation Authority of the Great Man-Made River Project*[14] the ICC tribunal had passed an interim order, not an award, whereby it refused to re-examine a particular aspect of the case at hand despite there being potentially new documents. While reviewing an appeal against the order, the Paris Cour d'Appel held that the qualification of a decision to be an award or an order does not come from the terms used by arbitrators, that in this case, the decision passed was a reasoned one,[15] and both parties were heard in a final manner, therefore it could be an award. The requirements for seeking interim measures were promulgated in the landmark case of *American Cyanamid* v. *Ethicon Ltd.*,[16] a three-pronged

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12 *Supra* note 9, at 480.

13 Channel Tunnel Group Ltd. v. Balfour Beatty Construction Ltd [1993] 1 All ER 664, 688 (HL).

14 Mealey's International Arbitration Report No. 8 (Fr.), Cour d' Appel, Paris, 1 July 1999.

15 YVES DERAINS & ERIC A. SCHWARTZ, A GUIDE TO THE ICC RULES OF ARBITRATION 31 (2005).

16 American Cyanamid Co v. Ethicon Ltd [1975] UKHL 1.

test was laid down for granting interim measures which included the requirement of a prima facie case on the merits of the dispute, the accrual of irreparable harm to the applicant on rejection of the interim measure so requested and the balance of convenience to swing in the favour of the applicant. Although interim measures have gained wide recognition, there are still problems with regard to the enforcement of such orders.

To understand the intertwined nature of Interim Measures and EA, this part of the article is further divided into four sub-parts; (a) Urgency, (b) Courts or EA for Interim Measure, (c) Nature and Enforcement of decision rendered by the EAr—Order or Award?, and (d) Tracing finality in Municipal Law. EA stems in the backdrop of interim relief, two components are considered essential for it to be invoked.[17]

1. *Fumus Boni Iuris* – This term refers to the probability of the party succeeding on the merits of the claim. Parties resorting to EA need to demonstrate their likelihood of success.

2. *Periculum In Mora* – This encompasses both the components of irreparable harm accruing to the party and the balance of convenience test falling in favour of the applicant. It primarily refers to the fact that the urgent relief sought should be granted if the measures sought are essential.

These two requirements parallel the established tests laid down for granting interim measures.

The common understanding between the institutional arbitration rules is that EA can only be invoked when the relief is extremely essential. The question arises on how urgent the need is. In order to obtain clarity, we examine the provisions concerning EA of the major arbitral institutions. At the outset, it is noted that arbitral institutions do not define the term '*urgent*.'

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17 Ravi Singhania, *Emergency Arbitration – Journey from SIAC to India*, CHINA BUSINESS LAW JOURNAL (Mar. 28, 2019), *available at* https://law.asia/emergency-arbitration-journey-siac-india/.

The closest substantive definition can be found in the ICC Rules which state that it must be a situation "*which cannot await the constitution of the arbitral tribunal.*"[18] This may be seen to be further supplemented in the ICDR Rules which state that parties can opt for the procedure unless they have agreed to the contrary.[19] Under ICDR, the situations in which EA can be invoked is elaborated by the provisions which existed earlier. As per Rule 37(5) of the ICDR Rules, the purpose of granting interim relief was linked to the conservation of property. This reasoning is used to strengthen an application for urgent relief. The discretion of deciding whether the situation warrants an EA or not is also left to the EAr so appointed in most cases. For example, the London Court of International Arbitration ["**LCIA**"] brings forth EA by referring to the party that opts for this procedure in case of an *"emergency."*[20] This leaves the choice in the hands of the arbitrator appointed to evaluate the merits of the application and at the same time creates no hindrance with respect to the application for EA itself. SCC approaches the subjectby referring to the parties seeking an EA.[21]

The case of *JKX Oil & Gas plc, Poltava Gas B.V., and JV Poltava Petroleum Company* v. *Ukraine* elucidates the extent to which an EAr can rule on the merits of the case.[22] In this case, an EAr's decision was upheld by the Pecherskyi District Court on the reasoning that the decision did not differ from a foreign arbitral award in terms of its enforcement as laid down under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ["**New York Convention**"]. It is noted that the EAr can view the

18 ICC Rules, art. 29(1).
19 ICDR Rules, art. 6.
20 LCIA Arbitration Rules 2020, art. 9B (*hereinafter* "LCIA Rules").
21 Stockholm Chamber of Commerce (SCC) Arbitration Rules, 2020, Appendix – II.
22 JKX Oil & Gas plc, Poltava Gas B.V. and JV Poltava Petroleum Company v. Ukraine, Case No. 757/5777/15, June 08, 2015, *available at* https://www.italaw.com/sites/default/files/casedocuments/italaw7391.pdf.

merits of the case as the award laid down is understood to be a final one and subject to challenge.

From a brief overview of the various rules, one notes that in order to establish '*urgency*', the parties have to showcase a situation of '*emergency*.' Therefore, one major threshold is proving why the relief sought cannot wait for the constitution of the tribunal so much so that the nature of the emergency in the relief needs to be visible.

A. Urgency

The aspect of urgency in EA connotes two perspectives. First, the extent of the EAr's powers to determine what constitutes '*urgent.*' Second, the aspects which can be included within the ambit of '*urgency*'.

There exists no established definition for what constitutes the term '*urgent.*' However, several judicial developments and arbitral institutions have elaborated on what can fall under the scope of the term.

With regard to the powers of the EAr to delve into the meaning of the term, a large part depends on whether the procedure for EA is contemplated to be opt-in or opt-out. The initial procedures such as the ICC Pre-Arbitral Referee Procedure were opt-in procedures and parties did not make much use of such procedures as local courts may have appeared as an attractive avenue. However, subsequently, several arbitral institutions have moved to the opt-out procedure, where EA can be invoked in a default manner.[23] In such cases where an arbitral institution finds place the EAr need not *per se* determine whether the case needs to be designated as '*urgent*.' The default procedure applies, and the EAr need only adjudicate on the relief sought. If the arbitration agreement is one between the parties without any reference to an institution, then the domestic laws of the relevant

[23] SCC Arbitration Rules, Appendix II; LCIA Rules, art. 9.14, Swiss Arbitration Rules, art. 43.

jurisdiction would apply to determine whether EA can be invoked or not thereby making a legislative backing warranted.

It must also be noted that EA provisions do not disallow the parties from seeking reliance on using other mechanisms. As per Article 29(7) of the ICC Rules, 2012, the "*EAr Provisions are not intended to prevent any party from seeking urgent interim or conservatory measures from competent judicial authority at any time prior to making an application for such measures, and in appropriate circumstances even thereafter.*"[24]

Over the years, there have been various kinds of reliefs sought by invoking EA including but not limited to, injunction requests, seeking to refrain parties from disposing goods, shares, etc. Maintenance of services, storing of products, and other specific requests have also been sought.[25] As per most institutional rules, EArs are also empowered to mandate the applicant to provide security as a pre-condition to granting the relief sought.[26] Thereby mandating a peek into the merits of the case.

B. Courts or EA for interim measures

Considering that the EAr may look into the merits of the case, a fundamental question arises, whether to approach the court or the EA for an interim relief.

A major case which delineated the factors involved while deciding a case for emergency relief was that of *Evrobalt LLC* v. *Republic of Moldova*, which reaffirmed and established certain thresholds.[27] The first criterion evolved was an assessment of the jurisdiction of the claim. *Moldova* contested that the SCC Rules, which incorporated EA provisions, only came into operation

24 ICC Rules 2012, art. 29(7).
25 *Supra* note 22, at 168.
26 ICC Rules 2012, appendix V, art. 6(7); SIAC Arbitration Rules 2016, schedule 1 (*hereinafter* "SIAC Rules").
27 Evrobalt LLC v. Republic of Moldova, SCC Arbitration EA (2016/082).

after the Bilateral Investment Treaty ["**BIT**"] was signed and therefore could not be contemplated under the initial agreement. Thus, there could be no consent with regard to the applicability of the SCC Rules which incorporated EA provisions then. The arbitrators ruled that as the BIT also did not state that any subsequent amendment to the rules would not be applicable therefore the new rules which contained provisions relating to EA would be applicable. Therefore, reaffirming the jurisdiction of the claim along with constructive consent being a possibility was evolved in this case. The scope of parties to approach a Court instead of invoking EA has been discussed in various judgments. In the case *of Seele Middle East FZE* v. *Drake & Scull International SA Co.*[28] it was held that:

> *"…the court under…shall only act if and to the extent that the arbitral tribunal and any arbitral or other institution or person vested by the parties with power in that regard has no power or isunable for the time being to act effectively. Although this is a matter where there is an arbitration under the ICC Rules, it is not subject to the recent change in those rules in the formof the introduction of an EAr to deal with applications."*[29]

Subsequently, in *Gerald Metals* v. *Timis*,[30] a threshold was established with regard to the applicant pursuing a relief sought in court and not by EA. It was held that a court could not grant an order if there was sufficient time to invoke EA. The applicant had requested for an EA under the LCIA Rules which was rejected by the LCIA and the Court stated that it could not accede to the request. Justice Leggatt specifically referred to Section 44 (3) of the Arbitration Act, 1996 ["**British Arbitration Act**"] with regard to the right of parties to approach the courts but a clear preference was shown for the EA.

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28 Seele Middle East FZE v. Drake & Scull International SA Co [2013] EWHC 4350 (TCC).
29 *Id.* at ¶ 33.
30 Gerald Metals v. Timis [2016] EWHC 2327 (Ch).

This position, however, has been updated by the LCIA rules of 2020.[31] Article 9.13 and Article 25.3 have been amended to allow parties to apply to courts for interim relief. While the text of the rules themselves does not pose a categorical shift from the position enumerated in *Gerald Metals*, it remains up to the English Courts to decide how the same is to be interpreted.

In order to determine the threshold of emergency, the three conditions as laid down by the Model Law and *American Cynamide* are used extensively. However, in the subsequent case of *DP World Djibouti* v. *Port de Dijbouti*,[32] the commercial court granted an interim injunction to protect contractual rights arising out of a joint venture agreement. The bench opined that the principles laid down by *American Cynamide* are '*guidelines*' and are not a '*straitjacket*.' The court subsequently held that it is the function of the courts to '*hold the position as justly as possible pending trial*' and make whatever order would best enable justice to be served.

The facet of irreparable harm was first elaborated upon in the case of *Papua New Guinea Sustainable Development Program Ltd.* v. *Independent State of Papua New Guinea*,[33] where it was stated that –

> *"[T]he party requesting provisional measures must demonstrate that, if the requested measures are not granted, there is a material risk of serious or irreparable injury. There are variations in approach or the precise wording used by the ICSID tribunals as to whether this requirement is that of "irreparable" harm, or whether a demonstration of "serious" harm will suffice. In the Tribunal's view, the term "irreparable" harm is properly understood as requiring a showing of a material risk of serious or grave damage to the requesting party,*

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31 London Court of International Arbitration (LCIA), Arbitration Rules 2020, *available at* https://www.lcia.org/media/download.aspx?MediaId=837.

32 DP World Djibouti v. Port de Dijbouti FZCO 2023 EWHC 1189.

33 Sustainable Development Program Ltd. v. Independent State of Papua New Guinea, Award, ICSID Case No. ARB/13/33.

and not a harm that is literally "irreparable" in what is sometimes regarded as the narrow common law sense of the term. The degree of "gravity" or "seriousness" of harm that is necessary for an order of provisional relief cannot be specified with precision, and depends in part on the circumstances of the case, the nature of the relief requested and the relative harm to be suffered by each party; suffice it to say that substantial, serious harm, even if not irreparable, is generally sufficient to satisfy this element of the standard for granting provisional measures."

This interpretation of irreparable harm was endorsed in the context of EA in the case of *Kompozit LLC* v. *Republic of Moldov*,[34] thereby becoming a standard that can be invoked by EArs while determining what constitutes urgency. With regard to the parties establishing a prima facie case on merits, it is opined that it may be a little premature when the standard is applied at the stage of EA itself. The arbitrator need not be concerned about the final outcome and only concentrate in his mandate. It has been opined that the EAr for these reasons may not consider the prima facie merits of the case.

C. Nature & enforcement of decisions rendered by an EAr – order or award?

In terms of ascribing a nature, it is worth deliberating, whether the decision passed by the EAr could be considered an award and most importantly the connotation of the word '*finality*,' whether it covers all orders passed or the final adjudication which ends the dispute between the parties on substantial issues identified by the arbitrators and acts as *res judicata*. The distinction between the terms is that an award can be subjected to scrutiny by the courts whereas an order cannot be.[35] The SCC and SIAC Rules, for instance, label

[34] Kompozit LLC v. Republic of Moldov, Stockholm Chamber of Commerce Arbitration No. 2016/095.

[35] Craig Tevendale, Rutger Metsch, *Procedural Orders or Challengeable Awards? The English High Court Clarifies Its Position*, KLUWER ARBITRATION BLOG (Nov. 01, 2019), *available at* https://arbitrationblog.kluwerarbitration.com/2019/11/01/procedural-orders-or-challengeable-awards-the-english-high-court-clarifies-its-position/.

the decisions as '*awards*' and not '*orders*.'[36] Whereas, the ICC Rules designate the decisions as an order.[37] The Swiss Arbitration Rules have a somewhat hybrid approach where the decisions can be given in the form of preliminary orders or awards.[38] The question of enforcement of such a decision again depends on national laws and international conventions. The New York Convention stipulates that an enforceable award is a decision that is given by the arbitral tribunal, as per the arbitration agreement, and is both binding on the parties and final.[39] However, there is no settled definition of what could be constituted as a final award.[40]

In *Resort Condominiums*, while dismissing the enforcement of an interim injunction the court opined that "*The Convention does not include an interlocutory order made by an arbitrator, but only an award which finally determines the rights of the parties*."[41] The Court also rejected the contention that there can only be a single final award which could be made enforceable under the New York Convention.[42] The reasoning of the Court was based on the principle that an award enforceable under the New York Convention must determine some of the matters which have been referred to the arbitrator and therefore be binding on the parties to the arbitration.[43] An interim measure

36 SIAC Rules 2016, schedule 1(6); SCC Rules 2020, art. 32(3).

37 ICC Rules 2012, art. 29(6).

38 Swiss Rules of International Arbitration, art. 43(8), art. 26(2), art. 26(3).

39 D Di Pietro, *What constitutes an Arbitral Award under the New York Convention*?, *in* ENFORCEMENT OF ARBITRATION AGREEMENTS AND INTERNATIONAL ARBITRAL AWARDS. THE NEW YORK CONVENTION IN PRACTICE 139-160 (Emmanuel Gaillard & D Di Pietro eds., 2008).

40 Fabio G. Santacroce, *The Emergency Arbitrator: A Full-Fledged Arbitrator Rendering an Enforceable Decision?*, 31 ARB. INT'L. 283 (2015).

41 Resort Condominiums Int'l Inc. v. Bolwell (Supreme Court of Queensland 1993) XX YB Comm Arb 628, 640, (1995).

42 *Id.* at 641.

43 The Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, art. V(1)(e), 1958.

did not fulfil this requirement as it could be suspended, rescinded, reopened, etc. by the tribunal.[44]

As per this interpretation, a decision of an EAr would not be final for two main reasons—*first*, such awards usually do not deal with substantive issues or look at the dispute on its merits. *Second*, EA decisions, akin to interim awards, are subject to amendment or revocation. This judgment has been criticised majorly on the ground that many times procedural orders play a large role in determining the substantive rights of the parties,[45] as most interim measures sought by parties are procedural in nature and do not involve adjudication on the substantive rights of the parties to the dispute.[46]

On the other hand, there exists a minority view like that in the United States of America ["**US**"], wherein the requirement of '*finality*' is given a broad connotation so as to include interim awards. This view suggests that an arbitral award is final when it resolves any one of the issues contested by the parties,[47] even if the effect of the decision is temporary. The rationale behind this view is the need to ensure that arbitral tribunals have the necessary tools to perform as an adjudicatory body. The idea, then is to ensure that the rights of the parties are protected to the greatest possible extent, pending the final resolution of the dispute.

Additionally, as per this interpretation, the finality requirement would be fulfilled if the tribunal resolves one of the issues presented, which is the

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44 Resort Condominiums International Inc. v. Ray Bolwell and Resort Condominiums, Pty Ltd, Case No. 389 (Queensland Sup. Ct, 29 Oct 1993), at 642.

45 Abu Manneh Raid, *Emergency Arbitrators: the case for enforcement*, INTERNATIONAL BAR ASSOCIATION, *available at* https://www.ibanet.org/Art./NewDetail.aspx?Art.Uid=C39CA4AB-724F4B30-BCD2-041CD0B9CC14.

46 *Id.*; *see also* Publicis Communications & Publicis SA v. True North Communications Inc 203F 3d 725 (7th Cir 2000).

47 ALI YESILIRMAK, PROVISIONAL MEASURES IN INTERNATIONAL COMMERCIAL ARBITRATION 265 (2005) (*hereinafter* "Ali Yesilirmark").

request for interim relief.[48] In this context, it may be expected that jurisdictions that approve of the enforcement of arbitral interim measures would also enforce the decisions of EAr.[49]

In the USA, the District Court for the Southern District of New York decided that an injunction given by an EAr was enforceable as per the American Arbitration Association Optional Rules for Emergency Measures for Protection.[50] The court stated that equitable relief which was awarded by the EAr was final for the purposes of enforcement, as per section 9 of the Federal Arbitration Act.[51] The court also took into consideration, the need to protect the applicant from time-sensitive irreparable harm which was effectively neutralised by the EAr. Non-enforcement in such a situation would hamper the applicant's rights. Although this decision was given in the context of a domestic arbitration, it is likely that a similar rationale could be used for foreign decisions under the Convention.[52]

In the case of *Chinmax Medical Systems Inc.* v. *Alere San Diego Inc.*,[53] the court had refused to vacate an award rendered by an EAr on the reasoning that it was not '*final*' and could still be reviewed by the arbitral tribunal under the ICDR Rules.

Subsequently, in *Yahoo!* v. *Microsoft*, Microsoft had requested an EA under the provisions of the American Arbitration Association["**AAA**"].[54] The EAr in order to adjudicate on the relief sought, found it necessary to peruse the original underlying contract between the parties and ruled against Yahoo!.

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48 GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION, 240, 2515 (2d. ed. 2014) 2515.

49 *See* ALI YESILIRMAK, *supra* note 47 at 253-254 (2005).

50 Yahoo! v. Microsoft 2013 CV 07237 26 (S.D.N.Y. 2013).

51 Southern Seas Nav Ltd v. Petroleos Mexicanos of Mexico City (SDNY 1985), 606 F Supp.

52 Fabio G. Santacroce, *The Emergency Arbitrator: A Full-Fledged Arbitrator Rendering an Enforceable Decision?*, 31 ARB. INT. 283 (2015).

53 Chinmax Medical Systems Inc. v. Alere San Diego Inc 2011 WL 2135350 (S.D. Cal. 2011).

54 Yahoo! v. Microsoft 2013 cv 07237 26 (S.D.N.Y. 2013).

Yahoo! contended that the EAr had crossed his jurisdiction by basing the decision on the merits of the case. To this the Court responded by stating that the decision of an EAr is '*sufficiently final*' in disposing of the initial separate relief sought by the parties.[55] This reasoning imparts a sufficient degree of finality to the decision of an EAr, thereby strengthening the case for its enforcement under the NY Convention. However, in *Al Raha Group for Tech Services* v. *PKL Services Inc.*, the Court refused to enforce a decision rendered by an EAr on the grounds that it was not a final award.[56] It is significant to note the question of whether orders granting interim measures are understoodas final awards vary from jurisdiction to jurisdiction. A major example of this under English case law can be seen in the case of *BMBF (No 12) Ltd* v. *Harland and Wolff Shipbuilding and Heavy Industries Ltd.*[57] In this case, interim relief was awarded in the form of an award. However, subsequently it was also opined that such relief was an *'exception'* to a final arbitral award being passed.[58]

With regard to the New York Convention, it has been opined that an arbitral interim measure is of utmostimportance. A major argument for interim measures not falling under the ambit of the New York Convention was that it may allow recalcitrant parties to cause further hurdles in the arbitral process.[59] At the same time, one needs to be cognisant about the fact that the New York Convention neither expressly bars the enforceability of an

55 American Arbitration Association provisions: R-38., (b), 2001.

56 Al Raha Group for Tech Services v. PKL Services Inc., No. 1:18-cv-04194 (N.D. Ga. Sept. 6, 2019).

57 BMBF (No 12) Ltd v. Harland and Wolff Shipbuilding and Heavy Industries Ltd [2001] EWCA Civ 862.

58 Ronly Holdings Ltd v. JSC Zestafoni G Nikoladze Ferroalloy Plant [2004] EWHC 1354 (Comm).

59 V. V. Veeder, *Provisional and Conservatory Measures* in ENFORCING ARBITRATION AWARDS UNDER THE NEW YORK CONVENTION: EXPERIENCE AND PROSPECTS, 2, 21, UN Publication Sales No. E.99.v.2, 21 (1999).

interim award nor does make it expressly permissible. However, judicial developments have favoured the former view.[60]

The definition of the term *'award'* does not appear in a comprehensive manner under the Model Law either. It has been erstwhile proposed that the Model Law should contain such a definition.[61] The Working Group on International Contract Parties proposed the following definition, which contains all the elements which most national legislations also impliedly include in defining an award –

> "*a final award which disposes of all issues submitted to the arbitral tribunal and any other decision of the arbitral tribunal which finally determine[s] any question of substance or the question of its competence or any other question of procedure but, in the latter case, only if the arbitral tribunal terms its decision an award.*"[62]

The major reason for the definition not being adopted was the disagreement between what should or should not procedurally constitute as an award. In terms of recognition, the Model Law has been favourable with regard to interim measures. In 1976 itself, in its Arbitration Rules, a provision for interim measures was inserted.[63] It was opined at the time that the development by itself was a big step because earlier arbitrators were not vested with the powers to order interim measures.[64]

These measures authorised tribunals to take interim measures in the form of an '*interim award*' and also provided that a tribunal would be authorised to make such interim or partial award. It has been opined that such language

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60 JAMES E CASTELLO & RAMI CHAHINE, GAR GUIDE TO CHALLENGING AND ENFORCING ARBITRATION AWARDS, CHAPTER 10 ENFORCEMENT OF INTERIM MEASURES (2019) (*hereinafter* "Castello & Chahine").

61 Gerold Bermann, *The UNCITRAL Model Law – its background, salient features and purposes*, 1 ARB. INT'L 6, 6-39 (1985).

62 Working Group on International Contract Practices, UN Doc A/CN.9/246, 192.

63 UNCITRAL Arbitration Rules 1976, art. 26.1, 26.2 & 32.1.

64 GARY B BORN, INTERNATIONAL COMMERCIAL ARBITRATION 1949-1950 (2009).

signalled the intent of the drafters to make such measures enforceable as awards under the New York Convention.[65]

Therefore, even though the term award is not defined in detail under the Model Law, there still exists a substantial recognition of interim measures.[66]

In the context of EA, the Model Law lacks clarity at multiple fronts. Apart from not defining an award it also does not define the term '*arbitral tribunal*', leaving it vague as to whether the decisions of an EAr have the same bearing as that of a conventional arbitral tribunal. The applicability of the Model Law also suffers from lack of implementation, even though several jurisdictions have based their domestic laws on the same, however many of them have not openly adopted it.

From the principles enunciated a *prima facie* case can be made for designating an EA relief as an '*award*' as the relief which is sought and adjudicated upon by an EAr cannot be re-adjudicated. The EAr would dispose of that particular relief sought.[67] The same can later be superseded by asking for subsequent relief but with regard to the initial relief, the adjudication is final.[68]

Imparting a nature may be possible only after having recognised EA legislatively because the effect of an EA has to be assessed on a case-to-case basis just as the difference between an interim relief and an adjudication. The EAr can do both, however the former only being recognised shall be prejudicial to the institution of EA. In the opinion of the authors, EA is stigmatised and also typified to correspond to urgent interim reliefs which leads to referring only pre-conceived category of issues. What if the EAr is called upon to decide the existence of an arbitration agreement or what if the arbitration agreement is a pathological clause are some

65 CASTELLO & CHAHINE, *supra* note 60 at 3.
66 The UNCITRAL Model Law, 2006, Art. 9 & 17.
67 *Supra* note 22, at 19.
68 *Id.*

questions that may require deliberation. An EA award may not be the final adjudication of the rights of the parties but it would be final in its own right with respect to that particular issue between the parties. It provides the requisiteinterim relief for that particular issue and can be considered final on its own accord. Moreover, even if it is a procedural direction, the same would be binding to the parties to the arbitration agreement.

Another facet which is of relevance here is the construction of the decision rendered by an EAr as an order or an award. The decisions of an EAr are recognised to have a legal bearing but when the term '*award*' is used it may become subject to further domestic procedures as well depending on the jurisdiction. An example of such a contestation can be seen in the ICC Rules which state that the decision made by an EAr would be considered to be an order and not an award. The same is enshrined under Art. 29(2) of the ICC Rules where it is stated that— "*the parties undertake to comply with any order made by the EAr.*" This allows the order to reach the enforcement stage without the scrutiny that would be undertaken if it was designated as an award.

D. Tracing finality in municipal law

The award given by an arbitral tribunal and the decree given by a court may be the same, at least to the extent that both are binding on the parties. They are similar in various ways. This section examines the nature of the two, and then sheds light on the nature of decisions rendered by an EAr in this context.

The term decree has been defined by Black's Law Dictionary as[69]–

> "*A decree, as distinguished from an order, is final, and is made at the hearing of the cause, whereas an order is interlocutory, and is made on motion or petition. Wherever an order may, in a certain event resulting from the direction contained*

[69] BLACK'S LAW DICTIONARY 498 (4d. ed., Bryan A. Garner eds., 1968).

in the order, lead to the termination of the suit in like manner as a decree made at the hearing, it is called a 'decretal order'."

Different national legislations have brought forth their own definitions of the term decree. In India, the Code of Civil Procedure, 1908 defines the term under Section 2(2) as "*the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties, with regard to all or any of the matters in controversy in the suit, and may be either preliminary or final.*"[70]

In the case of *Madan Naik* v. *Hansubala Devi,* the Supreme Court of India ["**SCI**"] held that the matter has to be judicially determined for the decision to constitute a decree.[71] It has also been held that a decree ought tobe conclusive and final with regard to the court passing it.[72]

In order to draw the context towards EA, it becomes necessary to differentiate between a '*preliminary decree*' and a '*final decree.*' In this context, the SCI in the case of *Shankar* v. *Chandrakant* held that:[73]

"A preliminary decree is one which declares the rights and liabilities of the parties leaving theactual result to be worked out in further proceedings. Then, as a result of the further inquiries,conducted pursuant to the preliminary decree, the rights of the parties are fully determined, and a decree is passed in accordance with such determination which is final. Both the decreesare in the same suit.

A final decree may be said to be final in two ways:

when the time for appeal has expired without appeal being filed against the preliminary decree or the matter has been decided by the highest court;

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70 The Code of Civil Procedure, 1908, No. 5, Acts of Parliament, 1908, § 2(2).
71 Madan Naik v. Hansubala Devi, (1983) 3 SCC 15.
72 Narayan Chandra v. Pratirodh Sahini, AIR 1991 Cal 53.
73 Shankar v. Chandrakant, AIR 1995 SC 1211.

> *When, as regards to the court passing the decree, the same stands completely disposed of. It is the latter sense that the word 'decree' is used in section 2(2) of the Code."*

Considering this definition, the requirement of '*finality*' appears to be one of the most fundamental requirements of a decree and can be implied to mean and include an award also. However, different jurisdictions have differing requirements when it comes to defining a decree**.** In the UK for instance a decree is subject to judicial review, creating a qualifier on theterm final.[74] Earlier, in the US, a decree was understood as an order passed by the court of equity which determined the rights of the parties to the dispute.[75]

Further, there are also interlocutory decrees.[76] Such decrees are not final and do not fully determine the rights and obligations of the parties. Different jurisdictions have varying approaches to the applicability of such decrees such as in the US, such decrees are generally not appealable except for special cases.[77]

The general construction of a '*decree*' by and large resembles that of an award. An award is understood as a decision of the arbitral tribunal which determines the questions raised by the parties in a final manner.[78] The decision should affect the rights between the parties and must be enforceable.[79]

When we come to decisions rendered by an EAr they fall within the latter part of the spectrum i.e. of interlocutory decrees. The decision made by an

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74 Walter Wheeler Cook, *Powers of Courts of Equity, Part III*, 15 COLUMBIA L.R., 228 (1915).
75 *Id.*
76 BLACK'S LAW DICTIONARY 498 (4d. Ed., Bryan A. Garner eds., 1968).
77 U.S. Code § 1292.
78 NIGEL BLACKABY, CONSTANTINE PARTASIDES & ALAN REDFERN, REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION 503 (6d. ed. 2015).
79 *Supra* note 1, ¶8.34, 8.44.

EAr is not a final adjudication of the rights of the parties. However, the factum also persists that many times parties may get their desired relief from the EAr and then the remaining proceedings, even though can question the EAr's decision, become pre-decided as the remaining demands are not the seminal demands ofthe parties.[80]

Since an enforceable award is both final and binding on the parties, it raises a matter of much controversy and dispute is whether the decision passed by the EAr could be considered an award and thereby enforceable in other jurisdictions.[81] It is clear that the decision of an EAr would fulfil the first two conditions. It is therefore important to determine whether the decision of the EAr can be deemed to be final. This makes it important to note that at the outset there is no settled definition of what could be constituted as a final award. [82]

Given that the objective of EAs is to protect the rights of the applicant in time sensitive issues, it may be argued that the enforcement of an interim measure given by an EAr would lay the foundation for the effective enforcement of the final award which is covered by the New York Convention. Thus, the rationale used by the US domestic courts would arguably uphold the objectives of the New York Convention.

Thus, the problem that exists is that even if the decision rendered by an EAr is understood as an arbitral award, its enforcement would still vary from jurisdiction to jurisdiction. There being no uniform international

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80 Rishab Gupta & Aonkan Ghosh, *Choice Between Interim Relief from Indian Courts and Emergency Arbitrator*, KLUWER ARBITRATION BLOG (May 10, 2017), *available at* https://arbitrationblog.kluwerarbitration.com/2017/05/10/choice-between-interim-relief-from-indian-courts-and-emergency-arbitrator/.

81 D Di Pietro, *What constitutes an Arbitral Award under the New York Convention?, in* ENFORCEMENT OF ARBITRATION AGREEMENTS AND INTERNATIONAL ARBITRAL AWARDS: THE NEW YORK CONVENTION IN PRACTICE 139-160 (Emmauel Gaillard and D Di Pietro eds., 2008).

82 Fabio G. Santacroce, *The Emergency Arbitrator: A Full-Fledged Arbitrator Rendering an Enforceable Decision?*, 31 ARB. INT. 283 (2015).

standard and no uniform acceptance among different jurisdictions regarding the applicability of such an award.

The following section will elaborate upon how the EAr decision is construed by different jurisdictions across the world and the enforceability of the award passed by the EAr whether by statutory principles or by the court evolved principles.

III. Jurisdictional Approaches towards Recognition and Enforcement of Emergency Awards/Orders

In order to deem EA as a more widely accepted mechanism, a uniform standard to construe the decision rendered by the EAr needs to be established. However, in light of the lack of such a standard, the parties to an EA are at the mercy of the statutory laws developed by each country or the laws evolved by the courts therein. The present section delves in detail into the EA provisions made by various arbitral institutions as well as jurisdictions across the world vide statutory provisions and/or court decisions.

A. Arbitral Institutions

In furthering a policy-based approach, arbitral institutions lie at the forefront in advocating the case for EA. The first instance is the ICC's Pre-Arbitral Referee Procedure ["**PAR**"].[83] In this the referee was the EAr. The procedure functioned on an opt-in basis,[84] and even involved the parties resorting to arbitration under the ICC to have a separate agreement for the application of the ICC PAR Rules.[85] These set of rules form an entirely

[83] ICC Pre-Arbitral Referee Procedure Rules, 1990.

[84] Justin D'Agostino, *First aid in arbitration: Emergency Arbitrators to the rescue*, KLUWER ARBITRATION BLOG (Nov. 15, 2011), *available at* https://arbitrationblog.kluwerarbitration.com/2011/11/15/first-aid-in-arbitration-emergency-arbitrators-to-the-rescue/.

[85] *Id.*

separate body of rules from the ICC Rules on Arbitration. The majorreason for the mechanism not attaining success was also the requirement of a separateagreement which took away the streamlined process advantage of institutional arbitration. The need for parties to expressly agree on a particular mechanism separately despite resorting to institutional arbitration was considered cumbersome by many parties when resorting to interim relief.

What is noteworthy is the validity of a decision that was rendered at the conclusion of such a procedure. The question was answered by the Paris Court of Appeal in the case of *Societe Nationale des Petroles du Congo and Republic of Congo* v. *Societe Total Fina Elf E&P Congo*.[86] The contention raised was regarding the annulment of an order passed by the Referee. Under the French Code of Civil Procedure, the Court has the power to annul an arbitral award. Therefore, the question that the Court had to first answer was whether the order passed by the referee amounted to an arbitral award.[87] The Court answered the same in the negative by stating that the PAR Rules did use the term '*arbitration*' therefore the Referee's decision could not amount to an arbitral award.[88]

However, subsequently several arbitral institutions developed rules specifically for EA. The first in this regard was the ICDR. Under Art. 6 of the ICDR Rules, power to seek emergency measures is given.[89] It is noted that the nature of the dispute with regard to which the relief is sought must be that it is soughtas interim relief and for the protection of property.

It is noted that it has been stated that the decision of the EAr will be made in the form of an '*interim award*' or an '*order*.' This by itself fulfils the requirement of being qualified as an award. Moreover, it also provides for

86 Societe Nationale des Petroles du Congo and Republic of Congo v. Societe Total Fina Elf E&P Congo, Judgment of 29th April 2003.

87 *Id.*

88 *Supra* note 86.

89 ICDR Rules 2021 (as amended in 2014), Art. 6.

a formal mechanism with which the EAr can sit on the tribunal by the consent of the parties once the tribunal has been constituted.[90]

The HKIAC amended the HKIAC Administered Arbitration Rules ["**HKIAC Rules**"] in 2018 to incorporate provisions for EA.[91] The HKIAC Rules bring forth certain interesting facets. They appear in Article 23.3 of the HKIAC Rules and the nature of disputes to be submitted to EAr are those in which relief is sought as conservatory measures or for preservation.[92] They warrant an agreement to be made between the parties to make good the EAr's decision without any delay. The nature of the relief granted is considered to be equivalent to an order of the High Court of the Hong Kong Special Administrative Region.[93]

These powers given to the EArs are not without qualifiers and can be terminated or suspended in the following conditions–[94]

- When the arbitral tribunal subsequently constituted renders a final arbitration award.
- The arbitration procedure is by itself terminated.
- The arbitral tribunal has to be constituted within a period of ninety days from the date of decision of the EAr, failing which the decision is not enforceable.

The procedure laid down does allow the EAr to function in an unhindered manner and at the same time tackles the problem of the arbitral tribunal being unable to interfere with the relief granted by the EAr. This reduces the possibility of frivolous claims and other such impediments.

90 ICDR Rules 2021, Clause (4) and Clause (5), Art 6.
91 HKIAC Administered Arbitration Rules, 2018.
92 HKIAC Rules 2018, Art. 23.3.
93 Hong Kong Arbitration (Amendment) Ordinance, 2013, art. 22B (1) (Hong Kong).
94 Hong Kong Arbitration (Amendment) Ordinance, 2013.

The International Institute for Conflict Prevention and Resolution ["**CPR**"] in its 2019 CPR Rules for Administered Arbitration of International Disputes also included provisions for emergencymeasures. The provisions for the same are contained in Article 14.[95] The nature of the decision to be made as an award or order is the same as that of the ICDR. What is noteworthy is Clause14.9 which sheds light on the nature of disputes that may be subjected to EA which includesmeasures for the preservation of assets, conversation of goods, sale of perishable goods, etc.[96]

The enumerated kind of disputes are not exhaustive in any manner but they do shed light on the kind of situations in which EA can be invoked in the first place. Also, the applicability of the rules is such that they would apply to an arbitration unless the parties specifically opt out of it.[97]

The SCC Rules themselves state that the power of the tribunal in granting interim measures is the same as the power of an ordinary tribunal.[98] The LCIA Rules also advocate the case for an EAr wherein it states that an arbitral tribunal includes a sole arbitrator which includes an EAr.[99] This kind of construction allows the decision of the EAr to be enforced without any hurdle as its ambit has been brought within the scope of the *'arbitral tribunal'* itself. Article 9B of the SCC Rules deals with the EAr and contains provisions similar to other institutions.

95 ICDR Rules 2021, art. 14.

96 ICDR Rules 2021, art. 14.9.

97 *Arbitration in 2017: Opting out of Emergency Arbitrator provisions*, SIMMONS SIMMONS (Jan 05, 2017), *available at* https://www.simmons-simmons.com/en/publications/ck0ahematnck60b33af1gthif/15-arbitration-in-2017-opting-out-of-emergency-arbitrator-provisions.

98 SCC Arbitration Rules 2020, art. 8, 37.

99 LCIA Arbitration Rules 2020, art. 5.2.

From the policy perspective, the following principles appear to have gained international recognition in the context of EA:[100]

1. The EAr does fall within the definition of an arbitral tribunal, therefore the decisions rendered by an EAr should ideally carry the same weight as the awards made or orders passed by an arbitral tribunal.

2. The procedure can be an opt out procedure, so that parties can expressly choose to not make it applicable, but it would otherwise exist as a swift recourse for parties to seek urgent interim relief.

3. The decision of an EAr is recognised to be made in the form of an interim order or award.

It is noted that such legislative support is essential to not only ensure the widespread acceptance of EA as a mechanism but also to ensure the enforcement of such awards. A potential solution can be a uniform recognition for enforcement of such awards through international instruments such as the New York Convention, however, even a uniform recognition cannot counter the approaches followed by different jurisdictions.

Even though several institutions do recognise the mechanism of EA however there still exists a lacuna with regard to the enforceability of awards rendered by an EAr. This is mainly due to the fact that some jurisdictions still do not consider the mechanism of EA valid. There are also certain jurisdictions where EA has not found its way in the national legislation but is at the same time widely accepted in the purview of judicial decisions. In this light, and in order to streamline the process, it becomes imperative to formulate legislative support on a national level. This would not only

[100] Patricia Louise Shaughnessy, *Chapter 32: The Ear, in* THE POWERS AND DUTIES OF AN ARBITRATOR: LIBER AMICORUM PIERRE A. KARRER 339-348 (Patricia Louise Shaughnessy & Sherlin Tung eds., 2017).

provide recognition to emergency arbitral orders/awards but wouldalso lead to speedy and seamless enforcement of the same.

B. Recognition of an EA within various jurisdictions

Different jurisdictions across the globe have accordingly treated the award/order passed by the EAr in different ways. This section seeks to shed light and draw a comparative analysis between jurisdictions where EA is either statutorily recognised or the arbitral institutions within that jurisdiction recognise it, there is another category of jurisdictions, where municipal courts have recognised and enforced EA award/orders.

i. Jurisdictions that have incorporated EA in their statutes

Singapore

The foremost example in this regard is the Singaporean International Arbitration Act, which was amended in 2012, to ensure that orders passed by an EAr are held to be legally at par with final awards as rendered by tribunals.[101] It has been done by adding Section 2(1) of the Act to include "*EAr*" in order to define "*Arbitral Tribunal*." This policy support, coupled with the institutional rules of the Singapore International Arbitration Centre, being the SIAC 2016 Rules which give the EAr the power to make any order or any kind of interim reliefthat they consider fit,[102] makes Singapore one of the jurisdictions to have accepted EA in a very efficient manner. Enforcement of emergency decisions under this piece of legislation is granted by virtue of sections 2(1) and 12(6).[103] Section 12(6) governs the interim relief made by an EAr seated in Singapore. Section 12(6) provides that "*all orders or directions—which pursuant to Section 12(1) include orders and directions on interim relief—made or given by an arbitral tribunal—thus, including an EAr, pursuant to Section 2(1)—shall, by leave of the High Court or a Judge thereof,*

101 Singapore International Arbitration Act (Cap. 143A), 1994.
102 SIAC Rules 2016, schedule 1, item 8.
103 Singapore International Arbitration Act 2012, § 2(1), 12(6).

be enforceable in the same manner as if they were orders made by a court."[104] Whereas on the other hand, section 27(1)(a) provides that the definition of "*award*" under the New York Convention includes interim orders made by a tribunal seated outside Singapore. It thereby permits foreign interim orders to be enforced as "*awards*" under the scheme of the New York Convention.[105]

The High Court of the Republic of Singapore further clarified the scope of enforcement of foreign EA awards vide its judgement in *CVG* v. *CVH*.[106] It was held that while foreign emergency awards were recognised owing to the legislative intent and scheme ofthe International Arbitration Act, 1994, the enforcement of the said award was stalled due to violation of the principles of natural justice.

Netherlands

Enforcement of interim measures issued by the EAr may also be granted under specialised legislation on the enforcement of emergency decisions. Article 1043b(2) of the Dutch Code of Civil Procedure provides for an EAr before the institution of the arbitral proceedings on merits. Pursuant to Article 1043b(4), the decision of such an EAr will be considered an arbitral award to which the municipal provisions would apply that apply to an arbitral decision rendered in the Netherlands.[107]

New Zealand

A similar provision is seen in New Zealand where Art. 2 (1) of the New Zealand Arbitration Act, 1996 was amended to bring the EAr within the ambit of the arbitral tribunal.[125] Apart fromrecognising recognising EA, the

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104 *Id.*

105 Fabio G. Santacroce, *The Emergency Arbitrator: A Full-Fledged Arbitrator Rendering an EnforceableDecision?* 31 ARB. INT. 306, 306-310 (2015).

106 CVG v. CVH, 2022 SGHC 249.

107 Dutch Arbitration Act, Code of Civil Procedure, Book IV (1986) [Wetboek van Burgerlijke Rechtsvordering], art. 1043b.

amendment has a significant effect on the arbitration landscape of New Zealand. It has been a jurisdiction where directly approaching the courts to seek urgent relief has been encouraged. In the case of *Safe Kids* v. *McNeill*,[108] it was held that a court's power to grant interim measures was 'co-extensive' with that of the arbitrator. Also, in the case of *Discovery Geo* v. *STP. Energy Ltd*.[109] it has been upheld that *ex-parte* interim orders can be passed by courts in support of arbitration agreements. It is opined that in such a jurisdiction, EA provisions would add as a supplementing mechanism and not as an additional avenue to seek urgent interim relief per se.

Hong Kong

Hong Kong passed the Arbitration (Amendment) Ordinance, 2013 which gave the power to the Courts to grant leave to enforce decisions rendered by EA.[110] The legislation lays down a favourable regime for the enforcement of emergency decisions. Article 22(B) sets forth that any interim relief awarded by an EAr will be enforceable in Hong Kong, irrespective of the seat of the EA.[111] However, enforcement will only be allowed if the emergency decision is made temporarily and for one of the reasons listed in Article 22(B) paragraph 2 of the Ordinance if it is made outside the country.[112]

The enforcement of the relief so granted is viewed favourably both inside and outside Hong Kong.[113] At the same time a slight qualifier was based by quantifying the kinds of interim relief which could be sought, the list

108 Safe Kids v. McNeill [2012] 1 NZLR 714.

109 Discovery Geo v. STP Energy Pte Ltd [2013] 2 NZLR 122.

110 *Supra* note 93.

111 *Supra* note 93, art 22(B).

112 Fabio G. Santacroce, *The Emergency Arbitrator: A Full-Fledged Arbitrator Rendering an EnforceableDecision?*, 31 ARB. INT. 306, 306-310 (2015).

113 Haifeng Li, *First Emergency Arbitrator Proceedings in China and Enforcement in Hong Kong, 2018*, GLOBAL ARBITRATION NEWS (Oct. 09, 2018), *available at* https://globalarbitrationnews.com/first-emergency-arbitrator-proceedings-in-china-and-enforcement-in-hong- kong/.

includes—relief sought to maintain status quo, to restrain from actions which may cause any prejudice or harm to the arbitral process, preservation, security for costs, etc.[114] The qualifier list is by itself broad and at the same time gives some indications of how national legislations are proceeding with respect to enforcement on a cross-jurisdictional scale.

Bolivia

Bolivia, by amending the Bolivian Conciliation & Arbitration Law, 1997, has incorporated EA into their legislative frameworks.[115] The major feature that the amendment provides for is that if there is a need for further assistance in enforcing an EA award, then judicial assistance will be provided by a competent judge who would issue a compliance order within a span of three days from the date of decision notification by the respective arbitral institution.[116] It is imperative to note that the competent judge can only review whether the decision so given conforms to the following rules of public order: that it may only affect the rights of the goods,rights and obligations of the parties, and that a request for arbitration must be filed within fifteen days of the interim order.[117]

This becomes one of the most important developments in moving towards a policy-based approach where apart from widespread acceptance, the Courts have the power to enforce such awards.

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114 *Id.*

115 Bolivian Conciliation and Arbitration Law no 708, Art. 67–71.

116 Bolivian Conciliation and Arbitration Law no 708, Art. 71(II).

117 SAI RAMANI GARIMELLA & POOMINTR SOOKSRIPAISARNKIT, 60 YEARS OF THE NEW YORK CONVENTION KEY ISSUES AND FUTURE CHALLENGES, CHAPTER 5 EMERGENCY ARBITRATOR AWARDS: ADDRESSING ENFORCEABILITY CONCERNS THROUGH NATIONAL LAW AND THE NEW YORK CONVENTION, 73 (Kluwer Law International, 2019).

ii. Jurisdictions which have developed jurisprudence around EA vide Court decisions.

USA

Another prong to the various approaches developed can be seen in the US where no express legislation has been passed in favour of making EA decisions enforceable. However, favourable judicial pronouncements have been given.

In the case of *Rocky Mt. Biologicals Inc. and Skyway Purified Solutions Inc.* v. *Microbix Biosystems Inc. and Irvine Scientific Sales Company Inc.*,[118] the Court had refused to set aside an EAr's award by giving a pro-arbitration approach that the parties had decided to resolve disputes via arbitration and therefore there should be minimum interference by the courts. Subsequently, in the case of *Sharp Corporation and Sharp Electronics Corporation* v. *Hisense USA Corporation and Hisense International (Hong Kong) America Investment Co.*,[119] the Court refused to revisit the merits of a decision rendered by an EAr. These developments indicate that the US landscape looks favourably upon the finality of the decision given by an EAr.

In the case of *Yahoo!* v. *Microsoft Corp.*,[120] it was held by the Southern District of New York that a decision by an EAr under the AAA-ICDR Rules was valid. It was enunciated that[121] "*if an arbitral award of equitable relief based upon a finding of irreparable harm is to have any meaning at all, the parties must be capable of enforcing or vacating it at the time it is made*."

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118 Rocky Mt. Biologicals Inc. and Skyway Purified Solutions Inc. v. Microbix Biosystems Inc. and Irvine Scientific Sales Company Inc. 986 F. Supp. 2d 1187 (D. Mont.2013).

119 Sharp Corporation and Sharp Electronics Corporation v. Hisense USA Corporation and Hisense International(Hong Kong) America Investment Co. 292 F. Supp. 3d 157 (DC 2017).

120 Yahoo! Inc. v Microsoft Corp [2013] 983 F Supp 2d 310.

121 Yahoo! Inc. v Microsoft Corp [2013] 983 F Supp 2d 310, 319.

From the various jurisdictions favouring EA, the following principles in support of a policy- based approach can be extracted –

1. The decision rendered by an EAr may be considered on the same pedestal as that of a Court order for purposes of enforcement.

2. Additionally, judicial assistance may be granted to enforce awards made in an EAr inorder to ensure speedy access to justice and compliance with the decision.

3. Avoidance of irreparable harm, maintenance of status quo and preservation are important factors to be considered while making an EA award enforceable.

India

India appears to be a jurisdiction, which lacks any significant legislative development pertaining to EA. However, lately, this mechanism has been accepted by the courts. The Supreme Court, in *Avitel Post Studioz* [122] upheld the award passed by the EAr for an arbitration seated in Singapore. Thereafter, a transcendent development of EA in India was seen in *Amazon.Com NV Investment Holdings Llc* v. *Future Retail Ltd. & Ors*,[123] wherein the SCI, while setting aside the judgement of the Division Bench of the Delhi High Court, stated that a party after agreeing to be governed by the institutional rules of an Arbitration Centre and participating in the EA proceedings, after losing cannot turn around and claim the award to be a nullity or *coram non judice*. Additionally, Section 17 of the Arbitration and Conciliation Act, 1996 ["**Arbitration Act**"] only refers to interim measures or provisional measures.[124] There is no clear distinction of whether the

[122] Avitel Post Studioz Limited & Ors. v. HSBC PI Holdings (Mauritius) Limited, 2020 SCC OnLine SC 656.

[123] Amazon.Com NV Investment Holdings LLC v. Future Retail Ltd. & Ors, (2022) 1 SCC 209.

[124] Arbitration and Conciliation Act, No. 26 of 1994, §17(2).

measures are to be made in the form or orders, awards or otherwise. The SCI stated that the parties are granted complete autonomy by the Arbitration Act to have a dispute decided in line with the institutional rules. This includes the EAr delivering 'interim' orders described as awards. Such orders, can be enforced under the provisions of Section 17(2) of the Arbitration Act and accordingly, the court opined the following:

> "*The Delhi High Court judgment in Raffles Design International (India) (P) Ltd. v. Educomp Professional Education Ltd. dealt with an award by an EAr in an arbitration seated outside India (as was mentioned in the Srikrishna Committee Report). What is of significance is that the said Report laid down that it is possible to interpret Section 17(2) of the Act to enforce Emergency Awards for arbitrations seated in India, and recommended that the Act be amended only so that it comes in line with international practice in favour of recognising and enforcing an emergency award.*"[125]

A legislative way to incorporate EAr in the municipal legislation i.e., the Arbitration Act was suggested by the Report of the 246th Law Commission of India by amending section 2(1)(d) to include EAr within its purview.[126] The consequence of the same would be statutory support for a decision by the EAr through the local legislation and not the *lex arbitri*.

However, the Court was conscious of the legal position that under Part II of the Arbitration Act, interim orders could not be enforced. Furthermore, the Court ruled that the parties had to rely on section 9 of the Arbitration Act in order to execute the EAr's ruling since Section 17 could not be applied in an arbitration with a foreign seat. This was on account of the scheme of the Arbitration Act that creates different regimes for India-seated and foreign-seated arbitrations—and not because the order was an order of an EAr. Thus, by implication, the Court equated the order of a foreign-seated EAr with interim measures of a foreign-seated arbitral

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125 Raffles Design v. Educomp, (2016) SCC Online Del 5521.

126 LAW COMMISSION OF INDIA, GOV'T OF IND., REPORT NO. 246 (2014).

tribunal. Thereafter, in *Ashwani* Minda v. *U-Shin*, which was seated in Japan, the Delhi High Court observed that the order passed by an EAr had the same character as an interim order passed by an arbitral tribunal, and in terms of Section 9(3) of the Arbitration Act, a court ought not to intervene if an EAr has already been appointed.[127] This finding was not interfered with by the Division Bench of the Delhi High Court. Importantly, the Division Bench also held that having failed to obtain relief from the EAr, a party could not maintain an application under Section 9 of the Arbitration Act seeking the same relief before a court. Thus, the Division Bench impliedly recognised that the forum of an EAr would serve as an alternate forum to proceedings before national courts under Section 9.

Germany

In Germany, neither the arbitration law nor the German Arbitration Institute [**"DIS"**] Sports Arbitration Rules, 2016 ["**DIS Rules**"] explicitly provide for EA. Although Section 20 of the DIS Rules empowers parties to opt for an arbitrator prior to the constitution of a tribunal.[128]

This, however, does not imply the nullity of EA within the jurisdiction. The Bavarian higher regional court,[129] stated that if the parties had agreed to DIS rules, a tribunal is authorised to order protective measures through interim relief as per Article 25 of the DIS rules. Additionally, it was held that, provided that the protective measure issued by the arbitral tribunal is within the scope of what the court could order, a closer control of the same by the courts is not required.

United Kingdom

127 Ashwani Minda v. U-Shin Limited, (2020) SCC Online Del 721.

128 DIS Sports Arbitration Rules, 2016 (Germany). *Available at* https://www.dis-sportschiedsgericht.de/en/tools-resources/sport-arbitration-rules.

129 BayObLG, Beschluss v. 18.08.2020 – 1 Sch 93/20 (Germany).

The final jurisdiction to be considered in this regard, which represents an amalgamation of thevarious approaches is that of United Kingdom ["**UK**"]. No specific legislation has been passed in favour of EA even though the LCIA has several provisions for the same.

Currently, the British Arbitration Act states that any party seeking urgent relief can approach the Courts for urgent measures and the Courts can subsequently pass orders when it comes with regard to the preservation of assets or evidence.[130] A qualifier to the same exists in Section 44(5) of the British Arbitration Act where it is stated that the power of the courts can only be invoked when the tribunal lacks the same.[131]

The distinction between Section 37 of the Senior Courts Act and Section 44 of the British Arbitration Act was brought into the limelight in *AES Ust Kamenogorsk* v. *Ust Kamenogosk Hydropower Plan*.[132] The Court here observed that arbitration agreements contained both positive and negative obligations. The positive obligation was to seek relief through arbitral proceedings. The negative obligation is to refrain from seeking a relief from alternate forums such as courts. While looking at the distinction between the two provisions, the Court held that the British Arbitration Act did not restrict the court's powers under the Senior Courts Act. In this regard, it was opined that in situations where Section 44 would be applicable, it would be principally wrong to apply section 37 of the Senior Courts Act. Thus, in a situation where the arbitration had already commenced or was close to commencement and a remedy was required for which there was no urgency, it would be wrong for the court to intervene under Section 37 of the Senior Courts Act. However, in a situation where there is no *'arbitration in being and none realistically in prospect'*, Section 44 is not applicable.[133] Thus, it could be concluded that for cases outside the scope of Section 44 of the Arbitration

130 The Arbitration Act, 1996 §44(3) (Eng.).
131 The Arbitration Act, 1996 §44(5) (Eng.).
132 AES Ust Kamenogorsk v. Ust Kamenogosk Hydropower Plan 2013 UK SC 35.
133 English Arbitration Act, 1996, §44 (Eng.).

Act, courts could intervene under Section 37 of the Senior Courts Act. When parties apply to national courts for interim relief, they may face concerns such as unfavorable jurisdiction, delay in court proceedings, etc. Beyond courts, in arbitrations (before EA) interim relief could be sought only after the Tribunal had been constituted which may be delayed owing to dilatory tactics, etc. However, EA provides an avenue to avoid these hindrances and ensure speedy and efficient dispute resolution.

The Law Commission observed that under Section 44 (5) of the Arbitration Act, majority of the consultees held the opinion that under Section 44 (4) a court cannot be said to be trespassing unless permitted by the tribunal or the agreement of the parties to approach the court for the interim measure.[134]

In the specific case of extreme urgency or necessity, the court could intervene in order to preserve evidence or assets and restore the status quo. This would not involve decision-making which is a role specifically of the arbitral tribunal. These include instances when the urgency overrides the time period of the EAr provisions. It has also been argued that if Section 44(5) is removed, it would invite a greater court intervention and that the section serves the purpose of setting out the prevailing position with regard to the relationship between the court and the tribunal. It is argued that Section 44 already allows an arbitral party to apply to the court, even when the EA provisions have been agreed to. And hence, for the above-mentioned reasons, the repeal or amendment of Section 44(5) would not be required.

A major case concerning EA appears to be that of *Gerald Metals SA* v. *Timi,*[135] where it was held that the EAr does have the power to grant relief subject to the fact that the arbitration agreement contains a clause for the same and there is sufficient time for the parties to invoke and seek relief via

134 LAW COMMISSION, REVIEW OF THE ARBITRATION ACT 1996: FINAL REPORT AND BILL, 2023, HC 1787 (UK).

135 Gerald Metals SA v. Timis [2016] 2327 (EWHC) (Ch).

the route. The problematic part of the judgment was that it also held that courts do not have the power to grant urgent interim relief. This raised a fundamental problem with respect to party autonomy to choose the forum of their choice even in light of an arbitration agreement.

The position was further elaborated upon in the case of *ZCCM Investments Holdings* v. *Kanasanshi Holdings Plc & Anr.*[136] The position brought forth in this case, was similar to French law, in that the Court held that the substance of the decision apart from the form will be looked at to determine whether the decision of an Ear will be considered to be an award or not.

The pro-arbitration approach of English courts continued in the case of *Schillings International LLP* v. *Christopher Howard Scott*[137] where the urgency of the interim relief was considered by the courts. The deputy judge held that an absence of urgency, alone would be fatal to an interimrelief application. The materials which the claimant sought to recover could be sought through arbitration as well. The judge found a lack of necessity for the courts to step in. Additionally, it was also opined that "*it is for the arbitral tribunal to decide what documentation and information should be provided and he will have to take into account the necessity for any information sought….it would be inappropriate for the court to step into that domain*"[138]

In the recent case of *SRS Middle East* v. *Chemie Tech*,[139] the English Commercial Court, relied on the cases of *Kallang No. 2*,[140] *Sam Purpose*[141] and *Angelic Grace*,[142] to refuse injunctive relief. The Court held that while there

136 ZCCM Investments Holdings v. Kanasanshi Holdings Plc & Anr. [2019] 1285 (EWHC Comm).

137 Schillings International LLP v. Christopher Howard Scott [2019] EWHC 1335 (Ch*).*

138 *Id.* ¶42.

139 SRS Middle East FZE v. Chemie Tech DMCC [2020] EWHC 2904 (Comm).

140 Kallang Shipping v. Axa Assurances and Comptoir Commercial Mandiaye Ndiaya [2008] EWHC 2761 (Comm).

141 Sam Purpose AS v. Transnav Purpose Navigation Ltd [2017] EWHC 719 (Comm).

142 Kompozit LLC v. Republic of Moldova, Stockholm Chamber of Commerce Arbitration No. 2016/095.

exists wide and general wording on the type of interim relief that can be sought, this cannot be read as permitting relief which requires a final determination of the merits of the case.[143] Such provisional measures would be seen as a breach of the arbitration agreement.

The English approach of having no specific legislation but at the same time, taking into account that the decision by an EAr is valid as long as it is practically within the powers of the arbitrator making it is also a major factor that furthers the argument for a policy-based approach, which would also avoid such a problem at all levels.

Finally, it is also noted that none of the jurisdictions have raised a question on the competence of an EAr. Therefore, it is not that the idea of an EAr is completely rejected in such jurisdictions and that an EAr cannot outright have the powers of an arbitral tribunal.

iii. Jurisdictions which do not recognise Emergency Arbitration

Most jurisdictions that do not accept EA are the ones that reject the enforcement of interim measures. Many of them propagate the requirement that only final awards as opposed to interimawards are enforceable.

An example of the same appears to be Sweden where interim measures themselves are not considered enforceable.[144] Similarly in Australia, it has been confirmed by the Supreme Court that an interlocutory order would not be considered as an enforceable award. It was stated that, "an award which has determined some or all of the issues submitted to the arbitrator for determination, rather than to an interlocutory order."[145]

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143 Kompozit LLC v. Republic of Moldova, Stockholm Chamber of Commerce Arbitration No. 2016/095, ¶44.

144 P SHAUGHNESSY, INTERIM MEASURES' IN EDS U FRANKE AND A MAGNUSSON, INTERNATIONAL ARBITRATION IN SWEDEN: A PRACTITIONER'S GUIDE (Kluwer Law International 2013).

145 Re Resort Condominiums (1993) 118 ALR 655.

A somewhat unique approach is seen under French law, where all tribunal decisions that qualify as awards are considered enforceable by the Courts. The definition of an award however in this context as brought forth by the case of *Groupe Antoine Tabet* v. *République du Congo*[146] was, "resolve in a definitive manner all or part of the dispute that is submitted to them on the merits, jurisdiction or a procedural matter which leads them to put an end to the proceedings."

This definition restricts EA awards as they are provisional in nature and can be further adjudicated and altered by the tribunal. However, this approach of seeing the substance of the award is a facet which can lead many jurisdictions to decide in favour of EA as the substance of an EA award, many times, does involve a determination of the rights of the parties.

C. Enforcing EA awards/orders:

In the practical realm, two situations arise with respect to enforcing an EAr's award/order for interim relief; the first is when the EAr is constituted in the same jurisdiction where the execution of the same is sought and the other is where the constitution of the EAr is constituted in a foreign seat to the execution of the interim relief rendered by the award/order of the EAr. With regard to the first scenario, the execution can be done in accordance with the municipal laws. The same can be evidenced through section 12(6) of the IAA, Singapore.

On the other hand, the enforcement of the interim relief rendered in the second situation is trickier. Article 17H and 17I of the UNCITRAL Model Law provide for enforcement of interim relief even by a foreign seated arbitral tribunal through an application to the competent court.[147] Article 17H(1) gives such awards/orders a binding nature. A similar understanding can be evidenced by section 27(1)(a) of the IAA, Singapore as explained

146 Groupe Antoine Tabet v. République du Congo [12 Oct. 2011] Cass Civ 1e nos 09-72, 439.

147 The UNCITRAL Model Law, 2006, Art 17H & 17I.

above. Even Galliard concurs with such understanding while using Article 54 paragraph 3 of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States which provides that the execution of an award shall be governed by the laws concerning the execution of judgements in force in the state in whose territories such execution is sought.[148] Being made subject to Article 17I means that the measure must be enforced, unless there are reasonable grounds for its non-enforcement, as set forth in Article 36.[149] Those grounds for non-enforcement are essentially the same grounds that are set forth in the New York Convention. The Model Law, however, avoids any need to establish whether the interim measure is an order or a final award. If the measure fits the Model Law definition of "*interim measure*," then it is binding, and a court in a country that has adopted this provision of the Model Law should enforce it.[150]

IV. Conclusion

EA has been used around the globe as a means to gain urgent interim relief prior to the constitution of arbitral tribunals. An analysis of multiple jurisdictions has showcased that while the mechanism has been used in principle and vide institutional rules, there is a significant lack of legislative support and recognition. Despite the substantial paucity of legislative reforms in favour of EA, the Courts in common law and civil law jurisdictions alike have strived to enforce EAr decisions within their respective jurisdictions. It is also noted that even in the jurisdictions that oppose EA, there exists a lot of ambiguity with regard to enforcement of such decisions. The approach of looking at the substance and not only at

148 GALLIARD GOLDMAN, INTERNATION COMMERCIAL ARBITRATION (Kluwer Law, 1999).
149 The UNCITRAL Model Law, 2006, Art 17I.
150 MOSES, M.L. THE PRINCIPLES AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 107 (Cambridge University Press, 3rd ed. 2017).

the form of the decision would render multiple EA decisions as enforceable awards under such jurisdictions.

While the persistent judicial support has engendered enforceability to/enforcement of many EAr decisions, negligible legislative support has markedly delayed the enforcement of such decisions thereby negating the purposes for which the decisions were delivered i.e. interim relief and/or speedy interim resolution. Thus, a policy-based approach appears to be essential in order to ensure that urgent interim relief measures are met in a timely manner as they create a backdrop for enforcement of such decisions without any hindrance.

DATA AS PROTECTED INVESTMENT IN THE BACKGROUND OF EINARSSON V. CANADA

Ioana Bratu & Arijit Sanyal†*

Abstract

*This article delves into the evolving legal landscape where data is increasingly viewed as a crucial asset international investment arbitration. It contextualises the discussion with the Einarsson v. Canada case ["**Einarsson**"], focusing on the contentious issue of whether seismic data, used in oil and gas exploration, can be considered a protected investment under international investment agreements. The case underscores the tension between intellectual property ["**IP**"] rights, specifically copyrights in seismic data, and regulatory measures enacted by states for public policy objectives. The article examines how arbitration tribunals grapple with state actions impacting the value or use of data owned by foreign investors, such as data localisation requirements or cybersecurity regulations. It questions whether these measures could be seen as indirect expropriation or violations of the fair and equitable treatment standard by restricting investors' control over their data.*

Further, the article explores the notion of data as an economic good, its valuation, and the legal frameworks governing its ownership and trade. It debates the argument for recognising data as an investment, highlighting the potential implications for the protections offered by international investment agreements to data assets. By analysing the Einarsson case, the article provides insights into the complex interplay between protecting

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data-driven investments and allowing states the regulatory discretion to achieve public policy goals. It highlights the challenges and implications for the regulatory discretion of states, the protection of foreign investments, and the broader relationship between international investment law and data regulation.

I. Introduction

The intersection of data as an investment and international investment arbitration is an emerging area of legal scholarship, based on a limited but growing body of case law. While there are not yet many cases that directly address data as a protected investment under international investment agreements ["**IIAs**"], several disputes touch upon related themes, such as IP rights, regulatory measures affecting digital assets, and the treatment of data-related investments.

As data becomes central to the functioning of companies across various sectors, its protection, ownership, and treatment under international investment law are slowly coming under scrutiny. In investment arbitration, data-related disputes may arise from state actions that impact the value or use of data held by foreign investors. These actions could include data localisation requirements, mandates for data sharing with government entities, breaches of data privacy, or cybersecurity regulations that disproportionately affect foreign companies. Such measures can significantly impact the business operations of foreign investors who rely on cross-border data flows and sophisticated data analytics for their core activities.

Arbitration tribunals are increasingly faced with the challenge of adjudicating disputes where data protection laws and state measures aimed at cybersecurity intersect with the protections afforded to foreign investors under IIAs. The key issues often revolve around whether such State measures constitute indirect expropriation or violate the fair and equitable

treatment standard by unduly restricting the investor's control over its data or by imposing unreasonable compliance burdens.

The notion of data as an investment brings forth the question of whether data, in its various forms, can be considered a protected asset under IIAs. This involves examining the nature of data as an economic good, its valuation, and the legal frameworks governing its ownership and trade. The argument for recognising data as an investment hinges on its value generation capacity, where data is not merely a by-product of business operations but a primary asset that companies invest in collecting, processing, and analysing to derive economic value.

The recognition of data as an investment would extend the protections of IIAs to data assets, covering aspects such as expropriation of data, restrictions on data transfer, and the imposition of discriminatory measures affecting data-driven investments. However, this raises complex legal and policy questions, such as defining the scope of what may constitute 'data' as an investment, determining the jurisdictional boundaries in a digital context, and balancing the protection of data assets with states' rights to regulate in the public interest, particularly concerning data privacy and national security. On this background, the present article aims to throw light on the interaction between IP rights in IP-heavy investments and data.

II. Case Study – Background

The case of *Einarsson*[1] revolves around an investment dispute under the North American Free Trade Agreement ["**NAFTA**"], at the intersection of IP rights, particularly copyrights in seismic data, and state measures that were perceived to infringe on those rights. The dispute highlights the complex interplay between protecting investments, including IP, under

[1] Theodore David Einarsson, Harold Paul Einarsson & Russell John Einarsson v. Dominion of Can., ICSID Case No. UNCT/20/6, Decision on Claimant's Motion to Disqualify Counsel, (July 8, 2024), 8 ICSID (2022), [*hereinafter* "Einarsson"].

international investment agreements, and the regulatory discretion of states to pursue public policy objectives.

The Claimants in the case, Mr. Theodore Einarsson and his two sons, Paul and Russell, were involved, through their Geophysical Services Incorporated ["**GSI**"] company, in the creation and utilisation of seismic data pertinent to oil and gas exploration in the offshore areas of Newfoundland and Labrador, Canada. Seismic data, which provides valuable information about the subterranean geological formations, is crucial for identifying potential oil and gas reserves.[2] The creation of this data involves sophisticated technology and significant financial investment, leading to the argument that such data should be protected under copyright laws as IP.

The dispute arose when the Canadian government, appearing as the Respondent, implemented regulatory measures that, according to the Claimants, effectively expropriated their copyright in the seismic data without providing adequate compensation, arguably breaching the investment protection obligations under NAFTA. The Claimants argued that Canada's regulatory actions, which required the submission of seismic data to Canadian authorities, eventually making such data available to the public or third parties, constituted an indirect expropriation of the Claimants' IP rights. Before the start of the arbitration, the Claimants had been involved in extensive, years-long litigation against Canadian authorities, in which they challenged Canadian authorities' disclosure of their seismic data to third parties, leading to alleged violations of copyright and trade secrets. Finally, the Court of Appeal of Alberta recognised GSI as the owner of the copyright, but ruled in favour of Canadian authorities,

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2 Kiana Cruz, *Unlocking the Depths: How seismic surveys drive oil and gas explorations*, ENVERUS BLOG (Sept. 18, 2023), *available at* https://www.enverus.com/blog/unlocking-the-depths-how-seismic-surveys-drive-oil-and-gas-exploration/; *see also* Kate Lowery, *Seismic Surveys 101*, AMERICAN PETROLEUM INSTITUTE BLOG (Nov. 08, 2016), *available at* https://www.api.org/news-policy-and-issues/blog/2016/11/08/seismic-surveys-101.

on the basis of *lex specialis* that allowed the State to disclose data according to the oil and gas legal framework.[3]

In the arbitration, the Claimants contended that the seismic data, being the product of significant investment and creative effort, should be recognized as a protected investment under NAFTA, similar to other IP rights. It was argued that the Respondent's measures amounted to an indirect expropriation by substantially depriving the Claimants of the value and economic use of their investment, without fair and equitable compensation, in violation of NAFTA provisions. The Claimants also put forward a fair and equitable treatment standard argument, suggesting that the regulatory measures were arbitrary and did not provide the necessary legal protections expected by foreign investors under NAFTA.

In response, the Respondent defended its measures as a legitimate exercise of its sovereign right to regulate in the public interest, particularly in areas concerning environmental protection and the management of natural resources. The Respondent therefore argued that the measures were non-discriminatory, applied equally to domestic and foreign investors, and were necessary for ensuring the sustainable exploration and exploitation of oil and gas resources. It was also contended by the Respondent that the regulatory framework provided sufficient safeguards to protect the interests of data creators, including mechanisms for compensation under certain conditions, thereby not constituting an expropriation.

Therefore, the arbitral tribunal will have to consider several critical issues, including the nature of seismic data, indirect expropriation, and the fair and equitable treatment standard. The Tribunal will have to look at whether seismic data could be considered an investment under NAFTA and, specifically, whether it qualifies for protection under IPrights. It will also inquire into whether the Respondent's regulatory measures constituted an

[3] Geophysical Service Incorporated v. EnCana Corporation, 2017 ABCA 125 (Can.).

indirect expropriation of the Claimants' investment by significantly impairing the value and economic use of the seismic data. Finally, it will deal with the arguments according to which Canada's actions violated the standard of fair and equitable treatment under NAFTA, by being arbitrary or lacking in due process.

While the specific outcome of the case is yet to be delivered, the dispute clearly underscores the tension between investor protections and state regulatory authority in the context of international investment law. The Tribunal's decision will likely reflect a balancing act between acknowledging the rights of investors to protect their IP and recognising the legitimate policy space of states to regulate in the public interest.

The case exemplifies the need for a nuanced understanding of IP rights as investments, and highlights the complexities involved in distinguishing between legitimate regulatory measures and indirect expropriation. The outcome of such cases has significant implications for the regulatory discretion of States, the protection of foreign investments, and the broader relationship between international investment law and other areas of public policy, such as data protection.

III. Commentary

One issue emerging from the arguments of the case is whether data can qualify as an investment under NAFTA. Data has been defined differently by international conventions and transboundary legislations. For instance, the African Union Convention on Cyber Security and Personal Data Protection ["**AU Convention**"] defines computerised data as "*any representation of facts, information or concepts in a form suitable for processing in a computer;"* [4]and personal data as "*any information relating to an identified or identifiable natural person by which this person can be identified, directly or indirectly in particular by the reference to an identification number or to one or more factors specific to*

[4] African Union, Convention on Cyber Security and Personal Data Protection, art. 1, June 27, 2014.

his/her physical, physiological, mental, economic, cultural or social identity."[5] From the perspective of the AU Convention, personal data, or any information in addition to personal data that may be processed in a computer system would qualify as data. This position is somewhat consonant with the definition in Article 2(1) of the EU Data Governance Act ["**DGA**"], which defines data as "*any digital representation of acts, facts or information and any compilation of such acts, facts or information, including in the form of sound, visual or audio-visual recording.*"[6] However, simply having a framework for defining data does not, on its own, bridge the gap between the nature of an investment and how data fits in a relevant IIA.

In *Einarsson*, the Tribunal will have to determine whether the Claimants' purported investment qualifies as an investment under NAFTA. This is in line with the well-settled principles of international investment law that any potential claim must be admissible in the first place.[7] The Claimants will carry the burden of satisfying the 'investment' prerequisite. The Claimants maintain that data would qualify as 'investment' per Article 1139 of NAFTA, as it represents an *'enterprise of a party*' as that term is defined in Article 1139 of NAFTA, that is operated in the 'territory' of Canada".[8] Claimants argue that their business, GSI, solely relied on seismic data (IP) for its existence, and that destroying the value of that data is akin to expropriating the investment. The Claimants also asserted that their personal investments were either to finance GSI through equity investments, loans or their own time and labour, and that each of them took

5 *Id.*

6 *See*, Council Regulation 2022/868, of the European Parliament and of the Council of May 30, 2022, art. 2(1), The Data Governance Act, *available at* https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32022R0868.

7 Saar A Pauker, *Admissibility of claims in investment treaty arbitration*, 34(1) ARB. INT'L 1, 1-78 (2018).

8 Einarsson, *supra* note 1, Claimants' Memorial ¶ 150 ff (Sept. 27, 2022).

a substantial amount of risk in financing and supporting GSI, and relying on its financial performance for their livelihood.[9]

In the Respondent's view, the dispute centres on the Canadian government's regulatory actions, which GSI claims effectively expropriated their copyright in the seismic data without adequate compensation, impacting GSI's business and the *Einarsson* family's investments. In its Counter-Memorial, the Respondent emphasizes its long-standing regulatory regime governing the submission and public disclosure of seismic materials collected for oil and gas exploration on Crown land.[10] This regime mandates operators to obtain authorization for seismic surveys, submit certain seismic materials to regulators and allows for the public disclosure of these materials after a predefined confidentiality period. The document details the confidentiality periods for seismic materials, noting that exclusive seismic surveys have consistently been subject to a five-year confidentiality period across relevant jurisdictions since 1982. For non-exclusive seismic surveys, the confidentiality period was administratively extended in some cases beyond the statutory five-year rule.

The Respondent outlines the evolution of its legislative framework concerning offshore resource management, from the Canada Oil and Gas Act ["**COGA**"], bought into force in 1982 to the Canada Petroleum Resources Act ["**CPRA**"] in 1986, which consistently maintained a five-year confidentiality period for seismic materials.[11] The Counter-Memorial emphasises the Respondent's policy of balancing the confidentiality of seismic data to incentivize investment in data acquisition with the public disclosure of this data to stimulate further exploration interest. It is argued that this policy aims to facilitate information dissemination for the public

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9 *Id.* at ¶ 168.

10 Einarsson, *supra* note 1, Counter Memorial on Jurisdiction, Merits and Damages (Jan. 17, 2023).

11 Canada Petroleum Resources Act, R.S.C. 1985, c 36, § 101(6.1)(b) (Can.); *see also* Canada Petroleum Resources Act, R.S.C. 1985, c 36, § 101(10)(b) (Can.).

good while ensuring a predictable and transparent regulatory environment for operators[12].

The *Einarsson* family and GSI's challenges to the Respondent's regulatory regime, particularly regarding the public disclosure of seismic materials, are portrayed as an attempt to revisit the terms of the regime under which they operated. The Respondent asserts that these challenges are unfounded, given the long-standing and transparent nature of the regime, and the industry's awareness of its conditions. The Respondent further discusses the *Einarsson* family and GSI's litigation history in Canadian courts regarding the regulatory regime and the disclosure of seismic materials. It frames the NAFTA arbitration as a continuation of these domestic legal challenges and argues that the claims lack merit both jurisdictionally and substantively.

The Respondent's defence is multi-faceted, challenging the jurisdiction of the Tribunal over the claims, the merits of the claims under NAFTA provisions, and the entitlement to any damages. The Respondent contends that the Claimants' business failures and risky decisions, rather than any alleged breaches of NAFTA or expropriation by the Respondent, led to their losses.

Overall, the Counter-Memorial presents the Respondent's comprehensive defence against the claims made by the *Einarsson* family and GSI, arguing that the regulatory regime for seismic data has been consistent, transparent, and known to industry participants, and that the Claimants' challenges to this regime and subsequent NAFTA claims are without basis.

The Respondent's position goes on to show that the dispute is not necessarily *about* data. Depending on how the arguments are put together, this could be a dispute about balancing the public interest with the need to

[12] Einarsson, *supra* note 1, Counter Memorial on Jurisdiction, Merits and Damages ¶ 3 (Jan. 17, 2013).

incentivize investment, or one about the overlap of IP rights with data that concerns investor protection. The first configuration is nothing ground-breaking, while the latter could stand to revolutionise the approach to data in investment arbitration.

A. The question about data and IP rights

Data has not been tackled head-on by any previous investment arbitration tribunal, but other tribunals have dealt with the issue of IP. In *Einarsson*, the IP covers seismic data and surveys. Seismic data, such as raw and processed data, compilations, and interpretations, can be copyrighted under Canadian law,[13] but that requires a work to be more than a mere copy of another work and to involve an exercise of skill and judgment. While this was confirmed for GSI's work in Canadian litigation, discussions about how seismic data is managed, accessed, and potentially disseminated further complicate the legal landscape. For instance, university-based consortia might receive large seismic data donations from companies, which are then used for research and publicised through academic outputs. Additionally, Digital Data Repositories (DDRs) might store government-owned seismic surveys and industry-released data, allowing broader access to these data sets for research and exploration purposes. Various models for seismic data disclosure have been explored in different jurisdictions to balance the protection of IP rights with the need to promote offshore exploration. Models that may be considered include "pay per view" access in digital data repositories, teasers and finder's fees, and agreements for first cost recovery followed by disclosure, implementation of Non Disclosure Agreements, etc.[14]

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13 Copyright Act, R.S.C. 1985, c C-42, § 3 (Can.); Geophysical Service Incorporated v. Encana Corporation, 2016 ABQB 230 (Can LII), ¶ 115 (Can.).

14 Michael Enachescu, *Digital Seismic Dilemma, Ownership and Copyright of Offshore Data*, 32(5) RECORDER (2007), *available at* https://csegrecorder.com/articles/view/digital-seismic-dilemma-ownership-and-copyright-of-offshore-data.

Nonetheless, a business relying on the exclusivity of access to such data will find its value diminished where control over access is lost. Given that the *Einarsson* Tribunal faces questions about the intangible nature of the investments, looking at *Apotex Holdings* v. *United States* ["**Apotex**"],[15] and *Eli Lilly* v. *Canada* ["**Eli Lilly**"],[16] might be indicative of how the Tribunal's reasoning might develop.

In *Apotex*, a case involving patents for the pharmaceuticals Sertraline and Pravastatin, the investor's claim was rejected by the Tribunal on the grounds that their activities did not meet the 'investment' requirements of NAFTA Article 1139.[17] Namely, the formulating, developing, and manufacturing of the pharmaceuticals in issue occurred in Canada, and not in the Host State (the US); and accordingly, exporting did not amount to 'investment.'[18] Furthermore, all activities expended with preparing and filing an Abbreviated New Drug Application (ANDA) by the investor in the Host State applied equally to investors and exporters, so they could not substantiate an 'investment' by themselves. Finally, the investor's litigation costs and expenditure on legal fees in relation to its export business in the Host State did not amount to 'investments,' nor did it change the nature of *Apotex*'s activity.[19] The *Apotex* tribunal's conclusion is unlikely to affect the claim in *Einarsson* as the data in *Einarsson* was prepared in Canada's territory, and subsequently licensed to businesses operating from Canada's territory. The Respondent in *Einarsson* also did not dispute that GSI is an *'enterprise'* that operated in the 'territory' of Canada.[20] However, *Einarsson* is different to *Apotex* in that what is claimed by the investor does not directly stem from

15 Apotex Holdings Inc. *v.* U.S., ICSID Case No. Arb (AF)/12/1, Award (Aug. 25, 2014). [*hereinafter* "Apotex"].

16 Eli Lilly & Co. v. Government of Can., UNCITRAL, ICSID Case No. UNCT/14/2, Award (Mar. 16, 2017) [*hereinafter* "Eli Lily"].

17 Apotex, *supra* note 15, Award On Jurisdiction and Admissibility ¶ 158 ff (June 14, 2013).

18 Apotex, *supra* note 15, Award, Part VII-Annex ¶ 186-195 (Aug. 25, 2014).

19 Apotex, *supra* note 15, Award, Part VII-Annex ¶ 225 (Aug. 25, 2014).

20 Einarsson, *supra* note 1, Claimants' Memorial ¶ 150 (Sep. 27, 2022).

the IP right. While the investor in *Apotex* specifically referred to formulating, developing, and manufacturing pharmaceuticals (the IP activity itself), the investor in *Einarsson* refers to a Canadian court decision that prohibits them from enforcing the copyright in its seismic data against infringers. Therefore, the IP in *Einarsson* is one step removed from the claim. This court decision is, according to the Claimants, the reason for which GSI's business was destroyed.[21] Therefore, the *Apotex* tribunal could not avoid dealing with the IP legislative framework, but the Tribunal in *Einarsson* might be able to elude the question by solely focusing on the 'enterprise', namely the business, which includes, but is not limited to the IP.

In *Eli Lilly*, the investor's patents for Zyprexa (Olanzapine) and Strattera (Atomoxetine) were revoked based on the Canadian patent law doctrine of 'promise utility.' The investor claimed that Canada changed its assessment standards, from the traditional standard at the time of investment to revoking based on a lack of utility[22], which gave rise to a claim of unfair and inequitable treatment contrary to NAFTA Article 1105, and an expropriation claim under NAFTA Article 1110. The investor argued that, under the preceding traditional utility standard, pharmaceutical patents were never found to lack utility.[23] Canada retorted that the meaning of 'utility' was not squarely prescribed in the Canadian Patent Act and that such terms naturally evolve through courts' interpretation.[24] While the Tribunal did note that courts were not exempt from the standards of protection under the treaty, the investor's claim did not succeed. In particular, the Tribunal held that there was no significant departure in

21 *See*, Claimants' formulation of the factual background in Einarsson, *supra note 1*, Claimants' Memorial ¶ 108-112 (Sep. 27, 2022).

22 Eli Lily, *supra* note 16, Notice of Intent to Submit a Claim to Arbitration under NAFTA Chapter Eleven ¶ 56 Nov. 07, 2012).

23 Thomas Musmann, *Eli Lilly v. Canada – The First Final Award Ever on Patents and International Investment Law*, KLUWER PATENT BLOG (Apr. 4, 2017), *available at* https://patentblog.kluweriplaw.com/2017/04/04/eli-lilly-v_canada-the-first-final-award-ever-on-patents-and-international-invest-ment-law/.

24 Eli Lily, *supra* note 16, Final Award ¶ 270 (Mar. 16, 2017).

Canada's patent law standards.[25] This was also an issue of competence, as an arbitral tribunal will not review the substance of a national court's interpretation of national law, where standards of treatment under the IIA are not breached. Again, when comparing *Eli Lilly* against *Einarsson*, the fact that the former is based directly on IP rights, and the latter is a claim about the value of a business solely relying on IP, can make a significant difference. On the one hand, the assessment of IP rights in general is expected to be much more straightforward, as the tribunal has to determine if the IP rights of an investor have been violated. On the other hand, in *Einarsson*, one of the major issue concerns the qualification of data asIP and hence an investment. Moving forward, in a claim similar to Eli Lilly, a tribunal is unlikely to be asked to re-look at an issue already decided by national courts. However, one thing that might be indicative is the degree of deference shown by arbitral tribunals to national courts when interpreting national IP law.

In discussing *Einarsson*, Lentner has highlighted the case as an example of the ongoing trend towards the propertization and expansion of IP protection through investment arbitration, extending from patents and trademarks to copyrights and data.[26] Though Lentner's work does not prescribe a two-stage test, it seems to suggest that a domestic court's ruling conferring the status of IP, as the Canadian court did in the factual background of *Einarsson* when recognising copyright in the seismic data in Claimants' favour, may not be enough to attract treaty protection. As Lentner explains, referencing the award in *Bridgestone* v. *Panama*,[27] merely owning IP does not immediately render the respective IP protected under an IIA, even if that IIA contains provisions about IP protection. That is

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25 Eli Lily, *supra* note 16, Final Award ¶ 325 (Mar. 16, 2017).

26 Gabriel M. Lentner, *International Investment Law and Data, Copyrights and Performance Requirements: A Closer Look at Einarsson v. Canada*, 18(6) J. OF IP L. & PRAC. 446, 446-454 (2023) [*hereinafter* "Lentner"].

27 Bridgestone Licensing Services, INC. & Bridgestone Americas INC. *v.* Republic of Pan., ICSID Case No. ARB 16/34, Award (Aug. 14, 2020).

because, to constitute an 'investment', the IP has to be approached as an element of the economic activity in which the investor engages, and only that activity as a whole may attain the status of an 'investment'.

To determine the presence of an investment in the territory of the Host State, the economic activity must conform to the tests framed in *Salini* v. *Morocco*,[28] which has become the predominant method.[29] The test framed by the *Salini* tribunal ["**Salini test**"] requires an investment to satisfy the following criteria: continuation, duration, risk, and contribution to the state's economy.[30] In the Claimants' submissions before the *Einarsson* tribunal, it has been highlighted how the data itself is not the final product, and the creation of raw data into seismic data is a capital-intensive and time-consuming process,[31] requiring considerable and sustained investment on the Claimants' part. Further, the Claimants submitted that there were high risks and capital expenditures involved in the creation of seismic data.[32] In this regard, it can be said that the seismic data stands a chance of satisfying the *Salini test*. Lentner has referred to instances where tribunals have satisfied themselves with the presence of an investment when trademark(s) are exploited in the territory of the host state. A few ways of exploitation noted by Lentner include licensing, which is also the method of exploitation performed by the Claimants in the present case.[33]

B. Violation of the Fair and Equitable Standard

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28 Salini Costruttori S.p.A. & Italstrade S.p.A. *v.* Kingdom of Morocco, ICSID Case No. ARB/00/4, Decision on Jurisdiction (July 23, 2001).

29 Darius Chan & Justin Lai, *Two decades after Salini v Morocco: The case for retaining the Salini test with modifications*, 39(1) ARB. INT'L 63, 63-84 (2023).

30 *Supra* note 29.

31 Einarsson, *supra* note 1, Claimants' Memorial ¶ 16 (Sep. 27, 2022).

32 *Id.*

33 Gabriel M. Lentner, *International Investment Law and Data, Copyrights and Performance Requirements: A Closer Look at Einarsson v Canada*, 8 (Transatlantic Technology Law Forum, Working Paper No. 92, 2022).

The Claimants in *Einarsson* argued that the Host State failed to honour the duty to afford fair and equitable treatment when they did not inform the Claimant of the nature of disclosure regarding their investment.[34] In this regard, Lentner observes that the Tribunal will have to analyse whether legitimate expectations existed at the time of the investment that "'*no legislation would be introduced to encourage the exploration of oil and gas through a limited privileging and non-disclosure of data*.'"[35] In this context, it will be highly relevant to see what are the representations that the investor relied upon at the time of the investment.

The general standard for assessing the violation of legitimate expectations includes two prongs. *First*, there were specific representations by the Hosthost State concerning the investment; and *second*, the investor's assumption that the regulatory framework will remain stable.[36] As a rule, if it can be shown that the host state made substantial changes to their legal framework, and such changes caused financial losses to the investor, tribunals will consider it as a breach of legitimate expectations.[37] In this regard, it has been submitted that the relevant authorities in Canada led the Claimants to believe that the IP would be protected.[38] This was further substantiated by reference to the fact that the disclosure legislation did not apply to copyright,[39] and that the authorities agreed via licensing agreements to take necessary steps to limit disclosure of the Claimants' investments in seismic data.[40]

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34 *Id.* at 28.

35 *Id.* at 451.

36 Yulia Levashova, *The Role of Investor's Due Diligence in International Investment Law: Legitimate Expectations of Investors*, KLUWER ARBITRATION BLOG (Apr. 22, 2020), *available at* https://arbitrationblog.kluwerarbitration.com/2020/04/22/the-role-of-investors-due-diligence-in-international-investment-law-legitimate-expectations-of-investors/.

37 *Id.*

38 Einarsson, *supra* note 1, Claimants' Memorial ¶ 57-58 (Sep. 27, 2022).

39 *Id.*

40 *Id.*

Parallels may be drawn between this instance and those before the Tribunal in *Crystallex* v. *Venezuela* ["**Crystallex**"].[41] In *Crystallex*, the Ministry of Environment had approved the environmental impact assessment provided by the investor. The investor was repeatedly assured that the required permits would be sent to them shortly. However, after several years of delay, the permits were not delivered to the investor. The Tribunal held that communications were such that the investor legitimately relied on the assurances, and that it was later frustrated by the ministry's conduct. The Tribunal observed:

> "*The Tribunal thus considers that, whether or not the 16 May 2007 letter was the formal "accreditation" of the project, it is much more than a mere request for a bond, as Venezuela submits. The letter contains a phrase – "the Permit will be handed over" – which would mean much more and appears on its face as a positive representation made by vice-minister Garcia specifically to Crystallex in clear and precise terms, to the effect that the Office of Permissions would continue with the procedures associated with the permitting process. As such, the 16 May 2007 letter was susceptible of creating the type of legitimate expectation that, if later frustrated, is protected under the FET standard.*
>
> *In the Tribunal's view, Crystallex legitimately relied on the Ministry of Environment's representation. Such expectation was further strengthened by the Ministry's request made on the same day to Crystallex (through the CVG) to pay the environmental taxes. The Stamp Tax Law provides that payment of the environmental taxes becomes due "simultaneously" with the issuance of the relevant document, in this case the Environmental Permit. In the Tribunal's view, the fact that the Ministry of Environment requested the payment of the bond and the stamp taxes on 16 May 2007 could be construed as meaning that the Ministry had already made a favorable decision with respect to the environmental Permit. Crystallex's expectations that it would be granted the Permit promptly after the posting of the bond and the payment of the taxes was thus reasonable and*

[41] Crystallex International Corporation *v.* Bolivarian Republic of Venez., ICSID Case No. ARB(AF)/11/2, Award (Apr. 4, 2016).

> *legitimate. Such expectation was later frustrated by the Respondent through the manner in which the Permit was denied and the MOC was rescinded, to which the Tribunal will revert later.*"[42] (emphasis added)

In this respect, it can be said that any positive representation made by the government or representatives of the government, whether formally communicated or not, has the potential to give rise to legitimate expectations for the investors. In *Einarsson*, the Claimants have submitted that between 1974 to 2010, the representatives of the host State and various instrumentalities of the host State continuously made such representations to them. This included the latest communication to the Claimants whereby they were told that the seismic data would not be provided to any individual. In this regard, the Claimants submitted that:

> "*As a result of NRC's letter, Paul and GSI were under the impression that Canada recognised that GSI likely had copyright and other intellectual property rights in the Submissions, and would be taking steps to limit the disclosure or dissemination of the Submissions.*"[43]

This likely paints a strong case for the Tribunal in what concerns the violation of the FET standard claim. Lentner has failed to consider this aspect, as he has focused on the exceptions of copyright law. However, his analysis misses the point that the creation of legitimate expectations in the investors' minds has served as a crucial benchmark for tribunals looking into breaches of FET claims. His analysis does not consider the repeated representations made to the Claimants by the representatives of the government of Canada. Hence, it is likely that the Tribunal will give considerable weight to the claim for violation of the FET standard, regardless of its particular position on data per se.

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42 *Id.* ¶ 563-564.

43 Einarsson, *supra* note 1, Claimants' Memorial ¶ 58 (Sep. 27, 2022).

C. Indirect Expropriation

In addition to the FET standard claim, the Claimants also submitted a claim for indirect expropriation. In this regard, the Claimants argued that they were deprived of enjoying the benefit of the investment even though they retained title to the copyright (based on the fact that the decision of the Alberta court in principle agreed that seismic data is covered under copyright protection).[44] In Lentner's view, this claim has the potential to be framed as a claim for indirect expropriation. In this respect, Lentner noted that there can be possible conflicts with the limitation on copyright protection for a five-year term, on the one hand, and the minimum protection of fifty years prescribed by the Berne Convention for the Protection of Literary and Artistic Works ["**Berne Convention**"], on the other hand. In this regard, Lentner argues that there are no acquired rights, as a consequence of which mere violation of the Berne Convention will not be sufficient to demonstrate indirect expropriation.[45] However, this argument seems to be based on the expropriation of IP, and not data itself as per the authors' views.

In the very general sense, IP can always be said to include some data, but the opposite does not hold. Data is not automatically protected as IP. This is where it becomes particularly relevant that the Claimants do not seem to raise the point of data as a protected asset, but that of an expropriated enterprise relying on copyright concerning seismic data. While there is no case law dealing specifically with data, observations have been made about cryptocurrency. In this regard, Rubinina has noted that cryptocurrency may not be able to meet some of the requirements of the *Salini test* if the issue of it constituting an investment were to come before an arbitral tribunal.

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44 *Supra* note 33, at 4.

45 *Id.* at 15.

Hence, proving the existence of a protected investment with acquired rights can be problematic.[46]

However, as echoed above, this may be an opportunity for the arbitral tribunal to touch upon the relevance of data in IP-related investments, if the Claimant raises the point. Indeed, such a point might represent an ambitious stretch, since it would prompt a distinction between data as an element of the IP right itself, and data as an independent asset. Data as an asset is still a 'tentative concept',[47] far from being established, while IP is commonly recognised and protected in IIAs. Nevertheless, as *Einarsson* suggests, there might be a need to start looking at the two as separate concepts.

IV. Conclusion

The digital revolution is reshaping the landscape of international investment law, challenging traditional notions and legal frameworks designed in the 'analogue' era. As Rodrigo Polanco explores,[48] the pervasive influence of digitalisation prompts a re-evaluation of investment treaties, which were historically conceived for tangible, 'brick and mortar' investments, rather than the intangible, often borderless nature of digital assets.

The crux of adapting investment law to the digital age lies in reinterpreting key components such as the definition of protected investments and investors, the territoriality of digital investments, and the applicability of traditional standards of treatment and protection. Traditional investments in the digital economy, encompassing digital firms, digital adoption by non-

46 Evgeniya Rubinina, *Are Cryptocurrency Assets a Protected Investment Under Investment Treaties?*, 89(1) ARB.: THE INT'L J. OF ARB., MEDIATION AND DISP. MGMT. 3, 3-20 (2023).

47 P. Bernt Hugenholtz, *Against 'Data Property'*, KRITIKA: ESSAYS ON IP 4 (2018).

48 Rodrigo Polanco, *The Impact of Digitalization on International Investment Law: Are Investment Treaties Analogue or Digital?*, 24(3) GER. L. J. 574, 574-588 (2023).

digital firms, and digital infrastructure, introduce complexities in proving ownership, control, and the economic value of inherently intangible assets.

Digital assets, including IP rights, data, and cryptocurrencies, further complicate the interpretation of investment treaties. The broad, asset-based definitions within these treaties could potentially encompass digital assets, provided there is a flexible interpretation of the required territorial nexus. Yet, the question remains whether these treaties and the corresponding investor-state dispute settlement mechanisms, are equipped to handle disputes arising from digital investments, particularly when such assets lack a physical presence in the host state. Moreover, as Polanco foregrounds, data localisation and source code disclosure requirements might challenge the principle of national treatment, raising concerns about discriminatory practices against foreign investors.

Although it is yet to be seen how extensively, if at all, data will be treated by the *Einarsson* Tribunal, the case will probably evidence itself as a landmark case in the ongoing evolution of international investment law in the digital era. Future arbitration tribunals and legal scholars will undoubtedly look to the resolution of this case and others like it, as they navigate the complex interrelations between data as an economic asset, IP rights, and the broader framework of international investment protection.

Arguably, the regulatory environment surrounding data is markedly different from that of IP. While IP rights are designed to encourage innovation and creative endeavours by granting inventors and creators exclusive rights to their works, data regulation is often driven by privacy concerns, security requirements, and the need to balance the free flow of information with the protection of individual rights and the public interest.

The distinction between data and IP rights in investment disputes may prove necessary due to the divergent regulatory objectives and public interest considerations inherent to each domain. Data regulation often involves issues of personal data protection, data sovereignty, and

cybersecurity, which are not typically addressed within the framework of IP rights. For instance, data protection laws such as the General Data Protection Regulation (GDPR) in the European Union impose obligations on data handlers that are unrelated to the creative or innovative quality of the data, focusing instead on the rights of individuals and the secure and ethical use of their information. In the same breath, such data represent the lifeblood of digital businesses. Therefore, the disruptive potential of digital transformation cuts across the private-public divide, and forces us to think differently.

In investment disputes involving data, it is crucial to consider these regulatory and public interest dimensions, which may not be adequately captured by the traditional IP rights framework. Recognizing data as a separate asset would allow tribunals to take into account the complex interplay between data-related investments and the regulatory landscape, ensuring that decisions reflect not only the economic value of the data but also the broader social, ethical, and legal implications of its use and management.

Furthermore, this distinction would enable a more balanced and context-sensitive approach to resolving disputes involving data, ensuring that legal frameworks remain adaptable and responsive to the evolving challenges and opportunities presented by the digital economy. It would also facilitate a clearer understanding of states' rights and obligations in regulating data, providing a solid foundation for the fair and equitable treatment of foreign investors while safeguarding the public interest in the digital age.

ARBITRATION AGREEMENTS IN THE GIG ECONOMY: PROTECTING THE RIGHTS OF WORKERS

*Bhanu Pratap**

Abstract

Over the past decade, there has been a significant rise in what is commonly referred to as the 'gig economy.' This term describes a growing sector of the workforce made up of individuals who work on a temporary or freelance basis, often through online platforms that connect them with clients or customers. The gig economy has also raised concerns about worker rights and protections. Many gig workers are classified as independent contractors rather than employees, which means that they are not entitled to benefits such as health insurance, paid time off, or minimum wage protections. Moreover, the contractual relationship between gig workers and the platforms they work for can be opaque and difficult to navigate, raising questions about the fairness of these arrangements. This paper primarily analyses the arbitration agreement between gig workers and Ola with a focus on the terms such as unilateral appointment of arbitrators and the adhesion nature of such agreements. Such arbitration agreements have been subject to a series of lawsuits, the most recent being Uber v. Heller. Ultimately, the paper underscores the importance of protecting the rights of gig workers, who often face significant power imbalances when negotiating with large platforms, and calls for greater scrutiny of arbitration agreements to ensure that they are truly fair and just.

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I. Introduction

'Gig economy' has seen an accelerated growth over the past decade. This form of market allows workers to be hired as independent workers on digital platforms for individual tasks. The economy has generated fierce debate over worker conditions and their rights. This uncertain form of employment is governed by provisions provided in the 'terms and conditions' present on the platforms. These contracts contain asymmetrical arbitration agreements, which include unilateral appointment of the arbitrators, and unilateral determination of the seat of arbitration. These arbitration agreements between the gig workers and platforms have generated litigation across jurisdictions – while this aspect has been relatively unexplored. This paper seeks to analyse some of the characteristics of these agreements. The author has argued that the adhesion nature of arbitration agreements and unilateral appointment of arbitrators by the platforms is not only detrimental to the interests of the gig workers, but also violates Section 12(5) of the Arbitration and Reconciliation Act, 1996 ["**the Act**"]. In the last section, the author has provided certain suggestions for improving the scope of arbitration in gig economy disputes.

II. Rise of gig economy in India

'Gig economy' is a form of labour market which includes freelance, hire on-demand, and short-term contracts. The workers of this structure are called 'gig workers,' who are hired by companies like Swiggy, Zomato, and Ola through their smartphone application platforms. NITI Aayog has estimated that in 2021, 7.7 million workers were already engaged in this gig economy

structure, and this workforce is expected to expand to 23.5 million workers by 2030.[49]

Through the widespread adoption of smartphones and associated technology, this new form of employment outside of traditional employer-employee relationship structures has emerged. A person who wants to participate in this economy can simply log in to the platform, accept the electronic agreement that appears on the application, and after the approval from the platform, can start working through the application.[50] Since this contractual relationship does not fall within the traditional employer-employee structure, they are not governed by any social security legislations.[51] Numerous public interest litigations and petitions have been filed on behalf of gig workers or platform workers,[52] to be declared as 'unorganised workers' under the Unorganized Workers' Social Security Act, 2008.[53] In many instances, Ola and Uber (the primary taxi-service providers present in the Indian economy) drivers have resorted to indefinite strikes in response to long working hours and meagre incomes.[54]

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49 Perspectives and Recommendations on the Future of Work India's Booming Gig and Platform Economy, https://www.niti.gov.in/sites/default/files/2022-06/25th_June_Final_Report_27062022.pdf.

50 Ola Partners - Terms & Conditions, Olacabs.com (2018), https://partners.olacabs.com/public/terms_conditions. "*Governing Law and Dispute Resolution: 1. If any dispute arises between the Transport Service Provider and OLA, in connection with, or arising out of, this Agreement, the dispute shall be referred to arbitration under the Arbitration and Conciliation Act, 1996 (Indian) to be adjudicated by a sole arbitrator to be appointed by OLA. Arbitration shall be held in Bangalore. The proceedings of arbitration shall be in the English language. The arbitrator's award shall be final and binding on the Parties.*"

51 Namrata, *The empty promise of social security to gig workers*, THE LEAFLET, https://theleaflet.in/the-empty-promise-of-social-security-to-gig-workers/.

52 Shruti Kakkar, *Gig Workers' Approach Supreme Court Seeking Social Security Benefits From Zomato, Swiggy, Ola, Uber*, LIVE LAW, https://www.livelaw.in/top-stories/gig-workers-approach-supreme-court-for-social-security-zomato-ola-uber-swiggy-182107; Haritima Kavia, *The gig is up: international jurisprudence and the looming Supreme Court decision for Indian gig workers*, THE LEAFLET, https://shorturl.at/lGMyw.

53 THE UNORGANIZED WORKERS' SOCIAL SECURITY ACT, No. 33 of 2008, § 2(m) (Ind.).

54 Aditi Shah, *Uber, Ola drivers strike in India, demanding higher fares*, REUTERS, https://www.reuters.com/article/us-uber-ola-strike-idUSKCN1MW1WZ.

In the international arena, various employers have used mandatory arbitration agreements as a shield from the employees bringing individual or class claims.[55] Even if the Supreme Court recognises gig workers as 'unorganised workers,' this problem is bound to persist. Issues related to fair wage, safe workspace, and discrimination will still have to be resolved according to the dispute resolution clauses given in the partnership agreement. These arbitration clauses are often termed as 'time bombs' for the gig economy as they shield the workers from bringing claims through the traditional litigation route.[56] Next part deals with the arbitration agreements between the gig workers and the platforms.

III. Arbitration agreements between gig workers and platforms

The arbitration agreements between the workers and the platforms are characterised by *first*, unilateral appointment of sole arbitrators, and *second*, 'take it or leave it' form of clauses. This section argues that such clauses are impermissible and detrimental to the interests of the gig workers.

A. Unilateral appointment of the sole arbitrator

The mandatory arbitration agreements that accompany the adhesion contracts for partnership often contain unilateral appointment of sole arbitrators. The statutory position pre-amendment to the Act, did not have any strict guidelines with respect to the impartiality or independence of the arbitrators.[57] Consequently, The International Bar Association on Conflict

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55 Jean R. Sternlight, *Disarming Employees: How American Employers are Using Mandatory Arbitration to Deprive Workers of Legal Protection*, 80(4) BROOK. L. REV. 1309, 1310 (2015).

56 Patrick Ouellette, *Mandatory Arbitration: A time bomb for the Gig economy*, PENNSTATE LAW ARBITRATION LAW REVIEW BLOG, https://sites.psu.edu/arbitrationlawreview/2020/12/18/mandatory-arbitration-a-time-bomb-for-the-gig-economy/.

57 Soham Banerjee, *To Appoint or Not to Appoint: A Critical Study of Unilateral Appointment of Arbitrators under the Arbitration Act, 1996*, SCC ONLINE BLOG, https://www.scconline.com/blog/post/2022/03/14/a-critical-study-of-unilateral-appointment-of-arbitrators-under-the-arbitration-act-1996/.

of Interest was incorporated within the Act in order to establish standards in the form of Schedule 5 and 7 under Section 12 (5).[58] According to Section 12(5) and the accompanying Schedules, the existence of an individual relationship between an arbitrator and a party does not necessarily disqualify the arbitrator from appointment, but it may raise justifiable doubts about their independence. According to Section 12(5) and the accompanying schedules, the existence of an individual relationship between an arbitrator and a party does not necessarily disqualify the arbitrator from appointment, but it may raise justifiable doubts about their independence.[59]

In *TRF Ltd.* v. *Energo Engg.* ["**TRF**"], the Supreme Court relied on Section 12(5) of the Act and held that any person who is statutorily ineligible to be an arbitrator (for example, in this case, the Managing Director of one of the parties to the dispute), cannot nomiate an arbitrator.[60] In the case of *Bhayana Builders Pvt. Ltd.* v. *Oriental Structural Engineers Pvt. Ltd.* ["**Bhayana Builders**"],[61] the Delhi High Court distinguished the principle established in *TRF*, holding that if parties in their commercial wisdom agree to vest the power to appoint the sole arbitrator on one of the parties to the dispute, such an agreement would not be violative of Section 12(5) of the Act.[62] The partnership agreement between gig workers and the platforms includes a similar clause, wherein, platforms like Ola have the right to appoint a sole arbitrator.[63]

Eventually, the Supreme Court reiterated the *TRF* principle, negating the distinction created by the High Courts. In the case of *Bharat Broadband*

58 *Id.*

59 HRD Corporation (Marcus Oil & Chemical Division) v. GAIL (India) Limited, (2018) 12 SCC 471.

60 *Id.* at ¶ 53.

61 Bhayana Builders Pvt. Ltd. v. Oriental Structural Engineers Pvt. Ltd., 2018 SCC OnLine Del 7634.

62 *Id.* at ¶ 32.

63 *Supra* note 2.

Network Ltd. v. *United Telecoms Ltd.* ["**Bharat Broadband**"],[64] the Court dealt with an arbitration clause between Bharat Broadband and United Telecoms on the supply, installation, commission, and maintenance of solar power equipment. The arbitration agreement included unilateral appointment of the Chairman and Managing Director ["**CMD**"] , Bharat Broadband Network Ltd. ["**BBNL**"] as the sole arbitrator, or in case CMD was unable or unwilling to act as an arbitrator, some person appointed by the CMD would be appointed as the sole arbitrator in the dispute.[65] The Supreme Court set the clause aside and held that if a person is statutorily ineligible to be appointed as the sole arbitrator, then he could also not be permitted to nominate an arbitrator.[66]

In the case of *Perkins Eastman Architects* v. *HSCC*,[67] the Supreme Court reiterated the principle established in the earlier TRF case. The court examined a contract between Perkins Eastman Architects DPC, a New York-based architectural firm, and HSCC (India) Limited ["**HSCC**"], a subsidiary of the public sector undertaking NBCC (India) Limited ["**NBCC**"]. The contract pertained to the planning, design, and preparation of working drawings for the All India Institute of Medical Sciences at Guntur. The dispute resolution clause in the contract stipulated that only the person appointed by the CMD of HSCC could act as the arbitrator. Consistent with the TRF precedent, the Supreme Court held that such a unilateral appointment clause violates Section 12(5) of the Arbitration and Conciliation Act, 1996.[68] The Court, while relying on *TRF*, set aside the appointment of the arbitrator made by HSCC, and appointed former judge of the Supreme Court Justice AK Sikri to preside as the sole arbitrator.[69] In this context, a perusal of the arbitration agreement which grants Ola or any

64 Bharat Broadband Network Limited v. United Telecoms Limited*,* (2019) 5 SCC 755.
65 *Id.* at ¶ 20.
66 *Id.* at ¶ 20.
67 Perkins Eastman Architects DPC v. HSCC (India) Limited, 2019 SCC OnLine SC 1517.
68 *Id.* at ¶ 2.2.
69 *Id.* at ¶ 28.

other platform the unilateral right to appoint the sole arbitrator, shows such a clause would be hit by Section 12(5).

However, there are yet another series of decisions that have moved away from the holding of *Bharat Broadband* and *Perkins Eastman*. Udian Sharma has argued these changes were made in light of the retrospective applicability of the *Perkins Eastman* holding in arbitration proceedings, and application on cases which have already been decided by unilaterally appointed arbitrators.[70] In *Voestalpine Schienen* v. *Delhi Metro*,[71] the Court was adjudicating a challenge to appointment of the arbitrator, wherein the Respondent-State had unilaterally provided a panel to choose from for the Petitioner-firm. The Supreme Court held that such an appointment is valid, since the parties mutually consented to the terms of the contract. On merits, the Court directed the Respondent-State to provide Petitioner-firm is a broader panel, upholding the clause.[72] While in the case of *Central Organisation for Railways Electrification* v. *M/s. ECI*,[73] the Court upheld an asymmetrical procedure for appointment of an arbitrator, that was mutually agreed by the parties. However, on merits, the Court directed the Petitioner to send a fresh panel of retired officers for the Respondent to choose from.[74]

The arbitration agreements that govern the contractual relationship between the platforms and the gig workers need to be distinguished from these series of judgments. As *first*, these series of judgments often deal with disputes which have already been decided by the arbitral tribunal, and, in appeal the appellate has questioned the unilateral appointment of the arbitrator.[75] Whereas, the arbitration agreements that this note deals with

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70 Udian Sharma, *Independence and Impartiality of Arbitral Tribunals: Legality of Unilateral Appointments*, 9(1) IND. J. ARB. L. 121, 135 (2020).

71 Voestalpine Schienen GmbH v. Delhi Metro Rail Corp. Ltd., (2017) 4 SCC 665.

72 *Id.* at ¶ 29.

73 Central Organisation for Railways Electrification v. M/s. ECI-SPIC-SMO-MCML (JV), 2019 SCC OnLine SC 1635.

74 *Id.* at ¶ 40.

75 *Supra* note 23.

are illegal from the start. *Second*, the cases mentioned above deal with a panel of arbitrators offered by one of the parties to the other to choose from. The arbitration clauses governing the partnership agreements do not have any mention of such a procedure. It merely mentions that the platform will be appointing the arbitrator for dispute resolution. *Third*, the Supreme Court has upheld the arbitration clauses in such cases on grounds of mutual consent.[76] However, the consent in partnership agreements is often vitiated for various reasons explained in subsequent sections.

B. 'Take it or leave it' Arbitration Agreements

The dispute resolution clauses between gig workers and the platforms are characterised by mandatory binding arbitration agreements, unilateral appointment of arbitrators and seat of arbitration.[77] This clause is part of an electronic 'take it or leave it' form of contract, also known as 'adhesion contracts.' Adhesion contracts require the customers to sign the standard form of contracts, without any scope of changes or adjustments.[78] Recently, the Supreme Court has criticised these forms of contracts, wherein the value of 'freedom of contract' is completely lost.[79] In this case, the Court, while analysing a standard form contract for insurance, held that such contracts are obviously one-sided, grossly in favour of the insurer, due to weak bargaining power of the consumer.[80] In the case of *Central Inland Water Transport Corporation* v. *Brojo Nath Ganguly*, the Supreme Court made an exception to this principle, stating this principle would not apply where the bargaining power of the contracting parties is equal or almost equal, such

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76 *Id.* at ¶ 19.

77 *Supra* note 2.

78 Nagpal, N. (2022) *Legality and enforceability of electronic arbitration agreements in India*, *Arbitration & Dispute Resolution - Litigation, Mediation & Arbitration - India*. Available at: https://www.mondaq.com/india/arbitration--dispute-resolution/1262248/legality-and-enforceability-of-electronic-arbitration-agreements-in-india.

79 M/S Texco Marketing Pvt. Ltd. v. TATA AIG General Insurance Company Ltd. & Ors., (2023) 1 SCC 428, ¶ 10.

80 *Id.* at ¶¶ 2-5.

as between two businessmen in a commercial transaction.[81] However, in the case of *Vidya Drolia* v. *Durga Trading Corporation* ["**Vidya Drolia**"],[82] the Supreme Court opined that the adhesion contracts that are non-negotiated and where party autonomy is weak, legislature can shield the weaker parties, and limited court intervention should be made.[83] This idea of non-intervention of courts is derived from the *kompetenz-kompetenz* principle of the United Nations Commission on International Trade Law (UNCITRAL), Model Law on International Commercial Arbitration, 1985 ["**Model Law**"].[84] Article 5 emphasises on minimal interference of courts in any arbitration proceeding.[85] However, as Sharma argues, this idea of minimal intervention is to be balanced with the idea of equity.[86] While Sharma only deals with the concept of unilateral appointment of arbitrators; for any clause that causes prejudice and bias against one of the parties, the Court must exercise its power to set aside such clauses. This would include unilateral decisions made for the seat and venue of the arbitration.

Ms. Jean Sternlight has critiqued this concept of mandatory arbitration clauses, which leave no room for negotiation. She bases her arguments on two grounds, *first*, lack of consent, and *second*, lack of public scrutiny.[87] These adhesion contracts containing mandatory arbitration agreements are often concealed or the employees often overlook the dispute resolution part of the contract. In an electronic contractual setting, this problem is aggravated as:

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81 Central Inland Water Transport Corporation v. Brojo Nath Ganguly, (1986) 3 SCC 156.

82 Vidya Drolia v. Durga Trading Corp., (2021) 2 SCC 1.

83 *Id.* at ¶ 72.

84 United Nations Commission on International Trade Law (UNCITRAL), Model Law on International Commercial Arbitration, 1985 U.N.G.A. Res. 40/72 (Dec. 11, 1985), as amended by U.N.G.A. Res. 61/33 (Dec. 18, 2006), art. 16 [hereinafter UNCITRAL Model Law].

85 UNCITRAL Model Law, art 5.

86 *Supra* note 24, at 128.

87 Jean R. Sternlight, *Creeping Mandatory Arbitration: Is it Just?*, 7(1) STAN. L. REV. 1631 (2005).

1. It is possible that gig economy participants may overlook the dispute resolution clause;
2. It is possible that even after reading the dispute resolution clause, the gig workers may be unable to comprehend the same substantively, owing to their population typically consisting of persons with low to middle level of education.[88] Hence, these mandatory arbitration agreements are bound to lack consent.

For declaring an adhesion arbitration clause illegal, it needs to be proved that the contract was executed between parties with unequal bargaining power and improvident bargains. This unconscionability doctrine has been adopted by most jurisdictions, with the most recent example being Canada. In the case of *Uber* v. *Heller*,[89] the Canadian Supreme Court adjudicated on the validity of an arbitration clause between a Toronto-based driver and the platform Uber Technologies. The argument presented on part of Heller in the class action suit, stated that he and his colleagues are employees, and that, as such, they should benefit from the protections of the Employment Standards Act, 2000, which grants specific rights and recourse to employees.[90] However, Uber Technologies filed a motion to stay the proceedings on the ground that Heller and others were bound by an arbitration clause requiring the dispute to be dealt through arbitration in the Netherlands.[91] The Ontario Supreme Court rejected Heller's argument, holding that since there was a valid arbitration agreement between Heller and Uber Technologies, the Employment Standards Act, 2000 does not expressly exclude recourse to arbitration.[92] In the Court of Appeals, the Court held that the arbitration clause prevented Heller from availing the benefits of the Act, and further, the arbitration clause itself was

88 *Supra* note 1.
89 Uber Technologies Inc. v. Heller, [2020] 2 SCR 118 (Can.)
90 Employment Standards Act, S.O. 2000, c 41 (Can.).
91 Heller v. Uber Technologies Inc., [2018] ONSC 718, ¶ 33 (Can. Ont.).
92 *Id.* at ¶ 65.

unconscionable in nature.[93] The Court found errors of fact in the Ontario Supreme Court's judgment, as, *first*, it was noted that there are numerous dispute resolution mechanisms that were accessible from Ontario, whereas Justice Parell inferred that no dispute resolution mechanism was located in Ontario. S*econd*, the cost of presenting a claim to the Netherlands was US$14,500, which in effect would have prevented Heller from bringing a claim through arbitration.[94]

The Court of Appeals laid down the equity principle stating, that where there is an overwhelming imbalance in bargaining power caused by the victim's ignorance of business, illiteracy, or ignorance of the language of the bargain, and the other party knowingly takes advantage of this vulnerability; then such arbitration clauses would be invalid due to their unconscionable nature.[95]

Similarly, the courts in India have dealt with the question of unconscionability of arbitration agreements as well; an example being the case of *Central Inland Water Transport Corporation* v. *Brojo Nath Ganguly*.[96] However, the Court pinned the idea of striking down of unfair or unreasonable clause in the contract, which was entered into by two parties of unequal bargaining power under Article 14.[97] The Court opined that this principle applies to situations where one of the parties to the dispute has no choice, or no meaningful choice, but to give his assent to a contract, or to sign on a dotted line prescribed, or a standard form of a contract presented.[98]

The arbitration agreement that governs dispute resolution process between the platform and the gig workers often unilaterally decides the seat of

93 *Supra* note 41, at 5.
94 *Id.* at ¶ 2.
95 *Id.* at ¶ 5.
96 *Supra* note 33, at 89.
97 *Id.*
98 *Id.*

arbitration and appointment of arbitrators, among other things.[99] Without any scope for negotiation, and without any real consent, these agreements are not only illegal, but are also detrimental to the interests of the gig workers, thus affecting their access to justice.

IV. Way forward for Arbitration in gig economy disputes

While various authors[100] have argued that the platforms of gig economy often use mandatory and prejudicial arbitration clauses to deprive workers of legal protection,[101] India could pave the way for arbitration agreements that benefit both the platforms and the workers. This part deals with some of the clauses that platforms in different jurisdictions have inserted that has saved tedious litigation, and has also prevented any reduction in access to justice for the workers.

A. Opt-out clause

In the United States of America ["**USA**"], Uber's use of an opt-out clause in its partnership agreements has often become a line of defence in the unconscionability challenges brought forward.[102] An opt-out clause provides the gig workers an opportunity to opt out of the arbitration requirement, assuming that this clause is substantively visible and not hidden away in fine print. In the case of *Mohamed* v. *Uber Tech.*,[103] the Court held that since the agreement includes an opt-out clause, it cannot be held to be unconscionable. Since the opt-out clause changes the nature of the contract from 'take it or leave it' to 'take it or opt out,' it is helpful for both,

99 *Id.*

100 *Id.*

101 Charlotte Garden, *Disrupting Work Law: Arbitration in the Gig Economy*, (2017) UNIV. CHI. LEGAL F. 205 (2018).

102 Jill I. Gross, *The Uberization of Arbitration Clauses*, 9 Y.B. ON ARB. & MEDIATION 43, 60 (2017).

103 Mohamed v. Uber Techs., Inc., 848 F.3d 1201 (9th Circuit, 2016).

the gig workers and the firms, saving litigation costs of challenging the clause itself.

The most important argument made above has been the idea of lack of consent in mandatory adhesion arbitration agreements. The idea of mandatory arbitration agreements is not only challenged because they are mandatory, or that they are taking away the jurisdiction of the courts. Such clauses are challenged as they violate one of the most fundamental values of arbitration procedure, i.e., voluntariness and consent to undertake arbitration for resolving disputes.[104] An opt-out clause could solve the issue of mandatory arbitration agreements. One would also suggest lengthening the opt-out period like Uber did in the USA. However, the effectiveness of this clause would depend on how the agreement is presented.

B. Delegation clause

An addition of delegation clause would mean that the chosen arbitrator would not only decide the issue of merits but also the issue of arbitrability.[105] Including such a clause would ensure that the decision on whether the dispute is arbitrable or not, can be decided by the tribunal itself. If such a clause is not included, the arbitrability could be challenged in the courts, consequently incurring litigation costs for the platform and the gig workers both.

C. Reasonable notice of the terms of the arbitration agreement

Perhaps the most important way to ensure consent in such electronic arbitration agreements would be to ask for consent separately from the overall partnership agreement. After multiple challenges to Uber's driver agreement in the USA, the platform revised its agreement to include a warning that the terms and conditions included an arbitration provision, by

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104 GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION § 1.02[A][2] (3rd ed. 2021).
105 *Supra* note 54.

specifying the same in bold, at the beginning of the same.[106] Adding such a warning would ensure the drivers do not unknowingly consent to an arbitration agreement. Any changes to the arbitration agreements should be notified on all communications lines between the drivers and the platform.

D. Online Dispute Resolution

Online Dispute Resolution ["**ODR**"] refers to an online forum where arbitrations can be conducted fairly and efficiently, without incurring additional costs of logistics to both the parties.[107] Various companies in the European Union are already using ODR to resolve arbitral disputes between them and their consumers.[108] The same model could ensure that gig workers can bring forth their claims without any financial prejudice.

V. Conclusion

Gig economy has expanded multi-folds in the past decade. While this shows increase in entrepreneurial strength of the country, the workers involved are often subjected to long working hours and unfair wage. Petitions related to defining this economy have drawn attention in many jurisdictions, including India. Since the relationship between the platforms and the workers is governed through contracts, it becomes imperative to study these contracts. Through this note, the author has primarily analysed the arbitration agreement between Ola and its drivers. The agreement is of electronic adhesion or 'take it or leave it' nature. The arbitration clause for dispute resolution consists of unilateral power of Ola to appoint an arbitrator and to select the seat of arbitration. These agreements are grossly biased against the gig workers, and no real consent can be inferred from these agreements.

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106 *Id.*

107 *Supra* note 24, at 140.

108 Mirèze Philippe, *ODR Redress System for Consumer Disputes: Clarifications, UNCITRAL Works & EU Regulation on ODR*, 1(1) INT'L J. ONLINE DISP. RES. 57, 57-69 (2014).

While electronic arbitration agreements are permissible in India,[109] the issue of adhesion arbitration agreements continues. This is the aspect of arbitration agreements which been explored in this note. In India, unilateral appointment of arbitrators is not permissible except in cases where both the parties are commercial entities.[110] However, this exception does not operate in the case of gig workers. In the international sphere, these contracts have been subjected to ample litigation on the grounds of unconscionability, lack of equal bargaining power, and lack of consent.[111] The agreement between Ola and gig workers can be challenged on similar grounds in the Indian context.

Employment contracts are held to be non-arbitrable in India. However, the gig economy workers are not considered workers under any of the legislations yet. There is an imminent need for the platforms to rework their arbitration agreements to prevent similar litigation in India. The solutions mentioned above could help the rising amount of gig economy workers without putting the platforms at a disadvantage.

109 *Supra* note 30.
110 *Supra* note 13, at 32.
111 *Supra* note 41.

RE-VISITING THE CONCEPT OF ANTI-ARBITRATION INJUNCTIONS IN LIGHT OF INTERIM INJUNCTIONS

Anusha Sarkar[*] *& Shaneel Mehta*[†]

Abstract

*Anti-arbitration injunctions ["**AAI or AAIs**"] have been used as a tool for legal protectionism. However, scholars have justified AAI based on the consensual nature of arbitration. Indian courts have now gained the reputation of being anti-arbitration, due to the frequent issue of AAI, and the recently developing murky jurisprudence around interim AAI. The travaux préparatoires of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ["**New York Convention**"] do not render much support to AAI. Similarly, the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ["**ICSID Convention**"] establishes a stricter approach to AAI. In this article, the authors analyse the legal framework and approaches to AAI in India, Malaysia and other jurisdictions. The authors demonstrate how Indian courts have conflated AAI with anti-suit injunctions ["**ASI**"], and hence broadened its scope. This position has further harmed the interest of the parties with the recent issuance of interim AAIs. The authors have demonstrated potential harmful effects of continuing on this path through a comparative analysis to Malaysia. Malaysia has taken a liberal approach in issuing AAI, and conflated them with ASI; thereby losing its status as a sought-after jurisdiction for arbitration. In contrast, other jurisdictions such as the United States of America ["**US**"] and the United*

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*Kingdom ["**UK**"] have restricted the scope of issue of AAI in international commercial arbitration. In light of this, the authors suggest that the principles of the ICSID Convention can be transposed to the New York Convention with respect to the subject matter of AAI. Further, it is imperative that India develops a more measured approach to issuing AAI which is only based on exceptional grounds.*

I. Introduction

International Commercial Arbitration ["**ICA**"] has been, for a considerable time, a popular choice for resolving cross-border disputes, especially those concerning business.[1] ICA is envisioned as a transnational mode of dispute resolution that must not be bound by the shackles of national moralities.[2] Hence, as multiple jurisdictions are developing their own ICA jurisprudence, the debates surrounding the interpretation of the New York Convention that executes ICA proceedings are also increasing. One such debate is apropos AAI. The two main effects of an arbitration agreement are to *first*, oblige the parties to submit the disputes within the arbitration agreement to arbitration; and *second*, for the arbitral tribunal to be given the jurisdiction to hear all these disputes.[3] This confers on the tribunal the jurisdiction to hear its own matters, which is known as the principle of *kompetenz-kompetenz*.[4] These two conflicting concepts; *first*, AAI, which provides greater power to national courts to influence the course of

1 Richard Garnett, *National Court Intervention in Arbitration as an Investment Treaty Claim*, 60(2) INT'L & COMP. L.Q. 485 (2011) [*hereinafter* "Garnett"].

2 Emmanuel Gaillard, *Three Philosophies of International Arbitration, in* CONTEMPORARY ISSUES IN INTERNATIONAL ARBITRATION AND MEDIATION 308 (Arthur W. Rovine ed. 2009) [*hereinafter* "Galliard"].

3 EMMANUEL GAILLARD, *Antisuit Injunctions Issued by Arbitrators, in* INTERNATIONAL ARBITRATION 2006: BACK TO BASICS?: ICCA CONGRESS SERIES NO. 13 238 (Albert Jan van den Berg ed. 2006).

4 FOUCHARD GAILLARD GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION 388 (Emmanuel Gaillard & John Savage eds. 1999).

arbitration proceedings and; *second*, the principle of *kompetenz-kompetenz*, which restricts it, are the source of such debates.

This article relies on the following literature to analyse AAIs. Emmanuel Gaillard, in his book, subscribes to the ideology that AAIs should not be mechanically accepted by an arbitrator.[5] Gary Born, in his commentary on ICA, advocates that it is more acceptable to refuse to enforce an award under question without encroaching upon others' jurisdiction than issuing AAIs.[6] Some other commentators such as Fouchard justify AAI in limited circumstances by emphasising that AAIs should not be granted only in an "*ideal*" world.[7] S.R. Subramanian traces succinctly the development of AAI in Indian private international law to conclude that India is moving towards a dangerous unfettered discretion being granted to courts to issue AAIs.[8] The case of *Devi Resources Limited* v. *Ambo Exports Limited* ["**Devi Resources**"], in which an interim AAI was issued, is an example of such dangerous precedent.[9] The Malaysian case of *Government of Malaysia* v. *Nurhima Kiram Fornan* shows how unfettered discretion results in addition of grounds for issuing AAIs, which were hitherto absent.[10]

In light of this literature, the objective of this article is to revisit the whole jurisprudence on AAI, given the plethora of decisions that are being

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5 GAILLARD, *supra* note 2, at 308; *see also* PIERRE A. KARRER, ANTI-ARBITRATION INJUNCTIONS: THEORY AND PRACTICE: ICCA Congress Series No. 13 228 (Wolters Kluwer 2007).

6 GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 1274 (Wolters Kluwer 2014) [*hereinafter* "Born"]; *see also,* Michael E. Schneider, *Court Actions in Defence Against Anti-Suit Injunction, in* ANTI-SUIT INJUNCTIONS IN INTERNATIONAL ARBITRATION: IAI SERIES NO. 2 41 (Emmanuel Gaillard ed., 2005).

7 Philippe Fouchard, *Anti-Suit Injunctions in International Arbitration What Remedie' Injunction, in* ANTI-SUIT INJUNCTIONS IN INTERNATIONAL ARBITRATION: IAI SERIES NO. 2 154 (Emmanuel Gaillard ed., 2005).

8 S.R. Subramanian, *Anti-arbitration injunctions and their compatibility with the New York convention and the Indian law of arbitration: future directions for Indian law and policy*, ARB. INT'L 1 (2018).

9 Devi Resources Limited v. Ambo Exports Limited, 2019 SCC OnLine Cal 7774 [*hereinafter* "Ambo exports"].

10 Government of Malaysia v. Nurhima Kiram Fornan, [2020] MLJU 425.

rendered in India on AAIs. The scope of the article is to review the multiplicity of arguments in favour and against AAI while reviewing the positions of India and Malaysia in this respect.

Malaysia has been chosen for the comparative study due to its similar socio-economic status and growth as a developing ICA state like India. While this article is limited to the analysis of Indian and Malaysian framework, it seeks support from the jurisprudence of developed countries to make its argument.

Thus, this article, in lieu of its objective, examines *first*, the origin of AAIs; *second*, their incidence in the New York Convention, in light of the approach taken in investment arbitration and *third*, the legal framework of the Indian approach to AAI in the context of Malaysian jurisprudence. The article concludes with the hypothesis that it is imperative for India to develop strict and rigid rules towards the issuance of AAIs to prevent itself from being termed as a jurisdiction of arbitral terrorism.

II. AAIs – A Conceptual Understanding

ASIs are the genesis of the concept of AAIs. While even the former is debated as an injunctive relief, the latter has dire implications. It is important to note that ASI can be traced to the principle of *forum non-conveniens*.[11] However, the same cannot justify AAIs since AAI is restricted by the principle of party autonomy. ASI is an order to the party acting in breach of their contractual terms and employing delay tactics.[12] AAI, in turn, incentivises the breach of the agreement and party autonomy, especially when different standards are exercised in evaluating the validity of an arbitration agreement.[13] The difference in the nature of ASI and AAI is recognised in the legal arena and hence ASIs are proliferated as compared

11 Johnson v. Spider Staging Corp. 87 Wn.2d 577 (1976).

12 Olga Vishnevskaya, *Anti-Suit Injunctions from Arbitral Tribunals in International Commercial Arbitration: A Necessary Evil?*, 32(2) J. INT'L ARB. 173, 177 (2015).

13 *Supra* note 12, at 179.

to AAIs.[14] The Working Group on the United Nations Commission on International Trade Law Model Law on International Commercial Arbitration has itself encouraged ASI by an amendment as a response to the prejudicial tactics undermining the arbitral process.[15] However, AAIs are frowned upon in the arena of ICA.

There is a tussle between the civil law and common law countries in the issuance of AAI. The former disparages the latter for issuing frequent AAIs as a tool for legal protectionism and frustrating the principles of ICA.[16] Historically, AAIs have had a reputation to be granted by courts in an attempt to thwart foreign arbitral proceedings, resorting to judicial protectionism of their own national companies.[17] Franco Ferrari, an eminent scholar believes that AAIs are predominantly sought to shop for a convenient forum or delays, regardless of the existence of a valid arbitration agreement.[18] Such commentators reject the idea that decisions by state courts are inherently superior to those of the arbitral tribunal.[19]

On the other hand, another set of scholars justify AAIs by focusing on the consensual nature of arbitration. This means that a party must be referred

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14 Ceskoslovenska Obchodni Banka (CSOB) v. Slovak Republic Procedural Order No. 5, at 2 - 3 (2000).

15 Working Group, Report of the Working Group on Arbitration and Conciliation on the work of its forty-third session 23 (UNCITRAL, 43rd Session, A/CN.9/589, (2005).

16 Abhishree Manikantan & Aayush Bapat, *Anti Arbitration Injunctions: The Endless Tussle for Jurisdiction* (The American Rev. on Intl Arb., 17 May 2021), *available at* https://aria.law.columbia.edu/anti-arbitration-injunctions-the-endless-tussle-for-jurisdiction/.

17 *An Overview of International Arbitration, in* NIGEL BLACKABY, CONSTANTINE PARTASIDES AND ALAN REDFERN, REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION 1 83 (7d ed. 2009).

18 FRANCO FERRARI, *Forum Shopping in the International Commercial Arbitration Context: Setting the Stage, in* FORUM SHOPPING IN THE INTERNATIONAL COMMERCIAL ARBITRATION CONTEXT (2013).

19 KARRER, *supra* note 5, at 228.

to arbitration only when it has contractually agreed to it.[20] A contract cannot cloak the arbitral tribunal with such jurisdiction, if the parties never entered into it.[21] When there is a question as to the existence or sanctity of such contract, arbitration must not be pursued. Commentators like Nicholas Poon opine that the principle of *kompetenz-kompetenz* does not preclude judicial view.[22] They even disparage the use of ASI, since it interferes with the court's jurisdiction to prevent "*a perverted and unjust end*," which is encouraged by AAI.[23] As opposed to prevalent notions, they believe that it is far better to issue AAIs than wasting the time and resources of the tribunals and the parties.[24] However, this argument has limited weightage since arbitral tribunals are specialised bodies, which do not have excessive backlogs as opposed to national courts.

There is a pro-enforcement bias present in the vehicles of ICA, that is, New York Convention, which is the most extensively tool of implementing ICA. The note by the Secretary-General clearly show that the drafters wanted the convention to be "*a simplified and expeditious procedure, … [and a] less onerous*" instrument of enforcing the awards.[25] Thus, conceptually, the enforcement of ASI is perceived to be less abhorrent than AAI. The former is seen as an aid to the enforcement of arbitral awards.[26]

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20 *Anti-Suit and Anti-Arbitration Injunctions, in* AJAR RAB, INTERIM MEASURES IN INTERNATIONAL COMMERCIAL ARBITRATION: A COMPARATIVE REVIEW OF THE INDIAN EXPERIENCE 165 (2022).

21 Dallah Real Estate and Tourism Holding Co v. Ministry of Religious Affairs of the Government of Pakistan [2010] 3 WLR 1472, ¶ 24.

22 Nicholas Poon, *The Use and Abuse of Anti-Arbitration Injunctions* 25 SING. ACADEMY OF L.J. 244, 251 (2013) [*hereinafter* "Poon"].

23 McHenry v. Lewis (1882), 22 Ch. D. 397, at 407.

24 *Supra* note 22.

25 UN Conference on International Commercial Arbitration, Comments on Draft Convention on Recognition and Enforcement of Foreign Arbitral Awards: Note by Secretary General (UNECOSOC, 6 March 1958, E/CONF.26/2).

26 William G. Bassler, *The Symbiotic Relationship between International Arbitration and National Courts*, 7 DISP. RES. INT'L 101, 107 (2013).

III. Analysis of the New York Convention in light of the ICSID Convention

A. New York Convention

The New York Convention is envisioned as a transnational instrument wherein all states collectively recognise and enforce an award, which meets certain standards of validity and legitimacy.[27] While the enforcement order operates independently, it is nonetheless grounded in the underlying principles of each nation's legal framework. Some commentators argue that in such truly transnational systems, the tribunals will not accept the incidence of AAI, since such instruments provide a single system of authority to regulate transnational systems, which is undesirable.[28]

The drafters of the New York Convention initially wanted to separate the recognition and enforcement of arbitral awards from the validity of arbitration agreement.[29] Thus, Article II, which provides courts the flexibility to grant AAIs, was incorporated only less than three weeks prior to adoption of the convention in a rushed manner.[30] It provides that the court of a contracting state shall refer the parties to arbitration who have made an agreement to do so in compliance with Article II(1), unless it is found to be "*null and void, inoperative or incapable of being performed.*"[31] Provisions similar to Article II(3) of the New York Convention, exist in the

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27 GAILLARD, *supra* note 2, at 307.

28 *Id.* at 308.

29 Dorothee Schramm, Elliott Geisinger & Phillippe Pinsolle, *Article II, in*, RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS: A GLOBAL COMMENTARY ON THE NEW YORK CONVENTION 40 (Herbert Kronke, Patricia Nacimiento, ET AL. eds. 2010).

30 Hassan Raza, *New York Convention Article II(3) – 'Refer the Parties to Arbitration' – Shield or a Compelling Measure?*, KLUWER ARBITRATION BLOG (Nov. 03, 2020), *available at* https://arbitrationblog.kluwerarbitration.com/2020/11/03/new-york-convention-article-ii3-refer-the-parties-to-arbitration-shield-or-a-compelling-measure/.

31 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 10 June 1958, 330 U.N.T.S. 3, Article II(3) (*hereinafter* "New York Convention").

Geneva Protocol of 1923 under Article 4 read with Article 1.[32] However, a similar provision on reference was absent in the Geneva Convention of 1927.[33] The proposal for Article II came from the delegates of Netherlands, which was opposed by Belgium since it did not want to concede to the proposed standards of validity of arbitration agreements.[34] There was hardly any discussion on the impugned provision. The debates pivoted around enforcement of the awards and the procedure therein.[35] It was nonetheless adopted by a vote of 18 in favour and eight against it, not being one of the popular and well-received provision.[36] The final text of the article was suggested five days before and confirmed merely two days before the convention was passed.[37]

The *travaux préparatoires* are silent on the subject of AAI and have not envisioned the same under Article II(3).[38] The initial drafts were significantly different and did not even accord the courts with the authority to reject a reference to arbitration. However, the provision was introduced

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32 United Nations Protocol on Arbitration Clauses, 24 Sept. 1923, art. 1, 4.

33 United Nations Convention on the Execution of Foreign Arbitral Awards, 26 Sept. 1927.

34 UN Conference on International Commercial Arbitration, Summary Records of the United Nations Conference on International Commercial Arbitration, New York (UNECOSOC, 20 May – 10 June 1958) 21st meeting [E/CONF.26/SR.21 - E/2704 and Corr.1, E/2822 and Add.1 to 6, E/CONF.26/2, 3 and Add.1, E/CONF.26/4, 7, E/CONF.26/L.16, L.28, L.49, L.52, L.55, L.56],17.

35 UN Conference on International Commercial Arbitration, *Consideration of the Draft Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (UNECOSOC, 1958) E/CONF.26/L.36 – Amendment to Article 2; *see also* UN Conference on International Commercial Arbitration, Report by the Secretary-General, Recognition and Enforcement of Foreign Arbitral Awards (UNECOSOC, 31 January 1956) E/2822, 11.

36 UN Conference on International Commercial Arbitration, *21st meeting [E/CONF.26/SR.21 - E/2704 and Corr.1, E/2822 and Add.1 to 6, E/CONF.26/2, 3 and Add.1, E/CONF.26/4, 7, E/CONF.26/L.16, L.28, L.49, L.52, L.55, L.56]* (UNECOSOC, 5 June 1958) 17.

37 UN Conference on International Commercial Arbitration, *E/CONF.26/L.54 - Netherlands: Amendment to proposal made by Working Party No. 2 (E/CONF.26/L.52)* (UNECOSOC, 5 June 1958); *see also* UN Conference on International Commercial Arbitration, E/CONF.26/L.59 - Text of new article to be included in the Convention, adopted by the Conference at its 21st meeting (UNECOSOC, 6 June 1958).

38 UNCITRAL, UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 68 (UNCITRAL, 2016).

later to prevent the parties from "*sabotaging*" the arbitration agreement that they are party to, by unnecessarily referring the dispute to a regular court.[39] This can be noted in the suggestions of Sweden's and Belgium's committees wherein it was required that the contracting parties to submit to the jurisdiction of arbitral tribunal apropos the validity of arbitration agreement rather than the application of conflicting private international law.[40] Thus, by interpreting Article II(3) in the context of Articles 31 and 32 of the Vienna Convention on the Law of the Treaties, it runs counter to the concept of AAI.[41] Nevertheless, certain scholars argue that AAIs can be justified within the ambit of Article II(3), when the arbitration agreement does not exist in the first place.[42]

The enforcement and recognition of foreign arbitral awards places a positive and a negative effect on the courts to enforce the arbitral award rendered and prevent parties from approaching alternate forums in violation of *pacta sunt servanda*, respectively.[43] The issuance of AAI depends on the extent of the negative effect a nation employs. The New York Convention puts the burden on the courts to compel arbitration in light of an agreement.[44] AAIs and the principle of *kompetenz-kompetenz* interact together to render a position wherein despite an AAI, the tribunals proceed with the arbitration and independently decide their own jurisdiction based

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39 UN Conference on International Commercial Arbitration, *E/CONF.26/2 - General observations and presentation of the objective of the Conference* (UNECOSOC, 6 March 1958), at 25; *see also GreCon Dimter Inc. v. J.R. Normand Inc. and Scierie Thomas-Louis Tremblay Inc* [2003] Q.J. No. 1262 (QL).

40 UN Conference on International Commercial Arbitration, *E/2822/Add.1 - General Observations, Comments on Articles 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15* (UNECOSOC, 21 February 1956); *see also* UN Conference on International Commercial Arbitration, *E/CONF.26/C.3/L.3 - Belgium: Working Paper on the draft Supplementary Protocol* (UNECOSOC, 3 June 1958).

41 IAN SINCLAIR, THE VIENNA CONVENTION ON THE LAW OF TREATIES (1973).

42 Richard Garnett, *Anti-arbitration injunctions: walking the tightrope*, 26 ARB. INT'L 1, 48 (2020).

43 BORN, *supra* note 6, at 2116.

44 Sourcing Unlimited Inc. v. Asimco International Inc., 526 F.3d 38 (1st Cir. 2008).

on the principle of *kompetenz-kompetenz*, ignoring the principle of *lis pendens*.[45] Some commentators believe that the arbitral tribunal not only has such a right, but an obligation as well.[46] This has become a common phenomenon in India as discussed later in the article.

In foreign arbitral awards, the question of AAI becomes crucial since granting one would interfere with the jurisdiction of the court at seat of arbitration.[47] The New York Convention is seen through a lens of comity, that the court seized of an injunction petition owes a duty to the foreign courts and arbitral tribunals to not encroach upon their territory.[48] Hence, the ground for questioning the validity of arbitration agreement or the jurisdiction of arbitral tribunal is limited to Article II(3).

It has been recognised by commentators arguing on both sides that there is nothing in the text of the New York Convention that may stop a national court from enjoining arbitration proceedings.[49] However, it is the nature of ICA that rationalises not engaging in AAI. These commentators argue that the determination of a dispute to be non-arbitrable or against public policy must not be a ground for enjoining the arbitration.[50] The same can be denied enforcement in those particular countries later, since individual conceptions of morality and public policy must not be imposed on other jurisdictions.[51]

45 Olga Vishnevskaya, *Anti-Suit Injunctions from Arbitral Tribunals in International Commercial Arbitration: A Necessary Evil?* 32(2) J. INT'L ARB. 173, 185 (2015).

46 BORN, *supra* note 6, at 2161.

47 Black Clawson International Ltd v. Papierwerke Waldhof-Aschaffenburg AG [1981] 2 Lloyd's Rep 446.

48 GARNETT, *supra* note 42, at 3.

49 BORN, *supra* note 6.

50 *Supra* note 45, at 202.

51 BORN, *supra* note 6, at 2160.

B. ICSID Convention

In contrast, the ICSID Convention specifically gives an additional protection from AAI in the form of Article 26.[52] Issuance of AAIs is generally considered a violation of the Convention.[53] This article provides for a deemed consent of the parties to arbitration under this Convention, unless agreed to the contrary. The ICSID arbitration, once initiated, is a self-contained legislation, and provides for the arbitration to proceed even without the cooperation of one party under the Convention.[54] Arbitration is a sought-after forum for investment disputes and hence both the host-state and investor prefer insulation of the arbitration from domestic or foreign courts. Such non-interference by the national courts, especially the courts of the state party to the agreement, prevent the investor from being particularly targeted.[55] The courts, nonetheless, have interfered with enforcement proceedings by breaching the ICSID.[56] However, the settled position of ICSID and the tribunal therein is that such interference will be a denial of justice and abhorrent to the principles of international law.[57] ICSID may not be entirely applicable to regular foreign arbitral proceedings since AAIs are not tantamount to denial of justice by the state court.[58] However, in the New York Convention, similar considerations of international principles, party autonomy, and the use of AAIs to frustrate

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52 Convention on the Settlement of Investment Disputes between States and the Nationals of other States, October 14, 1966, art. 26.

53 Saipem S.p.A. v. The People's Republic of Bangladesh, ICSID Case No. ARB/05/07, ¶ 166.

54 CHRISTOPH H. SCHREUER, THE ICSID CONVENTION: A COMMENTARY 351 (2009).

55 S SCHWEBEL, INTERNATIONAL ARBITRATION: THREE SALIENT PROBLEMS 61 (1987).

56 Standard Chartered Bank (Hong Kong) Limited v. Tanzania Electric Supply Company Limited, ICSID Case No. ARB/10/20; *see also,* SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan, ICSID Case No. ARB/01/13.

57 *Supra* note 53.

58 Sabahi Rubins, *National Court Interference: Anti-Arbitration Injunctions*, *in* INVESTOR-STATE ARBITRATION (2d. ed., Borzu Sabahi, Noah Rubins, ET AL. eds. 2019).

the proceedings resulting in denial of justice for the losing party, dissuade their employment.[59]

An argument that has been gaining momentum, even within investment arbitration, is that the courts in the jurisdiction of the seat of arbitration have supervisory jurisdiction and high degree of injustice must be portrayed to annul any AAIs issued by such States.[60] Such views are based on an extended application of the principle of *lex loci arbitri*.[61] However, such views contrast the de-localised nature of proceedings held in *Salini Costruttori SpA* v. *The Federal Democratic Republic of Ethiopia*.[62] For ICA, merely restricting the AAIs to jurisdiction of *lex arbitri* may not be enough since the parties will still be forced to expend time and money in a foreign jurisdiction. AAIs are understood to be issued to restrain a party than an arbitral tribunal, and the court of seat does not exercise jurisdiction over foreign parties.[63]

IV. Legal Framework

A. India

The debate surrounding AAIs in India deals with the proposition as to whether Part I of Arbitration and Conciliation Act, 1996 ["**Arbitration Act**"] is applicable to Part II. Section 5 of the Arbitration Act restricts judicial intervention by the courts in matters of arbitration and is a notwithstanding clause.[64] Section 16 incorporates the principle of *kompetenz-*

59 GARNETT, *supra* note 1 at 490; *see also* Mondev International Ltd v. United States of America, 6 ICSID Rep 1.

60 *Id.*

61 Roy Goode, *The Role of the Lex Loci Arbitri in International Commercial Arbitration*, 17(1) ARB. INT'L 19 (2001); *see also* Albert Jan Van Den Berg, *Control of Jurisdiction by Injunctions Issued by National Courts*, *in* 13 INTERNATIONAL ARBITRATION 2006: BACK TO BASICS? ICCA CONGRESS SERIES, 2006 MONTREAL 192 (2007).

62 Salini Costruttori SpA v. The Federal Democratic Republic of Ethiopia, ICC Arbitration No. 10623/AER/ACS.

63 Sharad Bansal and Divyanshu Agarwal, *Are anti-arbitration injunctions a malaise? An analysis in the context of Indian law*, 31 ARB. INT'L 613, 621 (2015).

64 The Arbitration and Conciliation Act, 1996, No. 26, Acts of Parliament, 1996, § 5.

kompetenz.[65] The legislature incorporated Article II(3) in form of Section 45 of the Arbitration Act.[66] Some decisions like *Chatterjee Petrochemical Co.* v. *Haldia Petrochemicals Ltd.* ["**Chatterjee Petrochemical**"], have read these three provisions to statutorily bar the use of AAI. This represented the former position adopted in India.[67] However, the Court in *World Sport Group (Mauritius) Limited* v. *MSM Sattelite (Singapore) Pvt. Ltd.* ["**World Sports Group**"] has noted that Section 45 in the Part II of the Arbitration Act is a notwithstanding clause that excludes the applicability of Part I to ICA.[68] Further, many decisions argue that Indian courts have wide powers under the Code of Civil Procedure, 1908 ["**CPC**"] (Order XXXIX) to grant interim reliefs akin to AAI.[69]

B. Malaysia

Malaysia has a developing jurisprudence on AAI. It has a separate chapter for the recognition and enforcement of foreign arbitral awards that incorporates the scheme of the New York Convention, under the Arbitration Act, 2005 ["**Malaysian Arbitration Act**"].[70] However, Malaysia has specified that Chapter I, II and IV of the Malaysian Arbitration Act apply to ICA, while Chapter III does not, unless explicitly incorporated by

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65 Jyoti Dastidar and Aman Chandola*, Anti-Arbitration Injunctions: Judicial Trends and Finding the Middle Path,* CYRIL AMARCHAND MANGALDAS (Nov. 27, 2020), *available at* https://corporate.cyrilamarchandblogs.com/2020/11/anti-arbitration-injunctions-judicial-trends-and-finding-the-middle-path/.

66 The Arbitration and Conciliation Act, 1996, No. 26, Acts of Parliament, 1996, § 45.

67 Chatterjee Petrochem Co. v. Haldia Petrochemicals Ltd., (2014) 14 SCC 574 [*hereinafter* "Haldia Petrochemicals"; *see also* Modi Entertainment Network v. WSG Cricket Pte Ltd., AIR 2003 SC 1177.

68 World Sport Group (Mauritius) Ltd. v. MSM Satellite (Singapore) Pte. Ltd., (2014) 11 SCC 639.

69 HALDIA PETROCHEMICALS, supra note 67.

70 Tan Sri Cecil Abraham and Thayananthan Baskaran, *Malaysia, in* ASIA ARBITRATION HANDBOOK 627 (Michael J. Moser & John Choong eds., 2011)[*herinafter* "Thayananthan Baskaran"].

the parties.[71] Section 88, applicable to ICA, limits court intervention to only those circumstances that are provided for under the Malaysian Arbitration Act.[72] It incorporates Article II(3) within Section 10, whose textual interpretation gives even narrower grounds for intervention by the court than the New York Convention. Here, the term "*valid*" as a prefix to the arbitration agreement has been omitted by the legislature. Hence, the only line of inquiry by the courts must be whether the arbitration agreement is "*null and void, inoperative or incapable of being performed.*"

V. Approach to AAIs

A. India

Section 45 of the Arbitration Act, which incorporates Article II(3) of the New York Convention, limits the application of AAIs to merely cases wherein it is prima facie found that the agreement is "*null and void, inoperative or incapable of being performed.*" The Indian jurisprudence continues the debate over the interpretation of this phrase. One key case that emerged in 2005 was the *Union of India* v. *Dabhol Power Co.* that broadened the scope of such injunctions and conflated it with the grounds of ASI.[73] It ignored the conceptual differences between both the injunctive reliefs, and held in line with the United Kingdom ["**UK**"] precedent *Excalibur Ventures LLC* v. *Texas Keystone Inc.* that AAIs can be granted even when the proceedings are vexatious or unconscionable, which are broad grounds to restrict the principle of *kompetenz-kompetenz*.[74] It is opined that enjoining an arbitration proceeding merely on the ground of oppressive proceedings is in contravention with the New York Convention and general international law principles.[75] This was later remedied by the Supreme Court in *World Sport*

71 Arbitration Act, Laws of Malaysia Act 646 of 2005, § 3(3) (Malaysia) [*hereinafter* "Malaysian Arbitration Act"].

72 MALASIAN ARBITRATION ACT, *supra* note 71, § 8.

73 Union of India v Dabhol Power Co., IA No 6663/ 2003, Suit No 1268/2003.

74 Excalibur Ventures LLC v. Texas Keystone Inc., 2011 EWHC 2411.

75 *Supra* note 63, at 620.

Group where it held that the conditions for granting AAI must be more exacting than ASI.[76] However, the applicability of this judgement has been limited by the persisting argument that interim reliefs are equitable in nature. Additionally, the applicability of the CPC to the Arbitration Act has been upheld by the courts. Hence, the grounds hitherto disregarded in *World Sports Group*, which have been applied to AAIs by the virtue of it being an interim relief, may continue to be applied in Indian jurisprudence, labelling India as an anti-arbitration jurisdiction. This is evident from the decision in *Vikram Bakshi* v. *McDonald's India Pvt. Ltd.* which applied the grounds discarded.[77]

The Indian court in *Shin Etsu Co. Ltd.* v. *Aksh Optifibre Limited* held that while the New York Convention does not stipulate prima facie or ex facie review, the former would serve a better purpose for the ICA.[78] It would prevent delay and judicial intervention and its validity of the award may again be challenged at the enforcement stage. Thereafter, the legislature, via an amendment in 2019, has itself specified a prima facie standard to be followed in such cases.[79]

A lacuna that has developed in Indian jurisprudence is apropos the novated concept of interim AAIs. Recent the decisions of the Calcutta and Delhi High Court have resulted in inefficiency in arbitration in every conceivable manner.[80] In these cases, the foreign arbitration proceedings were continued and an award was passed in subsistence of an interim AAI. However, the interim AAI was later vacated. In the Calcutta High Court's decision, one of the parties abstained from giving further evidence or

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76 World Sport Group (Mauritius) Limited v. MSM Sattelite (Singapore) Pvt. Ltd., (2010) 112 BOMLR 2942.

77 Vikram Bakshi v. State, 2012 SCC OnLine Del 4316.

78 Shin-Etsu Chemical Co. Ltd. v. Aksh Optifibre Ltd., (2005) 7 SCC 234.

79 The Arbitration and Conciliation (Amendment) Act, 2019, No. 33, Acts of Parliament, 2019, § 11.

80 AMBO EXPORTS, *supra* note 9; see also ADM International SRL v. Sunraja Oil Industries Private Limited, (2021) 4 Mad LJ 147.

pleadings in the matter due to the interim AAI.[81] However, the courts, in both these cases occupied a "*pro-arbitration*" stance by preaching their lack of jurisdiction, comity with foreign jurisdictions and prevention of one-upmanship, and allowing the order to subsist.[82] This means that the efficacy of the interim order would be known only when it attains finality. Thus, in such cases the courts claim their jurisdiction to issue AAIs as well as contest the same jurisdiction at a later stage.[83] This renders the interim order to be a fiction, which goes against the basic tenets of the arguments in favour of AAI. Resultantly, the purported pro-arbitration stance harms the interest of parties, making the process unpredictable, increasing delay and costs along with problematising the jurisprudence on AAIs.

B. Malaysia

An important case that has developed in Malaysia vis-à-vis AAIs is *Jaya Sudhir Jayaram* v. *Nautical Supreme Sdn Bhd*.[84] While this case deals with a domestic-seated arbitration, it lays the foundation of AAI in Malaysia. The court here adopted a very liberal approach, despite the narrow legal framework, based on the fairest approach to all the stakeholders involved.[85] It rejected the exceptional circumstances approach and advocated litigation since a third-party was involved. It noted that instruments like the New York Convention regrettably promote fragmentation of dispute resolution in the garb of encouraging enforcement.[86] This has been criticised by commentators for extending the power of the courts beyond the limited circumstance, by which an opportunistic third party may circumvent arbitral proceedings while the tribunal may have jurisdiction.[87]

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81 ADM International SRL v. Sunraja Oil Industries Private Limited, (2021) 4 Mad LJ 147.
82 ADM International SRL v. Sunraja Oil Industries Private Limited, (2021) 4 Mad LJ 147
83 Saarthak Jain and Kashish Makkar, *The dilution of interim anti-arbitration injunctions in Devi Resources: pro-enforcement approach gone too far?*, 36 ARB. INT'L 297, 301 (2020).
84 Jaya Sudhir Jayaram v. Nautical Supreme Sdn Bhd, [2019] CLJ JT (3).
85 *Id.*
86 *Id.* at 20.
87 *Supra* note 1.

The transnational decisions in Malaysia have a liberal approach towards issuing AAIs. The courts have issued AAIs in Malaysia based on the United States of America's approach for grant of interim injunctions as laid down in *American Cyanamid* v. *Ethicon* ["**American Cyanamide**"].[88] Similar to *Chatterjee Petrochemical*, Malaysia has also conflated the grounds for ASI and AAI. The *American Cyanamid* case allows courts to interfere with the jurisdiction of arbitral tribunals when *first*, there are serious issues to be tried, *second*, damages would not be an adequate remedy, and *third*, mere balance of convenience lies in favour of injunction. These grounds have been criticised to be too broad, non-specific, and in contravention of the conditions of the New York Convention. While some courts have attempted to narrow the grounds and increase the threshold for foreign arbitral proceedings,[89] the courts have still employed the *American Cyanamid* test.[90] Moreover, Malaysia has added even further grounds of its own. For instance, Malaysian courts can be the natural and proper forum wherein there are concerns of sovereign immunity, hitherto not a ground under the New York Convention.[91] The only arena wherein the Malaysian stance on AAIs has been praised is based on their adoption of the prima facie standard of review that emphasises on greater *kompetenz-kompetenz*.[92]

Section 10(3) of the Malayisan Arbitration Act, 2005 statutorily incorporates the issue arising in Indian jurisdiction vis-à-vis interim AAI.[93] It mandates that the arbitral proceedings may be commenced or continued and an award can be rendered during the pendency of any matter under Section 10(1), which incorporates Article II(3). This limits the issue of an

88 MICS Behad v. Cockett Marine Oil (Asia) Pte Ltd. [2023] 1 CLJ 20; American Cyanamid v. Ethicon (1975) UKHL 1.

89 Government of Malaysia v. Nurhima Kiram Fornan, [2020] MLJU 425.

90 Lysught Corrugated Pipe Sdn Bhd and Anoor v. Popeye Resources [2022] 1 LNS 191.

91 Government of Malaysia v. Nurhima Kiram Fornan, [2020] MLJU 425; *see also*, Hetal Doshi and Sankalp Udgata, *Anti-arbitration injunction by Malaysian High Court—un(measured) invocation of sovereign immunity*, 36(3) ARB. INT'L 415, 418 (2020).

92 MICS Behad v. Cockett Marine Oil (Asia) Pte Ltd. [2023] 1 CLJ 20.

93 MALAYSIAN ARBITRATION ACT, *supra* note 71, §10(1).

interim AAI, since statutorily the tribunal is allowed to proceed with the arbitration. This means that the courts have to pass a final order issuing AAIs without proper examination or else the AAI remains ineffective.

C. Other Prominent Jurisdictions

While American courts in general issue AAIs, they have, in the view of comity and deference to the supervisory authority of foreign courts, restricted its use in context of ICA.[94] While for domestic agreements, the inquiry is apropos the determination of the validity of arbitration agreements,[95] for ICA, they limit it to the remedies in the New York Convention or the Federal Arbitration Act.[96] The United Kingdom ["**UK**"] has explicitly held that the supervisory jurisdiction of the courts is limited only to the circumstances mentioned in the Arbitration Act, 1996, which is an incorporation of the New York Convention.[97] However, UK has exercised AAIs more in the foreign arbitration context than in its domestic cases.[98] They rely on the principle of *forum non-conveniens*, which is misconceived.[99] Nonetheless, the principles that are employed by the courts in the UK limit the exercise of AAIs to exceptional circumstances.[100] The courts have noted that different tests must apply to AAIs in ICA.[101] It cannot be issued on mere inconvenience.[102] Such cases only arise when the arbitration agreement does not exist in the first place, as stipulated under

94 URS Corp. v. Lebanese Co. for the Dev. & Reconstruction of Beirut Cent. Dist. SAL, 512 F.Supp.2d 199, 210 (D. Del. 2007).

95 First Options v. Kaplan, 514 U.S. 938 (1995).

96 Ghassabian v. Hematian, No. 08 Civ. 4400 (SAS) (2008).

97 Elektrim SA v. Vivendi Universal SA [2007] EWHC 571 (Comm) ¶ 75.

98 GARNETT, *Supra* note 1, at 8.

99 J Jarvis & Sons Ltd v. Blue Circle Dartford Estates Ltd. (2007) EWIC (TCC) 1262, ¶ 19; *see also* Internet FZCO v. Ansol Ltd. (2007) EWHC (Comm) 226, ¶ 1.

100 Weissfisch v. Julius [2006] EWCA Civ 218, ¶ 33.

101 Elektrim SA v. Vivendi Universal SA [2007] EWHC 571 (Comm).

102 J Jarvis & Sons Ltd v. Blue Circle Dartford Estates Ltd. (2007) EWIC (TCC) 1262; *see also* GARNETT, *supra* note 1, at 6.

Article II(1) of the New York Convention.[103] Consequently, there has been a growing reluctance amongst States to issue AAIs. Particularly, in mature arbitration jurisdictions like Singapore, AAIs have been not been issued easily.[104]

Since the New York Convention introduced a minimal definition of valid arbitration agreement to the body of norms, the jurisprudence on standard of review is vague.[105] However, previous commentators who have engaged in a comparative study opine that counterintuitively prima facie test is not dominant at the pre-award phase.[106] However, states like the UK are moving away from their hitherto position in determining the jurisdictional questions by a full scrutiny test and the prima facie test is now gaining momentum.[107] This momentum is due to increased issuance of AAI, and delay and disregard for the principle of *kompetenz-kompetenz*. A full scrutiny may enable courts to undertake an unfettered review of the decision of an arbitral tribunal, whose jurisdiction is conferred through party autonomy.[108] Hence, the review is limited to invalidity *qui crèvent les yeux* (which are astonishing).[109]

The issue of interim AAIs arises in other jurisdictions as well. For instance, in *Fomento de Construcciones y Contratos SA* v. *Colon Container Terminal SA*, the

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103 Albon v. Naza Motor Trading Sdn B EWCA Civ 1124; *see also* Kazakhstan v. Istil Group Inc. 4 [2007] EWHC 2729 (Comm.).

104 Mitsui Engineering and Shipbuilding Co Ltd v. Easton Graham Rush [2004] 2 SLR(R) 14.

105 UN Conference on International Commercial Arbitration, 9th Mtg, E/CONF.26/SR.9 (UNECOSOC 1958) 9-13; *see also* REINMAR WOLFF, *Article II, in* NEW YORK CONVENTION: COMMENTARY 93ff (Reinmar Wolff ed., 2012).

106 GIACOMO MARCHISIO, THE VALIDITY OF THE ARBITRATION AGREEMENT IN INTERNATIONAL COMMERCIAL ARBITRATION 36 (2014).

107 Louis Flannery, *The English Statutory Framework, in* ARBITRATION IN ENGLAND, WITH CHAPTERS ON SCOTLAND AND IRELAND 210 (Julian DM Lew ET AL. eds., 2013); *see also* Fiona Trust & Holding Corp v. Privalov [2007] UKHL 40.

108 *Supra* note 5, at 228.

109 Yves Strickler, *Arbitres et juges internes, in* L'ARBITRAGE: QUESTIONS CONTEMPORAINES 78 (Yves Strickler and Jean-Baptiste Racine eds., 2012).

Swiss Federal Tribunal has annulled the arbitral tribunal's awards on the ground of not exercising *lis pendens* to halt the arbitration proceedings in subsistence of pending litigation proceedings in the national courts.[110] However, the Swiss Federal Tribunal also noted that with objections to the arbitration agreement and jurisdiction, both the forums had an "*equal vocation*" to adjudicate.[111] While this is indeed a more desirable approach than the Indian position, it must be noted that issuing interim AAIs have severe consequences. The arbitral tribunals have powers to render awards even in default of the participation of the applicant of the AAI.[112] In ICA, what qualifies as a valid arbitration agreement is a low threshold, and imposing the decisions rendered in one nation cannot be said to be binding on the other.[113] Issuing interim AAIs will breach the de-localised manner of ICA, combined with subsistence of parallel and conflicting proceedings.

VI. Conclusion

The *travaux préparatoires* of the New York Convention provides minimal support to the issue of AAIs. While Article II(3) may be interpreted to give the flexibility to the courts to issue AAI, the policy arguments, and the nature of the New York Convention as a vehicle of enforcement and recognition of arbitral awards, demand the same to be issued in limited circumstances. In India, the lack of a definitive Supreme Court decision on this matter has contributed to a perception of the judiciary as anti-arbitration. This perception aligns with broader, often negative stereotypes held by developed nations about third-world countries' approaches to arbitration. Continuing on this path would render India being accused of arbitral terrorism or the act of dissuading arbitration in favour of one's legal

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110 Fomento de Construcciones y Contrates SA v. Colon Container Terminal SA DFT 127 III 279 [*hereinafter* "Fomento"].

111 FOMENTO, *supra* note 110, at 286.

112 United Nations Commission on International Trade Law (UNCITRAL), Model Law on International Commercial Arbitration, G.A. Res 40/72 (Dec. 11, 1985), as amended by G.A. Res. 61/33, U.N. Doc. A/RES/61/33 (Dec. 18, 2006) art. 25(c)

113 Indonesia v. Himpurna Cal. Energy Ltd. XXV Y.B. Comm. Arb. 469, 473 [*hereinafter* "Himpurna"].

system.[114] The Indian courts have conflated the grounds for ASI and AAI, created a murky jurisprudence on interim AAIs and have ignored the consequences of such approach. It must learn the valuable lessons from Malaysia's unfavourable approach. While Malaysia has stricter statutory conditions, the courts have liberalised its approach at an exponential rate, which is abhorrent to the basic tenets of ICA. Malaysian jurisprudence is hardly preferred by countries for ICA.[115]

The developed jurisprudences on AAI of US, UK etc., require India to adopt a more restrictive approach to AAI. While ICSID establishes a stricter approach to AAI based on the State being a party, it must be remembered that in any foreign arbitral proceedings, repudiating from a contract which one is a party to, whether it is the state or otherwise, and an unreasonable conduct of national courts is in breach of universal international arbitration principles.[116] Hence, such approach can be transposed to AAIs in ICA as well. It is imperative that India must not merely claim to be a pro-arbitration jurisdiction on the face of it, while rendering the parties hapless, as is the case in *Devi Resources*.[117] It must understand the severe complications of AAI separate it from understanding of ASI and develop rigid guidelines while issuing AAI. A measured approach to AAI may promote arbitration.[118] Nevertheless, in absence of any rigid guidelines or affirmed principles, India will not be able to develop the reputation as an arbitration-friendly jurisdiction. It must issue AAIs only based on the exceptional ground stipulated in Article II(3) of the New York Convention by a prima facie judicial determination.

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114 Doak Bishop, *Combating Arbitral Terrorism: Anti-Arbitration Injunctions increasingly threaten to frustrate the International Arbitral System*, *available at*: https://www.kslaw.com/library/pdf/bishop7.pdf.

115 THAYANANTHAN BASKARAN, *supra* note 70.

116 HIMPURNA, *supra* note 113, 187.

117 AMBO EXPORTS, *supra* note 9.

118 POON, *supra* note, 260.

THE ISSUANCE OF THE SUPREME COURT REGULATION NO. 3 OF 2023: AN ASSESSMENT OF HOW IT WOULD PROMOTE ARBITRATION IN INDONESIA

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Abstract

*To ensure effectiveness of dispute resolution such as arbitration, underlying laws should be in harmony with international standards and cater the existing development developments. Indonesian arbitration law, the Law No. 30 of 1999 on Arbitration and Alternative Dispute Resolution["**AADR Law**"], has remained the same since 1999 regardless there have been significant developments and evolution of the arbitration practice. Only after more than two decades there is finally an attempt to fill in the gaps existing in the AADR Law. This attempt came from the Supreme Court by issuing the Supreme Court Regulation No. 3 of 2023["**SCR 3/2023**"]. The regulation provides more clarity regarding the appointment of arbitrators, right of recusal, and the examination of enforcement and annulment of arbitral awards. This article will showcase how these changes may affect the practice of arbitration in Indonesia.*

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I. Introduction

Dispute resolution in legal contexts manifests through litigation and non-litigation methods. Litigation involving judicial intervention results in enforceable judgments but is often criticised for its time-consuming and costly nature, and potential to sour relationships between disputants.[1]

Non-litigation, specifically arbitration, offers a more streamlined alternative, empowering parties to tailor the resolution process, including selecting arbitrators and setting proceedings. Its confidentiality safeguards sensitive information and the finality of arbitral awards, making it preferred for business disputes. Recognised and practiced globally, including in Indonesia, arbitration operates under the framework of the Law Number 30 of 1999 on Arbitration and Alternative Dispute Resolution, which, despite its age, remained largely unchanged for over two decades.[2] This stagnation contrasts with the dynamic evolution of global arbitration practices, highlighting a disconnect between the AADR Law and contemporary needs.

Whilst outdated, the AADR Law still accommodates the arbitration practice in Indonesia, promoting swift, confidential dispute resolution. However, recent judicial update, particularly the Supreme Court Regulation Number 3 of 2023 on Procedures for the Appointment of Arbitrators by the Court, the Rights of Recusal, Examinations of Request for Enforcement, and the Annulment of Arbitral Awards, aim to encourage ease of doing business to promote national economy growth. SCR 3/2023 addresses procedural gaps in the AADR Law, serving as both a complement

1 *Advantages and Disadvantages of Litigation: A Quick Guide*, ROBERTSONS SOLICITORS (Feb. 14, 2022), https://robsols.co.uk/advantages-and-disadvantages-of-litigation-a-quick-guide/.

2 Constitutional Court Judgment Number 15/PUU-XII/2014 (Indonesia).

and a procedural guide,[3] thus marking a significant step towards aligning Indonesian arbitration with modern standards.

This article analyses SCR 3/2023's impact on arbitration practice and law enforcement in Indonesia, examining its role in facilitating the adoption of contemporary arbitration measures within the legal framework.

II. Historical context and evolution of arbitration in Indonesia

The AADR Law encompasses arbitration and alternatives like conciliation, mediation, and negotiation.[4] This is in line with the definition of alternative dispute resolution ["**ADR**"] in the AADR Law, which states that ADR is a mechanism for resolving disputes or differences of opinion through procedures agreed upon by the parties, namely settlement outside of court by means of consultation, negotiation, mediation, conciliation, or expert assessment. This legislation offers a method for resolving disputes and acts as a preventive mechanism against conflict escalation, thus establishing a critical framework for business and trade arbitration in Indonesia.

A significant milestone in Indonesian arbitration was the adoption of the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards through Presidential Decree No. 34 of 1981. This international commitment necessitates a harmonious relationship between national arbitration laws and global standards. Even with that, enforcement of arbitral awards was still full of challenge under the presumption that there was no implementing regulation. Only until the AADR Law was issued that the jurisdiction saw clearer procedure on how (international) arbitral awards could be enforced. However, the AADR Law does not follow the guidance

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3 Agus Satory, Hotma P. Sibuea, *Problematika Kedudukan Dan Pengujian Peraturan Mahkamah Agung Secara Materiil Sebagai Peraturan Perundang-Undangan*, 6(1) PAKUAN LAW REVIEW, 1-27 (2020).

4 *Alternative Dispute Resolution*, CORNWELL LAW SCHOOL, (date?https://www.law.cornell.edu/wex/alternative_dispute_resolution.

provided in the UNCITRAL Model Law on International Commercial Arbitration, which underscores the AADR Law, although accommodates basic provisions of arbitration found in many jurisdictions, does not follow the dynamic development of arbitration practices and norms in ensuring the efficacy of convening arbitration and enforcing arbitral award within the region.

The lack of clarity and current regulations' inability to accommodate contemporary arbitration's complexities pose challenges, especially in disputes involving international parties. This discrepancy has led to a preference for litigation despite its inherent risks for commercial entities.

Criticism from legal experts, practitioners, and the business community has been vocal about the urgency of updating the AADR Law to align with global arbitration practices.[5] However, revising the law has been stymied by stakeholders' need for more initiative to push for its inclusion in the 2019-2024 National Legislation Program. This inaction extends from the absence of academic proposals to the failure to submit draft revisions.[6]

In response to the evolving arbitration landscape and the legislative stagnation, there is a pressing need for more granular legal provisions to detail the AADR Law's framework, particularly regarding the judiciary's role in arbitration processes. The AADR Law's broad strokes leave much to the discretion of court proceedings without concrete procedural guidance. Here, under its purview, the Supreme Court stepped in with SCR 3/2023 to offer directives for court engagement in arbitration, attempting to fill the gaps left by the AADR Law's generality. This initiative represents

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5 Oleh, *UU Arbitrase Diusulkan Untuk Segera Direvisi*, UNIVERSITAS GADJAH MADA (Jan. 15 2022), https://ugm.ac.id/id/berita/18791-uu-arbitrase-diusulkan-untuk-segera-direvisi/.

6 Rofiq Hidayat, *Jalan Menuju Opsi Merevisi atau Membuat UU Arbitrase Baru*, HUKUM ONLINE (Aug 25, 2020) https://www.hukumonline.com/berita/a/jalan-menuju-opsi-merevisi-atau-membuat-uu-arbitrase-baru-lt5f44a29432823/.

a critical step towards modernising Indonesian arbitration and ensuring its functionality within national and international contexts.[7]

III. Analysis and legal implications of SCR 3/2023

A. Key features of SCR 3/2023

Efforts to align Indonesian arbitration law with the global standard to mainly promote investment climate needs to be continued to be pursued. One manifestation of this is the issuance and ratification of SCR 3/2023. Several regulatory aspects mark these adjustments such as below.

i. Appointment of arbitrators and rights of recusal

The standout provision of SCR 3/2023 is its approach to appointing arbitrators when parties disagree. Article 4(1) of SCR 3/2023 allows for the court's involvement, explicitly mandating the Chairman of the Court to appoint arbitrators within 14 days of the request,[8] should the parties reach an impasse.[9] This mechanism ensures continuity in the arbitration process, highlighting a pragmatic resolution to deadlock situations over arbitrator selection. The term "Chairman of the Court" encompasses both the District and Religious Courts, allowing for flexibility based on the nature of the dispute. This inclusivity ensures that the Religious Court appropriately manages commercial disputes with Sharia elements, whereas other commercial disputes fall under the District Court's purview.

This provision underscores the importance of judicial intervention in maintaining the integrity of the arbitration process,[10] especially in situations

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7 Arbitration and Alternative Dispute Resolutions, Law No. 30 of 1999, art. 32(4) (Indonesia) (*hereinafter* "AADR Law").

8 SCR 3/2023, Art. 4 (3) (Indonesia).

9 SCR 3/2023, Art. 4 (1) (Indonesia).

10 *Arb-Med-Arb: An Effort to Enhance Amicable Dispute Resolution*, ASSEGAF HAMZAH & PARTNERS (Aug. 3 2022), https://www.ahp.id/arb-med-arb-an-effort-to-enhance-amicable-dispute-resolution/.

where party autonomy might otherwise stall proceedings.[11] Including a strict timeline for appointing arbitrators further ensures efficiency and reduces the potential for extended disputes.

The regulation also addresses the challenge of arbitrator neutrality, offering a recourse for parties dissatisfied with an appointed arbitrator's potential biases due to personal, financial, or employment relationships. Parties can request the Chairman of the Court to review such concerns, with decisions made within 14 days.[12] This process, mirroring the impartiality expected of judges, is designed to uphold the fairness of the arbitration process, and protect against bias. The finality of the Chairman's decision on such matters, without the avenue for further legal challenge, underscores the regulation's aim to resolve disputes regarding arbitrator impartiality decisively, thus preventing additional conflicts and ensuring the arbitration's progression.[13]

ii. Differentiation between domestic and international arbitral awards

The first difference between domestic arbitral awards and international arbitral awards can be observed from a territorial perspective. Here, territoriality is understood to encompass the legal jurisdiction of Indonesia and the areas covered by the diplomatic representation of the Republic of Indonesia in foreign countries. Thus, domestic arbitral awards are defined as those rendered within the territorial bounds of Indonesia, whereas, international arbitral awards are rendered outside these territorial limits.[14]

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11 C. Chatterjee, *The Reality of Party Autonomy Rule in International Arbitration*, 20(6) JOURNAL OF INTERNATIONAL ARBITRATION 539, 540 (2003).

12 SCR 3/2023, Art. 4 (4) & (5) (Indonesia).

13 SCR 3/2023, Art. 5 (1), (3), & (4) (Indonesia).

14 Sashia Diandra Anindita & Prita Amalia, *Klasifikasi Putusan Arbitrase Internasional Menurut Hukum Indonesia Ditinjau Dari Hukum Internasional*, 2(1) JURNAL BINA HUKUM (2017); *see*, Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958, Article 1(1) (*hereinafter* "New York Convention").

The subsequent distinction relates to the absolute jurisdiction of courts over each arbitral award. The entire process, from the registration of domestic arbitral awards, the submission of requests for the enforcement of domestic arbitral awards, and the filing of applications to annul domestic arbitral awards, falls within the exclusive purview of the District Courts.[15] However, if the award contains elements of Sharia law, all such applications are exclusively handled by the Religious Courts.[16] Meanwhile, both absolute and relative court jurisdictions, apply to the registration of international arbitral awards, the submission of requests for the enforcement of international arbitral awards, and the filing of applications to annul international arbitral awards. These applications fall under the authority of the Central Jakarta District Court.[17] The same applies to international Sharia arbitral awards, which must be managed by the Central Jakarta Religious Court.[18]

Legal remedies available in case an application for the enforcement of an arbitral award is denied by the Court also differ. When a domestic arbitration/Sharia arbitral award is rejected by the District Court/Religious Court due to contraventions of the AADR Law and public order, no legal remedies are available to the parties.[19] This contrasts with international arbitration/international Sharia arbitral awards rejected by the Central Jakarta District Court/Central Jakarta Religious Court. In such cases, the last resort legal remedy, cassation to the Supreme Court, can be pursued.[20]

Another difference is found in the timeframe for the registration of arbitral awards. For national/Sharia national arbitral awards, registration is limited to a maximum of 30 days.[21] This restriction does not apply to

15 SCR 3/2023, Art. 2 (1) (Indonesia).
16 SCR 3/2023, Art. 2 (2) (Indonesia).
17 SCR 3/2023, Art. 1 (1) (Indonesia).
18 SCR 3/2023, Art. 1 (2) (Indonesia).
19 SCR 3/2023, Art. 12 (1) (Indonesia).
20 SCR 3/2023, Art. 16 (6) (Indonesia).
21 SCR 3/2023, Art. 6 (1) (Indonesia).

international/Sharia international arbitral awards, for which there is no specific registration timeframe.[22] The registration of national/Sharia national arbitral awards by the Court Clerk also has a shorter timeframe compared to international/Sharia international arbitral awards, which is up to 14 days. Different provisions regarding time limits also emerge in the timeframe for filing and granting exequatur for international/Sharia international arbitral awards. Such timeframes are not applicable to national/Sharia national arbitral awards, given the absence of an exequatur procedure for these arbitral awards.

iii. Discussion on the registration process for arbitral awards.

The execution of an arbitral award begins with the registration of the arbitral award. Both the registration of national/Sharia national arbitral award and international/Sharia international arbitral award are mandatorily to be filed in court through the Court Clerk.[23] However, the registration of international arbitration and international Sharia arbitral awards is carried out at the Central Jakarta District Court and the Central Jakarta Religious Court, respectively.[24] The registration method for both types of awards is facilitated electronically via the Court Information System.[25] This provision is deemed an effort to ensure the registration process can be conducted effectively and efficiently to meet the registration deadline requirements.

The deadline for registration and the execution of registration by the Court Clerk are also emphasised in these provisions. While the registration of national and Sharia national arbitral awards is limited to 30 days from the date the award is made, the registration of international/Sharia international arbitral awards only mandates the Court Clerk to complete registration

22 SCR 3/2023, Art. 7 (7) (Indonesia).
23 SCR 3/2023, Art. 6 (1) & 7 (1), (2) (Indonesia).
24 SCR 3/2023, Art. 7 (1) (Indonesia).
25 SCR 3/2023, Art. 6 (3) & Art. 7 (5) (Indonesia).

within a maximum of 14 days after the registration files are complete.[26] Meanwhile, the execution of registration by the Court Clerk for national/Sharia national arbitral awards is limited to 3 days from the submission of the award.

There is a difference in the consequences for the status of national and international arbitral awards if the registration deadline is exceeded. For national/Sharia national arbitral awards, failure to register results in the award being unregistrable. Thus, compliance with these regulations is crucial through the appointment of professional, credible, and experienced Arbitrators by the Arbitration Institution/Sharia Arbitration Institution, or the Chairman of the District Court, to carry out the registration process responsibly.[27] In case of violation of these provisions, accountability can be demanded from the party conducting the registration (arbitrator or their proxy), including the party appointing the arbitrator (national arbitration institution/Sharia national arbitration institution, or the Chairman of the District Court). Moreover, these provisions simultaneously ensure public trust in national and Sharia national arbitration.

Meanwhile, the consequence of an award's status being unregistrable does not apply to international arbitral awards. This regulation implicitly indicates that there is no time limit for registering with the Central Jakarta District Court or the Central Jakarta Religious Court, since the arbitral award is made.

Additionally, the obligation to create a registration deed and sign the end part of the arbitral award by the court clerk and the arbitrator or their agent, is seen as evidence that the submission and registration have been approved and acknowledged by both parties.[28] Not just these two parties, but the award to be registered must also be known to the disputing parties before

26 SCR 3/2023, Art. 6 (1) & Art. 7 (4) (Indonesia).
27 AADR Law, 1999, Art. 12 (1) (Indonesia).
28 SCR 3/2023, Art. 6 (2) (Indonesia).

registration. As evidenced, the registration must include documents proving notification of the award to the parties.[29] Registration of an arbitral award that has been proven to be delivered to the parties helps the execution of the award to proceed synchronously, thereby, preventing potential conflicts and claims by parties who find out at a belated time. This provision is considered quite technical to ensure transparency and fairness in the arbitration process and to maintain the essence of peaceful dispute resolution.

Technical obligations are also directed to the court clerk to execute the registration within a maximum of 3 days from the delivery of the arbitral award by the arbitrator or their agent.

iv. Examination of requests for the enforcement of arbitral awards

SCR 3/2023 delineates the procedure for enforcing arbitral awards in Indonesia – whether it is national (including Sharia national arbitration) or international (including Sharia international arbitration). For enforcement actions to commence, the relevant arbitral award must first be registered with the appropriate court: domestic awards with the District Court or Religious Court and international awards with the Central Jakarta District Court or Central Jakarta Religious Court.

Enforcement proceedings are initiated when an arbitral award is not complied with voluntarily. In such cases, the aggrieved party may seek an enforcement order for a national award from the Chairman of the District Court, or pursue an *exequatur* from the Supreme Court for international awards facilitated through the Central Jakarta District Court.[30] Notably, parties are permitted to request the enforcement of specific portions of an arbitral award,[31] a flexibility that extends across all categories of arbitration.

29 SCR 3/2023, Art. 6 (6) (Indonesia).
30 SCR 3/2023 Art. 8 (1) and Art. 16 (1) (Indonesia).
31 SCR 3/2023, Art. 8 (2) and Art. 16 (2) (Indonesia).

It is worth noting that this is not in line with Article 66 of the AADR Law which regulates that international arbitral awards can only be recognised and implemented in Indonesia after being registered by fulfilling the conditions specified in that article.

Submissions for enforcement are to be made electronically via the court information system. Upon filing, a national arbitration or Sharia national arbitration enforcement order must be communicated to the concerned parties within 30 days, whilst the decision to grant *exequatur* for international awards must be rendered within 14 days; followed by enforcement in line with civil decision procedures.[32]

Should an enforcement request be denied – on the grounds of non-compliance with the AADR Law, violation of public order, or because the matter falls outside the purview of commerce[33] – the avenues for legal recourse differ by the type of arbitration. Rejection is final for national and Sharia national arbitral awards, leaving no option for appeal. Conversely, denials of enforcement for international and Sharia international arbitral awards may be contested through a cassation appeal to the Supreme Court, offering a layer of judicial review for these decisions.[34]

v. *Guidelines for annulment of arbitral awards*

The annulment of domestic/share arbitral award starts with the registration of an annulment request, which can be submitted electronically or non-electronically. There are specific criteria based on which an award can be annulled, which are:

1. After the award is rendered, a letter or document submitted in evidence is admitted or is declared to have been forged;

32 SCR 3/2023, Art. 23 (Indonesia).
33 SCR 3/2023, Art. 11 & Art. 21 (Indonesia).
34 SCR 3/2023, Art. 21 (Indonesia).

2. After the award is rendered, documents of a decisive nature hidden by the opposing party are discovered; or
3. The award was rendered as a result of deception by one of the parties to the dispute proceedings.

Only one of these criteria is needed to register for the annulment of an award, supported by a letter or documents proving the alleged ground for annulment.[35]

The registration for an arbitral award becomes a requirement for filing an annulment. The submission period is limited to 30 days from registration and must be known to the parties within a maximum of 3 days after the application is registered. Registrations that do not meet these requirements will be immediately responded to with a certificate from the Clerk of the Court and a decision by the Chairman of the Court for violating formal requirements.[36]

The annulment of arbitration/sharia arbitral awards is then submitted to the District Court/Religious Court and undergoes a legal process like civil petition proceedings. Thus, the legal process also adheres to the Civil Procedure Law provisions in the Indonesian Civil Procedure Code, and the *Herzien Inlandsch Reglement* (HIR). The order of the petition process is as follows: the *first* hearing with the agenda of reading the petition, the *second* hearing for responses, the *third* for interim decisions (if any), the *fourth* for evidence proceedings, and *finally*, the reading of the decision.[37] However, this legal process does not accommodate counterclaims or reconvention, as affirmed in the SCR 3/2023 provisions, which limit the Respondent to only submit a response.[38]

35 SCR 3/2023 Art. 24 (4) & (5) (Indonesia).
36 SCR 3/2023, Art. 24 (1), (2), & (3) (Indonesia).
37 SCR 3/2023, Art. 26 (2) (Indonesia).
38 SCR 3/2023, Art. 26 (Indonesia).

Parties referred to as the Claimant (*Pemohon*) and Respondent (*Termohon*). There are different legal consequences for each party if they neglect the court summons. If the Applicant does not attend the first hearing despite being properly and reasonably summoned, the application will be declared void.[39] Meanwhile, if the Respondent does not attend the first hearing with a valid reason, the hearing will proceed, a final court summons will be made, and they would be informed to attend the second hearing to submit a response.[40] However, if the Respondent does not attend the second hearing to give a response, they will not be called upon again for the same agenda. Likewise, the evidence proceeding must be fully utilised by both the Applicant and Respondent to submit evidence, as the evidence proceeding is only given one opportunity.[41] The entire process, from the first hearing to the final hearing with the decision reading agenda, must be completed within 30 days.[42]

If the decision grants the annulment request for arbitration/sharia arbitration, the opposing party can only take the final legal recourse – which is an appeal to the Supreme Court – and must be submitted within a maximum of 14 days from the decision reading, or when the decision is informed to the parties.[43] Meanwhile, if the decision is rejected there will be no legal recourse.[44]

The appeal processes are the same as the proceeding civil procedure law for the appeal level, except SCR 3/2023 sets a deadline for each stage. For example, there is a 3-day deadline from recording the appeal for the Court to notify the Respondent Appeal about the appeal, a 7-day deadline from notification for the Respondent Appeal to send a counter-memorandum, and a deadline for examining each party's file completeness. The appeal

39 SCR 3/2023, Art. 26 Para. (3) & HIR, Art. 124 (Indonesia).
40 SCR 3/2023, Art. 26 (5) & HIR, Art. 126 (Indonesia).
41 SCR 3/2023, Art. 26 (6), (7), & (8) (Indonesia).
42 SCR 3/2023, Art. 26 (1) (Indonesia).
43 SCR 3/2023, Art. 27 (1) & (4) (Indonesia).
44 SCR 3/2023, Art. 27 (3) (Indonesia).

process is determined to be completed within 30 days from the appeal registration, so on the 30th day, according to SCR 3/2023 provisions, the parties will have received the appeal decision.

B. Assessing the impact of SCR No. 3/2023

i. Efficiency in the arbitration process

The introduction of a new arbitration framework undoubtedly brings several changes or developments that refine the previous framework. The presence of both old and new frameworks is considered to enable a more efficient arbitration practice. Yet, the efficiency of a framework is discernible through three factors. First, the extent to which a framework can cover legal processes and practices that may occur. Efficiency is also seen in how a framework can provide guidance down to address technical issues, thereby avoiding disputed practices. Lastly, efficiency is determined by the framework's ability to adapt to changing times and ongoing general practices, especially international practices. All these points are needed to ensure that the underlying regulations are in favour of arbitration.

There are several changes in SCR 3/2023 which occur in various aspects, such as:

1. The appointment of arbitrators and the right of recusal –

When comparing the aspect of arbitrator appointments, the new framework can complement the old, especially when parties do not reach an agreement on the arbitrator's selection.[45] Under SCR 3/2023, the parties or one of the parties can submit a request to the Chairman of the District Court, to appoint the arbitrator or arbitration panels.[46] The provisions for the appointment of arbitrators or arbitration panels, and the right of recusal

45 AADR Law, 1999, Art. 13 (1) (Indonesia).
46 SCR 3/2023, Art. 4 (1), (2), (3) (Indonesia).

in SCR 3/2023, focuses more on court procedures in handling both applications. This indicates that both AADR Law and SCR 3/2023 efficiently serve disputing parties in appointing arbitrators, and the right to challenge. However, when these aspects require court involvement, SCR 3/2023 is undoubtedly more efficient as a guideline.

2. Registration of arbitral award –

Regarding the registration of arbitral awards, SCR 3/2023 provides more detailed provisions, including the registration deadline and the conditions and procedures for registering arbitral awards, along with more specific technical provisions at every stage. One such requirement is the mandatory registration of national/Sharia national arbitral awards along with proof of decision notification to the parties.[47] This requirement in SCR 3/2023, complementing the old framework in AADR Law, anticipates potential conflicts, thus maintaining the spirit of peaceful dispute resolution. This example is just one representation of how SCR 3/2023 accommodates registration provisions more meticulously than AADR Law. Therefore, the new framework is considered more efficient for filing arbitral award registrations.

3. Applications for the enforcement of arbitral award –

The same efficiency is demonstrated in the aspect of enforcing arbitral awards, where SCR 3/2023 emphasises provisions related to the application process for enforcing arbitral awards in court, including deadlines for each stage. This indicates that the new framework is a more detailed complement to the old framework. For instance, SCR 3/2023 provides for the potential of simultaneous applications for the enforcement of national/Sharia national arbitral awards and the annulment of such awards, an aspect not addressed by AADR Law.

47 SCR 3/2023, Art. 6 (6) (Indonesia).

4. Applications for the annulment of arbitral award –

The annulment of arbitral awards also provides a more detailed framework for the court and disputing parties, from the process of registering applications for annulment, examining applications, legal remedies against court decisions from applications, and deadlines for several stages. SCR 3/2023 governs these stages in four comprehensive articles, compared to AADR Law's three articles that merely outline criteria for awards that can be annulled and general regulations on the application for annulment. Given that applications for the annulment of arbitral awards are directed to the Chairman of the District Court,[48] the procedural law for rendering decisions accordingly matches court procedures. Therefore, in this regard, the SCR 3/2023 framework is far more efficient to implement.

For all stages – the registration of arbitral awards, applications for the enforcement of awards, and applications for annulment – SCR 3/2023 provides new directives for electronic submissions using the court information system (SIP). This adaptation of the arbitration law with the times, demanding acceleration and technological progress, aligns with global arbitration practices. The implementation of electronic services also aims to facilitate parties' submissions to the court, unrestricted by territory and time (if they comply with regulations).

From the comparison of the two frameworks, it can be concluded that SCR 3/2023 is more efficient to implement once the three aspects of an efficient framework are met. Although courts do not have jurisdiction to adjudicate in arbitration dispute resolutions, post-award stages such as the registration of arbitral awards, involuntary applications for enforcement, and annulment of awards still require court involvement to command, decide,

48 AADR Law, 1999, Art. 72 (1) (Indonesia).

and issue orders. Thus, the Supreme Court's provisions in the form of SCR 3/2023 offer higher implementation efficiency.

ii. Clarity in legal standards and procedures

The detailed provisions and framework outlined in SCR 3/2023 provide clarity on legal standards and procedures in the current practice of arbitration law.

1. New definition of public order –

From a legal standards perspective, clarity is found in the delineation of the scope of public order, which serves as a reference for the applicability of an arbitral award in Indonesia. Before enacting SCR 3/2023, there was no definition related to public order as a benchmark standard.[49] In the AADR Law, public order lacked a formal definition, making its boundaries somewhat subjective.[50] Although the definition of public order is still quite broad, SCR 3/2023 attempts to provide definition which explains that public order comprises fundamental principles essential to the legal, economic, and socio-cultural system.

2. Specific procedures regarding sharia arbitration –

Recognition of the Sharia legal system, especially Sharia arbitration, is also included in the new framework. The AADR Law, as the older arbitration framework, did not differentiate the treatment of such arbitration from the

49 Prior to SCR 3/2023, the definition of public order was referred to in Supreme Court Regulation Number 1 of 1990 on the Procedures for Enforcement of Foreign Arbitral Awards (SCR 1/1990). Art. 4 Para. (2) of SCR 1/1990 stated that an exequatur would not be granted if the foreign arbitral decision was in clear contradiction with the fundamental principles of the entire legal and societal system in Indonesia, implying a broad and foundational scope of public order. SCR 3/2023 provides a different definition of public order which encompasses fundamental principles necessary for the functioning of the legal, economic, and socio-cultural systems of the Indonesian nation and society (Indonesia).

50 AADR Law, 1999, Art. 1 (Indonesia).

conventional arbitration, despite the National Sharia Arbitration Board (Basyarnas), formerly known as the Arbitration Board of the Indonesian Ulema Council (BAMUI), being established in October 1993;[51] six years prior to the enactment of the AADR Law. As a result, the practice of Sharia arbitration has come to a new beginning as the SCR 3/2023 is issued. In this new framework, Sharia arbitration is given a specific footing in arbitration dispute resolution, specifically within the scope of Sharia trade or business.

3. Affirmation of registration timeframe –

This new framework also clarifies legal procedures as seen from the provisions regarding the absence of a valid timeframe for the submission and registration of international arbitral awards. In the AADR Law, this was not explicitly affirmed. Provisions on the registration of arbitral awards were merely stated as a requirement for filing applications for enforcement and annulment of international arbitral awards, without a timeframe within which the awards must be registered. In contrast, SCR 3/2023 mentions the timeframe for arbitral award registration, indicating that the registration of international arbitral awards does not follow the timeframe for national arbitral award registration.[52]

4. Clarification on some procedures –

Another clarity is also achieved in the provisions for the appointment process of arbitrators and the right to challenge, registration of arbitral awards, applications for the enforcement of arbitral awards, and applications for the annulment of arbitral awards. From the moment of filing, the detailed explanation regarding the order of procedures, the parties involved, the applicable timeframes, and the legal remedies to respond to

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51 Basyarnas-MUI, *Majelis Ulama Indonesia*, (March 22, 2023) https://basyarnas-mui.org/sejarah/.

52 SCR 3/2023, Art. 7(7) (Indonesia).

court decisions is meticulously outlined. An example of procedural clarity in SCR 3/2023 not found in the AADR Law is the process for filing for exequatur. In the new arbitration framework, the process for applying for exequatur is detailed from the submission to the Central Jakarta District Court/Central Jakarta Religious Court, to the Supreme Court granting exequatur, and up to the execution of international/Sharia international arbitral awards.[53] A detailed process is also found in the provisions for examining applications for annulment of arbitral awards and legal remedies against the granting of applications for annulment of arbitral awards not included in the AADR Law. These provisions regulate the stages of trial examination, courtroom procedures, and detailed legal provisions for filing legal remedies, covering various potential scenarios and time limits for these stages.[54]

iii. Impact on enforceability of arbitral award

The impact of enforcing an arbitral award varies depending on the type of application submitted by one of the disputing parties; whether it is an application for the enforcement of the arbitral award or an application for the annulment of the arbitral award.

If an arbitral award is upheld in an application for the enforcement of a national/Sharia national arbitral award, this leads to the possibility of legal remedies being filed by the party objecting to the order to enforce the arbitral award from the Chairman of the District Court/Chairman of the Religious Court. The prohibition on taking legal action against the order to enforce the arbitral award is not regulated in SCR 3/2023. Therefore, as far as SCR 3/2023 is concerned, there is no prohibition on taking legal remedies by the party objecting to such an order. The same impact applies to the enforcement of international/Sharia international arbitral awards in the application for the enforcement of the arbitral award. However, in this

53 SCR 3/2023, Art. 18 (Indonesia).
54 SCR 3/2023, Chapter VII (Indonesia).

case, the legal remedies that can be taken by the party objecting to the enforcement of the arbitral award are limited to the cassation appeal to the Supreme Court, as the level of legal remedies available in the provisions of international/Sharia international arbitration is only the cassation level.[55]

In the application for the annulment of an arbitral award, an arbitral award upheld by the District Court/Religious Court results in no legal remedies.[56] This applies to both national/Sharia national arbitral awards and international/Sharia international arbitral awards.

C. Legal implications of SCR 3/2023

i. Implications of SCR 3/2023 for the enforcement of arbitral awards

The legal basis for the execution of an arbitral award is that the arbitral award does not conflict with the morality and/or public order, and is within the scope of commerce.[57] In this context, the Chairman of the Court is authorised to assess whether an arbitral award meets these criteria. Such assessment action in SCR 3/2023 is only found in the chapter regulating the enforcement of arbitral awards.[58] This means that the Chairman of the Court is only authorised to evaluate arbitral award when there is an application for exequatur, if the arbitral award is not voluntarily implemented. The result is in the form of exequatur allowing parties to enforce the award or a refusal to enforce the arbitral award due to non-compliance with morality/public order or arbitrability of the substance.

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55 SCR 3/2023, Art. 21 (Indonesia).

56 SCR 3/2023, Art. 27 (3) (Indonesia).

57 AADR Law, AADR Law Art. 5 (1) requires that the scope of disputes that can be resolved through arbitration are only trade disputes along with conditions related to the rights controlled by the parties to the dispute. Art. 5 (2) requires that disputes which according to statutory regulations cannot be reconciled cannot be resolved through arbitration (Indonesia).

58 SCR 3/2023, Art. 9 & Art. 17 (Indonesia).

ii. Revised grounds for annulment

The reasons for granting an arbitral award annulment are limited to the elements in Article 70 of the AADR Law.[59] In practice, however, there are evidence of parties using reasons for the annulment of arbitral awards not solely from Article 70 of the AADR Law.[60] In practice, courts have granted annulments of arbitral awards based on three types of reasons: applications that utilise Article 70, applications that use reasons beyond Article 70, and a combination of both.[61] On this note, the courts have also issued decisions considering various elements within and outside of Article 70 of the AADR Law as a basis for reasons for annulment,[62] even though the article specifically mandates that the reasons for annulment only need to satisfy one of the three elements.[63]

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59 AADR Law, 1999, Art. 70 stipulates that for an arbitral award to be annulled, one of the following elements must be met: a document submitted during the examination is recognized as counterfeit or declared counterfeit after the award is rendered; a document that was concealed by the opposing party and is decisive is discovered after the award is made; or the award is based on the deceit of one party during the dispute examination (Indonesia).

60 Setyawati Fitrianggraeni, Eva Fatimah Fauziah, and Sri Purnama, *Dealing with Unsatisfactory Arbitral Awards: Observing the Grounds of Annulment of Arbitral Awards in Indonesia*, 40(6) JOURNAL OF INTERNATIONAL ARBITRATION 747, (2023).

61 The data is a record of court decisions that consider elements in Article 70 AADR Law, reasons outside Article 70 AADR Law, and a combination of the two in the 2019-2022 period. There are 68% of decisions that consider elements in Article 70 AADR Law, 24% of decisions that consider reasons outside Article 70 AADR Law, and 8% of decisions that consider a combination of both.

62 The data is a record of court decisions which consider several elements at once in Art. 70 AADR Law during the 2019-2022 period. As many as 3% of the total annulment decisions consider Art. 70(a), 9% of the total decisions consider Art. 70(b), 37% of the total decisions consider Art. 70(c), and 51% of the total decisions consider various elements simultaneously in Art. 70; *see*, *Id.,* 747-748.

63 While courts are indeed obligated to address the grounds presented by the parties for annulment, the overarching legal framework mandates that any ground for annulment must strictly conform to the stipulations of Article 70. This obligation reflects the judiciary's responsibility to interpret the law based on the evidence and arguments presented and to ensure legal decisions align with established legal standards. However, in practice, judges have sometimes granted annulments based on grounds beyond those

The criteria for the reasons for the annulment of arbitral awards have undergone changes since SCR 3/2023. In SCR 3/2023, an arbitral award submitted for annulment must contain at least one of the three elements identical to points a, b, and c in Article 70 of the AADR Law.[64]

This provision serves as a more concrete guideline that must be adhered to by judges when considering the annulment of an arbitral award. The addition of the requirement 'containing one of the elements' in the article thus closes the option for judges to apply considerations to a combination of various reasons in Article 24 paragraph (4) of SCR 3/2023 or the option to apply considerations to reasons beyond that article.

iii. Procedural changes in SCR 3/2023 and their significance

The amended procedural provisions in SCR 3/2023 certainly introduce new legal implications. First, it appears that legal provisions related to filings or applications to the Court under the AADR Law have the potential to be superseded, or at the very least, be a trigger for the AADR Law to be amended.[65] As explained in the sub-section "*Key points of SCR 3/2023*," these provisions bring forth more detailed legal procedures than those found in the AADR Law. SCR 3/2023 essentially acts as an implementing

specified in Article 70, reflecting a broader judicial assessment of each case's circumstances. While intended to ensure equitable justice, this approach underscores the need for more straightforward guidelines to prevent discrepancies in the application of the law.

64 SCR 3/2023, Art. 24 (4) (Indonesia).

65 While SCR 3/2023 introduces significant procedural updates, it cannot supersede the AADR Law, given the hierarchy of laws where statutory laws hold higher authority over judicial regulations, *see*, Law Number 12 of 2012 in conjunction with Law Number 15 of 2019 in conjunction with Law Number 13 of 2022 on Lawmaking. SCR 3/2023 primarily serves as guidelines for judicial practice rather than amending statutory provisions. However, its enactment highlights the urgency and potential necessity for revising the outdated AADR Law to resolve existing ambiguities and align with contemporary arbitration practices (Indonesia).

regulation of the AADR Law, though not explicitly mentioned, capable of addressing the gaps and shortcomings within the AADR Law.

This makes the provisions of SCR 3/2023 more likely to be chosen as a reference, both for parties needing the court's role in deciding the appointment of arbitrators, the right to challenge, and arbitral awards, and as a guideline for conducting their legal processes. In this context, the AADR Law obviously remains obligatory to follow outside of provisions related to the Court, such as those concerning arbitration requirements, applicable procedural law in arbitration processes, opinions and arbitral awards, the termination of arbitrators' duties, and provisions about costs.

Among the many detailed procedural provisions explained in SCR 3/2023, there is one concerning the granting of exequatur to international arbitral awards, which marks a change from the exequatur provisions in the AADR Law. This change indicates that SCR 3/2023 still has weaknesses, namely the presence of provisions that conflict with higher provisions (AADR Law). This carries the potential impact on SCR 3/2023 itself that might warrant an evaluation of this provision, suggesting a need for revision to avoid conflicts with the AADR Law, and to provide procedural provisions that are in alignment.

However, despite its shortcomings, SCR 3/2023 offers greater legal certainty that safeguards the interests of the parties to execute arbitral awards as soon as possible, especially when considering the nature of SCR that directly affects how the courts operate and use them as judges' guidelines. The detailed order of procedural stages clearly stated parties interested in a particular stage, and limited timeframes are aspects so clearly regulated in these provisions, preventing multiple interpretations and able to form a system of norms that do not conflict with other norms.[66]

[66] R. Tony Prayogo, *The Implementation Of Legal Certainty Principle In Supreme Court Regulation Number 1 Of 2011 On Material Review Rights And In Constitutional Court Regulation Number*

Moreover, SCR 3/2023 removes arbitral institutions from parties when there are annulment requests, and it is different from the practice and not regulated in the AADR Law. Simply, SCR 3/2023 brings clarity of regulation that leads to legal certainty, thus also providing certainty for the parties to accurately determine their next steps.

IV. Case studies and practical applications

To ascertain the actual effectiveness of SCR 3/2023 provisions in dispute resolution efforts, it is imperative to examine a case study that applies these provisions. Regrettably, no arbitration case has emerged following the enactment of SCR 3/2023 on October 17, 2023. The closest cases are those decided after the SCR 3/2023 enactment date, which had already undergone trial processes before the SCR 3/2023 enactment.

One such instance is the Supreme Court Decision Number 1212 B/Pdt.Sus/Arbt/2023, rendered on November 13, 2023, which issued a judgment on the appeal in the matter of *PT Asuransi Jasa Indonesia* v. *PT Lintas Teknologi Indonesia and Anr.*[67] In summary, this appeal was lodged against the decision of the Central Jakarta District Court Number 202/Pdt.Sus-Arb/2023/PN Jkt. Pst, which rejected the application for the annulment of an arbitral award by the applicant. It is noteworthy that in this case, the appellant was previously positioned as the applicant for the annulment of the arbitral award against the arbitral award Number 45072/IX/ARB-BANI/2022 issued by the Indonesian National Arbitration Board (BANI).

06/Pmk/2005 On Guidelines For The Hearing In Judicial Review, 13(2) JURNAL LEGISLASI INDONESIA 190, 191-202 (2016).

67 PT Asuransi Jasa Indonesia v. PT Lintas Teknologi Indonesia & Ors., Putusan Mahkamah Agung Nomor 1212 B/Pdt.Sus-Arbt/2023, Direktori Putusan Mahkamah Agung Republik Indonesia, (Nov. 11, 2023) https://putusan3.mahkamahagung.go.id/direktori/putusan/zaeecca00be8c86885b231335303236.html.

The judges stated the appeal must consider the provisions of Article 72 paragraph (1) and paragraph (4) of the AADR Law along with the explanation of Article 72 paragraph (4) of the AADR Law. The requirement for filing an appeal is most clearly present in the explanation of Article 72 paragraph (4) of the AADR Law, where an appeal can only be made against the annulment of the arbitral award referred to in Article 70 of the AADR Law.[68]

This judicial consideration also constitutes the implementation of the provisions on the rejection of the application for the annulment of the arbitral award. In SCR 2023, the consequences of rejecting the application for the annulment of an arbitral award are explicitly stated in Article 27 paragraph (3) of SCR 3/2023, which clarifies that no legal remedy can be pursued against the rejection of an application for the annulment of an arbitration/sharia arbitral award by the Court. Therefore, for parties that still file an appeal, such action creates a formal defect in the application, making the appeal inadmissible. This consideration led the judges in the case to declare the appeal inadmissible or NO (*Niet Ontvankelijke Verklaard*).

Through this illustration, it can be concluded that the regulations in SCR 3/2023 fills in the gap on dealing with disputes arising post-arbitral award. The technical procedural provisions on various aspects of filing related to arbitral awards, as clearly stipulated in SCR 3/2023, indeed assist disputing parties in determining the legal steps that can be taken to avoid potential court disputes that could result in unfavourable judgments against them.

V. Critique and recommendations

Critical points of this regulation also emerge in several aspects, especially the inconsistencies that may pose issues when applied. First, the application

[68] AADR Law, 1999, Art. 70 emphasizes that the conditions for cancelling an arbitral award must meet the elements of a fake document, concealment of documents, or fraud in the examination (Indonesia).

for the exequatur of international arbitration/international sharia arbitral awards necessitates attention from legal practitioners, particularly the entire judiciary under the Supreme Court involved in the registration process and the granting of the exequatur. The positioning of the exequatur as an order to enforce an arbitral award executed without the voluntary compliance of one of the disputing parties represents a new norm that does not clarify and is even inconsistent with the exequatur provisions in the AADR Law. This requires rectification by the SCR drafters to avoid confusion for those engaged in the resolution of international arbitration/international sharia arbitration disputes. Besides preventing such issues, reconsidering this exequatur provision also provides clarity for parties to commence the enforcement of international arbitration/international sharia arbitral awards. Such efforts also need to be enforced by the SCR drafters to ensure judicial practice in judicial institutions complies with the laws applicable in Indonesia.

SCR 3/2023 has tightened up the grounds for arbitral award annulment that must be based on one of the three existing elements. This aims to further close the potential for the submission and granting of annulment applications based on conditions outside those annulment requirements. This provision can also be used as a reference for lawyers in providing advice to clients to focus on the three reasons for arbitral award annulment that stated in SCR 3/2023. Thus, the enforcement of SCR 3/2023 becomes more comprehensive and capable of suppressing the use of annulment requirements that do not comply with the latest provisions.

VI. Conclusion

As a framework focused on providing technical procedural provisions, SCR 3/2023 has enhanced clarity in the process and enforcement of arbitral awards for various parties. This framework sufficiently and comprehensively provides provisions that guide the parties when the appointment of arbitrators faces a deadlock, including the right to refuse,

directing and clarifying the procedures for registration, enforcement, and annulment of arbitral awards, offering a significant procedural difference between domestic and international arbitral awards, and effectively including sharia arbitration as a key player in arbitration practice in Indonesia.

The introduction of SCR 3/2023 has filled a gap within the main arbitration law regulation, the AADR Law. This signifies that SCR 3/2023 is a part of important development in Indonesian arbitration, striving to align with global arbitration advancements. Simultaneously, SCR 3/2023 also further promotes the effectiveness and efficiency of arbitration as an alternative dispute resolution method. The potential for arbitration as a favoured and considered dispute resolution method is highly likely to increase, hoping that the resolution of disputes peacefully will become more widespread.

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