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NOTE OF REMEMBRANCE

2020–2021 has been a phase of paradoxes, losses and heightened uncertainties for everyone. We have similar mixed feelings as we announce the tenth issue of the Indian J. Arb. L. Undoubtedly, we are filled with pride, but we also have to reckon with the fact that this year three shining stars of the world of arbitration and dispute resolution—Prof. J. Martin Hunter (1937–2021), Prof. Emmanuel Gaillard (1952–2021) and Mr. S.K. Dholakia (–2021)—left for their heavenly abode. Indian J. Arb. L. would not have emerged and reached this position but for the support of these leading lights. Not only did these stalwarts lent their name to the Board of Advisors of the Indian J. Arb. L., they also actively contributed to the journal in diverse ways—including, by writing thought-provoking and excellent pieces for the journal. Their guidance and expertise shall be fondly missed by all of us.

We pay our deepest respect and gratitude to Prof. J. Martin Hunter, Prof. Emmanuel Gaillard and Mr. S.K. Dholakia, and hope that they will keep inspiring us and millions of others.

Aditya Singh Chauhan
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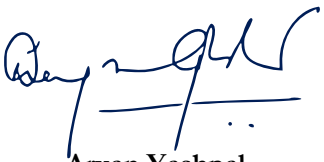

Aryan Yashpal
Editor-in-Chief

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INDIAN JOURNAL OF ARBITRATION LAW

TOWARDS A HARMONIZED THEORY OF THE LAW GOVERNING THE ARBITRATION AGREEMENT

Maxi Scherer[*] *& Ole Jensen*[†]

Abstract

The agreement to arbitrate is foundational to the arbitral process. At the gateway to arbitral proceedings, a myriad of questions can arise as to the arbitration agreement's validity, scope and effects. These questions must be answered based on the law(s) governing the arbitration agreement. For decades, the question how those laws should be determined has engaged courts and scholars around the world. It continues to do so. World-wide, four main approaches have developed, whereby the arbitration agreement may be governed by: (i) an "a-national" rule of substantive law that is solely based on the parties' intent; (ii) any relevant law that confirms the validity of the arbitration agreement; (iii) the law governing the merits of the dispute; or (iv) the law of the seat of the arbitration. Globally, the latter two approaches appear to dominate. Although, by and large, they are based on the same legal principles across jurisdictions, results diverge. Taking the Indian approach as an example, this editorial reviews where and why such divergence occurs, including whether the parties' choice of law for the main contract applies to the arbitration agreement and to which law the arbitration agreement is most closely connected. It is submitted that a stronger focus on objective criteria in answering these questions increases legal certainty and promotes a more harmonised approach across jurisdictions.

I. Introduction

The fundamental prerequisite for any arbitration is the parties' consent to arbitrate. Without such consent, parties resolve their disputes before state courts, not arbitral tribunals. As a gateway matter of jurisdiction, arbitration agreements are therefore regularly scrutinised as to their validity and scope: did the parties validly conclude their agreement? Did they have capacity to do so? Did they adhere to applicable form requirements? How should the agreement be interpreted? What is its scope? Does it extend to non-signatories? The answers to these and other questions are found in the law(s) governing the arbitration agreement.

Which conflict of laws rule should apply to an arbitration agreement is a true evergreen issue of international arbitration theory and practice;[1] and, by any measure, this topic remains one of the hot

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[1] *See, e.g.,* Ardavan Arzandeh & Jonathan Hill, *Ascertaining the Proper Law of an Arbitration Clause Under English Law*, 5(3) J. PRIV. INT. L. 425 (2009); Klaus Peter Berger, *Re-Examining the Arbitration Agreement: Applicable Law – Consensus or Confusion?*, *in* INTERNATIONAL ARBITRATION 2006: BACK TO BASICS?, 13 ICCA CONGRESS SERIES (Albert Jan van den Berg ed., 2007) [*hereinafter* "Berger"]; GARY B BORN, INTERNATIONAL COMMERCIAL ARBITRATION 507–674 (3d ed. 2021) [*hereinafter* "BORN"]; Mark Campbell, *The Law Applicable to International Arbitration Agreements: The English Court of Appeal Departs from Sulamerica*, 23(3) INT'L ARB. L. REV. 193 (2020); Darius Chan & Teo Jim Yang, *Ascertaining the Proper Law of an Arbitration Agreement: The Artificiality of Inferring Intention When There Is None*, 37(5) J. INT'L ARB. 635 (2020) [*hereinafter* "Chan & Jim Yang"]; Dietmar Czernich, *The Law Applicable to the Arbitration Agreement*, *in* AUSTRIAN YEARBOOK ON INTERNATIONAL ARBITRATION 2015 (Christian Klausegger, Peter Klein, Florian Kremslehner, Alexandre Petsche, Nikolaus Pitkowitz, Jenny Power, Irene Welser & Gerold Zeiler eds. 2015) [*hereinafter* "Czernich"];

issues today.[2] In the past two years alone, the question of the proper law of the arbitration agreement has engaged appellate and supreme courts in Austria, Canada, France, Hong Kong, Germany, Singapore, Sweden, the United Kingdom and elsewhere.[3]

The authors have taken the recent decisions as a cue to review the approaches of courts and legislators world-wide. Globally, four main approaches exist to determine the law governing the arbitration agreement. While many jurisdictions follow similar conflict of laws rules at the macro level, the application of these rules fundamentally differs at the micro level. In addition, some key arbitration jurisdictions follow entirely different approaches. This divergence in approaches continues to prevent the emergence of a harmonized approach across jurisdictions **[Part II]**. It is the purpose of the present editorial to identify where specifically these differences exist **[Part III]**, and to analyse how they can be harmonized to achieve more international uniformity **[Part IV]**.

II. Taking Stock of Approaches World-Wide: Some Convergence at the Macro Level

To identify which approaches currently exist with respect to determining the law applicable to the arbitration agreement, the authors have surveyed how courts in over 80 jurisdictions address the most prevalent situation in international commercial contracts: the parties have chosen the law applicable to their main contract and have selected a seat of the arbitration, but have not expressly provided for the law governing the arbitration agreement. As shown on the map reproduced in the Annex. to this editorial, four main approaches exist.[4]

First, a number of jurisdictions adopt an approach developed by the French courts and that may be described as *a-national*. In the famous *Municipalité de Khoms El Mergeb* v. *Société Dalico* decision of 1993, the French Cour de cassation held that in the absence of an express choice of law by the parties, the existence and validity of international arbitration agreements depend only on the parties' common intent, without it being necessary to apply any national law.[5] French courts neither assess whether

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Stelios Koussoulis, *Zur Dogmatik des auf die Schiedsvereinbarung anwendbaren Rechts*, *in* GRENZÜBERSCHREITUNGEN: FESTSCHRIFT FÜR PETER SCHLOSSER (Birgit Bachmann, Stephen Breidenbach, Dagmar Coester-Waltjen, Burkhard Heß, Andreas Nelle & Christian Wolf eds., 2005); Julian M. Lew, *The Law Applicable to the Form and Substance of the Arbitration Clause*, *in* IMPROVING THE EFFICIENCY OF ARBITRATION AGREEMENTS AND AWARDS: 40 YEARS OF APPLICATION OF THE NEW YORK CONVENTION, 9 ICCA CONGRESS SERIES (Albert Jan van den Berg ed., 1999) [*hereinafter* "Lew"].

2 *See also* Maxi Scherer & Ole Jensen, *The Law Governing the Arbitration Agreement: A Comparative Analysis of the United Kingdom Supreme Court's Decision in Enka v Chubb*, 41(2) IPRAX 2021, 177 (2021) [*hereinafter* "Scherer & Jensen"]; Maxi Scherer & Ole Jensen, *Of Implied Choices and Close Connections: Two Pervasive Issues Concerning the Law Governing the Arbitration Agreement*, *in* FESTSCHRIFT GEORGE A. BERMANN (Julie Bedard & Jack Busby eds., forthcoming 2021).

3 *See, e.g.,* Oberster Gerichtshof [OGH] [Supreme Court] May 15, 2019, 18 OCg 6/18 (Austria); Uber Technologies Inc v. Heller, 2020 SCC 16 (Can.) [*hereinafter* "Uber Technologies"]; Kout Food Group v. Kabab-Ji [2020] EWCA Civ. 6 (Eng.); Cour d'appel [CA] [regional court of appeal] Paris, June 23, 2020, 17/22943, Kout Food Group v. Kabab-Ji (Fr.); OCBC Wing Hang Bank Ltd. v. Kai Sen Shipping Co. Ltd., [2020] H.K.C.F.I. 375 (H.K.); Bundesgerichtshof [BGH] [Federal Court of Justice] Nov. 26, 2020, I ZR 245/19, 2021 SCHIEDSVZ 97 (Ger.); BNA v. BNB [2019] SGCA 84 (Sing.); Svea Hovrätt [Svea Court of Appeal] Dec. 19, 2019, T 7929-17 (Swed.); Enka Insaat Ve Sanayi AS v. OOO Insurance Company Chubb [2020] UKSC 38 (appeal taken from Eng.) [*hereinafter* "Enka"]. *See also* Oberlandesgericht Frankfurt am Main [OLG Frankfurt am Main] [Higher Regional Court of Frankfurt am Main] Sept. 7, 2020, 26 Sch 2/20, juris, ¶ 31 (Ger.).

4 The data underlying the survey is on file with the authors and available upon request. As with any comparative survey of legal approaches, uncertainties persist. The authors are grateful for corrections of any errors and guidance on filling the remaining blank spots on the below map.

5 Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Dec. 20, 1993, Bull. civ. I, No. 1675, 1994 REV. ARB. 116, 117 (Fr.) ("By virtue of a substantive principle of international arbitration law, an arbitration clause is legally

there was an implied choice of law, nor do they apply an objective connecting factor such as the law of the seat or the arbitration agreement's closest connection. Instead, they directly apply a substantive rule according to which it is only decisive whether, as a matter of fact, the parties intended to arbitrate and whether their agreement is in line with French mandatory law and international public policy.[6] Today, corresponding rules also exist in other jurisdictions, including Mauritius,[7] and the member states of the Organisation for the Harmonization of Business Law in Africa (OHADA).[8]

Second, several other jurisdictions follow the so-called "*validation principle*" (*in favorem validitatis*). According to Article 178(2) of the Swiss Law on Private International Law, for instance, "*an arbitration agreement is valid if it conforms either to the law chosen by the parties, to the law governing the subject-matter of the dispute, in particular the law governing the main contract, or to Swiss law.*"[9] Similar rules are found in Dutch, Portuguese, and Spanish law.[10] This solution is commendable because it ensures that the parties' intent to arbitrate is upheld to the greatest extent possible under one of several relevant legal systems. Based on this "*pro-arbitration*" approach, several authors propose that the validation principle should be adopted more widely as the ideal solution to determining the law governing the arbitration agreement.[11] However, the validation principle is limited in scope as it only provides satisfactory results where the issue requires a simple 'yes' or 'no' answer, such as validity.[12] Yet, there is a plethora of issues determined by the law applicable to the arbitration agreement,[13] including the scope and effects of an arbitration agreement, and the principle and amount of damages for its breach.[14]

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independent from the main contract in which it is contained, directly or by reference, and its existence and effectiveness are assessed, within the limits of the mandatory rules of French law and international public policy, by reference to the common intentions of the parties, without the need to refer to a national law.").

6 *See, e.g.,* Cour d'appel [CA] [regional court of appeal] Paris, May 12, 1997, Renault v. Société V. 2000 (Jaguar France), 1997(4) REV. ARB. 537–543 (Fr.); Cour d'appel [CA] [regional court of appeal] Paris, May 30, 2004, Société Uni-Kod v. Société Ouralkali, 2005(4) REV. ARB., 959–960 (Fr.); Cour d'appel [CA] [regional court of appeal] Paris, Feb. 24, 2005, Société Sidermetal SRL v. Société Arcelor International Export, 2006(1) REV. ARB., 2010–2013 (Fr.).

7 Cruz City 1 Mauritius Holdings v. Unitech Ltd., 2014 SCJ 100, at 20 (Mauritius) ("For us the issue is a factual one which depends on the common intention of the parties.").

8 *See* Acte Uniforme relatif au Droit de l'Arbitrage [Uniform Act on Arbitration], Dec. 15, 2017, JOURNAL OFFICIEL DE L'OHADA [J.O. OHADA], Mar. 15, 2018, art. 4 ("The arbitration agreement shall be independent of the main contract. Its validity shall not be affected by the nullity of the contract, and it shall be interpreted in accordance with the common intention of the parties, without necessarily referring to national law.").

9 LOI FÉDÉRALE SUR LE DROIT INTERNATIONAL PRIVÉ [FEDERAL STATUTE ON PRIVATE INTERNATIONAL LAW], Dec. 18, 1987 effective Feb. 1, 2021, art. 178(2) (Switz.).

10 *See* art. 10:166 BW (Neth.); Arbitration Act art. 9(6) (R.D. Ley 60/2003) (Spain); Portuguese Voluntary Arbitration Law art. 51 (2011) (Port.).

11 Fan Yang, *The Proper Law of the Arbitration Agreement: Mainland Chinese and English Law Compared*, 33(1) ARB. INT'L 121, 135 (2017); Johannes Koepp & David Turner, *A Massive Fire and a Mass of Confusion: Enka v Chubb and the Need for a Fresh Approach to the Choice of Law Governing the Arbitration Agreement*, 38(3) J. INT'L ARB. 377, 387–393 (2021).

12 DANIEL GIRSBERGER & NATHALIE VOSER, INTERNATIONAL ARBITRATION: COMPARATIVE AND SWISS PERSPECTIVES ¶ 362 (3d ed. 2016).

13 *See also* BORN, *supra* note 1, at 523 ("[a] formal validity of an arbitration agreement; [b] capacity of parties to conclude an arbitration agreement; [c] authority of parties' representatives to conclude an arbitration agreement; [d] formation and existence of an arbitration agreement; [e] substantive validity and legality of an arbitration agreement; [f] "nonarbitrability" or "objective arbitrability"; [g] identities of the parties to an arbitration agreement; [h] effects of an arbitration agreement; [i] means of enforcement of an arbitration agreement; [j] interpretation of an arbitration agreement; [k] termination and expiration of an arbitration agreement; [l] assignment of an arbitration agreement; and [m] waiver of right to arbitrate.").

14 On this issue, *see* JAN FROHLOFF, VERLETZUNG VON SCHIEDSVEREINBARUNGEN (2017) [*hereinafter* "FROHLOFF"].

Proponents of the validation principle would argue that the "*pro arbitration*" solution in these cases is to apply the law that provides for the widest possible scope of the arbitration agreement, assuming that the parties wanted to arbitrate any and all disputes between them. But is that really a blanket truth, applying in all cases, including for instance, with respect to antitrust follow-on damages claims?[15] And which law would govern where a party seeks damages for an alleged breach of the arbitration agreement: the law providing for maximum or minimum liability? It is submitted that the validation principle does not provide satisfactory answers to these questions. This means that for certain issues concerning the arbitration agreement, a single system of law must be identified.

The third and fourth approaches do so, pointing to the *law of the seat* and *law governing the main contract* respectively. The legal systems following these approaches by and large provide for similar conflict of laws rules: they accept that parties may expressly or impliedly choose the law applicable to the arbitration agreement, and provide for an objective connecting factor in the absence of a choice. These approaches also appear to be the most predominant solutions internationally, making up 85% of those reviewed jurisdictions that yielded a clear result:

Law of the seat	51%
Law of the main contract	34%
Validation principle	9%
A-national approach	6%

Comparing these four approaches, it is accepted in all reviewed jurisdictions—including those following the a-national approach and validation principle—that the parties may expressly choose a law governing their arbitration agreement. However, approaches diverge from there. While most jurisdictions also accept that the parties' choice of law may be implied, the a-national approach directly applies a rule of substantive law where an express choice does not exist. In addition to subjective connecting factors, the majority of jurisdictions rely on objective factors: in absence of a choice by the parties, either the law of the seat, the law of the main contract or the arbitration agreement's closest connection will determine the law that applies to it. In the case of the validation principle, it may also be a combination of these laws.

While the four approaches will thus often lead to different conclusions, there appears to be some consensus about the rough design of the conflict of laws rule governing arbitration agreements in the majority of jurisdictions: on a subjective level, the parties' intent is decisive; absent any indication thereon, the law applicable to the arbitration agreement is determined by an objective connecting factor, such as the so-called "*closest connection test.*" There is thus at least some convergence at the macro level.

One emanation of this archetypical conflict of laws rule is found in the major arbitration conventions and instruments: the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ["**New York Convention**"], Inter-American Convention on International Commercial Arbitration,

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15 *See* Aren Goldsmith, *Arbitration and EU Antitrust Follow-on Damages Actions*, 34(1) ASA BULL. 10, 20–23 (2016).

European Convention on International Commercial Arbitration and United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration.

Today, most international commentators agree that Article V(1)(a) of the New York Convention—and equivalent provisions in other instruments[16]—contains an authoritative conflict of laws rule to determine the proper law of the arbitration agreement.[17] Article V(1)(a) provides, in relevant part, that an arbitral award may be refused recognition and enforcement if the arbitration agreement "*is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made.*" Thus, an arbitration agreement is governed by the law the parties have expressly or impliedly chosen, and otherwise by the law of the seat of the arbitration, where the award is deemed to have been made.

It is often understood that the rule in Article V(1)(a) should apply throughout the lifecycle of the arbitration—i.e., not only at the post-award stage, but also prior to the constitution of the tribunal and during the proceedings before it.[18] However, not all contracting states of the New York Convention follow this approach and apply the rule contained in Article V(1)(a) and equivalent instruments uniformly. This is one of the main forks in the road where, at the micro level, the undesirable divergence of approaches occurs.

III. Identifying Divergences at the Micro Level

This leads to the emergence of questions regarding where and why approaches diverge specifically and how these inconsistencies can be overcome. There are two particularly controversial issues causing divergence: first, whether a choice of law clause in the main contract extends to the arbitration agreement **[Part III.A]**;[19] and, second, to which legal system an arbitration agreement is most closely connected **[Part III.B]**. As will be argued, a stronger focus on objective criteria results in a more consistent solution to determining the law governing the arbitration agreement.

A. Does an Express Choice of Law for the Main Contract Apply to the Arbitration Agreement?

Whether a choice of law clause for the main contract determines the law applicable to the arbitration agreement is one of the most controversial issues concerning the law governing the arbitration agreement. Courts in different jurisdictions readily apply choice of law clauses to the arbitration

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16 Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. V(1)(a), June 10, 1958, 330 U.N.T.S 38 [*hereinafter* "New York Convention"]; Inter-American Convention on International Commercial Arbitration art. 5(1)(a), Jan. 30, 1975, 1438 U.N.T.S. 245; European Convention on International Commercial Arbitration art. VI(2)(a)–(b), Apr. 21, 1961, 484 U.N.T.S. 7041; United Nations Comm'n on Int'l Trade Law (UNCITRAL), Model Law on International Commercial Arbitration, arts. 34(2)(a)(i) & 36(1)(a)(i), G.A. Res. 40/72, U.N. Doc. 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) [*hereinafter* "UNCITRAL Model Law"].

17 *See, e.g.,* ALBERT JAN VAN DEN BERG, THE NEW YORK ARBITRATION CONVENTION OF 1958 291 (1981) ("It has never been questioned that these conflict rules are to be interpreted as uniform rules which supersede the relevant conflict rules of the country in which the award is relied upon.") [*hereinafter* "VAN DEN BERG"]; Berger, *supra* note 1, at 316 ("It is fair to say that today, the conflict rule contained in Art. V(1)(a) New York Convention […] has developed into a truly transnational conflict rule for the determination of the law governing the substantive validity of the arbitration agreement.").

18 *See, e.g.,* Bundesgerichtshof [BGH] [Federal Court of Justice], Nov. 26, 2020, I ZR 245/19, 2021 SCHIEDSVZ 97, 102 (Ger.) (Article V(1)(a) applies directly in enforcement proceedings and by analogy in other contexts).

19 *See also* Berger, *supra* note 1, at 318 ("The only question that is still disputed is whether the choice of law clause of the main contract also extends to the arbitration clause contained therein.").

agreements, often without further analysis.[20] Yet, this issue is less clear than might appear at first blush. Instead, it is necessary to determine: (i.) whether the choice of law clause for the main contract "*extends to*" or "*comprises*" the arbitration agreement; and, if it does not, (ii.) whether the choice of law clause for the main contract indicates an implied choice of law for the arbitration agreement.

i. Choice of Law for the Main Contract as an Express Choice of Law 'Extending' to the Arbitration Agreement

Courts in Austria, Canada and Germany have readily assumed that a choice of law for the main contract applies to the entire contract in which the arbitration agreement is contained.[21] The Supreme Court of India followed a similar approach in *National Thermal Power Corp.* v. *Singer Co.* ["**NTPC**"].[22] In that case, the parties had "*expressly stated that the law which governs their contract, i.e., the proper law of the contract is the law in force in India.*"[23] Before the Supreme Court of India, the party applying for set aside of the resulting award argued that this choice of law for the main contract also determined the law governing the arbitration agreement:

> "*[T]he proper law of the contract is the law in force in India. The arbitration agreement is contained in a clause of that contract. In the absence of any stipulation to the contrary, the contract has to be seen as a whole and the parties must be deemed to have intended that the substantive law applicable to the arbitration agreement is exclusively the law which governs the main contract […].*"[24]

The Supreme Court of India agreed, holding as follows:

> "*The proper law of the arbitration agreement is normally the same as the proper law of the contract. It is only in exceptional cases that it is not so even where the proper law of the contract is expressly chosen by the parties.*"[25]

In subsequent decisions, the Supreme Court of India confirmed this decision, clarifying that "*when an arbitration agreement is silent as to the law and procedure to be followed in implementing the arbitration agreement, the law governing the said agreement would ordinarily be the same as the law governing the contract itself.*"[26] Similar approaches exist in the United States, and England and Wales. The proposed final draft of the Restatement of the U.S. Law of International Commercial and Investor-State Arbitration provides that, in the absence of a specific choice of law, the arbitration agreement is governed "*by the law identified in the general choice-of-law clause in the underlying contract.*"[27] And in *Kabab-ji* v. *Kout Food Group*, the English Court of Appeal relied on the wording of the relevant choice of law clause and its interplay with other provisions of the contract to conclude that the parties' choice of law comprised

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20 *See, e.g.,* Uber Technologies, 2020 SCC 16, ¶ 50 (Can.); Oberster Gerichtshof [OGH] [Supreme Court], May 15, 2019, 18 OCg 6/18h, ¶ 5.3 (Austria); Bundesgerichtshof [BGH] [Federal Court of Justice], Nov. 8, 2018, I ZB 24/18, juris, ¶¶ 12–13 (Ger.).

21 *See* Oberster Gerichtshof [OGH] [Supreme Court], May 15, 2019, 18 OCg 6/18h, ¶ 5.3 (Austria); Uber Technologies, 2020 SCC 16 ¶ 50 (Can.); Bundesgerichtshof [BGH] [Federal Court of Justice], Nov. 8, 2018, I ZB 24/18, juris, ¶¶ 12–13 (Ger.).

22 National Thermal Power Corp. v. Singer Co., (1992) 3 SCC 551 (India) [*hereinafter* "NTPC"].

23 *Id.* ¶ 6.

24 *Id.* ¶ 9.

25 *Id.* ¶ 23.

26 Indtel Technical Services Pvt. Ltd. v. W.S. Atkins Rail Ltd., (2008) 10 SCC 308, ¶ 36 (India). *See also* Yograj Infrastructure Ltd. v. Ssangyong Engineering and Construction Co. Ltd., (2011) 9 SCC 735, ¶ 51 (India); Aastha Broadcasting Network Ltd. v. Thaicom Public Company Ltd., (2011) SCC OnLine Del 5145, ¶¶ 10, 12 (India) [*hereinafter* "Aastha"].

27 RESTATEMENT OF THE U.S. LAW OF INTERNATIONAL COMMERCIAL AND INVESTOR-STATE ARBITRATION, § 4.10(c) (AM. LAW INST., Proposed Final Draft 2019).

the arbitration agreement.[28] Thus, according to a widely held view, the express choice of law for the main contract extends to the arbitration agreement.

Regularly invoked against this view is the doctrine of separability. Pursuant to this foundational element of international arbitration law, "*an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract.*"[29] Accordingly, because the main contract and the arbitration agreement are independent from each other, a choice of law clause for one should not automatically "*extend to,*" "*comprise*" or otherwise apply to the other. Therefore, if the choice of law clause refers to the law governing "*the agreement,*" such choice is tantamount to "*the agreement with the exception of the arbitration clause.*" On this basis, several scholars vehemently object that a choice of law clause in the main contract applies to the arbitration agreement.[30]

Similarly, in *NTPC*, the party opposing the setting aside of the award submitted as follows:

> "*[T]he arbitration agreement is a separate and distinct contract, and collateral to the main contract. Although the main contract is governed by the laws in force in India, as stated in the General Terms, there is no express statement as regards the law governing the arbitration agreement. In the circumstances, the law governing the arbitration agreement is not the same law which governs the contract, but it is the law which is in force in the country in which the arbitration is being conducted.*"[31]

To this, the first group of courts and scholars retort that the doctrine of separability has a very distinct scope of application and does not apply in regards to determining the law applicable to the arbitration agreement. As Bermann puts it, "*[t]he fact that an arbitration agreement survives the demise of the main contract does not mean that the arbitration agreement and the main contract must be governed by distinct bodies of law.*"[32] Similarly, in *Enka Insaat Ve Sanayi A.S.* v. *OOO Insurance Company Chubb* ["**Enka**"], the U.K. Supreme Court held that "*the principle of separability is not a principle that an arbitration agreement is to be treated as a distinct agreement for all purposes but only that it is to be so treated for the purpose of determining its*

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28 *See* Kabab-Ji S.A.L. v. Kout Food Group [2020] EWCA Civ. 6, ¶ 62 (Eng.) (the contract contained a general choice of law stating that "[t]his Agreement shall be governed by and construed in accordance with the laws of England" and another provision clarifying that "[t]his Agreement" comprises the arbitration agreement.).

29 UNCITRAL Model Law, art. 16(1). *See also* Arbitration Act 1996, c. 23, § 7 (Eng.) [*hereinafter* "English Arbitration Act"] ("Unless otherwise agreed by the parties, an arbitration agreement which forms or was intended to form part of another agreement (whether or not in writing) shall not be regarded as invalid, non-existent or ineffective because that other agreement is invalid, or did not come into existence or has become ineffective, and it shall for that purpose be treated as a distinct agreement."); Arbitration and Conciliation Act, No. 26 of 1996, § 16(1)(a)–(b) (India) ("(a) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and (b) a decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.").

30 Pierre Karrer, *The Law Applicable to the Arbitration Agreement: A Civilian Discusses Switzerland's Arbitration Law and Glances Across the Channel*, 26 SING. ACAD. L. J. 849, 861 (2014) [*hereinafter* "Karrer"]; Czernich, *supra* note 1, at 80. *See also* GEORGE A BERMANN, INTERNATIONAL ARBITRATION AND PRIVATE INTERNATIONAL LAW 132 (2017) [*hereinafter* "BERMANN"].

31 NTPC, (1992) 3 SCC 551, ¶ 10 (India).

32 BERMANN, *supra* note 30, at 152.

validity or enforceability."[33] This view dismisses the doctrine of separability as a "*rule of non-invalidation,*"[34] which has "*no bearing on governing law.*"[35]

The Supreme Court of India holds a similar view. It dismissed the view advanced by the party opposing the setting aside of the award, noting that "*though collateral or ancillary to the main contract, [the arbitration agreement] is nevertheless a part of such contract.*"[36] It therefore concluded:

> "*It is true that an arbitration agreement may be regarded as a collateral or ancillary contract in the sense that it survives to determine the claims of the parties and the mode of settlement of their disputes even after the breach or repudiation of the main contract. But it is not an independent contract, and it has no meaningful existence except in relation to the rights and liabilities of the parties under the main contract. It is a procedural machinery which is activated when disputes arise between parties regarding their rights and liabilities. The law governing such rights and liabilities is the proper law of the contract, and unless otherwise provided, such law governs the whole contract including the arbitration agreement, and particularly so when the latter is contained not in a separate agreement but, as in the present case, in one of the clauses of the main contract.*"[37]

It is certainly correct that the doctrine of separability does not mean that the laws governing the main contract and the arbitration are "*necessarily*" distinct.[38] If the law governing the main contract is the same as the law of the seat, the arbitration agreement is very likely to be governed by that law as well. However, the ratio of the doctrine of separability also does not imply that the law of the main contract and the arbitration agreement are automatically identical. If the doctrine of separability prescribes that the main contract and the arbitration agreement are to be considered separate agreements for the purpose of determining the arbitration agreement's existence and validity, it is not immediately apparent why this should not *also* apply to the question of which law applies to determine that existence and invalidity. Neither is it extraordinary that different aspects of a commercial contract are governed by separate legal systems. In private international law, this phenomenon is known as *dépeçage*.

In *Reliance Industries Ltd* v. *Union of India*, the Supreme Court of India accepted as much with respect to an express choice of law governing the arbitration agreement.[39] In this case, the parties had agreed that "*[t]he arbitration agreement contained in this Article 33 shall be governed by the laws of England.*"[40] Nevertheless, the High Court of Delhi had held that Indian law would be applied to the arbitration agreement as it was the governing law of the main contract, and that the parties' choice of English

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33 Enka, [2020] UKSC 38, ¶ 41 (referring to wording of the English Arbitration Act, Section 7 ("for that purpose")), ¶¶ 232–233 (Lords Burrows and Sales concurring).

34 Myron Phua & Matthew Chan, *The Distinctive Status of International Arbitration Agreements in English Private International Law?*, 36(3) ARB. INT'L 419, 425 (2020) [*hereinafter* "Phua & Chan"].

35 Ian Glick & Niranjan Venkatesan, *Choosing the Law Governing the Arbitration Agreement*, *in* ADMISSIBILITY AND CHOICE OF LAW IN INTERNATIONAL ARBITRATION: LIBER AMICORUM MICHAEL PRYLES 138 (Neil Kaplan & Michael J Moser eds., 2018).

36 NTPC, (1992) 3 SCC 551, ¶ 25 (India). *See also* Sumitomo Heavy Industries Ltd. v. ONGC Ltd., (1998) 1 SCC 305, ¶ 15–16 (India); Roger Shashoua v. Mukesh Sharma, (2017) 14 SCC 722, ¶ 16 (India).

37 NTPC, (1992) 3 SCC 551, ¶ 45 (India).

38 *See* Aaron Yoong, *Of Principle, Practicality, and Precedents: The Presumption of the Arbitration Agreement's Governing Law*, ARB. INT'L 1, 6 (2020) [*hereinafter* "Yoong"].

39 Reliance Industries Ltd. v. Union of India, (2014) 7 SCC 603 (India).

40 *Id.* ¶ 7.

law only related to "*curial law matters i.e. conduct of the arbitral proceedings.*"[41] The Supreme Court of India vacated that decision, holding as follows:

> "*[T]he High Court […] has failed to distinguish between the law applicable to the proper law of the contract and proper law of the arbitration agreement. The High Court has also failed to notice that by now it is settled, in almost all international jurisdictions, that the agreement to arbitrate is a separate contract distinct from the substantive contract which contains the arbitration agreement. […] This principle of separability permits the parties to agree: that law of one country would govern to the substantive contract and laws of another country would apply to the arbitration agreement.*"[42]

It remains to be seen whether the Supreme Court will revisit its decision in *NTPC* and also affirm separability for the purposes of determining the applicable law to the arbitration agreement where the parties have not expressly specified that law. Indeed, it is submitted that the doctrine of separability should be taken seriously in all circumstances. It should be understood as also applying to the question of which law governs the validity and existence of the arbitration agreement where parties have chosen the law governing their main contract, but not the arbitration agreement. As several authors note, this solution acknowledges that the purpose and content of the two agreements are fundamentally different:[43] whereas the main contract establishes substantive rights and obligations regarding the parties' commercial transaction, it is the purpose of the arbitration agreement to determine the type and mode of resolving any disputes arising from that transaction. Since the main contract and the arbitration agreement are thus legally distinct agreements, an express choice of law intended for the main contract neither automatically "*extends to*" nor "*comprises*" the arbitration agreement.

ii. Choice of Law for the Main Contract as Indicating an Implied Choice of Law for the Arbitration Agreement

If the express choice of law clause for the main contract does not automatically constitute an express choice of law for the arbitration agreement, it may nevertheless indicate the parties' *implied* intent for the arbitration agreement to be governed by the same law. Several courts and authors agree that businesspeople "*must be taken to have intended a single system of law to apply to their entire relationship*"[44] and that "*it is reasonable to assume that the contracting parties intend their entire relationship to be governed by the same system of law.*"[45] In the words of the U.K. Supreme Court:

> "*[C]onstruing a choice of law to govern the contract as applying to an arbitration agreement set out in a clause of the contract […] avoids artificiality. The principle that an arbitration agreement is separable from the contract containing it is an important part of arbitration law but it is a legal doctrine and one which is likely to be much better known to arbitration lawyers than to commercial parties. For them a contract is a contract;*

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41 *Id.* ¶ 23.

42 *Id.* ¶¶ 64-65.

43 VAN DEN BERG, *supra* note 17, at 293; Karrer, *supra* note 30, at 858; Phua & Chan, *supra* note 34, at 425.

44 Yoong, *supra* note 38, at 8.

45 BCY v. BCZ [2016] SGHC 249, ¶ 59 (Sing.). *See also* Sulamérica Cia Nacional de Seguros SA v. Enesa Engenharia SA [2012] EWCA Civ. 638, ¶¶ 26–27 (Eng.) [*hereinafter* "Sulamérica"]; Lew, *supra* note 1, at 144; Winnie Jo-Mei Ma, *Conflicting Conflict of Laws in International Arbitration? Choice of Law for Arbitration Agreement in Absence of Parties' Choice*, *in* SCHOLARSHIP, PRACTICE AND EDUCATION IN COMPARATIVE LAW: FESTSCHRIFT HISCOCK 148 (John H Farrar, Vai Io Lo & Bee Chen Goh eds., 2019).

> *not a contract with an ancillary or collateral or interior arbitration agreement. They would therefore reasonably expect a choice of law to apply to the whole of that contract.*"[46]

This general presumption would only be reversed "*where parties (or their lawyers) positively knew that the choice-of-law clause in the main contract does not extend to the arbitration clause.*"[47]

Others favour a more nuanced approach. According to them, it is decisive how the choice of law clause in the main contract is drafted. If that clause contains "*broad language*" (for example, "*the parties' entire legal relationship shall be governed by the law of X*" or "*all aspects of the contract shall be governed by the law of X*"), this constitutes an implied choice of law for the arbitration agreement; whereas more narrow language (for example, "*the contract is subject to the law of X*" or "*this agreement shall be interpreted under the law of X*") would be refined to the main contract.[48]

There is no question that business realities are an important consideration. After all, one of the fundamental advantages of international commercial arbitration is its flexibility to accommodate the needs and expectations of the business community. A solution that complies with these expectations certainly has its appeal. Yet, it is doubtful whether parties really would understand their general choice of law to also have an effect on their arbitration agreement. Is it not more likely that they considered their selection of the seat of the arbitration as decisive for all issues relating to the arbitration agreement?[49] Given that "*parties rarely, if ever, consider the arbitration clause when negotiating the choice of law clause in the contract,*"[50] would the matter even cross their minds? If the parties' presumed business realities are to be considered, one cannot discard the "*distinct possibility that they omitted to choose anything at all for the arbitration clause.*"[51] Ultimately, the truism remains that both choice of law and arbitration clauses are often neglected during contract negotiations, degrading them to "*midnight*" or "*champagne*" clauses.

Is it thus possible to know, in the abstract, which is true for individual parties to a given case? Were they (or their advisors) aware of the doctrine of separability? Did they give the scope of their choice of law clause any deep thought or did they simply adopt boilerplate language intended for contracts without an arbitration agreement? Did they consider their choice of seat or choice of law for the main contract as decisive? It is submitted that the honest answer to these questions is that we cannot know. Accordingly, rather than presuming too much about the parties' hypothetical expectations, wishes and intent, the cleaner approach is that neither a general choice of law clause for the main contract nor their selected seat should, without specific indications as to the parties' actual intent, be understood as an implied choice of law for the arbitration agreement. In that case, there simply

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46 Enka, [2020] UKSC 38, ¶ 53(iv).

47 Czernich, *supra* note 1, at 80–81.

48 Dietmar Czernich, *Das auf die Schiedsvereinbarung anzuwendende Recht*, ECOLEX 2019, 771, 773 [*hereinafter* "Czernich"]. *See also* VAN DEN BERG, *supra* note 17, at 293.

49 *See* Enka Insaat Ve Sanayi A.S. v. OOO Insurance Company Chubb, [2020] EWCA Civ. 574, ¶¶ 90–91, 109 (Eng.); VAN DEN BERG, *supra* note 17, at 293.

50 Berger, *supra* note 1, at 320.

51 Phua & Chan, *supra* note 34, at 427.

is no indication as to the parties' will regarding the law governing the arbitration agreement. The answer is thus found in an objective, not a subjective, connecting factor.[52]

B. What is the Arbitration Agreement's 'Closest Connection'?

Where Article V(1)(a) of the New York Convention applies, this objective connecting factor is straight-forward: the seat of arbitration. However, several common law jurisdictions do not apply Article V(1)(a), but instead rely on the common law rule on conflict of laws: in the absence of an express or implied choice of law, the arbitration agreement's "*closest and most real connection*" must be determined.[53] As the U.K. Supreme Court noted in *Enka*, this is an objective exercise:

> "*[T]he court must in these circumstances determine, objectively and irrespective of the parties' intention, with which system of law the arbitration agreement has its closest connection. This exercise is different in nature from the attempt to identify a choice (whether express or implied), as it involves the application of a rule of law and not a process of contractual interpretation.*"[54]

Similarly, the closest connection of the arbitration agreement is also invoked as the decisive connecting factor in a number of civil law jurisdictions.[55]

Determining the system of law to which a legal relationship is most closely connected is, of course, the very purpose of private international law.[56] At the same time, this formula alone does not provide much guidance. Indeed, the closest connection test has been described as a "*non-rule*"[57] that must be filled with meaning by providing either a concrete connecting factor or rules of presumption. Where both are missing because the closest connection test serves as a fall-back connecting factor, what is required is a "*grouping of contacts*" by which points of contact to different legal systems are collected and weighed against each other.[58]

Some have raised concerns whether this exercise provides satisfactory results with respect to arbitration agreements. For instance, the French and German delegations to the 1980 Rome Convention on the Law Applicable to Contractual Obligations had considered the closest connection test problematic, concluding that "*the concept of 'closest ties' [is] difficult to apply to arbitration*

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52 *See also Id.*; Chan & Jim Yang, *supra* note 1, at 645–646. This approach has the additional appeal that it avoids conflicting decisions between jurisdictions that consider parties' pre-contractual negotiations when discerning their intent and those that prohibit extrinsic evidence. A famous example in this regard is the *Dallah* saga. *See* Scherer & Jensen, *supra* note 2, at 184.

53 Enka, [2020] UKSC 38, ¶ 36. *See also* NTPC, (1992) 3 SCC 551, ¶ 50 (India).

54 Enka, [2020] UKSC 38, ¶ 118.

55 *See, e.g.,* Bundesgerichtshof [BGH] [Federal Court of Justice], June 8, 2010, XI ZR 349/08, 2011 SCHIEDSVZ 46, 48–49 (Ger.); Czernich, *supra* note 48, at 774 (on Austrian Law on Private International Law, Section 1).

56 *See* CHRISTIAN VON BAR & PETER MANKOWSKI, INTERNATIONALES PRIVATRECHT: BAND 1 – ALLGEMEINE LEHREN ¶ 7.92 (2d ed. 2003) [*hereinafter* "VON BAR & MANKOWSKI"]. *See also* BUNDESGESETZ ÜBER INTERNATIONALES PRIVATRECHT [FEDERAL CODE ON PRIVATE INTERNATIONAL LAW] Dec. 18, 1987, § 1 (Austria) ("[1] In private law, matters involving foreign countries shall be judged in accordance with the legal system with which there is the strongest connection. [2] The special provisions contained in this Federal Act on applicable law [reference provisions] shall be regarded as an expression of this principle.").

57 Kurt H Nadelmann, *Impressionism and Unification of Law: The EEC Draft Convention on the Law Applicable to Contractual and Non-Contractual Obligations*, 24 AM. J. COMP. LAW 1, 10 (1976); Friedrich K Juenger, *Parteiautonomie und objektive Anknüpfung im EG-Übereinkommen zum Internationalen Vertragsrecht: Eine Kritik aus amerikanischer Sicht*, 46 RABELSZ 57, 72 (1982).

58 VON BAR & MANKOWSKI, *supra* note 56, ¶ 7.108.

agreements."[59] Indeed, not surprisingly, diverging approaches have developed as to which pointers are considered decisive. As Bermann notes:

> "*Among the choice of law criteria that have been proposed are (a) the law of the place where the arbitration agreement was concluded, (b) the law of the place of contract performance, (c) the law of the arbitral situs (which is in effect the law of the place of performance of the arbitration agreement itself), and (d) the law of the place of judicial enforcement of the eventual award.*"[60]

Others suggest the geographical location of the designated arbitral institution[61] or the habitual residence of the arbitrators as potentially most closely connected to the arbitration agreement.[62]

Most of these points of contact do not weigh heavily and are unlikely to provide convincing results. The law of the place where the arbitration agreement was concluded can be entirely arbitrary,[63] and where the contract is concluded across borders, it does not point to a single system of law. Similarly, reference to the place where the award is likely to be enforced fails, since awards may typically be enforced in more than one jurisdiction.[64] Today's major arbitral institutions are chosen irrespective of where they are headquartered and tend to operate in more than one jurisdiction. Additionally, it is very rare to see all members of a tripartite international arbitral tribunal living in the same jurisdiction—if busy arbitrators have a "*habitual residence*" at all.

More authoritative points of contact are therefore again the main contract and the seat of the arbitration. The majority and minority of U.K. Supreme Court justices were divided in *Enka* as to which of these laws was more closely connected to the arbitration agreement. Noting that "*the place where the transaction is to be performed is the connecting factor to which the common law has long attached the greatest weight,*" the majority held that arbitration agreements are performed at the seat of the arbitration, with whose law they thus had their closest connection.[65] The minority, by contrast, considered it a "*general rule*" that arbitration agreements are most closely connected to the law governing the merits, citing an alleged "*expectation of business people*" that the main contract and the arbitration agreement are subject to the same law.[66] Similarly, German courts have repeatedly—but not uniformly—held that "*as a rule,*" the arbitration agreement is most closely connected to the main contract, albeit without providing any explanation of this rule.[67]

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59 Mario Giuliano & Paul Lagarde, Report on the Convention on the Law Applicable to Contractual Obligations, 1980 O.J. (C 282 1), at 11–12; *See also* BERMANN, *supra* note 30, at 155 ("Determining which jurisdiction has the closest connection or most significant relationship to the arbitration agreement is not necessarily a simple matter.").

60 BERMANN, *supra* note 30, at 156.

61 Stefan Münch, *10. Buch*, *in* MÜNCHENER KOMMENTAR ZPO ¶ 38 (Thomas Rauscher & Wolfgang Krüger eds., 5th ed. 2017) (with reference to Bayerisches Oberstes Landesgericht [Bavarian Regional Supreme Court] Sept. 17, 1998, BayObLG 4 Z Sch 1/98, NJW-RR 1999, 644, 645 (Ger.)) [*hereinafter* "Münch"].

62 Monika Anders, *10. Buch*, *in* ZIVILPROZESSORDNUNG § 1029, ¶ 11 (Monika Anders & Burkhard Gehle eds., 78th ed. 2020).

63 BERMANN, *supra* note 30, at 156.

64 *Id.*

65 Enka, [2020] UKSC 38, ¶¶ 118–123 (citing Sulamérica, [2012] EWCA Civ. 638; C v. D [2007] EWCA Civ. 1282 (Eng.)).

66 *Id.* ¶ 286 (Lord Sales), ¶¶ 257(iii), 260 (Lord Burrows concurring).

67 Bundesgerichtshof [BGH] [Federal Court of Justice] June 8, 2010, XI ZR 349/08, 2011 SCHIEDSVZ 46, 48–49 (Ger.); Bundesgerichtshof [BGH] [Federal Court of Justice] Sept. 21, 2005, III ZB 18/05, 2005 SCHIEDSVZ 306, 307–308 (Ger.); Oberlandesgericht Düsseldorf [OLG Düsseldorf] [Higher Regional Court of Düsseldorf] Nov. 15, 2017, VI-U

Conversely, scholars in different jurisdictions assume, without going into much more detail themselves, that an arbitration agreement is most closely connected to the law of the seat of arbitration.[68] According to Karrer, for instance, the law most closely connected to the arbitration agreement is "*[o]bviously*" the substantive law of the seat, as there is no law that has a closer connection with the arbitration than the *lex arbitri*.[69] In the (in)famous case of *Pechstein* v. *International Skating Union*, the German Federal Court of Justice had also considered the law of the seat of the arbitration as most closely connected to the arbitration agreement, citing (without clarifying) the presumption that the closest connection exists with the "*country where the party required to effect the characteristic performance of the contract has his habitual residence.*"[70] It has been rightly noted that this rule is hardly helpful with regard to arbitration agreements for which no one party performs the characteristic performance (the arbitrators not being party to the arbitration agreement).[71]

Nevertheless, much speaks in favour of the seat, rather than the main contract, as most closely connected to the arbitration agreement. The arbitration agreement's only point of contact to the main contract is that it serves to resolve disputes originating from that contract. Admittedly, this is a powerful connection, as there would not be an arbitration agreement without the main contract.[72] However, there is a plethora of contacts with the law of the seat that together outweigh the singular connection to the main contract: the arbitral award is deemed to be made at the seat, and the seat's courts fulfil important supporting and supervisory functions, including assisting in the constitution of the arbitral tribunal and in the taking of evidence, as well as deciding on challenges to arbitrators, the jurisdiction of the tribunal and the validity of the award.[73] Put differently, there is an intrinsic link between the arbitration agreement and the *lex arbitri*, with the latter providing the framework for the arbitral proceedings.[74] Moreover, the fact that Article V(1)(a) of the New York Convention and several other instruments use the law of the seat to determine the existence and validity of the arbitration agreement may in itself be considered a persuasive indication of the arbitration agreement's closest connection. Ultimately, considering the law of the seat as most closely connected with the arbitration agreement also has the benefit of creating international uniformity amongst courts and tribunals directly applying the conflict of laws rule in Article V(1)(a).

In the absence of a determinable choice of law by the parties, the Supreme Court of India also arrives at the law of the seat as governing the arbitration agreement:

(Kart) 8/17, juris, ¶¶ 60–61 (Ger.). Notably, the German BGH has recently clarified that rather than the closest connection test, Article V(1)(a) of the New York Convention applies as the decisive conflict of laws rule. *See* Bundesgerichtshof [BGH] [Federal Court of Justice] Nov. 26, 2020, I ZR 245/19, 2021 SCHIEDSVZ 97, 101–102 (Ger.).

68 München, *supra* note 61, § 1029, ¶ 37; Czernich, *supra* note 48, at 774; FROHLOFF, *supra* note 14, at 252; JENS-PETER LACHMANN, HANDBUCH FÜR DIE SCHIEDSGERICHTSPRAXIS ¶ 270 (3d ed. 2008).

69 Karrer, *supra* note 30, at 860–861.

70 Bundesgerichtshof [BGH] [Federal Court of Justice] June 7, 2016, KZR 6/15, juris, ¶ 68 (Ger.) (citing defunct Article 28(2) of the EINFÜHRUNGSGESETZ ZUM BÜRGERLICHEN GESETZBUCHE [EGBGB] [INTRODUCTORY ACT TO THE CIVIL CODE] Jan. 1, 1900, RGBl. at 604 (Ger.)).

71 München, *supra* note 61, § 1029, ¶ 38; Czernich, *supra* note 48, at 772.

72 *See also* NTPC, (1992) 3 SCC 551, ¶ 45 (India) ("[The arbitration agreement] has no meaningful existence except in relation to the rights and liabilities of the parties under the main contract. It is a procedural machinery which is activated when disputes arise between parties regarding their rights and liabilities").

73 *See, e.g.,* UNCITRAL Model Law, arts. 6, 11(3), 11(4), 13(3), 14(1), 16(3), 27, 31(3), 34(2).

74 *See also* Katharina Plavec, *Neues zum auf die Schiedsvereinbarung anwendbaren Recht*, ECOLEX 2019, 330, 331.

> "*Where, however, there is no express choice of the law governing the contract as a whole, or the arbitration agreement as such, a presumption may arise that the law of the country where the arbitration is agreed to be held is the proper law of the arbitration agreement. But that is only a rebuttable presumption.*"[75]

Although some authors consider this a result of the closest connection test,[76] it appears that the Indian courts do not apply the law of the seat as an objective connecting factor, but as the parties' (subjective) implied choice of law:

> "*Where there is no express choice of the law governing the contract as a whole, or the arbitration agreement in particular, there is, in the absence of any contrary indication, a presumption that the parties have* ***intended*** *that the proper law of the contract as well as the law governing the arbitration agreement are the same as the law of the country in which the arbitration is agreed to be held.*"[77] (emphasis added)

While recourse to an objective connecting factor such as the direct application of the law of the seat has the advantage of avoiding the need to seek for hidden meanings that might reverse the presumption as to the parties' intent, the result is likely the same in many cases. This means that the Indian approach of presuming that parties intend for their arbitration agreement to be governed by the law of the seat if they do not otherwise specify the applicable law yields identical results to an application of the conflict of laws rule in Article V(1)(a) of the New York Convention and the closest connection test. This promotes the international uniformity of decisions.

Only where the seat has not been determined (yet) does the closest connection not point to the law of the seat, and neither Article V(1)(a) of the New York Convention nor the Indian approach provide a clear answer. Something that does not exist (yet) is not connected to anything. In that case, the only plausible (and therefore closest) connection of the arbitration agreement is to the law of the contract in which it is contained or to which it refers.[78] When the seat is determined subsequently,[79] however, the question of the closest connection arises anew. It is submitted in that regard that the (subsequent) determination of the seat of the arbitration leads to a change in the applicable law, i.e., the law governing the arbitration agreement changes from the law of the main contract to the law of the seat.[80] While it is unfortunate that this change of law creates a measure of legal uncertainty, such hypothesis will be rare in practice. In those rare instances, a change of law is justified, since the strong connection between the seat and the arbitration agreement does not become weaker merely because the seat had not been selected from the outset.

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75 NTPC, (1992) 3 SCC 551, ¶ 23 (India).

76 Nakul Dewan, *The Laws Applicable to an Arbitration*, *in* ARBITRATION IN INDIA 112–14 (Dushyant Dave, Fali Nariman, Marike Paulsson & Martin Hunter eds. 2021).

77 NTPC, (1992) 3 SCC 551, ¶ 25 (India). *See also* Shreejee Traco (I) Pvt. Ltd. v. Paperline International Inc., (2003) 9 SCC 79, ¶ 7 (India); IMAX Corp. v. E-City Entertainment (I) Pvt. Ltd., (2017) 5 SCC 331, ¶ 24 (India) ("[W]here the parties have not expressly chosen the law governing the contract as a whole or the arbitration agreement in particular, the law of the country where the arbitration is agreed to be held has primacy."); Aastha, 2011 SCC OnLine Del 5145, ¶ 10 (India).

78 *See also* Bundesgerichtshof [BGH] [Federal Court of Justice] June 8, 2010, XI ZR 349/08, 2011 SCHIEDSVZ 46, 48–49 (Ger.).

79 UNCITRAL Model Law, art. 20(1).

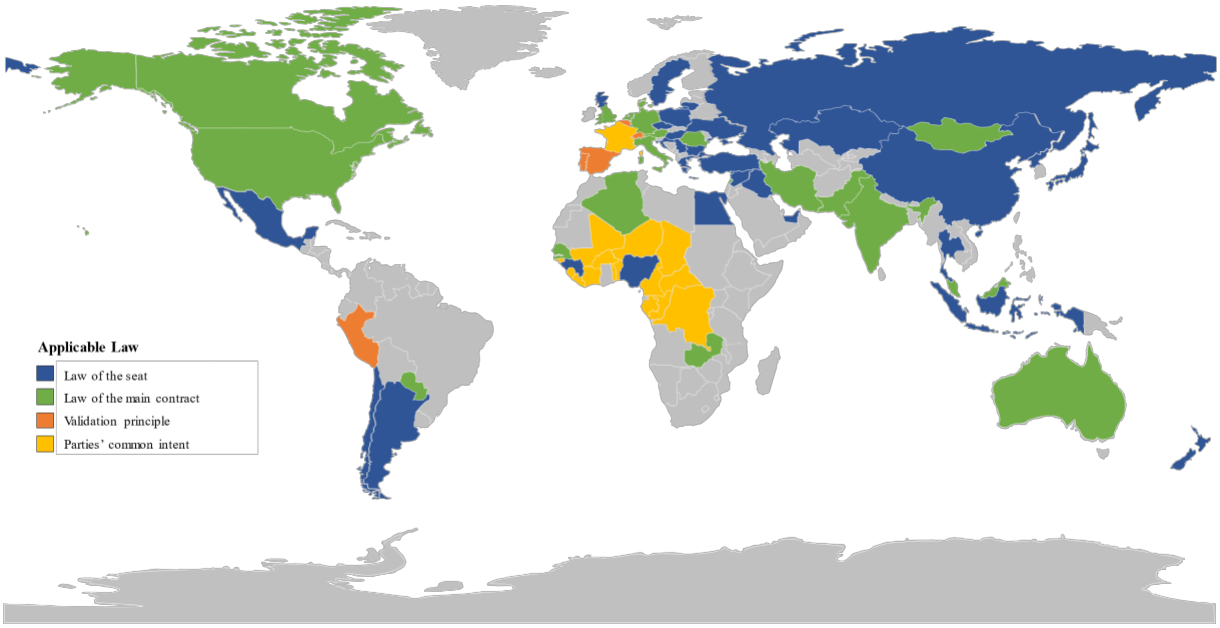
80 *See also* Berger, *supra* note 1, at 320–322.

IV. Conclusion: Increased Harmony by a Focus on Objective Criteria

Though notable exceptions remain, the majority of jurisdictions today provide for similar conflict of laws rules to determine the law governing the arbitration agreement: in the absence of an express or implied choice of law by the parties, an objective connecting factor is decisive. It is at the micro level—when assessing whether there has been an implied choice of law, and which law is most closely connected to the arbitration agreement—where results nevertheless, continue to diverge.

The authors suggest that a more uniform approach can be achieved by dispensing with presumptions and hypotheticals, and focusing on objective circumstances instead. If the parties have not included an express choice of law regarding the arbitration agreement, second-guessing the parties' hypothetical intent with regard to their implied choice of law is often a vain exercise. Rather, courts and arbitral tribunals should accept that the parties simply have not dealt with the question of the applicable law to their arbitration agreement and, therefore, should apply an objective connecting factor. This objective connecting factor should be the law of the seat—either directly because Article V(1)(a) of the New York Convention applies or indirectly as the system of law that is most closely connected to the arbitration agreement.

Annex: World Map of Approaches to the Law Governing the Arbitration Agreement



THE UAE FEDERAL ARBITRATION LAW: TAKING STOCK ON ITS THIRD ANNIVERSARY

Gordon Blanke[*]

Abstract

*The present article takes stock of the United Arab Emirates ["**UAE**"] Federal Arbitration Law ["**FAL**"] after its first three years in operation. In doing so, it focuses on areas of relevance that have emerged from case law of the UAE courts in interpreting the provisions of the FAL, such as the arbitration agreement, the arbitration defence, the principle of kompetenz-kompetenz and the waiver provision. An initial analysis will show that the UAE courts continue to take guidance from the case law that originated from the former UAE Arbitration Chapter, which was repealed by the FAL with effect from June 16, 2018. The UAE courts have pursued an arbitration-friendly interpretation of the FAL without losing any of the continuity that has followed on from the previous regime under the former UAE Arbitration Chapter. That said, it is regrettable that some of the shortcomings of the new law, such as the limited powers of a tribunal to award costs or the continued qualification of arbitration as an exceptional means of dispute resolution requiring a special authority for representation, are attributable to conservative law-making by the draftsmen of the new law. Nevertheless, the FAL sends distinctly positive signals in the promotion of the electronic conduct arbitration proceedings.*

I. Introduction

June 16, 2021 marks the third anniversary of the FAL,[1] which was adopted by the UAE legislature in May 2018 and entered into force on June 16, 2018. It would seem apposite to celebrate the tenth anniversary of the *Indian Journal of Arbitration Law*, which has featured so prominently in the "*Bibliography of recent writings related to the work of UNCITRAL*" over the course of its short lifetime to date, with a contribution on how the UAE Courts have so far fared in the interpretation of the FAL; the FAL itself being of United Nations Commission on International Trade Law ["**UNCITRAL**"] pedigree. Albeit not incorporating the body of the UNCITRAL Model Law on International Commercial Arbitration ["**Model Law**"][2] as a whole, the FAL takes inspiration from and is as such based upon the Model Law provisions in relevant part.[3] In recognition of its Model Law origin, the FAL has been listed in the April 2020 United Nations' General Assembly Report as one of the world's Model Laws, officially elevating the UAE to a Model Law jurisdiction.[4]

By way of background, with effect from its entry into force, the FAL repealed the former provisions of the so-called "*UAE Arbitration Chapter*" (i.e., Articles 235 to 238 of the UAE Federal

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1 Federal Law No. (6) of 2018 on Arbitration (U.A.E.) [*hereinafter* "UAE Arbitration Law"].

2 United Nations Comm'n on Int'l Trade Law (UNCITRAL), Model Law on International Commercial Arbitration, G.A. Res. 40/72, U.N. Doc. 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).

3 *See* M. Nasreddine, *The UNCITRAL Model Arbitration Law and the UAE Federal Arbitration Law: Points of Convergence and Divergence*, *in* THE UAE ARBITRATION YEARBOOK 2018 91–95 (G. Al Hajeri & Z. Penot eds., 2019).

4 *See* UNCITRAL, 53rd Session, New York, July 6–17, 2020. Status of conventions and model laws, Note by the Secretariat, ¶ 7, U.N. Doc. A/CN.9/1020 (Apr. 1, 2020).

Law No. (11) of 1992 (Concerning Issuance of the Civil Procedures Code) ["**CPC**"]),[5] also known as the "*UAE Arbitration Chapter,*" and has become the positive law of arbitration that governs arbitral proceedings with seat in the UAE.[6] For the avoidance of doubt, this excludes arbitrations seated in one of the offshore judicial free zones, i.e., the Dubai International Financial Centre ["**DIFC**"][7] or the Abu Dhabi Global Market ["**ADGM**"].[8] These are governed by their own, standalone arbitration laws, which go beyond the scope of this article and with which the author has dealt elsewhere.[9] The FAL also provides a regime for the recognition and enforcement of domestic awards, and it is complemented by Cabinet Decision No. 57 of 2018 for the enforcement of foreign awards,[10] which equally falls outside the scope of this article.

The following study—albeit brief—endeavours to provide some initial insight into how the UAE courts have so far scored on the construction of provisions of the FAL that are closely modelled on corresponding provisions of the Model Law, or that deserve mention for their significance within the context of the application of the FAL despite not featuring in the Model Law. Given constraints of space, for present purposes, emphasis is placed on the content of UAE case law precedent at the cost of a truly comparative study,[11] but in the hope that it will assist in a better understanding of the operation of the FAL as a Model Law-based legislation.

In the following, this article seeks to focus on areas of relevance that have emerged from case law of the UAE courts in interpreting the provisions of the FAL, such as the arbitration agreement, the arbitration defence, the principle of *kompetenz-kompetenz* and the waiver provision.

II. The Arbitration Agreement

A. General

The agreement to arbitrate has been recognised as the source of the tribunal's mandate and powers under the FAL.[12] It has been confirmed that pursuant to Article 4(1) of the FAL, which has no equivalent in the Model Law, and which limits the group of authorised signatories of an agreement to arbitrate to the original rightsholder and to specially authorised representatives, both natural and legal persons, i.e., individuals and body corporates, are empowered to enter into arbitration

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5 *See* Federal Law No. (11) of 1992 (Concerning Issuance of the Civil Procedures Code), arts. 203–218 (U.A.E.) [*hereinafter* "UAE Civil Procedures Code"]. For a full commentary, see GORDON BLANKE, COMMENTARY ON THE UAE ARBITRATION CHAPTER (2017) [*hereinafter* "BLANKE"].

6 Albeit that the overall scope of application of the FAL is significantly wider. *See* UAE Arbitration Law, art. 2. For commentary, *see* 1 GORDON BLANKE, BLANKE ON UAE ARBITRATION LEGISLATION AND RULES (forthcoming 2021) [*hereinafter* "BLANKE"].

7 *See* Dubai International Financial Centre (DIFC) Arbitration Law 2008 (Law No. 1 of 2008).

8 *See* Abu Dhabi Global Market (ADGM) Arbitration Regulations 2015.

9 *See* Gordon Blanke, *Free Zone Arbitration: The Mechanics*, 6(2) IND. J. ARB. L. 56 (2018); Gordon Blanke, *Free zone arbitration in the DIFC and the ADGM*, 35(1) ARB. INT'L 95 (2019).

10 *See* Cabinet Decision No. (57) of 2018 (Concerning the Executive Regulations of Federal Law No. (11) of 1992 on the Civil Procedure Law), Dec. 9, 2018, effective Feb. 16, 2019 (U.A.E.). For a full commentary, *see* BLANKE, *supra* note 6.

11 It should be noted that given the UAE are a civil law jurisdiction, there is no binding precedent and any guidance from previous court rulings does not bind future courts. That said, lower courts tend to comply with dicta of the court of cassation in the competent Emirate, thus creating a *jurisprudence constante* by analogy to the French legal system.

12 *See, e.g.,* Dubai Court of Cassation Case No. 114/2020 (Commercial), Mar. 18, 2020; Dubai Court of Cassation Case No. 324/2020 (Civil), Nov. 26, 2020.

agreements.[13] Given the similarity in wording between Article 4(1) of the FAL and former Article 203(4) of the CPC, the Dubai Court of Cassation has been seen to rely on the UAE courts' analysis of former Article 203 of the CPC in relevant part in construing Article 4(1) of the FAL.[14] Given the exceptional nature of arbitration, arbitration clauses and agreements are interpreted narrowly.[15]

Subject to the application of the doctrine of apparent authority in the terms set out under Part II.E of this article, the UAE courts have confirmed that a third party that seeks to submit to arbitration for and on behalf of and/or represent the original rightsholder in an arbitration, whether an individual or a body corporate, must be specifically authorised to do so by means of a special power of attorney in accordance with Article 58(2) of the CPC[16] or a board resolution, subject to a number of well-defined exceptions, such as the legal presumption in favour of the binding authority of a director of a UAE-incorporated limited liability company.[17] To this effect, the Dubai Court of Cassation has found in Case No. 153/2020 that "*[t]he director of a limited liability company is the holder of full authority in its management and has the capacity to dispose of the rights related to its activity including the agreement on arbitration in the contracts concluded between it and others unless the company's articles of incorporation specify its authority to deprive him of certain actions or expressly prevent him from agreeing to arbitration […].*"[18] According to more recent case law of the UAE courts, a lack of special authority may only be invoked by a principal against its agent or attorney, and not by the opponent party.[19] It has also been held that where a board of directors only counts two members and the articles of association authorise one director on its own to carry out the company affairs, one director on its own is considered authorised to bind the company to arbitration.[20]

Further, the UAE courts have confirmed that the requirement for a special power of attorney extends to the delegation of any powers to be conferred upon a tribunal in arbitration, including the power to award party costs more specifically. In Case No. 990/2019, the Dubai Court of Cassation observed as follows:

> "*[T]he decision according to the text of the first and third paragraphs of Article 4 of the [FAL] that 1- The agreement on arbitration is concluded only by a natural person who has the capacity to dispose of rights or from the person's representative, the legal person who is authorized to conclude an agreement on arbitration, otherwise the agreement will be void […] 3- And that in the cases in which this law permits the parties to agree on the procedure to be followed to decide on a specific issue, then each of them may authorize others to*

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13 *See, e.g.,* Dubai Court of Cassation Case No. 293/2019 (Commercial), June 30, 2019; Dubai Court of Cassation Case No. 276/2020 (Commercial), May 20, 2020; Dubai Court of Cassation Case No. 329/2020 (Commercial), Sept. 20, 2020.

14 *See, e.g.,* Dubai Court of Cassation Case No. 236/2019 (Real Estate), Dec. 11, 2019.

15 *See, e.g.,* Dubai Court of Cassation Case No. 329/2020 (Commercial), Sept. 20, 2020; Dubai Court of Cassation Case No. 441/2020 (Commercial), Sept. 27, 2020; Dubai Court of Cassation Case No. 459/2020 (Commercial), Oct. 4, 2020; Dubai Court of Cassation Case No. 567/2020 (Commercial), July 26, 2020.

16 *See, e.g.,* Dubai Court of Cassation Case No. 205/2019 (Commercial), June 23, 2019; Dubai Court of Cassation Case No. 236/2019 (Real Estate), Dec. 11, 2019; Dubai Court of Cassation Case No. 5/2020 (Real Estate), Mar. 19, 2020.

17 *See, e.g.,* Dubai Court of Cassation Case No. 236/2019 (Real Estate), Dec. 11, 2019; Dubai Court of Cassation Case No. 1013/2019 (Commercial), Jan. 19, 2020; Dubai Court of Cassation Case No. 870/2020 (Commercial), Nov. 25, 2020; Dubai Court of Cassation Case No. 71/2021 (Commercial), Feb. 28, 2021.

18 Dubai Court of Cassation Case No. 153/2020 (Commercial), Mar. 8, 2020.

19 *See, e.g.,* Dubai Court of Cassation Case No. 205/2019 (Commercial), June 23, 2019; Dubai Court of Cassation Case No. 685/2019 (Commercial), Nov. 10, 2019; Dubai Court of Cassation Case No. 1118/2019 (Commercial), Feb. 19, 2020; Dubai Court of Cassation Case No. 247/2020 (Real Estate), Oct. 13, 2020.

20 *See* Dubai Court of Cassation Case No. 153/2020 (Commercial), Mar. 8, 2020.

choose this procedure or decide on it, and it is considered among others in this regard every natural person or arbitration institution inside or outside the country. And that the text of Article (216/4) of the [CPC] under which the arbitration procedures were conducted is that resorting to arbitration is only valid for those who have the capacity to act in the disputed right and who are not qualified to resort to the judiciary, for the agreement on arbitration implies that if a person relinquishes filing a case to the state's judiciary, including the guarantees it contains for the litigants, which is an exceptional way to settle disputes, the legislator is required to agree on a private agency and that it is in the private agency that the agent has nothing but to undertake the matters assigned to it and the necessary consequences required by the nature of the behaviour and the current custom, it is not permissible to depart from the limits of this authorization, and if it exceeds those limits, then it does not apply to the right of the delegated person unless he permits this behaviour."[21]

B. The principle of separability

In accordance with Article 6(1) of the FAL, which is modelled on Article 16(1) of the Model Law, the UAE Courts have confirmed the isolation of the arbitration agreement from the main contract and its continued integrity despite the nullity, rescission or termination of the main contract,[22] provided that the agreement to arbitrate is itself not affected by an instance of invalidity.[23]

Against this background, it has been held by the UAE courts that the invalidity of a board resolution (intending to confer powers upon new management to submit a company to arbitration) does not extend to an existing arbitration agreement contained in the main contract between the parties in circumstances where the existing arbitration agreement was lawfully executed by previous management of the company.[24]

The net consequence of Article 6(1) of the FAL is that the arbitration agreement survives the termination (including in the form of a rescission) or invalidity of the main contract. In Case No. 516/2020, the Dubai Court of Cassation observed that "*the invalidity of the original contract that includes the arbitration clause, or its annulment or termination, does not prevent the arbitration clause from remaining valid and producing its effects with respect to the effects of the nullity, annulment or termination of the original contract unless the nullity extends to the arbitration clause itself […].*"[25] As a result, the arbitral tribunal retains jurisdiction to determine the question of the termination or invalidity of the main contract.[26]

C. The in-writing requirement

The UAE courts have confirmed the in-writing requirement of arbitration agreements under Article 7(1) of the FAL,[27] which takes after Article 7(2) of the Model Law, and as such, an agreement to arbitrate is never presumed.[28] A failure to sign an arbitration provision contained in

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21 *See* Dubai Court of Cassation Case No. 990/2019 (Commercial), Jan. 5, 2020.

22 *See, e.g.,* Dubai Court of Cassation Case No. 156/2020 (Commercial), Mar. 11, 2020; Dubai Court of Cassation Case No. 516/2020 (Commercial), July 15, 2020; Dubai Court of Cassation Case No. 1115/2020 (Commercial), Dec. 20, 2020.

23 *See, e.g.,* Dubai Court of Cassation Case No. 516/2020 (Commercial), July 15, 2020.

24 *See* Dubai Court of Cassation Case No. 946/2019 (Commercial), Nov. 24, 2019.

25 *See* Dubai Court of Cassation Case No. 516/2020 (Commercial), July 15, 2020.

26 *See Id.*

27 *See, e.g.,* Dubai Court of Cassation Case No. 293/2019 (Commercial), June 30, 2019; Dubai Court of Cassation Case No. 315/2020 (Commercial), Sept. 13, 2020; Dubai Court of Cassation Case No. 441/2020 (Commercial), Sept. 27 2020.

28 *See* Dubai Court of Cassation Case No. 224/2020 (Civil), Aug. 27 2020.

schedules to the original main contract will render that provision null and void *ab initio*.[29] It has been held that a simple amendment of a main contract, without specific reference to the underlying arbitration clause, does not displace the obligation to arbitrate.[30] In order to satisfy the in-writing requirement, it will suffice for an agreement to arbitrate to fall within one of the circumstances listed under Article 7(2) of the FAL,[31] thus qualifying as having been concluded in writing.[32]

Importantly, according to the UAE courts, an arbitration agreement is only binding *inter partes*, i.e., it only binds (authorised) signatory parties.[33] That said, like the position under the former UAE Arbitration Chapter,[34] the UAE courts have endorsed the express or implied assignment of the obligation to arbitrate to a third party provided the circumstances leave no room for doubt that the assignment has met with party acceptance.[35]

Further, pursuant to Article 1028 of the CPC, the arbitration agreement of an insurance contract is required to be contained in an agreement separate from the general conditions of the insurance.[36] In circumstances where this was not done, the insurer, which was the originator of those conditions, was not able to rely upon its own failure to insert the arbitration agreement into a separate agreement to overcome an arbitration defence advanced by the insured.[37] It has also been held that a settlement agreement between two parties with respect to a dispute arising from a main contract that contained an arbitration clause was not referable to arbitration where that agreement did not make reference to the obligation to arbitrate.[38] Equally, a letter agreement adopted to replace an earlier agreement on the same subject without making reference to the arbitration clause contained in the earlier agreement was found not to give rise to an obligation to arbitrate.[39]

D. Incorporation by reference

In application of Article 5(3) of the FAL, which is modelled on Article 7(6) – Option 1 of the Model Law and facilitates incorporation by reference, a generic reference in a subcontract to dispute resolution in the terms provided for in the main contract has been found sufficient for incorporation of a *Fédération Internationale Des Ingénieurs-Conseils* ["**FIDIC**"] dispute resolution clause contained in a main contract into a subcontract.[40]

Further, the UAE courts have found, taking account of the language of Article 7(2)(b) of the FAL more specifically, that for incorporation by reference to operate, the required reference must point

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29 *See* Dubai Court of Cassation Case No. 476/2020 (Commercial), July 8 2020.
30 *See* Dubai Court of Cassation Case No. 315/2020 (Commercial), Sept. 13, 2020.
31 Including, for example, an exchange of correspondence between authorised signatories, by sufficiently clear reference from one contract to another, an exchange of written submissions between the parties during an arbitration process.
32 *See, e.g.,* Dubai Court of Cassation Case No. 293/2019 (Commercial), June 30, 2019.
33 *See* Dubai Court of Cassation Case No. 43/2019 (Real Estate), May 8, 2019; Dubai Court of Cassation Case No. 5/2020 (Real Estate), Mar. 19, 2020.
34 *See* BLANKE, *supra* note 5, at II-018.
35 *See* Dubai Court of Cassation Case No. 43/2019 (Real Estate), May 8, 2019; Dubai Court of Cassation Case No. 503 (Commercial), June 15, 2019.
36 *See* BLANKE, *supra* note 5, at II-008.
37 *See* Dubai Court of Cassation Case No. 236/2020 (Civil), Aug. 13, 2020.
38 *See* Dubai Court of Cassation Case No. 567/2020 (Commercial), July 26, 2020; Dubai Court of Cassation Case No. 667/2020 (Commercial), Oct. 4, 2020.
39 *See* Dubai Court of Cassation Case No. 358/2020 (Civil), Nov. 26, 2020.
40 *See* Dubai Court of Appeal Case No. 1139/2020 (Commercial), Aug. 19, 2020; Dubai Court of Cassation Case No. 56/2021 (Commercial), Mar. 3, 2021.

to the arbitration provision in the referenced document and expressly state that the referenced arbitration provision forms an integral part of the subject contract, including more specifically within the context of the FIDIC standard conditions of contract.[41] In Case No. 329/2020, the Dubai Court of Cassation observed as follows:

> "*[A]n agreement to arbitrate is considered any referral contained in a contract drawn up between two parties to another contract that includes an arbitration clause if the referral is clear and explicit in adopting this condition, and the effect of the referral is not achieved unless it includes a specific reference to the arbitration clause. If the referral to the aforementioned contract is merely a general reference to the provisions of this contract without specifying the aforementioned arbitration clause specifically indicating that the parties know of its existence in the contract, then the referral does not extend to it and the arbitration is not agreed upon between the parties to the contract, […].*"[42]

E. Apparent authority

A consistent line of case law precedent suggests that the UAE courts now recognise a legal presumption in favour of the binding effect of a person's signature upon a company in one of the following two situations:

(i) Where that person is not specifically designated as the company's legal representative in the preamble of the underlying contract that contains an arbitration clause, yet—regardless of its true association with the company—signs the contract[43] with a legible signature.[44] In this regard, the Dubai Court of Cassation observed in Case No. 276/2020 that "*if the name of a specific company is mentioned in the preamble of the contract and another person signed at the end of this contract, this establishes a legal claim that whoever signed it signed in the name and account of the company, regardless of whether his name is associated with its name or added to it, and this will affect the rights and obligations of the company.*"[45]

(ii) Where that person is specifically designated as a company's legal representative in the preamble of the contract, but the signature placed under the contract is illegible.[46] The Dubai Court of Cassation further observed that "*[i]f the name of the legal person is mentioned in the preamble of the contract only and not associated with the name and description of the legal representative and the end of the contract is signed with an illegible signature and the contract includes the arbitration clause, in this case there is a conclusive legal presumption that the signature is attributed to the legal*

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41 *See* Dubai Court of Cassation Case No. 441/2020 (Commercial), Sept. 27, 2020; Dubai Court of Cassation Case No. 459/2020 (Commercial), Oct. 4, 2020; Dubai Court of Cassation Case No. 567/2020 (Commercial), July 26, 2020.

42 *See* Dubai Court of Cassation Case No. 329/2020 (Commercial), Sept. 20, 2020.

43 *See, e.g.,* Dubai Court of Cassation Case No. 236/2019 (Real Estate), Dec. 11, 2019; Dubai Court of Cassation Case No. 293/2019 (Commercial), June 30, 2019; Dubai Court of Cassation Case No. 581/2019 (Commercial), Sept. 15, 2019; Dubai Court of Cassation Case No. 51/2020 (Real Estate), May 14, 2020; Dubai Court of Cassation Case No. 236/2020 (Civil), Aug. 13, 2020; Dubai Court of Cassation Case No. 870/2020 (Commercial), Nov. 25, 2020.

44 *See* Dubai Court of Appeal Case No. 2/2020, Oct. 6, 2020.

45 *See* Dubai Court of Cassation Case No. 276/2020 (Commercial), May 20, 2020.

46 *See, e.g.,* Dubai Court of Cassation Case No. 236/2019 (Real Estate), Dec. 11, 2019; Dubai Court of Cassation Case No. 293/2019 (Commercial), June 30, 2019; Dubai Court of Cassation Case No. 581/2019 (Commercial), Sept. 15, 2019; Dubai Court of Appeal Case No. 2/2020, Oct. 6, 2020; Dubai Court of Cassation Case No. 51/2020 (Real Estate), May 14, 2020; Dubai Court of Cassation Case No. 236/2020 (Civil), Aug. 13, 2020; Dubai Court of Cassation Case No. 265/2020 (Commercial), June 28, 2020; Dubai Court of Cassation Case No. 870/2020 (Commercial), Nov. 25, 2020.

> *representative of the person possessing the capacity to act and the capacity to agree to arbitration and it is not accepted from him in this case to challenge this signature in accordance with the principle of good faith.*"[47]

Conversely, where a person is specifically designated as the company's legal representative in the preamble to the contract that contains the arbitration clause, yet the signature under the contract is legible and as such identifiable or identified as that of another person, the legal presumption in favour of binding authority is displaced.[48] The Dubai Court of Cassation further observed that "*[i]f the name of the legal person is mentioned in the preamble of the contract coupled with the name and description of the legal representative and the end of the contract is signed with a legible signature of another person and the contract includes the arbitration clause, then in that case the legal person may claim the nullity of the arbitration clause for its signature by a person other than the legal representative who has the capacity to agree to arbitration.*"[49]

For the avoidance of doubt, a legible signature at the end of a contract in the absence of any (contradictory) designation of the legal representative in the preamble to the contract will not displace the legal presumption in favour of binding authority.[50] It has hence been found that ordinary employees of a corporate entity that neither held a managerial position, nor were furnished with special authority, did bind that entity to arbitration by signing (legibly) a settlement agreement that contained an arbitration clause.[51] The UAE courts also appear to have recognised that the placement of a company seal on the arbitration agreement (bar proof of fraudulent interference by the agent) binds the company to arbitration and as such serves as conclusive evidence of the proper execution of the arbitration obligation by a legal person in its own right (irrespective of any other signature requirements).[52]

In finding in favour of the application of apparent authority, the UAE courts have relied upon an overarching obligation of good faith in the terms set out at Article 70 of the UAE Federal Law No. (5) of 1985 issuing the Civil Transactions Law ["**Civil Transactions Code**"].[53] In Case No. 236/2019, the Dubai Court of Cassation observed as follows:

> "*[I]n accordance with the principle established by Art. 70 of the [Civil Transactions Code], whoever is seeking to set aside what he has concluded on this part will be rejected, and the defendant may not take from his own actions/ grounds to validate/constitute his claim against [a] third party, which is an application of the general principle that is based on moral and social considerations to combat such behaviour and not to*

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47 *See* Dubai Court of Cassation Case No. 276/2020 (Commercial), May 20, 2020.

48 *See, e.g.,* Dubai Court of Cassation Case No. 236/2019 (Real Estate), Dec. 11, 2019; Dubai Court of Cassation Case No. 293/2019 (Commercial), June 30, 2019; Dubai Court of Cassation Case No. 581/2019 (Commercial), Sept. 15, 2019; Dubai Court of Cassation Case No. 51/2020 (Real Estate), May 14, 2020.

49 *See* Dubai Court of Cassation Case No. 276/2020 (Commercial), May 20, 2020.

50 *See* Dubai Court of Cassation Case No. 581/2019 (Commercial), Sept. 15, 2019.

51 *See* Dubai Court of Cassation Case No. 246/2020 (Civil), Sept. 24, 2020.

52 *See* Dubai Court of Cassation Case No. 685/2019 (Commercial), Nov. 10, 2019; Dubai Court of Appeal Case No. 2/2020, Oct. 6, 2020; Dubai Court of Cassation Case No. 51/2020 (Real Estate), May 14, 2020; Dubai Court of Cassation Case No. 161/2020 (Commercial), Oct. 4, 2020; Dubai Court of Cassation Case No. 236/2020 (Civil), Aug. 13, 2020; Dubai Court of Cassation Case No. 865/2020 (Commercial), Oct. 11, 2020; Dubai Court of Cassation Case No. 870/2020 (Commercial), Nov. 25, 2020. *But cf.* Dubai Court of Cassation Case No. 960/2020 (Commercial), Dec. 9, 2020; Dubai Court of Cassation Case No. 1037/2020 (Commercial), Dec. 9, 2020.

53 *See, e.g.,* Dubai Court of Cassation Case No. 161/2020 (Commercial), Oct. 4, 2020; Dubai Court of Cassation Case No. 276/2020 (Commercial), May 20, 2020; Dubai Court of Cassation Case No. 870/2020 (Commercial), Nov. 25, 2020.

deviate from the seriousness of the principle of good faith that must be complied with in all actions and procedures."[54]

On occasion, the courts have also found support in Article 14(2) of the CPC. For instance, in Case No. 51/2020, the Dubai Court of Cassation observed as follows:

"*It is not permissible – according to Article 14(2) of the Civil Procedure Law – to claim nullity that is not related to public order from the party who caused it, whether it was caused intentionally or by negligence or the one who caused it was the same person or someone working for them. It is established that a party to the arbitration may not claim before the court a defense that leads to the nullity of the arbitration award due to defects related to the arbitration agreement or to the arbitration procedures resulting from its own actions.*"[55]

III. The Arbitration Defence

The arbitration defence pursuant to Article 8 of the FAL, which takes after corresponding Article 8 of the Model Law, has been found to operate as an exception to the general rule in favour of the jurisdiction of the UAE courts in civil and commercial disputes.[56] According to the arbitration defence, a court before which an action on the merits has been initiated, is obligated to dismiss that action in the event that the opponent raises the existence of an obligation to arbitrate, unless the underlying arbitration agreement is found to be unenforceable, whether for being invalid or otherwise.[57] For this purpose, an arbitration agreement will be found unenforceable in circumstances where the parties fail to make payment of the advance on costs prescribed under the Dubai International Arbitration Centre ["**DIAC**"] Rules of Arbitration, 2007,[58] and the case is

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54 Dubai Court of Cassation Case No. 236/2019 (Real Estate), Dec. 11, 2019; *See also* Dubai Court of Cassation Case No. 293/2019 (Commercial), June 30, 2019; Dubai Court of Cassation Case No. 581/2019 (Commercial), Sept. 15, 2019; Dubai Court of Cassation Case No. 681/2019 (Commercial), Nov. 10, 2019; Dubai Court of Cassation Case No. 51/2020 (Real Estate), May 14, 2020; Dubai Court of Cassation Case No. 236/2020 (Civil), Aug. 13, 2020; Dubai Court of Cassation Case No. 276/2020 (Commercial), May 20, 2020; Dubai Court of Cassation Case No. 265/2020 (Commercial), June 28, 2020; Dubai Court of Cassation Case No. 870/2020 (Commercial), Nov. 25, 2020.

55 Dubai Court of Cassation Case No. 51/2020 (Real Estate), May 14, 2020. *See also* Dubai Court of Cassation Case No. 236/2020 (Civil), Aug. 13, 2020.

56 *See* Dubai Court of Cassation Case No. 1071/2019 (Commercial), Feb. 16, 2020.

57 *See, e.g.,* Dubai Court of Cassation Case No. 300/2019 (Real Estate), Feb. 13, 2020; Dubai Court of Cassation Case No. 319/2019 (Commercial), Dec. 8, 2019; Dubai Court of Cassation Case No. 399/2019 (Commercial), Feb. 23, 2020; Dubai Court of Cassation Case No. 521/2019 (Commercial), Jan. 30, 2020; Dubai Court of Cassation Case No. 581/2019 (Commercial), Sept. 15, 2019; Dubai Court of Cassation Case No. 604/2019, Nov. 24, 2019; Dubai Court of Cassation Case No. 685/2019 (Commercial), Nov. 10, 2019; Dubai Court of Cassation Case No. 853/2019 (Commercial), Feb. 2, 2020; Dubai Court of Cassation Case No. 903/2019 (Commercial), Nov. 11, 2020; Dubai Court of Cassation Case No. 986/2019 (Commercial), Dec. 15, 2019; Dubai Court of First Instance Case No. 1646/2019 (Commercial), Mar. 3, 2020; Dubai Court of Cassation Case No. 5/2020 (Real Estate), Mar. 19, 2020; Dubai Court of Cassation Case No. 135/2020 (Civil), May 14, 2020; Dubai Court of Cassation Case No. 142/2020 (Real Estate), Nov. 3, 2020; Dubai Court of Cassation Case No. 153/2020 (Commercial), Mar. 8, 2020; Dubai Court of Cassation Case No. 156/2020 (Commercial), Mar. 11, 2020; Dubai Court of Cassation Case No. 161/2020 (Commercial), Oct. 4, 2020; Dubai Court of Cassation Case No. 218/2020 (Commercial), May 20, 2020; Dubai Court of Cassation Case No. 224/2020 (Civil), Aug. 27, 2020; Dubai Court of Cassation Case 276/2020 (Commercial), May 20, 2020; Dubai Court of Cassation Case No. 315/2020 (Commercial), Sept. 13, 2020; Dubai Court of Cassation Case No. 367/2020 (Commercial), Aug. 7, 2020; Dubai Court of Cassation Case No. 421/2020 (Commercial), Oct. 4, 2020; Dubai Court of Cassation Case No. 441/2020 (Commercial), Sept. 27, 2020; Dubai Court of Cassation Case No. 732/2020 (Commercial), Sept. 30, 2020; Dubai Court of Cassation Case No. 803/2020 (Commercial), Oct. 25, 2020; Dubai Court of Cassation Case No. 865/2020 (Commercial), Oct. 11, 2020; Dubai Court of Cassation Case No. 960/2020 (Commercial), Dec. 9, 2020; Dubai Court of Cassation Case No. 1037/2020 (Commercial), Dec. 9, 2020; Dubai Court of Cassation Case No. 10/2021 (Real Estate), Feb. 23, 2021.

58 *See* Dubai International Arbitration Centre (DIAC), Rules of Arbitration 2007 [*hereinafter* "DIAC Rules"].

considered withdrawn and the arbitration procedure is consequently closed within the meaning of Article 2.9 of the Appendix on Costs of the DIAC Rules.[59]

Importantly, as confirmed by the UAE courts, an opponent party must raise the arbitration defence before making any submissions on the merits (rather than at the first hearing, as was the case under the former UAE Arbitration Chapter),[60] otherwise the opponent will be considered to have waived the right to enforce the arbitration obligation against the claimant.[61] In such a case, the courts—to the exclusion of an arbitral tribunal—will be properly competent to hear the action on the merits.[62] The UAE courts have found that for this purpose, pleadings on the merits include submissions before an expert appointed by the court to assist in resolving the parties' dispute.[63]

The UAE courts have further found that for an arbitration defence under Article 8(1) of FAL to succeed, it must meet three cumulative conditions:[64] (i) the opponent files a case before the courts in violation of an existing arbitration agreement; (ii) the aggrieved party raises the arbitration defence before arguing the case on the merits; and (iii) the subject arbitration agreement is valid and as such enforceable as between the parties. It has been found that condition (ii) allows a party to request an extension of time in the first hearing before the competent court to appoint a legal representative, who in turn raises the arbitration defence in the second hearing before the court.[65] Equally, the opponent party will be allowed to request an adjournment before the court to review the case file before formally raising the arbitration defence in the second hearing (or at a later hearing to the extent that it reserves its position on the merits). The UAE courts have been seen to entertain an arbitration defence raised by an attorney at a second hearing, following a successful application for adjournment of the first hearing in order to review the file.[66] The UAE courts have also granted the arbitration defence on the basis that the plaintiff in the court proceedings had advanced a counterclaim in competing arbitral proceedings pending in parallel.[67]

In case of multiple parties, where both signatories and non-signatories to the arbitration agreement are involved, and provided that the dispute between the parties is indivisible, the UAE courts have found that they have general jurisdiction on the basis that arbitration is an exceptional form of dispute resolution.[68]

Where no indivisible link can be established between a first contract that contains an arbitration clause and a second contract that does not, the tribunal will be competent to hear the dispute

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59 *See* Dubai Court of Cassation Case No. 215/2019 (Commercial), July 7, 2019.

60 *See* BLANKE, *supra* note 5, at II-040–II-041.

61 *See, e.g.,* Dubai Court of Cassation Case No. 1159/2018 (Commercial), July 21, 2019; Dubai Court of Cassation Case No. 319/2019 (Commercial), Dec. 8, 2019; Dubai Court of Cassation Case No. 399/2019 (Commercial), Feb. 23, 2020; Dubai Court of Cassation Case No. 156/2020 (Commercial), Mar. 11, 2020.

62 *See* Dubai Court of Cassation Case No. 156/2020 (Commercial), Mar. 11, 2020.

63 *See* Dubai Court of Cassation Case No. 604/2019, Nov. 24, 2019.

64 Dubai Court of Cassation Case No. 300/2019 (Real Estate), Feb. 13, 2020.

65 *Id.*

66 *See, e.g.,* Dubai Court of Cassation Case No. 1159/2018 (Commercial), July 21, 2019.

67 *See, e.g.,* Dubai Court of Cassation Case No. 56/2021 (Commercial), Mar. 3, 2021.

68 *See* Dubai Court of Cassation Case No. 153/2019 (Commercial), Apr. 28, 2019; Dubai Court of Cassation Case No. 300/2019 (Real Estate), Feb. 13, 2020; Dubai Court of Cassation Case No. 5/2020 (Real Estate), Mar. 19, 2020; Dubai Court of Cassation Case No. 17/2020 (Real Estate), May 14, 2020.

arising from the first contract to the exclusion of the general jurisdiction of the UAE courts.[69] The arbitration defence has failed with respect to matters that fall within the proper competence of the courts, particularly those that qualify as of public policy, including, for example, the registration of off-plan real estate;[70] and in circumstances where a party was not a signatory of the underlying sale contract that contained the subject arbitration agreement.[71] Subject to parties agreeing otherwise, the courts will also regain general jurisdiction in the event that an arbitration agreement cannot be performed for some reason, including, *inter alia*, the parties' failure to defray the costs of the arbitration, for example, within the meaning of the DIAC Rules, resulting in the closure of the DIAC reference.[72] The UAE courts have dismissed the arbitration defence where the dispute between the parties did not fall within the scope of the disputed arbitration agreement, as it arose from circumstances not covered by that agreement.[73] In Case No. 265/2020 the Dubai Court of Cassation refused to entertain as a debt enforcement action a claim for payment of a debt, which the debtor party had admitted was outstanding by email, declining the court's jurisdiction in favour of the existence of an arbitration clause under Article 8(1) of the FAL.[74] The UAE courts have also refused to accept that a Final Payment Certificate, within the meaning of the FIDIC Conditions of Contract for Construction, is suitable for enforcement as a debt by the competent courts irrespective of the existence of an arbitration clause.[75]

IV. Jurisdiction and *Kompetenz-Kompetenz*

The UAE courts have confirmed that Article 19 of the FAL, which is closely modelled on Article 16 of the Model Law, contains the principle of *kompetenz-komptenz*, according to which a tribunal serving under the FAL has the power to determine its own jurisdiction as a preliminary matter to the exclusion of the courts.[76] The courts have confirmed that pursuant to Article 19(1) of the FAL, the tribunal may decide on an issue of jurisdiction as a preliminary matter (by way of a "*preliminary decision*"), allowing a tribunal to bifurcate the proceedings into an initial phase on jurisdiction and a subsequent phase on the merits.[77]

The UAE courts have further found that a failure to comply with the FIDIC conditions precedent in the terms of Clause 67 of the fourth edition of the FIDIC Conditions of Contract for Works of Civil Engineering Construction, 1987 ["**Red Book**"][78] and, in particular, to make a timely referral to the Engineer under Clause 67.1, renders the commencement of arbitration proceedings premature.[79] Further, according to the courts, in circumstances where the Employer fails to give the Contractor written notice of a change of Engineer, the Contractor is allowed to refer to

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69 *See* Dubai Court of Cassation Case No. 803/2020 (Commercial), Oct. 25, 2020.

70 *See, e.g.,* Dubai Court of Cassation Case No. 5/2020 (Real Estate), Mar. 19, 2020; Dubai Court of Cassation Case No. 84/2020 (Real Estate), May 21, 2020.

71 *See* Dubai Court of Cassation Case No. 224/2020 (Civil), Aug. 27, 2020.

72 *See* Dubai Court of Cassation Case No. 791/2019 (Commercial), Jan. 19, 2020.

73 *See* Dubai Court of Cassation Case No. 1071/2019 (Commercial), Feb. 16, 2020.

74 Dubai Court of Cassation Case No. 265/2020 (Commercial), June 28, 2020.

75 *See, e.g.,* Dubai Court of Cassation Case No. 692/2020 (Commercial), Sept. 23, 2020.

76 *See* Dubai Court of Cassation Case No. 358/2020 (Civil), Nov. 26, 2020.

77 *See, e.g.,* Dubai Court of Cassation Case No. 933/2018, Feb. 10, 2019; Dubai Court of Cassation Case No. 1059/2018, Mar. 17, 2019. In both of these cases, the parties agreed to bifurcate the proceedings.

78 *See* Fédération Internationale Des Ingénieurs-Conseils (FIDIC), Conditions of Contract for Works of Civil Engineering Construction (4th ed. 1987), cl. 67.

79 *See* Dubai Court of Appeal Case No. 32/2019, Feb. 5, 2020, affirmed by Dubai Court of Cassation Case No. 339/2020, July 19, 2020.

arbitration under Clause 67.3 of the Red Book, without a Clause 67.1 referral for an Engineer's decision.[80] It has also been found that service of a request for arbitration following escalation of the parties' differences confirms a lack of willingness on part of the parties to reach amicable settlement within the meaning of Clause 67.2 of the Red Book and allows the commencement of arbitration in order to avoid unnecessary delay in the arbitral proceedings.[81] Further, a party's silence in response to an invitation to settle amicably followed by escalation to arbitration within the contractual time limits demonstrates a failure to settle amicably.[82] Similarly, an architect's refusal to entertain settlement discussions between two contracting parties has been found to exhaust a pre-arbitral obligation by the parties to refer a dispute for settlement by the architect.[83] Conversely, the conditions precedent under Clause 67 of the Red Book and, in particular, the requirement to attempt amicable settlement have been found unenforceable in circumstances where the courts retained their general jurisdiction over the subject dispute due to the unenforceability of the underlying arbitration agreement.[84]

Article 19(2) of the FAL allows a challenge of an affirmative ruling on jurisdiction under Article 19(1).[85] By contrast, a negative ruling on jurisdiction can only be challenged by recourse to the formal challenge provisions contained in Articles 53 and 54 of the FAL.[86] Under Article 19(2) of the FAL, a party is empowered to request the competent curial court to rule on the matter of jurisdiction within 15 days from the date it has been notified of an affirmative ruling on jurisdiction.[87] The 15-day time limit is strictly enforced by the competent court in accordance with Article 3 of the CPC.[88] For the avoidance of doubt, the competent court for present purposes is the Court of Appeal, and not the Court of First Instance, at the seat of the arbitration.[89] Choice of the wrong court will likely affect the timely filing of the challenge, as a result of which the challenging party will be considered to have waived its right to challenge under Article 19(2) of the FAL.[90] According to prevailing court practice, the 30-day time limit provided for the Court to decide such request is regulatory and as such not strictly binding. Importantly, the UAE courts have confirmed that the curial court's decision under Article 19(2) of the FAL is final and binding, and cannot be appealed.[91] Pending an application under Article 19(2) of the FAL, the arbitration

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80 *See* Dubai Court of Appeal Case No. 8/2018, Jan. 16, 2019.

81 *Id.* ("[T]he escalation of the differences between the parties and the […] request for arbitration confirms a lack of willingness to reach an amicable settlement. To ensure the effective performance of the parties' contract containing the arbitration clause, arbitration should be commenced after the parties invoked the arbitration clause for their dispute. Anything else would unnecessarily protract the proceedings.").

82 *See* Dubai Court of Appeal Case No. 19/2020, Sept. 9, 2020.

83 *See* Dubai Court of Cassation Case No. 864/2020 (Commercial), Nov. 4, 2020.

84 *See* Dubai Court of Cassation Case No. 215/2019 (Commercial), July 7, 2019.

85 *See* Dubai Court of Appeal Case No. 32/2019, Feb. 5, 2020, affirmed by Dubai Court of Cassation Case No. 339/2020, July 19, 2020; Dubai Court of Appeal Case No. 38/2019, Jan. 8, 2020.

86 *See, e.g.,* Dubai Court of Appeal Case No. 19/2020, Sept. 9, 2020.

87 *See* Dubai Court of Appeal Case No. 3/2018, Sept. 26, 2018; Dubai Court of Appeal Case No. 8 of 2018, Jan. 16, 2019; Dubai Court of Appeal Case No. 2/2020, Oct. 6, 2020; Dubai Court of Appeal Case No. 7/2020, Nov. 4, 2020; Dubai Court of Appeal Case No. 12/2020, Oct. 21, 2020; Dubai Court of Appeal Case No. 23/2020, Sept. 9, 2020.

88 *See* Dubai Court of Cassation Case No. 198/2020 (Commercial), May 13, 2020. *See also* Dubai Court of Appeal Case No. 33/2020, Nov. 25, 2020.

89 *See* Dubai Court of Cassation Case No. 198/2020 (Commercial), May 13, 2020.

90 *See Id.*

91 *See* Dubai Court of Cassation Case 225/2019 (Commercial), May 19, 2019.

proceedings will be stayed unless decided otherwise by the tribunal upon the request of a party.[92] In this sense, the stay of the proceedings is automatic.[93]

Under Article 19(2) of the FAL, the curial courts appear to enjoy a comparatively wide margin of discretion, being invited to review the actual merits of the tribunal's findings on jurisdiction and hence to decide the matter of jurisdiction afresh on the basis of the text of and the information provided by the award.[94] A supervisory court's negative finding on jurisdiction will result in the nullification of the tribunal's affirmative ruling on jurisdiction,[95] and require the parties to initiate a fresh arbitration unless they decide otherwise.

The UAE courts have further confirmed that pursuant to Article 20(1) of the FAL, jurisdictional objections must be filed by the time of the submission of a statement of defence and counterclaim within the meaning of Article 30 of the FAL.[96] In the alternative, an objection that the other party's pleadings fall outside the proper limits of the tribunal's mandate and are as such *extra petita* must be raised in the hearing following the hearing in which those pleadings were originally made.[97] Failure to do so has been held to be tantamount to a waiver of right.[98]

V. Waiver of right

According to the waiver of right provision at Article 25 of the FAL, a party that fails to raise an objection to the violation of or a failure to comply with any requirement of the underlying arbitration agreement or a non-mandatory provision of the FAL within an agreed period of time or within seven days from becoming aware of the instance of the violation or non-compliance is deemed to have waived its right to object.[99] This has been found to include the challenge of arbitrators for lack of impartiality and independence or competence.[100] In reliance on Article 25 of the FAL, the UAE courts have found that an award debtor had waived its right to object to the appointment of a tribunal, the scope of the tribunal's jurisdiction and the language of the arbitration in favour of Arabic (instead of English), in circumstances where such objections were only raised by way of challenge under Article 53 of the FAL.[101]

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92 *See* Dubai Court of Appeal Case No. 32/2019, Feb. 5, 2020.

93 *See* Dubai Court of Cassation Case No. 8/2018, Jan. 16, 2019.

94 *See* Dubai Court of Appeal Case No. 32/2019, Feb. 5, 2020, affirmed by Dubai Court of Cassation Case No. 339/2020, July 19, 2020.

95 *See* Dubai Court of Appeal Case No. 32/2019, Feb. 5, 2020, affirmed by Dubai Court of Cassation Case No. 339/2020, July 19 2020, in which the tribunal found in favour of its own jurisdiction despite the claimant's failure to comply with the FIDIC conditions precedent.

96 *See* Dubai Court of Appeal Case No. 3/2018, Sept. 26, 2018; Dubai Court of Appeal Case No. 8/2018, Jan. 16, 2019; Dubai Court of Cassation Case No. 1078/2019 (Commercial), Jan. 22, 2020; Dubai Court of Appeal Case No. 5/2020, Aug. 12, 2020; Dubai Court of Appeal Case No. 26/2020, Sept. 30, 2020; Case No. 33/2020, Dubai Court of Appeal Nov. 25, 2020; Dubai Court of Cassation Case No. 240/2020 (Commercial), June 3, 2020; Dubai Court of Cassation Case No. 324/2020 (Civil), Nov. 26, 2020.

97 *See, e.g.,* Dubai Court of Appeal Case No. 5/2020, Aug. 12, 2020; Dubai Court of Cassation Case No. 870/2020 (Commercial), Nov. 25, 2020.

98 *See, e.g.,* Dubai Court of Cassation Case No. 324/2020 (Civil), Nov. 26, 2020; Dubai Court of Cassation Case No. 870/2020 (Commercial), Nov. 25, 2020.

99 *See, e.g.,* Dubai Court of Cassation Case No. 247/2020 (Real Estate), Oct. 13, 2020; Dubai Court of Appeal Case No. 27/2019, Nov. 13, 2019.

100 *See* Dubai Court of Cassation Case No. 36/2020 (Commercial), July 12, 2020.

101 *See* Dubai Court of Cassation Case No. 492/2020 (Commercial), July 15, 2020.

VI. Electronic Conduct of Arbitration Proceedings

According to the UAE courts, unlike the Model Law, under Article 28(2)(b) of the FAL, the tribunal is empowered to conduct arbitration hearings remotely[102] through modern means of communication, such as video-conference and phone, unless otherwise agreed by the parties.[103] The use of electronic means of communication in the conduct of the arbitration process and the tribunal's deliberations has been found to take after UAE Law No. (10) of 2017,[104] which introduces electronic communication into the conduct of civil procedures before the courts. In Case No. 1083/2019, the Dubai Court of Cassation observed as follows:

> "*Decree-Law No. 10 of 2017 added a new section to the Civil Procedures Law related to the use of remote communication technology in civil procedures, with the aim of facilitating litigation procedures, as it allowed for the conduct of the trial to take place remotely, so that the litigants would attend and plead the case, express their defense and take evidence procedures in it. The deliberation of judges, the issuance of judgments, their implementation and appeals against them is done remotely by using the means of audio-visual communication and modern electronic technologies, in a manner that does not require the personal presence of the litigants before the court in order to facilitate the procedures of litigation and to achieve with it the principle of confrontation between the litigants in a way that guarantees allowing them to present their defense aspects in the lawsuit remotely; and that the new [FAL] came in line with the provisions of this Chapter Six of the [CPC], as stipulated in Articles 28 and 33 of the permissibility of holding arbitration sessions with the parties to the dispute and deliberating the ruling between the arbitrators through means of communication and modern electronic technologies and the unnecessary presence of litigants in person*."[105]

Further, according to recent case law precedent, Article 33(3) of the FAL allows hearings before the tribunal to be conducted electronically, "*through modern means of telecommunication.*"[106] This is evidently also assisted by the tribunal's power to question witnesses remotely without the need for the witness's physical presence pursuant to Article 35 of the FAL.

VII. The Award

A. Signing of award

Recent developments under Article 41(3) of the FAL provide some initial guidance on the signature requirement for arbitral awards under the new Law. Article 41(3) contains a mandatory signature requirement in the following simple terms: "*the award shall be signed by the arbitrators.*" No further guidance, other than this, can be found in the new law.[107] Recent case law precedent confirms the public policy nature of the signature requirement and requires signature on both reasoning and dispositive parts of the award in the same way and manner as used to be the case under former Article 212(5) of the CPC.[108] In doing so, the UAE courts have acknowledged that

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[102] *See, e.g.,* Dubai Court of Cassation Case No. 29/2020 (Commercial), July 12, 2020; Dubai Court of Cassation Case No. 34/2020 (Commercial), July 12, 2020.

[103] *See, e.g.,* Dubai Court of Cassation Case No. 247/2020 (Real Estate), Oct. 13, 2020.

[104] *See* Federal Decree No. 10 of 2017 (amending Federal Law No. (11) of 1992 on the Civil Procedure Law), Sept. 28, 2017 (U.A.E.).

[105] *See* Dubai Court of Cassation Case No. 36/2020 (Commercial), July 12, 2020.

[106] *See Id.*

[107] *See* Gordon Blanke, *Your signature, please: recent developments under article 41(3) of FAL*, PRACTICAL LAW ARBITRATION (Aug. 20, 2020), *available at* http://arbitrationblog.practicallaw.com/your-signature-please-recent-developments-under-article-413-of-fal.

[108] *See* Dubai Court of Cassation Case No. 1083/2019, June 14, 2020; *see also* BLANKE, *supra* note 5, at II-108.

in the event that the reasoning and dispositive parts of the award overlap on one and the same page, it is sufficient to sign that page of the award, in addition to the final page provided that the dispositive part of the award extends beyond the overlapping page.[109] In Case No. 1083/2019, the Dubai Court of Cassation has observed as follows:

> "*It is also established by the case law precedent of this Court that the arbitrator's signature is a form and content requirement that should be included in the award, given that the signature is the only evidence affirming that the award lawfully exists. If the award is not signed by the arbitrator, no one may attribute the award to the arbitrator. For that purpose, the arbitral award means the reasoning and the dispositive parts of the award. The arbitrator should sign both the reasoning and the dispositive part of the award. Otherwise, the award will be invalid. This excludes the case in which the reasoning of the award, or part thereof, is connected to the page which contains the dispositive part of the award and which is signed by the arbitrator. The legal effect of such a signature is that it extends to the reasoning of the award in a way that satisfies the legislator's intention with respect to the signature of the award. However, if the reasoning is contained in a page that are all separated from the dispositive part of the award, all pages shall be signed by the arbitrator in addition to the final page that contains the dispositive part of the award. Otherwise, the award will be invalid. Such invalidity is of public order, to be raised of the courts' own motion.*"[110]

B. Time limit for award

In application of Article 42(1) of the FAL, which empowers the parties to agree on a time limit for rendering the award, the UAE courts have found that to the extent that there are no specific provisions in the selected arbitration rules, such as the DIFC-LCIA Arbitration Rules (effective January 1, 2021), that govern the time limit for rendering an award, no such time limits find application to the arbitration.[111] Further, a party who is responsible for a delay in the arbitration process that prompts the expiry of the time limit may not raise the expiry of that time limit as a ground for challenge on the basis that a party must not benefit from its own wrongdoing.[112]

C. Notification of award

According to recent case law precedent, notification of the award under Article 44 of the FAL needs to be effected on the parties in person as opposed to their legal representative.[113] This is on the basis that pursuant to Article 45(1) of the FAL, an arbitral award ends an arbitration process and as such, the notification provisions that apply over the course of that process do not extend to the notification of the award.[114] The burden to prove that the award has not been received on time rests upon the aggrieved party.[115]

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109 *Id.*

110 *Id.*

111 *See, e.g.,* Dubai Court of Cassation Case No. 51/2020 (Real Estate), May 14, 2020. To the extent that there specific provisions providing time limits for the tribunal to render an award, such as under Article 36.2 of the DIAC Rules, they do find application to arbitration. *See* Dubai Court of Cassation Case No. 764/2019 (Commercial), Oct. 16, 2019; Dubai Court of Cassation Case No. 1003/2019 (Commercial), Jan. 19, 2020.

112 *See* Dubai Court of Cassation Case No. 36/2020 (Commercial), July 12, 2020.

113 *See* Dubai Court of Cassation Case No. 1201/2018 (Commercial), May 26, 2019; Dubai Court of Cassation Case No. 242/2019 (Commercial), May 26, 2019.

114 *See* Dubai Court of Cassation Case No. 1201/2018 (Commercial), May 26, 2019.

115 *See* Dubai Court of Cassation Case No. 33/2020 (Commercial), Oct. 4, 2020.

D. Costs

In Case No. 1029/2018, the Dubai Court of Cassation confirmed a restrictive interpretation of Article 46(1) FAL to exclude a tribunal's power to award party costs and observed as follows:

> "*The text […] the meaning of th[e] text [of the first paragraph of Article (46) of Law No. (6) of 2018 regarding arbitration] is that the arbitration expenses assessed by the arbitral tribunal […] are the fees and expenses incurred by any member of the arbitral tribunal in order to implement its duties and the expenses of appointing experts by the tribunal. Therefore, the costs that the parties pay to the legal representatives who represent them in the arbitration procedures or prepare and attend the lawsuit and advise the parties before the start of the arbitration procedures do not fall within these legal expenses. And in the absence of a legal text or explicit wording in the arbitral clause to that effect and given that the arbitration deed concluded between the two parties to the lawsuit did not include an agreement that one of the parties would bear the legal expenses, so it is not obligatory […] and the agreement concluded between the two parties did not include an agreement on fees, expenses and legal costs […].*"[116]

More recent case law precedent suggests that legal or party representatives are unable to confer upon a tribunal a power to award counsel fees unless having been specifically authorised to do so by the original rightsholder, for example, by a special power of attorney in accordance with Article 58(2) of the CPC. This is on the basis that the entitlement to such fees arises from the contractual engagement between the legal or party representative and the original rightsholder, which in turn is distinct and as such separate from the contract subject to and of the dispute in arbitration.[117] Further, case law precedent of the UAE courts confirms that in derogation from the limited scope of recoverable costs under the DIAC Rules, parties are free to confer an express power on the tribunal to award party costs.[118]

VIII. Public policy

The UAE courts have found that the public policy exception under Article 53(2)(b) of the FAL, which allows the successful challenge of an award that violates UAE public policy and corresponds to Articles 34(2)(b)(ii) and 36(1)(b)(ii) of the Model Law, encapsulates the definition of UAE public policy within the meaning of Article 3 of the Civil Transactions Code.[119] In Case No. 22/2019, the Dubai Court of Cassation observed as follows:

> "*[A]lthough [the Law] does not specify what is meant by public order, but it is agreed that it includes the rules that aim to achieve the supreme interest of the country, whether in terms of political, social or economic and related to the natural, material and moral condition of an organized society in it; this interest takes precedence over the interests of individuals, and its idea is based on the interest of the whole group, 'with what it leads', the idea of public order affecting the entity of the state or relating to a basic and general interest of the group. This and what I consider public order is stipulated in Article (3) of the [Civil Transactions Code]. Among them are those related to personal status, freedom of trade and the circulation of wealth and other*

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116 Dubai Court of Cassation Case No. 1029/2018 (Commercial), Apr. 28, 2019.
117 *See* Dubai Court of Cassation Case No. 990/2019 (Commercial), Jan. 5, 2020.
118 *See, e.g.,* Dubai Court of Cassation Case No. 205/2019 (Commercial), June 23, 2019.
119 *See, e.g.,* Dubai Court of Cassation Case No. 1003/2019 (Commercial), Jan. 1, 2020.

> *rules and foundations upon which society is based that do not violate the peremptory provisions and the basic principles of Islamic law.*"[120]

Given its public policy nature, failure to comply with the signature requirement prompts the absolute invalidity of the award, i.e., renders the award null and void *ab initio*,[121] and as such constitutes a valid ground for nullification. That said, courts are required to give priority to the procedural validity of the arbitration process over reasons for annulment of an award in accordance with Article 54(6) of the FAL, including where the ground for annulment is one of violation of public policy, and allow the rectification of any clerical shortcomings within the meaning of Article 54(6) of the FAL. In Case No. 1083/2019, the Dubai Court of Cassation observed as follows:

> "*[U]nder the new Arbitration Law [i.e., the FAL], the legislator reduced the causes of invalidity by stating that the requirements of procedural action should supersede the grounds of its invalidity or deficiency, considering that the objective of the action is to serve the right. For such purpose, the legislator provided for Art. 54(6) [FAL], allowing the tribunal – upon request from a party – to correct an invalidity in the form of the award, which in turn complies with the general principles of procedure according to which no invalidity may be adjudicated if the instance of invalidity is rectified […].*"[122]

The termination of agreements relating to the sale and purchase of land (short of matters of registration) do not qualify as of public policy and are as such capable of being arbitrated.[123] Conversely, matters of registration with respect to off-plan lands or real estate do and therefore cannot be arbitrated.[124] The UAE courts have also refused to nullify an award of contractually-agreed compound interest, which, according to the courts, does not constitute *riba* or usurious interest and falls within the arbitrator's discretionary powers to assess compensation, which in turn does not constitute a valid ground for nullification. In Case No. 217/2019, the Dubai Court of Cassation observed as follows:

> "*[I]t is well established that the contractually-agreed [compound] interest that is payable to the creditor upon the debtor's delay in paying the debt despite its due date does not qualify as riba, but rather is a form of compensation for the harm suffered by the creditor as a result of the debtor's delay in paying the debt despite its due date, and prevents the creditor from benefiting from it, which is a presumed damage that does not admit proof to the contrary and the creditor must be compensated for it in exchange for a debtor's fault, just for the delay in payment by itself, it does not change its nature as compensation and its legitimacy in determining it in a certain percentage as agreed upon by the two parties at the conclusion of the contract. The legislator did not intend to criminalize dealing with interest in civil and commercial transactions except between natural persons as explicitly stipulated in Article 409 of the Penal Code. […] As for the claim that the plaintiffs are not entitled to these benefits, it is in fact a controversy over the arbitrator's discretionary*

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120 Dubai Court of Cassation Case No. 22/2019 (Real Estate), Mar. 27, 2019.

121 *See* Dubai Court of Cassation Case No. 1083/2019, June 14, 2020.

122 *Id.*

123 *See, e.g.,* Dubai Court of Cassation Case No. 231/2019 (Real Estate), Dec. 4, 2019; Dubai Court of Cassation Case No. 84/2020 (Real Estate), May 21, 2020.

124 *See* Dubai Court of Cassation Case No. 5/2020 (Real Estate), Mar. 19, 2020; Dubai Court of Cassation Case No. 84/2020 (Real Estate), May 21, 2020.

authority to assess compensation that does not fit a ground of nullity of the arbitration award, and then the court decides to reject this reason […]."[125]

More recently, the UAE courts have confirmed that contracting parties cannot contract out of requirements of public policy.[126] In Case No. 217/2019, the Dubai Court of Cassation further observed as follows:

"*[I]t is decided that the legal rules that are considered public order are rules intended to achieve a general political, social or economic interest related to the higher society system and override the interest of individuals, so that all individuals must take into account and realize this interest and they may not oppose it by agreements among themselves even if they have concluded these agreements for their own individual interests.*"[127]

IX. Conclusion

The preceding study of the first three years of case law precedent under the FAL demonstrates that the UAE courts have pursued an arbitration-friendly interpretation of the new law without losing any of the continuity that has followed on from the previous regime under the former UAE Arbitration Chapter. It is regrettable that some of the shortcomings of the new law, such as the limited powers of a tribunal to award costs under the FAL or the continued qualification of arbitration as an exceptional means of dispute resolution requiring a special authority for representation (albeit that the courts' more recent, yet persistent pursuit of the apparent authority doctrine has taken much of the force that the special authority restrictions used to have), are attributable to conservative law-making by the draftsmen of the new law. That said, the FAL sends distinctly positive signals when, for example, promoting the electronic conduct of arbitrations, being one of the first arbitration laws in the world to support the digitalization of the entire arbitration process. Time will tell how the FAL will ultimately fare compared to the competing free zone arbitration laws, but given its Model Law origin and a positive first three years of its application, there is all reason to look ahead with confidence.

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125 *See* Dubai Court of Cassation Case No. 217/2019 (Commercial), May 19, 2019.
126 *See, e.g.,* Dubai Court of Cassation Case No. 1003/2019 (Commercial), Jan. 1, 2020.
127 *See* Dubai Court of Cassation Case No. 217/2019 (Commercial), May 19, 2019.

THE USE OF INTERIM DECLARATIONS IN INTERNATIONAL COMMERCIAL ARBITRATION: AN EXCELLENT REMEDY

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Abstract

An arbitral tribunal can make a declaratory award, simply setting forth the respective rights and obligations of the parties. Declaratory relief is efficient on many levels, and especially so where facts are undisputed or agreed or not needed to decide a legal right or obligation. The real issue is whether arbitral tribunals can and ought to issue declaratory awards at early or interim stages. This article advocates that interim declarations serve a fundamental purpose and should naturally be explored more often than the current empirical data indicates. Further, the "push" from arbitral institutions to increase efficiency, the significant increase in the number of "working groups" to address efficiency and user satisfaction in arbitration and reform of institutional rules, and the increased use of "soft law" ignore an obvious procedural tool with an inherent ability to escalate efficiency—the interim declaration. Declarations at an interim stage have potential energy to unlock key legal issues in dispute early in the proceedings, thereby reducing the need for extensive document production and expert technical evidence, and can even be a catalyst to amicable resolution or a more streamlined arbitral procedure. This article examines the contours and avenues available for parties to seek declarations in international commercial arbitration, including the possibility of obtaining emergency declaratory relief. Recent updates to the arbitral rules mean that the interim declaration in international arbitration is ready, able, and waiting to be embraced.

I. Introduction

As Professor Sutherland stated in his seminal paper published over a century ago in 1917:

> "*To ask the court merely to say whether you have certain contract rights as the defendant is a very different thing from demanding damages or an injunction against him. When you ask for a declaration of right only, you treat him as a gentleman. When you ask coercive relief you treat him as a wrongdoer. That is the whole difference between diplomacy and war[.]*"[1]

There is an obsession with procedural efficiency in international arbitration. This has caused the creation of a number of "*working groups,*" a myriad of procedural changes to arbitral rules and the increased promulgation of pieces of guidance or "*soft law*." Regrettably, one obvious and long-established procedural tool apt for quicker, less costly and more efficient arbitral proceedings has been inexplicably ignored: the parties' ability to obtain declaratory relief early in proceedings and prior to a tribunal's determination of monetary damages. In this article, the terms "*interim declarations*" and "*preliminary declarations*" are used interchangeably to describe a binding declaration ordered by a tribunal, which is final and not subject to revision in a final award. It is widely

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[1] Edson Sunderland, *A Modern Evolution in Remedial Rights - The Declaratory Judgement*, 16(2) MICH. L. REV. 69, 76 (1917).

understood that as a minimum standard a plea for a preliminary or interim declaration ought to meet three tests: (i) the legal rights and obligations of at least one of the parties to the arbitration are in dispute; (ii) the declaration(s) sought can resolve the dispute; and (iii) the declaration will serve a wider practical or procedural purpose.[2] This is not controversial.

Preliminary or interim declarations provide avenues to "*short-circuit*" disputes. This is because there are many disputes where parties agree on the governing legal regime (law and contractual provisions) and a set of facts, but disagree as to the legal rights and obligations arising out of those agreed or non-disputed circumstances. In such a case, the parties might well be able to unlock the dispute through an arbitral determination as to the legal consequences of the agreement (be it contractual interpretation or otherwise). The sooner the agreed legal status is adjudicated, the sooner the parties may be in a position to settle the claims—because time and money stemming from the legal consequences might be straightforward follow-on issues from the legal status (for example, in the case of liquidated damages for delay). Even if parties are unable to agree on the monetary consequences of the legal status, their follow-on adjudication of damages, including the articulation of expert evidence, will be more efficient because it is aligned to the rights and obligations decided by the tribunal in the interim declaration.[3] Naturally, there is less need for multiple and complex damages scenarios encompassing different legal arguments—the controlling legal regime has already been determined. This is the beauty of the preliminary declaration.

On the assumption that the increased use of declarations earlier in arbitral proceedings provides efficient avenues for the resolution and management of disputes (in whole or in part), there are three derivative points to clarify:

1. The arbitral tribunal's power to grant declaratory relief;
2. The ability for parties to obtain transient declaratory relief at an emergency or interim stage; and,
3. If parties are unable to obtain such relief at an interim stage, the tools available in the ordinary course of an arbitration at which parties can seek sequential proceedings for final declaratory relief leading to the efficient resolution of the dispute.

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2 Stefan Leimgruber, *Declaratory Relief in International Commercial Arbitration*, 32(3) ASA BULL. 467, 482–483 (2014) [*hereinafter* "Leimgruber"].

3 For example, in Partial Award in Case No. 15453 of 2016, conducted under the auspices of the International Chamber of Commerce (ICC) International Court of Arbitration, the Tribunal declared the following:
"214. […] That either the First or Second Respondent is the owner of:
a) The hull of the DP2 multipurpose support Vessel […] (under [Respondents' country's] flag with registration […] (and formerly designated as hull […]);
b) All items of Major Equipment delivered to and installed on the Vessel;
c) All other items of equipment which have been paid for out of the various payments made by Respondents, and have been delivered to and installed on the Vessel; and
d) Any other items of equipment affixed to the Vessel in course of construction which cannot be removed without doing damage to the Vessel or the equipment, irrespective of whether payment has been made for such items or not (this Declaration being without prejudice to any claims Claimant may have for payment for such equipment or otherwise).
215. The Arbitral Tribunal closes the proceedings in respect of the issues dealt with in this Partial Award."
Thus, allowing the substantive dispute to move to the next phase (i.e., quantum).

Whilst these points naturally fold in competing substantive legal and procedural questions,[4] the overall picture is clear that parties can seek declaratory relief. In practical terms, this means that certain discrete issues can be front-loaded, thereby increasing efficiency. As a threshold point, notions of "*burdening the state judges*" or "*misuse of publicly funded court time*" as a reason to restrict declaratory relief in international commercial arbitration fail in the context of party autonomy in private arbitration agreements. Put differently, the fact that the parties have entered into an arbitration agreement to ensure a comprehensive and final resolution of any future dispute is a sufficient basis for the arbitrators' power to award declaratory relief.

II. The Arbitral Tribunal's Power to Grant Interim Declaratory Relief

While there were historical debates in some jurisdictions as to an arbitral tribunal's power to award declaratory relief in addition to monetary damages—those questions have now largely been settled in favour of the arbitral tribunal's power to award declarations. The *Saudi Arabia* v. *Arabian American Oil Company (Aramco)* Award, dated August 23, 1958 (*ad hoc* arbitration), is a key authority on this point.[5] In this case, the parties sought and the tribunal granted only declaratory relief.[6] The tribunal was asked to interpret part of the concession agreement between the Government of the Kingdom of Saudi Arabia ["**KSA**"] and Aramco's predecessor, and declare whether Aramco could refuse to give priority to the Onassis tankers for transportation of its oil out of KSA.[7] The Award supports the notions that: (i) the parties' arbitration agreement can be a source of the tribunal's power to issue a purely declaratory award; (ii) a declaratory award can serve a useful purpose of interpreting the parties' obligations under a contract and allowing them to continue a friendly business relationship; and (iii) the non-enforceability of a declaratory award is not a bar to rendering it in the first place. This is not to say that the issue of a tribunal's power to grant declaratory relief will go unchallenged in every proceeding.

The issues surrounding the source of power from which a tribunal is able to grant declaratory relief have been well-covered by leading individuals in leading texts. In short there are two main sources of power: (i) the inherent power of the arbitral tribunal under the arbitration agreement and/or (ii) the laws governing the tribunal's powers from the seat of the arbitration and/or governing the contract.[8] In terms of the tribunal's power, the prevailing view is that arbitral tribunals enjoy the power to award declaratory relief under their inherent authority as arbitrators tasked with deciding the parties' dispute.[9] In some cases, the parties' arbitration agreement might contain an express

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4 *See* Leimgruber, *supra* note 2, at 468 ("Especially in cases where the parties, counsel, or members of the tribunal come from a civil law background, the question regularly arises whether requests for declaratory relief are subject to the same or similar restrictions as in state court proceedings, e.g. in Switzerland, Germany or Austria […].").

5 Saudi Arabia v. Arabian American Oil Company (Aramco), Award, (Aug. 23, 1958), 27 ILR 117 (1963).

6 *Id.* at 145.

7 *Id.* at 117–118.

8 *See* Michael E. Schneider, *Chapter 1: Non-Monetary Relief in International Arbitration: Principles and Arbitration Practice*, *in* PERFORMANCE AS A REMEDY: NON-MONETARY RELIEF IN INTERNATIONAL ARBITRATION 43 (Michael E. Schneider & Joachim Knoll eds., 2011) [*hereinafter* "Schneider"] ("In civil law countries the rights and the remedies that flow from them, as a matter of principle, are regulated in the substantive law. For instance the sanctions for the breach of a contract, including the claim for performance of that contract, are regulated in the law governing the contract or in the contract itself. Similarly, a question such as the effect of a termination, by virtue of the declaration of a party or by decision of the court, is governed by the law of the contract. While as a matter of principle an arbitral tribunal in a civil law approach is not restricted in its powers with respect to the remedies it may apply, restrictions arise from the rules on arbitrability, rules which in their own way restrict the powers of an arbitrator.").

9 GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION 3327–3328 (3d ed. 2021).

provision granting arbitral authority for declaratory relief or the applicable arbitral rules that might contain such a provision.[10] In any event, subject to the below discussion with respect to certain national laws, tribunals are now nearly universally seen to possess the power to grant declaratory relief in addition to monetary damages in order to fulfil the mandate they have been given by the parties, simply by virtue of the parties' free-standing agreement to arbitrate.

Some national arbitral legislations (for example, English and Singaporean) expressly provide for the power of arbitral tribunals to award declaratory relief.[11] However, sometimes there are potential wrinkles for arbitrations seated in the United States,[12] Switzerland,[13] Germany[14] and France[15] based on the domestic legislation that applies in court proceedings. These concerns appear to be overstated for two reasons:

- First, the wrinkle in domestic legislation in the U.S., Switzerland, Germany and France is the inclusion of a requirement for a cognizable legal interest in order to allow domestic courts to adjudicate declaratory relief proceedings. This requirement derives from a policy basis for keeping speculative legal disputes out of state courts and limiting the court's time to resolving those actual disputes that have arisen between the parties. However, as Michael Schneider pointed out, notions enshrined in domestic codes of civil procedure—including those of judicial economy—should not factor heavily in an arbitral tribunal's decision-making process.[16] The tribunal should be called upon to decide the issues put before it by the parties who have given the arbitral tribunal its mandate.

- Second, the premise behind this policy rationale is not shared in the context of international commercial tribunal where the parties have contracted for and are paying for an arbitral tribunal to deal with the issues they have decided to put before it. In a commercial arbitration setting, it would be unusual (and likely uncommercial) for parties to spend money and time filing arbitrations for declaratory relief simply on the basis of speculative questions of legal interpretation. In the large majority of circumstances, real

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10 The most common arbitral rules do not contain an explicit provision on the arbitral tribunal's power to grant declaratory relief. This is true for the arbitral rules used by the International Chamber of Commerce (ICC), London Court of International Arbitration (LCIA), Arbitration Institute of the Stockholm Chamber of Commerce (SCC), Singapore International Arbitration Centre (SIAC) and the United Nations Comm'n on Int'l Trade Law (UNCITRAL) Arbitration Rules 2010 [*hereinafter* "2010 UNCITRAL Rules"].

11 Arbitration Act 1996, c. 23, § 48 (Eng.) [*hereinafter* "English Arbitration Act"] ("(1) The parties are free to agree on the powers exercisable by the arbitral tribunal as regards remedies. (2) Unless otherwise agreed by the parties, the tribunal has the following powers. (3) The tribunal may make a declaration as to any matter to be determined in the proceedings."); International Arbitration Act, Cap 143A, 2002 Rev. Ed., § 12(5) (Sing.) (granting arbitrators the power to award any remedy or relief that could be ordered by a Singapore court if the dispute had been subject of civil proceedings and the power to award interest). There is a note of caution with a view that such statutory provisions should be regarded as non-mandatory, but subject to limitations or extensions by the parties (perhaps via the institutional rules forming part of the arbitration agreement).

12 *See, e.g.,* Declaratory Judgment Act, 28 U.S.C. § 2201(a) (2010) (U.S.) ("(a) In a case of actual controversy within its jurisdiction […], any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.").

13 *See, e.g.,* SCHWEIZERISCHES ZIVILGESETZBUCH [ZGB], CODE CIVIL [CC], CODICE CIVILE [CC] [CIVIL CODE] Dec. 10, 1907, SR 210, RS 210, art. 59(2)(a) (Switz.).

14 *See, e.g.,* BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE] § 256 (Ger.).

15 *See, e.g.,* CODE CIVIL [C. CIV.] [CIVIL CODE] art. 31 (Fr.) (requiring an *intérêt légitime* in an action for declaratory relief).

16 Schneider, *supra* note 8, at 30).

> disputes have arisen between the parties, which has led them to commence the expensive arbitral process.

Sceptics of declaratory relief have criticized or questioned the efficiency of declaratory relief as it is not directly capable of enforcement like monetary damages. This criticism is founded on theoretical implications rather than practical ones. Even if a declaration is not technically capable of enforcement—a view very much open for interpretation in certain jurisdictions like England and Wales after the *West Tankers Inc* v. *Allianz SpA* judgement[17]—it is nearly universally seen to gain both "*issue preclusion*" and "*claim preclusion*" under doctrines of *res judicata*. This means that neither the same legal issue, nor the same claim can be arbitrated or litigated again between the same parties, as long as the award has not been vacated.[18] Therefore, whether or not the parties are able to convert a declaratory arbitral award into a domestic judgement is not the only point of utility—declarations are of additional value to the parties in the event that follow-on disputes arise on related issues of interpretation or with collateral monetary implications (which were not determined in the earlier arbitration).

III. The Parties' Ability to Access Emergency or Interim Declaratory Relief?

On the basis that tribunals possess the power to grant declaratory relief, there are follow-on questions as to how quickly parties may be able to obtain such a relief and in what form. Implicit in these questions are discussions and tensions as to whether a party may obtain a grant of declaratory relief in emergency or interim situations before an arbitral tribunal pending the final award. Some parties might even *consider* interim supervisory court ordered declaratory relief or emergency arbitrator relief as an alternative to unlocking issues in dispute without awaiting the constitution of a tribunal. These questions do not have clear answers.

A. National Laws Dealing with Court Ordered Interim Measures

Some national laws dealing with the ability of the court to grant interim measures are general in nature and arguably broad enough to encompass court-ordered declaratory relief. One example of such a provision is Article 17J the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration ["**Model Law**"], which provides as follows:

> "*A court shall have the same power of issuing an interim measure in relation to arbitration proceedings, irrespective of whether their place is in the territory of this State, as it has in relation to proceedings in courts. The court shall exercise such power in accordance with its own procedures in consideration of the specific features of international arbitration.*"[19]

Under the Model Law, it is arguable that a court should be able to grant interim declaratory relief to parties in an arbitration if it is able to order such relief for parties to court proceedings. This

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17 *See* West Tankers Inc v. Allianz SpA [2012] EWCA Civ. 27 (Eng.); *see also* African Fertilizers and Chemicals Nig Ltd. (Nigeria) v. BD Shipsnavo GmbH & Co. Reederei Kg [2011] EWHC 2452 (Comm) (Eng.) (where African Fertilizers unsuccessfully sought to resist the application to enforce a declaratory award on the ground that the English court had no jurisdiction to make such an order because the material terms of the award were purely declaratory terms).

18 *See* Bernard Hanotiau, *The Res Judicata Effect of Arbitral Awards*, *in* ICC BULLETIN SPECIAL SUPPLEMENT: COMPLEX ARBITRATIONS 47 (2003).

19 UNCITRAL, Model Law on International Commercial Arbitration, art. 17J, G.A. Res. 40/72, U.N. Doc. 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).

type of provision would at least leave open the possibility of a party obtaining interim declaratory relief from a supervisory court prior to the constitution of the tribunal and seeking a subsequent tribunal order or award confirming the declaratory relief later in the proceedings.

Other supervisory legislations are restrictive in the powers it grants to courts (as opposed to arbitral tribunals) to issue interim relief. For example, section 44(1) of the (English) Arbitration Act 1996 ["**English Arbitration Act**"], provides as follows:

> "*Unless otherwise agreed by the parties, the court has for the purposes of and in relation to arbitral proceedings the same power of making orders about the matters listed below as it has for the purposes of and in relation to legal proceedings.*"[20] (emphasis added)

The English position on court's authority to order interim measures is therefore more restrictive and would not, on its face, necessarily permit the granting of interim declaratory relief.[21] However, even where legislation is arguably broad enough to encompass declaratory interim relief, there are a number of difficulties in the concept of court ordered interim declarations. The most obvious is the parties' arbitration agreement requiring an arbitral tribunal, and not the court, to decide the substantive issues of the dispute. Certain national laws make the requirement explicit. For example, Article 4 of the Swedish Arbitration Act, in its relevant part, provides as follows:

> "*A court may not, over an objection of a party, rule on an issue which, pursuant to an arbitration agreement, shall be decided by arbitrators.*"[22]

There are already potential tensions between the provisions which squarely prohibit court interference in matters that shall be decided by an arbitral tribunal and the granting of court-ordered interim measures where the tribunal once constituted would enjoy the same scope of authority. However, these tensions are usually resolved by focusing on the interim nature of the court-ordered relief, such that the court has not affected the tribunal's ultimate decision-making ability on the merits of the dispute. Nevertheless, court-ordered interim declaratory relief might appear different. While parties recognize that some court-ordered interim measures in aid of arbitration are potentially helpful (for example, security for costs, taking or preservation of evidence, and inspection of goods or sites), typically court intervention on the substance of the dispute is the opposite of the parties' bargain. Declaratory relief, unlike the procedural aids listed above, typically strikes at the heart of the substance of the dispute. In addition to distinctions on matters of substance rather than procedure, there is also a question as to whether a court ordered interim declaration—for example, on issues of interpretation of a seminal clause—is possible. Parties again accept that there may be circumstances where a court has ordered injunctive relief

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20 English Arbitration Act, § 44(1).

21 *Id.* § 44(2) ("Those matters are—(a) the taking of the evidence of witnesses; (b) the preservation of evidence; (c) making orders relating to property which is the subject of the proceedings or as to which any question arises in the proceedings—(i) for the inspection, photographing, preservation, custody or detention of the property, or (ii) ordering that samples be taken from, or any observation be made of or experiment conducted upon, the property; and for that purpose authorising any person to enter any premises in the possession or control of a party to the arbitration; (d) the sale of any goods the subject of the proceedings; (e) the granting of an interim injunction or the appointment of a receiver.").

22 Swedish Arbitration Act, art. 4 (Svensk författningssamling [SFS] 1999:116, updated as per SFS 2018:1954) (Swed.).

(and, therefore, has taken an interim view on the legal relationship and contract entered into by the parties), but a mere declaration on a particular state of affairs seems different.

B. Tribunal's Powers to Grant Interim Declaratory Relief

There are additional wrinkles when one considers a tribunal's ability to grant an interim declaration. Some arbitral rules contain broad provisions on a tribunal's power to grant interim measures. Article 25 of the London Court of International Arbitration ["**LCIA**"] Arbitration Rules 2020 ["**2020 LCIA Rules**"] is one example, which provides as follows:

> "*The Arbitral Tribunal shall have the power upon the application of any party, after giving all other parties a reasonable opportunity to respond to such application and upon such terms as the Arbitral Tribunal considers appropriate in the circumstances:*
>
> *[…]*
>
> *(iii) to order on a provisional basis, subject to a final decision in an award, any relief which the Arbitral Tribunal would have power to grant in an award, including the payment of money or the disposition of property as between any parties.*" (emphasis added)

On a broad reading, Article 25.1(iii) of the 2020 LCIA Rules could provide an avenue for a tribunal to grant such an interim declaration on the basis that the tribunal could ultimately award such relief to the parties later in the dispute. In such a way, the interim order, which might not entail the same procedural requirements for the parties or any scrutiny processes, could move a substantive decision (although interim in nature) much earlier in the case. However, as with supervisory national laws, other rules and guidelines are more restrictive in the types of interim measures which can be ordered by a tribunal and may be said to preclude interim declaratory relief. For example, Article 5 of the Chartered Institute of Arbitrators (CIArb)'s International Arbitration Practice Guideline on Applications for Interim Measures ["**CIArb Guidelines**"] provides the following:

> "*1. As a general rule, arbitrators may grant any measure that they deem necessary and appropriate in the circumstances of the case.*
>
> *2. Unless otherwise provided in the applicable national law and the applicable arbitration rules, arbitrators may grant any or all measures which fall within, but are not limited to, one of the following categories:*
>
> *i) measures for the preservation of evidence that may be relevant and material to the resolution of the dispute;*
>
> *ii) measures for maintaining or restoring the status quo;*
>
> *iii) measures to provide security for costs; and*
>
> *iv) measures for interim payments.*"[23]

[23] Chartered Institute of Arbitrators (CIArb), International Arbitration Practice Guideline: Applications for Interim Measures (2015), art. 5, *available at* https://www.ciarb.org/media/4194/guideline-4-applications-for-interim-measures-2015.pdf [*hereinafter* "CIArb Guidelines"].

Other rules have similar limitations.[24] These more restrictive approaches to interim measures would counsel against a tribunal granting interim declaratory relief unless expressly permitted to do so under national law or the parties' arbitral agreement. However, it must be borne in mind that such specific expressions are extremely rare.

There are other well-established arguments in the context of interim measures which run against the granting of interim declaratory relief, even when a tribunal arguably has such power. These points relate to inflammatory markers as to when a tribunal should not exercise its discretion in granting interim measures. The most prominent issues appear to be as follows:

- Prohibition on "*prejudging*" the merits of the dispute: It is well settled that the tribunal cannot "*prejudge*" the merits of the case at the interim stage.[25] This is either because the tribunal might be said to have closed its mind to issues of the case prior to the final award, or based their final decision on an incomplete record, without the same safeguards of evidentiary hearings. Of course, ordering interim measures entails some pre-judgment of the case by the tribunal, at least to satisfy itself that the measure sought is *prima facie* warranted on the facts and law. However, for declarations sought in cases where the facts and law are agreed, but the legal consequences are not, it is unclear what would change in the factual or legal matrix between the granting of the interim relief and the final relief.

- Prohibition on granting relief identical to final relief: Along similar lines, the tribunal should safeguard against awarding relief at an interim stage which is tantamount to final relief. The CIArb Guidelines, for example, explain: "*Arbitrators should consider denying an application that is, in fact, a disguised application for a final award on the merits. For example, where the subject matter of the dispute between the parties relates to the storage charges of a warehouse where goods are kept and the main claim requests a transfer of such goods to a different place, an interim measure having the same effect (i.e. transfer of the goods), will be tantamount to a final relief because it will involve a decision on one of the main claims*."[26] In such situations, it is difficult to imagine an interim declaration that would not be identical to the final declaration sought.

These preclusions explained above raise the question of what situations would lend themselves to an interim declaratory measure of only a transitory nature. Further, there are other practical considerations that might run against interim declaratory relief. Typically, parties want a final determination of an issue ripe for a declaration to provide clarity regarding their legal relationship and the subsequent steps to be taken in the adjudication of their dispute. The fact that an interim order could subsequently be reversed by the tribunal may not satisfy users' desire to understand and action the various steps through which the dispute is proceeding.

C. Other Suitable Interim Alternatives?

In light of the questionable ability of tribunals to grant interim declaratory relief, parties might explore other options. One alternative which might have overlapping efficiency could be an

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24 *See, e.g.,* 2010 UNCITRAL Rules, art. 26.

25 *See, e.g.,* CIArb Guidelines, art. 2(3).

26 *See, e.g.,* CIArb Guidelines, Commentary on Article 4(1)(iii), at 13 (citing ALI YESILIRMAK, PROVISIONAL MEASURES IN INTERNATIONAL COMMERCIAL ARBITRATION 183–185 (2005)).

interim measure for specific performance. Most arbitral rules and national laws provide explicitly for a tribunal's ability to grant interim measures for specific performance. For example, the "*restrictive*" English Arbitration Act allows for court orders for specific performance or "*mandatory injunctions.*"[27] Many institutional rules contain similarly explicit powers for tribunals to issue such interim injunctive relief. For example, Rule 30.1 of the Singapore International Arbitration Centre (SIAC) Arbitration Rules 2016 ["**SIAC Rules**"] provides as follows:

> "*The Tribunal may, at the request of a party, issue an order or an Award granting an injunction or any other interim relief it deems appropriate. The Tribunal may order the party requesting interim relief to provide appropriate security in connection with the relief sought.*"[28]

When seeking mandatory injunctions for specific performance parties, therefore, do not need to contend with the threshold question of whether the court or tribunal has the authority to grant the interim measure as framed in the form of a declaration.

This could be an attractive alternative to an interim declaration depending on creative drafting of the injunction, particularly in the case of ongoing contractual relationships. An interim measure for specific performance, incorporating the legal position sought in the declaration, could just unlock the issues in dispute. For example, where the parties have a dispute as to the legal effect of particular contractual provisions, which could be resolved by a declaration as a form of final relief, a requirement that a party affirmatively act/perform or refrain from such action pending the final resolution of the issue might have a similar legal effect to a declaration itself. The injunction could also serve to mitigate some of the risks (for example, significant increase in monetary losses), if the parties were simply to stop performance and move straight to dispute.

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In contrast to interim measures, the more natural choice for parties seeking an interim declaration may be to seek a partial final award on an issue ripe for a declaration. Partial awards are not without their drawbacks, as they would typically require more fulsome procedural steps, including multiple rounds of pleadings, a hearing, a reasoned award, and compliance with institutional scrutiny processes the governing institution might have. These processes add to the complexity, time and cost of obtaining a preliminary or interim declaration as compared to interim processes.

IV. Revisions to Arbitral Rules for Providing Paths to Obtain Declaratory Relief Prior to Final Award

There has been significant emphasis in recent revisions to arbitral rules in order to provide the tribunal with additional powers to move substantive issue determinations earlier into arbitrations and save overall time and cost. While such amendments were not necessarily drafted with an aim to increase the use of preliminary declarations in proceedings, they were not typically seen to add to powers which the tribunal did not already enjoy. The most noteworthy "*summary*" provision might be contained in Article 39 of the Arbitration Institute of the Stockholm Chamber of Commerce (SCC) Arbitration Rules 2017 ["**SCC Rules**"], which states as follows:

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27 English Arbitration Act, § 44(e).
28 SIAC Arbitration Rules 2016, r. 30.1.

"*(1) A party may request that the Arbitral Tribunal decide one or more issues of fact or law by way of summary procedure, without necessarily undertaking every procedural step that might otherwise be adopted for the arbitration.*

(2) A request for summary procedure may concern issues of jurisdiction, admissibility or the merits. It may include, for example, an assertion that:

(i) an allegation of fact or law material to the outcome of the case is manifestly unsustainable;

(ii) even if the facts alleged by the other party are assumed to be true, no award could be rendered in favour of that party under the applicable law; or

(iii) any issue of fact or law material to the outcome of the case is, for any other reason, suitable to determination by way of summary procedure.

(3) The request shall specify the grounds relied on and the form of summary procedure proposed, and demonstrate that such procedure is efficient and appropriate in all the circumstances of the case.

(4) After providing the other party an opportunity to submit comments, the Arbitral Tribunal shall issue an order either dismissing the request or fixing the summary procedure in the form it deems appropriate.

(5) In determining whether to grant a request for summary procedure, the Arbitral Tribunal shall have regard to all relevant circumstances, including the extent to which the summary procedure contributes to a more efficient and expeditious resolution of the dispute.

(6) If the request for summary procedure is granted, the Arbitral Tribunal shall seek to make its order or award on the issues under consideration in an efficient and expeditious manner having regard to the circumstances of the case, while giving each party an equal and reasonable opportunity to present its case pursuant to Article 23(2)."[29]

Article 39 of the SCC Rules is noteworthy because it provides for a hybrid approach between an interim measure and a partial final award. The tribunal is not only allowed to prescribe a less onerous procedure for final summary determination without following all steps that would otherwise be expected in the full procedure, but also to render a final determination of an issue in dispute. Commentators have noted that the summary procedure is an added "*tool in the [arbitrator's] toolbox*" and "*[it] should be tailored to the need to resolve those issues only […] certain procedural steps that otherwise would have been adopted may be either disregarded or adapted to the specific needs of the summary procedure. This could, for example, relate to the length, number and focus of the written submissions, the need (if any) of oral testimony and document production and whether a hearing will be needed and, if so, in what form.*"[30]

The ability to curtail the procedural steps necessary to obtain a partial award represents an ability for the tribunal to accelerate proceedings on certain issues. However, this power vested with the tribunal is tempered by parties' rights to due process and to fully present their case. These concerns are perhaps worth even more attention in the era of "*due process paranoia.*"[31] Empirical research on

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29 SCC Arbitration Rules 2017, art. 39.

30 JAKOB RAGNWALDH & FREDRIK ANDERSSON, A GUIDE TO THE SCC ARBITRATION RULES 124, 125 (2019).

31 *See* Lucy Ferguson Reed, *Ab(use) of due process: sword vs shield*, 33(3) ARB. INT'L 361 (2017).

challenges to summary decisions under Article 39 of the SCC Rules was not conclusive. Thus, it remains to be seen how far tribunals will take the power granted to them in this article to curtail proceedings leading up to a partial award.

A more tempered example of a modern provision on preliminary issue determination is contained in the 2020 LCIA Rules. Article 14.6 thereof gives the arbitral tribunal the explicit power to "*decid[e] the stage of the arbitration at which any issue or issues shall be determined, and in what order, in accordance with Article 22.1(vii)*" and "*exercis[e] its powers of Early Determination under Article 22.1(viii).*"[32] These provisions are in contrast to Article 14 of LCIA Arbitration Rules 2014, which was more general in the arbitrator's duty to "*adopt procedures suitable to the circumstances of the arbitration avoiding unnecessary delay and expense,*"[33] while providing the tribunal with the "*widest discretion to discharge these general duties.*"[34] Similar changes occurred in the recent revisions of the International Chamber of Commerce ["**ICC**"] Arbitration Rules 2021, and are likely to occur in the ongoing SIAC Rule revision.

This is not to say that prior to arbitral rule revisions, parties were unable to achieve the same result through bifurcation of proceedings. Parties were always able to seek bifurcated proceedings on different issues. In ICC Case 15453, the parties operating under the 1998 ICC Arbitration Rules proceeded through a multi-tiered arbitration, where the Tribunal first decided on a declaration as to the rightful owner of property in a partial final award, and subsequently decided on a number of follow-on monetary issues arising out of the decision on ownership.[35] It explicitly acknowledged the fact that its various declarations could help to clarify, if not narrow, subsequent issues in dispute which would be subject to determination later in the proceedings, and explained as follows:

> "*211. Neither we, nor, as we understand it, Respondents, are presently in a position to identify what, if any, other equipment would be covered by the Declarations referred to in the previous two paragraphs. Respondents may be entitled to a disclosure order to assist in the ascertainment of any such equipment. However, before attempting to formulate any such disclosure order, we consider that it is sensible to allow the Parties time to consider the implications of this Award, and whether such a disclosure order would advance matters, having regard, among other things, to the potential difficulties of ascertaining what equipment (other than the hull, the Major Steel Works, and the Major Equipment), has been purchased with the money advanced by Respondents. Respondents are, of course, nonetheless at liberty to make an application for such a disclosure order in the light of this Award, if so advised.*"[36] (emphasis added)

Of course, such a result was possible under previous versions of arbitral rules, as arbitral tribunals already enjoyed broad case management powers, including in respect of the order and timing of proceedings and the issues to be addressed. However, institutions have explained that the rule revision process has been undertaken to make more explicit tribunal powers in the hopes of

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32 LCIA Arbitration Rules 2020, art. 14.6.
33 LCIA Arbitration Rules 2014, art. 14.4.
34 *Id.* art. 14.5.
35 ICC Case No. 15453, Partial Award, (2) ICC DISP. RES. BULL. 113 (2016).
36 *Id.* ¶ 211.

encouraging tribunals, in circumstances which they find warranted, to exercise these broader case management powers for the purpose of efficient dispute resolution.[37]

This renewed attention to the time and cost of arbitration, and the codification of tribunal powers has increased opportunities for parties to obtain declarations at earlier stages in a case. Rather than asking for an exceptional exercise of the tribunal's case management power to bifurcate proceedings, parties can now avail themselves of codified procedural tools for "*early determination*" or other "*preliminary issue determinations,*" which better serve their interests in efficient dispute resolution. Given that parties are operating within a codified procedural system, as opposed to outside or on the edge of it, there is a strong possibility of them being more successful in obtaining relief sought earlier in the proceedings. Anecdotal evidence suggests that changes to arbitral rules, which now provide express rights and procedures for early determination of substantive issues, are shaping parties' and arbitrator's conduct in allowing structural changes to the proceedings.

V. Conclusion

Declarations at a preliminary or interim stage have benefits. An early final determination of legal rights and obligations relevant to points in dispute allows subsequent and more focused set of pleadings, witness evidence, expert evidence, and Redfern or Stern Schedules. Put shortly, unlocking key legal issues in dispute early in the proceedings has tangible dividends. As a minimum standard a plea for an interim declaration ought to happily satisfy three tests: (i) the legal rights and obligations of at least one of the parties to the arbitration are in dispute; (ii) the declaration(s) sought can resolve the dispute; and (iii) the declaration will serve a wider practical or procedural purpose. Questions of actual interest, legitimate interest, ability of the declaration to resolve the dispute, and breach of good faith or abuse of rights will continue to be obvious rebuttals to a request for an interim declaration. A tribunal's decision on a question is more likely to be answered by way of a preliminary or interim declaration if it is unlikely to involve a substantial dispute of fact. This is perhaps the most fundamental obstacle for obtaining a preliminary or interim declaration. If a tribunal forms the view that evidence (whether factual or expert) is needed to properly construe a contractual term (for example, an indemnity clause which is parasitic to an agreed breach of another contractual obligation, or a time-bar clause which is said to have been waived or amended), then a preliminary declaration may be denied on the basis that an analysis and testing of all the evidence at a final hearing is needed. Whilst a final hearing may yield a declaration (but only) in the final award, the procedural efficiencies would not have been enjoyed.

The authors advocate express clarity in the various institutional rules about the efficacy of preliminary declarations and what needs to be provided by a party to succeed in obtaining them. In so doing, the authors underline the benefits of providing clarity that include, greater focus on the seminal rights and obligations, and the essential facts and procedural efficiency. The authors also advocate and encourage empirical research on the frequency of requests for interim declarations, the type of declarations sought, and the success rate of such requests.

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[37] *See, e.g., Updates to the LCIA Arbitration Rules and the LCIA Mediation Rules (2020)*, LCIA, *available at* https://www.lcia.org/lcia-rules-update-2020.aspx (quoting Paula Hodges QC, it states: "The update to the LCIA Rules has enabled us to clarify a number of procedural issues, to emphasize the broad discretion for Tribunals to conduct arbitrations expeditiously and to reflect the ever-evolving nature of arbitration.").

CONFLICT OF LAWS AND ARBITRAL JURISDICTION—A STRUCTURAL AND COMPARATIVE ANALYSIS

Johannes Landbrecht[*]

Abstract

The conflict of laws analyses required in the context of determining arbitral jurisdiction, and the laws applicable to it, are often complicated enough. But they are rendered even more difficult by the lack of a clear and universally accepted legal framework and terminology. This article seeks to give guidance in that respect, without, however, prejudging the outcome of such analysis. The general structure and overall legal effects of arbitration agreements are similar to those of choice of court agreements. When determining the laws related to arbitral jurisdiction, i.e., the competence of a tribunal to decide on the merits, the structure of the analysis is therefore similar to the analysis undertaken in view of choice of court agreements. This analysis encompasses three distinct categories, each requiring a different mindset, with sub-issues. An applicable law must be determined for each category separately. The starting point is a determination of whether an arbitration agreement is admissible in principle, i.e., whether the difference allegedly covered is, in theory, capable of settlement by arbitration. Second, the validity of the individual arbitration agreement invoked must be determined. Third, it must be assessed whether the specific claim raised falls within this agreement's scope.

I. Arbitration Agreements as Choice of Forum Agreements

A complex conflict of laws analysis is often required when determining arbitral jurisdiction, i.e., the competence of an arbitral tribunal to hear a dispute and decide on the merits. Such analysis must be made from the perspective of an arbitral tribunal or from the perspective of state courts. In order to facilitate this task, while avoiding to impose any particular solution, this article proposes a general structure for such conflict of laws analysis.

Such jurisdictional analysis encompasses three distinct categories of issues: (1) the general admissibility of arbitration agreements, i.e., whether certain differences are deemed capable of settlement by arbitration in the sense of Article V(2)(a) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ["**New York Convention**"],[1] which is referred to by many as "*arbitrability,*" although the term is not used consistently worldwide;[2] (2) the validity of a particular arbitration agreement; as well as (3) its scope, and whether a specific claim falls within

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[1] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 7, 1959, 330 U.N.T.S. 38 [*hereinafter* "New York Convention"].

[2] The term "arbitrability" is used in the United States to label what most others call the "scope of the arbitration agreement." Bernard Hanotiau, *The Law Applicable to Arbitrability*, *in* IMPROVING THE EFFICIENCY OF ARBITRATION AGREEMENTS AND AWARDS: 40 YEARS OF APPLICATION OF THE NEW YORK CONVENTION, 9 ICCA CONGRESS SERIES, 146 (Albert Jan Van den Berg ed., 1999) [*hereinafter* "Hanotiau"]. The use of the term also encompasses, even more broadly, "all kinds of threshold issues." *Contra* JAN PAULSSON, THE IDEA OF ARBITRATION 72 (2013) [*hereinafter* "PAULSSON"].

it. For each of these categories, applicable laws or rules must be determined separately, although, of course, the applicable law need not be actually different.

Arbitration scholarship has discussed these issues extensively. However, the various issues and sub-issues are often grouped in a seemingly arbitrary way.[3] As will be explained in the subsequent parts, the perspective for each of the three aforementioned categories of issues is fundamentally different, requiring a somewhat different "*mindset*" to be applied when conducting the respective conflict of laws analysis—although the "*mindset*" is the same within each category.

The present structural analysis is not limited to a specific legal framework, domestic or otherwise—else we would have to start with a more detailed factual scenario and legal analysis. Also, while examples from domestic legal orders will be provided, the purpose is not to make a full comparative analysis of the individual issues on which excellent scholarship already exists.

Further, this structural analysis is not restricted by any specific concept of party autonomy—else the analysis would require an initial determination of the type of legal agreement under scrutiny. We would have to determine, to put it ontologically, what arbitration agreements "*are*" (jurisdictional, contractual, etc.). It is safe to say that there is no universal consensus on this issue—not on a worldwide scale, not across domestic legal orders, and often not even within a particular legal order.

Instead of an ontological approach, the focus in the following is on the function of arbitration agreements in the context of determining arbitral jurisdiction—which is to designate an independent (from the parties) decision-making body to hear and decide a dispute, and to shape its decision-making capacity.[4] This enables us to identify other agreements that perform a similar function. We can then hope to learn from the conflict of laws analysis undertaken with regard to such other agreements—in particular, with regard to the three distinct categories of conflict of laws issues mentioned above.

Such other agreements are, of course, choice of court agreements,[5] also referred to as prorogation agreements. Indeed, whatever they "*are*" under a particular law, arbitration agreements *operate* in a way that is not dissimilar to choice of court agreements, which will be further demonstrated in this article. Not surprisingly, arbitration and litigation are often discussed as competitors.[6] Which is

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3 *Cf., e.g.,* Marc Blessing, *The Law Applicable to the Arbitration Clause*, *in* IMPROVING THE EFFICIENCY OF ARBITRATION AGREEMENTS AND AWARDS: 40 YEARS OF APPLICATION OF THE NEW YORK CONVENTION, 9 ICCA CONGRESS SERIES, 168–188 (Albert Jan Van den Berg ed., 1999) [*hereinafter* "Blessing"] (discussing the law applicable to formal validity, substantive validity, representation, subjective arbitrability and objective arbitrability, but omitting to treat separately the arbitration agreement's *scope*, mixing it with the issue of substantive validity). *But see* Rolf A. Schütze, *Kollisionsrechtliche Probleme der Schiedsvereinbarung, insbesondere der Erstreckung ihrer Bindungswirkung auf Dritte*, 12(6) GER. ARB. J. (SCHIEDSVZ) 274 (2014).

4 *Cf.* Anthony Evans, *Forget ADR—Think A Or D*, 22 CIVIL JUSTICE QUARTERLY 230, 230–231 (2003). When discussing ways to resolve disputes, Evans distinguishes between "agreement" (by the parties) and "decision" (by a third person). The latter is rendered by a judge or an arbitrator.

5 *See* Ulrich Magnus, *Sonderkollisionsnorm für das Statut von Gerichtsstands- und Schiedsgerichtsvereinbarungen?*, 36(6) IPRAX 521 (2016).

6 *See, e.g.,* Ronald A. Brand, *Arbitration or Litigation? Choice of Forum After the 2005 Hague Convention on Choice of Court Agreements*, 3 BELGRADE L. REV. 23 (2009).

why Pryles pointed out a long time ago that it is beneficial to compare the functioning of choice of court (prorogation) and arbitration agreements.[7]

However, and in order to avoid any disappointment, it must be kept in mind that function and structure only provide the starting point and rough guidance for the conflict of laws analysis concerning arbitral jurisdiction. They do not finally determine the outcome, i.e., the laws actually applicable to the different aspects of a specific case. The purpose of the present analysis is thus primarily descriptive, in order to facilitate a comparative debate across legal orders, i.e., to highlight the aspects that need to be considered. It is submitted that many aspects of the debate about the laws applicable to arbitral jurisdiction would become clearer and less controversial, if this structure was kept in mind.

Still the question remains as to whether a detailed conflict of laws analysis is relevant for handling arbitration agreements. Some have argued that the whole phenomenon of arbitration, i.e., arbitration agreement, arbitration proceedings, and arbitral award, is necessarily governed by the same law. We disagree.[8] Arbitration is contractual in nature, which has an impact, in one way or another, on more or less all elements of its law and practice. However, the phenomenon of arbitration is not an indivisible unit. It is linked to a number of areas of law, i.e., numerous provisions may need to be coordinated, thereby requiring a more or less detailed[9] conflict of laws analysis on a case-to-case basis.[10] Therefore, the term "*conflict of laws analysis*" is used in a broad and functional sense, which relates to the determination of the applicable rules to a case at hand. This need not involve a domestic private international law rule.[11]

First, in Part II, we dwell into the matter pertaining to the overall effects of a choice of forum agreement. Then, in Part III, we present a structural analysis of the steps taken while determining the laws applicable to jurisdiction, that is, the required conflict of laws analysis. Finally, in Part IV, we assess how decision-makers approach this analysis, distinguishing, in regards to arbitration agreements, between the perspectives of state courts and arbitral tribunals.

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7 Michael Pryles, *Comparative Aspects of Prorogation and Arbitration Agreements*, 25(3) INT. COMP. LAW Q. 543 (1976) [*hereinafter* "Pryles"].

8 *See* Stelios Koussoulis, *Zur Dogmatik des auf die Schiedsvereinbarung anwendbaren Rechts*, *in* GRENZÜBERSCHREITUNGEN: BEITRÄGE ZUM INTERNATIONALEN VERFAHRENSRECHT UND ZUR SCHIEDSGERICHTSBARKEIT. FESTSCHRIFT FÜR PETER SCHLOSSER ZUM 70. GEBURTSTAG 417 *et seq.* (Birgit Bachmann, Stephan Breidenbach, Dagmar Coester-Waltjen, Burkhard Heß, Andreas Nelle, and Christian Wolf eds., 2005) (with historic overview and further references).

9 In line with our functional and structural approach, we do not opine on how detailed arbitral conflict of laws rules should be drafted and by whom. In favour of more detailed regulation, *see* Giuditta Cordero Moss, *International Arbitration and the Quest for the Applicable Law*, 8(3) GLOBAL JURIST 1 (2008).

10 *See, e.g.,* Daniel Girsberger, *The Effects Of Assignment On Arbitration Agreements. Why Conflict-Of-Laws Theory Is Still Needed*, *in* CONVERGENCE AND DIVERGENCE IN PRIVATE INTERNATIONAL LAW—LIBER AMICORUM KURT SIEHR (Katharina Boele-Woelki, Talia Einhorn, Daniel Girsberger & Symeon C. Symeonides eds., 2010); Pierre Lalive, *On the Conflict Rules Applicable by the International Arbitrator*, 7(1) ASA BULL. 27, 35 (1989) ("there must be a "choice" of some sort."); PETER SCHLOSSER, DAS RECHT DER INTERNATIONALEN PRIVATEN SCHIEDSGERICHTSBARKEIT ¶ 214 (2d ed. 1989) [*hereinafter* "SCHLOSSER"].

11 This, however, is what some arbitration scholars, usually with a critical undertone, understand by a conflict of laws analysis, *cf., e.g.,* Carlo Croff, *The Applicable Law in an International Commercial Arbitration: Is It Still a Conflict of Laws Problem?*, 16(4) THE INTERNATIONAL LAWYER 613 (1982); EMMANUEL GAILLARD, LEGAL THEORY OF INTERNATIONAL ARBITRATION 112 (2010).

II. Legal Effects of Choice of Forum Agreements

At the outset, we discuss certain basic terminologies in order to facilitate the debate across legal cultures and orders **[Part II.A]**. Semantics often unnecessarily cloud the debate around arbitral jurisdiction—the same thing being given different names, or different things being given the same name, depending on the legal order and the commentator involved. We will provide examples of both throughout this article.

There is also a debate as to whether choice of forum agreements are jurisdictional (procedural) or substantive in nature,[12] and what their "*legal nature*"[13] is. While we need not concern ourselves with the details of this debate—the advantage of a functional and structural analysis being that ontological questions can be avoided—we highlight that choice of forum agreements may have jurisdictional **[Part II.B]** and/or substantive effects **[Part II.C]**. To put it differently, certain effects can be ascribed to choice of forum agreements, and those effects can be analysed as jurisdictional or substantive.[14]

A. Terminology

In choice of forum agreements, we label agreements selecting any third party decision-maker to decide on the merits of a dispute, whether that be a state court ("*choice of court agreement*") or a private decision-making body, i.e., arbitral tribunal ("*arbitration agreement*"). While this terminology may appear obvious to many, it is not universally used—although terminological variations are often not reflective of substantive differences.

For instance, as alternatives to choice of forum agreements, one author alone uses "*conflicts clauses,*"[15] "*conflicts agreements,*"[16] or "*dispute resolution agreements*"[17]—without any apparent difference as to their content. In any event, all these terms may induce to error. The first two might be confused with choice of law clauses. The problem here is of a linguistic kind, namely that conflict

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12 *E.g.,* in a leading textbook on English conflict of laws, ADRIAN BRIGGS, PRIVATE INTERNATIONAL LAW IN ENGLISH COURTS ¶¶ 4.184 (2014) [*hereinafter* "BRIGGS"], Briggs distinguishes the jurisdictional (or procedural) purpose of choice of forum agreements from their operation as "though [they] were a contract." He states that, under the Brussels Ia Regulation (the "Regulation (EU) No 1215/2012 of the European Parliament and the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast)"), choice of court agreements are not "contractual in character," and that a contractual analysis of such agreements "may be positively misleading." *Id.* ¶¶ 4.204–4.205. There would be no need for "recourse to a "governing law" […] to determine validity" of a choice of court agreement. *Id.* ¶ 4.205. Yet it is respectfully submitted that this account is at least incomplete. According to Article 25(1)(1), a chosen court has jurisdiction "unless the agreement is null and void *as to its substantive validity under the law* of that Member State" (emphasis added)—i.e., the Regulation designates a governing law for determining the (substantive) validity of a choice of court agreement. What Briggs may mean is that choice of court agreements do not give rise to substantive effects *under the Regulation*, although possibly under domestic law.

13 For a Swiss perspective on the "nature" of *arbitration* agreements, in particular their duty-imposing (*verpflichtend*) and rights-modifying (*gestaltend*) elements, MARCO STACHER, DIE RECHTSNATUR DER SCHIEDSVEREINBARUNG (2007). For an overview of the historic debate, *see* BERNHARD BERGER & FRANZ KELLERHALS, INTERNATIONAL AND DOMESTIC ARBITRATION IN SWITZERLAND ¶¶ 309 *et seq.* (3d ed. 2015) [*hereinafter* "BERGER & KELLERHALS"].

14 Whether a particular choice of forum agreement actually *has* such effects then depends on the factual and legal framework—which is beyond the scope of this article.

15 ZHENG SOPHIA TANG, JURISDICTION AND ARBITRATION AGREEMENTS IN INTERNATIONAL COMMERCIAL LAW 18 (2014) [*hereinafter* "TANG"].

16 *Id.* at 33.

17 *Id.* at 74.

can refer to the parties' dispute[18]—hence "*conflicts clause*" as the clause concerning the parties' conflict or conflicts. But conflict can also refer, in the abstract, to the collision of norms[19]—the conflict of laws. The third term, "*dispute resolution clause,*" is even more infelicitous in that it risks confusion with contractual clauses serving the purpose of dispute resolution in a wider sense, albeit not by way of a third party decision—for instance, negotiation or mediation clauses.

Etymologically similar to "*choice of forum agreement*" is the term "*forum selection agreement,*" although it is usually meant to refer exclusively to the designation of state courts as the competent forum.[20] In addition to the resulting risk of a preconception by lawyers from some legal backgrounds, "*selection*" might also not be limited to choices made by the parties themselves. A court, when seized with a certain dispute not covered by a choice of court agreement, might also be required to "*select,*" for instance, an appropriate jurisdiction rule on which to base its jurisdiction. By contrast, the term "*choice of forum agreement*" is used herein to refer to an act by which parties exercise party autonomy ("*choice,*" "*agreement*") to designate a third-party decision-maker to decide their dispute ("*forum*").

The term choice of court agreement, more specifically, appears to be used primarily in European Union ["**EU**"] law[21] and international treaties.[22] We use the term as a label but do not limit the analysis to the types of agreements sanctioned by EU law or by some international treaty. The analysis covers all agreements performing a similar function in any jurisdiction. English common law, for instance, appears to prefer "*jurisdiction clause*" or "*jurisdiction agreement.*"[23] An Australian commentator uses the term "*prorogation agreement.*"[24] Although not uniform, the terms prevalent in the United States seem to be "*choice of forum clause,*"[25] "*forum selection clause,*" or "*forum selection agreement,*"[26] etymologically similar to the French "*clause d'élection de for.*"[27] We seek to avoid these terms as they are slightly imprecise if used only for agreements designating state courts. Arbitration agreements also relate to "*jurisdiction*" (of the arbitral tribunal).[28] By agreeing to arbitrate their disputes, parties designate a "*forum.*"

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18 In French *litige*, in German *Streit*.

19 In German *Kollisionsnorm*.

20 *Cf.* Louise Ellen Teitz, *The Hague Choice of Court Convention: Validating Party Autonomy and Providing an Alternative to Arbitration*, 53 AM. J. COMP. L. 543, 546 (2005) [*hereinafter* "Teitz"].

21 *See, e.g.,* Regulation (EU) No. 1215/2012, [2012] O.J. L351/1, Recital 22 [*hereinafter* "Brussels Ia Regulation"].

22 *See, e.g.,* Convention on Choice of Court Agreements, June 30, 2005, 44 I.L.M. 1294 (2005) [*hereinafter* "Hague Convention"]. It entered into force for the EU (without Denmark) and Mexico on October 1, 2015; for Singapore on October 1, 2016; for Montenegro on August 1, 2018; for Denmark on September 1, 2018; and for the United Kingdom on January 1, 2021; *see* also the (unsuccessful) Hague "Convention of 25 November 1965 on the Choice of Court", signed only by Israel.

23 BRIGGS, *supra* note 12, ¶ 4.421; RICHARD FENTIMAN, INTERNATIONAL COMMERCIAL LITIGATION ¶ 2.27 (2d ed. 2015).

24 *Cf.* Pryles, *supra* note 7.

25 Ronald A. Brand, *Forum Selection and Forum Rejection in US Courts: One Rationale for a Global Choice of Court Convention*, *in* REFORM AND DEVELOPMENT OF PRIVATE INTERNATIONAL LAW: ESSAYS IN HONOUR OF SIR PETER NORTH, 59 (James Fawcett ed., 2002).

26 *See, e.g.,* Teitz, *supra* note 20, at 546.

27 *See, e.g.,* NATHALIE COIPEL-CORDONNIER, LES CONVENTIONS D'ARBITRAGE ET D'ÉLECTION DE FOR EN DROIT INTERNATIONAL PRIVÉ (1999) [*hereinafter* "COIPEL-CORDONNIER"].

28 *See, e.g.,* BERGER & KELLERHALS, *supra* note 13, ¶¶ 686 *et seq.*

The term "*arbitration agreement*" is used herein without qualification as to its "*international,*" as opposed to domestic character. The denominator "*international*" in a comparative context often adds little to the debate.[29] As there is no transnational consensus on what international is,[30] the term has meaning only in the context of a specific legal framework.[31]

B. Jurisdictional Effects: Prorogation and Derogation

Choice of forum agreements have jurisdictional and substantive effects **[Part II.C]**. Within both types, there is a need to distinguish positive and negative effects.

i. General Observations

The positive jurisdictional effect is called "*prorogation,*" hence the term "*prorogation agreement.*"[32] A choice of forum agreement usually seeks to prorogate at least one forum, i.e., it designates a forum to have jurisdiction that would otherwise not have it.[33] This prorogative effect is also referred to as the "*jurisdiction-granting*" aspect of choice of forum agreements.[34]

The negative jurisdictional effect is called derogation. A choice of forum agreement may—although not compulsorily—derogate one forum or several fora, i.e., it may oust certain fora of the jurisdiction that they would otherwise have.[35] This derogative effect is also referred to as the "*jurisdiction-depriving*" aspect of choice of forum agreements.[36]

Choice of forum agreements often combine prorogation and derogation.[37]

These positive and negative jurisdictional effects play a role in different contexts, depending on which forum is faced with the choice of forum agreement. The allegedly prorogated forum must determine whether to accept jurisdiction, i.e., whether to accept the dispute for decision on the merits. Any potentially derogated forum must determine whether to respect the choice of forum agreement, i.e., whether to refrain from exercising its own jurisdiction that it would otherwise have, i.e., to refrain itself from making a decision on the merits.

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29 Unless a "sociological" (rather than legal) phenomenon is described that may transcend legal frameworks. *See, e.g.,* Karl-Heinz Böckstiegel, *Die Internationalisierung der Schiedsgerichtsbarkeit*, *in* GRENZÜBERSCHREITUNGEN: BEITRÄGE ZUM INTERNATIONALEN VERFAHRENSRECHT UND ZUR SCHIEDSGERICHTSBARKEIT. FESTSCHRIFT FÜR PETER SCHLOSSER ZUM 70. GEBURTSTAG (Birgit Bachmann, Stephan Breidenbach, Dagmar Coester-Waltjen, Burkhard Heß, Andreas Nelle, and Christian Wolf eds., 2005).

30 *See, e.g.,* GARY BORN, INTERNATIONAL ARBITRATION: LAW AND PRACTICE § 1.01[D] (2d ed. 2016) [*hereinafter* "BORN"] (providing a variety of possible definitions).

31 Swiss law, for example, distinguishes between international arbitration, *see* LOI FÉDÉRALE SUR LE DROIT INTERNATIONAL PRIVÉ [FEDERAL STATUTE ON PRIVATE INTERNATIONAL LAW], Dec. 18, 1987 effective Feb. 1, 2021, art. 176(1) (Switz.) [*hereinafter* "Swiss PILA"], and domestic arbitration, *see* CODE DE PROCÉDURE CIVILE [CODE OF CIVIL PROCEDURE] Dec. 19, 2008 effective Jan. 1, 2021, art. 353 (Switz.). Only in this context would it be meaningful to distinguish domestic and international arbitration agreements, or, more precisely, arbitration agreements relating to domestic or international (Swiss) arbitration proceedings.

32 *Cf.* Pryles, *supra* note 7.

33 *Cf.* HEIMO SCHACK, INTERNATIONALES ZIVILVERFAHRENSRECHT § 9.II.1 (8th ed. 2021) [*hereinafter* "SCHACK"].

34 TREVOR C. HARTLEY, CHOICE-OF-COURT AGREEMENTS UNDER THE EUROPEAN AND INTERNATIONAL INSTRUMENTS: THE REVISED BRUSSELS I REGULATION, THE LUGANO CONVENTION, AND THE HAGUE CONVENTION ¶ 1.08 (2013) [*hereinafter* "HARTLEY"].

35 *Cf.* SCHACK, *supra* note 33, § 9.II.2.

36 HARTLEY, *supra* note 34, ¶ 1.08.

37 *See, e.g.,* SCHACK, *supra* note 33, ¶ 544.

ii. Choice of Court Agreements—a Comparative Overview

With regard to choice of court agreements, we must look at three issues more closely: (1.) their exclusivity, (2.) the principle of *Kompetenz-Kompetenz*, and (3.) whether the choice of court agreement itself automatically prorogates the chosen court.

1. Whether the parties, by selecting a specific forum (prorogation), meant to exclude all other fora (derogation), thus providing the chosen forum with "*exclusive*" jurisdiction, is a matter of interpretation. In the context of choice of court agreements, many legal orders provide for legal presumptions failing specification by the parties.[38]

2. The issue of the exclusivity of a choice of forum agreement is distinct from the concept of *Kompetenz-Kompetenz*. In its most basic formulation, *Kompetenz-Kompetenz* means that a decision-making body may decide upon its own competence, i.e., determine whether to accept a case for decision on the merits. It need not delegate this determination to any other channel.[39]

   Two aspects need to be distinguished from this basic formulation, relating to (a.) the extent of the binding nature of a forum's decision on its competence, and (b.) the priority of the decision-making in that respect. They are often confused.[40]

   a. The fact that a decision-making body may determine its own competence does not mean that its decision on its competence will be recognised by other decision-making bodies.

   b. A decision-making body may have what could be called a "*right of first refusal*" to determine its jurisdiction, i.e., other decision-making bodies might have to wait for its decision before they can act themselves. For state courts within one legal order, the *lis alibi pendens* doctrine sometimes provides the court first seized with such a right of first refusal—other courts being blocked from taking the case pending the determination in the court first seized[41]—whereby, if the court first seized accepts jurisdiction, the doctrine of *res judicata* comes into play, implying that the other courts would have to follow its decision.[42] Sometimes the

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38 Pursuant to the Hague Convention, art. 3(b), a choice of court agreement is "deemed to be exclusive unless the parties have expressly provided otherwise." A similar approach applies under EU law, *see* Brussels Ia Regulation, art. 25(1)(2), and, apparently, in Australia, *see* Richard Garnett, *The Hague Choice of Court Convention: Magnum Opus or Much Ado About Nothing?*, 5(1) J. PVT. INT'L. L. 161, 164 (2009). In the U.S., the presumption seems to be the opposite, namely that choice of court agreements are non-exclusive, *cf.* RONALD A. BRAND & PAUL HERRUP, THE 2005 HAGUE CONVENTION ON CHOICE OF COURT AGREEMENTS: COMMENTARY AND DOCUMENTS 190 (2008) [hereinafter "BRAND & HERRUP"]; Louise Ellen Teitz, *Choice of Court Clauses and Third Countries From a US Perspective: Challenges to Predictability*, *in* INTERNATIONAL CIVIL LITIGATION IN EUROPE AND RELATIONS WITH THIRD STATES 288 (Arnaud Nuyts & Nadine Watté eds., 2005); Walter W. Heiser, *The Hague Convention on Choice of Court Agreements: the Impact on Forum Non Conveniens, Transfer of Venue, Removal, and Recognition of Judgments in United States Courts*, 31(4) U. PA. J. INT'L L. 1013, 1015–16 (2010) [*hereinafter* "Heiser"]. Under Singapore and English common law, there is no presumption either way, *cf.* Singapore Academy of Law, Law Reform Committee, *Report of The Law Reform Committee on the Hague Convention on Choice of Court Agreements 2005* (March 2013), ¶ 4, *available at* https://www.sal.org.sg/sites/default/files/PDF Files/Law Reform/2013-03 - Hague Convention on Choice of Court Agreements.pdf; BRIGGS, *supra* note 12, ¶ 4.423.

39 *See, e.g.,* PETER BINDER, INTERNATIONAL COMMERCIAL ARBITRATION AND MEDIATION IN UNCITRAL MODEL LAW JURISDICTIONS 253 (4th ed. 2019); MARCO STACHER, EINFÜHRUNG IN DIE INTERNATIONALE SCHIEDSGERICHTSBARKEIT DER SCHWEIZ ¶¶ 192 *et seq.* (2015) [*hereinafter* "STACHER"]; TANG, *supra* note 15, at 67.

40 For further details, *cf. also* PAULSSON, *supra* note 2, at 54 *et seq.*

41 *Cf., e.g.,* Brussels Ia Regulation, art. 29(1).

42 *Cf., e.g., Id.* art. 45(3).

right of first refusal is conferred upon the "*chosen*" court,[43] irrespective of whether it was seized first. In such a case, a court seized, albeit not chosen, would initially not have *Kompetenz-Kompetenz*.

3. Whether the choice of court agreement automatically prorogates the respective forum depends on the applicable rules. In most civil law systems, courts are directly granted jurisdiction, i.e., they have jurisdiction simply due to a choice of court agreement. If validly seized, the court must hear the case.[44] In traditional common law systems, on the other hand, *prima facie* jurisdiction is only based on service. Choice of court agreements do not confer jurisdiction, although they are an important factor when deciding on whether to permit service. Furthermore, common law judges exercise discretion as to whether to take up a matter by conducting a *forum non conveniens* analysis.[45] The existence of a choice of court agreement is one of the elements taken into account when exercising discretion.[46]

iii. Arbitration Agreements

Arbitration agreements, on their positive side, confer jurisdiction upon the arbitral tribunal, which is referred as "*l'effet attributif de compétence à l'égard de l'arbitre*" in French.[47] The prorogative effect of arbitration agreements thus concerns only the arbitral tribunal, since, as a forum, it would otherwise not be competent. On the other hand, the derogative effect plays a role in front of all state courts, if they are seized notwithstanding the alleged existence of an arbitration agreement.

Yet, the question of whether arbitration agreements automatically oust all other fora (state courts) of jurisdiction, i.e., whether they can be said to be exclusive choice of forum agreements, requires a more careful analysis. If and insofar as arbitration agreements need to be invoked to take effect, either by the party initiating arbitration proceedings (simply by initiating them), or by the defendant objecting to a state court's jurisdiction,[48] i.e., raising the arbitration defence or *exceptio arbitri*,[49] it would seem that arbitration agreements per se do not restrict the state courts' jurisdiction. Accordingly, prior to being invoked, arbitration agreements would not operate as exclusive choice of forum agreements. Notwithstanding that, arbitration agreements are fully binding, i.e., not

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43 *Id.* art. 31(2); limited to *exclusive* choice of court agreements.

44 *Cf., e.g., Id.* art 25(1)(1); Hague Convention, art. 5.

45 TANG, *supra* note 15, at 122. Many common law courts, for example, those in London, New York, or Singapore, operate as service providers to the global business community. When prorogated, they are unlikely to decline a case. However, not all courts share this view. Some refuse to spend the taxpayers' money on cases that they think should be litigated elsewhere. *Cf., e.g.,* Christopher Tate, *American Forum Non Conveniens in Light of the Hague Convention on Choice-of-court Agreements*, 69 U. PITT. L. REV. 165, 177 (2007).

46 BRIGGS, *supra* note 12, ¶¶ 4.426-7. For a comparative assessment, *see* Anna Gardella & Luca G. Radicati di Brozolo, *Civil Law, Common Law and Market Integration: The EC Approach to Conflicts of Jurisdiction*, 51(3) AM. J. COMP. L. 611 (2003); Julian Wyatt, *Chronique de droit international privé australien*, (2) CLUNET 673, 684–705 (2017).

47 JEAN-BAPTISTE RACINE, DROIT DE L'ARBITRAGE 226 (2016).

48 *Cf., e.g.,* United Nations Comm'n on Int'l. Trade Law (UNCITRAL), Model Law on International Commercial Arbitration, art. 8(1), G.A. Res. 40/72, U.N. Doc. 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) [*hereinafter* "UNCITRAL Model Law"] ("if a party so requests"); Arbitration Act 1996, c. 23, § 9 (Eng.) (a party "may […] apply to the court"); ZIVILPROZESSORDNUNG [ZPO] [CODE OF CIVIL PROCEDURE] § 1032(1) (Ger.).

49 *Cf., e.g.,* BERGER & KELLERHALS, *supra* note 13, ¶ 323.

binding to a limited extent or degree.[50] As demonstrated, choosing one forum does not necessarily exclude the competence of all other fora.

Furthermore, as regards the prorogation of arbitral tribunals, it would appear that tribunals do not have discretion as to whether to take up a matter,[51] although the *forum non conveniens* doctrine has been held in the U.S. to have an impact at the stage of recognition of arbitral awards by state courts.[52] Arbitral tribunals would seem to be granted, civil law style,[53] jurisdiction directly through the arbitration agreement, in conjunction with it being invoked.[54]

C. Substantive Effects: Damages for Breach of a Choice of Forum Agreement and Anti-suit Injunctions

The existence of the above-mentioned jurisdictional effects of choice of forum agreements should be uncontroversial, even though their precise shape and form will differ from one legal order to the other. Yet, whether choice of forum agreements also have substantive effects is a matter of controversy.

In some legal orders, substantive effects of choice of forum agreements provide a basis for a claim for damages, in case the agreement is breached. Such breach will often be the initiation of judicial proceedings in an allegedly incompetent (derogated) forum.[55] In the case of arbitration agreements in particular, some allege an obligation not to litigate in state courts as part of the arbitration agreement's "*negative effects.*"[56] Some also assume an obligation to arbitrate in good faith as part of the arbitration agreement's "*positive effects.*"[57] For the avoidance of doubt, those negative and positive effects are substantive and must not be confused with the arbitration agreement's negative and positive jurisdictional effects.[58]

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50 *Contra* Reinmar Wolff, *Die Schiedsvereinbarung als unvollkommener Vertrag? Zum Rügeerfordernis des § 1032 Abs. 1 ZPO*, 13(6) GER. ARB. J. (SCHIEDSVZ) 280, 281 (2015).

51 Individuals nominated as arbitrators may, of course, decline to sit as arbitrators. Yet this is a separate issue. The solution would be for them to decline the nomination or to resign. However, they must not deny jurisdiction (potentially with *res judicata* effect) on the basis that the case should be litigated in a state court.

52 *Cf.* (critical) Christian Borris & Rudolf Hennecke, *Article V*, *in* NEW YORK CONVENTION. COMMENTARY ON THE CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS OF 10 JUNE 1958 ¶ 25 (Reinmar Wolff ed., 2019).

53 *See* sources cited *supra* note 44 *et seq*.

54 There is a further discussion on whether an arbitral seat may become inconvenient, *see* BORN, *supra* note 30, § 3.01[F][9]. But this relates to a potential invalidation of the arbitration agreement itself (or, potentially, some legal argument as to why the seat must be moved), not an arbitral tribunal's power or duty to exercise discretion as to whether to take a case.

55 For a detailed Swiss law analysis regarding arbitration agreements, *see* Simon Gabriel, *Chapter 18, Part XVIII: Damages for Breach of Arbitration Agreements*, *in* ARBITRATION IN SWITZERLAND: THE PRACTITIONER'S GUIDE (Manuel Arroyo ed., 2d ed. 2018).

56 BORN, *supra* note 30, § 2.07[B]; JEAN-FRANÇOIS POUDRET & SÉBASTIEN BESSON, COMPARATIVE LAW OF INTERNATIONAL ARBITRATION 315 (2d ed. 2007) [*hereinafter* "POUDRET & BESSON"].

57 BORN, *supra* note 30, § 2.07[A].

58 On those positive and negative "jurisdictional" effects, *see* discussion *supra* Part II.B.

Other legal orders do not recognise substantive effects,[59] although there may be alternative legal bases for a damages claim such as ancillary obligations under the main contract, or a general duty of good faith and fair dealings.

Furthermore, if a legal order recognises substantive effects of choice of forum agreements, and if such substantive effects include the right not to be confronted with proceedings in a derogated forum, a threat of a violation of such right might, in addition to damages, provide the basis for interim or final injunctive relief. On this basis, courts enforce choice of forum agreements via anti-suit injunctions,[60] although such enforcement is effected indirectly, i.e., through blocking competing proceedings—by prohibiting a party to the choice of forum agreement to initiate or continue them. If the competing proceedings are arbitration proceedings, the term "*anti-arbitration injunction*" is also used.

III. The Structure of Choice of Forum Agreements

When seized with a specific claim and confronted with a particular choice of forum agreement, a judicial decision-making body must cumulatively deal with three categories of issues before accepting (if prorogated) or declining (if derogated) jurisdiction. As mentioned earlier, the mindset to be applied per category is different, as we shall now further explain.

First, the decision-making body ascertains, without looking at the particular agreement, whether choice of forum agreements are at all "*admissible*" in the area of law (such as family or competition law) that the specific claim touches upon. For if choice of forum agreements cannot be recognised at all, analysing the particular agreement would be unnecessary. In this context, the decision-maker exclusively looks to its own legal order, without taking into account the parties' choices **[Part III.A]**. Second, the decision-making body determines whether the particular choice of forum agreement is "*valid*." This is where the decision-maker focuses on the parties' intentions. Given that it has already been determined that, in principle, the respective legal order recognises the particular choice of forum, leniency can be given with regard to the validity issues, such as a presumption of validity, etc. **[Part III.B]**. Third, the decision-maker verifies whether the specific claim falls "*within the agreement's scope*." In this context, while giving due regard to the parties' intentions, the decision-maker must balance their interests with potential interests of third parties, i.e., a presumption of validity does not necessarily translate into a presumption of the claim falling within the agreement's scope **[Part III.C]**. This is how the mindset of the decision-maker changes when dealing with these three categories of issues relating to its jurisdiction in view of a choice of forum agreement. Before deciding on the substance of these issues, the decision-making body determines a law applicable to each of them. We will focus on this aspect in the following.

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[59] For the view of Swiss law, *see, e.g.,* Pascal Grolimund & Eva Bachofner, *Art. 5*, *in* INTERNATIONALES PRIVATRECHT: IPRG (BASLER KOMMENTAR) ¶ 62 (Pascal Grolimund, Leander D. Loacker & Anton K. Schnyder eds., 4th ed. 2021). Among these legal orders was, until very recently, also Germany. Yet its highest court has now decided that initiating proceedings abroad (in this case in the U.S.), in violation of an agreement on a domestic (German) forum, may entail liability in damages for costs incurred in US litigation, *cf.* Bundesgerichtshof [BGH] [Federal Court of Justice] Oct. 17, 2019, III ZR 42/19, 75(15-16) JURISTENZEITUNG 797 (2020) (Ger.).

[60] *Cf., e.g.,* BRIGGS, *supra* note 12, ¶¶ 5.105–13; Johannes Landbrecht, *Anti-Suit Injunctions and the Hague Choice of Court Convention—Turner v Grovit Turning Global?*, 24 ZZP INT'L 159 (2019).

A. Admissibility of a Choice of the Forum

The admissibility of choice of forum agreements concerns the issue of whether such agreements are considered permissible or acceptable in principle by a legal order with regard to certain disputes, i.e., whether the respective legal order generally recognises choice of forum agreements—relating to a particular area of law or entered into by a particular type of person—as "*potentially*" valid with regard to their prorogative or derogative effect.[61] To be even more precise, what is admissible in civil law jurisdictions is the prorogation or derogation of a particular forum by agreement of the parties, as the court then automatically has or loses jurisdiction.[62] In common law jurisdictions, admissible is the creation, by agreement of the parties, of a factor to be taken into account in the court's *forum non conveniens* analysis.[63]

To put it differently, such jurisdictional admissibility of choice of forum agreements concerns the conditions of the jurisdictional effects of those agreements in the abstract, i.e., without looking at an individual agreement.[64] Whether a decision-making body then applies the particular choice of forum agreement, depends on its validity **[Part III.B]**.

This notion of "*admissibility*" of choice of forum agreements generally must not be confused with the procedural admissibility of specific claims in particular proceedings (*Zulässigkeit*)—as opposed to the claim having merit (*Begründetheit*).[65] In the arbitration context, the admissibility of a specific claim is also sometimes referred to as "*procedural arbitrability*"—as opposed to "*substantive arbitrability*"[66]—again an example of possible terminological confusion. Yet, objections to the procedural admissibility of specific claims have no impact on the jurisdictional admissibility of choice of forum agreements generally and, thus, the decision-maker's jurisdiction. Prorogation of a forum may be admissible, i.e., accepted generally in a specific legal order, yet, the specific claim brought on the basis of a choice of forum agreement may be inadmissible procedurally.

But, the potential for terminological confusion does not end here. The concept of jurisdictional admissibility of choice of forum agreements is also sometimes referred to as "*enforceability,*"[67] enforceability in a narrow sense,[68] or "*validity*."[69] In order to avoid confusion with the enforceability of judgements and awards as well as with the legal effectiveness (validity) of choice of forum agreements, we prefer the term (jurisdictional) "*admissibility.*"

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61 *Cf., e.g.,* SCHACK, *supra* note 33, ¶¶ 549 (prorogation), 561 (derogation).

62 *See* sources cited *supra* note 44.

63 *See* sources cited *supra* note 46.

64 COIPEL-CORDONNIER, *supra* note 27, ¶ 55.

65 *Cf., e.g.,* Marco Stacher, *Jurisdiction and Admissibility under Swiss Arbitration Law—the Relevance of the Distinction and a New Hope*, 38(1) ASA BULL. 55, 60 (2020).

66 Carolyn G. Nussbaum & Christopher M. Mason, *Who Decides: The Court or the Arbitrator?*, BUSINESS LAW TODAY (Mar. 2014), at 1.

67 *See* TANG, *supra* note 15, at 110 (enforceability "means what effect should be given to the legally sound [valid] agreement," considering "a country's policy to give party autonomy its binding effect.").

68 *Cf.* the usage in Heiser, *supra* note 38, at 1013–1014. In a "wider" sense, on the other hand, "enforceability" determines whether a choice of forum agreement is considered effective in a specific case. *Id.* at 1014; Nino Sievi, *Enforceability of International Choice of Court Agreements: Impact of the Hague Convention on the US and EU Legal System*, *in* 24 HAGUE YEARBOOK OF INTERNATIONAL LAW (Nikolaos Lavranos & Ruth A. Kok eds., 2011).

69 *Cf.* RONALD A. BRAND & PAUL HERRUP, THE 2005 HAGUE CONVENTION ON CHOICE OF COURT AGREEMENTS: COMMENTARY AND DOCUMENTS 20 (2008) [*hereinafter* "BRAND & HERRUP"] ("Validity […] deals with state interests and limitations on the ability of private parties to enter into agreements that will be recognized by the state.").

The jurisdictional admissibility of arbitration agreements in particular, i.e., whether in the words of Article V(2)(a) New York Convention,[70] an issue is "*capable of settlement by arbitration,*" is often more specifically called "*arbitrability.*"[71] In line with Pamboukis' analysis,[72] we consider arbitrability to relate to a conflict of jurisdiction problem, not to a conflict of (substantive) law problem. To some, it may appear superfluous to speak of the admissibility of arbitration agreements, considering that we have the term "*arbitrability.*" However, as mentioned, the usage of the latter term is far from uniform globally.[73]

How can the admissibility of choice of forum agreements be analysed further?

The admissibility of choice of forum agreements may be limited *ratione materiae*, i.e., related to the relevant subject matter—for instance, competition law, constitutional law, family law etc.—or *ratione personae*. The latter "*personal aspect*" of the admissibility of choice of forum agreements concerns the issue of whether a legal order accepts, in principle, that certain persons prorogate or derogate its decision-making bodies. Such restrictions are rare these days.[74] Even consumers and employees enter into choice of forum agreements—although there may exist restrictions as to the timing (before or after the dispute has arisen), specific formal requirements, or the prohibition of derogation, but not of prorogation to the benefit of the "*weak*" party, i.e., the parties may be allowed to add an additional forum for the consumer to choose from, whereas the consumer must not be deprived of any default fora.[75] In an arbitration context, these types of admissibility are also referred to as subject-matter arbitrability (*objektive Schiedsfähigkeit*, *l'arbitrabilité objective*) and person-related arbitrability (*subjektive Schiedsfähigkeit*, *l'arbitrabilité subjective*).[76]

It is important to note that any decision-maker confronted with a choice of forum agreement needs to make itself, and independently of the others, a determination as to the admissibility of choice of forum agreements in the area invoked—the decision-making body allegedly prorogated as well as any decision-making body potentially derogated. It is important to distinguish those perspectives, because, a legal order might accept the prorogative effect of choice of forum agreements more readily than their derogative effect, or vice versa. For instance, a legal order might seek to ensure that its own courts decide employment disputes, but it does not seek to determine which one precisely. It may then accept prorogation, as long as it is prorogation of one of its own courts. Yet it may not accept derogation at all. The applicable law to all these sub-issues in the admissibility category must also be determined separately.

Finally, the question may arise whether a lack of admissibility affects the validity of the respective choice of forum agreement overall. Many commentators argue for instance that a lack of

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70 New York Convention, art. V(2)(a).

71 *See* Loukas A. Mistelis, *Arbitrability—International and Comparative Perspectives*, *in* ARBITRABILITY: INTERNATIONAL AND COMPARATIVE PERSPECTIVES 5, ¶ 1-9 (Loukas A. Mistelis & Stavros Brekoulakis eds., 2009) ("restrictions imposed on the parties' freedom to submit certain types of disputes to arbitration.").

72 Charalambos Pamboukis, *On Arbitrability: The Arbitrator as a Problem Solver*, *in* ARBITRABILITY: INTERNATIONAL AND COMPARATIVE PERSPECTIVES 128, ¶¶ 7-20 *et seq.* (Loukas A. Mistelis & Stavros Brekoulakis eds., 2009).

73 *Cf. supra* note 2 and accompanying text.

74 *Cf., e.g.,* SCHACK, *supra* note 33, ¶ 1418.

75 *Cf., e.g.,* Brussels Ia Regulation, art. 19.

76 *Cf., e.g.,* Bernard Hanotiau, *L'arbitrabilité et le favor arbitrandum: un réexamen*, 4 J. DU DROIT INT'L 899, 902 (1994) [*hereinafter* "Hanotiau"].

arbitrability renders arbitration agreements null and void.[77] We cannot go into the details of this discussion but caution against such approach. The admissibility of choice of forum agreements must be treated conceptually separate from a particular agreement's validity.[78] In particular, arbitrability is a jurisdictional requirement rather than a condition for the arbitration agreement's (substantive) validity.[79]

B. Validity of the Particular Choice of Forum Agreement

Once the decision-making body has determined that it would recognise choice of forum agreements generally with regard to a particular type of dispute (for instance, company law or involving employees), it would still need to determine whether the particular agreement presented to it is legally valid, i.e., whether the decision-making body should give effect precisely to this agreement between the relevant parties concerned.

What we thereby call "*validity,*" is sometimes also referred to as "*enforceability*" in a wider sense.[80] We avoid this term again in order not to create confusion between a wide and narrow sense of enforceability of choice of forum agreements, and in order not to create confusion with the enforceability of judgments or arbitral awards.

Some distinguish validity from the existence of choice of forum agreements.[81] Existence refers "*to the conclusion of a conflicts clause and incorporation of this clause into a contract,*" whereas validity refers "*to the quality and authenticity of the parties' consent and other issues that may render a conflicts clause void or voidable.*"[82] This distinction is unclear and adds little to the analysis. As for the "*existence,*" this is often merely a characterisation issue. For the purposes of applying a certain conflict of laws rule or treaty such as the Hague Convention on Choice of Court Agreements ["**Hague Convention**"] or the New York Convention, a particular agreement must be characterised prima facie as a choice of forum agreement—in order to point to the potential application of such treaties in the first place. Such characterisation, however, does not prejudge whether the respective choice of forum agreement is to be given legal effect, i.e., whether it is indeed valid. Beyond this distinction, existence and validity are the same issue—an invalid agreement does not exist and an existing agreement is valid. An agreement may, of course, be invalid *ab initio* (lack of consent) or become invalid subsequently (termination, repudiation, voidance etc.).

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77 *See, e.g.,* BERGER & KELLERHALS, *supra* note 13, ¶ 184; Hanotiau, *supra* note 76, at 901; POUDRET & BESSON, *supra* note 56, at 281; STACHER, *supra* note 39, ¶ 222; Pierre-Yves Tschanz, art. 177 *in* COMMENTAIRE ROMMAND LDIP ¶ 8 (Andreas Bucher ed., 2011) [*hereinafter* "Tschanz"]; Reinmar Wolff, *Article II*, *in* NEW YORK CONVENTION. COMMENTARY ON THE CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS OF 10 JUNE 1958 ¶ 161 (Reinmar Wolff ed., 2d ed. 2019) [*hereinafter* "Wolff"].

78 *Cf.* Stavros L. Brekoulakis, *On Arbitrability: Persisting Misconceptions and New Areas of Concern*, *in* ARBITRABILITY: INTERNATIONAL AND COMPARATIVE PERSPECTIVES, 37, ¶¶ 2-58 *et seq.* (Loukas A. Mistelis & Stavros Brekoulakis eds., 2009).

79 *See* David Quinke, *Article V*, *in* NEW YORK CONVENTION. COMMENTARY ON THE CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS OF 10 JUNE 1958 ¶ 426 (Reinmar Wolff ed., 2d ed. 2019) [*hereinafter* "Quinke"].

80 *See* sources cited *supra* note 6868. *See* Raymond J. Heilman, *Arbitration Agreements and the Conflict of Laws*, 38(5) YALE L.J. 617 (1929).

81 *Cf.* for references Johannes Landbrecht, *Uniform Jurisdiction Rules under the Hague Choice of Court Convention*, *in* 19 Y.B. PRVT. INT'L. L. 123 (Andrea Bonomi & Gian Paolo Romano eds., 2017/2018) [*hereinafter* "Landbrecht"].

82 TANG, *supra* note 15, at 18.

As to the alleged "*incorporation of this clause into a contract,*"[83] there may be a conceptual misunderstanding. Choice of forum agreements are, in regards to their legal validity, separate from the main contract to which they refer **[Part III.B.i]**. If a uniform validity standard is missing at the treaty level—which would reduce the conflict of laws analysis to the one step of determining whether the treaty applies **[Part III.B.ii]**—the laws applicable to a choice of forum agreement's formal **[Part III.B.iii]** and substantive validity **[Part III.B.iv]** must be determined according to a more or less complex conflict of laws analysis. Relating to substantive validity, but to be discussed separately,[84] is the capacity of individual parties to enter into the respective agreement, as well as a possible power to bind third parties **[Part III.B.v]**.

All the sub-issues falling within this validity category can be approached with a similar mindset. Having determined that the choice of forum agreement would be recognised in principle—i.e., is considered admissible—the decision-maker can potentially be more lenient with respect to the parties' intentions and choices.

i. The Doctrine of Separability or Severability

The main contract and the corresponding choice of forum agreement are treated as legally distinct, even if they are contained in a single document.[85] This concept is referred to as the "*doctrine of separability*" or "*severability,*" in its most general formulation. In many legal orders, the legal (in)effectiveness of the one does not affect the legal (in)effectiveness of the other[86]—although certain defects may affect both agreements, such as forgery of the document.[87]

The law applicable to the validity of either agreement thus needs to be determined separately. Different laws may apply. The most important consequence is that the parties' choice of law for the main contract (if any) does not necessarily imply a choice of law for the validity aspects of the choice of forum agreement.

The details of how the separability concept is applied will differ from one legal order to the other, and may differ with regard to choice of court and arbitration agreements. For instance, under English law, it has been argued that the arbitration-related doctrine of separability "*treats the arbitration agreement as a distinct agreement* only in the context of *a challenge to its validity and not for other purposes, including that of choice of law*."[88] For present purposes, we can leave open whether this view is accurate. Its practical impact seems to be limited, considering that its proponents nonetheless accept that different laws might apply to the main contract and the arbitration agreement.[89]

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83 *Id.*

84 *See, e.g.,* Tschanz, *supra* note 77, art. 178, ¶¶ 57 *et seq.* for the Swiss provisions governing the substantive validity (*la validité matérielle*) of arbitration agreements.

85 *E.g.,* Brussels Ia Regulation, art. 25(5)(1); Hague Convention, art. 3(d); UNCITRAL Model Law, art. 16(1)(2).

86 *Cf., e.g.,* Brussels Ia Regulation, art. 25(5)(2); Hague Convention, art. 3(d); UNCITRAL Model Law, art. 16(1)(3); Swiss PILA, art. 178(3).

87 *Cf.* Fiona Trust & Holding Corporation v. Privalov [2007] UKHL 40, ¶ 17 (Lord Hoffmann).

88 Ian Glick & Niranjan Venkatesan, *Choosing the Law Governing the Arbitration Agreement*, *in* JURISDICTION, ADMISSIBILITY AND CHOICE OF LAW IN INTERNATIONAL ARBITRATION: LIBER AMICORUM MICHAEL PRYLES 137 (Neil Kaplan & Michael J. Moser eds., 2018) (emphasis in the original).

89 *Id.* at 139 *et seq.*

ii. Uniform Standard of Validity of Choice of Forum Agreements under International Treaties?

With regard to arbitration agreements falling under the New York Convention, there is a debate as to whether it establishes, through substantive rules (*Sachnormen*) at treaty level, a uniform standard of validity.[90] If such a standard existed, it would make the conflict of laws analysis with regard to the law applicable to an arbitration agreement's validity much easier. One would not have to look farther than the New York Convention itself. The concern is, however, that it is unlikely that a uniform standard will ever emerge—for the simple reason that the New York Convention does not establish a judicial body that could define this standard with authority. Yet "*[a]ny promulgated text of law [like the provisions of the New York Convention] is just words until it is applied as law. And any drafted text purporting to be a uniform law is nothing until it is applied uniformly as law*."[91]

A comparable problem exists with regard to choice of court agreements falling under the Hague Convention.[92]

The issue is very different under the Regulation (EU) No. 1215/2012 of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ["**Brussels Ia Regulation**"], as the Court of Justice of the European Union ["**CJEU**"] has the final say on its interpretation,[93] and ensures uniformity not only of the textual basis, but also of its application.

iii. Formal Validity

The formal validity of a choice of forum agreement relates to aspects of how the agreement was made and/or recorded (in writing, etc.)—not what it contains—or whether the parties consented. The law applicable to a choice of forum agreement's formal validity is often determined separately from the law applicable to its substantive validity. Leniency may be applied to formal validity issues, as in the validity category generally, in view of the agreement's overall admissibility, and given that only the parties' interests must be protected in this context.

For instance, Article 25(1)(3) of the Brussels Ia Regulation determines, through substantive provisions at EU level, most aspects of formal validity. No further conflict of laws analysis is required. On the other hand, concerning substantive validity, Article 25(1)(1) contains an intra-EU conflict rule, referring to the law of the Member State of the court seized.

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90 On the debate, *see* Gary Born & Johannes Koepp, *Towards a Uniform Standard of Validity of International Arbitration Agreements Under the New York Convention*, *in* GRENZÜBERSCHREITUNGEN: BEITRÄGE ZUM INTERNATIONALEN VERFAHRENSRECHT UND ZUR SCHIEDSGERICHTSBARKEIT. FESTSCHRIFT FÜR PETER SCHLOSSER ZUM 70. GEBURTSTAG (Birgit Bachmann, Stephan Breidenbach, Dagmar Coester-Waltjen, Burkhard Heß, Andreas Nelle & Christian Wolf eds., 2005); SCHLOSSER, *supra* note 10, ¶¶ 247 *et seq.* (critical).

91 Camilla Baasch Andersen, *Defining Uniformity in Law*, 12(1) UNIF. L. REV. 5, 41 (2007).

92 On this discussion in detail, Landbrecht, *supra* note 81.

93 *Cf.* HARTLEY, *supra* note 34, ¶¶ 1.29–1.36. Such difference as regards the existence of a body ensuring uniformity of application should be reflected in the methodological approach to applying, for example, the three instruments that Hartley discusses, i.e., the Brussels Ia Regulation, the Lugano Convention (an international treaty with the CJEU having persuasive authority only), and the Hague Convention (no judicial authority to ensure uniformity).

Article 178(1) of the Swiss Private International Law Act ["**Swiss PILA**"] is a substantive rule determining formal requirements of arbitration agreements,[94] as is Section 1031 of the German Code of Civil Procedure or Article 7(2) of the United Nations Commission on International Trade Law ["**UNCITRAL**"] Model Law on International Arbitration (Option I). If the New York Convention applies, the formal requirements in Article II(1) and Article II(2) of the same must also be taken into account.

iv. Substantive Validity

The substantive validity of a choice of forum agreement relates for instance to issues of consent, certainty, variation, waiver, estoppel, or termination.[95] A law applicable to those aspects of the validity of the choice of forum agreement must be determined separately from the other issues in the validity category.

For instance, Article 178(2) of the Swiss PILA designates the laws applicable to the substantive validity of arbitration agreements.[96] Contrary to Article 178(1),[97] the provision is a conflict rule that refers, in the alternative, to three different laws, namely to "*the law chosen by the parties, or to the law applicable to the dispute, in particular the law governing the main contract, or to Swiss law*." If the agreement conforms to any one of those laws, it is considered valid as to its substance. The provision is often cited as a prime example of the "*validation principle.*"[98] Swiss law favours the validity of arbitration agreements by accepting their substantive validity alternatively under several laws.[99]

Whether an aspect is qualified as relating to formal or substantive validity differs from one legal order to the next. No distinction is possible in the abstract. However, such distinction is also not necessary. What is important is to be aware of the issue and to carefully determine the law applicable to the relevant aspect, as per the conflict of laws rules applicable. To provide an example, issues of fairness in the context of the conclusion of a choice of forum agreement, in particular if such agreement is supposed to be based on pre-formulated, non-negotiated standard contract terms (*Allgemeine Geschäftsbedingungen*), are considered formalities in some legal orders but issues of substantive validity (consent) in others.[100] Whatever the reason for such distinction, the decision-making body's own conflict of laws rules determine whether the issue is to be qualified as one of formal or substantive validity.

v. Capacity and Power of Attorney

The issue of the parties' capacity to contract is closely linked to a choice of forum agreement's validity, but potentially, a separate applicable law needs to be determined. While it may be rare that whole classes of persons are prohibited from entering into the choice of forum agreements—i.e.,

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94 *See, e.g.,* Andreas Furrer, Daniel Girsberger & Dorothee Schramm, *IPRG 176–178*, *in* HANDKOMMENTAR ZUM SCHWEIZER PRIVATRECHT. INTERNATIONALES PRIVATRECHT ¶ 18 (Andreas Furrer, Daniel Girsberger & Markus Müller-Chen eds., 3d ed. 2016) [*hereinafter* "Furrer et al."].

95 For these elements see in detail, Landbrecht, *supra* note 81, at 123 *et seq.*

96 *See, e.g.,* Furrer et al., *supra* note 94, ¶ 20.

97 *See* discussion *supra* Part III.B.iii.

98 *See, e.g.,* BORN, *supra* note 30, §2.06[D]; BERGER & KELLERHALS, *supra* note 13, ¶ 393 ("conflict of laws rule in favorem validitatis"); Tschanz, *supra* note 77, art. 178, ¶ 72.

99 Sabrina Pearson, *Sulamérica v Enesa: The Hidden Pro-validation Approach Ad- opted by the English Courts with Respect to the Proper Law of the Arbitration Agreement*, 29(1) ARB. INT'L 115, 125 (2013) argues that English courts in essence apply a similar principle.

100 *Cf.* Landbrecht, *supra* note 81, at 126.

there are limits to the admissibility *ratione personae*[101]—the individual parties still need to have capacity to enter into a legally binding agreement.

Yet another issue in regards to which an applicable law must be determined, and again separately, is whether the person attempting to enter into the choice of forum agreement had the power to bind the person or entity supposed to become a party to the agreement. The applicable law to this issue may differ depending on whether the person signing was an official representative, a simple employee, a third person with express authority, or a third person without express authority.

C. The Specific Claim Falling Within the Scope of a Particular Choice of Forum Agreement

Finally, if choice of forum agreements are admissible in principle in the relevant area of law, and if the particular agreement is legally valid, what is still left to do for the decision-making body is to determine whether the specific claims raised fall within the agreement's scope, i.e., whether these claims are covered by the particular choice of forum agreement. This is often an issue of interpretation of the particular choice of forum agreement.

The scope of a choice of forum agreement thereby has a substantive, a personal, and a temporal dimension.[102] An applicable law may have to be determined for each aspect separately. As will become clear in the following, the mindset for the jurisdictional analysis again changes slightly for the issues covered by this scope category, as compared to the previous admissibility and validity categories, as the interests of third parties may have to be taken into account.

The substantive scope refers to the types of claims covered by the choice of forum agreement—for instance, claims concerning pre-contractual liability (*culpa in contrahendo*) or competing tort claims. The link with the substantive validity of the respective choice of forum agreement may often be so close as to warrant applying the same law to both issues. However, it may sometimes be preferable to apply the law applicable to the main contract, given that the availability of remedies (potentially an aspect of the forum agreement's scope) and the existence of substantive rights (under the main contract) may overlap. Since events giving rise to extra-contractual liability may involve parties other than those having entered into the choice of forum agreement, these third-party interests will also be taken into account.

The personal scope of choice of forum agreements determines who is bound[103] through explicit, implied, presumed, or fictitious (imputed) consent.[104] In this context, it is even more obvious that third-party interests play a role in determining a choice of forum agreement's scope.

Conceptually, there is some overlap between the concepts of the personal scope of choice of forum agreements and consent—an aspect treated as part of substantive validity above. The question of who is bound is often identical to the question of who has consented. In straightforward scenarios, there may then be no need to determine separately a law applicable to the personal scope of the choice of forum agreement and its validity. However, it is sometimes

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101 *See* discussion *supra* Part III.A.

102 *See* STACHER, *supra* note 39, ¶ 215.

103 *See* Stefan Kröll, *Zur kollisionsrechtlichen Behandlung von Schiedsvereinbarungen—Rechtsfragen der subjektiven Reichweite (zu BGH, 8.5.2014—III ZR 371/12)*, 36(1) IPRAX 43 (2016).

104 On these distinctions, with regard to arbitration agreements, Johannes Landbrecht & Andreas Wehowsky, *Determining the Law Applicable to the Personal Scope of Arbitration Agreements and its "Extension"*, 35(4) ASA BULL. 837, 839–841 (2017).

undisputed that a valid choice of forum agreement exists—i.e., there is no dispute about validity in general—but it is disputed whether a particular individual is bound thereby. In these scenarios, the applicable law must be determined separately. The choice of forum agreement cannot necessarily be the starting point as it is yet unclear whether the individual has anything to do with it. The applicable law to the personal scope may also differ depending on whether one is dealing with presumptions of consent, assignment, responsibility due to good faith, etc.[105]

Finally, a choice of forum agreement's temporal scope may need to be determined, along with a law governing this issue. The agreement may be limited to claims arising within a defined period of time, or at a specific point in time. A choice of forum agreement might require pre-judicial steps, such as an attempt at mediation, before judicial proceedings can be initiated. If brought prematurely, a claim may not be within the agreement's (temporal) scope yet.

IV. Determining the Applicable Law to Jurisdiction

We have now discussed the potential effects of choice of forum agreements and their structure. Now the question arises as to how a decision-making body goes about determining a law applicable to its jurisdiction. At the outset, the relevant perspective must be clarified. This cannot be overemphasised as it is often neglected in scholarly discussions. Each decision-maker determines, by itself, the laws that are applicable to the issues, which it is required to decide, and according to its own perspective. For instance, asking about the law applicable to arbitration agreements, in general, is meaningless—as it always depends on the specific perspective of the relevant decision-maker involved.

In the forthcoming part of the article, we focus on arbitration agreements. We distinguish between the perspectives of state courts **[Part IV.A]**, and that of arbitral tribunals **[Part IV.B]**.

A. State Courts and Arbitral Jurisdiction

When assessing which laws are to be applied to the various aspects of choice of forum agreements, state courts start with their own conflict of laws rules, as part of their *lex fori*. As a scholar put it, judges take orders only from their own legal order.[106] Such conflict of laws analysis may guide the judge to the substantive rules of his or her domestic law or to foreign laws, which may be either substantive rules, or further conflict of laws rules.

State courts determine the law applicable to arbitral jurisdiction primarily[107] in two scenarios: either when faced with an arbitration agreement when the same was invoked as an exception to the court's jurisdiction (*exceptio arbitri*)—this often concerns the hypothetical jurisdiction of a potential arbitral tribunal insofar as arbitral proceedings have not yet been commenced; or if a court is asked to recognise and enforce an arbitral award rendered on the basis of an arbitration agreement—in which case the court verifies the jurisdiction of a particular arbitral tribunal having rendered a

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105 For detailed analyses concerning the law applicable to the personal scope of arbitration agreements, *cf., e.g., Id.*; Martin Gebauer, *Zur subjektiven Reichweite von Schieds- und Gerichtsstandsvereinbarungen—Maßstab und anwendbares Recht*, *in* ARS AEQUI ET BONI IN MUNDO, FESTSCHRIFT FÜR ROLF A. SCHÜTZE ZUM 80. GEBURTSTAG (Reinhold Geimer, Athanassios Kaissis & Roderich C, Thümmel eds., 2014); Michael Mráz, *Extension of an Arbitration Agreement to Non-Signatories: Some Reflections on Swiss Judicial Practice*, 3 BELGRADE L. REV. 54 (2009).

106 SCHACK, *supra* note 33, ¶ 549.

107 We leave aside the issue of state courts supporting arbitral proceedings (*juge d'appui*), for instance with regard to the taking of evidence.

decision. The overall structure of the conflict of laws analysis is similar—courts will go ahead and determine the laws applicable to the admissibility **[Part IV.A.i]**, validity **[Part IV.A.ii]**, and scope **[Part IV.A.iii]** of the arbitration agreement.

i. Arbitrability[108] in the Sense of General Admissibility

Many emphasise that the admissibility of choice of forum agreements, in the allegedly prorogated as well as in the potentially derogated forum, is governed by the *lex fori*,[109] i.e., the law of the court confronted with a particular choice of forum agreement. The same would apply in the arbitration context with regard to arbitrability in both (1.) the recognition or enforcement context as well as (2.) when a court is faced with an arbitration agreement as an exception to its jurisdiction.[110] This general statement is accurate insofar as the *lex fori* is the starting point for the conflict of laws analysis. Yet, whether the *lex fori* regulates the issue via substantive rules,[111] or contains conflict rules—including, potentially, the recognition of a choice of the applicable law by the parties[112]—remains to be determined.

1. In the context of recognition or enforcement, the conflict rule in Article V(2)(a) of the New York Convention refers, for determining the law applicable to arbitrability, to the law of the country where recognition or enforcement are sought, which may include its conflict of laws rules. This appears to be undisputed for arbitrability *ratione materiae*. With regard to arbitrability *ratione personae*, however, some use the conflict rule in Article V(1)(a) instead.[113]

2. If confronted with a particular arbitration agreement as an exception to its jurisdiction, a state court has the perspective of a potentially derogated forum. In the interest of efficiency, the court would probably start by determining its hypothetical jurisdiction according to general rules. If the court itself does not have jurisdiction, it need not concern itself with the arbitration agreement and will simply decline to hear the case. Only if the court otherwise could have jurisdiction, it assesses whether it is required to suspend or terminate the proceedings in view of the arbitration agreement.

What law will the state court apply to arbitrability in the latter context?

Within the framework of the New York Convention, the Contracting States are obliged to recognise arbitration agreements pursuant to Article II(1). The provision contains an exception to

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108 For a comparative account, *cf., e.g.,* Hanotiau, *supra* note 2.

109 *Cf.* TANG, *supra* note 15, at 110.

110 For a critical re-assessment of this *lex fori* approach, Stavros L. Brekoulakis, *Law Applicable to Arbitrability: Revisiting the Revisited Lex Fori*, *in* ARBITRABILITY: INTERNATIONAL AND COMPARATIVE PERSPECTIVES (Loukas A. Mistelis & Stavros Brekoulakis eds., 2009).

111 *See, e.g.,* Oberlandesgericht München [OLG München] [Higher Regional Court of Munich] July 7, 2014, 34 SchH 18/13, SCHIEDSVZ 2014, 262, 264 (Ger.) (if the place of arbitration is in Germany, arbitrability is governed exclusively by German law—this being the conflict of laws analysis of the Munich court. The corresponding provision of German arbitration law (s 1030 German CCP) then operates as a substantive rule (*Sachnorm*) on arbitrability).

112 In favour of (limited) party autonomy with respect to determining the law applicable to arbitrability, *e.g.,* Dietmar Czernich, *Österreich: Das auf die Schiedsvereinbarung anwendbare Recht*, 13(4) GER. ARB. J. (SCHIEDSVZ) 181, 185 (2015) (under Austrian law). Against party autonomy as regards the law applicable to arbitrability, *e.g.,* BERGER & KELLERHALS, *supra* note 13, ¶ 190 (for Swiss law).

113 SCHACK, *supra* note 33, ¶ 1417.

this obligation if the subject matter is not "*capable of settlement by arbitration*." However, Article II(1) does not stipulate the applicable law.

As one observer put it, "*nearly every conceivable position as to which law governs arbitrability has been taken*."[114] Indeed, many courts apply Article V(2)(a) of the New York Convention by analogy. Then it would be the law of the country in which the arbitrability issue arises—including, potentially, its conflict of laws rules—that governs arbitrability *ratione materiae*. This is where recognition or enforcement of an award or, by analogy, recognition of the arbitration agreement is sought. Others submit that the forum's arbitrability concept only applies if its legal order has a material connection to the dispute.[115] If anything, this confirms that issues of arbitrability must be analysed separately from validity issues.[116] This penchant for applying the law of the forum with regard to arbitrability, which is not present with respect to validity, also confirms that the mindset of the courts when dealing with issues of admissibility is different from that applied in the validity category. As for arbitrability *ratione personae*, a starting point could again be Article V(1)(a) of the New York Convention.[117]

ii. Validity

As mentioned, domestic law often has separate substantive or conflict rules for the (1.) formal and (2.) substantive validity of arbitration agreements,[118] as well as for (3.) the parties' capacity.

1. Concerning the formal validity of arbitration agreements, requirements at treaty level (Article II of the New York Convention), and those of domestic law, must be coordinated. A state's treaty obligations prevail over its domestic rules.[119] The provisions at treaty level must therefore be considered first.

Article II(1) and Article II(2) of the New York Convention contain substantive rules for the formal validity of arbitration agreements—much like the Brussels Ia Regulation for choice of court agreements.[120] If the particular arbitration agreement complies with these requirements, it must be recognised within the New York Convention's scope. No further reference to domestic law or conflict of laws analysis is required. Insofar as the New York Convention applies, it would seem that its formal requirements thus provide a maximum standard. No Contracting State may stipulate stricter form requirements.[121]

Insofar as the New York Convention does not apply, or if its formal requirements are not met, the court may or may not, according to its own law, recognise the particular arbitration agreement, or an arbitral award made on the basis of it. Article VII of the New York Convention expressly reserves the application of other treaties and domestic rules in case they are more lenient. Therefore, the court must turn to its conflict of laws and, ultimately, its own or foreign substantive rules, in order to determine the formal validity of the particular

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114 Wolff, *supra* note 77, ¶ 159.
115 For references, *see* BORN, *supra* note 30, § 3.02[C].
116 *Cf.*, *e.g.*, Quinke, *supra* note 79.
117 *Cf.*, *e.g.*, SCHACK, *supra* note 33, ¶ 1417.
118 *Cf.* discussion *supra* Parts III.B.iii, III.B.iv.
119 *Cf., e.g.,* HARTLEY, *supra* note 34, ¶ 1.02.
120 *Cf.* discussion *supra* Part III.B.iii.
121 *See* BORN, *supra* note 30, §3.01[E][4].

arbitration agreement. For instance, French law concerning international—as defined by French law[122]—arbitration, recognises oral arbitration agreements.[123] Although arguably not under the New York Convention, which governs only agreements in writing,[124] a court obliged to apply French law must recognise such oral arbitration agreements as per domestic law.

2. As for the laws applicable to the substantive validity of a particular arbitration agreement, the starting point under the New York Convention is Article II(3), if the issue is about recognising a particular arbitration agreement as an exception to the court's jurisdiction. According to Article II(3), an arbitration agreement need not be recognised if it "*is null and void, inoperative or incapable of being performed*." But the provision does not specify what law applies to these issues or whether Article II(3) is a substantive provision at treaty level.

As regards the recognition of an arbitral award, Article V(1)(a) of the New York Convention expressly refers, with regard to determining the law applicable to the arbitration agreement underlying such award, to "*the law to which the parties have subjected it [the arbitration agreement] or failing any indication thereon, under the law of the country where the award was made*" (the law at the seat). As per its wording, Article V(1)(a) is a conflict rule.

It could be argued that in the interest of internal consistency, the New York Convention subjects the same arbitration agreement—whether a state court is confronted with it directly as an exception to its jurisdiction or indirectly in a recognition and enforcement context—to the same laws, i.e., the New York Convention provides the same conflict or substantive rule for both scenarios. Article V(1)(a) would then seem to indicate that, even the parallel provision in Article II(3) should be read as a conflict rule, and not as a substantive rule.[125]

However, this is not the end of the conflict of laws analysis. It leaves the question open whether, failing an express agreement of the parties on the law applicable to the substantive validity of the arbitration agreement, it is the substantive rules of the law of the seat that determine the substantive validity of the arbitration agreement, or whether the reference to the law of the seat in Article V(1)(a) and Article II(3) of the New York Convention includes this law's conflict of laws rules—that might refer to the law applicable to the main contract or some other law. Failing a stipulation at treaty level, this must be left to the respective domestic law.

Domestic law sometimes prescribes that an arbitration agreement is valid if it is valid under at least one of several laws.[126] Such provisions are conflict of laws rules pointing to several substantive rules to determine validity. They must be taken into account by any decision-making body that is bound to apply the respective conflict rules.

3. As regards the parties' *capacity* to enter into the particular arbitration agreement, Article V(1)(a) of the New York Convention refers to "*the law applicable to them*" (the

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122 CODE DE PROCÉDURE CIVILE [C.P.C.] [CIVIL PROCEDURE CODE] art. 1504 (Fr.) [*hereinafter* "French C.P.C."] ("An arbitration is international when international trade interests are at stake.").

123 *Id.* art. 1507.

124 New York Convention, art. II(1).

125 *See* Wolff, *supra* note 77, ¶ 42.

126 On the corresponding example of Swiss law, *see* sources cited *supra* note 98.

parties). A similar conflict rule would seem to apply in the context of the recognition of the arbitration agreement,[127] although Article II is silent on the matter. Thus, insofar as the New York Convention applies, state courts determine the law governing the parties' capacity to contract separately from the other issues of the arbitration agreement's validity.

iii. Scope

Finally, a state court determines the laws applicable to the arbitration agreement's scope. The New York Convention provides little guidance on this matter.[128]

B. The Perspective of Arbitral Tribunals

When confronted with a particular arbitration agreement, and when determining whether it is admissible, valid and covering the specific claim raised, arbitral tribunals also need to start with determining the applicable laws. Although seemingly similar to the conflict of laws analyses conducted by state courts, an arbitral tribunal's task, in this context, is rendered much more difficult, in the sense of legal theory, as well as from a practical point of view, by the fact that arbitral tribunals do not have their own conflict of laws rules as a starting point. This is one important consequence of the fact that arbitral tribunals have no *lex fori* of their own **[Part IV.B.i]**—the other consequence being that they do not have their own procedural rules. Notwithstanding this, and given that arbitral tribunals cannot avoid a conflict of laws analysis, practice has found ways to deal with this dilemma **[Part IV.B.ii]**.

i. Theoretical Obstacles to Arbitral Tribunals Determining Conflict of Laws Rules

When conducting a conflict of laws analysis, state court judges have a solid starting point: their own conflict of laws rules, i.e., the conflict of laws rules applicable in the jurisdiction in which the judge is hearing the case—those of the *lex fori*. The judge may need to look at international treaties, such as, the New York Convention or the Hague Convention; at EU law, such as, the Rome or Brussels Ia Regulations; and at domestic law to locate all relevant (conflict) rules. But the judge has a way to clarify which of these rules apply and which regulatory level takes precedence (hierarchy of norms). The highest court in each jurisdiction will authoritatively settle potential disputes as to the right approach. Arbitrators, on the other hand, do not have their own conflict of laws rules.[129] They have no *lex fori*.[130]

Some commentators point to the conflict of laws rules of the *lex arbitri* as a starting point.[131] This is indeed one among several possible solutions. But it is not the only one, as the *lex arbitri* is not the arbitrators' own law either.[132] What do we mean by that?

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127 Wolff, *supra* note 77, ¶ 46.

128 For details, *cf. Id.* ¶¶ 43 *et seq.*

129 Carlo Croff, *The Applicable Law in an International Commercial Arbitration: Is It Still a Conflict of Laws Problem?*, 16(4) THE INTERNATIONAL LAWYER 613, 613 (1982); V.S. Deshpande, *The Applicable Law in International Commercial Arbitration*, 31(2) J. INDIAN L. INST. 127, 128 (1989); Tschanz, *supra* note 77, art. 187, ¶ 10; SCHLOSSER, *supra* note 10, ¶ 209.

130 SCHLOSSER, *supra* note 10, ¶ 726; BERGER & KELLERHALS, *supra* note 13, ¶ 1375.

131 *See, e.g.,* DANIEL GIRSBERGER & NATHALIE VOSER, INTERNATIONAL ARBITRATION: COMPARATIVE AND SWISS PERSPECTIVES ¶ 1402 (3d ed. 2016) [*hereinafter* "GIRSBERGER & VOSER"].

132 Johannes Landbrecht, *Strong by Association: Arbitration's Policy Debates, Mandatory Rules, and PIL Scholarship*, 37(2) ASA BULL. 305, 307 (2019) [*hereinafter* "Landbrecht"]; *cf.* specifically with regard to arbitrability, Bernard Hanotiau, *L'arbitrabilité et le favor arbitrandum: un réexamen*, 4 J. DU DROIT INT'L 899, 911 *et seq.* (1994).

A simple comparison illustrates the point. A state court judge is bound to apply his or her law, and knows which law that is, before ever being seized, i.e., before ever hearing about the parties' dispute. An arbitrator on the other hand, does not know which law he or she might be called upon to apply, and whether he or she might be asked to make determinations as an arbitrator in the first place—until appointed in a specific dispute. For arbitrators, therefore, the appointment comes first, and then they conduct the conflict of laws analysis in light of it. For state court judges, on the other hand, not only the structure but also the content of their conflict of laws analysis is certain before they ever hear about the case. For them, the legal order that makes them judges always takes precedence over the dispute.

Subject to express provisions to the contrary,[133] and although some have argued otherwise,[134] arbitrators as private decision-makers are not agents of a particular state, not even of the state in which is located the seat of the arbitration.[135] Therefore, they do not owe any independent duty to any state as decision-makers.[136] The status of state court judges is different, given that they swear an oath of office, promising to serve and uphold a specific legal order.[137]

In turn, arbitrators do not derive powers from the *lex arbitri*,[138] or any other arbitration law. A state may offer to accept a tribunal's decisions in case they comply with the requirements of the state's arbitration law. Yet the state usually reserves the right to review any such decision. To provide but one example, again from Swiss law: tribunals "*may*" order protective measures under Article 183(1) of the Swiss PILA. Yet, those measures will not be enforced directly—which they would if arbitral tribunals were granted powers under this provision. Rather, tribunals need to seek assistance from a state court in accordance with Article 183(2) of the Swiss PILA. It would then seem only logical that, if arbitrators are not empowered by this provision, they are also not obliged by it—at least not directly by the fact of it being a provision of the relevant arbitration law; although, they may be obliged to apply this provision, or refrain from doing so, because the parties so direct them.

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133 A certain domestic legal order may establish arbitral tribunals as state organs. Yet insofar as their jurisdiction is not based on a voluntary submission agreement, resulting awards would fall outside the scope of the New York Convention, *see* Bernd Ehle, *Article I*, *in* NEW YORK CONVENTION. COMMENTARY ON THE CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS OF 10 JUNE 1958 ¶ 87 (Reinmar Wolff ed., 2019).

134 *See, e.g.,* HANS-JÜRGEN HELLWIG, ZUR SYSTEMATIK DES ZIVILPROZESSUALEN VERTRAGES 54 *et seq.* (1968), referred to by GERHARD WAGNER, PROZEßVERTRÄGE 582 (1998), who, however, rejects this view.

135 *Cf.* Marco Stacher, *Der unzuständige Schiedsrichter*, SCHWEIZERISCHE ZEITSCHRIFT FÜR ZIVILPROZESS- UND ZWANGSVOLLSTRECKUNGSRECHT (ZZZ) 58 (2013) (the arbitrators are not exercising official authority of the state ("*keine hoheitliche Gewalt*")).

136 *See* Charalambos Pamboukis, *On Arbitrability: The Arbitrator as a Problem Solver, Thoughts About the Applicable Law on Arbitrability* in ARBITRABILITY: INTERNATIONAL AND COMPARATIVE PERSPECTIVES 124, ¶¶ 7–10 (Loukas Mistelis & Stavros Brekoulakis eds., 2009); Johannes Landbrecht, *supra* note 132, at 307 *et seq.* Rules of deontology, criminal law, administrative law (including work permits), taxes etc, that are applicable to the arbitrators in their personal capacity, regardless of their function as decision-makers, are a different matter.

137 *See, e.g.*, GRUNDGESETZ [GG] [BASIC LAW] art. 20(3) (Ger.) (according to which the judiciary is bound by law and justice—"*an Gesetz und Recht gebunden*"); in connection with DEUTSCHES RICHTERGESETZ [DRiG] [GERMAN JUDICIARY ACT] § 38(1) (concerning the judicial oath: "A judge shall take the following oath at a public sitting of the court: "I swear to exercise the judicial office in conformity with the Basic Law of the Federal Republic of Germany and with the law, to adjudicate to the best of my knowledge and belief, without distinction of person, and to serve the cause of truth and justice alone—so help me God".").

138 Tschanz, *supra* note 77, art. 187 ¶ 5.

Arbitral tribunals are thus required to create their own conflict of laws approach *ad hoc*. They might determine the applicable laws via the conflict of laws rules of the law of the seat[139] or some other law—which has been called indirect reference (*voie indirect*). Alternatively, tribunals might create their own conflict of laws rules or apply certain substantive rules without thinking too much about a conflict of laws analysis—although thereby, logically, not avoiding it—which has been called direct reference (*voie directe*).[140]

The only thing that would be wrong to argue is that arbitral tribunals do not apply any conflict of laws rules at all. For any rule that a tribunal uses—and if need be creates *ad hoc*—in order to determine applicable laws, is, from a structural and functional perspective, a conflict rule; maybe not a domestic one, but a conflict rule nevertheless; maybe the arbitral tribunal does not make a complicated conflict of laws analysis, but it needs to determine the applicable law—which is a conflict of laws analysis.[141]

How should arbitral tribunals proceed when creating their own conflict of laws approach *ad hoc*? The fact that they are, from a legal theory point of view, fairly unrestricted in developing their conflict of laws approach, does not provide an answer to how these conflict of laws rules should look like.

While an arbitral tribunal could apply conflict of laws rules specifically chosen by the parties, this option will rarely be available in practice—for lack of such choice. Also, a "*closest connection test,*" which is sometimes proposed in this context, provides little guidance—as long as it is unclear what a *"connection*" is, and what "*close*" should be, and to what.

The arbitral tribunal's analysis will, to a large extent, depend on the parties' agreements and choices, even if they have not chosen the applicable conflict of laws rules specifically. For the sake of clarity, the aforementioned does not say—and as submitted, this would be a wrong approach—that tribunals always have full discretion as to which conflict of laws approach they follow. Domestic law might provide for such discretion.[142] However, this would be no starting point for the tribunal—as it cannot rely directly on any domestic law. The parties' appointment comes—logically—before any law the tribunal would be obliged and could determine to apply. Only if the parties authorise the tribunal to exercise discretion, for instance by referring to institutional arbitration rules,[143] or indeed a particular domestic arbitration law,[144] would the tribunal be empowered to exercise discretion. All else, i.e., a determination of the relevant conflict of laws approach without regard to the parties' instructions would be an arbitrary determination of this conflict of laws approach that must be avoided.[145]

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139 *See* GIRSBERGER & VOSER, *supra* note 131, ¶ 1402.
140 BERGER & KELLERHALS, *supra* note 13, ¶ 1377.
141 *See* SCHLOSSER, *supra* note 10, ¶ 729.
142 *See, e.g.,* UNCITRAL Model Law, art. 28(2); French C.P.C., art. 1511(1).
143 *E.g.,* International Chamber of Commerce (ICC), Arbitration Rules 2021, art. 21(1)(2) [*hereinafter* "ICC Rules 2021"].
144 BERGER & KELLERHALS, *supra* note 13, ¶ 1377.
145 *See* SCHLOSSER, *supra* note 10, ¶ 726, with references also to the opposite view.

We cannot address all the details of how arbitral tribunals should determine the applicable law to arbitration agreements[146] and must limit ourselves to a few general thoughts.

ii. General Approach in a Nutshell

In practice, the laws most frequently used by arbitral tribunals to handle arbitration agreements are probably (1.) the laws chosen—expressly or impliedly through designating a law applicable to the main contract—by the parties, and (2.) the arbitration law of the seat (*lex arbitri*).[147] This may include the conflict of laws rules of those laws. Such general statement of a factual rather than legal nature is difficult to verify empirically. It is therefore made with all possible reservations.

But why is it at least likely that this statement is indeed correct? And what should an arbitral tribunal do if the analysis according to those laws does not yield a satisfactory result?

An arbitral tribunal could start with considering its mission, which is to decide, upon the parties' instruction, a dispute by rendering an arbitral award. Considering that the arbitral tribunal ultimately derives its authority from the parties' agreement, it is primarily the parties' interests—subject to the arbitral tribunal not violating general laws of a criminal, administrative, deontological nature etc.—that should be on the tribunal's mind.

This explains the common respect for and acceptance, to a very large extent, of the parties' choices (party autonomy). The principle of party autonomy is widely, and increasingly, respected as the starting point of any conflict of laws analysis—also in a domestic state court context.[148] In this respect, arbitration is not an outlier, but perfectly in sync with general developments of conflict of laws related legal theory.[149]

Explaining the penchant for applying the *lex arbitri* requires some intermediate steps.

The parties will be interested in receiving an award that is of practical usefulness to them. This usually means, on the one hand, that the award should not be set aside. Since it is difficult, although not impossible,[150] to enforce internationally an award set aside at the seat, its practical usefulness would otherwise be reduced. On the other hand, the parties require an award that can be enforced wherever they need it to be enforced—which they sometimes make clear in their arbitration agreement, for instance, by referring to arbitration rules that contain a duty, or incumbency, on the part of the arbitral tribunal to ensure enforceability.[151]

When resolving conflict of laws issues, the arbitral tribunal should thus, first and foremost, consider risks of setting aside and possible obstacles to enforcement. As discussed above, the provisions of international treaties, such as the New York Convention, and domestic laws, contain

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146 For the relevant aspects, *see supra* Part III.

147 *Cf.* SCHLOSSER, *supra* note 10, ¶¶ 228 *et seq*.

148 *See* the recent and comprehensive study in SAGI PEARI, THE FOUNDATION OF CHOICE OF LAW: CHOICE AND EQUALITY (2018).

149 *See* Landbrecht, *supra* note 132, at 308.

150 *See, e.g.,* BORN, *supra* note 30, § 16.05; Amanda Lee & Harald Sippel, *To Enforce or Not to Enforce: That is the Question: Arbitral Awards Set Aside at Their Seat*, *in* ARBITRAL AWARDS AND REMEDIES, 8 CZECH (& CENTRAL EUROPEAN) YEARBOOK OF ARBITRATION (Alexander J. Belohlávek & Nadezda Rozehnalová eds., 2018).

151 *See, e.g.,* ICC Rules 2021, art. 42.

many pointers as to the criteria for setting aside (*lex arbitri*) and enforcement (*lex loci executionis*). These provide at least some guidance for the resolution of conflict of laws issues.

For instance, arbitral tribunals are often prohibited, by virtue of the parties' agreement—through a reference to arbitration rules or a domestic arbitration law—from deciding *ex aequo et bono* or as *amiable compositeur*.[152] This is a negative conflict rule: the tribunal must, when deciding the claims brought before it, make a legal analysis, and such legal analysis, by definition, must contain—however rudimentary—a conflict of laws analysis. Even when implementing the parties' express authorisation to decide *ex aequo et bono*, the tribunal would apply a conflict rule—the parties' authorisation to not having to make a full legal assessment.

As long as the requirements under the *lex arbitri* and the *lex loci executionis* are compatible, following this approach—which is probably what most practitioners intuitively do—is a safe way forward. If those requirements are not too specific, the arbitral tribunal may indeed have considerable leeway—although still impliedly through the parties' agreement.

Yet what should the arbitral tribunal do if the requirements under the *lex arbitri* and a potential *lex loci executionis* are incompatible? The arbitral tribunal would then need to ask itself, and the parties, what is more important: an award that does not risk setting aside but may not be enforceable in a particular jurisdiction (although potentially somewhere else?)—the *lex arbitri*'s approach to conflict of laws issues should then take precedence; or an award that risks setting aside, but could be enforced in a relevant jurisdiction[153]—the *lex loci executionis*'s approach should then prevail.

V. Conclusion

Arbitral tribunals must, like any decision-making body, start their analysis of a given case by determining the applicable laws. While not necessarily elaborate, depending on the legal framework and facts, arbitral tribunals always conduct a conflict of laws analysis.

For arbitral tribunals to conduct such conflict of laws analysis properly, they must *ad hoc* create and apply conflict of law rules of their own, related to the admissibility, validity and scope category of arbitration agreements—given that they are not obliged, in their function as decision-makers, to uphold any specific domestic legal order. Even if tribunals refer to the conflict rules of the *lex arbitri* or look for a closest connection, they make a choice of their own—as neither the *lex arbitri* is gospel for the tribunal, nor a closest connection standard cast in stone. A state court judge can point to his or her own conflict rules, hide behind them, and otherwise decline responsibility. But arbitral tribunals are not in such a comfortable position.

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[152] *See, e.g.,* French C.P.C., art. 1512; ZIVILPROZESSORDNUNG [ZPO] [CODE OF CIVIL PROCEDURE] § 1051(3) (Ger.); Swiss PILA, art. 187(2); ICC Rules2021, art. 21(3).

[153] It is far from certain that an award set aside would *not* be enforced elsewhere. *See* sources cited *supra* note 150.

THE ARBITRABILITY DOCTRINE AND TRIBULATIONS OF TRIBUNALISATION

Harshad Pathak[*] *& Pratyush Panjwani*[†]

Abstract

Commercial arbitration frequently places the principle of party autonomy in conflict with a state's public policy considerations. The arbitrability doctrine is one such manifestation of this tendency. While many acknowledge the notion of arbitrability as a dying breed, India has remained immune to this apparent process of decay. However, while arbitrability continues to be a robust limitation to party autonomy in India, it is undergoing a gradual evolution. Under the garb of arbitrability, Indian courts now also assess if the establishment of special tribunals, either expressly or impliedly, ousts an otherwise private dispute from the purview of arbitration. The authors question this extension of the arbitrability doctrine in India and argue in favour of disassociating it from the process of tribunalisation of justice.

I. Introduction

Commercial arbitration—be it domestic or international—stands as a popular exception to the usual route of adjudicating disputes before the national courts of a state. It is an alternative method of dispute resolution premised on the autonomy of the disputing parties, who agree to resolve their disputes before an arbitral tribunal constituted solely for this purpose. But while party autonomy provides the basis for a tribunal's jurisdiction, the limitations attached to this principle emanate from the state. After all, the disputing parties possess the autonomy to refer only those disputes to arbitration that are capable of being resolved through arbitration in the first place.

Across several jurisdictions, arbitral statutes and judicial decisions stipulate certain categories of disputes that are not capable of settlement by arbitration, thereby relieving them from the state's obligation to recognise and enforce arbitration agreements. Thus, to determine whether a dispute is capable of being settled by arbitration is a fundamental exercise.

The rationale behind the aforementioned limitation stems from the fact that though arbitration is a private method of dispute resolution, it bears potential to impose consequences upon the public at large. Accordingly, one rightly questions whether all kinds of disputes ought to be arbitrated at all; especially when most arbitral proceedings and the resultant awards are confidential in nature. It then falls upon each state to decide which category of disputes may or may not be resolved by arbitration, in accordance with its own political, social and economic policy.[1] This limitation is called objective arbitrability.[2] While this understanding of the arbitrability doctrine is uncontested, the expression "*arbitrability*" is also sometimes given a broader meaning, particularly in the United

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1 REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION 111 (Nigel Blackaby, Constantine Partasides, Alan Redfern & Martin Hunter eds., 6th ed. 2015).

2 Henceforth, the expression "arbitrability" shall be construed as a reference only to objective arbitrability.

States, to encompass issues relating to the existence and validity of parties' consent to arbitration.[3] That is not what the authors refer to herein.

Conventionally, the notion of arbitrability entails an enquiry into which types of disputes are capable of settlement by arbitration, and which are not.[4] It imposes a duty upon national courts as well as arbitral tribunals to inquire this question, by reference to the applicable law.[5] However, the notion of arbitrability is undergoing a gradual evolution in India. Under the garb of the arbitrability doctrine, Indian courts now also assess whether the establishment of any special tribunals having subject-matter jurisdiction over the dispute under the applicable law, expressly or impliedly, ousts such dispute from the purview of arbitration. The authors refer to the process of establishing these special tribunals as "*tribunalisation*" or "*tribunalisation of justice.*"

It is this extension of the arbitrability doctrine in India that constitutes the focus of this article. Part II examines the general rule of arbitrability in India and identifies the various exceptions to this rule as identified by the Indian courts. Thereafter, Part III scrutinizes the impact of the proliferation of special tribunals on the arbitrability discourse in India and assesses if the same is justified or not. Part IV suggests a suitable approach to be adopted in India. Finally, Part V of the article provides some concluding comments.

II. The Arbitrability Doctrine in India

The relationship of Indian arbitration law with the concept of arbitrability is characterized by a long stint of distrustful flirtation, with scattered glimpses of stability and coherence. Section 20(4) of the Indian Arbitration Act, 1940 (equivalent to Section 8 of the Arbitration and Conciliation Act 1996 ["**Arbitration Act**"]) required one to show "*sufficient cause*" for any matter to not be referred to arbitration. Under this provision, Indian courts assumed substantial discretion in referring matters to arbitration.[6] This served as a window for courts to view arbitration with ample suspicion, and refuse referring a matter to arbitration on a ground as generic as "*coming to the conclusion that in arbitration complete justice cannot be obtained between the parties*."[7]

While one would expect this scepticism towards arbitration to be remedied to some extent by the revamped Arbitration Act, such a remedy, at least in an acceptably unequivocal form, came much after its enactment. For long, Indian courts struggled to come to terms with how the Arbitration Act changed the regime so far as arbitrability was concerned. As the Madras High Court noted in *H.G. Oomor Sait* v. *O Aslam Sait* (subsequently cited by the Supreme Court[8] and high courts),[9] "*the*

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3 *See* First Options of Chicago, Inc. v. Kaplan 514 U.S. 938, 942–943 (1995).

4 Karim Abou Youssef, *The Death of Inarbitrability*, *in* ARBITRABILITY: INTERNATIONAL AND COMPARATIVE PERSPECTIVES 47 (Loukas Mistelis & Stavros Brekoulakis eds., 2009).

5 *See* United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art. V(2), June 10, 1958, 330 U.N.T.S. 38; United Nations Comm'n on Int'l Trade Law (UNCITRAL), Model Law on International Commercial Arbitration, arts. 34(2)(b)(i), 36(1)(b)(i), 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).

6 *See* Abdul Kadir Shamsuddin Bubere v. Madhav Prabhakar Oak, (1962) 3 SCR 702 (India) [*hereinafter* "Madhav Prabhakar"].

7 Majeti Subbahiah & Co. v. Tetley & Whitley, 1923 SCC OnLine Mad 92 (India).

8 N. Radhakrishnan v. Maestro Engineers, (2010) 1 SCC 72, ¶ 25 (India) [*hereinafter* "N. Radhakrishnan"].

9 *See, e.g.,* Baburaj v. Faizal, 2014 SCC OnLine Ker 28591, ¶ 7 (India).

present Act had done [nothing] to remove the […] inadequacies and deficiencies which are inherent in an arbitration proceeding."[10] An indication of the said inadequacies comes in the following notable finding:

> "*[W]here […] the decision would depend upon consideration of minute details of evidence, it is always desirable to let the civil court to go into the issue rather than to leave it to the Arbitrator before whom the nature of the proceedings are summary and rules of evidence are not applicable.*"[11]

In addition to reflecting the Indian courts' continued cynicism towards arbitrators' capabilities to determine certain disputes, this finding represents an evident misunderstanding of how arbitral procedure works in general. Contemporaneous with these decisions also came other decisions where the courts either sidestepped the issue of arbitrability when it arose,[12] or laid out a fairly misdirected understanding of the concept.[13]

Thus, it comes as no surprise that scholars often hailed Section 2(3) of the Arbitration Act as the "*touchstone*" of the Indian approach to arbitrability[14] or the "*only guide*" in respect thereof, while simultaneously acknowledging that the provision itself was not indicative of either how arbitrability is to be conceived or what kinds of disputes are considered inarbitrable.[15] In fact, as recently as late-2020, a three-judge bench of the Supreme Court of India referred to the text of Sections 2(3) and 34(2)(b)(i) of the Arbitration Act to immediately conclude that the Act "*clearly recognizes and accepts that certain disputes or subjects are not capable of being resolved by arbitration.*"[16]

Indian courts' unwavering reliance on Section 2(3) as the legal foundation of the arbitrability doctrine in India is intriguing. After all, the provision only stipulates that "*[t]his Part [of the Arbitration Act] shall not affect any other law for the time being in force by virtue of which certain disputes may not be submitted to arbitration.*" While a detailed discussion on this provision is reserved for Part IV, for now, it suffices to mention that apart from its general priority in favour of other prohibiting statutes, the provision is certainly not the reservoir of how Indian law understands arbitrability.

Ultimately, the provisions of the Arbitration Act "*do not enumerate or categorize non-arbitrable matters*" nor do they lay out the principles for determining the arbitrability (or not) of a dispute. These principles are ultimately for the courts to formulate.[17]

A. *Booz Allen* – Establishing the General Rule and Exceptions

In order to obtain a discernible insight into this understanding of arbitrability, one had to wait until the Supreme Court of India's ruling in *Booz Allen and Hamilton Inc.* v. *SBI Home Finance Ltd.* ["**Booz**

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10 H.G. Oomor Sait v. O. Aslam Sait, 2001 SCC OnLine Mad 465, ¶ 29 (India).
11 *Id.* ¶ 39(B).
12 Vipin Kumar Gadhok v. Ravinder Nath Khanna, (2007) 10 SCC 623, ¶¶ 9, 12 (India).
13 Haryana Telecom Ltd. v. Sterlite Industries (India) Ltd., (1999) 5 SCC 688, ¶¶ 4, 5 (India) [*hereinafter* "Haryana Telecom"].
14 Jack Wright Nelson, *International Commercial Arbitration in Asia: Hong Kong, Australia and India Compared*, 10(2) ASIAN INT'L ARB. J. 105, 118 (2014).
15 Vinay Reddy & V. Nagaraj, *Arbitrability: The Indian Perspective*, 19(2) J. INT'L ARB. 117, 120 (2002).
16 Vidya Drolia v. Durga Trading Corporation, (2021) 2 SCC 1, ¶ 33 (India) [*hereinafter* "Vidya Drolia II"].
17 *Id.*

Allen"], even though there were prior instances wherein the Supreme Court had touched upon findings in the nature of what the apex court laid down herein.[18]

In *Booz Allen*, the Supreme Court of India held that "*[a]rbitral tribunals are private fora chosen voluntarily by the parties to the dispute, to adjudicate their disputes in place of courts and tribunals which are public fora constituted under the laws of the country*."[19] On such premise, the Court went on to prescribe what has since become the foundational rule of arbitrability in India:

> "*Generally and traditionally, all disputes relating to rights in personam were amenable to arbitration; [while] all disputes relating to the rights in rem are required to be adjudicated by courts and public tribunals, being unsuited for private arbitration.*"[20]

On the face of it, this seemingly straightforward finding of the Court reflects a subject-matter-centric understanding of the arbitrability doctrine. However, while the apex court did articulate the above test of arbitrability in terms of the subject matter of the dispute, its allegiance to this idea was not exclusive. Finding that the above proposition was not a "*rigid or inflexible rule,*"[21] the Court recognized that certain disputes, although *in personam* in nature, may nonetheless be regarded inarbitrable, since they may either be explicitly reserved for public fora by the legislature "*as a matter of public policy*," or stand excluded from the purview of private fora "*by necessary implication*."[22] In laying down this exception to the general rule, the Court appeared to pay homage to the essence of Section 2(3) of the Arbitration Act, while adding additional layers of public policy considerations and exclusion by necessary implication. Notably, it steered clear from defining the scope and extent of the public policy exceptions of arbitrability, or how public policy interacts with arbitrability.

There is no doubt that *Booz Allen* has grown to be the seminal authority in respect of the general rule of arbitrability in India, i.e., the delineation between disputes relating to rights *in personam,* which are generally considered arbitrable, and those relating to rights *in rem,* which are categorized as inarbitrable. The apex court effectively provided for two doorways to the elusive box of inarbitrability. The first came in the form of its general rule, which assigned all disputes in respect of *in rem* rights into the realm of inarbitrability. The second came in the form of the exception to this general rule, whereby the Court found that certain *in personam* disputes, which would ordinarily be arbitrable, may still find place in the box of inarbitrability due to considerations of public policy.

The second category of exception is explored in Part II.C of this article. However, as far as the first kind of inarbitrable disputes, i.e., those pertaining to rights *in rem,* is concerned, the Supreme Court itself listed the following "*well recognized examples*":

(i) Disputes relating to rights and liabilities which give rise to or arise out of criminal offences;
(ii) Matrimonial disputes relating to divorce, judicial separation, restitution of conjugal rights, child custody;
(iii) Guardianship matters;

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18 Haryana Telecom, (1999) 5 SCC 688 (India); Olympus Superstructures Pvt. Ltd. v. Meena Vijay Khetan (1999) 5 SCC 651, ¶ 37 (India).
19 Booz Allen & Hamilton Inc. v. SBI Home Finance Ltd., (2011) 5 SCC 532, ¶ 35 (India) [*hereinafter* "Booz Allen"].
20 *Id.* ¶ 38.
21 *Id.*
22 *Id.* ¶ 35.

(iv) Insolvency and winding up matters;
(v) Testamentary matters (grant of probate, letters of administration and succession certificate); and
(vi) Eviction or tenancy matters governed by special statutes where the tenant enjoys statutory protection against eviction and only the specified courts are conferred jurisdiction to grant eviction or decide the disputes.[23]

B. Deciphering Further Exceptions to the General Rule

Given the state's inherent discretion in determining the kinds of disputes that are amenable to arbitration, based on the malleable notions of public rights, policies, and the social and economic fabric of the state, the above list could not have been intended to be inflexible. Indeed, the Supreme Court of India recently acknowledged that "*exclusion from arbitrability is predominantly a matter of case law*."[24] This is confirmed by the fact that subsequent to the *Booz Allen* judgment, in 2016, the Supreme Court itself had "*added a seventh category of cases to the six non-arbitrable categories set out in Booz Allen,*"[25] namely, disputes relating to trusts, trustees and beneficiaries arising out of a trust deed and the Indian Trust Act, 1882 ["**Trust Act**"].[26] Notwithstanding the propriety of the Supreme Court's rationale in coming to this conclusion, which is discussed in Part III.A of this article, it is notable that this decision takes the tide of arbitrability of trust disputes in the opposite direction to the one shown by the single judge of the Delhi High Court. The single judge's order, the precedential value of which has been called in question by the apex court since,[27] noted that "*[a]ny dispute between the beneficiaries [of a trust] can be referred to the arbitration […] if there is an independent [a]rbitration [a]greement between the beneficiaries for referring the dispute to the arbitration.*"[28]

A similar fluctuation in the Indian judiciary's stance on arbitrability is also reflected in respect of intellectual property disputes, oscillating between a rigid and a more relaxed understanding of the arbitrability doctrine.[29] Disputes relating to "*patent, trademarks and copyright*" were traditionally considered inarbitrable.[30] However, Indian courts have recently begun to add certain nuances to the discourse surrounding the arbitrability of intellectual property disputes.

Refusing to acknowledge an "*absolute principle that all disputes in trade mark and copyright infringement and passing off are […] inarbitrable,*"[31] the Bombay High Court in *Eros International Media Ltd.* v. *Telemax Links India Pvt. Ltd.* ["**Eros Int'l**"] found that in an infringement or a passing off claim, the rights and remedies in question "*can only ever be an action in personam […] What is in rem is the Plaintiff's or registrant's entitlement to bring that action. That entitlement is a result of having obtained or acquired copyright (either by authorship or assignment) or having statutory or common law rights in a mark.*"[32] On this basis, the

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23 *Id.* ¶ 36.
24 Vidya Drolia II, (2021) 2 SCC 1, ¶ 33 (India).
25 A. Ayyasamy v. A. Paramasivam, (2016) 10 SCC 386, ¶ 35 (India) [*hereinafter* "Ayyasamy"].
26 *See* Vimal Kishore Shah v. Jayesh Dinesh Shah, (2016) 8 SCC 788 (India) [*hereinafter* "Vimal Kishore Shah"].
27 *See* State of West Bengal v. Associated Contractors, (2015) 1 SCC 32 (India).
28 Chhaya Shriram v. Deepak C. Shriram, 2008 SCC OnLine Del 233, ¶ 8 (India).
29 *See generally* Utkarsh Srivastava, *Putting the jig saw pieces together: an analysis of the arbitrability of intellectual property right disputes in India*, 33(4) ARB. INT'L. 631 (2017).
30 Ayyasamy, (2016) 10 SCC 386, ¶ 14 (India).
31 Eros International Media Ltd. v. Telemax Links India Pvt. Ltd., 2016 SCC OnLine Bom 2179, ¶ 14 (India) [*hereinafter* "Eros Int'l"].
32 *Id.* ¶ 17.

Court found an action in respect of infringement of a copyright to be arbitrable. In *Lifestyle Equities CV* v. *QDSeatoman Designs Pvt. Ltd.*,[33] the Madras High Court took a similar position, holding that "*while a patent right may be arbitrable, the very validity of the underlying patent is not arbitrable.*"[34]

The decisions of the Bombay High Court and Madras High Court were consistent with certain prior decisions that had reached a similar conclusion, without clearly articulating the underlying legal justification. For instance, the Delhi High Court, in *Ministry of Sound International Ltd.* v. *Indus Renaissance Partners Entertainment Pvt. Ltd.*,[35] had rejected a contention that an arbitration clause "*relating to breach of obligation of confidentiality or infringement of intellectual property right*" was inarbitrable.[36] Similarly, the Supreme Court of India, in a matter arising out of a petition under Section 9 of the Arbitration Act, had also shown no hesitation in upholding an interim order rendered in support of arbitration proceedings in respect of a breach of a deed of assignment of a trademark.[37] Although the question of arbitrability did not directly come up in this case, it evidently treated the matter as a purely contractual one, despite the involvement of intellectual property rights. More recently, the Delhi High Court endorsed the arbitrability of a dispute pertaining to the cancellation of a trademark on the ground that "*[t]he right that [wa]s asserted […] [wa]s not a right that emanates from the Trademark Act but a right that emanates [from a contract].*"[38]

On the other hand, shortly after the judgment in *Eros Int'l*, the Bombay High Court in *IPRS Ltd.* v. *Entertainment Network (India) Ltd.*,[39] arrived at a decision seemingly to the contrary; this time also in the context of copyright law. The Court observed that the arbitrator had "*rendered a finding on the legal character and validity of the ownership of the respondent in the copyright, and thus the said award would be in the nature of an adjudication on an action in rem.*"[40] Accordingly, relying on the general rule of arbitrability laid down in *Booz Allen*, and the exceptions thereto, the Court concluded that being equivalent an action in *rem*, the copyright dispute "*could not have been adjudicated upon by the learned arbitrator at all and could be decided only by a Civil Court.*"[41]

This is not to suggest that any civil dispute between the disputing parties will be automatically rendered inarbitrable merely because it appears to implicate an interest *in rem*. For it to be rendered inarbitrable, the resolution of the dispute must necessarily result in a judgment *in rem*. Indeed, this was the precise controversy raised before the Supreme Court of India in *Deccan Paper Mills Co. Ltd.* v. *Regency Mahavir Properties*.[42] There, it was contended that a suit for cancellation of a written instrument in terms of Section 31 of the Specific Relief Act, 1963 ["**SRA**"], with "*the proceeding under section 31 being a proceeding in rem, would fall within one of the exceptions made out in [Booz Allen],*" and

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33 Lifestyle Equities CV v. QDSeatoman Designs Pvt. Ltd., 2017 SCC OnLine Mad 7055 (India).
34 *Id.* ¶ 5(t).
35 Ministry of Sound International Ltd. v. Indus Renaissance Partners Entertainment Pvt. Ltd., 2009 SCC OnLine Del 11 (India).
36 *Id.* ¶ 4(b).
37 Suresh Dhanuka v. Sunita Mohapatra, (2012) 1 SCC 578, ¶¶ 44, 48 (India).
38 Golden Tobie Private Ltd. v. Golden Tobacco Ltd., 2021 SCC OnLine Del 3029, ¶ 16 (India).
39 The Indian Performing Right Society Ltd. v. Entertainment Network (India) Ltd., (2016) SCC Online Bom 5893 (India).
40 *Id.* ¶ 140.
41 *Id.* ¶ 152.
42 Deccan Paper Mills Co. Ltd. v. Regency Mahavir Properties, 2020 SCC OnLine SC 655 (India) [*hereinafter* "Deccan Paper Mills"].

therefore, be inarbitrable.[43] However, rejecting this argument, and overruling the judgment of the High Court of Telangana in *Aliens Developers Private Ltd.* v. *M. Janardhan Reddy*,[44] the Supreme Court of India reached a contrary conclusion by reference to several provisions of the SRA.

At the outset, with respect to the relief for rescission of a contract under Section 27 of the SRA, the Court explained that a judgment relating to a rescission of contract cannot be a judgment *in rem*, since the rescission inherently applies only *inter partes.*[45] Extending the same consideration to a determination of voidance, the Court held that "*when a written instrument is adjudged void or voidable, the Court may then order it to be delivered up to the plaintiff and cancelled – in exactly the same way as a suit for rescission of a contract [and as such] it is clear that the action under section 31(1) is strictly an action inter parties or by persons who obtained derivative title from the parties, and is thus in personam.*"[46] Further, the Court overruled the reasoning laid down in *Aliens Developers* by stating that:

> "*According to the judgment in Aliens Developers […], the moment a registered instrument is cancelled, the effect being to remove it from a public register, the adjudicatory effect of the Court would make it a judgment in rem. Further, only a competent court is empowered to send the cancellation decree to the officer concerned, to effect such cancellation and "note on the copy of the instrument contained in his books the fact of its cancellation". Both reasons are incorrect. An action that is started under section 31(1) [of SRA] cannot be said to be in personam when an unregistered instrument is cancelled and in rem when a registered instrument is cancelled. The suit that is filed for cancellation cannot be in personam only for unregistered instruments by virtue of the fact that the decree for cancellation does not involve its being sent to the registration office […].*"[47]

In fact, the Court cited Section 4 of the SRA, which states that "*[s]pecific relief can be granted only for the purpose of enforcing individual civil rights,*"[48] to derive a broader proposition of law, i.e., it would be anomalous if all provisions of the SRA, by extension of Section 4, were considered to refer to *in personam* actions, but Section 31 alone was not.[49] Thus, the Court concluded that "*[a]ll these anomalies only highlight the impossibility of holding that an action instituted under section 31 of the [SRA] is an action in rem.*"[50]

C. The Public Policy Exception

The above subject matter merely exemplifies an interaction with arbitrability on the premise of the nature of rights, i.e., whether they are *in rem* or *in personam.* However, in addition to this, there have traditionally existed subject matters that are considered inherently unfit for arbitration in India based on public policy implications. This caters to the second doorway to inarbitrability that *Booz Allen* had prescribed, and typically includes matters of bribery/corruption, criminal complaints, matrimonial disputes, etc.[51] A subset of this category is the disputes involving allegations of fraud. Although the issue concerning fraud is not one simpliciter of arbitrability as it involves various layered aspects transgressing issues of contractual validity, fundamentally fraud has been

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43 *Id.* ¶ 2.
44 Aliens Developers Private Ltd. v. M. Janardhan Reddy, 2015 SCC OnLine Hyd 370 (India).
45 Deccan Paper Mills, 2020 SCC OnLine SC 655, ¶ 15 (India).
46 *Id.* ¶ 21.
47 *Id.* ¶ 22.
48 Specific Relief Act, No. 47 of 1963, § 4 (India).
49 Deccan Paper Mills, 2020 SCC OnLine SC 655, ¶ 30 (India).
50 *Id.* ¶ 33.
51 Ayyasamy, (2016) 10 SCC 386, ¶ 14 (India).

considered unfit for arbitration on the ground that a party charged with fraud should be given the option to vindicate its character in open court, and the subject matter should be publicly inquired.[52]

While Indian jurisprudence regarding arbitrability of fraud under the Arbitration Act went through a phase of uncertainty, with decisions of the apex court going in various directions, the Supreme Court of India has now reached an equilibrium in dealing with allegations of fraud. The seminal verdict in *N. Radhakrishnan* v. *Maestro Engineers* ["**N. Radhakrishnan**"] saw the apex court taking shelter under precedents from the Indian Arbitration Act, 1940 to find that "*since the case relates to allegations of fraud and serious malpractices on the part of the respondents, such a situation can only be settled in court through furtherance of detailed evidence by either parties and such a situation cannot be properly gone into by the Arbitrator.*"[53] The said judgment was subsequently interpreted by high courts in India to filter out serious allegations of fraud as inarbitrable, but let "*mere allegations*" of fraud or allegations that cannot be proved *prima facie*,[54] pass through as amenable to arbitration.[55]

Notably, the aforementioned line of jurisprudence has been held to be inapplicable to Section 45 petitions in respect of international arbitrations seated abroad.[56] That apart, the apex court had also doubted the credibility of this line of jurisprudence on one occasion, in the context of domestic arbitrations, alleging that the *N. Radhakrishnan* judgment was *per incuriam* for not considering Section 16 of the Arbitration Act and certain binding decisions of the apex court.[57] However, the unrest created as a result of this was recently undone by the Supreme Court in *A. Ayyasamy* v. *A. Paramasivam*, where it confirmed *N. Radhakrishnan* as good law and held as follows:

> "*[M]ere allegation of fraud in the pleadings by one party against the other cannot be a ground to hold that the matter is incapable of settlement by arbitration and should be decided by the civil court. [In order to be inarbitrable] the allegations of fraud should be such that not only these allegations are serious that in normal course these may even constitute criminal offence, they are also complex in nature and the decision on these issues demands extensive evidence for which civil court should appear to be more appropriate forum than the Arbitral Tribunal.*"[58]

In this regard, the 246th Report of the Law Commission of India ["**246th Report**"] considered it "*important to set this entire controversy to a rest and make issues of fraud expressly arbitrable [by proposing] amendments to section 16 [of the Arbitration Act].*"[59] It suggested the inclusion of a sub-section (7), which would state that the "*arbitral tribunal shall have the power to make an award or give a ruling notwithstanding that the dispute before it involves a serious question of law, complicated questions of fact or allegations of fraud, corruption etc.*" However, this amendment was not adopted in either the 2015 or the 2019

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52 Madhav Prabhakar, (1962) 3 SCR 702, ¶ 13 (India).
53 N. Radhakrishnan, (2010) 1 SCC 72, ¶ 21 (India).
54 Bharat Kantilal Bussa v. Sanjana Cryogenic Storage Ltd., 2013 SCC OnLine Bom 376, ¶ 21 (India).
55 Ivory Properties & Hotels v. Nusli Neville Wadia, 2011 SCC OnLine Bom 22, ¶ 16 (India); C.S. Ravishankar v. Dr. C.K. Ravishankar, 2011 SCC OnLine Kar 4128, ¶¶ 7, 8 (India).
56 World Sport Group (Mauritius) Ltd. v. MSM Satellite (Singapore) Pte. Ltd., (2014) 11 SCC 639, ¶¶ 36, 39 (India).
57 Swiss Timing Ltd. v. Commonwealth Games 2010 Organising Committee, (2014) 6 SCC 677, ¶ 20 (India).
58 Ayyasamy, (2016) 10 SCC 386, ¶ 18 (India).
59 Law Commission of India, Report No. 246 – Amendments to the Arbitration and Conciliation Act, 1996 (2014), at 28, ¶ 52.

revamp of the Arbitration Act. In any event, the above finding of the apex court in *Ayyasamy* was rendered after considering the 246th Report.

D. *Vidya Drolia* – Attempting to Tie Up Loose Ends

As recently as in December 2020, a three-judge bench of the Supreme Court of India in *Vidya Drolia* v. *Durga Trading Corporation*[60] ["**Vidya Drolia**"] revisited the scope and ambit of the arbitrability doctrine in India. In this case, the Supreme Court of India's mandate was to resolve a conflict between two contradictory judgments rendered by co-ordinate benches of the Supreme Court on the arbitrability of landlord-tenant disputes governed by the provisions of the Transfer of Property Act, 1882.[61] On one hand, in 2017, a two-judge bench of the Supreme Court of India in *Himangni Enterprises* v. *Kamaljeet Singh Ahluwalia* ["**Himangni Enterprises**"] had held that even in the absence of a special law, the rights of the parties would be governed by the Transfer of Property Act and would thus be triable before civil courts and not arbitrable.[62] On the other hand, in 2019, a subsequent two-judge bench of the Supreme Court, in *Vidya Drolia* v. *Durga Trading Corporation*, disagreed with this view, on the ground that the Transfer of Property Act was silent on arbitrability and thus did not negate it.[63] Thus, the Court found that "*the judgment in Himangni Enterprises […] will require a relook by a Bench of three Hon'ble Judges of this Court.*"[64]

In addition to resolving this conflict, the Supreme Court's three-judge bench in *Vidya Drolia* took the opportunity to develop the legal position established in *Booz Allen*. In a nutshell, the Court clarified the operation of the arbitrability doctrine in India through the following principles.

First, the Supreme Court reaffirmed the distinction between *in personam* and *in rem* rights. It cited the judgment in *Booz Allen* with approval to note that while disputes regarding the former are amenable to arbitration, those regarding the latter category of rights are inarbitrable and can be adjudicated exclusively by courts and public tribunals.[65]

Second, notwithstanding the above, the Court added further nuance to the above distinction. It alluded to a situation where a dispute involves both rights *in rem* and rights *in personam*, which in turn, makes it difficult to ascertain the arbitrability of the dispute. Accordingly, as per the Court, the "*[u]se expressions "rights in rem" and "rights in personam" may not be correct for determining non-arbitrability because of the inter-play between rights in rem and rights in personam. Many a times, a right in rem results in an enforceable right in personam.*"[66] Instead, the Court emphasised on determining whether a dispute results in a judgment that operates *in rem* or *in personam.*

In this regard, the Court explained what is meant by the two kinds of judgments:

> "*A judgment in rem determines the status of a person or thing as distinct from the particular interest in it of a party to the litigation; and such a judgment is conclusive evidence for and against all persons whether parties, privies or strangers of the matter actually decided. Such a judgment "settles the destiny of the res itself" and*

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60 Vidya Drolia II, (2021) 2 SCC 1 (India).
61 *Id.* ¶ 1.
62 Himangni Enterprises v. Kamaljeet Singh Ahluwalia, (2017) 10 SCC 706, ¶ 24 (India).
63 Vidya Drolia v. Durga Trading Corpn., (2019) 20 SCC 406, ¶ 24 (India).
64 *Id.* ¶ 26.
65 Vidya Drolia II, (2021) 2 SCC 1, ¶ 37 (India).
66 *Id.* ¶ 48.

> *binds all persons claiming an interest in the property inconsistent with the judgment even though pronounced in their absence. By contrast, a judgment in personam, "although it may concern a res, merely determines the rights of the litigants inter se to the res".*"[67]

Third, in a significant development, the Supreme Court affirmed that "*[d]isputes relating to subordinate rights in personam arising from rights in rem are considered to be arbitrable.*"[68] By making a reference to the *Booz Allen* judgment, the Court held that "*the subordinate rights in personam derived from rights in rem can be ruled upon by the arbitrators, which is apposite.*"[69] To illustrate this finding, it noted that "*a claim for infringement of copyright against a particular person is arbitrable, though in some manner the arbitrator would examine the right to copyright, a right in rem.*"[70] This way, the Court appeared to tacitly endorse the approach propounded by the Bombay High Court in *Eros Int'l.*

Critically, the Supreme Court also applied this principle to resolve the conundrum surrounding the arbitrability of landlord-tenant disputes under the Transfer of Property Act, 1882. It concluded that "*[l]andlord-tenant disputes governed by the Transfer of Property Act are arbitrable as they are not actions in rem but pertain to subordinate rights in personam that arise from rights in rem.*"[71]

Fourth, consistent with and building upon the *Booz Allen* judgment, the Court laid down a four-fold test for determining the various circumstances in which the subject matter of a dispute is not arbitrable under the Indian law:

> "*(1) when cause of action and subject matter of the dispute relates to actions in rem, that do not pertain to subordinate rights in personam that arise from rights in rem.*
>
> *(2) when cause of action and subject matter of the dispute affects third party rights; have erga omnes effect; require centralized adjudication, and mutual adjudication would not be appropriate and enforceable;*
>
> *(3) when cause of action and subject matter of the dispute relates to inalienable sovereign and public interest functions of the State and hence mutual adjudication would be unenforceable; and*
>
> *(4) when the subject-matter of the dispute is expressly or by necessary implication non-arbitrable as per mandatory statute(s).*"[72]

The Supreme Court clarified that "*[t]hese tests are not watertight compartments; they dovetail and overlap, albeit when applied holistically and pragmatically will help and assist in determining and ascertaining with great degree of certainty when as per law in India, a dispute or subject matter is non-arbitrable.*"[73]

It is the fourth exception, which states that the subject-matter of the dispute may be rendered in arbitral "*expressly or by necessary implication,*" that is relevant for determining the relationship between the arbitrability doctrine and the process of tribunalisation.

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67 *Id.*
68 *Id.* ¶ 37.
69 *Id.* ¶ 48.
70 *Id.*
71 *Id.* ¶ 79.
72 *Id.* ¶¶ 76.1–76.4.
73 *Id.* ¶ 76.5.

Based on the above elucidation, it follows that for determining the subject matters considered to be arbitrable, Indian jurisprudence has long reflected a characteristic fluidity. And the recent judgment in *Vidya Drolia* only bolsters this claim. Nonetheless, while initial scepticism towards arbitration has made way for a more reasoned analysis of arbitrability, a clearer and more confident line of jurisprudence would help in determining the precise scope of arbitrable disputes. Even the recent improvements, as the subsequent parts discuss, are not without their own flaws; particularly when dealing with issues relating to the jurisdiction of special tribunals.

III. The Impact of Tribunalisation on Arbitrability

Despite ample progress, the discourse surrounding arbitrability in India remains inter-mingled with issues of statutory interpretation, in particular the conflict between a special law and a general law. The context in which this discussion occurs is the proliferation of special tribunals created by the state, comprising legal and expert members, to adjudicate a category of disputes that earlier fell within the jurisdiction of civil courts.[74] These include the establishment of a Telecom Disputes Settlement and Appellate Tribunal ["**TDSAT**"] under the Telecom Regulatory Authority of India Act of 1997 ["**TRAI Act**"], Appellate Tribunal for Electricity ["**APTEL**"] for matters relating to the Electricity Act of 2003, several Debts Recovery Tribunals ["**DRT**"] for the enforcement of provisions of the Recovery of Debts Due to Banks and Financial Institutions Act of 1993 ["**DRT Act**"], the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interests Act of 2002, the Commissions under the Consumer Protection Acts of 1986 and 2019, amongst others. This poses the question—whether *in personam* civil disputes within the jurisdiction of special tribunals, and not the general jurisdiction of civil courts, are arbitrable? The answer to this question is more convoluted than it may appear to a casual observer. Indian courts have sought to answer this question through the prism of statutory interpretation, by relying on Section 2(3) of the Arbitration Act. The authors prefer to address these two components individually.

A. Arbitrability and Statutory Interpretation

An arbitration agreement is deemed to have a positive as well as a negative effect. While the positive effect of an arbitration agreement requires the contracting parties to resort to arbitration, its negative effect entails a commitment to not submit any dispute falling within the scope of the arbitration agreement to national courts. From this perspective, an arbitration agreement ousts the jurisdictional of the national courts to the extent permissible under the applicable law. However, does an arbitration agreement also have the effect of ousting the jurisdiction of a special tribunal, established under a special enactment?

Indian courts have framed the above question as that of statutory interpretation. In case of any perceived conflict between a general law and a special law in India, ordinarily, it is the general law that must yield to the special law.[75] In this regard, a same statute can be treated as special vis-à-vis one legislation, but be regarded as general vis-à-vis another legislation.[76] Further, where there is a

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74 *See* Law Commission of India, Report No. 272 – Assessment of Statutory Frameworks of Tribunals in India (2017) [*hereinafter* "Report No. 272"].

75 Chairman, Thiruvalluvar Transport Corporation v. Consumer Protection Council, (1995) 2 SCC 479, ¶ 6 (India).

76 *See* Allahabad Bank v. Canara Bank, (2000) 4 SCC 406, ¶ 39 (India).

conflict between two special statutes, the one enacted later will prevail over the former if it contains a provision giving it overriding effect.[77]

On the basis of these principles, Indian courts tend to answer this question by assessing whether the legislative enactment establishing a special tribunal enjoys an overriding effect over the Arbitration Act. For instance, in *India Trade Promotions Org.* v. *International Amusement Ltd.*,[78] the Delhi High Court questioned if the Public Premises (Eviction of Unauthorised Occupants) Act of 1971, which granted an Estate Officer the exclusive jurisdiction to adjudicate tenancy disputes emanating from the Act, is a special law that will override the Arbitration Act. It ultimately answered in the affirmative, as has been the general tendency in Indian jurisprudence. This has, in turn, added another limb to the arbitrability doctrine in India.

The decisions in support of the above assertion are multiple. In *Aircel Digilink India Ltd.* v. *Union of India*, the TDSAT observed that the Arbitration Act "*is a general Act and it will apply to all the arbitration agreements but [TRAI Act] is a special Act and applies to the telecom sector [and] to broadcasting and cable services.*"[79] Thus, it found arbitration to be barred in respect of the matters within the exclusive jurisdiction of the TDSAT under the TRAI Act.[80] But this judgement was succeeded by a Delhi High Court verdict under Section 34 of the Arbitration Act, wherein the Court refused to set aside an arbitral award rendered in respect of a telecom dispute on the ground that the arbitral tribunal could exercise jurisdiction if it were approached prior in time to or in exclusion to the TDSAT.[81]

On similar lines, a three-judge Bench of the Bombay High Court in *Central Warehousing Corp.* v. *Fortpoint Automotive Pvt. Ltd.* noted that Section 41(1) of the Presidency Small Cause Courts Act of 1882, which constituted special courts for adjudication of tenancy disputes specified therein, is a special law, and an arbitration agreement in such cases would be invalid.[82] Notably, the Supreme Court of India affirmed this line of reasoning in *Gujarat Urja Vikash Nigam* v. *Essar Power Ltd.* and concluded that Section 86(1)(f) of the Electricity Act of 2003 "*is a special provision, and hence, will override the general provision in Section 11 of the [Arbitration Act for appointment of arbitrators] for arbitration of disputes between the licensee and generating companies.*"[83]

In fact, recently, the apex court took the above rationale a step further in respect of disputes arising under the Trust Act in the judgment of *Vimal Kishore Shah* v. *Jayesh Dinesh Shah*. While deriving comfort from its familiarity with "*principle of interpretation that where a specific remedy is given, it thereby deprives the person who insists upon a remedy of any other form of remedy than that given by the statute,*"[84] the Court took it upon itself to examine the scheme of the entire Trust Act. In this regard, it noted

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77 Damji Valji Shah v. LIC of India, (1965) 3 SCR 665, ¶ 19 (India).

78 India Trade Promotions Org. v. International Amusement Ltd., 2007 SCC OnLine Del 981, ¶¶ 38, 41 (India). This case was further upheld by the Supreme Court of India. *See* International Amusement Ltd. v. India Trade Promotion Organisation, (2015) 12 SCC 677 (India).

79 Aircel Digilink India Ltd. v. Union of India, 2005 SCC OnLine TDSAT 105, ¶ 20 (India).

80 *See also* Reliance Infratel Ltd. v. Etisalat DB Telecom Pvt. Ltd., 2012 SCC OnLine TDSAT 293, ¶¶ 281, 283 (India); Viom Network Ltd. v. S Tel Pvt. Ltd., 2013 SCC OnLine Del 4511, ¶ 34 (India).

81 Bharti Cellular Ltd. v. Dept. of Telecommunications, 2012 SCC OnLine Del 4846, ¶ 60–62 (India) [*hereinafter* "Bharti Cellular"].

82 Central Warehousing Corp. v. Fortpoint Automotive Pvt. Ltd., 2009 SCC OnLine Bom 2023, ¶ 40 (India) [*hereinafter* "Central Warehousing"].

83 Gujarat Urja Vikash Nigam v. Essar Power Ltd., (2008) 4 SCC 755, ¶ 28 (India).

84 Vimal Kishore Shah, (2016) 8 SCC 788, ¶ 51 (India).

that the scheme of the Trust Act reflects that "*the legislature has dealt with and taken care of each subject comprehensively and adequately,*"[85] and in the face of such an exhaustive legislation dealing with trusts, trustees and beneficiaries, including by providing them appropriate remedies to approach the concerned civil courts, the Court found that disputes regarding the affairs of a trust could not be considered arbitrable.

In its opinion, "*when the Trust Act exhaustively deals with the Trust, Trustees and beneficiaries and provides for adequate and sufficient remedies to all aggrieved persons by giving them a right to approach the Civil Court of principal original jurisdiction […], any such dispute pertaining to affairs of the Trust […] in relation to their right, duties, obligations, removal etc. cannot be decided by the arbitrator.*"[86]

Notwithstanding the judicial approval received in the cases above, to re-characterize an issue of arbitrability as a question of statutory conflict is misguided, and thus, an unnecessary distortion of the arbitrability doctrine. The reasons for this are two-fold:

First, the Indian courts' reliance on principles of statutory interpretation is premised on an assumption that the provisions of the Arbitration Act conflict with provisions contained in a legislative enactment establishing a special tribunal. However, such an assumption has no basis in law. The Indian arbitration machinery, like the arbitration machinery in most states, is an edifice constructed upon the core principle of party autonomy. That said, the existence of party autonomy is taken for granted, and there is little discussion as to its origins.[87] It is important to acknowledge that notwithstanding its importance, the principle of party autonomy exists not because of its centrality to arbitration, but because a state's legal framework allows it to sustain. After all, it is the primary responsibility of a state to provide its nationals with a functional judicial mechanism for settlement of disputes,[88] and any departure from it through the exercise of party autonomy is subject to the state's will.[89] Therefore, the parties' freedom to experiment with envisaged dispute resolution processes[90] must be sourced to a permissive legal system.

In India, the validity and enforceability of an arbitration agreement emanates in the first place from Section 28 of the Indian Contract Act, 1872, which provides that every agreement by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract *by the usual legal proceedings in the ordinary tribunals* is void to that extent.[91] Ordinarily, this would be sufficient to invalidate any arbitration agreement. However, Indian law nonetheless recognizes an arbitration agreement because of the statutory exceptions to the said provision. These exceptions state that the provision shall neither render illegal an agreement to refer disputes to arbitration,[92] nor affect any provision of any law in force for the time being as to references to arbitration.[93] Thus, Indian law expressly recognizes arbitration as an exception to "*usual legal proceedings in the*

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85 *Id.* ¶ 45.
86 *Id.* ¶ 50.
87 H. M. Watt, *Party Autonomy in international contracts: from the makings of a myth to the requirements of global governance*, 6(3) EUR. REV. CONT. L. 1, 4 (2010).
88 *See generally* JEAN JACQUES ROUSSSEAU, THE SOCIAL CONTRACT (2006).
89 *See generally* PETER NYGH, AUTONOMY IN INTERNATIONAL CONTRACTS (1999).
90 Rau, *The Culture of American Arbitration and the Lessons of ADR*, 40 TEX. INT'L L.J. 449, 534 (2005).
91 Indian Contract Act, No. 09 of 1872, § 28(a) (India).
92 *Id.* § 28 Exception 1.
93 *Id.* § 28 Exception 2.

ordinary tribunals." The deliberate use of the word "*tribunals*" herein, as opposed to courts, suggests that this includes proceedings before both national courts as well as special tribunals.

This understanding is affirmed when one notices that both Sections 8[94] and 45[95] of the Arbitration Act, which are analogous to Article II (3) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, obligate every "*judicial authority,*" and not just the courts, to refer a matter that is the subject of an arbitration agreement, to arbitration. As per the Law Commission of India's report on the Arbitration and Conciliation (Amendment) Bill, 2001, the expression "*judicial authority*" should be understood to include "*a District Court or a Court subordinate to the District Court or the High Court on the original side [and] may also refer to a quasi-judicial authority*."[96] Along these lines, the apex court has also confirmed, albeit in the context of the Indian Arbitration Act, 1940, that not only a civil court, but also a consumer tribunal, would constitute such a "*judicial authority*".[97] It is for this precise reason that the Arbitration and Conciliation (Amendment) Bill, 2001 sought to introduce Section 2(1)(fa) to clarify that a "*judicial authority*" included "*any quasi-judicial statutory authority*."[98] While the said proposal did not find place in the Arbitration and Conciliation (Amendment) Act, 2015 ["**2015 Amendment**"], it nonetheless confirms that a "*judicial authority*" includes both courts as well as special tribunals. Consequently, the provisions of the Arbitration Act are in conflict with any statute conferring exclusive jurisdiction upon a special tribunal to the same extent that they are in conflict with the Code of Civil Procedure, 1908 from where civil courts derive their jurisdiction. In other words, they are not.

Second, in any event, the Indian courts have faltered in framing a question of arbitrability as one of statutory conflict. This aspect was rightly recognized by a three-judge-bench of the Delhi High Court in *HDFC Bank Ltd.* v. *Satpal Singh Bakshi* ["**HDFC Bank**"], when reflecting upon the arbitrability of recovery disputes falling within the jurisdiction of DRT. The Court noted that the answer to this issue does not depend upon principles of statutory interpretation, which operate to oust the jurisdiction of civil courts vis-à-vis special tribunals. Instead, the Court identified the real question that even when a special tribunal is created, can the parties still agree that instead of such tribunal, their disputes shall be decided by an arbitral tribunal?[99] It continued that if this question is answered in the affirmative, the edifice of the submissions made based on the principles of statutory interpretation "*would collapse like house of cards as all those submissions would be relegated to the pale of insignificance.*"[100]

On such basis, the Delhi High Court clarified that the DRT, though created under a special enactment, is only a forum established to decide specific types of cases that were earlier decided by the civil courts.[101] Citing the test of arbitrability as laid down by the Supreme Court in *Booz Allen*, it affirmed that a claim of money by the bank or financial institution against the borrower, which falls within the jurisdiction of such a tribunal, does not involve any right *in rem*. In fact, "*a*

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94 Arbitration and Conciliation Act, No. 26 of 1996, § 8(1) (India) [*hereinafter* "Arbitration Act"].
95 *Id.* § 45.
96 Law Commission of India, Report No. 176 – The Arbitration and Conciliation (Amendment) Bill, 2001 (2001), at 20.
97 *See* Fair Air Engineers Pvt. Ltd. v. M.K. Modi, (1996) 6 SCC 385, ¶ 16 (India).
98 Arbitration and Conciliation (Amendment) Bill, 2001, § 4(a)(ii) (India).
99 HDFC Bank Ltd. v. Satpal Singh Bakshi, 2012 SCC OnLine Del 4815, ¶¶ 6,7 (India) [*hereinafter* "HDFC Bank"].
100 *Id.* ¶ 7.
101 *Id.* ¶ 11.

judgment/ decision of the [DRT] deciding a particular claim can never be a right in rem, and is a right in personam as it decides the individual case/claim before it with no elements of any public interest."[102] Accordingly, it found the array of *in personam* disputes, otherwise within the jurisdiction of the DRT, to be arbitrable. This leads to a conclusion that notwithstanding the contrary judicial opinions, the notion of arbitrability is focused on an assessment of the subject-matter of the dispute. And the mere creation of a special tribunal, which certainly ousts the jurisdiction of a civil court, does not *by itself* transform it into a question of statutory interpretation.

Unfortunately, the three-judge bench of the Supreme Court in *Vidya Drolia* disagreed with the Delhi High Court's conclusion as to the arbitrability of disputes within the jurisdiction of a DRT, confirming that they are inarbitrable.[103] As discussed in the subsequent pages, the Supreme Court's disagreement in this regard is without cogent reason, and vulnerable to legitimate criticism. However, even otherwise, it is apparent that the Court's decision to overrule the judgment in *HDFC Bank* was motivated by its understanding of the nature of rights created by the DRT Act. It did not cast any doubt on the Delhi High Court's preliminary finding that the issue of arbitrability cannot be viewed purely as a question of statutory conflict, with a view to ascertain whether a legislative enactment establishing a special tribunal constitutes a "*special law*" relative to the Arbitration Act. To this extent, despite its conclusion being overruled, the approach of the Delhi High Court in *HDFC Bank* continues to retain relevance.

B. Exploring Section 2(3) of the Arbitration Act

Dissociating the notion of arbitrability from the administrative prerogative of tribunalisation of justice[104] allows one to address issues of arbitrability in an appropriate framework. However, by no stretch of imagination does this imply that every *subject-matter* falling within the jurisdiction of a special tribunal is arbitrable *per se*. Instead, answering this question requires an inquiry as to whether there may be another reason that renders such categories of dispute inarbitrable.

In this regard, Section 2(3) of the Arbitration Act, quoted above, provides that Part I of the Act "*shall not affect any other law for the time being in force by virtue of which certain disputes may not be submitted to arbitration.*"[105] The provision implies that if any other law in India excepts disputes from being referred to arbitration, such disputes cannot be so referred under the Arbitration Act "*irrespective of any provisions contained herein.*"[106]

For instance, Section 6(1) of the West Bengal Premises Tenancy Act, 1997 affirms the jurisdiction of a civil judge over tenancy disputes emanating from the said Act "*notwithstanding anything to the contrary contained in any other law for the time being in force or in any contract.*"[107] In *Ranjit Kumar Bose* v. *Anannya Chowdhary* the Supreme Court of India construed this as "*one such law which clearly bars arbitration in a dispute relating to recovery of possession of premises by the landlord from the tenant.*"[108] However, barring such clear prohibition, the question arises as to whether the creation of a special tribunal

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102 *Id.* ¶ 13.
103 Vidya Drolia II, (2021) 2 SCC 1, ¶ 58.
104 *Id.* ¶ 10.
105 Arbitration Act, § 2(3).
106 P. C. MARKANDA, LAW RELATING TO ARBITRATION AND CONCILIATION 63 (2009).
107 West Bengal Premises Tenancy Act, No. 37 of 1997, § 6(1) (India).
108 Ranjit Kumar Bose v. Anannya Chowdhary, (2014) 11 SCC 446, ¶ 12 (India) [*hereinafter* "Ranjit Kumar Bose"].

by itself demonstrates a legislative intent to exclude disputes falling within the tribunal's jurisdiction from the purview of arbitration through necessary implication.

i. Comparison with Article 1(5), UNCITRAL Model Law

Section 2(3) of the Arbitration Act corresponds to Article 1(5) of UNCITRAL Model Law on International Commercial Arbitration 1985 ["**Model Law**"]. While the latter includes a reference to other laws by virtue of which certain disputes "*may be submitted to arbitration only according to provisions other than those of [the Model Law],*" thereby excluding the applicability of the Model Law to these disputes, the Indian variant does not include such a reference. It only mentions laws by virtue of which "*certain disputes may not be submitted to arbitration.*" This difference may not have the most significant practical implications, but is indicative of an attitude on part of the drafters of the Model Law to "*clarify that the model law is not a self-contained and self-sufficient legal system,*" but is open to the existence of "*all other national provisions of law dealing with arbitration.*"[109] On the other hand, Section 2(3), in its deference only to laws that exclude certain disputes from being submitted arbitration, does not exude similar openness to other forms of arbitration outside its own contours.

That apart, the Model Law's *travaux préparatoires* evidences a fairly limited discussion in respect of the adoption of this provision. To see how Article 1(5) of the Model Law was intended to operate, one may take inspiration from the jurisprudence of other Model Law countries. Certain countries such as New Zealand and Singapore have specifically stepped away from adopting Article 1(5) of the Model Law by stating that "*[t]he fact that any written law confers jurisdiction in respect of any matter on any court of law […] shall not, of itself, indicate that a dispute about that matter is not capable of determination by arbitration.*"[110] However, other countries, such as Germany, have adopted a variant of it, in which certain categories of disputes are specifically listed as inarbitrable.[111]

More pertinent are the judicial decisions from countries where Article 1(5) of the Model Law has been adopted either verbatim, or with slight modifications, as is the case in India. For instance, courts in Canada[112] and Hong Kong[113] have held that the existence of legislation prescribing certain matters to be dealt with in or by a specific court action or by a certain prescribed procedure would not render the Model Law inapplicable pursuant to Article 1(5), since they do not consider the aforesaid prescriptions to operate in exclusion of arbitration. In fact, even in the face of statutorily prescribed liquidation proceedings for proof of debt, a judge in the Hong Kong High Court ordered arbitration to proceed based on a comparison of the potential costs of the two kinds of adjudication on the grounds that "*it would benefit both the Applicant and the general body of unsecured creditors to give leave to proceed with the reduced arbitration.*"[114] Similarly, the Supreme Court of Canada has been reluctant to read a statutory grant of jurisdiction in copyright matters to a particular Court

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109 HOWARD M. HOLTZMANN & JOSEPH NEUHAUS, A GUIDE TO THE UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION: LEGISLATIVE HISTORY AND COMMENTARY 39 (1989).

110 International Arbitration Act, Cap 143A, 2002 Rev. Ed., § 11(2) (Sing.); Arbitration Act 1996, § 10(2) (N.Z.).

111 ZIVILPROZESSORDNUNG [ZPO] [CODE OF CIVIL PROCEDURE] § 1030(2) (Ger.).

112 *See* BWV Investments Ltd. v. Saskferco Products Inc., (1994) Can. LII 4557 (SK CA) (Can.).

113 *See* Union Charm Development Ltd. v. B+B Construction Co. Ltd., (2001) H.K.C.F.I. 779 (H.K.) [*hereinafter* "Union Charm"].

114 *Id.* ¶ 29.

as being in exclusion to arbitration, holding that "*[i]f Parliament had intended to exclude arbitration in copyright matters, it would have clearly done so.*"[115]

Thus, from the above comparative assessment, one can infer a general practice across Model Law jurisdictions, emanating either from judicial decisions or specific prescriptions in the arbitration laws, requiring a clear or explicit exclusion of arbitration in a comparator statutory provision. Courts have not assumed an exclusion of arbitration based on statutory schemes that provide for jurisdiction to particular courts or for a specifically prescribed procedure of dispute settlement.

ii. Judicial Practice in India

Compared to the international practice, Indian courts have adopted a different approach in respect of Section 2(3) of the Arbitration Act. It is not in doubt that explicit stipulations in another law by virtue of which certain disputes may not be submitted to arbitration will render disputes falling under such other law inarbitrable. Examples of such explicit stipulations exist in the form of *non-obstante* clauses, which prescribe, for instance, that the provisions of a particular statute shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force,[116] or notwithstanding anything to the contrary contained in any contract.[117]

However, apart from such seemingly explicit stipulations, courts have also considered Section 2(3) to give primacy to other laws, which by "*necessary implication*" do not permit disputes to be submitted to arbitration. This epithet of "*necessary implication*" was most clearly endorsed by the Bombay High Court, in the following manner:

> "*[Section 2(3)] amplifies the scope of the Act of 1996 […] if any law which is for the time being in force were to provide – either expressly or by necessary implication – that the specified disputes may not be submitted to arbitration, in that case […], that law has been saved by virtue of Section 2(3) of the Act of 1996.*"[118]

The proposition of excluding of arbitration by way of a necessary implication has received the approval of the Supreme Court, both under the Indian Arbitration Act, 1940[119] and in *Booz Allen*,[120] albeit not with a direct reference to Section 2(3) of the Arbitration Act. This judicial practice has opened doors to consider not only express provisions in statutes that appear to forestall the application of the Arbitration Act, but also the object of these other laws in question,[121] or elements in common law.[122] Consequently, courts have indicated an openness to examine the gamut of "*the existing law on the date when the [Arbitration Act] was enforced*" to decide whether a certain dispute is arbitrable.[123]

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115 Desputeaux v. Éditions Chouette, (2003) 1 S.C.R. 178, ¶ 46 (Can.).
116 Big Shoppers Supermarket Pvt. Ltd. v. KM Trading Agencies Pvt. Ltd., 2008 SCC OnLine Raj 1231 (India).
117 Ranjit Kumar Bose, (2014) 11 SCC 446, ¶ 12 (India).
118 Central Warehousing, 2009 SCC OnLine Bom 2023, ¶ 9 (India).
119 Natraj Studios (P) Ltd. v. Navrang Studios, (1981) 1 SCC 523 (India) [*hereinafter* "Natraj Studios"].
120 Booz Allen, (2011) 5 SCC 532, ¶ 35 (India).
121 Carona Ltd. v. Sumangal Holdings, 2007 SCC OnLine Bom 405, ¶¶ 11, 12 (India) [*hereinafter* "Carona"].
122 India Trade Promotions Org. v. International Amusement Ltd., 2007 SCC OnLine Del 981, ¶ 37 (India). This case was further upheld by the Supreme Court of India. *See* International Amusement Ltd. v. India Trade Promotions Org, (2015) 12 SCC 677 (India).
123 *Id.*

Apart from representing a glaring increase in the screening process that subject-matters need to go through before qualifying as arbitrable, this approach is inherently problematic on two levels.

First, as far as examination of common law and objectives behind legislations is concerned, so long as these facets bear a linkage to the public policy of the country, they operate as separate and independent exceptions to arbitrability. Thus, they do not fall within the ambit of Section 2(3) of the Arbitration Act. That notwithstanding, courts have extended this license of "*necessary implication*" to include enactments, which, although do not contain any *non-obstante* clause generally prioritizing that statute, are still considered to exclude reference of specified disputes to arbitration, as a larger scheme or a body of law. This is primarily on the ground that the particular "*law invests exclusive jurisdiction*"[124] in a "*special forum,*"[125] the creation of which is read as exclusion of arbitration by necessary implication under Section 2(3). While these decisions were rendered in the context of rent control legislations, which for reasons discussed below may warrant exceptional protection, the same proposition in support of an implied exclusion of the Arbitration Act has been advanced to exclude other kinds of disputes from the realm of arbitrability as well. On many occasions, this argument is advanced in conjunction with the use of principles of statutory interpretation discussed above. A case in point for this is the Supreme Court's recent decision in respect of disputes under the Trust Act, where, in addition to erroneously invoking principles of statutory interpretation, the Court also found that:

> "*[T]hough the Trust Act does not provide any express bar in relation to applicability of other Acts for deciding the disputes arising under the Trust Act yet […] there exists an implied exclusion of applicability of the Arbitration Act for deciding the disputes relating to Trust, trustees and beneficiaries through private arbitration. In other words, when the Trust Act exhaustively deals with the Trust, Trustees and beneficiaries and provides for adequate and sufficient remedies to all aggrieved persons by giving them a right to approach the Civil Court of principal original jurisdiction for redressal of their disputes arising out of Trust Deed and the Trust Act then, in our opinion, any such dispute pertaining to affairs of the Trust […] cannot be decided by the arbitrator by taking recourse to the provisions of the [Arbitration] Act.*"[126]

Using the existence of "*special remedies*" to denounce the arbitrability of a dispute is, in effect, an extension of the process of tribunalisation that has ended up influencing the interpretation of Section 2(3) of the Arbitration Act. As evident from the discussion concerning Article 1(5) of the Model Law, this was certainly not the intention of the drafters of the Model Law. While it is one thing to stipulate that an arbitration legislation is open to the existence of other forms of dispute resolution under other laws, it is quite another to assume that wherever a statute grants special jurisdiction to a particular tribunal or even a civil court, the same serves to exclude the possibility of arbitration by necessary implication. While the former proposition pertains to the cohabitation of arbitration with other legal regimes, the latter appears to fly in the face of the negative effect of an arbitration agreement. To put it differently, when the parties have been afforded the autonomy by the state to conclude arbitration agreements, the same cannot be readily curtailed by statutes only because they grant jurisdiction to tribunals that have "*all trappings of the Court.*"[127] Doing so

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124 Central Warehousing, 2009 SCC OnLine Bom 2023, ¶ 31 (India).
125 Carona, 2007 SCC OnLine Bom 405, ¶¶ 11, 12 (India).
126 Vimal Kishore Shah, (2016) 8 SCC 788, ¶ 50 (India).
127 HDFC Bank, 2012 SCC OnLine Del 4815, ¶ 12 (India).

under the garb of exclusion of arbitration by "*necessary implication*" extends Section 2(3) of the Arbitration Act beyond its intended objectives.

The *second* problematic implication of curtailing arbitrability by necessary implication arises in subject matters that have had a curious jurisprudential presence in India. A prime example of this is consumer disputes, which were initially considered unequivocally inarbitrable under the Arbitration and Conciliation Act, 1940 but have been subjected to a nuanced approach by the apex court under the Arbitration Act. The Supreme Court has found that in the absence of any provision in the Consumer Protection Act, 1986 ["**Consumer Act**"] "*authorising the Commission to refer a pending proceeding before it, on receipt of a complaint from a consumer, for being settled through a consensual adjudication, the conclusion is irresistible that the Commissions under the Consumer Protection Act do not have the jurisdiction to refer the dispute for a consensual adjudication.*"[128] Thus, the Court traced an exclusion of arbitrability as a necessary implication of the fact that the text of the Consumer Act does not contain a specific provision.

This finding was unwaveringly upheld by the apex court in subsequent decisions[129] as recent as in 2016, in an obiter,[130] under the chaperon of Section 3 of the Consumer Act, which states that "*[t]he provisions of this Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force.*" This provision, read in light of the above findings of the apex court, has resulted in a peculiar legal situation in respect of disputes under the Consumer Act, whereby:

> "*The remedy of arbitration is not the only remedy available to a [consumer]. Rather, it is an optional remedy. He can either seek reference to an arbitrator or file a complaint under the Consumer Act. If the grower opts for the remedy of arbitration, then it may be possible to say that he cannot, subsequently, file complaint under the Consumer Act. However, if he chooses to file a complaint in the first instance before the competent Consumer Forum, then he cannot be denied relief by invoking Section 8 of the [Arbitration Act].*"[131]

Consequently, whether or not consumer disputes are considered arbitrable is a question that has a different answer depending on which fora is approached first. In India, consumer disputes are arbitrable if a consumer first refers it to arbitration. However, if the consumer first approaches the Commission with a consumer complaint relating to its same dispute, a "*scrutiny of the different provisions of the Act and bearing in mind the powers conferred on the Commissions*" has resulted in the finding that disputes under the Consumer Protection Act cannot be referred to arbitration.[132] As recently as 2017, the National Consumer Dispute Redressal Commission affirmed that with respect to arbitrability, the 2015 Amendment has left the "*status quo ante unaltered.*"[133] This position was confirmed by the Supreme Court of India in 2018, with the following caveat:

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128 Skypak Couriers Ltd. v. Tata Chemicals, (2000) 5 SCC 294, ¶ 2 (India) [*hereinafter* "Skypak Couriers"].

129 Rosedale Developers Pvt. Ltd. v. Aghore Bhattacharya, (2018) 11 SCC 337 (India); National Seeds Corp. Ltd. v. M. Madhusudan Reddy, (2012) 2 SCC 506 (India) [*hereinafter* "National Seeds"].

130 Ayyasamy, (2016) 10 SCC 386, ¶ 37 (India).

131 National Seeds, (2012) 2 SCC 506, ¶ 66 (India). *But see* Yashwant Rama Jadhav v. Shaukat Hussain Shaikh, 2017 SCC OnLine NCDRC 578, ¶ 6 (India) ("The jurisdiction of the consumer forum is not ousted on account of a civil suit having been instituted by the respondents, even if the subject matter of the said suits is the same agreement which is the foundation of the consumer complaint.").

132 Skypak Couriers, (2000) 5 SCC 294 (India); *See also* DLF Ltd. v. Mridul Estate, 2013 SCC OnLine NCDRC 486, ¶ 30 (India).

133 Aftab Singh v. Emaar MGF Land Ltd., 2017 SCC OnLine NCDRC 1614, ¶ 52 (India) [*hereinafter* "Aftab Singh"].

> "*[I]n the event a person entitled to seek an additional special remedy provided under the statutes does not opt for the additional/special remedy and he is a party to an arbitration agreement, there is no inhibition in disputes being proceeded in arbitration. It is only the case where specific/special remedies are provided for and which are opted by an aggrieved person that judicial authority can refuse to relegate the parties to the arbitration.*"[134]

Curiously, a similar legal situation appears to have been fashioned in the context of telecom disputes. In an obiter in a Section 34 petition, the Delhi High Court has observed:

> "*Section 15 states that no civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which the TDSAT is empowered to determine. The words 'entertain any suit or proceeding' indicate the prospective nature of that provision. None of the above provisions support the contention […] that pending arbitral proceedings could not go on after the establishment of the TDSAT and that in the present case, the learned Arbitrator lacked inherent jurisdiction to adjudicate the disputes.*"[135]

The above approach is glaringly problematic. Assuming the exclusion of arbitration merely due to the absence of a specific provision empowering special tribunals to refer the parties to arbitration makes the implied exclusion argument under Section 2(3) of the Arbitration Act incoherent. It ignores the fact that Section 8 of the Arbitration Act extends to all "*judicial authorities*" and not just courts, and also opens the gates for "*special remedies*" available to tribunals to be brought into the arbitrability discourse. Even in such circumstance, this latter spin-off of tribunalisation is only considered selectively, i.e., where a consumer Commission is approached prior in time. Therefore, despite the existence of Section 3 in the Consumer Act, which states that the said Act is not in derogation of any other law in force, courts have concluded that a reference to arbitration cannot be made.

Accordingly, the exclusion of arbitration based on necessary implications—a phenomenon in existence in Indian jurisprudence prior to the enactment of Section 2(3)[136]—has tainted the interpretation of the provision. Not only has it allowed the subversion of arbitration to the process of tribunalisation, but it has also created a peculiar line of jurisprudence that is susceptible to arriving at varying answers to the same question.

IV. The Way Forward

Until now, the authors attempted to manufacture a lens through which the idiosyncrasies of Indian judicial practice in respect of the impact of tribunalisation on arbitrability become apparent. The objective is to demonstrate how the Indian jurisprudence in respect of Section 2(3) of the Arbitration Act has run counter to the evolution of case law in other Model Law jurisdictions. While this inconsistency with accepted international jurisprudence holds equally true in the broader context of the courts' dealings with specialised tribunals, this should not cause all hope of arbitral sophistication to be lost. After all, most sophisticated arbitral jurisdictions have been through the same growth cycle—transition from declaring arbitration agreements as deprivers of more "*advantageous court remedy afforded by*" a legal regime, such as the Securities Act 1933 in the U.S.,[137] to

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134 Emaar MGF Land Ltd. v. Aftab Singh, (2019) 12 SCC 751, ¶ 63 (India).
135 Bharti Cellular, 2012 SCC OnLine Del 4846, ¶ 60 (India).
136 Natraj Studios, (1981) 1 SCC 523, ¶ 26 (India).
137 Wilko v. Swan, 346 U.S. 427 (1953) (U.S.).

now embracing arbitration. Such has been the curve of transformation that today, some scholars recognize that "*[t]he federal contract right to arbitrate will displace state law, no matter how clearly stated, that requires judicial resolution rather than arbitration in a particular dispute.*"[138]

Inspiration must be drawn from jurisdictions, such as Hong Kong,[139] U.S.,[140] and New Zealand,[141] which have made conspicuous progress in respect of arbitrability, to mirror their journey from initial scepticism towards arbitration to now being comfortable with treating the arbitrability question as one of "*sound judicial case management rather than as a matter of construction,*" subject only to public policy exceptions.[142]

In India, a glimpse of promise was shown by the Delhi High Court's now-overruled judgment in *HDFC Bank,* which the authors believe correctly laid down the stepping stones for devising a better way forward. Therein, the Court found no reason to distinguish between an ordinary civil court and a tribunal that has all the trappings of a court, and thus, did not view the mere existence of alternate tribunals as a bar to arbitrability. A similar approach was also adopted by the Bombay High Court when it observed that the provisions of the Copyright Act, 1957 and the Trade Marks Act, 1999 do not confer any exclusivity. The Court held that "*it is not possible from such sections, common to many statutes, to infer the ouster of an entire [Arbitration] statute. These sections do not themselves define arbitrability or non-arbitrability. For that, we must have regard to the nature of the claim that is made.*"[143]

Nonetheless, going a step further, in seeking to answer the question "*as to what would be the yardstick to determine some kind of disputes to be decided by the tribunals are non-arbitrable*,"[144] the Delhi High Court had suggested a possible way out of this tribunalisation crisis. It opined that "*cases where a particular enactment creates special rights and obligations and gives special powers to the Tribunals which are not with the civil Courts, those disputes would be non-arbitrable.*"[145] Thus, it laid down a cumulative test requiring the creation of a special tribunal vested with powers, and the existence of special rights and obligations in an enactment, which would give rise to a conclusion of non-arbitrability. To exemplify, the Court pointed to matters under the state-enacted Rent Control legislations, which grant statutory protection to tenants that overrode the contract entered into between the parties. According to the Court, "*[i]t is the rights created under the Act which prevail and those rights are not enforceable through civil Courts, but only through the Tribunals, which is given special jurisdiction*" to adjudicate upon those rights.[146] Another example cited by the Court was that of the Industrial Disputes Act 1947. On the other hand, tribunals such as DRTs, which are only a replacement forum for civil courts, could not create an implicit bar to the arbitrability of disputes.[147]

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138 Richard E Speidel, *Arbitration of Statutory Rights Under the Federal Arbitration Act: The Case for Reform*, 4 OHIO ST. J. ON DISP. RESOL. 157, 173 (1988-89).
139 Union Charm, (2001) H.K.C.F.I. 779 (H.K.).
140 The Saturday Evening Post Company v. Rumbleseat Press Inc, 816 F.2d. 1191 (7th Cir. 1987) (U.S.).
141 IBM Australia Ltd v. National Distribution Services Pty Ltd Handley JA, (1991) 22 N.S.W.L.R. 466 (N.Z.).
142 Justice Andrew Rogers, *Arbitrability*, 1 ASIA PAC. L. REV. 1, 12–13 (1992).
143 Eros Int'l, 2016 SCC OnLine Bom 2179, ¶ 16 (India).
144 HDFC Bank, 2012 SCC OnLine Del 4815, ¶ 14 (India).
145 *Id.*
146 *Id.*
147 *Id.* ¶¶ 13, 14.

The progress made by the Delhi High Court was undone by the Supreme Court in *Vidya Drolia* for reasons that are at best, unclear, and at worst, unmeritorious. The Supreme Court provided two reasons for overturning the judgment in *HDFC Bank*; both of which remain unconvincing.

First, the Court reasoned that:

> "*The decision in HDFC Bank Ltd. holds that only actions in rem are non-arbitrable, which as elucidated above is the correct legal position. However, non-arbitrability may arise in case the implicit prohibition in the statute, conferring and creating special rights to be adjudicated by the courts/public fora, which right including enforcement of order/provisions cannot be enforced and applied in case of arbitration.*"[148]

This is an incomplete and erroneous reading of the Delhi High Court's judgment. In *HDFC Bank*, the Delhi High Court did not limit its analysis to merely acknowledge the inarbitrability of actions *in rem*. Rather, much like the Supreme Court, it also observed that the creation of "*special rights and obligations*" and conferral on "*special powers to the Tribunals*" would indicate that the dispute within the jurisdiction of such special tribunal is inarbitrable.[149] To this extent, both Courts share an identical understanding of the arbitrability doctrine. However, where the Delhi High Court's analysis differs from that of the Supreme Court is its interpretation of the rights created by the DRT Act. In *HDFC Bank*, the Delhi High Court rightly questioned whether the DRTs constitute anything more than a replacement for ordinary civil court, and concluded as under:

> "*When arbitration as alternate to the civil Courts is recognized, which is common case of the parties before us, creation of Debts Recovery Tribunal under the RDB Act as a forum for deciding claims of banks and financial institutions would make any difference? We are of the firm view that answer has to be in the negative. What is so special under the RDB Act? It is nothing but creating a tribunal to decide certain specific types of cases which were earlier decided by the civil Courts and is popularly known as 'tribunalization of justice'. It is a matter of record that there are so many such tribunals created.*"[150]

Astonishingly, the Supreme Court in *Vidya Drolia* does not event attempt a similar analysis. It neither explains its reasons for disagreeing with the Delhi High Court's assessment of the DRT Act, nor does it indicate the nature of the special rights purportedly created by the DRT Act. To put it differently, although the Supreme Court remarks that the DRT "*legislation has overwritten the contractual right to arbitration,*"[151] it fails to identify the content of this legislative writing.

This is a critical omission, which is contradicted by the Supreme Court's own reasoning in the same judgment. In *Vidya Drolia* itself, the Court accepts that *"[i]mplied non-arbitrability requires prohibition against waiver of jurisdiction, which happens when a statute gives special rights or obligations and creates or stipulates an exclusive forum for adjudication and enforcement.*"[152] As such, for a subject-matter to become inarbitrable by necessary implication, both the requirements, namely (i) the creation of special rights or obligations and (ii) the creation of an exclusive forum for adjudication and enforcement of such rights or obligations, must be satisfied. If the statute does not create special rights or

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148 Vidya Drolia II, (2021) 2 SCC 1, ¶ 58 (India).
149 HDFC Bank, 2012 SCC OnLine Del 4815, ¶ 14 (India).
150 *Id.* ¶ 11.
151 Vidya Drolia II, (2021) 2 SCC 1, ¶ 58 (India).
152 *Id.* ¶ 68.

obligations, as was held by the Delhi High Court in *HDFC Bank* in relation to the DRT Act, the mere act of creating an exclusive forum for adjudication of a specific category of disputes will not render such disputes inarbitrable.

In view of the above, the Court's conclusion, and its failure to engage with the reasoning in *HDFC Bank* regarding the nature of the DRT Act, effectively equates the requirement of creation of a special tribunal with that of creation of special rights.

Second, instead of engaging with the Delhi High Court's analysis, the Court merely remarks that to "*hold that the claims of banks and financial institutions covered under the DRT Act are arbitrable would deprive and deny these institutions of the specific rights including the modes of recovery specified in the DRT Act.*"[153] However, this is an incorrect statement, that the Court also fails to corroborate. If the banks and financial institutions covered under the DRT Act are keen to avail the recovery modes provided in the DRT Act, i.e., by means of adjudication before the DRTs, they are at liberty to not include any arbitration agreement in their agreements. This is a reasonable expectation in lending arrangements where unlike borrowers, lending banks and financial institutions often retain greater negotiating power to dictate the terms of the bargain. Therefore, recognising the *in personam* disputes falling within the jurisdiction of DRTs as arbitrable does not by itself deprive banks and financial institutions of their access to the modes of recovery under the DRT Act. Rather, it is the critical act of consciously entering into an arbitration agreement, coupled with the negative effect of an arbitration agreement, which leads to this conclusion in a specific case.

Viewed from another perspective, the Supreme Court's reasoning that suggests that even when banks and financial institutions remain dissatisfied with the modes of recovery under the DRT Act, such as absence of tribunal members or judicial delays, they remain wedded to the jurisdiction of the DRT. They must make peace with their grim reality that in 2016, about 78,118 cases were pending before DRTs in India.[154] Thus, the Court's conclusion is equally anomalous to the rising discontent with the functioning of statutory tribunals in India and the consequent attempts to dissolve many statutory tribunals.[155] This suggests that at least in relation to disputes before the DRTs, the Supreme Court's construction of the arbitrability doctrine is detached from reality.

Consequently, the Supreme Court's conclusion that "*there is a prohibition against waiver of jurisdiction of the DRT by necessary implication*"[156] is supported neither by law, nor by pragmatic considerations relevant to the functioning of statutory tribunals. Nevertheless, a quest for jurisprudential progress must be accompanied by cautious optimism. Despite the Supreme Court overruling the judgment in *HDFC Bank*, Indian law on the arbitrability doctrine has taken modest steps in the right direction. There is a visible attempt by Indian courts, including the Supreme Court in *Vidya Drolia*, to shift the focus of the discourse from mere creation of special tribunals to the more fundamental question relating to creation of special rights and their enforcement. While this approach leaves ample room for misinterpretation and ambiguity, it also assists in identifying a better way forward.

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153 *Id.*, ¶ 58.
154 Report No. 272, *supra* note 74, at 33.
155 *See* Tribunals Reforms (Rationalisation and Conditions of Service) Ordinance, No. 2 of 2021 (India).
156 Vidya Drolia II, (2021) 2 SCC 1, ¶ 58 (India).

The journey to identify this better way forward again begins with a consideration of the Delhi High Court's judgment in *HDFC Bank*. While speaking about statutory rights and obligations that override contracts,[157] the Delhi High Court essentially referred to the notion of mandatory or non-derogable laws, whose application cannot be excluded by means of any contractual agreement.[158] The question as to whether an arbitrator can adjudicate disputes in respect of mandatory laws has plagued the arbitral community through the march of time and jurisprudence.[159] This is primarily because of the apprehension that parties, in furtherance of their freedom of contract, could subject their contract as well as an arbitral tribunal to an external applicable legal system, which does not contain the mandatory law in question. Thus, to the extent that the Delhi High Court is wary of mandatory laws, containing special rights and obligations, being subjected to arbitration, its fears are well-founded and echoed around the world.

Nonetheless, keeping in mind a crucial difference between the jurisdiction of a tribunal on the one hand, and the applicable substantive law before it on the other, may go a long way in refining the outlook towards disputes canvassing the territory of mandatory laws. In this regard, inspiration may be drawn from the USA Supreme Court's decision in *Mitsubishi* v. *Soler Chrysler-Plymouth,* where the Court was faced with the dilemma of referring parties to arbitration in respect of a dispute that triggered the application of the mandatory antitrust laws of the USA. The solution ultimately adopted by the Court was that if the parties to the arbitration agreement agree that the arbitral tribunal has to "*decide a defined set of claims which includes, as in these cases, those arising from the application of American antitrust law, the tribunal therefore should be bound to decide that dispute in accord with the national law giving rise to the claim*", i.e., USA's antitrust law in that case.[160] Thus, the Court did not strip the tribunal of its jurisdiction merely because the tribunal, in order to make a proper determination of the case, would have had to apply a (foreign) mandatory law. Instead, the Court appeared to mandate the tribunal to apply the law in question, in light of the parties' agreement.[161] If that were not done by the tribunal, the Court declared its authority "*to ensure that the legitimate interest in the enforcement of the antitrust laws has been addressed*" at the award enforcement stage.[162]

A similar approach may be advisable for arbitrations in India, domestic and international alike, whereby courts could seek an agreement from the parties to have the tribunal apply the mandatory law in question, despite it containing special rights and obligations. In the event that such an agreement comes through, the arbitrability of a dispute that requires the application of mandatory laws need not be called in question at the stage of referring the parties to arbitration. This is particularly so since the Court ultimately retains the power to oversee the application of mandatory provisions. The authors' suggestion resonates with the observations made by the Supreme Court of India in *Vidya Drolia*, while clarifying the relationship between arbitrability and mandatory laws:

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157 *See, e.g.,* Delhi Rent Control Act, No. 59 of 1958, §§ 5(1), 14(1), 14A(1), 14A(2) (India). These provisions contain numerous *non-obstante* clauses that override contrary contractual stipulations.

158 *See* Harshad Pathak & Pratyush Panjwani, *Mandatory Rules and the Dwindling Restraint of Arbitrability*, 5 NLUD STUDENT L. REV. 82 (2018).

159 *See* Pierre, Mayer, *Mandatory Rules of Law in International Arbitration*, 2 ARB. INT'L. 274 (1986) [*hereinafter* "Pierre Mayer"]; Alexander K.A. Greenawalt, *Does International Arbitration need a Mandatory Rules method?*, 18 AM. REV. INT'L ARB. 103 (2007).

160 Mitsubishi v. Soler Chrysler-Plymouth*,* 473 U.S. 614 (1985), ¶ 38, fn. 19 [*hereinafter* "Mitsubishi"].

161 *See* Pierre Mayer, *supra* note 159.

162 Mitsubishi, 473 U.S. 614 (1985).

> "*Application of mandatory law to the merits of the case do not imply that the right to arbitrate is taken away. Mandatory law may require a particular substantive rule to be applied, but this would not preclude arbitration. […] An arbitrator, like the court, is equally bound by the public policy behind the statute while examining the claim on merits. […] There is a general presumption in favour of arbitrability, which is not excluded simply because the dispute is permeated by applicability of mandatory law. Violation of public policy by the arbitrator could well result in setting aside the award on the ground of failure to follow the fundamental policy of law in India, but not on the ground that the subject matter of the dispute was non-arbitrable.*"[163]

Accordingly, courts can encourage the parties to specifically agree to bind their tribunal to apply the mandatory laws regardless of the contractually agreed legal regime. If courts are amenable to such an amicable resolution, the Indian approach will steer closer to the internationally accepted outlook that focuses on employing practical case management techniques, rather than stubbornly foreclosing the doors to arbitration.

V. Conclusion

A significant part of how the notion of arbitrability is understood in each jurisdiction has a lot to do with the state's proclivity for arbitration. Simply put, in its conventional form, arbitrability is nothing more than a "*gateway*"[164] issue that filters disputes that are inherently unsuitable for arbitration. However, while many other jurisdictions have adopted a definitive understanding of arbitrability, be it narrow or broad, through legislative clarity, Indian arbitration jurisprudence in this regard has been rather inconsistent. It appears to reflect a tussle between the legislative and judicial organ of the state. This assertion was recently exemplified by the National Consumer Dispute Redressal Commission, when it observed that "*disputes are not characterized as arbitrable and non-arbitrable at the whim and fancy of the Legislature,*" before insisting that the "*[l]egislature and Judiciary have built this jurisprudence with consensus and harmony.*"[165]

The authors do not question the contribution of either the Indian legislature or the judiciary in developing the jurisprudence surrounding arbitrability in India. In fact, they support it since it is consistent with India's common-law tradition. However, what the authors certainly challenge is the assertion that such development occurred "*with consensus and harmony.*" In fact, the above analysis clearly demonstrates to the contrary. Consequently, in this article, the authors attempt to undo some of the convolutions that have crept into the understanding of arbitrability in India, to move towards a more simplistic and consistent conceptualization of it.

What emerges from the above discussion is that despite witnessing gradual progress, the Indian understanding of the arbitrability doctrine remains marred fundamental inconsistencies, especially in relation to the process of tribunalisation. Over time, Indian courts have adjudged many categories of *in personam* disputes inarbitrable by "*necessary implication*" merely because they do not fall within the jurisdiction of a civil court, but rather a special tribunal. While the Delhi High Court had attempted to introduce an element of nuance in this discourse, the Supreme Court of India's judgment in *Vidya Drolia* was a misstep. Even otherwise, Indian courts have added some alien elements, such as principles of law for resolving statutory conflict, to the discourse surrounding

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163 Vidya Drolia II, (2021) 2 SCC 1, ¶ 68 (India).
164 George Bermann, *The "Gateway" Problem in International Commercial Arbitration*, 37 YALE L.J. 1, 10–13 (2012).
165 Aftab Singh, 2017 SCC OnLine NCDRC 1614, ¶ 29 (India).

the doctrine of arbitrability. They remain equally oblivious to the fact that they have an unrestricted power to review issues of arbitrability at the stage of annulment or enforcement of an arbitral award, which ought to allow them to adopt a more mature approach in dealing with the impact of tribunalisation. Yet, they often overlook that opening the gateway of arbitrability to allow categories of *in personam* disputes to arbitration will not leave the parties completely remediless.

Fortunately, there is ample opportunity for Indian courts, and particularly the Supreme Court, to take constructive steps in this regard. An increased emphasis on simply ensuring the application of mandatory laws in India, as opposed to tightening the screws of arbitrability, may allow one to disentangle some of the unintended knots that have been created. This article is, ultimately, one such attempt in that direction.

EMERGENCY ARBITRATION AND INDIA—A LONG OVERDUE FRIENDSHIP

Akash Srivastava[*]

Abstract

Recent years have seen the rise of international arbitration as a robust tool for dispute resolution. Emergency arbitration was introduced to combat one of its few weaknesses—the inability to provide interim relief prior to the constitution of the arbitral tribunal. However, despite its extensive utilisation and many advantages, issues with regard to enforcement of the emergency arbitrator's decisions have thwarted emergency arbitration from being enthroned as the preferred forum for parties seeking interim relief prior to the tribunal's constitution; this is the case in India as well. In view of this, the purpose of this article is two-fold. First, to examine the status of an emergency arbitrator and enforceability of its decisions. Second, to make a case for providing statutory recognition to the procedure and its resulting decisions in India.

I. Introduction

The significance of provisional measures,[1] especially prior to the constitution of the arbitral tribunal,[2] cannot be overstated. That said, in the past, there was a lack of availability of arbitral provisional measures at this pre-formation stage.[3] This compromised parties' rights, including those of seeking to prevent an opposing party from destroying evidence, dissipating assets, damaging market value of the property or releasing confidential information,[4] prior to a final decision being rendered.[5] When urgent arbitral relief was not possible, parties would be forced to approach national courts, which has been widely regarded as the "*Achilles' heel*" of arbitration,[6] and thereby defeat the precise reason they chose arbitration in the first place. Alternatively, they would

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1 Note that different jurisdictions use these terms (provisional measures, interim relief, provisional relief, urgent relief, interim measures) in different contexts. For the purposes of this article, such terms are used interchangeably.

2 JEFFREY WAINCYMER, PROCEDURE AND EVIDENCE IN INTERNATIONAL ARBITRATION 622 (2012) ("[…] concerns as to treatment of assets or evidence typically arise immediately upon a dispute arising.").

3 ALI YESILIRMAK, PROVISIONAL MEASURES IN INTERNATIONAL COMMERCIAL ARBITRATION 114 (2005) [*hereinafter* "YESILIRMAK"].

4 GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION 2604–05 (3d ed. 2021) [*hereinafter* "BORN"].

5 *See* Louis Yves Fortier, *Interim Measures: An Arbitrator's Provisional Views, in* 2 CONTEMPORARY ISSUES IN INTERNATIONAL ARBITRATION AND MEDIATION: THE FORDHAM PAPERS 2008 47, 53 (Arthur W. Rovine ed., 2009); *see also* Occidental Petroleum Corp. and Occidental Exploration and Production Co. v. Republic of Ecuador, ICSID Case No. ARB/06/11, Decision on Provisional Measures, ¶ 60 (Aug. 17, 2007); REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION 313 (Nigel Blackaby, Constantine Partasides, Alan Redfern & Martin Hunter eds., 6th ed. 2015) [*hereinafter* "REDFERN & HUNTER"]; FOUCHARD GAILLARD GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION 721–34 (Emmanuel Gaillard et al. eds., 1999); JULIAN D. M. LEW, LOUKAS A. MISTELIS & STEFAN M. KRÖLL, COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION 586 (2003) [*hereinafter* "LEW ET AL."]; V. V. Veeder, *Provisional and Conservatory Measures*, *in* ENFORCING ARBITRATION AWARDS UNDER THE NEW YORK CONVENTION: EXPERIENCE AND PROSPECTS 21, 21 (1999).

6 David E. Wagoner, *Managing International Arbitration: A Shared Responsibility of the Parties, the tribunal, and the Arbitral Institution*, 54(2) DISP. RESOL. J. 15, 19 (1999); *see also* Martin Davies, *Court-Ordered Interim Measures in Aid of International Commercial Arbitration*, 17(3) AMERICAN REV. INT'L ARB. 299, 332 (2008); Jason Fry, *The Emergency Arbitrator – Flawed Fashion or Sensible Solution?*, 7(2) DISP. RESOL. INT'L 179, 180 (2013) [*hereinafter* "Fry"]; Erin Collins, *Pre-Tribunal Emergency Relief in International Commercial Arbitration*, 10(1) LOY. UNIV. CHI. INT'L L. REV. 105, 116 (2012).

be required to wait for the constitution of the tribunal, which would jeopardize the efficacy of the final decision.[7] Accordingly, introducing a reform was imperative.[8]

In order to fill this gap, the International Chamber of Commerce ["**ICC**"] introduced the Pre-Arbitral Referee Procedure in 1990 as an alternative recourse to national courts for emergency relief at the pre-formation stage. Under this procedure, the parties would agree to the appointment of a "*referee*" who would decide on issues of provisional measures prior to the referral of the dispute to arbitration or the courts.[9] This was the first procedure of its kind, and was not seen in the rules of any other arbitral institution.[10] Unfortunately, this procedure lacked in combat because, amongst other things, parties were often unaware of its existence and were required to expressly opt into it through a separate agreement at the time of contracting.[11]

With time, however, an increasing number of arbitral institutions began to adopt similar provisions. The 1997 Netherlands Arbitration Institute ["**NAI**"] Rules provided for self-standing summary arbitral proceedings[12] (*arbitraal kort geding*) exclusively for arbitrations seated[13] in the Netherlands,[14] to resolve preliminary interim issues prior to the constitution of the tribunal.[15] A different approach was provided for by Article 9 of the 1998 London Court of International Arbitration ["**LCIA**"] Rules, which allowed parties to apply for an expedited constitution of the tribunal in cases of "*exceptional urgency.*"[16] Yet another approach was adopted under Article 12(1) of the 2002 Arbitration Court of the Economic Chamber of the Czech Republic and Agricultural Chamber of the Czech Republic Arbitration Rules,[17] Article 8 of the 1994 Italian Association for Arbitration Rules, and Rule 37 of the 2004 Rules of the Court of Arbitration for Sport, which

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7 Charlie Caher & John MacMillan, *Emergency Arbitration: The Default Option for Pre-Arbitral Relief? in* THE INTERNATIONAL COMPARATIVE LEGAL GUIDE TO: INTERNATIONAL ARBITRATION 2015 1, 1 (Steven Finizio & Charlie Caher eds., 12th ed. 2015) [*hereinafter* "Caher & MacMillan"].

8 Koh Swee Yen, *The Use of Emergency Arbitrators in Investment Treaty Arbitration*, 31(3) ICSID REV. 534, 535 (2016).

9 *Pre-Arbitral Referee*, INTERNATIONAL CHAMBER OF COMMERCE, *available at* https://iccwbo.org/dispute-resolution-services/pre-arbitral-referee.

10 Charles N. Brower, Ariel Meyerstein & Stephan W. Schill, *The Power and Effectiveness of Pre-arbitral Provisional Relief: The SCC Emergency Arbitrator in Investor-State Disputes*, *in* BETWEEN EAST AND WEST: ESSAYS IN HONOUR OF ULF FRANKE 61, 61 (Kaj Hobér, Annette Magnusson, Marie Öhrsrtöm & Christopher Goddard eds., 2010) [*hereinafter* "Brower et al."].

11 *See* HERMAN VERBIST, ERIK SCHÄFER & CHRISTOPHE IMHOOS, ICC ARBITRATION IN PRACTICE 162–163 (2d ed. 2015); Chiann Bao, *Developing the Emergency Arbitrator Procedure: The Approach of the Hong Kong International Arbitration Centre*, *in* INTERIM AND EMERGENCY RELIEF IN INTERNATIONAL ARBITRATION – INTERNATIONAL LAW INSTITUTE SERIES ON INTERNATIONAL LAW, ARBITRATION AND PRACTICE 265, 269 (Anne Marie Whitesell, Diora Ziyaeva, Ian A. Laird & Borzu Sabahi eds., 2015) [*hereinafter* "Bao"].

12 Robert van Agteren & Mathieu Raas, *The Netherlands*, *in* THE BAKER MCKENZIE INTERNATIONAL ARBITRATION YEARBOOK 315 (2017), *available at* https://globalarbitrationnews.com/wp-content/uploads/2017/06/The-Netherlands.pdf; Netherlands Arbitration Institute (NAI), Arbitration Rules 1997, arts. 37, 38 [*hereinafter* "NAI Rules"].

13 The seat (juridical place) of arbitration provides the supporting legal framework to arbitration. Courts at the seat will have jurisdiction in case assistance is required during or after proceedings and exclusive jurisdiction as regards setting aside the award. *See* SIMON GREENBERG, CHRISTOPHER KEE & ROMESH WEERAMANTRY, INTERNATIONAL COMMERCIAL ARBITRATION: AN ASIA-PACIFIC PERSPECTIVE ¶ 1.76 (2011).

14 *Id.*; Rogier Schellaars & Albert Marsman, *The Netherlands, in* ARB. GUIDE 10 (Pascal Hollander & Sofia Martins eds., 2018), *available at* https://www.ibanet.org/MediaHandler?id=771279FD-6BA6-4A4B-8A5B-7A0A3D9FC62C.

15 Amir Ghaffari & Emmylou Walters, *The Emergency Arbitrator: The Dawn of a New Age?*, 30(1) ARB. INT'L 153, 155 (2014) [*hereinafter* "Ghaffari & Walters"].

16 MAXI SCHERER, LISA RICHMAN & REMY GERBAY, ARBITRATING UNDER THE 2014 LCIA RULES: A USER'S GUIDE 133–37 (2015); London Court of International Arbitration (LCIA), Arbitration Rules 1998, art. 9.

17 YESILIRMAK, *supra* note 3, at 118–19.

provided that the arbitral institution, instead of the tribunal, may grant provisional measures before the constitution of the tribunal.[18]

The concept of 'emergency arbitration' as we know it today first appeared in 2006, in the international arbitration rules of the International Center for Dispute Resolution ["**ICDR**"]. It would apply to all disputes arbitrated under the ICDR Arbitration Rules, with parties being able to opt-out if they so wished.[19] Pursuant to the procedure, parties could apply for interim relief prior to the constitution of the tribunal, after which the ICDR would appoint an emergency arbitrator to render an emergency decision,[20] typically within a period of two to fifteen days. Such an emergency arbitrator would need to have "*the ability to quickly organize the procedure under tight time constraints, ensure fairness and efficiency, understand the issues, and wisely make snap decisions that may have significant consequences.*"[21]

The introduction of emergency arbitration has received widespread recognition and acceptance.[22] It has become a common element of arbitral rules, for example, it was incorporated in the Stockholm Chamber of Commerce Arbitration ["**SCC**"] Rules in 2010, orchestrated by its Secretary General, Ulf Franke, who significantly contributed to the development of this mechanism.[23] Subsequently, this procedure was formally introduced under various leading institutional arbitration rules.[24] Redfern & Hunter commented in 2015, "*it is hoped that these new rules will be more effective and useful to parties than their precursors, which required parties expressly to opt in.*"[25] The increased utilisation of this procedure[26] is indicative of the accuracy of that comment.

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18 BORN, *supra* note 4, at 2635.

19 Ben Sheppard Jr. & John Townsend, *Holding the Fort until the Arbitrators are Appointed: The New ICDR International Emergency Rule*, 61(2) DISP. RESOL. J. 74, 78 (2006); International Centre for Dispute Resolution (ICDR), Arbitration Rules 2006, art. 37.

20 Note that for the purpose of this article, decisions of an emergency arbitrator are referred to as "emergency decisions."

21 Patricia Shaughnessy, *The Emergency Arbitrator*, *in* THE POWERS AND DUTIES OF AN ARBITRATOR: LIBER AMICORUM PIERRE A. KARRER 339, 339 (Patricia Shaughnessy & Sherlin Tung eds., 2017) [*hereinafter* "Shaughnessy"].

22 Lars Markert & Raeesa Rawal, *Emergency Arbitration in Investment and Construction Disputes: An Uneasy Fit?*, 37(1) J. INT'L ARB. 131, 131 (2020) [*hereinafter* "Markert & Rawal"]; *see also* Michael Dunmore, *The Use of Emergency Arbitration Provisions*, 17(3) ASIAN DISP. REV. 130, 130 (2015); Diana Paraguacuto-Maheo & Christine Lecuyer-Thieffry, *Emergency Arbitrator: A New Player in the Field - The French Perspective*, 40(3) FORDHAM INT'L L. J. 748, 751 (2017) [*hereinafter* "Paraguacuto-Maheo & Lecuyer-Thieffry"]; BORN, *supra* note 4, at 2634.

23 Brower et al., *supra* note 10, at 63.

24 *See, e.g.,* Singapore International Arbitration Centre Arbitration (SIAC), Arbitration Rules 2010, r. 26 & sched. 1; NAI Rules; Bahrain Chamber for Dispute Resolution (BCDR), Arbitration Rules 2010, art. 37; International Chamber of Commerce (ICC), Rules of Arbitration 2012, art. 29 & sched. V [*hereinafter* "ICC Rules 2012"]; Swiss Chambers' Arbitration Institution (SCAI), Rules of International Arbitration 2012, art. 43; International Institute for Conflict Prevention & Resolution (CPR), Administered Arbitration Rules 2013, r. 14; Hong Kong International Arbitration Centre (HKIAC), Arbitration Rules 2013, art. 23 & sched. 4; Kuala Lumpur Regional Centre for Arbitration (KLRCA), Arbitration Rules 2013, sched. 2 & r. 7 (later renamed as the Asian International Arbitration Centre (AIAC)); London Court of International Arbitration (LCIA), Arbitration Rules 2014, art. 9B; Japan Commercial Arbitration Association (JCAA), Arbitration Rules 2014, ch. V; China International Economic and Trade Arbitration Commission (CIETAC), Arbitration Rules 2015, art. 23 & app. III; Mumbai Centre for International Arbitration (MCIA), Arbitration Rules 2017, r. 14 [*hereinafter* "MCIA Rules"]; Indian Council of Arbitration (ICA), Rules of Domestic Commercial Arbitration and Conciliation 2016, r. 57; Korean Commercial Arbitration Board (KCAB), International Arbitration Rules 2016, app. 3; Delhi International Arbitration Centre (DIAC), Arbitration Proceedings Rules 2018, art. 14 [*hereinafter* "DIAC Rules"].

25 REDFERN & HUNTER, *supra* note 5, at 235.

26 The total number of emergency arbitration applications received by major arbitral institutions:

Nevertheless, the availability of this mechanism has led to different consequences. For example, in England and Wales, Singapore, and France, courts can only hear applications for interim relief in situations where the tribunal or arbitral institution are unable or unavailable to do so.[27] In other jurisdictions, such as Hong Kong and the United States, where there is no explicit legislative provision on this issue, courts have been reluctant to grant interim relief where a tribunal has been constituted.[28] This reluctance, or the existence of such legislative provisions, may limit a party's options when seeking interim relief to the procedure of emergency arbitration. It is therefore crucial that the emergency decisions are enforceable.

This article examines the status of an emergency arbitrator and the enforceability of its decisions under international regimes and various national legislations **[Part II]**. It then focuses specifically on these issues under the Indian arbitration regime by analysing the approach adopted by the Indian courts in various judgments of the past decade and more recently, in several rulings arising out of an ongoing high-profile dispute between two commercial giants **[Part III]**. Finally, it concludes by recommending the way forward for India **[Part IV]**.

II. Anatomising the emergency arbitration procedure and its enforceability issues

The recognition and enforcement of arbitral decisions is not only crucial to the success of arbitration, but is also one of the key reasons the reason for its popularity.[29] It has been stated that the issue of enforcement is of such importance that while drafting contracts, practitioners usually "*strategize backward*" from the enforcement angle.[30] That said, even though arbitration is a private agreement, the process is somewhat state-controlled because the enforcement of a decision is dependent upon international conventions and national laws.[31] This was foretold—over two decades ago—by Mr. Fali S. Nariman, who paid tribute to the framers of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ["**New York Convention**"][32] for

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ICC – 154 applications for 'Emergency measures' as on March 01, 2021.
ICDR – 119 Emergency Arbitrator applications as on January 01, 2021.
SIAC – 116 Emergency Arbitrator applications as on Feb 26, 2021.
SCC – 47 Emergency arbitration applications as on 01 Jan 2021.
HKIAC – 28 Emergency Arbitration applications as on March 08, 2021.
SCAI – 13 applications for the Emergency relief procedure as on March 2, 2021.
LCIA – 11 Emergency arbitration applications as on May 17, 2021.
MCIA – 1 Emergency Arbitrator application as on March 09, 2021.
AIAC – 1 Emergency Arbitrator application as on March 09, 2021.

27 Caher & MacMillan, *supra* note 7, at 3. *See also* Arbitration Act 1996, c. 23, § 44(5) (Eng.); International Arbitration Act, Chapter 143A (as revised in 2002) No. 23 of 1994, § 12(A)(6) (Sing.) ["*hereinafter* "Singapore IAA"]; CODE DE PROCÉDURE CIVILE [C.P.C.] [CIVIL PROCEDURE CODE] art. 1449(1) (Fr.) ("This provision applies to international arbitration by means of art. 1506(1).").

28 *See* sourced cited *supra* note 27. *See also* Leviathan Shipping Co. Ltd. v. Sky Sailing Overseas Co. Ltd., [1998] 4 HKC 347 (H.K.); Next Step Med. Co. v. Johnson & Johnson Int'l, 619 F.3d 67, 70 (5th Cir. 2010) (U.S.); Simula, Inc. v. Autoliv, Inc., 175 F.3d 716 (9th Cir. 1999) (U.S.).

29 LEW ET AL., *supra* note 5, at 688.

30 Lucy Reed, *Experience of Practical Problems of Enforcement*, *in* 9 IMPROVING THE EFFICIENCY OF ARBITRATION AGREEMENTS AND AWARDS: 40 YEARS OF APPLICATION OF THE NEW YORK CONVENTION 557, 561 (Albert Jan Van den Berg ed., 1999) [*hereinafter* "Reed"].

31 Bernard Hanotiau, *International Arbitration in a Global Economy: The Challenges of the Future*, 28(2) J. INT'L ARB. 89, 91 (2011).

32 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 330 U.N.T.S. 38 [*hereinafter* "New York Convention"].

recognising the "*genetic heritage*" of national courts and said "*without the aid and assistance of local municipal courts transnational arbitral awards could not be effectively enforced.*"[33]

Similarly, as it stands, national courts play a major role in the enforcement of emergency decisions. Even though national legislators have "*abandoned their historical animosity towards, or distrust of, international arbitration,*"[34] the same cannot be said for emergency arbitration, and there is still the possibility of a mere pyrrhic victory.[35] There is a long way to go in dealing with the enforcement issues of emergency arbitration, especially where enforcement is sought in a foreign jurisdiction. The Honourable William G. Bassler questions the existence of this problem, by stating that, "*[r]efusing to enforce an emergency award when the parties have granted the emergency arbitrator the power to issue emergency awards depreciates the principle of freedom of contract. Of what value is a contractual provision as important as emergency relief if it is unenforceable?*"[36]

This is especially important when looking at the reasons based on which parties opt to specifically seek emergency relief through emergency arbitration, and not from courts. A survey conducted in 2015 found that 79% of the respondents considered enforceability of emergency decisions to be one of the most important factors.[37] Unfortunately, the importance has seemingly been placed due to the concerns regarding enforceability, as opposed to enforceability being a reason for utilizing emergency arbitration. As some interviewees have noted, *"the prospect of successfully enforcing emergency arbitrator decisions varies between jurisdictions. In certain jurisdictions, enforcement is seen as time-consuming and unpredictable. The use of emergency arbitrators was seen as an unnecessary extra in other jurisdictions because of the perceived effectiveness of the national courts compared to the uncertainty of enforcing an emergency arbitrator's decision.*"[38] Thus, enforceability of emergency decisions has faced many practical challenges and uncertainties.

These problems stem from the fact that tribunals generally lack the coercive power to enforce provisional relief, and thus the responsibility falls onto national courts.[39] In general arbitral proceedings, most parties voluntarily comply with provisional measures, as they fear that non-compliance could prompt a tribunal to draw a negative inference.[40] However, this voluntary

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33 Fali S. Nariman, *The Convention's contribution to the globalization of international commercial arbitration*, *in* ENFORCING ARBITRATION AWARDS UNDER THE NEW YORK CONVENTION: EXPERIENCE AND PROSPECTS 11, 13 (1999).

34 Emmanuel Gaillard, *Interim and Emergency Measures of Protection (BCDR Rules 2017, Arts 26 & 14)*, *in* 4(2) BCDR INT'L ARB. REV. 297, 299 (Nassib Ziadé ed., 2017).

35 ALBERT JAN VAN DEN BERG, NEW YORK ARBITRATION CONVENTION OF 1958: TOWARDS A UNIFORM JUDICIAL INTERPRETATION 143 (1981); *see also* LEW ET AL., *supra* note 5, at 688.

36 William G. Bassler, *The enforceability of emergency awards in the United States: or when interim means final*, 32(4) ARB. INT'L 559, 572 (2016) [*hereinafter* "Bassler"].

37 White & Case & School of International Arbitration, Queen Mary Univ. of London, 2015 International Arbitration Survey: Improvements and Innovations in International Arbitration (2015), at 28, *available at* http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2015_International_Arbitration_Survey.pdf.

38 *Id.*

39 BORN, *supra* note 4, at 2627; YESILIRMAK, *supra* note 3, at 246.

40 Gregoire Marchac, *Interim Measures in International Commercial Arbitration Under the ICC, AAA, LCIA & UNCITRAL Rules*, 10 AM. REV. INT'L ARB. 123, 133 (1999).

compliance is not always the case,[41] and since damages are often an inadequate substitute,[42] it is imperative that parties are able to enforce these interim orders.[43] The same applies to the enforcement of emergency decisions.[44] Even though the voluntary compliance of an emergency decision is expected,[45] it is not a guarantee, and therefore, ensuring a clear-cut enforcement procedure is paramount.[46]

These unclear repercussions of non-compliance, along with the preservation of arguments on jurisdiction and questions regarding enforceability in local courts, increase the likelihood of parties refusing to comply with emergency decisions.[47] In the opinion of Jason Fry, emergency arbitration needs to be "*properly welcomed into a legal framework*" to ensure that it is as effective as it is popular.[48]

In order to do this, and to ensure the clear-cut enforcement of emergency decisions, two issues need to be addressed:

(a) The status of emergency arbitrators and emergency decisions; and

(b) The enforceability of emergency decisions under the New York Convention, as arbitral decisions on interim relief under the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration ["**UNCITRAL Model Law**"]; and under national legislation.

A. Status of emergency arbitrators and emergency decisions

When the ICC introduced the pre-arbitral referee procedure in 1990, commentators started to question the status of the referees' decisions.[49] However, criticisms were not limited to commentators, and in *Société Nationale des Pétroles du Congo and République du Congo* v. *Total E & P*

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41 David L. Zicherman, *The Use of Pre-Judgment Attachments & Temporary Injunctions in International Commercial Arbitration Proceedings: A Comparative Analysis of the British & American Approaches*, 50(2) UNIV. PITT. L. REV. 667, 690 (1989) ("eighty-five percent of all awards are paid without controversy. Turning this argument around, the statistics point out exactly why pre-judgment attachment is necessary: fifteen percent of all awards are not paid voluntarily."); *see also* Tijana Kojovic, *Court Enforcement of Arbitral Decisions on Provisional Relief - How Final is Provisional?*, 18(5) J. INT'L ARB. 511, 512 (2001) ("placing too much faith in the parties' cooperative spirit seems to be a romantic echo of the 'good old times' when arbitration was a friendly forum where the parties looked to their business peers for an answer to their differences.").

42 Zia Mody & T.T. Arvind, *Redeeming Sisyphus: The Need to Invigorate Interim Relief in International Commercial Arbitration*, *in* 10 INTERNATIONAL ARBITRATION AND NATIONAL COURTS: THE NEVER ENDING STORY, ICCA CONGRESS SERIES 126, 132 (Albert Jan Van den Berg ed., 2001).

43 Peter Sherwin & Douglas C Rennie, *Interim Relief under International Arbitration Rules and Guidelines: A Comparative Analysis*, 20(3) AMERICAN REV. INT'L ARB. 317, 324 (2010) [*hereinafter* "Sherwin & Rennie"].

44 Philippe Cavalieros & Janet (Hyun Jeong) Kim, *Emergency Arbitrators Versus the Courts: From Concurrent Jurisdiction to Practical Considerations*, 35(3) J. INT'L ARB. 275, 287 (2018).

45 Report of The ICC Commission on Arbitration and ADR Task Force on Emergency Arbitrator Proceedings, ¶ 35 (Apr. 2019), *available at* https://iccwbo.org/content/uploads/sites/3/2019/03/icc-arbitration-adr-commission-report-on-emergency-arbitrator-proceedings.pdf [*hereinafter* "ICC REPORT"] ("in the vast majority of cases, parties comply voluntarily with EA decisions"); *see also* Fry, *supra* note 6, at 196–97; Paraguacuto-Maheo & Lecuyer-Thieffry, *supra* note 22, at 777; Bao, *supra* note 11, at 282; Markert & Rawal, *supra* note 22, at 133.

46 Rania Alnaber, *Emergency Arbitration: Mere Innovation or Vast Improvement*, 35(4) ARB. INT'L 441, 457 (2019) [*hereinafter* "Alnaber"].

47 Hamish Lal & Brendan Casey, *Ten Years Later: Why the 'Renaissance of Expedited Arbitration' Should Be the 'Emergency Arbitration' of 2020*, 37(3) J. INT'L ARB. 325, 330 (2020).

48 Fry, *supra* note 6, at 181.

49 Ank A. Santens & Jaroslav Kudrna, *The State of Play of Enforcement of Emergency Arbitrator Decisions*, 34(1) J. INT'L ARB. 1, 2 (2017).

Congo ["**Congo**"], the *Paris Cour d'appel* expressly ruled that the referee was not an "*arbitrator*" with jurisdictional features, and the resulting decisions were not "*arbitral awards.*"[50] This was perhaps part of the reason why the ICC's mechanism never really took off. Other reasons included its scarce usage,[51] its opt-in design, its need for a separate written agreement, and its lack of general recognition.

In the aftermath of its failure to take off, the ICC jumped on the bandwagon in 2012, and included a provision for emergency arbitration in its 2012 arbitral rules.[52] This new provision has built on the old one, resulting in a more refined, readily available, and well-structured mechanism as compared to the referee procedure. For instance, ICC emergency arbitration is opt-out, removing the requirement of a separate written agreement. This arguably gave the mechanism a more authoritative standing and greater recognition. The success of this mechanism is evident, as the ICC has received over 150 emergency arbitration applications in the span of nine years.[53]

One may question whether the *Paris Cour d'appel's* decision in *Congo* would also apply to emergency arbitrators. In this regard, the Report of the ICC Task Force on Emergency Arbitrator Proceedings ["**ICC Report**"] noted that the reasoning in *Congo*—as regards the "*non-jurisdictional character*" of the ICC referee—is widely criticised[54] and is not likely to apply to the ICC's emergency proceedings.[55] In fact, through its widespread use,[56] emergency arbitration has essentially reached universal recognition, making it further unlikely to be affected by *Congo*'s decision.

Nevertheless, there are other issues that could give rise to the uncertainty regarding the status of an emergency arbitrator, for instance, the continual lack of universal statutory recognition. A number of States have attempted to address this issue, including Singapore,[57] New Zealand,[58] Malaysia,[59] and Fiji.[60] These States have included "*emergency arbitrator*" within the statutory definition

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50 Société Nationale des Pétroles du Congo and République du Congo v. TEP Congo, Court of Appeals, Paris, Cour d'appel [CA] Regional court of appeal, Paris 1'ch, Apr. 29, 2003 (Fr.), *in* Emmanuel Gaillard & Philippe Pinsolle, *The ICC Pre-Arbitral Referee: First Practical Experiences*, 20(1) ARB. INT'L 13, 22 (2004) [*hereinafter* "Gaillard & Pinsolle"].

51 BORN, *supra* note 4, at 2632; *see also* Toulson, *Van Houtte acts as emergency referee*, GLOB. ARB. REV. (Dec. 9, 2010), *available at* https://globalarbitrationreview.com/van-houtte-acts-emergency-referee ("The ICC's Pre-Arbitral Referee Procedure Rules have been in force since 1990 but have been used only very rarely (less than a dozen instances).").

52 ICC Rules 2012, art. 29.

53 *See supra* text accompanying notes 21–24.

54 Gaillard & Pinsolle, *supra* note 50, at 22 ("Overall, we do not necessarily disagree with the result reached by the Paris Court of Appeal, which denies the characterization as an award, even though we would have welcomed more detailed reasons supporting it.").

55 ICC REPORT, *supra* note 45, ¶ 197.

56 *See supra* text accompanying notes 12–24.

57 International Arbitration (Amendment) Act, No. 12 of 2012, § 2 (Sing.) (amending the Singapore IAA, § 2(1)) (""arbitral tribunal" means a sole arbitrator or a panel of arbitrators or a permanent arbitral institution, and includes an emergency arbitrator appointed pursuant to the rules of arbitration agreed to or adopted by the parties including the rules of arbitration of an institution or organisation.").

58 Arbitration Amendment Act 2016, § 4 (N.Z.) (amending the Arbitration Act 1996, § 2(1) (N.Z.)) ("arbitral tribunal includes any emergency arbitrator appointed under (i) the arbitration agreement that the parties have entered into; or (ii) the arbitration rules of any institution or organisation that the parties have adopted.").

59 Arbitration (Amendment) Act, No. 2 of 2018, § 2 (Malay.) (amending the Arbitration Act, No. 646 of 2005, § 2(1) (Malay.)) (""arbitral tribunal" means an emergency arbitrator, a sole arbitrator or a panel of arbitrators.").

60 International Arbitration Act, No. 44 of 2017, § 2 (Fiji) (""arbitral tribunal" means a sole arbitrator, a panel of arbitrators or an emergency arbitrator appointed pursuant to the rules of arbitration agreed to or adopted by the parties.").

of an "*arbitrator*." On the other hand, Hong Kong,[61] South Korea,[62] and Bolivia[63] have amended their national legislations to construct specialised mechanisms for the enforcement of emergency decisions.[64] Further, as per the ICC Report, National Committees of many countries such as Belgium, Brazil, Spain, and Ukraine recognise the powers of an arbitral tribunal to grant interim relief extend to emergency arbitrators.[65]

Even though states have adopted a pro-emergency arbitration approach, the mechanism itself has not been free of criticism. Baruch Baigel,[66] for example, has observed that an ICC emergency arbitrator is not an arbitrator for a number of reasons. Some of the reasons he puts forth are that (i) the ICC emergency arbitration procedure is "*contractual*", and not "*jurisdictional*";[67] (ii) if an ICC tribunal and an emergency arbitrator have similar jurisdiction, there is no "*clear basis on which an ICC tribunal should be able to modify decisions made by another properly appointed arbitrator*" without some reasonable justification on the basis of "*error or new circumstances*";[68] and (iii) unlike a traditional arbitrator, an ICC emergency arbitrator is not appointed by the parties but instead by the President of the ICC court.[69] The author respectfully argues that Baigel's views are not necessarily accurate, and each of these arguments is addressed below.

First, an emergency arbitrator possesses both "*contractual*" and "*jurisdictional*" features. With regard to the former, it is clear that emergency arbitration has contractual features—just like traditional arbitration—by virtue of the contracted arbitration agreement.[70] As regards the latter, the Honourable Charles N. Brower has opined:

> "*[A]s the emergency arbitrator has the same role and powers, limited by duration of the appointment, as an already constituted arbitral tribunal (Article 1(2)), the same jurisdictional standard should apply to the emergency arbitrator as applies to a fully constituted tribunal, which is faced with a request for provisional measures by a claimant and objections to jurisdiction by the respondent.*"[71]

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61 Arbitration (Amendment) Ordinance, (2013) Ord. No. 7, § 5 (H.K.) (amending the Arbitration Ordinance, (2011) Cap. 609, §§ 22A, 22B (H.K.)) [*hereinafter* "HK Arbitration (Amendment) Ordinance"].

62 Eun Jeong Park & Joel Richardson, *Rush to Judgment: Speed v Fairness in International Arbitration*, 18(4) ASIAN DISP. REV. 174, 175 (2016) ("In July 2016, Korea followed this trend by enacting amendments to its Arbitration Act to permit the enforcement of interim measures ordered by an arbitral tribunal seated in Korea, which is understood to apply to orders rendered by emergency arbitrators.").

63 Conciliation and Arbitration Law, No. 708 of 2015, §§ 67–71 (Bol.).

64 BORN, *supra* note 4, at 2709.

65 ICC REPORT, *supra* note 45, ¶ 187.

66 Note that Baigel, *infra* note 67, in his article, specifically talks about the ICC emergency arbitration process. One of the major differences between ICC and most other arbitral institutions (like LCIA, SIAC, SCC, HKIAC) is that the emergency decisions under ICC rules are only termed as "orders," whereas the institutions generally allow emergency decisions to be termed as both orders or awards.

67 Baruch Baigel, *The Emergency Arbitrator Procedure under the 2012 ICC Rules: A Juridical Analysis*, 31(1) J. INT'L ARB. 1, 11 (2014) [*hereinafter* "Baigel"].

68 *Id.* at 12.

69 *Id.* at 15.

70 *See* Shaughnessy, *supra* note 21, at 341–42.

71 Brower et al., *supra* note 10, at 64–65.

The overlapping powers that a regular tribunal and an emergency arbitrator have include that of being able to rule on their own jurisdiction[72] under the doctrine of *kompetenz-kompetenz*,[73] and to issue interim relief by "*independent*" and "*impartial*" adjudication[74] at the seat of the proceedings.[75]

This position has also been espoused by Yesilirmak, who has stated that an emergency arbitrator "*resolves the request for an interim remedy in a judicial manner,*"[76] and by the likes of Gaillard and Pinsolle.[77] It is thus clear that emergency arbitration is not just a contractual mechanism, but also has jurisdictional features, like traditional arbitration.[78]

Second, an emergency decision being subject to modification by the fully constituted tribunal should not affect the way in which an emergency arbitration is viewed. An analogy can be drawn with the way in which court X modifying court Y's interim relief decision does not take away the status or recognition of court Y.[79] Furthermore, as per the ICC Report, even though the fully constituted tribunal is not bound by the emergency decision, it may have an indirect effect on the tribunal when it comes to considering the same issues or evidence.[80] It is also pertinent to note that it is not only the tribunal that can modify the emergency decision. The emergency arbitrator can also modify its own decision where necessary.[81] This possibility of modification is a result of the

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72 International Chamber of Commerce (ICC), Arbitration Rules 2021, art. 6(2), app. V [*hereinafter* "ICC Rules 2021"]; ICDR International Arbitration Rules 2021, art. 7(3) [*hereinafter* "ICDR Rules 2021"]; Singapore International Arbitration Centre (SIAC), Arbitration Rules 2016, sched. 1(7) [*hereinafter* "SIAC Rules 2016"]; Hong Kong International Arbitration Centre (HKIAC), Administered Arbitration Rules 2018, sched. 4(10) [*hereinafter* "HKIAC Rules 2018"]. *See also* Fry, *supra* note 6, at 187 ("One might argue that similarities between the duties of emergency arbitrators, as defined in most arbitration rules (mostly relating to independence and impartiality) and those of arbitral tribunals (which also relate to independence, fairness and impartiality) tend to show that an emergency arbitrator is an arbitral tribunal, without the need for further definition.").

73 The doctrine of *kompetenz-kompetenz* (also known as "competence-competence"), empowers an arbitral tribunal to rule on its own jurisdiction. This is the "positive effect" of this principle, which also entails that a challenge to the validity or existence of the arbitration agreement will not limit the powers of the arbitrator to decide on their own jurisdiction and eventually render a decision on merits. This doctrine also purports that during the time the arbitrator has a jurisdictional challenge before him, "courts should limit, at that stage, their review to a prima facie determination that the agreement is not 'null and void, inoperative or incapable of being performed'. This principle is known as the 'negative effect' of the doctrine". *See* Emmanuel Gaillard & Yas Banifatemi, *Negative Effect of Competence-competence: The Rule of Priority in Favour of the Arbitrators*, *in* ENFORCEMENT OF ARBITRATION AGREEMENTS AND INTERNATIONAL ARBITRAL AWARDS: THE NEW YORK CONVENTION IN PRACTICE 257, 257–73 (Emmanuel Gaillard & Domenico di Pietro eds., 2008).

74 Christopher Boog & Bertrand Stoffel, *Preliminary Orders and the Emergency Arbitrator: Urgent Interim Relief by an Arbitral Decision Maker in Exceptional Circumstances*, *in* TEN YEARS OF SWISS RULES OF INTERNATIONAL ARBITRATION - ASA SPECIAL SERIES NO. 44, 71, 78 (Nathalie Voser ed., 2014) [*hereinafter* "Boog & Stoffel"]; *see also* Andrea Meier, *Article 43 Swiss Rules*, *in* SWISS RULES OF INTERNATIONAL ARBITRATION: COMMENTARY 453, ¶ 33 (Tobias Zuberbühler, Christoph Müller & Philipp Habegger eds., 2d ed. 2013); ICC Rules 2021, app. V, art. 2(4) ("Every emergency arbitrator shall be and remain impartial and independent of the parties involved in the dispute."), app. V, art. 2(5) ("Before being appointed, a prospective emergency arbitrator shall sign a statement of acceptance, availability, impartiality & independence.").

75 ICC Rules 2021, art. 4, app. V; SIAC Rules 2016, sched. 1(4); HKIAC Rules 2018, sched. 4(9); Arbitration Institute of The Stockholm Chamber of Commerce Arbitration (SCC), Arbitration Rules 2017, art. 5, app. II [*hereinafter* "SCC Rules 2017"].

76 YESILIRMAK, *supra* note 3, at 123.

77 Gaillard & Pinsolle, *supra* note 50, at 22 ("Arbitration is also contractual in nature, but nevertheless undoubtedly leads to a jurisdictional decision. In our view, the referee does render a jurisdictional decision […].").

78 Fabio G. Santacroce, *The emergency arbitrator: a full-fledged arbitrator rendering an enforceable decision?*, 31(2) ARB. INT'L 283, 293–96 (2015) [*hereinafter* "Santacroce"]; Alnaber, *supra* note 46, at 458.

79 Alnaber, *supra* note 46, at 459.

80 ICC REPORT, *supra* note 45, ¶ 93.

81 ICC Rules 2021, art. 6(8), app. V; ICC REPORT, *supra* note 45, ¶ 217.

"*emergency*" element of the emergency arbitration process and is not about the status of an emergency arbitrator. Put simply, emergency arbitrations take place in high stake situations, where facts may change overnight. Accordingly, it is crucial that emergency decisions be open to modifications in such situations.

Third, the parties do have a say in the appointment of the emergency arbitrator, even though they do not directly appoint him. This is put forth by Fabio Santacroce, who rightly notes that parties can confer the power of appointing emergency arbitrators on the arbitral institution.[82] As parties possess the "*ultimate control*" of their dispute resolution system,[83] by agreeing to arbitrate under the relevant rules, parties implicitly agree to the application of emergency arbitration provisions, and accordingly, the arbitral institution can appoint the emergency arbitrator. On a practical note, assigning this right is crucial considering the clear urgent circumstances in which emergency arbitration applications are made. The institutions are well-equipped, specialised and efficient in appointing a capable emergency arbitrator within the narrow time frame.

In view of the above, some commentators, such as Christopher Boog, note that an emergency arbitrator is in fact an arbitrator.[84] This view is supported by the argument that emergency decisions are similar to provisional measures provided by fully constituted tribunals, both of which implement a strict threshold requirement for granting interim relief. In emergency arbitration, the standard is usually of urgency that cannot wait for the constitution of the tribunal,[85] and in traditional arbitration, it has been upheld that "*extraordinary measures […] are not to be recommended lightly,*" but only after the conduct of meticulous analysis.[86]

Gary B. Born has aptly stated:

> "*[...] the better view is that emergency arbitrators should be treated like other arbitrators. The general definition of 'arbitration' should be satisfied by an 'emergency arbitration,' and an emergency arbitrator's award should be capable of recognition and enforcement in the same manner as other awards [...].*"[87]

B. Enforcement of emergency decisions under the New York Convention, UNCITRAL Model Law and national legislation

The nomenclature of an emergency decision varies across jurisdictions and arbitral institutions. For the former, barring a few jurisdictions such as Australia, Russia, and the United Arab Emirates, many others look to the substance of an emergency decision, as opposed to its terminology.[88] In

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82 Santacroce, *supra* note 78, at 301.

83 LEW ET AL., *supra* note 5, at 4.

84 Boog & Stoffel, *supra* note 74, at 78.

85 Shaughnessy, *supra* note 21, at 339 ("an emergency arbitrator is like a doctor who must operate in the emergency room." She borrowed this expression from Mark Kantor.); *see also* ICC REPORT, *supra* note 45, ¶ 8; ICC Rules 2021, art. 29(1) ("A party that needs urgent interim or conservatory measures that *'cannot await the constitution of an arbitral tribunal'* may make an application for such measures pursuant to the Emergency Arbitrator Rules in Appendix V.")

86 Brigitte Stern*, Interim/Provisional Measures*, *in* BUILDING INTERNATIONAL INVESTMENT LAW: THE FIRST 50 YEARS OF ICSID 627, 628 (Meg Kinnear, Geraldine R. Fischer, Jara Minguez Almeida, Luisa Fernanda Torres & Mairée Uran Bidegain eds., 2015). *See also* Phoenix Action Ltd. v. The Czech Republic, ICSID Case No. ARB/06/5, Decision on Provisional Measures, ¶ 33 (Apr. 6, 2007); Emilio Agustín Maffezini v. Kingdom of Spain, ICSID Case No. ARB/97/7, Procedural Order No. 2 (Decision on Request for Provisional Measures), ¶ 10 (Oct. 28, 1999).

87 BORN, *supra* note 4, at 2709.

88 ICC REPORT, *supra* note 45, ¶¶ 38, 194.

doing so, the jurisdiction in which enforcement is sought will look to the agreement of parties, the *lex arbitri*,[89] and its own national arbitration framework.[90]

As for the latter, most arbitral institutions generally term emergency decisions as "*awards.*"[91] In contrast, the ICC labels these decisions as "*orders,*"[92] whereas the SCC terms them as "*emergency decisions.*"[93] Notwithstanding the differing terminologies, these decisions are binding on the parties under the rules of most arbitral institutions.[94] In this regard, the author agrees with Born, one of the commentators questioning why a reasoned emergency decision should not be considered enforceable under the New York Convention or national legislations.[95]

i. Under the New York Convention

The New York Convention is commonly regarded as the "*most important legal instrument in the history of international economic exchanges,*" with 168 States[96] having accepted to enforce arbitral awards in a similar manner as final judgments of their local courts.[97] In the context of emergency arbitration, some commentators have taken the view that the enforceability of emergency decisions under the New York Convention is questionable because of their temporary nature.[98] Nevertheless, there are many voices arguing for the opposing view. One such voice is Albert Jan Van den Berg's—widely considered an authority on the New York Convention—who has stated that "*arguably, an arbitral award in summary arbitral proceedings [also referred to as emergency arbitration] can be enforced outside the Netherlands under the 1958 New York Convention.*"[99] Building on this, it is certainly arguable that under the New York Convention, an emergency decision made in any jurisdiction would be enforceable outside that jurisdiction.

Even though the New York Convention does not explicitly require decisions on provisional measures to be "*final,*"[100] Yesilirmak has argued that two criteria must be met for a decision to be

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89 *Lex arbitri* is typically the law of the seat/place of arbitration and governs the arbitral proceedings. It is also referred to as the *curial law*. *See* MARGARET L. MOSES, THE PRINCIPLES AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 73 (3d ed. 2017).

90 ICC REPORT, *supra* note 45, ¶¶ 89–90.

91 *See, e.g.,* London Court of International Arbitration (LCIA), Arbitration Rules 2020, art. 9.8 [*hereinafter* "LCIA Rules 2020"]; SIAC Rules 2016, sched. 1(8); HKIAC Rules 2018, sched. 4(12); ICDR Rules 2021, art. 7(4).

92 ICC Rules 2021, art. 29(2).

93 SCC Rules 2017, art. 8, app. II.

94 *See, e.g.,* SCC Rules 2017, app. II, art. 9(1) ("An emergency decision shall be binding on the parties when rendered."), app. II, art. 9(3) ("By agreeing to arbitration under the Arbitration Rules, the parties undertake to comply with any emergency decision without delay."); ICC Rules 2021, art. 29(2); SIAC Rules 2016, sched. 1(12); HKIAC Rules 2018, art. 35(3); ICDR Rules 2021, art. 7(4).

95 BORN, *supra* note 4, at 2703.

96 Contracting States to the New York Convention, *available at* http://www.newyorkconvention.org/countries.

97 Jan Paulsson, *Moral Hazard in International Dispute Resolution*, 25(2) ICSID REV. – FOREIGN INV. L. J. 339, 340 (2010).

98 Leonie Parkin & Shai Meir Wade, *Emergency Arbitrators and the State Courts: Will They Work Together?* 80(1) INT'L J. ARB. MED. & DISP. MAN. 48, 50 (2014) ("Much might depend on whether the EA decisions are regarded as temporary measures or as final awards. If the latter, then they may be enforceable under the New York Convention. Conversely, focus on the interim and temporary nature of the relief granted will cast doubts over the effectiveness of the process.").

99 Albert Jan Van den Berg, *National Report for the Netherlands (2020), in* ICCA INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION 1, 47–48 (Lise Bosman ed. Supp. 112, 2020).

100 Brower et al., *supra* note 10, at 72.

enforceable under the New York Convention: that a decision be both "*final*" and "*binding.*"[101] In this respect, it is argued that an emergency decision satisfies both the criteria.

With regard to the former criterion, certain national courts have stated that if an interim order granted by an arbitral tribunal addresses and determines a particular question to finality, then it should be enforceable.[102] This can be seen, for example, in *Braspetro Oil Services Company - Brasoil* v. *The Management and Implementation Authority of the Great Man-Made River Project*,[103] where the *Paris Cour d'appel* approached the issue by giving due regard, not to the form of the ICC arbitral tribunal's decision (terming their decision as an "*order*"), but to its "*content*" and "*finality,*" ruling that "*[t]he qualification of a decision as an award does not depend on the terms used by the arbitrators or by the parties*".[104]

Another example is *Publicis Communication* v. *Publicis S.A., True North Communications Inc.,*[105] where the U.S. Court of Appeals for the Seventh Circuit held that a tribunal's decision not being final or enforceable if it is not labelled as an award "*is extreme and untenable formalism. The New York Convention, the United Nations arbitration rules, and the commentators' consistent use of the label 'award' [...] as interchangeable with final does not necessarily mean that synonyms such as decision, opinion, order, or ruling could not also be final. The content of the decision – not its nomenclature – determines finality.*"[106] Various other American courts have supported this view holding that such decisions are to be treated as "*final*" and "*enforceable.*"[107]

Although the above cases are discussed in the context of interim decisions of traditional arbitrators, Ghaffari and Walters have questioned why the approach of the U.S. and France cannot also apply to emergency arbitrations.[108] Applying the broadly construed approach taken in the U.S., an interim award would be considered as "*final,*" even if it often only has temporary binding effects,[109] because it resolves one of the issues put forth by the parties.[110] Any issue that parties raise can constitute a dispute, which relates to both the merits of the case and interim measures, as stated by Fry.[111] Accordingly, since an emergency arbitrator decides an issue that the parties

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101 YESILIRMAK, *supra* note 3, at 263–64.

102 Ghaffari & Walters, *supra* note 15, at 163.

103 *Braspetro Oil Services Company - Brasoil v. The Management and Implementation Authority of the Great Man-Made River Project, Cour d' Appel [Court of Appeal], July 1, 1999*, *in* 24a Y.B. COM. ARB. 296 (Albert Jan Van den Berg ed., 1999) (Fr.).

104 Ghaffari & Walters, *supra* note 15, at 163.

105 Publicis Communication v. True North Communications Inc., 206 F.3d 725, 728–30 (7th Cir. 2000) (U.S.).

106 *Id.*; *see also* Ghaffari & Walters, *supra* note 15, at 163–64.

107 Sherwin & Rennie, *supra* note 43, at 325–26; *see also* James M. Gaitis, *The Federal Arbitration Act: Risks & Incongruities Relating to the Issuance of Interim & Partial Awards in Domestic & International Arbitrations*, 16 AM. REV. INT'L ARB. 1, 67–68 (2005); *See, e.g.,* Yahoo! Inc. v. Microsoft Corp., 983 F.Supp.2d 310, 319 (S.D.N.Y. 2013) (U.S.); Metallgesellschaft A.G. v. MV Capitan Constante, 790 F.2d 280, 282-83 (2d Cir. 1986) (U.S.); Arrowhead Global Solutions, Inc. v. Datapath, Inc., 166 F.App'x 39, 41 (4th Cir. 2006) (U.S.); Yasuda Fire & Marine Ins. Co. of Europe v. Continental Casualty Co., 37 F.3d 345 (7th Cir. 1994) (U.S.); Pacific Reinsurance Management Corp. v. Ohio Reinsurance Corp., 935 F.2d 1019, 1023 (9th Cir. 1991) (U.S.); McVay v. Halliburton Energy Servs., Inc., 608 F. App'x 222 (5th Cir. 2015) (U.S.); Island Creek Coal Sales Co. v. City of Gainesville, 729 F.2d 1046 (6th Cir. 1984) (U.S.); Ecopetrol SA v. Offshore Exploration and Prod. LLC, 46 F.Supp.3d 327 (S.D.N.Y. 2014) (U.S.) (cited in BORN, *supra* note 4, at 2699).

108 Ghaffari & Walters, *supra* note 15, at 163

109 Santacroce, *supra* note 78, at 304.

110 YESILIRMAK, *supra* note 3, at 265 ("As to the finality of an award on a provisional measure, an interim award or a partial award, in order to be final, needs to dispose of an issue in dispute. To this end, it is arguable that an interim award is final in respect of the issues it deals with.").

111 Fry, *supra* note 6, at 189.

have raised, namely the request for interim relief; then, even though his mandate is limited by time,[112] the resulting decision should also be considered as final and enforceable.

With regard to the latter criterion of the decision needing to be "*binding,*" by agreeing to arbitrate their disputes under the rules of the arbitral institution—which provide for an emergency arbitrator—the parties are "*deemed to have made the rules a part of their agreement*"[113] and have thus empowered the emergency arbitrator with the authority to issue a binding award.[114]

In view of the above, it can be safely said that an emergency decision is both final and binding and is arguably enforceable under the New York Convention. Yesilirmak believes that this "*approach should be taken because it is in line with the overall object and purpose of the Convention: enhancing effectiveness of arbitration through facilitating international enforcement of arbitral decisions.*"[115] Having demonstrated that emergency decisions can be considered as awards under the New York Convention, it is important to note that such decisions may nevertheless be refused enforcement in various states[116] that have made the "*reciprocity reservation.*"[117]

ii. Under the UNCITRAL Model Law

Taking note of the disparities between the various national arbitration regimes, as regards the enforcement of arbitral interim orders, the 2006 revisions of the UNCITRAL Model Law[118]

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112 Boog & Stoffel, *supra* note 74, at 78.

113 Bassler, *supra* note 36, at 572.

114 *See, e.g.,* Olga Hamama & Olga Sendetska, *Interim measures in support of arbitration in Ukraine: lessons from JKX Oil & Gas et al v Ukraine and the recent reform of Ukrainian legislation*, 34(2) ARB. INT'L 307, 311 (2018). *See also* Kyiv Pechersk District Court, JKX Oil & Gas et al. v. Ukraine, June 8, 2015 (Ukr.) ("[T]he emergency arbitrator procedure was in accordance with the agreement of the parties since the emergency arbitrator mechanism was foreseen in the SCC Arbitration Rules that were in force at the time of the request for the appointment of an emergency arbitrator. The court also ruled that Ukraine was properly notified about the appointment of the emergency arbitrator.").

115 YESILIRMAK, *supra* note 3, at 265.

116 *See supra* note 92 and accompanying text. *See also* August Reinisch, *Chapter 1: The New York Convention as an Instrument of International Law, in* 61 AUTONOMOUS VERSUS DOMESTIC CONCEPTS UNDER THE NEW YORK CONVENTION 1, 6, n. 25 (Franco Ferrari & Friedrich Rosenfeld eds., 2020) ("Seventy-two state parties have opted for the reciprocity reservation.") [*hereinafter* "Reinisch"].

117 The "Reciprocity reservation" allows a State to apply the New York Convention only to awards made in the territory of another Contracting State. *See* Article 1, 1958 N.Y. CONVENTION GUIDE, *available at* https://newyorkconvention1958.org/index.php?lvl=cmspage&pageid=10&menu=617&opac_view=-1. ("There is a *"commercial reservation"* provision as well, that allows States to apply the Convention only to commercial issues, but in recent times it has not been an issue, since most courts consider "commercial" in broad terms"); *see* Reinisch, *supra* note 116.

118 United Nations Comm'n on Int'l Trade Law (UNCITRAL), Model Law on International Commercial Arbitration, G.A. Res. 40/72, U.N. Doc. 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) [*hereinafter* "UNCITRAL Model Law"].

adopted a "*specialized enforcement regime,*"[119] based on an "*opt-out*" formula,[120] to foster uniformity[121] regarding enforcement. However, only a handful of states have adopted the 2006 revisions.[122]

Before delving into the substance of this regime, it is pertinent to understand the long-established gravity of the issue of enforcing interim relief by noting that this was an issue that was raised decades ago in the discussions leading up to the 1985 UNCITRAL Model Law.[123] At the time, the UNCITRAL Secretariat proposed the inclusion of the following text in Article 17 of the 1985 UNCITRAL Model Law: "*If enforcement of any such interim measure becomes necessary, the arbitral tribunal may request [a competent court] [...] to render executory assistance.*"[124] Even though this was eventually not adopted due to practical complications,[125] the Fourth Working Group stated that the national courts in which such enforcement was to be sought could decide the approach they wanted to take—to enforce or not to enforce,[126] and it would not be advisable to limit the courts' ability to enforce these decisions.

The version of Article 17 that was eventually adopted in the 1985 UNCITRAL Model Law allowed the tribunal to order interim measures, at the request of either party, where it deemed it necessary to do so. The 2006 revisions completely revamped Article 17, with the most crucial modification in terms of enforcement being the addition of Article 17H(1), which provides for tribunal-ordered interim relief to be binding and enforceable upon application to the competent court.[127] Article 17H(1), arguably, also extends to emergency arbitrators as they should be considered the same as traditional arbitrators.[128] In this regard, an emergency decision should be deemed to be of the same

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119 BORN, *supra* note 4, at 2705.

120 Luis Enrique Graham, *Interim Measures: Ongoing Regulation and Practices (A View from the UNCITRAL Arbitration Regime)*, *in* 14 50 YEARS OF THE NEW YORK CONVENTION: ICCA INTERNATIONAL ARBITRATION CONFERENCE, ICCA CONGRESS SERIES 539, 547 (Albert Jan Van den Berg ed., 2009).

121 Dana Renée Bucy, *How to Best Protect Party Rights: The Future of Interim Relief in International Commercial Arbitration Under the Amended UNCITRAL Model Law*, 25(3) AMERICAN U. INT'L L. REV. 579, 582 (2010).

122 According to Peter Binder, out of the 111 jurisdictions that he surveyed, merely 13 jurisdictions "*adopted*" the revised Article 17, 2 jurisdictions "mostly adopted" and 9 territories adopted provisions "similar in parts" to Article 17. *See* PETER BINDER, INTERNATIONAL COMMERCIAL ARBITRATION AND MEDIATION IN UNCITRAL MODEL LAW JURISDICTIONS 803–810 (4th ed. 2019).

123 UNCITRAL Model Law; YESILIRMAK, *supra* note 3, at 249.

124 UNCITRAL, Working Papers submitted to the Working Group on International Contract Practices at its fifth session – Note by the Secretariat: Model Law on International Commercial Arbitration: Revised Draft Articles I to XXVI, U.N. Doc. A/CN.9/WG.II/WP.40, art. XIV (Feb. 22, 1983 – Mar. 04, 1983) *available at* https://undocs.org/en/A/CN.9/WG.II/WP.40.

125 YESILIRMAK, *supra* note 3, at 249.

126 UNCITRAL, Report of the Working Group on International Contract Practices on the Work of its Sixth Session, U.N. Doc. A/CN.9/245, art. XIV ¶ 72 (Sept. 22, 1983), *available at* https://undocs.org/en/A/CN.9/245; *Id.*

127 UNCITRAL Model Law, art. 17 H(1) ("An interim measure issued by an arbitral tribunal shall be recognized as binding and, unless otherwise provided by the arbitral tribunal, enforced upon application to the competent court, irrespective of the country in which it was issued, subject to the provisions of article 17 I.").

128 *See supra* text accompanying notes 51–84.

standing as a tribunal-ordered interim relief. This view has been supported by various commentators,[129] including Nathalie Voser,[130] and has also been noted by the ICC Report.[131]

Adopting a contrary view, Baigel opines that "*Article 17H simply begs the question as to whether the ICC [emergency arbitrator] is an arbitral tribunal*" and even if it is covered, enforcement might still be refused under Article 17I, on the basis of the very short notice period (lack of proper notice) in an ICC emergency arbitration.[132] The author does not agree with Baigel in this regard, and has already addressed Baigel's first point regarding the status of an emergency arbitrator previously.[133] As for the relatively short notice period in an emergency arbitration, this will not result in the enforcement of an emergency decision being refused under Article 17I because it is in line with the parties' agreement. By agreeing to have the arbitral rules apply, the respondents have implicitly accepted the accelerated nature of the emergency arbitrator proceedings.

iii. Under national legislations

Enforcement in some jurisdictions does not require an emergency decision to be enforceable under any international instrument. Instead, these jurisdictions have implemented the "*optimal solution,*"[134] which is to have a specialised legislation that allows for the enforcement of emergency decisions, often with the assistance of national courts.

Jurisdictions such as Singapore, New Zealand, Malaysia, and Fiji have expanded their definition of an "*arbitrator*" to explicitly include "*emergency arbitrators,*" thus making emergency decisions enforceable in the same manner as arbitral decisions.[135]

Going one step further, some jurisdictions have completely clarified the issue of enforceability of an emergency decision. Hong Kong, for example, in an amendment to its Arbitration Ordinance, explicitly stated that emergency decisions are to be enforced in the same manner as a court order, irrespective of the jurisdiction in which the emergency arbitration was seated.[136] Another example is of Bolivia, whose national arbitration law provides that all emergency decisions are binding on parties, and where they do not comply, judicial assistance for enforcement can be sought.[137] Furthermore, France allows the courts to order—through a summary judgment—an emergency decision to be specifically performed.[138]

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129 Monika Feigerlová, *Emergency Measures of Protection in International Arbitration*, 18(1) INT'L COMP. L. REV. 155, 169–170 (2018); Alnaber, *supra* note 46, at 461; Santacroce, *supra* note 78, at 306.

130 Nathalie Voser, *Overview in the Most Important Changes in the Revised ICC Arbitration Rules,* 29(4) ASA BULLETIN 783, 818 (2011) ("In particular jurisdictions which have adopted or will adopt the revised UNCITRAL Model Law, including the Articles 17H and 17I, are likely to recognize and enforce orders issued by an ICC emergency arbitrator.").

131 ICC REPORT, *supra* note 45, ¶ 186 ("[…] most reports from countries that have incorporated the UNCITRAL Model Law (and in particular its provisions on enforceability of interim measures), tend to favour the enforceability of EA decisions considering that full effect should be given to the provisions of the arbitration rules as the expression of the parties' intent and that it is reasonable to assume that the EA has the same powers as an arbitrator.").

132 Baigel, *supra* note 67, at 6.

133 *See supra* text accompanying notes 64–84.

134 Bassler, *supra* note 36, at 574.

135 *See supra* notes 55–58 and accompanying text.

136 Arbitration (Amendment) Ordinance, § 5 (H.K.).

137 Conciliation and Arbitration Law, No. 708 of 2015, § 67(IV) (Bol.).

138 ICC REPORT, *supra* note 45, ¶ 205.

Despite the above developments, a majority of the jurisdictions do not have any specific provisions on emergency arbitrations in their national legislations. Nevertheless, where such jurisdictions have adopted the 2006 revisions of the UNCITRAL Model Law, enforcement of emergency decisions may still be sought indirectly, as explained above, pursuant to provisions under the national legislation allowing tribunal-ordered interim relief to be enforced.

Unfortunately, there may be situations where there is neither a specific provision in the national legislation, nor has the legislature adopted the 2006 revisions of the UNCITRAL Model Law. In such circumstances, the question arises as to how emergency decisions can be enforced? This is the case in India.

III. Emergency Arbitration under India's current arbitration regime

India, at least after 1996[139]—once the *nemesis* of the Indian arbitration regime, the 1940 Arbitration Act,[140] was repealed—has always demonstrated its intent of becoming arbitration-friendly. However, regarding the issue of interim measures, India has faced various setbacks in getting to the position it is at today.

A. The erratic history of the provision for interim relief in support of foreign-seated arbitrations under Indian law

In 1996, the Arbitration and Conciliation Act ["**Arbitration Act**"] was enacted.[141] The arbitration regime under this Act comprises of Part I, which applies to India-seated arbitrations[142] and is largely based on the UNCITRAL Model Law; and Part II, which deals with the enforcement of foreign awards.[143] Certain provisions, for example, those relating to the availability of court-ordered interim relief, are only mentioned in Part I of the Arbitration Act.[144] Where a foreign-seated arbitration needed the assistance of Indian courts in providing interim relief, they had no avenues of procuring such relief under Part II. Accordingly, this two-fold nature of the Arbitration Act raised questions as to whether the provisions of Part I could apply to Part II.

In 2002, the Indian Supreme Court in *Bhatia International* v. *Bulk Trading S.A.* ["**Bhatia International**"] held that the relevant provisions of Part I would be applicable to arbitral proceedings that fall under the aegis of Part II,[145] thus meaning that a court could now order interim relief in support of foreign-seated arbitrations. However, this also meant that parties could

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139 Prior to the enactment of the Arbitration and Conciliation Act, No. 26 of 1996 (India) [*hereinafter* "Arbitration Act"] (adopted to ensure compatibility with the UNCITRAL Model Law) – domestic arbitrations were governed by the Arbitration Act, No. 10 of 1940 (India), and foreign awards were enforceable under Arbitration (Protocol and Convention) Act, No. 6 of 1937 (India) and the Foreign Awards (Recognition and Enforcement) Act, No. 45 of 1961 (India) for awards made under the Geneva Convention on the Execution of Foreign Arbitral Awards, July 24, 1923, 27 L.N.T.S. 157 and New York Convention respectively.

140 Sumeet Kachwaha, *The Arbitration Law of India: A Critical Analysis*, 1(2) ASIAN INT'L ARB. J. 105, 105 (2005). *See also* Guru Nanak Foundation v. Rattan Singh, (1981) 4 SCC 634 (India) ("This Act was largely premised on mistrust of the arbitral process and afforded multiple opportunities to litigants to approach the court for intervention") ("A telling comment on the working of the old Act can be found in a 1981 judgment of the Supreme Court where the judge (Justice DA Desai) in anguish remarked 'the way in which the proceedings under the (1940) Act are conducted and without an exception challenged in Courts, has made lawyers laugh and legal philosophers weep' […].").

141 Arbitration Act, No. 26 of 1996 (India).

142 *Id.* § 2(2).

143 *Id.* pt. II.

144 *Id.* § 9.

145 Bhatia Int'l v. Bulk Trading S.A., (2002) 4 SCC 105, ¶ 26 (India).

apply to set aside foreign-seated awards,[146] as the provisions for setting aside of an award were set out in Part I.[147] This accordingly led to heavy criticism,[148] to which Fali S. Nariman noted that the Supreme Court would have to "*iron out the creases*" resulting from the judgment in *Bhatia International*.[149]

Bhatia International was eventually overturned, with the Supreme Court stating in *Bharat Aluminium Co.* v. *Kaiser Aluminium Technical Services Inc.*, that Part I would not be applicable to foreign seated arbitral proceedings.[150] This judgment was received with open arms by the international arbitration community because Indian courts had essentially adopted a "*less interventionist approach.*"[151] However, this reignited the issue of what parties to foreign-seated arbitrations could do when they needed to seek interim relief in support of their arbitrations from the Indian courts.[152] This issue persisted until 2015, when the Arbitration Act was amended,[153] and it was clarified that interim relief could be sought in support of foreign-seated arbitrations through the assistance of courts. Although assistance in obtaining interim relief could now be sought prior to the constitution of an arbitral tribunal, the "*Achilles' Heel*" problem still remained.[154]

B. The current Indian approach to the emergency arbitration mechanism

Currently, India allows for emergency arbitration proceedings, with some arbitral rules providing that emergency decisions fall within the definition of an award,[155] whereas others, taking it a step further, provide that an emergency arbitrator is covered within the definition of an arbitral tribunal.[156] Despite this, there are issues regarding enforcement of emergency decisions in India, and the author believes that the same may only be resolved through statutory recognition of emergency arbitration in India.

The Law Commission of India in 2014 had proposed the inclusion of an emergency arbitrator within the definition of an "*arbitral tribunal*" under Section 2(1)(d)[157] of the Arbitration Act.[158] This proposal was not accepted, and subsequently, the Srikrishna Committee—set up to "*review the*

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146 *See, e.g.,* Venture Global Engineering v. Satyam Computers Services Ltd., (2008) 4 SCC 190 (India).

147 Arbitration Act, § 34.

148 Lucy Reed addressed this so-called "Section 9(b) problem" (based on prior English law), prevalent in many jurisdictions, such as India, which entailed a risk that courts might treat foreign-seated arbitral awards as domestic awards, subjecting them to judicial review and eventually to setting-aside proceedings. *See* Reed, *supra* note 30, at 564.

149 Fali S. Nariman, *Application of the New York Convention in India*, 25(6) J. INT'L ARB. 893, 898 (2008).

150 Bharat Aluminum Co. v. Kaiser Aluminium Tech. Serv. Inc., (2012) 9 SCC 552, ¶ 194 (India).

151 Audley Sheppard & Jo Delaney, *A brighter future: moves towards a less interventionist approach by Indian courts*, 7535 NEW L. J. 1347, 1348 (2012).

152 *Id.*; *see also* Abhishek M. Singhvi, *Interim Relief: The Role of Arbitrators and the Courts in India, in* 10 INTERNATIONAL ARBITRATION AND NATIONAL COURTS: THE NEVER ENDING STORY, ICCA CONGRESS SERIES 136, 136 (Albert Jan Van den Berg ed., 2001) (He noted that he could not see any reason why domestic courts in India could not grant interim relief in support of foreign-seated arbitrations.).

153 Arbitration and Conciliation (Amendment) Act, No. 3 of 2015 § 2(2) (India) (Section 9, 27 and 37 would also apply to foreign-seated international commercial arbitrations.).

154 *See supra* text accompanying note 6.

155 *See* MCIA Rules, r. 1.3; Indian Council of Arbitration (ICA), Rules of International Commercial Arbitration 2016, r. 2(b).

156 DIAC Rules, r. 2.1(c).

157 The current definition is "*arbitral tribunal* means a sole arbitrator or a panel of arbitrators." *See* Arbitration Act, § 2(1)(d).

158 Law Comm'n of India, Report No. 246 – Amendments to the Arbitration and Conciliation Act, 1996(2014), at 9–10, 37, *available at* http://lawcommissionofindia.nic.in/reports/Report246.pdf [*hereinafter* "246th Report"].

institutionalisation of arbitration mechanism in India"—recommended, *inter alia*, that the law be amended to allow the enforcement of emergency decisions, and that the Law Commission of India's proposal be adopted.[159] It was hoped that a majority of the Srikrishna Committee's recommendations would be adopted;[160] however this was not the case, and as of the date of this article, emergency arbitration is yet to find a home in India's statutory arbitration regime.

That said, notwithstanding the lack of express statutory recognition, it is possible to enforce emergency decisions in India. For India-seated arbitrations, Part I of the Arbitration Act provides for enforcement of orders and awards of arbitral tribunals to be conducted in the same manner as an order of the court.[161] Even though the definition of "*arbitral tribunal*" under the Arbitration Act does not include an emergency arbitrator, some commentators have argued that it is nevertheless "*broad enough to impliedly include emergency arbitrators within its scope.*"[162] This is further bolstered by Yesilirmak's comment that, "*if an emergency arbitrator is accepted as an arbitrator by a given legal system, his decision should be enforceable like a decision of an arbitrator.*"[163] Building on this, any "*order*" or "*interim award*"[164] granted by an emergency arbitrator should be enforceable like an order or interim award of the court as per Sections 17(2) and 36(1) of the Arbitration Act respectively.[165] In fact, in August 2021, the Supreme Court of India held that the emergency arbitration mechanism and its resulting decisions, come within the purview of the Indian arbitration legislation, and that the scope of an arbitral tribunal extended to emergency arbitrators.[166] This judgment is discussed later in this Part.

For foreign-seated arbitrations, an argument can be made for an emergency decision to be enforced under Part II of the Arbitration Act. This may be possible because an arbitral award can be enforced as per the New York Convention in India under the Arbitration Act.[167] Since it has been demonstrated previously that an emergency decision is enforceable under the New York Convention by virtue of being both final and binding,[168] it is certainly arguable that an emergency decision can therefore be enforced under the Arbitration Act. However, emergency decision may

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159 Ministry of Law & Justice, Government of India, Report of the High Level Committee to Review the Institutionalisation of Arbitration Mechanism in India (2017), at 76, *available at* https://legalaffairs.gov.in/sites/default/files/Report-HLC.pdf [*hereinafter* "HLC Report"].

160 Vyapak Desai, Kshama A. Loya & Ashish Kabra, *Arbitration in India: The Srikrishna Report – A Critique*, 20(1) ASIAN DISP. REV. 4, 10 (2018).

161 Arbitration Act, § 17(2) ("any order issued by the arbitral tribunal under this section shall be deemed to be an order of the Court for all purposes and shall be enforceable under the Code of Civil Procedure, 1908."), § 36(1) ("[…] award shall be enforced in accordance with the provisions of the Code of Civil Procedure, 1908, in the same manner as if it were a decree of the court.").

162 Promod Nair & Shivani Singhal, *Interim Measures*, *in* ARBITRATION IN INDIA 145, 171 (Dushyant Dave, Martin Hunter, Fali Nariman & Marike Paulsson eds., 2021) [*hereinafter* "Nair & Singhal"].

163 YESILIRMAK, *supra* note 3, at 146.

164 The definition of an "arbitral award" under Arbitration Act, § 2(1)(c) includes an interim award.

165 Nair & Singhal, *supra* note 162.

166 Amazon.Com NV Inv. Holdings LLC v. Future Retail Ltd., Civil Appeal Nos. 4492-4493 of 2021 ¶¶ 19–22 (India) [*hereinafter* "Amazon (SC)"].

167 Arbitration Act, §§ 44–49 (These sections deal with enforcement of foreign awards under the New York Convention in India).

168 *See supra* text accompanying notes 94–113.

nevertheless be refused enforcement in cases where India's commercial and reciprocity reservations become relevant.[169]

Since enforcement under the above methods is not guaranteed, parties have opted for an "*indirect method*" of enforcing their foreign-seated emergency decisions, i.e., to file a suit in the Indian courts after having procured an emergency decision. Although this method does not technically "*enforce*" an emergency decision, instead while seeking fresh interim relief from the Indian courts, it does not preclude the court from considering the merits, or the existence, of the emergency decision when coming to its own conclusions.

An example of this "*indirect method*" can be seen in *HSBC PI Holdings (Mauritius) Ltd.* v. *Avitel Post Studioz Ltd.* ["**Avitel Post**"].[170] In this case, the applicant had procured a favourable emergency decision in a Singapore-seated Singapore International Arbitration Centre ["**SIAC**"] arbitration, but did not seek its direct enforcement, instead opting to seek interim relief under Section 9 of the Arbitration Act.[171] The Bombay High Court held that, by directly applying for interim relief and not pursuing enforcement of the emergency decision, the applicant was "*entitled to invoke Section 9 for interim measures.*"[172] Section 9 was applicable to the case because, even though the parties had excluded the applicability of Part I of the Arbitration Act, Section 9 was specifically made to apply. In determining the interim relief application, the Court conducted its own analysis,[173] and eventually granted the relief sought.

In line with *Avitel Post*, for the purposes of our Section 9 discussion, the Delhi High Court in *Raffles Design International India Pvt. Ltd.* v. *Educomp Professional Education Ltd.* ["**Raffles Design**"][174] stated that although a party to a foreign-seated arbitration could not seek enforcement of an emergency decision under Section 17 of the Arbitration Act, it could bring a separate interim relief petition under Section 9 and a court could decide on such an application by conducting its own analysis – without being required to consider the emergency arbitrator's decision.[175]

In a recent case, *Ashwani Minda* v. *U-Shin Ltd.* ["**Ashwani Minda**"],[176] a slightly different factual matrix resulted in the Court finding that an application for interim relief under Section 9 was not possible. In this case, the parties had agreed to exclude the applicability of the Part I of the Arbitration Act by agreeing to being regulated by Japan Commercial Arbitration Association (Commercial Arbitration Rules), 2014 ["**JCAA Rules**"].

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169 Arbitration Act, § 44 ("foreign award means an arbitral award on differences between persons arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India, made on or after the 11th day of October, 1960 – (a) in pursuance of an agreement in writing for arbitration to which the Convention set forth in the First Schedule applies, and (b) in one of such territories as the Central Government, being satisfied that reciprocal provisions have been made may, by notification in the Official Gazette, declare to be territories to which the said Convention applies."). *See also supra* notes 114–15 and accompanying text.

170 HSBC PI Holdings (Mauritius) Ltd. v. Avitel Post Studioz Ltd., 2014 SCC Online Bom 102 (India) [*hereinafter* "Avitel"].

171 *Id.* ¶ 89.

172 *Id.*

173 *Id.* ¶ 99.

174 Raffles Design International India Pvt. Ltd. v. Educomp Professional Education Ltd., 2016 SCC OnLine Del 5521 (India) [*hereinafter* "Raffles"].

175 *Id.* ¶¶ 103–05.

176 Ashwani Minda v. U-Shin Ltd., 2020 SCC OnLine Del 1648 (India) [*hereinafter* "Ashwani (single-bench)"]; Ashwani Minda v. U-shin Ltd., 2020 SCC OnLine Del 721 (India) [*hereinafter* "Ashwani (division-bench)"].

The case specifically involved an applicant attempting to seek interim relief from the single bench of the Delhi High Court, even though it had already received a detailed and reasoned unfavourable emergency decision in a Japan-seated emergency arbitration under the JCAA Rules. The single bench denied the interim relief application under Section 9, and this was upheld by a division bench of the Delhi High Court. The former denied the application, stating that a "*second bite at the cherry*" was not possible.[177] The latter, in upholding the decision, recognized the applicant's intention of approaching the forum as an "*appellate remedy*" against the order of the emergency arbitrator,[178] and provided that, "*[h]aving chosen the tribunal, the seat, the applicable rules and the forum from which to seek interim measures, the appellants cannot revise that choice at this juncture.*"[179] In saying this, the Court essentially recognized the emergency decision, taking into account the fact that the applicant had already been denied interim relief by an emergency arbitrator. The division bench's decision was thereafter upheld by the Supreme Court.[180]

The judgments in *Ashwani Minda* and *Raffles Design* presented contrasting approaches under Indian law as regards the availability of approaching a court under Section 9 of the Arbitration Act. It was provided in *Raffles Design* that an application could be assessed—independent of the tribunal's orders—by the court under Section 9. However, in *Ashwani Minda*, the court, considering the dismissal of an interim relief application by an emergency arbitrator, dismissed the Section 9 application.

The *Ashwani Minda* position is similar to the position in England, as per the *Gerald Metals S.A.* v. *Timis & Ors* ["**Gerald Metals**"][181] judgment in 2016.[182] In *Gerald Metals*, the applicants sought interim relief from the English High Court, despite receiving an unfavourable emergency decision from the LCIA Court. In refusing to hear the application, Leggatt J. stated that as per the legislation,[183] the court would only interfere if the powers of the tribunal were "*inadequate*" or ineffective in the case and noted that the LCIA's emergency arbitration provision was meant to "*reduce the need to invoke the assistance of the court in cases of urgency.*"[184]

The similarity between the judgments in *Ashwani Minda* and *Gerald Metals* with regard to giving due consideration to an emergency decision is indicative of the pro-arbitration approach of Indian courts. Arguably, *Ashwani Minda* took an even stronger pro-arbitration approach by limiting its own jurisdiction with respect to a "*foreign-seated*" emergency decision. Despite the pro-arbitration stance adopted by *Ashwani Minda*, the Indian courts' decisions with regard to emergency arbitration are varied, and it is exactly due to this inconsistency that it is imperative for India to introduce

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177 Ashwani (single-bench), 2020 SCC OnLine Del 1648, ¶ 55.
178 Ashwani (division-bench), 2020 SCC OnLine Del 721, ¶ 43.
179 *Id.* ¶ 44.
180 Ashwani Minda v. U-shin Ltd., 2020 SCC OnLine SC 1123 (India).
181 Gerald Metals S.A. v. Timis, [2016] EWHC (Ch) 2327 (Eng.) [*hereinafter* "Gerald"].
182 Matthew Gearing QC, Sheila Ahuja & Arun Mal, *Ashwani Minda v U-Shin: The Delhi High Court's recent observations on emergency arbitrator relief and the availability of court-ordered interim measures*, ALLEN & OVERY PUBL'N (May 29, 2020), *available at* https://www.allenovery.com/en-gb/global/news-and-insights/publications/ashwani-minda-v-u-shin-the-delhi-high-court's-recent-observations [*hereinafter* "Gearing et al."].
183 *See* Arbitration Act 1996, c. 23, § 44(5) (Eng.) ("[…] court shall act only if or 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 is unable for the time being to act effectively.").
184 Gerald, [2016] EWHC (Ch) 2327, at 15–17. *See also* Gearing et al., *supra* note 182.

statutory recognition to emergency arbitration, like in Hong Kong and Singapore. A legislative amendment should be adopted as soon as possible, especially in light of the fact that discussions on emergency arbitration and enforcement of emergency decisions are constantly taking place.

Case in point, in 2021, there were numerous hearings before the Indian Supreme Court on the specific issue of enforcing an emergency decision arising out of a dispute between Amazon.com NV Investment Holdings ["**Amazon**"] and the Future Group.[185]

As a brief introduction to the case, on October 5, 2020, Amazon initiated emergency arbitration proceedings against Future Group under the 2016 SIAC Rules in accordance with the dispute resolution clause in the parties' contract, alleging a violation of the Shareholders Agreement.[186] The violation alleged was that Future Group had entered into a sales transaction with a "*Restricted Person*" (Mukesh Dhirubhai Ambani Group/ Reliance) without first obtaining consent ["**Disputed Transaction**"].[187] On October 25, 2020, the emergency arbitrator, Mr. V.K. Rajah, Senior Counsel, granted the injunction, restricting Future Group from proceeding with the Disputed Transaction. In doing so, he dismissed Future Group's arguments that the definition of an "*arbitrator*" under Section 2(1)(d) does not include an emergency arbitrator, and that the resulting decision would not be enforceable under the Arbitration Act, by holding "*that the Emergency Arbitrator is an Arbitral Tribunal for all intents and purposes.*"[188] The emergency arbitrator further noted that "*emergency arbitrators are recognized under the Indian arbitration framework.*"[189]

Subsequently, Amazon sought to enforce the emergency decision in India, by filing a petition in the Delhi High Court under Section 17(2) of the Arbitration Act.[190] Future Group objected to the enforcement and raised concerns regarding the status of an emergency arbitrator and the enforceability of an emergency decision under Section 2(1)(d) and Section 17(2) respectively.[191] A single bench of the Delhi High Court dismissed these objections, granted the petitioner's request for interim relief, and directed Future Group to maintain status quo till the pronouncement of the reserved order.[192] An appeal against this decision led to a division bench of the Delhi High Court staying the operation of the interim order;[193] however this was on the basis of issues regarding the "*group of companies*" doctrine, and not because of the nature of the emergency decision.

The single bench of the Delhi High Court passed its final order on March 18, 2021. Justice J.R. Midha imposed a fine of INR 20,00,000 on the respondents for violating the emergency decision and observed that the status of an emergency arbitrator is one of a "*sole arbitrator appointed by the Arbitration Institution to consider the Emergency Interim Relief Application in cases where the parties have agreed*

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185 A number of issues were raised in this case but this article only explores the issue regarding the "status" of the New Delhi-seated SIAC emergency arbitrator and the "enforcement" of his award under the Arbitration Act.

186 Amazon.com NV Inv. Holdings LLC v. Future Coupons Pvt. Ltd., 2021 SCC OnLine Del 1279, ¶¶ 10, 11 (India) [*hereinafter* "Amazon"].

187 *Id.* ¶¶ 6–9.

188 *Id.* ¶ 19.

189 *Id.*

190 Arbitration Act, § 17(2) (India) read with Code of Civil Procedure, No. 5 of 1908, § 151 & Order XXXIX, r. 2A (India).

191 Amazon, 2021 SCC OnLine Del 1279, ¶ 7 (India).

192 *Id.* ¶¶ 8, 9.

193 Future Retail Ltd. v. Amazon.com NV Inv. Holdings LLC, 2021 SCC OnLine Del 412, ¶ 13 (India).

to arbitrate according to the Rules of that Arbitration Institution which contain provisions relating to Emergency Arbitration."[194] He provided that the decision of the emergency arbitrator does not bind the arbitral tribunal, but is binding on all parties.[195] In Justice Midha's view:

> "*[…] Emergency Arbitrator is an Arbitrator for all intents and purposes, which is clear from the conjoint reading of Sections 2(1)(d), 2(6), 2(8), 19(2) of the Arbitration and Conciliation Act and the Rules of SIAC which are part of the arbitration agreement by virtue of Section 2(8). Section 2(1)(d) is wide enough to include an Emergency Arbitrator. Under Section 17(1) of the Arbitration and Conciliation Act, the Arbitral Tribunal has the same powers to make interim order, as the Court has, and Section 17(2) makes such interim order enforceable in the same manner as if it was an order of the Court.*"[196]

In the author's opinion, Justice J.R. Midha's meticulously drafted judgment fuelled a quantum leap in the Indian arbitration regime. This judgment in itself was an in-depth analysis of the emergency arbitration mechanism and attempted to clarify the status of an emergency arbitrator and the resulting decisions, under the Indian arbitration regime.

However, despite the forward-thinking nature of the judgment, it was stayed by an order issued by a division bench of the Delhi High Court.[197] Subsequently, the Indian Supreme Court set aside this order, and in doing so, held that:

> "*Given that the definition of "arbitration" in Section 2(1)(a) means any arbitration, whether or not administered by a permanent arbitral institution, when read 35 with Sections 2(6) and 2(8), would make it clear that even interim orders that are passed by Emergency Arbitrators under the rules of a permanent arbitral institution would, on a proper reading of Section 17(1), be included within its ambit. […] The heart of Section 17(1) is the application by a party for interim reliefs. There is nothing in Section 17(1), when read with the other provisions of the Act, to interdict the application of rules of arbitral institutions that the parties may have agreed to. This being the position, at least insofar as Section 17(1) is concerned, the "arbitral tribunal" would, when institutional rules apply, include an Emergency Arbitrator.*"[198]

Notwithstanding the fact that this judgment effectively recognized the legitimacy of emergency arbitration and its resulting decisions in India, and is a colossal step forward for the Indian arbitration regime, it is pertinent to note that in this case, the arbitration was seated in New Delhi, i.e., it was not a foreign-seated arbitration. In this regard, the issue of enforcement of foreign-seated emergency arbitrations in India remains unsettled.

These widely differing approaches to emergency arbitration adopted by the Indian courts in recent years mirrors a time when India's arbitral process was caught in a litigation jamboree and was falling short of being an effective dispute resolution system.[199] The author sees no way forward except to finally settle the issue regarding enforcement of an emergency decision in India through the provision of statutory recognition to the mechanism. Such recognition will not only provide

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194 Amazon, 2021 SCC OnLine Del 1279, ¶¶ 133, 192 (India).
195 *Id.* ¶ 133.
196 *Id.* ¶¶ 144, 145.
197 Future Coupons Pvt. Ltd. v. Amazon.Com NV Inv. Holdings LLC, 2021 SCC OnLine Del 4101 (India).
198 Amazon (SC), Civil Appeal Nos. 4492-4493 of 2021, ¶¶ 19–20 (India).
199 Nakul Dewan, *Arbitration in India: An Unenjoyable Litigating Jamboree!*, 3(1) ASIAN INT'L ARB. J. 99, 123 (2007).

for permanence and predictability concerning the enforcement of India-seated emergency decisions, but will also ensure that foreign-seated emergency decisions are enforced in India without having to undergo the "*indirect method*" discussed previously.

IV. The way forward: An emergency arbitration regime

In the last couple of decades, there has been a seismic shift in the balance of economic power from developed economies to emerging economies, particularly towards Asia,[200] and the continual economic progress and foreign investment has driven the rapid development of international arbitration in Asia.[201] The question arose as to whether Asian countries could exhibit a strong arbitration regime; in response, many Asian countries adopted the UNCITRAL Model law—making Asia possess the "*highest concentration of Model law-based arbitration laws*"—laying the groundwork for such a regime[202] and also ensuring "*cross-continent uniformity.*"[203]

In 2018, Mr. Narendra Modi, the Prime Minister of India, stated, "*Now the continent finds itself at the centre of global economic activity, [...] we are now living through what many have termed the Asian Century*", while speaking at the third annual meeting of the Asian Infrastructure Investment Bank.[204] This is clearly indicative of India's current opportune moment to become a strong economic power, and rival economies the likes of Hong Kong and Singapore. However, the seizing of this moment will require India to step its game up in the field of dispute resolution by strengthening its arbitration regime.

In addition to the various arguments and reasons discussed previously in this article, the absolute need to recognize emergency arbitration is also evident from its regular utilization in times of crisis to resolve disputes, for example, in the persistence of devastation by the COVID-19 pandemic. The pandemic has had a considerable detrimental impact upon not only people, businesses and trade but also dispute resolution. However, emergency arbitration remained unaffected in the face of the circumstances. In fact, as per a recent survey, many arbitral institutions—such as ICC and SIAC—reported that there was a significant increase in emergency arbitration applications since the start of the pandemic.[205] The resilience of emergency arbitration and its demand during critical periods by the international business community is another reason why it should be recognized in India.

It has been argued in this article that emergency decisions are enforceable under the New York Convention and the UNCITRAL Model Law. India is already a signatory to the former, and it is possible for it to adopt the 2006 revisions of the latter, especially Article 17H.[206] In the author's

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200 Julian David Mathew Lew, *Increasing Influence of Asia in International Arbitration*, 16(1) ASIAN DISP. REV. 4, 5 (2014) [*hereinafter* "Lew"].

201 Donald Francis Donovan, Lord (Peter) Goldsmith, David V. Rivkin & Christopher K. Tahbaz, *Asia Leading the World into the Twenty-First Century: A Survey of Developments and Innovation in International Arbitration in Asia*, *in* INTERNATIONAL ARBITRATION: WHEN EAST MEETS WEST: LIBER AMICORUM MICHAEL MOSER 25, 26 (Neil Kaplan Michael Pryles & Chiann Bao eds., 2020) [*hereinafter* "KAPLAN ET AL."].

202 Lew, *supra* note 200, at 6–8.

203 KAPLAN ET AL., *supra* note 201, at 29.

204 *Id.* at 26; *see also* Valentina Romei & John Reed, *The Asian Century Is Set to Begin*, FIN. TIMES (Mar. 26, 2019), *available at* https://www.ft.com/content/520cb6f6-2958-11e9-a5ab-ff8ef2b976c7.

205 Patricia Louise Shaughnessy, *Initiating and Administering Arbitration Remotely, in* INTERNATIONAL ARBITRATION AND THE COVID-19 REVOLUTION 27, 42 (Maxi Scherer, Niuscha Bassiri & Mohamed S. Abdel Wahab eds., 2020).

206 *See supra* note 125 and accompanying text.

opinion, if this is done, an emergency decision—foreign or India-seated—could then be enforced in India under these two regimes. That said, as it stands, enforcement of emergency decisions under these two regimes would depend on the interpretation of the Indian courts deciding the particular enforcement application. There is no guarantee under the current Indian arbitration regime of these decisions being enforced. Therefore, India needs to adopt a clear-cut regime that allows parties to avoid having to justify the status of their emergency decisions, and instead be able to seek direct enforcement of the same.

Taking this idea forward, it is crucial that, in accordance with the recommendations of the Law Commission of India and the Srikrishna Committee,[207] India provides statutory recognition to the emergency arbitration mechanism. Although the Supreme Court of India in *Amazon* has already made progress in this regard, by validating the mechanism and its resulting decisions, the Arbitration Act should nevertheless be amended to expressly include: (1.) "*emergency arbitrator*" within the definition of an "*arbitral tribunal*" under Section 2(1)(d) of the Arbitration Act; and (2.) the decisions of an emergency arbitrator under Section 2(1)(c)—irrespective of the terminology of the decision in the definition of an arbitral award. Making the above amendments would strengthen India's arbitration regime, and would not only provide permanence and predictability for India-seated emergency decisions, but also for those that are foreign-seated. Consequently, the amendments would have the effect of making foreign-seated emergency decisions final and binding on the parties under Section 35,[208] and enforceable under Section 36(1), of the Arbitration Act.

Going above and beyond, India should also implement a specialized emergency arbitration regime, specifically for foreign-seated emergency decisions. In this regard, inspiration can be sought from the regime in Hong Kong,[209] where the legislation provides that "*any emergency relief granted, whether in or outside Hong Kong, by an emergency arbitrator under the relevant arbitration rules is enforceable in the same manner as an order or direction of the Court that has the same effect, but only with the leave of the Court*."[210] Furthermore, certain limitations could be provided so that the enforcement of foreign-seated emergency decisions would depend on whether these decisions grant the usual accepted standard of provisional measures. In this regard, inspiration can be sought, once again, from Hong Kong's regime.[211]

The Indian arbitration regime may have been subject to heavy criticism in the past, but it is now in a good position to implement a strong arbitration regime and keep pace with its contemporaries.

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207 *See supra* text accompanying notes 159–60.

208 Arbitration Act, No. 26 of 1996, § 35 (India) ("Subject to this Part an arbitral award shall be final and binding on the parties and persons claiming under them respectively.").

209 Arbitration Ordinance, (2011) Cap. 609, §§ 22A, 22B (H.K.).

210 *Id.* § 22B(1).

211 *Id.* § 22B(2) ("The Court may not grant leave to enforce any emergency relief granted outside Hong Kong unless the party seeking to enforce it can demonstrate that it consists only of one or more temporary measures (including an injunction) by which the emergency arbitrator orders a party to do one or more of the following: (a) maintain or restore the status quo pending the determination of the dispute concerned; (b) take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process itself; (c) provide a means of preserving assets out of which a subsequent award made by an arbitral tribunal may be satisfied; (d) preserve evidence that may be relevant and material to resolving the dispute; (e) give security in connection with anything to be done under paragraph (a), (b), (c) or (d); give security for the costs of the arbitration.").

A clear-cut and reliable statutory recourse to urgent arbitral relief at the pre-formation stage in the form of emergency arbitration, will not only bolster India's position as a predictable arbitration environment within the international arbitration community but also instil confidence and faith in the international business community.

THE DOCTRINE OF SEPARABILITY: THROUGH THE LENS OF DARWINISM

Karan Rukhana[*] *& Saisha Bacha*[†]

Abstract

The doctrine of separability is a cardinal principle of arbitration. It allows an arbitration agreement to be treated independently of the contract that contains it. Traditionally, the arbitration agreement was viewed as divorced from the underlying contract only for the purpose of its existence and validity; however, over time, an evolved understanding of separability has allowed an arbitration agreement to be treated as separate for other purposes as well. For instance, as can be seen from English and Singapore decisions, arbitration agreements are treated as separate to determine the law governing the arbitration agreement as well. This article, in its limited scope, dissects separability in recent decisions to gain an updated understanding of the doctrine; it compares the present view with the traditional view in order to examine a possible evolution of the doctrine.

I. Introduction

The growing popularity of arbitration is attributable to its ability to accommodate parties' unique interests and transmute them into binding decisions. It affords parties the malleability to decide the dispute resolution procedure as per need—a characteristic that is witnessed in the arbitration agreement.[1] An arbitration agreement more often than not forms part of the contract that describes the commercial relation between the parties, their obligations and warranties.[2] Such a contract, as any other relationship, can suffer from defect, breach, or termination, which may consequently affect the entwined arbitration agreement. To salvage the arbitration agreement—the parties' intent to resolve disputes in the chosen manner—jurisprudence from contract law has been imported to arbitration law.[3]

Recently, as is discussed in the course of this article, the separability doctrine's scope of application has broadened beyond tradition affecting the choice of law, contractual validity, and competence-

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1 GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 81 (3d ed. 2020) [*hereinafter* "BORN"].

2 United Nations Comm'n on Int'l Trade Law (UNCITRAL), Model Law on International Commercial Arbitration, art. 7(1), U.N. Doc. A/40/17, Annex I (June 21, 1985) [*hereinafter* "UNCITRAL Model Law"] ("An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement"); *see* United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art. II(2), June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 ("The term 'agreement in writing' shall include an arbitral clause in a contract […].").

3 BORN, *supra* note 1, at 377 ("Common law jurisdictions have historically referred to the 'separability' or 'severability' doctrine, reflecting a focus on the contractual origins of the doctrine […]."); HUGH BEALE, CHITTY ON CONTRACTS § 16-211 (32d ed. 2017) [*hereinafter* "BEALE"] ("Where all the terms of a contract are illegal or against public policy or where the whole contract is prohibited by statute, clearly no action can be brought by the guilty party on the contract; but sometimes, although parts of a contract are unenforceable for such reasons, other parts, were they to stand alone, would be unobjectionable"); SIR JACKSON BEATSON, ANDREW BURROWS & JOHN CARTWRIGHT, ANSON'S LAW OF CONTRACT 433 (29th ed. 2010) ("The general rule is that, where you cannot sever the illegal from the legal part of a covenant, the contract is altogether void; but, where you can sever them, whether the illegality be created by statute or by the common law, you may reject the bad part and retain the good.").

competence.[4] Although there is no uncertainty surrounding the vitality of separability, a uniform and reliable application of this supposed rudimentary doctrine is yet desired.[5] Perhaps it is this inconsistency that has allowed Darwin's theory of evolution[6] to manifest in the recent decisions that innocuously or consciously, ameliorate the doctrine of separability. Just as the Darwin's theory of evolution states that there is a constant tendency in the forms of life to supplant and exterminate the less divergent, the less improved, and preceding forms, this article explores whether the pro arbitration approach of Courts has led to the further refinement of the doctrine of separability, exterminating its less divergent forms.

This article, in Part II, examines the provenance of separability and highlights its treatment in different jurisdictions, as to explore its evolution is to understand its origin and development. It then coalesces the understanding of separability in various jurisdictions in Part III. Part IV discusses the application of the doctrine in determining the applicable law. To ensure that the article does not wander, the focus is to only trace a possible evolution of the doctrine and not on the inquiry to determine the law applicable to an arbitration agreement. After understanding the doctrine's limited role in determining the law applicable to an arbitration agreement, Part V, through distillation, determines if recent decisions have heralded a change in the doctrine, i.e., to understand whether the doctrine, as applied today, is more divergent and improved, over its preceding form. Part VI highlights the findings of the article and presents the conclusion.

II. Doctrine of separability

The doctrine of separability, a legal fiction, protects the arbitration agreement from any defects of the main contract,[7] to the extent that it even survives the termination of the main contract.[8] In its permanence, the doctrine provides a refuge for the parties' intent to refer disputes to arbitration.

Separability's contribution to commerce is certainly undeniable. As, barring its application, a mere challenge to the substantive contract would lead the parties down the road of unpredictability. For instance, despite agreeing to arbitration, upon a challenge to the contract, the parties may find themselves litigating before a state court or forum, which may not be commercial or neutral. They may be subject to a system of law which may be alien or archaic, and embroiled in the dispute for

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4 BORN, *supra* note 1, at 377 ("The separability presumption has substantial practical, as well as analytical, importance, and produces a number of closely-related consequences relating to the issues of choice of law, contractual validity and competence-competence.").

5 *Id.* ("Despite the practical and analytical importance of the separability presumption, there are significant uncertainties as to its basis, content and effects.").

6 CHARLES DARWIN, ON THE ORIGIN OF SPECIES BY MEANS OF NATURAL SELECTION, OR THE PRESERVATION OF FAVOURED RACES IN THE STRUGGLE FOR LIFE 359 (1859).

7 REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION § 2.101 (Nigel Blackaby, Constantine Partasides, Alan Redfern & Martin Hunter eds., 2015) [*hereinafter* "REDFERN & HUNTER"]; DAVID ST JOHN SUTTON, JUDITH GILL, MATTHEW GEARING, ANGELINE WELSH, KATE DAVIES & FRANCIS RUSSELL, RUSSEL ON ARBITRATION § 2–007 (24th ed. 2015) ("An arbitration agreement specifies the means whereby some or all disputes under the contract in which it is contained are to be resolved. It is however separate from the underlying contracts."); BORN, *supra* note 1, § 3.01.

8 *Id.*; REDFERN & HUNTER § 2.101; DAVID JOSEPH, JURISDICTION AND ARBITRATION AGREEMENTS AND THEIR ENFORCEMENT § 4.36 (3d ed. 2015) ("An arbitration agreement is a separate and distinct agreement from the substantive contract and is not ordinarily impeached or rendered void if the substantive contract is discharged, frustrated, repudiated, rescinded, avoided or found to be void.").

years, considering the time many domestic systems take to resolve a dispute. Such an invidious outcome is a hinderance to commerce.[9]

It was the House of Lords' celebrated decision in *Heyman* v. *Darwins* ["**Heyman**"][10] that introduced this doctrine. The parties had entered into an agency agreement which contained a broadly worded arbitration clause. Following a dispute, the Appellant argued that the Respondent had repudiated the contract and filed a writ for damages. The Respondent relied on Section 4 of the Arbitration Act, 1889[11] to contend that the writ should be stayed and parties referred to arbitration. Section 4 of the English Arbitration Act 1889 provided Courts the discretion to stay proceedings in defiance of an arbitration agreement if the agreed will of the parties was for the dispute to be referred to arbitration.[12] The repudiation of the agreement did not limit the right of the parties to seek remedy against the repudiation.[13] Upholding this argument, the Court rejected the appellant's contention that the arbitration agreement stood terminated as a result of the termination of the main contract. Lord Macmillan's concurring speech explained the thought behind the Court's decision. Although his speech does not expressly refer to separability, it does contain a version of separability. In his view, the repudiation was of the obligations undertaken by one of the parties and not of the arbitration clause.[14] Lord Macmillan's speech brings out the separation of the arbitration clause from the agency contract, although not in absolute terms. Ultimately, the Court was persuaded in deciding so, considering the purpose of an arbitration clause which is independent of the purpose of the underlying contract.[15]

On the other hand, the United States Court of Appeals for the Second Circuit, around the same time in *Kulukundis Shipping Co.* v. *Amtorg Trading Corp.* ["**Kulukundis**"],[16] did not share the same view. It interpreted Section 2 of the Federal Arbitration Act, 1925 ["**FAA**"] to exclude arbitration agreements which referred disputes of existence and validity of underlying agreements to arbitration.[17] Stating American law, as it was then, an arbitration agreement was considered to be "*an integral part*"[18] of the main contract—the basis of the divergent view. The earlier position required courts to first determine the existence of the main contract before referring the parties to

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9 BORN, *supra* note 1, at 378; THOMAS WEBSTER, HANDBOOK OF UNCITRAL ARBITRATION, COMMENTARY PRECEDENTS AND MATERIALS §§ 23-27, 23-28 (2d ed. 2015) ("The principle that an arbitration agreement is to be treated as separable from any underlying contract is based on practical necessity and to a certain degree on common sense. The practical necessity arises from the fact that if potential respondents were able to avoid an arbitration agreement by alleging invalidity of the underlying contract, then it would reduce the effectiveness of international arbitration. In some instances, a recalcitrant debtor's strategy is to prolong any proceedings that might be brought against it with a view of requiring it to perform its obligations.").

10 Heyman v. Darwins [1942] 1 All ER 337 (HL) (appeal taken from Eng.) [*hereinafter* "Heyman"].

11 Arbitration Act, 1889, § 4, 52 & 53 Vict., c. 49 (Eng.).

12 Shri Patanjal & Anr v. M/s Rawalpindi Theatres Pvt Ltd., 1969 SCC OnLine Del 70 (India).

13 Heyman, [1942] 1 All ER 337 (HL).

14 *Id.* at 347 ("The repudiation being not of the contract but of obligations undertaken by one of the parties, why should it imply a repudiation of the arbitration clause so that it can no longer be invoked for the settlement of disputes arising in consequence of the repudiation? I do not think that this is the result of what is termed repudiation.").

15 *Id.* ("The contract is not put out of existence, though all further performance of the obligations undertaken by each party in favour of the other may cease. It survives for the purpose of measuring the claims arising out of the breach, and the arbitration clause survives for determining the mode of their settlement. The purposes of the contract have failed, but the arbitration clause is not one of the purposes of the contract.").

16 Kulukundis Shipping Co. v. Amtorg Trading Corp., 126 F.2d 978 (2d Cir. 1942) (U.S.).

17 *Id.* at 985.

18 *Id.*

arbitration. The arbitration clause did not enjoy an independent identity. This, however, could be attributed to the then restrictive language of Section 2 of the FAA.[19]

Since then, pro-commerce initiatives at the international and national levels brought about a remediating change, as the doctrine now enjoys wide recognition, and is applied by national courts and arbitral tribunals from both sides of the Atlantic.

A. International Recognition of Separability

The United Nations Commission on International Trade Law ["**UNCITRAL**"] Model Law on International Commercial Arbitration ["**Model Law**"] recognises arbitration agreements as separate from the underlying agreement.[20] Article 16(1) provides that "*[a] decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.*"[21] This ensures that any objection to the existence and validity of the underlying contract, if upheld, would not invalidate the arbitration agreement, as it did in *Kulukundis*. Article 23 of the UNCITRAL Arbitration Rules, 2010 ["**UNCITRAL Arbitration Rules**"] also endorses this position,[22] as do the rules of leading arbitration institutions.[23] For instance, Article 6(9) of the International Chamber of Commerce ["**ICC**"] Rules of Arbitration, 2021 ["**ICC Arbitration Rules**"] provides:

> "*Unless otherwise agreed, the arbitral tribunal shall not cease to have jurisdiction by reason of any allegation that the contract is non-existent or null and void, provided that the arbitral tribunal upholds the validity of the arbitration agreement. The arbitral tribunal shall continue to have jurisdiction to determine the parties' respective rights and to decide their claims and pleas even though the contract itself may be non-existent or null and void.*"[24]

Like Article 23 of the UNCITRAL Arbitration Rules,[25] Article 6(9) of the ICC Arbitration Rules deals with severability and competence-competence.[26] This provision confirms the tribunal's

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19 *See* Federal Arbitration Act, 9 U.S.C. § 2.

20 UNCITRAL Model Law, *supra* note 2, art. 7(1) (""Arbitration agreement" is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.").

21 *Id.* art. 16(1); *See* BORN, *supra* note 1, § 3.03[B](e).

22 UNCITRAL, Arbitration Rules, art. 23, U.N. Doc. A/Res/65/22, Annex. 1 (2010) ("The arbitral tribunal shall have the power to rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. *For that purpose*, an arbitration clause that forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null shall not entail automatically the invalidity of the arbitration clause." (emphasis added)).

23 *See* Singapore International Arbitration Centre (SIAC) Arbitration Rules 2016, r. 28.2; London Court of International Arbitration (LCIA), Arbitration Rules 2020, art. 23 ("23.1 The Arbitral Tribunal shall have the power to rule upon its own jurisdiction and authority, including any objection to the initial or continuing existence, validity, effectiveness or scope of the Arbitration Agreement. 23.2 *For that purpose*, an arbitration clause which forms or was intended to form part of another agreement shall be treated as an arbitration agreement independent of that other agreement. A decision by the Arbitral Tribunal that such other agreement is non-existent, invalid or ineffective shall not entail (of itself) the non-existence, invalidity or ineffectiveness of the arbitration clause.").

24 International Chamber of Commerce (ICC), Rules of Arbitration 2021, art. 6(9). Exclusive Agent v. Manufacturer, ICC Case No. 8938, Final Award, *reprinted in* 24 Y.B. COM. ARB. 174, 176 (Albert Jan Van den Berg ed., 1999).

25 CLYDE CROFT, CHRISTOPHER KEE & JEFF WAINCYMER, A GUIDE TO THE UNCITRAL ARBITRATION RULES 249 (2013).

26 MICHAEL W BÜHLER & THOMAS H WEBSTER, HANDBOOK OF ICC ARBITRATION: COMMENTARY AND MATERIALS 139 (4th ed. 2018) [*hereinafter* "WEBSTER & BÜHLER"].

authority notwithstanding a challenge to the underlying contract.[27] From the perspective of the arbitral tribunal's jurisdiction, it follows that separability protects the doctrine of competence-competence—the tribunal's jurisdiction to decide questions of validity of the main contract.[28] Further, on the strength of this provision, the tribunal continues to have jurisdiction even if there is a specific challenge to the arbitration agreement itself, provided that, in the end, the tribunal upholds the validity of the arbitration agreement.[29] The doctrines of separability and competence-competence, although not co-dependent, do have a material relationship.[30] The intersection of the two doctrines means that arbitral tribunals play an equally significant role as national courts in determining the validity of arbitration agreements.

B. Separability under English Law

The doctrine was recognized by English courts even before its codification in England,[31] for instance, by the Court of Appeals in *Harbour Assurance Co. (UK) Ltd.* v. *Kansa General International Insurance Co. Ltd.* ["**Harbour Assurance**"].[32] The primary issue before the Court was, notwithstanding separability, does initial invalidity of the substantive contract – and not its subsequent frustration, like in *Heyman* – defeat the arbitration agreement it contains. The Plaintiff argued that in *Heyman*, the Court drew a distinction between "*a contract which is alleged to have come to an end, and a contract which is alleged never to have been made and never to have been valid.*"[33] Separability, it contended, protected arbitration agreements in the former case and not the latter. This contention was rejected.[34] Lord Hoffmann, in his concurring speech, explained that barring some cases like

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27 *Id.* at 140.

28 BORN, *supra* note 1, at 1165 ("There are instances in which the separability presumption has consequences for the arbitrators' competence-competence. In many cases, purported challenges to the arbitrators' jurisdiction will in fact be nothing more than challenges to the existence, validity, or legality of the parties' underlying contract, not to the arbitration agreement. In these circumstances, the separability presumption provides an explanation for the conclusion that the arbitral tribunal has the authority to consider and decide such challenges.").

29 WEBSTER & BÜHLER, *supra* note 26, at 140; *see* BORN, *supra* note 1, at 1166 ("Importantly, however, the competence-competence doctrine also […] applies in cases where the existence, validity, or legality of the arbitration agreement itself […] is in fact challenged."); NEIL ANDREWS, ARBITRATION AND CONTRACT LAW: COMMON LAW PERSPECTIVES § 2.54 (2016) ("Combination of the principles of Kompetenz-Kompetenz and separability enables the arbitral tribunal to provide a preliminary opinion on whether the arbitration clause is valid […].").

30 Ronàn Feehily, *Separability in international commercial arbitration; confluence, conflict and the appropriate limitations in the development and application of the doctrine*, 34(3) ARB. INT'L 355, 360 (2018) ("Due to the fact that the jurisdiction of the arbitral tribunal is not affected where a party challenges the validity of the matrix contract, the doctrine of separability sets the groundwork for the jurisdiction of an arbitral tribunal to decide issues concerning its own jurisdiction, and consequently interacts in an important way with the competence–competence doctrine. For example, separability facilitates arbitrators to find a matrix contract invalid in a context where the contract is predicated on bribery and therefor illegal, without destroying the arbitrators' power to issue an award pursuant to the arbitration clause.").

31 *See* Bremer Vulkan Schiffbau Und Maschinenfabrik v. South India Shipping Corp. Ltd. [1981] AC 909 (HL) 998 (appeal taken from Eng.); Paal Wilson & Co v. Partenreederei Hannah, [1983] 1 All ER 34 (HL) 50 (appeal taken from Eng.).

32 Harbour Assurance Co. (U.K.) Ltd. v. Kansa General International Insurance Co. Ltd. [1993] 3 All ER 897 (Eng.) [*hereinafter* "Harbour Assurance"], *affirmed in* Deutsche Bank AG v. Asia Pacific Broadband Wireless Communications Inc. [2008] EWCA Civ 1091, ¶ 29 (Eng.) ("[There is no] requirement that [arbitration] clauses are not to apply if there is a (plausible) allegation that the contracts, in which such clause are contained, are vitiated by mistake, misrepresentation, illegality, lack of authority or lack of capacity. That would be to deny the concept of separability which is as much part of European law as English law. *Separability was indeed a doctrine in many European jurisdictions well before it was acknowledged in English law*: see *Harbour v Kansa* […]." (emphasis added)).

33 Harbour Assurance, [1993] 3 All ER 897, at 902 (Lord Ralph Gibson).

34 *Id.* at 907 (Lord Leggatt) ("I agree with the judge's conclusion that – 'the separability principle, as applicable also to cases of the initial invalidity of the contract, is sound in legal theory. It is also in the public interest that the arbitral

denial of a concluded agreement altogether or mistake as to the identity of the other contracting party, there is no reason why separability would not rescue the arbitration agreement from the substantive contract's initial invalidity.[35] The determinative question in his opinion was "*not whether the issue goes to the validity of the contract but whether it goes to the validity of the arbitration agreement.*"[36]

Following this, the (English) Arbitration Act, 1996 was enacted which codified the doctrine under Section 7.[37] It provides that for the purposes of existence, validity and effectiveness, the arbitration agreement is "*a distinct agreement.*"[38] Lord Hoffmann, now armed by statute, built on his past decision of *Harbour Assurance*[39] in *Fiona Trust & Holding Corporation* v. *Yuri Privalov* ["**Fiona Trust**"].[40] He prefaced his speech by explaining the rationale underlying a broad construction of an agreement to arbitrate disputes: rational businessmen are more likely to want all questions, those of performance, as well as validity and enforceability of the contract, to be decided by one tribunal. This presumption is certainly rebuttable by very clear and specific language evidencing a contrary intent. After addressing the scope of the arbitration agreement, he proceeded to determine whether an arbitration agreement can be enforced in view of bribery allegations surrounding the making of the underlying contract. Writing for the House of Lords, Lord Hoffmann decided that it can be enforced. In his decision, he was guided by the principle of separability in Section 7 of the (English) Arbitration Act, 1996. He was convinced of his decision to enforce the arbitration agreement based on the nature of the allegation and the principle of separability. He did not equate an attack on the underlying contract to that on the arbitration agreement.[41]

C. Separability under the U.S. Federal Arbitration Act

In the U.S., arbitration is governed by the FAA, which is the "*principal law on arbitration*" and individual state laws.[42] As a matter of substantive federal law, an arbitration agreement is severable

process, which is founded on party autonomy, should be effective. There are strong policy reasons in favour of holding that an arbitration clause is capable of surviving the initial invalidity of the contract […]."").

35 *Id.* at 914 (Lord Hoffmann).

36 *Id.*

37 Arbitration Act 1996, ch. 23, § 7 (Eng.) ("Unless otherwise agreed by the parties, an arbitration agreement which forms or was intended to form part of another agreement (whether or not in writing) shall not be regarded as invalid, non-existent or ineffective because that other agreement is invalid, or did not come into existence or has become ineffective, and it shall for that purpose be treated as a distinct agreement.").

38 *Id.*

39 Harbour Assurance, [1993] 3 All ER 897 (Eng.).

40 Fiona Trust & Holding Corp. v. Yuri Privalov [2007] 4 All ER 951 (HL) 959 (Eng.) ("The principle of separability enacted in section 7 means that the invalidity or rescission of the main contract does not necessarily entail the invalidity or rescission of the arbitration agreement. The arbitration agreement must be treated as a 'distinct agreement' and can be void or voidable only on grounds which relate directly to the arbitration agreement.") [*hereinafter* "Fiona Trust"].

41 *Id.* at 959, 960 ("In the present case, it is alleged that the main agreement was in uncommercial terms which, together with other surrounding circumstances, give rise to the inference that an agent acting for the owners was bribed to consent to it. But that does not show that he was bribed to enter into the arbitration agreement [...]. But section 7 in my opinion means that they must be treated as having been separately concluded and the arbitration agreement can be invalidated only on a ground which relates to the arbitration agreement and is not merely a consequence of the invalidity of the main agreement.").

42 JAMES H. CARTER & JOHN FELLAS, INTERNATIONAL COMMERCIAL ARBITRATION IN NEW YORK 2 (2d ed. 2010).

from the underlying contract.[43] The same has been reiterated in *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.* ["**Prima Paint**"][44] and *Buckeye Check Cashing Inc* v. *Cardegna* ["**Buckeye**"].[45]

Unlike in the United Kingdom, separability does not expressly feature in the FAA. However, Sections 2 and 4 of the FAA are considered to be the implicative source of the doctrine under federal law.[46] Section 2 holds an agreement to arbitrate on the same pedestal as any other contract. It gives statutory recognition to arbitration agreements, which are "*valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.*"[47] According to Section 2, an arbitration agreement can only be challenged on contractual grounds that exist at law or in equity and not on the ground of any defect in the underlying contract.[48] By not permitting a challenge to the underlying contract to defeat the arbitration agreement, Section 2, in a sense, champions separability. Once the arbitration agreement is recognized under Section 2, Section 4 ensures compliance with the arbitration agreement. It makes it mandatory for a court to refer the parties to arbitration once it is clear that a valid arbitration agreement exists.[49] The only obvious precondition to reference is a valid arbitration agreement.[50] Therefore, statutorily, questioning the validity or enforceability of the underlying agreement would have no effect whatsoever on the arbitration agreement. It would not impede the reference. Two seminal decisions of the U.S. Supreme Court in *Prima Paint*[51] and *Rent-A-Center, W., Inc.* v. *Jackson* ["**Rent-A-Center**"][52] elaborate the separability design of Sections 2 and 4 of the FAA.

In *Prima Paint*, the Appellant principally alleged fraud on Respondent's part in the inducement of making the main contract and sought to stay the arbitration commenced by the Respondent. The Respondent opposed the application, arguing that the issue of fraud in the making of the main contract must be decided by the arbitrator and not the court. The Court accepted the Respondent's contention. It explained that according to Section 4 of the FAA, if the claim of fraud goes to the making of the arbitration agreement itself, then the court may adjudicate it, but this would not be the case if the claim lies against the contract generally. [53]

It predicated its decision on the congressional purpose behind Section 4 that arbitration procedure, when selected, should be speedy, and not subject to delay and obstruction in courts.[54] Cases

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43 *Id.* at 15.

44 Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1976) [*hereinafter* "Prima Paint"].

45 Buckeye Check Cashing Inc. v. Cardegna, 546 U.S. 440, 445, 449 (2006) [*hereinafter* "Buckeye Check"] ("Prima Paint resolved this conundrum -- and resolved it in favor of the separate enforceability of arbitration provisions. We reaffirm today that, regardless of whether the challenge is brought in federal or state court, a challenge to the validity of the contract as a whole, and not specifically to the arbitration clause, must go to the arbitrator.").

46 *Id.* at 442.

47 Federal Arbitration Act, 9 U.S.C. § 2, 43 Stat. 883 (U.S.).

48 *See* South Jersey Sanitation Co. v. Applied Underwriters Captive Risk Assur. Co., 840 F.3d 138, 143 (3rd Cir. 2016) (U.S.) [*hereinafter* "South Jersey"] (where "a wholesale fraud defense [did] not defeat a clear arbitration provision" as the challenge was not "arbitration-provision specific.").

49 Republic of Nicaragua v. Standard Fruit Co., 937 F.2d 469, 475, 476, 479 (9th Cir. 1991) (U.S.) [*hereinafter* "Standard Fruit"].

50 Republic of the Philippines v. Westinghouse Elec. Corp., 714 F. Supp. 1362, 1368 (1989) (U.S.).

51 Prima Paint, 388 U.S. 395 (1976).

52 Rent-A-Center, W., Inc. v. Jackson, 561 U.S. 63 (2010) (U.S.) [*hereinafter* "Rent-A-Center"].

53 Prima Paint, 388 U.S. 395 (1976).

54 *Id.* at 404.

decided in the wake of *Prima Paint*, confirmed it and blessed separability, making *Prima Paint* controlling.[55]

However, the U.S. Supreme Court in *Rent-A-Center*,[56] arguably travelled beyond this order. The Court was asked to determine a challenge to, what the court termed, a delegation provision of the arbitration agreement. The delegation provision stated that any threshold issue surrounding enforcement of the arbitration agreement would be referred to and decided by the arbitrator. The respondent challenged the enforceability of the arbitration agreement as a whole, and not specifically the delegation provision. The Court rejected this challenge and enforced the arbitration agreement. In the first instance, the Court relied on Section 2 of the FAA and *Buckeye* to reiterate that "*a party's challenge to another provision of the contract, or the contract as a whole, does not prevent a court from enforcing a specific agreement to arbitrate.*"[57] It then proceeded to build on this proposition to say that the delegation provision sought to be enforced is the agreement to arbitrate threshold issues, and the rest of the arbitration agreement, it considered as the underlying contract. In other words, the Court divided the arbitration agreement itself into two parts: the first being the agreement to arbitrate threshold issues, and the second being the remaining arbitration clause. In treating the delegation provision as the arbitration agreement and the arbitration agreement as the underlying contract, the Court applied separability to enforce the delegation provision. In its view, the "*[a]pplication of the severability rule does not depend on the substance of the remainder of the contract.*" This, Justice Stevens, writing for a plurality of dissenting justices, termed as a "*breezy assertion.*"[58] In his opinion, the majority's decision constitutes "*a new layer of severability.*" He stated:

> "*Today, the Court adds a new layer of severability – something akin to Russian nesting dolls – into the mix: Courts may now pluck from a potentially invalid arbitration agreement even narrower provisions that refer particular arbitrability disputes to an arbitrator. […] In my view, a general revocation challenge to a standalone arbitration agreement is, invariably, a challenge to the 'making' of the arbitration agreement itself.*"[59]

Recently, *Rent-A-Center* was approvingly cited by the U.S. Court of Appeal of the Third Circuit in *S. Jersey Sanitation Co.* v. *Applied Underwriters Captive Risk Assur. Co.* Following *Rent-A-Center*,[60] the Court found that since South Jersey's purported challenges to the arbitration agreement applied to the parties' contract as a whole, rather than to the arbitration agreement alone, the parties' dispute was arbitrable. It highlighted the Congress' intent to enact the FAA to reverse the longstanding judicial hostility towards arbitration agreements, and to place them on the same footing as other

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55 *See* Buckeye Check, 546 U.S. 440 (2006); Union Mutual Stock Life Ins. Co. v. Beneficial Life Ins. Co., 774 F.2d 524, 528, 529 (1st Cir. 1985) (U.S.); ACE Capital Re Overseas Ltd. v. Cent. United Life Ins. Co., 307 F.3d 24, 29 (2d Cir. 2002) (U.S.); MXM Constructions Co. v. N.J. Bldg. Laborers Statewide Benefit Funds, 974 F.3d 386, 399, 400, 401 (3rd Cir. 2020) (U.S.); Standard Fruit, 937 F.2d 469 (9th Cir. 1991), at 476 (U.S.).

56 Rent-A-Center, 561 U.S. 63 (2010).

57 *Id.* at 71.

58 *Id.* at 77 (Stevens, J., dissenting).

59 *Id.* at 85 (Stevens, J., dissenting).

60 South Jersey, 840 F.3d 138 (3rd Cir. 2016), at 143 (U.S.) ("The challenge, however, must focus exclusively on the arbitration provision, rather on than the contract as a whole. As the Supreme Court stressed in Rent-A-Center, 'only [an arbitration provision-specific] challenge is relevant to a court's determination whether the arbitration agreement at issue is enforceable.' [...] If the challenge encompasses the contract as a whole, the validity of that contract, like all other disputes arising under the contract, is a matter for the arbitrator to decide.").

contracts. Safe to state that the emerging legal position is that separability in the U.S. has faintly travelled beyond the English position by adding to it another 'layer'.

D. Separability under French Law

As in England, the doctrine of separability enjoys statutory recognition in France. In 2011, the French Code of Civil Procedure was amended to introduce provisions supporting arbitration. One of the amendments was the codification of the doctrine in Article 1447,[61] which provides, "*[t]he arbitration agreement is independent of the contract to which it relates. It is not affected by the ineffectiveness of it. When it is null, the arbitration clause is deemed unwritten.*" This is not to say that separability was not recognized prior to this amendment.

The doctrine was first applied by the French Cour de Cassation in *Etablissements Raymond Gosset* v. *Société Carapelli* ["**Gosset**"].[62] It protected the arbitration clause from a challenge to the underlying agreement. In the court's opinion, an arbitration agreement is "*completely autonomous in law, which excludes the possibility of it being affected by the possible invalidity of the main contract.*" Following *Gosset*, French courts continued to recognize the doctrine in subsequent decisions despite the absence of statutory support.[63] Even in cases in which the principal contract is void because it is contrary to French public policy, the arbitration clause remains effective and arbitrators still have jurisdiction to rule on a dispute which involves an alleged failure of performance.[64] The *Tardits* decision of the the Cour d'appel of Orleans lent invaluable support to the separability doctrine elaborated in *Gosset*, integrating it into French jurisprudence. This decision integrated separability into the mainstream of French jurisprudence.[65] In another case, the French Cour de Cassation applied the doctrine of separability while dismissing an appeal challenging the jurisdiction of an arbitration tribunal.[66] It observed that "*the parties' common intention is the fundamental condition of the existence and validity of an arbitration agreement,*"[67] and that the jurisdiction of the arbitrator can be hindered only in case of nullity or manifest inapplicability of the arbitration clause.

Under French law, the arbitration clause is autonomous as compared to the main convention in which it fits, and it is not affected by the ineffectiveness of the main convention.[68] The principle

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61 Décret n° 2011-48 du 13 janvier 2011 portant réforme de l'arbitrage [Decree No. 2011-48 of Jan. 13, 2011 reforming arbitration], art. 2, JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Jan. 13, 2011 (Fr.).

62 Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., May 7, 1963, D. JUR. 545 (Fr.).

63 *See* Cour de cassation [Cass.] [supreme court for judicial matters] com., Nov. 12, 1968, Bull. civ. V, No. 316 (Fr.) [*hereinafter* "Minoteries Lochoises"]; Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Dec. 20, 1993, Municipalité de Khoms El Mergeb v. Société Dalico, 91-16.828, 1994 REV. ARB. 116, 117 (Fr.) [*hereinafter* "Khoms El Mergeb"] ("By virtue of a substantive rule of international arbitration, the arbitration agreement is *legally independent of the main contract containing or referring to it*, and the existence and effectiveness of the arbitration agreement are to be assessed, subject to the mandatory rules of French law and international public policy, on the basis of the parties' common intention, there being no need to refer to any national law." (emphasis added)).

64 *See* Thomas E. Carbonneau, *The Elaboration of a French Court Doctrine on International Commercial Arbitration: A Study in Liberal Civilian Judicial Creativity*, 55 TUL. L. REV. 1, 36–37 (1981) (citing Cour d'appel [CA] [reginal court of appeal] Orléans, Feb. 5, 1966, Tardits, (1966) D.S. Jur. 340 (Fr.)).

65 *Id.*

66 National Bank of Xanadu v. Company ACME, Final Award, ICC Case No. 17818, *reprinted in* 44 Y.B. COM. ARB. 47, ¶ 56 (Stephan W. Schill ed., 2019) [*hereinafter* "National Bank of Xanadu"].

67 *Id.*

68 Cour de cassation [Cass.] [supreme court for judicial matters] com., Nov. 25, 2008, Bull. Civ. IV, No. 197 (Fr.).

only allows assessment of the validity of the arbitration agreement independent of any flaw in the underlying contract which would otherwise automatically taint the arbitration agreement.[69]

E. Separability under Singapore law

Separability of an arbitration agreement has developed over time. The initial holding of the Singapore Court of Appeal in *New India Assurance Co. Ltd.* v. *Lewis*[70] reflected the orthodox position that the existence of an arbitration agreement depended on the existence of the main contract. The arbitrator could not be given the jurisdiction to decide a dispute if the agreement itself was in question.[71] Later, in *FirstLink Investments Corp Ltd.* v. *GT Payment Pte Ltd.*,[72] the Singapore High Court recognized that an arbitration agreement is shielded from the underlying contract by separability.[73]

Following this, in *BCY* v. *BCZ*,[74] the Singapore High Court elaborated that the doctrine of separability serves to give effect to the parties' expectation of upholding their chosen method of dispute resolution even if the main contract suffers from invalidity.[75] It ensures that parties do not avoid their obligation to submit to arbitration by merely denying the existence of the underlying contract.[76] Finding support in Article 16 of the Model Law, the Court explained that the doctrine does protect the arbitration agreement, but it can only be resorted to when the validity of the main contract is challenged.[77] The Court's findings, simply and effectively, capture the understanding of separability, at least at the relevant time. Separability has also received statutory recognition in Singapore with the adoption of the Model Law in the International Arbitration Act. As per Section 3 of the International Arbitration Act, the Model Law and, accordingly, separability under Article 16, has the force of law in Singapore.[78]

It is clear that separability has been explicated by courts to protect the arbitral process; a collective reading of the above decisions of courts from different countries, testifies to this. These decisions, which are supported by powerful commercial reasons, have been uniform to a large degree. For instance, the reasoning behind *Prima Paint*[79] and *Harbour Assurance*,[80] and indeed the findings themselves, are broadly a mirror reflection of one another. Suffice it to say that the doctrine has been successful in protecting arbitration agreements from the defects of substantive contracts.

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69 National Bank of Xanadu, *supra* note 66, ¶ 57 (French law, in its position is consistent with its counterparts. Although it is comparatively more flexible as it provides parties the freedom to opt out of the separability presumption through the insertion of an express stipulation to that effect.); *see* Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Apr. 2, 2014, Bull. civ. I, No. 59 (Fr.).

70 New India Assurance Co. Ltd. v. Lewis [1966] SGFC 13 (Sing.).

71 Heyman, [1942] 1 All ER at 345.

72 FirstLink Investments Corp Ltd. v. GT Payment Pte Ltd. [2014] SGHCR 12 (Sing.).

73 *Id.* ¶ 10. ("There is therefore an obvious curiosity as to how the parties' substantive obligations can be governed by the rules of an arbitral institution, but this is not in and of itself an issue in the present case given that the validity of the main contract is not in question before this court. The arbitration agreement is, at the moment, shielded by the doctrine of separability").

74 BCY v. BCZ [2017] 3 SLR 357 (Sing.) [*hereinafter* "BCY"].

75 *Id.* at 374.

76 *Id.* at 375.

77 *Id.*

78 International Arbitration Act, No. 24 of 1994, ch. 143A, § 3 (Sing.).

79 Prima Paint, 388 U.S. 395.

80 Harbour Assurance, [1993] 3 All ER 897.

However, its application is not restricted. As is discussed in Part IV below, the doctrine plays an important role in aiding the determination of the law applicable to arbitration agreements as well.

III. Coalesced Understanding of Separability

The doctrine has been afforded judicial and legislative recognition to safeguard and give effect to, the parties' intent to arbitrate disputes. In England, Section 7 of the (English) Arbitration Act, 1996 provides that the arbitration agreement would not be affected by a challenge to the validity or the effect of the main contract. And, "*it shall for that purpose [and that purpose only] be treated as a separate agreement.*"[81] This position was also reiterated in *Fiona Trust*.[82] The language of Section 7 and separability's scope of operation, is consistent with that of Article 23 of the UNICTRAL Arbitration Rules and Article 16 of the Model Law.

In the U.S., the doctrine enjoys implicit recognition in statute and has been judicially chiseled in federal and state law. Like in England, the courts in the U.S. would only oust the jurisdiction of an arbitrator if the challenge was directed specifically to the arbitration agreement and not the main contract. But the U.S. courts do not stop there. As discussed in Part II.C above, the U.S. Supreme Court in *Rent-A-Center* added another layer to the traditional version of separability. It stated that courts could pluck from a potentially invalid arbitration agreement even narrower provisions that refer particular arbitrability disputes to an arbitrator.[83] Following which, other decisions have followed suit.[84]

In France, separability was, and continues to be, used to protect the arbitration clause from a challenge to the underlying agreement. The unchanged scope of the doctrine is to protect the arbitration agreement from the possible invalidity of the main contract.[85] Likewise, in Singapore, the doctrine protects the arbitration agreement from a defect in the main contract. However, as the Singapore High Court clarified in *BCY* v. *BCZ* ["**BCY**"], it "*does not mean that the arbitration clause forms a distinct agreement from the time the main contract is formed*."[86]

So far, the courts and statutes have, in different ways and designs, somewhat been uniform in their recognition and application of the doctrine. This said, some of the following decisions involving determination of the applicable law of the arbitration agreement, (including one which reached the U.K. Supreme Court) explore a metamorphized separability.

IV. Separability and Determining the Law of the Arbitration Agreement

As stated above, separability has practical consequences for determining the choice of law of the arbitration agreement. Sometimes the arbitration agreement and the underlying contract expressly state which facet is to be governed by which law; yet in certain cases, the agreements are silent. In such an eventuality, one approach is to reasonably presume that the parties would prefer the

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81 Arbitration Act 1996, ch. 23, § 7 (Eng.).
82 Fiona Trust, [2007] 4 All ER 951 (HL) 959.
83 Rent-A-Center, 561 U.S. 63 at 85.
84 *See* sources cited *supra* note 55.
85 Minoteries Lochoises, 1968 Bull. civ. V, No. 316 (Fr.); Khoms El Mergeb, 1e civ., Dec. 20, 1993, 91-16.828, 1994 REV. ARB. 116, 117 (Fr.).
86 BCY, [2017] 3 SLR 357.

uniform application of a single law, i.e., the same law which the parties choose to govern the substantive contract would govern the arbitration agreement which forms part of it.[87]

Another approach is to extend the law of the chosen seat of the arbitration to that of the arbitration agreement. Considering that, by selecting a particular seat, parties intend for its law to govern all aspects of the arbitration, it only seems logical that the law of the seat should also govern the arbitration agreement. Courts and arbitral tribunals that advocate this approach distinguish between the laws applicable to the arbitration agreement and the law applied to the rest of the contract.[88] This autonomy of the arbitration agreement stems from the doctrine of separability.[89] An arbitration clause is taken to be independent of, and separable from, other clauses in the contract. If necessary, it may stand alone.

The English Court of Appeal introduced the celebrated three-stage inquiry to determine the arbitration agreement law and explained the role of separability in this exercise in its famous decision of *Sulamérica CIA Nacional de Seguros S.A.* v. *Enesa Engenharia S.A.* ["**Sulamérica**"].[90] This decision is not only applicable in the U.K., but is also greatly respected in other jurisdictions.[91] The Insured, Enesa Engelharia S.A., argued that by choosing Brazil as the law governing the insurance policy, the parties had impliedly chosen Brazilian law to govern the arbitration agreement. Opposing this view, the Insurer contended that the parties had chosen English law to govern the arbitration agreement by virtue of agreeing on London as the seat of the arbitration. The Court accepted the Insurer's position. To determine the law governing the arbitration agreement, it laid down the three-stage test: it asked three pointed questions to be answered in order. First, whether it was the parties' express choice for Brazilian law to govern the arbitration. Second, whether the parties made an implied choice in that regard. Third, with which system of law does the agreement have the closest and most real connection. This three-stage test is now routinely applied to identify the governing law of an arbitration agreement. It lays the foundation for the application of the doctrine of separability which plays a pivotal role at the second and third stage of the inquiry. Based on the third limb of this test, Moore-Bick LJ, with whom Neuberger and Hallett LJ agreed, held that English law (and not Brazilian law) would govern the arbitration agreement, as it was the

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87 BORN, *supra* note 1, § 4.04(A)(i) ("[A] number of common law judicial decisions have also concluded that a general choice-of-law clause presumptively applies to the parties' arbitration agreement."); Julian M. Lew, *The Law Applicable to the Form and Substance of the Arbitration Clause*, *in* IMPROVING THE EFFICIENCY OF ARBITRATION AGREEMENTS AND AWARDS: 40 YEARS OF APPLICATION OF THE NEW YORK CONVENTION, 9 ICCA CONGRESS SERIES 114 (Albert Jan Van Den Berg ed. 1999) (cited in REDFERN & HUNTER, *supra* note 7, § 3.12).

88 BORN, *supra* note 1, § 4.04(A)(ii) ("[A]nother substantial, and contradictory, body of authority has held that a general choice-of-law clause does not encompass an arbitration clause contained within the underlying contract and does not impliedly select the law applicable to the arbitration clause. [...] these authorities have concluded that a general choice-of-law clause applies only to the parties' underlying contract, and not to the 'separable' arbitration agreement.").

89 *Id.* ("The foregoing conclusion is described as a consequence of the separability presumption, as well as the particular characteristics of the arbitration agreement [...] and the intentions of rational commercial parties.").

90 Sulamérica CIA Nacional de Seguros S.A. v. Enesa Engenharia S.A. [2013] 1 WLR 102 (Eng.) [*hereinafter* "Sulamérica"].

91 *See, e.g.,* BCY, [2017] 3 SLR 357 at 371; BNA v. BNB [2019] SGHC 142, ¶ 16 (Sing.) [*hereinafter* "BNA"]; Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc., (2012) 9 SCC 552, 617, 618 (India); Reliance Industries Ltd. v. Union of India, (2014) 7 SCC 603, 631 (India); Roger Shashoua v. Mukesh Sharma, (2017) 14 SCC 722, 753 (India); Cheung Shing Hong Ltd. v. China Ping An Insurance (H.K.) Ltd., [2020] HKCFI 2269, ¶ 33 (H.K.).

law of the seat of the arbitration, and not that of the insurance policies, that had the closest most real connection to the arbitration agreement.[92]

The insurer relied on separability to argue that since an arbitration agreement is distinct from the substantive contract, the arbitration agreement has the closest, most real connection with the law of the seat of the arbitration. The Court was not entirely convinced. Rather, in the first instance, it downplayed the importance of separability by stating that "*[it does] not think that separability provides an easy answer to the question that arises in this case, which turns primarily on the relative importance to be attached to the parties' express choice of proper law and their choice of London as the seat of the arbitration.*"[93] But, in the same breath, it did admit to a limited role the doctrine played in the exercise: the objective of separability is to simply respect the parties presumed intention to refer disputes to arbitration by effecting the agreed procedure for resolving disputes in circumstances that would render the substantive contract ineffective. Thus, "*[i]ts purpose is to give legal effect to that intention, not to insulate the arbitration agreement from the substantive contract for all purposes.*"[94] The Court's illumination of this limited role the doctrine plays is arguably its most important contribution from the perspective of this subject. However, courts and tribunals have interpreted this statement rather differently.

The Arbitral Tribunal in *Alstom Brasil Energia E Transporte LTDA* v. *Mitsui Sumitomo Seguros S.A.* ["**Mitsui**"],[95] for example, extended the choice of law clause contained in the main contract to the arbitration agreement. In the ICC administered arbitration, the Claimant argued for application of New York law, the law of the seat, to the arbitration agreement to determine whether the Respondent was bound by it. The Respondent, on the other, advocated for Brazilian law, the choice of law contained in the main contract. Acknowledging the two approaches on the issue, the Tribunal was persuaded by the latter—the arbitration agreement is governed by the choice of law in the main contract. Granted the primary reason for the Tribunal for deciding so was the unique wording of the choice of law clause which encompassed any decision or award; the Tribunal did state that it would have reached the same conclusion even if the choice of law did not expressly cover the arbitration agreement.[96] In its view, separability allowed for such a conclusion. By implication, the doctrine permits an arbitration clause to be governed by a different law from the law governing the main contract. But this did not preclude a finding that the arbitration agreement and main contract are governed by separate laws.[97] Particularly since the doctrine "*does not mean that an arbitration agreement will necessarily be governed by a different law from the law governing the main contract*."[98]

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92 Sulamérica, [2013] 1 WLR 102, at 116 ("In my view an agreement to resolve disputes by arbitration in London, and therefore in accordance with English arbitral law, does not have a close juridical connection with the system of law governing the policy of insurance, whose purpose is unrelated to that of dispute resolution; rather, it has its closest and most real connection with the law of the place where the arbitration is to be held and which will exercise the supporting and supervisory jurisdiction necessary to ensure that the procedure is effective. Its closest and most real connection is with English law. I therefore agree with the judge that the arbitration agreement is governed by English law.").

93 *Id.* at 111.

94 Sulamérica, [2013] 1 WLR 102, at 114.

95 Alstom Brasil Energia E Transporte LTDA, Alstom Power Inc. v. Mitsui Sumitomo Seguros S.A., ICC Case No. 20686/RD, Final Award (July 10, 2015).

96 *Id.* ¶ 147.

97 *Id.* ¶ 158.

98 *Id.*

Upon careful examination of the reasoning in *Sulamérica* and *Mitsui*, the role of separability in determining the law governing the arbitration agreement is undeniable. But the extent of its influence on the determination and the outcome are demonstrably unpredictable.

V. Evolution of Separability

From the opening salvo in *Sulamérica*,[99] separability has been involved in a somewhat tortuous, genteel affair with the three-stage test to determine the law governing the arbitration agreement. For some, *Sulamérica*'s justification to rely on separability to give effect to parties' intent to arbitrate[100] has licensed an expansion of the doctrine's traditional boundaries. This is despite the restrictive language of Section 7 of the (English) Arbitration Act, 1996 (like Article 16 of the Model Law and Article 23 of the UNCITRAL Arbitration Rules), which allows separability to only salvage the arbitration agreement when the "*other agreement [the substantive or the main agreement] is invalid, or did not come into existence or has become ineffective.*"[101] In other terms, there is a statutory pre-condition for the application of the doctrine. But for this, by implication, the arbitration agreement and the substantive agreement, which it forms a part of, are not separate but one. It follows that there is tension between the expanded version of separability and the narrow statutory language.

This underlying tension was discussed by the Singapore High Court in *BNA* v. *BNB* ["**BNA**"],[102] a case involving issues rather similar to *Sulamérica*. The dispute arose from a takeout agreement which contained a critical dispute resolution clause. The parties had expressly chosen the law of the People's Republic of China ["**PRC**"] to govern the Takeout Agreement, but were silent as to the law governing the arbitration agreement. Guided by *BCY*, the Court embarked upon the *Sulamérica* three-stage inquiry. Considering both sides agreed that neither the Takeout Agreement, nor the arbitration agreement contained an express choice of law governing the arbitration agreement, the Court proceeded to the second limb of the three-stage inquiry: to determine the implied choice of law governing the arbitration agreement. The Plaintiff argued that by selecting PRC law to govern the Takeout Agreement, the parties had impliedly chosen PRC law to govern the arbitration agreement as well. A consequence of applying PRC law to the arbitration agreement was that the arbitration agreement would be rendered ineffective. The Defendant, on the other hand argued, for Singapore law to be the proper law of the arbitration agreement on the strength of separability and Singapore being the seat. Antithetical to the legal effect of applying PRC law, Singapore law would allow the arbitration agreement to be enforceable.

In the first instance, while addressing the plaintiff's advocacy for the more traditional doctrine of separability and the observations in *Sulamérica*, V. Coomaraswamy J., writing for the Court, acknowledged the statutory restriction on the operation of the doctrine under the (English) Arbitration Act, 1996. But, considering there was no equivalent provision under Singapore law, the Court did not find itself constrained from applying a broader version of separability. It justified:

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99 Sulamérica, [2013] 1 WLR 102.

100 *Id.* at 114 ("The concept of separability itself, however, simply reflects the parties' presumed intention that their agreed procedure for resolving disputes should remain effective in circumstances that would render the substantive contract ineffective. Its purpose is to give legal effect to that intention, not to insulate the arbitration agreement from the substantive contract for all purposes.").

101 Arbitration Act 1996, ch. 23, § 7 (Eng.).

102 BNA, [2019] SGHC 142.

> "*This section [(Section 7 of the (English) Arbitration Act, 1996)] is a statutory statement of the doctrine of separability in English arbitration law. It expressly makes the invalidity or ineffectiveness of the substantive contract a condition precedent to s 7 applying. To the extent that Moore-Bick LJ stated the doctrine of separability narrowly, he was constrained by a controlling statute to do so. We have no equivalent statutory provision in, Singapore. There is therefore in Singapore law no equivalent statutory constraint on the scope of the doctrine of separability or on its development.*"[103]

This statutory vacuum in Singapore law was the first of the three factors supporting the recognition and application of an evolved doctrine of separability.

The second was the observations made by the *Sulamérica* court.[104] The *BNA* court relied on these to catalytically add another dimension to separability i.e., the doctrine ensures that the "*arbitration agreement [remains] effective [even] if a provision of the substantive contract into which it is integrated could, in certain circumstances of fact or law, operate to render their arbitration agreement invalid.*"[105] It justified this evolution on the basis of the filament underlying the doctrine: "*the desire to give effect to a presumed intention of the parties that their arbitration agreement should remain effective.*"[106]

The third factor supporting this broader version of separability was, as per the Court, the *ut res magis valeat quam pereat* principle: words should be understood in a way that the matter is effective rather than ineffective.[107]

This is not to say that the Court in *BNA* did not define, rather re-define, the scope of separability. The Court was guided by the fundamental objective of separability–to give effect to parties' intent to resolve disputes through arbitration–to establish that "*the only limit […] is that it should go no further than is reasonable to give effect to the parties' intention to arbitrate their disputes.*"[108] In other words, the "*scope would not go so far as to supply a manifest intent to arbitrate where the parties have themselves to make that intent manifest in the words, they have chosen to express their arbitration agreement.*"[109] Following this eloquent discussion, the Court decided to apply Singaporean law, the law of the seat, to the arbitration agreement, thereby successfully protecting the intent to arbitrate.

It appears rather simplistic to justify such a broad approach to separability. But, a collective reading of past and present decisions, particularly the restrictive reading of the doctrine in *BCY*,[110] does

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103 *Id.* ¶ 70.
104 Sulamérica, [2013] 1 WLR 102 at 114.
105 BNA, [2019] SGHC 142, ¶ 73.
106 *Id.*
107 BEALE, *supra* note 3, § 12-081. ("If the words used in an agreement are susceptible of two meanings, one of which would validate the instrument or the particular clause in the instrument, and the other render it void, ineffective or meaningless, the former sense is to be adopted. This rule is often expressed in the phrase *ut res magis valeat cum* [*sc quam*] *pereat*. Thus, if by a particular construction the agreement would be rendered ineffectual and the apparent object of the contract would be frustrated, but another construction, though by itself less appropriate looking to the words only, would produce a different effect, the latter interpretation is to be applied, if that is how the agreement would be understood by a reasonable man with a knowledge of the commercial purpose and background of the transaction. So, where the words of a guarantee were capable of expressing either a past or a concurrent consideration, the court adopted the latter construction, because the former would render the instrument void. If one construction makes the contract lawful and the other unlawful, the former is to be preferred […].").
108 BNA, [2019] SGHC 142, ¶ 74.
109 *Id.*
110 BCY, [2017] 3 SLR 357 at 374, 375.

allow for a compelling argument that the *BNA* court did in fact bend separability to convenience. Unfortunately, the Singapore Court of Appeal in *BNA* v. *BNB*[111] did not decide "*on the doctrine of separability and whether it applies even where the validity of the main or substantive contract is not impugned.*"[112] The Singapore High Court's decision was overturned to a limited extent as the Singapore Court of Appeals held that PRC, and not Singapore, was the seat of the arbitration. That said, its following concluding remarks are revelatory:

> "*The essential point we make is that the parties' manifest intention to arbitrate is not to be given effect at all costs. The parties did not only choose to arbitrate – they chose to arbitrate in a certain way, in a certain place, under the administration of a certain arbitral institution. Those all have to be given effect to by a process of construction which critically gives the words of the arbitration agreement their natural meaning, unless there are sufficient contrary indicia to displace that reading. If the result of this process of construction is that the arbitration agreement is unworkable, then the parties must live with the consequences of their decision.*"[113]

The Singapore Court of Appeal's observation could be perceived as disturbing the Singapore High Court's justification to stretch separability to protect the parties' intent to arbitrate at all costs.

As is clear, one of the most important factors permitting the Singapore High Court to venture into expanding separability was the absence of a restrictive statutory provision in Singapore. This suggests that such an expansive reading would not be permissible in the United Kingdom courtesy of the restrictive language of Section 7 of the (English) Arbitration Act, 1996. The apparent conflict with Section 7 undoubtedly makes an expansive reading a difficult problem, more difficult than what the *BNA* court faced. Notwithstanding this, the English courts have not shied away from arguably recasting separability and, at the same time, resolving this tension.

In *Kabab-Ji SAL* v. *Kout Food Group* ["**Kabab-Ji**"],[114] the England and Wales Court of Appeal, which was to decide whether to recognize and enforce the French award, had to preliminarily decide the question of the law governing the arbitration agreement: would the arbitration agreement be governed by French law, i.e., the law of the seat of the arbitration, or by English law, i.e., the law expressly chosen to govern the underlying contract, a Franchise Development Agreement ["**FDA**"]. Like in *BNA*, the Court proceeded with the *Sulamérica*[115] three-stage inquiry.

It found that the arbitration agreement forms part of the FDA and, therefore, the law governing the FDA, i.e., English law, also applies to the arbitration agreement. Conscious of Section 7 of the (English) Arbitration Act, 1996, the Court did not resort to separability to read the arbitration agreement de hors the substantive contract. In support of its finding, the Court relied on the seminal statement made in *Sulamérica*, i.e., "*[separability's] purpose is to give legal effect to that intention [intent to arbitrate], not to insulate the arbitration agreement from the substantive contract for all purposes.*"[116] It explained that separability "*does not preclude the arbitration agreement being construed with the remainder of*

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111 BNA v. BNB [2020] 1 SLR 456 (Sing.).
112 *Id.* at 483.
113 *Id.* at 485.
114 Kabab-Ji SAL v. Kout Food Group [2020] EWCA Civ 6 (Eng.) [*hereinafter* "Kabab-Ji"].
115 Sulamérica, [2013] 1 WLR 102.
116 Sulamérica, [2013] 1 WLR 102, at 114.

the main agreement as a whole."[117] This is so particularly "*where the clear intention is that the main agreement should be construed as a whole and where […] there is nothing in the wording of the arbitration agreement which suggests that it is intended to be construed in isolation from the remainder of the main agreement.*"[118]

What constitutes "*clear intention*"? There is no certain answer. It is entirely subjective and requires explication. It not only depends on the language of the contract, particularly the choice of law clause, as in *Kabab-Ji*, but also on the predisposition of the adjudicator. In *Kabab-Ji*, the main contract provided "*[t]his Agreement consists of the foregoing paragraphs,*" two of which were the arbitration agreement (which provided for Paris as the seat) and the choice of law clause. The choice of law clause read *"[t]his Agreement shall be governed by and construed in accordance with the laws of England.*"[119] Reading the terms harmoniously, the Court concluded that the main contract contained an express choice of law which extended to the arbitration agreement. One can compare this with the arbitral tribunal's views expressed in the interim award issued in *Property owner (US)* v. *Property manager (Germany)*.[120] Similar to the wording of choice of law clause in *Kabab-Ji*, the main contract provided, "*[t]his Agreement shall be governed by the laws of Belgium.*"[121] For the *Kabab-Ji* court, such language sufficiently indicated parties' clear intent to apply the choice of law to the arbitration agreement; but for the arbitral tribunal, it did not. The following observation clarifies this:

> "*If parties want to explicitly provide for a certain arbitration law […] to apply, they either refer to the 'law governing the arbitration clause' or the 'application of another law' (i.e., another than the law applicable to the main contract). They would certainly not just state that the laws of Belgium or Germany shall be applied as it has been the case with Article 19.2 of the Agreement. As a result, Articles 19.1 and 19.2 of the Agreement both address the law applicable to the main contract.*"[122]

The divergent outcomes obtained on rather similar choice of law clauses underscores the instrumentality of the language of the contract and the influence of the deciding bodies in discerning the parties intent and, consequently, in determining the law applicable to the arbitration agreement. Notwithstanding the detailed and labyrinthine reasoning in *Kabab-Ji*, and as consistent with Section 7 of the (English) Arbitration Act, 1996 and *Sulamérica* as it may appear, the decision is not dispositive and neither is it free from criticism.[123]

In contrast to *Kabab-Ji*, the England and Wales Court of Appeal in *Enka Insaat ve Sanayi AS* v. *OOO "Insurance Company Chubb*" ["**Enka Insaat**"][124] applied the law of the seat to the arbitration agreement as opposed to the law of the substantive agreement. This variance can be attributed, in part, to the construction of the particular contractual language.[125] In *Enka Insaat*, the Respondent, an insurance company, argued that the arbitration agreement, in the subcontracting agreement concerning Enka's participation in constructing a power plant, was governed by Russian law,

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117 Kabab-Ji, [2020] EWCA Civ 6, ¶ 66.
118 *Id.* (emphasis added).
119 *Id.* ¶ 8.
120 Property owner (U.S.) v. Property manager (Germany), ICC Case No. 14617, Interim Award on Jurisdiction, *reprinted in* 38 Y.B. COM. ARB. 111 (Albert Jan Van den Berg ed., 2013).
121 *Id.* ¶ 29.
122 *Id.* ¶ 32.
123 *See* BORN, *supra* note 1, at 572–573, 606.
124 Enka Insaat ve Sanayi AS v. OOO "Insurance Company Chubb" [2020] 3 All ER 577 (Eng.) [*hereinafter* "Enka Insaat"].
125 *Id.* at 611, 612.

which was the proper law of the substantive agreement. The Court rejected this argument. Popplewell LJ, writing for the Court of Appeal, concluded that it was English law, the law of the seat, that governed the arbitration agreement. The Court first admitted that "*it would be idle to pretend that English authorities speak with one voice*"[126] on the relative weight to be given to the law of the seat and the law of the substantive contract in discerning the law governing the arbitration agreement.

It then began, consistent with past precedents, by conducting the *Sulamérica* three-stage inquiry. It dissected *Sulamérica* to glean the underlying factors that led the Court to decide, as it did, that English law and not Brazilian law, governed the arbitration agreement. The two factors, in the Court's opinion, that rebutted the presumption that the proper law of the substantive agreement also applied to the arbitration agreement, were: (i.) by choosing another country as the seat of the arbitration, the parties were deemed to have accepted that the law of that country will govern the arbitration proceedings. This means that parties intended that the law of the seat would govern all aspects of the arbitration, including the formal validity of the arbitration agreement; and (ii.) the application of the law of the substantive agreement would possibly undermine the parties' intent to arbitrate disputes. It then turned to *Kabab-Ji*. Per the *Enka Insaat* court, since *Kabab-Ji* decided the proper law of the arbitration agreement based on an express choice of the parties, which is identified by interpreting the contract, including the arbitration agreement, it did not feel compelled to address *Kabab-Ji* in detail considering the distinguishing facts, i.e., absence of an express choice of the law governing the arbitration agreement in the case before it.

With the intent to restore some semblance of predictability and uniformity in English commercial law, the Court endeavoured to clarify this point. In cases where the parties have not expressly chosen the law governing the arbitration agreement, the Court, in a manner mimicking a rule of law, stated that the law of arbitration agreement should be the law of the seat as it constitutes an implied choice of the parties. Digressing from its past decisions, the Court underplayed the importance attached to the law of the substantive agreement. And, it did so on the comfort of separability. It explained, "*the law of the main contract is a system of law applicable to the terms of the main contract and the validity, interpretation and performance of those terms, other than the terms of the separate arbitration agreement and the validity, interpretation and performance of those separate arbitration terms.*"[127]

This is a slight departure from Section 7 of the (English) Arbitration Act, 1996, which predicates the invocation of separability on a challenge to the validity, enforceability of the substantive agreement or the main contract. Pertinently, the *Enka Insaat* court does not say that its understanding of separability is found in Section 7. What it does say, and note the emphasis, is that its statement "*follows from the doctrine of separability of the arbitration agreement recognized in section 7 […].*"[128] In other words, its understanding of separability is rather consanguineous with Section 7.

Enka Insaat arguably travelled beyond past decisions by holding that an express choice of law constitutes a choice of law to be applied to all terms apart from the separate arbitration agreements, barring cases where the parties have expressly stated their intention to treat the substantive agreement and the arbitration agreement it contains, as one like in *Kabab-Ji*. Since separability treats

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126 Enka Insaat, *supra* note 124, at ¶ 69.
127 *Id.* at 612 (emphasis in original).
128 *Id.* (emphasis added).

an arbitration agreement separate from the underlying agreement for one aspect covered by the arbitration agreement law, i.e., the purpose of its validity, existence and effectiveness, why should it then not, in the Court's opinion, isolate the arbitration agreement for determining the arbitration agreement law itself.[129] This statement may be read in light of not only the limiting language of section 7 of the (English) Arbitration Act, 1996, but also the observations made in *Sulamérica*, where the Court categorically stated that separability merely insulates the arbitration agreement from the substantive agreement to protect the parties' intent to resolve disputes through arbitration and not for all other purposes. Does this statement in *Enka Insaat* not transgress the inner circle of section 7 and the outer circle of *Sulamérica*, re-emphasized in *Kabab-Ji*?

As per the U.K. Supreme Court, it did. In *Enka Insaat Ve Sanayi AS (Respondent)* v. *OOO Insurance Company Chubb (Appellant)*,[130] Chubb renewed its argument for application of the Russian law, as it contended that a choice of law for the contract is, by implication, the choice of law for the arbitration agreement.[131] The majority, comprising of Lord Hamblen, Lord Leggatt and, Lord Kerr, writing for the U.K. Supreme Court, in the first instance, agreed: "*[w]here the law applicable to the arbitration agreement is not specified, a choice of governing law for the contract will generally apply to an arbitration agreement which forms part of the contract.*"[132] The Court then proceeded to carve out an exception to this rule, following from the validation principle—and not separability—that where there is a serious risk that the arbitration agreement would be ineffective if subjected to the law of the main contract, it may be implied that the arbitration agreement was intended to be governed by the law of the seat.[133] Lord Burrows and Lord Sales, the dissenters, also concurred with the majority on this issue.[134] Despite such concurrence, the Court rejected Chubb's plea for applying Russian law to the arbitration agreement. It agreed with the finding of the Court of Appeal that English law and not Russian law applied to the arbitration agreement, but concluded so for different reasons. The Court held that since the substantive contract did not contain a choice of law clause, the law applicable to the arbitration agreement was English law, the law of the seat of the arbitration which had the closest connection to the arbitration agreement.[135] Its summary of the principles governing determination of the applicable law of the arbitration agreement[136] is a valuable contribution to field guidance on the subject. From the perspective of separability, the Court rejected the expansive version. Expressing its agreement with Chubb's understanding of separability, it stated as follows:

> "*[T]he principle of separability is not a principle that an arbitration agreement is to be treated as a distinct agreement for all purposes but only that it is to be so treated for the purpose of determining its validity or enforceability. That is clear from the words 'for that purpose' in section 7 of the [(English) Arbitration Act, 1996]. Thus, the separability principle does not require that an arbitration agreement should be treated as a separate agreement for the purpose of determining its governing law.*"[137]

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129 *Id.* at 613.
130 Enka Insaat Ve Sanayi AS (Respondent) v. OOO Insurance Company Chubb (Appellant) [2020] 1 WLR 4117 (U.K.) [*hereinafter* "Insurance Company Chubb"].
131 *Id.* at 4123.
132 *Id.* at 4167.
133 *Id.* at 4146, 4147.
122 *Id.* at 4198 (Lord Burrows), 4200 (Lord Sales).
135 *Id.* at 4167, 4168.
136 *Id.*
137 *Id.* at 4131.

In the Court's view, the presumption of the Court of Appeal that the choice of law of the contract would not apply to the "*different and separate [arbitration] agreement,*"[138] "*puts the principle of separability of the arbitration agreement too high.*"[139] An arbitration agreement, the Court stated, is "*part of the bundle of rights and obligations recorded in the contractual document*."[140] Lord Burrows in his dissenting speech also shared this view. He reemphasized the language of Section 7 of the (English) Arbitration Act, 1996 whose "*wording makes clear that the separability doctrine has been devised for a particular purpose.*"[141] And it is for the purpose of safeguarding the validity of the arbitration agreement that it is severable from the main contract. Lord Burrows approvingly relied on Adrian Briggs' "*Private International Law in English Courts,*"[142] to echo that the arbitration agreement is severable for that purpose – but that does not mean it is separate and will still be governed by the law which governs the contract, even after any such fictional severance.[143]

In cases where it is necessary to impute the intention to apply the law of the seat to an arbitration agreement to avoid putative invalidity resulting from the application of the law of the contract, it can be done so on the basis of the validation principle: "*the contract should be interpreted so that it is valid rather than ineffective,*"[144] not on the grounds of separability. Following the clarity provided by the Supreme Court, at least in the U.K., for the foreseeable future, it appears that the understanding of separability has reverted to tradition. The lacunae in separability to safeguard the arbitration agreement in all cases (including where the application of the law of the contract would render it ineffective), has been addressed by the validation principle. Whether courts in other jurisdictions, including Singapore, are inspired by *Enka Insaat*, remains to be seen.

VI. Conclusion

This article began with the hypothesis that there may have been a judicial development of the doctrine of separability, and safe to say that based on the variances discussed above, the hypothesis is, to an extent, arguable. There are two contributing factors. The first, and primary factor, necessity. Through the vehicle of separability, courts and legislations have vindicated a principle that is elementary to arbitration: to protect the parties' intention to refer disputes to arbitration. Separability was created to protect this intent. However, based on the recent decisions, it would appear that separability, as it is understood in its traditional sense, at times, was not sufficient to fulfil its primary purpose: to protect parties' intent to arbitrate. This in turn compelled courts, like

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138 Enka Insaat, [2020] 3 All ER, at 612, 613.

139 Insurance Company Chubb, [2020] 1 WLR, at 4136, 4137.

140 *Id.* at 4137.

141 *Id.* at 4189 (Lord Burrows).

142 *See* ADRIAN BRIGGS, PRIVATE INTERNATIONAL LAW IN ENGLISH COURTS § 14.37 (2014) ("If the agreement to arbitrate is a term of a larger contract, the law which governs the contract as a whole will generally determine the scope of the terms of that contract. For even though the arbitration agreement is for some important purposes notionally severable from the substantive contract, those purposes do not include the need for its governing law to be separate or different from that of the substantive contract in which the arbitration agreement is contained. It would be perverse to deduce from the principle of severability a rule that the law governing the agreement to arbitrate should be identified without reference to the substantive contract in which the parties included it as a term. The autonomy of the arbitration agreement is one thing; its hermetic isolation would be quite another. To put the point yet another way: the agreement to arbitrate is severable, but that does not mean it is separate. Prior to any severance it will have been governed by the law which governs the contract; after severance, it must remain governed by the same law, for otherwise 'it' is not being severed; something else is instead being created.").

143 *Id.* at 4189, 4190 (Lord Burrows), 4204 (Lord Sales).

144 *Id.* at 4146.

in Singapore and the England and Wales Court of Appeal in *Enka Insaat*, to adopt a more evolved, utilitarian version of the doctrine to safeguard this intent not unlike adopt more evolved version. Whereas in *Enka Insaat*, the U.K. Supreme Court allayed any such concerns by justifying reliance on the validation principle.

The second is the change in the courts' perception of arbitration. At first, courts were animus towards arbitration, but with the passage of time, owing to the ever-growing needs of commerce, their perception of arbitration has reversed. They advance arbitration, rather than impede it. This change in outlook has certainly contributed to the development, or, at the very least, divergent understanding and application of separability. Thus, we find that the natural tendency to supplant and exterminate the less improved, and preceding forms, has also percolated in the approach of Courts, leading to an arguable evolution of the doctrine of separability, which might exterminate its preceding forms.

The modification of the doctrine of separability, whether by default or design, can have significant consequences particularly relating to the choice of law, validity of the arbitration agreement and underlying contract, and competence-competence. It is therefore, more than ever before, imperative to address all aspects comprehensively whilst drafting an arbitration agreement. Arbitration, which is based on the agreement between parties, greatly depends on the interpretation of the agreement by and the predilection of, courts and arbitral tribunals. While it is custom to act in accordance with the intention of the parties as stated in the agreement, it is unclear what will happen when this intention is not clearly stated. The outcome, as can be seen from the above decisions, can vary depending on the jurisdiction in which the parties find themselves. In such a scenario, absent guiding, uniform principles, it is difficult to predict the result, rendering the proactive approach counter-productive. Undoubtedly the catalytic approach of courts in bending the doctrine to need is welcomed but it leaves something to be desired.

What emerges is that the nuances of the separability doctrine, are, in some cases, bordering evolution. In order to ensure that separability's understanding and application is not unruly, it is imperative to stem the tide signalled by the recent decisions, which, the *Enka Insaat* decision has, to a great degree, achieved in the U.K.

THE ADVISABILITY OF APPELLATE ARBITRATION: PROPOSING AN EFFICIENT INSTITUTIONAL FRAMEWORK

Ojaswa Pathak[*]

Abstract

The juridical roots of arbitration lie in freedom of contract. Yet, the existing scholarship, while opposing the appellate review of the arbitral awards, cites arbitral finality and efficiency to oppose a review on the substantive merits of the final award. This mechanism has already seen an increased demand among the business community owing to the pressing need of correcting substantive errors of the award, which cannot qualify as procedural improprieties to set aside the award. This article aims at settling this debate of the viability of appellate arbitration by reasoning and stressing the importance of an appellate mechanism in any dispute resolution mechanism, and then weighing the pros and cons with the adoption of appeals in arbitration. This cogitation would allude that contrary to popular beliefs, adoption of arbitral appeal mechanism would lead to increased finality and enforcement of arbitral awards. After establishing the desirability of appellate review of awards, the article will assess the existing appellate mechanism offered by arbitral institutions and proposed mechanisms by the existing scholarship. It will then propose a unique variant appellate framework which will be efficient and economical for parties to opt for.

I. Introduction

The notion of party autonomy, which is the contractual mandate of arbitration, has been considered as the *grundnorm* by courts all over the world.[1] Party autonomy is rooted in the freedom of contract, which is "*at the very core of how the law regulates arbitration,*" especially considering the absence of a supranational legislative or adjudicatory body in international commercial arbitration.[2] Additionally, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ["**New York Convention**"] has mandated courts to adopt a *laissez-faire* approach in adjudication, ergo limiting the judicial scrutiny in the arbitration.[3] This has led to arbitrations culminating into a final award, which is free from any court's interference, except in case of gross procedural inequities in the arbitration or the award being contrary to public policy.[4] Consequently, this has

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1 Bharat Aluminium v. Kaiser Technical Services, (2016) 4 SCC 126 ¶ 10 (India); *see also* Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 57–58 (1995) (citing Volt Info. Sci., Inc. v. Bd. of Tr. of Leland Stanford Junior Univ., 489 U.S. 468, 479 (1989)).

2 Thomas E. Carbonneau, *The Exercise of Contract Freedom in the Making of Arbitration Agreements*, 36 VAND. J. TRANSNAT'L L. 1189, 1191–1193 (2003).

3 Ulrich Drobnig, *Assessing Arbitral Autonomy in European Statutory Law*, *in* LEX MERCATORIA AND ARBITRATION: A DISCUSSION OF THE NEW LAW MERCHANT 195 (Thomas E. Carbonneau ed., 1998).

4 United Nations Comm'n on Int'l Trade Law (UNCITRAL), Model Law on International Commercial Arbitration, art. 34(2), G.A. Res. 40/72, U.N. Doc. 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) [*hereinafter* "UNCITRAL Model Law"].

increased the popularity of arbitration among the business community, as it provides an efficient process and ensures finality of the award.[5]

The scholarship opposing appellate arbitration has been cueing arbitral finality as an obstacle for reviewing its substantive merits to increase its accuracy.[6] However, the scholarship that has advocated for appellate arbitration seems to have underemphasised the importance of party autonomy and contractual freedom in countering the opposition to appellate arbitration or any other novel supplement to the arbitral process.[7] Part II of this article fills that gap by pointing out the importance of appeal in any kind of dispute resolution process and settling the debate on the viability of appellate arbitration after assessing the arguments for and against appeals, and basing its desirability on the fundamental tenet of party autonomy. After assessing the existing and proposed appellate frameworks around the globe, Part III of this article will propose a unique framework for arbitral appeals, which should be considered for adoption by the Indian arbitration institutions.

II. The Rationale of Arbitral Appeals

Part II of this article endeavours to highlight the importance of an appellate review in any kind of dispute resolution system, and settle the debate on the viability of appellate arbitration, after critically analysing the arguments presented for and against the same. Additionally, the growing demand of appeal options in arbitration would also be highlighted to understand their desirability. After persuading the reader in favour of the viability and desirability of an appeal mechanism in arbitration, this part would form the foundation on which part III of the article proposes the precise standards of appellate review of arbitral awards.

A. The importance of appeal

i. History and significance of appellate review

The justice delivery system has, since time immemorial, provided an appellate mechanism to challenge the decision of a court in front of a higher authority.[8] This concept traces its roots in the Roman law procedure of *appellatio*, where a party aggrieved by a judgment could challenge it all the way up to the level of the monarch.[9] The reason such appellate review was offered is to account for the errors that can occur owing to the human fallibility of a judge.[10] Additionally, the greater

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5 THOMAS E. CARBONNEAU, CASES AND MATERIALS ON THE LAW AND PRACTICE OF ARBITRATION 466–70 (3d ed. 2002).

6 William H Knull, III & Noah D. Rubins, *Betting the Farm on International Arbitration: Is it Time to Offer an Appeal Option?*, 11 AM. REV. INT'L. ARB. 531, 563 (2000) [*hereinafter* "Knull & Rubins"]; Paul Bennett Marrow, *A Practical Approach to Affording Review of Commercial Arbitration Awards: Using an Appellate Arbitrator*, 60 DISP. RESOL. J. 485, 486 (2005) [*hereinafter* "Marrow"]; Axay Satagopan, *Conceptualizing a Framework of Institutionalized Appellate Arbitration in International Commercial Arbitration*, 18 PEPP. DISP. RESOL. L.J. 325, 348–350 (2018) [*hereinafter* "Satagopan"]; Irene Ten Cate, *International Arbitration and the Ends of Appellate Review*, 41 N.Y.U. J. INT'L L. & POL. 1109, 1110–11 (2011) [*hereinafter* "Cate"]; *See also* Lord Dyson, *Lectures and Addresses: Finality in Arbitration and Adjudication The Eversheds Lecture 2000*, 66(4) INT'L J. ARB. MED. & DISP. MGMT. 288 (2000) ("The more generous the scope for challenging decisions by appeal or review, the greater the chance of eliminating error.").

7 *Id.*; *see also* Aashesh Singh & Swarna Sengupta, *Second Bite at the Arbitration Apple: Analysing the Applicability and the Utility of the Internal Appeal Mechanisms in Commercial Arbitrations in India*, 11 NUJS L. REV. 4 (2018).

8 Christopher R. Drahozal, *Judicial Incentives and the Appeals Process*, 51 SMU L. REV. 469, 469–70 (1998) [*hereinafter* "Drahozal"].

9 BRYAN A. GARNER, BLACK'S LAW DICTIONARY 856 (8th ed. 2004).

10 Mateus Aimoré Carreteiro, *Appellate Arbitral Rules in International Commercial Arbitration*, 33 J. INT'L. ARB. 185, 189 (2016) [*hereinafter* "Carreteiro"].

experience and expertise of appellate judges and deliberative decision-making of the appellate benches would likely enable the appellate review to rectify substantive errors of the lower courts.[11]

However, this omnipotence of appeals in most jurisdictions does not evince in the form of a substantive uniformity across all legal systems. The function and purpose served by an appeal vary in civil law countries and common law countries. In common law jurisdictions, the appellate courts are entrusted with the purpose of substantive error correction and the development of the law.[12] However, error correction is the primary function of an appeal in a civil law court.[13] In addition to the purpose, the scope of an appeal is also moulded by reasons of appellate hierarchy, quality of adjudication, and specifically, the expertise of the court concerned.[14] This division of labour in adjudication leads to better collective decision-making and forms the backbone of an effective legal system.[15] Therefore, an appeal mechanism not only brings legal and factual accuracy to the decisions, but also improves the general legitimacy of decision-making by increasing the quality and quantity of adjudicators.

ii. Demand for appeal in arbitration

Arbitration has seen usage throughout our history and has been generally without any appellate mechanism.[16] This absence of an appellate review was reasoned on grounds such as arbitration being a genesis of the agreement between the parties, ensuring the finality of the award and efficiency in the process, and protecting the honour of the arbitrator.[17] This position of a systemic absence of arbitral appeal was codified in the New York Convention, which became the constitution of modern commercial arbitration.[18] Therefore, the modern arbitration ushered in an apparent paramountcy of arbitral finality.

However, the increase in the complexity of the transactions being arbitrated increased the possibility of errors in the awards.[19] The tolerance of errors in the name of arbitral efficiency also decreased as the amount in disputes started increasing, resulting in significant consequences for the parties.[20] This led to an increasing demand of appellate review in arbitration, which is evinced

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11 *Id.* at 190; *see also* Drahozal, *supra* note 8.

12 Carreteiro, *supra* note 10, at 190; Chad M. Oldfather, *Universal De Novo Review*, 77 GEO. WASH. L. REV. 308, 316–317 (2009) [*hereinafter* "Oldfather"]; *see also* Lester B. Orfield, *Appellate Procedure in Equity Cases: A Guide For Appeals At Law*, UNIV. PA. L. REV. 563, 563–654 (1942).

13 Carreteiro, *supra* note 10, at 196; PAUL CARRINGTON, DANIEL MEADOR & MAURICE ROSENBERG, JUSTICE ON APPEAL 3 (1976). *See also* Nina Nicholas Pugh, *The Structure and Role of Courts of Appeal in Civil Law Systems*, 35(5) LA. L. REV. 1163, 1199–1200 (1975).

14 Chad M. Oldfather, *Appellate Courts, Historical Facts, and the Civil-Criminal Distinction*, 57 VAND. L. REV. 437, 439–440, 443 (2004).

15 Carreteiro, *supra* note 10, at 190; David Frisch, *Contractual Choice of Law and the Prudential Foundations of Appellate Review*, 56 VAND. L. REV. 57, 74 (2003).

16 GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 80 (3d ed. 2020).

17 REINHARD ZIMMERMANN, THE LAW OF OBLIGATIONS: ROMAN FOUNDATIONS OF THE CIVILIAN TRADITION 528–529 (1996); Ivan Milotic, *Exclusion of Appeals Against Arbitration in Roman Law*, 20 CROAT. ARB. Y.B. 241(2013).

18 *See* United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 330 U.N.T.S 4739 [*hereinafter* "New York Convention"].

19 Knull & Rubins, *supra* note 6, at 540–541.

20 Stephen Hayford & Ralph Peeples, *Commercial Arbitration in Evolution: An Assessment and Call for Dialogue*, 10 OHIO ST. J. DISP. RESOL. 343, 348 (1995); Tom Cullinan, *Contracting for an Expanded Scope of Judicial Review in Arbitration Agreements*, 51 VAND. L. REV. 395, 400 (1998).

by its affirmation by leading practitioners.[21] Furthermore, few studies and surveys endorsed that there is an increasing demand for arbitral appeals by businesses.[22] This empirical endorsement adds up when seen in light of the fact that a few arbitration institutions have already started offering appeal options.[23] Therefore, it is clear that the objections on arbitral appeal mechanism are ignoring the direction where the arbitration community is moving towards.

B. Settling the debate on the appeal of arbitral appeal

i. Sacrificing "finality" for justice

When introducing the idea of arbitral appeals, scholarship object to it by stating that any attempt at meddling with arbitral finality would compromise arbitration's essence.[24] They stress that any kind of judicialization through an appellate review would stymie the arbitral process and make it similar to litigation.[25] Such objections are specious and have to be refuted by viewing the concept of finality in its historical context. The New York Convention aimed to bind its member states to recognise and enforce international arbitral awards and end the common "*second-guessing*" of arbitral awards by local courts,[26] which were obstructions to the seamless international trade and arbitration.[27] This culminated in the form of the principle of finality of arbitral awards, which is construed as a key principle of international arbitration.[28] However, it must be recognised here that it was the party autonomy and freedom of contract that gave birth to arbitration and ensured its finality. Therefore, arbitral finality was only a characteristic feature of arbitration, which was the

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21 Christopher R. Drahozal, *Of Rabbits and Rhinoceri: A Survey of Empirical Research on International Commercial Arbitration*, 20(1) J. INT'L ARB. 23 (2003).

22 David B. Lipsky & Ronald L. Seeber, *The Appropriate Resolution of Corporate Disputes: A Report on the Growing Use of ADR by U.S. Corporations*, Cornell/PERC Institute on Conflict Resolution (1998), at 26, *available at* https://ecommons.cornell.edu/handle/1813/76218; *see also* David B. Lipsky & Ronald L. Seeber, *In Search of Control: The Corporate Embrace of ADR*, 1(1) UNIV. PA. J. LAB. & EMP. L. 133, 148 (1998); CHRISTIAN BÜHRING-UHLE, ARBITRATION AND MEDIATION IN INTERNATIONAL BUSINESS 107–08 (2d ed. 2006). *Contra* Bryan Cave Leighton Paisner, *Annual Arbitration Survey 2020, A right of appeal in International Arbitration – A second bite of the cherry: Sweet or Sour?* (2020), *available at* https://www.bclplaw.com/images/content/1/8/v2/186066/BCLP-Annual-Arbitration-Survey-2020.pdf.

23 *The Korean Commercial Arbitration Board: An Interview with Gary Born*, 4 KOR. ARB. REV. 50, 52 (2014).

24 Nana Japaridze, *Fair Enough? Reconciling the Pursuit of Fairness and Justice with Preserving the Nature of International Commercial Arbitration*, 36(4) HOFSTRA. L. REV. 1415, 1418; Hilary Heilbron, *Dynamics, Discretion, and Diversity: A Recipe for Unpredictability in International Arbitration*, 32(2) ARB. INT'L 261, 273 (2016); Caroline Larson, *Substantive Fairness in International Commercial Arbitration: Achievable through an Arbitral Appeals Process?*, 84(2) INT'L J.ARB., MEDIATION & DISP. MGMT. 104, 110 (2018) [*hereinafter* "Larson"].

25 Hans Smit, *Contractual Modification of the Scope of Judicial Review of Arbitral Awards*, 8 AM. REV. INT'L ARB. 147 (1997); Kevin A. Sullivan, *The Problems of Permitting Expanded Judicial Review of Arbitration Awards under the Federal Arbitration Act*, 46(2) ST. LOUIS UNIV. L.J. 509, 511 (2002).

26 Amy J Schmitz, *Ending a Mud Bowl: Defining Arbitration's Finality through Functional Analysis*, 37 GA. L. REV. 123, 131(2002); Larson, *supra* note 24, at 107.

27 Hiro N Aragaki, *Constructions of Arbitration's Informalism: Autonomy, Efficiency, and Justice,* 2016 (1) J. DISP. RESOL. 141, 153 (2016); *See also* THOMAS HALE, BETWEEN INTERESTS AND LAW: THE POLITICS OF TRANSNATIONAL COMMERCIAL DISPUTES 28 (2015).

28 GARY B. BORN, INTERNATIONAL ARBITRATION: LAW AND PRACTICE 11 (2d ed. 2016).

result of an agreement between parties.[29] It follows that the demand for modifying the arbitral process cannot be objected on the status quo ground of arbitral finality.[30]

Further, as arbitration grew, it was realised that legal accuracy was being traded off for finality.[31] Commenting on this trade-off, it was stated that absolute arbitral finality can only be accepted if arbitrators are immune to human fallibility, they commit tolerable errors, and any attempt at error correction would be inefficient.[32] If any of these preconditions are absent, then the parties will be left with an erroneous award and limited recourse.[33] Additionally, it was also pointed out that the attraction of arbitration was not primarily owing to arbitral finality.[34] To the contrary, when arbitrating high-stakes disputes, it would be undesirable to trade finality for accuracy.[35]

Perhaps arbitration has to evolve and acknowledge that the risk in arbitrating highly complex and valuable international transactions must be offset with an appellate mechanism aimed to correct any substantive errors.[36] The desirability of such mechanism increases when we consider that it would improve the standards of arbitral adjudication and the long-term legitimacy of the whole system.[37] Therefore, recent trends in arbitration prompt us to not discard accuracy of justice because of arbitral finality, especially considering that the consumers of the modern arbitration regime demand both arbitral finality and arbitral justice, or sometimes only the latter.

ii. *Ineffectiveness of setting aside application*

One of the arguments against appellate arbitration is that recourse is available to an aggrieved party through a setting aside application or refusing enforcement at the local court. This argument is specious considering that the New York Convention has a pro-enforcement bias and only gross procedural improprieties or public policy concerns could set aside the award.[38] Therefore, the arbitrator's award essentially becomes free from any substantive review on merits.[39] The downside of this pro-enforcement regime is that the "*decisional sovereignty of the arbitrator is sometimes close to a*

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29 Jessica L. Gelander, *Judicial Review of International Arbitral Awards: Preserving Independence in International Commercial Arbitrations*, 80(2) MARQ. L. REV. 625, 626 (1997) [*hereinafter* "Gelander"]; Rowan Platt, *The Appeal of Appeal Mechanisms in International Arbitration: Fairness over Finality?*, 30(5) J. INT'L. ARB. 531, 534 (2013).

30 Lord Mustill, *A Commercial Way to Justice*, 63(1) ARB.: INT'L J. ARB., MEDIATION & DISP. MGMT. 15, 17 (1997); Thomas J. Stipanowich, *Arbitration: The 'New Litigation'*, 2010(1) UNIV. ILL. L. REV. 1, 52 (2010) [*hereinafter* "Stipanowich"]; Di Jiang-Schuerger, *Perfect Arbitration = Arbitration + Litigation?*, 4 HARV. NEGOT. L. REV. 231, 246, 251 (1999).

31 Sobel v. Hertz, Warner & Co., 469 F.2d 1211, 1214 (2nd Cir. 1972) (U.S.); *see also* Knull & Rubins, *supra* note 6, at 540.

32 Knull & Rubins, *supra* note 6, at 541.

33 Stephen P. Younger, *Agreements to Expand the Scope of Judicial Review of Arbitration Awards*, 63(1) ALB. L. REV. 241 (1999); Margaret L. Moses, *Can Parties Tell Court What to Do? Expanded Judicial Review of Arbitral Awards*, 52 UNIV. KAN. L. REV. 429 (2004).

34 Martin Hunter, *International Commercial Dispute Resolution: The Challenge of the Twenty-first Century*, 16(4) ARB. INT'L 379, 382 (2000). *See also* AT&T Mobility L.L.C. v. Concepcion, 131 S. Ct. 1740 (2011) (U.S.) (wherein the court commented that arbitral finality will not be suitable for disputes with very high stakes considering that the award would never be reviewed on its substantive merits.).

35 Mauro Rubino Sammartano, *The Fall of a Taboo: Review of the Merits of an Award by an Appellate Arbitration Panel and a Proposal for an International Appellate Court*, 20(4) J. INT'L ARB. 387, 388–390 (2003); Knull & Rubins, *supra* note 6, at 539–540.

36 Duncan Wallace, *Control by the Courts: A Plea for More, Not Less*, 6(3) ARB. INT'L. 253, 258 (1990); Marrow, *supra* note 6.

37 Satagopan, *supra* note 6, at 368; Alan Scott Rau, *The Culture of American Arbitration and the Lessons of ADR*, 40(3) TEX. INT'L L. J. 449, 456–457 (2005).

38 REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION 606, 642 (Alan Redfern, Martin Hunter, Constantine Partasides & Nigel Blackaby eds., 6th ed. 2015).

39 Thomas E. Carbonneau, *Arguments in Favor of the Triumph of Arbitration*, 10 CARDOZO J. CONFLICT RESOL. 395, 397 (2009).

divine right."[40] The problems with an unchecked authority culminating into a final award (highlighted above in Part II.B.i of this article) are exacerbated by the fact that most arbitration clauses are considered boilerplate in commercial agreements signed by parties, with their implications not being deliberated enough on the negotiation table.[41] Therefore, parties who contently trust the arbitral process are hardly aware that the adjudication of the merits of their dispute can be a hostage to the idiosyncrasy of an arbitrator and without any review mechanism.

Furthermore, even if an aggrieved party is successful in setting aside the award through a competent court, it still does not resolve the dispute, and resets the dispute cycle.[42] Therefore, a setting aside application, despite being allowed in certain cases, proves to be futile and antithetical to the business interest involved. However, if an appeal mechanism is introduced, it would allow review of the award on procedure and merits, and save costs by correcting the award without court's interference, which would provide a solution to the futility of a setting aside application. This is important to maintain a fine balance between finality and justice through an appellate review.[43]

iii. Improved decision-making of arbitrators

Introducing appeals, apart from serving the purpose of error correction, would also serve a latent purpose culminating into better decision-making by the arbitrators. First, it has been observed that an appellate review performs a latent function of error avoidance in the dispute resolution system.[44] Error avoidance essentially means that owing to the possibility of an appellate review, the first instance adjudicator adopts a more cautious approach in the adjudication.[45] This is because there is a concern of reversal of their judgment, if it contains factual or legal inaccuracies.[46] This function has been observed uniformly in both civil and common law courts.[47] Therefore, it is likely that an arbitrator would draft their award prudently, and evince rationality in adjudication if there is a chance of reversal of the award by an appellate tribunal, as it happens in litigation.

Second, appellate reviews are generally assessed by a bench of multiple judges owing to the juridical belief that the number of judges would improve the decision-making of the court.[48] Two reasons have been put forth behind this belief. First, the statistical probability of an erratic decision is reduced by an increase in the number of judges.[49] Second, a bench of multiple judges will always decide after due deliberation among themselves, which is bound to remove individual

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40 Thomas E. Carbonneau, *The Revolution in Law through Arbitration*, 56 CLEV. ST. L. REV. 233, 266 (2008).

41 Richard W. Naimark & Stephanie E. Keer, *International Private Commercial Arbitration: Expectations and Perceptions Of attorneys And Business People: A Forced Rank Analysis*, 30(5) INT'L BUS. LAW. 203 (2002).

42 Antonio Sánchez-Pedreño Kennaird, *An Appellate Procedure in Arbitration? The Present State of Play*, *in* INTERNATIONAL ARBITRATION UNDER REVIEW: ESSAYS IN HONOUR OF JOHN BEECHEY 379 (Andrea Carlevaris, Laurent Lévy, Alexis Mourre & Eric A. Schwartz eds., 2015).

43 Gelander, *supra* note 29.

44 Cate, *supra* note 6, at 1110–11.

45 Oldfather, *supra* note 12.

46 David Frisch, *Contractual Choice of Law and the Prudential Foundations of Appellate Review*, 56(1) VAND. L. REV. 57, 74 (2003).

47 Cate, *supra* note 6, at 1147; Mathilde Cohen, *Reason Giving in Court Practice: Decision-Makers at the Crossroads*, 14(2) COLUM. J. EUR. L. 257, 265–270 (2008).

48 Jonathan Remy Nash & Rafael I. Pardo, *An Empirical Investigation into Appellate Structure and the Perceived Quality of Appellate Review*, 61(6) VAND. L. REV. 1745, 1803–1806 (2008).

49 Saul Levmore, *Ruling Majorities and Reasoning Pluralities*, 3 THEORETICAL INQUIRIES IN L. 87, 88–89 (2002).

idiosyncrasies from the judgment.[50] Additionally, the exchange of viewpoints among the bench improves decision-making, especially for the legal issues concerned.[51] Similarly, the application of an appellate review mechanism in arbitration is likely to improve the quality of arbitral adjudication because of the combined effect of error avoidance and deliberative decision-making.

iv. A step towards systemic substitution of courts

An ideated object of arbitration is the substitution of courtrooms with arbitration rooms.[52] Arbitration is fairly popular among corporates for being an efficient mode of dispute resolution.[53] Yet, it is has faced certain shortcomings such as lack of qualified arbitrators, asymmetrical arbitral administrative standards, difficulties with arbitrator compromise, and absence of any appeal on substantive errors in the award.[54] These shortcomings should be taken care of so as to truly realise the object of systemic substitution of courts by arbitral tribunals. The part which can be played by appeal mechanisms is delineated herein.

1. Eliminating the Need of Contractual Expansion of Judicial Review of Awards

The lack of substantial review on merits of an arbitral award has prompted parties to proactively draft their arbitration agreement with an expanded scope of judicial review on the award.[55] The courts across the globe have taken different approaches when determining the validity of such agreements, with several jurisdictions holding such expansions as legally impermissible.[56] However, it has been argued that momentum is building in favour of their validity.[57] This momentum is an indication of the growing need for an appeal mechanism, which is required, since, a substantial review by court would be undesirable considering the lack of a supranational recognition of court orders setting aside awards, confidentiality concerns and the systemic deficiencies of litigation, including lack of party autonomy.[58] Therefore, if arbitral institutions start offering appeal mechanisms, it would eliminate the need for contractual expansion of judicial review and would aim at making the arbitral experience better for businesses.

2. Reduced Chances of Setting Aside Applications

Offering appeal mechanism will give a chance to the aggrieved party to be heard by a different tribunal, and it is very likely that after that appeal is dismissed, the party will have no choice but to

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50 Lewis A. Kornhauser & Lawrence G. Sager, *The One and the Many: Adjudication in Collegial Courts*, 81(1) CALIF. L. REV. 1, 51–56 (1993); Evan H. Caminker, *Sincere and Strategic Voting Norms on Multimember Courts*, 97(8) MICH. L. REV. 2297, 2312–2333 (1999).

51 Evan Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46(4) STAN. L. REV. 817, 848–849 (1994).

52 Stipanowich, *supra* note 30, at 36.

53 Fulbright & Jaworski L.L.P., *U.S. Corporate Counsel Litigation Trends Survey Findings*, (2004), at 10, *available at* http://www.fulbright.com/images/publications/15122612_1.PDF; Michael T. Burr, *The Truth About ADR: Do Arbitration and Mediation Really Work? (Corporate Legal Times)*, INT'L INST. FOR CONFLICT PREVENTION & RESOLUTION (Feb. 1, 2004), *available at* https://www.cpradr.org/news-publications/articles/2004-02-01-the-truth-about-adr-do-arbitration-and-mediation-really-work-corporate-legal-times; John H. Henn, *Where Should You Litigate Your Business Dispute?*, 59(3) DISP. RESOL. J. 34, 36–38 (2004).

54 Charles E. Buffon & Joshua D. Wolson, *Antitrust Arbitration Counselling*, 19 ANTITRUST 31, 32–34 (2004).

55 *See* Leanne Montgomery, *Expanded Judicial Review of Commercial Arbitration Awards: Bargaining for the Best of Both Worlds*, 68 UNIV. CIN. L. REV. 529, 530 (1999) [*hereinafter* "Montgomery"].

56 Stipanowich, *supra* note 30, at 5.

57 Montgomery, *supra* note 55, at 554.

58 Knull & Rubins *supra* note 6, at 548.

trust the arbitral process. This is because the appeal will provide closure to the aggrieved party, which is a significant psychological advantage after the appellate arbitrator has modified or upheld the original award. This can lead to less setting aside applications, considering that in a single-tier arbitral process, the parties are simply willing to take a chance in a setting aside hearing.[59]

3. Strengthened Finality and Enforcement of Awards

The threat of the parties being left without any recourse or remedy after an incorrect award will not only create a disincentive for parties to choose arbitration, but also undermine the legitimacy of the whole system.[60] However, introducing the appeal mechanism will in turn increase the finality of the awards by ensuring a double check on the substance of the award. This can result in easy enforcement of the award, and will also strengthen the whole arbitration system.

III. Identifying the appropriate appellate mechanism

The only valid argument against an arbitral appeal could be that it will make the process costly and inefficient. This, however, can be ensured by tailoring an efficient arbitral appeal framework, which will also keep a tab on its costs. The existing institutions that offer a variant of arbitral appeal mechanisms are the International Institute for Conflict Prevention and Resolution ["**CPR**"],[61] JAMS,[62] American Arbitration Association ["**AAA**"],[63] and the European Court of Arbitration ["**ECA**"].[64] Additionally, some scholars have also proposed their own novel appeal mechanism.[65] This Part proposes a variant of such a framework, after critically analysing the existing and proposed arbitral appeal frameworks.

A. Agreement to appeal

An agreement to appeal would detail out the mode through which parties would be agreeing for arbitral appeal. The CPR,[66] JAMS[67] and AAA,[68] have a mechanism which requires the parties to expressly agree for an appeal. On the contrary, the ECA mandates that parties would have to expressly opt-out of the appeal mechanism; ergo, all their awards can be appealed unless the appeal has been waived through agreement.[69] Some authors have endorsed the approach of the ECA.[70]

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59 Devashish Bharuka, *Two-Tier Arbitration: Ensuring A Private Appellate Forum*, LIVELAW.IN (Mar. 2, 2020), *available at* https://www.livelaw.in/columns/two-tier-arbitration-ensuring-a-private-appellate-forum-153370.

60 Noam Zamir & Peretz Segal, *Appeal in International Arbitration—An Efficient and Affordable Arbitral Appeal Mechanism*, 35(1) ARB. INT'L 79, 79-93 (2019) [*hereinafter* "Zamir & Segal"].

61 International Institute for Conflict Prevention and Resolution (CPR), Appellate Arbitration Procedure 1999, *available at* https://www.cpradr.org/resource-center/rules/arbitration/appellate-arbitration-procedure [*hereinafter* "CPR Procedure"].

62 *See* JAMS, JAMS Optional Arbitration Appeal Procedure 2003, *available at* https://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS_Optional_Appeal_Procedures-2003.pdf [*hereinafter* "JAMS Procedure"].

63 American Arbitration Association (AAA), Optional Appellate Arbitration Rules 2013, *available at* https://www.adr.org/sites/default/files/AAA-ICDR_Optional_Appellate_Arbitration_Rules.pdf [*hereinafter* "AAA Rules"].

64 The European Court of Arbitration (ECA), Arbitration Rules of The European Court of Arbitration 2015, *available at* https://cour-europe-arbitrage.org/arbitration-rules [*hereinafter* "ECA Rules"].

65 Satagopan, *supra* note 6, at 370–389; Zamir & Segal, *supra* note 60, at 89–92.

66 *See* CPR Procedure, pt. I.

67 *See* JAMS Procedure, r. (b).

68 *See* AAA Rules, r. A-1.

69 *See* ECA Rules, art. 28.

70 *See* Zamir & Segal, *supra* note 60, at 90.

One scholar has devised his own Novel Appellate Arbitration Model ["**NAAM**"] for arbitral appeals.[71] This approach conditions permissibility of the appeal on the amount of the dispute. It provides that disputes below a certain threshold would not be permitted appeal, even if there is a contractual agreement to that effect. However, NAAM allows appeals above that threshold. The author has ramified this appealable threshold limit into two other thresholds, wherein, if the dispute comes below a certain amount, it would be appealable only if contractually agreed. Whereas, the disputes that are above that threshold would be mandatorily appealable unless parties expressly agree otherwise. The author has reasoned such a hybrid and paternalistic standard owing to little attention paid by parties to the dispute resolution clause, even in high-stake contracts.[72]

The approach adopted by the CPR, JAMS and AAA for an opt-in mechanism seems to defeat the very purpose of arbitral appeals because, generally, parties pay little to no attention to the dispute resolution clause when the deal is signed in the jovial atmosphere of the conference room.[73] At the other end, by allowing arbitral appeals through a blanket opt-in mechanism as practised by the ECA, is bound to increase the likelihood of arbitral award being appealed by the losing party and will thereby increase the costs involved. The approach adopted by NAAM seems to be the right combination of opt-in and opt-out mechanism in appeals. However, it fails to consider that benchmarking a threshold amount and basing the permissibility of an appeal on that is not only an impractical task, but also unfair to the parties in small disputes, who would want to arbitrate their dispute by an appellate tribunal, but fall short of the concerned quantitative limit of appealing. The author's concern for such parties arises due to two reasons. First, mandating such rules to permit a facility as important as appeal erodes the primacy of party autonomy by denying arbitral appeals to parties in small disputes, even after an agreement to that effect. Second, there are practical difficulties that will arise in setting an objective criterion based on the amount of the dispute for allowing arbitral appeals. Since it is difficult to ascertain an objective threshold amount that would justly qualify parties for appeal, it would be just to offer appeals, unless parties agree otherwise.[74] The solution to this problem is an appropriate appellate framework that would not only reduce the costs of an appeal, but also aim to deter and swiftly dismiss vexatious appeals. This would be ensured by the framework proposed in the following sub-parts. Thus, the only right way would be swallowing the bitter pill of adopting the opt-out mechanism in arbitral appeals.

B. The scope of appellate review

Both the CPR and AAA have a similar standard of review for allowing the appeal on facts and law. An appeal therein should involve a material error of law or an unsubstantiated factual determination.[75] However, perhaps a broader standard of review is recommended by JAMS, which offers the very standard of review that would have applied in the first-level appellate court of that jurisdiction.[76] Similarly, ECA provides for a de novo review of the whole dispute.[77] This substantial

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71 Satagopan, *supra* note 6, at 376.

72 *Id.* at 380–381.

73 John M. Townsend, *Drafting Arbitration Clauses: Avoiding the Seven Deadly Sins*, 58(1) DISP. RESOL. J. 28, 30 (2003).

74 To illustrate this point, we need to understand that the consumers of arbitration are increasing day by day and any threshold amount set can disqualify some parties with a 'relatively' small dispute to appeal their arbitrations.

75 *See* CPR Procedure, r. 8.2(a); AAA Rules, art. A-10.

76 JAMS Procedure, r. (d).

77 ECA Rules, art. 28.4.

scope of review has been endorsed by scholarship.[78] In contrast to this, NAAM has tried to balance the de novo review standard and the limited review standard.[79] This has been ensured by devising a two-step appellate review which would involve a *prima facie* review and an ensuing *detailed review*. The *prima facie* review will involve finding errors apparent on the face of the record that will allow it to go to the detailed review, which shall review of the merits of the case. Yet, this two-step requirement can be permitted to be converted into a detailed review by a contractual waiver. The object behind this hybrid standard is to save costs by dismissing vexatious appeals.[80]

The NAAM's process and standard of appellate review is a step in the right direction and can be procedurally modified to improve its efficiency. The author's proposal is that the *prima facie* review should be confined to written submissions by the parties, which would be reviewed by two arbitrators. These two arbitrators shall independently assess the written submissions and allow the appeal for a detailed review, or shall dismiss it at that stage itself. However, in case their decision is not unanimous, the appeal shall be automatically transferred for a detailed review, which may include oral hearings if the tribunal deems it fit. The reason for using written submissions is to improve efficiency, while the reason to use two arbitrators independently is to improve the quality of decision making. The following sub-part explains the importance of the composition of an appellate tribunal and proposes a suitable standard for such composition.

C. Appointment of appellate tribunal

The JAMS,[81] and CPR,[82] provide for a three-member appellate panel, unless the parties agree for a one-member tribunal. However, there are nuances regarding the procedure of such appointment. The CPR provides a list of candidates from which the parties will have to choose.[83] If the parties fail to agree on it, they have to submit a rank-ordered list of the CPR's candidates on whom they did not agree. Thereupon, the required number of candidates that have received the lowest combined score from the parties would be chosen. In case of a tie, the same shall be broken by the Institution. This is in contrast to the procedure in JAMS, where, in case of a deadlock persisting for more than a week, JAMS would proceed to appoint the tribunal.[84] The procedure in AAA is also similar, wherein, the AAA sends the parties a list of ten potential arbitrators.[85] The parties strike the names objected to, number the remaining names in order of preference, and return the list to the AAA. However, if this list is not returned by the party within the stipulated time period, all the names therein shall be deemed as acceptable to that party. From among the persons who have been approved on both lists, and in accordance with the designated order of mutual preference, the AAA shall invite the acceptance of the appeal tribunal to serve. Furthermore, AAA shall have the power to appoint the tribunal in case the parties are unable to agree on a composition, or for some other reasons due to which the tribunal could not be composed.[86] The ECA goes another step in restricting party autonomy by itself appointing the appeal panel

78 *See* Zamir & Segal, *supra* note 60, at 90.
79 Satagopan, *supra* note 6, at 385–86.
80 *Id.*
81 JAMS Procedure, r. (a).
82 CPR Procedure, r. 4.1.
83 *See* CPR Procedure, r. 4.2.
84 JAMS Procedure, r. (a).
85 *See* AAA Rules, r. A-5(a).
86 AAA Rules, r. A-5(b).

composed of three members.[87] Some authors have proposed the arbitral tribunal to be composed of two party-appointed arbitrators, so as to ensure trust in the process, and most importantly, reduce the costs.[88] Furthermore, they have also suggested that this even-numbered arbitral tribunal can be changed to an odd-numbered tribunal if the parties agree to do so. An addition to this abovementioned proposal, it is a suggestion that to avoid conflict of interest, it is proposed that these can be blindly appointed.

The mode of appointment of the appellate tribunal has to balance party autonomy and improve decision-making. This is because the high-handed approach of *sua sponte* appointment by the arbitral institution erodes party autonomy. However, giving complete freedom to the parties in appointing the appellate tribunal degrades the quality of decision-making because party-appointed arbitrators act as proxy counsel-arbitrators in the front of the presiding arbitrator during the tribunal's internal deliberations.[89] These diverging interests of party autonomy and the quality of arbitral decision-making have to be balanced while devising the appointment procedure. This can be assured if the two arbitrators during the *prima facie* review stage are appointed by the institution after considering the eligibility criteria mutually proposed by the parties. After their appointment, a detailed review shall be conducted by a panel presided by an arbitrator appointed mutually by the parties. In case of a deadlock, the institution would again have to appoint the presiding arbitrator after considering any eligibility criteria. Such restrictions might be antithetical to party autonomy, but would indeed be in the interest of the parties and lead to betted arbitral adjudication.

D. Miscellaneous considerations

In order to avoid uncertainty in the appeal process, it is necessary to provide for a time limitation to appeal, after which the appeal shall be considered as waived and the award of the first instance would become final. Only after the award has become final in this sense, it would be liable for enforcement or setting aside.

Another interesting consideration is with respect to the contents of the award—if appealed, an award would have two tribunals as its authors. The author proposes that in case the appeal is dismissed in the *prima facie* review stage, then the award of the first instance court would be considered final for setting aside and enforcement purposes. However, if the appeal goes into a full detailed review, then the appellate tribunal would be liable to issue an award on the dispute, which would be final for all fits and purposes in the court. Additionally, to prevent frivolous appeals, an appropriate authorisation to the appellate tribunal for imposing costs can also be made. These proposals, if applied after due consideration, have the potential to make appeals efficient.

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87 ECA Rules, art. 28.

88 Zamir & Segal, *supra* note 60, at 90.

89 Cate, *supra* note 6, at 1148–1151. It has been stated that party-appointed arbitrators in a tribunal are generally those with maximum predisposition towards the appointing party and minimum appearance of bias. Thus, this means that the party-appointed arbitrators would press their appointers' cause before the presiding member of the tribunal. This will affect arbitral decision-making, considering that only one independent mind of the presiding arbitrator would be adjudicating the dispute. *See also* Alan Scott Rau, *Integrity in Private Judging*, 38(2) S. TEX. L. REV. 485, 497–98 (1997).

IV. Conclusion

We have understood the omnipresence and importance of appellate review in a dispute resolution system, and have also acknowledged the arbitration-specific advantages of appeals. This settles the debate on the viability of the appeal mechanisms. The only remaining piece of the puzzle is maintaining efficiency and saving costs of the appellate review, which the proposed framework in this article endeavours to ensure to a significant extent. Thus, it is recommended that Indian arbitral institutions should deliberate on adopting such a system, which would make them the early innovators in the arbitration community, to open up their awards to appellate review. This would also offer numerous benefits such as channelling the demand of arbitral appeals to increase the arbitration tourism in India, increasing the legitimacy of arbitration by improved decision-making and reduction in the number of setting aside applications filed before Indian courts.

BETWEEN THE SCYLLA AND CHARYBDIS: TAX CARVE-OUTS AND TRIBUNAL JURISPRUDENCE

Colin Cherian[*]

Abstract

Can tribunals overlook a tax carve-out? Succinctly put, the answer is in the affirmative. However, in light of how sparingly, tribunals have done so, there is room for discussion on this view. When interpreting carve-outs, the tribunal is often faced with a predicament. Despite a carve-out exclusion, if a tribunal were to rule on the claims, it may overstep its competence. On the other hand, the reluctance of the tribunal to hold the State accountable for usurping the investors' properties by taxes maybe an abdication of justice. This article, in light of this predicament, deliberates on three questions—tribunals' interpretation of carve-outs, the effectiveness of such carve-outs and finally, those instances when a tribunal would likely overlook a carve-out.

I. Introduction

The imagery of tax as a powerful instrument of State policy and a symbol of sovereignty is a universally recognised dictum. However, with the advent of Bilateral Investment Treaties ["**BITs**"] and the provision to resort to investor-State arbitrations, powerful nations have been held accountable for their abusive use of sovereign powers. The practice, although invidious to some nations, in recent years, has been extended to matters of fiscal measures. It is no secret that through their renunciations, treaty limitations and denials to enforce awards, States have sought to reduce the oversight of international law into their sovereign matters.

A growing practice suggests that States resort to tax exclusions in treaties to leave out matters of tax from the protections afforded to investors by the treaty. This includes the latter's right to arbitration.[1]

No doubt the sovereign may contract and negotiate as they may wish, however, these exclusions present an interesting problem. On the one hand, should a State usurp properties by tax, an indignant investor would be left without remedies if the treaty prohibits such tax-based claims (the *Scylla*). On the other hand, if a tribunal were to rule on such issues, it may overstep its competence (the *Charybdis*). To prevent such injustice, a tribunal must, within its competence, navigate between this Scylla and Charybdis when interpreting tax exclusions.

In light of the above predicament, this article examines three questions. *First*, how do tribunals interpret specific exclusions? *Second*, are tax exclusions effective? *Third*, can tribunals overlook the tax exclusion? Accordingly, our study is divided into four parts. Part II elaborates the tax disputes of the last century, the differential treatment of tax and the methods used to regulate the competence of the tribunal in matters of tax. Part III then examines the primary questions of our study before concluding in Part IV.

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[1] In making this assertion, the author relies on the State practice of including tax exclusions in treaties dating nearly half a century ago, which continues to this day. As would be discussed later, such exclusions have evolved to comprise more subject matters and consequently limit the tribunal's competence in tax matters.

II. The Preliminaries on Tax Carve-Outs

Before proceeding to the deliberation of the three questions, it would be necessary to first comprehend and examine the background surrounding tax carve-outs.

A. Tax Disputes of the last Century

A century ago, the notion that absent a treaty or an agreement, payment to foreign aliens for sovereign takings was arguably, an anachronistic opinion.[2] The early twentieth-century views are appropriately summarised by Sir Williams:

> "*[…] where no treaty or other contractual or quasi-contractual obligation exists by which a state is bound in its relations to foreign owners of property, no general principle of international law compels it not to expropriate except on terms of paying full or "adequate" compensation.*"[3]

It is in this backdrop that the early tax disputes were adjudicated. It is not our purpose that we pinpoint the exact date when these archaic notions lost their support. Its mention here is to enlighten readers that tax disputes were adjudicated by international bodies even when the modern-day notions on confiscatory takings, were in their infancy. Naturally, our analysis is not an exhaustive examination of all the tax disputes from that era but only those that fit our purpose.

In the *Brewer, Moller & Co.* case, the Claimants sought a refund of taxes paid to the municipality of San Cristobal on irregular assessments.[4] The Umpire denied the claims reasoning that the presumption of regularity and validity of all acts of public officials would apply and also suggested that the actions of the municipal district could not be attributed to the Republic of Venezuela. However, the Umpire did note that the claims would have a better chance if they could prove that such tax levied was due to their nationality and hence discriminatory.

In the same year, in the *Santa Clara Estates* case, the umpire ordered the return of those taxes exacted by the Government for the period when the municipal district was under the control of revolutionaries; outside the sovereignty of the government.[5] Two years later, a Tribunal in an inter-State dispute between Japan on one side and Britain, France, and Germany on the other, deduced that a certain treaty provision grants exemption from tax payments, not only to land, but also to the buildings on such properties. Japan had contended otherwise.[6]

In the *George W. Cook* v. *United Mexican States*, the Claimant sought to recover a sum, "*illegally*" collected by the municipal authority.[7] Illegal because the tax levied was on his property, which he constructed on the promise that the Governor shall recommend for its exemption from any real estate tax. The General Claims Commission disallowed the claim; one of its reasons being that the specific tax levied did not fall within the exemption.

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2 Although this notion was unpopular it was not non-existent. Commentators on this subject have as back as 1925, have noted that there may arise such an obligation under international law. *See* Alexander P. Fachiri, *International Law and the Property of Aliens*, 10 BRIT. YEAR BK. INT'L L. 32, 33 (1929) [*hereinafter* "Fachiri"].

3 John Fischer Williams, *International Law and the Property of Aliens*, 9 BRIT. YEAR BK. INT'L L. 1, 28 (1928).

4 Brewer, Moller & Co. Case (first), 10 R.I.A.A. 423 (1903).

5 Santa Clara Estates Case, 9 R.I.A.A. 455, 459 (1903).

6 Japanese House Tax (Ger., Fran. and Brit. v. Japan), PCA Case No. 1902-02, Award, at 5 (Perm. Ct. Arb. May 22, 1905).

7 George W. Cook v. United Mexican States, 4 R.I.A.A. 593 (Mex.-U.S. General Cl. Comm'n, 1930).

Much later, in the claims of *John Lusdyk*, the Foreign Claims Commission considered the claimant's property to be nationalized by a law which "*compelled owners of buildings with a gross rental income of more than 15,000 Czech crowns or more to deposit a certain portion of the rent in special account*."[8] It observed that despite the owners remaining owners on record, they lost control over their property. Another tribunal noted that the State shall not be responsible for loss of property resulting from "*bona fide general taxation*" and other police powers absent discrimination or expropriation.[9]

It may be questionable as to why claimants, today, face the prospect of tax exclusions, but a century ago, such claims were brought with considerable ease before international bodies. Most likely, early tax disputes were brought under agreements between States, which were worded broadly enough to encompass all kinds of liabilities and claims that may be incurred by the nationals of the contracting States. Tax exclusions only appeared in international investment agreements after the late 1960s.[10]

These decisions from the last century demonstrate that it would be a misnomer to think the subject-matter of tax was never assailable to the interventions by international bodies. The above claims demonstrate that recourse to international forums in matters of tax was prevalent from the start of the last century. Although there were questionable deliberations, tribunals did not hesitate to hold States liable for abuses of tax powers as demonstrated in *Santa Clara* and *Lusdyk*.

B. How are taxes excluded from Treaties?

Permutations of carve-outs, vetoes and claw-backs are devices used by contracting States to regulate the competence of a tribunal when deciding matters relating to tax. A tax carve-out is a clause that exempts the protections of the treaty from tax. Simultaneously, it also limits the ability of an investor to bring tax claims under the treaty.[11] A wide carve-out such as in the India-UAE treaty excludes all taxation measures from the review of the tribunal.[12] Tax vetoes are clauses that empower fiscal authorities of the host State and home State of the investor to substantiate the validity of the tax-based claim.[13] The function of such authorities is to make "*a preliminary cut between normal and abnormal taxes*."[14] For instance, the Benin-Canada BIT stipulates that investors must bring their tax claims first to the taxation authorities, before advancing to arbitration.[15] Hence, vetoes provide insulation against frivolous claims by investors. Claw-backs are exceptions to the exclusions; they claw-back the protections of the treaty which were carved out. Article 21(5)(a) of the Energy Charter Treaty ["**ECT**"] is one such specimen of a claw-back; Article 21(1) carves out all taxation measures, but Article 21(5)(a) allows the investor protection from expropriation.[16]

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8 Claim of John Lusdyk, Claim No. CZ-2517, at 3–4 (Foreign Cl. Settlement Comm'n, 1961) [*hereinafter* "Lusdyk"]; *see also* G. C. Christie, *What Constitutes a Taking of Property under International Law*, 38 BRIT. YEAR BK. INT'L L. 307 (1962).

9 Too v. Greater Modesto Insurance Associates, 23 IRAN-U.S. CL. TRIB. REP. 26 (1989).

10 Matthew Davie, *Taxation-Based Investment Treaty Claims*, 8 J. INT'L DISP. SETTLEMENT 202, 212 (2015) [*hereinafter* "Davie"].

11 *Id.*

12 Agreement between the Government of the Republic of India and the Government of the United Arab Emirates on the Promotion and Protection of Investments, India-U.A.E., art. 2, Dec. 12, 2013.

13 William W. Park, *Arbitration and the Fisc: NAFTA's "Tax Veto"*, 2 CHIC. J. INT'L L. 231, 236 (2001) [*hereinafter* "Park"].

14 *Id.* at 237.

15 Agreement between the Government of Canada and the Government of the Republic of Benin for the Promotion and Reciprocal Protection of Investments, Can.-Benin, art. 17, Jan. 09, 2013.

16 Energy Charter Treaty, art. 21, Dec. 17, 1994, 2080 U.N.T.S. 100 [*hereinafter* "Energy Charter Treaty"].

Commentators have classified taxes into multiple groups based on permutations and combinations of these devices. One author identifies seven such groups;[17] another classifies them into five groups.[18] We need not go into such modalities for our study. In short, these practices demonstrate that States widely write into their treaties, a carve-out to "*jealously*" protect their fiscal powers.

C. Why is tax treated differently?

In modern-day treaties, the subject-matter of taxation receives arguably some form of preferential treatment. Treaties frequently provide elaborate schemes on the treatment of tax. For instance, some treaties despite stipulating a cooling-off period for arbitration, further mandate that the investor should first submit the tax claim before the competent authorities before commencing arbitration.[19] In another instance, although preferential treatment between foreign aliens would likely violate treaty obligations, some treaties allow contracting States to afford preferential treatment to foreign aliens through double taxation treaties.[20] Some BITs have detailed provisions, applicable if an expropriation by tax is alleged.[21]

As to why tax is looked at differently eludes a satisfactory answer. The common justification is that matters of tax are an integral component of the sovereignty of the State; fiscal sovereignty. As one author notes, States include tax exclusions to avoid any restrains to their tax powers.[22] However, this argument fails to throw light on why the State would subject other parts of its sovereignty to scrutiny but not the power to tax. Perhaps States view their power to tax as paramount to their existence, since taxation provides the "*necessary means to carry out their governmental functions.*"[23]

Other authors opine a different reason. Professor Park notes that the very nature of taxation allows the State to regulate foreign investments.[24] As Professor Wälde elaborates on this point, the "*squeezing*" of foreign investors by taxation appears to be less obvious in contrast to other methods of taking, owing to the "*inherent complexity of such fiscal measures.*"[25] Although taxation shares a

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17 Julien Chaisse, *Investor-State Arbitration in International Tax Dispute Resolution - A Cut above Dedicated Tax Dispute Resolution?*, 35 VA. L. REV. 149 (2016).

18 Davie, *supra* note 10.

19 *See* Agreement between Australia and the Oriental Republic of Uruguay on the Promotion and Protection of Investments, Austl.-Uru., Apr. 5, 2019. Despite providing for a six-month duration to resolve all disputes through consultation and negotiation, the treaty also separately provides taxation measures shall be submitted to the authorities before proceeding to arbitration.

20 Thomas Wälde & Abba Kolo, *Investor-State Disputes: The Interface Between Treaty-Based International Investment Protection and Fiscal Sovereignty*, 35 INTERTAX 424, 432–434 (2007) [*hereinafter* "Wälde & Kolo"]; *see* Agreement between the Government of the United Kingdom of great Britain and Northern Ireland and the Government of the United Mexican States for the Promotion and Reciprocal Protection of Investment, U.K.-Mex, art. 5, May 12, 2006. Article 5 disallows the application of the National Treatment and Most Favoured Clause to "any agreement or arrangement relating wholly or mainly to taxation or any domestic legislation relating wholly to mainly to taxation."

21 *See* Agreement between the Government of the Republic of Singapore and the Government of the Republic of Rwanda on the promotion and Protection of Investments, Rwanda-Sing., art. 29, June 14, 2018.

22 Davie, *supra* note 10.

23 Stadtwerke Munchen GmbH v. The Kingdom of Spain, ICSID Case No. ARB/15/1, Award, ¶ 169 (Dec. 2, 2019) [*hereinafter* "Stadtwerke"].

24 Park, *supra* note 13.

25 Wälde & Kolo, *supra* note 20.

resemblance to expropriation, general taxation does not constitute expropriation. This very nature of taxation makes challenging taxation measures an "*uphill battle*" for most claimants.[26]

Commenting on the incorporation of tax vetoes in treaties, one author points out that vetoes perform a political function rather than legal—the contracting States can "*off-set*" one tax claim as against a political favour.[27] With regard to the preferential treatment negotiated by taxation agreements, although discriminatory taxes are illegal, no tribunal has condemned preferential treatment afforded by these agreements to violate the law.[28]

Thus, it is submitted that it is highly unlikely, in the distant future, for any tribunal to hold States accountable for these practices, or for States to abandon these practices.

III. The Three Questions

In this part, we shall discuss the three questions posed earlier. Each of the questions is discussed under Part III.A, Part III.B and Part III.C with sub-themes that follow under each.

A. Tribunal Jurisprudence

There is no consensus on the total number of tax-based claims presented before international tribunals. However, out of the known number of claims, tribunals have extensively deliberated on the scope and limitations of the various carve-outs. We shall examine, in this Part, how tribunals have construed and applied tax exclusions in tax-related disputes.

i. What is tax?

In light of our study on carve-outs, the distinction between fiscal measures as tax or otherwise assumes significance since a State can only avail protections of the carve-out if the alleged measure is a tax under the treaty. Conversely, the claimant can only bring claims if it does not qualify as tax to the extent exempted by the treaty. Treaties seldom define what taxes, taxation measures, and taxation policies are. This leaves the Tribunal with ample authority to define the term. In the laconic sense, tribunal jurisprudence suggests that taxes include customs duties,[29] levies,[30] and export withholdings,[31] amongst other fiscal measures. However, these definitions are contingent on the treaty and other instruments. For instance, although the *Duke Energy* Tribunal held customs duties to be tax, the ECT, however, excludes customs duties from the definition of tax.[32]

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26 Abba Kolo, *Tax Veto as a Special Jurisdictional and Substantive Issue in Investor-State Arbitration: Need for Reassessment*, 32 SUFFOLK TRANSNAT'L L. REV. 475–492, 491 (2009) [*hereinafter* "Kolo"].

27 Ilias Bantekas, *Interstate arbitration in international tax disputes*, 8 J. INT'L DISP. SETTLEMENT 507, 525 (2017).

28 For an elaborate discussion on this point, *see* discussion *infra* Part III A.iii.

29 Link-Trading Joint Stock Co. v. The Republic of Moldova, UNCITRAL, Award on Jurisdiction, at 9 (Feb. 6, 2001) [*hereinafter* "Link-Trading"]; Duke Energy Electroquil Partners & Electroquil S.A. v. The Republic of Ecuador, ICSID Case No. ARB/04/19, Award, ¶ 177–179 (Aug. 18, 2008) [*hereinafter* "Duke Energy"].

30 Stadtwerke, ICSID Case No. ARB/15/1, Award, ¶ 171 (Dec. 2, 2019).

31 El Paso Energy International Co. v. The Argentine Republic, ICSID Case No. ARB/03/15, Decision on Jurisdiction, ¶ 112 (Apr. 27, 2006) [*hereinafter* "El Paso"]; Pan American Energy LLC & BP Argentina Exploration Co. v. The Argentine Republic, ICSID Case No. ARB/04/13, Decision on Preliminary Objections, ¶ 136 (July 27, 2006) [*hereinafter* "Pan Energy"].

32 Energy Charter Treaty, art. 21(7)(d).

The *Encana* Tribunal defines a taxation law as a law that imposes liability on a defined class of persons to pay to the State for public purposes.[33] This definition has been relied on by other tribunals in *Burlington Resources Inc.* v. *The Republic of Ecuador* ["**Burlington**"],[34] *Duke Energy Electroquil Partners & Electroquil S.A.* v. *The Republic of Ecuador* ["**Duke Energy**"],[35] *9REN Holdings Holdings S.A.R.L.* v. *Kingdom of Spain*,[36] *Stadtwerke Munchen GmbH* v. *The Kingdom of Spain* ["**Stadtwerke**"],[37] *Cube Infrastructure Fund SICAV* v. *The Kingdom of Spain* ["**Cube Infrastructure**"],[38] and *Foresight Luxembourg Solar* v. *The Kingdom of Spain*.[39] However, later tribunals have also observed that not every mandatory payment made by a class of persons to the State for public purposes without direct benefit is necessarily a tax.[40] For instance, fines may share a likeness with taxes, however, they cannot qualify for the protection of the carve-out.[41] Neither do fees to obtain licenses, permits, or authorizations.[42]

Hence to further distinguish such unilateral payments, tribunals also rely on other factors, such as the characterisation of the tax in domestic law[43] or its legal operation.[44] In *Antaris Solar GmbH* v. *The Czech Republic* claims, the Tribunal declined to afford the exemptions of the tax carve-out to the solar "*levy*" of the Czech government on finding that the Administrative Court of the State had not characterised the measure as a tax despite the State contending so before the Tribunal.[45] The Nissan Tribunal performs an inquiry into the domestic characterisation using the "*who,*" "*what*" and "*why*" approach.[46] The "*who*" determines which entities are empowered to perform tax functions under the domestic law and whether their conduct forms part of the investor's claims, the "*what*" determines the qualitative nature—whether such a tax is "*customarily*" used in the State, and the "*why*" examines the purpose of the tax. On the other hand, the economic effect of the tax gains is only gauged to identify the propriety of the tax.[47]

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33 EnCana Corporation v. The Republic of Ecuador, LCIA Case No. UN3481, Award, ¶ 142 (Feb. 3, 2006) [*hereinafter* "EnCana"].

34 Burlington Resources Inc. v. The Republic of Ecuador, ICSID Case No. ARB/08/5, Decision on Jurisdiction, ¶ 166 (June 2, 2010) [*hereinafter* "Burlington"].

35 Duke Energy, ICSID Case No. ARB/04/19, Award, ¶ 174 (Aug. 18, 2008).

36 9REN Holdings S.A.R.L. v. Kingdom of Spain, ICSID Case No. ARB/15/15, Award, ¶¶ 198–202 (May 31, 2019) [*hereinafter* "9REN"].

37 Stadtwerke, ICSID Case No. ARB/15/1, Award, ¶ 166 (Dec. 2, 2019).

38 Cube Infrastructure Fund SICAV v. The Kingdom of Spain, ICSID Case No. ARB/15/20, Decision on Jurisdiction, Liability and Partial Decision on Quantum, ¶¶ 230–231 (Feb. 19, 2019) [*hereinafter* "Cube"].

39 Foresight Luxembourg Solar v. The Kingdom of Spain, SCC Case No. 2015/150, Final Award, ¶¶ 255–256 (Nov. 14, 2018).

40 Murphy Exploration & Production Company – International v. The Republic of Ecuador, UNCITRAL, Partial Final Award, ¶ 191 (May 6, 2016) [*hereinafter* "Murphy"]; Nissan Motor Co. Ltd. v. The Republic of India, PCA Case No. 2017-37, Decision on Jurisdiction, ¶ 385 (Perm. Ct. Arb. Apr. 29, 2019) [*hereinafter* "Nissan"].

41 Nissan, PCA Case No. 2017-37, Decision on Jurisdiction, ¶ 385 (Perm. Ct. Arb. Apr. 29, 2019).

42 *Id.* ¶ 385.

43 Murphy, Partial Final Award, ¶ 185 (May 6, 2016).

44 EnCana, LCIA Case No. UN3481, Award, ¶ 142 (Feb. 3, 2006).

45 Antaris GmbH v. The Czech Republic, PCA Case No. 2014-01, Award, ¶ 233 (Perm. Ct. Arb. May 2, 2018) [*hereinafter* "Antaris"].

46 Nissan, PCA Case No. 2017-37, Decision on Jurisdiction, ¶ 386 (Perm. Ct. Arb. Apr. 29, 2019).

47 Burlington, ICSID Case No. ARB/08/5, Decision on Liability, ¶¶ 395, 397 (Dec. 14, 2012).

The broadest definitions of taxation would include the levy of tax,[48] assessment[49] and collection of taxes,[50] measures providing relief from the tax,[51] and decisions taken by tax authorities or courts.[52]

ii. *Whether the standard of treatment obligation within the exclusion is enforceable before the Tribunal?*

Tax exclusions in most BITs signed by the United States before the 2000s provided that:

> "*[…] [E]ach Party should strive to accord fairness and equity in the treatment of investment of nationals and companies of the other Party.*"[53] ["**Clause**"]

Although the U.S. seems to have changed its approach, treaties with this exclusion remain in force and hence the relevance of this discussion.[54] Whether the above Clause imposes any duty on the Contracting Parties, so that the violation of such duty is a breach of the BIT, has been a matter of debate among the various tribunals. The *Enron Corporation* v. *The Republic of Argentine* ["**Enron**"] and *Occidental Exploration* v. *The Republic of Ecuador* ["**Occidental**"] Tribunals answer this question in the positive. In *Enron*, the Tribunal notes that to "*strive to accord fairness and equity*" is not a meaningless reference.[55] The *Occidental* Tribunal opines that the obligation imposed is a less mandatory duty, although similar, to the original Fair and Equitable Treatment ["**FET**"] obligation contained in the BIT elsewhere.[56] The Tribunal was of the view that the Clause opens up the standards of treatment if the alleged expropriation is proved.[57] In a similar vein, the *Enron* Tribunal further opines that the Clause attains its significance when expropriation is invoked since "*questions of transparency and the availability of effective remedies*" must be analysed in this context.[58] Similarly, the Tribunal in *Pan American Energy LLC & BP Argentina Exploration Co.* v. *The Argentine Republic* observed that the Clause attains significance in light of the expropriation claims, if proved.[59]

On the other hand, the Tribunal in *El Paso Energy Int'l Co.* v. *The Argentine Republic* ["**El Paso**"] thinks that the Clause "*creates only [a] best-effort obligation*" since any possibility of review is limited by the Treaty.[60] However, the Tribunal does observe that the obligation is not "*no law*" but affirms that its competence over tax matters is as per the limited grounds as under the Treaty.[61] The

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48 Vincent J. Ryan, Schooner Capital LLC and Atlantic Investment Partners LLC v. Republic of Poland, ICSID Case No. ARB (AF)/11/13, Award, ¶ 284 (Nov. 24, 2015) [*hereinafter* "Ryan"]; EnCana, LCIA Case No. UN3481, Award, ¶ 142 (Feb. 3, 2006).

49 Ryan, ICSID Case No. ARB (AF)/11/13, Award, ¶ 284 (Nov. 24, 2015); Enron Corporation and Ponderosa Assets L.P. v. The Republic of Argentine, ICSID Case No. ARB/01/03, Decision on Jurisdiction, ¶ 67 (Jan.14, 2004) [*hereinafter* "Enron"].

50 Ryan, ICSID Case No. ARB (AF)/11/13, Award, ¶ 284 (Nov. 24, 2015).

51 EnCana, LCIA Case No. UN3481, Award, ¶ 142 (Feb. 3, 2006).

52 Spyridon Roussalis v. Romania, ICSID Case No. ARB/06/1, Award, ¶ 493 (Dec. 7, 2011) [*hereinafter* "Spyridon"].

53 Treaty between the united states of America and the Republic of Moldova concerning the Encouragement and Reciprocal Protection of Investment, Mold.-U.S., art. 10, Apr. 21, 1993.

54 A perusal of the United States BITs, starting from the Model BIT 1984 demonstrates the use of language to ensure fairness in tax policies—"With respect to its tax policies, each Party should strive to accord fairness and equity […]." Such a "duty" fails to find mention in BITs concluded after 1998. Seemingly, the U.S. has abandoned such an interpretation as reflected in its Model BIT 2004.

55 Enron, ICSID Case No. ARB/01/03, Decision on Jurisdiction, ¶ 65 (Jan.14, 2004).

56 Occidental Exploration and Production Company v. The Republic of Ecuador, LCIA Case No. UN 3467, Final Award, ¶ 70 (July 1, 2004) [*hereinafter* "Occidental"].

57 *Id.* ¶ 75.

58 Enron, ICSID Case No. ARB/01/03, Decision on Jurisdiction, ¶ 66 (Jan.14, 2004).

59 Pan Energy, ICSID Case No. ARB/04/13, Decision on Preliminary Objections, ¶¶ 132–136 (July 27, 2006).

60 El Paso, ICISD Case No. ARB/03/15, Award, ¶ 291 (Oct. 31, 2011).

61 El Paso, ICSID Case No. ARB/03/15, Decision on Jurisdiction, ¶ 110 (Apr. 27, 2006).

Tribunal further opines that a violation of a stabilisation clause is a matter of FET standard, not expropriation (unless the tax is "*totally confiscatory*").[62] In this context, even if there is a violation of the FET standards due to the excessiveness of the tax or a breach of a contractual obligation, the tribunal shall have no jurisdiction.[63]

Almost a decade later in *Vincent J. Ryan, Schooner Capital LLC, and Atlantic Investment Partners, LLC* v. *Republic of Poland*, the Tribunal carried an extensive discussion on this subject. The Tribunal declined to entertain the idea that if an investor succeeds to demonstrate an expropriation, "*it opens the gate*" to all other claims including those excluded by the Treaty.[64] The Tribunal reasoned that such an interpretation would likely deviate from the intention of the contracting parties and render the carve-out meaningless.[65] Perhaps, sharply contrasting with the interpretation by the *Enron* and *Occidental* Awards, the Tribunal here dismisses the idea that a finding on expropriation would invite independent claims to arise under other provisions of the BIT. The Tribunal, however, does not diminish violations of the standards of treatment prescribed in the Clause. In the opinion of the Tribunal, the failure on part of the State to observe such standards under the BIT would play a role in damages in matters concerning expropriation.[66]

iii. What is the ambit of generic tax exclusions?

As discussed earlier, states reserve their power to treat foreign aliens preferentially. Ubiquitous in most treaties, this obligation is frequently worded such that, in substance, it resembles the exclusion in the Lebanon-Malaysia BIT:

> "*The provisions of this Agreement relative to the granting of treatment not less favourable than that accorded to the investors of any third State shall not be construed so as to oblige one Contracting Party to extend to the investors of the other Contracting Party the benefit of any treatment, preference or privilege resulting from […] any international agreement or arrangement relating wholly or mainly to taxation or any domestic legislation relating wholly or mainly to taxation.*"[67]

The exclusion illustrates that States, even in modern times, retain their power to treat foreign aliens preferentially, in terms of benefits accorded by separate tax treaties. The purpose of this exclusion is to "*strike a balance*" between the State's obligations of non-discrimination and its fiscal sovereignty.[68] Typically, this exclusion finds a place in the standards of treatment provision of the treaty. This primitive, but inalienable, sovereign power is very much accepted by tribunals and is out of the question. However, tribunals do deliberate on the ambit and nature of the exclusion.

In the *Fouad Alghanim & Sons Co. for General Trading & Contracting, W.L.L and Mr. Fouad Mohammed Thunyan Alghanim* v. *Hashemite Kingdom of Jordan* ["**Alghanim**"] claims, the Tribunal notes that the exclusion does not hinder any claims relating to any arbitrary measure, but merely restricts those

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62 El Paso, ICISD Case No. ARB/03/15, Award, ¶ 448 (Oct. 31, 2011).
63 *Id.* ¶ 449.
64 Ryan, ICSID Case No. ARB (AF)/11/13, Award, ¶¶ 261–262 (Nov. 24, 2015).
65 *Id.* ¶¶ 262–265.
66 *Id.* ¶ 267.
67 Agreement between the Government of the Lebanese Republic and the Government of Malaysia for the Promotion and Protection of Investments, Leb.-Malay., art. 3, Feb. 02, 1998.
68 Wälde & Kolo, *supra* note 20, at 433.

claims arising from the preferential treatment of investors through agreements.[69] However, the silence on the application of this exclusion does not imply that an investor can bring any tax-related claim. This situation reminds the author of the words of Professor Park;

> "*While the doll [matryoshka] releases smaller figures, treaty exceptions often reveal other exceptions that prove as capacious […].*"[70]

Although Professor Park was talking about tax exclusions in general, a singular characteristic of this generic exclusion is that the wording matters.

Take the case of this exclusion in the Netherland-Venezuela BIT.[71] The BIT was worded to separate FET from the Most-Favoured Nations ["**MFN**"] and National Treatment ["**NT**"] provisions; the latter containing the carve-out and exclusively dealing with "*taxes, fees, charges, and to fiscal deductions and exemptions*." Contrast this wording to the Jordan-Kuwait BIT in the *Alghanim* claims, the MFN and NT standards were worded in the same provision as FET and the carve-out.[72] In *Venezuela Holdings* v. *Bolivarian Republic of Venezuela*, the Tribunal chanced to examine if the FET (Article 3) standard in the Netherland-Venezuela BIT would apply to fiscal measures, which otherwise find mention in the MFN and NT provision (Article 4).[73] The Respondents proposed that Article 4 and not Article 3 laid down the standard of treatment applicable for fiscal measures. The Tribunal affirmed the Respondent's submissions. In their reasoning, the Tribunal *first* observed that the two different provisions have their own list of exceptions of which this type of carve-out is an exception of the latter provision. If the two provisions were to act in the same paradigm, it would result in an overlap of such exceptions and even render this exclusion meaningless.[74] *Second*, the Tribunal observed that had the Contracting Parties intended to not carve out fiscal measures from Article 4, it would have been easier to include such a carve out as a subset of Article 3 (3) rather than enumerate a similar group of exceptions in addition to fiscal measures as a separate provision.[75] The Tribunal, hence, rejected the Claimant's tax-based claim.[76]

However, variations in the standard of treatment clause are not the only limitation imposed on this carve-out. BITs sometimes limit the disputes that can be brought before the tribunal, as in the case of the Russia-United Kingdom BIT; the dispute resolution provision allowed only certain contentions for arbitration.[77] To circumvent this limitation, States rely on the standards of treatment clause; specifically, the MFN. The matter came before the tribunal in two claims;

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69 Fouad Alghanim & Sons Co. for General Trading & Contracting, W.L.L and Mr. Fouad Mohammed Thunyan Alghanim v. Hashemite Kingdom of Jordan, ICSID Case No. ARB/13/38, Award, ¶ 124 (Dec. 14, 2017) [*hereinafter* "Alghanim"].

70 William W. Park, *Tax and Arbitration*, ARB. INT'L 1, 12 (2020).

71 Agreement on encouragement and reciprocal protection of Investments between the Kingdom of the Netherlands and the Republic of Venezuela, Neth.-Venez., art. 4, Oct. 10, 1991.

72 Agreement between the Hashemite Kingdom of Jordan and the Government of the State of Kuwait for the Encouragement and Reciprocal Protection of Investments, art. 4, May 21, 2001.

73 Venezuela Holdings, B.V., et al. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/07/27, Award, ¶¶ 245–248 (Oct. 9, 2014).

74 *Id.* ¶¶ 243–245.

75 *Id.* ¶ 246.

76 *Id.* ¶ 247.

77 Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Union of Soviet Socialist Republics for the Promotion and Reciprocal Protection of Investments, Russ.-U.K., art. 8, Apr. 6, 1989.

RosInvest v. *The Russian Federation* ["**RosInvest**"] and *Renta4* v. *The Russian Federation* ["**Renta4**"]. In both cases, the dispute resolution clause barred any claims arising from matters other than expropriation and compensation due. The question before the Tribunal was whether the investor can invoke benefits specifically excluded by the basic treaty through the MFN clause. The Claimants in both claims sought to invoke the Danish-Russia BIT to circumvent the restrictive dispute resolution clauses of the Russia-U.K. BIT and Russia-Spain BIT. In *RosInvest*, the Tribunal answered this question in the affirmative. The Tribunal held that the Claimants can invoke the benefits of the Danish-Russia BIT for two-fold reasons. *First*, the protections of the BIT read in light of the MFN provision, allow the investor to submit the claims for arbitration.[78] And, *second*, there does not appear to be any intention of the contracting parties to exclude the extension of the MFN protection to arbitration, despite other MFN exclusions in the Treaty.[79] However, the *RosInvest* Tribunal allowed jurisdiction of the tax claim not on these arguments.[80] Consequently, the Tribunal did not carry out a discourse on whether the imported MFN benefit should be interpreted subject to the tax exclusions of the comparator BIT. However, in *Renta4*, the Claimants were less successful in persuading the Tribunal of its competence by invoking the MFN protection. The Tribunal was dissuaded to extend its jurisdiction due to the narrow scope of the clause.[81] Unlike the Russia-UK BIT of the *RosInvest* claim, the MFN obligations under the Spain-Russia BIT[82] extended only under the FET standards. The Tribunal was doubtful whether such a clause would include the benefit of arbitration.

iv. *Whether tax veto is mandatory?*

Why shouldn't tribunals overlook a procedural device for convenience? Tax vetoes are after all an archaic remainder from the age of diplomatic intervention.[83] As one author puts it, it goes to the very consent of the contracting parties to the arbitration.[84] However, its acceptance among the contracting States is arguably positive. States have employed vetoes in their treaties as recently as in 2019.[85] Its purpose is to give the authorities the power to distinguish between legitimate taxes and abusive taxes.[86] Either of the two events follows when the investor submits to the tax veto procedure. There may be an agreement between the authorities named in the veto clause, that the actions are not expropriatory, as in the *Marvin and Elaine Gottlieb* v. *Canada* claims,[87] or the

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78 RosInvest Co. UK Ltd. v. The Russian Federation, SCC Case No. V079/2005, Award on Jurisdiction, ¶¶ 130–133 (Oct. 1, 2007) [*hereinafter* "RosInvest"].

79 *Id.* ¶ 135.

80 RosInvest, SCC Case No. V079/2005, Award, ¶ 271 (Sept. 12, 2010).

81 Renta4 S.V.S.A Ahorro Corporacion Emergentes F.I., Ahorro Corporación Eurofondo F.I., Rovime Inversiones SICAV S.A., Quasar de Valors SICAV S.A., Orgor de Valores SICAV S.A., GBI 9000 SICAV S.A. v. The Russian Federation, SCC Case No. 24/2007, Award on Preliminary Objections, ¶ 119 (Mar. 20, 2009) [*hereinafter* "Renta4"].

82 Agreement for Reciprocal Promotion and Protection of Investments between Spain and the USSR, Spain-Russ, art. 5, Oct. 10, 1990.

83 A consequence of the present day investor-State arbitration is the minimal role of the home State to support, initiate or involve in the dispute of the investor. However, such "modernity" is not reciprocated in matters of tax where tax veto provision involves the diplomatic agencies of the Host and Home States. *See also* Kolo, *supra* note 26, at 477–479.

84 Davie, *supra* note 10, at 226.

85 Agreement between the Government of the Republic of Singapore and the Government of the Republic of the Union of Myanmar on the Promotion and Protection of Investments, art. 31, Sept. 4, 2019.

86 William Park, *Tax Arbitration and Investor Protection*, *in* INVESTMENT PROTECTION AND THE ENERGY CHARTER TREATY 115, 131 (Graham Coop & Clarisse Ribeiro eds., 2008).

87 Marvin & Elaine Gottlieb v. Canada, 2008 (Withdrawn)—the fiscal authorities of the investor's home and host States agreed that the tax measure did not constitute as expropriation.

competent authorities may not reach an agreement as to the true nature of the actions of the Respondent, as in *EnCana* v. *The Republic of Ecuador* ["**EnCana**"] claims.[88] Our enquiry is limited to whether an investor can bring tax-related claims directly to the Tribunal without submitting to the tax veto procedure.

Perhaps the strongest affirmation to our question is by relying on the *Yukos* v. *Russian Federation* ["**Yukos**"] claims. The Tribunal dismissed Russia's objections as to Yukos' inability to first bring their claims before the Russian tax authorities. The Tribunal dismissed the objection not at the jurisdictional stage, but at the awards stage in light of the "*enormous*" evidence and facts to illustrate that there was an expropriation.[89] It is in this context that the Tribunal held such a step to be meaningless for a timely determination, and futile owing to the evidence of expropriation.[90] There is, however, consensus that the Yukos claims were indeed an extraordinary case.[91] Would the tribunal choose to approach in this way in less extraordinary claims?

In *Plama* v. *The Republic of Bulgaria*, the investor did not first submit to the veto procedure, however, the Tribunal did not deliberate on whether, on that ground, the claim may be dismissed.[92] The *Eiser* v. *Kingdom of Spain* award throws more light on this question. The Tribunal, here, outright rejected the Claimant's claims owing to their non-compliance with the tax-veto procedure.[93] Relying on the above authorities, it is deduced that in ordinary claims, tribunals would disallow those which have not complied with the procedure in the veto clause.

It may also be argued whether the tax veto clause would be inapplicable if the tax measure is found not to be bona fide. Although in the *SoIEs Badajoz GmbH* v. *Kingdom of Spain* ["**SoIEs**"] claims, the Respondent objected to the Claimants bringing their expropriation claims, since they did not first submit the alleged expropriation measure before the competent tax authorities as under the ECT.[94] The Tribunal, however, did not deliberate on this objection. It nevertheless held that it did not have jurisdiction, based on the State's less "*extraordinary conduct*" to subvert the presumption of the legitimacy (bona fide conduct of the State).[95] Presumably, this would mean if the State's conduct is not bona fide, the tribunal may not consider the tax veto as an essential precedent to arbitration based on the "*futility*" or "*good faith*" defence.

B. Whether tax exclusions are effective?

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88 EnCana, LCIA Case No. UN3481, Award, ¶ 109 (Feb. 3, 2006).

89 Yukos Universal Limited (Isle of Man) v. The Russian Federation, PCA No. AA/227, Final Award, ¶¶ 1422–1424 (Perm. Ct. Arb. July 18, 2014) [*hereinafter* "Yukos"].

90 *Id.* ¶ 1424.

91 Masdar Solar &Wind Cooperatief U.A.E. v. Kingdom of Spain, ICSID Case No. ARB 14/1, Award, ¶ 284 (May 16, 2018) [*hereinafter* "Masdar"].

92 Plama Consortium Limited v. Republic of Bulgaria, ICSID Case No. ARB/03/24, Award, ¶ 266 (Aug. 27, 2008) [*hereinafter* "Plama"].

93 Eiser Infrastructure Limited and Energia Solar Luxembourg S.A.R.I. v. Kingdom of Spain, ICSID Case No. ARB/13/36, Award, ¶ 296 (May 4, 2017) [*hereinafter* "Eiser"].

94 SoIEs Badajoz GmbH v. Kingdom of Spain, ICSID Case No. ARB/15/38, Award, ¶ 173 (July 31, 2019) [*hereinafter* "SoIEs"].

95 *Id.* ¶ 276.

Indeed, this question was examined in a 2015 paper by Matthew Davie.[96] Any re-examination of this question would be, hence, unnecessary. However, while I respectfully acknowledge the learned opinion, some clarification on this matter is necessary. Hence the following discourse.

Davie asserts that tribunals have "*shown a willingness to read down or even ignore carve-out clauses,*"[97] a conclusion arrived at after examination of the tribunal's approach in *Occidental*, *Renta4*, *Rosinvest* and *Yukos*. For better understanding, the decisions are discussed here.

The Ecuador-U.S. BIT, as discussed earlier, provided that the State should strive to accord FET standard to tax measures. The carve-out directed States "*strive*" for fairness in their tax policies on one hand and on the other specified those instances in which investors can bring disputes in regard to tax-based claims. This position leaves much to the interpretation of the tribunal. Whether the interpretation was wrong or right is a different debate but as on facts, the Treaty did not prohibit FET standard to be applied to tax measures. Furthermore, the Spain-Russia and Russia-U.K. BITs did not prohibit the protection of the BIT to tax measures. I shall not repeat the challenges faced by the tribunals which were elaborated in Part III.A.

To summarise their findings, despite the *Renta4* Tribunal, as Davie notes, observing a tax carve-out not to be a loophole for abuses of the power to tax, the Tribunal found it has no competence under the Spanish BIT to entertain the claims relating to tax.[98] In *RosInvest*, the Tribunal, in the absence of any explicit carve-outs in the jurisdiction stage, ruled that it has jurisdiction to FET but declined to entertain the discussion as to whether such benefits would be extended if the comparator BIT limited the benefit.[99] Nevertheless, from none of the above claims should it be deduced that the tribunal ignored or read down any exclusions.

As to the *Yukos* claims, the ECT, from which the claims arise, does not bar the competence of a tribunal, but heavily regulates it. In *Yukos*, the Tribunal, alternatively, had jurisdiction despite the conduct of the State because of the expropriation claw-back present in Article 21 of the ECT.[100]

Davie then expostulates with the Tribunals' reliance on the good faith principle as an essential component of taxation measures.[101] There is merit in his apprehension that claimants may bring up the defence of good faith to engage States in "*lengthy battles*" over legitimate taxation measures to persuade the tribunal otherwise. The claims of *Eiser* v. *Kingdom of Spain*,[102] *Isolux* v. *Kingdom of Spain*,[103] *Masdar* v. *Kingdom of Spain*[104] and *Novenergia* v. *Kingdom of Spain*[105] are a testament to that effect. Also, there is merit in his observations regarding the underdevelopment of these aspects, i.e., what degree of good faith would render a carve-out inoperative.[106] However, the reluctance of

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96 Davie, *supra* note 10.
97 *Id.* at 223.
98 Renta4, SCC Case No. 24/2007, Award on Priliminary Objections ¶ 74 (Mar. 20, 2009).
99 RosInvest, SCC Case No. V079/2005, Award on Jurisdiction, ¶ 137 (Oct. 1, 2007).
100 Yukos, PCA No. AA/227, Final Award, ¶ 1409 (Perm. Ct. Arb. July 18, 2014).
101 Davie, *supra* note 10, at 225.
102 Eiser, ICSID Case No. ARB/13/36, Award, ¶ 258 (May 4, 2017).
103 Isolux infrastructure Netherlands, B.V. v. Kingdom of Spain, SCC Case V2013/153, Award (July 17, 2016).
104 Masdar, ICSID Case No. ARB 14/1, Award, ¶ 281 (May 16, 2018).
105 Novenergia II – Energy & Environment (SCA) (Grand Duchy of Luxembourg), SICAR v. Kingdom of Spain, SCC Arbitration 2015/063, Final Arbitral Award, ¶ 516 (Feb. 15, 2018) [*hereinafter* "Novenergia"].
106 Davie, *supra* note 10, at 225.

the Tribunal to overlook the exclusion demonstrates that tribunals, for now, are not willing to read down the exclusions absent extraordinary circumstances.

His argument that States may not have considered bad faith as a "*decisive consideration*" is, in my opinion, fallible. If States had intended to cover only its *bona fide* intentions, it would be highly doubtful, as history illustrates, for investors to get any justice.[107] International investment agreements evolved to protect investors from mala fide and wrongful actions of States. In that light, it is highly doubtful that States, or for that matter customary international law, would empower tax carve-outs to protect the State's mala fide actions. It is also argued here that the Tribunal's reliance on good faith as a decisive factor is not misplaced; it is uncontroversial that the inherent police powers of the State qualify protection of the treaty on condition that they are bona fide.[108]

As for the clarification I tend to bring to the earlier assertion is that tax carve-outs are indeed effective to the extent of its wording and the conduct of the State. I present two arguments to support this proposition.

First, post-*Yukos* jurisprudence suggests that the presumption of good faith is a high wall for a claimant to circumvent. Perhaps, we should turn our attention to the claims relating to Law 15/2012 (on tax policy aimed at energy sustainability) against Spain. Multiple tribunals have more than once agreed that the actions of the Respondent, the Republic of Spain, concerning the tax claims, fall short of constituting the mala fide grounds needed to override the exclusion under the ECT.[109] The *SoIEs* Tribunal notes that the tax carve-out may only be overlooked in "*extraordinary circumstances.*"[110] The tribunal can review only "*egregious abuse of tax power*" under the clause. For that matter, the *Yukos* Tribunal itself notes that the tax authorities would be empowered to implement bona fide taxation measures with respect to the "*sham-like nature*" of Yukos' tax payments.[111]

It may be kept in mind that probing the alleged confiscatory or discriminatory measure is not the same as overriding the tax carve-out. There is no controversy regarding the established rule that a tribunal has the right to decide its own jurisdiction. In the former case, the tribunal ascertains whether there are grounds in the claimant's assertions of overlooking the high thresholds of the tax carve-out. Where the tribunal finds that the State's action does constitute such egregious abuse of tax power, it would likely overlook the carve-outs.

Second, State practice indeed supports this proposition. Despite the observations of the tribunal in *Yukos*, States continue to incorporate tax carve-outs as evidenced by the recent treaties between

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[107] Indeed, the Yukos claims demonstrate how States could misuse their bona fide powers to elude international obligations.

[108] Too v. Greater Modesto Insurance Associates, 23 Iran-U.S. Cl. Trib. Rep. 26 (1989).

[109] Eiser, ICSID Case No. ARB/13/36, Award, ¶ 271 (May 4, 2017); Masdar, ICSID Case No. ARB 14/1, Award, ¶ 292 (May 16, 2018).

[110] SoIEs, ICSID Case No. ARB/15/38, Award, ¶ 273 (July 31, 2019).

[111] Yukos, PCA No. AA/227, Final Award, ¶ 1404 (Perm. Ct. Arb. July 18, 2014).

Armenia-Japan,[112] Rwanda-Singapore,[113] and Brazil-United Arab Emirates,[114] among others. Why should States include tax exclusion if they are not effective? Even India seems to think that tax carve-outs can help its woes arising from tax-related arbitration.[115]

It is submitted that any space for interpretation for the tribunal shall test the effectiveness of the exclusion. A tightly worded carve-out would presumably convey clear meaning and purpose. A practice amongst contracting States suggests the inclusion of interpretative texts in matters of tax, to bring clarity on the intention of the parties as to the tax carve-out.[116] With respect to the conduct of the State, it is argued that nothing should protect a State's measure against an investor if such measure is shrouded with mala fide intentions.

C. Can tribunals overlook carve-outs?

To put it as succinctly as possible, the answer to this question is yes, tribunals can overlook tax carve-outs. However, this positive assertion is rudimentary in light of how sparingly tribunals have, in practice, done so. Nevertheless, if one were to ratiocinate this proposition, it is well-supported. There is a "*thin line*" that separates bona fide taxation measures from abusive taxation. The *Marvin Feldman* v. *United Mexican States* Tribunal notes that the Restatement of the Law of Foreign Relations of the U.S. recognises taxation as a possible expropriatory action when it is an unreasonable interference with an alien's property.[117] In the *Yukos* claims, the Tribunal was of the opinion that carve-outs may be overlooked if the measure is not bona fide.[118] In *Renta4*, the Tribunal opined that a carve-out cannot provide a loophole for the State to escape its obligations.[119] The *Renta4* Tribunal seem to align itself with the *Yukos* Tribunal to distinguish taxation into legitimate and abusive taxes. The Tribunal in *Novenergia* also opined that carve-outs will be effective only if the tax measures were adopted in good faith.[120]

These observations of the tribunals should not be interpreted to mean that taxation in itself is a breach of international obligations. The herculean task of most tribunals, when faced with tax-related claims, is to determine if the State's tax measures cross that thin line; the line between abusive and legitimate taxes. Crossing that line would result in scrutiny of taxes under the light of a breach and non-application of treaty carve-outs.

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[112] Agreement between Japan and the Republic of Armenia for the Liberalisation, Promotion and Protection of Investment, Arm.-Japan, art. 20, Feb. 12, 2018.

[113] Agreement between the Government of the Republic of Singapore and the Government of the Republic of Rwanda on the promotion and Protection of Investments, Rwanda-Sing., art. 29, June 14, 2018.

[114] Cooperation and facilitation investment Agreement between the Federative Republic of Brazil and the United Arab Emirates, Braz.-U.A.E., art. 11, Mar. 15, 2019.

[115] Although India's early BITs included only generic tax exclusions, as per the BITs available on the public domain, India has in the recent BITs completely excluded any "law or measure regarding taxation." *See* Agreement between the Government of the Republic of India and the Government of the United Arab Emirates on Promotion and Protection of Investments, India-U.A.E., art. 2, Dec. 12, 2013.

[116] *See* Agreement between the Government of the State of Israel and the Government of the United Arab Emirates on Promotion and Protection of Investments, Israel-U.A.E., art 10, Oct. 20, 2020.

[117] Marvin Feldman v. United Mexican States, ICSID Case No. ARB(AF)/99/1, Award, ¶ 106 (Dec. 16, 2002) [*hereinafter* "Feldman"].

[118] Yukos, PCA No. AA/227, Final Award, ¶ 1430 (Perm. Ct. Arb. July 18, 2014).

[119] Renta4, SCC Case No. 24/2007, Award on Priliminary Objections, ¶ 74 (Mar. 20, 2009).

[120] Novenergia, SCC Arbitration 2015/063, Final Arbitral Award, ¶ 521 (Feb. 15, 2018).

Arguably, one may contend that the thin line is a recent invention by tribunals, however, there has always been the discussion of how much is "*too much*" with respect to tax on foreign aliens. Perhaps after the *Yukos* award, the idea that a carve-out cannot provide the State with a loophole to escape its obligations gained traction. Even the narrowest definitions of police powers comprise taxation.[121] There is no dispute that measures are not wrongful if such measures are enacted, are *bona fide*, non-discriminatory and proportionate, and follow due process.

The presumption for the legitimacy of the regulatory measure is in the positive.[122] Hence it is the burden of the claimant(s) to dispel the legitimacy of the tax.[123] We shall now discuss those circumstances when a tribunal can overlook the tax carve-out.

i. Confiscatory and discriminatory taxes

Perhaps the earliest restraints on taxes on foreign aliens recognised by customary international law were confiscatory or discriminatory taxes.[124] Modern-day tribunals too reiterate that a State cannot impose confiscatory or discriminatory taxes on its foreign investors.[125]

Due to the very nature of taxes, tribunals seldom agree on "*what is*" or "*how much*" constitutes a confiscatory tax. In this light, confiscatory tax eludes a proper definition. Tribunal jurisprudence suggests that excessive or high taxes need not always be confiscatory.[126] For example, the *Burlington* Tribunal sine unanimity concluded that the 99% tax on profits is not confiscatory.[127]

The promulgation of confiscatory taxes need not violate domestic law or necessarily be outside the competence of the State.[128] Tribunals have, more than once, relied on the facts and circumstances of the taxation measure when determining whether confiscatory or otherwise. The *Burlington* Tribunal was of the opinion that the legitimacy of the tax depends on the effect of the tax.[129] The dissenting arbitrator of that Tribunal emphasised that the Tribunal should focus on the impact of the tax measure and characterised Eucador's Law 42, relating to a "*windfall tax,*" as a confiscatory measure.[130] Other commentators too have elaborated on other methods to assess the nature of the tax; variation in the tax rate and profitability of the investment are two such methods.[131] The *Link-Trading* v. *The Republic of Moldova* Tribunal observed that "*tax measures may also*

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121 Noam Zamir, *The Police Powers Doctrine in International Investment Law*, 14 MANCHESTER J. INT'L ECON. L. 318 (2017).
122 El Paso, ICISD Case No. ARB/03/15, Award, ¶ 290 (Oct. 31, 2011).
123 Link-Trading, Final Award, ¶ 67 (Apr. 18, 2002); Novenergia, SCC Arbitration 2015/063, Final Arbitral Award, ¶ 521 (Feb. 15, 2018).
124 A. R. Albrecht, *The Taxation of Aliens under International Law*, 29 BR. YEAR B. INT'L L. 145, 172 (1952); Fachiri, *supra* note 2.
125 Feldman, ICSID Case No. ARB(AF)/99/1, Award, ¶ 103 (Dec. 16, 2002); Burlington, ICSID Case No. ARB/08/5, Decision on Liability, ¶ 393 (Dec. 14, 2012); Stadtwerke, ICSID Case No. ARB/15/1, Award, ¶ 170 (Dec. 2, 2019).
126 *See* El Paso, ICISD Case No. ARB/03/15, Award, ¶ 449 (Oct. 31, 2011) (the tribunal distinguishes between excessiveness of the tax and confiscatory taxes.).
127 Burlington, ICSID Case No. ARB/08/5, Decision on Liability, ¶ 457 (Dec. 14, 2012).
128 Link-Trading, Award on Jurisdiction, at 10 (Feb. 6, 2001).
129 Burlington, ICSID Case No. ARB/08/5, Decision on Liability, ¶ 395 (Dec. 14, 2012).
130 Burlington, ICSID Case No. ARB/08/05, Dissenting opinion of Arbitrator Orrego Vicuña, ¶ 27 (Nov. 08, 2012).
131 Arno E. Gildemeister, *How Much is Too Much: When is Taxation Tantamount to Expropriation?*, 29 ICSID REV. 315, 317 (2014).

become expropriatory, without necessarily being arbitrary or discriminatory, when their application violates a specific obligation that the State has undertaken previously […] such as an investor protected under a treaty."[132]

For discriminatory taxes, the *Burlington* Tribunal opines that, to violate customary standards, discrimination too "*must still meet the test of substantial deprivation.*"[133] It is submitted that this approach is not followed by other tribunals. The *EnCana* Tribunal looks at discrimination as the treatment of different classes of investors.[134] This approach has been adopted by the Tribunals in *Ampal American Israel Corporation* v. *Arab Republic of Egypt* [135] and *Alghanim*,[136] which scrutinized the claimant's allegation of discriminatory tax measures in the fashion that the tax measure was carried out; not quite the substantial deprivation test. As Professor Wälde also notes the "*selective and discriminatory enforcement*" violates obligations.[137]

ii. Violation of contractual obligations

It is uncontroversial that a State should honour its commitments arising from a contract with the investor. Accordingly, the *Paushok* v. *The Government of Mongolia* Tribunal opined that an agreement between the State and the investor on those aspects of the taxing power that the investor requires protection from (known as "*stability agreements*"), would allude better protection to the investor than exclusively relying on treaties.[138] The stability agreement is likely to create legitimate expectations and is the "*proper way*" to protect the investment from taxation and other related matters.[139]

Otherwise, there remains no compulsion on the State to adapt its policies for the benefit of the investor; and an investor, without such agreement, cannot protest against an increase in the tax, which is within the regulatory powers of the State.[140] Absent an agreement to the contrary, there is an inherent right of the State to participate in the benefits arising from the claimant's use of the State's inalienable natural resources.[141]

However, not every breach of a contract can give rise to treaty claims. In that light, tribunals are also of the opinion that an investor can bring such claims only if permitted by the treaty. In the *El Paso* claims, the Tribunal notes that violation of agreements between the State and investor, unless confiscatory, are a violation of the FET standards.[142] As a result, if the treaty prohibits FET claims, the tribunal cannot rule on the breaches of contract and such other violations.

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132 Link-Trading, Final Award, ¶ 73 (Apr. 18, 2002).
133 Burlington, ICSID Case No. ARB/08/5, Decision on Liability, ¶ 402 (Dec. 14, 2012).
134 EnCana, LCIA Case No. UN3481, Award, ¶ 146 (Feb. 3, 2006).
135 Ampal-American Israel Corporation and others v. Arab Republic of Egypt, ICSID Case No. ARB/12/11, Decision on Liability and Heads of Loss, ¶ 184 (Feb. 21, 2017).
136 Alghanim, ICSID Case No. ARB/13/38, Award, ¶¶ 123, 426 (Dec. 14, 2017).
137 Thomas Wälde, *National Tax Measures Affecting Foreign Investors Under the Discipline of International Investment Treaties*, 102 PROC. ASIL ANNU. MEET. 55, 58 (2008).
138 Sergei Paushok, CJSC Golden East Co. & CJSC Vostokneftegaz Co. v. The Government of Mongolia, UNCITRAL, Award on Jurisdiction and Liability, ¶ 370 (Apr. 28, 2011) [*hereinafter* "Paushok"].
139 *Id.*
140 *Id.* ¶ 370.
141 Occidental Petroleum Corporation, Exploration & Production Co. v. The Republic of Ecaudor, ICSID Case No. ARB/06/11, Dissenting Opinion, ¶ 9 (Sept. 20, 2012).
142 El Paso, ICISD Case No. ARB/03/15, Award, ¶ 448 (Oct. 31, 2011).

Although in the *Bogdanov* v. *The Republic of Moldova* claims, the Tribunal was of the opinion that excessive taxation would qualify as a breach of the treaty if found to be unfair or inequitable;[143] inferring from the *El Paso* award, the competence of the tribunal to rule on such breaches would be dependent on the carve-out. Furthermore, on this point, the *Oostergetel* v. *The Slovak Republic* ["**Oostergetel**"] Tribunal notes that, for the State to "*incur liability,*" its conduct must constitute breaches of not only municipal law but also the treaty.[144]

iii. Changes in tax policy

Changes in tax policies include a high tax, windfall taxes, unwise taxation, and unpredictable taxes, all of which are discussed below. The sovereign right to tax is a well-respected prerogative of the State. Tribunals seldom consider any variation in the taxes, provided they are not confiscatory, discriminatory or in bad faith, as a breach of the treaty obligations. One tribunal worded strongly that it is not their function to "*micromanage*" a State's tax policy,[145] others have emphasised that the prerogative of a State to raise taxes should not come under the review of the tribunal.[146]

A high level of tax does not per se constitute a breach of obligations of the State.[147] Such a tax increase, absent a fiscal agreement, cannot constitute a breach.[148] The *El Paso* Tribunal has observed that States have no duty to "*adapt its tax regime*" to the interests of their investors.[149] The Tribunal in *Link-Trading* furthers this view and elaborates that taxation measures cannot be challenged for creating an unfavourable environment for the investor, absent any "*abusive, arbitrary or discriminatory*" treatment to the investor.[150]

Even the structuring of payments to the State to "*resemble tax*", to circumvent international obligations, is not bad faith according to the *Antaris* Tribunal.[151] A view also shared by the *SoIEs* Tribunal.[152] However unwise the decision to tax, the *Stadtwerke* tribunal is of the opinion that it cannot interfere with that discretion of the State.[153]

However, in *Occidental*, the Tribunal was of the opinion that the tax law which was changed, without providing any clarity about its meaning, and the other subsequent conduct of the State that followed violated the FET standard under the BIT.[154]

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143 Yuri Bogdanov & Yulia Bogdanov v. The Republic of Moldova, SCC Case No. 091/2012, Award, ¶ 167 (Apr. 16, 2013).

144 Jan Oostergetel & Theodora Laurentius v. Slovak Republic, UNCITRAL, Final Award, ¶ 228 (Apr. 23, 2012) [*hereinafter* "Oostergetel"].

145 9REN, ICSID Case No. ARB/15/15, Award, ¶ 203 (May 31, 2019).

146 Masdar, ICSID Case No. ARB 14/1, Award, ¶¶ 281, 291 (May 16, 2018); Eiser, ICSID Case No. ARB/13/36, Award, ¶ 270 (May 4, 2017).

147 Paushok, Award on Jurisdiction and Liability, ¶ 303 (Apr. 28, 2011).

148 *Id.* ¶ 305.

149 El Paso, ICISD Case No. ARB/03/15, Award, ¶ 295 (Oct. 31, 2011).

150 Link-Trading, Final Award, ¶ 72 (Apr. 18, 2002).

151 Antaris, PCA Case No. 2014-01, Award, ¶ 253 (Perm. Ct. Arb. May 2, 2018).

152 SoIEs, ICSID Case No. ARB/15/38, Award, ¶ 275 (July 31, 2019).

153 Stadtwerke, ICSID Case No. ARB/15/1, Award, ¶ 174 (Dec. 2, 2019).

154 Occidental, LCIA Case No. UN 3467, Final Award, ¶ 184 (July 1, 2004).

With respect to retroactive taxation, despite the recent awards in *Vodafone* v. *The Government of India*[155] and *Cairn Energy* v. *The Republic of India*,[156] some commentators believe that mere retroactivity of the tax may not suggest a breach of the treaty obligations.[157] To surmise the findings, Tribunals are seldom likely to find changes in tax policy as credible grounds to overlook a tax carve-out unless there exist extraordinary circumstances.

iv. *Tax collection and enforcement*

More than once, tribunals have disallowed claimants' allegations that the collection or recovery of unpaid taxes was a breach of the treaty obligations.[158] The Tribunal in *Ryan* v. *Poland* noted that it is reasonable for the State to impose penalties on unpaid dues to the State.[159] As discussed earlier, the decisions taken by the courts and other tax authorities, and the actions of the State's authorities to enforce such decisions qualify as taxes, and fall within the public powers of the State.[160] Again, in the *Oostergetel* claims, the Tribunal observed that the collections of overdue taxes by the State through its organs were "*undoubtedly legitimate.*"[161]

Naturally, undisputedly, tribunals have observed that it is the duty of the claimant, as an investor, to conduct due diligence regarding the tax environment, and for taking the necessary measures to deal with them.[162] However, the conduct of the State, in this aspect, must be legitimate, and such measures shall not qualify for the protections under the carve-out if the actions were taken under the "*guise of taxation*" to adversely affect the investor.[163] Despite holding the State's conduct to not be legitimate, the Tribunal notes that the tax authorities would have been empowered to measures with respect to the "*sham-like nature*" of Yukos' tax payments.[164]

v. *Series of expropriatory measures*

Two tribunals have opined that tax carve-outs may be overlooked when the taxation measure forms as one of the many acts of expropriation carried out by the State to dispose of control of the investor over the investment. In the *RosInvest* claims, the Tribunal did not consider expropriation by taxation but tax as one of the "*cumulative combinations of measures*" of expropriation by the State.[165] Similarly, in the *Cube Infrastructure* claims, despite the Tribunal not overlooking the ECT carve-out, it was of the opinion, that the Claimants' argument is "*strongest*" when the tax levy is considered as one of the measures intended to adversely affect the investor.[166]

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155 Vodafone Group PLC & Vodafone Consolidated Holdings Ltd. v. Government of India, PCA Case No. 2016-35, Final Award (Perm. Ct. Arb. Sept. 25, 2020).

156 Cairn Energy PLC & Cairn UK Holdings Limited v. The Republic of India, PCA Case No. 2016-7, Final Award (Perm. Ct. Arb. Dec. 21, 2020).

157 Markus Burgstaller & Agnieszka Zarowna, *The Growing Importance Of Investment Arbitration In Relation To Tax Measures In The Energy And Natural Resources Sectors*, 4 TURKISH COM. L. REV. 81, 86 (2018).

158 Spyridon, ICSID Case No. ARB/06/1, Award, ¶ 506 (Dec. 7, 2011); Oostergetel, Final Award, ¶ 301 (Apr. 23, 2012).

159 Ryan, ICSID Case No. ARB (AF)/11/13, Award, ¶ 492 (Nov. 24, 2015).

160 Spyridon, ICSID Case No. ARB/06/1, Award, ¶ 493 (Dec. 7, 2011).

161 *Id.*

162 Plama, ICSID Case No. ARB/03/24, Award, ¶ 268 (Aug. 27, 2008); Paushok, Award on Jurisdiction and Liability, ¶¶ 323–25 (Apr. 28, 2011).

163 Yukos, PCA No. AA/227, Final Award, ¶ 1407 (Perm. Ct. Arb. July 18, 2014).

164 *Id.* ¶ 1404.

165 RosInvest, SCC Case No. V079/2005, Award, ¶ 271 (Sept. 12, 2010).

166 Cube Infrastructure, ICSID Case No. ARB/15/20, Decision on Jurisdiction, Liability and Partial Decision on Quantum, ¶ 226 (Feb. 19, 2019).

These observations by the above tribunals concur with the notion that tax carve-outs may not apply if the alleged tax measure forms one of the components of a series of expropriatory measures. No doubt that for such taxation measures to exceed protection by the carve-out, the other actions of the State must fulfil the criteria of expropriation.[167]

IV. Conclusion: Sailing between the Scylla and the Charybdis

Undoubtedly, in this age, the petulance of a sovereign to not conform to rule of law invites the scrutiny of international tribunals even into the matters of fiscal sovereignty.

As our study comes to a close, the conclusions of the study are summarised henceforth. With regard to interpreting tax exclusions, tribunals construe such tax-based measures on the presumption of legitimacy. Due to the nature of tax measures, such a presumption is however a high one for the claimant to prove otherwise. Tax exclusions are effective to the extent of their wording and the conduct of the State. Nevertheless, tribunals can overlook such exclusions if the conduct of the State is not bona fide or violate international law. However, such power has been, until now, used very sparingly. There is considerable consensus that, to overlook the carve-out, the very extraordinary circumstances remain very much to the conjectures of the tribunal.

It is argued that when faced with the vicissitude of opinions allowing international scrutiny over its fiscal sovereignty, States are likely to counter with broader and comprehensive tax carve-outs in their treaties. On the other hand, post-*Yukos* claimants are likely to bring up tax-based claims to exploit any vulnerability of the carve-out. Hence the persistent tussle between fiscal sovereignty and increased scrutiny. Thus, when navigating between the Scylla and the Charybdis, the Tribunal need not fret for the viciousness of either if it does not overlook carve-outs but for extraordinary circumstances.

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[167] 9REN, ICSID Case No. ARB/15/15, Award, ¶ 208 (May 31, 2019).

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DUE PROCESS CONSIDERATIONS IN EXPEDITED ARBITRATIONS

Peter J. Pettibone[*]

Abstract

Arbitration is a preferred method for resolving international commercial disputes. However, it has been criticized as being too lengthy and costly for the efficient resolution of these disputes. To address these concerns, a number of leading arbitration institutions have adopted expedited procedures to shorten the process and make it more efficient. However, the concern is that by shortening the process, these rules may prevent parties from presenting their cases fully and thus deny them due process. This note looks at the due process considerations in four recently adopted or drafted expedited arbitration rules and examines how the due process concerns may be addressed.

I. Introduction

Expedited arbitration procedures are a relatively new feature in international commercial arbitration. They respond to the frequently heard mantra of saving time and costs in arbitration and recognize that a "*one size*" arbitration procedure does not fit all cases. A survey conducted in 2019 of users of arbitration in construction disputes found that a principal objection was that arbitrations of construction disputes involving claims below USD 10 million were too costly, and that the cost of those arbitrations was a barrier to justice and a fair resolution of the dispute.[1]

Currently, expedited arbitration rules have been adopted by a number of leading arbitration institutions, including the International Chamber of Commerce ["**ICC**"],[2] the Arbitration Institute of the Stockholm Chamber of Commerce,[3] the Singapore International Arbitration Centre,[4] the Hong Kong International Arbitration Centre,[5] the American Arbitration Association,[6] the International Centre for Dispute Resolution,[7] the International Institute for Conflict Prevention and Resolution ["**CPR**"],[8] the World Intellectual Property Organization,[9] and Judicial Arbitration and Mediation Services.[10] The London Court of International Arbitration ["**LCIA**"] has expedited

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1 Queen Mary University of London & Pinsent Masons, *2019 International Arbitration Survey – International Construction Disputes* (2019), at 5, 15–16, *available at* http://www.arbitration.qmul.ac.uk/research/2019.

2 *See* International Chamber of Commerce (ICC), Arbitration Rules 2021, art. 30 & app. VI [*hereinafter* "ICC Rules"].

3 *See* Arbitration Institute of Stockholm Chamber of Commerce (SCC), Rules for Expedited Arbitrations 2017 [*hereinafter* "SCC Expedited Rules"].

4 *See* Singapore International Arbitration Centre (SIAC), Arbitration Rules 2016, r. 5 [*hereinafter* "SIAC Rules"].

5 *See* Hong Kong International Arbitration Centre (HKIAC), Administered Arbitration Rules 2018, art. 42 [*hereinafter* "HKIAC Rules"].

6 *See* American Arbitration Association (AAA), Commercial Arbitration Rules and Mediation Procedures 2013, arts. E-1–E-10.

7 *See* International Centre for Dispute Resolution (ICDR), International Dispute Resolution Procedures (Including Mediation and Arbitration Rules) 2014, arts. E-1–E-10.

8 *See* International Institute for Conflict Prevention and Resolution (CPR), Fast Track Administered Arbitration Rules 2020 [*hereinafter* "CPR Fast Track Rules"].

9 *See* World Intellectual Property Organization (WIPO), Expedited Arbitration Rules 2020.

10 *See* JAMS Comprehensive Arbitration Rules and Procedure 2021, rr. 16.1 & 16.2; JAMS Engineering and Construction Arbitration Rules & Procedures For Expedited Arbitration 2021.

rules only for the formation of the tribunal and the replacement of arbitrators,[11] and leaves it to the tribunal to use the flexibility of the LCIA rules to streamline the process.

Part II of this note will examine the principal features of expedited arbitration rules and how they are drafted to provide due process to the expedited procedure by using four examples – the ICC Expedited Procedure Rules ["**ICC Expedited Rules**"], the CPR Fast Track Administered Arbitration Rules 2020 ["**CPR Fast Track Rules**"], the United Nations Commission on International Trade Law ["**UNCITRAL**"] Expedited Arbitration Rules 2021 ["**UNCITRAL Expedited Rules**"][12] and the Rules on the Efficient Conduct of Proceedings in International Arbitration 2018 ["**Prague Rules**"].[13] Part III of this note analyses the due process considerations in expedited arbitration procedures and, in Part IV, it provides some concluding comments.

II. Features of Expedited Arbitration Procedures

The main purpose the expedited arbitration rules is to shorten the length of time between the commencement of a case in arbitration and the issuance of the award, thereby reducing costs. Essentially, there are six common features to accomplish this:

First, the expedited arbitration rules abbreviate the process of selecting the tribunal and show a strong preference for the tribunal to consist of a sole arbitrator.[14]

Second, they compress the procedures at the outset of the arbitration by requiring the claimant to "*front- load*" its claim at the time it commences the arbitration and the respondent to do the same with its defence and counterclaim, and impose constraints on the ability of parties to amend their pleadings or submit later pleadings.[15] This means that the initial submissions should include a summary of facts to be proven and legal grounds supporting the claim, defence or counterclaim. The party making the initial submission should also provide the names of fact witnesses and the issues as to which they will testify or, alternatively, provide copies of their witness statements with the initial submission.[16] They also require copies of the documents to support claims, defenses or counterclaims—or at least a reference to them—to accompany the initial submission.[17]

Third, the expedited arbitration rules significantly discourage discovery or disclosure requests. To the extent allowed, they are limited to documents that are relevant and known to be in the possession of the other party, and the request must be proportionate to the amount in

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11 *See* London Court of International Arbitration (LCIA), Arbitration Rules 2020, arts. 9A & 9C.

12 United Nations Comm'n on Int'l Trade Law (UNCITRAL), Expedited Arbitration Rules, U.N. Doc. A/76/17 (Sept. 19, 2021), *available at* https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/uncitral_ear-e_website.pdf [*hereinafter* "UNCITRAL Expedited Rules"].

13 *See* Rules on the Efficient Conduct of Proceedings in International Arbitration (Dec. 14, 2018), *available at* http://praguerules.com/upload/medialibrary/9dc/9dc31ba7799e26473d92961d926948c9.pdf [*hereinafter* "Prague Rules"]. The Prague Rules are not designed to replace arbitration rules. They are an independent set of rules adopted by an ad hoc group of lawyers principally from Eastern Europe and Russia which are intended to provide a framework or guidance for arbitral tribunals and parties on how to increase the efficiency of arbitration by encouraging a more active role for arbitral tribunals in managing the proceedings.

14 *See, e.g.,* CPR Fast Track Rules, r. 3.2; ICC Rules, app. VI, art. 2: SIAC Rules, art. 5.2(b); HKIAC Rules, art. 42.2(a); SCC Expedited Rules, art. 17.

15 *See, e.g.,* CPR Fast Track Rules, rr. 2.3, 2.4 & 2.5; UNCITRAL Expedited Rules, art. 13.

16 *See, e.g.,* CPR Fast Track Rules, r. 2.3 (d).

17 *See, e.g., id.* r. 2.3 (f).

controversy.[18] In other words, requests for "*any and all*" documents in the possession of the other party (i.e., a "*fishing expedition*") are prohibited.

Fourth, while the rules usually do not eliminate the holding of a hearing during the arbitration, they allow the tribunal to render the award solely on the basis of the papers submitted.[19]

Fifth, they require the final award to be issued within a relatively short period of time after the commencement of the arbitration and in some cases permit the award to be succinct, i.e., an award that is shorter in length than would be the case in a non-expedited arbitration.[20]

Sixth, the rules often expressly permit the tribunal to impose costs on a party that did not cooperate with the expedited treatment of the case.[21]

The four examples of expedited arbitration rules referred to earlier illustrate these principles but handle the subject in somewhat different ways.

A. ICC Expedited Rules

The ICC Expedited Rules are very succinct and appear as Annexure VI to the 2021 ICC Arbitration Rules.[22] This means that an ICC expedited arbitration will be conducted according to the ICC Arbitration Rules except to the extent they are expressly modified by the ICC Expedited Rules.[23] The ICC Expedited Rules are applicable when the amount in dispute at the time the arbitration agreement was concluded is USD 3 million or less.[24] A distinguishing characteristic is that they are an "*opt out*" set of rules, meaning that they will apply to each case where the amount in dispute is at or below the threshold amount, unless the parties agree to opt out or the ICC Court of Arbitration, on its own motion or upon the request of a party, and after consultation with the parties and the tribunal, determines that it is inappropriate to apply them to that case.[25] At the expense of party autonomy, the ICC Expedited Rules provide that the tribunal will be a sole arbitrator even where the arbitration clause in the contract specifies a three-member tribunal.[26] This is in contrast to the rules of other institutions that, while expressing a preference for the tribunal to be a sole arbitrator, give primacy to party autonomy or empower the institution to decide on the number of arbitrators depending on the complexity of the case.[27] The ICC Expedited Rules require that the award be must be rendered within six months after the date of the case management conference and eliminate the requirement in the ICC Arbitration Rules that the tribunal must prepare terms of reference for submission to the ICC Secretariat at the outset of the

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18 *See, e.g., id.* r. 5.3.
19 *See, e.g.,* CPR Fast Track Rules, r. 6.2; HKIAC Rules, art. 42.2(e).
20 *See, e.g.,* CPR Fast Track Rules, r. 7.1.
21 *See, e.g., id.* r. 8.
22 ICC Rules, app. VI [*hereinafter* "ICC Expedited Rules"].
23 *Id.* art. 30; ICC Expedited Rules, art. 1(1).
24 ICC Rules, art. 30(2); ICC Expedited Rules, art. 1(2). The USD 3,000,000 limit is for arbitrations commenced on or after January 1, 2021. For cases filed between 2017 and 2021, the limit was USD 2,000,000.
25 ICC Rules, art. 30(2); ICC Expedited Rules, art. 1(4). Since Article 30(2) of the ICC Rules provides that the ICC Expedited Procedure takes precedence over any contrary term of the arbitration agreement, parties are restricted from opting out of parts of the ICC Expedited Rules only allowing them to opt out completely.
26 ICC Expedited Rules, art. 2.
27 *See, e.g.,* CPR Fast Track Rules, r. 3.2.

arbitration.[28] The tribunal is given the authority, after consulting with the parties, to adopt any procedural measures that it deems appropriate. These measures may include limiting document production and the number, length and scope of submissions, requiring written witness evidence, and deciding the dispute without holding a hearing.[29] When a hearing is to be held, the arbitral tribunal may conduct it by videoconference, telephone or similar means of communication.

B. CPR Fast Track Rules

The CPR Fast Track Rules are lengthier than the ICC Expedited Rules, but like the ICC Expedited Rules they are tied into the CPR Administered Arbitrations Rules, which apply except to the extent they are expressly modified by the CPR Fast Track Rules. Unlike the ICC Expedited Rules, the CPR Fast Track Rules are "*opt-in*" rules, although at any time during the proceedings, the parties may mutually agree to opt out of the rules, and the tribunal in exceptional cases and at the request of a party may determine that these rules should not apply to a given case. A list of the non-exclusive factors that the tribunal may consider in making this determination include (i) the complexity of the case, (ii) the stage of the proceedings, (iii) whether the parties could foresee the circumstances relied upon to support the request when they agreed to adopt these rules, (iv) the urgency of the need to resolve the dispute, (v) the need for efficiency and expedition and (vi) the need to ensure due process and procedural fairness.[30] Further, there is no threshold limit in the CPR Fast Track Rules, meaning that the rules may be used for large as well as smaller cases. The CPR Fast Track Rules specify that the parties may pick a date between 90 and 180 days after the tribunal has been constituted for the delivery of the award, and that absent any such designation, the award shall be delivered within 90 days after the constitution of the tribunal (which is a much shorter period of time than under the ICC Expedited Rules).[31] They call for a sole arbitrator but CPR, at the request of a party, may determine that three arbitrators shall be appointed, and the factors that CPR shall consider will be the legal or factual complexity of the case and the total amount in dispute.[32] They require enhanced information to be disclosed at the outset, including a summary of the facts to be proven, names and addresses of known potential fact witnesses, and identification of the issues that may be the subject of expert witness testimony. They contain limitations on document discovery or disclosure, and provide that the award must be succinct.[33]

C. UNCITRAL Expedited Rules

In 2018, the UNCITRAL Commission mandated its Working Group II (Dispute Settlement) take up issues relating to expedited arbitrations in order to take into account the experience and feedback of many arbitral institutions, to strike a balance between efficiency and due process, and to encourage institutions to adopt or modify their rules on expedited arbitration.[34] The Working Group held sessions in Vienna and New York in 2019 and 2020 to prepare provisions on expedited arbitrations, and in March 2021 Working Group II finalized the draft UNCITRAL Expedited

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28 ICC Expedited Rules, art. 3(1); ICC Rules, art. 31(2).

29 ICC Expedited Rules, arts. 3(4) & 3(5).

30 CPR Fast Track Rules, r. 1.6.

31 *See, e.g.,* CPR, Commentary for CPR Fast Track Rules for Administered Arbitration, Objective of Rules, *available at* https://www.cpradr.org/resource-center/rules/arbitration/fast-track-administered-arbitration-rules.

32 CPR Fast Track Rules, r. 3.2.

33 *Id.* rr. 2.3, 5.1, 5.2 & 7.1.

34 *See* UNCITRAL, Draft Explanatory Note to the UNCITRAL Expedited Arbitration Rules, Note by the Secretariat, ¶ 1, U.N. Doc. A/CN.9/WG.II/WP.219 (Apr. 15, 2021) [*hereinafter* "Draft Explanatory Note"].

Rules for submission to the Commission. These were adopted in July 2021 and entered into force on September 19, 2021. Like both the ICC Expedited Rules and the CPR Fast Track Rules, the UNCITRAL Expedited Rules are presented as an appendix to the UNCITRAL Arbitration Rules 2010 ["**UNCITRAL Arbitration Rules**"], meaning that the latter will apply except to the extent expressly modified by the former. Like the CPR Fast Track Rules, the UNCITRAL Expedited Rules are "*opt-in*" rules and there is no threshold limit above which they would not be applicable.[35] At any time during the proceedings, the parties may agree that the UNCITRAL Expedited Rules shall no longer apply.[36] A party may also request the tribunal to determine whether the UNCITRAL Expedited Rules shall no longer apply, in which case the tribunal is directed to take into account a number of factors in making its determination.[37] These include the complexity of the dispute, the anticipated amount in dispute, the urgency of resolving the dispute and the stage of the proceedings at which the request is made.[38] If the expedited rules no longer apply to the arbitration, the tribunal will remain in place, and the arbitration will be conducted in accordance with the UNCITRAL Arbitration Rules.[39] The UNCITRAL Expedited Rules specify that the award shall be made within six months from the date of the case management conference, but in exceptional circumstances this limit may be extended to nine months.[40] They contain many of the same limitations in the two other expedited rules discussed in Parts II.A and II.B above. On the subject of whether hearings shall be held, the UNCITRAL Expedited Rules provide that the tribunal, after inviting the parties to express their views and in the absence of a request to hold hearings, may decide that hearings shall not be held.[41] In other words, the tribunal must hold hearings if a party requests. By contrast, the ICC Expedited Rules and the CPR Fast Track Rules allow the tribunal to proceed with determining issues solely on the basis of documents and written submissions without a hearing provided it has consulted with the parties beforehand.[42]

D. Prague Rules

The Prague Rules are stand-alone rules not connected with any arbitration institute or international organization, and they do not supplement to an existing set of arbitration rules. Unlike the arbitration rules of most arbitration institutions, which are required to be applied in whole and may not be used only in part, parties may choose to apply some parts of the Prague Rules while agreeing not to apply other parts.[43] They may be used in administered and non-administered arbitrations. A special feature of the Prague Rules is that they give the tribunal extensive authority, far more than in any other set of expedited rules. The tribunal is encouraged to be pro-active and inquisitorial. It can establish the facts and express its view at an early stage of the proceedings on the allocation of the burden of proof between the parties, on the relief sought, on the disputed issues and on the weight and relevance of evidence submitted by the parties.[44] It is encouraged to establish the facts in a case which it considers relevant for the resolution of the dispute. It can call

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35 *See* UNCITRAL Arbitration Rules, art. 1 ¶ 4.
36 UNCITRAL Expedited Rules, art. 2.1.
37 *Id.* art. 2.2.
38 *See* Draft Explanatory Note, *supra* note 34, ¶ 13.
39 UNCITRAL Expedited Rules, art. 2.3.
40 *Id.* arts. 16.1 & 16.2.
41 *Id.* art. 11.
42 ICC Expedited Rules, art. 3(5); CPR Fast Track Rules, r. 6.2.
43 Prague Rules, Preamble, at 3.
44 *Id.* art. 2.4(e).

witnesses, and it can even exclude a witness if it considers that the testimony of that witness would be irrelevant, immaterial, unnecessarily burdensome or duplicative, or for any other reasons not necessary for the resolution of the dispute.[45] It may appoint one or more independent expert witnesses at the cost of the parties, and require the parties to provide the expert witness so appointed with all the information and documents that the expert needs to prepare its report.[46] While a party is able to appoint an expert witness, this will not prevent the tribunal from appointing its own expert witness. The parties are encouraged to avoid any form of document production, including e-discovery.[47] If a party in a particular case needs certain documents from the other party, it should indicate this at the case management conference and provide reasons to the satisfaction of the tribunal as to why such documents are needed. Such a request cannot be made at a later stage, unless the requesting party proves to the satisfaction of the tribunal that the existence of exceptional circumstances prevented the party from making its request at the case management conference.[48] While hearings are not prohibited, the tribunal and the parties are encouraged to seek to resolve the dispute on a documents-only basis.[49] The Prague Rules contain an express provision—*iura novit curia*, i.e., the court knows the law—permitting the tribunal to apply legal provisions not pleaded by the parties, if it finds it necessary, including, but not limited to public policy rules, provided it seeks the parties' views on the legal provisions it intends to apply.[50] This proviso is particularly important as it may limit the use by the tribunal of *iura novit curia* and thus insulate the award from being vacated or being held unenforceable on the grounds that the tribunal exceeded its mandate. The Prague Rules also encourage amicable settlement of the dispute, permit any member of the tribunal to act as a mediator in the settlement discussions, and even permit that member to return as an arbitrator in the arbitration proceedings in the event the mediation is unsuccessful, provided that all the parties give their written consent to this at the end of the mediation.[51] Thus, the Prague Rules, by giving the tribunal tighter control over the proceeding, may be more efficient than other forms of expedited arbitration in a case where the parties are earnest in their pursuit of an expedited resolution of the dispute.

III. Due Process Considerations in Expedited Arbitration

Before examining the due process considerations involved in expedited arbitration proceedings, we should look at the main features of due process. While there is no specific definition of due process, it has been called an umbrella concept in the arbitration context, covering various guarantees of procedural justice that are disbursed across the arbitration framework.[52] Due process is the opposite of arbitrary and capricious. We find elements of due process in national laws, for example, the Federal Arbitration Act ["**FAA**"] of the United States[53] and the Arbitration Act 1996

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45 *Id.* art. 5.3.
46 *Id.* art. 6.2(d).
47 *Id.* art. 4.2
48 *Id.* arts. 4.3 & 4.4.
49 *Id.* art. 8.1.
50 *Id.* art. 7.2.
51 *Id.* art. 9.
52 *See* Dietmar Czernich, Franco Ferrari & Friedrich Rosenfeld, *Chapter 1: General Report*, *in* DUE PROCESS AS A LIMIT TO DISCRETION IN INTERNATIONAL COMMERCIAL ARBITRATION 2 (Franco Ferrari, Friedrich Rosenfeld & Dietmar Czernich eds., 2020) [*hereinafter* "Czernich et al."].
53 *See* Federal Arbitration Act 1925, 9 U.S.C. Ch. 1 (U.S.) [*hereinafter* "Federal Arbitration Act"].

of the United Kingdom.[54] We also find it in treaties such as the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ["**New York Convention**"],[55] in soft law instruments such as the International Bar Association's Guidelines on Conflicts of Interest in International Arbitration ["**IBA Guidelines**"],[56] and in the rules of arbitration institutions. For example, Section 10 of the FAA provides that a U.S. district court may vacate an arbitration award where the award was procured by corruption, fraud, or undue means; where there was evident partiality in the arbitrators or any of them; where the arbitrators were guilty of misconduct in refusing to postpone the hearing or refusing to hear evidence; and where the arbitrators exceeded their authority.[57] Another example is found in Article V(1)(b) of the New York Convention, which provides that recognition and enforcement of an award may be refused if "*[t]he party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present its case.*"[58]

A. Elements of Due Process

In general, the elements of due process cover five important concepts: (i) the arbitrator or arbitral tribunal must be independent and impartial, (ii) a proper notice of the proceedings must have been given; (iii) the parties have a right to equal treatment, including that all applicable procedural rules will be available to both sides unless waived or overridden by the tribunal, (iv) except in very rare and exceptional circumstances, there must be no *ex parte* contacts between a party and the arbitral tribunal, and (v) the parties have the right to be heard.[59] This last concept itself has four components: (a) the right to make submissions and evidentiary offers in support of one's case, (b) the right to comment on the submissions and evidentiary evidence offered by the opposing party, (c) the right to comment on the findings of the tribunal and (d) the tribunal has a duty to take cognizance of and consider the parties' submissions and evidentiary offers.[60]

B. Balancing Due Process, Efficiency and Party Autonomy

In an expedited arbitration it is necessary to strike a balance between these rights on the one hand, particularly the right to be heard, and the speed and efficiency of the expedited process on the other hand. In the first three examples, viz. the ICC Expedited Rules, CPR Fast Track Rules and UNCITRAL Expedited Rules, the principal due process objection seems to be that the deadlines and time frames in a given case may be too rigid, and one of the parties may find that it cannot present its case fully. However, since a party has the right to request the ICC Court to remove the case from the expedited procedures or, in the case of a CPR or UNCITRAL expedited arbitration where the parties have opted in, they may mutually agree to opt out or one of the parties may ask the tribunal to remove the case from the expedited proceedings. Thus, the parties have some degree of protection against the process becoming too abbreviated to allow a party to present its case. In such a situation, the parties would find themselves back in the non-expedited rules of the

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54 *See* Arbitration Act 1996, c. 23, §§ 33 & 68(2)(a) (Eng.).

55 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 6, 1958, 330 U.N.T.S. 38 [*hereinafter* "New York Convention"].

56 Int'l Bar Ass'n (IBA), Guidelines on Conflicts of Interest in International Arbitration (Oct. 23, 2014) [*hereinafter* "IBA Guidelines"].

57 Federal Arbitration Act, §§ 10(a)(1)–(3).

58 New York Convention, art. V(1)(b).

59 Czernich et al., *supra* note 52, § 1.03, at 19–38.

60 *Id.*

institution with its expanded time frames. Doing that would slow down the process and might benefit the party seeking to delay, but it could be detrimental to the party who had selected an expedited arbitration because it wanted to have the case heard and determined in a relatively short period of time. A potential due process issue arises where one of the parties does not agree to opt out of the expedited proceedings, and the ICC Court or the tribunal in CPR or UNCITRAL proceedings does not convert the proceedings to a non-expedited arbitration. In such a situation, the party denied the ability to have a non-expedited arbitration might argue that its due process rights were violated because it was not given the right to present its case fully. It is hoped that when parties consider whether to use an expedited process for their arbitration, irrespective of whether the process is opt-in or opt-out, they will carefully evaluate the trade-offs in using a more expeditious process and will conclude at the outset of their case that they should be able to present their case fully within the abbreviated schedule.

C. Prague Rules: Tipping the Balance

The Prague Rules present added issues. Here, when considering the right to be heard, there are many norms in traditional non-expedited arbitrations, especially in common law jurisdictions, that are turned on their head. Control over the process is moved from the parties to the tribunal which is directed to act in a pro-active and inquisitorial manner. If the tribunal expresses its preliminary views on the allocation of the burden of proof between the parties, on the relief sought or the disputed issues, or on the weight and relevance of the evidence submitted by the parties, it could give rise to the ground that the tribunal was biased and potentially lead to a vacatur of the award. The Prague Rules, however, specifically provide that the tribunal "*expressing such preliminary views shall not by itself be considered as evidence of the tribunal's lack of independence or impartiality, and cannot constitute grounds for disqualification.*"[61] The question is raised whether a court considering vacatur of an award or an arbitral institution considering the removal of an arbitrator—on the ground that the arbitrator was biased because it had expressed its views at a preliminary stage of the proceedings—will accept this provision in the Prague Rules on the grounds that the parties agreed to it by agreeing to the application of the Prague Rules, and thereby deny vacatur of the award or exculpate the arbitrator from being removed. Another example of where the Prague Rules differs from customary practice in both common law and civil law jurisdictions is that they allow the tribunal to refuse to hear a factual witness if it feels that the witness's testimony would be "*irrelevant, immaterial, unreasonably burdensome, duplicative or for any other reasons not necessary for the resolution of the dispute.*"[62] This takes control of the arbitration away from the parties and counsel, and places it in the hands of the tribunal and is perhaps the strongest reason why the Prague Rules are not favoured in common law jurisdictions where counsel for the parties customarily take the lead on the selection, examination and cross examination of witnesses. Yet another example of where the Prague Rules differ from the practice in many jurisdictions and the IBA Guidelines is where they allow an arbitrator, who has become the mediator in a dispute that has moved from arbitration to mediation, to return to being an arbitrator if the mediation fails to result in a settlement of the case. The Prague Rules expressly allow the mediator to return to being an arbitrator in the case provided all the parties have consented in writing to this after the mediation has concluded.[63] The

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61 Prague Rules, art. 2.4(e).
62 *Id.* art. 5.3.
63 *Id.*

arbitrator, as mediator, however, will likely have gained a significant amount of inside information while acting as mediator, potentially making that mediator biased when he or she becomes the arbitrator again. The unresolved issue is whether the requirement of written consent by all the parties after the mediation has concluded to permit the mediator to return to his or her prior statues as arbitrator will be adequate grounds to avoid a vacatur of the award by reason of bias.

Thus, in addition to the due process considerations listed above in the case of an ICC, CPR or UNCITRAL expedited arbitration, which should be able to be accommodated by careful planning by the parties and their counsel, the Prague Rules present additional due process concerns by moving control over the process from the parties and their counsel and placing it in the hands of the tribunal, thereby potentially limiting the parties' right to be heard in fundamental ways.

IV. Conclusion

Expedited arbitration rules play a very valuable role in resolving international commercial disputes by providing a streamlined procedure for the resolution of such disputes by arbitration. Arbitration is a preferred method for resolving international commercial disputes because it can provide confidentiality, party autonomy, and forum selection and the selection of decision makers who are knowledgeable in the field of the dispute. However, users have become increasingly wary of using arbitration because of the length of time it takes to reach a decision and the relatively high costs involved. Expedited forms of arbitration can save time and costs. But not all cases are suitable for an expedited process, especially large complex matters with voluminous documents and many witnesses. Trying to fit such a case into an expedited process will likely deprive a party of a fair opportunity to present its case, which could lead to an infringement of due process and a denial of justice. But for smaller cases, or for cases where there is an ongoing relationship between the parties that should be preserved, the resolution of the dispute through an expedited procedure is ideally suited because they will be resolved relatively quickly and without a large expenditure of funds. It should be possible to structure an expedited arbitration for those cases in ways that are not only efficient and less costly, but also ensure that the parties are provided with due process.

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