IJAL

INDIAN JOURNAL OF ARBITRATION LAW

Volume 9, Issue 1 | July 2020 | ISSN: 2320-2815

EDITORIAL

Online Arbitration

Jeffrey M. Waincymer

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published by

CENTRE FOR ADVANCED RESEARCH & TRAINING IN ARBITRATION LAW

Cite as
9(1) INDIAN J. ARB. L. 1 (2020)

PUBLISHED BY
Centre for Advanced Research and Training in Arbitration Law
National Law University, Jodhpur (INDIA)
ISSN: 2320-2815 | eISSN: 2320-2823

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ONLINE ARBITRATION

Jeffrey M. Waincymer[*]

Abstract

*This editorial addresses the policy and practical considerations when we seek to use online systems with international arbitration. It traverses the criteria by which online dispute resolution ["**ODR**"] should be evaluated, considers the powers, rights, and obligations of the parties, outlines some of the key practical approaches that tribunals might encourage, and considers some of the key stages of a typical arbitration, to consider how online systems may best be utilised.*

I. Introduction

The current pandemic has forced us all to consider many things of far more importance than the disruptions to our own day-to-day working lives, particularly for those of us who have not lost our careers in the short term. But these careers must go on where they can. Effective continuance of commercial activity is a vital means to minimise the losses that we will be left with. In the arbitral context, the maintenance of fair and efficient dispute resolution processes impacts heavily on the parties' commercial potential and, in turn, their own supply chains and employees. Thus, there are always important external benefits of any well-functioning dispute settlement system. In the current crisis, ineffective dispute settlement might add to the economic damage caused by the pandemic.

In seeking solutions to the current disruption caused to international arbitration, a plethora of institutions and individuals have rapidly turned their minds to the utility of ODR. ODR is not a new phenomenon, with a massive literature on that topic and many court-based initiatives established in that regard. Nevertheless, in the main, this development has been in the context of attempts to promote efficient access to justice for small claims. Much of the academic literature is also about the feasibility of computer-assisted decision-making and not simply about technology as an aid to dispute resolution by human adjudicators. Concern for small claims or computer-assisted decision-making is not the focus of this article.[1] Instead, attention is given to the benefits and limits of technology in aid of high value international commercial and investment arbitration.

Such disputes retain a strong preference for face-to-face hearings, particularly in relation to witness cross-examination and oral submissions, and particularly where common law

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His publications include Procedure and Evidence in International Arbitration; WTO Litigation: Procedural Aspects of Formal Dispute Settlement; Australian Income Tax: Principles and Policy; A Guide to the New UNCITRAL Arbitration Rules; A Practical Guide to International Commercial Arbitration and International Trade Law: Commentary and Materials.

1 Other questions not dealt with here include whether the delays caused by the pandemic might alter the balance of convenience test under any interim measure application. Statutes of limitations that prevent time running during impediments might also come into contention, although it should normally be the case that proceedings can be commenced electronically and preserve rights accordingly. I am also not considering other commercial implications of the pandemic such as insolvency and its interaction with arbitration, increased demand for security for costs, or parties and law firms that might even go out of business.

practitioners are involved. Civilian arbitrators and practitioners are less concerned with the need for such hearings, as they tend to put less weight on oral testimony, preferring to make contemporaneous documents determinative, wherever possible. Documents-only arbitrations are obviously less affected by the pandemic. Nevertheless, it can now be stated with confidence that even when both parties are from civil law backgrounds, a combination of document production, written submissions, and face-to-face oral testimony is the norm in most substantial international commercial and investment arbitrations. In the short term, that model will often not be possible. In that context, the purpose of this editorial is to consider the powers, policy considerations, and practical suggestions in relation to the use of online techniques in aid of fair and efficient arbitral dispute resolution.

These questions are raised in more detail in another contribution to this issue; David Bateson provides a very comprehensive overview of the powers and practicalities as to the use of ODR in international arbitration.[2] This editorial contribution does not wish to replicate the excellent points made therein, but instead provides some broad theoretical and practical contexts as to the role of a proactive and customer-focused arbitrator. It may indeed make sense to first read Bateson's contribution and then return to this one. The following matters touched upon there are expanded further in this editorial. Bateson makes the wise observation that tribunals should, wherever possible, seek agreement of the parties. This editorial explores the scenario where that agreement is not forthcoming. Bateson acknowledges the queries that some common law counsel raise as to the effectiveness of online cross-examination. That is also explored further in this contribution. Bateson also directs attention to a plethora of very useful written guides and checklists that have recently been published. This contribution comments on some of the key suggestions being made from various sources and presents some added pointers as to design options for consideration by arbitrators and counsel.

It is important to note at the outset that there are three scenarios in which to consider the potential use of virtual arbitration. The first relates to what to do with existing arbitrations already established under more normal processes that have now been disrupted by the pandemic. To what extent can virtual processes take over? To what extent are there any permissible extensions of time? How are these questions to be resolved when there is no consensus between the parties? A second related question is to what extent can virtual processes allow for efficient arbitration of new disputes while the pandemic continues? The third aspect is a more general consideration of the role of technology in dispute resolution. Going forward to a time when the pandemic is over, would we revert to the presumptive model of a face-to-face final hearing or at most bifurcated hearings, or would we allow technology to replace some or all of the face-to-face contact we have had in the past and consider other modes of structuring the arbitral process with the aim of reducing time and cost?

It is likely to be the case that current experiences, many born of necessity, will lead to greater use of some online techniques on a regular basis post-pandemic, thus decreasing some of the costs and increasing the speed of resolution of arbitral disputes. Conversely, where some aspects of ODR are concerned, experience and evaluation may lead us to conclude that these techniques are not optimal and might only be a short-term expedient. We might also conclude from

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2 *See* David Bateson, Virtual Arbitration, 9(1) INDIAN J. ARB. L. 143 – 153 (2020).

experience that in order for these processes to indeed be optimised, important safeguards must be put in place. As always, there is a need for arbitrators who are alert to these issues and who collaborate with the parties in identifying the best suite of procedures for the particular dispute at hand. We should all acknowledge that in the early days, we are likely to have much to learn through these experiences.

In aid of further consideration of each of the above scenarios, this editorial traverses the criteria by which ODR should be evaluated, considers the powers, rights, and obligations of the parties, outlines some of the key practical approaches that tribunals might encourage, and considers some of the key stages of a typical arbitration, to consider how online systems may best be utilised.

II. Criteria for evaluating ODR

As with all aspects of arbitral procedure, we need appropriate criteria by which to evaluate any procedural model. The two criteria that must always be considered are fairness and efficiency. The International Council for Online Dispute Resolution proposed the following additional standards.[3] ODR processes should be accessible, accountable, competent, confidential, support equality, be fair, impartial, and neutral, uphold all relevant laws, be secure, and be transparent.[4] One could argue persuasively that each of these is either a subset of fairness or efficiency.

Where fairness is concerned, issues might flow from differing technological capabilities of the parties and how a tribunal should deal with these. In the extreme, that could be a violation of due process rights if not handled appropriately. Even if differences are not so marked as to justify impugning an award, it is always wise to recall the salutary observation of the *Klöckner* annulment committee that "…*an award has not fully attained its purpose if it leaves one of the parties with the feeling – no doubt mistaken but perhaps understandable in the circumstances of the case – of unequal treatment and injustice*".[5]

Even very experienced arbitrators need to be alert to the fact that many things that can be taken for granted in face-to-face hearings might not be so where technology is the gateway. We are used to the fact that in highly respected neutral arbitral venues, there is more than adequate infrastructure to meet the needs of both simple and complex disputes. There will also be highly trained support staff. Persons in attendance will be operating in the same time-zone. Where virtual arbitration is concerned, however, one cannot presume these things. Some parties and witnesses who seek to access hearings remotely might not live in communities with high quality and secure internet connections or might not even have dependable electricity supplies. In addition to serious differences in access and competence, some jurisdictions still have high levels of government control or censorship over all aspects of the internet. Not even the most sophisticated and well-resourced institution can guarantee that any such problem would be

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3 International Council for Online Dispute Resolution (ICODR), ICODR Standards, *available at* https://icodr.org/standards/.

4 *See also* Fed. Ct. of Austl., Guide to video conferencing in court proceedings, art. 1.7 (2016) (which calls for attention to be given as to whether a video link would be "a just, timely, economic and efficient use of the Court's and the parties' resources and aid the progress or resolution of the litigation.").

5 Klöckner Industrie-Anlagen GmbH, Klöckner Belge, S.A. & Klöckner Handelsmaatschappij B.V. v. Republic of Cameroon & Société Camerounaise des Engrais S.A., ICSID Case No. ARB/81/2, Decision on Annulment, ¶ 111 (May 3, 1985), 2 ICSID Rep. 95, 135 (1994).

prevented and could thus be ignored by the tribunals. Time-zones are likely to be different. Tribunals need to respond adequately to all predictable and emerging issues. As arbitrators, we must even be alert to the potential for us to wrongly blame counsel or witnesses who are failing to adequately employ technology, rather than see our own culpability in the way we have set up the process.[6]

Another aspect is the overall fairness of online procedures as compared to face-to-face hearings. This is a more contentious proposition, with champions of ODR presenting strong arguments in support of fairness. This editorial simply seeks to delve into this question in the areas where the concerns have been the loudest. Typically, this relates to cross-examination of witnesses. This is discussed in two parts, *first* as to the entitlement to face-to-face hearings and *second* as to the challenges to effective cross-examination via videoconferencing.

Where efficiency is concerned, one can at least say that an ODR process that does not require airfares and hotels and does not require one uninterrupted hearing has, at the very least, significant cost saving potential. It must always be easier to find common times for arbitrators, counsel, and witnesses when such processes do not require travel and where they can be segmented and interspersed with other unrelated activities. There is, then, less need for rescheduling when problems arise, for example, where a key participant can still function but might be too sick to travel.

III. Powers as to ODR

As with all aspects of arbitral procedure, there is a need to consider the rights, duties, and powers of the various participants where ODR is concerned. This calls attention to the interaction of party consent and the procedural framework of the arbitration. One must consider the arbitral law of the seat of the arbitration (the *lex arbitri*), the procedural rules or other agreements made between the parties, and the potential for annulment or enforcement challenges.

In that sense, there are some key gateway questions as to the potential use of ODR. What express or implied consent, if any, has there been to online processes? Alternatively, have the parties agreed on an ad hoc or institutional basis to procedures that afford such discretion to the tribunal? Conversely, is there disagreement between the parties, one in favour and one opposed to such processes? What does the procedural framework allow for in that regard? In the extreme, is there any power for a tribunal to utilise online processes where this is thought by the tribunal to be the only reasonable option, even if both parties are opposed?[7]

In answering these questions, absent binding agreement of the parties, one looks at arbitral statutes and selected rules. These typically provide tribunals with broad discretionary powers over all procedural and evidentiary matters, subject to contrary directions of the parties and subject to the requirement that processes need to meet stipulated mandatory due process norms. These require the tribunal to treat each party with equality and to give each a full or reasonable

[6] A range of contributions to literature have sought to warn adjudicators of some of the more problematic psychological barriers to optimal decision-making. *See generally* JENNIFER K. ROBBENNOLT & JEAN R. STERNLIGHT, PSYCHOLOGY FOR LAWYERS: UNDERSTANDING THE HUMAN FACTORS IN NEGOTIATION, LITIGATION, AND DECISION MAKING (2012).

[7] While the presumption is that the tribunal cannot ignore an agreement between the parties, what if there was a statutory or contractual time-limit for the final award, soon to expire?

opportunity to present its case.[8] Annulment criteria under Article 34 of the United Nations Commission on International Trade Law ["**UNCITRAL**"] Model Law on International Commercial Arbitration ["**Model Law**"] and Section 34 of the Indian Arbitration and Conciliation Act, 1996 ["**Arbitration Act**"] or enforcement criteria under Article 36 of the Model Law, Section 36 of the Arbitration Act, and Article V of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards ["**New York Convention**"], work hand in hand with the due process norms under Article 18 of the Model Law and Section 18 of the Arbitration Act.[9] A violation of such norms will typically be a ground for annulment or for blocking enforcement.

Bateson's article lists some key provisions in a range of jurisdictions, and these will not be repeated here.[10] It is simply worth pointing out that there are a range of approaches to virtual hearings in these instruments. Very few proscribe video hearings absent party consent.[11] Some provide express discretion to the tribunal, thus requiring no further agreement of the parties.[12] The bulk of both institutional and ad hoc arbitrations under *lex arbitri* and rules like the Model Law and UNCITRAL Arbitration Rules simply afford general procedural discretion to the tribunal and virtual hearings are not referred to discretely.[13]

Parties might also agree to virtual hearings by accepting certain guides or soft law instruments, most notably, the IBA Rules on the Taking of Evidence in International Arbitration ["**IBA Rules**"]. Article 8.1 of the IBA Rules stipulates that "*[e]ach witness shall appear in person unless the Arbitral Tribunal allows the use of video conference or similar technology with respect to a particular witness*".[14] All such rights and discretions are subject to mandatory due process norms as articulated in core provisions such as Article 18 of the Model Law and Section 18 of the Arbitration Act.

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8 Such due process norms are found in United Nations Commission on International Trade Law (UNCITRAL), Model Law on International Commercial Arbitration, art. 18, 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* "Model Law"] and the Arbitration and Conciliation Act, No. 26 of 1996, § 18 (India) [*hereinafter* "Arbitration Act"].

9 Virtual hearings will also lead to tensions in jurisdictions that struggle to understand the difference between the seat and the place of arbitration, a question that has troubled certain Indian courts. *See, e.g.,* Bharat Aluminium Co. v. Kaiser Aluminium Tech. Servs., Inc., (2012) 9 SCC 552 (India); Indus Mobile Distrib. Pvt. Ltd. v. Datawind Innovations Pvt. Ltd., (2017) 7 SCC 678 (India); Antrix Corp. Ltd. v. Devas Multimedia Pvt. Ltd., 2018 (4) Arb. L. Rep. 66 (Delhi) (India); Union of India v. Hardy Expl. & Prod. (India) Inc., (2019) 13 SCC 472 (India); BGS SGS Soma JV v. NHPC Ltd., 2019 (6) Arb. L. Rep. 393 (SC) (India); Mankastu Impex Pvt. Ltd. v. Airvisual Ltd., (2020) SCC Online SC 301 (India).

10 Bateson, *supra* note 2.

11 Vietnam International Arbitration Centre (VIAC), Rules of Arbitration 2017, art. 25(1) [*hereinafter* "VIAC Rules 2017"] is an exception (which states that "[t]he Arbitral Tribunal may conduct the hearings by means of teleconference, video-conference or by any other appropriate means if the parties have agreed so.").

12 Video conferencing of witnesses is expressly allowed in the ALLGEMEINES BÜRGERLICHES GESETZBUCH [ABGB] [CIVIL CODE] §§ 595(2), *available at* http://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10001622 (Austria); art. 4:1072(b) RV (Neth.); Arbitration Ordinance, (2011) Cap. 609, § 48 (H.K.). *See also* London Court of International Arbitration (LCIA), Arbitration Rules 2014, art. 19(2) (which expressly stipulates that "[a]s to form, a hearing may take place by video or telephone conference or in person (or a combination of all three)…").

13 Model Law, *supra* note 8, art. 19; UNCITRAL, Rules on Transparency in Treaty-based Investor-State Arbitration (2014), art. 17.1; International Chamber of Commerce (ICC), Rules of Arbitration 2017, art. 22(2) [*hereinafter* "ICC Rules 2017"]; Arbitration Act, No. 26 of 1996, §§ 19, 24 (India).

14 Given the fact that few *lex arbitri* or institutional rules directly address the entitlement to or optimal way to conduct online arbitrations, a number of guides have been developed, some accelerated by the needs of the current pandemic. As with any guide, these are not binding on any arbitration unless expressly agreed to by the parties. Some of the more elaborate guides are outlined in Bateson's article. *See* Bateson, *supra* note 2, at 146.

Where the laws and the rules are not clear, one issue is to consider what these say about 'hearings' and their required nature, if required at all. A number of debatable terms then need to be interpreted as a number of different expressions are used. For instance, the notion of a 'hearing' also relates to procedural applications and requests for interim relief as well as any final process for witness testimony and oral submissions. A proposal during the drafting of the Model Law to limit Article 24(1) to hearings on substantive issues was rejected.[15]

Article 17(3) of the UNCITRAL Arbitration Rules stipulates that if any party so requests, "*the arbitral tribunal shall hold hearings for the presentation of evidence by witnesses, including expert witness, or for oral arguments*". That rule juxtaposes "*hearings*" with decisions on documents and other materials alone. It uses the term "*oral*" with arguments but not expressly with witnesses although the latter seems implied. Most importantly, Article 28(4) stipulates that the "*tribunal may direct that witnesses, including expert witnesses, be examined through means of telecommunication that do not require their physical presence at the hearing (such as video conference)*". Article 28(2) speaks more generally about such witnesses being heard "*under the conditions and examined in the manner set by the arbitral tribunal*". The drafting history demonstrates that the drafters were comfortable with video hearings, even though the earlier versions did not say so expressly.[16] Thus, the ability of either party to demand a hearing does not allow that party to bar the tribunal from directing videoconferencing.

The Model Law was drafted at an earlier point in time than the most recent UNCITRAL Arbitration Rules. Article 24(1) of the Model Law stipulates that subject to any contrary agreement by the parties, the tribunal shall decide whether to hold "*oral*" hearings. It goes on to state, however, that "*unless the parties have agreed that no hearing shall be held, the arbitral tribunal shall hold such hearings at an appropriate stage of the proceedings, if so requested by a party*". The reference of "*such hearings*" is to "*oral*" hearings.

This raises a key question as to whether an "*oral*" hearing means a face-to-face hearing or whether speaking via video is compliant with this entitlement. The latter is a better view. The plain meaning of the word 'oral' simply means spoken and not written. Rules often juxtapose the

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15 HOWARD M. HOLTZMANN & JOSEPH E. NEUHAUS, A GUIDE TO THE UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION: LEGISLATIVE HISTORY AND COMMENTARY 674 (1989).

16 *See* UNCITRAL, Rep. of Working Group II (Arb. & Conciliation) on the Work of its Fifty-First Session, ¶ 46, U.N. Doc. A/CN.9/WG.II/WP.154/Add.1 (July 23, 2009). *See also* UNCITRAL, Rep. of Working Group II (Arb. & Conciliation) on the Work of its Fiftieth Session, ¶¶ 65, 67, 84, U.N. Doc. A/CN.9/669 (Mar. 9, 2009). Note also the comment made in earlier discussions in the UNCITRAL, Rep. of Working Group II (Arb. & Conciliation) on the Work of Its Forty-Seventh Session, ¶ 43, U.N. Doc. A/CN.9/641 (Sept. 25, 2007):
"43. A suggestion was made that paragraph (5) should also refer to the possibility of witnesses being heard by videoconference. In support of that proposal, it was suggested that paragraph (4), which required that the hearings be held in camera, when read in conjunction with paragraph (5), which referred to evidence by witnesses also being presented in the form of written signed statement, could be understood as excluding witness evidence presented in any other form. However, it was said that inclusion of a reference to videoconference delved into detail that could overburden the Rules and reduce their flexibility. Some hesitation was expressed to including a reference to a particularly technology, such as video conferencing, given the rapidly evolving technological advancements in means of communication. A suggestion was made to provide a more generic term such as "teleconference" to accommodate technological advancements. Broad support was expressed for a suggestion that paragraph (5) should state not only that evidence of witnesses might be presented in the form of a signed written statement but also that oral statements might be presented by means that did not require the physical presence of witnesses. More generally, it was also noted that the arbitral tribunal had the authority under paragraph (6) to determine the weight of the evidence." (The paragraph numbering in this Article changed with later revisions to the draft)."

notion of an oral hearing with the notion of a documents-only arbitration.[17] Thus, a telephone or a video communication would properly be described as oral. On that basis, if either party wants an oral hearing but one disagrees as to a virtual hearing being compliant, a tribunal that utilises such a process cannot be said to have conducted proceedings contrary to the agreed procedures per Article V(1)(d) of the New York Convention.

The International Chamber of Commerce ["**ICC**"] Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration, 2019, under the ICC Rules of Arbitration ["**ICC Rules**"], allows for video-conference hearings on dispositive applications.[18] Where the Expedited Procedure Rules are applicable, Article 3(5) expressly allows for hearings by video-conference.[19] Article 24(4) of the ICC Rules expressly allows for case management conferences by video-conference, telephone, or similar means, as well as in person. Paragraph (f) under Appendix IV (Case Management Techniques) to the ICC Rules also leaves the question somewhat open when it refers to "*using telephone or video conferencing for procedural and other hearings where attendance in person is not essential and use of IT then enables online communication among the parties, the arbitral tribunal and the Secretariat of a Court*".[20] It is not uncommon for similar express references in other rules. Some might then query whether, by inference, this precludes a similar result for final hearings when only the normal broad discretionary rules are applicable. That should not be so. An express reference to a tribunal's right to call for videoconferencing for some procedures should not be taken to limit a broad discretion to do so, absent a contrary direction from the parties.

There is, however, another query where the ICC Rules are concerned. As to the entitlement to hearings on the merits, Article 25(2) stipulates, "*the arbitral tribunal shall hear the parties together <u>in person</u> if any of them so request*" (emphasis added). The ICC has also published the ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic ["**ICC Guidance Note**"]. The ICC Guidance Note has sought to interpret the concept of hearing parties "*in person*" as allowing for a "*live, adversarial exchange…by virtual means if the circumstances so warrant*".[21] Various English dictionaries suggest the contrary and describe "*in person*" as requiring physical presence as opposed to telephone and similar devices.[22]

These supportive comments as to the meaning of "*hearing*" or "*oral hearing*" and, to a lesser extent, "*in person hearing*", coupled with the drafting history where UNCITRAL is concerned, do not alone prevent other adverse New York Convention considerations, but these should also be rejected if directed at virtual hearings per se. Challenges might be theoretically possible on either of the Article 18 grounds, namely interference with the right to present one's case or the right to

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17 *See, e.g.*, Hong Kong International Arbitration Centre (HKIAC), Administered Arbitration Rules 2018, r. 22.4 [*hereinafter* "HKIAC Rules 2018"].

18 ICC International Court of Arbitration, Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration 2019, at 12, ¶ 77, *available at* https://iccwbo.org/content/uploads/sites/3/2017/03/icc-note-to-parties-and-arbitral-tribunals-on-the-conduct-of-arbitration.pdf.

19 ICC Rules 2017, *supra* note 13, app. VI - Expedited Procedure Rules, art. 3(5).

20 ICC Rules 2017, *supra* note 13, app. IV - Case Management Techniques, ¶ f.

21 ICC International Court of Arbitration, Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic 2020, ¶ 23, *available at* https://iccwbo.org/content/uploads/sites/3/2020/04/guidance-note-possible-measures-mitigating-effects-covid-19-english.pdf [*hereinafter* "ICC Guidance Note"].

22 *See, e.g.*, *In person*, CAMBRIDGE DICTIONARY, *available* at https://dictionary.cambridge.org/dictionary/english/in-person.

equal treatment. As to the first, there is a need to consider a per se claim that denial of a face-to-face hearing necessarily prevents a party from properly presenting its case in violation of Article V(1)(b) of the New York Convention. That should not be so, unless the applicable laws or rules demand physical presence. Courts and tribunals have long had experience of at least some witnesses needing remote access. In that context, a United States appeals court held that there was no barrier to enforcement under Article V(1)(b) when a witness refused to attend for fear of arrest, as the witness could have attended remotely.[23] In addition, a number of enforcement courts considering Article V(1)(b) claims require that the respondent to enforcement demonstrate that the procedural concerns could have affected the outcome of the case.[24] That would be close to impossible to argue in a well-run virtual hearing.

Conversely, if there are indeed significant and insurmountable technological problems facing one party that the tribunal does not respond to effectively, then this ground can be made out, but there is no justification for a mere assertion that online adjudication is an *ipso facto* barrier to presenting a case. This is discussed further below when considering cross-examination of witnesses, the element of proceedings where this concern is most likely to be raised.

Even disparity in quality as between technological resources should not *ipso facto* be seen as a proscribed form of inequality. Parties often have different quality of counsel, professional training, and proficiency in the language of the arbitral proceeding. It will have to be an extreme case of technological inadequacy, where one could say that the treatment is indeed materially unequal, in a due process sense, when relying on online technology. Tribunals will need to ensure that this is not the case and be prepared to make on-going assessments as to the implications of any technical difficulties. A tribunal must always be prepared to adjourn a hearing if the connection is inadequate, and the right to be heard is indeed being detracted from.

In some cases, a tribunal might be faced with conflicting due process concerns. For example, there may be conflicting problems with indeterminate delay. As is the case in India, *lex arbitri* might impose time-limits for completion of awards, although these can typically be extended.[25] Express duties of efficiency and expediency may still call for consideration of virtual hearings during the pandemic at least.

One inequality scenario readily conceivable during the pandemic is a dispute between parties from one country that has reopened and has allowed for travel, as against another country that does not even allow parties, witnesses, and counsel to congregate in the same place. It would

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23 Consorcio Rive, S.A. de C.V. v. Briggs of Cancun, Inc., 01-30553 (5th Cir. 2003), ¶ 29 (U.S.).

24 Tribunale fédérale [TF] Jan. 29, 2019, 4A_424/2018 (Switz.); Hanseatisches Oberlandesgericht Hamburg [HansOLG] [Hanseatic Higher Regional Court Hamburg] Apr. 3, 1975, 2 Y.B. COMM. ARB. 241 (1977) (Ger.); Bundesgerichtshof [BGH] [Federal Court of Justice], May 15, 1986, 98 ENTSCHEIDUNGEN DES BUNDESGERICHTSHOF IN ZIVILSACHEN [BGHZ] 70 (Ger.); Apex Tech. Inv. Ltd. v. Chuang's Dev. (China) Ltd., [1996] 2 H.K.L.R.D. 155 (C.A.) (H.K.); Bundesgerichtshof [BGH] [Federal Court of Justice], Apr. 26, 1990 21 Y.B. COMM. ARB. 532 (1996) (Ger.); Polytek Eng'g Co. Ltd. v. Hebei Import & Exp. Corp., [1998] 1 H.K.L.R.D. 287 (C.A.) (H.K.); Schelswig-Holsteinisches Oberlandesgericht [OLG] [Schelswig-Holstein Supreme Court of Justice], June 24, 1999, 16 SCHH 01/99 (1999) (Ger.); Oberlandesgericht Frankfurt [OLG] [Higher Regional Court], Oct. 18, 2007, 26 SCH 1/07 (2007) (Ger.); Oberlandesgericht Frankfurt [OLG] [Higher Regional Court], Aug. 27, 2009, 35 Y.B. COMM. ARB. 377 (2010) (Ger.). *See also* M. Scherer, *Article V(1)(b)*, *in* NEW YORK CONVENTION: CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS OF 10 JUNE 1958: A COMMENTARY ¶¶ 142-4 (R. Wolff ed., 2019).

25 Arbitration Act, No. 26 of 1996, § 29A (India).

seem undesirable to have one side represented face-to-face with the other wholly online unless the parties agree to this. Even then, if allowed in the face of disagreement between the parties and if appropriate safeguards were in place, most enforcement courts would not block enforcement simply because this has occurred when the party with virtual access had high quality access.

The next question is whether there are any other mandatory laws that could prevent virtual hearings, or which could at least direct certain minimum standards. One should at least consider whether any domestic laws of the seat, of the parties' home countries purporting to apply extra-territorially, or of a likely enforcement country can be argued to impose such proscriptions. Again, that is unlikely to be so, but it should be for counsel to draw any such possibilities to the attention of the tribunal. One such possibility is the application of universal human rights conventions that call for equal treatment.[26] Similarly, European legal systems must consider Article 6 of the European Convention on Human Rights ["**ECHR**"], which stipulates as follows:

> "*In the determination of … civil rights and obligations, everyone is entitled to a fair and public hearing …*"

This, of course, mixes notions of transparency in litigation that are quite distinct from the privacy inherent in arbitration. Lew, Mistelis, and Kröll argue that as arbitrations are private proceedings, Article 6 of the ECHR does not apply to arbitration.[27] At the very least, the European Court of Human Rights has concluded that by agreeing to arbitrate, certain rights under Article 6 that would flow from court proceedings have instead been waived.[28]

Finally, one could consider the way that international and domestic courts have considered these due process questions under their litigation rules. Court attitudes could be considered to see if they provide any guidance as to the interpretative challenges when parties to an arbitration do not come to the same view as to the use of virtual hearings. Domestic courts that are supportive where litigation is concerned are less likely to see problems where enforcement of arbitral awards is concerned. References to 'open court' are clearer and more specific than references to 'hearings' and even 'in person hearings'.[29] Private arbitrations do not have the same problem as to the need for transparency and public access that domestic courts must promote. Even then, domestic rules at times allow for videoconferencing for good cause in compelling circumstances and with appropriate safeguards.[30] Some international criminal courts have also allowed for video testimony, often where witnesses are concerned for their safety.[31]

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[26] G.A. Res. 217 (III) A, Universal Declaration of Human Rights, (Dec. 10, 1948), art. 10; G.A. Res. 2200A (XXI); International Covenant on Civil and Political Rights, (Dec. 16, 1966), art. 14. Various cases discuss differential treatment, fair balance, and substantial disadvantage. *See, e.g.*, United Nations Hum. Rts. Comm'n, Gen. Cmt. No. 32, art. 14: Right to Equality Before Courts and Tribunals and to a Fair Trial, Rep. on the Work of Its Ninetieth Session, U.N. Doc. CCPR/C/GC/32, at 3, ¶ 13 (2007); Dudko v. Australia, Comm. No. 1347/2005, Views of 23 July 2007, U.N. Doc. CCPR/C/90/D/1347/2005, ¶¶2.3, 7.3–7.4 (July 23, 2007).

[27] JULIAN DAVID MATHEW LEW QC, LOUKAS A. MISTELIS & STEFAN M. KRÖLL, COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION (2003).

[28] Suovaniemi & Ors. v. Fin., App. No. 31737/96 Eur. Ct. H.R. (1999). *See also* GABRIELLE KAUFMANN-KOHLER & THOMAS SCHULTZ, ONLINE DISPUTE RESOLUTION: CHALLENGES FOR CONTEMPORARY JUSTICE 205 (2004).

[29] FED. R. CIV. P. 43(a) (U.S.).

[30] *Id.* Videoconferencing for witnesses is also allowed under the Civil Procedure Rules 1998, No. 3132 (L.17), r. 32, ¶ 3 (Eng.). While arbitral advances at times occur ahead of domestic litigation reform, the same is not uniformly so with

At the very least, the above discussion would suggest that there are a range of permutations that a tribunal might need to consider where virtual hearings are concerned. At first sight, the easiest scenario would appear to be where both parties agree to use online processes rather than face-to-face hearings. However, there is one issue that might still need to be considered. That is whether a party who has so agreed has, as a result, waived any right to seek annulment or to block enforcement even if some argument is tenable as to inequality or as to some restraint of either party's ability to put its case. This is discussed below in terms of the potential to waive such rights.

The second scenario is where one party would wish to see greater use of online proceedings, with the other party taking an opposing view. Such a scenario should not alarm an arbitrator with unconstrained discretionary powers. Many decisions as to procedure will also flow from differences in party preferences. It is the role of the arbitrator to then utilise residual discretions to promote a fair and efficient outcome. Choosing a mechanism in the face of disagreement between the parties should *ipso facto* be treated in the same way as where a tribunal selects a place for hearing, contrary to one party's preferences. This has survived a challenge in response to an ICC arbitration.[32] Those arguing for or against greater use of online processes should have to provide their reasoning and engage with the contrary arguments of the opposing party where there are no constraints on a tribunal's discretion in that context. This may also be impacted upon by rules that impose obligations of good faith on the parties. This may relate to the evaluation of the justification for refusing consent to a procedural option where no viable alternative exists.

It is nonetheless important to manage such procedural disagreements in a way that gives each party the optimal chance to present its reasoning and ultimately maintain respect for the tribunal even by a party that was not preferred under the procedural ruling. In many instances, a practical and forward-looking tribunal will not need to resolve a head-on procedural disagreement, but may instead find a practical solution that alleviates the concerns of a reluctant party.

For completeness, one should also consider an extreme hypothetical – the third situation – where both parties are averse to the use of online proceedings, but where the tribunal considers that this would be the only reasonable way forward. That might arise where a tribunal is alert to express duties of expediency and efficiency and sees strict time-limits for the final award fast

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online dispute resolution, given that a number of courts around the world have been trialling such initiatives for some time. While care should always be taken to consider whether a model that works well in one dispute resolution forum could readily be transplanted fairly and efficiently into a different environment, nevertheless, it can only be helpful to give some attention to court models and experiences when considering optimal arbitral processes. Here again, Bateson's article gives direction to the reader. *See* Bateson, *supra* note 2.

[31] Prosecutor v. Mucic & Landzo, Case No. IT-96-21-T, Decision on the Motion to Allow Witnesses K, L and M to Give their Testimony by Means of Video Link Conference, ¶ 15 (Int'l Crim. Trib. for the Former Yugoslavia May 28, 1997); Prosecutor v. Tadić, Case No. IT-94-1-T, Decision on the Defence Motions to Summon and Protect Defence Witnesses and on the Giving of Evidence by Video-Link, ¶ 2 (Int'l Crim. Trib. for the Former Yugoslavia June 25, 1996). *But see* the contrary concern as to problems in assessing witnesses' demeanour in Prosecutor v. Zigiranyirazo, Case No. ICTR-2001-73-T, Decision on the Defence and Prosecution Motions Related to Witness ADE, ¶¶ 12, 32 (Int'l Crim. Trib. for Rwanda Jan. 31, 2006).

[32] Salini Costruttori S.P.A. v. Fed. Dem. Republic of Eth., Addis Ababa Water & Sewerage Auth., Case No. 10623/AER/ACS, Award Regarding the Suspension of the Proceedings and Jurisdiction (ICC Int'l Ct. Arb. Dec. 7, 2001); JEAN-FRANÇOIS POUDRET & SÉBASTIEN BESSON, COMPARATIVE LAW OF INTERNATIONAL ARBITRATION 116, ¶ 146a (2d ed. 2007).

elapsing. One could at least envisage arguments that a tribunal might wish to invoke a duty of efficiency to urge use of online processes where there is no end in sight to the pandemic.

Nevertheless, a tribunal can only ignore an express procedural agreement of the parties if such agreement offended against mandatory due process norms or retrospectively sought to undermine the arbitrators' agreement with the parties.[33] It would not be easy to envisage a simple refusal to engage in online proceedings as being of this nature. All such an agreement would do is that it would delay the process until such time as face-to-face hearings were permitted once again. If both parties want to defer a result for an indefinite period, why should they be prevented from doing so, even if that meant that the time for the award elapsed? They can agree to abandon a process, so why can they not agree to let time run out? It would also be rare for a tribunal to have grounds for resignation in such circumstances, although hard and fast rules should always be avoided. The closest scenario to one where required norms conflict is indeed where a time-limit for the award cannot be extended and where physical presence is called for by the parties which is not possible during the pandemic. Attention might then be given to the additional question as to whether that is a force majeure event vis-à-vis the arbitration agreement.[34]

If there are in fact mandatory norms that prevent or limit virtual hearings, the next question is whether these can be waived. Conceptually, the notion of a mandatory norm is one that cannot be waived by private parties, but the key is the discretionary nature of Article V of the New York Convention. Even if a ground is made out, a court may enforce the award nonetheless, and is likely to do so if a party has waived its right to complain about a virtual hearing procedure. Gary Born points to various national laws in support of the principle that procedural protections may be waived. He argues that this is required to support the arbitral process and party autonomy.[35]

Where waiver is concerned, a related question is whether the party has made any protest at the time of the online proceedings. A number of rules or laws indicate that objections as to procedural unfairness need to be taken in a timely manner, otherwise the right to object is lost.[36] A number of enforcement courts have refused to allow an Article V(1)(b) challenge where no protest was made at the time of the subsequently challenged procedure.[37]

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33 For example, parties cannot ex post facto agree to extend the time for a hearing after contractually agreeing with arbitrators for a flat fee in relation to a shorter arbitration.

34 That may be uncertain, including as to the applicable law of force majeure or frustration.

35 GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 2186–2187 (2d ed. 2014).

36 *See, e.g.*, Arbitration Act 1996, c. 23, § 73(1) (Eng.).

37 Oberlandesgericht Hamm [OLG] [Higher Regional Court of Hamm], Nov. 2, 1983, 20 U 57/83 (1983) (Ger.); Hanseatisches Oberlandesgericht Hamburg [Hans OLG] [Hanseatic Higher Regional Court Hamburg], Jan. 26, 1989, 6 U 71/88 (1989) (Ger.); Int'l Standard Elec. Corp. v. Bridas Sociedad Anonima Petrolera, Indus. y Comm., 745 F. Supp. 172 (S.D.N.Y. 1990) (U.S.); Shenzhen Nan Da Indus. & Trade United Co. Ltd. v. FM Int'l Ltd., [1992] 1 H.K.C. 328 (H.C.) (H.K.); K Trading Company (Syria) v. Bayerischen Motoren Werke AG Bayerisches Oberstes Landesgericht [BayObLG] [Bavarian Higher Regional Court], Sept. 23, 2004, 4Z Sch 05-04, 30 Y.B. COMM. ARB. 568 (2005) (Ger.); Oberlandesgericht München [OLG] [Munich Higher Regional Court], Nov. 28, 2005, 31 Y.B. COMM. ARB. 722 (2006) (Ger.); Oberlandesgericht Karlsruhe [OLG] [Karlsruhe Higher Regional Court], Mar. 27, 2006, 32 Y.B. COMM. ARB. 342 (2007) (Ger.); AO Techsnabexport v. Globe Nuclear Servs. & Supply GNSS Ltd., No. 09-2064 (4th Cir. Dec 15, 2010) (U.S.).

IV. Selection of arbitrator and proactive arbitrator behaviour

It is always important for parties to select arbitrators that have the necessary skill set to deal with all aspects of their dispute. Where online processes are concerned, that involves arbitrators with a sufficient understanding of the technical issues and potential due process challenges and the willingness to work with the parties to find mutually agreeable processes that ensure fairness and promote efficiency.[38]

One contentious aspect of an ideal arbitrator, at least where common law counsel are concerned, is as to how proactive an arbitrator needs to be. There is never likely to be consensus as to the degree to which an arbitrator should choose to lead the parties, as opposed to sitting back and merely umpiring their respective submissions. Current responses to the on-going COVID-19 pandemic and ODR generally heighten these questions. Some propositions are hopefully less contentious. I would argue that while many tribunals may sit back and rely on counsel where legal arguments are concerned, the same cannot be said for the design and security of online processes. Tribunals have a duty to promote fairness and efficiency and cannot rely on the lack of expertise or lack of interest of counsel or the parties to justify suboptimal use of online processes or to justify a failure to even consider their use when there are major disruptions to the normal way of doing things.

ODR allows tribunals to act in a more inquisitorial manner, identifying discrete issues and stipulating an order and method for their analysis. While this has been the norm in civilian legal systems, this also mirrors the trend under common law litigation where it is more and more the case that legislators direct judges to engage more actively in case management and to use principles of proportionality to deal fairly and efficiently with all disputes.[39] ODR means that we no longer need to see a final hearing as an all or nothing model for dispute resolution. At the very least, we should not set procedural stages without first considering whether one single hearing will indeed be the ultimate element of the process. Too often, larger arbitrations work back from the tribunal members' calendars to see the earliest time that such a hearing is possible,[40] and then set stages beforehand accordingly. But if people do not have to congregate in one foreign place, there is no longer any necessity to have all witnesses and oral submissions presented at the same time. Virtual hearing times might well be broken into discrete parts when international travel and hotels are no longer an issue. In some cases, there would be added benefits, for example, separating out fact witnesses and then giving experts the time to consider their testimony before themselves giving evidence, if the latter testimony would benefit from such reflection and analysis time.

Arbitrators should also be prepared to propose hybrid models where some matters can be dealt with on the paperwork, through contemporaneous documents and written submissions, with online hearings kept for witness examination and perhaps expert witness conferencing, and only necessary questions posed to counsel. Tribunals should understand, as should counsel, that

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[38] A question then arises as to whether a proposed arbitrator could be successfully challenged for lack of technological expertise if a virtual hearing is inevitable. That would be unlikely and even less so when backed by a competent institution that can provide all necessary support and infrastructure.

[39] Lord Woolf CJ, *The Woolf Report*, 3 INT'L J. L. & INFO. TECH. 2, 144, 145–155 (1995).

[40] And the more famous and busy each arbitrator, the more distant will be the earliest significant intersection between their free spots on their calendars.

written submissions will often be the best way to present complex and competing arguments about an established evidentiary framework, while in-person discussion is the best way to explore matters of remaining concern to the tribunal. Tribunals can also consider greater use of summary disposition where possible or promoting agreed statements of fact and retaining oral cross-examination and submissions only where these remain optimal processes.

There may also be a difference between how to best establish procedures for new cases and, alternatively, how best to deal with existing cases with already agreed face-to-face hearings that have been adversely impacted by the pandemic. Where modifications are made to existing arbitrations that were never intended to be conducted virtually, tribunals need to be sensitive to the need to allow parties to familiarise themselves with the options and be given a meaningful opportunity to form their views as to their preferences. Where a virtual hearing is a modification to a previous procedural order, the agreed modification should also be properly documented. A tribunal should at least invite any party to raise any procedural concerns as soon as they are perceived to arise. The tribunal might also invite parties to attest to their agreement to a virtual hearing in writing and to waive, where possible, their right to challenge by reason of the mechanism alone.

V. Virtual arbitration and the stages of the arbitral process

One court-based study has strongly suggested that the effectiveness of new technologies will be very dependent on the way the adjudicatory processes are modified to best accommodate them. In a study of Australian courts and their use of video, the researchers reported two major findings:[41]

> "*Firstly, the way in which video-link technology is implemented has a real impact on service delivery, and therefore justice outcomes; how video links are used, their design and operation, matters.*
>
> *Secondly, a successful video linked court encounter requires careful consideration of the technology, environments, personnel, protocols and legislation that enable their use. These factors work together and none of them should be ignored or viewed in isolation. The type of the remote participant, the reason for their remote participation, and the nature of the remote space from which they appear, are key factors in determining the way in which these components should be configured to achieve the best results (…)*"

These findings should lead arbitrators to accept that with their first experiences, they are less likely to be expert at managing the processes or dealing with nuances in the challenges that arise. The balance of this editorial considers some of the more significant practical steps that might be utilised throughout an arbitral process. As always, the guiding criteria should be ensuring fairness and equality on the one hand and promoting efficiency wherever possible.

A. Preliminary conferences and cyber-protocols

A pre-hearing conference should cover all aspects of technological preparedness. Normally that might be limited to counsel but could instead consider bringing in necessary users such as parties, key witnesses, and interpreters or stenographers to confirm equipment and protocols. The tribunal might also need a technical manager to be involved.

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[41] E. ROWDEN, DAVID TAIT, DIANE JONES, ANNE WALLACE & MARK HANSON, GATEWAYS TO JUSTICE: DESIGN AND OPERATIONAL GUIDELINES FOR REMOTE PARTICIPATION IN COURT PROCEEDINGS 10 (2013).

There can be side benefits from logistical challenges. Providing instructions for online processes might allow tribunals to give parties better guidance as to the essence of the arbitral process. Instead of a pro forma Procedural Order No. 1 speaking primarily to lawyers, there could be better materials directed at a broader audience of stakeholders explaining the purpose of each step and the way they will be dealt with in an online format. It is always ideal to develop procedures in consultation with the parties, both to promote agreement wherever possible, and also to allow all stakeholders to bring useful insights into the analysis. Ideally, a tribunal would help the parties develop a cyber-protocol. A tribunal ought to explain to all participants the pitfalls and recommendations for virtual presentation. The ICC Guidance Note sets out a checklist for a cyber-protocol and suggested clauses on matters to be agreed or directed.[42] It is important that each participant has appropriate responsibility for certain aspects. For instance, it should be the responsibility of each party to identify any local laws that provide barriers to virtual proceedings.

While the need for adequate preparation is clear, conversely, it is also important to ensure that there should not be undue concern for technological matters. One could envisage situations where costs and delay are increased simply through debates about technological matters.

B. Equipment and equality

One challenge is to consider which platform works best for any particular dispute. If the arbitration is institutional, chances are that the particular institution has selected a particular platform. If that is not the case, the parties could be invited to seek agreement. Parties would hopefully wish to select a platform that integrates well with online document management systems.

In the absence of any other direction, arbitrators should at least consider the advantages and disadvantages of different alternatives. Tribunals should ensure that, if they make suggestions as to any platform or document management system, they are not liable for any defects. The parties themselves should ensure adequacy. At most, the tribunal should direct minimum specifications. Each platform will also have its own contractual conditions of use, which should be read by all and confirmed as agreeable.

Where parties suggest different platforms, there is a difficulty in having the tribunal make a selection if that means that a preference is given to a program familiar to one party but not the other. Choosing a neutral platform may simply mean that both parties face efficiency concerns. Selection of a platform should also not disadvantage a participant with less technological capability. An important question is whether parties have equal technological equipment and expertise. A related question is whether one party would need to purchase additional equipment and/or software and if so, how could such costs be accommodated within any ensuing arbitral award.

A protocol should direct the minimum standards of equipment, for example, barring any person from relying solely on smartphones. A protocol can include minimum standards of video

[42] ICC Guidance Note, *supra* note 21, annex - I, II.

bandwidths and upload and download speeds.[43] Wired or wireless and password protected internet connections could also be directed. Consideration needs to be given as to whether to mandate the use of headsets with microphones to maximise audio quality or allow parties their own preferences. Without headphones and microphones there is unlikely to be a perfect mix between sufficient distance to the camera for comfortable and wide-ranging vision and closeness for audio clarity. If multiple devices are being used, it is important to ensure that only one is ever un-muted. Volume should be set to avoid audio feedback. Ideally, participants should try and avoid natural light in the room.

Participants should confirm suitable equipment and test it.[44] They should confirm that directed alternative mechanisms are properly established and that privacy and agreed confidentiality are to be maintained. Parties might promise each other that all necessary tests have been undertaken prior to a formal hearing. A tribunal might direct the parties to undertake training programs provided by commercial platform sources. Alternatively, a test run could be organised by the tribunal or by the hearing administrator. Such tests should cover all potential steps that might be taken during the proceedings. Guide notes should be provided as to how to deal with all key processes. If at all possible, a test session could have everyone available at one time and work through a checklist of potential steps that might be taken during the hearing itself. Aspects that may need to be tested include means of displaying multiple screens, screen sharing, audio muting, transfers between waiting, hearing and breakout rooms, document access, communal chats, inviting non-participants, and control panel features generally.

C. Control

Platforms will typically have a host with controlling powers, which should, wherever possible, be the presiding arbitrator or a secretary or a hearing administrator under the presiding arbitrator's control.

There is a need for identification and log-in details of all relevant persons whether tribunal, parties, counsel, fact and expert witnesses, interpreters, transcribers, and technical and support staff. Any platform selected must allow for proper verification of the identity of participants. The host should monitor participants, being able to note when each is offline or online, to ensure that the required persons are indeed available. Once all designated persons are in attendance, the tribunal may lock the meeting. The tribunal will also need to have sufficient technological control over the processes, for example, being able to mute parties when appropriate. It may be difficult to ensure proper sequestration of future witnesses, if that is ordered by the tribunal, but thought should be given to how best to do so. All proposed attendees should have notified the tribunal of their intentions and modes of access prior to any hearing.

Whatever processes are selected, it is important to consider what might go wrong. The first and simple step addressed above is to test any hardware and software prior to formal use in the proceedings. There still needs to be a speedy method to notify a lack of connection as soon as it

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[43] *See, e.g.*, Korean Commercial Arbitration Board (KACB) International, Seoul Protocol on Video Conferencing in International Arbitration 2020, art. 5, annex. - I, *available at* http://www.kcabinternational.or.kr/user/Board/comm_notice_view.do?BBS_NO=548&BD_NO=169&CURRENT_MENU_CODE=MENU0025&TOP_MENU_CODE=MENU0024 [*hereinafter* "Seoul Protocol"]; ICC Guidance Note, *supra* note 21, annex. - II.

[44] ICC Guidance Note, *supra* note 21, app. II, cl. II, IV.

occurs. Reports via email should be sent to all registered participants. Often, connection problems are not black and white, and may simply arise from delays in the process or human error in clicking the wrong button. It may be appropriate to have a designated period before connection failures are reported. Where faults arise because of the inexperience of stakeholders, expert platform managers can often view multiple screens remotely and talk users through what is required to regain access. Ideally, parties might agree on a fallback platform or teleconference link to ensure minimum downtime, should there be problems with the primary platform. The Seoul Protocol on Video Conferencing in International Arbitration ["**Seoul Protocol**"] proposes that parties maintain similar "*cable back-ups, teleconferencing, or alternative methods of video/audio conferencing*".[45]

It is appropriate to have a waiting room as people log on so that the tribunal can admit all participants to the hearing room concurrently and not be in a position of being seen speaking to one side alone. After parties are in breakout rooms, there again needs to be a mechanism to have all parties return to the hearing room at the same time. If there are to be breakout rooms, there need to be mechanisms to ensure that there is no inadvertent access by unauthorised persons.

The parties should make clear that they agree to the tribunal's discretion to terminate a virtual hearing if it is believed that the current process is unfair to one of the parties.

D. Etiquette

Some unique etiquette issues may need to be addressed. It is important to set etiquette standards and ensure that the tribunal is indeed acting as the master of ceremonies.[46] For example, online hearings will tend to find people speaking over each other without intending to do so. Participants should not attempt to multitask such as checking emails. It is useful to turn off other computer applications not needed for the hearing. Computers used for the video link should not be used for other purposes such as making notes.

E. Cybersecurity

Normally one would expect the parties to organise all logistical details at the tribunal's directions. However, one area where tribunals have quickly come to understand that they have new duties is in relation to cybersecurity. There are three elements to cybersecurity. The first is compliance with any applicable domestic data privacy regulations. Participants in arbitration should be aware that they may have obligations under domestic data protection laws regardless of the arbitration obligations themselves.[47] The parties should be asked to indicate whether there are any such provisions that are relevant. The second aspect is the privacy of the arbitral process itself. The parties should expressly confirm that proceedings are private. The third is the protection of confidential information made available during the process.

There may also be problems if there is to be improper recording by any of the participants. Thought needs to be given as to whether online proceedings shall be recorded or should, in due course, be transcribed. Recordings must be promptly distributed to all appropriate persons. A

[45] Seoul Protocol, *supra* note 43, art. 6.2.
[46] ICC Guidance Note, *supra* note 21, cl. 4.
[47] INT'L COUNCIL FOR COM. ARB. & INT'L BAR ASS'N, THE ICCA-IBA ROADMAP TO DATA PROTECTION IN INTERNATIONAL ARBITRATION – PUBLIC CONSULTATION DRAFT FEBRUARY 2020, *available at* https://www.arbitration-icca.org/media/14/18191123957287/roadmap_28.02.20.pdf.

tribunal is in a difficult position if one party wishes to separately record proceedings but the other opposes that option. It is important to have appropriate confidentiality obligations formally agreed to.

If electronic documents are confidential, they would need to be password protected. Passwords should be provided by a different mechanism to the email invitation to the platform. Calendar invites should not give access to information in an unsecure form. Members of each team need to ensure that passwords shared with others are done so in a secure fashion. Another possibility is to connect through a virtual private network.

Some platforms have already admitted that they were, temporarily at least, insufficiently secure. Arbitrators need to keep up to date with such information, in particular to avoid recommending a platform that allows for such problems. A tribunal must, at the very least, ensure that online communications between a three-person tribunal and/or a draft of procedural orders or awards are totally secure.

F. Timing

Differing time zones must always be considered, and tribunals should seek to ensure that no single party seems to be significantly disadvantaged. Tribunals should even be alert to how they describe time, given that there will be differing time zones represented.

Time allocated to virtual hearings should allow for some degree of administrative delay, confusion, or human error. As participants are likely to be doing other things on relevant days, there is a greater risk of persons misjudging commencement time. The tribunal should indicate how much before the scheduled start time persons must log on. Given the greater potential problems with online proceedings, the common practice of having a reserve day or two for oral hearings seems sensible, although catch-up may not be needed as promptly. The time devoted to online proceedings may also need to take into account people's attention span. Where chess-clock arbitration is being utilised, it ought to be possible to have a common stopwatch displayed.

G. Mediation and settlement

The optimal solution to most disputes is a mutually agreeable solution. Proactive arbitrators will often think about how to encourage settlement, either by inviting direct negotiations or via mediation. Some arbitrators will encourage parallel mediation, either to obviate the need for an award or to deal with discrete aspects that do not justify the expense of arbitration. This may even be done to deal with certain procedural aspects such as disputes over document production. Arbitrators active in this manner should give the same consideration to the benefits and pitfalls of online mediation as they would to an online arbitration itself. There must be some added barrier to a negotiated solution if counsel and parties are not drawn together at the time of the hearing, perhaps discussing matters in the corridors and looking for a mutually agreeable solution, as they see arbitral costs escalate.[48] A proactive tribunal can at least invite parties to have regular conversations exploring such possible avenues.

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[48] Carrie Menkel-Meadow, *Is ODR ADR? Reflections of an ADR Founder from 15th ODR Conference, The Hague, The Netherlands, 22–23 May 2016*, 3 INT'L J. ONLINE DISP. RESOL. 4, 7 (2016) (Carrie Menkel-Meadow notes the value in face-to-face procedures providing "room to brainstorm and create a different solution, give an apology, come to understand someone else's perspective and improve, rather than just 'resolve' relations and disputes.").

H. Ethics and ODR

Differences in views about ethics may come to the fore with certain questions about online preparation and behaviour. Arbitrators must be prepared for the fact that a small but not insignificant number of parties might engage in unduly aggressive tactics for strategic purposes. Sometimes such behaviour seeks to escalate costs that would be more damaging to one's opponent. In other circumstances, a party who expects to lose may seek to draw out proceedings as long as possible. Contests as to the use of new technologies can be a fertile ground in which to try and manipulate the process in that way. There is the potential for parties to call for delays and extensions simply as a result of the pandemic and rely on claims of technological failure. It may be desirable to utilise a commercial manager, particularly if they can accurately determine whether any breakdown is legitimate or not.[49]

On the other hand, it is important to not generate undue ethical concerns about matters that also permeate live hearings, for example, the possibility of unauthorised secret recordings, which any unscrupulous counsel can do in an in-person hearing with a smartphone.

I. Document management

As noted above, it would be desirable for the virtual platform to work well with the electronic management of documentation. Given that physical bundles may not be available in each key place, some special concerns may need to be addressed. Methods of identifying documents should be the most efficient for actually accessing electronic data management platforms. Thought should be given as to how to access more than one document at any point in time, particularly when sourced from different avenues. Size of electronic document files is also important. If too large, it can be difficult to manage or even send via email. Effective document management also must involve integration of written submissions. Arbitrators need to be able to link to necessary supporting material with ease. If presentation slides are to be used, these also need discrete visuals that do not override the views of key faces.[50]

J. Witnesses and cross-examination

There are two elements to cross-examination within ODR. The first, alluded to above, is whether a denial of the right to cross-examine in the same room is somehow a denial of the right to fully present one's case or is contrary to general procedural models that do not express a position either way. The second element is, if cross-examination in ODR is not proscribed, what is the way for a tribunal to structure any virtual witness process to promote fairness and efficiency and minimise the chances of any due process challenge.

As to the first, it was suggested above that an online dialogue is indeed a 'hearing' and is also 'oral.' More debatable is whether that is also 'in person.' The better view should be in the affirmative. Nevertheless, those seeking to argue the contrary might gain support from unlikely

[49] In addition to the question of counsel ethics, even arbitrators might benefit from thinking about their own efficiency obligations. Arbitrators with the busiest practices that have been disrupted by the pandemic will need to carefully consider their ethical obligations when rescheduling hearings. One systemic concern might be that the busiest arbitrators may feel able to take on even more work in the hope that they can sneak the odd witness in-between other time-consuming activities.

[50] At the end of a normal hearing, it is easy for the party owning documents to remove them and deal with them as they wish. If physical documents have been delivered to opposing witnesses and counsel in a virtual hearing, steps might need to be taken to ensure proper disposal.

sources that would perhaps be misused in this context. Without referring to video evidence, Born suggests that "*it is almost uniformly accepted and reflects sensible policy: the opportunity to present its case, in person and in the physical presence of the tribunal, is a basic, irreducible aspect of the adjudicative process which ought in virtually all cases be fully respected*".[51] He also notes and criticises contrary U.S. authority that would readily allow video evidence under the concept of an oral hearing.[52] Confusion remains, as the logic in that case can indeed be criticised. The Court suggested that an arbitrator "*hears evidence by providing a 'legal hearing,' that is, by affording an 'opportunity to … present one side of a case'*". This is obviously going too far in the other direction – allowing a documents-only hearing when an oral hearing has been called for.

The better view remains that a properly conducted online cross-examination should be acceptable. Other courts have also supported video cross-examination,[53] including the Indian Supreme Court.[54] Those more reluctant have suggested that physical presence before the adjudicator and one's opponents supports an understanding of the solemnity, gravity, and importance of truth-telling.[55]

During the pandemic, any solution must also be compared to alternatives. Written questions and answers seem an undesirable alternative as one would expect that answers would simply be drafted by counsel. Alternatively, merely delaying proceedings will often breach duties of expediency and efficiency and can run into time-limits for awards.[56]

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51 BORN, *supra* note 35, at 2266.

52 Schlessinger v. Rosenfeld, Meyer & Susman, 47 Cal. Rptr. 2d 650, 656 (Cal. Ct. App. 1995) (U.S.) ("… the arbitrator's obligation 'to hear evidence' does not mean that the evidence must be orally presented or that live testimony is required." "Legally speaking the admission of evidence is to hear it.").

53 *Polanski v. Condé Nast Publ'ns. Ltd.* [2005] UKHL 10, [13] (Eng.) (the U.K. House of Lords did not consider that video conference cross-examination was itself prejudicial); *see also* Ian McGlinn v. Waltham Contractors Ltd. & Ors. [2006] EWHC 2322 (TCC) (Eng.). Canadian courts have also been receptive. *See, e.g.*, the Ontario Superior Court in Arconti v. Smith, 2020 CanLII 2782 (Can.) and Chandra v. CBC, 2015 CanLII 5385 (Can). In Australia, consideration is directed towards what will ultimately "best serve the administration of justice… [whilst]... maintaining justice between the parties." *See Kirby v Centro Props.* [2012] FCA 60 (Austl.); *Tetra Pak Mktg. Pty Ltd. v Musashi Pty Ltd.* [2000] FCA 1261, ¶25 (Austl.) (wherein Katz J. concluded that there was "a strong current of authority in favour of permitting the relatively new video-link technology to be used, in the absence of some considerable impediment telling against its use in a particular case."); *Capic v Ford Motor Co. Australia Ltd. (Adjournment)* [2020] FCA 486 (in this recent case before the Australian Federal Court, Perram J. considered that while video cross-examination might interfere with "chemistry" and "formality," it was acceptable on the facts of that case). *See also* the Evidence (*Miscellaneous Provisions) Act 1958* (Vic) § 42G (Austl.) (which provides the minimum technical requirements that must be met before a court may direct that a witness give evidence by video-link).
Entitlement has been refused where the witness provided no reason for non-attendance and the evidence went to a key issue (*Campaign Master (U.K.) Ltd. v Forty Two Int'l Pty Ltd. [No. 3]* (2009) 181 FCR 152 (Austl.) [*hereinafter* "Campaign Master"]) or where the witness' evidence was highly controversial and required interpretation (*Stuke v ROST Capital Grp. Pty Ltd.* [2012] FCA 1097 (Austl.)).

54 State of Maharashtra v. Praful B. Desai (Dr.) (2003) 4 SCC 601 (India)(wherein the Court considered that when technology works well, credibility can be adequately assessed).

55 Campaign Master, [2009] FCA 1306, ¶ 78 (Austl.).

56 Domestic courts have supported video-link because of logistical difficulties of bringing witnesses and their attorneys from one country to another (Dist. Ct. of the D.C. in U.S. v. Philip Morris USA, Inc., Civ. App. No.- 99-2496 (GK), 2004 WL 3253681, at *1 (D.D.C. Aug. 30, 2004) (U.S.) or because of the inability of witnesses to travel for health reasons. These circumstances were seen as constituting "*good cause*" and "*compelling circumstances*" (Dist. Ct. of Conn. Sawant v. Ramsey, No. 3:07-CV-980 (VLB), 2012 WL 1605450, at *3 (D. Conn. May 8, 2012) (U.S.). In the Singapore International Commercial Court case of Bachmeer Capital Ltd. v. Ong Chih Ching [2018] S.G.H.C. (I) 01 (Sing.), the Court permitted one witness to give evidence by video link on the grounds of inability to obtain passport and permission to travel to the place of hearing.

Some common law commentators suggest that arguments against the use of videoconferencing for cross-examination purposes seem stronger where issues of credibility are concerned. An important issue, then, is to consider more generally when and why the demeanour of a witness is relevant and if so, how can this be validly assessed by an adjudicator. Leggat J. in *Gestmin SGPS SA*[57] considered that in commercial cases, little reliance should be placed on witness recollections, and instead, factual findings and inferences should be drawn from documentary evidence and known or probable facts.[58] There also remains a healthy debate as to whether questions going to credibility alone are appropriate for international commercial arbitration on all but the rarest of occasions. Many would argue that general challenges to credibility, where it is not otherwise an obvious issue, are less appropriate for arbitration. Human beings do particularly badly on psychological tests directed at discerning whether they can detect when a person is lying, so the presumption as to this supposed value of cross-examination is questionable.[59]

While there should not be successful per se challenges to video cross-examination unless the use of videoconferencing is expressly proscribed, there are a number of matters that should be considered by tribunals and counsel. Witness preparation has an added dimension whereby counsel should familiarise witnesses with the technology to be employed. Experienced counsel might be concerned to have adequate visuals both as to the witness and also as to the tribunal, to gauge the latter's reaction to the flow of the discussion. A related question is whether the camera must be on each arbitrator at all times so that counsel can view their facial reactions as an element in optimising submissions. The ability of counsel to evaluate the body language of witnesses and the receptiveness or otherwise of a three-person tribunal may also be impacted by whether the tribunal sits in one place, with only two screens to be viewed by counsel or instead, is fully separated. Where common law style cross-examination is concerned, there may potentially be greater difficulty in assessing body language depending on the technological quality and set-up, any technological delay that breaks the flow of questioning and even slight but annoying delays between the audio and the video. All can adversely impact the ambience of the process.[60] Live text may assist the process when there is any diminution in the quality of the audio output. Expert witness conferencing (sometimes described as 'hot-tubbing') is likely more problematic where all persons are physically separated.

If the tribunal would normally administer an oath or seek some affirmation of truthfulness from a witness, consideration might also be given to asking the witness to affirm that no unauthorised communication would take place and no unauthorised materials would be accessed during their testimony. If oaths or affirmations are to be utilised, care should be taken to ensure that local law does not negate an online form. The relevant witness should also have ready access to the required documentation if some is needed.

An important aspect is to ensure that no party gains improper assistance when utilising video or phone connection for cross-examination purposes. Natural responses are to organise dual cameras to show both the room and the witness, and ideally, where circumstances permit, to

57 Gestmin SGPS SA v. Credit Suisse (UK) Ltd. & Anr. [2013] EWHC 3560 (Comm) (Eng.)
58 *Id.* [15]–[23].
59 See ROBENNOLT & STERNLIGHT, *supra* note 6.
60 To many civilian scholars and practitioners, this is less a problem with the medium than a pointer to the problems with cross-examination per se.

have an observer from the opposing party's camp or at least from a neutral source, to ensure no improper assistance is given in answering questions. Neutral observers are, of course, problematic in the time of COVID-19. Institutions in one jurisdiction could invite those in others to host witness cross-examination to ensure integrity. Parties should agree that the tribunal may take whatever steps it wishes to ensure proper security. Given that witnesses should not have notes when being cross-examined, other than the authorised ones, it is preferable that they give evidence in front of a computer on a clear desk. Venues for witness cross-examination might be directed to be neutral.[61] Conversely, witnesses may feel more comfortable when in their own natural environment. They may feel less intimidated than they would with the plethora of counsel often present in significant-sized arbitrations.

There is also an issue as to how cross-examining counsel presents a document to a witness during cross-examination. It is important for the tribunal to establish a process that allows key documents to be considered at the same time that witnesses are cross-examined about them. Separate cameras or split screen programs must all be optimised for this to occur. Physical bundles may suffice, or a technician might be utilised to *send* documents to all necessary screens. Opposing counsel who wish to put hard copy documents in front of the witness being cross-examined might send the hard copies in a sealed envelope to be opened on camera.

It would be unfortunate if witnesses seem more engaging if they are better able to concentrate on the camera point than on the screens where the listener is visible. Ideally, a camera can be placed mid-screen so that one appears to be looking directly at the listener. A tribunal might even indicate a protocol as to how far away one should be from the screen to ensure that all witnesses and counsel are at an optimal distance and do not look too different in approach. Even identical background protocols for witness examination might be desirable. With some platforms, there is also the potential to digitally enhance one's image. This should be barred. A related issue is whether the cross-examining counsel can call for the witness to position themselves closer to the camera so facial expressions can be better gauged. Arbitrators who believe that they would never be affected by such differences could readily find respected general psychological studies as to human biases that at least suggest contrary hypotheses.

K. Translation, interpreters, and stenographers

The need for interpretation and translation slows down hearings in any event. Cross-examination via an interpreter can be even more problematic when videoconferencing is concerned. There is a need to consider whether translation will be simultaneous or consecutive. Interpreters and transcribers are particularly disadvantaged when different people attempt to speak at the same time. Interpreters and transcribers would need a discrete method of communicating with the tribunal. If live transcript is to be utilised, it is preferable to display it on a different device to that which is used for visuals.

L. Oral submissions

Regardless of the potential for ODR, tribunals should consider the utility of oral openings and post-witness closing oral submissions. As to oral openings, it is problematic to hear counsel outline a case for many hours and sometimes days, if the tribunal is properly prepared, has read

[61] *See, e.g.*, Seoul Protocol, *supra* note 43, art. 2.1(c).

all written submissions and witness statements, and simply wishes to hear the results of testing of the witness testimony and orally explore matters of remaining uncertainty. Similarly, if post-hearing written briefs are to be allowed, only the briefest oral recap of matters considered at a hearing would seem worthwhile. In some cases, an earlier opening might allow all parties to carry out their preparation more efficiently.[62]

Another potential scenario discussed above is where one party's counsel can be present, but the other's may not. It was suggested above that this is problematic either way. The choice is between the appearance of favoured circumstances for one versus lowest common denominator for both.

M. ODR and side-communication and consultation

Due process and a full opportunity to present one's case should include adequate means for separated parties and counsel to be able to regularly confer before, during, and after proceedings. During proceedings, there ought to be separate secure communication platforms. Some platforms provide for virtual breakout rooms that are password protected and with their own videoconferencing options. Counsel in different locations may need some form of distinct communication mechanism to provide thoughts and suggestions for further questions or submissions. If counsel, parties, and advisers are discussing matters remotely, perhaps by chat rooms, a tribunal may need to give them time to allow comments to be read and synthesised where concurrent links are unavailable. There may also need to be channels for communication between opposing counsel. Some platforms may not allow for arbitrator chat, requiring instead that parties be put into a waiting room while the tribunal wishes to confer.

Each team should indicate exactly what method they seek to use for private communication. Only methods approved by the tribunal should be permitted. Chat windows with the tribunal should be open to all and there should be no ex parte communications with the tribunal or between counsel and witnesses during their testimony. Tribunals should direct that there be no communication with witnesses during breaks in cross-examination. Because breaks in technology might be inadvertent, such warnings should be given at the outset of each witnesses' testimony.

Where counsel wishes to object to a question, it would be desirable if there was a simple flagging method, otherwise parties would be speaking over each other.

N. Costs

Tribunals may need to consider how to deal with disparate technology costs between the parties. Proportionality principles dealing with value and complexity may then be further impacted by both the level of technology costs and any disproportionate distribution.

O. Deliberations and awards

Where three-person tribunals are concerned, there may well be a difference between the interpersonal communication when all are temporarily living in a neutral venue, for example, dining together regularly, as opposed to the more remote ambience of online proceedings from separate locations. It is not clear whether the likely lesser interpersonal connection has any

[62] Neil Kaplan, How we must adapt to covid-19, GLOB. ARB. REV. (Mar. 29, 2020), *available at* https://globalarbitrationreview.com/article/1222179/kaplan-how-we-must-adapt-to-covid-19.

meaningful impact on the justice or otherwise of the outcome. Technology can still allow tribunals to regularly confer as to the progress of the hearing.

Tribunals will need to be careful about the rules for signature of hard copy of awards, whether members of the tribunal can sign counterparts in different places or electronic signatures will suffice.

VI. Conclusion

Some criticisms of online hearings flow from views about optimal procedure that are themselves subject to dispute, particularly as between different legal families. For common law advocates trained to test credibility in cross-examination, anything other than the face-to-face theatre of experienced Queen's Counsel against inexperienced fact and expert witnesses is problematic. Conversely, the more proactive a tribunal, the more likely that online processes can achieve most of what face-to-face hearings can do and can, in turn, save time and expense. Importantly, for significant-sized arbitrations, those typically in the tens of millions of dollars and above, the parties must be able to access the most sophisticated video technology that negates the most simplistic challenges about body language and visualisation of witness behaviour. In the short term, whatever one's philosophical views, necessity will be the mother of invention. We can all strive to also make a virtue of that necessity and continually work towards ever more efficient and fair arbitral processes. In this case, by using the best that technology has to offer to question and improve upon traditional processes.

A TRAP FOR THE UNWARY: DELINEATING PHYSICAL AND LEGAL PROTECTION UNDER FULL PROTECTION AND SECURITY CLAUSES

Thomas Snider* & Aishwarya Nair†

Abstract

*This article considers the scope of protection accorded by the full protection and security [“**FPS**”] standard and the potentially inadvertent impact of the wording of certain FPS clauses on this scope. Based on a review of the FPS clauses in model bilateral investment treaties [“**BITs**”] issued by 45 countries around the world, this article identifies a growing trend towards limiting the scope of FPS clauses to providing physical protection and security and assesses the typical styles of drafting such FPS clauses. This article concludes, with the support of investment arbitration awards, that broadly-worded FPS clauses – even if expressly limited to physical protection and security – may enable claims related to the legal protection and security of investments to be successfully raised.*

I. Introduction

Customary international law requires a State to “*accord protection and security to foreigners and their property*”.[1] Under international investment agreements, this obligation is typically set forth within an FPS clause. These clauses essentially record the host State’s obligation to take active measures to protect the investment from adverse effects.[2]

Discussion and debate over FPS clauses typically relate to three different topics: (1) the standard of protection and security the host State is expected to provide a foreign investor or investment; (2) the responsibility of the host State for the actions of third parties; and (3) the scope of protection and security offered. This article is concerned with the third question: whether FPS clauses cover only *physical* protection and security or can also include *legal* protection and security.

The scope of the FPS clause and the question of its applicability to instances of non-physical harm have been, and continue to be, discussed and debated.[3] While there is no consensus yet on whether FPS clauses are intended to cover instances of physical and non-physical harm, it is understood that the specific language of an FPS clause can be very instructive in this exercise; while some clauses remain unqualified, others will expressly provide only for *physical* or, alternatively, for *legal* protection and security.

Globally, as will be set out in Part III of this article, States are increasingly disposed towards restricting the FPS clause to *physical* protection and security and, with this intention, expressly limit the scope of the FPS clauses in their model BITs and international investment agreements

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The authors would like to thank Mozar Ross and Sreedevi Jayachandran for their valuable research for and contributions to this article.

1 Jack Rankin v. Iran, Award No. 326-10913-2, 17 Iran-U.S. Cl. Trib. Rep. 135, ¶ 30 (1987).

2 Christoph Schreuer, *Full protection and security,* 1(2) J. INT’L DISP. SETTLEMENT 353 (2010).

3 *See* Thomas W. Wälde, *Energy charter treaty-based investment arbitration,* 5 J. WORLD INV. TRADE 373, 390–391 (2004); Schreuer, *supra* note 2; SEBASTIÁN MANTILLA BLANCO, FULL PROTECTION AND SECURITY IN INTERNATIONAL INVESTMENT LAW 278 (2019); MAXIMILIAN CLASMEIER, ARBITRAL AWARDS AS INVESTMENTS: TREATY INTERPRETATION AND THE DYNAMICS OF INTERNATIONAL INVESTMENT LAW 32 (2017).

to *physical* protection and security. Inadvertently, however, as a result of the vague wording of some of these clauses, it is possible that acts and/or omissions covered by the *legal* protection and security standard may also find themselves covered by an FPS clause that, on its face, articulates a *physical* protection and security standard.

This article assesses the possibility of such ingress by looking at the wording of FPS clauses. By way of background, in Part II, the article will first consider the types of acts and/or omissions that have been recognised by arbitral tribunals to fall under the *physical* or *legal* formulations of the FPS clause. Following this, in Part III, the article will set out and discuss the global trend towards restricting the FPS provisions to a purely *physical* interpretation. This part will also look at the common trends in terms of the wording of FPS clauses limited to *physical* protection and security. In Part IV, the article will consider the impact of a vaguely worded FPS clause on its intended restricted application. Finally, in Part V, the article will provide some concluding comments.

II. The scope of protection offered by FPS clauses

In the context of investor-State arbitrations, the FPS clause was first raised in *Asian Agricultural Products Ltd.* v. *Republic of Sri Lanka*[4] ["**AAPL**"] in 1987. In this case, the investor – a 48.2% shareholder in a Sri Lankan joint venture company established to cultivate and export shrimp – brought a claim against Sri Lanka under the Sri Lanka-United Kingdom BIT following the destruction of the joint venture's shrimp farm as a result of a counter-insurgency operation of the Sri Lankan Security Forces. The investor based its claim, among other things, on the FPS clause in the BIT.[5]

Although the scope of the protection afforded by the FPS clause was not in question in this case[6] – the investor only claimed that there had been a violation of Sri Lanka's responsibility to ensure the *physical* protection and security of the shrimp farm – AAPL is an important milestone because it heralded the invocation of these clauses to varied situations in the context of investor-State arbitrations.

The rest of this part will focus on how FPS clauses have been interpreted in investor-State arbitrations and the scope of the protection deemed to be provided by them.

A. Physical protection and security

The traditional understanding of the FPS standard is that it is limited to *physical* protection and security. As noted in *Saluka Investments B.V.* v. *Czech Republic* ["**Saluka**"], the FPS clause applies "*essentially when the foreign investment has been affected by civil strife and physical violence*".[7] In addition to

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4 Asian Agric. Prod. Ltd. v. Republic of Sri Lanka, ICSID Case No. ARB/87/3, Final Award (June 27, 1990), 4 ICSID Rep. 245 (1997) [*hereinafter* "AAPL"].

5 *Id.* ¶ 7.

6 The Tribunal's determination was limited to the standard of liability imposed by the FPS clause. The Tribunal ultimately determined that the FPS clause did not impose strict liability on the host State for losses suffered by a foreign investment protected under an investment treaty.

7 Saluka Inv. B.V. v. Czech Republic, Case No. 2001-04, Partial Award, ¶ 483 (Perm. Ct. Arb. Mar. 17, 2006), 15 ICSID Rep. 274 (2010) [*hereinafter* "Saluka"].

application to situations of attacks on or destruction of an investment as set out in *AAPL*,[8] the FPS clause has been recognised to apply in the situations outlined below as well.

i. <u>*Looting of premises*</u>

In *American Manufacturing and Trading, Inc.* v. *Republic of Zaire*,[9] the FPS clause in the United States-Zaire BIT was invoked in the context of two separate occasions of destruction and looting of the premises of the investor by members of the Zairian armed forces. In this case, the Tribunal found in favour of the investor and determined that Zaire had violated the FPS clause because of its failure to take "*every measure necessary to protect and ensure the security of the investment*".[10] This award is noteworthy because it expanded the FPS provision to include instances of looting of property. Similarly, in *Cengiz İnşaat Sanayi ve Ticaret A.S* v. *Libya*, the Tribunal found that the pillaging and eventual take-over of the investor's worksites amounted to a violation of the FPS provision.[11]

In *Adel A Hamadi Al Tamimi* v. *Sultanate of Oman*,[12] the Tribunal introduced a restriction on the claims that may be brought in this regard. Here, the investor had, among other things, claimed that following the Royal Oman Police's ejection of the investor from the premises of his investment and the subsequent closure of the investment site,[13] Oman had permitted the theft of equipment and other property from the investor's worksite and that this constituted a breach of the FPS provision in the free trade agreement between the United States and Oman.[14] The Tribunal rejected this claim on the basis that the FPS protection could not be extended to 'abandoned investments' or investments over which the investor's property rights had been extinguished.[15]

ii. <u>*Seizure of premises*</u>

In *Wena Hotels Ltd.* v. *Arab Republic of Egypt*[16] ["**Wena Hotels**"], the investment in question – two hotels in Egypt that had been provided to the investor on long-term lease agreements by Egyptian Hotels Company ["**EHC**"], a wholly-owned subsidiary of Egypt – was forcibly seized by EHC. Consequently, the investor initiated arbitral proceedings against Egypt under the Egypt-United Kingdom BIT claiming, among other things, that Egypt had failed to accord full protection and security to the investment.[17] The Tribunal found that the act of seizure would fall within the scope of the FPS protection under the BIT.[18] Since *Wena Hotels*, the FPS clause has

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8 AAPL, ICSID Case No. ARB/87/3, Final Award (June 27, 1990), 4 ICSID Rep. 245 (1997). Apart from AAPL, this issue also arose and FPS protection was successfully claimed in the case of Ampal-Am. Isr. Corp. & Ors. v. Arab Republic of Egypt, ICSID Case No. ARB/12/11, Decision on Liability and Heads of Loss, ¶¶ 283–291 (Feb. 21, 2017).

9 Am. Mfg. & Trading, Inc. v. Republic of Zaire, ICSID Case No. ARB/93/1, Award (Feb. 21, 1997), 5 ICSID Rep. 11 (2002).

10 *Id.* ¶ 6.11.

11 Cengiz Insaat Sanayi ve Ticaret A.S v. Libya, ICC Case No. 21537/ZF/AYZ, Award, ¶ 435 (Nov. 7, 2018) [*hereinafter* "Cengiz"].

12 Adel A Hamadi Al Tamimi v. Sultanate of Oman, ICSID Case No. ARB/11/33, Award, ¶ 171 (Nov. 3, 2015).

13 *Id.* ¶¶ 169–170.

14 *Id.* ¶ 394.

15 *Id.* ¶¶ 448–452.

16 Wena Hotels Ltd. v. Arab Republic of Egypt, ICSID Case No. ARB/98/4, Award (Dec. 8, 2002), 6 ICSID Rep. 89 (2006).

17 *Id.* ¶ 80.

18 *Id.* ¶¶ 84–91, 95,131.

been invoked successfully in the context of seizure of foreign investments in other cases as well.[19]

iii. Forced removal of personnel from the premises of the investment and usurpation of control over the investment

In *Biwater Gauff (Tanzania) Ltd.* v. *United Republic of Tanzania*,[20] a dispute arose out of the termination of the investor's contract to develop Tanzania's water and sewage infrastructure and services by the Dar-es-Salaam Water and Sewerage Authority ["**DAWASA**"], a State agency. The investor claimed that there had been a violation of the FPS clause in the Tanzania-United Kingdom BIT on the basis that the DAWASA usurped the investor's management and control of its facilities, seized and occupied the premises, and forcibly removed and deported the investor's personnel.[21] The Tribunal found that all these actions constituted a violation of the FPS clause, noting, importantly, that these activities would constitute a violation of the FPS provision even without the use of force.[22]

iv. Occupation of premises and the failure to provide an adequate police response

In *Bernhard von Pezold and Others* v. *Republic of Zimbabwe*,[23] a claim under the FPS clauses of the Switzerland-Zimbabwe and Germany-Zimbabwe BITs was brought in relation to the State's land reform programs and the resultant incursion and occupation of the investors' properties by local war veterans. In this case, the Tribunal decided that Zimbabwe's failure to protect the investors' properties from occupation or to remove the settlers and the lack of response from the police to various violent incidents that subsequently occurred were all in violation of the FPS provisions under the BITs.[24] Similarly, in *MNSS B.V. and Recupero Credito Acciaio N.V* v. *Montenegro*, the Tribunal found Montenegro in breach of the FPS clause under the Montenegro-Netherlands BIT for the failure to provide police protection during two separate instances of occupation of the investors' premises.[25] In particular, the Tribunal noted that Montenegro should have had "*a more pro-active attitude to ensure the protection of persons and property*".[26]

In *Joseph Houben* v. *Republic of Burundi*, the Tribunal found Burundi responsible for failing to respond adequately to the invasion and illegal settlement of the investor's property.[27] In this case, parts of the investor's land had been sold to and occupied by the local population under the approval of the local administration.[28] Although the investor had repeatedly protested against this situation and requested police assistance, the local authorities had refused to take any action.[29]

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[19] Waguih Elie George Siag & Clorinda Vecchi v. Arab Republic of Egypt, ICSID Case No. ARB/05/15, Award, ¶¶ 445–448 (June 1, 2009); Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanz., ICSID Case No. ARB/05/22, Award, ¶¶ 729–731 (July 24, 2008) [*hereinafter* "Biwater Gauff"].

[20] Biwater Gauff, ICSID Case No. ARB/05/22, Award (July 24, 2008).

[21] *Id.*, ¶¶ 714, 814(c).

[22] *Id.* ¶¶ 729–731.

[23] Bernhard von Pezold & Ors. v. Republic of Zim., ICSID Case No. ARB/10/15, Award (July 28, 2015).

[24] *Id.* ¶¶ 593–599.

[25] MNSS B.V. & Recupero Credito Acciaio N.V v. Montenegro, ICSID Case No. ARB(AF)/12/8, Award, ¶¶ 348–356 (May 4, 2016).

[26] *Id.* ¶ 356.

[27] Sebastian Perry, *Burundi claim leads to Pyrrhic victory*, GLOB. ARB. REV. (Apr. 15, 2016), *available at* https://globalarbitrationreview.com/article/1035462/burundi-claim-leads-to-pyrrhic-victory.

[28] Joseph Houben v. Republic of Burundi, ICSID Case No. ARB 13/7, Award, ¶ 93 (Jan. 12, 2016).

[29] *Id.* ¶¶ 166–167.

However, in *Toto Costruzioni Generali S.p.A.* v. *Republic of Lebanon*, the Tribunal found that a temporary obstruction to the investment would not constitute a violation of the FPS provision.[30]

v. Repeated and sustained harassment of personnel

In *Eureko B.V.* v. *Republic of Poland*, although the Tribunal was not convinced that the alleged acts of harassment of the senior representatives of Eureko's management at issue in the case breached the FPS standard under the Netherlands-Poland BIT,[31] the Tribunal concluded that a breach of the FPS provision could have occurred had the acts been "*repeated and sustained*".[32]

vi. Deployment of security forces at the site of the investment

In *OI European Group B.V.* v. *Bolivarian Republic of Venezuela*, the Tribunal determined what would *not* constitute a breach of the FPS clause under the Netherlands-Venezuela BIT: measures taken by the State's security forces to protect the investment.[33] In this case, the investor had argued that the deployment of security personnel at its plants had "*caused an atmosphere in which the employees of the Plants were threatened and intimidated and had no other alternative than to obey the orders of [the] Respondent or face legal action*".[34] Nevertheless, the Tribunal ruled that the "*mere presence*" of security forces was only a precautionary measure that a "*government authority legitimately can and should take*".[35] It is unclear from the Tribunal's wording, however, if the Tribunal's decision was founded on a lack of sufficient evidence of the investor's allegations[36] or purely on the understanding that the measures taken by the security forces to "*protect*" an investment could not in themselves be found to be in violation of the FPS provision.

B. Unqualified protection and security

Following the award in *Ronald S. Lauder* v. *Czech Republic*[37] ["**Lauder**"] in 2001, there have also been numerous instances where the FPS provision has been accorded a more expansive interpretation in investor-State arbitrations to include *legal* protection and security. Broadly speaking, tribunals have done this by recognising two different types of protections: appropriate procedures that enable investors to vindicate their rights and substantive provisions to protect investments.[38]

i. Procedural aspects of legal protection and security

In *Lauder*, the investor had argued that changes to the State's legal framework and the administrative actions of the State's media council had adversely affected the investor's investment and that this constituted a breach of the FPS clause in the United States-Czech

30 Toto Costruzioni Generali S.p.A. v. Republic of Leb., ICSID Case No. ARB/07/12, Award, ¶¶ 226–230 (June 7, 2012).
31 Eureko B.V. v. Republic of Pol., Partial Award, ¶ 236 (Aug. 19, 2005), 12 ICSID Rep. 335 (2007).
32 *Id.* ¶ 237.
33 OI European Group B.V. v. Bolivarian Republic of Venez., ICSID Case No. ARB/11/25, Award, ¶ 580 (Mar. 10, 2015).
34 *Id.* ¶ 564.
35 *Id.* ¶ 580.
36 *Id.* ¶¶ 578–580 (the Tribunal's reasoning is limited to the "mere presence" of the security forces and is based on Venezuela's dismissal of the investor's allegations that the presence of the security forces created an intimidating atmosphere at its plants).
37 Ronald S. Lauder v. Czech Republic, Final Award (Sept. 3, 2001) [*hereinafter* "Lauder"].
38 Frontier Petro. Servs. Ltd. v. Czech Republic, Case No. 2008-09, Final Award, ¶ 263 (Nov. 12, 2010) (Perm. Ct. Arb. 2010).

Republic BIT.[39] Although the claims themselves were unsuccessful, the Tribunal noted that the FPS clause required the State "*to keep its judicial system available for the [investor] and any entities [the investor] controls to bring their claims, and for such claims to be properly examined and decided in accordance with domestic and international law*".[40] This decision thus established that a host State could be held liable under the FPS provision even for the lack of *judicial* security in a host State – a procedural element to ensure *legal* protection and security.

This approach has since been recognised in a number of other investor-State awards. For example, in *Marion Unglaube* v. *Republic of Costa Rica*,[41] although the Tribunal did not find that there had been a violation of the FPS clause in the Germany-Costa Rica BIT, the Tribunal noted that instances of "*impropriety, corruption or discrimination*" in the court proceedings could constitute a breach of the FPS clause.[42]

ii. *Substantive aspects of legal protection and security*

In *CME Czech Republic B.V.* v. *Czech Republic*[43] which arose out of the same facts and concerned the same issues of liability as *Lauder*, the Tribunal ruled that the changes to the State's legal framework and the administrative actions of the State's media council did in fact, breach the FPS provision. The Tribunal noted that as part of its FPS obligation, the host State "*is obligated to ensure that neither by amendment of its laws nor by actions of its administrative bodies, is the agreed and approved security and protection of the foreign investor's investment withdrawn or devalued*".[44]

Similarly, in *Siemens A.G.* v. *Argentine Republic*,[45] the FPS clause in the Argentina-Germany BIT itself provided for "*full protection as well as juridical security*".[46] Based on this language, the investor was able to successfully claim that the State's actions in relation to the renegotiation and termination of a contract that "*destroyed irreparably the legal framework for Siemens' investment*", constituted a breach of the FPS clause.[47] In determining that there had been a breach, the Tribunal found the lack of transparency in Argentina's handling of the investment to be decisive.[48] According to the Tribunal, *legal* security could be defined as "*the quality of the legal system which implies certainty in its norms and, consequently, their foreseeable application*".[49]

So too, in *National Grid P.L.C.* v. *Argentine Republic* ["**National Grid**"], the investor successfully claimed that the actions taken by Argentina to stem a financial crisis in 2001, which included the dismantling of the existing regulatory framework upon which the investor's investment relied,

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39 Lauder, Final Award, ¶ 305 (Sept. 3, 2001), 9 ICSID Rep. 62 (2001).
40 *Id.* ¶ 314.
41 Marion Unglaube v. Republic of Costa Rica, ICSID Case No. ARB/08/1, Award (May 16, 2012).
42 *Id.* ¶ 286.
43 CME Czech Republic B.V. v. Czech Republic, Partial Award (Sept. 13, 2001).
44 *Id.* ¶ 613.
45 Siemens A.G. v. Argentine Republic, ICSID Case No. ARB/02/8, Award (Jan. 17, 2007), 14 ICSID Rep. 513 (2009) [*hereinafter* "Siemens"].
46 Germany-Argentina BIT, art. 4(1), *available at* https://treaties.un.org/doc/Publication/UNTS/Volume%201910/v1910.pdf.
47 Siemens, ICSID Case No. ARB/02/8, Award, ¶ 276 (Jan. 17, 2007), 14 ICSID Rep. 513 (2009). An enumeration of the specific acts that the investor alleged violated the FPS clause is provided at ¶ 286.
48 *Id.* ¶ 308.
49 *Id.* ¶ 303.

and the resultant economic uncertainty that the investor suffered, constituted a breach of the FPS clause in the Argentina-United Kingdom BIT.[50]

Some tribunals have sought to justify this relatively expansive approach to defining FPS clauses by relying on the relationship between FPS and fair and equitable treatment ["**FET**"] clauses. For example, in *National Grid*, the Tribunal reasoned that the FPS clause in the BIT was not limited to granting protection and security of physical assets by referring to its inclusion in the "*same article of the Treaty as the language on fair and equitable treatment*".[51] The awards in *Occidental Exploration and Production Company* v. *Republic of Ecuador (I)* ["**Occidental**"] and *Azurix Corp.* v. *Argentine Republic (I)* ["**Azurix**"] are also good illustrations of this. In *Occidental*, the abrupt change of the State's tax law "*without providing any clarity about its meaning and extent and the practice and regulations*"[52] was deemed to have been a violation of the FPS clause under the Ecuador-United States BIT.[53] In *Azurix*, the State's harassment of the investor (by refusing to accept its notice of termination and repeated calls from State officials regarding the non-payment of bills)[54] and the politicisation of the tariff regime[55] was found to have constituted a violation of the FPS clause.[56] In both these cases, the tribunals determined that the FPS clause had been breached by assessing whether the FET clause under the BIT had been breached.[57] In the words of the Tribunal in *Occidental*, "*treatment that is not fair and equitable automatically entails an absence of full protection and security*".[58]

This is not to say, however, that the obligation to ensure substantive legal protection to a foreign investment is absolute. In *Mamidoil Jetoil Greek Petroleum Products Societe S.A.* v. *Republic of Albania*, the "*general business environment*" in a State was found to be an exception to this protection.[59] In this case, the investor alleged that Albania had deprived the investor's investment of the necessary protection and security owed under the Energy Charter Treaty by failing to enforce its legal framework, especially regarding fuel smuggling, tax evasion, and fuel adulteration.[60] The Tribunal rejected this claim on the basis that the conditions described by the investor constituted the "*general business environment and investment conditions*" in Albania;[61] while the investor might have been entitled to expect that the general conditions of insecurity would improve over time, it was not entitled to expect that Albania "*would protect its investment against the general insecurity that was inherent to the investment climate as opposed to specific instances of harassment*".[62]

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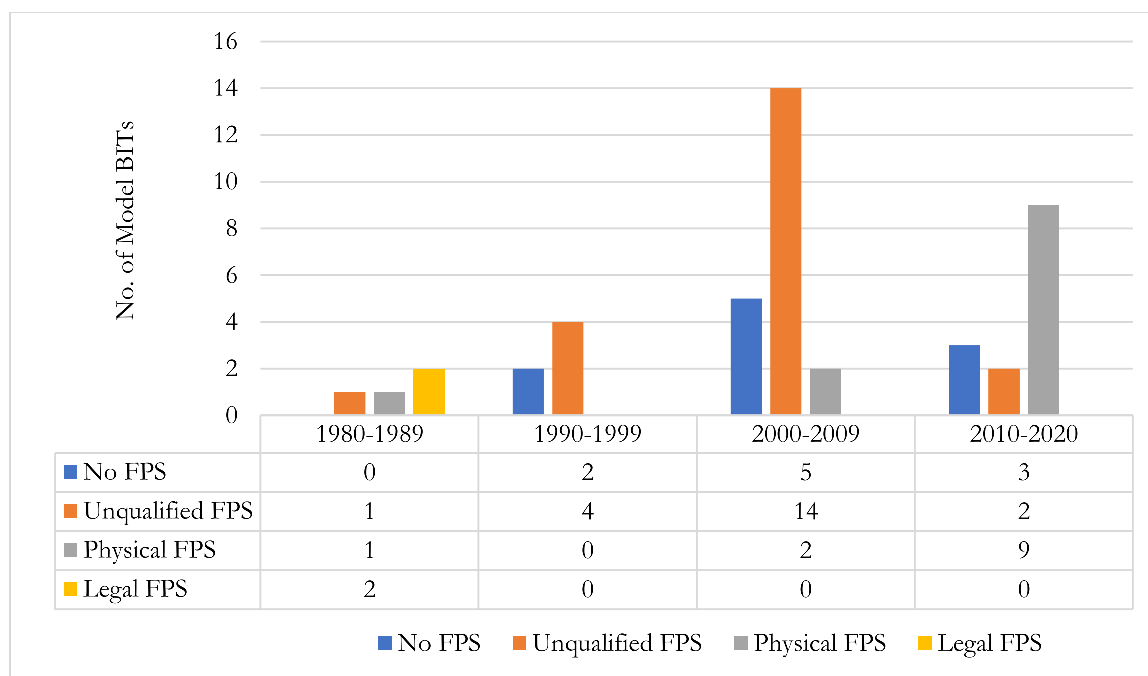
50 Nat'l Grid plc v. Argentine Republic, Award, ¶ 189 (Nov. 3, 2008).
51 *Id.*
52 Occidental Expl. & Prod. Co. v. Republic of Ecuador, LCIA Case No. UN3467, Final Award, ¶ 184 (July 1, 2004), 12 ICSID Rep. 59 (2007) [*hereinafter* "Occidental Exploration"].
53 *Id.* ¶ 187.
54 Azurix Corp. v. Argentine Republic, ICSID Case No. ARB/01/12, Award, ¶ 376 (July 14, 2006), 14 ICSID Rep. 374 (2009).
55 *Id.* ¶ 375.
56 *Id.* ¶ 408.
57 *Id.*; Occidental Exploration, LCIA Case No. UN3467, Final Award, ¶ 187 (July 1, 2004), 12 ICSID Rep. 59 (2007).
58 Occidental Exploration, LCIA Case No. UN3467, Final Award, ¶ 184 (July 1, 2004), 12 ICSID Rep. 59 (2007).
59 Mamidoil Jetoil Greek Petroleum Prods. Societe S.A. v. Republic of Alb., ICSID Case No. ARB/11/24, Award, ¶¶ 823–829 (Mar. 30, 2015).
60 *Id.* ¶ 803.
61 *Id.* ¶ 823.
62 *Id.* ¶ 824.

III. The global position on FPS

The authors have conducted a survey of 45 model BITs that are publicly available for the period 1980-2020.[63] Based on the scope of the FPS clauses therein, the authors have classified them into four categories: (1) model BITs with no FPS provision; (2) model BITs with unqualified FPS provisions (i.e. simply providing for "full protection and security"); (3) model BITs expressly limited to a *physical* formulation of FPS ["***physical* FPS**"]; and (4) model BITs expressly limited to a *legal* formulation of FPS ["***legal* FPS**"]. The authors' findings are represented in the following chart:



	1980-1989	1990-1999	2000-2009	2010-2020
No FPS	0	2	5	3
Unqualified FPS	1	4	14	2
Physical FPS	1	0	2	9
Legal FPS	2	0	0	0

From the above chart, a growing preference for a *physical* formulation of the FPS clause can be identified. From 1990-1999, when there were *no* model BITs with *physical* FPS clauses, to the last decade, where the majority of new model BITs that have been released provide for such a clause, it is evident that this restricted articulation of the FPS clause has been gaining traction. Model BITs with *physical* FPS clauses can further be classified, based on the degree of specificity of the clause, into three categories. The first category includes model BITs, which specifically limit the protection and security to the standard set by customary international law ["**Category 1 Model BIT**"]. For example, in the 2016 Azerbaijan Model BIT, the FPS clause states that "*[e]ach Contracting Party shall accord to investments of investors of the other Contracting Party in the territory of its [S]tate … full physical protection and security in accordance with international law minimum standard of*

[63] All model BITs used for this purpose can be found here: *Model Agreements*, INVESTMENT POLICY HUB, *available at* https://investmentpolicy.unctad.org/international-investment-agreements/model-agreements. For the avoidance of doubt, model BITs that have not been published on this website have not been considered; the authors have only considered those model BITs that are currently valid, accessible on the provided link, and available in English. The model BITs of the following countries have been considered: Austria, Azerbaijan, Belgium, Benin, Brazil, Burkina Faso, Burundi, Canada, Chile, Colombia, Croatia, Czech Republic, Denmark, Finland, France, Germany, Ghana, Greece, India, Indonesia, Iran, Israel, Italy, Jamaica, Kenya, Macedonia, Malaysia, Mauritius, Mexico, Mongolia, Morocco, Netherlands, Norway, Peru, Russia, Serbia, Slovakia, South Africa, Sri Lanka, Sweden, Switzerland, Thailand, Uganda, the United Kingdom, and the United States.

treatment of aliens … and 'full physical protection and security' do[es] not require treatment in addition to or beyond that which is required by that standard, and do[es] not create additional substantive rights".[64]

The second and third categories both include unqualified *physical* FPS clauses; the difference arises from the specificity lent to the clause by the surrounding words. The second category includes BITs with *physical* FPS clauses which, by their language, specifically limit the host State's obligation to ensuring the *physical* protection and security of a foreign investment but are otherwise unqualified ["**Category 2 Model BIT**"]. In contrast, BITs falling into the third category contain *physical* FPS clauses which, by their language, broaden the host State's obligation from ensuring *physical* protection and security to other obligations which are *related to* the *physical* protection and security of a foreign investment ["**Category 3 Model BIT**"].

The difference between Category 2 Model BITs and Category 3 Model BITs is best explained through illustration. Thus, for example, the 2019 Netherlands Model BIT simply provides that "*each Contracting Party shall accord to such investments full physical security and protection*".[65] In contrast, the 2016 Indian Model BIT provides that "*[e]ach Party shall accord in its territory to investments of the other Party and to investors with respect to their investments full protection and security. For greater certainty, 'full protection and security' only refers to a Party's obligations relating to physical security of investors and to investments made by the investors of the other Party and not to any other obligation whatsoever*".[66]

The Netherlands Model BIT – without an explanation of what constitutes *physical* protection and security – provides for a more specific and limited obligation. This is an example of a Category 2 Model BIT. The Indian Model BIT, on the other hand, provides for a broader obligation by including the words "*relating to*" in the definition: the obligation will accordingly extend to any action or omission that is proven to affect the *physical* protection and security of the investment even if it does so indirectly. Thus, the Indian Model BIT is a Category 3 Model BIT.

Of the 12 model BITs with *physical* FPS clauses that this article has considered, five were Category 1 Model BITs,[67] four were Category 2 Model BITs,[68] and the remaining three were Category 3 Model BITs.[69] The data also indicates that the Category 1 Model BITs are waning in popularity (the last one was issued in 2016).[70] In 2019, two Category 2 Model BITs and two Category 3 Model BITS were issued.[71] The following part will consider Category 3 Model BITs in more detail.

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64 Azerbaijan Model BIT 2016, art. 2(2), *available at* https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/4787/download.

65 Netherlands Model BIT 2019, art. 9(1), *available at* https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5832/download.

66 India Model BIT 2016, art. 3(2), *available at* https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3560/download.

67 These model BITs are the following: Canada Model BIT (2004), Ghana Model BIT (2008), Colombia Model BIT (2011), U.S. Model BIT (2012), and Azerbaijan Model BIT (2016).

68 These model BITs are the following: Indonesia Model BIT (pre-1984), Serbia Model BIT (2014), Morocco Model BIT (2019), and Netherlands Model BIT (2019).

69 These model BITs are the India Model BIT (2016), Belgium Model BIT (2019), and Slovak Model BIT (2019).

70 Azerbaijan Model BIT 2016, *available at* https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/4787/download.

71 The Category 2 Model BITs are the Morocco Model BIT (2019) and Netherlands Model BIT (2019). The Category 3 Model BITS are the Belgium Model BIT (2019) and Slovak Model BIT (2019).

IV. Analysis of FPS clauses in Category 3 Model BITs

When a claim is brought under an FPS clause, a tribunal is faced with determining whether the act or omission of which the host State is accused is something that would fall within the ambit of the FPS clause. As a first step, the tribunal will look to the language of the FPS clause itself; the tribunal will have to identify if the FPS clause is limited in its application to purely *physical* or purely *legal* threats to the investment or investor. Thus, for example, if a foreign investor brought a claim against the host State under the Brunei Darussalam-India BIT[72] for failing to protect its investment from an attack by the local community, the tribunal would, after considering the relevant clause in this BIT, which notes, in relation to FPS, that "*[i]nvestments and returns of investors of each Contracting Party shall at all times … enjoy full legal protection and security in the territory of the other Contracting Party,*" presumably be able to immediately dismiss this claim on this ground.[73]

If, on the other hand, the language of the FPS clause does not assist the tribunal, as a second step, the tribunal is left to make this decision for itself.

The tribunal's determinations at both of the above-mentioned steps are complicated by different factors. At the first step, even if the FPS clause suggests that it is limited in its application, the exact wording of the clause may allow the ingress of obligations that were not intended to be included within the scope of protection accorded by the FPS clause. At the second step, the tribunal's determination is made confusing by the lack of a clear and consistent approach in investment arbitrations to defining the scope of the FPS clause.

The remainder of this part will consider the difficulties faced at the first level through the lens of the FPS clauses in Category 3 Model BITs. Indeed, as will be evidenced below, the lack of definition in the FPS clauses found in these BITs may actually open the floodgates to acts or omissions that would be less likely to be covered by the *physical* protection and security standard, and more likely to fall within the ambit of the *legal* protection and security standard.

A. The potential overlap between physical and legal formulations of FPS

The interrelationship between *physical* and *legal* security has been touched upon, albeit sometimes inadvertently, in several investor-State awards. The Tribunal's findings in *Saluka* provides a good illustration. In this case, arising out of a failed attempt by the Czech Republic to privatise a State-owned bank, the investor (which had acquired shares in the State bank by a transfer from the investor's parent company) claimed that there had been a violation of the FPS clause because of the Czech Republic's suspension of trade in the bank's shares, a prohibition on transfers of the investor's shares in the bank, police searches of premises and employees of the investor's parent company, and seizure of its documents.[74] The Tribunal found that there had been no breach of the FPS clause on any of these grounds.[75]

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[72] Brunei Darussalam-India BIT 2008, art. 3(2), *available at* https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/517/download.

[73] *Id.*

[74] Saluka, Case No. 2001-04, Partial Award, ¶ 485 (Perm. Ct. Arb. Mar. 17, 2006), 15 ICSID Rep. 274 (2010).

[75] *Id.* ¶ 505.

Under the relevant BIT, the FPS clause obliged the Czech Republic to "*accord to such investments full security and protection*".[76] Despite the unqualified language of this clause, the Tribunal noted that an FPS clause generally "*is not meant to cover just any kind of impairment of an investor's investment, but to protect more specifically the physical integrity of an investment against interference by use of force*".[77] This suggests that the Tribunal was inclined towards a purely *physical* interpretation of the FPS clause, though the Tribunal did note that "*it appears not to be necessary for the Tribunal to precisely define the scope of the 'full security and protection' clause in this case*".[78] In any event, several subsequent awards have quoted this sentence from the *Saluka* award to justify their own restricted interpretation of the FPS clause.[79]

Despite the *Saluka* Tribunal's initial nod towards a purely *physical* interpretation, the Tribunal's analysis and decision on each of the investor's grounds was based on a more holistic understanding of the FPS clause. With regards to the first ground raised by the investor – the Czech Republic's suspension of trade in the bank's shares – the Tribunal noted that there had been no breach of the FPS clause because the suspension was justifiable on regulatory grounds. In regards to a related amendment of Czech law that precluded the investor from appealing the suspension of trade, the Tribunal further noted that "*the elimination of shareholders' right of appeal does not per se transcend the limits of a legislator's discretion … The amendment of the [law] cannot be said to be totally unreasonable and unjustifiable by some rational legal policy*".[80]

The investor's claim under the second ground – the prohibition on transfers of the bank's shares – arose out of a sense of "*procedural denial of justice*".[81] According to the investor, apart from the initial order by which the investor's shareholding in the bank was frozen, the treatment of its appeals against this order to both police and prosecutorial authorities constituted a "*procedural denial of justice*".[82] In ruling that this did not constitute a breach of the FPS clause, the Tribunal concluded that none of these issues amounted to a "*manifest lack of due process*".[83] According to the Tribunal, only if there had been such a lack of due process, would the FPS clause be breached.[84]

The third ground on which the investor claimed a breach of the FPS provision – the search of the premises and employees of the investor's parent company and seizure of documents – was arguably the only action that could have qualified as a threat to the *physical* protection and security of the investor. In spite of this, in determining whether these actions amounted to a breach of the FPS clause, the Tribunal instead considered whether the investor had legal recourse against these measures. The Tribunal determined that there had been no violation of

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76 Netherlands-Czech Republic BIT 1991, art. 3(2), *available at* https://www.italaw.com/sites/default/files/laws/italaw6080%283%29.pdf.

77 Saluka, Case No. 2001-04, Partial Award, ¶ 484 (Perm. Ct. Arb. Mar. 17, 2006), 15 ICSID Rep. 274 (2010).

78 *Id.*

79 Rumeli Telekom A.S. & Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kaz., ICSID Case No. ARB/05/16, Award, ¶ 668 (July 29, 2008); Cengiz, ICC Case No. 21537/ZF/AYZ, Award, ¶ 403 (Nov. 7, 2018); Suez, Sociedad General de Aguas de Barcelona, S.A. & Vivendi Universal, S.A. v. Argentine Republic, ICSID Case No. ARB/03/19, Decision on Liability, ¶ 178 (July 30, 2010).

80 Saluka, Case No. 2001-04, Partial Award, ¶ 490 (Perm. Ct. Arb. Mar. 17, 2006), 15 ICSID Rep. 274 (2010).

81 *Id.* ¶ 492.

82 *Id.* ¶¶ 492–493.

83 *Id.* ¶ 493

84 *Id.*

the FPS clause because the investor had, in fact, filed a petition seeking relief in relation to this measure with the Czech Constitutional Court and the relief sought had been granted.[85]

Had the Tribunal truly believed that the FPS clause was limited to according *physical* protection and security, there would have been no need to go into such detailed analysis on any of the three grounds. Save for the search and seizure conducted by the police, all the other measures that the investor argued were in breach of the FPS clause did not directly impact the physical security or sanctity of the investment. Instead, the Tribunal chose to avoid commenting on whether any of these measures would fall within the scope of the FPS clause.[86] This suggests that the Tribunal did not actually intend to limit the FPS clause to *physical* protection and security alone; the *legal* protection and security of the investment was, seemingly, given equal importance in determining whether there had been a breach of the FPS clause.

In this case, the unqualified language of the FPS clause under the Netherlands-Czech BIT enabled the Tribunal to arrive at such a decision. However, this is not the only case in which *legal* protection and security could be read into an FPS clause. The language of the FPS clause in a Category 3 Model BIT lends itself to a similarly wide interpretation of *physical* protection and security and, indeed, an even wider interpretation. By prefixing the express reference to *physical* protection and security with "*relating to*" or other similar language, the provision provides an entrance for acts and/or omissions that would not align with the strict sense of *physical* protection and security. The only requirement would be that the investor would have to prove a causal relationship between the loss of *physical* protection and security of the investment and the act and/or omission by which the investor has been aggrieved.

B. Acts or omissions "relating to" physical protection and security

There have already been attempts to push the boundaries of what *physical* protection and security can cover. For example, in *Peter A. Allard* v. *Government of Barbados* ["**Allard**"], the investor sought to characterise environmental damages caused to an investment as a breach of the State's obligation to ensure the *physical* protection and security of the investment.[87] The environmental damage in question had been caused by the discharge of raw sewage into the investor's investment – a sanctuary spread over 240 acres in Barbados.[88] According to the investor, this damage could have been avoided if the State had taken reasonable care to protect the sanctuary (including through the regular repair and operation of the sluice gate on the property that controlled the flow of water between the sanctuary and the ocean)[89] and enforced its environmental laws (in particular, the Marine Pollution Control Act).[90] The investor claimed that there had been a violation of the FPS clause under the Barbados-Canada BIT, which contained an unqualified clause providing that "*[e]ach Contracting Party shall accord investments or returns of*

[85] *Id.* ¶¶ 495–496.
[86] *Id.* ¶¶ 490, 493.
[87] Peter A. Allard v. Gov't of Barb., Case No. 2006-12, Award, ¶ 232 (Perm. Ct. Arb. June 27, 2016) [*hereinafter* "Allard"].
[88] *Id.* ¶¶ 33–43.
[89] *Id.* ¶¶ 232, 234.
[90] *Id.* ¶¶ 232, 239.

investors of the other Contracting Party … full protection and security" on the basis of the above two grounds.[91]

Although the Tribunal rejected this claim on all three grounds, it was not on the basis that the alleged omissions on the part of Barbados fell outside the scope of the FPS clause. In the Tribunal's words, "*[e]ven accepting the [investor's] articulation of the FPS standard as including an obligation of the host State to protect foreign investments against environmental damage*,"[92] the investor had failed to prove that there had been a violation of the FPS clause.

Thus, this award is important because the alleged omissions of the State – recognised by the Tribunal as potential breaches of the FPS clause[93] – constituted instances outside the typical scope of *physical* protection and security. None of these omissions related to the use of physical force on the investment; they related to the environmental degradation caused by "*physical interference with property through the unlawful trespass of pollutants*".[94]

With regards to the investor's allegation that the State had failed to take reasonable care to protect the sanctuary, the Tribunal noted that "*it [was] quite implausible for the [investor] to attribute responsibility for the egress or ingress of [the] Sanctuary waters to the actions or inactions with respect to the operation of the Sluice Gate*".[95] In any event, there was sufficient evidence to show that Barbados had, based on knowledge of the environmental sensitivities of the investment, taken "*reasonable steps*" to protect it.[96] Thus, while the Tribunal could have denied this claim solely on the basis that the FPS clause would not extend to the alleged omissions of the State, it did not expressly do so. Instead, the Tribunal, as in *Saluka*, considered each allegation separately and determined on the basis of the evidence of the legislative and policy measures taken by the State that there had been no breach of the FPS clause.

The Tribunal's willingness to expand the ambit of protection accorded by the FPS clause is further emphasised in its treatment of the investor's allegation that the State had failed to enforce its environmental legislation. This allegation – clearly relating to the *legal* protection and security of the investment – was pleaded as an omission related to the *physical* protection and security of the investment. Instead of rejecting this claim solely on the basis that this measure did not constitute a breach of the *physical* protection and security of the investment, the Tribunal's decision to reject this allegation was on the basis of the investor's failure to evidence a breach under the legislation in question.[97]

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[91] Barbados-Canada BIT 1996, art. II.2 (b), *available at* https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/280/download.

[92] Allard, Case No. 2006-12, Award, ¶ 252 (Perm. Ct. Arb. June 27, 2016).

[93] *Id.*

[94] *Id.* ¶ 231.

[95] *Id.* ¶ 250.

[96] *Id.* ¶¶ 242–246. The steps which the Tribunal referred to were all measures taken at the policy level. These steps included the setting up of a committee to investigate and coordinate government action in relation to the sanctuary and to address issues related to its effective management; the review of land development applications to ensure that they were consistent with the objective of environmental protection of the sanctuary and prevented the establishment of potential polluters in the vicinity of the sanctuary; and monitoring the interaction between the sanctuary and the sewage treatment plant.

[97] *Id.* ¶ 251.

If this set of facts is analysed through the lens of a Category 3 Model BIT, then, as long as the act or omission in question affected the *physical* security of the investment (i.e. being "*related to*" to its *physical* protection and security), the claim likely would be successful as a legal matter regardless of whether the act or omission constituted an actual incursion on the investment in a physical sense. In *Allard*, given that the investment's value depended upon the ecosystem that it hosted, a failure to manage the sluice gate would have undoubtedly affected the physical security and viability of the investment. Thus, as an omission *related to* the physical protection and security of the investment, this claim would have succeeded under a broadly-worded clause for *physical* protection and security such as the FPS clause in a Category 3 Model BIT as well.

C. The scope for reading legal protection and security into physical fps clauses

In the same way, many acts or omissions that would be covered under what is understood as *legal* protection and security could be brought within the scope of *physical* FPS clauses that are couched in sufficiently broad terms similar to the language of FPS clauses in Category 3 Model BITs.

This is especially true in the context of claims related to substantive *legal* protection and security of an investment. As evidenced by the award in *Allard*, a State's failure to implement or enforce a law or regulation upon which a foreign investment's *physical* protection or security is predicated could lead to a breach of an FPS clause.

This is not to say that claims related to procedural *legal* protection and security would not be successful. If the investor is able to prove that its failure to obtain adequate judicial redress has adversely affected the *physical* protection and security of the investment, then the investor would likely have a successful claim under a *physical* FPS clause couched in language similar to a Category 3 Model BIT. While such instances are admittedly not as common, they are not altogether impossible. If, for example, the investor seeks judicial redress against the forced closure of its investment, there could arguably be a successful claim for the breach of a *physical* FPS clause worded similar to a Category 3 Model BIT.

Already, in relation to the COVID-19 pandemic, there has been discussion of invoking the FPS clause in relation to circumstances arising out of a host State's response to the pandemic.[98] A host State's failure to take effective measures to protect the health of employees of a foreign investment is just one way in which a widely-worded FPS clause (even if limited to *physical* protection and security) could be harnessed by an investor.

Thus, the types of claims that could be brought under a widely-worded *physical* FPS clause are broader in scope than what would typically be understood as direct physical damage. The success of such claims will depend on the ability of the investor to convince the tribunal of the causal relationship between the alleged breach and the *physical* protection and security of an investment.

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[98] Massimo Benedetteli, Caterina Coroneo & Nicolò Minella, *Could COVID-19 emergency measures give rise to investment claims? First reflections from Italy*, GLOB. ARB. REV. (Apr. 15, 2020), *available at* https://globalarbitrationreview.com/article/1222354/could-covid-19-emergency-measures-give-rise-to-investment-claims-first-reflections-from-italy.

V. Conclusion

Although it appears that there is a global movement towards restricting FPS clauses to a *physical* formulation, the use of vague wording in these clauses could inadvertently open up the doors to claims related to *legal* protection and security as well. A good example of the type of wording that would enable such ingress is the "*relating to*" prefix used in Category 3 Model BITS as discussed above.

Admittedly, this conclusion is based on an analysis of model BITs. This is because the model BIT of a country is generally a more accurate representation of its policy (as opposed to BITs which can reflect the difference in the bargaining power of the Contracting States). Notwithstanding this, the issue of vague wording of *physical* FPS clauses is one that could plague BITs as well. For example, in line with the language of the 2016 Indian Model BIT (a Category 3 Model BIT), the 2018 Belarus-India BIT defines 'full protection and security' as "*relating to physical security of investors and to investments made by the investors*".[99]

While the authors are not aware of any investment arbitrations where investors have sought to claim a breach of a *physical* FPS clause on the basis of a violation of the procedural or substantive *legal* security of the investment, the authors believe that there is potential for such an argument to be made (and to potentially be made successfully) in cases of broadly-worded FPS clauses. Based on the above, it behoves States to pay greater attention when drafting FPS clauses to ensure that the outcome meets their intent.

[99] Belarus-India BIT 2018, art. 3(2), *available at* https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5724/download.

FORK IN THE ROAD IN INVESTMENT DISPUTES

*Sergiy A. Voitovich**

Abstract

*Some investment treaties provide that once the dispute has been submitted to the court of the host State or to international arbitration, the choice of one of these procedures will be final. Such provisions are called 'fork in the road' ["**FITR**"] provisions. In this paper, based on a review of the major cases dealing with FITR provisions, the author suggests some thoughts on the nature of the FITR concept and practical methods of addressing FITR-based arguments in investor-State disputes. In the author's view, ideally the 'triple identity test' and the 'same fundamental basis' test should be jointly applied to the analysis of case-specific FITR issues. Apparently, the most tenable decision would be if both tests show the same result. While the triple identity test with all its formalism, has clear criteria, the same fundamental basis test needs clarification. Based on some arbitral decisions, the author considers that the fundamental basis should include both the factual and the legal/normative basis for the claims to be considered essentially the same.*

I. The rationale and interest served by FITR

Forum selection provisions in investment treaties indicate the routes for claimants to protect their investment rights by way of domestic litigation or international arbitration. Some investment treaties say that if the dispute has been submitted to the court of the host State or to arbitration provided in the treaty, the choice of one of these procedures will be final.[1] Such provisions are called "*fork in the road*" provisions, and they reflect the Latin maxim *electa una via, non datur recursus ad alteram*.

As held by one tribunal, "*[t]he right to choose once is the essence of the 'fork-in-the-road' rule*".[2] Therefore, once the way has been selected, "*the party waives its right to seek relief through the unchosen fora*".[3]

At the outset, it is crucial to understand the rationale behind the FITR concept, and whose interests, i.e. the investor's or the host State's, it serves.

Apparently, an FITR clause is a protective tool used by host States against claimant-investors. Some tribunals consider the FITR clause a matter of public policy of the host State.[4] Moreover,

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1 *E.g.*, Agreement on the promotion and reciprocal protection of investments, S. Afr.-Zim., art. 7(3), Nov. 27, 2009 ("If the investor submits the dispute to the competent court of the host Party or to international arbitration mentioned in sub-Article (2), the choice shall be final.").

2 M.C.I. Power Grp. L.C. & New Turbine, Inc. v. Republic of Ecuador, ICSID Case No. ARB/03/6, Award, ¶ 181 (July 31, 2007) [*hereinafter* "M.C.I. Power Grp."].

3 INT'L BAR ASS'N, CONSISTENCY, EFFICIENCY AND TRANSPARENCY IN INVESTMENT TREATY ARBITRATION 18 (2018).

4 *See* Emilio Agustín Maffezini v. Kingdom of Spain, ICSID Case No. ARB/97/7, Decision on Jurisdiction, ¶ 63 (Jan. 25, 2000); Toto Costruzioni Generali S.p.A. v. Republic of Leb., ICSID Case No. ARB/07/12, Decision on Jurisdiction, ¶ 207 (Sept. 11, 2009) [*hereinafter* "Toto"].

since re-litigation of matters is not in line with established general principles of law such as *res judicata* and *lis pendens*, FITR provisions are intended to ensure that a single forum adjudicates a particular issue.

At the same time, a pro-claimant negotiator on an investment treaty would hardly support an FITR approach as it is too rigid and inflexible for investors who might prefer having various litigation routes, rather than a single route, for protecting their rights in a host State. As shown below, the modern treaty practice knows of more liberal waiver-based clauses.[5] This seems to be a matter for discussion between States in a treaty-making process.

Commentators note that one of the main purposes of investment arbitration is to avoid the use of domestic courts which are not an attractive forum for investors due to potential partiality by the host State judiciary.[6] However, it is not unusual for a local company of the investor to apply first to domestic courts, for example, to challenge an administrative action (e.g. revocation of license or termination of concession) before the commencement of the investor-State arbitration.

As mentioned above, it is usually argued that the purpose of FITR is to avoid multiple/parallel proceedings in various fora on the same dispute.[7] This approach is based on the presumption that multiple proceedings are perceived as having negative consequences for investment arbitration.[8] However, it may be reasonably asked whether multiple proceedings always have a negative effect (such as abuse of process[9] or inconsistent arbitral decisions on the same

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[5] *See infra* Part II on "no-U-turn" or "waiver" clauses which generally state that the right of an investor to have recourse to arbitration is subject to the condition that the investor discontinues its domestic court proceedings on the same subject matter.

[6] *See, e.g.*, Christoph Schreuer, *Interaction of International Tribunals and Domestic Courts in Investment Law*, *in* 4 CONTEMPORARY ISSUES IN INTERNATIONAL ARBITRATION AND MEDIATION: THE FORDHAM PAPERS 71 (Arthur W. Rovine ed., 2010).

[7] H&H Enters. Inv., Inc. v. Arab Republic of Egypt, ICSID Case No. ARB/09/15, Excerpts of Award, ¶ 367 (May 6, 2014) [*hereinafter* "H&H Enterprises"] (wherein the Tribunal noted that the purpose of the FITR provision is "to ensure that the same dispute is not litigated before different fora"); Supervision y Control S.A. v. Republic of Costa Rica, ICSID Case No. ARB/12/4, Award, ¶¶ 294, 297 (Jan. 18, 2017) [*hereinafter* "Supervision y Control"] (wherein the Tribunal noted that FITR and similar provisions are used "to avoid the duplication of procedures and claims, and therefore to avoid contradictory decisions" and "to avoid conflicting decisions and eliminate the possibility of obtaining double recovery for the same acts.").

[8] *See* Olesya V. Kryvetska, Multiple Proceedings in the Disputes between Foreign Investor and State 55, 72 (2019) (unpublished thesis, Taras Shevchenko National University of Kyiv); Supervision y Control, ICSID Case No. ARB/12/4, Award, ¶ 293 (Jan. 18, 2017) (wherein the Tribunal stated that "[t]he existence of national courts and international arbitration as mechanisms for resolving disputes can generate a significant risk of duplication of claims and a problem in determining what is the proper dispute resolution mechanism for disputes that may arise during the investment period.").

[9] Ampal-Am. Isr. Corp. v. Arab Republic of Egypt, ICSID Case No. ARB/12/11, Decision on Jurisdiction, ¶ 331 (Feb. 1, 2016) (wherein the Tribunal took the following view on abuse of process with respect to parallel proceedings: "[i]n the Tribunal's opinion, while the same party in interest might reasonably seek to protect its claim in two fora where the jurisdiction of each tribunal is unclear, once jurisdiction is otherwise confirmed, it would crystallise in an abuse of process for in substance the same claim is to be pursued on the merits before two tribunals. However, the Tribunal wishes to make it very clear that this resulting abuse of process is in no way tainted by bad faith on the part of the Claimants as alleged by the Respondent. It is merely the result of the factual situation that would arise were two claims to be pursued before different investment tribunals in respect of the same tranche of the same investment.").

subject),[10] or by providing investors with additional possibilities to defend their rights in host States, multiple proceedings may in some instances have a positive effect for doing justice?

If a choice has to be made between an investor-State claim and a domestic court claim, an investor would plausibly consider initiating a less expensive and time-consuming domestic claim (e.g. an administrative claim challenging the revocation of a license);[11] even realising that the chances for success of such a claim against the host State may be quite limited. If it turns out within a rather short period (e.g. one year) that such claim is unsuccessful, but an international claim, with all its burdens and risks, still has chances for a better result, the question arises – whether it is fair to prohibit the disappointed investor to make further attempt towards bringing an international claim.

Alternatively, it is very unlikely that an investor would first file an expensive international claim, and if it fails after several years of the proceedings, initiate a domestic claim.

Professor Schreuer reasonably suggests that the FITR provision "*does not apply to every legal action taken in domestic courts that relates to the investment dispute before the international tribunal*".[12] Otherwise, "*[t]he investor would have to sit still and endure any form of injustice passively on pain of losing its access to international arbitration. In particular, the investor would have to forego appeals against administrative action that are subject to preclusive time limits under domestic law*".[13]

A balanced approach to the interests of investors and host States in investment treaties dictates a more flexible concept of the forum-selection clause. The use of earlier mentioned waiver-based provisions in some investment treaties seems to be a reasonable reflection of this approach.

The next part of this paper will discuss the various approaches to interpretation of the FITR clauses and similar treaty provisions.

II. FITR and similar clauses in investment treaties

The variety of treaty formulations gives ground for the classification of FITR and similar provisions into several types.[14] For instance, a traditional FITR clause says that once an investor has made a choice between the competent court of the host State and international arbitration, such choice is final.[15]

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10 *See* Mark Friedman, *Treaties as Agreements to Arbitrate – Related Dispute Resolution Regimes: Parallel Proceedings in BIT Arbitration*, *in* INTERNATIONAL ARBITRATION 2006: BACK TO BASICS? 545 (Albert Jan Van den Berg ed., 2007).

11 *See* Alex Genin, E. Cred. Ltd., Inc. & A.S. Baltoil v. Republic of Est., ICSID Case No. ARB/99/2, Award, ¶¶ 47, 58 (June 25, 2001) [*hereinafter* "Alex Genin"].

12 Christoph Schreuer, *Travelling the BIT Route of Waiting Periods, Umbrella Clauses and Forks in the Road*, 5 J. WORLD INV. & TRADE 231, 248–249 (2004).

13 *Id.*

14 *See, e.g.*, Markus A. Petsche, *The Fork in the Road Revisited: An Attempt to Overcome the Clash Between Formalistic and Pragmatic Approaches Clash Between Formalistic and Pragmatic Approaches*, WASH. U. GLOBAL STUD. L. REV. 391, 397–398 (2019) (for suggested classification of the FITR clauses).

15 *E.g.*, Agreement on the promotion and reciprocal protection of investments, Leb.-It., art. 7, Nov. 7, 1997, *available at* https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/1688/download. Article 7 reads as follows:
"In case of disputes regarding investments between a Contracting Party and an investor of the other Contracting Party, consultations will take place between the Parties concerned with a view to solving the case, as far as possible, amicably.

On the other hand, unlike a traditional FITR clause, some more flexible forum selection provisions of investment treaties say that the right of an investor to have recourse to arbitration is subject to the condition that the investor discontinues its domestic court proceedings on the same subject matter. Such provisions are called "*no-U-turn*" or "*waiver*" clauses.[16]

For example, Article 13(4) of the Turkey-Australia Bilateral Investment Treaty ["**BIT**"] envisages: "*As a precondition to electing arbitration under paragraph 13(2), the investor must waive any right it may have to initiate or continue proceedings on the same matter before judicial or administrative bodies of either Party*". Similarly, Article 8(4) of the Israel-Ukraine BIT provides: "*Unless otherwise agreed, an investor who has submitted the dispute to national jurisdiction may have recourse to the arbitral tribunals mentioned in paragraph 2 of this Article so long as a judgement has not been delivered on the subject matter of the dispute by a national court. For the sake of clarification, the right of an investor under this paragraph shall apply provided that the investor discontinues the proceedings on the subject matter before the national court*". The Netherlands Model BIT of 2018 also provides that domestic court proceedings relating to the same measures must be withdrawn or discontinued prior to a claim to arbitration.[17]

In *Supervision y Control S.A.* v. *Republic of Costa Rica*, a forum selection provision of this type was characterised as a provision based on the concept of waiver. The Tribunal found that Article XI(3) of the Spain-Costa-Rica BIT[18] stipulated a waiver provision.[19] The Tribunal explained that to avoid the risk of having contradictory decisions, investment treaties use two methods: the FITR and the concept of waiver. Under the second method, once the investor chooses international arbitration, the exercise of any claim before another dispute resolution mechanism must be waived.[20]

If these consultations do not result in a solution within six months from the date of written request for settlement, the investor may submit the dispute, at his choice, for settlement to:
the competent court of the Contracting Party in the territory of which the investment has been made; or
the International Center for Settlement of Investment Disputes (ICSID) provided for by the Convention on the Settlement of Investment Disputes between States and Nationals of the other States, opened for signature at Washington, on March 18, 1965, in case both Contracting Parties have become members of this Convention; or
an ad hoc arbitral tribunal which, unless otherwise agreed upon by the Parties to the dispute, shall be established under the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL).
The choice made as per subparagraphs a, b, and c herein above is final."

16 *See*, *e.g.*, UNITED NATIONS CONF. ON TRADE & DEV., *Scope And Definition*, 2 SERIES ON INTERNATIONAL INVESTMENT AGREEMENTS 89 (2011).

17 *See* Joep Wolfhagen & Natalie Sheehan, *New model BIT goes beyond consultation draft and introduces sweeping changes for investors*, INT'L L. OFF. (Nov. 22, 2018), *available at* https://www.internationallawoffice.com/Newsletters/Arbitration-ADR/Netherlands/Freshfields-Bruckhaus-Deringer-LLP/New-model-BIT-goes-beyond-consultation-draft-and-introduces-sweeping-changes-for-investors?utm_source=ILONewsletter&utm_medium=email&utm_content=Newsletter2018-11-22&utm_campaign=Arbitration&ADRNewsletter.

18 Agreement on the promotion and reciprocal protection of investments, Costa Rica-Spain, art. XI(3), July 8, 1997, 2079 U.N.T.S. 413 ("Once an investor has submitted the dispute to an arbitral tribunal, the award shall be final. If the investor has submitted the dispute to a competent court of the Party in whose territory the investment was made, it may, in addition, resort to the arbitral tribunals referred to in this article, if such national court has not issued a judgment. In the latter case, the investor shall adopt any measures that are required for the purpose of permanently desisting from the court case then underway.").

19 Supervision y Control, ICSID Case No. ARB/12/4, Award, ¶ 297 (Jan. 18, 2017).

20 *Id.* ¶ 294; *See also* Javier Ferrero, *Tribunal dismisses investor's claims because of breach of admissibility requirements under the applicable BIT in the ICSID case Supervisión y Control S.A. v. Republic of Costa Rica*, GLOB. ARB. NEWS (June 20, 2017), *available at* https://globalarbitrationnews.com/tribunal-dismisses-investors-claims-because-of-breach-of-admissibility-requirements-under-the-applicable-bit-in-the-icsid-case-supervision-y-control-s-a-v-republic-of-costa-rica-06202017/.

A similar forum selection provision was considered in *Infinito Gold Ltd.* v. *Costa Rica*. The Respondent highlighted the "*unusual*" provision in Article XII(3)(d) of the Canada-Costa Rica BIT, which was "*similar to (but broader than)*" an FITR clause.[21] The relevant part of the provision reads as follows: "*An investor may submit a dispute as referred to in paragraph (1) to arbitration in accordance with paragraph (4) only if: ... (d) in cases where Costa Rica is a party to the dispute, and no judgement has been rendered by a Costa Rican court regarding the measure that is alleged to be in breach of this Agreement*".[22]

The Respondent noted that Article XII(3)(d) was asymmetric: "*It only applies to cases in which Canadian investors contest measures regarding which a Costa Rican court has issued a judgment, not cases brought by Costa Rican investors against measures taken by Canada. This shows that this provision was specifically negotiated with the Costa Rican judiciary in mind*".[23] In turn, the Claimant insisted that Article XII(3)(d) was not an FITR provision, on the grounds that it was not designed to make investors choose between domestic and international remedies, but simply encouraged without mandating the exhaustion of local remedies.[24]

The Tribunal did not characterise the provision of Article XII(3)(d) either as an FITR or a waiver-based clause, but, after the analysis of the terms "*judgment*" and "*measure*" against the facts of the case, found that the Claimant's claims were not barred by Article XII(3)(d) of the BIT.[25]

Both a traditional FITR clause and a waiver-based clause are aimed at avoiding duplication of litigations on the same matter in domestic courts and international arbitration. The difference is that a traditional FITR is more restrictive in relation to an investor's choice of route, while a waiver clause is more flexible and gives more possibilities to protect an investor's rights.

On the other hand, a different approach altogether is used in the Energy Charter Treaty ["**ECT**"]. The forum selection clause of the ECT does not expressly say that a choice of the procedure is final. Instead, a Contracting State may submit a special declaration having an FITR effect.[26] Such Contracting States are listed in Annex ID entitled "*List of Contracting Parties Not Allowing an Investor to Resubmit the Same Dispute to International Arbitration at a Later Stage under Article*

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21 Infinito Gold Ltd. v. Republic of Costa Rica, ICSID Case No. ARB/14/5, Decision on Jurisdiction, ¶ 256 (Dec. 4, 2017).

22 *Id.* ¶ 144.

23 *Id.* ¶ 258.

24 *Id.* ¶ 278.

25 *Id.* ¶ 298.

26 Energy Charter Treaty, art. 26(2)–(3), Dec. 17, 1994, 2080 U.N.T.S. 100. Article 26(2) and 26(3) read as follows:
"(2) If such disputes cannot be settled according to the provisions of paragraph (1) within a period of three months from the date on which either party to the dispute requested amicable settlement, the Investor party to the dispute may choose to submit it for resolution: (a) to the courts or administrative tribunals of the Contracting Party to the dispute; (b) in accordance with any applicable, previously agreed dispute settlement procedure; or (c) in accordance with the following paragraphs of this Article.
(3) (a) Subject only to subparagraphs (b) and (c), each Contracting Party hereby gives its unconditional consent to the submission of a dispute to international arbitration or conciliation in accordance with the provisions of this Article.
(b)(i) The Contracting Parties listed in Annex ID do not give such unconditional consent where the Investor has previously submitted the dispute under subparagraph (2)(a) or (b). (ii) For the sake of transparency, each Contracting Party that is listed in Annex ID shall provide a written statement of its policies, practices and conditions in this regard to the Secretariat no later than the date of the deposit of its instrument of ratification, acceptance or approval in accordance with Article 39 or the deposit of its instrument of accession in accordance with Article 41."

26".[27] In one case, such a written Statement by Italy was called "*Italy's 'fork-in-the-road' declaration*".[28]

Another variation of a forum selection clause can be gauged from Article 26 of the International Centre for Settlement of Investment Disputes ["**ICSID**"] Convention, which reads as follows: "*Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy. A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention*" (emphasis added). In other words, once the ICSID is seized, other remedies including domestic litigation on the same matters are excluded. The exclusive character of consent to ICSID arbitration may give rise to a debate on whether the matters before ICSID are the same as the matters before the domestic court of the host State.[29]

Lastly, some FITR provisions in BITs reflect modern trends observable in investment treaty disputes. For instance, an FITR clause in the 2017 Columbia Model BIT refers to the "*same fundamental basis*" of judicial and arbitration claims.[30] The approach of various tribunals considering this concept has been discussed in the next part of this paper.

III. Methods applied by arbitral tribunals

Conceptually, the known case law divides between the pro-investor position of the tribunals mostly based on a strict interpretation of the *triple identity test*[31] and the tribunals' support of respondent States based on the "*same fundamental basis*" approach.[32] However, each case has its specific circumstances, and it would be an oversimplification to say that a tribunal should either apply the triple identity test or the same fundamental basis approach. Probably, the most tenable decision would be if both tests show the same result.

A. The triple identity test

The traditional triple identity test verifies whether the legal actions in domestic court and international arbitration have the same parties, object, and cause of action. In one of the early

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27 *See* Khan Resources v. Mongolia, Case No. 2011-09, Decision on Jurisdiction, ¶ 387 (Perm. Ct. Arb. July 25, 2012), *available at* http://www.italaw.com/sites/default/files/case-documents/italaw4268.pdf [*hereinafter* "Khan Resources"] (wherein the Tribunal noted that Mongolia was listed in Annex ID of the ECT as one of the States that had restricted their unconditional consent to submit disputes to international arbitration to those disputes that had not been previously submitted to the courts of the Contracting Party).

28 Greentech Energy Sys. A/S, et al. v. Italian Republic, SCC Case No. V (2015/095), Final Award, ¶ 201 (Dec. 23, 2018), *available at* https://www.italaw.com/sites/default/files/case-documents/italaw10291.pdf [*hereinafter* "Greentech Energy"].

29 *See, e.g.*, *infra* Part IV(R) the analysis in United Util. (Tallinn) B.V. & Aktsiaselts Tallinna Vesi v. Republic of Est., ICSID Case No. ARB/14/24, Award (June 21, 2019), *available at* https://www.italaw.com/sites/default/files/case-documents/italaw10648.pdf [*hereinafter* "United Utilities"].

30 Colombia Model Bilateral Investment Treaty 2011, arts. 3, 4, *available at* http://www.mincit.gov.co/temas-interes/documentos/model-bit-2017.aspx. Articles 3 and 4 read as follows:
"A claim may not be submitted to a Court of Law or Arbitration under this Article when a Claimant Investor is either directly or indirectly through its Investment in the case of an Enterprise, party to judicial or arbitral proceedings within the Host Party, that refer to the same fundamental basis, or could result in the same reparation to the claimant.
Once the Claimant Investor has submitted the dispute to a competent tribunal of the Host Party or any of the arbitration proceedings stated above, the choice of the procedure shall be final."

31 *E.g.*, Khan Resources, Case No. 2011-09, Decision on Jurisdiction, ¶¶ 390–396 (Perm. Ct. Arb. July 25, 2012).

32 *E.g.*, Pantechniki S.A. Contractors & Eng'rs v. Republic of Alb., ICSID Case No. ARB/07/21, Award, ¶¶ 61–62 (July 30, 2009) [*hereinafter* "Pantechniki"].

ICSID cases, *Benvenuti & Bonfant* v. *Congo*, "*the Tribunal declared that there could only be a case of lis pendens where there was identity of the parties, object and cause of action in the proceedings pending before both tribunals*".[33] In some cases, "*legal basis*" is used instead of "*cause of action*,"[34] and "*issues*" instead of "*object*".[35]

In a number of cases favourable to the claimants, only some elements of the triple identity test were found sufficient by the tribunals to reach a conclusion. For example, if the object of the claims is clearly not identical, it may be futile for a tribunal to analyse other elements of the test.[36]

The opponents may say that the triple identity test is too formalistic and may disregard that the claims in question are substantially identical, due merely, to the formalistic difference of the parties or normative sources. For instance, in one case, the Respondent State argued that "*to assess whether there is identity of the parties, the Tribunal should analyse the economic reality of the corporate structure of the different entities present in the various procedures in question. Indeed, if this was not the case 'any Claimant company could modify its corporate structure, using intermediary companies, subsidiaries, and ultimately restructuring its participation in the corporate chain, to justify inapplicability of the triple identity test with regard to the identity of the party'*".[37]

On this point, one tribunal notes that "*[a] strict application of the triple identity test would deprive the fork in the road provision of all or most of its practical effect*".[38]

Similarly, another tribunal, is of the view that the strict application of the triple identity test "*removes all legal effects*" from FITR clauses, "*which contravenes the effect utile principle applicable to the interpretation of treaties*". What ultimately matters for the application of FITR clauses "*is that the two relevant proceedings under examination have the same normative source and pursue the same aim*".[39]

In order to make the relevant test more flexible, it was suggested to use a kind of double identity test when "*the sameness of a dispute would be determined – in addition to the identity of the parties – either by reference to the object of proceedings, or else by the proceedings' 'equivalence in substance'*".[40]

B. The same fundamental basis test

On the other hand, the advantage of the triple identity test is that the borderline between claims is made on clear criteria, unlike the other more liberal, but likely more vague approach[41] which focuses on fundamentally the same factual and normative bases.

33 S.A.R.L. Benvenuti & Bonfant v. People's Republic of the Congo, ICSID Case No. ARB/77/2, Award, ¶ 1.14 (Aug. 8, 1980).

34 *E.g.*, Charanne & Constr. Inv. v. Kingdom of Spain, SCC Case No. V (062/2012), Final Award, ¶ 399 (Jan. 21, 2016) [*hereinafter* "Charanne and Construction Investment"].

35 *E.g.*, M.C.I. Power Grp., ICSID Case No. ARB/03/6, Award, ¶ 176 (July 31, 2007).

36 *E.g.*, Total S.A. v. Argentine Republic, ICSID Case No. ARB/04/1, Decision on Liability, ¶ 443 (Dec. 27, 2010) [*hereinafter* "Total S.A."].

37 Charanne and Construction Investment, SCC Case No. V (062/2012), Final Award, ¶ 406 (Jan. 21, 2016).

38 Chevron Corp. & Texaco Petrol. Co. v. Republic of Ecuador (II), Case No. 2009-23, Third Interim Award on Jurisdiction and Admissibility, ¶¶ 4.76-4.77 (Perm. Ct. Arb. Feb. 27, 2012) [*hereinafter* "Chevron Corporation"].

39 Supervision y Control, ICSID Case No. ARB/12/4, Award, ¶ 330 (Jan. 18, 2017).

40 *See, e.g.*, Vid Prislan, Domestic courts in Investor-State Arbitration: Partners, Suspects, Competitors 377, ¶ 10.2.2 (June 27, 2019) (Doctoral thesis, University of Leiden), *available at* https://openaccess.leidenuniv.nl/bitstream/handle/1887/74364/10.pdf?sequence=16.

This more liberal test means that if a domestic claim and an international claim are "*fundamentally same*" claims, this would be sufficient to support the jurisdictional objection of a respondent State based on the FITR clause. The same fundamental basis test as applied in *Pantechniki* v. *Albania* ["**Pantechniki**"] split the case law on FITR.[42]

The Pantechniki tribunal held that the relevant test was expressed by the America-Venezuela Mixed Commission in the Woodruff case in 1903 i.e. "*whether or not 'the fundamental basis of a claim' sought to be brought before the international forum is autonomous of claims to be heard elsewhere*". The Tribunal noted that "*the same facts can give rise to different legal claims*," while "*the similarity of prayers for relief does not necessarily*" indicate an identity of causes of action. The Tribunal believed that to determine whether claims have the same normative source is necessary. However, the Tribunal warned against rapid decisions based on "*abstract*" statements, by observing as follows: "*The frontiers between claimed entitlements are not always distinct. Each situation must be regarded with discernment.*"[43]

The "*fundamental basis*" test raises several questions. *First*, whether the basis under consideration is legal or factual, or both? *Second*, what comprises the *essence of claims*: the facts, the relief, the cause of action? *Third*, in what way should it be established that the claim before an arbitral tribunal has an "*autonomous*" existence from the claim brought before a domestic court? The author has searched the answers to these questions in the arbitral decisions discussed below and summarised his understanding in the last part entitled '*Conclusions'*.

C. Other approaches

Tribunals also apply other methods for establishing whether the compared claims are identical. For instance, a dividing line between breaches of contract and breaches of the treaty is often suggested. It is quite usual for claimants to say that the claims brought to domestic court are related to the breaches of contract, while the claims submitted to international arbitration are relating to the breaches of the treaty, in an attempt to avoid being barred by virtue of FITR provisions.[44] The tribunal in one case noted: "*A purely contractual claim will normally find difficulty in passing the jurisdictional test of treaty-based tribunals, which will of course require allegation of a specific violation of treaty rights as the foundation of their jurisdiction*".[45] However, contractual claims may be interlinked with treaty claims, which makes the differentiation practically difficult.[46]

Another dividing line may be drawn between a breach of the treaty and a dispute related to the investment under the treaty, which is considered to be broader.[47] The ad hoc committee in

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41 Petsche, *supra* note 14, at 391 (wherein it is also noted that the clash is "between formalistic and pragmatic approaches."); Petsche, *supra* note 14, at 394–395 ("However, they have also (and rightly so) pointed out that the fundamental-basis test is vague and that it does not therefore ensure a high degree of legal certainty and predictability.").

42 Pantechniki, ICSID Case No. ARB/07/21, Award, ¶¶ 61–62 (July 30, 2009).

43 *Id.*

44 *See, e.g.*, Toto, ICSID Case No. ARB/07/12, Decision on Jurisdiction, ¶ 208 (Sept. 11, 2009).

45 Occidental Expl. & Prod. Co. v. Republic of Ecuador, LCIA Case No. UN3467, Final Award, ¶ 52 (July 1, 2004), 12 ICSID Rep. 59 (2007) [*hereinafter* "Occidental Exploration"]; *see also* Joy Mining Mach. Ltd. v. Arab Republic of Egypt, ICSID Case No. ARB/03/11, Award on Jurisdiction, ¶ 58 (Aug. 6, 2004).

46 *See, e.g.*, Occidental Exploration, LCIA Case No. UN3467, Final Award, ¶ 81 (July 1, 2004), 12 ICSID Rep. 59 (2007).

47 *See* Compañiá de Aguas del Aconquija S.A. & Vivendi Universal S.A.v. Argentine Republic, ICSID Case No. ARB/97/3, Decision on Annulment, ¶ 55 (July 3, 2002).

Vivendi v. *Argentine Republic* took the view that the initiation of proceedings in the administrative courts would prima facie constitute a choice of forum under the FITR clause of the France-Argentina BIT "*if that claim was coextensive with a dispute relating to investments made under the BIT*".[48] The Committee in particular held: "*Article 8 deals generally with disputes 'relating to investments made under this Agreement between one Contracting Party and an investor of the other Contracting Party.' It is those disputes which may be submitted, at the investor's option, either to national or international adjudication. Article 8 does not use a narrower formulation, requiring that the investor's claim allege a breach of the BIT itself. Read literally, the requirements for arbitral jurisdiction in Article 8 do not necessitate that the Claimant allege a breach of the BIT itself: it is sufficient that the dispute relate to an investment made under the BIT*".[49] This analysis has been based on the textual interpretation of the particular FITR provision.

Below is a brief analysis of the major cases: (i) supporting investor interests and (ii) where the respondent States have been successful on the FITR issue. By this time, statistically, investors have prevailed. However, the *Pantechniki* award and further similar decisions in favour of host States, while still in the minority, have brought more intrigue to the FITR analysis.

IV. Selected cases favourable to investors

There are several cases where claimants have been successful as far as the interpretation of FITR clauses is concerned. While in some cases, the analysis by tribunals was limited to identifying parties, objects or claims as not identical, this does not take away from the importance of the findings,[50] as most cases clearly concerned different factors.

A. Olguín v. Paraguay

In *Olguín* v. *Paraguay*, the Tribunal did not find evidence that the Claimant had irrevocably elected to bring a claim to the courts of the host State similar to the ICSID claim. The Claimant's request for a declaratory judgment of bankruptcy and liquidation of a commercial corporation, mentioned by the Respondent, could not, in the view of the Tribunal, "*have the same juridical effect as a claim against the Republic of Paraguay*".[51] Therefore, the Respondent's jurisdictional objection was dismissed.

B. Champion Trading v. Egypt

The Tribunal in *Champion Trading* v. *Egypt* rejected the Respondent's defence based on the FITR clause solely due to the different parties (the Egyptian company and its shareholders) in the

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48 *Id.*

49 *Id.*

50 With reference to the triple identity test, three tribunals have dismissed the Respondents' FITR objections: Hulley Enters. Limited (Cyprus) v. Russian Federation, Case No. 2005-03/AA226, Interim Award on Jurisdiction and Admissibility, ¶¶ 597–599 (Perm. Ct. Arb. 2009) [*hereinafter* "Hulley Enterprises"]; Hulley Enterprises, Case No. 2005-03/AA226, Final Award, ¶¶ 1271-1272 (Perm. Ct. Arb. 2014); Yukos Universal Ltd. (Isle of Man) v. Russian Federation, Case No. 2005-04/AA227, Interim Award on Jurisdiction and Admissibility, ¶¶ 598–600 (Perm. Ct. Arb. 2009) [*hereinafter* "Yukos Universal"]; Yukos Universal, Case No. 2005-04/AA227, Final Award, ¶¶ 1271–1272 (Perm. Ct. Arb. 2014); Veteran Petro. Ltd. (Cyprus) v. Russian Federation, Case No. 2005-05/AA228, Interim Award on Jurisdiction and Admissibility, ¶¶ 609-611 (Perm. Ct. Arb. 2009) [*hereinafter* "Veteran Petroleum"]; Veteran Petroleum, Case No. 2005-05/AA228, Final Award, ¶¶ 1271-1272 (Perm. Ct. Arb. 2014). The *ad hoc* committee, in one known ICSID case, briefly mentioned that the Tribunal, based on the triple identity test, dismissed the FITR challenge of the Respondent State to its jurisdiction (Victor Pey Casado & President Allende Found. v. Republic of Chile, ICSID Case No. ARB/98/2, Decision on the Application for Annulment of the Republic of Chile, ¶¶ 43-45 (Dec. 18, 2012)).

51 Eudoro Armando Olguín v. Republic of Para., ICSID Case No. ARB/98/5, Decision on Jurisdiction, ¶ 30 (Aug. 8, 2000), 6 ICSID Rep. 156 (2006) (unofficial translation from Spanish).

domestic and ICSID proceedings, holding that the treaty should be interpreted "*in good faith in accordance with the ordinary meaning expressed therein*". It was further held that this interpretation in good faith "*excludes from ICSID arbitration only those disputes where the ICSID claimant is also the claimant in the national proceedings*".[52]

C. Azurix v. Argentina

In *Azurix* v. *Argentina*, which dealt with the termination of a concession contract, the Tribunal noted that neither of the parties to arbitration was a party to the proceedings before the local courts, and added that Argentina was not a party to any domestic proceedings in question.[53] Also, the Tribunal noted "*the differentiation of the claims*," such as the administrative appeals to domestic court over the termination of the concession agreement, on the one hand, and the ICSID claim concerning investment in an Argentinian subsidiary, on the other hand, and rejected the FITR objection of the Respondent State.[54]

D. Enron v. Argentina

In *Enron* v. *Argentina,* the Claimants argued that the parties and the subject matter of the claims before the local courts and before ICSID were different. The Tribunal held that "*even if there was recourse to local courts for breach of contract this would not prevent resorting to ICSID arbitration for violation of treaty rights, or that in any event, as held in Benvenuti & Bonfant, any situation of lis pendens would require identity of the parties*". The Tribunal also noted that, in the present case, the Claimants have not made submissions before local courts and "*[t]he conditions for the operation of the principle electa una via or 'fork in the road' are thus simply not present*".[55]

E. Total S.A. v. Argentina

In *Total S.A.* v. *Argentina*, the Claimant objected to the FITR-based argument of the Respondent State "*because the present arbitration was initiated before the domestic litigation so that its claim concerning this issue must be viewed as predating the domestic proceedings*". The Claimant explained that "*its specific claim against Argentina's demand for the tax payment at issue is ancillary to [its] initial arbitration request, to which it was added when Argentina requested payment of those taxes in 2006, while these proceedings were pending*".[56] The Tribunal had no difficulty in finding that the two proceedings had a different object, and held as follows: "*The object of the arbitration before this Tribunal is the alleged breach of the [France-Argentina] BIT by Argentina's demand for retroactive tax payment; the claim before Argentina's domestic courts is that the demand is in breach of Argentina's law. Further, the Claimant in the domestic proceedings for amparo is Total's subsidiary, Total Austral, and not Total itself. It is the Tribunal's view therefore that Article 8.2 of the BIT is not applicable*".[57]

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52 Champion Trading Co., Ameritrade Int'l, Inc. v. Arab Republic of Egypt, ICSID Case No. ARB/02/9, Decision on Jurisdiction, ¶ 3.4.3 (Oct. 21, 2003), 10 ICSID Rep. 400 (2006).

53 Azurix Corp. v. Argentine Republic, ICSID Case No. ARB/01/12, Decision on Jurisdiction, ¶ 90 (Dec. 8, 2003), 10 ICSID Rep. 416 (2006) [*hereinafter* "Azurix Corporation"].

54 *Id.* ¶ 92.

55 Enron Corp. & Ponderosa Assets, L.P. v. Argentine Republic, ICSID Case No. ARB/01/3, Decision on Jurisdiction, ¶¶ 95-98 (Jan. 14, 2004), 11 ICSID Rep. 273 (2007).

56 Total S.A., ICSID Case No. ARB/04/1, Decision on Liability, ¶ 443 (Dec. 27, 2010).

57 *Id.*

F. Charanne and Construction Investments v. Spain

In *Charanne and Construction Investments* v. *Spain*,[58] the Respondent referred to "*a flexible interpretation of the triple identity test developed by some recent decisions of international tribunals*".[59] The Tribunal dismissed the Respondent State's objection that the Claimants, by bringing local administrative proceedings and a proceeding before the European Court of Human Rights ["**ECHR**"], triggered the FITR provision of the ECT and were precluded from bringing the case before an investor-State tribunal. The Tribunal considered, in particular, that there was no substantial identity of parties in the local proceedings and the ECHR as required under the triple identity test.[60] Consequently, it was unnecessary "*to examine the arguments of the Parties as to the subject identity and identity of legal basis, since it would not change the decision of the Arbitral Tribunal in this respect*".[61]

G. Hassan Awdi, Enterprise Business Consultants, Inc. and Alfa El Corporation v. Romania

The Tribunal's finding, in *Hassan Awdi, Enterprise Business Consultants, Inc. and Alfa El Corporation* v. *Romania*,[62] was based on grounds different from the identity of the parties or objects of claims. In the Tribunal's view, the FITR provision "*is meant to avoid that by resorting initially to the State courts and then to arbitration under the BIT, the investor tries its case a second time should it be not satisfied with the outcome of the first attempt before the local courts*".[63] Noting that the local court proceeding was annulled due to the Claimants' failure to pay court fees and pleadings did not happen before the domestic courts, the Tribunal rejected Romania's challenge and found that there was no parallel litigation, and hence no room for application of the FITR provision.[64]

While the above decisions provide an insight into the issue, other tribunals have provided a more detailed analysis of FITR.

H. Alex Genin v. Estonia

In *Alex Genin* v. *Estonia*, the Estonian Innovation Bank ["**EIB**"] filed a claim to national court and then its shareholders brought their claim to arbitration.[65] Estonia argued that, by electing to litigate their disputes in the Estonian courts, the Claimants had exhausted their right to re-litigate the same disputes in the other forum.[66]

The Tribunal did not expressly mention the triple identity test, but actually applied this approach. Two questions were analysed: *first*, to what extent the issues litigated in domestic courts were identical to those raised in the ICSID arbitration and *second*, was it proper to consider EIB and

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58 Charanne and Construction Investment, SCC Case No. V (062/2012), Final Award, ¶¶ 398-410 (Jan. 21, 2016).

59 *Id.* ¶ 404.

60 *Id.* ¶ 408 (the tribunal concluded that "[w]hile it is true that the Claimants are part of the same group of the company Grupo T-Solar and of the company Grupo Isolux Corsan S.A., this is insufficient to consider that there is a substantial identity of the parties, even under a flexible interpretation of the triple identity test. For that to be the case it would have been necessary to demonstrate that the Claimants enjoy decision-making powers in Grupo T-Solar and Grupo Isolux Corsan S.A. in such a way that these companies have been in reality intermediary companies. This demonstration has not been provided. Neither has it been alleged that the corporate structure of the group of the claiming parties has been designed or modified with a fraudulent purpose to allow the Claimants to avoid the fork in the road provision of the ECT.").

61 *Id.* ¶ 410.

62 Hassan Awdi, Enter. Bus. Consultants, Inc. & Alfa El Corp. v. Rom., ICSID Case No. ARB/10/13, Award (Mar. 2, 2015).

63 *Id.* ¶ 203.

64 *Id.* ¶¶ 204–205.

65 Alex Genin, ICSID Case No. ARB/99/2, Award, ¶¶ 47, 58, 321, 333 (June 25, 2001), 6 ICSID Rep. 241 (2006).

66 *Id.* ¶ 321.

the Claimants "*as a 'group' and to view EIB's legal acts in Estonia as an 'election of remedy' for the group as a whole?*"[67]

The Tribunal found that the lawsuits undertaken by EIB in Estonia, relating to the purchase by EIB of the branch of another bank and to the revocation of EIB's license, were not identical to the Claimants' "*cause of action in the 'investment dispute' that they seek to arbitrate in the present proceedings*".[68] The Tribunal also indicated the distinction between the causes of action brought by EIB in Estonia and by the Claimants in the "*investment dispute*" in the ICSID.[69] The Tribunal held that certain aspects of the facts that gave rise to the dispute in ICSID "*were also at issue in the Estonian litigation*". However, "*the 'investment dispute' itself was not*," and the Claimants, therefore, were not "*barred from using the ICSID arbitration mechanism*".[70]

As to the second question, the Tribunal concluded that the actions taken by EIB in Estonia regarding the losses suffered by EIB due to the alleged misconduct of the Bank of Estonia "*certainly affected the interests of the Claimants, but this in itself did not make them parties to these proceedings*".[71]

I. CMS v. Argentina

In *CMS* v. *Argentina*, the Respondent State contended that the Claimant triggered the FITR provision of the respective BIT.[72] The Claimant submitted that the parties and the subject matter of the local and ICSID disputes were different, as the local claim concerned the contractual arrangements under the license while the investor's claims related to the affected treaty rights. The Tribunal noted: "*Decisions of several ICSID tribunals have held that as contractual claims are different from treaty claims even if there had been or there currently was a recourse to the local courts for breach of contract, this would not have prevented submission of the treaty claims to arbitration*".[73] The Tribunal also noted that, "*[b]oth the parties and the causes of action under separate instruments were different. Had the Claimant renounced recourse to arbitration, for example by resorting to the courts of Argentina, this would have been a binding selection under the BIT*".[74]

J. Middle East Cement v. Egypt

In *Middle East Cement* v. *Egypt*, the Claimant brought a case before the Egyptian courts regarding the alleged nullity of an auction and then referred the dispute to ICSID for arbitration. The Tribunal rejected the Respondent's argument on the forum selection clause because the dispute before the Egyptian courts and the one before the Tribunal were different.[75] In particular, the Tribunal noted that the FITR provisions of the respective BIT refers to "*such disputes*" as were specified in paragraph 1 of Article 10 of the BIT i.e. disputes "*between an investor of a Contracting*

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67 *Id.* ¶ 330.
68 *Id.* ¶ 331.
69 *Id.* ¶¶ 330-332.
70 *Id.* ¶ 333.
71 *Id.* ¶ 331.
72 CMS Gas Transmission Co. v. Argentine Republic, ICSID Case No. ARB/01/8, Decision of the Tribunal on Objections to Jurisdiction, ¶¶ 77-82 (July 17, 2003), 7 ICSID Rep. 494 (2005).
73 *Id.* ¶ 80.
74 *Id.* ¶¶ 80–81.
75 Middle E. Cement Shipping & Handling Co. S.A. v. Arab Republic of Egypt, ICSID Case No. ARB/99/6, Award, ¶¶ 71–72 (Apr. 12, 2002), 7 ICSID Rep. 178 (2005).

Party and the Other Contracting Party concerning an obligation of the latter under this Agreement".[76] The case brought by the Claimant before the Egyptian courts regarding the alleged nullity of the auction was not and could not be '*concerning*' Egypt's obligations under the BIT but only the validity of the auction under Egyptian national law.[77] The Tribunal's argument referring to the precise definition of an investor-State dispute under the BIT seems to be useful to Claimants in other arbitrations. For example, if an FITR clause expressly indicates that a treaty claim is a claim "*brought by an investor*," a claim brought to the host State court by a domestic legal entity connected with the investor will not trigger such an FITR clause.

K. Occidental v. Ecuador

An interesting analysis of the FITR issue can be seen in the London Court of International Arbitration ["**LCIA**"] award, in *Occidental* v. *Ecuador*.[78] Ecuador argued that the Claimant had submitted four separate lawsuits to Ecuadorian courts that constituted an irrevocable choice to submit the dispute to the courts of the Respondent State in accordance with the FITR provision of the United States-Ecuador BIT. The Claimant relied on the triple identity test and further argued that the relief requested in the two separate disputes is different. It must be noted that, unlike some other cases under consideration, in this case, the Claimant had not submitted any contractual claims to either forum. It submitted the claims on its rights under the BIT to arbitration, while the claim to the courts of the Respondent State concerned an issue of interpretation of the tax legislation.

The Tribunal focused on the nature of the submitted dispute and took the view that if the nature of the dispute submitted to arbitration is treaty-based, "*the jurisdiction of the arbitral tribunal is correctly invoked*".[79] This situation, in the Tribunal's view, occurred where treaty-based issues came to arbitration and non-contractual domestic law questions were dealt with by local courts in Ecuador. The decisions adopted by Ecuadorian courts on matters of interpretation of the Ecuadorian Tax Law were "*of great help to this Tribunal in its own interpretation of both the Treaty and the relevant provisions of Ecuadorian law … It follows that the causes of action might be separate and the nature of the disputes different, yet they may both have cumulative effects and interact reciprocally*".[80]

There was one more reason for the Tribunal in this case to find that the FITR mechanism was not triggered in that dispute. The FITR clause, by its very definition, assumed that the investor had made a choice between alternative avenues. In the Tribunal's view, such a choice was required to "*be made entirely free and not under any form of duress*". In the present case, the local tax law required the taxpayer to apply to the courts within the brief period of 20 days following the issuance of the resolution on value-added tax, which becomes final and binding if this is not done.[81] The Tribunal was of the view that in this case, "*the investor did not have a real choice. Even if it took the matter instantly to arbitration, which is not that easy to do, the protection of its right to object to the*

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76 *Id.* ¶ 71.
77 *Id.*
78 Occidental Petro. Corp. & Occidental Expl. & Prod. Co. v. Republic of Ecuador, ICSID Case No. ARB/06/11, Award, ¶¶ 37(a), 38–63 (Oct. 5, 2012), 12 ICSID Rep. 59 (2007).
79 *Id.* ¶ 57.
80 *Id.* ¶ 58.
81 *Id.* ¶ 60.

adverse decision of the SRI [tax authority] would have been considered forfeited if the application before the local courts were not made within the period mandated by the Tax Code".[82]

L. M.C.I. Power Group L.C. and New Turbine, Inc. v. Ecuador

In *M.C.I. Power Group L.C. and New Turbine, Inc.* v. *Ecuador*, the Tribunal dismissed the Respondent's FITR based objection due to the specific circumstances of the case.[83] The Claimants alleged that they had not triggered the FITR clause because "*the claim before the Ecuadorian tribunals involved different parties and different issues and that the claim was not a free election of forum and was annulled without a decision being made on the Merits*".[84] The Tribunal held that the FITR issue was irrelevant in view of the fact that the suits to the Ecuadorian courts "*related to disputes that arose prior to the entry into force of the BIT. Thus, in accordance with the principle of the non-retroactivity of treaties, those disputes remain outside the temporal Competence of this Tribunal*".[85]

In this case, one more aspect is of interest. The Claimants argued that they had not triggered the FITR mechanism because the proceedings were annulled before the court could make a decision on the merits of the case.[86] The Tribunal found this argument irrelevant for purposes of determining jurisdiction because if a right to choose an option had been exercised in that case that would have been "*irrevocable, whether or not there had been a final decision on the Merits*".[87]

M. Toto v. Lebanon

In *Toto* v. *Lebanon*,[88] the Respondent State argued that the claims submitted to both the Lebanese Conseil d'Etat and the ICSID have the same aim of obtaining compensation for the extra costs incurred in the execution of the contract. The parallel proceedings could result in conflicting decisions.[89] The Tribunal applied the triple identity test and rejected the objection of the Respondent. It stated that claims arising out of the contract and treaty claims do not have the same cause of action.[90] Moreover, in this case the Claimant had recourse to domestic litigation based on the contractual forum selection clause. In the Tribunal's view, this could not exclude the jurisdiction of the Tribunal based upon the respective BIT.[91] The Tribunal also held that the contractual jurisdiction clause and the treaty jurisdiction clause "*are not mutually exclusive clauses*". The contractual jurisdiction clause applies to actions and matters that are violations of the contract; the treaty jurisdiction clause applies to actions and matters that constitute violations of the substantive treaty provisions "*even if the same actions and matters may give rise to breach of contract*".[92]

N. Chevron Corporation and Texaco Petroleum Company v. Ecuador (II)

In *Chevron Corporation and Texaco Petroleum Company* v. *Ecuador (II)*,[93] the same "*fundamental basis*" of two claims was under discussion. The Respondent submitted that "*in a situation where a claim in a*

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82 *Id.* ¶ 61.
83 M.C.I. Power Group, ICSID Case No. ARB/03/6, Award, ¶¶ 171–189 (July 31, 2007).
84 *Id.* ¶ 175.
85 *Id.* ¶ 189.
86 *Id.* ¶ 177.
87 *Id.* ¶ 182.
88 Toto, ICSID Case No. ARB/07/12, Decision on Jurisdiction, ¶¶ 203–217 (Sept. 11, 2009).
89 *Id.* ¶ 206.
90 *Id.* ¶ 211.
91 *Id.* ¶ 213.
92 *Id.* ¶ 214.
93 Chevron Corporation, Case No. 2009-23, Third Interim Award on Jurisdiction and Admissibility, ¶¶ 4.72–4.89 (Perm. Ct. Arb. Feb. 27, 2012).

local court is contract-based and a claim in an arbitration is treaty-based, a tribunal should only exercise jurisdiction where the 'fundamental basis' of the contract and treaty claims are different".[94] The Claimants argued that these claims are "*fundamentally different,*"[95] and the "*investment dispute*" before the arbitral Tribunal had not been submitted to another forum. Further, the dispute in the domestic court was characterised by the Claimants as an "*environmental damage dispute*" rendering the FITR provision inapplicable.[96]

The Tribunal analysed what was required to establish "*sameness*" of two disputes.[97] It was clear to the Tribunal that the Claimants had not themselves submitted the dispute before this Tribunal to any other court.[98] This, due to the specific words of the FITR provision in this case, did not allow the FITR clause to be applied.[99] The Tribunal also concluded that the prayer for relief and the matters before the domestic courts and the Tribunal were not the same[100] and rejected the Respondent's FITR case.

O. The ideal test in AES Corporation and Tau Power B.V. v. Kazakhstan

The ideal case on the FITR provision would be the one in which the tribunal's finding satisfies both the triple identity test and the fundamental basis test. In *AES Corporation and Tau Power B.V.* v. *Kazakhstan* ["**AES Corporation**"],[101] the Respondent State relying on the *Pantechniki* award, argued that it was impermissible to bring claims before ICSID having the same "*fundamental basis*" as disputes which had already been submitted and ruled upon by the domestic courts.[102] The Claimants stated that the FITR clause did not operate to bar the Claimants' claims, because the dispute presented to this arbitral Tribunal was different from the disputes which were submitted to the Kazakh courts by the AES Entities affiliated to the Claimants.[103] The Tribunal took the view that the Claimants' claims, as submitted in the ICSID arbitration, although based on the same facts and on the same alleged basic wrongdoings by the Respondent, were different from the claims filed by the entities affiliated with Claimants with the Kazakh courts. This conclusion and the further finding that the claims in ICSID were not barred by any FITR provision, in the view of the Tribunal, satisfied both the triple identity test and the "*fundamentally the same [normative] basis*" test.[104] Importantly, the Tribunal emphasised that "*fundamentally the same*

94 *Id.* ¶ 3.80.
95 *Id.* ¶ 3.185.
96 *Id.* ¶¶ 3.131–3.132.
97 *Id.* ¶ 4.74.
98 *Id.* ¶ 4.79.
99 *Id.* ¶¶ 4.78, 4.80.
100 *Id.* ¶¶ 4.81–4.88.
101 AES Corp. & Tau Power B.V. v. Republic of Kaz., ICSID Case No. ARB/10/16, Award, ¶¶ 225–230 (Nov. 1, 2013).
102 *Id.* ¶ 176.
103 *Id.* ¶ 179.
104 *Id.* ¶ 227–229. Paragraphs 228 and 229 read as follows:
"228. The key difference between the claims is as follows: through the court proceedings before the Kazakh courts, Claimants mainly sought to invalidate decisions of the competition authorities with regard to the listing of the AES Entities on the Monopoly Register and to challenge orders through which fines and penalties were imposed on the AES Entities for allegedly anti-competitive behavior. Claimants did so mainly by arguing that the relevant authorities had misapplied the relevant Kazakh competition law.
229. Claimants' claims in the present proceeding have a different dimension and meaning: While the implementation by the Kazakh authorities of the new Kazakh competition law plays an important role in the present proceedings, it does so only from a factual perspective in the sense that it is one of the factual causes for Claimants' treaty claims in the present ICSID proceedings. In other words, it is the result of the Kazakh court proceedings, i.e. the

basis" means normative basis, rather than merely factual basis. Apparently, this approach puts stricter requirement to the notion of "*fundamental basis*".

P. Mobil Exploration v. Argentina

Certain elements of the triple identity test were used in *Mobil Exploration* v. *Argentina*, wherein the Claimants argued that the FITR clause applies only when the disputes before international tribunals and before local courts "*are between the same parties and involve the same purpose as well as the same cause of action*".[105] The objection to the admissibility of claims on the basis of FITR concerned the claims in relation to the so-called "*amparo* actions" which is a brief summary trial in the Argentine court with a limited purpose, "*to obtain the Statement of unconstitutionality or illegality of norms or a regulation*".[106] The Tribunal found "*it obvious that the sole purpose of the amparo actions was to declare Argentina's export restrictions and re-routing measures as unconstitutional and void under Argentine law*," and these domestic claims were not "*based on violations of the US-Argentina BIT*".[107] In the Tribunal's view, an ICSID tribunal does not have the power to declare an Argentine law unconstitutional or to grant an *amparo*. *Amparo* is not a precondition to claim damages which are sought in the ICSID proceedings. Thus, the *amparo* actions have a different cause of action, a different purpose, and object than the ICSID arbitration.[108] Accordingly, the Respondent's objection was dismissed.

Q. Greentech Energy Systems A/S, et al. v. Italian Republic

In *Greentech Energy Systems A/S, et al.* v. *Italian Republic,* the Respondent raised the FITR issue in the context of "*unconditional consent*" to arbitration under Article 26(2)-(3) of the ECT.[109] The Respondent contended that several Italian administrative court actions were brought by "*parties, including companies owned by Claimants*" regarding the matter at issue. The Respondent argued that a proper application of Article 26(3)(b)(i) would "*focus on the real substance of the underlying rights as opposed to the form of the legal action*".[110] Alternatively, as argued by the Respondent, the triple identity test would here be met, since the domestic cases were instituted by the Claimants' subsidiaries, the "*measures at stake are exactly the same as in these proceedings*", and the grounds include alleged violations of Article 10 of the ECT.[111] In response, the Claimants asserted that they have not commenced domestic litigation in Italy and are not participating in any domestic Italian case. The Tribunal found that the Respondent has not shown that the Claimants have previously submitted the present dispute to Italian courts or administrative tribunals and thus rejected the Respondent's FITR objection.[112] In particular, the Tribunal stated that it "*has not been persuaded to adopt a non-literal interpretation of ECT Article 26(3)(b)(i)*" and that "*the Italian subsidiaries of Claimants*

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confirmation by Kazakh courts that the Kazakh competition law was applied correctly by the administrative authorities, which led Claimants to file a claim for breach of the protection allegedly afforded to Claimants under the ECT, BIT and 1994 FIL in connection with legitimate expectations arising out of and other assurances made in the Altai Agreement. Had the Kazakh courts decided differently, the treatment of Claimants under the law would have been different and the effect on Claimants' alleged legitimate expectations would also have been different."

105 *See* Mobil Expl. & Dev. Inc. Suc. Argentina & Mobil Argentina S.A. v. Argentine Republic, ICSID Case No. ARB/04/16, Decision on Jurisdiction and Liability, ¶ 139 (Apr. 10, 2013).

106 *Id.* ¶¶ 139, 141.

107 *Id.* ¶¶ 144–145.

108 *Id.* ¶ 145.

109 Greentech Energy Sys., SCC Case No. V (2015/095), Final Award, ¶ 195 (Dec. 23, 2018).

110 *Id.* ¶ 197.

111 *Id.*

112 *Id.* ¶ 205.

in this arbitration cannot be understood to be 'Investors' but are, instead, to be treated as 'Investments' which are located 'in the Area of' Italy".[113]

R. United Utilities v. Estonia

In *United Utilities* v. *Estonia,*[114] the Tribunal considered whether it was necessary to engage in an exercise of construction of Article 26 of the ICSID Convention. The Tribunal concluded that the ICSID proceeding and the matter before the Estonian court were "*not substantially the same*". As a result, Article 26 of the ICSID Convention on the exclusion of non-ICSID remedies, in the Tribunal's view, did not enter into play.[115] Further, the Tribunal held that the remedies sought in this arbitration derived from a different normative source than those before the domestic courts. The Tribunal did not have difficulty in establishing that the Estonian courts had considered facts that were also before the Tribunal. However, the Estonian courts considered ASTV's (one of the Claimants) and the Estonian Competition Authority respective rights and obligations solely through the prism of Estonian law, and not the rights of ASTV as a foreign investor in Estonia pursuant to the relevant BIT and international public law.[116] Interestingly, the "*same factual basis*" of the domestic and ICSID proceedings did not prevent this Tribunal from upholding its jurisdiction.

V. Selected cases favourable to respondent States

A. Pantechniki v. Albania

In *Pantechniki,* the dispute arose from the severe civil disturbances in Albania in 1997, which caused damages to the Claimant which was forced to abandon its contractor's road work site. Albania argued that Article 10(2) of the Greece-Albania BIT, which provided for FITR, precluded the investor's claims filed in the ICSID arbitration because it had brought the "*same claim*" before the Albanian court.[117] Unlike the cases where a domestic claim is made by a local company and an international claim is brought by an investor, *Pantechniki* itself filed both claims: *first*, to the domestic court, which was dismissed, and *second*, to the ICSID. In the course of the ICSID proceedings, the Claimant stated that it abandoned its challenge before the Supreme Court of Albania.[118]

In the defence, the Claimant stressed the difference between a contractual claim in the Albanian court and a treaty claim in the ICSID.[119] However, the Tribunal concluded that it was not sufficient for the Claimant to assert merely that the claim was founded on the treaty. The Tribunal noted that the domestic claim was clearly based on the contracts which "*allocated loss from incidents*" of 1997.[120] At the same time, the Tribunal had to determine whether the claim truly had "*an autonomous existence outside the contract*".[121] The Tribunal found that there was no such autonomous existence, as to the extent that the prayer to the local court "*was accepted it would grant*

[113] *Id.* ¶ 204.
[114] United Utilities, ICSID Case No. ARB/14/24, Award (June 21, 2019).
[115] *Id.* ¶ 464.
[116] *Id.* ¶ 465.
[117] Pantechniki, ICSID Case No. ARB/07/21, Award, ¶ 50 (July 30, 2009).
[118] *Id.* ¶ 27.
[119] *Id.* ¶¶ 54–55.
[120] *Id.* ¶ 63.
[121] *Id.* ¶ 64.

the Claimant exactly what it is seeking before ICSID – and on the same 'fundamental basis'".[122] The Tribunal held that both claims concerned payment for contractual losses and were essentially the same. As the Claimant chose to take this matter to the Albanian courts, in the Tribunal's view, it could not later "*adopt the same fundamental basis as the foundation of a Treaty claim*".[123]

With all its innovative effect, the *Pantechniki* award has been criticised by some commentators. For example, it is argued that the same fundamental basis test and the related inquiries (as to the same normative source of the claims and an autonomous existence of the later claim) are "*inherently vague and ambiguous;*" as none of them is based on established legal terminology. It is also suggested that the sole arbitrator did not provide any explanations as to the meaning of these terms, and his approach lacked "*legal certainty and predictability*".[124] However, a similar approach was also used in several further cases, particularly, in *H&H Enterprises Investments, Inc.* v. *Egypt* and *Supervision y Control S.A.* v. *Costa Rica.*[125]

B. H&H Enterprises Investments, Inc. v. Egypt

In *H&H Enterprises Investments, Inc.* v. *Egypt,*[126] the Respondent State prevailed on the basis of its FITR objection. Egypt strongly relied on the methodology applied by the *Pantechniki* tribunal arguing that (a) the treaty claim has the same fundamental basis as the claim submitted to the local courts; (b) the factual components of a treaty cause of action have already been brought before the local courts; and (c) the treaty claim does not truly have an autonomous existence outside the contract. The Respondent also submitted that the triple identity test deprives the FITR provision of genuine meaning and practical effect.[127]

In turn, the Claimant argued that its claims were fundamentally treaty claims not barred by the FITR clause.[128] The triple identity test was not met, "*even though the local proceedings and this arbitration involve the same parties, the causes of action are not the same, as the present arbitration involves treaty claims and not contract claims*".[129] The Claimant also argued that the factual basis of the claims and the relief being sought were different.

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122 *Id.* ¶ 67.

123 *Id.*

124 Petsche, *supra* note 14, at 418.

125 *See also* Transglobal Green Energy, LLC & Transglobal Green Panama, S.A. v. Republic of Panama, ICSID Case No. ARB/13/28, Award, ¶¶ 86–88 (June 2, 2016) (the Respondent State strongly relied on Pantechniki and H&H Enterprises arguing that Claimants were precluded from pursuing their claims before ICSID under (i) the FITR clause of the BIT and (ii) Article 26 of the ICSID Convention. Panama argued that as the Claimants had already sought recourse for their claims in various domestic fora on the same fundamental basis as the claims brought before ICSID i.e. challenging the legality of the decision on termination of concession in domestic administrative litigation, the Claimants were not permitted to consent to ICSID arbitration. On the question of which test the Tribunal should apply to determine whether the FITR clause had been breached, Panama stated that the Tribunal should employ the "fundamental basis" test, rather than the triple identity test. In Panama's view, the triple-identity test would deprive the FITR clause of the BIT of practical effect in violation of Article 31 of the Vienna Convention on the Law of International Treaties). *See also* ¶118 (ultimately the Tribunal did not consider the FITR objection, as it upheld the other Respondent's objection to jurisdiction "on the ground of abuse by Claimants of the investment treaty system by attempting to create artificial international jurisdiction over a pre-existing domestic dispute.").

126 H&H Enterprises, ICSID Case No. ARB/09/15, Tribunal's Decision on Respondent's Objections to Jurisdiction (June 5, 2012).

127 *Id.* ¶¶ 70–71.

128 *Id.* ¶ 74.

129 *Id.* ¶ 78.

The Tribunal noted that in order to decide whether the Claimant's treaty claims were barred by the FITR clause, the Tribunal had to determine whether the treaty claims had "*the same fundamental basis as the claims submitted before the local fora*".[130] The Tribunal concluded that the basis for the Claimant's treaty claims and its contractual claims, which were founded, *inter alia*, on the option to buy, were *fundamentally the same*.[131]

The Tribunal further noted that the triple identity test does not apply in this case as Article VII of the United States-Egypt BIT did not expressly require that the triple identity test be met before the FITR provision could be invoked. The triple identity test raised by the Claimant "*is based on its reading of arbitral jurisprudence as opposed to the specific language of the US-Egypt BIT and/or its interpretation*".[132] The Tribunal noted that it should not be allowed that form prevail over substance. According to this Tribunal, the language of Article VII of the BIT did not require specifically that the parties be the same. What mattered, in the Tribunal's view, was the subject matter of the dispute.[133] The Tribunal concluded that the domestic claim and the ICSID claim on expropriation "*share fundamentally the same factual basis*".[134] The Tribunal's emphasis on fundamentally the same factual basis differs from the positions of the *Pantechniki* tribunal (which noted that the same facts can give rise to different claims) and of the Tribunal in *AES Corporation* (which considered that "*fundamentally the same basis*" meant normative basis, rather than a factual one).

C. Supervision y Control S.A. v. Costa Rica

In *Supervision y Control S.A.* v. *Costa Rica,* the Tribunal applied the "*same fundamental basis*" test with respect to the forum selection provision of the Spain-Costa-Rica BIT based on the concept of waiver.[135] The Tribunal concluded that "*the disputes in both fora must be identical or have a significant overlap for the forum selection clause to be applicable*".[136]

The Tribunal analysed two issues: regarding *first*, the parties that brought claims to the local proceeding and to ICSID, and *second*, the basis of the claims. On the first issue, the Tribunal found that the entity Riteve controlled by the Claimant "*is a corporate vehicle that acts according to the interests and instructions of Claimant,*" and "*that the proceeding initiated by Riteve before the Administrative Contentious Court must be considered as filed by Claimant*".[137]

On the second issue, the Tribunal concluded that what, in the end, matters for the application of FITR clauses is that the two relevant proceedings "*have the same normative source and pursue the same*

130 H&H Enterprises, ICSID Case No. ARB/09/15, Excerpts of Award, ¶ 369 (May 6, 2014).
131 *Id.* ¶ 360.
132 *Id.* ¶ 364.
133 *Id.* ¶¶ 367–368 (it was also raised whether the dispute resolution provision without the FITR clause from the Germany-Egypt BIT could be imported through the most-favoured-nation (MFN) clause in the US-Egypt BIT. The tribunal agreed with the Respondent that the MFN clause contained in the US-Egypt BIT could not be used to avoid the application of the FITR clause contained therein).
134 *Id.* ¶ 378.
135 Supervision y Control*,* ICSID Case No. ARB/12/4, Award, ¶¶ 293–335, 308 (Jan. 18, 2017); *see also* the discussion of the waiver clause *supra* Part II.
136 Supervision y Control*,* ICSID Case No. ARB/12/4, Award, ¶ 295 (Jan. 18, 2017).
137 *Id.* ¶¶ 325, 329; Supervision y Control*,* ICSID Case No. ARB/12/4, Dissenting Opinion of Joseph P. Klock, ¶ 10 (the finding of the majority was strongly opposed in the dissenting opinion of arbitrator Klock who noted, among other things, that "[t]his case does not involve a frustrated litigant unhappy with a rejection of its relief in a local court who decides to try for a second bite at the apple.").

aim". The Tribunal found that this was exactly the case.[138] Consequently, the Tribunal concluded that the claim to ICSID was inadmissible since the Claimant had already submitted the same claim to the local courts.

VI. Conclusions

As could be gleaned from the analysis of various cases pertinent to the present discussion, certain aspects of FITR provisions have become clear.

First, if the system of investment arbitration gets more pro-State, investors as potential claimants would simply refuse to bring claims in highly costly investment cases. For the sake of balance of interests between investors and host States, a more flexible forum selection clause based on the concept of waiver should take preference over a traditional, more rigid FITR provision in investment treaties.

Second, the triple identity test and the same fundamental basis test should be jointly applied to the analysis of case-specific FITR issues. Apparently, the most tenable decision would be if both tests show the same result.

Third, it is likely, however, that in some cases application of these tests will arrive at different results, for example, the triple identity test saying that the claims are different, while the same fundamental basis test showing that the claims are essentially the same. It is always useful to verify whether a domestic claim and an international claim are investment claims by their nature.

Further, in order to have a successful FITR case, investors should have to prove more than that the parties to the domestic proceedings and the parties to investor-State arbitration are different. A mere lack of identity of the parties may be insufficient for a positive finding on jurisdiction in this case. The investors must prove that the object and the cause of action of these claims are substantially different and that the claims as such are substantially different.

Additionally, while the triple identity test with all its formalism has clear criteria, the same fundamental basis test needs clarification. Apparently, the fundamental basis should include both the factual and legal/normative bases for the claims to be essentially the same. The same underlying facts do not seem to suffice for a conclusion that the basis of claims is fundamentally the same. It is not unusual for the same facts to give rise to different claims.[139] The author finds it difficult to agree with an argument that the legal bases invoked in the different proceedings (violation of a treaty and violation of a contract governed by domestic law) should not be relevant for the purposes of the operation of FITR provisions due to potential "*overcompensation of claimants*".[140] As follows from many arbitral decisions, a legal/normative basis is one of the central criteria for establishing a "*sameness*" of claims which is a test for operation of FITR clauses. The risk of so-called "*overcompensation of claimants*" is a separate issue which may be resolved by courts and tribunals, for example, in the context of avoiding double recovery.

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138 *Id.* ¶ 330.

139 Pantechniki, ICSID Case No. ARB/07/21, Award, ¶ 62 (July 30, 2009) ("The same facts can give rise to different legal claims.").

140 Petsche, *supra* note 14, at 427.

Moreover, it is also advisable to verify whether the claim before an arbitral tribunal has an "*autonomous existence*" from the claim brought before a domestic court. A careful interpretation of a particular FITR clause may be useful for this purpose. For example, if an FITR clause expressly indicates that a claim in question is a claim "*brought by an investor*," there is no doubt that the claim brought by an investor has an "*autonomous existence*" from a claim brought by another person, such as a local subsidiary of the investor or other entities which act on behalf of the investor.

Lastly, relief sought in the proceedings under comparison has been argued in several cases as a distinctive feature of the claims. For example, a domestic claim is aimed at the annulment of a governmental decision, while a treaty claim, instead of this, requests solely a monetary compensation for the harm made by the breaches of the treaty, including such governmental decisions. Such difference of the relief sought is likely to be taken into account along with other features of claims.

Not only facts, normative sources and relief are of essence. The *nature of claims* is of fundamental importance. For example, a difference between an investment claim in ICSID and an administrative claim in domestic court can be clearly seen. Only the claims for protection of the investment rights under a particular investment treaty fall within the ambit of a specific FITR. If an investor or associated persons file a domestic claim having a different purpose, such a claim may not trigger the FITR mechanism.

Thus, keeping these factors in mind, it is possible that more certainty can be infused into the practice of interpretation of FITR provisions in investment treaty arbitration.

A CONSERVATIVE MODEL OF ARBITRATION: THE RUSSIAN EXPERIENCE

Prof. Oleg Skvortsov[*]

Abstract

Between 2015-2019, large-scale arbitration reforms were carried out in Russia. As a result of these reforms, a conservative model of arbitration emerged. Simultaneously, Russian lawmakers rejected the liberal approach to arbitration that had prevailed in Russia for the previous 25 years. This article analyses the reasons and prerequisites for the reform and its consequences. In particular, it investigates the widespread phenomenon which has received the name "pocket arbitration". The role of the higher state courts that fought against pocket arbitration as well as anti-arbitration judicial practice resulting from the confrontation between the courts and arbitration are noted in this article. Special attention is paid to the ideology of conservative reform and its legal technique. The author assumes that each legal technique can be applied to regulate arbitration even within the framework of a liberal model, but it is their combination that creates a conservative model in the form of an integral regulatory system. The analysis results in the conclusion that an unfavourable atmosphere has been created in Russia for the consideration of disputes through arbitration.

I. Introduction

Despite the relatively recent history of commercial arbitration[1] in Russia, being less than three decades old;[2] this institution has undergone such drastic changes that its new appearance is radically different from what was created in the early 1990s. Arbitration in Russia has evolved from an extremely liberal model to an extremely conservative model in which the State, having completed the reform of private justice, exercises total control over the activities of arbitral institutions. This supervision is carried out at all stages, beginning at the moment of their creation, continuing throughout the course of their activities, and even during the execution of arbitral awards.

Many reasons led to this sharp change in government policy as well as to the conservative ideology of the Russian legislature in relation to commercial arbitration. In order to identify these reasons and analyse the current regulatory model, this article in Part I provides a classification of

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[1] This term is used in Russian law in two ways: (1) arbitration as state courts that consider economic disputes between entrepreneurs; (2) arbitration as a private court alternative to state courts or, in other words, classical arbitral tribunals in a way that they are understood worldwide. This double use of words often misleads lawyers who are not familiar with the legal system of the Russian Federation. In situations where we are talking about state arbitration courts, foreign lawyers may think that we are talking about private arbitration. Without going into explanations about the historical reasons that influenced this bilingual situation, we note that in this article, the author will try to explain each time, when it does not follow from the context, which body we are talking about – the state arbitration court or private commercial arbitration.

[2] In this article, we consider Russian arbitration, starting from the 1990s, when Russia made the transition from a socialist economic model to a market economy. At the same time, we leave aside the previous Soviet period during which international commercial arbitration, which was under the control of the State, operated in the Union of Soviet Socialist Republics (USSR) to a limited extent. *See* ANDREY KOTELNIKOV, SERGEY KUROCHKIN & OLEG SKVORTSOV, ARBITRATION IN RUSSIA 1–7 (Andrey Kotelnikov, Sergey Kurochkin & Oleg Skvortsov eds., 2019) [*hereinafter* "KOTELNIKOV ET AL."].

arbitration into liberal, neutral, and conservative models. Part II describes the reform of arbitration from 2015 to 2019 and the reasons behind the creation of a conservative model of arbitration in Russia. Part III analyses anti-arbitration court practice and its impact on arbitration legislation. Part IV identifies the main ideas and legal techniques involved in the introduction of a conservative model of arbitration. Part V draws conclusions about the consequences of introducing a conservative model of arbitration in Russia.

II. Three models for the regulation of arbitration

In general, the practice of countries with developed market economies and well-established legal orders indicates a tendency to unify the national regulation of arbitration with generally recognised acts of international law. At the same time, national jurisdictions, depending on various objective and subjective factors, also contain very significant differences in the regulation of arbitration. Such differences determine national models of arbitration regulation.

Classifying on the basis of these differences allows us to identify three distinct models of arbitration regulation, with a certain degree of conditionality. These are the liberal, neutral, and conservative models. This classification is based on the degree of state control over arbitration activity and consequently, the degree of freedom enjoyed by arbitral institutions operating in a particular legal order.

In the liberal model, issues relating to arbitration are resolved by conditions prevailing objectively in the free market, whereas the conservative model is characterised by the free discretion of officials relying on a paternalistic approach to the sphere of private law in general and private justice in particular.

A. The liberal model

The harmonisation and unification of arbitration legislation in developed countries is generally based on the United Nations Commission on Intertional Trade Law ["**UNCITRAL**"] Model Law on International Commercial Arbitration ["**Model Law**"],[3] which is generally liberal in its approach.[4] However, even if a national law does not reproduce the literal provisions of the Model Law, its liberalism is ensured as long as it enshrines the principles and ideals of party autonomy and free will of the arbitrating parties. Under the liberal model of arbitration, the State entrusts private arbitrators with the right to resolve private law disputes, and this trust involves giving arbitrators a broad discretion as well as giving up the day-to-day supervision of arbitration institutions.

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

[4] However, it should be borne in mind that the mere reproduction of the Model Law in national legislation does not make the arbitration system of a particular state liberal. It also requires an arbitration-friendly application of the law, a well-developed infrastructure that ensures the application of the law (including a community of lawyers with the appropriate skills, experience, and traditions) as well as the State's rejection of preferences in favour of certain arbitrations related to the authorities. For example, in Ukraine, the arbitration law is based on the Model Law; but in 1995, the law "on foreign economic activity" was adopted, according to which all disputes arising from foreign economic activity must be referred to the International Commercial Arbitration Court or the Maritime Arbitration Commission at the Ukrainian Chamber of Commerce and Industry. Thus, the legislation introduced a monopoly of these arbitral institutions for the resolution of foreign economic disputes, which undermines the liberal idea behind the Model Law. *See* Law of Ukraine on International Commercial Arbitration 1994 (Ukr.); Law of Ukraine on Foreign Economic Activity 1995, art. 38 (Ukr.).

In other words, the liberal model of arbitration regulation assumes minimal control over private justice by the State. State courts are usually only involved when enforcement is sought or an award is challenged. The powers of the court include refusing recognition if the award does not comply with minimum standards of the judicial procedure or violates public order. The grounds for setting aside an award usually coincide with the narrow list of grounds for refusing to enforce a foreign award established by the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards ["**New York Convention**"].[5] Thus, state courts do not interfere in the substance of the dispute.[6]

Lastly, the liberal model does not assume control of arbitration by executive authorities. In addition, the liberal model of arbitration does not require permission from the executive authorities to establish arbitral institutions and the creation of such organisations remains entirely in the power of interested persons independent of the state.

B. The neutral model

The neutral model of arbitration regulation is based on the principle that in addition to the limited supervisory role of state courts, self-regulation of arbitration institutions is carried out by the arbitration community. For this purpose, self-regulating organisations are created, whose members must be permanent arbitration institutions.

This model allows the State to exercise control over arbitral tribunals, not only through state courts, but also through the self-governing bodies of the arbitration community, which significantly saves the resources of the public authorities required for control.[7]

As a result of the implementation of the ideas of a neutral model of arbitration, a self-regulating organisation is responsible for the activities of arbitration institutions in place of the State. Thus, the neutral arbitration model creates a two-stage control system: the State controls the self-regulating organisation, while the self-regulating organisation oversees its members i.e. the arbitral institutions.

It is believed that the professional community is more effective in ensuring regulation as it has a greater capacity to combat abuse in the field of arbitration and a tangible interest in fighting for the purity of its ranks.

C. The conservative model

Conservative arbitration models are based on strict control of private justice by the State. According to research, Costa Rica, Ecuador, Nicaragua, Panama, Peru, Angola, Mozambique,

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5 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 330 U.N.T.S. 3.

6 The examples for implementing a liberal arbitration model are the legislations of Sweden, Great Britain, France, and Austria.

7 An example of implementing a neutral arbitration model is the legislation of Kazakhstan. In 2016, the Law of the Republic of Kazakhstan No. 488-V was adopted, which established the Arbitration Chamber of Kazakhstan, a non-profit organization that unites permanent arbitral institutions and arbitrators. The Arbitration Chamber organises the activities of arbitral institutions based on the principle of self-regulation and maintains a register of arbitrators of permanent arbitrations. *See* Arbitration Law, No. 488-V, (2016) Cap. 2 (Kaz.).

Zambia, Uganda, Bahrain, Ukraine, and Uzbekistan are examples of countries with a conservative model of arbitration.[8]

The conservative model of arbitration regulation assumes that the executive authorities (usually the Ministry of Justice), in addition to the judiciary, have control over the administrative admission of arbitral institutions (including foreign arbitral institutions) to operate in the territory of a State or in respect of disputes between residents of that State. At the same time, the authorities, when allowing arbitration institutions to operate in the territory of the State, have broad and virtually unlimited discretion. For example, in Zambia, the Ministry of Justice has the power to refuse to register an arbitral institution if it finds that the number of such organisations is sufficient for the jurisdictional needs of the State.[9]

Among other things, the conservative model of arbitration prohibits residents of the State from applying to foreign arbitration centres for the resolution of domestic disputes.[10] As it is known, the Model Law, as well as the national laws of the countries where the most recognised arbitration centres are located, do not contain restrictions on the possibility of submitting domestic disputes to foreign arbitral institutions. The conservative model of arbitration usually excludes this possibility, leaving the resolution of disputes under the control of the internal State jurisdiction.[11]

In some cases, the conservative model of national arbitration may mimic the liberal model. This is the case when a national law reproduces the provisions of the Model Law textually, but distorts its spirit and principles. This situation arises because many provisions of international law that are reproduced in national laws contain "*rubber*" concepts,[12] and make it possible to expand the boundaries of these concepts excessively. The most striking example is the concept of 'public order,' the boundaries of which are very mobile and can be extended very widely.[13] In States with a paternalistic approach to arbitration, it is through the immeasurable extension of

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8 *See* Galina Zhukova, *Arbitration institutes: legal status, creation, binding requirements and oversight*, 2/3 TRETEISKY SUD 55, 55–75 (2016) [*hereinafter* "Zhukova"]; *See also* Vladimer Khvalei, *Why Arbitration Reform in Russia Failed*, 11 ARB. J. 4 (2019), *available at* https://journal.arbitration.ru/upload/iblock/cc2/Arbitration.ru_N7_11_August2019_upd.pdf#page=6 [*hereinafter* "Khvalei"].

9 *See* Zhukova, *supra* note 8, at 74; *See also* Khvalei, *supra* note 8, at 7.

10 Alexander Katzendorn, *Arbitration in the Russian Federation – Latest amendments to the federal law*, LEGALMONDO (Apr. 9, 2019), *available at* https://www.legalmondo.com/2019/04/arbitration-russian-federation-latest-amendments-federal-law.

11 For example, after the 2019 Amendment, foreign arbitral institutions can administer local disputes between Russian companies only if they have a branch in Russia. *See* Federal'nyi zakon O vnesenii izmeneniy v Federal'nyy Zakon o Arbitrazhe (Arbitrazhnoye Razbiratel'stvo) v RF i Federal'nyy zakon RF o Reklame [Federal Law No. 531-FZ "On the Incorporation of Amendments to the Federal Law 'On Arbitration in the Russian Federation' and to the Federal Law 'On Advertising'"], SOBRANI ZAKONODATEL'STVA ROSIISKOI FEDERATSII [SZ RF] [Russian Federation Collection of Legislation], Dec. 27, 2018 (Russ.) [*hereinafter* "2019 Amendment"]; *see also* Vladimir Khvalei & Irina Varyushina, *Baker McKenzie International Arbitration Yearbook 2019-2020*, GLOB. ARB. NEWS (Jan. 1, 2020), *available at* https://globalarbitrationnews.com/baker-mckenzie-international-arbitration-yearbook-2019-2020-russia.

12 Raymond W. Mack & Richard C. Snyder, *The analysis of social conflict—toward an overview and synthesis*, 1(2) J. CONFLICT RESOL. 212 (1957), *available at* http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.817.4778&rep=rep1&type=pdf.

13 Matthew Gearing, *The Public Policy Exception – Is the Unruly Horse Being Tamed in the Most Unlikely of Places?*, KLUWER ARB. BLOG (Mar. 17, 2011), *available at* http://arbitrationblog.kluwerarbitration.com/2011/03/17/the-public-policy-exception-is-the-unruly-horse-being-tamed-in-the-most-unlikely-of-places-4/?doing_wp_cron=1596455474.7694749832153320312500.

the concept of 'public order,' that the meaning of the Model Law and the New York Convention is perverted. This is possible as there are no formal criteria that would restrict courts in interpreting this concept.

III. Russia's adoption of a conservative model of arbitration

Russia's arbitration laws have evolved in three phases. The Interim Regulation on Commercial Arbitration for the Resolution of Economic Disputes[14] regulated domestic arbitration from 1992 to 2002. From 2002 to 2015, arbitration was regulated by the Federal Law on Arbitration Courts in the Russian Federation ["**Law on Arbitration Courts**"].[15] Since 2015, the Federal Law on Arbitration in the Russian Federation ["**Law on Arbitration**"] has been in force.[16] In addition, the Federal Law on International Commercial Arbitration ["**Law on ICA**"] has been in force since 1993 and has been amended in 2013, 2015, and 2017.[17]

Until 2015, Russia had an extremely liberal model for regulating arbitration. This led to the mass-creation of permanent arbitral institutions. According to experts' calculations, several thousand arbitral institutions were created in Russia by 2015.[18] At the same time, pocket arbitral institutions became widespread.

"*Pocket*" arbitral institutions are arbitral institutions that are created by commercial organisations to resolve disputes involving them or their affiliates. The founders of the commercial organisation directly fund pocket arbitrations, provide them with premises and necessary equipment, appoint the arbitrators and assign them cases that should be considered. Thus, the founders have the opportunity to influence the outcome of the arbitration.[19]

One of the types of pocket arbitral institutions were institutions created by large corporations[20] that imposed arbitration agreements on their counterparties, which mandated consideration of disputes by pocket arbitral institutions. Such pocket arbitration institutions were financially and organisationally dependent on the companies that created them. The founders of such arbitral

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14 Supreme Council of Russian Federation, Resolution on the Adoption of the Interim Regulation Commercial Arbitration for the Resolution of Economic Disputes, No. 3115-1, June 24, 1992 (Russ.).

15 ARBITRAZHNO-PROTSESSUALNYI KODEKS ROSSIISKOI FEDERATSII [APK RF] [Code of Arbitration Procedure] (Russ.) [*hereinafter* "Law on Arbitration Courts"].

16 Federal'nyy Zakon o Arbitrazhe (Arbitrazhnoye Razbiratel'stvo) v RF [Federal Law On Arbitration (Arbitral Proceedings) in the Russian Federation], SOBRANI ZAKONODATEL'STVA ROSIISKOI FEDERATSII [SZ RF] [Russian Federation Collection of Legislation] 2015, No. 382-FZ (Russ.) [*hereinafter* "Law on Arbitration"].

17 Federal'nyy Zakon RF o Mezhdunarodnyy Kommercheskiy Arbitrazh [Federal Law of the Russian Federation Law on International Commercial Arbitration], SOBRANI AKTOV PRESIDENTA I PRAVITELSTVA ROSIISKOI FEDERATSII [SAPP] [Collection of Acts of the President and Government of the Russian Federation] 1993, No. 5338-1 (Russ.) [*hereinafter* "Law on Interantional Commercial Arbitration"]; Oleg Skvortsov & Leonid Kropotov, *Arbitration Changes in Russia: Revolution or Evolution?*, 35(2) J. INT'L ARB. 253, 254 (2018) [*hereinafter* "Skvortsov et al."].

18 Ministry of Justice of the Russian Federation, Report on the activities of the Council for the improvement of arbitration proceedings for 2017 (July 13, 2016), *available at,* http://minjust.gov.ru/ru/deyatelnost-v-sfere-treteyskogo-razbiratelstva/otchety-o-deyatelnosti-soveta-po-sovershenstvovaniyu; K. E. Dobrynin, Topical issues of the development of the Institute of arbitration courts in the Russian Federation, Round Table, Federal Assembly of the Russian Federation, Federation Council (Apr. 17, 2014), *available at* http://council.gov.ru/activity/activities/roundtables/51077; Skvortsov et al., *supra* note 17, at 255.

19 RUSSIAN ARBITRATION CENTRE, ANNUAL REPORT 2017-18 51 (2018), *available at* https://centerarbitr.ru/wp-content/uploads/2018/08/Annual_Report17_18-1.pdf; Skvortsov et al., *supra* note 17, at 254–255.

20 Lorenzo Sasso, *The Russian Arbitration Reform: Between Lights and Shadows*, 8(2) RUSS. L. J. 79, 83–84 (2020) (arbitral institutions created by large Russian corporations such as Gazprom, Sberbank, Rosatom, LUKOIL, etc. were also called corporate arbitral institutions).

institutions and their managers were able to appoint arbitrators and distribute cases among the arbitrators.[21]

These institutions were often used to implement illegal schemes that circumvented the prohibitions established by law. Such negative situations were especially frequent in the sphere of land and real estate turnover, as well as in corporate disputes. In addition, fictitious decisions made by arbitrators were used in bankruptcy cases to facilitate procedures for recognising the debt of an insolvent debtor.[22]

All these phenomena discredited the idea of arbitration and had a very negative impact on the attitude of public officials and judges to private justice.

Thus, one of the main reasons for the radical reform of arbitration and the creation of a conservative model of arbitration in Russia was the mass spread of pocket arbitration. This was facilitated by excessively liberal legislation, the almost complete refusal of the State to control arbitral institutions, and the absence of long-standing traditions that promote self-regulation in the field of arbitration. For example, the Law on Arbitration Courts allowed commercial organisations to create arbitral institutions.[23] This gave such commercial organisations the opportunity (directly or indirectly through their affiliates) to influence the formation of the arbitral tribunal and, ultimately, the adoption of the arbitral award.

The need to reform arbitration became particularly obvious to the Russian expert community in 2011. One of the main ideologists of the reform was the Russian journal, "*Arbitration court*" (*Treteiskiysud*), on the pages of which the first proposals for changing the system of arbitration regulation were formulated. At the initiative of the journal, an expert community was formed from among the leading experts in arbitration, which influenced the formation of public opinion. A survey conducted among the journal's readers showed that more than 80% of respondents were in favour of large-scale and radical changes to the existing arbitration system.[24]

Even the President of the Russian Federation joined the discussion on arbitration reform. He instructed the Government, together with business associations, to develop a set of measures for the development of arbitration.[25] Based on instructions from the President and the Government, the Ministry of Justice developed a concept for arbitration reform, which was formulated in the document entitled 'Complex of measures for the development of arbitration in the Russian Federation'.[26]

In the end, after lengthy discussions on various versions of the text of the draft laws, the Law on Arbitration was prepared, which was approved by the Federal Assembly and signed by the President of the Russian Federation. The new law was designed to eliminate the pocket arbitral

21 Skvortsov et al., *supra* note 17, at 255.
22 *VS gave an algorithm for checking an arbitration award for fictitious debt*, PRAVO.RU (May 11, 2017), *available at* https://pravo.ru/review/view/140583; *The arbitration court was suspended from bankruptcy*, PRAVO.RU (Nov. 14, 2012), *available at* https://pravo.ru/news/view/79735.
23 Law on Arbitration Courts, [APK RF] [Code of Arbitration Procedure], art. 3 (Russ.).
24 KOTELNIKOV ET AL., *supra* note 2, at 8.
25 *List of instructions for the implementation of the Address to the Federal Assembly - cl. 3.1*, PRESIDENT OF RUSSIA (Dec. 22, 2012), *available at* http://www.kremlin.ru/acts/assignments/orders/17248.
26 Zhukova, *supra* note 8, at 27–49.

institutions and the numerous abuses using arbitration that were taking place prior to the reforms.

As part of the implementation of this idea, it was decided that existing arbitral institutions would be abolished and only new arbitration institutions with permission from the executive power (Ministry of Justice) would be allowed.[27]

Another idea that was implemented during the reform process was to concentrate arbitration proceedings in a small number of arbitration centres. According to the reformers, the idea was for such centres to become arbitration hubs for international disputes. Therefore, all arbitration institutions that had received permission to operate were expected to focus on resolving both international and domestic disputes.[28] Moreover, it was the responsibility of the State to support the establishment of such arbitration centres as well as to encourage the business community to support them. However, the State has not done so very proactively and hence there are very few arbitral institutions in Russia today.[29] The 2019 amendments to the Law on Arbitration have also reinforced the conservative approach to arbitration in Russia in some ways.[30]

These changes have led to a significant restriction on the possibility of establishing arbitral institutions. Ultimately, they have led to the creation of a conservative model of arbitration in Russia, which is largely under the control and management of the State.

IV. Anti-arbitration court practice and its impact on arbitration legislation

The policy of the state courts in relation to arbitral institutions is no less important for the development of the latter than the legislation on arbitration. In this sense, it is customary to distinguish between pro-arbitration and anti-arbitration judicial policy, depending on how state courts support or restrict arbitration.

In the period up to 2006, the practice of Russian state courts was generally pro-arbitration, despite the fact that within the framework of liberal legislation, there were many abuses by arbitral institutions and arbitrators, such as partiality, breach of laws, and manipulation.[31] The approaches formulated by the higher courts created a favourable atmosphere in which state

27 One of the main ideologists of the arbitration reform, Deputy Minister of Justice, Elena Borisenko, at a speech in the Federation Council directly stated that one of the goals of the reform was to reduce the number of arbitration courts. *See* E. A. Borisenko, Deputy Minister of Just., Current issues of the development of the institution of arbitration courts in the territory of the Russian Federation, Round Table, Federal Assembly of the Russian Federation, Federation Council (Apr. 17, 2014), *available at* http://council.gov.ru/activity/activities/roundtables/51077 [*hereinafter* "Borisenko"].

28 Law on Arbitration, SOBRANI ZAKONODATEL'STVA ROSIISKOI FEDERATSII [SZ RF] [Russian Federation Collection of Legislation] 2015, No. 382-FZ, art. 44(18) (Russ.). In Russia, as in many other countries, there is a dualistic system of arbitration regulation, which separately regulates international commercial arbitration and domestic arbitration. For this purpose, as already mentioned, the Law on International Commercial Arbitration and Law on Arbitration were adopted. KOTELNIKOV ET AL., *supra* note 2, at 15.

29 Alexander Vaneev, Dimitriy Mednikov & Maxim Kuzmin, *Russia*, EUROPEAN ARB. REV. 66 (2020).

30 Law on Arbitration, SOBRANI ZAKONODATEL'STVA ROSIISKOI FEDERATSII [SZ RF] [Russian Federation Collection of Legislation] 2015, No. 382-FZ, art. 44(1) (as amended by the 2019 Amendment) (Russ.). *See* 2019 Amendment, SOBRANI ZAKONODATEL'STVA ROSIISKOI FEDERATSII [SZ RF] [Russian Federation Collection of Legislation] Dec. 27, 2018, art. 1(4)(a) (Russ.). However, not all changes brought by this amendment can be considered conservationist in nature. *See* Marina Akchurina, *Changes to Russia's Arbitration Law Will Come Into Effect on 29 March 2019*, CLEARLY GOTTLIEB 1 (2019), *available at* https://www.clearygottlieb.com/-/media/files/alert-memos-2019/changes-to-russias-arbitration-law-eng.pdf [*hereinafter* "Akchurina"].

31 Skvortsov et al., *supra* note 17, at 255.

judges sought to support[32] arbitral institutions. The situation changed quite dramatically in 2006 with the arrival of the new leadership of the Supreme Arbitration Court of the Russian Federation.[33] The Supreme Arbitration Court of the Russian Federation, on the one hand, fought against pocket arbitration, and on the other hand, actively restricted the possibility of arbitration of various categories of civil disputes. Therefore, state courts have thus far resisted the arbitration of disputes on real estate;[34] corporate disputes;[35]certain disputes on procurement of products for the State's needs;[36] investment disputes;[37] disputes on the lease of forest plots,[38] among others. The apotheosis of the confrontation between state courts and arbitration was the appeal of the Supreme Arbitration Court of the Russian Federation to the Constitutional Court of the Russian Federation with an application for recognition of the unconstitutionality of several provisions of Russian law permitting arbitration of real estate disputes.[39] The Constitutional Court of the Russian Federation rejected this application and, pointing to the constitutional nature of arbitration, recognised the right of arbitral tribunals to consider disputes about real estate.[40] However, the fact that the Constitutional Court of the Russian Federation 'came to the defence' of arbitration did not fundamentally affect the practice of the Supreme Arbitration Court of the Russian Federation and the Supreme Court of the Russian Federation,

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32 During this period of time, the higher courts adopted many judicial acts in support of arbitration: (1) Postanovleniye Plenuma Vysshego Arbitrazhnogo Suda RF [Decree of the Plenum of the Supreme Arbitration Court of the Russian Federation] June 11, 1999, No. 8 (Russ.); (2) Postanovleniye Verkhovnogo Suda RF [Decree of the Supreme Court of the Russian Federation] Feb. 16, 1998, No. 29 (Russ.); (3) Postanovleniye Prezidiuma Vysshego Arbitrazhnogo Suda RF [Decree of the Presidium of the Supreme Arbitration Court of the Russian Federation] Dec. 22, 2005, No. 98 (Russ.), etc.

33 From 1992 to 2014, the Supreme Arbitration Court of the Russian Federation was the highest judicial instance of one of the branches of the Russian judicial power – the system of state arbitration courts (the other highest instance was the Supreme Court of the Russian Federation). The Supreme Arbitration Court of the Russian Federation considered cases as a supervisory instance and also summarised judicial practice and made recommendations to lower courts. In 2014, the Supreme Arbitration Court of the Russian Federation was abolished and its functions were transferred to the Supreme Court of the Russian Federation. At the same time, the entire system of arbitration courts (first instance arbitration courts, appellate arbitration courts, and cassation arbitration courts) was preserved and reassigned to the judicial and administrative control of the Supreme Court of the Russian Federation.

34 Postanovleniye Prezidiuma Vysshego Arbitrazhnogo Suda RF [Resolution of the Presidium of the Supreme Arbitration Court of the Russian Federation] Nov. 13, 2012, No. 6141/2012 (Russ.).

35 Postanovleniye Prezidiuma Vysshego Arbitrazhnogo Suda RF [Resolution of the Presidium of the Supreme Arbitration Court of the Russian Federation] Jan. 30, 2012, No. 15384/2011 (Russ.).

36 Postanovleniye Prezidiuma Vysshego Arbitrazhnogo Suda RF [Resolution of the Presidium of the Supreme Arbitration Court of the Russian Federation] Jan. 28, 2014, No. 11535/2013 (Russ.). Amendments to the law on arbitration allowed the consideration of some types of procurement disputes by arbitration, but not all. *See* O. Yu Skvortsov, *Dispute on Purchase and Problem of Arbitrability*, 3/4 TRETEISKY SUD 25 (2018) [*hereinafter* "Skvortsov"].

37 Postanovleniye Prezidiuma Vysshego Arbitrazhnogo Suda RF [Resolution of the Presidium of the Supreme Arbitration Court of the Russian Federation] Apr. 3, 2012, No. 17043/2011 (Russ.).

38 Postanovleniye Prezidiuma Vysshego Arbitrazhnogo Suda RF [Resolution of the Presidium of the Supreme Arbitration Court of the Russian Federation] Feb. 11, 2014, No. 11059/2013 (Russ.).

39 Request of the Supreme Commercial Court of the Russian Federation to the Constitutional Court, at 12 (July 29, 2010). The request of the Supreme Arbitration Court of the Russian Federation, the case materials and expert opinions are published in the journal TRETEISKY SUD 74 (2011). *See* Dmitry Davydenko, *Arbitrability of Real Estate and Corporate Disputes under Russian Law: The Problem and its Context*, *in* ARBITRATION IN CIS COUNTRIES: CURRENT ISSUES 91–94 (2012).

40 Postanovlenie Konstitutsionnogo Suda RF ot 26 maya 2011 g. [Ruling of the Russian Federation Constitutional Court of May 26, 2011 on case about check of constitutionality of provisions of paragraph 1 of article 11 of the Civil code of the Russian Federation, paragraph 2 of article 1 of the federal Law on Arbitration Courts in the Russian Federation, article 28 of the federal law on state registration of rights to immovable property and transactions therewith, paragraph 1 of article 33 and article 51 of the Federal law on mortgage (pledge of real estate) in connection with the request of the Supreme Arbitration Court of the Russian Federation], SOBRANIE ZAKONODATEL'STVA ROSSIISKOI FEDERATSII [SZ RF] [Russian Federation Collection of Legislation] 2011 (Russ.).

which continued their anti-arbitration approach in deciding disputes arising from challenges to arbitral awards and enforcement actions.[41]

In the anti-arbitration practice of the Supreme Arbitration Court of the Russian Federation, the concept of concentration of publicly significant elements should be given special significance. To some extent, this judicial theory has replaced the doctrine of public order. Its essence is that if there is any public element in the relations between the parties (a company established by the State,[42] financing from the State's budget funds,[43] socially significant goals of the contract, etc.), then such a dispute cannot be submitted to arbitration.[44] State courts have de facto considered the existence of public elements in the relationship between the parties as rendering the dispute inarbitrable under the public policy exception. This concept has been fiercely debated,[45] and many law professors and legal practitioners have expressed opinions about its unfairness. Nevertheless, the theory of concentration of publicly significant elements has been firmly held and continues to be held by state courts.[46]

Thus, the Supreme Arbitration Court of the Russian Federation has adopted anti-arbitration policy and practice, and the approaches formulated by it have perpetuated the ideology of a conservative model of arbitration. This ideology was adopted by the Ministry of Justice, which

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41 There are many examples of absurd anti-arbitration practices of state courts. For example, a model arbitration clause recommended by the International Court of Arbitration at the International Chamber of Commerce ["**ICC**"] was declared illegal by the Russian courts. In the opinion of the Russian state court, this clause is ambiguous and does not allow defining a forum for resolving the dispute, which is why it is defective. This decision of the state court is an indicator of ill-will towards arbitration on the part of state judges. In connection with this court decision, ICC President Alexis Mourre was even forced to write to the Chairman of the Supreme Court of the Russian Federation, Vyacheslav Lebedev, expressing his concern about the current situation and pointing out that this approach raises serious concerns about the violation of the rights of Russian individuals to justice. *See* Postanovlenie Plenuma Verkhovnogo Suda RF Priznaniye I Ispolneniye Resheniy Inostrannykh Sudov I Inostrannykh Arbitrazhey ot 21 sentyabrya 2017 g. [Russian Federation Supreme Court Ruling on the recognition and enforcement of decisions of foreign courts and foreign arbitral awards of Sept. 21, 2017] Biulleten' Verkhovnogo Suda RF [BVS] [Bulletin of the Supreme Court of Russian Federation] 2017, No. A40-176466 (Russ.), *available at* http://kad.arbitr.ru/Card/e14833d5-67ca-48a9-adff-78c46640dabe; CMS Russia, *Russian Courts point out flaws in ICC Standard Arbitration Clause*, LEXOLOGY (Dec. 18, 2018), *available at* https://www.lexology.com/library/detail.aspx?g=a57e928e-a06b-4557-bfc2-cc18d3236d1f.

42 Different courts have taken different views on this particular issue. *See* Ilya Kokorin & Wim A. Timmermans, *Arbitration Reform in Russia: Will Russia Become More Arbitration-Friendly?*, 22(2) TIJDSCHRIFT VOOR ARBITRAGE 50, 52 (2017).

43 Postanovleniye Prezidiuma Vysshego Arbitrazhnogo Suda RF [Resolution of the Presidium of the Supreme Arbitration Court of the Russian Federation] Nov. 17, 2014, No. A40-188599/2014 (Russ.), *available at* http://kad.arbitr.ru/Card/965d6ab2-6d63-49e6-99db-46101c6f1b44.

44 For a concentrated form presentation of this theory. *See* Skvortsov, *supra* note 36.

45 *See* M. S. Kalinin, *Arbitrability of disputes in the light of the Russian concept of* "*concentration of socially significant public elements*", *in* NEW HORIZONS OF INTERNATIONAL ARBITRATION 58–85 (A.V. Asoskov, A.N. Zhiltsov & R.M. Khodykin eds., 4th ed. 2018); O. Skvortsov, *Arbitrability of procurement disputes: the struggle of the civil approach and the theory of* "*accumulation of the public element*", 1(2) TRETEISKY SUD 113, 114 (2018); A. I. Muranov, *Public and private in arbitration. Analysis of the request of the Supreme Court of the Russian Federation to the Constitutional Court of the Russian Federation about the non-arbitrability of disputes in connection with the procurement by certain types of legal entities* 16 (2018).

46 Postanovleniye Verkhovnogo Suda RF [Decree of the Supreme Court of the Russian Federation] Mar. 3, 2015, No. 305-ЭС14-4115 (Russ.); Postanovleniye Verkhovnogo Suda RF [Decree of the Supreme Court of the Russian Federation] July 28, 2017, No. 305-ЭС15-20073 (Russ.); Postanovleniye Verkhovnogo Suda RF [Decree of the Supreme Court of the Russian Federation] Feb. 25, 2020, No. 305-ЭС19-19555 (Russ.).

subsequently implemented a reform based on the approaches developed by the Supreme Arbitration Court of the Russian Federation.[47]

V. Russia's conservative model: Legal techniques and methods

The creation of a conservative model of arbitration is based on a number of specific legal techniques characterised by the paternalistic influence of the State. Each of these legal and technical methods can be applied to regulate the liberal model, but it is their combined use that makes it possible to create a conservative model of arbitration.

A. Regulation of the internal organisation of arbitral institutions

The Law on Arbitration established provisions prescribing the procedure for organising the internal activities of arbitral institutions. As is known, the Model Law does not contain such provisions. Therefore, the provisions of Russian legislation have become novelties in the regulation of arbitration. Mandatory requirements were established in relation to (1) the procedure for establishing an arbitral institution; (2) a list of documents (list of arbitrators, rules, and regulations) to be adopted by the administrative body; and (3) the internal structure of the arbitral institution (including officers and committees that must be established).[48] The law also provides many formal requirements for the internal organisation of an arbitral institution, which must be met by the founders (for example, the recommendation list must include at least 50% of arbitrators who have ten years of experience in civil disputes as state judges or arbitrators; among the arbitrators must be at least 30% persons with PhDs or doctor of law degrees, and so forth).[49] Compliance with a huge number of bureaucratic requirements creates almost insurmountable difficulties in the formation of arbitral institutions.[50] Further, setting such strict requirements for the experience of arbitrators included in the recommendation lists, among other things, undermines the future of Russian arbitration, since it prevents the involvement of young lawyers in arbitration proceedings who need to gain experience in this field.

B. Restrictions on establishing arbitral institutions

The Law on Arbitration prohibits commercial organisations from creating arbitral institutions. Since the law came into force, only non-profit organisations have the right to establish

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[47] A kind of program document that combines the ideology of the Supreme Arbitration Court of the Russian Federation and the Ministry of justice was an article written for the magazine "The Law" jointly by the Deputy Minister of Justice Mikhail Galperin (an official responsible for arbitration reform) and a judge of the Supreme Court of the Russian Federation, Natalia Pavlova (who was also a former judge of the Supreme Arbitration Court of the Russian Federation, which formed the judicial policy on arbitration issues). *See* Mikhail L. Galperin & Natalia V. Pavlova, *What's Ahead for Arbitration?*, 8 ZAKON MAGAZINE [THE LAW] 126–139 (2019).

[48] Ukazy RF o Utverzhdeniye Pravil Predostavleniya Prava na Ispolneniye Funktsiy Postoyannoye Arbitrazhnoye Uchrezhdeniye I Polozheniya o Deponirovanii Reglamenta Postoyanno Deystvuyushchego Arbitrazhnogo Uchrezhdeniya [Decree of the Russian Federation on Approval of the "Rules on Granting of the Right to Perform the Functions of a Permanent Arbitral Institution" and of the "Regulation on Depositing of the Rules of a Permanent Arbitral Institution"], SOBRANI ZAKONODATEL'STVA ROSIISKOI FEDERATSII [SZ RF] [Russian Federation Collection of Legislation] June 25, 2016, No. 577 (Russ.); Sergey Anatolievich Kurochkin, *Arbitration Reform in Russia: A General Overview*, 2017(1) INT'L COM. ARB. BULL. 180, 185 (2017).

[49] Law on Arbitration, SOBRANI ZAKONODATEL'STVA ROSIISKOI FEDERATSII [SZ RF] [Russian Federation Collection of Legislation] 2015, No. 382-FZ, art. 47(3) (Russ.).

[50] For example, the world's leading arbitrators, such as Pierre Tercier, Sigvard Jarvin, Karl-Heinz Böckstiegel, and John Beachy, refused to fill out the papers that were requested by the Ministry of Justice to confirm their seniority when they were included in the list of arbitrators of various Russian arbitral institutions. *See What do foreign arbitrators think about the requirements of the RF Ministry of Justice*, KOMMERSANT (Nov. 1, 2017), *available at* https://www.kommersant.ru/doc/3455596?from=doc_vrez.

permanent arbitration institutions.[51] These non-profit organisations have special (limited) legal capacity and are entitled to carry out activities only for the organisation of arbitration proceedings. In addition, the creation of arbitral institutions by federal and regional state authorities, local governments, state and municipal institutions, state corporations and companies, political parties and religious organisations, as well as chambers of lawyers and notaries is prohibited.[52]

Another method of conservative regulation is to restrict international arbitral institutions that have not received permission from the Ministry of Justice of the Russian Federation to operate in Russia.[53] When establishing an arbitral institution, obtaining a permit for its activities from the Ministry of Justice is mandatory. Granting the Ministry of Justice the right to issue such permits is an extreme form of regulatory paternalism. The law also gives the Ministry of Justice a wide discretion. For example, when issuing an activity permit, the Ministry of Justice assesses "*the reputation of a non-profit organisation that creates an arbitration*",[54] "*the scale and nature of its activities that allow for a high level of organisation of the arbitration, including in terms of financial support for the creation and operation of an arbitral institution*",[55] *"a widely recognised reputation*"[56] (the only criteria for foreign arbitration institutions). All these concepts, being "*rubber*", allow unlimited discretion in decision making.

The decision of a foreign arbitral institution that has not received a business permit is equivalent to that of an ad hoc arbitration,[57] which, as discussed below, has a very narrow scope of competence. As a result of restrictions on the legal regime, such foreign arbitral institutions are also not entitled to consider, for instance, certain corporate disputes seated in Russia.[58]

C. Licensing system of the arbitration establishment

Under the conservative model, the clear notice system for creating arbitral institutions that existed from 1992 to 2015 was rejected, and a permissive system for the implementation of dispute resolution activities was introduced. Before the reform, the creation of arbitral institutions was based on the decision of the founders, who only had to notify the state court. The fact of notification legitimised the newly created institution. After the reform, the procedure for creating arbitral institutions has become extremely complicated. The process of granting a license for establishing an arbitral institution goes through several stages. At the first stage, the officials of the Ministry of Justice carry out the verification of documents and evaluate them from the point of view of formal requirements. At the second stage, the documents are reviewed by the Council for Improvement of Arbitration at the Ministry of Justice of the Russian

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[51] Law on Arbitration, SOBRANI ZAKONODATEL'STVA ROSIISKOI FEDERATSII [SZ RF] [Russian Federation Collection of Legislation] 2015, No. 382-FZ, arts. 2(9), 44(1) (Russ.); Kokorin et al., *supra* note 42, at 51.

[52] Law on Arbitration, SOBRANI ZAKONODATEL'STVA ROSIISKOI FEDERATSII [SZ RF] [Russian Federation Collection of Legislation] 2015, No. 382-FZ, art. 44(2) (Russ.).

[53] *Id.* art. 44; Skvortsov et al., *supra* note 17, at 257.

[54] Law on Arbitration, SOBRANI ZAKONODATEL'STVA ROSIISKOI FEDERATSII [SZ RF] [Russian Federation Collection of Legislation] 2015, No. 382-FZ, art. 44(8)(4) (Russ.).

[55] *Id.*

[56] *Id.* art. 44(12).

[57] Kokorin et al., *supra* note 42, at 50–57.

[58] *Id.* at 51.

Federation ["**Council**"],[59] which issues a recommendation to the arbitration institution to conduct dispute resolution activities. At the third stage, the final decision is made by the Ministry of Justice of the Russian Federation, which issues the activity permit.[60]

D. Limitation on arbitrability of disputes

In the opinion of the author, the reform has narrowed the scope of arbitrability of disputes.[61] As known, determining arbitrability is one of the main instruments of the State's policy in relation to arbitration. By establishing a list of disputes that arbitral tribunals are allowed to decide upon, the State determines the scope of their activities.[62] Within the framework of the liberal model of arbitration, not only "*classic*" commercial disputes, but also disputes with a certain social significance such as disputes about real estate, public procurement, labour, inheritance and family disputes, and even disputes about compensation for damages caused by the violation of antitrust laws are recognised as arbitrable.[63] "*This differs from state to state reflecting the political, social and economic prerogatives of the state, as well as its general attitude towards arbitration.*"[64] As for the conservative model of arbitration, the State restricts the possibility of arbitration of many private (including commercial) disputes. At the same time, consideration of certain categories of disputes is possible only if special rules for their consideration are adopted. Thus, in Russia, consideration of certain categories of corporate disputes is possible only if the arbitral institution has separate rules for the consideration of corporate disputes (at the same time, the arbitration institution must develop and adopt general rules for the consideration of disputes).[65] The absence of such rules makes it illegitimate for arbitral institutions to consider corporate disputes.

E. The Prosecutor in the arbitration

Prosecutors have been granted the right to participate in arbitration proceedings, even if they did not participate in the conclusion of the arbitration agreement.[66] In addition, the Prosecutor has the right to challenge the arbitration decision in the state court, even if they did not participate in the arbitration proceedings.[67] Prior to the reform, since 2012, state courts assumed that the

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59 The Council for the Improvement of Arbitration Proceedings has been established under the Ministry of Justice, which approves its composition. The Council is a public body and its members work free of charge. The Council consists of 50 members – representatives of state authorities, law professors, practicing lawyers, retired judges, and young professionals who have proven themselves in the legal field. The main function of the Council is to make recommendations on granting or refusing to grant the right to resolve disputes to arbitral institutions.

60 Until March 2019, the Government of the Russian Federation issued a permit for the activity of arbitral institutions. Since March 2019, the level of decision-making has been reduced and this function has been transferred to the Ministry of Justice of the Russian Federation. Akchurina, *supra* note 30, at 3; Law on Arbitration, SOBRANI ZAKONODATEL'STVA ROSIISKOI FEDERATSII [SZ RF] [Russian Federation Collection of Legislation] 2015, No. 382-FZ, art. 44 (Russ.).

61 However, this position is not undisputed. *See* Skvortsov et al., *supra* note 17, at 260; The Code of Commercial Procedure and the Code of Civil Procedure list non-arbitrable disputes; *See* Kommercheskiy Protsessual'nyy Kodeks Rossiiskoy Federatsii [KPK RF] [Commercial Procedure Code], art. 33(2) (Russ.); GRAZHDANSKII PROTSESSUAL'NYI KODEKS ROSSIISKOI FEDERATSII [GPK RF] [Civil Procedural Code], art. 22.1 (Russ.).

62 Kokorin et al., *supra* note 42, at 51.

63 *See*, *e.g.*, Olesya Petrol, *Arbitrability of Matrimonial Disputes*, *in* NEW HORIZONS OF INTERNATIONAL ARBITRATION 332-346 (A.V. Asoskov, A.N. Zhiltsov & R.M. Khodykin eds., 5th ed. 2019).

64 JULIAN DAVID MATHEW LEW QC, LOUKAS A. MISTELIS & STEFAN M. KRÖLL, COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION 199 (2003).

65 Law on Arbitration, SOBRANI ZAKONODATEL'STVA ROSIISKOI FEDERATSII [SZ RF] [Russian Federation Collection of Legislation] 2015, No. 382-FZ, arts. 44(6.2)(4), 45(2) (Russ.).

66 ARBITRAZHNO-PROTSESSUALNYI KODEKS ROSSIISKOI FEDERATSII [APK RF] [Code of Arbitration Procedure] art. 40 (Russ.).

67 *Id.* arts. 40, 230(3) (Russ.).

Prosecutor had the right to challenge the decision of the arbitration institution if it affected the interests of public legal entities that did not participate in the arbitration.[68] As part of the reform, the Prosecutor was given the opportunity to participate in arbitration proceedings even if the parties object to it and the Prosecutor is not a party to the arbitration agreement.[69] Participation of the Prosecutor in arbitration is conditioned on the possibility of filing claims for invalidation of transactions made by state authorities of the Russian Federation, state authorities of subjects of the Russian Federation, local self-government bodies, state and municipal unitary enterprises, state institutions as well as legal entities in whose authorised capital (fund), there is a share of participation of the Russian Federation, subjects of the Russian Federation, or municipalities.[70]

F. Control by the Ministry of Justice

One of the most important elements of the conservative model of arbitration is granting the Ministry of Justice the right to exercise control over the activities of a permanent arbitration institution, including the possibility of applying to courts for the abolition of arbitral institutions that violate the requirements of the law. The Ministry of Justice is empowered to monitor the activities of a permanent arbitration institution. If gross repeated violations of the law are detected in the activities of the arbitral institution, the executive authority has the right to issue an order to terminate the activity within one month.[71] In case of failure to comply with this order, the executive authority has the right to apply to the court for termination of the arbitral institution.[72] However, it is not clear from the current regulations as to what is meant by "*gross violation of the law*". Thus, the Ministry of Justice still has broad discretionary powers that allow them to exercise significant supervisory power over arbitral institutions.

G. Restriction of ad hoc arbitration

As a result of the reform, the capacity of ad hoc arbitrations was significantly limited in comparison to institutional arbitration.[73] In the pre-reform period, ad hoc arbitrations were mostly beyond the control of the State. As a result, it was the ad hoc arbitrators who committed a significant number of violations of the law and caused the greatest distrust among the reformers.[74] During the reform process, it was decided to introduce different modes of institutional and ad hoc arbitration. At the same time, the scope of and the legal possibilities available for ad hoc arbitrations were reduced – especially in comparison with permanent arbitral institutions.

In particular, parties or arbitrators in ad hoc proceedings, unlike arbitral institutions, were not given the right to apply to a state court for assistance in administration, for example, in

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68 Postanovleniye Plenuma VAS RF po Otdel'nym Voprosam Uchastiya Prokurora v Arbitrazhnom Protsesse [Resolution of the Plenum of the Supreme Commercial Court of the Russian Federation "On certain issues of participation of the Prosecutor in the arbitration process"], SOBRANI ZAKONODATEL'STVA ROSIISKOI FEDERATSII [SZ RF] [Russian Federation Collection of Legislation] Mar. 23, 2012, No. 15, Item 6 (Russ.).

69 Boris Romanovich Karabelnikov, *National Report for Russian Federation (2020)*, *in* ICCA INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION 93 (Lise Bosman ed., 2020).

70 Law on Arbitration Courts, [APK RF] [Code of Arbitration Procedure] art. 52(1) (Russ.).

71 Law on Arbitration, SOBRANI ZAKONODATEL'STVA ROSIISKOI FEDERATSII [SZ RF] [Russian Federation Collection of Legislation] 2015, No. 382-FZ, art. 48(3) (Russ.).

72 *Id.* ¶ 4.

73 The lack of confidence in *ad hoc* arbitration on the part of conservative reformers was so great that during the discussion of the draft law, proposals were made to completely ban *ad hoc* arbitration. *See* Borisenko, *supra* note 27.

74 Skvortsov et al., *supra* note 17, at 255.

appointing arbitrators, for interim measures, or securing evidence.[75] In respect of a decision made by an ad hoc arbitral tribunal, an agreement of the parties on its finality (prohibition on right to challenge) has not been allowed.[76] Further, ad hoc arbitrators do not have the right to consider corporate disputes.[77] In addition, there are legal restrictions on advertising ad hoc arbitration. Lastly, the Law on Arbitration also prohibits organisations that are not permanent arbitration institutions from performing administrative functions for ad hoc arbitrations.[78]

H. Prohibition on international arbitration between domestic parties

One of the elements of the conservative arbitration model is to limit the possibility of submitting domestic disputes between residents to international commercial arbitration located outside the Russian Federation. In Russia, in the pre-reform period, there was a contradictory practice[79] on this issue. However, after the reform, on the instructions of the Ministry of Justice, one of the leading experts in this field prepared an expert opinion which concluded that it was unacceptable to submit disputes between Russian companies to international arbitration seated outside Russia, without permission from the Ministry of Justice.[80] It is obvious that this conclusion will be used for the ideological justification of conservative policy on this issue.

I. Inapplicability of antitrust law

As a result of the reform, there was a refusal to consider the activities of bodies that administer arbitration as a type of service provision. This entailed a refusal to apply competition law to their activities.[81] In conditions where the established arbitral institutions are more or less controlled by the State, this leads to monopolisation in the field of arbitration. Moreover, the law includes provisions prohibiting advertising of arbitration by those who have not received permission to

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[75] Law on Interantional Commercial Arbitration, SOBRANI AKTOV PRESIDENTA I PRAVITELSTVA ROSIISKOI FEDERATSII [SAPP] [Collection of Acts of the President and Government of the Russian Federation] 1993, No. 5338-1, art. 27 (Russ.); Law on Arbitration, SOBRANI ZAKONODATEL'STVA ROSIISKOI FEDERATSII [SZ RF] [Russian Federation Collection of Legislation] 2015, No. 382-FZ, art. 30 (Russ.); Skvortsov et al., *supra* note 17, at 261.

[76] Law on Interantional Commercial Arbitration, SOBRANI AKTOV PRESIDENTA I PRAVITELSTVA ROSIISKOI FEDERATSII [SAPP] [Collection of Acts of the President and Government of the Russian Federation] (1993), No. 5338-1, art. 34(1) (Russ.); Law on Arbitration, SOBRANI ZAKONODATEL'STVA ROSIISKOI FEDERATSII [SZ RF] [Russian Federation Collection of Legislation] 2015, No. 382-FZ, art. 40 (Russ.); Skvortsov et al., *supra* note 17, at 261.

[77] Law on Arbitration Courts, [APK RF] [Code of Arbitration Procedure] art. 225.1(5) (Russ.); Skvortsov et al., *supra* note 17, at 261.

[78] Law on Arbitration, SOBRANI ZAKONODATEL'STVA ROSIISKOI FEDERATSII [SZ RF] [Russian Federation Collection of Legislation] 2015, No. 382-FZ, art. 44(20) (Russ.). This provision has been amended by the 2019 Amendment, as a consequence of which, awards rendered in violation of the prohibition are at risk of being set aside. *See* 2019 Amendment, SOBRANI ZAKONODATEL'STVA ROSIISKOI FEDERATSII [SZ RF] [Russian Federation Collection of Legislation] Dec. 27, 2018. *See also* Taisiya Vorotilova & Vladimir Khvalei, *Russia is now finally closed for arbitration administered by foreign institutions*, ARB. J. (Mar. 12, 2019), *available at* https://journal.arbitration.ru/ru/analytics/russia-is-now-finally-closed-for-arbitration-administered-by-foreign-institutions.

[79] *See* Postanovleniye Verkhovnogo Suda RF [Decree of the Supreme Court of the Russian Federation] Mar. 22, 2010, No. 3174/2010 (Russ.); Postanovleniye Verkhovnogo Suda RF [Decree of the Supreme Court of the Russian Federation] June 19, 2012, No. 1831/2012 (Russ.); Postanovleniye Verkhovnogo Suda RF [Decree of the Supreme Court of the Russian Federation] Feb. 10, 2014, No. 17046/2013 (Russ.); *See* Vladimer Khvalei, Andrey Gorlenko, Alexander Muranov, Roman Khodykin, D. Litvinsky, Mikhail Ivanov, Alexei Dudko, Natalia Chumak, G. Zhukova, Gleb Sevastyanov & Sergey Budylin, *Domestic disputes are the domain of national arbitration?*, THE LAW 3, 12–27 (2017); Anton Vladimirovich Asoskov, *Can Purely Domestic Disputes Without a Foreign Element Be Referred to Foreign Arbitration?,* 8 ZAKON 115–123 (2017) [*hereinafter* "Asoskov"].

[80] The ideas of this conclusion were outlined in the following article. *See* Asoskov, *supra* note 79.

[81] Law on Arbitration, SOBRANI ZAKONODATEL'STVA ROSIISKOI FEDERATSII [SZ RF] [Russian Federation Collection of Legislation] 2015, No. 382-FZ, art. 44(1)(1) (Russ.).

perform the functions of a permanent arbitration institution. This prohibition also applied to ad hoc arbitrations.[82] Such prohibitions made it almost impossible for new arbitration institutions to enter the market unless they were supported by the State. In connection with this regulatory system, lawyers note that such monopolisation of arbitration proceedings severely reduces both administrative efficiency and independence and does not contribute to the creation of a "*world-class arbitration institution*" in Russia.[83]

J. The arbitration decision must be legitimised by a state court

The Law on Arbitration does not consider arbitration decisions as an independent basis for making an entry in public registers that record rights to certain types of property. The law stipulates that entries in legally significant registers (the register of rights to real estate, the register of rights to securities, the register of intellectual property rights, pledge registers, etc.) are made only if there is a writ of execution issued on the basis of a decision made by a state court.[84] Thus, the State's distrust of arbitration takes the form of paternalistic control, which presupposes the legitimation of the arbitration award through its verification by a state court.

K. The rejection of regional arbitration

The abolition of regional arbitral institutions has become one of the ideological goals of the reform, which involves the creation of "*strong, internationally recognized arbitration courts*" in a highly centralised environment.[85] All five arbitral institutions are located in Moscow. At the same time, under the auspices of the Ministry of Justice, these central arbitration institutions with headquarters in Moscow create regional offices, which in practice turn out to be unviable due to the lack of authority of local businesses. At the same time, regional arbitral institutions that existed for decades did not receive permission to operate and ceased their activities.[86]

L. The dependence of the arbitrator from the management

The adoption of these reforms led to the creation of a system of internal organisation in which the arbitrator is significantly dependent on the management of the arbitral institution. The same can be viewed as a manifestation of a paternalistic approach to arbitration. Among other things, this is reflected in the fact that the Law on Arbitration requires that each arbitral institution must have a committee for the appointment of arbitrators.[87] In this case, the Jesuit method[88] of

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[82] Federal'nyy Zakon RF o Reklame [Federal Law of the Russian Federation on Advertising], SOBRANI ZAKONODATEL'STVA ROSIISKOI FEDERATSII [SZ RF] [Russian Federation Collection of Legislation] Mar. 13, 2006, No. 38-FZ, art. 30.2 (Russ.).

[83] Khvalei, *supra* note 8, at 15, 17.

[84] Law on Arbitration, SOBRANI ZAKONODATEL'STVA ROSIISKOI FEDERATSII [SZ RF] [Russian Federation Collection of Legislation] 2015, No. 382-FZ, art. 43 (Russ.).

[85] In Russia, there is a term that describes this process – 'vertical power'. This term covers centripetal trends in all areas of public relations including arbitration. *See* Hugh Barnes, *Dictating the Law in Putin's Russia: Hyper-legalism and "Vertical Power"*, *in* DICTATORSHIP OR REFORM? THE RULE OF LAW IN RUSSIA 4 (2006); Alena Ledeneva, *Behind the Façade: 'Telephonic Justice' in Putin's Russia*, *in* DICTATORSHIP OR REFORM? THE RULE OF LAW IN RUSSIA 32 (2006).

[86] A strong public response was caused by the refusal of the Ministry of Justice to issue a permit to the Siberian arbitration court. This arbitration institution has existed for more than 25 years, considering hundreds of cases a year. Its authority in the business community and among experts in arbitration was not questioned. However, the Ministry of Justice considered that the Siberian arbitration court does not have a generally recognized reputation, and therefore cannot engage in arbitration proceedings. *See* Anna Zanina, *Until the Ministry of justice becomes uncomfortable, nothing will change*, KOMMERSANT (Nov. 1, 2017), *available at* https://www.kommersant.ru/doc/3454660.

[87] Law on Arbitration, SOBRANI ZAKONODATEL'STVA ROSIISKOI FEDERATSII [SZ RF] [Russian Federation Collection of Legislation] 2015, No. 382-FZ, art. 47(4) (Russ.).

appointing arbitrators is provided. Herein, the nominating committee is elected by the arbitrators from the recommended list of arbitrators, and the recommended list of arbitrators is formed by the management of the arbitration institution. This allows the management of an arbitration institution to effectively influence arbitrators through their appointment procedures in specific cases.[89]

M. State control and supervisory authorities in arbitration proceedings

Participation of the State and supervisory bodies in cases related to the enforcement of arbitral awards in the territory of the Russian Federation is an extreme method of enforcing a conservative approach to arbitration. At the same time, there has been a clash between the roles of executive and judicial authorities.[90] For instance, the Chairman of the Supreme Court of the Russian Federation formulated a recommendation[91] to lower courts to involve the state service, *Rosfinmonitoring*,[92] in court sessions. The *Rosfinmonitoring* would consider applications for challenging decisions of foreign courts and foreign arbitral institutions and for enforcing such decisions. In addition, in practice, state courts involve the federal tax service as a third party in this category of cases. State courts often involve such authorities on their own initiative.[93] The courts either do not comment on the reasons for involving these authorities or use general wording, such as: "*in order to comply with the control to counteract the legalization (laundering) of proceeds from crime [...]*"[94] or based on the "*suspicious*" procedural behaviour of the applicant in the case.[95]

VI. Conclusion

The reform has caused sharp discussion within the Russian arbitration community. A significant section of lawyers, both academicians and practitioners, disapproved the changes that led to the introduction of a conservative model of arbitration in Russia.[96]

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88 The Jesuit approach involves duplicity in achieving goals.

89 The case of Alexander Muranov, a well-known arbitrator and Professor at the Moscow State Institute of International Relations, was actively discussed in Russia. Muranov very sharply criticised the leadership of the Chamber of Commerce and Industry of the Russian Federation, which created the International Commercial Arbitration Court, and as a result was excluded from the list of arbitrators of this institution. Muranov appealed to the state court for the illegality of his exclusion from the list of arbitrators, but lost the case. Nevertheless, the public feels sympathy for Muranov for his principled position pointing to the abuses committed by the leadership of the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation.

90 In this case, the conflict between the executive and judicial authorities is seen in the fact that the court assumes functions that are not typical of it. Thus, the court, rather than the executive, initiates the involvement of state bodies in the judicial process. State authorities are passive. This situation deprives the court of impartiality, since it takes the position of one of the parties.

91 Alexey Chernyshev, *The Supreme Court will streamline the execution of decisions of foreign courts*, KOMMERSANT (Sept. 26, 2018), *available at* https://www.kommersant.ru/doc/3752831.

92 Rosfinmonitoring (federal financial monitoring service) is a federal executive body of Russia that performs functions to counteract the legalisation (laundering) of proceeds from crime and the financing of terrorism.

93 E.O. Kondratenko, *Participation of control and Supervisory bodies in disputes related to the execution of decisions of arbitration courts on the territory of the Russian Federation*, 117/118 TRETEISKY SUD 227, 228 (2019).

94 Postanovlenie VAS RF Chelyabinsk Oblast ot 13 aprelya 2018 g. No. A76-38304/2017 [Ruling of the Highest Arbitration Court of the District of Chelyabinsk of July 7, 2020, No. A76-38304/2017] (Russ.).

95 Postanovlenie VAS RF Mordovia Oblast ot 25 sentyabrya 2018 g. No. A39-4089/2018 [Ruling of the Highest Arbitration Court of the District of Mordovia of Sept. 25, 2018, No. A39-4089/2018] (Russ.).

96 Yu. V. Kholodenko, *Arbitration Proceedings: Reform or Destruction?*, 112 TRETEISKY SUD 28–31 (2017); A. I. Zaitsev, *Cons of the reformed arbitration proceedings in Russia*, 112 TRETEISKY SUD 37–48 (2017); M. E. Morozov, *The Arbitration is dead, long live ad hoc*, 112 TRETEISKY SUD 49–55 (2017); Khvalei, *supra* note 8, at 4–19; Alexander Muranov, "*Russian*" *Institute of Modern Arbitration and* "*Russian*" *Arbitration Center: Examining Their Role in Russian Arbitration, GONGO-Structures?Declarations and Reality, How the Hierarchies of State Power Affect Arbitration in Russia,* ZAKON RU 71

In practice, the reform resulted in the abolition of several thousand arbitral institutions and significant restrictions on international commercial arbitration. In the post-reform period, only five Russian arbitration institutions[97] and two foreign arbitration institutions[98] received permission to operate. The sphere of arbitration has come completely under the control of the Ministry of Justice, which monitors the activities of arbitral tribunals.

While the Ministry of Justice has, by policy, sought to support several arbitral institutions, which, according to the ideologists of the reform, ought to match the level of the world's leading arbitration centres, in practice, the authorised arbitrators are far from the level of leading arbitration centres such as the London Court of International Arbitration, the ICC International Court of Arbitration, Arbitration Institute of the Stockholm Chamber of Commerce, etc.

At the same time, in order to make arbitration available throughout the vast territory of Russia, the Ministry of Justice is encouraging the development of a network of arbitration institutions. Arbitral institutions that have received permission to operate have started opening regional offices that attract leading experts from the region to resolve disputes.[99]

Although the reform has achieved a number of positive results, the negative consequences, according to many academic and practising lawyers, have been much more noticeable. As they say in Russia, "*along with the dirty water from the bath, the child was thrown out*".

Thus, the Russian Federation has created a conservative model for regulating arbitration. The State controls arbitral institutions in the course of all their activities: from the moment of their creation to the execution of the award. At the same time, the main focus is not so much on judicial as on administrative control, which also implies broad discretion of the executive authorities.

These circumstances make the Russian jurisdictional system an extremely unattractive forum for resolving private disputes. Foreign companies are reluctant to settle disputes in Russia. On the other hand, Russian companies prefer to look for foreign forums to resolve disputes with their foreign counterparts. The growing criticism following the negative experience of introducing the conservative arbitration model in Russia must serve to alert reform ideologues to reconsider their views. It seems that at this stage of development of Russian arbitration law, the conservative

(June 2, 2020), *available at* https://disk.yandex.ru/i/qizc9vyg5VWStQ; G.V. Sevastianov, *The Ups and Downs of Alternative Dispute Resolution in Russia: Key Outcomes of a Difficult Year*, 119/120 TRETEISKY SUD 11–16 (2019); D. N. Volosov, *On the Margins of the Arbitration Reform. Arbitrations to Get a Choice: To Nowhere or to Never*, 2/3 TRETEISKY SUD 26, 36 (2016); M. A. Yaremenko, *Arbitration Law: Practical Issues in the Absence of Practice*, 2/3 TRETEISKY SUD 76 (2016); G. V. Sevastianov, *The Cold Breath of the Arbitration Reform*, TRETEISKY SUD 6–10 (2016).

[97] (1) Russian arbitration centre at the Autonomous nonprofit organization "Russian Institute of modern arbitration"; (2) Arbitration centre at the all-Russian public organization "Russian Union of Industrialists and entrepreneurrs"; (3) National centre for sports arbitration of the Autonomous non-commercial organization "Sports Arbitration Chamber"; (4) Maritime Arbitration Commission at the Chamber of Commerce of the Russian Federation; (5) International Commercial Arbitration Court at Trading-Industrial Chamber of the Russian Federation. *See* Karabelnikov, *supra* note 69, at 1–104.

[98] The two institutions were the Hong Kong International Arbitration Centre (HKIAC) and the Vienna International Arbitral Centre (VIAC). Jack Ballantyne, *VIAC becomes second institution licensed in Russia*, GLOBAL ARB. REV. (July 15, 2019), *available at* https://globalarbitrationreview.com/article/1195175/viac-becomes-second-institution-licensed-in-russia.

[99] However, this practice appears to be temporary. It does not contribute to the stability of arbitration since it is based on the popularity of the capital's lawyers and ignores the authority of local lawyers.

model of arbitration should be abandoned. It would seem that a more rational approach would be based on a neutral model, in which the regulation of arbitration is carried out on the principles of self-regulation and the State has limited control over arbitration through the procedure of enforcement of arbitral awards.

MORE RIGHTS FOR MORE PEOPLE?: THE STRUGGLE OF INDEPENDENT CONTRACTORS TO ARBITRATE EMPLOYMENT CLAIMS AGAINST INTERNATIONAL ORGANISATIONS

Luis Bergolla[*]

Abstract

*This article discusses an arbitration that took place under the Employment Arbitration Rules ["**Employment Rules**"] of the American Arbitration Association ["**AAA**"], in which I was the Claimant's pro bono attorney. The parties to this arbitration were an individual and her employer—an international organisation based in the United States. This article focuses on the organisation's argument that the parties' different nationalities and the individual's post-employment relocation outside the U.S. rendered the dispute 'international'. Accepting this characterisation would have been fatal to the arbitration to the extent that each party would have been responsible for 50% of the arbitrator's fees and arbitration costs under the AAA's International Arbitration Rules—something prohibitive for most employee-claimants—whereas under the Employment Rules only the organisation would have been financially responsible. Unfortunately, when the AAA decided to administer the case under the Employment Rules, the organisation asserted its immunity of jurisdiction and withdrew from the arbitration. Contrasted with the recent arbitration cases in which the workers of large corporations have sought to annul arbitration clauses, this case speaks about an individual who, unable to have her day in court, struggled—and failed—to preserve her right to settle her employment claims in arbitration.*

I. Introduction

After finishing her graduate studies in 2008, Joana[1] ["**Joana**" or "**Claimant**"] accepted an offer to intern with a certain international organisation ["**Organization**" or "**Respondent**"] in Washington D.C. ["**Washington**"]. The prospect of acquiring her first professional experience and the possibility of securing a permanent staff position with the Organization prompted her to relocate to the United States. Following the internship, Joana was offered a three-month independent consultant contract.

This was the first in a long series of contracts. Indeed, Joana would sign 46 similar contracts over the course of her relationship with the Organization. Despite the control the Organization always exercised over Joana being consistent with an employer-employee relationship, each of these contracts invariably called her an independent contractor. Each of these contracts contained identical arbitration agreements, which were silent on the applicable arbitration rules.

After almost ten years of being classified as an independent contractor, the Organization told Joana that it was ready to normalise her employment status. Despite this promise, in late 2018,

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1 "Joana" is a fictional name used to preserve the Claimant's real identity.

the supervisor told Joana that she had not been selected to keep her job and that her contract of ten years was being terminated with immediate effect and "*that [was] it*".[2]

Following a series of unsuccessful attempts to have her claims adjudicated through the Organization's internal administrative procedure,[3] Joana commenced an arbitration pursuant to the Employment Rules.[4] Throughout this article and for the sake of simplicity, I shall refer to this case as *Joana* v. *Organization,* or by its short form, *Joana*.

Soon after the filing of Joana's request for arbitration, the AAA sent a letter to the parties stating that the outcome of the preliminary administrative review was to apply the AAA Commercial Arbitration Rules[5] ["**Commercial Rules**"] along with the Employment/Workplace Fee Schedule[6] ["**Employment Fee Schedule**"] to this dispute.[7] Suddenly, however, the International Centre for Dispute Resolution ["**ICDR**"][8]—not the AAA—followed up with a letter to the parties,[9] assigning the case to an international case manager and indicating that the Procedures for Large, Complex Commercial Disputes[10] would apply to this case given the amounts at stake.[11] This decision likely prompted a letter from the Organization disregarding the AAA/ICDR's prior determinations regarding the applicable rules and declaring its intention to apply for security for costs and attorneys' fees pursuant to Article 34 of the ICDR Rules ["**International Rules**"].[12] Without providing any authority in support, the Organization's external counsel concluded that this was "*undoubtedly an 'international' dispute*".[13] The Claimant opposed categorically.

This article argues that a broadly-worded AAA arbitration clause, like the one present in Joana's contracts, cannot prevent individual claimants from arbitrating employment-related claims against the Organization who drafted the ambiguous clause. Below, I discuss the arguments that I advanced in *Joana* acting as Joana's pro bono attorney. The arguments reported in this article

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2 From Claimant's recollection conveyed in the attorney-client intake interview with the author.

3 *See* Claimant's petition for an administrative hearing with the Organization's Secretary-General (Jan. 29, 2018) (on file with author); *see also* Memorandum from the Organization's Human Resources, denying Claimant's petition of hearing (Feb. 28, 2018) (on file with author) [*hereinafter* "HR Memorandum"].

4 American Arbitration Association (AAA), Employment Arbitration Rules 2009, *available at* https://www.adr.org/sites/default/files/EmploymentRules_Web_2.pdf [*hereinafter* "AAA Employment Arbitration Rules"].

5 AAA, Commercial Arbitration Rules 2013, *available at* https://adr.org/sites/default/files/Commercial%20Rules.pdf [*hereinafter* "AAA Commercial Arbitration Rules"].

6 AAA, Employment/Workplace Fee Schedule: Cost of Arbitration 2019, *available at* https://www.adr.org/sites/default/files/Employment_Fee_Schedule1Nov19_0.pdf [*hereinafter* "Employment Fee Schedule"].

7 *See* E-mail from the AAA Employment filing team to the counsel (Jan. 11, 2019) (on file with author).

8 International Centre for Dispute Resolution (ICDR) is the AAA's branch for the administration of international disputes. *See* ICDR, *available at* https://www.icdr.org.

9 *See* Letter from the ICDR case manager (Jan. 25, 2019) (on file with author).

10 AAA, Procedures for Large, Complex Commercial Disputes 2013, *available at* https://adr.org/sites/default/files/Commercial%20Rules.pdf.

11 The Claimant's total claim for damages for employment misclassification, breach of implied employment contract, constructive discharge, and employment discrimination, among others, exceeded $1,000,000.

12 ICDR, International Arbitration Rules 2014, *available at* https://www.adr.org/sites/default/files/ICDR%20Rules_0.pdf [*hereinafter* "International Rules"].

13 *See* Letter from the Organization's external counsel to the AAA/ICDR (Jan. 29, 2019) (on file with author).

are published with Joana's prior informed consent[14] and absent any language of confidentiality in the arbitration agreement.[15]

The balance of this article is as follows. Part II explains the role that the AAA/ICDR played in the case and Parts III to V discuss the main arguments regarding the non-internationality of employment disputes against the Organization. Finally, in Part VI, I offer a few policy recommendations highlighting the issues that still warrant additional research, and then I conclude.

II. Obstacles to claiming and the erratic role of the AAA

Joana encountered multiple obstacles in her search for redress for the violation of her employment rights. *First*, the Organization denied her petition for an administrative hearing indicating that only those whom the Organization considers its "*staff*" were entitled to them.[16] *Second*, when the independent contractors realise that arbitration is the only option for dispute resolution contemplated in their contracts, it becomes clear to them that retaining a lawyer is essential. Yet, lawyers are expensive in Washington and are typically unwilling to take this type of employment misclassification cases against the Organization on a contingency fee basis. Similarly, third-party arbitration funders are also reluctant to fund these cases, as discussed below in further detail, given the slim chances of success in enforcing an arbitral award against an international organisation.

In this environment, pro bono lawyers are probably one of the last resources through which similarly situated claimants can proceed with their claims in arbitrations against international organisations. After many unsuccessful attempts to retain a lawyer,[17] I finally accepted to represent Joana on a pro bono basis.[18]

As noted previously, the Organization's main defence in *Joana* was to challenge the commencement of the arbitration under the Employment Rules. The Organization also objected to the AAA's preliminary determination to administer this case under the Commercial Rules along with the Employment Fee Schedule.[19] According to the Organization, this decision was inadequate and impermissible in a case that was, in its opinion, "*clearly international*".[20]

Neither the Employment Rules nor the International Rules provide for the procedure that must be followed when a party disputes the administration of the arbitration under certain arbitration provisions. Rule 5(c) of the Commercial Rules, however, says that in such cases, the arbitration must continue "*in accordance with the arbitration provision submitted by the initiating party subject to a final*

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14 *See* E-mail from the Claimant to the author (May 31, 2019) (on file with author).

15 *See* discussion *infra* Part III (reproducing the arbitration agreement present in Joana v. Organization); *see also* 2 GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 2264 (2009) (citing United States of America v. Panhandle Eastern Corp., 118 F.R.D. 246 (C.D. Cal. 1998) for the proposition that U.S. courts have generally appeared reluctant to recognize an implied obligation of confidentiality arising out of arbitration agreements).

16 *See* HR Memorandum, *supra* note 3.

17 The Claimant visited at least three lawyers, but all declined to take her case on contingency fee basis. One attorney offered his services upon the payment of a $5,000 retainer that the Claimant could not afford.

18 At the time Joana v. Organization was filed, I was a newly admitted attorney in the District of Columbia (the seat and the applicable law to the arbitration). That I accepted to represent the Claimant on a pro bono basis means that I did not receive any compensation for this representation.

19 *See supra* note 13.

20 *Id.*

determination by the arbitrator".[21] In the case at hand, instead of affirming its preliminary decision subject to the arbitrator's review, the AAA/ICDR invited the parties to provide commentaries as to the rules applicable to the case.[22] In its commentaries, the Organization reiterated its position that the dispute was international while citing to no authority in support of the application of the International Rules.[23] The Claimant instead submitted a substantial brief in support of administering the arbitration pursuant to the Employment Rules—never under the International Rules.[24]

The AAA/ICDR case manager escalated the parties' contentions to the ICDR International Administrative Review Council ["**IARC**"]. Based on the parties' previous submissions, the IARC sided with the Claimant and determined that the arbitration was to proceed under the Employment Rules and the Employment Fee Schedule.[25] Parts III to V summarise the Claimant's (arguably)[26] successful arguments to defeat the Organization's first attempt to end this arbitration before the hearing on the merits even took place.

III. Only domestic employment arbitration rules should apply to the arbitration of purely domestic employment disputes

Subject matter appropriateness is perhaps the obvious reason why the Employment Rules and the Employment Fee Schedule should always apply to domestic employment disputes. But this is not the only reason. The Employment Rules together with the Employment Fee Schedule were designed to preserve the employees' due process rights by placing the arbitration's financial burden entirely on the employers.[27] Yet, the correct application of the Employment Rules is not always straightforward. To illustrate this last point, consider the arbitration clause present in Joana's contracts:

> "*Upon written notice by either Party to the other, any dispute between the Parties arising out of this Contract may be submitted to either the Inter-American Commercial Arbitration Commission or the American Arbitration Association, for final and binding arbitration <u>in accordance with the selected entity's rules</u>. The law applicable to the arbitration proceedings shall be the law of the District of Columbia, USA and the language of the arbitration shall be English.*" (emphasis added)

While seemingly functional, the critical shortcoming of this arbitration agreement is that it fails to specify which of the many AAA arbitration rules should apply to the arbitration. But this alone should not be fatal to the arbitration inasmuch as all AAA/ICDR arbitration rules contain provisions designed to cure this kind of silence in the arbitration agreement. Unfortunately, the very fact that each of the different AAA arbitration rules contains similar provisions clouds the limited guidance that they were intended to provide. That is why I now try to unpack the AAA/ICDR's official position on this issue by looking at the relevant provisions, one at a time:

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21 AAA, Commercial Arbitration Rules, *supra* note 5, r. 5(c).

22 *See* E-mail from the ICDR case manager (Jan. 30, 2019) (on file with author).

23 *See* Letter from the Organization's external counsel to the AAA/ICDR (Feb. 14, 2019) (on file with author).

24 *See* Letter from the Claimant's counsel to the AAA/ICDR (Feb. 14, 2019) (on file with author).

25 E-mail from the ICDR case manager containing the letter from the International Administrative Review Council (IARC) (Feb. 27, 2019) (on file with author).

26 Unfortunately, the IARC's decision was unmotivated.

27 Employment Fee Schedule, *supra* note 6 (capping the employee's filing fee at $300; placing the burden of paying the $750 case management fee entirely on the employer; and making the latter responsible for paying the arbitrator's fees unless in cases where the parties agree otherwise).

1. Rule 1 of the Employment Rules says:

> "*The parties shall be deemed to have made these rules a part of their arbitration agreement whenever they have provided for arbitration by the American Arbitration Association (hereinafter "AAA") or under its Employment Arbitration Rules and Mediation Procedures or for arbitration by the AAA of an employment dispute without specifying particular rules**. […]" (emphasis added).

2. Rule 1 of the AAA Commercial Rules states:

> "*The parties shall be deemed to have made these rules a part of their arbitration agreement whenever they have provided for arbitration by the American Arbitration Association (hereinafter AAA) under its Commercial Arbitration Rules or for arbitration by the AAA of a domestic commercial dispute without specifying particular rules. […]*" (emphasis added).

3. Article 1(1) of the International Rules also contains similar language:

> "*Where parties have agreed to arbitrate disputes under these International Arbitration Rules ("Rules"), or have provided for arbitration of an international dispute by the International Centre for Dispute Resolution (ICDR) or the American Arbitration Association (AAA) without designating particular rules, the arbitration shall take place in accordance with these Rules as in effect at the date of commencement of the arbitration, subject to modifications that the parties may adopt in writing. The ICDR is the Administrator of these Rules.*" (emphasis added).

In *Joana*, the Respondent obviously relied on Article 1(1) of the International Rules in support of its argument that these rules—not the Employment Rules—should have applied to the case given the international nature of the dispute. Conversely, the Claimant cited to Rule 1 of the Employment Rules in support of applying these rules. This part of the article continues to focus on the appropriateness of applying the Employment Rules to cases similar to *Joana*.[28]

From the Claimant's perspective, the curing language in Rule 1 of the Employment Rules is particularly relevant. In order to activate this provision, it is critical to ascertain whether the dispute that the parties agreed to arbitrate is, in fact, an "*employment dispute*". But what is an employment dispute after all?

The AAA's website for Employment Arbitration gives the following answer:

> "*Disputes can arise out of an employer plan (the employer has drafted a standard arbitration clause for use with all its employees) or an individually-negotiated employment agreement or contract (the employee has had the ability to negotiate the terms and conditions of the employment agreement) or an independent contractor (working or performing as an individual and not incorporated) and a business or organization and the dispute involves work or work-related claims, including any statutory claims.*"[29] (emphasis added)

[28] *See* discussion *infra* Parts IV and V (discussing in further detail the impropriety of applying the International Rules to this type of cases).

[29] *See Practice Areas: Employment Arbitration under AAA Administration*, AM. ARB. ASS'N, *available at* https://www.adr.org/Employment.

Similarly, the introduction to the Employment Rules includes the following language:

> "*These dispute resolution procedures were developed for arbitration agreements contained in employee personnel manuals, an employment application of an individual employment agreement, independent contractor agreements for workplace disputes and other types of employment agreements or workplace agreements, or can be used for a specific dispute. They do not apply to disputes arising out of collective bargaining agreements.*"[30] (emphasis added)

In *Joana*, the Claimant was an individual independent contractor whose claims were, by definition, work or employment-related (i.e. employment misclassification, breach of employment contract, constructive discharge, etc.). The Employment Rules would thus have applied effectively and fairly to Joana's case. Notwithstanding, the asterisk appended to Rule 1 of the Commercial Arbitration Rules generates additional ambiguity:

> "*Beginning October 1, 2017, AAA will apply the Employment Fee Schedule to any dispute between an individual employee or an independent contractor (working or performing as an individual and not incorporated) and a business or organization and the dispute involves work or work-related claims, including any statutory claims and including work-related claims under independent contractor agreements. A dispute arising out of an employment plan will be administered under the AAA's Employment Arbitration Rules and Mediation Procedures. A dispute arising out of a consumer arbitration agreement will be administered under the AAA's Consumer Arbitration Rules.*"[31] (emphasis added)

With this language, the AAA suggests again that either the Employment Rules or the Commercial Rules could apply to the arbitration of work-related disputes. In *Joana*, the Claimant argued that the Commercial Rules should not be applied to her case in lieu of the Employment Rules because her claims had nothing to do with the obligations set forth in her written contracts. In other words, the Claimant was suing for the breach of an employment contract implied-in-fact.

The doubts that the AAA introduces with the conflicting language flagged in this part of the article dissipate where the Organization, as in *Joana*, uses standard contract forms to memorialise the relationships with all of its performance contractors (*contratos por resultado*) ["**CPRs**"]. It is generally understood that CPRs cannot negotiate the terms of their contracts for these standard contracts are the quintessential example of an adhesion contract. An adhesion contract is one that is so one-sided for the strong party that the weak party must sign or else decline.[32] In short, a CPR has no more control over the wording of the arbitration clause placed within the Organization's standard contract than a consumer does when she opens a bank account or a brokerage account. The standard contract form(s) present in *Joana* derive from the

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30 *See* AAA, Employment Arbitration Rules, *supra* note 4, at 9.

31 *See* AAA, Commercial Arbitration Rules, *supra* note 5, art. 1.

32 Rob Jagtenberg & Annie de Roo, *Employment Disputes and Arbitration an Account of Irreconcilability, with Reference to the EU and the USA*, 68 ZBORNIK PFZ 171, 175-176 (2018) ("[…] arbitration clauses can increasingly be found in individual contracts, but the terms of these contracts are not genuinely negotiated. Rather, they follow a set model imposed by the employer; these are contracts of adhesion. For a candidate aspiring to a job position under such conditions with an employer, it is often simply a case of 'Take it or leave the building.' One could say that a referral to arbitration emanating from a clause in an adhesion contract comes effectively down to mandatory arbitration. […]").

Organization's internal deliberation process and is publicly available.[33] To the extent that arbitration constitutes a meaningful alternative forum for dispute resolution available to the CPRs, the publicity of the arbitration clause is probably being used to justify the grant of immunity and privileges that the Organization enjoys under U.S. law. This point is discussed in further detail in Part VI below.

That the Organization uses contracts of adhesion invariably for the hiring of every CPR can reasonably be construed as the equivalent to the sort of employment plans alluded to in the asterisk that adorns Rule 1 of the Commercial Rules.[34] According to the AAA, an employment plan is one whereby "*the employer has drafted a standard arbitration clause for use with all of its employees*".[35] That is why the Claimant in *Joana* argued that the Employment Rules should apply to her case despite the deficiency of the arbitration clause and the ambiguity introduced by the AAA's conflicting language signalled before.

For these reasons, the Claimant asked the AAA/ICDR to change its original preliminary determination—to apply the Commercial Rules—and to start administering her arbitration pursuant to the Employment Rules. In the alternative, the Claimant urged the AAA/ICDR to affirm its preliminary determination to apply the Commercial Rules along with the Employment Fee Schedule subject to the arbitrator's review. Simultaneously, the Claimant urged the AAA/ICDR to dismiss the Organization's request to administer her matter under the International Rules. The next part explains the reasons why the International Rules should not apply to this kind of cases.

IV. A dispute shall be deemed domestic where the parties' place of business and "place for delivery and/or performance of the work" is the same

The Respondent in *Joana* posited that Article 1(1) of the International Rules was dispositive of the issue of the applicable rules because the Claimant was a national of a Latin American country now residing outside the U.S. and the Organization was an "*entity in Washington, D.C.*"[36] According to the Organization, the parties' connection with different states at the time of the arbitration rendered the dispute "*undoubtedly*" international.[37] The reason behind this defence strategy is clear. As a sophisticated party, the Organization knew that the application of Article 34 of the International Rules would have been fatal to the *Joana* arbitration simply because the Claimant—as most similarly situated CPRs—could not afford the cost of an international arbitration.

The foregoing presents a complex dichotomy. As I noted previously, that an independent contractor is not able to defray the cost of an international arbitration against her employer is a due process problem that is best solved by applying the Employment Rules. On the other hand, from a policy perspective, the type of economic consideration raised by the Organization's defence should be the least of the reasons to rule out the application of the International Rules. Nevertheless, the Organization's position regarding the internationality of the dispute in *Joana* leaves a number of analytical holes that I try to cover next for the sake of the argument.

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33 *See* the Organization's standard contract form (on file with the author).
34 *See supra* note 28.
35 *See supra* note 29.
36 *See* s*upra* note 13.
37 *Id.*

As explained in Part III, the parties in *Joana* did not expressly grant authority to the AAA/ICDR to apply the International Rules to their arbitration. In light of the silence in the arbitration agreement, the question was whether the dispute between the parties to this arbitration was an "*international dispute*" within the meaning of Article 1(1) of the International Rules. The answer to this question is intrinsically difficult[38] and by all means not as obvious as the Organization suggested.[39]

The International Rules do not define the term "*international dispute*" and the AAA/ICDR's position on the issue is not clear either.[40] Fortunately, specialised commentators do provide guidance regarding the course that the ICDR has followed in similar past cases.

Gusy et al., for example, note that the ICDR commonly sends a letter[41] to the parties stating the two criteria that are used to define what an international dispute is: (i) "*analyzing the nationality or [the] residence of the parties*"; and (ii) "*the nature of the dispute*".[42] (emphasis added). The same commentators stress that the nationality of the parties is not the critical element for determining the dispute's "*internationality*", for an arbitration "*between parties resident of the same country could be genuinely or intrinsically international*".[43] In fact, better indicators of the so-called internationality are the objective factors related to the second criterion above—"*the nature of the dispute*".[44] In other words, a dispute between "*parties resident of the same country could be genuinely or intrinsically international*" where the contract that binds them calls for performance abroad.[45]

Stated differently, the residence of the parties is as good an indicator of the dispute's internationality as the parties' citizenship or nationality; and the different places of residence or nationalities of the parties are not as strong an indicator of internationality as the objective international connections the contract has or lacks with more than one country.

The analysis presented so far is not free of nuanced interpretations and criticism. Nevertheless, most commentators[46] agree when they refer to Article 1(3) of the United Nations Commission on International Trade Law Model Law on International Commercial Arbitration[47] ["**Model Law**"] as the guiding beacon on the issue of internationality of a dispute. For example, Article 1(3) says:

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38 *See* MARTIN F. GUSY, FRANZ T. SCHWARZ & JAMES M. HOSKING, A GUIDE TO THE ICDR INTERNATIONAL ARBITRATION RULES 20, ¶ 1.79 (2011).

39 *See supra* note 13.

40 *See supra* note 12.

41 *See* GUSY ET AL., *supra* note 38, at 20-21, ¶ 1.81. In Joana v. Organization, the ICDR did not send a letter containing this kind of language to the parties.

42 *Id.*

43 *Id.* at 21, ¶ 1.84 (noting the example of "two companies from the same jurisdiction relating to a contract to be performed abroad").

44 *See* FOUCHARD, GAILLARD, GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION 51, § 2, ¶ 99 (Emmanuel Gaillard & John Savage eds., 1999) (these factors are what Fouchard et al. call "objective factors of internationality" and consider them necessary and sufficient for the dispute to be intrinsically international).

45 *See* GUSY ET AL., *supra* note 38, at 21, ¶ 1.84.

46 *See* REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION 10, ¶ 1.32 (Nigel Blackaby, Constantine Partasides, Alan Redfern & Martin Hunter eds., 6th ed. 2015) [*hereinafter* "REDFERN AND HUNTER"]; GUSY ET AL., *supra* note 38, at 21, ¶ 1.85 (specifically referring to the scenario where the arbitration agreement is silent as to the set of applicable AAA arbitration rules).

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

"*(3) An arbitration is international if:*

(a) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States; or

(b) one of the following places is situated outside the State in which the parties have their places of business:

(i) the place of arbitration if determined in, or pursuant to, the arbitration agreement;

(ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or

(c) the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country.

(4) For the purposes of paragraph (3) of this article:

(a) if a party has more than one place of business, the place of business is that which has the closest relationship to the arbitration agreement;

(b) if a party does not have a place of business, reference is to be made to his habitual residence." [omissis] (emphasis added).

Roth's commentary on the Model Law is helpful to unpack the wealth of information contained in Article 1(3)-(4) of the Model Law. Accordingly, it is important to note that Article 1(4)(a) considers a party's place of business the place with the closest relationship with the arbitration.[48] For an individual without a place of business, the relevant place is that of her habitual residence.[49] Another important provision that would render an arbitration "*international*" would be a foreign situs.[50] Finally, a critical factor to render a dispute "*international*" is the place of performance. On this point, Roth refers to *Fung Sang Trading Ltd.* v. *Kai Sun Sea Products & Food Co. Ltd.*[51] ["**Fung Sang**"] as the leading authority. In *Fung Sang*, the court held that an arbitration with most of its elements set in Hong Kong (parties, applicable law, and payment) was nonetheless international where the delivery of the goods was to take place in China.[52]

In *Joana*, the Respondent was a *sui generis* international organisation, which, by definition, is incapable of being "*incorporated*" or having the nationality or citizenship of any country. By that same logic, an international organisation is also incapable of having the same or a different nationality as any individual person. Therefore, the inquiry into the parties' nationalities in *Joana* was not an adequate approach to ascertain the internationality of the dispute. Instead, in line with Article 1(3)(a) of the Model Law, what was relevant in that case was to determine the parties' place of business at the time of signing the relevant CPR contracts.

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48 *See* Marianne Roth, *UNCITRAL Model Law on International Commercial Arbitration*, *in* PRACTITIONER'S HANDBOOK ON INTERNATIONAL COMMERCIAL ARBITRATION 963, ¶ 14.37 (Frank-Bernd Weigand ed., 2d ed. 2009).

49 *See id.*

50 *Id.* at 963, ¶ 14.39.

51 Fung Sang Trading Ltd. v. Kai Sun Sea Products & Food Co. Ltd. [1991] 2 HKC 526 (H.K.).

52 Roth, *supra* note 48, at 964, ¶ 14.41.

By the same token, the Organization's non-incorporation could not mean that it did not or could not have a place of business. Much to the contrary, the Organization may well have had—indeed has—numerous places of business. Washington, for one, was arguably the Organization's principal place of business because it has its principal headquarters ["**HQ**"] there and conducts the overwhelming majority of its activity from there.

Admittedly, the *Joana* arbitration could have been deemed international based on the Organization's multiple places of business in the territories of most of its member states. For purposes of the *Joana* arbitration, however, Article 1(4)(a) of the Model Law considers the place that has the strongest connection with the arbitration agreement as the relevant place of business. For the Organization, in this case, that place was Washington. Consistent with this, every contract between Joana and the Organization mentions the HQ as "*the place for performance and/or delivery of the 'work*".[53] Similarly, the contracts, as well as the arbitration agreements, both designate D.C. Law as the governing law.[54]

On the other hand, as an individual, Joana could not have a place of business. Although, *arguendo*, if one were to accept the Respondent's logic and consider Joana as a non-incorporated entity working as an independent contractor for the Organization, then Joana too may have had a place of business. And that place of business would also have been Washington because Article 1(4)(b) of the Model Law considers the individual's 'habitual residence' analogous to an incorporated entity's place of business. In fact, throughout the parties' entire working relationship, Joana had fixed her domicile in Washington.

As it is the case with similarly situated CPRs who are not U.S. citizens or permanent residents, Joana held a G-4 visa that the Organization itself sponsored and procured.[55] This visa obliged Joana to establish her domicile in Washington's metropolitan area. The G-4 visa also constrained Joana to work exclusively and full-time for the Organization.[56] Thus, there is no doubt that the Claimant was present and domiciled in Washington at all relevant times.

The local nature of the parties' relationship in *Joana* was also apparent from the way the parties performed under the contracts. As mentioned previously, the place for performance and/or delivery of the work was the HQ. In fact, Joana physically worked at the HQ for approximately ten years. There, she shared office space with other Organization staff and was provided with a workstation that included a computer and other resources. Furthermore, the Organization compensated Joana for her work with payments issued in the U.S. currency that were deposited into her U.S. checking account. Additionally, during the course of her employment relationship, Joana received constant supervision and direction from her Washington-based supervisors. Finally, Joana performed the overwhelming majority of her duties just as any other employee stationed at the HQ. On a few occasions, the Organization designated Joana to represent it in meetings held outside the United States.

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53 *See* s*upra* note 33.

54 *Id.*

55 *See* OFF. FOR. MISSIONS, ACCREDITATION POLICY HANDBOOK 6–7 (U.S. State Dep't Dipl. Note 16-886, June 7, 2016), *available at* https://www.state.gov/wp-content/uploads/2019/05/Diplomatic-Note-18-1686-Accreditation-Policy-Handbook.pdf.

56 *See also 9 FAM 402.3-7(B) (U) G Visa Classifications (b)*, FOR. AFF. MANUAL: U.S. DEP'T OF STATE, *available at* https://fam.state.gov/fam/09FAM/09FAM040203.html.

In sum, at all relevant times, both parties in *Joana* had their respective places of business/residence in Washington, the city in which they conducted a purely local employment-related relationship that spanned almost ten years. That is why, as in *Joana*, neither the nationality of similarly situated CPRs nor their relocation outside the U.S. following their termination[57] should have any bearing over the internationality of the dispute.

But there is at least one additional argument to make against the internationality of this kind of dispute based on an ambiguous or vaguely drafted arbitration agreement.

To interpret an arbitration agreement that is silent on the applicable arbitration rules as an agreement to submit employment-related claims to arbitration under the International Rules would be contrary to the common law rule, *contra proferentem*, that a court should construe an ambiguous contract term against the party who drafted it.[58]

As the sole drafter of the arbitration agreement, all the Organization needs to do—if it wants to ensure that arbitrations like *Joana* are conducted under the International Rules—is to specify that the Organization only consents to arbitrate pursuant to those rules. Of course, such a blanket imposition on an adhesion contract would reflect poorly on an international organisation that gives the option to arbitrate "*any claims*"[59] as a "*quid pro quo*"[60] of sorts for the privileges and absolute immunities that it enjoys under the laws of the host country and which it so conveniently invoked in Joana's arbitration.

To recapitulate, the internationality of a dispute has little to do with the parties' nationalities, place of business, or residence, and a whole lot more with the nature of the dispute. The facts in *Joana* support a finding that the nature of the dispute was purely domestic. Moreover, a party cannot reap the benefits of an ambiguous clause it drafted to the detriment of the other party.

The following Part V discusses how the unenforceability of arbitral awards against the Organization renders the "*international*" characterisation of the underlying disputes illusory or superfluous.

V. A dispute should not be deemed international where the resulting award cannot be enforced under international conventions

According to Redfern and Hunter, the ability to obtain a final and binding award is the main motivation that parties have for taking their disputes to international arbitration and bearing the expense that is associated with this form of dispute resolution.[61] In this vein, the arbitrators' main duty is to hand down an award that is internationally enforceable.[62] Accordingly, the AAA/ICDR acknowledges that the main advantage of arbitrating under the International Rules is that such an

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57 A very likely event as upon being terminated, non-U.S. CPRs typically lose their eligibility to continue in the United States under a G4 visa.

58 *See* Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 62 (1995), 115 S. Ct. 1212 (1995) *as cited in* 1 GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 1063–64 (2009).

59 *See* arbitration agreement reproduced in Part III of this article.

60 William M. Berenson, *Squaring the Concept of Immunity with the Fundamental Right to a Fair Trial: The Case of the OAS*, *in* THE WORLD BANK LEGAL REVIEW 133 (Hassane Cissé, Daniel D. Bradlow & Benedict Kingsbury eds., 2011).

61 *See* REDFERN AND HUNTER, *supra* note 46, at 501, ¶ 9.01.

62 *Id.* at 502, ¶ 9.04.

arbitration would lead to the making of an internationally enforceable award.[63] For practical purposes, that an award is internationally enforceable means that the award falls under the New York Convention[64] or the Panama Convention[65] [collectively referred to as the "**Conventions**"].

Under the current international arbitration regime, the award that would have resulted from *Joana* could not have been enforced under the Conventions. This important indicator of the dispute's internationality—enforceability—fails to materialise in cases where, as the Organization noted in *Joana*,[66] the respondent enjoys privileges and immunities that shield it from being sued in the national courts of the U.S.[67] Moreover, a panoply of international instruments further entitles the Organization to the same privileges and absolute immunity of jurisdiction that it enjoys in the U.S. in virtually every country in which the Organization has offices, holds assets, or otherwise "*does business*".

Indeed, the Organization derives its absolute immunity in the U.S. from the International Organizations Immunities Act of 1945 ["**IOIA**"] and the Headquarters Agreement with the U.S. government.[68] Similarly, at least 13 of the Organization's member states have entered into a multilateral agreement[69] granting the Organization immunity of jurisdiction in the following terms:

> "*Article 2. The Organization and its Organs, their property and assets wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except insofar as in any particular case the immunity has been expressly waived. It is understood, however, that no such waiver of immunity shall make the said property and assets subject to any measure of execution.*
>
> *Article 3. The premises of the Organization and of its Organs shall be inviolable. Their property and assets, wherever located and by whomsoever held, shall be immune from search, requisition, confiscation, expropriation and any other form of interference, whether by executive, administrative, judicial or legislative action*." (emphasis added).

An additional 23 member States have entered into bilateral agreements with the Organization granting the latter full immunity from jurisdiction. The following article is a typical example of these agreements:

> "*Article 7. The Secretariat and its Office, as well as their property, funds and assets, wherever located and by whomever held, shall enjoy in Jamaica immunity from judicial and administrative process, except in those particular cases in which such immunity is expressly waived by the Secretary General of the*

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[63] *See ICDR, Rules, Forms & Fees*, INT'L CTR. FOR DISP. RESOLUTION, *available at* https://www.icdr.org/rules_forms_fees (noting that "[t]he ICDR Rules were created with and maintain UNCITRAL Rule philosophies that empower parties and arbitrators to control their own process. The results have allowed for ICDR awards to be enforced in jurisdictions around the world.").

[64] *See* United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 330 U.N.T.S. 38 [*hereinafter* "New York Convention"]; 9 U.S.C. §§ 201–08 (1970).

[65] *See* Inter-American Convention on International Commercial Arbitration, Jan. 30, 1975, 1438 U.N.T.S. 245 [*hereinafter* "Panama Convention"]; 9 U.S.C. §§ 301–07 (1990).

[66] *See supra* note 13.

[67] *Id.*

[68] *See* Headquarters Agreement Between the Organization […] and the Government of the United States of America (on file with author).

[69] *See* list of multilateral agreements granting immunity of jurisdiction to the Organization (on file with author).

> *Organization […]. No such waiver, however, shall make the said property, funds and assets subject to any measure of execution.*"[70]

Therefore, the hypothetical enforceability of an arbitration award under the Conventions cannot justify treating the underlying dispute in any case against the Organization as "*international*".

Notwithstanding the unenforceability of arbitration awards against the Organization on account of immunity, there is one additional reason to deny the enforceability of an employment-related arbitration award under the Conventions. At least according to one court, inasmuch as employment disputes concern the internal administration of international organisations, such disputes are deemed non-commercial.[71] Following this reasoning, disputes like the one present in *Joana* are non-commercial, and therefore, the resulting awards would fall outside the scope of the Conventions, regardless of the dispute's internationality.[72] In sum, arbitral awards, especially if employment-related, are unenforceable against the Organization.

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As noted previously, the foregoing arguments were tested in *Joana.* The IARC sided with the Claimant and decided to revert the AAA/ICDR's preliminary determination to run the *Joana* arbitration under the Commercial Rules.[73] In so doing, the IARC determined that the rules applicable to that case were the Employment Rules and the Employment Fee Schedule.[74] Unfortunately, as I noted previously, one can only speculate as to the persuasiveness of the arguments presented in this article because the IARC decision was unmotivated. I discuss the Organization's reaction to this determination in the following Part VI.

VI. More rights but not for all people: The Organization walks away from the arbitration

In response to the IARC determination, the Organization submitted a series of letters to the arbitral institution threatening to withdraw from the *Joana* arbitration if the AAA/ICDR did not reconsider its decision.[75] The Organization's reasoning for repudiating the arbitration boils down to the idea that arbitrating this matter under the Employment Rules "*would be wholly inconsistent with the privileges and immunities afforded to the Organization […] pursuant to its treaty with the United States, which unambiguously grants the Organization […] [']exclusive jurisdiction over the resolution of any and all disputes and matters arising out of, related to, or deriving from employment in, by, or with the Organization […].[']*"[76] In its final plea, the Organization engages in a series of blatant mischaracterisations such as that the Organization "*never consented to arbitrate what the ICDR has […] decided to*

[70] *See* Agreement Between the General Secretariat of the Organization […] and The Government of Jamaica on the Functioning in Kingston of the Office of the Secretariat in Jamaica (on file with author).

[71] *See* Broadbent v. Organization of American States, 628 F.2d. 27 (D.C. Cir. 1980) (U.S.).

[72] *See* New York Convention, *supra* note 64, art. I(3) (the United States signed the New York Convention with the following reservation: "The United States of America will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the United States."); *see also* Panama Convention, *supra* note 65, art. 1 (as the names indicates, the Inter-American Convention on International Commercial Arbitration only applies to commercial arbitration awards).

[73] *See* s*upra* note 25.

[74] *Id.*

[75] *See* Letter from the Organization in response to the IARC decision (Mar. 12, 2019) (on file with author); Letter from the Organization, following the AAA/ICDR's confirmation of the IARC decision (Mar. 26, 2019) (on file with author).

[76] *See* 'Final Letter' from the Organization (Apr. 12, 2019) (on file with author).

recharacterize as an employment dispute"[77] and this decision by the ICDR "*vitiates any consent that the Organization […] gave to participate in these proceedings*".[78]

At this point, the Organization proceeded to warn that "*the immunities afforded to the Organization under the Headquarters Agreement, particularly with respect to employment disputes, prevent the enforcement of an arbitral award of this nature in United States courts*".[79] To top it all, the Organization concluded its admonition to the AAA/ICDR and the Claimant with a statement that speaks for itself:

> "*The Organization […], in good faith, commits to final and binding arbitration in its commercial contracts precisely to avoid the need for any post-award enforcement proceedings*".[80]

This statement evidences that the Organization is either unable to understand the most basic tenets of arbitration law as well as the law of privileges and immunities, or else it understands them well and decided to ignore the rules that bind most litigants, as they did in *Joana*.

For whatever purpose, this behaviour raises the issue of whether an arbitration agreement, of which an international organisation is a signatory, constitutes a waiver of the right to invoke its immunities. This issue was not particularly relevant in *Joana* because the non-participation of the Organization in the arbitration did not prevent the constitution of the sole-arbitrator tribunal and the Claimant did not seek to compel arbitration when, as noted below, the Respondent failed to pay the arbitrator's fees. I feel, however, that addressing the interplay between organisational immunity and waiver is important for the generality of future arbitration cases that may be brought against the Organization.

In their article on international organisations and immunity, Professors Gaillard and Pingel-Lenuzza readily conclude that an arbitration agreement constitutes a waiver on the part of the organisation of the right to invoke its immunity before the arbitral tribunal.[81] The authors point to the dominant view that the existence of dispute resolution alternatives like arbitration is precisely what justifies the absolute immunity that international organisations are often accorded.[82] According to this view, international organisations should not be allowed to have it both ways; that is, to maintain absolute immunities that they can invoke to interfere with the mechanisms that are supposed to counterbalance that immunity in the first place.[83]

Pierre Schmitt notes that international organisations like the United Nations generally—but not always—add non-waiver language to their standard arbitration clauses.[84] When such language is absent, the issue of the international organisation's immunity of jurisdiction is likely to emerge in court.[85] Schmitt references two cases in which French and Swiss courts disposed of the issue of

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77 *Id.*
78 *Id.*
79 *See supra* note 75.
80 *See supra* note 76.
81 Emmanuel Gaillard & Isabelle Pingel-Lenuzza, *International Organisations and Immunity from Jurisdiction: to Restrict or to Bypass*, 51 INT'L & COMP. L. Q. 1, 12 (2002).
82 *See id.* at 3.
83 *See id.* at 4.
84 PIERRE SCHMITT, ACCESS TO JUSTICE AND INTERNATIONAL ORGANIZATIONS: THE CASE OF INDIVIDUAL VICTIMS OF HUMAN RIGHTS VIOLATIONS 180 (2017).
85 *Id.* at 181.

waiver of organisational immunity in different ways.[86] In *UNESCO* v. *Boulois* ["**UNESCO**"], the UNESCO refused to appoint an arbitrator thereby impeding the proper functioning of the arbitration.[87] The Paris Court of Appeals held that the UNESCO could not be allowed to defeat the *pacta sunt servanda* principle as it had waived its immunities in entering into an arbitration agreement.[88] The Court concluded that allowing the UNESCO to invoke its immunity to defeat the arbitration would have constituted a denial of justice as well as a human rights violation pursuant to Article 6(1) of the European Convention on Human Rights.[89]

Conversely, in *Groupement Fougerolle and Consorts* v. *CERN* ["**CERN**"], the Swiss Federal Supreme Court held that the arbitration agreement alone did not amount to a waiver of the international organisation's immunity.[90] Unlike *UNESCO*, the proceedings in *CERN* were initiated by a private party for the annulment of an arbitral award obtained against an international organisation.

In *International Tin Council* v. *Amalgamet, Inc.*, an international organisation headquartered in the United Kingdom petitioned a court in the state of New York to stay the arbitration that had been initiated against it in New York for breach of contract.[91] The Court dismissed the petition finding, in relevant part, that the grant of immunity enjoyed by the Petitioner in the host country did not extend to the U.S., and even if it did, the immunity had been waived by virtue of the arbitration agreement. In sum, despite the diverging holdings, the three courts sought to preserve a similar value: to ensure the arbitral instance remains undisturbed by either the international organisation or the private party.[92]

Reading these three cases together, one can appreciate how the courts can restrict on a case-by-case basis the scope of the immunity of international organisations and reinforce the effectiveness of arbitration. In other words, the recommendations that Gaillard and Pingel-Lenuzza posited as alternatives[93] do not necessarily need to be mutually exclusive if the courts take a position more or less deferential to the immunity of international organisations. It remains to be tested in the U.S. courts whether an international organisation can be compelled to arbitrate if, as the Organization in *Joana,* it invokes immunity and fails to pay the arbitration fees.

Arbitral institutions also can do their part in solving the issue of non-waiver of organisational immunity. Schmitt notes how the Permanent Court of Arbitration, having enacted its 'Optional Rules for Arbitration between International Organizations and Private Parties'[94] modelled after

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86 *Id.* at 181–82.

87 *See* Cour d'appel [CA][regional court of appeal] Paris, 14e ch. A, June 19, 1998, REVUE DE L'ARBITRAGE 1999, 343 (Fr.) *as cited in* SCHMITT, *supra* note 84, at 181.

88 *Id.* at 344.

89 *Id.*

90 *See* Tribunal fédéral [TF] [Federal Supreme Court] Dec. 21, 1992, 118 Ib 562 (Switz.) *as cited in* SCHMITT, *supra* note 84 at 182.

91 Int'l Tin Council v. Amalgamet, Inc., 524 N.Y.S.2d 971 (Sup. Ct. N.Y. Co. 1988) (U.S.) [*hereinafter* "Tin Council"].

92 For a detailed commentary on Tin Council, *see* Steven R. Ratner, *International Tin Council v. Amalgamet Inc. 524 N.Y.S.2d 971,* 82 AM. J. INT'L L. 837 (1988).

93 *See* Gaillard & Pingel-Lenuzza, s*upra* note 81, at 4.

94 Permanent Court of Arbitration, Model Arbitration Clauses: For Use in Connection with the Permanent Court of Arbitration Optional Rules for Arbitration between International Organizations and Private Parties, *available at* https://docs.pca-cpa.org/2016/02/Model-Arbitration-Clauses-for-Use-in-Connection-with-the-Permanent-Court-of-Arbitration-Optional-Rules-for-Arbitration-between-International-Organizations-and-Private-Parties.pdf.

the UNCITRAL Arbitration Rules, is one of such examples.[95] The solution provided in Article 1(2) of these Optional Rules is simple: agreement to arbitrate under the Optional Rules constitutes a waiver of the organisation's right to invoke its immunity of jurisdiction.[96]

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Despite the Organization's efforts to defeat the arbitration in *Joana*, an arbitrator was appointed, and a preliminary hearing took place. The Organization did not participate in this preliminary hearing despite the arbitrator's assurances that such an appearance would not constitute a waiver of any arbitrability defences. The Organization only responded with a note to the case manager indicating that "*the position of the General Secretariat in respect of [the Joana] arbitration as expressed in [its] communications dated […] remain[ed] unchanged*".[97] Shortly thereafter, the ICDR case manager wrote an e-mail indicating that because the Organization had failed to make a deposit to cover the arbitrator's compensation as is stipulated in the Employment Fee Schedule, the Claimant was invited to advance the arbitrator's fees. For a case like this, the arbitrator's fees were estimated to run anywhere between $4,500 and $20,000. Because the Claimant could not afford to pay the arbitrator's steep fees, the arbitrator closed the case for lack of payment.[98]

VII. Conclusion

Independent contractors beware! The avenues for obtaining redress for the violation of their employment rights can be extremely limited if not inexistent. The Organization is prepared to deploy unorthodox legal strategies to prevent independent contractors from airing their claims both internally and externally. The double layer of protection afforded to the Organization under the IOIA and the Headquarters Agreement with the government of the U.S. makes it impossible for a claimant to compel arbitration against the Organization in the U.S. courts. The Organization, however, will concentrate its efforts on shifting the financial burden of the arbitration to the claimants. While *Joana* proves that the Organization's attempt to accomplish this strategy by turning the arbitration into an international dispute will not bear fruit, the Organization can always achieve the same goal by resorting to the privileges and immunities that it enjoys under the U.S. laws.

This article makes two policy recommendations. First, the AAA/ICDR should publicly explain the institution's position after the *Joana* arbitration for the benefit of similarly situated claimants who trust the arbitration clause in their contracts as their only guarantee of redress if their employer violates their employment rights. The second recommendation is simple and entirely within the Organization's power to implement: revise the arbitration clause discussed in this article so as to indicate the specific arbitration rules under which the Organization is willing to arbitrate.

Future empirical research needs to address two important research questions that remain unanswered. Why did it take the Organization so long in *Joana* to advance what is probably its bread-and-butter immunity defence? And why more CPRs have not sued the Organization for what strikes as one perverse employment misclassification scheme? Regarding the first question,

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95 *See* SCHMITT, *supra* note 84, at 148.

96 *Id.*

97 *See* E-mail from the Organization to the ICDR case manager (May 17, 2019) (on file with author).

98 Joana v. Organization, Arb. Ord. No. 2 (Aug. 21, 2019) (on file with author).

I venture to speculate that because this was a case of first impression both for the Organization and the AAA, having prevailed on the 'internationality' argument would have been a more desirable outcome for the Organization. As to the second question, I cannot be sure as to one specific factor; rather, a mix of personal, financial, and reputational factors may be at the root of the problem.

LIMITATION PERIOD FOR THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

Guiqiang Liu[*]

Abstract

*When seeking the recognition and enforcement of foreign arbitral awards, the limitation period is one of the factors that award creditors need to consider. The limitation period, however, varies significantly in different countries. This article conducts a comprehensive survey of the limitation periods in the Contracting States of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards ["**New York Convention**"] by studying relevant legislation, case law, and survey reports. The author argues that the current diversified practice on limitation periods among the Contracting States undermines certainty and predictability in international commercial transactions, and at the same time, prejudices commercial parties' interest. To solve the problem, the article proposes three solutions. First, the best approach is to harmonise limitation periods at the international level by providing a uniform limitation period in the New York Convention. Second, another viable approach is to urge the Contracting States to provide specific limitation periods in their domestic laws, so as to provide a clear and predictable time for both award creditors and award debtors. Alternatively, with no further changes at either the international or the domestic level, the only option for award creditors would be to seek enforcement in another forum or enforce the arbitral awards in the form of judgments in certain jurisdictions.*

I. Introduction

For commercial parties who choose to settle their disputes through arbitration, winning a favourable award is only half the battle. Sometimes, the losing party may refuse to perform the arbitral tribunal's decision, and under such a circumstance, one of the steps that award creditors can take is to seek enforcement of the arbitral award before national courts.[1] Enforcement of foreign arbitral awards has thus become a new battlefield for both parties.[2]

To promote the recognition and enforcement of arbitral awards worldwide, the United Nations Conference on International Commercial Arbitration adopted the New York Convention in 1958, which has been honoured as the "*most successful international instrument in the field of arbitration*".[3] Even though the New York Convention has achieved great success in the past six

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1 *See* REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION 607 (Nigel Blackaby, Constantine Partasides, Alan Redfern & Martin Hunter eds., 6th ed. 2015); *see also* Le Nguyen Gia Thien, *Time Limit to File Petition for the Recognition and Enforcement of Foreign Arbitral Awards: A Comparative Perspective*, 35(1) ASA BULL. 95, 97 (2017) [*hereinafter* "Thien"].

2 *See* Sumru Akter, *Flipping the Hourglass: Time Limits for the Recognition and Enforcement of Foreign Arbitral Awards*, *in* 60 YEARS OF THE NEW YORK CONVENTION: KEY ISSUES AND FUTURE CHALLENGES 85, 86 (Katia Fach Gómez & Ana M. Lopez-Rodriguez eds., 2019).

3 *See* M. J. Mustill, *Arbitration: History and Background*, 6(2) J. INT'L ARB. 43, 49 (1989).

decades, there are still many unsettled issues that may hinder the enforcement of arbitral awards, and the issue of limitation periods is one of them.[4]

Limitation periods (also known as statutes of limitations,[5] time limits,[6] time limitations,[7] and prescription periods)[8] are a controversial issue during the process of enforcing foreign arbitral awards under the New York Convention. The New York Convention is silent on whether Contracting States can refuse to enforce foreign arbitral awards on the grounds of the expiration of a limitation period.[9] In practice, however, the Contracting States have "*diversified laws and practices*" on limitation periods,[10] and divergences exist in characterisation, the applicable law to determine the limitation period, its duration, its commencement as well as its interruption, suspension, and extension.

The issue of limitation period has begun to receive more attention from scholars and practitioners in recent years. For instance, Gary Born noticed that even though the New York Convention does not provide any limitation period for enforcing foreign arbitral awards,[11] many Contracting States have imposed such limitation for enforcement.[12] For an arbitral award whose limitation period has expired, he proposed that the award creditors can seek a foreign court judgment confirming the award and then apply for the enforcement of that foreign judgment.[13] Robert Morgan also noticed that limitation periods may bar the enforcement of foreign arbitral awards,[14] and in some jurisdictions, limitation periods may be ambiguous.[15] He worried that the ambiguity and uncertainty would "*be of little comfort*" to award creditors.[16] Lecturer Le Nguyen Gia Thien compared various statutes and case law on limitation periods in civil law and common law countries.[17] He made a very interesting argument that Vietnam's amendment to the Code of Civil Procedure in 2015, which provides a clear and longer limitation period for enforcement, may

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4 Considering 164 countries have ratified the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 6, 1958, 330 U.N.T.S. 3 [*hereinafter* "New York Convention"], this article mainly focuses on the recognition and enforcement of foreign arbitral award under the regime of the New York Convention.

5 *See* George A. Bermann, *Recognition and Enforcement of Foreign Arbitral Awards: The interpretation and Application of The New York Convention by National Courts*, *in* RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS: THE APPLICATION OF THE NEW YORK CONVENTION BY NATIONAL COURTS 67-68 (George A. Bermann ed., 2017).

6 *See* Andreas Börner, *Article III*, *in* RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS: A GLOBAL COMMENTARY ON THE NEW YORK CONVENTION 126–127 (2010) [*hereinafter* "Börner"]; Akter, *supra* note 2, at 85-97; Thien, *supra* note 1, at 95 –107.

7 *See* GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 3725–3730 (2d ed. 2014).

8 *See* María Blanca Noodt Taquela, *Interpretation and Application of the New York Convention in Argentina*, *in* RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS: THE APPLICATION OF THE NEW YORK CONVENTION BY NATIONAL COURTS 92 (George A. Bermann ed., 2017).

9 BORN, *supra* note 7, at 3725.

10 *See* United Nations Commission on International Trade Law, Report on the survey relating to the legislative implementation of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958), at 3, U.N. Doc. A/CN.9/656 (2008) [*hereinafter* "UNCITRAL Report"]. *See also* Akter, *supra* note 2 at 86.

11 BORN, *supra* note 7, at 3726.

12 *Id.*

13 *Id.* at 3729–3731.

14 Robert Morgan, *Tick, Tock - Limitation Periods and the Enforcement of Arbitral Awards*, 12 ASIAN DISP. REV. 113, 115 (2010).

15 *Id.* at 115 ("*Yugraneft* dispels ambiguity as to the applicability of limitation periods in jurisdictions where the enforcement of Convention awards is sought").

16 *Id.*

17 Thien, *supra* note 1, at 100–106.

increase Vietnam's attraction amongst commercial parties who are seeking the enforcement of arbitral awards worldwide.[18] Further, in a recent book chapter, Sumru Akter introduced various practices on limitation period across the world.[19] She observed that many countries failed in providing express limitation periods in their domestic laws,[20] and the lack of clear guidance may result in "*contradicting interpretations and uncertain enforcement regime*".[21]As a solution, Akter "*strongly*" proposed that Contracting States provide a clear limitation period in their domestic laws so as to increase commercial parties' foreseeability.[22]

Based on these earlier studies, this article seeks to provide a comprehensive analysis of the application of limitation periods for enforcement in different States, by looking to their legislative provisions and court judgments as well as relevant academic literature. The article proceeds in four parts.

Part II starts by analysing a threshold question and concludes with the observation that it does not contravene the New York Convention if the Contracting States refuse to enforce foreign arbitral awards by reason of the expiration of the limitation period. Part III continues to discuss the applicable law to determine the limitation period and mainly analyses three choice of law rules: *lex fori*, *lex causae*, and *lex loci arbitri*. Part IV considers the duration of the limitation period, the commencement of the limitation period and the factors that may interrupt, suspend, or extend the same. Part V argues that Contracting States' diversified practice on limitation periods undermines certainty and predictability in international commercial transactions. In the author's opinion, the most ideal approach to solve this problem is to provide a uniform limitation period in the New York Convention so as to eliminate the divergences. Another practicable approach is specifying the limitation period for the enforcement of a foreign arbitral award in domestic law. Without further measures taken at both international and domestic levels, the author opines that award creditors need to realise the importance of limitation periods and identify the specific limitation period in the enforcing State. By being aware of the same, if the limitation period for enforcement has expired in the enforcing State, the last available approach for award creditors is to try and enforce the award in another forum where a longer limitation period is provided or in the form of a judgment in certain jurisdictions.

II. Limitation period under the New York Convention: another ground for refusing enforcement?

The New York Convention does not impose any limitation period on enforcement proceedings.[23] As for the grounds for refusal of recognition and enforcement of foreign arbitral awards, Article V contains an exclusive and narrow list of exceptions to the Contracting State's duty to recognise and enforce foreign arbitral awards, among which a limitation period is not

18 *Id.* at 107.
19 Akter, *supra* note 2, at 89–94.
20 *Id.* at 89.
21 *Id.* at 94.
22 *Id.* at 97.
23 *See* BORN, *supra* note 7, at 3725.

clearly stated.[24] Therefore, a threshold question is whether the New York Convention allows for refusal of enforcement based on expiration of the limitation period.

There are probably two grounds that may justify the imposition of a limitation period on enforcement proceedings. *First*, it is argued that the limitation period may cause a public policy issue, especially where extremely long or extremely short limitation periods could harm vulnerable parties' interest.[25] *Second*, under Article III of the New York Convention, the Contracting States may follow local rules of procedure to enforce foreign arbitral awards. If a limitation period belongs to the enforcing States' "*rules of procedure*," it seems natural for Contracting States to refuse enforcement by reason of the expiration of a limitation period. Therefore, the threshold question turns to two separate questions: *first*, whether the expiration of Contracting States' limitation period constitutes a violation of public policy and *second*, whether the limitation period falls into the scope of "*rules of procedure*".

A. Limitation period as public policy under Article V of the New York Convention

Article V of the New York Convention contains an exclusive list of the grounds for refusing enforcement, among which public policy is the only ground that arguably justifies the application of a limitation period to refuse enforcement.[26] As mentioned before, inadequate or lengthy limitation periods could prejudice parties' interest, thus raising public policy concerns.[27] A Japanese scholar once noted that, for a foreign judgment whose limitation period has expired, a Japanese court may refuse to enforce it out of public policy concern.[28] Although the enforcement of foreign judgments differs from the enforcement of foreign arbitral awards, the rationale behind the limitation period would be the same, or, at least, can be considered for reference.

Refusing enforcement on the ground of public policy, however, is sometimes debatable. Because even if limitation period may raise public policy concern, it does not mean that the violation of local rules on limitation period equals the violation of public policy. As admitted by the same Japanese scholar earlier mentioned, a foreign judgment that is time-barred by Japanese law may still be enforced in Japan.[29]

To clarify the difference between the violation of local rules on limitation period and the violation of public policy, this article focuses on the scope and objective of public policy under the New York Convention. As noted by a prestigious scholar, public policy is one of the most controversial bases for refusing enforcement of foreign arbitral awards.[30] In most cases, "*public policy is a very unruly horse, and when once you get astride it you never know where it will carry you*".[31] For this reason, the New York Convention's structure and objectives are "*strongly against the notion that*

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[24] The grounds for refusing enforcement under the New York Convention include: 1) incapacity or invalidity of the arbitration agreement; 2) lack of proper notice of the arbitrator's appointment or lack of an opportunity to present its case; 3) the award deals with matters outside the scope of the arbitration agreement; 4) the tribunal was not composed in accordance with the arbitration agreement; 5) the suspension or setting aside of the award; 6) non-arbitrability; and 7) violation of public policy. *See* New York Convention, *supra* note 4.

[25] Morgan, *supra* note 14, at 115.

[26] *See supra* note 24.

[27] *See* Morgan, *supra* note 14, at 115.

[28] *See* Toshiyuki Kono, *Country Report Japan*, *in* RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS IN ASIA 114 (Adeline Chong ed., 2017).

[29] *Id.* at 114–15, n.56.

[30] *See* BORN, *supra* note 7, at 1250.

[31] *See* Richardson v. Mellish [1824] 130 Eng. Rep. 294 C.P. (Burrough, J.) (Eng.).

Contracting States would be free to define national public policy expansively".[32] Accordingly, many national courts tend to interpret public policy narrowly and thus the violation of local mandatory rules does not necessarily constitute the violation of public policy. For instance, a United States federal court once held that refusing enforcement based on public policy is justified only when the "*forum state's most basic notions of morality and justice*" have been violated.[33] Similarly, in *Traxys Europe S.A.* v. *Balaji Coke Industry Pvt Ltd.*,[34] the Australian court considered public policy as the "*fundamental, core questions of morality and justice*" in the forum state.[35] Further, in *Adviso NV* v. *Korea Overseas Constr. Corp.*,[36] the Korean court took a comparable approach, concluding that only when Korea's "*good morality and other social order*" is prejudiced, will the Korean court refuse the recognition and enforcement of the award.[37] Thus, under the above interpretations, public policy is normally described as "*the guardian of the forum state's most basic moral certitude or policies*" and "*the forum state's most basic notions of morality and justice*".[38] Therefore, in the phase of arbitral award enforcement, even though the expiration of a limitation period may violate the Contracting State's law, this does not necessarily constitute a violation of public policy.

B. Limitation periods as "rules of procedure" under Article III of the New York Convention

As earlier mentioned, Article III of the New York Convention provides that Contracting States shall enforce foreign arbitral awards in accordance with the enforcing States' "*rules of procedure*".[39] Whether limitation period falls within the scope of Article III depends on the interpretation of "*rules of procedure*". Generally, "*rules of procedure*" is interpreted as enforcing States' procedural laws, and therefore, the enforcing State's law shall govern the procedural issues during enforcement.[40] Following this interpretation, if the limitation period is characterised as a procedural matter, the enforcing state is allowed to refuse enforcement of time-barred foreign arbitral awards based on its procedural laws.[41]

Limitation periods, however, are not necessarily a procedural issue. Most civil law jurisdictions, e.g., Germany and the Netherlands, characterise limitation periods as substantive.[42] For States where the limitation period is characterised as substantive, imposing a limitation period on enforcement seems to violate the New York Convention since Article III allows Contracting States to apply only local procedural laws rather than local substantive laws.[43] Therefore,

interpreting "*rules of procedure*" as local procedural laws would lead to a situation of non-

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32 *See* BORN, *supra* note 7, at 3662.

33 Parsons & Whittemore Overseas Co. v. Societe Generale De L'Industrie Du Papier (RAKTA), 508 F.2d 969, 974 (2d Cir. 1974) (U.S.).

34 *Traxys Europe SA v Balaji Coke Industry Pvt Ltd (No 2)* [2012] FCA 276 (Austl.).

35 *Id.* ¶ 105.

36 *See* Adviso N.V. v. Korea Overseas Constr. Corp., Supreme Court [S. Ct.], 6363, Feb. 14, 1995 (S. Kor.), *reprinted in* 21 Y.B. COMM. ARB. 612–616 (Albert Jan van den Berg ed., 1996).

37 *Id.* at 614.

38 *See* Byung Chol Yoon & Brian C. Oh, *The Standards for Refusing to Enforce An Arbitral Award on Public Policy Grounds: A Korean Case Study*, 6 ASIAN INT'L ARB. J. 64, 68 (2010).

39 *See* New York Convention, *supra* note 4, art. III.

40 *See* Börner, *supra* note 6, at 119.

41 *See* Yugraneft Corp. v. Rexx Mgmt. Corp., [2010] 1 S.C.R. 649, ¶ 16 (Can.) [*hereinafter* "Yugraneft Corp."].

42 Ingeborg Schwenzer & Simon Manner, *The Claim is Time-Barred: The Proper Limitation Regime for International Sales Contracts in International Commercial Arbitration*, 23 ARB. INT'L 293, 296 (2014).

43 Yugraneft Corp., [2010] 1 S.C.R. 649, ¶ 16 (Can.).

uniformity under the New York Convention. An application for enforcement of a foreign arbitral award may be time-barred in Contracting States where limitation periods are characterised as a procedural issue;[44] while that same application would not be refused in Contracting States where limitation periods are characterised as substantive. This situation would "*render established national practices meaningless, especially those that regulate limitation expressly for enforcement of awards*".[45]

In *Yugraneft CorpRexx Management Corp.* ["**Yugraneft Corp.**"],[46] the Supreme Court of Canada solved the characterisation issue by interpreting "*rules of procedure*" as the enforcing State's "*domestic law*,"[47] which includes both procedural and substantive laws. The facts of the case are straightforward: Yugraneft won a favourable arbitral award against Rexx Management on September 6, 2002.[48] On January 27, 2006, Yugraneft sought to enforce this arbitral award in Alberta, Canada.[49] Rexx resisted the enforcement, claiming that the two-year limitation period for enforcement as provided under the Alberta Limitation Act has expired.[50] In this case, the first question raised before the Canadian court was whether the New York Convention allows local rules on limitation period provided in Alberta laws to apply. The Canadian court answered affirmatively and reached the conclusion based on three reasons.

First, the Court primarily analysed the context and purpose of the New York Convention to find that it "*was designed to be applied in a large number of States*" and "*intended to interface with a variety of legal traditions*".[51] Judge Rothstein observed that the drafters were fully aware of the divergence in characterising limitation periods among different States when drafting the New York Convention, and the drafters should foresee that the term "*rules of procedure*" under Article III may include limitation periods in States where limitation periods are regarded as procedural.[52] Judge Rothstein then concluded that the drafters did not restrict the States' ability to impose limitation periods on enforcement with the knowledge that some States would do so, showing that the drafters intended to take a "*permissive approach*" to the applicability of the local limitation period.[53]

Second, the Court believed that the imposition of a limitation period on enforcement under the New York Convention accorded with Contracting States' practice. To support this argument, Judge Rothstein referred to two reports conducted by the International Chamber of Commerce ["**ICC**"] and the United Nations Commission on International Trade Law ["**UNCITRAL**"], which indicated that "*at least 53 Contracting States, including both common law and civil law States, subject the recognition and enforcement of foreign arbitral award to some kind of time limit*".[54]

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44 *Id.*
45 *See* Akter, *supra* note 2, at 87.
46 *See* Yugraneft Corp., [2010] 1 S.C.R. 649 (Can.).
47 *Id.* ¶ 18.
48 *Id.*
49 *Id.* ¶ 3.
50 *Id.*
51 *Id.* ¶ 19.
52 *Id.* ¶ 20.
53 *Id.*
54 *See* Yugraneft Corp., [2010] 1 S.C.R. 649, ¶ 21 (Can.) (quoting Int'l Chambers Comm. (ICC), Guide to National Rules of Procedure for Recognition and Enforcement of New York Convention 343–346 (ICC Pub. No. 727, ICC Spec. Supp. 2008)).

Last but not the least, the Court found subjecting enforcement to limitation periods is also supported by leading scholars in the field of arbitration. Judge Rothstein mentioned that scholars "*appear to take it for granted that Article III permits the application of limitation periods to recognition and enforcement proceedings*," which, in the eyes of the Judge, suggested that the imposition of limitation period on enforcement is not a "*controversial matter*".[55]

From the reasons provided above, it seems the second reason given by Judge Rothstein is the most persuasive one. As already noted by Judge Rothstein, when interpreting an international treaty, the Vienna Convention on the Law of Treaties requires the Court to take Contracting States' "*subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation*" into consideration.[56] Given the fact that many Contracting States have their own limitation periods for enforcement proceedings, it seems unreasonable to deny their practice, especially when some States have specified a limitation period for enforcement proceedings in their domestic laws or case law.[57]

The interpretation of "*rules of procedure*" in *Yugraneft Corp.* justified the application of limitation periods in enforcement proceedings. According to the Court's interpretation, the characterisation of a limitation period in a Contracting State is "*immaterial*,"[58] and Contracting States may refuse to enforce foreign arbitral awards based on their domestic rules on limitation periods.[59] In *Norman Bard et Shirley Bard* v. *Randall S. Appel* ["**Norman Bard**"],[60] the Superior Court of Quebec followed the interpretation in *Yugraneft Corp.*, holding that the Contracting States of the New York Convention are allowed to "*impose local time limits on the recognition and enforcement of foreign arbitral awards if they so wished*".[61]

In summary, the New York Convention can be said to allow Contracting States to refuse enforcement of foreign awards for the expiration of limitation periods. The ground for refusal, however, is not the public policy exception in Article V. This is because, under the New York Convention, the public policy exception mainly focuses on enforcing State's fundamental policy as well as basic morality and social order, while the expiration of limitation can hardly be considered as a violation of such policy or order. The Contracting States, however, can refuse to enforce time-barred awards based on Article III, since, as per what Canada's Supreme Court has decided in the leading case of *Yugraneft Corp.*, "*rules of procedure*" under Article III can be interpreted as including local rules on limitation period.

III. Law applicable to determine limitation period

Since Contracting States can impose local limitation periods on recognition and enforcement proceedings, the award creditors need to determine what the enforcing State's limitation period is. The first step is to clarify the enforcing State's law applicable to determine limitation periods. According to the practice of Contracting States, there are basically three approaches to determine

55 *See* Yugraneft Corp., [2010] 1 S.C.R. 649, ¶ 22 (Can.).
56 *See* Vienna Convention on the Law of Treaties art. 31(3), May 23, 1969, 1155 U.N.T.S. 331.
57 *See infra* Part IV(A).
58 *See* Yugraneft Corp, [2010] 1 S.C.R. 649, ¶ 28 (Can.).
59 *Id.* ¶ 18.
60 *See* Norman Bard et Shirley Bard v. Randal S. Appel, [2015] Q.C.C.S. 4752 (Can. Que.), *reprinted in* 41 Y.B. COMM .ARB. 355–356 (Albert Jan Van den Berg ed., 2017) [*hereinafter* "Norman Bard"].
61 *Id.* at 356.

the applicable law: 1) the *lex fori* approach; 2) the *lex causae* approach; and 3) the *lex arbitri* approach.

A. Lex fori

Many Contracting States determine the limitation period according to the *lex fori* or the law of the forum where enforcement is sought. For instance, in *Yukos Capital S.A.R.L. (Luxembourg)* v. *OAO Tomskneft VNK* ["**Yukos Capital**"],[62] Yukos Capital sought to enforce an ICC arbitral award in Russia. One of the claims that OAO Tomskneft VNK made was that Yukos Capital had missed the deadline for submitting its application for enforcement.[63] The Russian court, applying the three-year limitation period stipulated in Russian law, determined that the limitation period for enforcement has not expired.[64] Similarly, in *Shanghai Jwell Machinery Co. Ltd.* v. *Retech Aktiengesellschaft* ["**Jwell**"],[65] the Chinese court applied the limitation period stipulated in Chinese Civil Procedure Law to determine whether Jwell's application for enforcement had missed the deadline.[66]

According to the report conducted by UNCITRAL, the forum laws that regulate the limitation period can be found in a variety of sources including but not limited to arbitration statutes, civil codes or laws of civil procedure, limitation acts, etc.[67] or their equivalents.[68]

B. Lex causae

In jurisdictions where the limitation period is characterised as substantive, the applicable limitation period is determined by the *lex causae* (the law applicable to the merits of the dispute).[69] Courts that take the *lex causae* approach normally determine the applicable limitation period through two steps: *first*, the courts would determine the *lex causae* based on their country's conflict of laws rules[70] and *second*, if the *lex causae* is foreign law, the courts need to apply the foreign law's limitation period to enforce the foreign arbitral award.[71] If the *lex causae* is the law of the enforcing State, then the courts would apply its own substantive rules on limitation periods.[72] Taking Portugal as an example, if the law of Portugal is the *lex causae*, the limitation period for enforcement of foreign arbitral awards before a Portuguese court is 20 years.[73] Courts in

62 *See* Yukos Capital S.à r.l. (Lux) v. OAO Tomskneft VNK, Postanovlenie VAS RF Tomsk Oblast ot 7 iyulya 2010 g. No. A67- 1438/2010 [Ruling of the Highest Arbitration Court of the District of Tomsk of July 7, 2020, No. A67-1438/2010] (Russ.), *reprinted in* 35 Y.B. COMM. ARB. 435–437 (Albert Jan van den Berg ed., 2010) [*hereinafter* "Yukos Capital"].
63 *Id.* ¶ 27.
64 *Id.*
65 Shanghai Jwell Machinery Co., Ltd v. Retech Aktiengesellschaft, Guiding Case No. 37 (Jud. Comm. of Sup. People's Ct. Dec. 18, 2014) (China) (transl. *available at* https://cgc.law.stanford.edu/wp-content/uploads/sites/2/2015/09/GC37-English.pdf [*hereinafter* "Jwell"].
66 *Id.* at 6-8.
67 UNCITRAL Report, *supra* note 10, at 3.
68 *Id.*
69 *See* Bermann, *supra* note 5, at 68.
70 *See* Akter, *supra* note 2, at 90.
71 *Id.*
72 *Id.*
73 *See* Bermann, *supra* note 5, at 68.

Bulgaria,[74] Czech Republic,[75] Hungary,[76] Poland,[77] Slovenia,[78] and Uruguay[79] are also said to follow this approach.[80]

When the *lex causae* is foreign law but cannot be proved or ascertained, the enforcing State may apply its own laws on the limitation period. In *Norman Bard*,[81] the Superior Court of Quebec held that the applicable law to the limitation period is the law applicable to the merits of the dispute.[82] In this case, the law governing the disputes was Florida law. However, since the Claimants neither pleaded nor proved the law of Florida, which was supposed to be applied, the Court finally decided to apply the ten-year limitation period provided under Quebec law.[83]

Compared with the *lex fori* approach, *lex causae* may "*create a procedural hurdle and extend the duration of the proceedings*" because the court would need to ascertain the applicable foreign law if the *lex causae* is not the law of the enforcing State.[84]

C. Lex arbitri

Some Contracting States determine the limitation period pursuant to the law of the place where the award was made. Chile and Finland are argued to apply *lex arbitri* as the law applicable to the limitation period for enforcement.[85] In addition, the arbitral award will be incapable of being enforced in Romania[86] and Syria[87] if the application for enforcement of an award issued by a New York Convention State is time-barred under the law of that country.[88] The rationale of the *lex arbitri* approach is that "*an award arguably becomes unenforceable if the enforcement time limit in the lex arbitri has expired*".[89] Therefore, the enforcing court would look to the limitation period of the *lex arbitri* to determine whether to enforce the award. It should be noted that not all States have adopted the *lex arbitri* rule. Case law show the Netherlands is one of the countries that does not follow such approach. In *Kompas Overseas Inc.* v. *OAO Severnoe Rechnoe Parokhodstvo* ["**Kompas Overseas**"], Kompas Overseas Inc. ["**Kompas**"] commenced three separate arbitral proceedings

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74 *See* ICC, *ICC Guide to National Rules of Procedure for Recognition and Enforcement of Foreign Awards under the New York Convention*, Bulgaria, ¶ C6, ICC DIGI. LIBR., *available at* https://library.iccwbo.org/dr-enforcementguide.htm [*hereinafter* "ICC Enforcement Guide"].

75 *See* Akter, *supra* note 2, at 91 (citing ICC, *ICC Guide to National Rules for Recognition and Enforcement of Awards under the New York Convention*, 23 ICC BULL. SPL. SUPP. 10 (2012) [*hereinafter* "ICC Supplement"]).

76 ICC Enforcement Guide, *supra* note 74, Hungary, ¶C6.

77 *Id.* Poland, ¶C6.

78 Bermann, *supra* note 5, at 68.

79 *Id.*

80 *See id.*; Akter, *supra* note 2, at 68.

81 *See* Norman Bard, 41 Y.B. COMM .ARB. 355–356 (Albert Jan Van den Berg ed., 2017).

82 *Id.* at 356.

83 *Id.*

84 *See* Akter, *supra* note 2, at 91–92.

85 *Id.* at 92; *see also* ICC Enforcement Guide, *supra* note 74, Chile, ¶ C6.

86 ICC Enforcement Guide, *supra* note 74, Romania, ¶ C6. There is a controversy regarding the limitation period for enforcement in Romania. According to the ICC Enforcement Guide, there is no limitation period imposed on the application for enforcement, and a foreign arbitral award would not be enforced if it is time-barred based on the law of the country where the arbitration is seated. However, a scholar once noted that, according to Article 705(1) of the Romanian Civil Procedure Code, a three-year limitation is applicable when award creditors seek the enforcement of a foreign arbitral award. *See* Radu Bogdan Bobei, *Interpretation and Application of the New York Convention in Romania*, *in* RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS: THE APPLICATION OF THE NEW YORK CONVENTION BY NATIONAL COURTS 791 (George A. Bermann ed., 2017).

87 UNCITRAL Report, *supra* note 10, at 22.

88 *See* UNCITRAL Report, *supra* note 10, at 22; *see also* ICC Enforcement Guide, *supra* note 74, Romania, ¶ C6.

89 *See* Akter, *supra* note 2, at 92.

before the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation ["**ICAC**"].[90] In the third arbitral proceeding, the ICAC rendered an award in favor of Kompas on March 26, 2002.[91] OAO Severnoe Rechnoe Parokhodstvo ["**OAO**"] refused to comply with the award and sought annulment of the arbitral award.[92] On May 19, 2005, after OAO's several unsuccessful attempts to annul the award, the ICAC confirmed that the arbitral award had become final.[93] Kompas then sought enforcement of the arbitral award in the Netherlands. According to Russian law, the limitation period for enforcement of foreign arbitral awards is three years.[94] However, according to the Dutch Civil Code, the limitation period for enforcement in the Netherlands is 20 years.[95] Based on Russian law, OAO claimed the arbitral award was no longer enforceable since the limitation period for enforcement in Russia had expired. The Amsterdam Court of First Instance refused to adopt OAO's argument, holding that "*[e]ven if it is correct that the right of Kompas to enforce the arbitral award in the Russian Federation has expired, this does not mean that this right has expired also under Dutch law*".[96]

IV. Calculation of the limitation period

After clarifying the law applicable to determine limitation period, the award creditors then need to determine the specific limitation period for enforcement in the enforcing State. Three factors would influence the calculation of limitation period: the duration of limitation period, the date from which the limitation period begins to run, and whether there are factors that interrupt, suspend, or extend the limitation period.

A. Duration of limitation period

Contracting States' practice on the limitation period varies significantly. Some jurisdictions do not impose any limitation period on enforcement proceedings; for the States that specify limitation period for enforcement proceedings, the limitation period ranges from three months to 30 years, and the most frequent limitation periods are three, six, and ten years.[97]

A few Contracting States prescribe specific limitation periods for enforcement proceedings. States like Kazakhstan,[98] Kyrgyzstan,[99] Latvia,[100] Lithuania,[101] Russia,[102] Thailand,[103] the U.S.,[104]

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90 *See* LJN: BW7066, Rechtbank Amsterdam 10 mei 2012 (Kompas Overseas Inc./OAO Severnoe Rechnoe Parokhodstvo (N. River Shipping Co.)) (Neth.), *reprinted in* 35 Y.B. COMM. ARB. 277, 278 (Albert Jan van den Berg ed., 2012) [*hereinafter* "Kompas Overseas"].

91 *Id.*

92 *Id.*

93 *Id.* at 279.

94 ARBITRAZHNO-PROTSESSUALNYI KODEKS ROSSIISKOI FEDERATSII [APK RF] [Code of Arbitration Procedure], art. 246 (Russ.).

95 Kompas Overseas, 35 Y.B. COMM. ARB. 281 (Albert Jan van den Berg ed., 2012).

96 *Id.*

97 *See* UNCITRAL Report, *supra* note 10; *see also* ICC Enforcement Guide, *supra* note 74.

98 *See* CIVIL PROCEDURE CODE, art. 253(3) (2015) (Kaz.)("The application for issuing an enforcement order shall be filed no later than three years from the date when the term for the voluntary execution of the arbitration award expires.").

99 *See* UNCITRAL Report, *supra* note 10, at 17.

100 *See* CIVIL PROCEDURE LAW, § 636 (1998) (Lat.).

101 *See* CODE OF CIVIL PROCEDURE, art. 387 (2002) (Lith.).

102 *See* ARBITRAZHNO-PROTSESSUALNYI KODEKS ROSSIISKOI FEDERATSII [APK RF] [Code of Arbitration Procedure], art. 246 (Russ.).

103 *See* Arbitration Act, B.E. 2545, § 42 (2002) (Thai.).

104 *See* 9 U.S.C. § 207; *see also* RESTATEMENT (THIRD) OF THE U.S. LAW OF INTERNATIONAL COMMERCIAL ARBITRATION § 4.30 cmt. (a)(iii).

Ukraine,[105] Uzbekistan,[106] and Vietnam,[107] all impose a three-year limitation period on actions to enforce foreign arbitral awards.

Most commonly, some States' statutes do not impose specific limitation periods on proceedings to recognise and enforce foreign arbitral awards. In this case, there are probably four possibilities for the application of a limitation period.

First, there may be no limitation period for enforcement of foreign arbitral awards, and award creditors may apply for enforcement at any time, provided the delay is not excessive.[108] Although Contracting States can impose a limitation period on enforcement based on "*rules of procedure*" under Article III of the New York Convention, they are not required to do so.[109] According to an UNCITRAL report, a significant number of States do not impose limitation periods for enforcement of foreign arbitral award, including Algeria, Bahrain, Belgium, Botswana, the Czech Republic, Dominica, Iran, Luxemburg, Malta, San Marino, Saudi Arabia, Slovakia, Sweden, Turkey, Uganda, and Venezuela.[110]

Second, some States determine the limitation period for enforcement by combining statutory law and case law. In some common law countries, the issue of limitation period is governed by their respective limitation acts. Rather than providing a specific limitation period for enforcement of foreign arbitral awards, the limitation acts only provide limitation periods for general causes of action. Under such a circumstance, case law help to clarify the definite limitation period applicable to enforcement proceedings. Taking Canada's Alberta Province as an example, the Alberta Limitation Act provides two main limitation periods for different causes of action: *first*, a ten-year limitation period for the enforcement of a remedial order based on a "*judgment or order for the payment of money*";[111] and *second*, a two-year limitation period for the enforcement of a "*general*" remedial order.[112] The Alberta Limitation Act, however, does not make it clear which limitation period applies to enforcement of foreign arbitral awards. In *Yugraneft Corp.*, the Supreme Court of Canada clarified that an arbitral award is not a remedial order based on a judgment or a court order, which means that an application for enforcement of a foreign arbitral award is subject to the general two-year limitation period.[113] With the interpretations in *Yugraneft Corp.*, the limitation period for enforcement in Alberta thus has become clear. Some other States, including Brunei,[114]

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105 *See* UNCITRAL Report, *supra* note 10, at 23.

106 *See id.* at 24.

107 *See* CODE OF CIVIL PROCEDURE, art. 451 (2015) (Viet). There may be a slip of pen regarding the limitation period in the English version of Vietnam's 2015 Code of Civil Procedure, *available at* https://www.wipo.int/edocs/lexdocs/laws/en/vn/vn083en.pdf. The English version offers a "*3 months*" limitation period. However, according to an article, the limitation period under the 2015 Code of Civil Procedure of Vietnam should be "*3 years*". *See* Thien, *supra* note 1, at 106.

108 E.g., although Israeli law does not impose limitation period for the enforcement, Israeli court may refuse to enforce a foreign arbitral award if there are excessive delays in submitting the application for enforcement. *See* Akter, *supra* note 2, at 92.

109 *See* BORN, *supra* note 7, at 3727.

110 *See* UNCITRAL Report, *supra* note 10, at 11–24.

111 *See* Limitations Act, R.S.A. 2000, c L-12, § 11 (Can.).

112 *See Id.* § 3.

113 *See* Yugraneft Corp., [2010] 1 S.C.R. 649, ¶ 44 (Can.).

114 Limitation Act, (2000) Cap. 14, 34 § 46 (Brunei).

Cayman Islands,[115] Ireland,[116] Kenya,[117] Malaysia,[118] Singapore,[119] and the United Kingdom,[120] also belong to this category.

Third, some States tend to impose the limitation period that is applicable to the enforcement of judgments by analogy.[121] Taking China as an example, Article 239 of Chinese Civil Procedure Law only provides a two-year limitation period for the enforcement of foreign judgments.[122] As for the limitation period for the enforcement of foreign arbitral awards, the Chinese Supreme People's Court provided that the limitation period applicable to enforcement of foreign judgment also applies to foreign arbitral awards.[123] In Cameroon,[124] Colombia,[125] Croatia,[126] Estonia,[127] Lebanon,[128] Luxembourg,[129] there is no specific limitation period applicable to the action for recognising and enforcing foreign arbitral awards, and it is argued that limitation period applicable to actions for the enforcement of judgments also applies to foreign awards.

Fourth, the limitation period becomes far more complicated in civil law jurisdictions. Some civil law jurisdictions have argued to apply the general limitations period, mostly found in the civil code or its equivalent, to actions for recognition and enforcement proceedings. These States include Argentina,[130] Bolivia,[131] Costa Rica,[132] Panama,[133] Peru,[134] and Qatar.[135] Some civil law countries, however, believe that the limitation period is a substantive issue and will be governed by the law applicable to the merits of the dispute rather than the law of the forum.[136] Thus, the general limitation period provided in their civil codes will only apply when their domestic law governs the merits of the arbitral disputes.[137] In Switzerland, for example, if Swiss law is the *lex*

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115 Limitation Law (1996 Revision), No. 12 of 1991, § 9 (Cayman Is.).
116 Statute of Limitations, 1957 (Act No. 6/1957), §§ 11, 75 (Ir.); *see* UNCITRAL Report, *supra* note 10, at 17.
117 Limitation of Actions Act (Rev. 2012), Cap. 22 § 4(1) (Kenya).
118 Limitation Act 1953 (1981 Revision), No. 254, § 6 (Malay.).
119 Limitation Act, Cap. 163, § 6(1)(c) (Sing.).
120 Limitation Act 1980, c. 58, § 7 (Eng.).
121 *See* BORN, *supra* note 7, at 3725.
122 *See* Civil Procedure Law of the People's Republic of China (promulgated by Order No. 44 of the President of the People's Republic of China, Apr. 9, 1991) (2017 revision), art. 239 (China) ("The limitation period for submission of an application for enforcing judgment shall be two years. The termination or suspension of the limitation period for submission of an application for enforcement shall be governed by the provisions of law on the termination or suspension of the limitation of action.").
123 *See* Interpretations of the Supreme People's Court concerning the "Civil Procedure Law of the People's Republic of China", art. 547 (China) (the time period for a party concerned to apply for recognition and enforcement of a legally binding judgment or ruling rendered by a foreign court or a foreign arbitration award shall be governed by Article 239 of the Law of Civil Procedure.).
124 *See* ICC Enforcement Guide, *supra* note 74, Cameroon, ¶C6.
125 *Id.* Colombia, ¶C6.
126 *Id.* Croatia, ¶C6.
127 *Id.* Estonia, ¶C6.
128 *Id.* Lebanon, ¶C6.
129 *Id.* Luxembourg, ¶C6.
130 Bermann, *supra* note 5, at 68.
131 ICC Enforcement Guide, *supra* note 74, Bolivia, ¶C6.
132 *Id.* Costa Rica, ¶C6.
133 *Id.* Panama, ¶C6.
134 *Id.* Peru, ¶C6.
135 *Id.* Qatar, ¶C6. *See also* Kompas Overseas, 35 Y.B. COMM. ARB. 277–281 (Albert Jan van den Berg ed., 2012) (wherein the court decided the 20-year limitation period under art. 3:324 BW (Neth.) applied to application for enforcement of foreign arbitral award.).
136 Akter, *supra* note 2, at 90.
137 *Id.*

causae, the application for enforcement of a foreign arbitral award should be filed within ten years.[138] Pursuant to the German Civil Code, the applicable limitation period for enforcement of foreign arbitral award is argued to be 30 years if German law is the *lex causae*.[139] States like Bulgaria, Cyprus, Hungary, and Poland also take this approach.[140]

B. Commencement of limitation period

Regarding the date that limitation periods begin to run, Contracting States' practice also varies greatly. Inconsistencies may even exist within the same country.

i. Accrual of cause of action

In some common law countries, the limitation period starts to run when the cause of action accrues. Taking the U.K. as an example, Section 7 of the Limitation Act 1980 provides that the action to enforce an award shall not be brought after the expiration of six years from the date on which the cause of action accrued.[141] Lagos State of Nigeria also requires that the limitation period for enforcement begin to run from the date on which the cause of action accrued.[142] A question that arises here is when does the cause of action "*accrue*"? Regarding the interpretation of this term, English and Nigerian courts have taken different approaches thus far.

English courts hold that an arbitral award creates a new cause of action and the cause of action accrues when the award debtor fails to perform its obligation under the award. In *Agromet Motoimport Ltd.* v. *Maulden Engineering Co. Ltd.* ["**Agromet**"],[143] the award creditor obtained a favourable award in 1980 and sought enforcement in 1983. The award debtor argued that cause of action accrued in 1976 when the Defendant refused to obey the distributorship agreement, and therefore, the award creditor's application was time-barred by the six-year limitation period.[144] Judge Octon opined that the action to enforce an award is an independent cause of action which is distinct from the cause of action for initiating arbitration proceedings.[145] Thus, the cause of action under Section 7 of the Limitation Act 1980 accrued when the Defendant failed to honour the award. In *International Bulk Shipping and Services Ltd.* v. *Minerals and Metals Trading Corporation of India* ["**International Bulk Shipping**"],[146] the Court held that "*the six year limitation period began whenever the claimants became entitled to enforce the award; in legal terms, when his cause of action arose*".[147] Seven years later, in *Good Challenger Navegante S.A.* v. *Metalexportimport S.A.* ["**Good Challenger**"],[148] the Court of Appeal reaffirmed the holdings in *Agromet* as a "*common ground*".[149] The Court clarified that the limitation period for enforcement starts to run "*from the*

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138 *See* SCHWEIZERISCHES ZIVILGESETZBUCH [ZGB], CODE CIVIL [CC], CODICE CIVILE [CC] [CIVIL CODE] Dec. 10, 1907, SR 210, RS 210, art. 137(2) (Switz.) [*hereinafter* "Swiss Civil Code"].

139 *See* BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE], § 197(1)(2) (Ger.) [*hereinafter* "German Civil Code"].

140 *See* ICC Enforcement Guide, *supra* note 74.

141 *See* Limitation Act 1980, c. 58, § 7 (Eng.).

142 Limitation Law of Lagos State (1994) Cap. 118, § 8(1)(d) (Nigeria).

143 *See* Agromet Motoimport Ltd. v. Maulden Engineering Co. (Beds) Ltd. [1985] 2 All ER 436 (Eng.), *reprinted in* 12 Y.B. COMM. ARB. 523–525 (Albert Jan Van den Berg ed., 1987) [*hereinafter* "Agromet Motoimport"].

144 *Id.* at 523.

145 *Id.* at 525.

146 Int'l Bulk Shipping & Servs. Ltd. v. Mins. & Metals Trading Corp. of India [1996] 1 All ER 1017 (Eng.) [*hereinafter* "Int'l Bulk Shipping and Services"].

147 *Id.* at 118.

148 Good Challenger Navegante S.A. v. Metalexportimport S.A. [2003] EWCA (Civ.) 1668 (Eng.) [*hereinafter* "Good Challenger"].

149 *Id.* ¶9, citing Agromet Motoimport, 12 Y.B. COMM. ARB. 523–525 (Albert Jan Van den Berg ed., 1987).

date when the paying party is in breach of its implied obligation to pay the award,"[150] rather than "*from the date upon which the award is made or published*".[151]

Unlike the English courts, the Nigerian courts maintain that the cause of action for enforcement proceedings accrues when the cause of action for initiating arbitration proceedings arises. In *Murmansk Steve Steamship* v. *Kano Oil Millers Ltd.* ["**Murmansk**"],[152] the award creditor, in 1972, sought to enforce a foreign arbitral award rendered in 1966. The original dispute arose in 1964. The Supreme Court of Nigeria refused to enforce the award on the ground that the limitation period started to run in 1964, and thus the six-year limitation period for enforcement had already expired.[153] In 1977, the Supreme Court of Nigeria was again invited to determine when the cause of action for enforcement accrued in *City Engineering Ltd.,* v. *Federal Housing Authority* ["**City Engineering**"],[154] and the Court followed the approach taken in *Murmansk*, holding that the limitation period begins from the date on which the cause of action for arbitration arises.[155]

In *Murmansk* and *City Engineering*, although the Supreme Court of Nigeria only addressed the accrual of the cause of action issue in the context of Lagos State's Limitation Act, it is believed these judgments reflect Nigeria's general judicial position towards limitation periods.[156] Nigeria's interpretation regarding the accrual of cause of action has been criticised. As Judge Octon mentioned in *Agromet*, interpreting accrual of the cause of action as the original breach of contract would lead to a "*surprising result*"[157]: the limitation period for enforcement would have already expired if an arbitral award was made more than six years after the breach.[158] The Court in *International Bulk Shipping* also observed that "*it cannot seriously be argued that the cause of action arose before the awards were published*".[159] The Nigerian Court's interpretation may also harm arbitration's role as an efficient dispute resolution mechanism since the losing party, who would be reluctant to enforce the unfavourable award, may take every measure to keep the arbitration proceeding running so as to have the limitation period for enforcement expire.[160]

While the Nigerian courts have not changed their position reflected in *Murmansk* and *City Engineering,* the legislators of Nigeria seem determined to take a new approach. On February 1, 2018, the Nigerian Senate passed the Arbitration and Conciliation Act (Repeal and Enactment) Bill to amend the existing Nigerian Arbitration and Conciliation Act.[161] Regarding the calculation of limitation period for enforcement of foreign arbitral award, the Bill suggested exclusion of the

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150 *Id.*
151 *Id.*
152 *See* Murmansk State S.S. Line v. Kano Oil Millers Ltd. [1974] All NLR 893 (Nigeria), *reprinted in* 7 Y.B. COMM. ARB. 349–350 (Pieter Sanders ed., 1982).
153 *Id.* at 350.
154 City Eng'g Ltd. v. Fed. Hous. Auth. [1997] 9 NSCC 590 (Nigeria).
155 *Id.*
156 *See* Adebayo Adaralegbe, *Limitation Period for the Enforcement of Arbitral Award in Nigeria*, 22(4) ARB. INT'L 613, 623 (2006).
157 Agromet Motomport, 12 Y.B. COMM. ARB. 525 (Albert Jan Van den Berg ed., 1987).
158 *Id.*
159 *See* Int'l Bulk Shipping, [1996] 1 All ER 1017, 1022 (Eng.).
160 *See* Adaralegbe, *supra* note 156, at 621.
161 Dr. Ademola Bamgbose, *The proposed amendment of Nigeria's Federal Arbitration Law could see the arbitration landscape in Nigeria improve significantly,* PRACTICAL L. BLOG (Feb. 20, 2020), *available at*, http://arbitrationblog.practicallaw.com/the-proposed-amendment-of-nigerias-federal-arbitration-law-could-see-the-arbitration-landscape-in-nigeria-improve-significantly/.

period between the commencement of the arbitration and the date of the award".[162] In this way, even if the limitation period for enforcement started to run from the date that the dispute leading to arbitration arose, the "*surprising result*" that Judge Octon worried about would no longer exist.

In addition to the U.K. and Nigeria, Australia,[163] Brunei,[164] Cayman Islands,[165] Ireland,[166] Kenya,[167] Malaysia,[168] Singapore,[169] and Trinidad and Tobago[170] also calculate the limitation period from the date when the "*cause of action accrued*". In *Antclizo Shipping Corp.* v. *Food Corp. of India*,[171] the Supreme Court of Western Australia held that the "*limitation period begins to run when award debtor fails to perform payment obligation under the award within a reasonable period*".[172] In *Hallen* v. *Angleda*,[173] the Court of New South Wales also mentioned that the six-year limitation period[174] is "*not concerned with a limitation on components of the cause of action giving rise to the arbitration, but with the cause of action to enforce an Award*".[175] As for other countries like Brunei,[176] Cayman Islands, Ireland, Kenya, Malaysia, Singapore,[177] and Trinidad and Tobago,[178] for the lack of case law, it is not clear which approach they follow to determine when the cause of action "*accrued*".

ii. *The discoverability rule*

The discoverability rule is also considered by some courts to determine the commencement of limitation period.[179] Under the discoverability rule, the limitation period begins to run when the award creditor discovers that the award debtor has assets or appears in the enforcing state.[180] In *Jwell*,[181] Shanghai Jwell, the award creditor, sought to enforce an award made by the China International Economic and Trade Arbitration Commission ["**CIETAC**"] on September 18, 2006. After an unsuccessful attempt for enforcement before a Swiss court, Jwell discovered that

162 *Id.*
163 E.g., *Limitation Act 1985*, s 11(1) (Austl.); *Limitation Act 1969 No 31* (NSW) s 20(1); *Limitation of Actions Act 1974* (Qld) s 10(c).
164 Limitation Act (2000) (Cap. 14), § 11 (Brunei).
165 Limitation Law (Revision 1996), No. 12 of 1991, § 9 (Cayman Is.).
166 Statute of Limitations, 1957 (No. 6/1957), §§ 11, 75 (Ir.). *See also* UNCITRAL Report, *supra* note 10, at 17.
167 Limitation of Actions Act (Rev. 2012), Cap. 22§4(1) (Kenya).
168 Limitation Act 1953 (1981 Revision), No. 254, § 6(1) (Malay). *See also* UNCITRAL Report, *supra* note 10, at 18.
169 Limitation Act, Cap. 163, § 6(1)(c) (Sing.).
170 Limitation of Certain Actions, Cap. 7:09, § 3(1)(b) (Trin. & Tobago).
171 *Antclizo Shipping Corp. v Food Corp. of India* [1998] WASC 342 (Austl.).
172 Richard Garnett & Michael Pryles, *Recognition and Enforcement of Foreign Awards under the New York Convention in Australia and New Zealand*, 25 J. INT'L ARB. 899, 902 (2008).
173 *Hallen v Angledal* [1999] NSWSC 552 (Austl.) [*hereinafter* "Hallen"].
174 *Limitation Act 1969 No 31* (NSW) s 20 (Austl.).
175 Hallen, [1999] NSWSC 552, ¶¶ 34–36 (Austl.).
176 The limitation period for enforcement in Brunei is unclear. Brunei's Limitation Act provides that "an action to enforce an award ... shall not be brought after the expiration of six years from the date on which the cause of action accrued". According to the ICC Enforcement Guide, the six-year limitation period in Brunei starts to run "from the date on which the judgment became enforceable". *See* ICC Enforcement Guide, *supra* note 74, Brunei, ¶C6. However, as per the UNCITRAL report, there is no limitation period for enforcement of foreign arbitral award in Brunei. See UNCITRAL Report, *supra* note 10, at 12.
177 When a limitation period begins to run is also debatable in Singapore. The ICC Enforcement Guide indicates that it starts "from the date on which it becomes binding on the parties". *See* ICC Enforcement Guide, *supra* note 74, Singapore, ¶C6. The UNCITRAL Report states the limitation period begins to run from the date when the arbitral award is made. See UNCITRAL Report, *supra* note 10, at 22.
178 Trinidad and Tobago is said to follow the United Kingdom's approach in Agromet Motoimport, 12 Y.B. COMM. ARB. 523–525 (Albert Jan Van den Berg ed., 1987). *See* UNCITRAL Report, *supra* note 10, at 23.
179 Akter, *supra* note 2, at 93.
180 *Id.*
181 Jwell, Guiding Case No. 37 (Jud. Comm. of Sup. People's Ct. Dec. 18, 2014) (China).

the award debtor's machinery was on exhibition in Shanghai on July 30, 2008. On the same day, Jwell applied to a Shanghai court to enforce the award.[182] Retech objected to the enforcement by claiming that Jwell's application for enforcement has exceeded the six-month limitation period under Chinese Civil Procedure Law.[183] The Shanghai court held that under Chinese law the award creditors obtain the right to request civil compulsory enforcement of an arbitral award when the award debtor fails to perform the obligation under that award.[184] Thus, enforcement jurisdiction is the basis and precondition of an award creditor's right to request civil compulsory enforcement.[185] The Court stated that the Shanghai court did not obtain enforcement jurisdiction until July 30, 2008 since neither the award debtor nor its property appeared in China before then. The Court concluded that the limitation period for enforcement began to run when the court's enforcement jurisdiction was confirmed, which was the date on which the award creditor discovered the property available for enforcement in China.[186] In the end, the Shanghai court decided that the limitation period began to run on July 30, 2008 and Jwell's application for enforcement was not time-barred.

It should be noted that the discoverability rule followed by the Shanghai court in *Jwell* does not mean it would apply to all enforcement proceedings before Chinese courts. According to the Chinese Civil Procedure Law, the two-year limitation period shall be calculated from the last day of the period specified by the legal document for its performance; if the legal document specifies that it shall be performed in separate stages, the time limit shall be calculated from the last day of the period specified for each stage of performance.[187]

The Supreme Court of Canada also adopted the discoverability rule. In *Yugraneft Corp.*, Yugraneft won a favourable arbitral award on September 6, 2002 and applied for enforcement on January 27, 2006.[188] The Court reasoned that:

> "*[...] it is not infrequent for the parties to an international arbitration to have assets in a number of different states or jurisdictions within a federal state. An arbitral creditor cannot be presumed to know the location of all of the arbitral debtor's assets. If the arbitral creditor does not know, and would have no reason to know, that the arbitral debtor has asset in a particular jurisdiction, it cannot be expected to know that recognition and enforcement proceedings are warranted in that jurisdiction. Thus...once an arbitral creditor had learned, exercising reasonable diligence, that the arbitral debtor possessed assets in that jurisdiction.*"[189]

iii. *The date when the award is made*

Some States calculate the limitation period from the date on which the arbitral award is rendered or made. According to the ICC Enforcement Guide, Jordan[190] and Kuwait[191] provide a 15-year

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182 *Id.* at 4.
183 *Id.*
184 *Id.* at 7
185 *Id.*
186 *Id.* at 8.
187 Civil Procedure Law of the People's Republic of China (promulgated by Order No. 44 of the President of the People's Republic of China, Apr. 9, 1991) (2017 revision), art. 239. (China).
188 Yugraneft Corp., [2010] 1 S.C.R. 649, at ¶ 2–3(Can.).
189 *Id.* ¶61.
190 ICC Enforcement Guide, *supra* note 74, Jordan, ¶ C6.
191 *Id.* Kuwait ¶C6.

limitation period from the date of the issuance of the award. Peru requires a ten-year limitation period from the date on which the foreign award is rendered.[192] Similarly, in Italy, the limitation period for filing an application to enforce a foreign arbitral award begins to run from the date on which the award is made.[193]

Under the Federal Arbitration Act ["**FAA**"] of the U.S., an action to enforce a foreign New York Convention award in the U.S. is subjected to a three-year limitation period, beginning to run when the award is made.[194] The disputes surrounding this provision mainly focus on the meaning of the word "*made*". In *Seetransport Wiking Trader Schiffarht-gesellschaft MBH & Co.* v. *Navimpex Centrala Navala* ["**Seetransport Wiking**"],[195] the Court of Arbitration of the ICC issued interim and final awards in favour of Seetransport Wiking Trader Schiffarht-gesellschaft MBH ["**Seetransport**"] on November 2, 1982 and March 26, 1984, respectively. Dissatisfied with the outcome, Navimpex Centrala Navala ["**Navimpex**"] appealed to the Court of Appeal of Paris for annulment, and the same was dismissed on March 4, 1986.[196] Later, on March 28, 1988, Seetransport sought to enforce the ICC award in the U.S.[197] Regarding the question of whether Seetransport's application for enforcement was time-barred, Seetransport argued the word "*made*" means "*became final*," which in the present case is the date on which the Paris court dismissed Navimpex's appeal.[198] Navimpex contended that an award is "*made*" when the award is decided by the arbitrators.[199] The U.S. court, by analysing the term's literal meaning under the FAA, finally accepted Navimpex's interpretation and found the application for enforcement to be time-barred.[200]

iv. <u>The date when the award comes into force</u>

Some other States calculate the limitation period from the date that the award comes into force. For example, Vietnam's law provides the time limit is running from the day when the award enters into force.[201] Similarly, in *Yukos Capital*, the Arbitrazh (Commercial) Court of the Tomsk District of Russia decided that foreign arbitral awards may be presented for mandatory enforcement no later than three years from the date on which it came into force.[202] The limitation period in Latvia also starts to run from the day when the award has lawful effect.[203]

v. <u>The date when award creditors receive the award</u>

In some jurisdictions, the limitation period does not run until the award creditor receives the award. For instance, in *Noy Vallesina Engineering Spa* v. *Jindal Drugs Limited Company* ["**Noy**

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192 *Id.* Peru ¶C6.

193 Bermann, *supra* note 5, at 67. When the limitation period starts to run seems to be debatable in Italy. According to the ICC Enforcement Guide, the limitation period for enforcement in Italy is ten years "from the date on which a court action can be brought". *See* ICC Enforcement Guide, *supra* note 74, Italy, ¶ C6.

194 *See* 9 U.S.C. § 207. *See also* RESTATEMENT (THIRD) OF THE U.S. LAW OF INTERNATIONAL COMMERCIAL ARBITRATION § 4.30 cmt. (a)(iii).

195 *See* Seetransport Wiking Trader Schiffarhtsgesellschaft MBH & Co., Kommanditgesellschaft v. Navimpex Centrala Navala, 989 F.2d 572, 581 (2d Cir. 1993) (U.S.).

196 *Id.*

197 *Id.*

198 *Id.* at 581.

199 *Id.*

200 *Id.*

201 *Id.*

202 *See* Yukos Capital, 35 Y.B. COMM. ARB. 437 (Albert Jan van den Berg ed., 2010).

203 *See* UNCITRAL Report, *supra* note 10, at 18.

Vallesing"],[204] the High Court of Bombay applied a three-year limitation period for the recognition and enforcement of an ICC award that began to run from the day on which the prevailing party received the award, rather than the day on which the award entered into force.[205] In Mexico, if the ten-year limitation period is applied for enforcement of foreign arbitral award, it will begin running from the date the final award is notified to the party requesting enforcement of the award.[206] According to one scholar, the limitation period in France also begins to run from the date of notification of the award to the parties.[207]

vi. Other methods

In addition to the methods mentioned above to calculate the commencement of limitation periods, there are still other approaches taken in different jurisdictions. In Thailand, the limitation period starts to run when the award becomes enforceable.[208] Albania requires that limitation period starts running from the date the award becomes final.[209] Costa Rica is unusual in making the date on which the limitation period begins to run depend on the date the award becomes binding under the *lex arbitri*.[210] According to the law of Ecuador, the award creditor needs to first apply for recognition within ten years from the moment the award becomes *res judicata* in accordance with the law of the place of arbitration.[211] The award creditor can then seek enforcement within ten years from the moment the award is recognised in Ecuador.

C. Interruption, suspension, and extension of the limitation period

Whether there are factors that interrupt, suspend, or extend the limitation period also matters significantly in determining the limitation period for enforcement. However, both Contracting States' legislation and relevant case law seldom provide detailed information regarding the interruption, suspension, and extension of limitation periods. Most of the relevant discussions can only be found in particular cases or academic literature.

Interruption of the limitation period means that a new limitation period begins after the original one was interrupted by some factor.[212] Such interruption may happen due to the award debtor's acknowledgement or partial payment.[213] In *Good Challenger*,[214] one of the issues before the Appeal Court was whether a 1998 telex message from the losing party agreeing to honour the award amounted to a written and signed acknowledgement within the meaning of the Limitation Act 1980 so as to bring the enforcement action within the time-bar set by the statute. The Court resolved the issue in the affirmative.

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204 *See* Noy Vallesina Eng'g Spa v. Jindal Drugs Ltd. Co., 2006 (5) Bom CR 155, ¶ 10 (India) [*hereinafter* "Noy Vallesina"].
205 *Id.* ¶ 10 (India).
206 ICC Enforcement Guide, *supra* note 74, Mexico, ¶ C6.
207 *See* Akter, *supra* note 2, at 90.
208 Thien, *supra* note 1, at 104.
209 ICC Enforcement Guide, *supra* note 74, Albania, ¶ C 6.
210 *Id.* Costa Rica, ¶ C6.
211 *Id.* Ecuador, ¶ C6 citing Civil Code, arts. 2414, 2415 (Ecuador).
212 *Id.*
213 *See* Akter, *supra* note 2, at 93; *see also* Lafi Mohammad Mousa Daradkeh, Recognition and Enforcement of Foreign Commercial Arbitral Awards Relating to International Commercial Disputes: Comparative Study (English and Jordanian Law) 93 (Feb. 2005) (unpublished Ph.D. dissertation, University of Jordan), *available at* http://etheses.whiterose.ac.uk/494/2/DX231171.pdf.
214 *See* Good Challenger, [2003] EWCA (Civ.) 1668 (Eng.).

In addition, an award creditor's application for enforcement also constitutes an interruption of the limitation period. In *Lugana Handelsgesellschaft mbH* v. *OAO Ryazan Metal-Ceramic Instrument Factory*,[215] the Russian court decided the limitation period was interrupted when Lugana "*made submission of a statement of claim*" for enforcement.[216] In *Norman Bard*,[217] the award creditor applied to the Quebec Court on June 1, 2015 to enforce an award rendered on December 4, 2002.[218] Appel, the award debtor, was declared bankrupt in 2003. On October 2, 2003, Norman Bard, the award creditor, obtained a judgment from the Bankruptcy Court for the Eastern District of New York, stating that Appel's bankruptcy did not exempt him from his obligation under the award ["**Bankruptcy Judgment**"].[219] According to the Quebec Civil Code, the filing of a judicial application before the expiry of the prescriptive period constitutes a civil interruption.[220] The Superior Court of Quebec held that Norman Bard's application for the Bankruptcy Judgment constitutes "*filing of a judicial application*"[221] under the Quebec Civil Code, and therefore, interrupts the limitation period for enforcement of the arbitral award.

Suspension of limitation period may occur when award creditors withdraw their application for enforcement. In *O'KEY Logistics LLC* v. *Guangdong SouthFortune Import & Export Co., Ltd.*,[222] O'KEY Logistics sought to enforce an arbitral award before a Chinese court. The award was made on December 8, 2010. On April 19, 2012, O'KEY Logistics first filed an application to enforce the award. Later, on November 5, 2012, O'KEY withdrew the application for the reason that it would take a long time to get the relevant evidence certificated and notarised. On January 24, 2013, more than two years after the award was made, O'KEY Logistics submitted its application for enforcement again.[223] The Guangzhou Intermediate People's Court held that O'KEY's withdrawal of application for enforcement led to the suspension of the limitation period. Therefore, O'KEY's application filed on January 24, 2013 did not exceed China's two-year limitation period under the Chinese Law of Civil Procedure.

In the U.S., the three-year limitation period for recognition of New York Convention awards is subject to the federal doctrine of equitable tolling. A limitation period can be tolled if the award debtor has wrongfully impeded the award creditor's ability to seek recognition, or if extraordinary circumstances prevented the award creditor from seeking recognition despite diligent efforts.[224]

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215 *See* Lugana Handelsgesellschaft mbH (Ger.) v. OAO Ryazan Metal-Ceramic Instrument Factory (Russ.) ot 2 fevralya 2010 g. No. 13211/09 [Ruling of the Presidium of the Highest Arbitration Court of the Russian Federation of February 2, 2010, No. 13211/09], *reprinted in* 35 Y.B. COMM. ARB. 429–431 (Albert Jan van den Berg ed., 2010).

216 *Id.*

217 *See* Norman Bard, 41 Y.B. COMM. ARB. 356 (Albert Jan Van den Berg ed., 2017).

218 *Id.*

219 *Id.*

220 *See* Civil Code of Quebec, S.Q. 1991, c. 64, art. 2892 (Can.) ("The filing of a judicial application before the expiry of the prescriptive period constitutes a civil interruption, provided the demand is served on the person to be prevented from prescribing not later than 60 days following the expiry of the prescriptive period.").

221 Norman Bard, 41 Y.B. COMM. ARB. 355–356 (Albert Jan Van den Berg ed., 2017).

222 *See* O'KEY Logistics LLC v. Guangdong SouthFortune Import & Exp. Co., Ltd., (2013) Sui Zhongfa Minsi Chuzi No. 12 (The Guangzhou Intermediate People's Court of Guangzhou Dec. 3, 2013) (China).

223 Id. ¶ F.

224 *See* Everplay Installation Inc. v. Guindon, 2009 U.S. Dist. LEXIS 113054 (D. Colo. Dec. 2, 2009), 2009 WL 4693884 (D. Colo. Dec. 2, 2009) (U.S.).

Extension of limitation period happens after the original limitation period expires under certain circumstances. One scholar mentioned that one of the circumstances that extends the limitation period is when the award debtor gives a false statement about its financial circumstances or its assets.[225]

V. A call for more certain and predictable limitation periods in international commercial arbitration

Parts III and IV of this article reveal how diverse the legislation and practices are among Contracting States. The diversified legislation and practices can influence an award creditor's right for remedy, especially when the award creditor's application for enforcement is time-barred. Furthermore, it may impact arbitration's status as an effective dispute resolution mechanism since all the advantages of arbitration, e.g., "*expedition, efficiency, convenience of enforcement*," will be less attractive to commercial parties when the arbitral award cannot be enforced due to varying and unclear practices regarding limitation periods in different states.[226] In Part V(A), this article argues that the ideal approach is to provide a uniform limitation period in international instruments. Part V(B) agrees with Akter's proposal that national legislators shall specify the limitation periods applicable to the enforcement of foreign arbitral awards in their domestic legislation. Part V(C) suggests that award creditors must take the limitation period into serious consideration when applying for enforcement before foreign courts. By doing so, when the limitation period for enforcement has expired pursuant to enforcing State's law, the award creditor can still try to enforce the award in another forum or enforce the award in the form of a judgment.

A. The ideal approach: uniform limitation period in an international instrument

For certainty and predictability, some scholars and institutions have urged for a uniform limitation period for the enforcement of foreign arbitral award in international instruments. This suggestion has been considered by the Working Group on International Contract Practices ["**Working Group**"] which has provided two approaches to include a limitation period provision in the Model Law on International Commercial Arbitration ["**Model Law**"].

The first approach is providing a uniform five-year limitation period for enforcement of foreign arbitral awards, along with the conditions that calculate the running and cessation of the limitation period. This approach needs to consider "*whether a request to a court for enforcement in any State should cause the cessation of the running of the limitation period or whether the cessation is to be confined only to the State where the request for enforcement is made*".[227] Following this approach, the Working Group designed the following draft provision:

"*Article G, Alternative A*

(1) The limitation period for enforcement of the arbitral award shall be [five] years from the date when the award was received by the party requesting the enforcement. The limitation period shall cease to run when

[225] *See* IHAB AMRO, RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS IN THEORY AND IN PRACTICE: A COMPARATIVE STUDY IN COMMON LAW AND CIVIL LAW COUNTRIES 408 (2d. 2014).
[226] *See* Morgan, *supra* note 14.
[227] *See* U.N. Secretariat, Model Law on International Commercial Arbitration: Possible Further Features and Draft Articles of a Model Law, ¶ 42, U.N. Doc. A/CN.9/WG/II/WP.41 (Jan. 12, 1983).

that party requests a court in any State that the arbitral award be enforced, provided that he has taken all reasonable steps to ensure that the other party is informed of the request for enforcement.

(2) Where enforcement proceedings have ended without success for reasons other than the merits of the request for enforcement, the limitation period shall be deemed to have continued to run. If, at the time such enforcement proceeding ended, the limitation period has expired or has less than one year to run, the party requesting enforcement shall be entitled to a period of one year from the date on which the enforcement proceeding ended."[228]

The second approach suggests a fixed limitation period which would run continuously without a possibility of cessation or extension of its running.[229] A draft provision of this approach suggested by the Working Group provides as follows:

"*Article G, Alternative B*

Enforcement of the arbitral award may not be requested after [ten] years from the date when the award was received by the party requesting the enforcement."[230]

Reaching a uniform limitation period for enforcement of foreign arbitral awards is not easy. As noted by the Working Group, "*many legal systems already had rules on the period for enforcement of arbitral awards, either by assimilating for this purpose arbitral awards to court judgments or by special legislation. Harmonization of these rules would be difficult to achieve since they were based on the differing national policies closely linked to the procedural law as aspects of States*".[231] Due to the consideration of national policies behind the limitation period, most international treaties seldom provide a uniform limitation period for enforcement. Rather, they prefer to leave this issue to be determined by the Contracting States.

The difficulty in achieving a uniform limitation period is also reflected in the Draft New York Convention, presented by Professor Van den Berg in 2008, in which a limitation period for enforcement of foreign arbitral awards is not included. Under the section "*Provisions Not Included in the Draft Convention*," it is explained that the limitation periods vary considerably among States, ranging from six months in China to 20 years in the Netherlands.[232]

B. The practical approach: providing a clear and reasonable limitation period in domestic law

Many States do not specify the limitation period for enforcement of foreign arbitral awards in domestic laws, making the limitation period for enforcement a highly controversial issue. This situation has arisen frequently in India. Article 136 of the Indian Limitation Act 1963 provides a 12 year limitation period for the "*execution of any decree of any civil court*" when the decree becomes enforceable.[233] Meanwhile, Article 137 stipulates that for any other application for which no

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228 *Id.* ¶ 45.
229 *Id.* ¶ 44.
230 *Id.* ¶ 45.
231 *See* HOWARD M. HOLTZMANN & JOSEPH NEUHAUS, A GUIDE TO THE UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION: LEGISLATIVE HISTORY AND COMMENTARY 1157 (1989).
232 *See* ALBERT JAN VAN DEN BERG, HYPOTHETICAL DRAFT CONVENTION ON THE INTERNATIONAL ENFORCEMENT OF ARBITRATION AGREEMENTS AND AWARDS 15 (2009), *available at* http://newyorkconvention1958.org/index.php?lvl=notice_display&id=2873&opac_view=1.
233 Limitation Act, No. 36 of 1963, art. 136 (India).

limitation period is provided elsewhere, the limitation period is three years from the time when the right to apply accrues.[234] As a result, which limitation period applies to the enforcement of foreign arbitral award has become a controversial issue among the Indian courts.

The High Courts of Bombay, Madras, and Delhi have discussed the applicable limitation period in separate cases but drawn different conclusions. In *Noy Vallesina*, the High Court of Bombay held that an arbitral award is "*deemed to be a decree only when the court to which the application is made for enforcement of the foreign award is satisfied that the foreign award is enforceable*".[235] Under this approach, the limitation period for filing an action to enforce a foreign arbitral award would be three years as stipulated in Article 137.[236] Further, once the Indian Court decides that the foreign award is enforceable as a decree, then award creditors can seek to enforce the same within 12 years based on Article 136 of the Limitation Act. In *Compania Naviera SODNOC* v. *Bharat Refineries Ltd.* ["**Compania Naviera**"],[237] the High Court of Madras took a different approach and held that a foreign award is already stamped as a decree under the scope of Article 136.[238] Thus, the award creditors can apply for enforcement within 12 years from the date the award becomes enforceable.[239] In the past few years, the view taken in *Compania Naviera* has gained more recognition among Indian courts. In *Imax Corporation v. ECity Entertainment (I) Pvt. Ltd.*[240] and *Cairn India Ltd & Ors v. Government of India*,[241] the Indian courts agreed with *Compania Naviera* that the limitation period for enforcement of foreign arbitral award is 12 years as provided in Article 136. At first glance, it seems that the court split on limitation period has come to an end in India. However, in the recent case *Bank of Baroda v. Kotak Mahindra Bank Ltd.* ["**Bank of Baroda**"],[242] the Indian Supreme Court's decision has "*reopened the limitation conundrum*".[243] In *Bank of Baroda*, the Supreme Court held that Article 136 "*only deals with decrees passed by Indian courts*",[244] which means a foreign arbitral award is not a "*decree*" under Article 136 and the 12-year limitation period will not be applicable to enforcement of foreign arbitral awards. It can be predicted that ambiguity and controversy surrounding the limitation issue will continue to exist in India.

As discussed in Part IV(A), only a few States have specific limitation periods for the enforcement of foreign arbitral awards in domestic law. In some jurisdictions, whether there is a limitation period and if so, what is the limitation period applicable to the enforcement of foreign arbitral award is unclear, which in turn leads to contradicting opinions among experts and judges.[245] For example, except for the inconsistencies mentioned before, controversies over the limitation

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234 *Id.* art. 137.
235 *See* Noy Vallesina, 2006 (5) Bom CR 155, ¶ 8 (India).
236 *Id* ¶ 9.
237 Compania Naviera 'SODNOC' v. Bharat Refineries Ltd., AIR 2007 Mad. 251 (India).
238 *Id.* ¶ 42.
239 *Id.*
240 Imax Corp. v. ECity Ent. (I) Pvt. Ltd., (2018) 18 SCC 313 (India).
241 Cairn India Ltd. & Ors. v. Gov't of India, OMP (EFA) (COMM.) No. 15/2016 (decided by the Delhi High Court on Feb. 19, 2020) (India).
242 Bank of Baroda v. Kotak Mahindra Bank Ltd., Civil Appeal No. 2175 of 2020 (decided by the Supreme Court of India on Mar. 17, 2020) (India) [*hereinafter* "Bank of Baroda"].
243 Smriti Shukla & Yash Raj, *Supreme Court Reopens the Limitation Period for Enforcement of Foreign Awards*, INDIACORPLAW (Apr. 9, 2020) *available at*, https://indiacorplaw.in/2020/04/supreme-court-reopens-the-limitation-period-for-enforcement-of-foreign-awards.html.
244 Bank of Baroda, Civil Appeal No. 2175 of 2020, ¶ 36.
245 Akter, *supra* note 2, at 92.

period largely exist in France,[246] Germany,[247] and Switzerland.[248] Under such circumstances, both the award creditors who seek to enforce the arbitral award and the award debtors who prepare to rebut award creditors' application would get lost in various limitation periods. The need for certainty and predictability in international commercial transactions requires that Contracting States provide a clear and reasonable limitation period in their domestic law.

Providing clear limitation period means that the Contracting States must specify limitation periods for enforcement of foreign arbitral award in domestic laws. This proposal is strongly advised by Akter in her noted book chapter.[249] The relevant domestic laws can be, including but not limited to arbitration acts, laws of civil procedure, limitation acts, or any legislation that implements the New York Convention.[250] In 2015, Vietnam amended its Code of Civil Procedure to improve its legal procedures, and Article 451 now clearly provides for a three-year limitation period running from the day when the award enters into force for enforcing foreign arbitral award.[251] This amendment is believed to "*help Vietnam stand out as a more arbitration friendly jurisdiction*".[252]

Specifying a reasonable limitation period for enforcement of foreign arbitral awards means avoiding extremely long or extremely short limitation periods and providing a proper date for the commencement of the limitation period.[253] As discussed in Part IV(B), the Nigerian Court's erstwhile approach[254] to interpret "*accrual of cause of action*" as "*the date of the dispute leading to arbitration arose*" is unreasonable, because under this approach, the limitation period for enforcement may expire before the award creditor can apply for enforcement. Thus, being aware of this problem, the Nigerian legislators have made some changes in the Arbitration and Conciliation Act (Repeal and Enactment) Bill, proposing to exclude the "*period between the commencement of the arbitration and the date of the award*" when calculating the limitation period.[255] This

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246 The limitation period for enforcement of foreign arbitral awards in France is controversial. There is no specific limitation period for enforcement of foreign arbitral awards. Some argue that the five-year limitation period under Article 2224 of the Civil Code shall apply to actions to enforce foreign arbitral awards. See ICC Enforcement Guide, *supra* note 74, France ¶ C6. *See also* Akter, *supra* note 2, at 90, citing CODE CIVIL [C. CIV.] [CIVIL CODE] art. 2224 (Fr.); ICC Supplement, *supra* note 75, at 168. Some others believe the five-year limitation period under Article 2224 is irrelevant. Accordingly, the party seeking recognition and enforcement can request enforcement any time. *See* AMRO, *supra* note 225, at 410.

247 Regarding the limitation period for enforcement of foreign arbitral awards in Germany, some argue the 30-year limitation period under Article 197(1)(2) of the German Civil Code shall apply, because recognition and enforcement equals to a claim for performance of debt or a legal action to reclaim ownership of real rights from the award debtor. *See* Thien, *supra* note 1, at 101. Some argue there is no limitation period for enforcement of foreign arbitral awards in Germany, and the party seeking recognition and enforcement can bring its application whenever it considers appropriate. See AMRO, *supra* note 225, at 410; Bermann, *supra* note 5, at 68. The third opinion argues that the German court will apply its own conflict of law rules to determine the *lex causae* and apply the limitation period under that law. If the *lex causae* is German law, then the 30-year limitation period would apply to proceedings for recognition and enforcement of foreign arbitral award. See Börner, *supra* note 6, at 127; Akter, *supra* note 2, at 91.

248 *See* Akter, *supra* note 2, at 90–91 (Akter argues the limitation period for enforcement of foreign arbitral awards in Swiss is subject to *lex causae*. When the *lex causae* is Swiss law, the ten-year limitation period under Article 137(2) of the Swiss Civil Code applies.); *see* Thien, *supra* note 1, at 100 (Thien seems to believe that the ten-year limitation period would apply regardless of whether Swiss law is the governing law.)

249 Akter, *supra* note 2, at 97.

250 UNCITRAL Report, *supra* note 10, at 3.

251 Thien, *supra* note 1, at 106.

252 *See* Thien, *supra* note 1, at 97.

253 *Id.* at 99.

254 *See supra* notes 152–162 and accompanying text.

255 *Id.*

amendment undoubtedly would improve the reasonableness of Nigeria's practice on limitation period. In addition, federal countries need to consider whether to provide a uniform limitation period at the federal level like the U.S. or to allow each State to regulate the limitation period under different states laws like Canada. For the purpose of achieving certainty and predictability, the U.S. model is preferable. Critique regarding the Supreme Court of Canada decision in *Yugraneft Corp.* also mentioned that "*it makes no sense for Canada to have a collection of different limitation periods when our largest trading partner, the United States, has one limitation period for the recognition and enforcement of foreign arbitration awards*".[256]

C. The alternative approaches

Award creditors who endeavour to enforce arbitral awards in foreign countries need to realise the importance of a limitation period during the enforcement proceedings. *First*, they need to determine the enforcing States' relevant legislation and practices to make sure that their applications for enforcement are filed within the required time frame. Additionally, in situations where the limitation period for enforcement has expired in the enforcing State, they can still try to enforce the arbitral award in another forum where a longer limitation period is provided, or they can seek to enforce the arbitral award in the form of a judgment in a certain jurisdiction, such as the U.S.

i. Understanding Contracting States' divergent practice on limitation period

When considering the recognition and enforcement of foreign arbitral awards, the award creditors and their lawyers need to judge whether their application for enforcement is time-barred in the enforcing state. Basically, there are four steps to follow.

First, the limitation period can raise choice of law issues. As discussed in Part III, there are basically three approaches to determine the applicable law to limitation period. Many States adopt the *lex fori* approach, and some States, mostly common law countries, adopt the *lex causae* approach. In addition, some States follow *lex arbitri* approach and would apply the limitation period of the State where the award was rendered.

Second, after identifying the law applicable to the limitation period, the award creditors can determine the duration of the limitation period by examining enforcing States' legislation and case law. The Contracting States regulate limitation periods through different legislation and impose various limitation periods on the application for enforcement. Some Contracting States do not impose a limitation period;[257] other States prescribe specific limitation periods for enforcement, and the periods range from three months to 30 years.[258]

Third, when the limitation period starts to run matters significantly in judging whether the application was time-barred. In this regard, inconsistencies also arise as to the date that the limitation period begins to run. Some States believe the limitation period is running when the "*cause of action accrued*". For States that follow the discoverability rule, the limitation period will not start to run until the award debtor is found to appear or have property in the enforcing States.

[256] *See* Jonnette Watson Hamilton, *Much Ado about Little: The Supreme Court's Decision in Yugraneft Corp. v. Rexx Management Corp.*, ABLAWG.CA (Jun 4, 2010), *available at* https://ablawg.ca/2010/06/04/much-ado-about-little-the-supreme-court%E2%80%99s-decision-in-yugraneft-corp-v-rexx-management-corp/.
[257] *Id.*
[258] UNCITRAL Report, *supra* note 10, at 3.

Additionally, there are many different approaches taken to commence the running of the limitation period, including the date when the award is made, the date when the award attains legal force, the date when the award becomes enforceable, the date when award creditors receive the award, the date award becomes final, etc.

Last but not the least, the award creditors also need to pay attention to the factors that interrupt, suspend, or extend the limitation period for enforcement. These factors, however, are ambiguous since they are mainly discussed in academic literature and are rarely found in Contracting States' legislation and case law.[259]

ii. Enforcing arbitral awards in the form of foreign judgments

In some States where the limitation period for enforcing foreign judgments is longer than enforcing foreign arbitral awards, the award creditor may seek to turn the arbitration award into a judgment and then seek enforcement of the judgment.[260] In *Commissions Import Export S.A.* v. *Republic of the Congo* ["**Commissions Import Export S.A.**"], the Commissions Import Export S.A. ["**Commission Import**"], the Plaintiff, successfully obtained the enforcement of a limitation-expired arbitral award in the form of foreign judgment.[261] In 2000, Commission Import won a favorable arbitral award in France.[262] Pursuant to FAA, an application for enforcement of foreign arbitral award in the U.S. must be filed "*[w]ithin three years after an arbitral award falling under the [New York] Convention is made*".[263] Nine years after the issuance of the arbitral award, however, Commission Import failed to seek award enforcement. In 2009, Commission Import obtained a judgment from the English High Court, which recognised the French arbitral award and ruled that the arbitral award is enforceable in the same manner as an English judgment.[264] Later, Commission Import commenced court proceeding before the U.S. District Court for the District of Columbia, applying for enforcement of the English judgment. According to the District of Columbia's Uniform Foreign-Country Money Judgments Recognition Act ["**D.C. Judgment Act**"], "*[a]n action to recognize a foreign-country judgment must be commenced within the earlier of the time during which the foreign-country judgment is effective in the foreign country or 15 years from the date that the foreign-country judgment became effective in the foreign country*".[265] Thus, the central issue before the U.S. court turned to whether the three-year limitation period under the FAA, a federal law, pre-empts the longer period under the D.C. Judgment Act, a state law.

The Court of Appeals for the District of Columbia, by referring to the U.S. Supreme Court's decision in *Hines v. Davidowitz*,[266] first identified that the federal law would preempt state law when the state law "*stands as an obstacle to the accomplishment and execution of the full purpose and*

[259] For example, some scholars believe an award debtor's acknowledgement or partial payment may lead to the interruption of limitation period. *See* Akter, *supra* note 2, at 93; *see also* Daradkeh, *supra* note 213. *See* AMRO, *supra* note 225 (Amro holds that limitation period may be extended if award debtors give false statement(s) about their financial circumstances or assets).

[260] BORN, *supra* note 7, at 3729–3730.

[261] Comm'ns Imp. Exp. S.A. v. Republic of the Congo & Caisse Congolaise d'Amortissement, 757 F.3d 321 (D.C. Cir. 2014) (U.S.) [*hereinafter* "Commissions Import"].

[262] *Id.* at 323.

[263] *See* 9 U.S.C. § 207; see *also* RESTATEMENT (THIRD) OF THE U.S. LAW OF INTERNATIONAL COMMERCIAL ARBITRATION § 4.30 cmt. (a)(iii).

[264] Commissions Import, 757 F.3d 325 (D.C. Cir. 2014) (U.S.)

[265] Uniform Foreign-Country Money Judgments Recognition Act of 2011, Feb. 24, 2012, D.C. Law 19-86, § 2(b), 58 DCR 11186, § 15-369 (Colum.).

[266] Hines v. Davidowitz, 312 U.S. 52 (1941) [*hereinafter* "Hines"].

objectives of Congress".[267] After examining the objectives of the FAA, the U.S. court held that the "*basic purpose*" of FAA was to "*implement the New York Convention*",[268] and the "*overriding purpose*" of FAA is to "*facilitate international commercial arbitration by ensuring…valid arbitral awards are enforced*".[269] The U.S. court thus concluded that enforcing the English judgment based on state law accords with FAA's objective and "*pose no obstacle*" to its purpose.[270] Therefore, the U.S. court decided that the English judgment that confirmed the French award was enforceable. Following the decision in *Commissions Imp.*, when the limitation period for the enforcement of arbitral awards has expired, the award creditors may seek to enforce the award in the form of judgment in the U.S.

iii. Enforcing arbitral award in another forum

The New York Convention does not impose restrictions on the number of times a prevailing party can seek to enforce an award.[271] As noted by leading scholars, the fact that an application to enforce an arbitral award was time-barred in one State does not necessarily mean the award cannot be enforced in another.[272] Thus, if an arbitral award was refused enforcement in one Contracting State, the award creditor can still seek to enforce the award in another forum where the law provides no limitation period or a longer limitation period for the enforcement of foreign arbitral awards.[273]

VI. Conclusion

No one wants to fail at the final hurdle, and especially not award creditors who have spent millions of dollars to secure a favourable arbitral award. Although the New York Convention itself is silent on whether the expiration of a limitation period constitutes a ground for refusing enforcement, the purpose of the New York Convention and Contracting States' practice tend to justify the imposition of limitation periods on enforcement. In practice, award creditors may fail at the final hurdle because their applications for enforcement exceeded the limitation period. To solve the uncertainty caused by Contracting States' varying limitation periods, it is argued to provide a uniform limitation period at the international level. As an alternative, legislators need to consider specifying specific limitation periods for enforcement of foreign arbitral awards. Finally, as a last resort, award creditors can also seek to enforce the arbitral award in the form of judgments or enforce the award in other forums where no limitation period or a longer limitation period is provided. By considering these options and giving due importance to the question of limitation, parties can avoid disappointing ends to their committed pursuit of favourable arbitral awards.

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267 Commissions Import, 757 F.3d 326 (D.C. Cir. 2014) citing Hines, 312 U.S. 52 (1941).
268 *Id.*
269 *Id.* at 330.
270 *Id.* at 329.
271 *See Thien*, *supra* note 1, at 99.
272 *See* BORN, *supra* note 7, at 3729.
273 *See* Akter, *supra* note 2, at 93.

INDEPENDENCE AND IMPARTIALITY OF ARBITRAL TRIBUNALS: LEGALITY OF UNILATERAL APPOINTMENTS

Udian Sharma[*]

Abstract

*An independent and impartial arbitral tribunal is one of the cornerstones of arbitration law. Apropos of this, the unilateral appointment of arbitrators raises a reasonable apprehension of partiality and bias, resulting in a collapse of the arbitral process. This article will attempt to analyse the law of asymmetrical clauses present in arbitration agreements, thus questioning the unfettered right of a party to appoint arbitrators solely. This article shall compare the principles of contractual laws qua the principle of equity, through legislative intent and judicial interpretations of unequal clauses. Further, the contemporary developments under the Arbitration and Conciliation Act, 1996 ["**Arbitration Act**"], along with the significant judicial pronouncements on the issue of unilateral appointment of arbitrators shall also be critically examined. The article shall also examine the ambiguity and the conflict created by divergent decisions of the courts, while discussing the international jurisprudence on this issue. This article concludes by proposing to achieve a system of 'faceless tribunals', through the advancement of arbitral institutions and the use of artificial intelligence in the appointment of arbitral tribunals, which can reduce the presumption of partiality.*

I. Introduction

It is a settled principle of curial law that arbitration is a creature of contract, and the parties are bound by the terms of the arbitration agreement as prescribed in the contract. The procedure of appointment of arbitrators is a primary and essential part of the entire arbitral process. While such procedure in arbitration agreements usually allows each party to choose a co-arbitrator to constitute the tribunal, there are instances wherein the agreement may provide an unfettered right of appointment to only one party.

The Arbitration and Conciliation Act, 1996[1] ["**1996 Act**"] is bound by the universal principles of natural justice, which embody the maxim of *nemo judex in causa sua* (no one can be a judge in their own cause).[2] Impartiality of the adjudicator is one of the most fundamental tenets of any dispute resolution mechanism. Naturally, a person who has an interest in the outcome or decision of the dispute must not have the sole power to appoint arbitrators.[3]

The appointment clause in an arbitration agreement can either provide for appointment of arbitrators through mutual consent where both parties have an equal right to nominate one

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1 Arbitration and Conciliation Act, No. 26 of 1996 (India) [*hereinafter* "1996 Act"].

2 Supreme Court Advocates-on-Record Ass'n & Anr. v. Union of India, (2016) 5 SCC 808, ¶¶ 10–11 (India).

3 Shivani Khandekar & Divyansh Singh, *Independence and Impartiality of Arbitrators: Are We There Yet?*, KLUWER ARB. BLOG (Nov. 14, 2017), *available at* http://arbitrationblog.kluwerarbitration.com/2017/11/14/independence-impartiality-arbitrators-yet/.

arbitrator each of their choice or through a unilateral appointment where only one party has the sole and exclusive right to appoint the arbitrator(s) of its choice. The latter form of appointments unequivocally creates doubt regarding the independence and impartiality of the person appointed as the arbitrator, arguably violating the principles of natural justice. According to Russell, an arbitrator is "*neither more nor less than a private judge of a private court. An arbitrator derives its powers wholly from the private law of contract and accordingly the nature and exercise of these powers must not be contrary to the proper law of the contract or the public policy, bearing in mind that the paramount public policy is that freedom of contract is not lightly to be interfered with*".[4]

The author, through this article, focuses on the independence and impartiality of the arbitral process, and in particular, addresses the legal consequences of arbitration clauses containing unilateral appointment of arbitrators. This article is divided into four parts. The following part, i.e. Part II, deals with the legislative intent on the subject matter of the article while traversing through various statutes which deal with impartiality in the arbitral process and unequal arbitration clauses. Part III deals with the national and international judicial developments on the subject and the dilemma that surrounds it. Part IV discusses the different measures and solutions adopted by international arbitration institutions. The author, in Part IV(C) of this article, proposes the use of artificial intelligence in the arbitral process to achieve a system of 'faceless tribunals'. In Part V, the author concludes by pointing out the urgent need for the legislature and/or the judiciary to step in to settle the controversial dispute of unilateral appointment of arbitrators.

II. Legislative intent to preserve the independence and impartiality of arbitral tribunals

The tests of independence and impartiality of an arbitral tribunal are governed by the respective substantive and procedural laws; even then, the concepts of independence and impartiality can co-exist. Alan Redfern and Martin Hunter in their book Law and Practice of International Commercial Arbitration noted that there is a point of view in considering the two terms as being the "*opposite side of the same coin*".[5] Independence, on one side, refers to the arbitrator's relationship with one of the parties; impartiality, on the other side, "*is considered to be connected with an actual or apparent bias of an arbitrator either in favour of one of the parties or in relation to the issues in dispute*".[6] The two terms are "*usually joined together as a term of art*".[7] Apropos of this, the essence of an arbitral process lies in the independence of an arbitral tribunal's relationship with the parties, the power to adopt its own procedures and the absence of intervention from courts during the adjudication of the dispute. Further, the need for an impartial arbitral tribunal precedes the want of independence, as there can be instances where an adjudication process is procedurally not absolutely independent, albeit it is required to be mandatorily impartial.

Indian laws and international laws do not explicitly define the procedures to determine the independence and impartiality of an arbitral tribunal. However, various national and international

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4 DAVID ST. JOHN SUTTON, JUDITH GILL QC & MATTHEW GEARING QC, RUSSELL ON ARBITRATION 104 (20th ed. 1982).

5 ALAN REDFERN & MARTIN HUNTER, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 201 (4th ed. 2004).

6 *Id.*

7 *Id.*

jurisdictions have developed systems of checks and balances to maintain the independence and impartiality of an arbitral tribunal, which are the fundamental safeguards for the parties during the adjudication of disputes.

A. Historical analysis

Prior to the promulgation of the 1996 Act, the law on arbitration in India was substantially contained in three enactments, namely the Arbitration and Conciliation Act, 1940 ["**1940 Act**"];[8] the Arbitration (Protocol and Convention) Act, 1937;[9] and the Foreign Awards (Recognition and Enforcement) Act, 1961.[10]

The position under the erstwhile 1940 Act was that a party could commence proceedings in court by moving an application under Section 20 for the appointment of an arbitrator.[11] Further, Section 11 of the 1940 Act contained a judicial safeguard through which the court was given the power to remove an arbitrator in certain circumstances, including in cases of partiality or bias either during the pendency of arbitration proceedings or after its conclusion.[12]

The new 1996 Act is based on the United Nations Commission on International Trade Law Model Law on International Commercial Arbitration ["**Model Law**"].[13] In the face of the necessitude of time, the Law Commission of India proposed amendments thereto to be more responsive to the contemporary exigencies and to attract foreign businesses and investors towards India in the changing economic scenario.

The Model Law had sought to maintain absolute independence and impartiality of the arbitrator.[14] Article 12(1) of the Model Law provides for special features which include an arbitrator's commitment towards independence and impartiality.[15] Article 13(1) and (2) of the Model Law,[16] read with Article 12, provide for a challenge to an arbitrator on the ground of "*justifiable doubts as to her impartiality or independence*" and for an opportunity to the arbitrator to either withdraw her name as the arbitrator or otherwise to decide on the challenge.[17] Further, Article 13(3) of the Model Law provides the party failing in its challenge before the arbitral

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8 Arbitration Act, No. 10 of 1940 (India) [*hereinafter* "1940 Act"].
9 Arbitration (Protocol and Convention) Act, No. 6 of 1937 (India).
10 Foreign Awards (Recognition and Enforcement) Act, No. 45 of 1961 (India).
11 1940 Act, No. 10 of 1940, § 20 (India).
12 *Id.* § 11 reads as under:
"Power to Court to remove arbitrators or umpire in certain circumstances:
(1) The Court may, on the application of any party to a reference, remove an arbitrator or umpire who fails to use all reasonable dispatch in entering on and proceeding with the reference and making an award.
(2) The Court may remove an arbitrator or umpire who has misconducted himself or the proceedings.
(3) Where an arbitrator or umpire is removed under this section, he shall not be entitled to receive any remuneration in respect of his services.
(4) For the purposes of this section the expression "proceeding with the reference" includes, in a case where reference to the umpire becomes necessary, giving notice of that fact to the parties and to the umpire."
13 United Nations Commission on International 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* "Model Law"].
14 Koorosh H. Ameli, *Impartiality and Independence of International Arbitrators*, 27-28 REVUE DE RECHERCHE JURIDIQUE 89–109 (1999); *see also* HOWARD M. HOLTZMANN & JOSEPH E. NEUHAUS, A GUIDE TO THE UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION: LEGISLATIVE HISTORY AND COMMENTARY 478 (1989).
15 Model Law, *supra* note 13, art. 12(1).
16 Model Law, *supra* note 13, art. 13(1)–(2).
17 Hasmukhlal H. Doshi & Anr. v. J. M.L. Pendse & Ors., 2000 SCC OnLine Bom 242, ¶¶ 9, 11 (India).

tribunal with an additional remedy before the court or the other authority specified in Article 6.[18] Such safeguards ensure that the principles of natural justice are followed while maintaining party autonomy.

The Statement of Objects and Reasons appended to the Bill that was proposed for the 1996 Act stated that the general law of arbitration contained in the 1940 Act had become out-dated.[19] Section 11 of the 1940 Act, as mentioned earlier, provided courts as the only forum for making an application for the removal of an arbitrator.[20] Thus, when the 1996 Act came into force repealing the 1940 Act, Section 13 of the 1996 Act[21] omitted the judicial safeguard provided in Section 11 of 1940 Act, redefining the challenge procedure, and in effect, curbing the Model Law provision for adopting the erstwhile course altogether.

Therefore, in this regard, the legislature through the enactment of the 1996 Act took a significant departure from the Model Law and the 1940 Act.

B. The 1996 Act and its amendments

The legislature, through the 1996 Act, placed a few safeguards to preserve the independence and impartiality of arbitrators. Even before the amendments to the 1996 Act, it has been a valid ground under Section 12(3)(a) of the 1996 Act to challenge the appointment of the arbitral tribunal if circumstances exist that give rise to justifiable doubts as to its independence or impartiality.[22] However, as discussed earlier, this challenge can only be before the constituted arbitral tribunal, with no right of appeal before the courts.

The 246th Law Commission Report ["**Report**"],[23] *inter alia*, proposed changes to promote the neutrality of arbitrators to maintain the independence and impartiality of the arbitral process. The Report led to the enactment of the Arbitration and Conciliation (Amendment) Act, 2015 ["**2015 Amendment Act**"],[24] which radically changed the landscape of the appointment of arbitrators, amongst other things. Section 11(8) of the 1996 Act now provides that the court while appointing an arbitrator may obtain a disclosure in writing from the prospective arbitrator in terms of Section 12(1) of the 1996 Act, with regard to any qualifications required by the parties and other considerations which are likely to secure the appointment of an independent and impartial arbitrator.

The 2015 Amendment Act has thus widened the grounds of challenge to the composition of the arbitral tribunal under Section 12 of the 1996 Act by providing that a person may be challenged as an arbitrator if such person fails to make necessary disclosures when approached in connection to their appointment as an arbitrator. Therefore, the person must categorically state her (direct or indirect) existing or past relationship with any of the parties in relation to the

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18 Model Law, *supra* note 13, art. 13(3); Sunil Gupta, *No Power to Remove a Biased Arbitrator Under: The New Arbitration Act of India*, 2000(3) SCC J. 1 (2000).

19 Sundaram Fin. Ltd. v. NEPC India Ltd., AIR 1999 SC 565, ¶ 8 (India).

20 1940 Act, No. 10 of 1940, § 11 (India).

21 1996 Act, No. 26 of 1996, § 13 (India).

22 *Id.* § 12(3)(a) ("An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his independence or impartiality").

23 Law Commission of India, Report No. 246 – Amendments to the Arbitration and Conciliation Act, 1996, at 46–49 (2014), *available at* http://lawcommissionofindia.nic.in/reports/Report246.pdf.

24 Arbitration and Conciliation (Amendment) Act, 2015, No. 3 of 2016 (India) [*hereinafter* "2015 Amendment Act"].

subject matter of the dispute. The relationship can be financial, business related, professional, or of any other nature which may give rise to justifiable doubts about the arbitrator's independence and impartiality.[25]

The legislature, by way of the 2015 Amendment Act, adopted the international practices of the IBA Guidelines on Conflict of Interest ["**IBA Guidelines**"].[26] The IBA Guidelines enumerate examples of possible conflicts of interests, which are divided into three lists, namely, the Red List, which is further divided into waivable and non-waivable lists, the Orange List, and the Green List.[27] Following the IBA Guidelines, the legislature introduced an exhaustive mechanism of checks and balances in the form of introduction of three schedules, namely, the fifth, sixth, and seventh schedules in the 1996 Act.

These schedules are briefly described as under:

- The Fifth Schedule guides in determining whether circumstances exist which give rise to justifiable doubts as to the independence or impartiality of an arbitrator;
- The Sixth Schedule specifies the form for disclosure to be made by the arbitrator; and
- The Seventh Schedule specifies the categories of persons who shall be ineligible to be appointed as arbitrators.

Therefore, by virtue of the 2015 Amendment Act, the legislature attempted to maintain the independence and impartiality of an arbitrator appointed by the parties, specifically by inserting exclusion categories for persons to be appointed as arbitrators.

III. The dilemma surrounding unilateral appointment of arbitrators

A. Proactive role of the judiciary

The amendments brought in by the 2015 Amendment Act reflect the sanguine approach of the legislature to maintain the independence and impartiality of arbitral tribunals. However, this step cannot be termed as a comprehensive approach towards ensuring absolute impartiality. Thus, the courts while dealing with petitions under Section 11 or Section 14 of the 1996 Act are often faced with various impediments.

It is trite to say that if one party is allowed to appoint the arbitral tribunal unilaterally, that party will always be at an advantageous position in comparison to the other party, which may lead to a potentially partial set up of the arbitration proceedings.

Further, Section 25 of the 1996 Act allows an arbitral tribunal to enter reference and adjudicate the disputes ex parte in case of default of either party to appear or communicate their respective statements without sufficient cause.[28] However, where one party has an unfettered right to

[25] Shweta Sahu, Moazzam Khan & Payal Chatterjee, *Legitimacy of Arbitral Appointments in India*, KLUWER ARB. BLOG (Nov. 3, 2018), *available at* http://arbitrationblog.kluwerarbitration.com/2018/11/03/legitimacy-arbitral-appointments-india/; *see also* 2015 Amendment Act, No. 3 of 2016, § 8 (India).

[26] HRD Corp. v. GAIL (India) Ltd., (2018) 12 SCC 471 (India).

[27] Khaled Moyeed, Clare Montgomery & Neal Pal, *A Guide to the IBA's Revised Guidelines on Conflicts of Interest,* KLUWER ARB. BLOG (Jan. 29, 2015), *available at* http://arbitrationblog.kluwerarbitration.com/2015/01/29/a-guide-to-the-ibas-revised-guidelines-on-conflicts-of-interest/?doing_wp_cron=1596221860.2151229381561279296875.

[28] 1996 Act, No. 26 of 1996, § 25 (India).

appoint arbitrators of its choice as per the mutually agreed terms of the arbitration agreement, an ex parte adjudication by the arbitral tribunal so constituted may gravely prejudice the rights of the other party.

In the recent landmark judgment in the case of *Perkins Eastman Architects DPC* v. *HSCC (India) Ltd.* ["**Perkins Eastman**"],[29] the Supreme Court of India discussed the unsettled issue of the validity of unilateral appointment of arbitrators. The Supreme Court declared the unilateral arbitrator appointments to be invalid in the light of the 2015 Amendment Act, and thus held as follows:

> "*The reason is clear that whatever advantage a party may derive by nominating an arbitrator of its choice would get counter balanced by equal power with the other party. But, in a case where only one party has a right to appoint a sole arbitrator, its choice will always have an element of exclusivity in determining or charting the course for dispute resolution. Naturally, the person who has an interest in the outcome or decision of the dispute must not have the power to appoint a sole arbitrator.*"[30]

In the *Perkins Eastman* case, a contract was entered into between the parties, which contained an elaborate 'Dispute Resolution' clause. The clause provided, *inter alia*, that any dispute or difference shall be referred to arbitration before a "*sole arbitrator appointed by the Chief Managing Director*" of the Respondent. The Supreme Court relied heavily on its previous decision rendered by a full bench in *TRF Limited* v. *Energo Engineering Projects Ltd.* ["**TRF Limited**"],[31] which had held the unilateral appointment of the Managing Director of one party, or his nominee, as an arbitrator to be invalid.

The Supreme Court in *TRF Limited*, while quashing the clause, placed reliance on the doctrine of agency i.e. *qui facit per alium facit per se* (she who acts through another does the act herself).[32] The Supreme Court further rightly held that once an appointee had become ineligible to act as an arbitrator, its unrestricted power to appoint a nominee also ceases.[33] The rationale of the Court in setting aside the appointment clause was drawn from the fact that the Managing Director, having interest in the dispute, represented the interests of one party, thus making him ineligible to be appointed as an arbitrator, or to even appoint a nominee as an arbitrator.

Similarly, this issue was looked into by the Delhi High Court in *Proddatur Cable TV Digi Services* v. *SITI Cables Network Ltd.* ["**Proddatur Cable**"].[34] The Petitioner in this case had challenged the power of the Respondent *to unilaterally appoint the arbitrator as provided under the arbitration agreement. The Delhi High Court, relying on the decision in Perkins Eastman, held that a person having an interest in the*

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29 Perkins Eastman Architects DPC & Ors. v. HSCC (India) Ltd., 2019 SCC OnLine SC 1517 (India) [*hereinafter* "Perkins Eastman"].

30 *Id.* ¶ 21.

31 TRF Limited v. Energo Eng'g Projects Ltd., (2017) 8 SCC 377 (India).

32 *See* Firm of Pratapchand Nopaji v. Firm of Kotrike Venkata Setty & Sons & Ors., (1975) 2 SCC 208, ¶¶ 8, 9 (India); *see also* Walter Bau AG, Legal Successor, of the Original Contractor, Dyckerhoff & Widmann A.G. v. Municipal Corp. of Greater Mumbai, (2015) 3 SCC 800, ¶¶ 9, 10 (India).

33 Puneet Vyas, *Unilateral Appointment: Continued Dilemma Initiated by TRF*, SSRN (Dec. 13, 2019), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3486689.

34 Proddatur Cable TV Digi Servs. v. SITI Cables Network Ltd., 2020 SCC OnLine Del 350 (India).

outcome of the dispute cannot unilaterally appoint a sole arbitrator.[35] *Thus, the Court* declared that the mandate of the appointed arbitrator had terminated *de jure and appointed a new arbitrator.*[36]

Therefore, on the one hand, the judgment in *TRF Limited* merely settled the proposition of law that a disqualified or ineligible person cannot appoint a nominee as an arbitrator, leaving the question of unilateral appointment of third-party arbitrators unanswered. On the other hand, the judgment in *Perkins Eastman* failed to occupy the field in regard to unilateral and asymmetrical clauses in an arbitration agreement, leaving scope for further interpretation, as will be discussed in Part III(G) below.

B. Determination of bias under the 1996 Act

As the contractual laws are private in nature, unequally placed parties are bound by any unequal terms of the contract, unless such terms are specifically barred by law.[37] There being no explicit restrictions on one party to unilaterally appoint the arbitral tribunal under the provisions of the 1996 Act, such unilateral clauses are considered binding on the parties.

However, the character of the clause for the appointment of an arbitrator in an arbitration agreement should ideally be bilateral, not unilateral. Both parties to the dispute must be given an opportunity to equally and fairly select an arbitrator. An asymmetrical clause containing waiver of one party against a particular right raises serious doubts over the nature of the relationship of the contracting parties. The issue of legality and validity of asymmetrical clauses often stems from the unequal bargaining power between the parties in the absence of equality and fairness in their relationship.

As mentioned earlier, Section 12 (as amended by the 2015 Amendment Act) sets out the grounds under which the appointment of an arbitrator can be challenged. Section 13(3) states that if there is a challenge to the appointment of an arbitrator, the arbitral tribunal must decide the challenge. Bias has been defined as a "*preconceived opinion, or a predisposition or predetermination to decide a case or an issue in a particular manner*".[38] Under Section 12(1) and 12(2) of the 1996 Act, an arbitrator is bound to disclose circumstances which may give rise to justifiable doubts about her impartiality or independence. These disclosures are important for the parties to assess whether an arbitrator is biased and thus incapable of providing an impartial and independent adjudication of the dispute concerned. Failing such disclosure, a challenge can lie under Section 12(3) of the 1996 Act. Pursuant to a challenge, the arbitrator can either withdraw as an arbitrator or the other party may agree to the challenge thereby terminating the appointment.[39] If neither happens, the tribunal decides the challenge.

It can certainly be inferred that the arbitrators will not be willing to accept the challenge as such doubts on their impartiality and/or independence directly relate to their integrity. The 1996 Act

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35 *Id.* ¶ 23.

36 *Id.* ¶ 28.

37 Nishanth Vasanth & Rishabh Raheja, *Examining the Validity of Unilateral Option Clauses in India: A Brief Overview*, KLUWER ARB. BLOG (Oct. 20, 2017), *available at* http://arbitrationblog.kluwerarbitration.com/2017/10/20/examining-validity-unilateral-option-clauses-india-brief-overview/?doing_wp_cron=1597326578.4179279804229736328125.

38 State of West Bengal & Ors. v. Shivananda Pathak & Ors., (1998) 5 SCC 513 (India); *see also* Manak Lal v. Prem Chand, AIR 1957 SC 425 (India).

39 1996 Act, No. 26 of 1996, § 13 (India).

is thus superficial in this regard, and by allowing the tribunal to decide the challenge to an arbitrator sitting on that tribunal itself, gravely prejudices the parties during an arbitration proceeding.

It is pertinent to note that the parties to a dispute may also expressly waive the right to challenge an arbitrator upon becoming aware of the circumstances of possible bias.[40] There can also be a circumstance under which a party may move the court to terminate the mandate of an arbitrator under Section 14 of the 1996 Act for failure or impossibility of the arbitrator to act, through which the court may be in a position to examine the real possibility of bias.[41] However, from a bare perusal of Section 14, it cannot be said that the courts can strike down a clause for the unilateral appointment of an arbitrator on grounds of impartiality – which can only be challenged at the post-award stage in a petition under Section 34 of the 1996 Act.[42]

Therefore, such an eventuality of unilaterally appointing an arbitrator will result in irreversible consequences and, eventually, the failure to maintain independence and impartiality – a situation neither statutorily conceived nor countenanced.[43]

C. Equity versus non-intervention

Where a petition is filed under Section 11 of the 1996 Act, particularly in cases where the challenge is against the unfettered power of one party to appoint an arbitrator and the court intervenes by setting aside the appointment clause and adopting its own procedure for appointment of the arbitrator, it fails to comply with the provisions of the non-obstante clause enshrined under Section 5 of the 1996 Act.[44] The quintessence of an arbitration agreement is that the parties are supposed to be directed to arbitration, abiding by the terms and clauses of that arbitration agreement. The Chief Justice or his designate are to act purely in an administrative capacity while deciding a petition under Section 11 of the 1996 Act.[45]

This must be read in light of the principle of *kompetenz-kompetenz*[46] and Article 5 of the Model Law which place emphasis on minimal interference of the courts. The excessive intervention of courts in arbitration cases is a situation of judicial overreach which goes against the tenets of arbitral law. Such judicial overreach also defeats the purpose of maintaining party autonomy in arbitration.

However, on the other hand, to meet the ends of justice, the intervention of the court is extremely essential in cases where one party's right can prejudice and bind the other party by virtue of unequal bargaining power positions. Such abuse of power cannot be allowed, especially in judicial and quasi-judicial forums which are governed by the principle of equity. Arbitration

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40 1996 Act, No. 26 of 1996, proviso to § 12(5) (India); Bharat Broadband Network Ltd. v. United Telecoms Ltd., (2019) 5 SCC 755 ¶¶ 15, 20 (India) [*hereinafter* "Bharat Broadband"].

41 West Haryana Highways Projects Pvt. Ltd. v. National Highway Authority of India, 2017 SCC OnLine Del 8378, ¶¶ 24, 28 (India).

42 State of Arunachal Pradesh v. Subhash Projects & Mktg. Ltd. & Anr., 2006 SCC OnLine Gau 57, ¶ 32 (India) [*hereinafter* "Subhash Projects"].

43 *Id.*

44 1996 Act, No. 26 of 1996, § 5 (India) ("Extent of judicial intervention: Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part.").

45 Konkan Ry. Corp. Ltd. v. Rani Constr. Pvt. Ltd., (2002) 2 SCC 388, ¶¶ 22–23 (India).

46 Khandekar & Singh, *supra* note 3.

clauses containing unilateral modes of appointment of arbitrators can result in a partial and biased adjudication of disputes. Thus, the courts must exercise their powers to set aside such clauses, and thereby adopt their own procedures of appointment.

For instance, the Supreme Court while hearing a petition filed by a State government under Section 11 of the 1996 Act, in *State of Bihar* v. *Brahmaputra Infrastructure Ltd.* ["**Brahmaputra Infra**"],[47] dealt with a provision which afforded unilateral powers to the government in regard to the tenure of the members of an arbitral tribunal.[48] The Court, while relying on the doctrine of pleasure, held that a provision which deals with the tenure of the Chairman and other members of the arbitration tribunal at the pleasure of the Government is inconsistent with the constitutional scheme, particularly Article 14 of the Constitution of India, 1950.[49] The Court observed that if the party to the dispute terminates the service of such member, it would directly interfere with the impartiality and independence expected from such member. The Supreme Court also struck down the provision of the State legislation on the basis of it being manifestly arbitrary and contrary to the rule of law. This doctrine of manifest arbitrariness has been discussed by the Supreme Court in the case of *Shayara Bano* v. *Union of India,*[50] wherein it remarked that a provision of law would be manifestly arbitrary if it lacked a clear determinative principle or encapsulated a capricious or irrational measure.

The Patna High Court has extensively followed the rationale of *Brahmaputra Infra* in petitions filed under its writ jurisdiction, or under Section 11 of the 1996 Act. This was done in the cases of *Rajesh Singh* v. *State of Bihar,*[51] *Priyanshu Kumar Ranjan* v. *The Bihar State Food and Civil Supplies Corporation Limited,*[52] *Sarvesh Security Services Pvt. Ltd.* v. *Office of the Principal Chief Conservation of Forest,*[53] *Bhaibhaw Construction Pvt. Ltd.* v. *State of Bihar,*[54] *BLG Construction Services Pvt. Ltd.* v. *State of Bihar,*[55] *Bhaibhaw Construction Pvt. Ltd.* v. *State of Bihar,*[56] *M/s. Arjun Engicon Pvt. Ltd.* v. *State of Bihar,*[57] *Kamladitya Construction Pvt. Ltd.* v. *State of Bihar,*[58] and *Hindustan Steelworks Constructions Ltd.* v. *Union of India.*[59] The Patna High Court, in these matters, has consistently appointed neutral arbitrators and set aside the asymmetrical clauses which gave unfettered powers to government

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47 State of Bihar v. Brahmaputra Infrastructure Ltd., (2018) 17 SCC 444 (India) [*hereinafter* "Brahmaputra Infrastructure"].

48 Bihar Public Works Contracts Arbitration Tribunal Act, Act No. 21 of 2008, § 4(3)(b) (India).

49 Brahmaputra Infrastructure, (2018) 17 SCC 444, ¶ 7 (India).

50 Shayara Bano v. Union of India, (2017) 9 SCC 1, ¶ 101 (India).

51 Rajesh Singh v. State of Bihar, Civ. Writ Jurisdiction, Case No. 192 of 2020 (decided by the Patna High Court on Feb. 20, 2020) (India).

52 Priyanshu Kumar Ranjan v. Bihar State Food & Civil Supplies Corp. Ltd., Request Case No. 19 of 2020 (decided by the Patna High Court on Feb. 26, 2020) (India).

53 Sarvesh Sec. Servs. Pvt. Ltd. v. Off. of Principal Chief Conservator of Forest, Request Case No. 9 of 2020 (decided by the Patna High Court on Feb. 26, 2020) (India).

54 Bhaibhaw Constr. Pvt. Ltd. v. State of Bihar, Request Case No. 8 of 2020 (decided by the Patna High Court on Feb. 26, 2020) (India).

55 BLG Constr. Servs. Pvt. Ltd. v. State of Bihar, Request Case No. 5 of 2020 (decided by the Patna High Court on Feb. 26, 2020) (India).

56 Bhaibhaw Constr. Pvt. Ltd. v. State of Bihar, Request Case No. 1 of 2020 (decided by the Patna High Court on Feb. 26, 2020) (India).

57 M/s. Arjun Engicon Pvt. Ltd. v. State of Bihar, Request Case No. 182 of 2019 (decided by the Patna High Court on Feb. 26, 2020) (India).

58 Kamladitya Constr. Pvt. Ltd. v. State of Bihar, Request Case No. 178 of 2019 (decided by the Patna High Court on Feb. 26, 2020) (India).

59 Hindustan Steelworks Constr. Ltd. v. Union of India, Request Case No. 169 of 2019 (decided by the Patna High Court on Feb. 26, 2020) (India).

agencies in the appointment process. Therefore, the benefits of *Brahmaputra Infra* have resulted in a level playing field in the state of Bihar, which indicates the proactive approach of the judiciary to side with the principle of equity in cases of unequal arbitration clauses.

Further, in *Northern Railway Administration* v. *Patel Engineering Company Limited*,[60] the Supreme Court held that although Section 11 of the 1996 Act emphasises on adherence to the terms of the arbitration agreement, the court need not uniformly follow the same. Instead, the court must pay due regard to the qualifications stipulated in the agreement for the persons to be appointed as arbitrators. The Bombay High Court in the case of *Siddhi Real Estate Developers* v. *Metro Cash*[61] has similarly held that:

> "*[T]he courts should as far as possible preserve the sanctity of party autonomy and defer to the appointment procedure agreed to between the parties whilst at the same time retaining a discretion to appoint such arbitrators as may be deemed fit to 'meet the end of justice'… It may also be that an order to follow the appointment procedure is likely to result in a 'stalemate' or otherwise 'the interests of justice may require that the appointment procedure ought not to be followed'. In all such cases, the courts are not powerless to ignore the appointment procedure and appoint an independent tribunal outside the appointment procedure.*"[62]

Therefore, it can be inferred that the judiciary has adopted a proactive role to curb the practice of unilateral appointment of arbitrators by intervening at the time of reference to maintain the independence and impartiality of the arbitration proceedings, thus siding with the principle of equity over the laws of non-intervention.

D. Principle of party autonomy in contractual laws

The freedom to enter into a contract and to determine the terms of that contract is the essence of party autonomy, which is a non-intrusive right, unless the specific condition is explicitly barred by law. Consequently, parties have the right to mutually agree over the terms of appointment of an arbitrator in a dispute resolution clause. Party autonomy gives the parties the freedom to choose the method of appointment of an arbitrator, seat, or venue of the arbitration, applicable laws, and procedure.[63] Moreover, Section 19(2) of the 1996 Act permits the parties to adopt any procedure to be followed for the arbitration proceedings.[64]

The issue of maintaining a balance between the principle of party autonomy and the principle of equity, while dealing with clauses relating to unilateral appointment of arbitrators, has troubled courts ever since. Accordingly, the legislature through the 2015 Amendment Act has created safeguards to ensure that the appointed arbitrator is impartial, particularly through the Fifth and the Seventh Schedules of the 1996 Act.

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[60] N. Ry. Admin. v. Patel Eng'g Co. Ltd., (2008) 10 SCC 240 (India).

[61] Siddhi Real Estate Developers v. Metro Cash & Carry India Pvt. Ltd. & Anr., 2014 SCC OnLine Bom 623 (India).

[62] *Id.* ¶ 8.

[63] SIMON GREENBERG, CHRISTOPHER KEE & J. ROMESH WEERAMANTRY, INTERNATIONAL COMMERCIAL ARBITRATION: AN ASIA PACIFIC PERSPECTIVE 305 (2011).

[64] 1996 Act, No. 26 of 1996, § 19(2) (India) ("Subject to this Part, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting its proceedings.").

The Supreme Court's reasoning in the decision of *Perkins Eastman* and *TRF Limited* was to maintain impartiality in arbitral proceedings by restricting one party's right to solely appoint an arbitrator. Although this reasoning pierced through the principle of party autonomy, it rightly upheld the principles of equity and fairness. By appointing a sole arbitrator and quashing the unilaterally appointed arbitral tribunal, both the parties are put on the same pedestal, which leads to an impartial adjudication of the dispute and thus a fair trial.

The issue of invalidity of unilateral appointment of an arbitrator was also dealt with by a single-judge bench of the Delhi High Court in *Bhartia Cutler Hammer Ltd.* v. *AVN Tubes Ltd.*,[65] which throws valuable light on the issue of party autonomy and asymmetrical clauses. The Court observed that the arbitration agreement gave a right of reference to arbitration and appointment of an arbitrator to only one party and the decision of the arbitrator so appointed was made final and binding on both parties. The Court held that such agreement is unilateral and lacks mutuality of contract and as such, was not enforceable in a court of law.[66] This judgment was later affirmed by a Division Bench of the Delhi High Court.[67]

An issue that can be derived from the above judgment is whether such a condition in the arbitration agreement is a valid condition capable of enforcement under the Indian laws, or the same is hit by Section 28 of the Indian Contract Act, 1872.[68] Section 28 of the Indian Contract Act, 1872 provides that agreements in restraint of legal proceedings will be void. [69]

The Delhi High Court, while setting aside a unilateral clause of an arbitration agreement in the case of *Emmsons International Ltd.* v. *Metal Distributors (UK) & Ors.*,[70] observed that "*such type of absolute restriction is clearly hit by the provisions of Section 28 of the Contract Act besides it being against the public policy*".[71]

Therefore, the challenge against the unilateral appointment of arbitral tribunals is mainly on the count that such appointments are against the morality, conscionability, and validity of arbitration agreements. The task of the courts is to maintain a tryst between equity and private laws while dealing with such unequal clauses. This dilemma, in turn, gives more power and reasons to courts to intervene in confidential disputes between the parties casting a shadow over the effectiveness of arbitration as an alternative dispute resolution mechanism. Hence, there is a pressing need to nip these unilateral appointment clauses in the bud to stop a potential problem even before it develops.

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65 Bhartia Cutler Hammer Ltd. v. AVN Tubes Ltd., 1991 SCC OnLine Del 322 (India).

66 *Id.* ¶ 5.

67 A.V.N. Tubes Ltd. v. Bhartia Cutler Hammer Ltd., 1992 SCC OnLine Del 81 (India).

68 Vasnth & Raheja, *supra* note 37.

69 Indian Contract Act, No. 9 of 1872, § 28 (India) ("Agreements in restraint of legal proceedings, void- Every agreement, (a) by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, (b) by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, or (c) which extinguishes the rights of any party thereto, or discharges any party thereto, from any liability, under or in (d) respect of any contract on the expiry of a specified period so as to restrict any party from enforcing his rights, is void to that extent.").

70 Emmsons Int'l Ltd. v. Metal Distrib. (U.K.) & Ors., 2005 SCC OnLine Del 17 (India).

71 *Id.* ¶ 15.

E. <u>Contracts between private parties and governmental authorities – selection of arbitrators from fixed panels</u>

Private parties, especially individuals, have a lesser scope of negotiation while entering into a contract with a governmental entity or a public sector undertaking. It is also standard practice for governmental entities to include general conditions of contract which emphasise their dominant position.[72] These contracts, which contain rigid and archaic general conditions, are called 'standard form contracts'. When private parties succeed in the tender process, they often enter into such contracts without protest against the presence of any 'standard' asymmetrical clauses.

Consequently, the terms of an arbitration agreement which form part of the general conditions of these dotted line contracts, are often not negotiated by private parties.[73] As such, asymmetrical and unequal clauses are missed in the fine print of these standard form contracts. Therefore, courts across jurisdictions have strictly ruled against such unreasonable and unilateral clauses and have observed that "*it is settled law that if a contract or a clause in a contract is found unreasonable or unfair or irrational one must look to the relative bargaining power of the contracting parties*".[74]

Similarly, the procedure for appointment of an arbitrator by the dominating party either unilaterally or from a panel is often a non-negotiable term in a standard form contract. Once a dispute arises, these entities appoint arbitrators from a panel of their retired officers as per the terms of the arbitration agreement. These arbitration agreements are also commonly used by public entities or by banking, finance, and insurance sectors.

The clauses for unilateral appointment of an arbitrator not only elucidate the colourable nature of the arbitration agreement but are also in the teeth of the doctrine of *contra proferentem* in contracts. The doctrine of *contra proferentem* states that any clause considered to be biased or ambiguous should be interpreted against the interests of the party that created, introduced, or requested that such a clause be included.[75]

Such a threat to the independence and impartiality of the arbitral tribunal has been dealt with by the Indian courts with two divergent views and reasoning. One limb of the decisions takes a proactive role in striking down such unilateral appointment clauses and provides similar reasoning as rendered by the Supreme Court in *Perkins Eastman* and *TRF Limited.*

For instance, the Supreme Court in *Bharat Sanchar Nigam Limited* v. *Motorola India Pvt Ltd.*[76] held that as the Petitioner-Department which was entitled to appoint an arbitrator as per the arbitration agreement was the one which had imposed liquidated damages on the Respondent-Contractor, allowing the same party to appoint the arbitrator would defeat the principles of natural justice.[77]

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72 Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 95 HARV. L. REV. 1174 (1983).

73 Superintendence Co. of India Pvt. Ltd v. Sh. Krishan Murgai, (1981) 2 SCC 246 (India).

74 Life Ins. Corp. of India v. Consumer Educ. & Res. Ctr., (1995) 5 SCC 482, ¶ 47 (India); *see also* Central Inland Transp. Corp. Ltd. v. Brojo Nath, 1986 AIR 1571 (India); *see also* Gillespie Bros. & Co. Ltd. v. Roy Bowles Transp. Ltd. [1973] 1 Lloyd's Rep. 10 (Eng.).

75 Bank of India v. K. Mohan Das, 2009 (5) SCC 313, ¶ 47 (India).

76 Bharat Sanchar Nigam Ltd. v. Motorola India Pvt. Ltd., (2009) 2 SCC 337 (India).

77 *Id.* ¶ 16.

The Jammu and Kashmir High Court in *Tramboo Joinery Mills Pvt. Ltd.* v. *Commissioner/Secretary to Govt. & Ors.*[78] and the Gauhati High Court in *Panihati Rubber Limited* v. *The Principal Chief Engineer, Northeast Frontier Railway*[79] have recently taken a more proactive role by quashing the unilateral appointment of the arbitrators and appointing neutral arbitrators in their place, while observing that the courts have a right to appoint independent and impartial arbitrators from a list other than the one mentioned in the arbitration agreement.[80]

However, the other limb of decisions provides reasoning that party autonomy is the norm in arbitration laws and judicial intervention an exception. The mutually agreed terms for the appointment procedure cannot be interfered with by the courts. Moreover, the eligibility of the panel unilaterally selected by one party will go through the eligibility test set out under the provisions of Section 12 of the 1996 Act.

The Supreme Court in 2017, in the case of *Voestalpine Schienen GmbH* v. *Delhi Metro Rail Corporation Ltd.* ["**Voestalpine Schienen**"],[81] was posed with an issue regarding the appointment of an arbitral tribunal, where one party (private contractor) was forced to choose limited names from a panel which was unilaterally selected by the other party (a government entity). The Petitioner-Contractor challenged the arbitration clause on the ground that the panel was selected solely by the Respondent-Department, which would lead to impartiality of the arbitral tribunal. The Supreme Court observed that the parties have to abide by the mutually agreed terms of the contract. Interestingly, on merits, the Court declared the choices in the panel to be too small a number and stressed on the need for a broad-based panel. The Court, even though with an intention to "*send positive signals to the international business community, in order to create healthy arbitration environment and conducive arbitration culture in this country*,"[82] failed in considering that even with a broad-based panel, the candidates unilaterally selected for the panel by the Respondent-Department might still be compromised during the arbitral proceedings.

Thus, the inclusion of unequal clauses in an arbitration agreement, specifically pertaining to unilateral appointment of arbitrators, should be read against the party that inserted such a biased clause, and the courts should intervene by appointing a neutral arbitral tribunal. This exercise will dilute the unfettered powers of the dominant party, leading to the independent and impartial adjudication of disputes.

F. International jurisprudence

Article 12(2) of the Model Law states that "*an arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence*". If a challenge against an arbitrator is successful, the arbitral tribunal will be reconstituted in accordance with the rules governing the arbitration proceedings.

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78 Tramboo Joinery Mills Pvt. Ltd. v. Comm'r/Sec'y to Gov't & Ors., 2014 SCC OnLine J&K 55 (India) [*hereinafter* "Tramboo Joinery"].

79 Panihati Rubber Ltd. v. Principal Chief Eng'r Northeast Frontier Ry., 2016 SCC OnLine Gau 69 (India).

80 Tramboo Joinery, 2014 SCC OnLine J&K 55, ¶ 47 (India).

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

82 *Id.* ¶ 30.

The United States Supreme Court in the much-celebrated case of *Commonwealth Coatings Corp.* v. *Continental Casualty Co.*,[83] regarding the importance of independence and impartiality of arbitrators, held that:

> "*[W]e should, if anything, be even more scrupulous to safeguard the impartiality of arbitrators than judges, since the former have completely free rein to decide the law as well as the facts and are not subject to appellate review. We can perceive no way in which the effectiveness of the arbitration process will be hampered by the simple requirement that arbitrators disclose to the parties any dealings that might create an impression of possible bias.*"[84]

Similar to the Indian statutory laws for arbitration, a number of international statutes also do not explicitly define the standards for the impartiality and independence of arbitrators, particularly in reference to unilateral appointment of arbitrators. In international commercial arbitrations, the issue regarding equal treatment of parties during the arbitration process has been a controversial and hence an extremely contentious topic.

In the case of *Societes BKMI et Siemens* v. *Societe Ducto*,[85] the Paris Court of Appeal upheld a clause where the right to appoint the arbitral tribunal was with the Defendants, prejudicing the Claimant. However, the French Court of Cassation overturned the decision of the Paris Court of Appeal and held that:

> "*In light of Articles 1502 para. 2, and 1504 of the New Code of Civil Procedure and Article 6 of the Civil Code; Whereas the principle of the parties being equal in appointing arbitrators falls under public policy; which can only be waived only after the dispute has arisen.*"[86]

The French Court of Cassation, in the case of *X* v. *Banque Privee Edmond de Rothschild Europe*,[87] held that a unilateral option clause is void for creating a *potestative* condition, which is contrary to the French law. A *potestative* condition is that which makes the execution or performance of the agreement to depend on a condition precedent, which is entirely in the power of one of the contracting parties.[88] Such unfair conditions and terms go against the ethos of contractual laws as well.

Similarly, the Presidium of the highest arbitration court of the Russian Federation, in the case of *Russian Telephone Company* v. *Sony Ericsson Mobile Communications Rus,*[89] held that such unilateral option clauses in an arbitration agreement are invalid and unenforceable, due to them being

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83 Commonw. Coatings Corp. v. Cont'l Casualty Co., 393 U.S. 145 (1968) (U.S.).

84 *Id.* ¶ 3.

85 Cour de cassation [Cass.] [supreme court for judicial matters] 1e. civ., Jan. 7, 1992, Bull. civ. I, No. 2 (Fr.).

86 *Id.* ¶ 6.

87 Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Sept. 26, 2012, Bull. civ. I, No. 983 (Fr.).

88 Vernon V. Palmer & Andre L. Pauche, *A Review of the Louisiana Law on Potestative Conditions*, 47 TUL. L. REV. 284 (1973).

89 Postanovlenie Prezidiuma VAS RF ot 19 iyun 2012 g. No. 1831/12 [Ruling of the Presidium of the Highest Arbitration Court of the Russian Federation of June 19, 2012, No. 1831/12] (Russ.).

fundamentally unequal.[90] The Court also held that one-sided option clause violated the principle of procedural equality of the parties.

On the other hand, in *Wilson Taylor Asia Pacific Pte Ltd* v. *Dyna-Jet Pte Ltd,*[91] while upholding the validity of a one-way arbitration option clause, the Singapore Court of Appeal observed that if there exists a valid arbitration agreement between the parties and the said arbitration agreement is not null and void, inoperative, or incapable of being performed, then the courts cannot set aside such one-way option clauses. Likewise, U.S. courts have considered the unilateral clauses in an arbitration agreement to be in line with the principle of party autonomy.[92]

Therefore, in comparison to international courts, the Indian courts through the decisions rendered in *Perkins Eastman* and *TRF Limited*, amongst others, have projected a proactive and a much more dynamic approach towards dealing with unequal and unilateral clauses in an arbitration agreement, by intervening and setting aside asymmetrical arbitration clauses and by adopting own procedures for appointment of arbitrators.

G. Developments post-Perkins Eastman – conflicting outcomes

The decision rendered by the Supreme Court in *Perkins Eastman* in 2019 was a step forward towards achieving independence and impartiality in arbitration proceedings. However, the decision has a few limitations and reservations attached to it, which makes the law of appointment of arbitral tribunals vulnerable.

The Supreme Court, while declaring the arbitration clause invalid on the basis of reasonable apprehension of bias, quashed the entire arbitration proceedings along with the award. This implies that the applicability of a future decision like *Perkins Eastman* would also be retrospective, and as such, similar decisions would apply in cases where the arbitral tribunal has entered reference and also where the award has already been published. The Supreme Court erred in even specifying the category of cases which deserve to be exempted from this straitjacket formula, as will be discussed below.

While dealing with the applicability of Perkins Eastman, the Delhi High Court in *Proddatur Cable* referred to a decision of the Supreme Court in *Bharat Broadband Network Limited* v. *United Telecoms Limited* [“**Bharat Broadband**”] to decide the fate of pending arbitrations.[93] In the case of B*harat Broadband*, the Supreme Court held that as soon as any court adjudicates on the issue of the mandate of an arbitrator, Section 14 of the 1996 Act will operate, thus leading to the termination of the mandate de jure.[94]

There exist situations where one party may have consented to the unilateral appointment of an arbitrator, either by formal consent or by an act of acquiescence, for instance, where the non-appointing party without protest participated in the arbitral proceeding by filing their response or

90 Cole Rabinowitz, *Fate of the Unilateral Option Clause Finally Decided in Russia*, N.Y.U. J. INT’L L. POL. (Apr. 10, 2013), *available at* https://www.nyujilp.org/fate-of-the-unilateral-option-clause-finally-decided-in-russia/.

91 Wilson Taylor Asia Pacific Pte Ltd. v. Dyna-Jet Pte Ltd. [2017] SGCA 32 (Sing.).

92 M.A. Mortenson Co. v. Saunders Concrete Co., Inc., 676 F.3d 1153, 1158 (8th Cir. 2012) (U.S.).

93 Bharat Broadband, (2019) 5 SCC 755 (India).

94 *Id.* ¶ 17; *see also* Naval Sharma & Saurajay Nanda, *Arbitrations by Unilaterally Appointed Arbitrators: In Jeopardy?*, MONDAQ (Mar. 19, 2020), *available at* https://www.mondaq.com/india/arbitration-dispute%20resolution/904892/arbitrations-by-unilaterally-appointed-arbitrators-in-jeopardy.

claims. There can also be a situation where the non-appointing party had failed to resist the appointment at the constitution of the tribunal, but questioned the unilateral appointment when it challenged the award in a petition filed under Section 34 of the 1996 Act. However, such challenges would be barred by virtue of the doctrine of estoppel, which means that a non-appointing party is estopped from challenging the appointment of the arbitrator later, once it has accepted the arbitral tribunal's jurisdiction and competency by participating in the arbitration proceedings without coercion or misrepresentation.[95]

In light of these limitations, Indian courts soon started distinguishing the *Perkins Eastman* decision on merits. The full bench of the Supreme Court in the case of *Central Organisation for Railways Electrification* v. *M/s. ECI-SPIC-SMO-MCML (JV)* ["**Central Organisation for Railway**"],[96] held contrary to the reasoning of the judgments in the cases of *TRF Limited* and *Perkins Eastman*. The Court upheld the mutually agreed asymmetrical procedure for appointment of an arbitrator. This decision was in line with the reasoning rendered by the Supreme Court in *Voestalpine Schienen*. The Court, however, directed the Petitioner-Department to send a 'fresh' panel of four retired railway officers, and the Respondent-Contractor was asked to select the arbitral tribunal from the said panel.[97] The Supreme Court while allowing the appeal of the Railway Department, quashed the High Court's appointment of a sole arbitrator.

While the *Central Organisation for Railway*, one can say, is a clear case of deviation from *Perkins Eastman*, further signs of such deviation could also be gathered during the course of a recent matter in the case of *Subha Gopalakrishnan* v. *M/s. Karismaa Foundations Pvt. Ltd.*[98] ["**Subha Gopalakrishnan**"].[99] The case concerned unilateral appointment of an arbitrator by the Respondent Company, which was made as per the arbitration agreement. The Petitioner relying on the decision in *Perkins Eastman* sought intervention of the Court to invalidate the mandate of the arbitrator, even though the arbitration proceedings were initiated and the Petitioner had started active participation in the arbitration hearings. The Madras High Court rejected the Section 11 petition filed by the Petitioner on the ground that the sole arbitrator[100] – before whom the Petitioner had also submitted herself by participating in the proceedings – had already entered reference. The Madras High Court relied on the proposition of law that when the arbitral tribunal has entered reference with respect to the dispute between the parties, constitution of another arbitral tribunal in respect of those same issues, would be without jurisdiction.[101] Aggrieved by the decision of the High Court, the Petitioner approached the Supreme Court.

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95 New India Assurance Co. v. Dalmiya Iron & Steel Co. Ltd., 1964 SCC OnLine Cal 34, ¶ 10 (India).

96 Central Org. for Rys. Electrification v. M/s. ECI-SPIC-SMO-MCML (JV), 2019 SCC OnLine SC 1635 (India).

97 *Id.* ¶ 40.

98 Subha Gopalakrishnan v. M/s. Karismaa Founds. Pvt. Ltd., SLP(C) No. 30404 of 2019 (decided by the Supreme Court on Jan. 8, 2020) (India) [*hereinafter* "Subha Gopalakrishnan"].

99 It is pertinent to state here that the author represented the Respondent Company (M/s Karismaa Foundations Pvt. Ltd.) in the case of *Subha Gopalakrishnan* before the Supreme Court. Reluctance of the Bench to apply the rationale of *Perkins Eastman* could be inferred from the fact that the Court allowed the petitioner to withdraw its petition. We as lawyers perceived this as dilution of the stance taken by the Supreme Court on the issue of unilateral appointment of arbitrators in *Perkins Eastman* and also as our success in making it possible for the Respondent to continue with the arbitration.

100 Mrs. Subha Gopalakrishnan v. M/s. Karismaa Founds. Pvt. Ltd. & Ors., O.P. No. 711 of 2017 (decided by the Madras High Court on Sept. 6, 2019) (India).

101 *See* Antrix Corp. Ltd. v. Devas Multimedia Pvt. Ltd., (2014) 11 SCC 560 (India); *see also* Som Datt Builders Pvt. Ltd. v. State of Punjab & Ors., 2005 SCC OnLine P&H 891 (India).

However, the matter resulted in what can be called *in limine* disposal, since the Petitioner decided to withdraw its petition with the permission of the Supreme Court.

Before the Petitioner could withdraw its petition, three main arguments were raised by the author on behalf of the Respondent Company before the Supreme Court: *first*, that the Petitioner had already participated in the arbitral proceedings, hence is estopped to challenge the appointment of the arbitrator. *Second*, the rationale of *Perkins Eastman* should not be made applicable to the pending arbitration proceedings where both parties have participated in arbitral hearings, without protest. *Third*, the finding of *Perkins Eastman* could be distinguished on merits, on the basis of the type of the appointment clauses present in the arbitration agreements. However, due to withdrawal of the petition, *Subha Gopalakirshna* became a missed opportunity for clear and further deliberation on the rationale of *Perkins Eastman* by the apex court.[102] However, it can be argued that the very fact that the Petitioner decided to withdraw and the apex court allowed it, is a clear enough sign that rationale of *Perkins Eastman* needs reconsideration.[103]

Further, in the cases of *SMS Ltd.* v. *Rail Vikas Nigam Limited* ["**SMS Ltd.**"][104] and *BVSR-KVR (Joint Ventures)* v. *Rail Vikas Nigam Limited* ["**BVSR-KVR**"],[105] where the appointment procedures in the respective arbitration agreements were similar to the one present in *Central Organisation for Railway*, the Delhi High Court chose to rely on the ratio of *Perkins Eastman* instead and thereby appointed an independent sole arbitrator by declaring the unilateral appointment clause to be invalid and biased.

The Delhi High Court, in *SMS Ltd.* and *BVSR-KVR*, relied on the decision of a concurrent bench in *Assignia-VIL-JV* v. *Rail Vikas Nigam Limited*,[106] wherein the Delhi High Court had held that the Respondent-Department could not appoint its retired or serving employees as arbitrators, as it would defeat the very purpose of the 2015 Amendment Act. The Court found that it was duty bound to secure the appointment and to remove any justifiable doubts as to the independence and impartiality of the arbitrator, and therefore, appointed a neutral arbitral tribunal of three arbitrators.

Therefore, different courts have interpreted the judgments of *Perkins Eastman* and *Central Organisation for Railway* as per their own understanding of the rationale of these judgments. The courts have either distinguished these decisions on merits or have relied upon them mechanically without close examination. This has resulted in conflicting decisions, which are treated as precedents for the issue involving unilateral appointments creating further uncertainty on the issue.

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102 A.K. Awasthi, *Stare Decisis and Supreme Court*, 30 JUD. TRAINING & RES. INST. J. 77–81 (Dec. 2008).

103 The author opines that, even though the author was successful in defending the rights of the Respondent in the case of *Subha Gopalakrishnan* before the Supreme Court, the Court's *in limine* disposal consequently led to a further dilution of the issue of unilateral appointment of arbitrators in India.

104 SMS Ltd. v. Rail Vikas Nigam Ltd., 2020 SCC OnLine Del 77 (India).

105 BVSR-KVR (Joint Ventures) v. Rail Vikas Nigam Ltd., 2020 SCC OnLine Del 456 (India).

106 Assignia-VIL-JV v. Rail Vikas Nigam Ltd., 2016 SCC OnLine Del 2567 (India).

IV. The way forward

A. Taking away the absolute immunity of arbitrators

As the cases of professional misconduct by arbitrators increased,[107] the questions against arbitral immunity arose. The blanket immunity granted to arbitrators shields them from perceived misconduct.[108] In an arbitration process, proving the bias of the arbitral tribunal post-reference is extremely difficult. However, in a case where bias is proved against the arbitrator the only solution is to remove the arbitrator and appoint a new one. There needs to be penal and tortious consequences against persons who attempt to violate the independence and impartiality of an arbitral process.

This can be done by taking away the absolute immunity granted to arbitrators and imposing sanctions on them in cases of gross misconduct. The unilateral appointment of an arbitral tribunal gives rise to the presumption of bias towards the party who solely appointed the arbitral tribunal. Thus, unilateral appointment prima facie raises doubts against the independence and impartiality of the arbitration process. Mere removal of a biased arbitrator will not put an end on the dominant party's attempt to appoint a favourable arbitral tribunal.

Further, the remedies adopted by Indian courts against a partial arbitrator are mostly limited to the removal of such arbitrator. The courts in these circumstances have, however, also set aside the arbitration proceedings and the award in the past. During the process of biased unilateral appointment and subsequent removal by the courts, the prejudiced party suffers irreparable loss of time and money. Thus, in cases of grave partiality and bias, the prejudiced party should be entitled to monetary damages from the offending arbitrator and the erring party. This will act as a deterrent against the arbitrators who recklessly abuse their powers.

B. System of 'faceless tribunals'

Independence, fairness, impartiality, and neutrality are the indispensable qualities of an arbitrator.[109] The reasonable apprehension of partiality and bias is understood to be more in cases of unilateral appointments than in neutral appointments. There is a dire need to have access to new institutional arbitration centres, as the number of commercial arbitration cases increase. Such mechanisms will bring in more transparency in the appointment process which, in turn, will ensure the independence and impartiality of the arbitral tribunal.

In this regard, the Government of India in 2017 constituted a ten-member High Level Committee ["**High Level Committee**"] to review the institutionalisation of arbitration mechanism and suggest reforms thereto.[110] The High Level Committee noted that the 2015 Amendment Act created undue hardship for its users, for instance, by the delays in the

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[107] Susan D. Franck, *The Liability of International Arbitrators: A Comparative Analysis and Proposal for Qualified Immunity*, 20 N.Y.L SCH. J. INT'L & COMP. L. 1 (2000).

[108] Prathima R. Appaji, *Arbitral Immunity: Justification and Scope in Arbitration Institutions*, 1(1) INDIAN J. ARB. L. 63–74 (July 2012), *available* at http://www.ijal.in/sites/default/files/IJAL%20Volume%201_Issue%201_Prathima%20Appaji.pdf.

[109] Subhash Projects, 2006 SCC OnLine Gau 57, ¶ 29 (India); *see also* Yashwith Constr. (P) Ltd. v. Simplex Concrete Piles India Ltd., 2008 SCC OnLine AP 826, ¶ 12 (India).

[110] Government of India, Report of the High Level Committee to Review the Institutionalisation of Arbitration Mechanism in India (July 30, 2017), *available at* http://legalaffairs.gov.in/sites/default/files/Report-HLC.pdf.

arbitration process caused by the extensive involvement of the courts.[111] Thereby, the High Level Committee report suggested amendments to the 1996 Act specifically aimed at promoting institutional arbitration in India, citing examples of the appointment mechanisms in Singapore, Hong Kong and the United Kingdom. Furthermore, the suggestions included, *inter alia*, setting up of an autonomous body styled by the Arbitration Promotion Council of India ["**APCI**"], having representatives from all stakeholders for grading arbitral institutions in India. The APCI, in turn, will recognize professional institutes providing for training and accreditation of arbitrators.

Considering the recommendations of the High Level Committee, the legislature through the Arbitration and Conciliation (Amendment) Act, 2019 ["**2019 Amendment Act**"] inserted 'Part IA – Arbitration Council of India'.[112] The Arbitration Council of India is required to grade the arbitral institutions and arbitrators and provide accreditation, amongst other things.[113] These steps are meant to bring about a paradigm shift from the current perception of partiality of arbitral tribunals and delay in resolution of commercial disputes in India to it being viewed as an investor-friendly destination, which will ensure the independence and impartiality of arbitral tribunals without the involvement of courts.

Encouraging and promoting the use of arbitral institutions will create a system of faceless tribunals by removing the option of selecting the arbitrator. The term 'faceless tribunals' envisages a process where arbitral institutions will have specialised persons on board, and through a system of randomised selection, the arbitral tribunal will be constituted by the institution without the involvement of the parties. The arbitrators selected will then be scrutinised on the basis of Section 12 and the Fifth and the Seventh Schedules of the 1996 Act, as amended and inserted by the 2015 Amendment Act respectively.

The 2019 Amendment Act, *inter alia*, amended Section 11 of the 1996 Act, empowering the Supreme Court and the high courts to designate arbitral institutions for the process of appointment of arbitrators.[114] Prior to this amendment also, the Supreme Court,[115] in a pro-arbitration move, had instructed the Mumbai Centre for International Arbitration to appoint an arbitrator in an international dispute, in exercise of its powers under Section 11 of the 1996 Act

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111 Mridul Godha & Kartikey M., *The New-Found Emphasis on Institutional Arbitration in India*, KLUWER ARB. BLOG (Jan. 7, 2018), *available at* http://arbitrationblog.kluwerarbitration.com/2018/01/07/uncitral-technical-notes-online-dispute-resolution-paper-tiger-game-changer/?doing_wp_cron=1597346999.8069019317626953125000.

112 Arbitration and Conciliation (Amendment) Act, 2019, No. 33 of 2019 (India) [*hereinafter* "2019 Amendment Act"].

113 *Id.* § 10; 1996 Act, No. 26 of 1996, § 43D (India).

114 2019 Amendment Act, Act No. 33 of 2019, § 3 (India) amended § 11 of the 1996 Act. Section 3 reads as follows:
"In section 11 of the principal Act,–
(i) after sub-section (3), the following sub-section shall be inserted, namely:—
'(3A) The Supreme Court and the High Court shall have the power to designate, arbitral institutions, from time to time, which have been graded by the Council under section 43-I.'".

115 Sun Pharm. Indus. Ltd., Mumbai v. M/s Falma Organics Ltd. Nigeria, 2017 SCC OnLine SC 1200, ¶ 3 (India).

(as amended by the 2015 Amendment Act).[116] This decision marked the first time that a court invoked Section 11 to designate an institution to assist with the appointment of an arbitrator.[117]

Such references to neutral institutions will ensure that appointments are impartial and curb the unfettered right of parties to unilaterally appoint arbitrators.

C. Use of artificial intelligence for appointment of arbitrators

The use of the phenomenal advancements in information technology has not yet affected the world of arbitration. With the rise of commercial arbitrations across the globe between internationally placed parties, there is a need for arbitral institutions to put technology at the forefront with an aim to reduce the workload and assist the parties in the arbitration process.

Artificial Intelligence ["**AI**"] is now a reality. The arbitration institutions should start investing in software with built-in AI features, for every aspect related to the arbitration process. Around the world, various law firms have started using AI as a method of determining effective case strategies, research and case outcomes.[118] AI can also be used by the arbitral institutions for effectively organising and storing the pleadings and document of the parties, while maintaining complete confidentiality.

Most importantly, AI can be used for selection of arbitrators from a pool of empanelled persons. This feature can first select a list of persons from the pool who possess specialisation in the field of that particular dispute and then filter persons who are statutorily exempted from being arbitrators in relation to a specific set of parties. This will ensure that a system of faceless tribunal is achieved which, therefore, will maintain absolute independence and impartiality of arbitral tribunals.

V. Conclusion

The quintessence of an arbitration process is to maintain the independence and impartiality of the arbitral tribunal. Unilateral clauses in arbitration agreements result in reasonable apprehension of partiality and bias. The pristine rule of adjudicative ethics rests on the premise that the arbitral tribunal permitted by the law to try cases and controversies must not only be unbiased, but must also avoid even the appearances of bias.[119] It is, therefore, extremely crucial to ensure that the arbitration process follows the highest standards of impartiality. The author thus suggests that the process of appointment of the arbitral tribunal must incorporate the system of faceless tribunals by embracing the use of AI in the selection process.

The lack of clarity arising from the silence of statutory law on the issue of unilateral appointments of arbitrators has led to grave uncertainty. Further, as no singular decision of the Supreme Court occupies the field in this regard, it has resulted in conflicting decisions of the

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[116] Ayushi Singhal, *Appointment of Arbitrators in India – Finally Courts Divest Some Power*, KLUWER ARB. BLOG (Sept. 5, 2019), *available at* http://arbitrationblog.kluwerarbitration.com/2017/09/05/appointment-arbitrators-india-finally-courts-divest-power/?doing_wp_cron=1597346249.0300669670104980468750.

[117] Nicholas Peacock, Donny Surtani & Kritika Venugopal, *MCIA Recognised by the Supreme Court of India as an Appointing Institution*, HSF NOTES (Aug. 3, 2017), *available at* https://hsfnotes.com/arbitration/2017/08/03/mcia-recognised-by-the-supreme-court-of-india-as-an-appointing-institution/.

[118] Alberto Acevedo Rehbein, *Artificial intelligence in international arbitration: from the legal prediction to the awards issued by robots*, GARRIGUES NEWSL. (Feb. 2, 2019), *available at* https://www.garrigues.com/en_GB/new/artificial-intelligence-international-arbitration-legal-prediction-awards-issued-robots.

[119] Subhash Projects, 2006 SCC OnLine Gau 57 (India).

Supreme Court and various high courts. This ambiguity and conflict in decisions questions the legality of the appointments of arbitral tribunals by courts. This uncertainty is in the teeth of the legislative intent of maintaining the independence and impartiality of an arbitrator.

Therefore, it is imperative upon the legislature to step in to settle the debate and/or for the courts to seize the opportunity to revisit and settle the law on unilateral clauses in arbitration agreements. The much-awaited conclusion to this dispute should definitely uphold the fundamental tenets of arbitration and contractual laws by putting an end to such unequal and unilateral appointments.

JURISDICTIONAL ISSUES IN INDIAN ARBITRATION CASES: A UNIFORMIZED APPROACH

Soumil Jhanwar[*]

Abstract

One of the major goals of the legal regime of arbitration is the elimination of the need for courts in resolving arbitrable disputes. However, court assistance is very frequent in arbitration. This may be for conducting procedural supervision or testing substantive validity. In light of this, the determination of the court with valid jurisdiction is crucial. This determination is a two-step process. First, one needs to determine the seat of the arbitration. Then, the appropriate court must be decided on the basis of the law of the seat. Both steps of the process are very complex and have led to various conflicting judgments in India. This article attempts to provide rationally sound and normatively defensible tests for the determination of the seat and the appropriate court. In Part I, the article looks at the conflicts in the determination of the seat where an agreement does not explicitly mention a seat. In Part II, the article looks at the domestic conflicts in determination of jurisdiction. The aim of the article is to uniformize these two determinations in order to make the law more predictable.

I. The seat of arbitration

The most important rule of drafting an arbitration agreement is to clearly mention a seat of arbitration. The seat is of high importance as it decides the law that would govern the substantive validity and the procedure of an arbitration. Further, it decides the legal system and courts whose jurisdiction the arbitration will be subject to.[1] However, it is often found that parties fail to mention any specific seat in their arbitration agreements. This necessitates the usage of other factors in determination of the seat. The following sub-part analyses the apex court's usage of various factors in determination of the seat in the absence of specific stipulation of the same. The next sub-part assesses the relevance of the venue of an arbitration in determination of the seat.[2] The third sub-part proposes a unique six-part test to determine the seat in such cases. The last sub-part applies this test to major Supreme Court judgments on the determination of the seat, in order to examine its practical utility.

A. The divide at the Supreme Court

The landmark judgment of *Bharat Aluminium Co.* v. *Kaiser Aluminium Technical Services* ["**BALCO**"] had explained the concept of the seat of arbitration in detail.[3] It had also overruled *Bhatia International* v. *Bulk Trading SA* ["**Bhatia International**"], holding that Indian courts can only apply Part I of the Arbitration and Conciliation Act, 1996 ["**Arbitration Act**"] to an arbitration seated in India[4] and that an arbitration can only have one seat.[5] However, the five-judge bench controversially held that the judgment would only apply to contracts drafted after the date of its

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1 GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 2053 (2d ed. 2014) [*hereinafter* "BORN"].

2 This is because, as it would be discussed, the Indian Supreme Court is greatly divided on the importance of the venue in determination of the seat of an arbitration.

3 *See* Bharat Aluminium Co. v. Kaiser Aluminium Tech. Servs., Inc. (2012) 9 SCC 552, ¶¶ 71–76, 95–117 (India) [*hereinafter* "BALCO"].

4 *See id.* ¶¶ 194–196 (it is important to note that *BALCO* uses the word "place" for the "seat" of arbitration).

5 *Id.* ¶¶ 100, 110, 136–143, 153.

pronouncement.[6] This meant that many post-*BALCO* cases would still have to use the *Bhatia International* principle[7] to determine the applicability of Part I of the Arbitration Act. However, the apex court, in subsequent cases, has subtly circumvented the approach in *Bhatia International* in excluding the jurisdiction of Indian courts, even in the absence of any "*implied exclusion*" of the Part I.[8] Thus, the *BALCO* approach has indirectly been applied.[9] This approach may be challenged on grounds of stare decisis as *BALCO* and *Bhatia International*, being judgements of higher benches, would be binding on them.[10] However, it would be imprudent to do so, especially in light of the important purpose these cases seek to achieve.[11] In any case, the *BALCO* position was reaffirmed by the 2015 amendment to the Arbitration Act, which clarified that Part I is applicable to arbitrations seated outside India only in some exceptional circumstances.[12] The apex court has also stopped differentiating between pre-*BALCO* and post-*BALCO* contracts while analysing cases.[13] Thus, it is clear that the *Bhatia International* principle stands ineffective in India today, and the courts can only interfere with arbitral proceedings if the seat of arbitration is situated in India. However, this does not mean that the determination of jurisdiction of Indian courts has become any easier over time. The determination of seat remains a very complex process and may involve multiple considerations.

The Supreme Court stands divided on the relevance of the venue in the determination of seat. In *Roger Shashoua* v. *Mukesh Sharma* ["**Roger Shashoua**"], the contract had provided the venue to be

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6 *Id.* ¶ 197.

7 *See* Bhatia Int'l v. Bulk Trading S.A., (2002) 4 SCC 105, ¶¶ 21, 32 (India) [*hereinafter* "Bhatia International"] (the *Bhatia International* principle was that the Indian Courts will exercise jurisdiction over interim applications and challenges resulting from arbitrations, unless the intention of the parties was to expressly or impliedly oust the jurisdiction of Indian courts. This means that the Indian Courts would exercise concurrent jurisdiction, along with the courts of the seat of the arbitration).

8 *See, e.g.*, Videocon Indus. Ltd. v. Union of India, (2011) 6 SCC 161, ¶¶ 16–18, 23 (India); Dozco India (P) Ltd. v. Doosan Infracore Co. Ltd., (2011) 6 SCC 179, ¶ 20 (India) [*hereinafter* "Dozco India"]; Reliance Indus. Ltd. and Anr v. Union of India, (2014) 7 SCC 603, ¶¶ 45, 51, 53, 57 (India) [*hereinafter* "Reliance Industries 2013"]; Harmony Innovation Shipping Ltd. v. Gupta Coal India Ltd., (2015) 9 SCC 172, ¶¶ 45, 50–53 (India) [*hereinafter* "Harmony Innovation"]; Union of India v. Reliance Indus., (2015) 10 SCC 213, ¶ 20 (India) [*hereinafter* "Reliance Industries 2015"] (while in each of these cases, there may have been an implied choice of a foreign seat, there had been no "implied exclusion" of Part I of the Arbitration and Conciliation Act, No. 26 of 1996 (India) [*hereinafter* "Arbitration Act"]. The reasoning in these judgements seems to be that the choice of a foreign seat automatically excludes the application of Part I. However, in *Bhatia International*, the apex court had held that a choice of foreign seat does not preclude jurisdiction of Indian courts. Thus, an implied or express choice of another seat cannot be understood as an implied exclusion of jurisdiction of Indian Courts. The approach of "choice of one is exclusion of another" was rather proposed in *BALCO*, which does not apply to these cases).

9 *See* BALCO, (2012) 9 SCC 552, ¶¶ 77, 89, 198 (India) (this is because *BALCO*'s ratio was also that Part I cannot be applied to foreign seated arbitrations).

10 *See* Central Board of Dawoodi Bohra Cmty. & Anr. v. State of Maharashtra, (2005) 2 SCC 673, ¶¶ 5, 12 (India) (the judgments of larger benches are binding on the smaller ones).

11 *See* BALCO, (2012) 9 SCC 552, ¶¶ 136-143, 153 (India) (the purpose is avoidance of multiplicity and complexity in legal proceedings and upholding comity).

12 *See* Arbitration Act, No. 26 of 1996, § 2(f) (India) (this was a partial reaffirmation of the *BALCO* position, as it implied that the arbitrations seated outside India cannot be interfered with otherwise); *See* Arbitration Act, No. 26 of 1996, § 87 (India) (however, it is unclear whether this partial reaffirmation applies to contracts entered into before *BALCO*. This is because Section 87 had only barred retrospective application of the amendment to proceedings initiated before 2015); Hindustan Constr. Co. Ltd. v. Union of India, (2019) SCC OnLine SC 1520, ¶ 57 (India) [*hereinafter* "Hindustan Construction"] (further, even this bar on retrospective application was struck down by the Supreme Court as being manifestly arbitrary).

13 *See* Union of India v. Hardy Expl. & Prod. (India) Inc., (2019) 13 SCC 472, ¶ 23 (India) [*hereinafter* "Hardy Exploration"].

London and the governing law to be Indian law but had not mentioned the seat of arbitration.[14] The Court declared London to be the seat, borrowing from the reasoning of the High Court of the United Kingdom deciding the same matter.[15] This was because, *first*, the contract had provided that the arbitration be conducted in accordance with the International Chamber of Commerce ["**ICC**"] Rules of Arbitration ["**ICC Rules**"]. The choice of supranational rules for governing the proceedings meant that the ICC could determine the place/seat of the arbitration.[16] In the absence of any formal declaration by the ICC on the place/seat of an arbitration, the Court assumed that the ICC had decided London to be the seat.[17] *Second*, London is internationally regarded as an ideal seat for arbitral awards due to the legal framework of England being favourable to arbitration. Thus, the parties, being rational businesspersons, would have intended London to be the seat.[18] The Court, therefore, did not rely on the approach followed in *Bhatia International*.

In *Imax Corporation* v. *E-City Entertainment (India) (P) Ltd.* ["**Imax Corporation**"], the Supreme Court dealt with a similar factual scenario and reached the same decision.[19] However, the rationale employed was different. The Court used the *Bhatia International* approach and held that the express choice of the ICC Rules meant that the parties intended to exclude the jurisdiction of India's courts.[20]

In 2018, the apex court in *Union of India* v. *Hardy Exploration* ["**Hardy Exploration**"] dealt with a factual situation which was similar to those in *Roger Shashoua* and *Imax Corporation*. The governing law was Indian, the venue was Kuala Lumpur, and the proceedings were to be governed by the United Nations Commission on International Trade Law Model Law on International Commercial Arbitration, 1985 ["**Model Law**"].[21] However, the three-judge bench differed from the previous two benches, in holding that the determination of venue cannot automatically be used to infer a decision on seat, in the absence of other relevant concomitant factors coinciding with the venue.[22] The Court also held that the Model Law does not automatically confer the status of seat on the pre-decided venue, as it prescribes careful consideration of convenience of the parties in determination of the seat.[23] The Court held that the award could be challenged in

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14 Roger Shashoua v. Mukesh Sharma, (2017) 14 SCC 722, ¶¶ 69–70 (India) [*hereinafter* "Shashoua India"].

15 Roger Shashoua v. Mukesh Sharma [2009] EWHC (Comm) 957 [33]–[34] (Eng.) [*hereinafter* "Shashoua UK"].

16 *See* International Chamber of Commmerce (ICC), Rules of Arbitration 1998, art. 14(1), *available at* https://www.jus.uio.no/lm/icc.arbitration.rules.1998/portrait.pdf [*hereinafter* "ICC Rules 1998"] (while Article 14(1) of the ICC Rules 1998 mentioned the word 'place', it is well-established that for the purpose of the provision, 'place' means the seat of the arbitration. It is important to note that the ICC Rules 1998 would apply as the agreement was signed in 1998 and the arbitral proceedings had begun before the 2012 Rules came into being. Currently, the 2017 ICC Rules are available for use by parties).

17 Shashoua India, (2017) 14 SCC 722, ¶¶ 29–30, 69–72 (India).

18 *Id.* ¶¶ 37, 46.

19 Imax Corp. v. E-City Entm't (India) (P) Ltd., (2017) 5 SCC 331, ¶¶ 31–33 (India) [*hereinafter* "Imax Corporation"].

20 *Id.* ¶¶ 28, 31, 33.

21 Hardy Exploration, (2019) 13 SCC 472, ¶¶ 26–27 (India); *See* United Nations Commission on International 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* "Model Law"] (the Model Law is similar to the ICC Rules as it also gives the arbitral tribunal the right to decide the seat if the parties have not already specified it).

22 *See* Hardy Exploration, (2019) 13 SCC 472, ¶¶ 29–30 (India).

23 *See id.* ¶¶ 29–30 (meaning thereby that the arbitral tribunal did not have complete discretion in deciding the matter).

Indian courts.[24] However, it provided no rationale for or analysis on why the substantive law must be seen as the relevant criterion for deciding the seat.[25]

In *BGS SGS Soma JV* v. *NHPC Ltd.* ["**BGS SGS Soma**"], the Court opined that the bench in *Hardy Exploration* had erred in ignoring *Roger Shashoua* while determining the seat.[26] The Court used venue and institutional arbitration rules to reach its conclusion.[27] The Court opined that whenever the venue has been mentioned along with the words 'shall be held' or 'arbitration proceedings',[28] it would, in fact, be interpreted that the venue was intended to be the seat of the arbitration.

Most recently, in *Mankastu Impex Private Limited* v. *Airvisual Ltd.* ["**Mankastu Impex**"], the Court acknowledged the conflicting positions of law that persist in the country.[29] In this case, the arbitration agreement had provided for the proper law to be Indian and the exclusive jurisdiction of the courts of India.[30] However, the Court decided that the seat was situated in Hong Kong because it was mentioned as the "*place*". The rationale was that the clause had mentioned that the arbitration "*shall finally be resolved by arbitration administered*" in Hong Kong.[31] This was held to have conferred the status of "*seat*" on Hong Kong.[32] The Court seemed to have followed the *BGS SGS Soma* approach of the use of contractual language in relation to the venue, in the determination of seat.

B. Relevance of the venue

Evidently, the aforementioned judgments evince no clear unified test or position of law. One common thread amongst all of them is their detailed discussion on the importance of the venue of an arbitration.[33] Thus, it must be assessed whether the venue should be the paramount consideration in the determination of seat.

It will be pertinent to look at the factors usually considered while determining the venue of an arbitration. *First*, geographical neutrality is very important. Venues are usually neutral locations so that one party is not unnecessarily advantaged during the proceedings.[34] *Second*, convenience of the parties is relevant. A venue must be a location which is convenient for both the parties to

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24 *See id.* ¶¶ 33–34 (this, in light of *BALCO*, implies that India is the seat of the arbitration).

25 *See supra* text accompanying notes 3–13 (while one may contend that the Court decided this based on the *Bhatia International* principle, this contention would be erroneous for two reasons: (1) the judgment does not hint at the *Bhatia International* principle being used or applied; and (2) the *Bhatia International* approach has been watered down by subsequent judgments).

26 *See* BGS SGS Soma JV v. NHPC Ltd., 2019 SCC OnLine SC 1585, ¶¶ 93–96 (India) [*hereinafter* "BGS SGS Soma"].

27 *Id.* ¶¶ 98–99.

28 *See id.* ¶ 89 (according to the Court, this would be because it would imply that all the proceedings are to be held at that particular place).

29 *See* Mankastu Impex Pvt. Ltd. v. AirVisual Ltd., 2020 SCC OnLine SC 301, ¶¶ 10, 13, 14 (India) [*hereinafter* "Mankastu Impex"].

30 *Id.* ¶¶ 8–9.

31 *Id.* ¶ 21.

32 *Id.* ¶¶ 19–23.

33 *See*, *e.g.*, Shashoua India, (2017) 14 SCC 722, ¶¶ 63–74 (India); Hardy Exploration, (2019) 13 SCC 472, ¶¶ 22–36 (India); BGS SGS Soma, 2019 SCC OnLine SC 1585, ¶ 64 (India).

34 REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION LAW: STUDENT VERSION 166 (Nigel Blackaby, Constantine Partasides, Alan Redfern & Martin Hunter eds., 6th ed. 2015) [*hereinafter* "BLACKABY ET AL."]; Loukas A. Mistelis, *Arbitral Seats – Choices and Competition*, *in* INTERNATIONAL ARBITRATION AND INTERNATIONAL COMMERCIAL LAW: SYNERGY, CONVERGENCE AND EVOLUTION 376–377 (Stefan M. Kröll, Loukas A. Mistelis, Pilar Perales Viscasillas, Vikki M. Rogers eds., 2011) [*hereinafter* "Mistelis"].

access.[35] *Third*, the venue must have necessary facilities for the smooth conduct of an arbitration.[36]

In contradistinction, the most important aspect in determining the seat is the legal framework and the efficiency of courts of the seat.[37] While convenience of the parties may also be a consideration, it is not as crucial as the legal framework itself.[38] It is evident that the overall considerations in the determination of seat and venue differ. Further, the choice of substantive law may also be indicative of the choice of seat in some cases.[39] Hence, in the case of conflict between substantive law and venue, there needs to be a deeper analysis.[40]

The apex court has attempted to use phrases like "*shall be administered at*" and "*arbitral proceedings shall be held at*" to hold that the intent was to confer the status of seat on the venue.[41] However, this is manifestly erroneous, as seat of an arbitration is a legal concept and not a geographical one.[42] The choice of venue cannot be used to automatically imply a choice of seat, especially in the presence of other indicators that may point to the contrary.[43]

Admittedly, internationally, high importance is attached to the venue in determination of the seat.[44] However, this has often been because of the other concomitant factors being attached to

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[35] JULIAN DAVID MATHEW LEW QC, LOUKAS A. MISTELIS & STEFAN M. KRÖLL, COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION 361 (2003); MISTELIS, *supra* note 34, at 376–377.

[36] BLACKABY ET AL., *supra* note 34, at 288.

[37] *See* BORN, *supra* note 1, at 2053 (the legal framework of the seat of an arbitration is of much relevance as it determines the national legislation applicable to an arbitration, the jurisdiction and scope of interference of courts; the internal functioning of an arbitration, and the law determining the validity of the arbitral proceedings and the agreement to arbitrate); White & Case & School of Int'l Arb., Queen Mary Univ. of London, 2010 International Arbitration Survey: Choices in International Arbitration, *available at* http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2010_InternationalArbitrationSurveyReport.pdf [*hereinafter* "2010 International Arbitration Survey Report"]; BLACKABY ET AL., *supra* note 34, at 166–167; H. HOLTZMANN, *The Importance of Choosing the Right Place to Arbitrate An International Case*, *in* PRIVATE INVESTORS ABROAD – PROBLEMS AND SOLUTIONS IN INTERNATIONAL BUSINESS 183, 192–197 (M. Bender ed., 1977); Parties usually prefer a seat that has consistency in laws, predictability in outcomes and expediency in legal proceedings. *See, e.g.*, C v. D [2007] EWCA (Civ) 1282 [16], [30] (Eng.) [*hereinafter* "C v. D"]; Fiona Trust & Holdings Corp. v. Privalov [2007] UKHL 40 [6] (appeal taken from Eng.) [*hereinafter* "Fiona Trust"].

[38] *See id.*; BORN, *supra* note 1, at 2052–2053; Michael Hwang, SC & Fong Lee Cheng, *Relevant Considerations in Choosing the Place of Arbitration*, 2 ASIAN INT'L ARB. J. 195, 201 (2008); Kazuo Iwasaki, *Selection of Situs: Criteria and Priorities*, 2 ARB. INT'L 57, 57–60 (1986).

[39] *See* BORN, *supra* note 1, at 1617 (this is when the parties would have assumed that the substantive law would govern the whole agreement including the arbitration agreement); Hardy Exploration, (2019) 13 SCC 472 ¶ 36 (India); Sumitomo Heavy Indus. Ltd. v. ONGC Ltd., (1998) 1 SCC 305, ¶¶ 15–17 (India) [*hereinafter* "Sumitomo"]; Nat'l Thermal Power Corp. v. Singer Corp., (1992) 3 SCC 551, ¶¶ 49–50 (India) [*hereinafter* "NTPC-Singer"].

[40] *See, e.g.*, Hardy Exploration, (2019) 13 SCC 472, ¶¶ 34–35 (India); Enercon Gmbh v. Enercon India, (2014) 5 SCC 1, ¶¶ 40, 90, 92, 113, 130 (India) [*hereinafter* "Enercon"]; Braes of Doune Wind Farm (Scotland) Ltd. v. Alfred McAlpine Bus. Sers. Ltd. [2008] EWHC (TCC) 426 [12], [14] (Eng.) [*hereinafter* "Braes of Doune"].

[41] *See* Shashoua India, (2017) 14 SCC 722, ¶¶ 45, 65 (India); Mankastu Impex, 2020 SCC Online SC 301, ¶¶ 22–23 (India).

[42] BORN, *supra* note 1, at 1595–1597 (this assertion will be elaborated upon further in Part II(B)).

[43] *See* cases cited in *supra* note 40.

[44] *See, e.g.*, Shashoua UK, [2009] EWHC (Comm) 957 [26]–[34] (Eng.); Shashoua India, (2017) 14 SCC 722, ¶¶ 69–75 (India); Imax Corporation, (2017) 5 SCC 331, ¶ 33 (India) ; C v. D, [2007] EWCA (Civ) 1282 [16], [30] (Eng.); Atlas Power v. NTDC [2018] EWHC (Comm) 1052 [38]–[49] (Eng.) [*hereinafter* "Atlas Power"].

the venue.[45] These other aspects of an arbitration agreement must be analysed, along with the venue and the substantive law in order to determine the seat.

C. The proposed test

In addition to the venue, various other factors might be important in the determination of the seat. These factors must be ranked in the order of their similarity and affinity with the seat. The factors that are highly indicative of the choice of seat are ranked higher. A six-step test is proposed to look at these factors in a hierarchical manner.[46]

Step 1: The arbitration clause may grant exclusive jurisdiction to the courts of a country[47] or provide that a specific national legislation would govern an arbitration.[48] As stated, seat is a legal concept. Determination of national legislation is akin to determination of the seat.[49] Further, determination of seat is also the same as saying that a specific country's courts will have exclusive jurisdiction.[50] Conferment of exclusive jurisdiction must also lead the inference of determination of seat. These positions are not contradictory as usually national legislations provide for jurisdiction of the same country's courts exclusively.[51] Thus, if national legislation or exclusive jurisdiction is mentioned, that shall automatically decide the seat.[52]

Step 2: In the absence of such prescriptions, it must be seen whether the substantive law and the venue of the arbitration lie in the same country. Parties may choose substantive law, while presuming that it will apply to the arbitral proceedings as well.[53] At the same time, geographic convenience is a factor that is common in the determination of seat and venue, which may in

45 In Shashoua India, (2017) 14 SCC 722, ¶¶ 69–72 (India), Shashoua UK, [2009] EWHC (Comm) 957 [33] (Eng.) and Atlas Power, [2018] EWHC (Comm) 1052 [47] (Eng.), the venue was declared as the seat as such prescription was supported by the choice of supranational rules of arbitration. In C v. D, [2007] EWCA (Civ) 1282 [1], [16], [30] (Eng.) and Shashoua UK, [2009] EWHC (Comm) 957 [34] (Eng.), the Court used the rationale of the general normative superiority of the London courts and the concept of Bermuda Arbitration to hold that in the absence of other factors, London should be the seat. In C v. D, [2007] EWCA (Civ) 1282 [16]–[17] (Eng.), the Court also used the fact that English law would govern the agreement to arbitrate to hold England as the seat. In Imax Corporation, (2017) 5 SCC 331, ¶ 12 (India), the Tribunal had decided upon a seat and thus that was upheld. *See* cases cited in *infra* note 52.

46 Every further step is only to be used when the prior steps do not help in determination of the seat.

47 Braes of Doune, [2008] EWHC (TCC) 426 [4]–[8] (it was mentioned that the courts of England will have exclusive jurisdiction; this was held to imply that London is the seat).

48 *See, e.g.,* Bharat Aluminium Co. v. Kaiser Aluminium Tech. Servs., Inc. (2016) 4 SCC 126, ¶¶ 3–4 (India) [*hereinafter* "BALCO II"] (the contract stated that English Arbitration law would apply); Enercon, (2014) 5 SCC 1, ¶ 114 (India) (it was mentioned that the Arbitration Act would apply).

49 BALCO II, (2016) 4 SCC 126, ¶¶ 12, 16 (India); Enercon, (2014) 5 SCC 1, ¶¶ 97, 101, 147, 152 (India); *see also* Naviera Amazonica Peruana SA v. Compania International de Seguros del Peru [1988] 1 Lloyd's Rep. (CA) 116 (Eng.) [*hereinafter* "Naviera Amazonica"].

50 Braes of Doune, [2008] EWHC (TCC) 426 [4]–[8] (Eng.); *See, e.g.,* BALCO, (2012) 9 SCC 552, ¶¶ 106, 110 (India) (affirming Braes of Doune and Shashoua UK); A v. B, [2007] 1 Lloyd's Rep. 237 [111] (Eng.) (many cases have also recognized that determination of seat is akin to the exclusive jurisdiction of the courts of a country).

51 Arbitration Act, No. 26 of 1996, § 2(1)(e)(i)–(ii) (India); Arbitration Act, 1996, c. 23, § 105 (U.K.); Arbitration Act 2001, § 2(1) (Sing.).

52 *See* Union of India v. McDonnell Douglas Corporation [1993] 2 Lloyd's Rep. 48 (Eng.) [*hereinafter* "McDonnell Douglas"] (while in some cases the express stipulation of legislation may not be taken as determination of the seat, such is only because of an express choice of a conflicting seat); Naviera Amazonica [1988] 1 Lloyd's Rep. (CA) 116 (Eng.) (similarly, when another seat is clearly provided, an exclusive jurisdiction would not decide the seat); U & M Mining Zambia Ltd. v. Konkola Copper Mines plc [2013] EWCH 260 [25], [38], [45], [47]–[48] (Eng.).

53 NTPC-Singer, (1992) 3 SCC 551, ¶¶ 15, 22–23, 49–50 (India); Hardy Exploration, (2019) 13 SCC 472, ¶¶ 34–36 (India); Sumitomo, (1998) 1 SCC 305, ¶¶ 15–17 (India).

some cases lead to concurrence of both.[54] While substantive law or venue alone may not be individually sufficient, their concurrence raises a strong presumption that the law of the chosen country would also be the *lex arbitri*.[55] This is because parties are assumed to be rational businesspersons, who could not have intended to involve multiple laws and locations when a simpler approach is possible.[56]

Step 3: When the substantive law and venue indicate different locations, the law governing the arbitration agreement must be looked at. This is because determination of the law governing the arbitration agreement depends on factors that are very similar to the factors used in determination of a seat.[57] While choosing each of these laws, the parties will be conscious of their treatment of arbitrability, validity of an agreement, strict compliance to (or flexible interpretation of, as the case may be) the contractual timelines, and treatment of costs, amongst others.[58] The law governing an arbitration agreement also coincides with the *lex arbitri* in most cases.[59]

Step 4: The aforementioned factors have been used to infer the implied intention of the parties in the determination of seat. In the absence of such factors, one needs to look for factors that do not imply an obvious choice of seat. Next, one must look for the stipulation of supranational rules. Supranational rules usually provide for the tribunal to determine an arbitral seat.[60] In such cases, the tribunal may be better suited to choose a seat because of its expertise and impartiality.[61] This does not contravene party autonomy as institutional rules are chosen by parties

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54 *See* cases cited in *supra* note 44.

55 *See, e.g.*, Eitzen Bulk A/S v. Ashapura Minechem Ltd., (2016) 11 SCC 508, ¶ 33 (India) [*hereinafter* "Eitzen Bulk"]; Dozco India, (2011) 6 SCC 179, ¶¶ 4, 15, 18 (India).

56 NTPC-Singer, (1992) 3 SCC 551, ¶ 15 (India); C v. D, [2007] EWCA (Civ) 1282 [1], [16], [30] (Eng.); Fiona Trust, [2007] UKHL 40 [6] (appeal taken from Eng.); Shashoua India, (2017) 14 SCC 722, ¶ 69 (India).

57 *See* BLACKABY ET AL., *supra* note 34, at 159–163; BORN, *supra* note 1, at 2088; C v. D, [2007] EWCA (Civ) 1282 [22], [26], [28] (Eng.); Enka Insaat ve Sanayi AS v. OOO Insurance Co. Chubb [2020] EWCA (Civ) 574 [35]–[40] (Eng.) [*hereinafter* "Enka"]; *Sul América Cia Nacional de Seguros SA v. Enesa Engenharia SA* [2012] EWCA (Civ) 638 [18], [32] (Eng.) [*hereinafter* "Sul América"]; Habas Sinai Ve Tibbi Gazlar Istihsal Endustrisi AS v. VSC Steel Co. Ltd. [2014] 1 Lloyd's Rep. 479 [101] (Eng.) [*hereinafter* "Habas Sinai"]; Ian Glick & Niranjan Venkatesan, *Choosing the Law Governing the Arbitration Agreement*, *in* JURISDICTION, ADMISSIBILITY AND CHOICE OF LAW IN ARBITRATION: LIBER AMICORUM MICHAEL PRYLES 131, 141–150 (Neil Kaplan & Michael Moser eds., 2018) (this is because there are many overlaps in the purposes of the law governing the arbitration agreement and the law of the seat, and that they are generally assumed to have intended to be the same).

58 *See* Glick & Niranjan, *supra* note 57, at 136, 142 (this is because both these laws may simultaneously affect all these issues).

59 C v. D, [2007] EWCA (Civ) 1282 [22], [26], [28] (Eng.); *Sul América,* [2012] EWCA (Civ) 638 [18], [32] (Eng.); Enka, [2020] EWCA (Civ) 574 [35]–[40] (Eng.); Habas Sinai, [2014] 1 Lloyd's Rep. 479 [101] (Eng.).

60 ICC Rules of Arbitration 2017, art. 19(1), *available at* https://cdn.iccwbo.org/content/uploads/sites/3/2017/01/ICC-2017-Arbitration-and-2014-Mediation-Rules-english-version.pdf.pdf; London Court of International Arbitration (LCIA), Arbitration Rules 2014, art. 16.1, *available at* https://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2014.aspx; Permanent Court of Arbitration (PCA), Arbitration Rules 2012, art. 18(1), *available at* https://docs.pca-cpa.org/2015/11/PCA-Arbitration-Rules-2012.pdf; UNCITRAL Arbitration Rules 2010, G.A. Res. 65/22, art. 18; International Centre for Dispute Resolution (ICDR), Arbitration Rules 2014, art. 13, *available at* https://www.adr.org/sites/default/files/ICDR%20Rules_0.pdf; Hong Kong International Arbitration Centre (HKIAC), Administered Arbitration Rules 2018, art. 14(1), *available at* https://www.hkiac.org/sites/default/files/ck_filebrowser/PDF/arbitration/2018_hkiac_rules.pdf; Singapore International Arbitration Centre (SIAC), Rules of Arbitration 2016, art. 21, *available at* https://www.siac.org.sg/our-rules/rules/siac-rules-2016.

61 BORN, *supra* note 1, at 2094–2096; Anibal Sabater, *When Arbitration Begins Without A Seat*, 27(5) J. INT'L ARB. 443, 466 (2010).

themselves,[62] and moreover, all major institutional rules subject the choice of seat to an express choice by parties themselves.[63] Determination through such rules has been validly recognized by courts as seat.[64]

Step 5: In the absence of other factors, if only either of the substantive law or the venue has been mentioned in an agreement, then the mentioned place must be determined as the seat.[65] While both these factors counterbalance each other, the presence of only one of them would raise a strong presumption of seat, in the absence of the other. Again, this is because parties are to be understood as rational businesspersons who would not unnecessarily choose conflicting laws and locations.[66]

Step 6: In all the other cases, the intent of the parties must be traced through other surrounding factual scenarios. This would mean that a "*subtle intent*" test would need to be applied in order to resolve this conflict. The test would involve a combined analysis of the language of the contract (implied intent),[67] the analysis of the surrounding facts (closest connection),[68] and normative comparison of the two locations (normative superiority).[69] Thus, in such cases, the case as a whole would need to be looked into to determine the intention of the parties.[70]

D. Retrospective application of the test

For this test to be useful, it must help simplify the determination of seat. In *Mankastu Impex*, the parties had mentioned that the courts of New Delhi would have the exclusive jurisdiction over any proceedings.[71] Using Step 1, this would negate the need to even look at the venue of the

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62 10% of ICC Arbitrations use institutional rules to determine seat. *See* Int'l Chamber of Com., *2012 Statistical Report*, 24(1) ICC CT. BULL. 5, 14 (2013).

63 *See* sources cited in *supra* note 60.

64 *See*, *e.g.*, Shashoua UK, [2009] EWHC (Comm) 957 [27] (Eng.); Shashoua India, (2017) 14 SCC 722, ¶¶ 67–71 (India); Eitzen Bulk, (2016) 11 SCC 508 ¶¶ 26–29, 32 (India); Atlas Power, [2018] EWHC (Comm) 1052 [47]–[49] (Eng.).

65 *See* BGS SGS Soma, 2019 SCC Online SC 1585, ¶ 64 (India); NTPC-Singer, (1992) 3 SCC 551, ¶¶ 49–50 (India).

66 NTPC-Singer, (1992) 3 SCC 551, ¶ 15 (India); C v. D, [2007] EWCA (Civ) 1282 [1], [3], [16], [30] (Eng.); Fiona Trust, [2007] UKHL 40 [6] (appeal taken from Eng.); Shashoua India, (2017) 14 SCC 722 ¶ 69 (India).

67 *See* Harmony Innovation, (2015) 9 SCC 172, ¶¶ 20, 37–38 (India); Shashoua India, (2017) 14 SCC 722, ¶ 72 (India); McDonnell Douglas, [1993] 2 Lloyd's Rep. 48 (Eng.).

68 This is akin to the usage of the closest and most real connection test in light of the factual scenario, as against contractual prescriptions. *See* Enercon, (2014) 5 SCC 1, ¶¶ 98, 130–135 (India); NTPC-Singer, (1992) 3 SCC 551, ¶¶ 16–17, 44 (India); Naviera Amazonica, [1988] 1 Lloyd's Rep. (CA) 116 (Eng.); Sul América, [2012] EWCA (Civ) 638 [5], [6], [13], [15] (Eng.).

69 *See* C v. D, [2007] EWCA (Civ) 1282 [1], [16], [30] (Eng); Shashoua UK, [2009] EWHC (Comm) 957 [33] (Eng.).

70 The final test is:
(1) If the agreement prescribes the exclusive jurisdiction of courts of a country or the governance of arbitration by the arbitration law of a country, then that country becomes the seat of the arbitration;
(2) Subject to the first step, if the venue and the substantive law coincide, then the substantive law will also be the *lex arbitri*;
(3) Subject to the first two steps, if the parties have decided on a law governing the agreement to arbitrate, then that law will be the law of the set;
(4) Subject to the first three steps, if the seat has been expressly decided by the tribunal by using the chosen supranational rules of arbitration, then the same shall be finalised as the valid seat of the arbitration;
(5) Subject to the first four steps, if only either of substantive law or venue is given, then that factor must be seen as the conclusive determination of seat;
(6) Subject to the first five steps, the adjudicator must look at: the language of the contract; the surrounding facts of the case and the normative comparison of the conflicting locations. These factors must be collectively used to discern the subtle intention of the parties for the determination of seat.

71 Mankastu Impex, 2020 SCC Online SC 301, ¶¶ 26–27(India).

proceedings and confer the status of seat on New Delhi. In *BGS SGS Soma*, the contract had only mentioned the venue of arbitration.[72] In such a case, it is obvious that Step 5 of the test would be used to hold that the venue is, in fact, the seat of the arbitration.

In *Hardy Exploration*, different venue and governing laws had been mentioned. While the Model Law was to govern the arbitral proceedings, the tribunal had not determined the seat.[73] In this scenario, the subtle intent test must be used, in furtherance of Step 6. As a matter of fact, both the parties were Indian. Moreover, Malaysia is not an arbitration hub like London. Thus, India should be the seat in such a scenario. Alternatively, it could also be argued that since the supranational rules provided for the determination of seat in consideration of the "*convenience of parties*," India should be the seat.[74]

In factual scenario of *Roger Shashoua*, one may use the Tribunal's determination of seat under Step 4 of the test to infer London as the seat. However, the Tribunal had, in fact, not even considered the question of seat.[75] Thus, Step 6 would be applied to look at the subtle intent test. Mukesh Sharma was Indian, whereas Roger Shashoua was English. In such a situation, the normative comparison of India and London would imply that the parties wanted London as the seat.[76] Thus, London should be the seat.

In *Imax Corporation*, the seat had categorically been determined in pursuance of the ICC Rules by the Tribunal.[77] Thus, Step 4 would make London the seat. In *Enercon Gmbh.* v. *Enercon India* ["**Enercon**"], the governing statute was mentioned as India,[78] thus Step 1 would apply directly to make India the seat. In *Eitzen Bulk A/S* v. *Ashapura Minechem Ltd.*, Step 2 would be used to make England the seat, as both the substantive law and the venue were in England.[79] In both the *Reliance Industries* cases,[80] since the governing law of the arbitration agreement was English, the use of Step 3 would make London the seat.

With the exception of *Mankastu Impex*, the use of the test has thus led to identical conclusions as those arrived at in the actual cases. The exception of *Mankastu Impex* is justified. This is because the conferment of the status of seat on Hong Kong completely ousted the jurisdiction of the Delhi courts.[81] This rendered Clause 17.1 of the contract ineffective and redundant.[82] This was in manifest disregard of the express intention of the parties and thus, cannot be held to be the correct interpretation. This shows that the varied and often conflicting tests in various cases must be replaced with this simple six-part test in order to assess the intention of the parties in

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72 BGS SGS Soma, 2019 SCC Online SC 1585, ¶ 3 (India).
73 Hardy Exploration, (2019) 13 SCC 472, ¶¶ 25–26 (India).
74 This is because it would be more convenient for both the parties to hold the proceedings in India.
75 Shashoua India, (2017) 14 SCC 722, ¶ 68 (India).
76 This is because London is internationally renowned as an ideal seat for arbitration.
77 Imax Corporation, (2017) 5 SCC 331, ¶ 18 (India).
78 Enercon, (2014) 5 SCC 1, ¶ 107 (India).
79 Eitzen Bulk, (2016) 11 SCC 508, ¶ 2 (India).
80 Reliance Industries 2013, (2014) 7 SCC 603, ¶ 7 (India); Reliance Industries 2015, (2015) 10 SCC 213, ¶ 2 (India).
81 *See* Mankastu Impex, 2020 SCC Online SC 301, ¶¶ 26–27 (India) (this is because all the disputes were to be resolved by arbitration).
82 *See id.* ¶ 26. Further, it must be emphasized that contracts must be interpreted in such a manner that none of the clauses are rendered redundant. *See*, *e.g.*, M Arul Jothi v. Lajja Bal, (2000) 3 SCC 723, ¶ 10 (India); Insil Hydro Power & Manganese Ltd. v. State of Kerala, (2019) SCC OnLine SC 1194, ¶ 37 (India).

determination of the seat.[83] This would simplify and uniformize the process of determination of the seat, as it has generally proven to be in line with the outcomes that have been rationalised by the apex court using different tests. But the determination of seat is not the end of the process of jurisdictional determination. If the seat is determined to be India, the next big question is: which court within India would exercise jurisdiction over the relevant arbitral proceedings?

II. Domestic conflicts in determination of jurisdiction

Various sections of the Arbitration Act enable parties to go to a "*court*" for legal remedy.[84] Section 2(1)(e)(i) and 2(1)(e)(ii) mention that the appropriate court would be the court "*having jurisdiction to decide the questions forming the subject matter of the arbitration if the same had been the subject matter of a suit*".[85] While most of the other parts of the Arbitration Act are borrowed from the Model Law, the definition of "*court*" in India is unique. The following sub-part looks at the various tests used by the Supreme Court in the determination of the correct meaning of "*court*". The second sub-part proposes the ideal approach to be used for this determination, by analysis of various cases.

A. Tests used by the Supreme Court

The meaning of "*court*" has been contentious since the inception of the new arbitration regime in 1996. The earliest cases indicated that the words "*questions forming subject matter of the arbitration*" connoted the issues that led to the arbitration.[86] Thus, the earlier interpretation required the court to assume that the parties were bringing those issues straight to a court of law, with a deeming fiction of non-existence of the arbitral award itself.[87] This would require the court to test jurisdiction on the basis of the Code of Civil Procedure, 1908 ["**CPC**"] or the Letters Patent, as the case may be.[88] Thus, the test would be whether the relevant court presides over the

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83 This is a very simplified test and thus may be subject to exceptions. The exclusive jurisdiction to the courts of a country may not be as important in cases where the arbitration clause in itself is extremely narrow. The mention of a national legislation may not be relevant when it is evident that such has been done only for procedural aspects of the law and not the supervisory aspects. *See*, *e.g.*, McDonnell Douglas [1993] 2 Lloyd's Rep. 48 (Eng.); Process and Indus. Dev. Ltd. v. Federal Republic of Nigeria [2019] EWHC (Comm) 2241 (Eng.); *See* BLACKABY ET AL., *supra* note 34, at 158–159 (the law governing the agreement to arbitrate may not be important when it is merely chosen to be in line with the substantive law of the contract); Mistelis, *supra* note 34 (venue may not be relevant when it is solely chosen for the purpose of convenience or neutrality); C v. D, [2007] EWCA (Civ) 1282 [1], [16], [30] (Eng.) (substantive law may not be relevant when it is clear that the parties could not, being rational businesspersons, have intended the same in the scenario); Hardy Exploration, (2019) 13 SCC 472, ¶¶ 32–34 (India) (determination through institutional rules may not be important when the tribunal does not follow the rules in determining the seat or determines an absurd seat). Thus, while using the test one would need to look out for the factors that negate the importance of any element of the test. This can be done by looking at why any specific element has been chosen. The test is flexible and can be altered accordingly.

84 Arbitration Act, No. 26 of 1996, §§ 8, 9, 13, 14, 27, 29A, 34 (India).

85 *Id.* §§ 2(1)(e)(i)–2(1)(e)(ii) (India) (the arbitration act differentiates between international commercial arbitrations and other arbitrations while defining courts. However, the definitions are almost identical with only the superiority of the court changing).

86 Khaleel Ahmed Dakhani v. Hatti Gold Miners Co. Ltd., (2000) 3 SCC 755, ¶ 6 (India) [*hereinafter* "Khaleel Ahmed"]; JSW Steel v. Jindal Praxair Oxygen Co. Ltd, (2006) 11 SCC 521, ¶¶ 66–68 (India) [*hereinafter* "JSW Steel"]; Swastik Gases (P) Ltd. v. Indian Oil Corp. Ltd., (2013) 9 SCC 32, ¶ 28 (India) [*hereinafter* "Swastik Gases"]; Fountain Head Developers v. Maria Arcangela Sequeira, 2007 SCC Online Bom 340, ¶¶ 6–7, 10–16 (India).

87 *Id.*; *See* Vaden v. Discover Bank, 556 U.S. 49, 129 S. Ct. 1262 (2009), ¶ (b) [*hereinafter* "Vaden"] (this test is very similar to the "look through" jurisdiction approach suggested by the US Supreme Court in the *Vaden* case).

88 Khaleel Ahmed, (2000) 3 SCC 755, ¶ 6 (India); JSW Steel, (2006) 11 SCC 521, ¶¶ 19, 32, 36–37, 66–68 (India); Swastik Gases, (2013) 9 SCC 32, ¶¶ 28–29 (India).

location of the cause of action or the location[89] of the respondent.[90] This test is based on the golden rule of interpretation,[91] and shall be referred to as the 'CPC Test'.

However, the CPC Test received a setback after the judgment in *BALCO*.[92] The five-judge bench in *BALCO* opined that Section 2(1)(e) must be interpreted keeping in mind the principle of party autonomy enshrined in Section 20 of the Arbitration Act.[93] The two courts having concurrent jurisdiction would, therefore, be the court where the cause of action is located and the court where the arbitration takes place.[94] This shall be referred to as the '*BALCO* Test'.[95]

The leading case interpreting *BALCO* is that of *Indus Mobile Distribution Pvt. Ltd.* v. *Datawind Innovations Pvt. Ltd.* ["**Indus Mobile**"].[96] In *Indus Mobile*, the performance of the contract was supposed to be in Delhi and Chennai, and the contract conferred exclusive jurisdiction on the courts of Mumbai.[97] The seat of arbitration was held to be in Mumbai. The Court used certain parts of *BALCO* to interpret that the seat of arbitration is akin to an exclusive jurisdiction clause.[98] Thus, the courts presiding over the seat would have exclusive jurisdiction.[99] However, the Court did not take note of the specific test in *BALCO* itself, which was a different and a wider test.[100] The Court expressly precluded any scope of application of the principles of the CPC in determination of jurisdiction.[101] The test in *Indus Mobile* will be called the 'Seat Test'.

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89 *See* CODE CIV. PROC. (1908), § 20 (India) (providing that the location of the respondent includes the residence (in case of a person), main office (in case of a company) and place of conduct of business of the respondent).

90 *See* CODE CIV. PROC. (1908), §§ 19–20 (India); Letters Patent of the High Court of Judicature at Calcutta (1862), § 12 (India); Letters Patent of the High Court of Judicature at Madras (1865), § 12 (India); Letters Patent of the High Court of Judicature at Bombay (1866), § 12 (India) (for example, if the cause of action of a contractual breach only existed in New Delhi, the defendant resided in Mumbai, the seat of the arbitration was Kolkata and the venue of the arbitration was Chennai, then only courts of New Delhi and Mumbai would have the jurisdiction).

91 *See* FRANCIS BENNION, STATUTE LAW 81–82 (1980) (according to Bennion's Golden Rule of interpretation of statutes, the statute must be interpreted literally, unless such interpretation leads to an absurdity. Since in this case, the literal interpretation does not seem to lead to an absurd outcome, the same interpretation must be used).

92 BALCO, (2012) 9 SCC 552 (India).

93 *See id.* ¶ 96 (thus, according to the Court, the "subject-matter" of an arbitration also included the venue, apart from the cause of action).

94 *Id.* (the Court also gave an example in furtherance of this. In a case where the causes of action arose in different cities, but the arbitration proceedings had been conducted in New Delhi, there would be simultaneous jurisdiction of the courts presiding the cause of action and those in New Delhi).

95 This test has also been used in several landmark high court cases. *See*, *e.g.*, Konkola Copper Mines v. Stewarts & Lloyds of India Ltd., 2013 SCC Online Bom 777, ¶¶ 56–59 (India) [*hereinafter* "Konkola Copper Mines"]; Antrix Corp. v. Devas Multimedia, 2018 SCC Online Del 9338, ¶¶ 51–53 (India) [*hereinafter* "Antrix Corporation"].

96 Indus Mobile Distrib. Pvt. Ltd. v. Datawind Innovations Pvt. Ltd., (2017) 7 SCC 678 (India) [*hereinafter* "Indus Mobile"].

97 *Id.* ¶¶ 2, 21.

98 *Id.* ¶¶ 10, 13, 17, 19.

99 *See* Konkola Copper Mines, 2013 SCC Online Bom 777, ¶¶ 56–59 (India); BGS SGS Soma, 2019 SCC Online SC 1585, ¶¶ 56–61 (India) (the Court also gave an example in furtherance of this. In a case where the causes of action arose in different cities, but the arbitration proceedings had been conducted in New Delhi, there would be simultaneous jurisdiction of the courts presiding the cause of action and those in New Delhi); *id.* ¶¶ 19–20 (while in *Indus Mobile*, the Court does discuss the freedom of choice of parties when multiple courts have jurisdiction, the rationale provided by the Court is that decision on the seat is tantamount to decision on exclusive jurisdiction. For the purpose of this article, it is assumed that the Court decided that the courts of the seat will have exclusive jurisdiction, even when there is no exclusive jurisdiction clause).

100 *See* BALCO, (2012) 9 SCC 552, ¶¶ 125–130 (India) (while *BALCO* did say that seat was akin to exclusive jurisdiction clause, the discussion was only focused on which country the arbitration would be challenged in. The Court did not use this test for the domestic determination of jurisdiction, as that would have depended on the prescription by the national legislation. The Court's determination of the location of challenge was based on its interpretation of the

Emkay Global Financial Services v. *Girdhar Sondhi* ["**Emkay Global**"] had a similar factual scenario and the Supreme Court reached the same outcome in that case.[102] However, the Court's reasoning was centred around the exclusive jurisdiction clause and not the seat.[103] It is unclear what the Court would have done, had the seat clause and the exclusive jurisdiction clause mentioned different places. The Court does not seem to lay down a specific test.

In *Brahmani River Pellets Ltd.* v. *Kamachi Industries Ltd.* ["**Brahmani River Pellets**"], while the venue of the arbitration was in Bhubaneshwar, the cause of action arose in Chennai as the pellets were to be delivered in Chennai.[104] The Court borrowed the importance of the "*venue*" from the *BALCO* judgment.[105] The Court then analysed the judgment of the Supreme Court in *Reliance Industries Ltd. and Anr.* v. *Union of India*[106] to indicate that the venue would be equivalent to the seat.[107] The Court concluded that the decision on the venue is akin to conferment of exclusive jurisdiction.[108] Thus, the Madras High Court was held to have erred in entertaining a challenge. However, this test was quite different from the *BALCO* Test, as *BALCO* had granted concurrent jurisdiction to courts presiding over the cause of action as well.[109] The test in *Brahmani River Pellets* shall be called the 'Venue Test'.

Recently, in *BGS SGS Soma*,[110] the apex court disagreed with the interpretation of *BALCO* by both the Delhi and the Bombay High Courts,[111] in holding that the courts of the seat will have exclusive jurisdiction over arbitral proceedings. Interpreting an arbitration clause which declared "*New Delhi/Faridabad*" as the venue, the Court held that this amounts to the declaration of a seat.[112] It was further held that since there were no arbitral proceedings held in Faridabad and all awards were signed at New Delhi, the seat was evidently situated at New Delhi.[113] Then, following the Seat Test, exclusive jurisdiction was held to be conferred on the courts of New Delhi.[114] This was despite the Faridabad courts presiding over the location of the cause of action.[115] The Court also held that the *BALCO* Test was erroneous as the determination of the seat automatically confers exclusive jurisdiction.[116] In another case with a similar factual

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statute and not on the basis of general principles. The apex court in *Indus Mobile* seemed to have ignored this distinction).

101 *See* Indus Mobile, (2017) 7 SCC 678, ¶ 19 (India) (this includes jurisdiction of the place of cause of action which was not excluded by *BALCO*).

102 *See* Emkay Global Financial Services v. Girdhar Sondhi, (2018) 9 SCC 49, ¶¶ 2–4 (India) [*hereinafter* "Emkay Global"] (even in this case, Mumbai was prescribed as the seat. Further, an exclusive jurisdiction clause conferred jurisdiction on the courts of Bombay).

103 *Id.* ¶¶ 8, 9.

104 *See* Brahmani River Pellets Ltd. v. Kamachi Industries Ltd., (2019) SCC OnLine SC 929, ¶¶ 2–4 (India).

105 *Id.* ¶ 12.

106 *See* Reliance Industries 2013, (2014) 7 SCC 603 (India).

107 *Id.* ¶ 15.

108 *Id.* ¶¶ 18–19.

109 Applying this test, the Madras High Court would have had valid jurisdiction.

110 BGS SGS Soma, 2019 SCC Online SC 1585 (India).

111 Konkola Copper Mines, 2013 SCC Online Bom 777 (India); Antrix Corporation, 2018 SCC Online Del 9338 (India).

112 BGS SGS Soma, 2019 SCC Online SC 1585, ¶¶ 98–101 (India) (the reasons for this shall be discussed in the next sub-part).

113 *Id.* ¶¶ 100–102.

114 *Id.* ¶¶ 98–102.

115 *Id.* ¶ 23.

116 *Id.* ¶¶ 50–54, 60–62.

scenario,[117] another three-judge bench of the apex court relied on *BGS SGS Soma* to hold that the courts of New Delhi would have exclusive jurisdiction, even though the cause of action had arisen in Faridabad.[118] The following table summarizes the aforementioned tests:

Test Name	**Supreme Court Cases**	**Places Having Jurisdiction**
CPC Test	*Khaleel Ahmed* (2J);[119] *JSW Steel* (2J);[120] *Swastik Gases* (3J)[121]	Location of cause of action of the dispute; or location of residence of the defendant; or location where the defendant carries on business.
BALCO Test	*BALCO Case* (5J)	Location of cause of action of the dispute; or the venue of the arbitration.
Seat Test	*Indus Mobile* (2J); *BGS SGS Soma* (3J); *Hindustan Construction Co.* (3J)[122]	Seat of the arbitration has the exclusive jurisdiction.
Does not seem to lay down a specific test	*Emkay Global* (2J)	Test was unclear; but it was held that the parties are free to provide for exclusive jurisdiction separately.
Venue Test	*Brahmani River Pellets* (2J)	Courts presiding over the venue have exclusive jurisdiction

B. The ideal approach

The enunciation of the Seat Test by various judgments makes one thing clear: the benches have failed to appreciate the concept of the seat of an arbitration.[123] The seat of an arbitration is not a physical or a geographical concept, but a legal one.[124] Meaning thereby, the seat does not refer to a place, but rather refers to a system of laws that would govern the arbitration.[125] Therefore, when it is said that the seat confers exclusive jurisdiction, it merely means that only one legal

117 *See* Hindustan Const. Co. v. NHPC, 2020 SCC OnLine SC 305, ¶ 3 (India) (in this case, the cause of action arose in Faridabad. However, the seat was mentioned to be New Delhi. The proceedings were first initiated in Faridabad. The argument was that Faridabad courts would have exclusive jurisdiction by virtue of Section 42 of the Arbitration Act. This was refuted by the Court.)
118 *Id.* ¶¶ 3–6.
119 Khaleel Ahmed, (2000) 3 SCC 755 (India).
120 JSW Steel, (2006) 11 SCC 521 (India).
121 Swastik Gases, (2013) 9 SCC 32 (India).
122 Hindustan Construction, 2020 SCC OnLine SC 305 (India).
123 The significant exception to this is the case of BALCO, (2012) 9 SCC 552 (India).
124 BORN, *supra* note 1, at 1538; GEORGIOS PETROCHILOS, *PROCEDURAL LAW IN INTERNATIONAL ARBITRATION* 65 (2004); ROBERT M. MERKIN, *ARBITRATION LAW* ¶¶ 1.29–1.30 (2013).
125 *Id.*; *see* BLACKABY ET AL., *supra* note 34, at 166–167 (thus, the word seat is a misnomer. *Lex arbitri* is the proper term to be used for the seat).

system can govern the arbitration proceedings.[126] Thus, irrespective of whether the seat is mentioned to be Mumbai, Delhi, Kolkata, or India, it only connotes that the parties intended Part I of the Arbitration Act to govern their arbitration procedure and validity. After choosing the Arbitration Act, the domestic jurisdiction must be determined by using the relevant provisions of the Arbitration Act itself.

This would indicate that the CPC Test would be correct as it uses a literal interpretation of the statute. However, such a test would ignore some important considerations. For instance, the *BALCO* Test interprets Section 2(1)(e) to confer jurisdiction on the courts at the venue as well, apart from the courts presiding over the cause of action.[127] Venue is an important consideration for grant of jurisdiction because it is a convenient and neutral place.[128] It makes logical sense to also allow parties to litigate at such a convenient and neutral place. The strong reasons backing both the CPC Test and the *BALCO* Test (which includes venue) lead to two important questions: *first*, whether it is prudent to confer concurrent jurisdiction on multiple courts; and *second*, if yes, what must be the various considerations for determination of jurisdiction.

The Indian civil litigation system follows the doctrine of *dominus litis* in order to grant limited discretion to the plaintiff in the determination of jurisdiction.[129] In furtherance of this principle, a plaintiff must generally be allowed to choose a convenient forum for initiation of proceedings, amongst several rationally justifiable but normatively indistinguishable forums. Further, the use of the phrase "*a court*" instead of "*the court*" in various provisions indicates that an applicant is free to approach one amongst multiple designated courts,[130] thus incorporating the *dominus litis* principle. Moreover, if jurisdiction is exclusively conferred on a single court for all the applications, then Section 42 of the Arbitration Act would be rendered redundant and ineffective.[131] Section 42 ties any application arising out of an arbitration to the court where the first application with respect to the same dispute had been made.[132] But if all applications are anyway required to be made exclusively to one designated court under Section 2(1)(e), then such tying of later applications to the same court under Section 42 is rendered redundant.[133] Such teleological redundancy of provisions must be avoided while interpreting statutes.[134] Section 42 can only serve a purpose if Section 2(1)(e)(i) and 2(1)(e)(ii) confer concurrent jurisdiction on

126 *See* BALCO, (2012) 9 SCC 552, ¶¶ 194–197 (India) (this is manifest in the discussion in *BALCO* wherein the Court overruled *Bhatia International*'s position that the provisions of Part I of the Arbitration Act can be used in foreign seated arbitrations).

127 BALCO, (2012) 9 SCC 552, ¶ 96 (India).

128 Mistelis, *supra* note 34, at 376–377.

129 Krishna Veni Nagam v. Harish Nagam, (2017) 4 SCC 150, ¶ 13 (India); Indian Overseas Bank v. Chemical Constr. Co., (1979) 4 SCC 358, ¶ 16 (India); Dhannalal v. Kalawatibai, (2002) 6 SCC 16, ¶¶ 23, 25 (India).

130 Arbitration Act, No. 26 of 1996, §§ 9, 34, 37, 42 (India).

131 *See* Antrix Corporation, 2018 SCC Online Del 9338, ¶ 59 (India).

132 *See* Arbitration Act, No. 26 of 1996, § 42 (India); State of Maharashtra v. Atlanta Ltd., (2014) 4 SCC 619, ¶ 29 (India) (Section 42 says that once any application arising out of an arbitration agreement is made to a court, such court shall exclusively deal with all further applications. The visible purpose behind this is to avoid inconvenience by preventing a situation whereunder the parties would file different applications with respect to the same dispute before different courts. Section 42 ties all the later applications in a dispute (after the first application) to the same court as the first application, so as to avoid such chaos).

133 This is because even if Section 42 had not existed, there would anyway be only one court where the parties could go for all applications.

134 Calcutta Gas Co. (Proprietary) Ltd. v. State of West Bengal, 1962 Supp (3) SCR 1, ¶ 9 (India); Hardeep Singh v. State of Punjab (2014) 3 SCC 92, ¶ 42 (India).

multiple courts.[135] Thus, both the practice of civil litigation and the principles of statutory interpretation indicate that Section 2(1)(e) must be held to confer concurrent jurisdiction on multiple courts, rather than exclusive jurisdiction on one designated court. After having answered the first question in the affirmative, it is important to determine the various factors that must be used for the determination of jurisdiction of these courts.

The considerations must include the "*cause of action*", as it is covered within the definition of "*subject-matter*" of the arbitration and that of the suit.[136] The location of the cause of action is also important as it is the place where evidence is located.[137] While an arbitral challenge itself does not require the court to peruse any evidence outside of the records of the tribunal,[138] evidence may be required in interim proceedings.[139] Further, in exceptional circumstances, evidence may be introduced even at the stage of challenge.[140] Thus, the cause of action must be one of the considerations. Further, even the location of the respondent must be read into Section 2(1)(e)(i) and 2(1)(e)(ii). This is because Section 2(1)(e)(i) and 2(1)(e)(ii) ask the court to fictionally assume that a civil suit is being filed.[141] In India, the location of the respondent is necessarily one of the places with concurrent jurisdiction in all civil suits.[142] Moreover, the location of the respondent is a fair consideration, as the principle of *dominus litis* is an equitable counterbalance to it.[143] Hence, the respondent's location of residence and business must also be valid considerations. As stated above, venue must also be a relevant consideration as it is a place of convenience and neutrality. While Section 2(1)(e)(i) or 2(1)(e)(ii) does not explicitly mention "*venue*", it can be interpreted into the sections as one of the locations of 'causes of action' for any arbitral application.[144] Such interpretation was used in *BALCO* to incorporate venue in the test.[145]

The final test that is arrived at is a combination of the *BALCO* Test and the CPC Test, whereby concurrent jurisdiction is conferred on the basis of the venue; the causes of action; and the location of the respondent. Further, in pursuance of established civil jurisprudence, the parties may, at their discretion, confer exclusive jurisdiction on any of these courts.[146] Notably however, this test comes with a caveat. Hypothetically, it is possible for all three of the aforementioned

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135 *See* Antrix Corporation, 2018 SCC Online Del 9338, ¶ 59 (India).

136 *See* Khaleel Ahmed, (2000) 3 SCC 755, ¶ 6 (India); JSW Steel, (2006) 11 SCC 521, ¶¶ 66–68 (India); Swastik Gases, (2013) 9 SCC 32, ¶ 28 (India); BALCO, (2012) 9 SCC 552, ¶ 96 (India).

137 DINSHAH FARDUNJI MULLA, THE CODE OF CIVIL PROCEDURE § 20.12 (2011).

138 Arbitration Act, No. 26 of 1996, § 34(2)(a).

139 *See id.* §§ 8, 9, 13, 14, 27, 29A.

140 *See, e.g.*, Canara Nidhi v. M. Shashikala, (2019) 9 SCC 462, ¶ 19 (India); Emkay Global, (2018) 9 SCC 49, ¶¶ 13, 21 (India) (citing Fiza Developers & Inter-Trade (P) Ltd. v. AMCI (India) (P) Ltd., (2009) 17 SCC 796, ¶¶ 14, 17–18, 21, 24, 31 (India)).

141 *See* text accompanying *supra* notes 86–91 (as discussed, the "look through" approach needs to be used, by deeming that the case directly went to a civil court).

142 CODE CIV. PROC. (1908), §§ 16–20 (India).

143 Since the ultimate choice of forum is anyway granted to the petitioner, it will not be unfair to her/him to include the location of the defendant as one of the locations. If this is, in fact, chosen as the location for proceedings, it would be fair to both the parties. This is because it is already convenient to the respondent, and the petitioner has also actively chosen the same place for the proceedings.

144 *See* BALCO, (2012) 9 SCC 552, ¶ 96 (India).

145 *Id.*

146 Hakam Singh v. Gammon (India) Ltd., (1971) 1 SCC 286, ¶ 3 (India) [*hereinafter* "Hakam Singh"]; ABC Laminart v. AP Agencies, (1989) 2 SCC 163, ¶ 19 (India); Swastik Gases, (2013) 9 SCC 32, ¶ 19 (India); B.E. Simoese Von Staraburg Niedenthal v. Chhattisgarh Inv. Ltd., (2015) 12 SCC 225 (India).

factors to be located outside India, despite India being the seat of arbitration.[147] Having said that, this problem cannot be resolved by use of any of the four pre-existing tests either.[148] Since, in such cases, all the locations in India would stand at par, any pre-determined location of exclusive jurisdiction must be given precedence.[149] This is because party autonomy is of high importance in arbitration.[150] In the absence of such a clause, places within India with good international connectivity and reputable courts may be granted default jurisdiction.[151] In any case, this gap is for the legislature to fill and the proposed test suffices to uniformize existing jurisprudence.

III. Conclusion

This article has highlighted the inconsistency in the tests used by the Supreme Court in the determination of domestic and international jurisdiction of courts to entertain arbitration cases. Such inconsistency is generally undesirable in law.[152] Further, such inconsistencies would deter parties from choosing India as the seat of arbitration and using Indian supranational rules of arbitration,[153] the use of which is likely to bring in significant revenue for the government. Thus, it is very important to uniformize the law of arbitration in India.

In Part I, this article has proposed a six-step test to simplify the determination of the choice of seat, in the absence of a specific stipulation. The proposed test hierarchically looks at all the factors that are the most akin to a seat of arbitration, in order to arrive at a conclusion. Admittedly, the test is extremely simplified and is subject to certain exceptions, as discussed above. However, the test is generally of high utility in the determination of seat, as is evident

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147 Hypothetical scenario: A bag manufacturer in Pakistan enters into a contract with a jute textile mill in Bangladesh. The contract is for the supply of jute through the seas. The venue of the arbitration is held to be Hong Kong as the arbitration is to be held in accordance with the Hong Kong International Arbitration Centre (HKIAC) Rules. However, the contract categorically provides that the seat of the arbitration is India, Indian Arbitration Act would govern the proceedings and the courts of India would have exclusive jurisdiction over the dispute. This decision may have been made as the law of arbitration is more settled in India and the parties are less comfortable with Hong Kong authorities.

148 When the seat is mentioned to be "India", even the Seat Test would not be of use. Moreover, the other reasons for discarding the Seat Test have already been discussed. Other tests involve the 3 factors already discussed (cause of action, respondent's location, and venue), which are anyway not helpful in such a scenario.

149 *See* Hakam Singh, (1971) 1 SCC 286, ¶ 4 (India). One may argue that this goes against the principle in *Hakam Singh*. However, one must use the Golden Rule of interpretation in this scenario. It is absurd that the courts of the seat do not have any jurisdiction, thus the statute must be purposively interpreted. The only other reasonable interpretation would be that all the courts in the country would have simultaneous jurisdiction (as none of them is prescribed). In such cases, the exclusive jurisdiction clause must be held valid in light of the *Hakam Singh* principle. Moreover, judgments must not be read in a pedantic manner and one must look at the intent behind the judgment rather than the strict language of it. *See, e.g.,* Amar Nath Om Prakash v. State of Punjab, (1985) 1 SCC 345, ¶ 11 (India); Union of India v. Amrit Lal Manchanda, (2004) 3 SCC 75, ¶¶ 14–18 (India); BGS SGS Soma, 2019 SCC OnLine SC 1585, ¶¶ 43–45 (India).

150 ARJUN GUPTA, SAHIL KANUGA & VYAPAK DESAI, *Blessed Unions in Arbitration: An Introduction to Joinder and Consolidation in Institutional Arbitration*, 4(2) INDIAN J. ARB. L. 134, 136, 142, 144, 149 (2016), *available at* http://www.ijal.in/sites/default/files/IJAL%20Volume%204_Issue%202_Arjun%20Gupta%20et%20al.pdf; *See* CHARLES CHATTERJEE, *The Reality of Party Autonomy Rule in International Arbitration*, 20(6) J. INT'L ARB. 539, 557 (2003) (in the absence of specific provisions of law to the contrary, any decision on ambiguous matters in arbitration must be made based on party autonomy).

151 *See* Fiona Trust, [2007] UKHL 40 [66] (appeal taken from Eng.); NTPC-Singer, (1992) 3 SCC 551, ¶ 15 (India) (these could be the courts of New Delhi and Bombay. The reasoning behind this is that the parties are assumed to be rational businesspersons who are presumed to prefer convenience in proceedings and competence of the adjudicator. This reasoning is used in deciding jurisdictional disputes in commercial law matters).

152 LON FULLER, THE MORALITY OF LAW 79–80 (2d. ed. 1969).

153 *See* 2010 International Arbitration Survey Report, *supra* note 37, at 17–23 (this is because parties prefer to determine countries as seats that have predictable positions of law, to escape from arbitrariness of the legal process).

from its application on major Supreme Court judgments. The article has also listed the situations in which the test needs to be suitably altered to fit the necessary requirements.

In Part II, this article has proposed that the domestic jurisdiction in arbitration cases must be simultaneously conferred on multiple courts i.e. the courts presiding over the venue, the causes of action and the respondent's location. This would not lead to inconvenience to parties, as Section 42 firmly establishes that the court approached first ousts all other courts in the future. Further, this would be in consonance with the civil law principle of *dominus litis*.

Both the proposed tests will help the judiciary in simplifying and uniformizing the process of determination of seat jurisdiction and domestic jurisdiction. While the article has addressed only a narrow part of the largely convoluted arbitration jurisprudence in India, it aims to be a small stepping-stone in the uniformization of arbitration law in India. It will indeed be interesting to see how the Supreme Court resolves the conflicts highlighted above.

VIRTUAL ARBITRATION: THE IMPACT OF COVID-19

David Bateson[*]

Abstract

The need of the international community to resolve their disputes during the COVID-19 pandemic has resulted in a sudden increase in the number of arbitrations taking place virtually. Governments have imposed containment measures, making it impossible to conduct in-person arbitrations. Several concerns have been raised regarding the adequacy of present-day procedural frameworks to accommodate virtual arbitrations, witness testimonies, and cross-examination taking place virtually, and limitations of new technologies, and issues arising therefrom. This note addresses these concerns in light of the various soft law instruments that were already in place or have been developed to facilitate the transition to virtual arbitrations as the 'new normal'. In addition to serving as guidelines on how to conduct arbitrations, take evidence, and handle witness testimonies and cross-examinations, these soft law instruments ensure that the rights of the parties are not prejudiced as a result of arbitrations taking place virtually. Lastly, after listing some of the platforms available to the parties for conducting virtual arbitrations and features thereof, this note concludes with some remarks on how the 'new normal' impacts the future of arbitration.

I. Introduction

COVID-19 is an unpredictable global health crisis and a challenge for international arbitration. Travel restrictions, quarantine notices, and lockdowns have made it impossible globally to conduct in-person hearings for the foreseeable future, and substantial hardship can be caused if hearings are adjourned indefinitely, with an extended period of financial uncertainty. For many commercial concerns and advisers, the crisis has caused immense difficulties, raising further liquidity concerns. Dispute resolution cannot stop, and options have to be explored for existing and future disputes to be resolved under the current conditions. One option to proceed is having issues decided "*on the papers*", i.e. when a dispute is decided on the basis of written pleadings, documents and submissions without any oral hearing. Where this approach might not be appropriate, particularly in arbitrations involving high value claims and complex issues,[1] technology gives the means and keeps international arbitration going by virtual hearings. While such technical possibilities existed before the crisis, in the wake of COVID-19, they have become the main focus. Fortunately, international arbitration by nature is flexible, innovative, and adaptive to the needs of the present day. This note examines what arbitrators need to consider in the new era regarding the option of holding virtual hearings.

II. Procedural frameworks for virtual hearings

With regard to the procedural fairness requirement of arbitration, the starting point for consideration must be the legal framework within which arbitral proceedings and hearings take place. Under all popular institutional rules, for example, the International Chamber of

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1 JULIAN DAVID MATHEW LEW QC, LOUKAS A. MISTELIS & STEFAN M. KRÖLL, COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION 535 (2003).

Commerce ["**ICC**"] Arbitration Rules, 2017 ["**ICC Rules**"];[2] United Nations Commission on International Trade Law ["**UNCITRAL**"] Arbitration Rules, 2013 ["**UNCITRAL Arbitration Rules**"];[3] London Court of International Arbitration Rules, 2014 ["**LCIA Rules**"],[4] and under the general statutory powers in most seats, for example, Sections 19 and 24 of the (Indian) Arbitration and Conciliation Act, 1996 ["**Arbitration Act**"], the tribunal is granted wide powers to direct the procedures as it wishes, which should include the choice of holding a virtual hearing. Some of the rules expressly provide for a hearing to take place by telephone or videoconferencing that does not require physical presence of the participants, whilst others do not specifically refer to this, but do not prohibit it either.[5] Nonetheless, the Case Management Techniques under the ICC Rules and Singapore International Arbitration Centre, 2016 ["**SIAC Rules**"] on emergency arbitrators cater to the possibility of virtual hearings.[6]

The wide existing procedural powers of the tribunal are subject to the general duties and obligations of the tribunal which are embodied in Section 18 of the Arbitration Act titled "*Equal treatment of parties*," which states that "*[t]he parties shall be treated with equality and each party shall be given a full opportunity to present his case*". Holding a virtual hearing essentially relates to the right to be heard and the right to be treated equally, which are both covered in Section 18 of the Arbitration Act.

A. Right to be heard

The right to be heard means that in arbitral hearings, parties must be granted sufficient opportunity to present their case i.e. to allege facts, present legal reasoning, and to produce evidence on relevant facts.[7] It is one of the most fundamental and universally recognised rights, and a violation of this right will render an award unenforceable as a violation of public policy.[8] In the laws governing the arbitration procedure, three main positions can be found. Either (a) there exists no right to an oral hearing;[9] (b) there is a right to oral hearing, but it can be waived as under Article 24(1) of the UNICTRAL Model Law on International Commercial Arbitration;[10] or (c) the procedural power of the tribunal to decide whether an oral hearing is held is subject to the parties' agreement in the arbitration agreement. These regulations thereby serve the purpose to distinguish between oral hearings and written proceedings. Considering, in addition, that the meaning of "*oral hearing*" cannot be equated strictly with an in-person hearing,[11] it follows that the

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2 International Chamber of Commerce (ICC), Rules of Arbitration 2017, art. 22(2) [*hereinafter* "ICC Rules"].

3 United Nations Commission on International Trade Law (UNCITRAL), Arbitration Rules 2013, art. 17(1).

4 London Court of International Arbitration (LCIA), Arbitration Rules 2014, art. 19.2.

5 Singapore International Arbitration Centre (SIAC), Rules of Arbitration 2016, r. 24 [*hereinafter* "SIAC Rules"]; ICC Rules, *supra* note 2, art. 26.

6 ICC Rules, *supra* note 2, app. IV(h); SIAC Rules, *supra* note 5, sched. 1, ¶ 7.

7 Gabrielle Kaufmann-Kohler & Thomas Schultz, *The Use of Information Technology in Arbitration*, JUSLETTER, Dec. 2005, at 37, *available at* http://lk-k.com/wp-content/uploads/The-Use-of-Information-Technology-in-Arbitration.pdf [*hereinafter* "Kaufmann-Kohler & Schultz"]; CHRISTOPH LIEBSCHER, THE HEALTHY AWARD: CHALLENGE IN INTERNATIONAL COMMERCIAL ARBITRATION 243–273, 344 (2003).

8 RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS: A GLOBAL COMMENTARY ON THE NEW YORK CONVENTION 387 (Herbert Kronke, Patricia Nacimiento, Dirk Otto & Nicola Christine Port eds., 2010).

9 For example, Switzerland. *See* Bundesgericht [BGer] [Federal Supreme Court] July 1, 1991, 117 ENTSCHEIDUNGEN DES SCHWEIZERISCHEN BUNDESGERICHTS [BGE] II 346.

10 UNCITRAL Model Law on International Commercial Arbitration, art. 24(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).

11 Yvonne Mak, *Do Virtual Hearings Without Parties' Agreement Contravene Due Process? The View from Singapore*, KLUWER ARB. BLOG (Aug. 2, 2020), *available at* http://arbitrationblog.kluwerarbitration.com/2020/06/20/do-virtual-

right to be heard does not guarantee a right to an oral, in-person hearing in all circumstances.[12] In fact, the exchange of arguments or evidence is made orally in both an in-person hearing and a virtual hearing, with the mere difference that the communication is transmitted either with or without technological tools.

Consequently, the right to be heard is not ordinarily a legal obstacle for virtual hearings. Nevertheless, the tribunal should always seek to obtain the parties' consent before it decides to proceed with holding a virtual hearing in order to ensure that the award is not rendered unenforceable.[13] Nonetheless, if the tribunal proceeds with a virtual hearing over the objection of one party, as long as parties are given equal opportunity to present their case, the author suggests an award is unlikely to be rendered unenforceable.

B. Right to equal treatment

With regard to the right to equal treatment, the decision to hold a virtual hearing affects generally both parties in an equivalent manner. However, issues may arise because of possible differences between the technological capabilities of the parties, both with regard to the availability of the new Information Technology ["**IT**"] tools and the skills to use them.[14] To avoid such issues, particularly during the COVID-19 crisis, the tribunal should use its existing procedural powers with due proportion, and organise the procedure in agreement with the parties in a manner which ensures that the proceedings are not disrupted by the use of the new IT tools and that both parties can effectively take part in the virtual hearing. In fact, as more people are working remotely from home via virtual platforms due to the COVID-19 outbreak, it is likely that parties and advisers will already be able to cope with the new IT tools having collected substantial experience since the crisis started.

Therefore, resorting to virtual hearings raises surprisingly few legal issues in the context of arbitral proceedings. As long as sensible actions are taken by the tribunal, neither the right to be heard nor the right of equal treatment would be violated by holding virtual hearings.

Moreover, for proper exercise of the tribunal's procedural powers, guidance to the best practice of virtual hearings can be found in the impressive number of existing soft law instruments on videoconferencing of witnesses, which give a very useful framework for almost all of the practical problems inherent in taking virtual evidence. Needless to say, the scope and nature of a virtual hearing are different compared to the mere taking of evidence. However, this impressive body of guidelines provides high standard templates as a basis from which principles can be derived and developed in greater depth for conducting full virtual hearings.[15]

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hearings-without-parties-agreement-contravene-due-process-the-view-from-singapore/?doing_wp_cron=1594274573.4666559696197509765625.

12 *See*, *e.g.*, Dirk Otto & Omaia Elwan, *Article V(2)*, *in* KRONKE ET AL., *supra* note 8, at 345–414.

13 Mak, *supra* note 11.

14 Kaufmann-Kohler & Schultz, *supra* note 7.

15 Janet Walker, *Virtual Hearings – The New Normal*, GLOB. ARB. REV. (Mar. 27, 2020), *available at* https://globalarbitrationreview.com/article/1222421/virtual-hearings-%E2%80%93-the-new-normal [*hereinafter* "Walker"]; Simon Rainey QC & Gaurav Sharma, *Arbitration Hearings… and the Corona 'New Normal' Ten Golden Rules: or the easy path to your Virtual Hearing*, QUADRANT CHAMBERS (Mar. 30, 2020), *available at* https://www.quadrantchambers.com/news/arbitration-hearings-and-corona-new-normal-ten-golden-rules-or-easy-path-your-virtual-hearing [*hereinafter* "Rainey & Sharma"].

The body of resources comprises of the following:

1. The Hague Conference Draft Guide to Good Practise on the Use of Video-Links under the Evidence Convention, 2019,[16] contemplates procedural steps and other considerations before the taking of evidence through videoconferencing.

2. The ICC Commission Report on Information Technology in International Arbitration, 2018,[17] provides a framework that practitioners may refer to for the use of different forms of IT tools in a cost-effective and efficient manner, to identify the possible issues that may arise, and follow the international best practices for the same.

3. The Chartered Institute of Arbitrators Guidelines for Witness Conferencing in International Arbitration, 2019,[18] provides a practical note for parties, arbitrators and witnesses for preparing and presenting evidence through videoconferencing. It includes a checklist, standard directions and specific directions to ensure its application in different situations, and to preserve the quality of evidence.

4. The commentary on the revised text of the IBA Rules on the Taking of Evidence in International Arbitration, 2010,[19] supplements the rules by providing additional information for practitioners.

5. The Seoul Protocol on Video Conferencing in International Arbitration, 2020,[20] provides for international best practice in arbitration through videoconferencing, while addressing due process concerns, confidentiality problems, and practical difficulties.

As mentioned earlier, the key question to be answered in conducting virtual hearings is the enforceability of the subsequent award.[21] The author would venture to suggest there should be no impediments if the above guidelines are observed, but local laws should always be checked.

III. Current practice of virtual hearings

Fortunately, technology for virtual hearings already exists and the experiences with the mass deployment of the new technological tools in the pandemic have been promising.[22] In general, there are two different options at use in the market.

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16 Hague Conference on Private International Law, Draft Guide to Good Practice on the Use of Video-Link under the Evidence Convention 2019, *available at* https://assets.hcch.net/docs/e0bee1ac-7aab-4277-ad03-343a7a23b4d7.pdf.

17 ICC Commission, Report on Informational Technology in International Arbitration 2017, *available at* https://iccwbo.org/content/uploads/sites/3/2017/03/icc-information-technology-in-international-arbitration-icc-arbitration-adr-commission.pdf.

18 Chartered Institute of Arbitrators (CIArb), Guidelines for Witness Conferencing in International Arbitration 2019, *available at* https://www.ciarb.org/news/ciarb-s-new-guidelines-for-witness-conferencing-in-international-arbitration/.

19 *Newly revised IBA Rules on the Taking of Evidence in International Arbitration*, INT'L BAR ASS'N, *available at* https://www.ibanet.org/ENews_Archive/IBA_30June_2010_Enews_Taking_of_Evidence_new_rules.aspx.

20 Korean Commercial Arbitration Board (KCAB) International, Seoul Protocol on Video Conference in International Arbitration 2020, *available at* https://globalarbitrationreview.com/digital_assets/9eb818a3-7fff-4faa-aad3-3e4799a39291/Seoul-Protocol-on-Video-Conference-in-International-Arbitration-(1).pdf [*hereinafter* "Seoul Protocol"].

21 Andrew Foo, *No further questions?*, SOC'Y OF CONSTR. L. (Mar. 27, 2020), *available at* https://www.scl.org.sg/public-resources/161-resources/articles.

22 Walker, *supra* note 15.

First, many arbitration centres have facilities to conduct virtual arbitration in an "*all-in-one*" platform. For example, Maxwell Chambers in Singapore and the International Arbitration Centre in London have collaborated with the provider Opus 2 to offer parties an integrated platform for case preparation and electronic hearing solutions. The cloud-based platform enables access to materials from anywhere and online collaborations in a single connected environment.[23] Similarly, the Arbitration Place Virtual of the Arbitration Place in Canada,[24] the Australian Disputes Centre Virtual of the Australian Disputes Centre in Australia,[25] and other similar platforms also have the facilities to conduct virtual hearings. The Draft Procedural Order for the Use of Online Dispute Resolution Technologies,[26] published by the Australian Centre for International Commercial Arbitration, also provides guidance on how hearings may be conducted with video conferencing or the Cisco WebEx Meeting Center.[27]

Second, virtual hearings are also being conducted through online platforms and applications that provide video conferencing through the live transmission of video and audio data between different locations coupled with setting up multiple parallel meeting rooms or 'chat' groups for the various counsel and tribunal teams and their internal communication.[28] Such services are prominently provided by Zoom, Microsoft Teams, Skype for Business, and BlueJeans which all offer user-friendly, easy-to-go solutions.

Not only tribunals, but domestic courts in different countries have also shifted matters to remote hearings, as illustrated by the following examples: *first*, from February 2020 onwards, a number of Japanese civil courts have adopted the submission of video evidence in virtual court hearings in order to eliminate the burden of trial participants travelling and the impact of changing court dates on participants. This includes collecting evidence between the courts and different lawyers' offices which are all in different locations connected by Microsoft Teams.[29] *Second*, in China, on August 18, 2017, the Hangzhou Internet Court was established as a pilot project for a digital court, and one year later, two other such courts were set up in Beijing and Guangzhou.[30] In these

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23 *Maxwell Chambers Offers Virtual ADR Hearing Solutions*, MAXWELL CHAMBERS *available at* https://www.maxwellchambers.com/2020/02/18/maxwell-chambers-offers-virtual-adr-hearing-solutions; Arunn Ramadoss, *Maxwell Chambers bring virtual ADR solutions to Singapore with Opus 2*, OPUS 2 INSIGHT (Aug. 2, 2020), *available at* https://insight.opus2.com/maxwell-chambers-collaborate-with-opus-2-to-bring-virtual-adr-solutions-to-singapore; *Virtual Hearings*, OPUS 2, *available at* https://www.opus2.com/en-sg/virtual-hearings.

24 *Arbitration Place Virtual – eHearings*, ARB. PLACE, *available at* https://www.arbitrationplace.com/arbitration-place-virtual-ehearings.

25 *Australian Disputes Centre Virtual*, AUSTRALIAN DISP. CTR., *available at* https://www.disputescentre.com.au/adc-virtual.

26 Australian Centre for International Commercial Arbitration, Draft Procedural Order for Use of Online Dispute Resolution Technologies in ACICA Rules Arbitrations 2016, *available at* https://acica.org.au/wp-content/uploads/2016/08/ACICA-online-ADR-procedural-order.pdf.

27 Joachim Delaney, *The Show Must Go On: Alternative Dispute Resolution and Litigation During COVID-19 in Australia*, BAKER MCKENZIE (Mar. 26, 2020), *available at* https://www.bakermckenzie.com/en/insight/publications/2020/03/alternative-dispute-resolution-covid19.

28 Rainey & Sharma, *supra* note 15.

29 *Start of a New Operation for Controversial Issue Management using IT tools such as Web Conferences*, CTS. IN JAPAN (Aug. 2, 2020), *available at* https://www.courts.go.jp/about/topics/webmeeting_2019/index.html; *Expediting Japan's Civil Court Proceedings with adoption of Microsoft Teams*, MICROSOFT (Aug. 2, 2020), *available at* https://news.microsoft.com/apac/2020/01/29/expediting-japans-civil-court-proceedings-with-adoption-of-microsoft-teams.

30 Guodong Du & Meng Yu, *China Establishes Three Internet Courts to Try Internet-Related Cases Online: Inside China's Internet Courts Series-01*, CHINA JUST. OBSERVER (Dec. 16, 2018), *available at*

courts, all legal procedures including case filing, trial, and ruling delivery are conducted online applying blockchain technology in combination with big data and cloud storage.[31] Transcripts are generated electronically by a voice identification software.

In its white paper titled 'Chinese Courts and Internet Judiciary' dated December 4, 2019,[32] the Supreme Peoples' Court of China revealed that the three courts had heard 118,764 internet-related disputes as of October 31, 2019, of which more than 88,000 were concluded. It also described that the courts took 45 minutes on average in an online hearing and 38 days in concluding a case in total.

Some of the benefits of virtual court hearings are listed as follows:

- Recognisability of the facial expressions of participants who are not physically present during the evidentiary proceedings in court;
- Case participants can use the virtual conferencing feature to participate in evidence proceedings from remote locations such as law firms;
- Virtual document sharing and concurrent editing features that allow parties to include additional claims to the evidentiary proceedings summary drafted by the court in order to provide a more consistent document; and
- Availability of a virtual screen-sharing feature for all parties to identify and view relevant documents (such as contracts and documents clarifying the disputed issues) as though they are physically in the same place, enabling document confirmation, discussion, and negotiation of key issues.

Further, due to the COVID-19 crisis, in March 2020, the Vis Moot (East) was conducted virtually using Microsoft Teams supported by eBram, a Hong Kong-based not-for-profit start-up. The virtual competition comprised of 71 teams and 250 arbitrators from all over the globe and from different time zones. In April, 2020, the even larger Vis Moot 2020 took place by using the online dispute resolution platform, Immediation,[33] and video-links for the first time ever, giving the best practice example for working virtually and safely in the current circumstances.[34] The move to a virtual event was strikingly described during the opening ceremony as a result of being "*forced to think about the 'new normal'*". Further, the fact that traditional dispute resolution is now being reinvented as a consequence of the pandemic was also appreciated.[35]

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https://www.chinajusticeobserver.com/insights/china-establishes-three-internet-courts-to-try-internet-related-cases-online.html.

31 Guodong Du & Meng Yu, *Big Data, AI and China's Justice: Here's What's Happening*, CHINA JUST. OBSERVER (Dec. 1, 2019), *available at* https://www.chinajusticeobserver.com/a/big-data-ai-and-chinas-justice-heres-whats-happening.

32 *White paper reveals how courts are using internet to improve efficiency,* SUP. PEOPLE'S CT. CHINA (Dec. 6, 2019), *available at* http://english.court.gov.cn/2019-12/06/content_37528024.htm.

33 IMMEDIATION, *available at* https://www.immediation.com/.

34 Neil Kaplan, *How we must adapt to COVID-19*, GLOB. ARB. REV. (Mar. 29, 2020), *available at* https://globalarbitrationreview.com/article/1222179/kaplan-how-we-must-adapt-to-covid-19.

35 *Virtual Vis Mooting and Recalibrating for the Future*, LONDON CT. INT'L ARB. (Aug. 2, 2020), *available at* https://lcia.org/News/virtual-mooting-and-recalibrating-for-the-future.aspx.

Another recent development in light of the developing COVID-19 crisis is the American Arbitration Association's update dated March 17, 2020, which encourages parties to explore alternative hearing capabilities, explicitly including the use of video teleconferencing that allows for remote participation in hearings.[36] Similar approaches can be found by courts in different countries to keep the litigation process on track, as can be seen from following illustrations:

- After the courts had been closed in Hong Kong for more than two months from January 29, 2020 with a general adjournment of all proceedings, the judiciary announced that it would make greater use of video conferencing facilities to ensure justice during the crisis by the Guidance Note dated April 2, 2020,[37] stating that "*[t]he essence is to replicate as closely as practically possible the core requirements of court*" and that "*[r]emote hearings using video technology preserve most of the benefits of an oral hearing, allowing parties and their legal representatives and the court to interact with each other on a real-time basis*".

- In the United Kingdom, on March 18, 2020, Her Majesty's Courts and Tribunal Service declared that courts will start holding trials and hearings through video conferencing during the current health crisis, and it justified this step by saying that running courts and tribunals are an essential public service to ensure justice.[38] A Guidance Note[39] and the Practice Direction 51Y[40] have been introduced, providing for remote hearings (by video or audio) by using either the Justice Video Service or Skype for Business. The latter provider was only added during the crisis to give staff and judges a more quick and flexible capacity. After the Supreme Court building was closed for the foreseeable future, from March 24, 2020 onwards, it switched to video conferencing to hear cases, and conducted the matter of *Fowler (Respondent)* v. *Commissioners for Her Majesty's Revenue and Customs (Appellant)* as a virtual hearing by video-link for the first time in its history.[41]

- During the height of the outbreak in February, 2020, the Supreme People's Court of China ordered "*courts at all levels to guide litigants to file cases or mediate disputes online, encouraging judges to make full use of online systems for litigation, including those for case filing and ruling delivery, to ensure litigants and their lawyers get better legal services and protection*". In addition, the Supreme People's

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36 *See* American Arbitration Association–International Centre for Dispute Resolution (AAA–ICDR), *AAA-ICDR COVID-19 Resource Center*, *available at* https://go.adr.org/covid19.html?_ga=2.266173005.351640490.1584719392-888347822.1584719391; Raid Abu-Manneh, Menachem M. Hasofer, B. Ted Howes, Dany Khayat & Yu-Jin Tay, *Impact of Covid-19 in International Arbitration*, MAYER BROWN (Mar. 20, 2020), *available at* https://www.mayerbrown.com/en/perspectives-events/publications/2020/03/impact-of-covid19-in-administered-arbitrations.

37 Judiciary of Hong Kong Special Administrative Region of the People's Republic of China, Guidance Note for Remote Hearings For Civil Business in the High Court, *available at* https://www.judiciary.hk/doc/en/court_services_facilities/guidance_note_for_remote_hearings_phase1_20200402.pdf; Antonia Croke & Nigel Sharman, Hogan Lovells, *Hong Kong Courts in Lockdown – How Technology is Helping with Dispute Resolution in the time of COVID-19*, JD SUPRA (Aug. 2, 2020), *available at* https://www.jdsupra.com/legalnews/hong-kong-courts-in-lockdown-how-51811.

38 Her Majesty's Courts & Tribunal Services, *HMCTS telephone and video hearings during coronavirus outbreak*, GOV.UK (Mar. 18, 2020), *available at* https://www.gov.uk/guidance/hmcts-telephone-and-video-hearings-during-coronavirus-outbreak.

39 *Id.*

40 MINISTRY OF JUSTICE, PRACTICE DIRECTION 51Y – VIDEO OR AUDIO HEARINGS DURING CORONAVIRUS PANDEMIC 2020 (U.K.), *available at* http://www.justice.gov.uk/courts/procedure-rules/civil/rules/part51/practice-direction-51y-video-or-audio-hearings-during-coronavirus-pandemic.

41 *See* Fowler v. Comm'rs for HM Revenue & Customs [2020] UKSC 22 (Eng.).

Court promoted the use of 'mobile micro court' on the social media platform WeChat to support the courts in conducting trials over the internet.[42] Acknowledging the prevalence of mobile phones and the WeChat application, it is a well-structured WeChat Mini Program that litigants and judges can use to conduct online litigation activities such as filing, service, hearing, evidence exchange, and mediation via mobile phone upon the employment of facial recognition, remote audio and video systems, e-signature, and other technologies. It is available in 12 provinces and cities.[43]

IV. Adapting to the new technology

Most arbitrators were not familiar with full virtual hearings before the COVID-19 crisis set off, and concerns of technical, procedural and arbitral nature were raised. However, the new technology offers promising features which can serve in particular the needs of virtual hearings in arbitration.

A. Challenges and risks

Indeed, while on an exceptional basis, remote participation of a single or few participants at in-person hearings is not an unfamiliar concept to international arbitration, the new challenge is different as parties, counsels, and arbitrators are faced with carrying out a full hearing on a virtual basis, which represents a different level and intensity in the use of new IT tools.[44]

The challenges and concerns expressed in technical regards, therefore, include the requirement of connectivity for each participant, which goes along with the fact that the system is only as good as the weakest link, and there is no magic solution for participants located in places with poor connectivity.[45] Another such challenge is the need to avoid technical failures upfront and during the virtual hearing, combined with the new necessity to define who immediately addresses technical issues when everyone is in separate locations. Technical breakdowns are a real issue, but, in fact, the risk that they occur can be significantly reduced by implementing a strict set of chronological steps and measures to be taken, such as testing the equipment beforehand, a test conference with all participants in advance, and fallback solutions in case of disruptions. The latter is prudently encouraged by Article 6 of the Seoul Protocol on Video Conferencing in International Arbitration. With regard to technical assistance, virtual hearings might involve a new kind of tribunal secretary, who acts as a technical advisor participating and addressing all technical needs. Many arbitration centres offering virtual hearings include such a technological operator in their service. All of these measures should be determined by a procedural order of the tribunal and, if possible, in agreement with the parties.[46]

Another logistical problem which is often raised is the challenge to manage participation from various time zones, with participants located around the globe, forcing some or all parties to sit

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42 Ben Knowles & Maurice Kenton, *COVID-19 Global: Arbitration and court impacts*, CLYDE & CO. (May 1, 2020), *available at* https://www.clydeco.com/insight/article/covid-19-impact-on-courts-and-arbitration.

43 *Chinese courts urged to promote online services amid virus battle*, SUP. PEOPLE'S CT. CHINA (Feb. 19, 2020), *available at* http://english.court.gov.cn/2020-02/19/content_37533789.htm; *Internet court handles cases despite coronavirus epidemic*, SUP. PEOPLE'S CT. CHINA (Mar. 11, 2020), *available at* http://english.court.gov.cn/2020-03/11/content_37534291.htm; *Chinese Courts and Internet Judiciary*, SUP. PEOPLES' CT. CHINA 69-70 (Dec. 4, 2019), *available at* http://english.court.gov.cn/pdf/ChineseCourtsandInternetJudiciary.pdf.

44 Walker, *supra* note 15.

45 Kaplan, *supra* note 34.

46 Kaufmann-Kohler & Schultz, *supra* note 7; Rainey & Sharma, *supra* note 15.

at unsociable hours, and thus creating an imbalance between the parties.[47] These issues are neither new nor unknown to tribunals, as they have already appeared in the past with regard to management conferences and procedural hearings, which usually take place on video call. These issues have been smoothly resolved, either in agreement with the parties or by way of the tribunal's directions.

Other concerns are more specifically related to arbitration in terms of its basic elements and the decision-making process. Regarding the latter, evaluating witness testimony, particularly under cross-examination, with the loss of in-person observation is the major focus and, consequently, so is the ability to assess the credibility and strength of the witness evidence. There is also the possibility and the risk that witness statements are influenced unnoticed by a coach or a script hidden from the tribunal's view.[48] However, these worries are not completely new and are elaborated upon in the existing soft law instruments on videoconferencing of witnesses mentioned above with reasonable solutions, such as a camera that can be controlled by the tribunal.[49]

With regard to virtual hearings, the issue that currently appears to be more pressing is the impact on privacy and cybersecurity when using new IT tools.[50] To avoid such conflicts, it is important to carefully examine the extent of the user's consent to the collection of data given according to the privacy policy of the respective platform. While the professional "*all-in-one*" solutions of many arbitration centres provide a set of given rules tailor-made for the needs of arbitration, the video-conference applications which are widely used in all different kinds of professions and exchanges are often new kids on the block which have become popular just recently. Thus, it is advisable to always enquire carefully about the security measures incorporated in the software one plans to use, and cross-check if there are any warnings either regarding the privacy policy, or the host's capacity to monitor the activities of attendees, such as, attention tracking or user tracking.[51] Some of the products on the market provide encrypted data, two-factor authentication, and cloud-based backups with no standing access to customer data. These features may be preferred for the security and privacy of arbitrations.[52]

Thus, a tribunal needs to carefully consider availability, usability, and security when adopting the new technological tools but all of these conditions are no obstacles on the pathway to virtual hearings.

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47 Walker, *supra* note 15.

48 *Id.*

49 Seoul Protocol, *supra* note 20, art. 1.

50 Lindsay Oliver, *What you should know about online tools during the COVID-19 crisis*, ELEC. FRONTIER FOUND. (Mar. 19, 2020), *available at* https://www.eff.org/deeplinks/2020/03/what-you-should-know-about-online-tools-during-covid-19-crisis.

51 *Id.*; Jane Wakefied, *Coronavirus: Zoom is in everyone's living room – how safe is it?*, BBC NEWS (Mar. 27, 2020), *available at* https://www.bbc.com/news/technology-52033217; Natasha Gillezeau, *Mind that Zoom in the work-from-home boom*, AUSTL. FIN. REV. (Mar. 24, 2020), *available at* https://www.afr.com/technology/later-are-zoom-video-meetings-giving-up-business-secrets-20200324-p54ddd; *Coronavirus: Zoom under increased scrutiny as popularity soars*, BBC NEWS, Aug. 2, 2020, *available at* https://www.bbc.com/news/business-52115434.

52 *Id.*; Ravie Lakshmanan, *COVID-19: Hackers begin exploiting Zoom's overnight success to spread malware*, THE HACKER NEWS (Mar. 30, 2020), *available at* https://thehackernews.com/2020/03/zoom-video-coronavirus.html; Hannah Murphy, *Zoom admits user data 'mistakenly' routed through China*, FIN. TIMES, Apr. 4, 2020, *available at* https://www.ft.com/content/2fc518e0-26cd-4d5f-8419-fe71f5c55c98.

B. Technological possibilities

In the past years, technological possibilities have advanced tremendously, and the new IT tools feature possibilities exceeding the conventional video calls used for case management conferences and other procedural hearings. Moreover, many of the new features are ideally suited for the needs of arbitration, such as real-time transcripts generated electronically and simultaneous recording and translating of the hearing which can be spread easily and quickly to all participants right after the virtual hearing. As far as scanning the room with many participants and observing several participants in rapid succession are said to be key features of in-person hearings,[53] the new technology also permits up to 49 or even more participants to be displayed in a mosaic of images with the option for expanding the image of individual participants such as those who are speaking.[54] In addition, relevant documents can be displayed on-screen, with images of the participants and integration of the PowerPoint or multimedia presentations that are often used by experts. Further, video platforms accommodate breakout rooms for the parties and the tribunal either for one-to-one conversations or as a group.

V. The 'new normal' and the future?

In the wake of COVID-19, all participants in the arbitration process must be flexible and bold in examining whether holding a virtual hearing offers a viable solution to overcome the travel restrictions and to avoid long deferral of scheduled in-person hearings. As the extraordinary circumstances of COVID-19 are affecting the running of businesses, it is a logical consequence that it will also impact the way disputes are resolved. In countries such as Singapore and China, courts have already introduced virtual hearings to ensure smooth functioning of the judicial system during the crisis. Similarly, due to the new technological tools, the arbitration community is also well-equipped and well-placed to carry on.

As mentioned earlier, in case virtual hearing is an option, the tribunal should always seek to obtain the parties' consent before proceeding in order to avoid potential challenges to enforcement. While these challenges may not be ultimately successful, they still serve to prolong the process of dispute resolution. Further, regarding the procedure, the tribunals can find a useable framework to build on the existing soft law instruments on witness evidence by video conferencing. Undoubtedly, more developments will come in the near future regarding full virtual hearings. In particular, a tribunal should by way of procedural orders, implement a set of procedural steps to reduce the risks of technological failures and balance the logistical hardships for all participants in a fair manner. Issues to be addressed include recording, technical aspects, managing witnesses and exhibits, the hearing schedule and logistics, test runs, potential technical failure, and costs.[55] Taking into account privacy and security issues, the tribunal should decide in agreement with the parties which specific provider is chosen, depending on the specific features that are needed.

While virtual hearings were once considered an exceptional solution, without other viable solutions at hand due to the COVID-19 crisis, the arbitration community is already in the midst of the new virtual experiment. It is being conducted on a trial-and-error basis with multiple challenges and new risks, but best guidance will be provided through the experience gained in

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53 Walker, *supra* note 15.

54 Kaplan, *supra* note 34.

55 Maxi Scherer, *Remote Hearings in International Arbitration: An Analytical Framework*, 37(4) J. INT'L ARB. 12–13 (2020).

the upcoming months, and many of the practical issues will be resolved soon. From its early beginnings, one of the strengths of arbitration was its character of being an informal option of dispute resolution that can adapt to the specific needs of a dispute and its parties. Historically, arbitration has been a pioneer of procedural and technological innovation among other things with electronic filing and service of documents, long before such features were introduced in court proceedings.[56] Without a doubt, as more people work remotely, the use of virtual technologies will improve in terms of reliability and efficiency to meet the higher demand. Clearly, the COVID-19 crisis is changing the way international arbitration works, and the 'new normal' may be different even when the pandemic is over. Virtual hearings may not be the only option in the future, but they might become an equal alternative to in-person hearings, which are unattractive due to costs and time efficiency. Thus, the pandemic may accelerate a permanent shift to a more digital and virtual arbitration.

[56] Matthew Croagh, Gemma Thomas & Rahul Thyagarajan, *Online Dispute Resolution and electronic hearings: Arbitration in motion*, *in* NORTON ROSE FULBRIGHT, INTERNATIONAL ARBITRATION REPORT 5–8 (2017), *available at*, https://www.nortonrosefulbright.com/-/media/files/nrf/nrfweb/imported/20170925---international-arbitration-report---issue-9.pdf?la=en&revision=c9a5375e-5aff-4a71-a492-18c9305047d6.

"IF IN DOUBT, DISCLOSE?": ARBITRATOR CONFLICTS, CHALLENGES AND REPERCUSSIONS

Robert S. Pé[*]

Abstract

In view of the increase in challenges being raised against arbitrators, this note examines two real-life case studies with opposite outcomes to consider their differences in context and to explore the importance of disclosure.

I. Introduction

Challenges against arbitrators are on the increase. Without doubt, a successful challenge can have a devastating impact. This note considers two recent real-life case studies in which the parties, counsel, and Tribunal members have been anonymised and the facts adjusted very slightly for anonymity and simplicity. In one, the arbitrator eventually stood down in the face of a compelling challenge and in the other, the arbitrator resisted and prevailed. This note identifies the key differences and the common themes that emerged in these two cases.

II. Case Study I

A. The factual background

The arbitration was seated in Singapore and conducted under the 2012 International Chamber of Commerce ["**ICC**"] Rules of Arbitration ["**ICC Rules**"]. It arose from a shareholders' agreement relating to the business of setting up and operating a luxury hotel project. Under the shareholders' agreement, the Claimant was entitled to various rights including a right to exercise a put option should certain default events take place, including, *inter alia*, failure to complete construction of the hotel project by a specific date.

The Claimant commenced the arbitration in 2016 and a three-member tribunal was constituted. The Claimant was represented by, among others, a leading international law firm ["**ILF**"]. A merits hearing took place in 2018 and the Tribunal rendered a Partial Award in April 2019. The Tribunal found in favour of the Claimant and ordered the Respondents to pay damages. The Tribunal reserved various matters, including interest and costs, to a future award.

In June 2019, after rendering of the Partial Award, the co-arbitrator designated by the Respondents made a disclosure to the parties. He informed them that earlier in 2019, he had been instructed to act as local counsel for a consortium in connection with the enforcement of an interim award in a wholly unrelated dispute between a sovereign government on the one hand and the consortium on the other ["**local enforcement proceedings**"]. The partner of ILF, who had been acting as lead counsel for the Claimant in the arbitration, also served as international counsel to the consortium in the unrelated enforcement proceedings.

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Following the disclosure, the Respondents asked the co-arbitrator a series of questions. In his responses, he indicated, among other things, that the enforcement proceedings had been listed in March 2019 and that he had also been approached by the consortium to represent them in related arbitration proceedings [“**other arbitration proceedings**”]. He understood that ILF were appearing in those other arbitration proceedings on behalf of one of the companies that was part of the consortium.

B. The Challenge

The Respondents brought a challenge against the co-arbitrator in July 2019 under Article 14 of the ICC Rules. The co-arbitrator initially rejected the challenge, as did the Claimant, which filed detailed submissions through ILF. An interesting feature of this challenge is that it was made by the Respondents against the co-arbitrator whom they had designated.

C. The Respondents' position

The Respondents' challenge against the co-arbitrator was based on two main grounds, namely the “*ongoing professional relationship with Claimant's counsel*” and the “*lack of disclosure*”. By accepting his role as local counsel in the enforcement proceedings, the co-arbitrator had assumed a co-counsel relationship with ILF. He compounded the conflict of interest by also acting as co-counsel with ILF in the other arbitration proceedings. The Respondents stated that it was a serious conflict of interest for the co-arbitrator to be acting together with ILF on two significant mandates while also serving as co-arbitrator in the arbitration. These circumstances cast doubt on his impartiality and called into question his independence.

The Respondents stated that if they had been aware of this co-counsel relationship between the co-arbitrator and ILF at the start of the arbitration, they would never have nominated him as arbitrator or accepted his appointment. They observed that his acceptance of instructions as co-counsel with ILF in the other arbitration proceedings took place just six weeks after the Tribunal in the first arbitration had rendered the Partial Award in favour of the Claimant. The Respondents observed that it could reasonably be assumed that the co-arbitrator's acceptance of the co-counsel relationship in the other arbitration proceedings must have been under discussion for a significant period of time beforehand and the co-arbitrator's lack of disclosure had deprived them of a chance to object to his continuing role in their arbitration. The Respondents further stated that the fact that the co-arbitrator had a relationship with ILF before the Partial Award had been rendered and the fact that the Partial Award was overwhelmingly in favour of the Claimant may have had some bearing on his being instructed in the other arbitration proceedings. All of the above circumstances called into question the co-arbitrator's independence in the eyes of any fair-minded observer and gave rise to reasonable doubts as to his impartiality.

The Respondents stated that the co-arbitrator's failure to disclose his relationship with ILF since at least March 2019 was a violation of Article 12(1) of the United Nations Commission on International Trade Law Model Law on International Commercial Arbitration [“**Model Law**”], which provides as follows:[1]

[1] United Nations Commission on International Trade Law, Model Law on International Commercial Arbitration, art. 12(1), 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).

> "*When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties unless they have already been informed of them by him.*"

The Respondents indicated that arbitrators have a responsibility to avoid situations that may lead to a conflict of interest. Therefore, the co-arbitrator was under an on-going duty to disclose any potential conflict, and he should have disclosed the conflict immediately. They further stated that the appropriate time to disclose this information was on or before March 2019, by when he had been engaged by the consortium for the enforcement proceedings.

In light of the above, the Respondents invited the co-arbitrator to step down immediately, failing which they invited the ICC International Court of Arbitration ["**ICC Court**"] to remove him.

D. The Claimant's position

The Claimant stated that the challenge was unsustainable and asserted that ILF had virtually no professional contact, let alone *relationship*, with the co-arbitrator prior to the initiation of the arbitration. The Claimant stated that ILF had had prior contact with the co-arbitrator on only two occasions: (i) in 2003 when they had engaged him as a local law expert for a different arbitration with a completely different set of ILF lawyers; and (ii) several years ago when ILF had acted against the co-arbitrator in a different arbitration. ILF had never nominated the co-arbitrator for appointment as arbitrator and had never worked with him as counsel except for the then current co-counsel role in connection with the other arbitration proceedings. The Claimant stated that the terms of that engagement were finalised only in July 2019, after the Partial Award had been rendered and only five days prior to the Respondents' challenge. The Claimant disputed the assertion that the relationship between ILF and the co-arbitrator in the enforcement proceedings was that of co-counsel. It further stated that ILF had not had an active role in the co-arbitrator's engagement in the enforcement proceedings or the other arbitration proceedings – both the engagements had been initiated by the underlying client.

In light of the above, the Claimant stated that there was no failure by the co-arbitrator to make disclosure and no delay in his doing so.

E. Admissibility of the Challenge

For a challenge to be admissible in the context of an ICC arbitration, it must be filed by a party "*either within 30 days from receipt by that party of the notification of the appointment or confirmation of the arbitrator, or within 30 days from the date when the party making the challenge was informed of the facts and circumstances on which the challenge is based if such date is subsequent to the receipt of such notification*".[2]

The challenge was based on the co-arbitrator's additional disclosure of June 2019. The Respondents submitted the challenge in July 2019, one day before the 30-day time limit expired. The challenge was, therefore, admissible.

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[2] International Chamber of Commerce (ICC), Rules of Arbitration 2012, art. 14(2).

F. The justifiable doubts test

Given that the arbitration was seated in Singapore, the parties agreed that the applicable test was the justifiable doubts test. This has been summarised as follows:

> "*The arbitrator's appointment may be challenged only if circumstances exist which give rise to justifiable doubts as to his impartiality or independence or he does not possess the qualifications agreed to by the parties. Such circumstances include a personal, business or professional relationship with the parties to the dispute, or an interest in the outcome of the dispute. The standard of bias or partiality that has been applied by the Singapore courts is whether a reasonable and fair-minded person sitting in court and knowing all the facts would have a reasonable suspicion that a fair trial for the applicant would not be possible*".[3]

Under this test, the relevant question is whether a reasonable and fair-minded person would entertain a reasonable suspicion that the relevant circumstances might result in the arbitral proceedings being affected by apparent bias if the arbitrator was not removed or view the relevant circumstances as bearing on the tribunal's impartiality in the resolution of the dispute before it. The assumption is that the reasonable and fair-minded person possesses all the relevant facts available to the decision-maker at the time of the determination of the challenge and not merely the facts known to the party bringing the challenge.

G. Analysis and outcome

The relationship between the co-arbitrator and ILF can be summarised as follows:

1. The local enforcement proceedings related to the enforcement of a partial award issued in unrelated arbitration proceedings;

2. The co-arbitrator had been and was representing the consortium in the local enforcement proceedings but was not being instructed by ILF in those proceedings;

3. ILF was representing that same party—the consortium—in the other arbitration proceedings;

4. The co-arbitrator had recently agreed to serve as lead counsel in the same other arbitration proceedings and that he would take instructions from ILF; and

5. The co-arbitrator's agreement to serve as lead counsel in the other arbitration proceedings occurred after he had made the additional disclosure in the first arbitration.

There was disagreement between the co-arbitrator and the Respondents as to whether there had been, and was, a co-counsel relationship between the co-arbitrator and ILF in the local enforcement proceedings. Despite the disagreement as to the nature of the relationship in the local enforcement proceedings, it was not disputed that the co-arbitrator and ILF were now representing the same client in proceedings related to the local enforcement proceedings, namely the other arbitration proceedings.

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[3] Lawrence Boo, *International and Domestic Arbitration in Singapore*, *in* ARTICLES ON SINGAPORE LAW ¶ 4.2.11 (2005).

Regardless of whether the co-arbitrator and ILF had a co-counsel relationship in the enforcement proceedings, it was clear that the co-arbitrator was aware by some point in March 2019 of ILF's involvement in the aforementioned proceedings. He chose to make disclosure only in June 2019 i.e. around 3 months after his involvement started and shortly after the Tribunal in the arbitration had rendered its Partial Award. Even if there was no failure to disclose, there was at least a delay in making the disclosure. The ICC Court has in the past accepted challenges where it found that the relationship between an arbitrator and a law firm is current and on-going.[4] It is, therefore, not surprising that, on the eve of the Court's consideration of the challenge, the co-arbitrator resigned of his own accord. He really had no choice at that stage; the repercussions were likely to be very substantial. The Respondents had initiated setting aside proceedings against the Partial Award, and the co-arbitrator's resignation in the face of their challenge would have greatly bolstered the prospects of the award being set aside.

III. Case Study II

A. The factual background

There were two connected arbitrations, both seated in Hong Kong and both pursuant to the 2018 Hong Kong International Arbitration Centre ["**HKIAC**"] Administered Arbitration Rules ["**HKIAC Rules**"]. The first arose out of a guarantee in respect of an International Swaps and Derivatives Association, Inc. ["**ISDA**"] Master Agreement and the second arose out of the Master Agreement itself.

The Claimant was a company incorporated in England and Wales and was represented in the two arbitrations by a major international law firm and a major law firm from the People's Republic of China ["**PRC**"]. In the first of the two arbitrations, the Respondent was a PRC company, and in the second, the Respondent was a Hong Kong company. The Respondents were represented by a Hong Kong solicitors' firm in both arbitrations.

In its Notices of Arbitration, the Claimant designated an English barrister as the first arbitrator. In their Answers, the Respondents designated a PRC lawyer as the second arbitrator. After adopting a list-procedure, the co-arbitrators designated a Hong Kong Senior Counsel as the Presiding Arbitrator. The designee did not make any kind of disclosure in his Declaration of Acceptance and Statement of Availability, Impartiality and Independence. In the absence of any objections from the parties, the HKIAC confirmed the candidate as the Presiding Arbitrator, thereby constituting the arbitral tribunal.

The Claimant filed an application in the first arbitration for interim anti-suit relief in relation to the proceedings commenced by the Respondents against the Claimant and an affiliate of the Claimant before an Intermediate People's Court in the PRC. When the Respondents filed their submissions in opposition to the Claimant's application for anti-suit relief, it became clear that their legal team included not only the solicitors' firm but also two barristers from outside that firm, namely a Senior Counsel and a Junior Counsel from the same barristers' chambers as the Presiding Arbitrator. The Claimant noted from public sources that the Presiding Arbitrator and the Respondents' Junior Counsel had acted as co-counsel in a number of cases and had co-presented two seminars, including one on anti-suit relief given to the solicitors' firm that was

[4] *Challenge and Disqualification on the Ground of Independence Issues*, *in* 24 KAREL DAELE, CHALLENGE AND DISQUALIFICATION OF ARBITRATORS IN INTERNATIONAL ARBITRATION 299–301 (2012).

now representing the Respondents. The Claimant also noted that both the Presiding Arbitrator and the Respondents' Senior Counsel were on the Pupillage Committee of their chambers. The Claimant sought further details from the Presiding Arbitrator in relation to each of those matters as well as the nature and extent of his relationship and interaction with the Respondents' Senior and Junior Counsel over the past five years.

The Presiding Arbitrator responded to the Claimant's request for information and confirmed that the Respondents' Senior and Junior Counsel were members of the same chambers as him, disclosed copies of the materials used in the two seminars, and provided further information regarding his relationship and interaction with the Respondents' Senior and Junior Counsel. The Claimant requested that the Respondents confirm certain details of their engagement of the Senior and Junior Counsel in both arbitrations and certain other information relating to the seminar on anti-suit relief they had given to the solicitors' firm that was now representing the Respondents. The Respondents confirmed that they intended to instruct the Senior and Junior Counsel to appear at the hearing of the anti-suit injunction application in the first arbitration and to advise on matters relating to both arbitrations. The Respondents provided some of the information requested by the Claimant about the above seminar.

B. The Challenge

On September 18, 2019, the Claimant filed a Notice of Challenge against the Presiding Arbitrator on the basis that there were justifiable doubts as to his impartiality and independence. The Presiding Arbitrator indicated that he would not withdraw from the Arbitral Tribunal unless the Respondents agreed with the Challenge. The Respondents indicated that they did not agree with the Challenge and filed an Answer to the Notice of Challenge.

C. The Claimant's position

The Claimant relied on the following facts in support of its Challenge:

1. The Presiding Arbitrator and the Respondents' Junior Counsel had given a seminar to the Respondents' solicitors two months before the appointment of the Presiding Arbitrator in the two arbitrations. Based on a report available on the website of the barristers' chambers, the seminar was a closed-door event, attended by a few people from the solicitors' firm, including the lead partner on the Respondents' legal team. The seminar included a discussion of a Hong Kong case which was of direct relevance to the Claimant's anti-suit injunction application.

2. The Presiding Arbitrator had a close relationship with the Respondents' Senior and Junior Counsel. In the case of the Senior Counsel, this was supported by the fact that he and the Presiding Arbitrator both sat on their chambers' Pupillage Committee. In the case of the Junior Counsel, this was supported by the fact that she had spent three months of her pupillage with the Presiding Arbitrator, they had acted as co-counsel in four cases in the past three years, and they had co-presented at the two seminars.

3. The Presiding Arbitrator had failed to make disclosures on three occasions: *first*, prior to or at the time of his appointment on April 25, 2019; *second*, when the Claimant submitted its anti-suit injunction application in the first arbitration on July 23, 2019; and *lastly*, when the

Respondents submitted their opposition to the Claimant's application on August 16, 2019 making the involvement of the Respondents' Senior and Junior Counsel apparent.

The Claimant submitted that the above facts had *cumulatively* given rise to justifiable doubts as to the impartiality and independence of the Presiding Arbitrator in the eyes of an objective, fair-minded, and informed observer. The Claimant also contended that the Presiding Arbitrator's answers to the Claimant's enquiries had been inadequate and incomplete.

D. The Respondents' position

The Respondents submitted that the Challenge should be dismissed at the outset. Their primary position was that the Challenge was made out of time. The Claimant became aware of the circumstances giving rise to the Challenge on at least August 16, 2019 (when the Respondents in the first arbitration filed their submissions in response to the anti-suit injunction application, thereby identifying their Senior and Junior Counsel) or at the latest by August 31, 2019 (when the Claimant first made enquiries about the Presiding Arbitrator's impartiality and independence). The Notice of Challenge should have been submitted on August 31, 2019 or at the latest by September 15, 2019.[5] There was no reason to justify any extension of time for the submission of the Notice of Challenge on September 18, 2019.[6]

In the event that the HKIAC decided that the Challenge was made in time or that the time limit for submitting the Challenge should be extended, the Respondents referred to *Laker Airways Inc.* v. *F.L.S. Aerospace Ltd.* ["**Laker Airways**"] in which the English Commercial Court had dismissed a party's application to remove an arbitrator on the basis that the arbitrator and the barrister representing a party came from the same barristers' chambers.[7] The Respondents also referred to the IBA Guidelines on Conflicts of Interest in International Arbitration ["**IBA Guidelines**"].[8] The parties were not bound by the IBA Guidelines and merely used them for reference. The Guidelines are not legal provisions and do not represent the position under Hong Kong law but they have found broad acceptance among the international arbitration community. The Respondents relied on paragraph 4.3.4, which lists the following circumstance on the Green List:[9]

> "*[t]he arbitrator was a speaker, moderator or organiser in one or more conferences, or participated in seminars or working parties of a professional, social or charitable organisation, with another arbitrator or counsel to the parties.*"

The Respondents submitted that such a circumstance could never lead to disqualification or require disclosure under the objective test in General Standard 2 of the IBA Guidelines.[10]

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5 Hong Kong International Arbitration Centre (HKIAC), Administered Arbitration Rules 2018, art. 11.7 [*hereinafter* "HKIAC Arbitration Rules"].

6 *Id.* art. 21.2 (which permits the tribunal to extend time limits in certain cases).

7 Laker Airways Inc. v. F.L.S. Aerospace Ltd. [2000] 1 WLR 113 (Eng.).

8 International Bar Association (IBA), IBA Guidelines on Conflicts of Interest in International Arbitration 2014 [*hereinafter* "IBA Guidelines"].

9 The IBA Guidelines set out various potential circumstances and allocate them to a Non-Waivable Red List, a Waivable Red List, an Orange List and a Green List. A circumstance on the Green List does not require disclosure and does not preclude an individual from serving as arbitrator.

10 IBA Guidelines, *supra* note 8, Gen. Stand. 2(c) (which provides that "[d]oubts are justifiable if a reasonable third person, having knowledge of the relevant facts and circumstances, would reach the conclusion that there is a

E. The Presiding Arbitrator's position

The Presiding Arbitrator considered that, as a matter of principle, there were no good grounds to support a perception of lack of impartiality. He indicated that he had adjudicated both as Deputy High Court Judge and arbitrator in numerous cases in which members of his chambers had appeared. He did not consider that his impartiality and independence were in any way affected. He pointed out that the position should be reviewed in the context of these two arbitrations, which involved sophisticated and professional parties and lawyers. Participating at seminars and in legal discourse on any particular topic, whether or not arbitration-related, was not a ground to support a perception of bias.

F. Admissibility of the Challenge

The HKIAC Rules provide that:[11]

> "*A party who intends to challenge an arbitrator shall send notice of its challenge within 15 days after the confirmation or appointment of that arbitrator has been communicated to the challenging party or within 15 days after that party became aware of the circumstances mentioned in Article 11.6.*"

An HKIAC Practice Note on Challenges to Arbitrators ["**HKIAC Practice Note**"] sets out the procedure for submitting and determining a challenge to an arbitrator and provides that:[12]

> "*A party wishing to challenge an arbitrator shall submit, within 15 days… after the party became aware of the circumstances giving rise to the challenge, a Notice of Challenge…*"

The Claimant's letter dated August 31, 2019 raised reasonable enquiries with the Presiding Arbitrator, and it was appropriate for the Claimant to await a response from him before reaching a decision on launching a Challenge based on cumulative factors. The 15-day period under the HKIAC Practice Note, therefore, ran from the date of the Presiding Arbitrator's response to the enquiries of the Claimant i.e. from September 3, 2019. The Claimant's Notice of Challenge dated September 18, 2019 was hence submitted within time. Even if the Claimant were out of time, it would have been appropriate to allow an extension because any delay was minimal and not such as to cause undue prejudice to the Respondents.

G. The justifiable doubts test

The HKIAC Rules provide as follows:[13]

> "*Any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence, or if the arbitrator does not possess qualifications agreed by the parties, or if the arbitrator becomes de jure or de facto unable to perform his or her functions or for other reasons fails to act without undue delay. A party may challenge the arbitrator designated by it or in whose appointment it has participated only for reasons of which it becomes aware after the designation has been made.*"

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likelihood that the arbitrator may be influenced by factors other than the merits of the case as presented by the parties in reaching his or her decision").

11 HKIAC Arbitration Rules, *supra* note 5, art. 11.7.

12 HKIAC, Practice Note on Challenges to Arbitrators 2019, ¶ 2.1.

13 HKIAC Arbitration Rules, *supra* note 5, art. 11.6.

To assess "*if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence*," the test in Hong Kong is that stated by the Hong Kong Court of First Instance in *Jung Science Information Technology Co., Ltd* v. *ZTE Corporation*, which is "*whether an objective fair-minded and informed observer, having considered the relevant facts, would conclude that there was a real possibility that the Tribunal was biased*".[14]

H. Analysis and outcome

The applicable test referred to above represents a high threshold. The first of the three cumulative factors on which the Claimant relied was the seminar given by the Presiding Arbitrator and the Respondents' Junior Counsel to the lawyers from the Respondents' solicitors' firm. It is normal for barristers and solicitors to hold such private events at which they discuss recent developments in the law. The fact that someone says something at one of these private events on a particular issue of law does not commit that person to decide a future case in a particular way, and participants are aware of this fact. Such discussions are beneficial for the development of law, and if challenges were allowed based on this ground, it would have an unhelpful chilling effect.

The second factor on which the Claimant relied was that the Respondents' barristers were members of the same chambers as the Presiding Arbitrator and had a close relationship with him. The Claimant had sought to distinguish the *Laker Airways* case[15] in which the challenge was based merely on the fact that the arbitrator and the counsel of one of the parties belonged to the same chambers, and not on any particular/specific facts related to their relationship. This had, in fact, prompted the court to declare that barristers are "*independent self-employed practitioners*" and that there are too many of them within the same chambers to have even basic interaction. Finally, the Court held that there can be no presumed imputation of knowledge between them to justify the removal of the arbitrator. The Claimant submitted that, unlike the challenge in that case, the Claimant's Challenge in this case was based on various specific features of the Presiding Arbitrator's relationship with the Respondents' Senior and Junior Counsel. The specific features were that the Presiding Arbitrator and the Respondents' Senior Counsel sat together on their chambers' Pupillage Committee and that the Junior Counsel had done three months of pupillage with him, acted as his co-counsel on four recent cases and delivered the seminar with him (and another member of their chambers). However, it appeared that the Presiding Arbitrator was not currently acting as co-counsel with either of the Respondents' counsel on any cases. His relationship with each of them appeared typical of that shared by members of the same barristers' chambers and entirely proper and appropriate.

The Claimant had cited, among other authorities, International Commercial Arbitration by Gary B. Born, in which Mr. Born states as follows:[16]

> "…*In recent years, this structure and setting has significantly evolved, with barristers' chambers increasingly engaging in common promotional, training and other professional activities comparable to those of law firms. As a consequence, conclusions regarding barristers' independence must be reexamined in light of the realities of contemporary practice. That reexamination has occurred in several recent cases,*

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14 Jung Sci. Info. Tech. Co., Ltd. v. ZTE Corp., [2008] 4 H.K.L.R.D. 776, ¶ 50 (C.F.I.) (H.K.).

15 Laker Airways Inc. v. F.L.S. Aerospace Ltd. & Anr. [2000] 1 WLR 113 (Eng.).

16 GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 1894 (2d ed. 2014).

with some authorities now holding that, at least in international cases, the relationship between members of a barristers' chambers are relevant to an arbitrators' independence in much the same manner that relationships within law firms are relevant."

The aforementioned text is accompanied by a footnote in the book consisting of several cases – one of which,[17] an ICSID case, had also been cited by the Claimant in its submissions. However, the said case was clearly not on all fours with the situation in the two arbitrations. The same footnote continued to refer to another case as follows:[18]

"*…But see Decision in LCIA Ref. No. UN97/X11 of 5 June 1997, 27 Arb. Int'l 320 (2011) (dismissing challenge based on respondent's counsel and arbitrator being from same chambers, noting that claimant and its counsel were familiar with organization of barristers' chambers in England).*"

In the current case, the Claimant's counsel were clearly familiar with the organisation of barristers' chambers in Hong Kong. The Claimant itself was domiciled in England and Wales and one would expect it to be familiar with the organisation of barristers' chambers there and also in Hong Kong.

The third of the three cumulative factors on which the Claimant relied was that the Presiding Arbitrator had failed to disclose the first two factors and had failed to address the reason for the non-disclosure and to adequately explain the circumstances around the first and second factors. However, neither of those factors appeared in the IBA Guidelines' Non-Waivable Red List or Waivable Red List. These lists are non-exhaustive and detail specific situations that, depending on the facts of a given case, give rise to justifiable doubts as to the arbitrator's impartiality and independence. An example of a situation on the Non-Waivable Red List is where "*[t]he arbitrator or his or her firm regularly advises the party, or an affiliate of the party, and the arbitrator or his or her firm derives significant financial income therefrom*".[19] An example of a situation on the Waivable Red List is where the arbitrator currently represents or advises one of the parties or an affiliate of one of the parties.[20]

Looking at all three factors, they were clearly not sufficient individually or cumulatively to justify a successful challenge, and the Challenge was thus rightly rejected.

IV. Conclusion: if in doubt, disclose?

Challenges to arbitrators must be decided on their own individual facts, and as the above case studies demonstrate, fact patterns can be complex and nuanced. Fine distinctions can make the difference between allowing a challenge and rejecting it. In the first of these two case studies, it was clear that the co-arbitrator and the Claimant's counsel had been acting for a common client in a local enforcement proceedings and that there was now an on-going co-counsel relationship in the other arbitration proceedings. In the second case study, the Presiding Arbitrator had, in the past, acted as co-counsel with the Respondents' Junior Counsel, but was not currently doing

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[17] *Hrvatska Elektroprivreda d.d. v. Republic of Slovn.,* ICSID Case No. ARB/05/24, Order Concerning the Participation of Counsel (May 6, 2008).

[18] BORN, *supra* note 16, n.1389.

[19] IBA Guidelines, *supra* note 8, Non-Waivable Red List, ¶ 1.4.

[20] IBA Guidelines, *supra* note 8, Waivable Red List, ¶ 2.3.1.

so. This was a key difference between the two cases, but common questions arose around the duty of arbitrators to disclose matters that might be viewed as giving rise to conflicts of interest.

In this context, although the IBA Guidelines are non-binding in nature, unless otherwise agreed by the parties, they provide helpful guiding principles. In the second case study, the private nature of the seminar given by the Presiding Arbitrator and the Respondents' Junior Counsel meant that it was unclear whether or not it fell within the IBA Guidelines' Green List, which reads as follows:[21]

> "*The arbitrator was a speaker, moderator or organiser in one or more conferences, or participated in seminars or working parties of a professional, social or charitable organisation with another arbitrator or counsel to the parties.*"

Arguably, it would have been prudent for the Presiding Arbitrator to disclose the details of the seminar once he became aware of the involvement of the Respondents' Junior Counsel in the two arbitrations.

The Presiding Arbitrator's relationship with the Respondents' Junior Counsel fell within the IBA Guidelines' Orange List, which provides that:[22]

> "*The arbitrator and another arbitrator or counsel for one of the parties in the arbitration, currently act or have acted together within the past three years as co-counsel.*"

According to the IBA Guidelines, the Presiding Arbitrator, therefore, had a duty to disclose his relationship with the Respondents' Junior Counsel once he became aware of her involvement in these two arbitrations. Arguably, he did not discharge that duty or did not discharge it sufficiently promptly.

However, the 'Practical Application of the General Standards' of the IBA Guidelines provides that:[23]

> "*[…] a later challenge based on the fact that an arbitrator did not disclose such facts or circumstances should not result automatically in non-appointment, later disqualification or a successful challenge to any award…non-disclosure cannot make an arbitrator partial or lacking independence; only the facts or circumstances that he or she did not disclose can do so.*"

Notwithstanding this, the maxim "*if in doubt, disclose*" can sometimes be helpful if it causes arbitrators to apply their minds so as to avoid embarrassment or far worse.

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[21] IBA Guidelines, *supra* note 8, ¶ 4.3.4.
[22] *Id.* ¶ 3.3.9.
[23] *Id.* pt. II, ¶ 5.

N.V. INTERNATIONAL AND THE CONFOUNDING CASE OF LIMITATION FOR ARBITRATION APPEALS IN INDIA

Anhad S. Miglani[*]

Abstract

*The Arbitration and Conciliation Act, 1996 ["**Arbitration Act**"] was enacted with a view, inter alia, to develop a fair and efficient system of arbitration in India, with minimal judicial intervention. Yet, ironically, in balancing the interests of fairness against the need for efficiency, judicial intervention sometimes becomes inevitable. The Supreme Court, recently faced with a similar situation, was called upon to decide on the contours of the limitation period applicable to arbitration appeals under the Arbitration Act. Highlighting efficiency and speedy resolution as the foundation of India's arbitration regime, the Court laid down a law favouring seemingly restrictive and technical considerations at the expense of certain settled legal principles. In light of the same, this note is an attempt to analyse and evaluate the rationale behind the decision and the implications thereof on parties, proceedings and the law itself.*

I. Introduction

The recent decision of the Indian Supreme Court in *M/s N.V. International* v. *State of Assam*[1] ["**NV International**"] has caused more than a ripple effect for present and potential appellants in pursuit of their remedies under Section 37 of the Arbitration Act.[2] The judgment, a mere six paragraphs, has, undoubtedly, immediate implications for arbitration appeals in India. However, more critically, the Court seems to have gone down a dangerously vague path of statutory interpretation, whereby the language of the statute and the intent of the legislature have been given a go-by for reasons not seemingly justifiable as per settled law and established legal principles.

Upholding the dismissal of an appeal under Section 37 on the ground of delay, the Supreme Court has read in and established sudden and rather restrictive contours on the applicability of the law of limitation to arbitration appeals. Following an earlier decision rendered in *Union of India* v. *Varindera Construction* ["**Varindera Construction**"],[3] the Court laid down that the period of 90 days hitherto made applicable to Section 37 appeals through the Limitation Act, 1963 ["**Limitation Act**"] could only be extended by a maximum period of 30 days. Shorn of any detail or discussion, the primary reason given for such an absolute approach was that an appeal, being a continuation of the original proceeding (i.e. the application under Section 34 for setting aside an award), is liable to be subjected to the same procedural rigour as the latter. Of course, the Arbitration Act's intended object of speedy resolution of arbitral disputes is also a stated justification behind the decision rendered by the bench headed by Nariman J.[4]

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1 M/s N.V. Int'l v. State of Assam & Ors., (2020) 2 SCC 109 (India) [*hereinafter* "NV International"].

2 Arbitration and Conciliation Act, No. 26 of 1996, § 37 (India) [*hereinafter* "Arbitration Act"] (providing for the orders from which an appeal may lie to a court).

3 Union of India v. M/s Varindera Constr. Ltd., (2018) 7 SCC 794 (India) [*hereinafter* "Varindera Construction"].

4 NV International, (2020) 2 SCC 109, ¶ 4 (India).

II. A chequered judicial record

It must be pointed out that the muddle of conflicting judicial precedent around this issue of limitation under the Arbitration Act is probably as old as the statute itself. In the opinion of the author, the same seemingly has had much to do with the fact that the provision for appeals provided under Section 37 prescribes no statutory time limit for the same to be filed. Contrasted with the strict timeframe prescribed for the original proceedings under Section 34,[5] and coupled with the Arbitration Act's stated intent of providing a speedy and efficient dispute resolution mechanism, the lack of a similar rigour of time in respect of appeals under Section 37 is an issue that even the Supreme Court has continued to grapple with.

In one of the earliest decisions on the very same question, the Bombay High Court in *ONGC* v. *Jagson International* ["**Jagson**"] had held that since Section 37 of the Arbitration Act provided for no period of limitation within which to file an appeal, the same was clearly a deliberate legislative omission, and thus no such time limit could be judicially read into it.[6] The Court considered the crucial fact that since such limits had been expressly provided for in other provisions under the same part of the same Act, including in Sections 11, 13, 16, and 34, the legislative intent behind excepting appeals filed under Section 37 from such rigour was clearly made out.[7] Such an approach found its basis in the judgment rendered by a three-judge bench of the Supreme Court in *Uttam Namdeo Mahale* v. *Vithal Deo*,[8] wherein in the absence of a prescribed period of limitation under a provision of a special law, the law of limitation was held to be inapplicable. A similar decision was delivered by another three-judge bench in *L.S. Synthetics* v. *Fairgrowth Financial Services*.[9]

Subsequently, however, at least in the context of arbitration, this position of law appears to have changed with the Supreme Court's judgment in *Consolidated Engineering Enterprises* v. *Principal Secretary, Irrigation Department* ["**Consolidated Engineering**"].[10] By liberally interpreting Section 43 of the Arbitration Act, it was held by Raveendran J., in his concurring judgment, that the Limitation Act would apply to all proceedings under the Arbitration Act, except where it was specifically excluded. It was noticed that the Arbitration Act did not expressly exclude the applicability of the limitation statute, but merely contained some departures from it.[11] Accordingly, the Limitation Act was held to apply to appeals under Section 37, and the ruling in *Jagson* hence stood impliedly overruled. As a consequence thereof, and in line with Section 29(2)

5 Arbitration Act, No. 26 of 1996, § 34 (India) (Section 34(3) provides that an application thereunder for setting aside an arbitral award may not be made after three months of the date of receipt of the award by a party. The proviso to the sub-section provides that on showing sufficient cause, the said time can further be extended by the court for a period of 30 days, but not thereafter).

6 Oil & Natural Gas Comm'n v. Jagson Int'l Ltd., AIR 2005 Bom 335 (India) [*hereinafter* "Jagson"].

7 *Id.* ¶ 14; Arbitration Act, No. 26 of 1996, §§ 11, 13, 16 (India) (Section 11 deals with the appointment of arbitrators. Specific time limits are given in case parties wish to approach the courts for appointment. Section 13 provides for a provision to challenge an arbitrator. A time limit of 15 days from the date of constitution or of knowledge is provided for thereunder. Similarly, a jurisdictional challenge under Section 16 can only be made before or at the time of submission of the statement of defence).

8 Uttam Namdeo Mahale v. Vithal Deo & Ors., AIR 1997 SC 2695, ¶ 4 (India).

9 L.S. Synthetics Ltd. v. Fairgrowth Fin. Servs. Ltd., AIR 2005 SC 1209 (India).

10 M/s Consol. Eng'g Enters. v. Principal Sec'y, Irrigation Dep't & Ors., (2008) 7 SCC 169 (India) [*hereinafter* "Consolidated Engineering"].

11 *Id.* ¶ 42.

of the Limitation Act,[12] it can be inferred that even Section 5 of the Limitation Act[13] came to be applied by courts to condone delays in filing appeals under Section 37. The same made complete legal and logical sense: once the Limitation Act was held to be applicable to all proceedings under the Arbitration Act, it could only have been so *in toto*, subject only to clear exclusions i.e. where the provisions itself provided a specified period of limitation.[14] However, with the ruling in *NV International*, this seemingly sound position of law – that had come to be accepted by courts all over the country for more than a decade[15] – has suddenly been altered.

III. Section 5: the source of the power

What is pertinent to note at the outset is that unlike the case of Section 34, the Supreme Court in *N.V. International* has not excluded the applicability of the provisions of the Limitation Act to appeals filed under Section 37 of the Arbitration Act. Rather, an outer limit of 30 days has been read into the courts' discretionary power to condone delays under Section 5 of the Limitation Act.[16] In this context, it is important to look at the precise wording of Section 5, which is reproduced as follows:

> "***5. Extension of prescribed period in certain cases—****Any appeal or any application, other than an application under any of the provisions of Order XXI of the Code of Civil Procedure, 1908 (5 of 1908), may be admitted after the prescribed period if the appellant or the applicant satisfies the court that he had sufficient cause for not preferring the appeal or making the application within such period.*"[17]

It may be noted that the provision does not provide for any outer limit beyond which the courts are absolutely barred to admit matters – all that is required is the existence of a 'sufficient cause'. In fact, it has time and again been recognised and upheld by the Supreme Court itself that, in condoning delays under Section 5, what is important is not the length of the delay, but the acceptability of the explanation for sufficient cause.[18] The same has been, and continues to be, a well-settled principle applied by courts in exercising their discretion under the provision, and for good reason. Litigants may be prevented from approaching courts within the prescribed time for a multitude of reasons, not all of which may necessarily be attributable to them. Even otherwise, ordinarily, no litigant stands to benefit by a delay in approaching a court. Therefore, in order to advance the interest of substantial justice, the need to liberally construe the term 'sufficient cause' has been espoused and adopted.[19] Furthermore, it has been repeatedly held that the rules of limitation are not meant to destroy the rights of parties and that "*when substantial justice and*

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12 *See* Limitation Act, No. 36 of 1963, § 29(2) (India) ("Where any special or local law prescribes for any suit, appeal or application a period of limitation different from the period prescribed by the Schedule, the provisions of Section 3 shall apply as if such period were the period prescribed by the Schedule and for the purpose of determining any period of limitation prescribed for any suit, appeal or application by any special or local law, the provisions contained in Sections 4 to 24 (inclusive) shall apply only in so far as, and to the extent to which, they are not expressly excluded by such special or local law.").

13 *Id.* § 5 (allowing courts to extend the period of limitation, if sufficient cause is shown for the delay).

14 The use of the term "but not thereafter" in Section 34 of the Arbitration Act was held to be an unambiguous bar to the application of Section 5 of the Limitation Act and the courts' power to condone delays thereunder. *See* Union of India v. Popular Constr. Co., (2001) 8 SCC 470, ¶ 12 (India).

15 M/s Patel Unity Joint Venture v. N. E. Elec. Power Corp. Ltd., (2018) 4 NEJ 505, ¶ 3 (India); Oil & Natural Gas Corp. v. M/s Dinamic Corp., (2013) 1 MH. L.J. 94, ¶ 6 (India) [*hereinafter* "Dinamic Corporation"].

16 NV International, (2020) 2 SCC 109, ¶ 5 (India).

17 Limitation Act, No. 36 of 1963, § 5 (India).

18 State of Nagaland v. Lipok AO & Ors., (2005) 3 SCC 752, ¶¶ 8, 9 (India).

19 Collector, Land Acquisition, Anantnag v. Mst. Katiji, AIR 1987 SC 1353, ¶ 3 (India).

technical considerations are pitted against each other, cause of substantial justice deserves to be preferred for the other side cannot claim to have vested right in injustice being done because of a non-deliberate delay".[20]

It is clear that, in circumscribing the discretionary power of courts under Section 5 to an outer limit of 30 days in respect of arbitration appeals, the decision in *NV International* runs contrary to the explicit wording of the statutory provision as well as well-established judicial precedent and policy guiding the law of limitation in India. Intriguingly, the stated rationale for judicially engrafting such a specific bar of limitation is to effectuate the apparent legislative intent of speedy dispute resolution under the Arbitration Act. Yet, the fact that the legislature itself did not think it necessary to bring in such a limit, despite otherwise having brought in two substantial amendments to the scheme of the Arbitration Act, seems to have gone unnoticed. In fact, the decision in *Varindera Construction*, the ratio of which has guided the Court in *NV International*, had been rendered much before the latest amendment made to the Arbitration Act in 2019.[21] In the author's opinion, the fact that the Parliament chose not to take that judicial pronouncement into account while amending the Arbitration Act ought to have weighed in with the Court before judicially reading in such a limit.

IV. The interpretative standard applied

The Apex Court, time and again, has categorically held that the Arbitration Act is a complete, self-contained code, intended to establish an exhaustive framework for arbitration.[22] The import of the same has also succinctly been brought out in the concluding paragraphs of the judgment in *Fuerst Day Lawson* v. *Jindal Exports Ltd.*,[23] wherein it is stated:

> "*Once it is held that the Arbitration Act is a self-contained code and exhaustive, then it must also be held, using the lucid expression of Tulzapurkar, J., that it carries with it 'a negative import that only such acts as are mentioned in the Act are permissible to be done and acts or things not mentioned therein are not permissible to be done'.*"

Hence, it is abundantly clear that interpolation of the kind done in *NV International* stands in apparent conflict with the interpretative standard otherwise made applicable to the Arbitration Act. Even otherwise, the same is in stark contrast to well-established canons of statutory interpretation under common law, as accepted by the courts as well.

Maxwell's treatise, On the Interpretation of Statutes, states that a law, otherwise complete and unambiguous, should not be construed on the basis of the legislature's assumed intent.[24] It is stated that the same would amount, not to construing the law, but to altering it. Accordingly, a legislation as comprehensive as the Arbitration Act or a provision as clear as Section 5 of the Limitation Act is thus required to be understood as complete in all respects. The scope of

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20 *Id.* ¶ 3.

21 The Arbitration and Conciliation (Amendment) Act, 2019, No. 33 of 2019 (India) received the assent of the President on August 9, 2019. *Inter alia*, a new time limit to complete pleadings has been introduced by inserting sub-section (4) to Section 23 of the Arbitration Act. Even the language of Section 37 itself was amended, and a non-obstante clause has since been inserted therein. However, no time frame was introduced within which to file the appeal.

22 P. S. Sathappan v. Andhra Bank Ltd., (2004) 11 SCC 672, ¶ 10 (India); Kandla Exp. Corp. v. OCI Corp., (2018) 14 SCC 715, ¶ 20 (India).

23 Fuerst Day Lawson Ltd. v. Jindal Exp. Ltd., AIR 2011 SC 2649, ¶ 89 (India).

24 PETER BENSON MAXWELL, ON THE INTERPRETATION OF STATUTES 6 (2d ed. 1883).

judicial innovation must, therefore, be severely restricted. Moreover, it is also a recognised principle of interpretation that if the words of a provision are clear and unambiguous, the same have to be given effect to, and that there can be no assumption of a defect or an omission.[25] In other words, in the absence of a clear finding to the contrary, the legislature is presumed to have intended to mean what it has plainly expressed (or not expressed).[26] In this light, it is hard to contemplate how the Court reached the decision that it did, in judicially circumscribing the discretionary power under Section 5 of the Limitation Act with respect to Section 37 appeals.

Interestingly, Salmond, while explaining the maxim *expressio unis est exclusio alterius* (i.e. expression of one is the exclusion of another), makes use of an example that seems appropriate to quote here:

> "*Suppose that a statue makes two provisions, A and B, both of which would normally be taken to have a certain implication. Now suppose, further, that the statute expresses this implication for A, but fails to express it for B. According to this maxim, the implication which would normally hold for B is impliedly negatived by the failure to express it, having regard to the fact that it is expressed for A.*"[27]

The legislature has provided for specific time limits in respect of various proceedings under the Arbitration Act, including for the original objection petition under Section 34, but has not imposed any such restriction on appeals under Section 37. Consequently, such an omission should have been treated to be deliberate, and the Court ought to have left any change to the wisdom of Parliament alone.[28] Remarkably, if viewed through this lens, Deshmukh J.'s dicta in *Jagson* appears to have laid down the most sound position of law (though the same has been subjected to criticism on account of not having considered Section 29 of the Limitation Act).[29] Yet, in the opinion of the author, notwithstanding the applicability of the Limitation Act, reading such a limit into Section 5 of the Limitation Act, as has been done in *NV International*, is, by the same standard, a case of judicial overreach.[30]

In fact, while scrapping similar judicially enacted bars of limitation, albeit in the context of a criminal trial, a bench of seven judges of the Supreme Court in *P. Ramachandra Rao* v. *State of Karnataka* has held, in no ambiguous terms, that the same would be tantamount to judicial legislation.[31] It was, thus, held to be impermissible under the constitutional framework. What is noteworthy is that the Constitution Bench, on that ground, disapproved of judicially enacted timeframes read in by courts to protect an accused's right of speedy trial in criminal offences. Now, unless the Court in *NV International* has placed the Parliament's apparent intention of speedy arbitration in India on a standard even higher than an accused's fundamental right to a

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25 Afcons Infrastructure Ltd. v. Cherian Varkey Constr. Co. (P) Ltd., (2010) 8 SCC 24, ¶ 13 (India).

26 *Id.* ¶ 3.

27 SIR JOHN W. SALMOND & P.J. FITZGERALD, SALMOND ON JURISPRUDENCE 134 (12th ed. 1966).

28 Especially since no such change was introduced despite two far reaching amendments to the Arbitration Act in 2016 and 2019.

29 Dinamic Corporation, (2013) 1 Mah.L.J. 94, ¶ 8 (India).

30 There was no anomaly that was sought to be rectified by reading in a 30-day limit into Section 5. In fact, the apparent anomaly of Section 37 not having any limitation period stood corrected by the decision in *Consolidated Engineering*, and as such, the Limitation Act came to be applied harmoniously with the provisions of the Arbitration Act.

31 P. Ramachandra Rao v. State of Karnataka, AIR 2002 SC 1856, ¶ 33 (India).

speedy trial involving questions of life and liberty, there seems to be little justification for deviating from the clear line of precedent set by much larger benches.

V. The basis in law

Every decision of a court of law has invariably to be based on reason i.e. it has to have a basis in law. The same is, in a sense, a means to the end sought to be achieved through a judicial order. Likewise, both in *Varindera Construction* as well as in *NV International*, the aim of giving effect to the legislative intention behind the Arbitration Act (i.e. the end sought to be achieved) has primarily been achieved by placing reliance on a decision of the Federal Court[32] in *Lachmeshwar Prasad Shukul* v. *Keshwar Lal Chaudhuri* ["**Lachmeshwar**"][33] (i.e. the means), in the following words:

> "*Given the fact that an appellate proceeding is a continuation of the original proceeding, as has been held in Lachmeshwar Prasad Shukul and Others vs. Keshwar Lal Chaudhuri and Others, AIR 1941 Federal Court 5, and repeatedly followed by our judgments, we feel that any delay beyond 120 days in the filing of an appeal under Section 37 from an application being either dismissed or allowed under Section 34 of the Arbitration and Conciliation Act, 1996 should not be allowed[…]*"[34]

While the Court in *Lachmeshwar* did state that an appeal was, in a sense, a re-hearing of the original proceeding,[35] it is pertinent to note that the decision was given in a completely different context. The decision was rendered in respect of the substantive law of the dispute and not a procedural law like limitation. The question before the Federal Court was whether legislative changes brought about pending an appeal could be taken into account by an appellate court. Affirming the same, it was held that, on admission of the appeal, the matter became sub judice again as a final adjudication on the rights of the parties was yet to take place.[36] Consequently, it was stated that an appellate court in such a case was bound to apply the law as it existed on the date it administered the judgment. Therefore, the bench headed by Sir Maurice Gwyer C.J. upheld the appellants' entitlement to the benefit under Section 7 of the new Bihar Money Lenders Act, 1939, notwithstanding the fact that the same was not even in the law-books when the lower court had decided the matter. It is in this context then, that the ratio of *Lachmeshwar* is required to be seen – it dealt with the applicability of substantive law in the context of legislative changes brought about to the same during the pendency of appeals.

Nothing in the *Lachmeshwar* judgment can be said to mandate appellate procedure to conform to the procedural laws applicable to an original proceeding. In fact, such an interpretation taken to its logical conclusion effectively renders the Second Division[37] of the Schedule to the Limitation Act, nugatory. The mere fact that even the statute of limitation draws a clear distinction between original proceedings and appeals (and provides for different periods of limitation for both) is enough to suggest that the reliance placed on the *ratio decidendi* of *Lachmeshwar* is entirely out of

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32 The Federal Court was the pre-independence precursor to the Supreme Court of India. It was established in 1937 under the provisions of the Government of India Act, 1935.
33 Lachmeshwar Prasad Shukul v. Keshwar Lal Chaudhuri, AIR 1941 FC 5 (India) [*hereinafter* "Lachmeshwar"].
34 Varindera Construction, (2020) 2 SCC 111, ¶ 4 (India).
35 Lachmeshwar, AIR 1941 FC 5, 103 (India).
36 *Id.*
37 The Second Division in the Schedule provides for specific limitation periods for filing appeals against orders passed in original proceedings, including those for which periods of limitation are separately prescribed under the First Division in the same Schedule. *See* Limitation Act, No. 36 of 1963 (India).

context. In fact, looked at from another angle, the judgments in *NV International* and *Varindera Construction* are also seemingly self-contradictory in light of their own reasoning – if the law applicable to original proceedings were also to be applied to appeals arising therefrom, the 120-day limit could not have been imposed at all. This is because the law applicable to the proceedings at the time would be the *Consolidated Engineering* regime, whereby Section 5 of the Limitation Act would have been available to potential appellants without any outer limit. Alternatively, the Court's reliance on *Lachmeshwar* is equally misplaced owing to the fact that the Limitation Act, including Section 5, is not applicable to proceedings under Section 34 of the Arbitration Act. Therefore, by the Court's own rationale, it could not have used the same to prescribe a grace period of 30 days for the appeal under Section 37.

In this sense, perhaps a better way would have been for the Supreme Court to do away with the applicability of the Limitation Act to Section 37 completely, and instead apply the same standard by citing Section 34 itself as the basis for the same.

VI. Some important technicalities

In any case, by virtue of Article 141 of the Indian Constitution,[38] *NV International* is now the law of the land. Yet, it appears that its application by appellate courts (under Section 37 of the Arbitration Act) might still not be as seamless as desired. In laying down the law, the Supreme Court seems to have overlooked a couple of discrepancies, which although seemingly trivial at first, might have a significant bearing on the rights of parties under the Arbitration Act.

First, in purportedly applying the same standard as Section 34 to appeals under Section 37 of the Arbitration Act, the actual period provided for under the former seems to have been missed. The time limit for filing an application under Section 34 of the Arbitration Act is "*three months*" which is further extendable by 30 days. Therefore, the said limit can potentially range from 119-122 days, depending on the months in question.[39] Fixing an outer limitation period of 120 days does not seem to be in consonance with the Court's own reasoning based on the dicta culled out from *Lachmeshwar*. Interestingly though, it appears that the initial limit of 90 days was taken from the Limitation Act, while applying the rigour of the outer limit of 30 days from Section 34 of the Arbitration Act. This is even more incongruous, not only with fundamental legal principles, but with the basis of the decision itself.

Second, the import of the introduction of the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 ["**Commercial Courts Act**"] has not been considered by the decisions in *NV International* or *Varindera Construction*. Although, presumably, both cases seem to deal with matters arising prior to its commencement, nonetheless, in the opinion of the author, a distinction ought to have been drawn by the apex court while laying down such an absolute and unqualified position of law. The distinction is important because of the procedure laid down in the Commercial Courts Act with respect to Section 37 of the Arbitration Act. This is in addition to the fact that with the "*specified value*"

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38 *See* INDIA CONST. art. 141 (wherein it is specifically provided that the law declared by the Supreme Court is binding on all other courts in the country. The provision is, in a sense, a constitutional codification of the doctrine of stare decisis).

39 Faced with the exact same question in the year 2010, the Supreme Court had categorically held that three months could not always be counted as 90 days and the same would depend on the months involved. *See* State of Himachal Pradesh v. M/s Himachal Techno Eng'rs, (2010) 12 SCC 210, ¶¶ 14-18 (India).

under the Commercial Courts Act having been reduced to a mere three lakh rupees,[40] most arbitration proceedings are now inevitably required to be governed by it. While Section 10 of the Commercial Courts Act vests commercial courts with jurisdiction in relation to arbitration matters arising out of the Arbitration Act, Section 13 explicitly provides for appeals under Section 37 of the Arbitration Act to be governed as per the conditions provided thereunder, one of which is a limitation period of 60 days. While the judgment in *NV International* may possibly be distinguished on account of the inapplicability of the Commercial Courts Act thereto, there is no certainty about how High Courts across the country will interpret the same, especially in light of the broad and authoritative language that the decision is couched in. Furthermore, even in matters to which the Commercial Courts Act would apply, the limitation period provided for under Section 34 of the Arbitration Act remains the same. Consequently, it may not be as easy for courts to deviate from the Supreme Court's dicta in cases where the Commercial Courts Act is applicable.

VII. Conclusion

At the core of the judicial process lies the ability to weigh a plethora of considerations pitted against each other to arrive at a 'just conclusion'. While such considerations may be many, the inescapable basis of a judicial decision is always the underlying law and the context of its application. Accordingly, insofar as arbitrations seated in India are concerned, any decision has to be ultimately based on the provisions of the Arbitration Act.

While it is true that courts should aim to give effect to the legislative intent and policy behind an enactment, the same should always be subject to the clear wording of the statute, as well as be in line with principles of uniformity, consistency and the value of precedent. As Salmond has noticed, "*too much regard for policy and too little for legal consistency may result in a confusing and illogical complex of contrary decisions*".[41] Moreover, it is also counter-intuitive that in arriving at a just conclusion under law, technical and procedural rigours be allowed to limit the rights of a party to get a decision on the merits of the dispute itself.

While the pronouncements in *NV International* and *Varindera Construction* might help in reducing the time taken in Section 37 proceedings, the same will inevitably be at the cost of litigants oblivious to the prospect of a sudden change in law to their detriment. Many of them might not even have control over the time being taken to file a Section 37 appeal. Accordingly, it would appear that the long-settled position of law as laid down in *Consolidated Engineering* perfectly balanced the legitimate interests of parties against policy considerations. The same should ideally have been the case at least till the time the Parliament made an explicit change to the Act. Nevertheless, if now the decision in *NV International* is indeed to stand, it is the opinion of the author that the same must be held to apply only prospectively, in the ultimate interests of justice and fairness.

[40] *See* Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, No. 4 of 2016, § 2(i) (India) (the pecuniary jurisdiction of courts under the Commercial Courts Act was reduced from Rupees One Crore to only Rupees Three Lakhs, by way of an amendment made to the Arbitration Act in 2018).

[41] SALMOND & FITZGERALD, *supra* note 27, at 188.

INDIAN JOURNAL OF ARBITRATION LAW

Cite as
9(1) INDIAN J. ARB. L. 1 (2020)

PUBLISHED BY
Centre for Advanced Research and Training in Arbitration Law
National Law University, Jodhpur (INDIA)
ISSN: 2320-2815 | eISSN: 2320-2823

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INDIAN JOURNAL OF ARBITRATION LAW

ONLINE ARBITRATION

Jeffrey M. Waincymer[*]

Abstract

*This editorial addresses the policy and practical considerations when we seek to use online systems with international arbitration. It traverses the criteria by which online dispute resolution ["**ODR**"] should be evaluated, considers the powers, rights, and obligations of the parties, outlines some of the key practical approaches that tribunals might encourage, and considers some of the key stages of a typical arbitration, to consider how online systems may best be utilised.*

I. Introduction

The current pandemic has forced us all to consider many things of far more importance than the disruptions to our own day-to-day working lives, particularly for those of us who have not lost our careers in the short term. But these careers must go on where they can. Effective continuance of commercial activity is a vital means to minimise the losses that we will be left with. In the arbitral context, the maintenance of fair and efficient dispute resolution processes impacts heavily on the parties' commercial potential and, in turn, their own supply chains and employees. Thus, there are always important external benefits of any well-functioning dispute

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His publications include Procedure and Evidence in International Arbitration; WTO Litigation: Procedural Aspects of Formal Dispute Settlement; Australian Income Tax: Principles and Policy; A Guide to the New UNCITRAL Arbitration Rules; A Practical Guide to International Commercial Arbitration and International Trade Law: Commentary and Materials.

settlement system. In the current crisis, ineffective dispute settlement might add to the economic damage caused by the pandemic.

In seeking solutions to the current disruption caused to international arbitration, a plethora of institutions and individuals have rapidly turned their minds to the utility of ODR. ODR is not a new phenomenon, with a massive literature on that topic and many court-based initiatives established in that regard. Nevertheless, in the main, this development has been in the context of attempts to promote efficient access to justice for small claims. Much of the academic literature is also about the feasibility of computer-assisted decision-making and not simply about technology as an aid to dispute resolution by human adjudicators. Concern for small claims or computer-assisted decision-making is not the focus of this article.[1] Instead, attention is given to the benefits and limits of technology in aid of high value international commercial and investment arbitration.

Such disputes retain a strong preference for face-to-face hearings, particularly in relation to witness cross-examination and oral submissions, and particularly where common law practitioners are involved. Civilian arbitrators and practitioners are less concerned with the need for such hearings, as they tend to put less weight on oral testimony, preferring to make contemporaneous documents determinative, wherever possible. Documents-only arbitrations are obviously less affected by the pandemic. Nevertheless, it can now be stated with confidence that even when both parties are from civil law backgrounds, a combination of document production, written submissions, and face-to-face oral testimony is the

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[1] Other questions not dealt with here include whether the delays caused by the pandemic might alter the balance of convenience test under any interim measure application. Statutes of limitations that prevent time running during impediments might also come into contention, although it should normally be the case that proceedings can be commenced electronically and preserve rights accordingly. I am also not considering other commercial implications of the pandemic such as insolvency and its interaction with arbitration, increased demand for security for costs, or parties and law firms that might even go out of business.

norm in most substantial international commercial and investment arbitrations. In the short term, that model will often not be possible. In that context, the purpose of this editorial is to consider the powers, policy considerations, and practical suggestions in relation to the use of online techniques in aid of fair and efficient arbitral dispute resolution.

These questions are raised in more detail in another contribution to this issue; David Bateson provides a very comprehensive overview of the powers and practicalities as to the use of ODR in international arbitration.[2] This editorial contribution does not wish to replicate the excellent points made therein, but instead provides some broad theoretical and practical contexts as to the role of a proactive and customer-focused arbitrator. It may indeed make sense to first read Bateson's contribution and then return to this one. The following matters touched upon there are expanded further in this editorial. Bateson makes the wise observation that tribunals should, wherever possible, seek agreement of the parties. This editorial explores the scenario where that agreement is not forthcoming. Bateson acknowledges the queries that some common law counsel raise as to the effectiveness of online cross-examination. That is also explored further in this contribution. Bateson also directs attention to a plethora of very useful written guides and checklists that have recently been published. This contribution comments on some of the key suggestions being made from various sources and presents some added pointers as to design options for consideration by arbitrators and counsel.

It is important to note at the outset that there are three scenarios in which to consider the potential use of virtual arbitration. The first relates to what to do with existing arbitrations already established under more normal processes that have now been disrupted by the pandemic. To what extent can virtual processes take over? To what extent are there any permissible extensions of time? How are these questions to be resolved when there is

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[2] *See* David Bateson, Virtual Arbitration, 9(1) INDIAN J. ARB. L. 143 – 153 (2020).

no consensus between the parties? A second related question is to what extent can virtual processes allow for efficient arbitration of new disputes while the pandemic continues? The third aspect is a more general consideration of the role of technology in dispute resolution. Going forward to a time when the pandemic is over, would we revert to the presumptive model of a face-to-face final hearing or at most bifurcated hearings, or would we allow technology to replace some or all of the face-to-face contact we have had in the past and consider other modes of structuring the arbitral process with the aim of reducing time and cost?

It is likely to be the case that current experiences, many born of necessity, will lead to greater use of some online techniques on a regular basis post-pandemic, thus decreasing some of the costs and increasing the speed of resolution of arbitral disputes. Conversely, where some aspects of ODR are concerned, experience and evaluation may lead us to conclude that these techniques are not optimal and might only be a short-term expedient. We might also conclude from experience that in order for these processes to indeed be optimised, important safeguards must be put in place. As always, there is a need for arbitrators who are alert to these issues and who collaborate with the parties in identifying the best suite of procedures for the particular dispute at hand. We should all acknowledge that in the early days, we are likely to have much to learn through these experiences.

In aid of further consideration of each of the above scenarios, this editorial traverses the criteria by which ODR should be evaluated, considers the powers, rights, and obligations of the parties, outlines some of the key practical approaches that tribunals might encourage, and considers some of the key stages of a typical arbitration, to consider how online systems may best be utilised.

II. Criteria for evaluating ODR

As with all aspects of arbitral procedure, we need appropriate criteria by which to evaluate any procedural model. The two criteria that must always

be considered are fairness and efficiency. The International Council for Online Dispute Resolution proposed the following additional standards.[3] ODR processes should be accessible, accountable, competent, confidential, support equality, be fair, impartial, and neutral, uphold all relevant laws, be secure, and be transparent.[4]One could argue persuasively that each of these is either a subset of fairness or efficiency.

Where fairness is concerned, issues might flow from differing technological capabilities of the parties and how a tribunal should deal with these. In the extreme, that could be a violation of due process rights if not handled appropriately. Even if differences are not so marked as to justify impugning an award, it is always wise to recall the salutary observation of the *Klöckner*annulment committee that "…*an award has not fully attained its purpose if it leaves one of the parties with the feeling – no doubt mistaken but perhaps understandable in the circumstances of the case – of unequal treatment and injustice*".[5]

Even very experienced arbitrators need to be alert to the fact that many things that can be taken for granted in face-to-face hearings might not be so where technology is the gateway. We are used to the fact that in highly respected neutral arbitral venues, there is more than adequate infrastructure to meet the needs of both simple and complex disputes. There will also be highly trained support staff. Persons in attendance will be operating in the same time-zone. Where virtual arbitration is concerned, however, one cannot presume these things. Some parties and witnesses who seek to access hearings remotely might not live in communities with high quality

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3 International Council for Online Dispute Resolution (ICODR), ICODR Standards, *available at*https://icodr.org/standards/.

4 *See also* Fed. Ct. of Austl., Guide to video conferencing in court proceedings, art. 1.7 (2016) (which calls for attention to be given as to whether a video link would be "a just, timely, economic and efficient use of the Court's and the parties' resources and aid the progress or resolution of the litigation.").

5 KlöcknerIndustrie-Anlagen GmbH, KlöcknerBelge, S.A. &KlöcknerHandelsmaatschappij B.V. v. Republic of Cameroon & Société Camerounaise des Engrais S.A., ICSID Case No. ARB/81/2, Decision on Annulment, ¶ 111 (May 3, 1985), 2 ICSID Rep. 95, 135 (1994).

and secure internet connections or might not even have dependable electricity supplies. In addition to serious differences in access and competence, some jurisdictions still have high levels of government control or censorship over all aspects of the internet. Not even the most sophisticated and well-resourced institution can guarantee that any such problem would be prevented and could thus be ignored by the tribunals. Time-zones are likely to be different. Tribunals need to respond adequately to all predictable and emerging issues. As arbitrators, we must even be alert to the potential for us to wrongly blame counsel or witnesses who are failing to adequately employ technology, rather than see our own culpability in the way we have set up the process.[6]

Another aspect is the overall fairness of online procedures as compared to face-to-face hearings. This is a more contentious proposition, with champions of ODR presenting strong arguments in support of fairness. This editorial simply seeks to delve into this question in the areas where the concerns have been the loudest. Typically, this relates to cross-examination of witnesses. This is discussed in two parts, *first* as to the entitlement to face-to-face hearings and *second* as to the challenges to effective cross-examination via videoconferencing.

Where efficiency is concerned, one can at least say that an ODR process that does not require airfares and hotels and does not require one uninterrupted hearing has, at the very least, significant cost saving potential. It must always be easier to find common times for arbitrators, counsel, and witnesses when such processes do not require travel and where they can be segmented and interspersed with other unrelated activities. There is, then,

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[6] A range of contributions to literature have sought to warn adjudicators of some of the more problematic psychological barriers to optimal decision-making. *See generally* JENNIFER K. ROBBENNOLT& JEAN R. STERNLIGHT, PSYCHOLOGY FOR LAWYERS: UNDERSTANDING THE HUMAN FACTORS IN NEGOTIATION, LITIGATION, AND DECISION MAKING (2012).

less need for rescheduling when problems arise, for example, where a key participant can still function but might be too sick to travel.

III. Powers as to ODR

As with all aspects of arbitral procedure, there is a need to consider the rights, duties, and powers of the various participants where ODR is concerned. This calls attention to the interaction of party consent and the procedural framework of the arbitration. One must consider the arbitral law of the seat of the arbitration (the *lex arbitri*), the procedural rules or other agreements made between the parties, and the potential for annulment or enforcement challenges.

In that sense, there are some key gateway questions as to the potential use of ODR. What express or implied consent, if any, has there been to online processes? Alternatively, have the parties agreed on an ad hoc or institutional basis to procedures that afford such discretion to the tribunal? Conversely, is there disagreement between the parties, one in favour and one opposed to such processes? What does the procedural framework allow for in that regard? In the extreme, is there any power for a tribunal to utilise online processes where this is thought by the tribunal to be the only reasonable option, even if both parties are opposed?[7]

In answering these questions, absent binding agreement of the parties, one looks at arbitral statutes and selected rules. These typically provide tribunals with broad discretionary powers over all procedural and evidentiary matters, subject to contrary directions of the parties and subject to the requirement that processes need to meet stipulated mandatory due process norms. These require the tribunal to treat each party with equality and to give each a full or reasonable opportunity to present its case.[8] Annulment

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7 While the presumption is that the tribunal cannot ignore an agreement between the parties, what if there was a statutory or contractual time-limit for the final award, soon to expire?

8 Such due process norms are found in United Nations Commission on International Trade Law (UNCITRAL), Model Law on International Commercial Arbitration, art. 18, G.A.

criteria under Article 34 of the United Nations Commission on International Trade Law [“**UNCITRAL**”] Model Law on International Commercial Arbitration [“**Model Law**”] and Section 34 of the Indian Arbitration and Conciliation Act, 1996 [“**ArbitrationAct**”] or enforcement criteria under Article 36 of the Model Law, Section 36 of the Arbitration Act, and Article V of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards [“**New York Convention**”], work hand in hand with the due process norms under Article 18 of the Model Law and Section 18 of the Arbitration Act.[9] A violation of such norms will typically be a ground for annulment or for blocking enforcement.

Bateson’s article lists some key provisions in a range of jurisdictions, and these will not be repeated here.[10] It is simply worth pointing out that there are a range of approaches to virtual hearings in these instruments. Very few proscribe video hearings absent party consent.[11] Some provide express discretion to the tribunal, thus requiring no further agreement of the parties.[12] The bulk of both institutional and ad hoc arbitrations under *lex*

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* “Model Law”] and the Arbitration and Conciliation Act, No. 26 of 1996, § 18 (India) [*hereinafter* “Arbitration Act”].

9 Virtual hearings will also lead to tensions in jurisdictions that struggle to understand the difference between the seat and the place of arbitration, a question that has troubled certain Indian courts. *See, e.g.,* Bharat Aluminium Co. v. Kaiser Aluminium Tech. Servs., Inc., (2012) 9 SCC 552 (India); Indus Mobile Distrib. Pvt. Ltd. v. Datawind Innovations Pvt. Ltd., (2017) 7 SCC 678 (India); Antrix Corp. Ltd. v. Devas Multimedia Pvt. Ltd., 2018 (4) Arb. L. Rep. 66 (Delhi) (India); Union of India v. Hardy Expl. & Prod. (India) Inc., (2019) 13 SCC 472 (India); BGS SGS Soma JV v. NHPC Ltd., 2019 (6) Arb. L. Rep. 393 (SC) (India); Mankastu Impex Pvt. Ltd. v. Airvisual Ltd., (2020) SCC Online SC 301 (India).

10 Bateson, *supra* note 2.

11 Vietnam International Arbitration Centre (VIAC), Rules of Arbitration 2017, art. 25(1) [*hereinafter* “VIAC Rules 2017”] is an exception (which states that “[t]he Arbitral Tribunal may conduct the hearings by means of teleconference, video-conference or by any other appropriate means if the parties have agreed so.”).

12 Video conferencing of witnesses is expressly allowed in the ALLGEMEINESBÜRGERLICHESGESETZBUCH [ABGB] [CIVIL CODE] §§ 595(2), *available at*

arbitri and rules like the Model Law and UNCITRAL Arbitration Rules simply afford general procedural discretion to the tribunal and virtual hearings are not referred to discretely.[13]

Parties might also agree to virtual hearings by accepting certain guides or soft law instruments, most notably, the IBA Rules on the Taking of Evidence in International Arbitration ["**IBA Rules**"]. Article 8.1 of the IBA Rules stipulates that "*[e]ach witness shall appear in person unless the Arbitral Tribunal allows the use of video conference or similar technology with respect to a particular witness*".[14] All such rights and discretions are subject to mandatory due process norms as articulated in core provisions such as Article 18 of the Model Law and Section 18 of the Arbitration Act.

Where the laws and the rules are not clear, one issue is to consider what these say about 'hearings' and their required nature, if required at all. A number of debatable terms then need to be interpreted as a number of different expressions are used. For instance, the notion of a 'hearing' also relates to procedural applications and requests for interim relief as well as any final process for witness testimony and oral submissions. A proposal

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http://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10001622 (Austria); art. 4:1072(b) RV (Neth.); Arbitration Ordinance, (2011) Cap. 609, § 48 (H.K.). *See also* London Court of International Arbitration (LCIA), Arbitration Rules 2014, art. 19(2) (which expressly stipulates that "[a]s to form, a hearing may take place by video or telephone conference or in person (or a combination of all three)…").

13 Model Law, *supra* note 8, art. 19; UNCITRAL, Rules on Transparency in Treaty-based Investor-State Arbitration (2014), art. 17.1; International Chamber of Commerce (ICC), Rules of Arbitration 2017, art. 22(2) [*hereinafter* "ICC Rules 2017"]; Arbitration Act, No. 26 of 1996, §§ 19, 24 (India).

14 Given the fact that few *lex arbitri* or institutional rules directly address the entitlement to or optimal way to conduct online arbitrations, a number of guides have been developed, some accelerated by the needs of the current pandemic. As with any guide, these are not binding on any arbitration unless expressly agreed to by the parties. Some of the more elaborate guides are outlined in Bateson's article. *See* Bateson, *supra* note 2, at 146.

during the drafting of the Model Law to limit Article 24(1) to hearings on substantive issues was rejected.[15]

Article 17(3) of the UNCITRAL Arbitration Rules stipulates that if any party so requests, "*the arbitral tribunal shall hold hearings for the presentation of evidence by witnesses, including expert witness, or for oral arguments*". That rule juxtaposes "*hearings*" with decisions on documents and other materials alone. It uses the term "*oral*" with arguments but not expressly with witnesses although the latter seems implied. Most importantly, Article 28(4) stipulates that the "*tribunal may direct that witnesses, including expert witnesses, be examined through means of telecommunication that do not require their physical presence at the hearing (such as video conference)*". Article 28(2) speaks more generally about such witnesses being heard "*under the conditions and examined in the manner set by the arbitral tribunal*". The drafting history demonstrates that the drafters were comfortable with video hearings, even though the earlier versions did not say so expressly.[16] Thus, the ability of either party to

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15 HOWARD M. HOLTZMANN & JOSEPH E. NEUHAUS, A GUIDE TO THE UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION: LEGISLATIVE HISTORY AND COMMENTARY 674 (1989).

16 *See* UNCITRAL, Rep. of Working Group II (Arb. & Conciliation) on the Work of its Fifty-First Session, ¶ 46, U.N. Doc. A/CN.9/WG.II/WP.154/Add.1 (July 23, 2009). *See also* UNCITRAL, Rep. of Working Group II (Arb. & Conciliation) on the Work of its Fiftieth Session, ¶¶ 65, 67, 84, U.N. Doc. A/CN.9/669 (Mar. 9, 2009). Note also the comment made in earlier discussions in the UNCITRAL, Rep. of Working Group II (Arb. & Conciliation) on the Work of Its Forty-Seventh Session, ¶ 43, U.N. Doc. A/CN.9/641 (Sept. 25, 2007):
"43. A suggestion was made that paragraph (5) should also refer to the possibility of witnesses being heard by videoconference. In support of that proposal, it was suggested that paragraph (4), which required that the hearings be held in camera, when read in conjunction with paragraph (5), which referred to evidence by witnesses also being presented in the form of written signed statement, could be understood as excluding witness evidence presented in any other form. However, it was said that inclusion of a reference to videoconference delved into detail that could overburden the Rules and reduce their flexibility. Some hesitation was expressed to including a reference to a particularly technology, such as video conferencing, given the rapidly evolving technological advancements in means of communication. A suggestion was made to provide a more generic term such as "teleconference" to accommodate technological

demand a hearing does not allow that party to bar the tribunal from directing videoconferencing.

The Model Law was drafted at an earlier point in time than the most recent UNCITRAL Arbitration Rules. Article 24(1) of the Model Law stipulates that subject to any contrary agreement by the parties, the tribunal shall decide whether to hold "*oral*" hearings. It goes on to state, however, that "*unless the parties have agreed that no hearing shall be held, the arbitral tribunal shall hold such hearings at an appropriate stage of the proceedings, if so requested by a party*". The reference of "*suchhearings*" is to "*oral*" hearings.

This raises a key question as to whether an "*oral*" hearing means a face-to-face hearing or whether speaking via video is compliant with this entitlement. The latter is a better view. The plain meaning of the word 'oral' simply means spoken and not written. Rules often juxtapose the notion of an oral hearing with the notion of a documents-only arbitration.[17] Thus, a telephone or a video communication would properly be described as oral. On that basis, if either party wants an oral hearing but one disagrees as to a virtual hearing being compliant, a tribunal that utilises such a process cannot be said to have conducted proceedings contrary to the agreed procedures per Article V(1)(d) of the New York Convention.

The International Chamber of Commerce ["**ICC**"] Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration, 2019, under the ICC Rules of Arbitration ["**ICC Rules**"], allows for video-conference hearings

advancements. Broad support was expressed for a suggestion that paragraph (5) should state not only that evidence of witnesses might be presented in the form of a signed written statement but also that oral statements might be presented by means that did not require the physical presence of witnesses. More generally, it was also noted that the arbitral tribunal had the authority under paragraph (6) to determine the weight of the evidence." (The paragraph numbering in this Article changed with later revisions to the draft)."

17 *See, e.g.*, Hong Kong International Arbitration Centre (HKIAC), Administered Arbitration Rules 2018, r. 22.4 [*hereinafter* "HKIAC Rules 2018"].

on dispositive applications.[18] Where the Expedited Procedure Rules are applicable, Article 3(5) expressly allows for hearings by video-conference.[19] Article 24(4) of the ICC Rules expressly allows for case management conferences by video-conference, telephone, or similar means, as well as in person. Paragraph (f) under Appendix IV (Case Management Techniques) to the ICC Rules also leaves the question somewhat open when it refers to "*using telephone or video conferencing for procedural and other hearings where attendance in person is not essential and use of IT then enables online communication among the parties, the arbitral tribunal and the Secretariat of a Court*".[20] It is not uncommon for similar express references in other rules. Some might then query whether, by inference, this precludes a similar result for final hearings when only the normal broad discretionary rules are applicable. That should not be so. An express reference to a tribunal's right to call for videoconferencing for some procedures should not be taken to limit a broad discretion to do so, absent a contrary direction from the parties.

There is, however, another query where the ICC Rules are concerned. As to the entitlement to hearings on the merits, Article 25(2) stipulates, "*the arbitral tribunal shall hear the parties together <u>in person</u> if any of them so request*" (emphasis added). The ICC has also published the ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic ["**ICC Guidance Note**"]. The ICC Guidance Note has sought to interpret the concept of hearing parties "*in person*" as allowing for a "*live, adversarial exchange…by virtual means if the circumstances so warrant*".[21] Various

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18 ICC International Court of Arbitration, Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration 2019, at 12, ¶ 77, *available at*https://iccwbo.org/content/uploads/sites/3/2017/03/icc-note-to-parties-and-arbitral-tribunals-on-the-conduct-of-arbitration.pdf.

19 ICC Rules 2017, *supra* note 13, app. VI - Expedited Procedure Rules, art. 3(5).

20 ICC Rules 2017, *supra* note 13, app. IV - Case Management Techniques, ¶ f.

21 ICC International Court of Arbitration, Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic 2020, ¶ 23, *available at* https://iccwbo.org/content/uploads/sites/3/2020/04/guidance-note-possible-measures-mitigating-effects-covid-19-english.pdf[*hereinafter* "ICC Guidance Note"].

English dictionaries suggest the contrary and describe "*in person*" as requiring physical presence as opposed to telephone and similar devices.[22]

These supportive comments as to the meaning of "*hearing*" or "*oral hearing*" and, to a lesser extent, "*in person hearing*", coupled with the drafting history where UNCITRAL is concerned, do not alone prevent other adverse New York Convention considerations, but these should also be rejected if directed at virtual hearings per se. Challenges might be theoretically possible on either of the Article 18 grounds, namely interference with the right to present one's case or the right to equal treatment. As to the first, there is a need to consider a per se claim that denial of a face-to-face hearing necessarily prevents a party from properly presenting its case in violation of Article V(1)(b) of the New York Convention. That should not be so, unless the applicable laws or rules demand physical presence. Courts and tribunals have long had experience of at least some witnesses needing remote access. In that context, a United States appeals court held that there was no barrier to enforcement under Article V(1)(b) when a witness refused to attend for fear of arrest, as the witness could have attended remotely.[23] In addition, a number of enforcement courts considering Article V(1)(b) claims require that the respondent to enforcement demonstrate that the procedural concerns could have affected the outcome of the case.[24] That would be close to impossible to argue in a well-run virtual hearing.

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22 *See, e.g.*, *In person*, CAMBRIDGE DICTIONARY, *available* at https://dictionary.cambridge.org/dictionary/english/in-person.

23 Consorcio Rive, S.A. de C.V. v. Briggs of Cancun, Inc., 01-30553 (5th Cir. 2003), ¶ 29 (U.S.).

24 Tribunalefédérale [TF] Jan. 29, 2019, 4A_424/2018 (Switz.); HanseatischesOberlandesgericht Hamburg [HansOLG] [Hanseatic Higher Regional Court Hamburg] Apr. 3, 1975, 2 Y.B. COMM. ARB. 241 (1977) (Ger.); Bundesgerichtshof [BGH] [Federal Court of Justice], May 15, 1986, 98 ENTSCHEIDUNGEN DES BUNDESGERICHTSHOF IN ZIVILSACHEN [BGHZ] 70 (Ger.); Apex Tech. Inv. Ltd. v. Chuang's Dev. (China) Ltd., [1996] 2 H.K.L.R.D. 155 (C.A.) (H.K.); Bundesgerichtshof [BGH] [Federal Court of Justice], Apr. 26, 1990 21 Y.B. COMM. ARB. 532 (1996) (Ger.); Polytek Eng'g Co. Ltd. v. Hebei Import & Exp. Corp., [1998] 1 H.K.L.R.D. 287 (C.A.)

Conversely, if there are indeed significant and insurmountable technological problems facing one party that the tribunal does not respond to effectively, then this ground can be made out, but there is no justification for a mere assertion that online adjudication is an *ipso facto* barrier to presenting a case. This is discussed further below when considering cross-examination of witnesses, the element of proceedings where this concern is most likely to be raised.

Even disparity in quality as between technological resources should not *ipso facto* be seen as a proscribed form of inequality. Parties often have different quality of counsel, professional training, and proficiency in the language of the arbitral proceeding. It will have to be an extreme case of technological inadequacy, where one could say that the treatment is indeed materially unequal, in a due process sense, when relying on online technology. Tribunals will need to ensure that this is not the case and be prepared to make on-going assessments as to the implications of any technical difficulties. A tribunal must always be prepared to adjourn a hearing if the connection is inadequate, and the right to be heard is indeed being detracted from.

In some cases, a tribunal might be faced with conflicting due process concerns. For example, there may be conflicting problems with indeterminate delay. As is the case in India, *lex arbitri* might impose time-limits for completion of awards, although these can typically be extended.[25]

(H.K.); Schelswig-HolsteinischesOberlandesgericht [OLG] [Schelswig-Holstein Supreme Court of Justice], June 24, 1999, 16 SCHH 01/99 (1999) (Ger.); Oberlandesgericht Frankfurt [OLG] [Higher Regional Court], Oct. 18, 2007, 26 SCH 1/07 (2007) (Ger.); Oberlandesgericht Frankfurt [OLG] [Higher Regional Court], Aug. 27, 2009, 35 Y.B. COMM. ARB. 377 (2010) (Ger.). *See also* M. Scherer, *Article V(1)(b)*, *in* NEW YORK CONVENTION: CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS OF 10 JUNE 1958: A COMMENTARY ¶¶ 142-4 (R. Wolff ed., 2019).

[25] Arbitration Act, No. 26 of 1996, § 29A (India).

Express duties of efficiency and expediency may still call for consideration of virtual hearings during the pandemic at least.

One inequality scenario readily conceivable during the pandemic is a dispute between parties from one country that has reopened and has allowed for travel, as against another country that does not even allow parties, witnesses, and counsel to congregate in the same place. It would seem undesirable to have one side represented face-to-face with the other wholly online unless the parties agree to this. Even then, if allowed in the face of disagreement between the parties and if appropriate safeguards were in place, most enforcement courts would not block enforcement simply because this has occurred when the party with virtual access had high quality access.

The next question is whether there are any other mandatory laws that could prevent virtual hearings, or which could at least direct certain minimum standards. One should at least consider whether any domestic laws of the seat, of the parties' home countries purporting to apply extra-territorially, or of a likely enforcement country can be argued to impose such proscriptions. Again, that is unlikely to be so, but it should be for counsel to draw any such possibilities to the attention of the tribunal. One such possibility is the application of universal human rights conventions that call for equal treatment.[26] Similarly, European legal systems must consider Article 6 of the European Convention on Human Rights ["**ECHR**"], which stipulates as follows:

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[26] G.A. Res. 217 (III) A, Universal Declaration of Human Rights, (Dec. 10, 1948), art. 10; G.A. Res. 2200A (XXI); International Covenant on Civil and Political Rights, (Dec. 16, 1966), art. 14. Various cases discuss differential treatment, fair balance, and substantial disadvantage. *See, e.g.*, United Nations Hum. Rts. Comm'n, Gen. Cmt. No. 32, art. 14: Right to Equality Before Courts and Tribunals and to a Fair Trial, Rep. on the Work of Its Ninetieth Session, U.N. Doc. CCPR/C/GC/32, at 3, ¶ 13 (2007); Dudko v. Australia, Comm. No. 1347/2005, Views of 23 July 2007, U.N. Doc. CCPR/C/90/D/1347/2005, ¶¶2.3, 7.3–7.4 (July 23, 2007).

> *"In the determination of … civil rights and obligations, everyone is entitled to a fair and public hearing …"*

This, of course, mixes notions of transparency in litigation that are quite distinct from the privacy inherent in arbitration. Lew, Mistelis, and Kröll argue that as arbitrations are private proceedings, Article 6 of the ECHR does not apply to arbitration.[27] At the very least, the European Court of Human Rights has concluded that by agreeing to arbitrate, certain rights under Article 6 that would flow from court proceedings have instead been waived.[28]

Finally, one could consider the way that international and domestic courts have considered these due process questions under their litigation rules. Court attitudes could be considered to see if they provide any guidance as to the interpretative challenges when parties to an arbitration do not come to the same view as to the use of virtual hearings. Domestic courts that are supportive where litigation is concerned are less likely to see problems where enforcement of arbitral awards is concerned. References to 'open court' are clearer and more specific than references to 'hearings' and even 'in person hearings'.[29]Private arbitrations do not have the same problem as to the need for transparency and public access that domestic courts must promote. Even then, domestic rules at times allow for videoconferencing for good cause in compelling circumstances and with appropriate

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27 JULIAN DAVID MATHEW LEW QC, LOUKAS A. MISTELIS & STEFAN M. KRÖLL, COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION (2003).

28 Suovaniemi& Ors. v. Fin., App. No. 31737/96 Eur. Ct. H.R. (1999). *See also*GABRIELLE KAUFMANN-KOHLER & THOMAS SCHULTZ, ONLINE DISPUTE RESOLUTION: CHALLENGES FOR CONTEMPORARY JUSTICE 205 (2004).

29 FED. R. CIV. P. 43(a) (U.S.).

safeguards.[30] Some international criminal courts have also allowed for video testimony, often where witnesses are concerned for their safety.[31]

At the very least, the above discussion would suggest that there are a range of permutations that a tribunal might need to consider where virtual hearings are concerned. At first sight, the easiest scenario would appear to be where both parties agree to use online processes rather than face-to-face hearings. However, there is one issue that might still need to be considered. That is whether a party who has so agreed has, as a result, waived any right to seek annulment or to block enforcement even if some argument is tenable as to inequality or as to some restraint of either party's ability to put its case. This is discussed below in terms of the potential to waive such rights.

The second scenario is where one party would wish to see greater use of online proceedings, with the other party taking an opposing view. Such a scenario should not alarm an arbitrator with unconstrained discretionary powers. Many decisions as to procedure will also flow from differences in party preferences. It is the role of the arbitrator to then utilise residual

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30 *Id.* Videoconferencing for witnesses is also allowed under the Civil Procedure Rules 1998, No. 3132 (L.17), r. 32, ¶ 3 (Eng.). While arbitral advances at times occur ahead of domestic litigation reform, the same is not uniformly so with online dispute resolution, given that a number of courts around the world have been trialling such initiatives for some time. While care should always be taken to consider whether a model that works well in one dispute resolution forum could readily be transplanted fairly and efficiently into a different environment, nevertheless, it can only be helpful to give some attention to court models and experiences when considering optimal arbitral processes. Here again, Bateson's article gives direction to the reader. *See* Bateson, *supra* note 2.

31 Prosecutor v. Mucic&Landzo, Case No. IT-96-21-T, Decision on the Motion to Allow Witnesses K, L and M to Give their Testimony by Means of Video Link Conference, ¶ 15 (Int'l Crim. Trib. for the Former Yugoslavia May 28, 1997); Prosecutor v. Tadić, Case No. IT-94-1-T, Decision on the Defence Motions to Summon and Protect Defence Witnesses and on the Giving of Evidence by Video-Link, ¶ 2 (Int'l Crim. Trib. for the Former Yugoslavia June 25, 1996). *But see* the contrary concern as to problems in assessing witnesses' demeanour in Prosecutor v. Zigiranyirazo, Case No. ICTR-2001-73-T, Decision on the Defence and Prosecution Motions Related to Witness ADE, ¶¶ 12, 32 (Int'l Crim. Trib. for Rwanda Jan. 31, 2006).

discretions to promote a fair and efficient outcome. Choosing a mechanism in the face of disagreement between the parties should *ipso facto* be treated in the same way as where a tribunal selects a place for hearing, contrary to one party's preferences. This has survived a challenge in response to an ICC arbitration.[32] Those arguing for or against greater use of online processes should have to provide their reasoning and engage with the contrary arguments of the opposing party where there are no constraints on a tribunal's discretion in that context. This may also be impacted upon by rules that impose obligations of good faith on the parties. This may relate to the evaluation of the justification for refusing consent to a procedural option where no viable alternative exists.

It is nonetheless important to manage such procedural disagreements in a way that gives each party the optimal chance to present its reasoning and ultimately maintain respect for the tribunal even by a party that was not preferred under the procedural ruling. In many instances, a practical and forward-looking tribunal will not need to resolve a head-on procedural disagreement, but may instead find a practical solution that alleviates the concerns of a reluctant party.

For completeness, one should also consider an extreme hypothetical – the third situation – where both parties are averse to the use of online proceedings, but where the tribunal considers that this would be the only reasonable way forward. That might arise where a tribunal is alert to express duties of expediency and efficiency and sees strict time-limits for the final award fast elapsing. One could at least envisage arguments that a tribunal might wish to invoke a duty of efficiency to urge use of online processes where there is no end in sight to the pandemic.

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[32] Salini Costruttori S.P.A. v. Fed. Dem. Republic of Eth., Addis Ababa Water & Sewerage Auth., Case No. 10623/AER/ACS, Award Regarding the Suspension of the Proceedings and Jurisdiction (ICC Int'l Ct. Arb. Dec. 7, 2001); JEAN-FRANÇOIS POUDRET& SÉBASTIEN BESSON, COMPARATIVE LAW OF INTERNATIONAL ARBITRATION 116,¶ 146a(2d ed. 2007).

Nevertheless, a tribunal can only ignore an express procedural agreement of the parties if such agreement offended against mandatory due process norms or retrospectively sought to undermine the arbitrators' agreement with the parties.[33] It would not be easy to envisage a simple refusal to engage in online proceedings as being of this nature. All such an agreement would do is that it would delay the process until such time as face-to-face hearings were permitted once again. If both parties want to defer a result for an indefinite period, why should they be prevented from doing so, even if that meant that the time for the award elapsed? They can agree to abandon a process, so why can they not agree to let time run out? It would also be rare for a tribunal to have grounds for resignation in such circumstances, although hard and fast rules should always be avoided. The closest scenario to one where required norms conflict is indeed where a time-limit for the award cannot be extended and where physical presence is called for by the parties which is not possible during the pandemic. Attention might then be given to the additional question as to whether that is a force majeure event vis-à-vis the arbitration agreement.[34]

If there are in fact mandatory norms that prevent or limit virtual hearings, the next question is whether these can be waived. Conceptually, the notion of a mandatory norm is one that cannot be waived by private parties, but the key is the discretionary nature of Article V of the New York Convention. Even if a ground is made out, a court may enforce the award nonetheless, and is likely to do so if a party has waived its right to complain about a virtual hearing procedure. Gary Born points to various national laws in support of the principle that procedural protections may be waived. He argues that this is required to support the arbitral process and party autonomy.[35]

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33 For example, parties cannot ex post facto agree to extend the time for a hearing after contractually agreeing with arbitrators for a flat fee in relation to a shorter arbitration.

34 That may be uncertain, including as to the applicable law of force majeure or frustration.

35 GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 2186–2187 (2d ed. 2014).

Where waiver is concerned, a related question is whether the party has made any protest at the time of the online proceedings. A number of rules or laws indicate that objections as to procedural unfairness need to be taken in a timely manner, otherwise the right to object is lost.[36] A number of enforcement courts have refused to allow an Article V(1)(b) challenge where no protest was made at the time of the subsequently challenged procedure.[37]

IV. Selection of arbitrator and proactive arbitrator behaviour

It is always important for parties to select arbitrators that have the necessary skill set to deal with all aspects of their dispute. Where online processes are concerned, that involves arbitrators with a sufficient understanding of the technical issues and potential due process challenges and the willingness to work with the parties to find mutually agreeable processes that ensure fairness and promote efficiency.[38]

One contentious aspect of an ideal arbitrator, at least where common law counsel are concerned, is as to how proactive an arbitrator needs to be.

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[36] *See, e.g.*, Arbitration Act 1996, c. 23, § 73(1) (Eng.).

[37] Oberlandesgericht Hamm [OLG] [Higher Regional Court of Hamm], Nov. 2, 1983, 20 U 57/83 (1983) (Ger.); HanseatischesOberlandesgericht Hamburg [Hans OLG] [Hanseatic Higher Regional Court Hamburg], Jan. 26, 1989, 6 U 71/88 (1989) (Ger.); Int'l Standard Elec. Corp. v. Bridas Sociedad AnonimaPetrolera, Indus. y Comm., 745 F. Supp. 172 (S.D.N.Y. 1990) (U.S.); Shenzhen Nan Da Indus. & Trade United Co. Ltd. v. FM Int'l Ltd., [1992] 1 H.K.C. 328 (H.C.) (H.K.); K Trading Company (Syria) v. BayerischenMotoren Werke AG BayerischesOberstesLandesgericht [BayObLG] [Bavarian Higher Regional Court], Sept. 23, 2004, 4Z Sch 05-04, 30 Y.B. COMM. ARB. 568 (2005) (Ger.); Oberlandesgericht München [OLG] [Munich Higher Regional Court], Nov. 28, 2005, 31 Y.B. COMM. ARB. 722 (2006) (Ger.); Oberlandesgericht Karlsruhe [OLG] [Karlsruhe Higher Regional Court], Mar. 27, 2006, 32 Y.B. COMM. ARB. 342 (2007) (Ger.); AO Techsnabexport v. Globe Nuclear Servs. & Supply GNSS Ltd., No. 09-2064 (4th Cir. Dec 15, 2010) (U.S.).

[38] A question then arises as to whether a proposed arbitrator could be successfully challenged for lack of technological expertise if a virtual hearing is inevitable. That would be unlikely and even less so when backed by a competent institution that can provide all necessary support and infrastructure.

There is never likely to be consensus as to the degree to which an arbitrator should choose to lead the parties, as opposed to sitting back and merely umpiring their respective submissions. Current responses to the on-going COVID-19 pandemic and ODR generally heighten these questions. Some propositions are hopefully less contentious. I would argue that while many tribunals may sit back and rely on counsel where legal arguments are concerned, the same cannot be said for the design and security of online processes. Tribunals have a duty to promote fairness and efficiency and cannot rely on the lack of expertise or lack of interest of counsel or the parties to justify suboptimal use of online processes or to justify a failure to even consider their use when there are major disruptions to the normal way of doing things.

ODR allows tribunals to act in a more inquisitorial manner, identifying discrete issues and stipulating an order and method for their analysis. While this has been the norm in civilian legal systems, this also mirrors the trend under common law litigation where it is more and more the case that legislators direct judges to engage more actively in case management and to use principles of proportionality to deal fairly and efficiently with all disputes.[39] ODR means that we no longer need to see a final hearing as an all or nothing model for dispute resolution. At the very least, we should not set procedural stages without first considering whether one single hearing will indeed be the ultimate element of the process. Too often, larger arbitrations work back from the tribunal members' calendars to see the earliest time that such a hearing is possible,[40] and then set stages beforehand accordingly. But if people do not have to congregate in one foreign place, there is no longer any necessity to have all witnesses and oral submissions presented at the same time. Virtual hearing times might well be broken into discrete parts when international travel and hotels are no longer an issue.

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[39] Lord Woolf CJ, *The Woolf Report*, 3 INT'L J. L. & INFO. TECH. 2, 144, 145–155 (1995).

[40] And the more famous and busy each arbitrator, the more distant will be the earliest significant intersection between their free spots on their calendars.

In some cases, there would be added benefits, for example, separating out fact witnesses and then giving experts the time to consider their testimony before themselves giving evidence, if the latter testimony would benefit from such reflection and analysis time.

Arbitrators should also be prepared to propose hybrid models where some matters can be dealt with on the paperwork, through contemporaneous documents and written submissions, with online hearings kept for witness examination and perhaps expert witness conferencing, and only necessary questions posed to counsel. Tribunals should understand, as should counsel, that written submissions will often be the best way to present complex and competing arguments about an established evidentiary framework, while in-person discussion is the best way to explore matters of remaining concern to the tribunal. Tribunals can also consider greater use of summary disposition where possible or promoting agreed statements of fact and retaining oral cross-examination and submissions only where these remain optimal processes.

There may also be a difference between how to best establish procedures for new cases and, alternatively, how best to deal with existing cases with already agreed face-to-face hearings that have been adversely impacted by the pandemic. Where modifications are made to existing arbitrations that were never intended to be conducted virtually, tribunals need to be sensitive to the need to allow parties to familiarise themselves with the options and be given a meaningful opportunity to form their views as to their preferences. Where a virtual hearing is a modification to a previous procedural order, the agreed modification should also be properly documented. A tribunal should at least invite any party to raise any procedural concerns as soon as they are perceived to arise. The tribunal might also invite parties to attest to their agreement to a virtual hearing in writing and to waive, where possible, their right to challenge by reason of the mechanism alone.

V. Virtual arbitration and the stages of the arbitral process

One court-based study has strongly suggested that the effectiveness of new technologies will be very dependent on the way the adjudicatory processes are modified to best accommodate them. In a study of Australian courts and their use of video, the researchers reported two major findings:[41]

> "*Firstly, the way in which video-link technology is implemented has a real impact on service delivery, and therefore justice outcomes; how video links are used, their design and operation, matters.*
>
> *Secondly, a successful video linked court encounter requires careful consideration of the technology, environments, personnel, protocols and legislation that enable their use. These factors work together and none of them should be ignored or viewed in isolation. The type of the remote participant, the reason for their remote participation, and the nature of the remote space from which they appear, are key factors in determining the way in which these components should be configured to achieve the best results (…)*"

These findings should lead arbitrators to accept that with their first experiences, they are less likely to be expert at managing the processes or dealing with nuances in the challenges that arise. The balance of this editorial considers some of the more significant practical steps that might be utilised throughout an arbitral process. As always, the guiding criteria should be ensuring fairness and equality on the one hand and promoting efficiency wherever possible.

A. Preliminary conferences and cyber-protocols

A pre-hearing conference should cover all aspects of technological preparedness. Normally that might be limited to counsel but could instead consider bringing in necessary users such as parties, key witnesses, and

41 E. ROWDEN, DAVID TAIT, DIANE JONES, ANNE WALLACE & MARK HANSON, GATEWAYS TO JUSTICE: DESIGN AND OPERATIONAL GUIDELINES FOR REMOTE PARTICIPATION IN COURT PROCEEDINGS 10 (2013).

interpreters or stenographers to confirm equipment and protocols. The tribunal might also need a technical manager to be involved.

There can be side benefits from logistical challenges. Providing instructions for online processes might allow tribunals to give parties better guidance as to the essence of the arbitral process. Instead of a pro forma Procedural Order No. 1 speaking primarily to lawyers, there could be better materials directed at a broader audience of stakeholders explaining the purpose of each step and the way they will be dealt with in an online format. It is always ideal to develop procedures in consultation with the parties, both to promote agreement wherever possible, and also to allow all stakeholders to bring useful insights into the analysis. Ideally, a tribunal would help the parties develop a cyber-protocol. A tribunal ought to explain to all participants the pitfalls and recommendations for virtual presentation. The ICC Guidance Note sets out a checklist for a cyber-protocol and suggested clauses on matters to be agreed or directed.[42]It is important that each participant has appropriate responsibility for certain aspects. For instance, it should be the responsibility of each party to identify any local laws that provide barriers to virtual proceedings.

While the need for adequate preparation is clear, conversely, it is also important to ensure that there should not be undue concern for technological matters. One could envisage situations where costs and delay are increased simply through debates about technological matters.

B. Equipment and equality

One challenge is to consider which platform works best for any particular dispute. If the arbitration is institutional, chances are that the particular institution has selected a particular platform. If that is not the case, the parties could be invited to seek agreement. Parties would hopefully wish to

42 ICC Guidance Note, *supra* note 21, annex - I, II.

select a platform that integrates well with online document management systems.

In the absence of any other direction, arbitrators should at least consider the advantages and disadvantages of different alternatives. Tribunals should ensure that, if they make suggestions as to any platform or document management system, they are not liable for any defects. The parties themselves should ensure adequacy. At most, the tribunal should direct minimum specifications. Each platform will also have its own contractual conditions of use, which should be read by all and confirmed as agreeable.

Where parties suggest different platforms, there is a difficulty in having the tribunal make a selection if that means that a preference is given to a program familiar to one party but not the other. Choosing a neutral platform may simply mean that both parties face efficiency concerns. Selection of a platform should also not disadvantage a participant with less technological capability. An important question is whether parties have equal technological equipment and expertise. A related question is whether one party would need to purchase additional equipment and/or software and if so, how could such costs be accommodated within any ensuing arbitral award.

A protocol should direct the minimum standards of equipment, for example, barring any person from relying solely on smartphones. A protocol can include minimum standards of video bandwidths and upload and download speeds.[43] Wired or wireless and password protected internet connections could also be directed. Consideration needs to be given as to whether to mandate the use of headsets with microphones to maximise

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[43] *See, e.g.*, Korean Commercial Arbitration Board (KACB) International, Seoul Protocol on Video Conferencing in International Arbitration 2020, art. 5, annex. - I, *available at* http://www.kcabinternational.or.kr/user/Board/comm_notice_view.do?BBS_NO=548&BD_NO=169&CURRENT_MENU_CODE=MENU0025&TOP_MENU_CODE=MENU0024 [*hereinafter* "Seoul Protocol"]; ICC Guidance Note, *supra* note 21, annex. - II.

audio quality or allow parties their own preferences. Without headphones and microphones there is unlikely to be a perfect mix between sufficient distance to the camera for comfortable and wide-ranging vision and closeness for audio clarity. If multiple devices are being used, it is important to ensure that only one is ever un-muted. Volume should be set to avoid audio feedback. Ideally, participants should try and avoid natural light in the room.

Participants should confirm suitable equipment and test it.[44] They should confirm that directed alternative mechanisms are properly established and that privacy and agreed confidentiality are to be maintained. Parties might promise each other that all necessary tests have been undertaken prior to a formal hearing. A tribunal might direct the parties to undertake training programs provided by commercial platform sources. Alternatively, a test run could be organised by the tribunal or by the hearing administrator. Such tests should cover all potential steps that might be taken during the proceedings. Guide notes should be provided as to how to deal with all key processes. If at all possible, a test session could have everyone available at one time and work through a checklist of potential steps that might be taken during the hearing itself. Aspects that may need to be tested include means of displaying multiple screens, screen sharing, audio muting, transfers between waiting, hearing and breakout rooms, document access, communal chats, inviting non-participants, and control panel features generally.

C. Control

Platforms will typically have a host with controlling powers, which should, wherever possible, be the presiding arbitrator or a secretary or a hearing administrator under the presiding arbitrator's control.

There is a need for identification and log-in details of all relevant persons whether tribunal, parties, counsel, fact and expert witnesses, interpreters,

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[44] ICC Guidance Note, *supra* note 21, app. II, cl. II, IV.

transcribers, and technical and support staff. Any platform selected must allow for proper verification of the identity of participants. The host should monitor participants, being able to note when each is offline or online, to ensure that the required persons are indeed available. Once all designated persons are in attendance, the tribunal may lock the meeting. The tribunal will also need to have sufficient technological control over the processes, for example, being able to mute parties when appropriate. It may be difficult to ensure proper sequestration of future witnesses, if that is ordered by the tribunal, but thought should be given to how best to do so. All proposed attendees should have notified the tribunal of their intentions and modes of access prior to any hearing.

Whatever processes are selected, it is important to consider what might go wrong. The first and simple step addressed above is to test any hardware and software prior to formal use in the proceedings. There still needs to be a speedy method to notify a lack of connection as soon as it occurs. Reports via email should be sent to all registered participants. Often, connection problems are not black and white, and may simply arise from delays in the process or human error in clicking the wrong button. It may be appropriate to have a designated period before connection failures are reported. Where faults arise because of the inexperience of stakeholders, expert platform managers can often view multiple screens remotely and talk users through what is required to regain access. Ideally, parties might agree on a fallback platform or teleconference link to ensure minimum downtime, should there be problems with the primary platform. The Seoul Protocol on Video Conferencing in International Arbitration ["**Seoul Protocol**"] proposes that parties maintain similar "*cable back-ups, teleconferencing, or alternative methods of video/audio conferencing*".[45]

It is appropriate to have a waiting room as people log on so that the tribunal can admit all participants to the hearing room concurrently and not be in a

[45] Seoul Protocol, *supra* note 43, art. 6.2.

position of being seen speaking to one side alone. After parties are in breakout rooms, there again needs to be a mechanism to have all parties return to the hearing room at the same time. If there are to be breakout rooms, there need to be mechanisms to ensure that there is no inadvertent access by unauthorised persons.

The parties should make clear that they agree to the tribunal's discretion to terminate a virtual hearing if it is believed that the current process is unfair to one of the parties.

D. Etiquette

Some unique etiquette issues may need to be addressed. It is important to set etiquette standards and ensure that the tribunal is indeed acting as the master of ceremonies.[46] For example, online hearings will tend to find people speaking over each other without intending to do so. Participants should not attempt to multitask such as checking emails. It is useful to turn off other computer applications not needed for the hearing. Computers used for the video link should not be used for other purposes such as making notes.

E. Cybersecurity

Normally one would expect the parties to organise all logistical details at the tribunal's directions. However, one area where tribunals have quickly come to understand that they have new duties is in relation to cybersecurity. There are three elements to cybersecurity. The first is compliance with any applicable domestic data privacy regulations. Participants in arbitration should be aware that they may have obligations under domestic data protection laws regardless of the arbitration obligations themselves.[47] The

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46 ICC Guidance Note, *supra* note 21, cl. 4.

47 INT'L COUNCIL FOR COM. ARB. & INT'L BAR ASS'N, THE ICCA-IBA ROADMAP TO DATA PROTECTION IN INTERNATIONAL ARBITRATION – PUBLIC CONSULTATION DRAFT FEBRUARY 2020, *available at*https://www.arbitration-icca.org/media/14/18191123957287/roadmap_28.02.20.pdf.

parties should be asked to indicate whether there are any such provisions that are relevant. The second aspect is the privacy of the arbitral process itself. The parties should expressly confirm that proceedings are private. The third is the protection of confidential information made available during the process.

There may also be problems if there is to be improper recording by any of the participants. Thought needs to be given as to whether online proceedings shall be recorded or should, in due course, be transcribed. Recordings must be promptly distributed to all appropriate persons. A tribunal is in a difficult position if one party wishes to separately record proceedings but the other opposes that option. It is important to have appropriate confidentiality obligations formally agreed to.

If electronic documents are confidential, they would need to be password protected. Passwords should be provided by a different mechanism to the email invitation to the platform. Calendar invites should not give access to information in an unsecure form. Members of each team need to ensure that passwords shared with others are done so in a secure fashion. Another possibility is to connect through a virtual private network.

Some platforms have already admitted that they were, temporarily at least, insufficiently secure. Arbitrators need to keep up to date with such information, in particular to avoid recommending a platform that allows for such problems. A tribunal must, at the very least, ensure that online communications between a three-person tribunal and/or a draft of procedural orders or awards are totally secure.

F. Timing

Differing time zones must always be considered, and tribunals should seek to ensure that no single party seems to be significantly disadvantaged. Tribunals should even be alert to how they describe time, given that there will be differing time zones represented.

Time allocated to virtual hearings should allow for some degree of administrative delay, confusion, or human error. As participants are likely to be doing other things on relevant days, there is a greater risk of persons misjudging commencement time. The tribunal should indicate how much before the scheduled start time persons must log on. Given the greater potential problems with online proceedings, the common practice of having a reserve day or two for oral hearings seems sensible, although catch-up may not be needed as promptly. The time devoted to online proceedings may also need to take into account people's attention span. Where chess-clock arbitration is being utilised, it ought to be possible to have a common stopwatch displayed.

G. Mediation and settlement

The optimal solution to most disputes is a mutually agreeable solution. Proactive arbitrators will often think about how to encourage settlement, either by inviting direct negotiations or via mediation. Some arbitrators will encourage parallel mediation, either to obviate the need for an award or to deal with discrete aspects that do not justify the expense of arbitration. This may even be done to deal with certain procedural aspects such as disputes over document production. Arbitrators active in this manner should give the same consideration to the benefits and pitfalls of online mediation as they would to an online arbitration itself. There must be some added barrier to a negotiated solution if counsel and parties are not drawn together at the time of the hearing, perhaps discussing matters in the corridors and looking for a mutually agreeable solution, as they see arbitral costs escalate.[48] A proactive tribunal can at least invite parties to have regular conversations exploring such possible avenues.

[48] Carrie Menkel-Meadow, *Is ODR ADR? Reflections of an ADR Founder from 15th ODR Conference, The Hague, The Netherlands, 22–23 May 2016*, 3 INT'L J. ONLINE DISP. RESOL. 4, 7 (2016) (Carrie Menkel-Meadow notes the value in face-to-face procedures providing "room to brainstorm and create a different solution, give an apology, come to understand someone else's perspective and improve, rather than just 'resolve' relations and disputes.").

H. Ethics and ODR

Differences in views about ethics may come to the fore with certain questions about online preparation and behaviour. Arbitrators must be prepared for the fact that a small but not insignificant number of parties might engage in unduly aggressive tactics for strategic purposes. Sometimes such behaviour seeks to escalate costs that would be more damaging to one's opponent. In other circumstances, a party who expects to lose may seek to draw out proceedings as long as possible. Contests as to the use of new technologies can be a fertile ground in which to try and manipulate the process in that way. There is the potential for parties to call for delays and extensions simply as a result of the pandemic and rely on claims of technological failure. It may be desirable to utilise a commercial manager, particularly if they can accurately determine whether any breakdown is legitimate or not.[49]

On the other hand, it is important to not generate undue ethical concerns about matters that also permeate live hearings, for example, the possibility of unauthorised secret recordings, which any unscrupulous counsel can do in an in-person hearing with a smartphone.

I. Document management

As noted above, it would be desirable for the virtual platform to work well with the electronic management of documentation. Given that physical bundles may not be available in each key place, some special concerns may need to be addressed. Methods of identifying documents should be the most efficient for actually accessing electronic data management platforms. Thought should be given as to how to access more than one document at

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[49] In addition to the question of counsel ethics, even arbitrators might benefit from thinking about their own efficiency obligations. Arbitrators with the busiest practices that have been disrupted by the pandemic will need to carefully consider their ethical obligations when rescheduling hearings. One systemic concern might be that the busiest arbitrators may feel able to take on even more work in the hope that they can sneak the odd witness in-between other time-consuming activities.

any point in time, particularly when sourced from different avenues. Size of electronic document files is also important. If too large, it can be difficult to manage or even send via email. Effective document management also must involve integration of written submissions. Arbitrators need to be able to link to necessary supporting material with ease. If presentation slides are to be used, these also need discrete visuals that do not override the views of key faces.[50]

J. Witnesses and cross-examination

There are two elements to cross-examination within ODR. The first, alluded to above, is whether a denial of the right to cross-examine in the same room is somehow a denial of the right to fully present one's case or is contrary to general procedural models that do not express a position either way. The second element is, if cross-examination in ODR is not proscribed, what is the way for a tribunal to structure any virtual witness process to promote fairness and efficiency and minimise the chances of any due process challenge.

As to the first, it was suggested above that an online dialogue is indeed a 'hearing' and is also 'oral.' More debatable is whether that is also 'in person.' The better view should be in the affirmative. Nevertheless, those seeking to argue the contrary might gain support from unlikely sources that would perhaps be misused in this context. Without referring to video evidence, Born suggests that "*it is almost uniformly accepted and reflects sensible policy: the opportunity to present its case, in person and in the physical presence of the tribunal, is a basic, irreducible aspect of the adjudicative process which ought in virtually all cases be fully respected*".[51] He also notes and criticises contrary U.S. authority that

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[50] At the end of a normal hearing, it is easy for the party owning documents to remove them and deal with them as they wish. If physical documents have been delivered to opposing witnesses and counsel in a virtual hearing, steps might need to be taken to ensure proper disposal.

[51] BORN, *supra* note 35, at 2266.

would readily allow video evidence under the concept of an oral hearing.[52] Confusion remains, as the logic in that case can indeed be criticised. The Court suggested that an arbitrator "*hears evidence by providing a 'legal hearing,' that is, by affording an 'opportunity to … present one side of a case*". This is obviously going too far in the other direction – allowing a documents-only hearing when an oral hearing has been called for.

The better view remains that a properly conducted online cross-examination should be acceptable. Other courts have also supported video cross-examination,[53] including the Indian Supreme Court.[54] Those more reluctant have suggested that physical presence before the adjudicator and

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52 Schlessinger v. Rosenfeld, Meyer & Susman, 47 Cal. Rptr. 2d 650, 656 (Cal. Ct. App. 1995) (U.S.) ("… the arbitrator's obligation 'to hear evidence' does not mean that the evidence must be orally presented or that live testimony is required." "Legally speaking the admission of evidence is to hear it.").

53 *Polanski v. Condé Nast Publ'ns. Ltd.* [2005] UKHL 10, [13] (Eng.) (the U.K. House of Lords did not consider that video conference cross-examination was itself prejudicial); *see also* Ian McGlinn v. Waltham Contractors Ltd. & Ors. [2006] EWHC 2322 (TCC) (Eng.). Canadian courts have also been receptive. *See, e.g.*, the Ontario Superior Court in Arconti v. Smith, 2020 CanLII 2782 (Can.) and Chandra v. CBC, 2015 CanLII 5385 (Can). In Australia, consideration is directed towards what will ultimately "best serve the administration of justice… [whilst]... maintaining justice between the parties." *See Kirby v Centro Props.* [2012] FCA 60 (Austl.); *Tetra Pak Mktg. Pty Ltd. v Musashi Pty Ltd.* [2000] FCA 1261, ¶25 (Austl.) (wherein Katz J. concluded that there was "a strong current of authority in favour of permitting the relatively new video-link technology to be used, in the absence of some considerable impediment telling against its use in a particular case."); *Capic v Ford Motor Co. Australia Ltd. (Adjournment)* [2020] FCA 486 (in this recent case before the Australian Federal Court, Perram J. considered that while video cross-examination might interfere with "chemistry" and "formality," it was acceptable on the facts of that case). *See also* the Evidence (*Miscellaneous Provisions) Act 1958* (Vic) § 42G (Austl.) (which provides the minimum technical requirements that must be met before a court may direct that a witness give evidence by video-link).
Entitlement has been refused where the witness provided no reason for non-attendance and the evidence went to a key issue (*Campaign Master (U.K.) Ltd. v Forty Two Int'l Pty Ltd. [No. 3]* (2009) 181 FCR 152 (Austl.) [*hereinafter* "Campaign Master"]) or where the witness' evidence was highly controversial and required interpretation (*Stuke v ROST Capital Grp. Pty Ltd.* [2012] FCA 1097 (Austl.)).

54 State of Maharashtra v. Praful B. Desai (Dr.) (2003) 4 SCC 601 (India)(wherein the Court considered that when technology works well, credibility can be adequately assessed).

one's opponents supports an understanding of the solemnity, gravity, and importance of truth-telling.[55]

During the pandemic, any solution must also be compared to alternatives. Written questions and answers seem an undesirable alternative as one would expect that answers would simply be drafted by counsel. Alternatively, merely delaying proceedings will often breach duties of expediency and efficiency and can run into time-limits for awards.[56]

Some common law commentators suggest that arguments against the use of videoconferencing for cross-examination purposes seem stronger where issues of credibility are concerned. An important issue, then, is to consider more generally when and why the demeanour of a witness is relevant and if so, how can this be validly assessed by an adjudicator. Leggat J. in *Gestmin SGPS SA*[57]considered that in commercial cases, little reliance should be placed on witness recollections, and instead, factual findings and inferences should be drawn from documentary evidence and known or probable facts.[58] There also remains a healthy debate as to whether questions going to credibility alone are appropriate for international commercial arbitration on all but the rarest of occasions. Many would argue that general challenges to credibility, where it is not otherwise an obvious issue, are less appropriate for arbitration. Human beings do particularly badly on psychological tests

55 Campaign Master, [2009] FCA 1306, ¶ 78 (Austl.).

56 Domestic courts have supported video-link because of logistical difficulties of bringing witnesses and their attorneys from one country to another (Dist. Ct. of the D.C. in U.S. v. Philip Morris USA, Inc., Civ. App. No.- 99-2496 (GK), 2004 WL 3253681, at *1 (D.D.C. Aug. 30, 2004) (U.S.) or because of the inability of witnesses to travel for health reasons. These circumstances were seen as constituting "*good cause*" and "*compelling circumstances*" (Dist. Ct. of Conn. Sawant v. Ramsey, No. 3:07-CV-980 (VLB), 2012 WL 1605450, at *3 (D. Conn. May 8, 2012) (U.S.). In the Singapore International Commercial Court case of Bachmeer Capital Ltd. v. Ong Chih Ching [2018] S.G.H.C. (I) 01 (Sing.), the Court permitted one witness to give evidence by video link on the grounds of inability to obtain passport and permission to travel to the place of hearing.

57 Gestmin SGPS SA v. Credit Suisse (UK) Ltd. & Anr. [2013] EWHC 3560 (Comm) (Eng.)

58 *Id.* [15]–[23].

directed at discerning whether they can detect when a person is lying, so the presumption as to this supposed value of cross-examination is questionable.[59]

While there should not be successful per sechallenges to video cross-examination unless the use of videoconferencing is expressly proscribed, there are a number of matters that should be considered by tribunals and counsel. Witness preparation has an added dimension whereby counsel should familiarise witnesses with the technology to be employed. Experienced counsel might be concerned to have adequate visuals both as to the witness and also as to the tribunal, to gauge the latter's reaction to the flow of the discussion. A related question is whether the camera must be on each arbitrator at all times so that counsel can view their facial reactions as an element in optimising submissions. The ability of counsel to evaluate the body language of witnesses and the receptiveness or otherwise of a three-person tribunal may also be impacted by whether the tribunal sits in one place, with only two screens to be viewed by counsel or instead, is fully separated. Where common law style cross-examination is concerned, there may potentially be greater difficulty in assessing body language depending on the technological quality and set-up, any technological delay that breaks the flow of questioning and even slight but annoying delays between the audio and the video. All can adversely impact the ambience of the process.[60] Live text may assist the process when there is any diminution in the quality of the audio output. Expert witness conferencing (sometimes described as 'hot-tubbing') is likely more problematic where all persons are physically separated.

If the tribunal would normally administer an oath or seek some affirmation of truthfulness from a witness, consideration might also be given to asking the witness to affirm that no unauthorised communication would take place

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59 See ROBENNOLT&STERNLIGHT, *supra* note 6.

60 To many civilian scholars and practitioners, this is less a problem with the medium than a pointer to the problems with cross-examination per se.

and no unauthorised materials would be accessed during their testimony. If oaths or affirmations are to be utilised, care should be taken to ensure that local law does not negate an online form. The relevant witness should also have ready access to the required documentation if some is needed.

An important aspect is to ensure that no party gains improper assistance when utilising video or phone connection for cross-examination purposes. Natural responses are to organise dual cameras to show both the room and the witness, and ideally, where circumstances permit, to have an observer from the opposing party's camp or at least from a neutral source, to ensure no improper assistance is given in answering questions. Neutral observers are, of course, problematic in the time of COVID-19. Institutions in one jurisdiction could invite those in others to host witness cross-examination to ensure integrity. Parties should agree that the tribunal may take whatever steps it wishes to ensure proper security. Given that witnesses should not have notes when being cross-examined, other than the authorised ones, it is preferable that they give evidence in front of a computer on a clear desk. Venues for witness cross-examination might be directed to be neutral.[61] Conversely, witnesses may feel more comfortable when in their own natural environment. They may feel less intimidated than they would with the plethora of counsel often present in significant-sized arbitrations.

There is also an issue as to how cross-examining counsel presents a document to a witness during cross-examination. It is important for the tribunal to establish a process that allows key documents to be considered at the same time that witnesses are cross-examined about them. Separate cameras or split screen programs must all be optimised for this to occur. Physical bundles may suffice, or a technician might be utilised to *send* documents to all necessary screens. Opposing counsel who wish to put hard

61 *See, e.g.*, Seoul Protocol, *supra* note 43, art. 2.1(c).

copy documents in front of the witness being cross-examined might send the hard copies in a sealed envelope to be opened on camera.

It would be unfortunate if witnesses seem more engaging if they are better able to concentrate on the camera point than on the screens where the listener is visible. Ideally, a camera can be placed mid-screen so that one appears to be looking directly at the listener. A tribunal might even indicate a protocol as to how far away one should be from the screen to ensure that all witnesses and counsel are at an optimal distance and do not look too different in approach. Even identical background protocols for witness examination might be desirable. With some platforms, there is also the potential to digitally enhance one's image. This should be barred. A related issue is whether the cross-examining counsel can call for the witness to position themselves closer to the camera so facial expressions can be better gauged. Arbitrators who believe that they would never be affected by such differences could readily find respected general psychological studies as to human biases that at least suggest contrary hypotheses.

K. Translation, interpreters, and stenographers

The need for interpretation and translation slows down hearings in any event. Cross-examination via an interpreter can be even more problematic when videoconferencing is concerned. There is a need to consider whether translation will be simultaneous or consecutive. Interpreters and transcribers are particularly disadvantaged when different people attempt to speak at the same time. Interpreters and transcribers would need a discrete method of communicating with the tribunal. If live transcript is to be utilised, it is preferable to display it on a different device to that which is used for visuals.

L. Oral submissions

Regardless of the potential for ODR, tribunals should consider the utility of oral openings and post-witness closing oral submissions. As to oral openings, it is problematic to hear counsel outline a case for many hours

and sometimes days, if the tribunal is properly prepared, has read all written submissions and witness statements, and simply wishes to hear the results of testing of the witness testimony and orally explore matters of remaining uncertainty. Similarly, if post-hearing written briefs are to be allowed, only the briefest oral recap of matters considered at a hearing would seem worthwhile. In some cases, an earlier opening might allow all parties to carry out their preparation more efficiently.[62]

Another potential scenario discussed above is where one party's counsel can be present, but the other's may not. It was suggested above that this is problematic either way. The choice is between the appearance of favoured circumstances for one versus lowest common denominator for both.

M. ODR and side-communication and consultation

Due process and a full opportunity to present one's case should include adequate means for separated parties and counsel to be able to regularly confer before, during, and after proceedings. During proceedings, there ought to be separate secure communication platforms. Some platforms provide for virtual breakout rooms that are password protected and with their own videoconferencing options. Counsel in different locations may need some form of distinct communication mechanism to provide thoughts and suggestions for further questions or submissions. If counsel, parties, and advisers are discussing matters remotely, perhaps by chat rooms, a tribunal may need to give them time to allow comments to be read and synthesised where concurrent links are unavailable. There may also need to be channels for communication between opposing counsel. Some platforms may not allow for arbitrator chat, requiring instead that parties be put into a waiting room while the tribunal wishes to confer.

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62 Neil Kaplan, How we must adapt to covid-19, GLOB. ARB. REV. (Mar. 29, 2020), *available at* https://globalarbitrationreview.com/article/1222179/kaplan-how-we-must-adapt-to-covid-19.

Each team should indicate exactly what method they seek to use for private communication. Only methods approved by the tribunal should be permitted. Chat windows with the tribunal should be open to all and there should be no ex parte communications with the tribunal or between counsel and witnesses during their testimony. Tribunals should direct that there be no communication with witnesses during breaks in cross-examination. Because breaks in technology might be inadvertent, such warnings should be given at the outset of each witnesses' testimony.

Where counsel wishes to object to a question, it would be desirable if there was a simple flagging method, otherwise parties would be speaking over each other.

N. Costs

Tribunals may need to consider how to deal with disparate technology costs between the parties. Proportionality principles dealing with value and complexity may then be further impacted by both the level of technology costs and any disproportionate distribution.

O. Deliberations and awards

Where three-person tribunals are concerned, there may well be a difference between the interpersonal communication when all are temporarily living in a neutral venue, for example, dining together regularly, as opposed to the more remote ambience of online proceedings from separate locations. It is not clear whether the likely lesser interpersonal connection has any meaningful impact on the justice or otherwise of the outcome. Technology can still allow tribunals to regularly confer as to the progress of the hearing.

Tribunals will need to be careful about the rules for signature of hard copy of awards, whether members of the tribunal can sign counterparts in different places or electronic signatures will suffice.

VI. Conclusion

Some criticisms of online hearings flow from views about optimal procedure that are themselves subject to dispute, particularly as between different legal families. For common law advocates trained to test credibility in cross-examination, anything other than the face-to-face theatre of experienced Queen's Counsel against inexperienced fact and expert witnesses is problematic. Conversely, the more proactive a tribunal, the more likely that online processes can achieve most of what face-to-face hearings can do and can, in turn, save time and expense. Importantly, for significant-sized arbitrations, those typically in the tens of millions of dollars and above, the parties must be able to access the most sophisticated video technology that negates the most simplistic challenges about body language and visualisation of witness behaviour. In the short term, whatever one's philosophical views, necessity will be the mother of invention. We can all strive to also make a virtue of that necessity and continually work towards ever more efficient and fair arbitral processes. In this case, by using the best that technology has to offer to question and improve upon traditional processes.

A TRAP FOR THE UNWARY: DELINEATING PHYSICAL AND LEGAL PROTECTION UNDER FULL PROTECTION AND SECURITY CLAUSES

Thomas Snider[*]& Aishwarya Nair[†]

Abstract

*This article considers the scope of protection accorded by the full protection and security ["**FPS**"] standard and the potentially inadvertent impact of the wording of certain FPS clauses on this scope. Based on a review of the FPS clauses in model bilateral investment treaties ["**BITs**"] issued by 45 countries around the world, this article identifies a growing trend towards limiting the scope of FPS clauses to providing physical protection and security and assesses the typical styles of drafting such FPS clauses. This article concludes, with the support of investment arbitration awards, that broadly-worded FPS clauses – even if expressly limited to physical protection and security – may enable claims related to the legal protection and security of investments to be successfully raised.*

I. Introduction

Customary international law requires a State to "*accord protection and security to foreigners and their property*".[1] Under international investment agreements, this obligation is typically set forth within an FPS clause. These clauses essentially record the host State's obligation to take active measures to protect the investment from adverse effects.[2]

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The authors would like to thank Mozar Ross and Sreedevi Jayachandran for their valuable research for and contributions to this article.

1 Jack Rankin v. Iran, Award No. 326-10913-2, 17 Iran-U.S. Cl. Trib. Rep. 135, ¶ 30 (1987).

2 Christoph Schreuer, *Full protection and security,* 1(2) J. INT'L DISP. SETTLEMENT 353 (2010).

Discussion and debate over FPS clauses typically relate to three different topics: (1) the standard of protection and security the host State is expected to provide a foreign investor or investment; (2) the responsibility of the host State for the actions of third parties; and (3) the scope of protection and security offered. This article is concerned with the third question: whether FPS clauses cover only *physical* protection and security or can also include *legal* protection and security.

The scope of the FPS clause and the question of its applicability to instances of non-physical harm have been, and continue to be, discussed and debated.[3] While there is no consensus yet on whether FPS clauses are intended to cover instances of physical and non-physical harm, it is understood that the specific language of an FPS clause can be very instructive in this exercise; while some clauses remain unqualified, others will expressly provide only for *physical* or, alternatively, for *legal* protection and security.

Globally, as will be set out in Part III of this article, States are increasingly disposed towards restricting the FPS clause to *physical* protection and security and, with this intention, expressly limit the scope of the FPS clauses in their model BITs and international investment agreements to *physical* protection and security. Inadvertently, however, as a result of the vague wording of some of these clauses, it is possible that acts and/or omissions covered by the *legal* protection and security standard may also find themselves covered by an FPS clause that, on its face, articulates a *physical* protection and security standard.

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[3] *See* Thomas W. Wälde, *Energy charter treaty-based investment arbitration,* 5 J. WORLD INV. TRADE 373, 390–391 (2004); Schreuer, *supra* note 2; SEBASTIÁN MANTILLA BLANCO, FULL PROTECTION AND SECURITY IN INTERNATIONAL INVESTMENT LAW 278 (2019); MAXIMILIAN CLASMEIER, ARBITRAL AWARDS AS INVESTMENTS: TREATY INTERPRETATION AND THE DYNAMICS OF INTERNATIONAL INVESTMENT LAW 32 (2017).

This article assesses the possibility of such ingress by looking at the wording of FPS clauses. By way of background, in Part II, the article will first consider the types of acts and/or omissions that have been recognised by arbitral tribunals to fall under the *physical* or *legal* formulations of the FPS clause. Following this, in Part III, the article will set out and discuss the global trend towards restricting the FPS provisions to a purely *physical* interpretation. This part will also look at the common trends in terms of the wording of FPS clauses limited to *physical* protection and security. In Part IV, thearticle will consider the impact of a vaguely worded FPS clause on its intended restricted application. Finally, in Part V, the article will provide some concluding comments.

II. The scope of protection offered by FPS clauses

In the context of investor-State arbitrations, the FPS clause was first raised in *Asian Agricultural Products Ltd.* v.*Republic of Sri Lanka*[4][“**AAPL**”] in 1987. In this case, the investor – a 48.2% shareholder in a Sri Lankan joint venture company established to cultivate and export shrimp – brought a claim against Sri Lanka under the Sri Lanka-United Kingdom BIT following the destruction of the joint venture’s shrimp farm as a result of a counter-insurgency operation of the Sri Lankan Security Forces. The investor based its claim, among other things, on the FPS clause in the BIT.[5]

Although the scope of the protection afforded by the FPS clause was not in question in this case[6] – the investor only claimed that there had been a violation of Sri Lanka’s responsibility to ensure the *physical* protection and security of the shrimp farm – AAPL is an important milestone because it

4 Asian Agric. Prod. Ltd. v. Republic of Sri Lanka, ICSID Case No. ARB/87/3, Final Award (June 27, 1990), 4 ICSID Rep. 245 (1997) [*hereinafter* “AAPL”].

5 *Id.* ¶ 7.

6 The Tribunal’s determination was limited to the standard of liability imposed by the FPS clause. The Tribunal ultimately determined that the FPS clause did not impose strict liability on the host State for losses suffered by a foreign investment protected under an investment treaty.

heralded the invocation of these clauses to varied situations in the context of investor-State arbitrations.

The rest of this part will focus on how FPS clauses have been interpreted in investor-State arbitrations and the scope of the protection deemed to be provided by them.

A. Physical protection and security

The traditional understanding of the FPS standard is that it is limited to *physical* protection and security. As noted in *Saluka Investments B.V.*v. *Czech Republic* ["**Saluka**"], the FPS clause applies "*essentially when the foreign investment has been affected by civil strife and physical violence*".[7] In addition to application to situations of attacks on or destruction of an investment as set out in *AAPL*,[8] the FPS clause has been recognised to apply in the situations outlined below as well.

i.Looting of premises

In *American Manufacturing and Trading, Inc.* v. *Republic of Zaire*,[9] the FPS clause in the United States-Zaire BIT was invoked in the context of two separate occasions of destruction and looting of the premises of the investor by members of the Zairian armed forces. In this case, the Tribunal found in favour of the investor and determined that Zaire had violated the FPS clause because of its failure to take "*every measure necessary to protect and ensure the security of the investment*".[10] This award is noteworthy because it expanded the FPS provision to include instances of looting of property. Similarly, in

7 Saluka Inv. B.V. v. Czech Republic, Case No. 2001-04, Partial Award, ¶ 483 (Perm. Ct. Arb. Mar. 17, 2006), 15 ICSID Rep. 274 (2010) [*hereinafter* "Saluka"].

8 AAPL, ICSID Case No. ARB/87/3, Final Award (June 27, 1990), 4 ICSID Rep. 245 (1997). Apart from AAPL, this issue also arose and FPS protection was successfully claimed in the case of Ampal-Am. Isr. Corp. & Ors. v. Arab Republic of Egypt, ICSID Case No. ARB/12/11, Decision on Liability and Heads of Loss, ¶¶ 283–291 (Feb. 21, 2017).

9 Am. Mfg. & Trading, Inc. v. Republic of Zaire, ICSID Case No. ARB/93/1, Award (Feb. 21, 1997), 5 ICSID Rep. 11 (2002).

10 *Id.* ¶ 6.11.

Cengiz İnşaat Sanayi veTicaret A.S v. *Libya*, the Tribunal found that the pillaging and eventual take-over of the investor's worksites amounted to a violation of the FPS provision.[11]

In *Adel A Hamadi Al Tamimi* v. *Sultanate of Oman*,[12] the Tribunal introduced a restriction on the claims that may be brought in this regard. Here, the investor had, among other things, claimed that following the Royal Oman Police's ejection of the investor from the premises of his investment and the subsequent closure of the investment site,[13] Oman had permitted the theft of equipment and other property from the investor's worksite and that this constituted a breach of the FPS provision in the free trade agreement between the United States and Oman.[14] The Tribunal rejected this claim on the basis that the FPS protection could not be extended to 'abandoned investments' or investments over which the investor's property rights had been extinguished.[15]

ii.Seizure of premises

In *Wena Hotels Ltd.* v. *Arab Republic of Egypt*[16] ["**Wena Hotels**"], the investment in question – two hotels in Egypt that had been provided to the investor on long-term lease agreements by Egyptian Hotels Company ["**EHC**"], a wholly-owned subsidiary of Egypt – was forcibly seized by EHC. Consequently, the investor initiated arbitral proceedings against Egypt under the Egypt-United Kingdom BIT claiming, among other things, that Egypt had failed to accord full protection and security to the

11 Cengiz Insaat Sanayi veTicaret A.S v. Libya, ICC Case No. 21537/ZF/AYZ, Award, ¶ 435 (Nov. 7, 2018) [*hereinafter* "Cengiz"].

12 Adel A Hamadi Al Tamimi v. Sultanate of Oman, ICSID Case No. ARB/11/33, Award, ¶ 171 (Nov. 3, 2015).

13 *Id.* ¶¶ 169–170.

14 *Id.* ¶ 394.

15 *Id.* ¶¶ 448–452.

16 Wena Hotels Ltd. v. Arab Republic of Egypt, ICSID Case No. ARB/98/4, Award (Dec. 8, 2002), 6 ICSID Rep. 89 (2006).

investment.[17] The Tribunal found that the act of seizure would fall within the scope of the FPS protection under the BIT.[18] Since *Wena Hotels*, the FPS clause has been invoked successfully in the context of seizure of foreign investments in other cases as well.[19]

iii. Forced removal of personnel from the premises of the investment and usurpation of control over the investment

In *Biwater Gauff (Tanzania) Ltd.* v. *United Republic of Tanzania*,[20] a dispute arose out of the termination of the investor's contract to develop Tanzania's water and sewage infrastructure and services by the Dar-es-Salaam Water and Sewerage Authority ["**DAWASA**"], a State agency. The investor claimed that there had been a violation of the FPS clause in the Tanzania-United Kingdom BIT on the basis that the DAWASA usurped the investor's management and control of its facilities, seized and occupied the premises, and forcibly removed and deported the investor's personnel.[21] The Tribunal found that all these actions constituted a violation of the FPS clause, noting, importantly, that these activities would constitute a violation of the FPS provision even without the use of force.[22]

iv. Occupation of premises and the failure to provide an adequate police response

In *Bernhard von Pezold and Others* v. *Republic of Zimbabwe*,[23] a claim under the FPS clauses of the Switzerland-Zimbabwe and Germany-Zimbabwe BITs was brought in relation to the State's land reform programs and the resultant incursion and occupation of the investors' properties by local war

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17 *Id.* ¶ 80.

18 *Id.* ¶¶ 84–91, 95,131.

19 Waguih Elie George Siag& Clorinda Vecchi v. Arab Republic of Egypt, ICSID Case No. ARB/05/15, Award, ¶¶ 445–448 (June 1, 2009); Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanz., ICSID Case No. ARB/05/22, Award, ¶¶ 729–731 (July 24, 2008) [*hereinafter* "Biwater Gauff"].

20 Biwater Gauff, ICSID Case No. ARB/05/22, Award (July 24, 2008).

21 *Id.*, ¶¶ 714, 814(c).

22 *Id.* ¶¶ 729–731.

23 Bernhard von Pezold& Ors. v. Republic of Zim., ICSID Case No. ARB/10/15, Award (July 28, 2015).

veterans. In this case, the Tribunal decided that Zimbabwe's failure to protect the investors' properties from occupation or to remove the settlers and the lack of response from the police to various violent incidents that subsequently occurred were all in violation of the FPS provisions under the BITs.[24] Similarly, in *MNSS B.V. and RecuperoCreditoAcciaio N.V* v. *Montenegro*, the Tribunal found Montenegro in breach of the FPS clause under the Montenegro-Netherlands BIT for the failure to provide police protection during two separate instances of occupation of the investors' premises.[25] In particular, the Tribunal noted that Montenegro should have had "*a more pro-active attitude to ensure the protection of persons and property*".[26]

In *Joseph Houben*v. *Republic of Burundi*, the Tribunal found Burundi responsible for failing to respond adequately to the invasion and illegal settlement of the investor's property.[27] In this case, parts of the investor's land had been sold to and occupied by the local population under the approval of the local administration.[28] Although the investor had repeatedly protested against this situation and requested police assistance, the local authorities had refused to take any action.[29]

However, in *Toto Costruzioni Generali S.p.A.* v. *Republic of Lebanon*, the Tribunal found that a temporary obstruction to the investment would not constitute a violation of the FPS provision.[30]

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24 *Id.* ¶¶ 593–599.

25 MNSS B.V. &RecuperoCreditoAcciaio N.V v. Montenegro, ICSID Case No. ARB(AF)/12/8, Award, ¶¶ 348–356 (May 4, 2016).

26 *Id.* ¶ 356.

27 Sebastian Perry, *Burundi claim leads to Pyrrhic victory*, GLOB. ARB. REV. (Apr. 15, 2016), *available at*https://globalarbitrationreview.com/article/1035462/burundi-claim-leads-to-pyrrhic-victory.

28 Joseph Houben v. Republic of Burundi, ICSID Case No. ARB 13/7, Award, ¶ 93 (Jan. 12, 2016).

29 *Id.* ¶¶ 166–167.

30 Toto Costruzioni Generali S.p.A. v. Republic of Leb., ICSID Case No. ARB/07/12, Award, ¶¶ 226–230 (June 7, 2012).

v. Repeated and sustained harassment of personnel

In *Eureko B.V.* v. *Republic of Poland*, although the Tribunal was not convinced that the alleged acts of harassment of the senior representatives of Eureko's management at issue in the case breached the FPS standard under the Netherlands-Poland BIT,[31] the Tribunal concluded that a breach of the FPS provision could have occurred had the acts been "*repeated and sustained*".[32]

vi. Deployment of security forces at the site of the investment

In *OI European Group B.V.* v. *Bolivarian Republic of Venezuela*, the Tribunal determined what would *not* constitute a breach of the FPS clause under the Netherlands-Venezuela BIT: measures taken by the State's security forces to protect the investment.[33] In this case, the investor had argued that the deployment of security personnel at its plants had "*caused an atmosphere in which the employees of the Plants were threatened and intimidated and had no other alternative than to obey the orders of [the] Respondent or face legal action*".[34] Nevertheless, the Tribunal ruled that the "*mere presence*" of security forces was only a precautionary measure that a "*government authority legitimately can and should take*".[35] It is unclear from the Tribunal's wording, however, if the Tribunal's decision was founded on a lack of sufficient evidence of the investor's allegations[36] or purely on the understanding that the measures taken by the security forces to "*protect*" an investment could not in themselves be found to be in violation of the FPS provision.

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31 Eureko B.V. v. Republic of Pol., Partial Award, ¶ 236 (Aug. 19, 2005), 12 ICSID Rep. 335 (2007).

32 *Id.* ¶ 237.

33 OI European Group B.V. v. Bolivarian Republic of Venez., ICSID Case No. ARB/11/25, Award, ¶ 580 (Mar. 10, 2015).

34 *Id.* ¶ 564.

35 *Id.* ¶ 580.

36 *Id.* ¶¶ 578–580 (the Tribunal's reasoning is limited to the "mere presence" of the security forces and is based on Venezuela's dismissal of the investor's allegations that the presence of the security forces created an intimidating atmosphere at its plants).

B. Unqualified protection and security

Following the award in *Ronald S. Lauder* v. *Czech Republic*[37] ["**Lauder**"] in 2001, there have also been numerous instances where the FPS provision has been accorded a more expansive interpretation in investor-State arbitrations to include *legal* protection and security. Broadly speaking, tribunals have done this by recognising two different types of protections: appropriate procedures that enable investors to vindicate their rights and substantive provisions to protect investments.[38]

i. Procedural aspects of legal protection and security

In *Lauder*, the investor had argued that changes to the State's legal framework and the administrative actions of the State's media council had adversely affected the investor's investment and that this constituted a breach of the FPS clause in the United States-Czech Republic BIT.[39] Although the claims themselves were unsuccessful, the Tribunal noted that the FPS clause required the State "*to keep its judicial system available for the [investor] and any entities [the investor] controls to bring their claims, and for such claims to be properly examined and decided in accordance with domestic and international law*".[40] This decision thus established that a host State could be held liable under the FPS provision even for the lack of *judicial* security in a host State – a procedural element to ensure *legal* protection and security.

This approach has since been recognised in a number of other investor-State awards. For example, in *Marion Unglaube* v. *Republic of Costa Rica*,[41] although the Tribunal did not find that there had been a violation of the FPS clause in the Germany-Costa Rica BIT, the Tribunal noted that

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37 Ronald S. Lauder v. Czech Republic, Final Award (Sept. 3, 2001) [*hereinafter* "Lauder"].

38 Frontier Petro. Servs. Ltd. v. Czech Republic, Case No. 2008-09, Final Award, ¶ 263 (Nov. 12, 2010) (Perm. Ct. Arb. 2010).

39 Lauder, Final Award, ¶ 305 (Sept. 3, 2001), 9 ICSID Rep. 62 (2001).

40 *Id.* ¶ 314.

41 Marion Unglaube v. Republic of Costa Rica, ICSID Case No. ARB/08/1, Award (May 16, 2012).

instances of "*impropriety, corruption or discrimination*" in the court proceedings could constitute a breach of the FPS clause.[42]

ii. *Substantive aspects of legal protection and security*

In *CME Czech Republic B.V.* v. *Czech Republic*[43] which arose out of the same facts and concerned the same issues of liability as *Lauder*, the Tribunal ruled that the changes to the State's legal framework and the administrative actions of the State's media council did in fact, breach the FPS provision. The Tribunal noted that as part of its FPS obligation, the host State "*is obligated to ensure that neither by amendment of its laws nor by actions of its administrative bodies, is the agreed and approved security and protection of the foreign investor's investment withdrawn or devalued*".[44]

Similarly, in *Siemens A.G.* v. *Argentine Republic*,[45] the FPS clause in the Argentina-Germany BIT itself provided for "*full protection as well as juridical security*".[46] Based on this language, the investor was able to successfully claim that the State's actions in relation to the renegotiation and termination of a contract that "*destroyed irreparably the legal framework for Siemens' investment*", constituted a breach of the FPS clause.[47] In determining that there had been a breach, the Tribunal found the lack of transparency in Argentina's handling of the investment to be decisive.[48] According to the Tribunal, *legal*

42 *Id.* ¶ 286.

43 CME Czech Republic B.V. v. Czech Republic, Partial Award (Sept. 13, 2001).

44 *Id.* ¶ 613.

45 Siemens A.G. v. Argentine Republic, ICSID Case No. ARB/02/8, Award (Jan. 17, 2007), 14 ICSID Rep. 513 (2009) [*hereinafter* "Siemens"].

46 Germany-Argentina BIT, art. 4(1), *available at*https://treaties.un.org/doc/Publication/UNTS/Volume%201910/v1910.pdf.

47 Siemens, ICSID Case No. ARB/02/8, Award, ¶ 276 (Jan. 17, 2007), 14 ICSID Rep. 513 (2009). An enumeration of the specific acts that the investor alleged violated the FPS clause is provided at ¶ 286.

48 *Id.* ¶ 308.

security could be defined as "*the quality of the legal system which implies certainty in its norms and, consequently, their foreseeable application*".[49]

So too, in *National Grid P.L.C.* v. *Argentine Republic* ["**National Grid**"], the investor successfully claimed that the actions taken by Argentina to stem a financial crisis in 2001, which included the dismantling of the existing regulatory framework upon which the investor's investment relied, and the resultant economic uncertainty that the investor suffered, constituted a breach of the FPS clause in the Argentina-United Kingdom BIT.[50]

Some tribunals have sought to justify this relatively expansive approach to defining FPS clauses by relying on the relationship between FPS and fair and equitable treatment ["**FET**"] clauses. For example, in *National Grid*, the Tribunal reasoned that the FPS clause in the BIT was not limited to granting protection and security of physical assets by referring to its inclusion in the "*same article of the Treaty as the language on fair and equitable treatment*".[51] The awards in *Occidental Exploration and Production Company* v. *Republic of Ecuador (I)* ["**Occidental**"] and *Azurix Corp.* v. *Argentine Republic (I)* ["**Azurix**"] are also good illustrations of this. In *Occidental*, the abrupt change of the State's tax law "*without providing any clarity about its meaning and extent and the practice and regulations*"[52] was deemed to have been a violation of the FPS clause under the Ecuador-United States BIT.[53] In *Azurix*, the State's harassment of the investor (by refusing to accept its notice of termination and repeated calls from State officials regarding the non-payment of bills)[54] and the politicisation of the tariff regime[55] was found to have constituted a violation

49 *Id.* ¶ 303.
50 Nat'l Grid plc v. Argentine Republic, Award, ¶ 189 (Nov. 3, 2008).
51 *Id.*
52 Occidental Expl. & Prod. Co. v. Republic of Ecuador, LCIA Case No. UN3467, Final Award, ¶ 184 (July 1, 2004), 12 ICSID Rep. 59 (2007) [*hereinafter* "Occidental Exploration"].
53 *Id.* ¶ 187.
54 Azurix Corp. v. Argentine Republic, ICSID Case No. ARB/01/12, Award, ¶ 376 (July 14, 2006), 14 ICSID Rep. 374 (2009).
55 *Id.* ¶ 375.

of the FPS clause.[56] In both these cases, the tribunals determined that the FPS clause had been breached by assessing whether the FET clause under the BIT had been breached.[57] In the words of the Tribunal in *Occidental*, "*treatment that is not fair and equitable automatically entails an absence of full protection and security*".[58]

This is not to say, however, that the obligation to ensure substantive legal protection to a foreign investment is absolute. In *MamidoilJetoil Greek Petroleum Products Societe S.A.* v. *Republic of Albania*, the "*general business environment*"in a State was found to be an exception to this protection.[59] In this case, the investor alleged that Albania had deprived the investor's investment of the necessary protection and security owed under the Energy Charter Treaty by failing to enforce its legal framework, especially regarding fuel smuggling, tax evasion, and fuel adulteration.[60] The Tribunal rejected this claim on the basis that the conditions described by the investor constituted the"*general business environment and investment conditions*" in Albania;[61] while the investor might have been entitled to expect that the general conditions of insecurity would improve over time, it was not entitled to expect that Albania "*would protect its investment against the general insecurity that was inherent to the investment climate as opposed to specific instances of harassment*".[62]

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56 *Id.* ¶ 408.

57 *Id.*; Occidental Exploration, LCIA Case No. UN3467, Final Award, ¶ 187 (July 1, 2004), 12 ICSID Rep. 59 (2007).

58 Occidental Exploration, LCIA Case No. UN3467, Final Award, ¶ 184 (July 1, 2004), 12 ICSID Rep. 59 (2007).

59 MamidoilJetoil Greek Petroleum Prods. Societe S.A. v. Republic of Alb., ICSID Case No. ARB/11/24, Award, ¶¶ 823–829 (Mar. 30, 2015).

60 *Id.* ¶ 803.

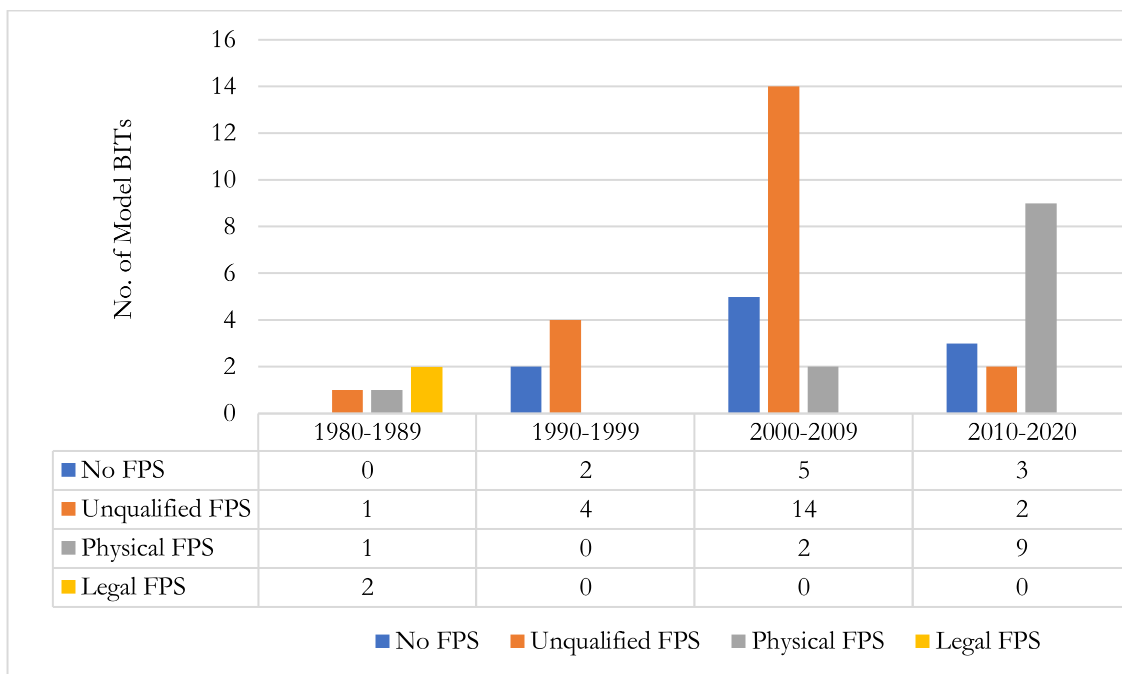
61 *Id.* ¶ 823.

62 *Id.* ¶ 824.

III. The global position on FPS

The authors have conducted a survey of 45 model BITs that are publicly available for the period 1980-2020.[63] Based on the scope of the FPS clauses therein, the authors have classified them into four categories: (1) model BITs with no FPS provision; (2) model BITs with unqualified FPS provisions (i.e. simply providing for "full protection and security"); (3) model BITs expressly limited to a *physical* formulation of FPS ["***physical* FPS**"]; and (4) model BITs expressly limited to a *legal* formulation of FPS ["***legal* FPS**"]. The authors' findings are represented in the following chart:

63 All model BITs used for this purpose can be found here: *Model Agreements*, INVESTMENT POLICY HUB, *available at*https://investmentpolicy.unctad.org/international-investment-agreements/model-agreements. For the avoidance of doubt, model BITs that have not been published on this website have not been considered; the authors have only considered those model BITs that are currently valid, accessible on the provided link, and available in English. The model BITs of the following countries have been considered: Austria, Azerbaijan, Belgium, Benin, Brazil, Burkina Faso, Burundi, Canada, Chile, Colombia, Croatia, Czech Republic, Denmark, Finland, France, Germany, Ghana, Greece, India, Indonesia, Iran, Israel, Italy, Jamaica, Kenya, Macedonia, Malaysia, Mauritius, Mexico, Mongolia, Morocco, Netherlands, Norway, Peru, Russia, Serbia, Slovakia, South Africa, Sri Lanka, Sweden, Switzerland, Thailand, Uganda, the United Kingdom, and the United States.



	1980-1989	1990-1999	2000-2009	2010-2020
No FPS	0	2	5	3
Unqualified FPS	1	4	14	2
Physical FPS	1	0	2	9
Legal FPS	2	0	0	0

From the above chart, a growing preference for a *physical* formulation of the FPS clause can be identified. From 1990-1999, when there were *no* model BITs with *physical* FPS clauses, to the last decade, where the majority of new model BITs that have been released provide for such a clause, it is evident that this restricted articulation of the FPS clause has been gaining traction. Model BITs with *physical* FPS clauses can further be classified, based on the degree of specificity of the clause, into three categories. The first category includes model BITs, which specifically limit the protection and security to the standard set by customary international law ["**Category 1 Model BIT**"]. For example, in the 2016 Azerbaijan Model BIT, the FPS clause states that "*[e]ach Contracting Party shall accord to investments of investors of the other Contracting Party in the territory of its [S]tate … full physical protection and security in accordance with international law minimum standard of treatment of aliens … and 'full physical protection and security' do[es] not require treatment in addition to or beyond*

that which is required by that standard, and do[es] not create additional substantive rights".[64]

The second and third categories both include unqualified *physical* FPS clauses; the difference arises from the specificity lent to the clause by the surrounding words. The second category includes BITs with *physical* FPS clauses which, by their language, specifically limit the host State's obligation to ensuring the *physical* protection and security of a foreign investment but are otherwise unqualified ["**Category 2 Model BIT**"]. In contrast, BITs falling into the third category contain *physical* FPS clauses which, by their language, broaden the host State's obligation from ensuring *physical* protection and security to other obligations which are *related to* the *physical* protection and security of a foreign investment ["**Category 3 Model BIT**"].

The difference between Category 2 Model BITs and Category 3 Model BITs is best explained through illustration. Thus, for example, the 2019 Netherlands Model BIT simply provides that "*each Contracting Party shall accord to such investments full physical security and protection*".[65] In contrast, the 2016 Indian Model BIT provides that "*[e]ach Party shall accord in its territory to investments of the other Party and to investors with respect to their investments full protection and security. For greater certainty, 'full protection and security' only refers to a Party's obligations relating to physical security of investors and to investments made by the investors of the other Party and not to any other obligation whatsoever*".[66]

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64 Azerbaijan Model BIT 2016, art. 2(2), *available at*https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/4787/download.

65 Netherlands Model BIT 2019, art. 9(1), *available at*https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5832/download.

66 India Model BIT 2016, art. 3(2), *available at*https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3560/download.

The Netherlands Model BIT – without an explanation of what constitutes *physical* protection and security – provides for a more specific and limited obligation. This is an example of a Category 2 Model BIT. The Indian Model BIT, on the other hand, provides for a broader obligation by including the words "*relating to*" in the definition: the obligation will accordingly extend to any action or omission that is proven to affect the *physical* protection and security of the investment even if it does so indirectly. Thus, the Indian Model BIT is a Category 3 Model BIT.

Of the 12 model BITs with *physical* FPS clauses that this article has considered, five were Category 1 Model BITs,[67] four were Category 2 Model BITs,[68] and the remaining three were Category 3 Model BITs.[69] The data also indicates that the Category 1 Model BITs are waning in popularity (the last one was issued in 2016).[70] In 2019, two Category 2 Model BITs and two Category 3 Model BITS were issued.[71] The following part will consider Category 3 Model BITs in more detail.

IV. Analysis of FPS clauses in Category 3 Model BITs

When a claim is brought under an FPS clause, a tribunal is faced with determining whether the act or omission of which the host State is accused is something that would fall within the ambit of the FPS clause. As a first step, the tribunal will look to the language of the FPS clause itself; the tribunal will have to identify if the FPS clause is limited in its application to

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67 These model BITs are the following: Canada Model BIT (2004), Ghana Model BIT (2008), Colombia Model BIT (2011), U.S. Model BIT (2012), and Azerbaijan Model BIT (2016).

68 These model BITs are the following: Indonesia Model BIT (pre-1984), Serbia Model BIT (2014), Morocco Model BIT (2019), and Netherlands Model BIT (2019).

69 These model BITs are the India Model BIT (2016), Belgium Model BIT (2019), and Slovak Model BIT (2019).

70 Azerbaijan Model BIT 2016, *available at*https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/4787/download.

71 The Category 2 Model BITs are the Morocco Model BIT (2019) and Netherlands Model BIT (2019). The Category 3 Model BITS are the Belgium Model BIT (2019) and Slovak Model BIT (2019).

purely *physical* or purely *legal* threats to the investment or investor. Thus, for example, if a foreign investor brought a claim against the host State under the Brunei Darussalam-India BIT[72] for failing to protect its investment from an attack by the local community, the tribunal would, after considering the relevant clause in this BIT, which notes, in relation to FPS, that "*[i]nvestments and returns of investors of each Contracting Party shall at all times … enjoy full legal protection and security in the territory of the other Contracting Party,*" presumably be able to immediately dismiss this claim on this ground.[73]

If, on the other hand, the language of the FPS clause does not assist the tribunal, as a second step, the tribunal is left to make this decision for itself.

The tribunal's determinations at both of the above-mentioned steps are complicated by different factors. At the first step, even if the FPS clause suggests that it is limited in its application, the exact wording of the clause may allow the ingress of obligations that were not intended to be included within the scope of protection accorded by the FPS clause. At the second step, the tribunal's determination is made confusing by the lack of a clear and consistent approach in investment arbitrations to defining the scope of the FPS clause.

The remainder of this part will consider the difficulties faced at the first level through the lens of theFPS clauses in Category 3 Model BITs. Indeed, as will be evidenced below, the lack of definition in the FPS clauses found in these BITs may actually open the floodgates to acts or omissions that would be less likely to be covered by the *physical* protection and security standard, and more likely to fall within the ambit of the *legal* protection and security standard.

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72 Brunei Darussalam-India BIT 2008, art. 3(2), *available at*https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/517/download.

73 *Id.*

A. The potential overlap between physicaland legalformulations of FPS

The interrelationship between *physical* and *legal* security has been touched upon, albeit sometimes inadvertently, in several investor-State awards. The Tribunal's findings in *Saluka* provides a good illustration. In this case, arising out of a failed attempt by the Czech Republic to privatise a State-owned bank, the investor (which had acquired shares in the State bank by a transfer from the investor's parent company) claimed that there had been a violation of the FPS clause because of the Czech Republic's suspension of trade in the bank's shares, a prohibition on transfers of the investor's shares in the bank, police searches of premises and employees of the investor's parent company, and seizure of its documents.[74] The Tribunal found that there had been no breach of the FPS clause on any of these grounds.[75]

Under the relevant BIT, the FPS clause obliged the Czech Republic to "*accord to such investments full security and protection*".[76] Despite the unqualified language of this clause, the Tribunal noted that an FPS clause generally "*is not meant to cover just any kind of impairment of an investor's investment, but to protect more specifically the physical integrity of an investment against interference by use of force*".[77] This suggests that the Tribunal was inclined towards a purely *physical* interpretation of the FPS clause, though the Tribunal did note that "*it appears not to be necessary for the Tribunal to precisely define the scope of the 'full security and protection' clause in this case*".[78] In any event, several subsequent awards

[74] Saluka, Case No. 2001-04, Partial Award, ¶ 485 (Perm. Ct. Arb. Mar. 17, 2006), 15 ICSID Rep. 274 (2010).

[75] *Id.* ¶ 505.

[76] Netherlands-Czech Republic BIT 1991, art. 3(2), *available at*https://www.italaw.com/sites/default/files/laws/italaw6080%283%29.pdf.

[77] Saluka,Case No. 2001-04, Partial Award, ¶ 484 (Perm. Ct. Arb. Mar. 17, 2006), 15 ICSID Rep. 274 (2010).

[78] *Id.*

have quoted this sentence from the*Saluka* award to justify their own restricted interpretation of the FPS clause.[79]

Despite the *Saluka* Tribunal's initial nod towards a purely *physical* interpretation, the Tribunal's analysis and decision on each of the investor's grounds was based on a more holistic understanding of the FPS clause. With regards to the first ground raised by the investor – the Czech Republic's suspension of trade in the bank's shares – the Tribunal noted that there had been no breach of the FPS clause because the suspension was justifiable on regulatory grounds. In regards to a related amendment of Czech law that precluded the investor from appealing the suspension of trade, the Tribunal further noted that "*the elimination of shareholders' right of appeal does not per se transcend the limits of a legislator's discretion … The amendment of the [law] cannot be said to be totally unreasonable and unjustifiable by some rational legal policy*".[80]

The investor's claim under the second ground – the prohibition on transfers of the bank's shares – arose out of a sense of "*procedural denial of justice*".[81] According to the investor, apart from the initial order by which the investor's shareholding in the bank was frozen, the treatment of its appeals against this order to both police and prosecutorial authorities constituted a "*procedural denial of justice*".[82] In ruling that this did not constitute a breach of the FPS clause, the Tribunal concluded that none of these issues amounted

79 Rumeli Telekom A.S. &Telsim Mobil TelekomunikasyonHizmetleri A.S. v. Republic of Kaz., ICSID Case No. ARB/05/16, Award, ¶ 668 (July 29, 2008); Cengiz, ICC Case No. 21537/ZF/AYZ, Award, ¶ 403 (Nov. 7, 2018); Suez, Sociedad General de Aguas de Barcelona, S.A. & Vivendi Universal, S.A. v. Argentine Republic, ICSID Case No. ARB/03/19, Decision on Liability, ¶ 178 (July 30, 2010).

80 Saluka, Case No. 2001-04, Partial Award, ¶ 490 (Perm. Ct. Arb. Mar. 17, 2006), 15 ICSID Rep. 274 (2010).

81 *Id.* ¶ 492.

82 *Id.* ¶¶ 492–493.

to a "*manifest lack of due process*".[83] According to the Tribunal, only if there had been such a lack of due process, would the FPS clause be breached.[84]

The third ground on which the investor claimed a breach of the FPS provision – the search of the premises and employees of the investor's parent company and seizure of documents – was arguably the only action that could have qualified as a threat to the *physical* protection and security of the investor. In spite of this, in determining whether these actions amounted to a breach of the FPS clause, the Tribunal instead considered whether the investor had legal recourse against these measures. The Tribunal determined that there had been no violation of the FPS clause because the investor had, in fact, filed a petition seeking relief in relation to this measure with the Czech Constitutional Court and the relief sought had been granted.[85]

Had the Tribunal truly believed that the FPS clause was limited to according *physical* protection and security, there would have been no need to go into such detailed analysis on any of the three grounds. Save for the search and seizure conducted by the police, all the other measures that the investor argued were in breach of the FPS clause did not directly impact the physical security or sanctity of the investment. Instead, the Tribunal chose to avoid commenting on whether any of these measures would fall within the scope of the FPS clause.[86] This suggests that the Tribunal did not actually intend to limit the FPS clause to *physical* protection and security alone; the *legal* protection and security of the investment was, seemingly, given equal importance in determining whether there had been a breach of the FPS clause.

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83 *Id.* ¶ 493

84 *Id.*

85 *Id.* ¶¶ 495–496.

86 *Id.* ¶¶ 490, 493.

In this case, the unqualified language of the FPS clause under the Netherlands-Czech BIT enabled the Tribunal to arrive at such a decision. However, this is not the only case in which *legal* protection and security could be read into an FPS clause. The language of the FPS clause in a Category 3 Model BIT lends itself to a similarly wide interpretation of *physical* protection and security and, indeed, an even wider interpretation. By prefixing the express reference to *physical* protection and security with "*relating to*" or other similar language, the provision provides an entrance for acts and/or omissions that would not align with the strict sense of *physical* protection andsecurity. The only requirement would be that the investor would have to prove a causal relationship between the loss of *physical* protection and security of the investment and the act and/or omission by which the investor has been aggrieved.

B. Acts or omissions "relating to"physical protection and security

There have already been attempts to push the boundaries of what *physical* protection and security can cover. For example, in *Peter A. Allard* v. *Government of Barbados* ["**Allard**"], the investor sought to characterise environmental damages caused to an investment as a breach of the State's obligation to ensure the *physical* protection and security of the investment.[87] The environmental damage in question had been caused by the discharge of raw sewage into the investor's investment – a sanctuary spread over 240 acres in Barbados.[88] According to the investor, this damage could have been avoided if the State had taken reasonable care to protect the sanctuary (including through the regular repair and operation of the sluice gate on the property that controlled the flow of water between the sanctuary and the ocean)[89] and enforced its environmental laws (in particular, the Marine Pollution Control Act).[90] The investor claimed that there had been a

87 Peter A. Allard v. Gov't of Barb., Case No. 2006-12, Award, ¶ 232 (Perm. Ct. Arb. June 27, 2016) [*hereinafter* "Allard"].

88 *Id.* ¶¶ 33–43.

89 *Id.* ¶¶ 232, 234.

90 *Id.* ¶¶ 232, 239.

violation of the FPS clause under the Barbados-Canada BIT, which contained an unqualified clause providing that "*[e]ach Contracting Party shall accord investments or returns of investors of the other Contracting Party … full protection and security*" on the basis of the above two grounds.[91]

Although the Tribunal rejected this claim on all three grounds, it was not on the basis that the alleged omissions on the part of Barbados fell outside the scope of the FPS clause. In the Tribunal's words, "*[e]ven accepting the [investor's] articulation of the FPS standard as including an obligation of the host State to protect foreign investments against environmental damage*,"[92] the investor had failed to prove that there had been a violation of the FPS clause.

Thus, this award is important because the alleged omissions of the State – recognised by the Tribunal as potential breaches of the FPS clause[93] – constituted instances outside the typical scope of *physical* protection and security. None of these omissions related to the use of physical force on the investment; they related to the environmental degradation caused by "*physical interference with property through the unlawful trespass of pollutants*".[94]

With regards to the investor's allegation that the State had failed to take reasonable care to protect the sanctuary, the Tribunal noted that "*it [was] quite implausible for the [investor] to attribute responsibility for the egress or ingress of [the] Sanctuary waters to the actions or inactions with respect to the operation of the Sluice Gate*".[95] In any event, there was sufficient evidence to show that Barbados had, based on knowledge of the environmental sensitivities of the investment, taken "*reasonable steps*" to protect it.[96] Thus, while the Tribunal

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91 Barbados-Canada BIT 1996, art. II.2 (b), *available at*https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/280/download.

92 Allard, Case No. 2006-12, Award, ¶ 252 (Perm. Ct. Arb. June 27, 2016).

93 *Id.*

94 *Id.* ¶ 231.

95 *Id.* ¶ 250.

96 *Id.* ¶¶ 242–246. The steps which the Tribunal referred to were all measures taken at the policy level. These steps included the setting up of a committee to investigate and

could have denied this claim solely on the basis that the FPS clause would not extend to the alleged omissions of the State, it did not expressly do so. Instead, the Tribunal, as in *Saluka*, considered each allegation separately and determined on the basis of the evidence of the legislative and policy measures taken by the State that there had been no breach of the FPS clause.

The Tribunal's willingness to expand the ambit of protection accorded by the FPS clause is further emphasised in its treatment of the investor's allegation that the State had failed to enforce its environmental legislation. This allegation – clearly relating to the *legal* protection and security of the investment – was pleaded as an omission related to the *physical* protection and security of the investment. Instead of rejecting this claim solely on the basis that this measure did not constitute a breach of the *physical* protection and security of the investment, the Tribunal's decision to reject this allegation was on the basis of the investor's failure to evidence a breach under the legislation in question.[97]

If this set of facts is analysed through the lens of a Category 3 Model BIT, then, as long as the act or omission in question affected the *physical* security of the investment (i.e. being "*related to*" to its *physical* protection and security), the claim likely would be successful as a legal matter regardless of whether the act or omission constituted an actual incursion on the investment in a physical sense. In *Allard*, given that the investment's value depended upon the ecosystem that it hosted, a failure to manage the sluice gate would have undoubtedly affected the physical security and viability of the investment. Thus, as an omission *related to* the physical protection and

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coordinate government action in relation to the sanctuary and to address issues related to its effective management; the review of land development applications to ensure that they were consistent with the objective of environmental protection of the sanctuary and prevented the establishment of potential polluters in the vicinity of the sanctuary; and monitoring the interaction between the sanctuary and the sewage treatment plant.

[97] *Id.* ¶ 251.

security of the investment, this claim would have succeeded under a broadly-worded clause for *physical* protection and security such as the FPS clause in a Category 3 Model BIT as well.

C. The scope for reading legal protection and security into physical fps clauses

In the same way, many acts or omissions that would be covered under what is understood as *legal* protection and security could be brought within the scope of *physical* FPS clauses that are couched in sufficiently broad terms similar to the language of FPS clauses in Category 3 Model BITs.

This is especially true in the context of claims related to substantive *legal* protection and security of an investment. As evidenced by the award in *Allard*, a State's failure to implement or enforce a law or regulation upon which a foreign investment's *physical* protection or security is predicated could lead to a breach of an FPS clause.

This is not to say that claims related to procedural *legal* protection and security would not be successful. If the investor is able to prove that its failure to obtain adequate judicial redress has adversely affected the *physical* protection and security of the investment, then the investor would likely have a successful claim under a *physical* FPS clause couched in language similar to a Category 3 Model BIT. While such instances are admittedly not as common, they are not altogether impossible. If, for example, the investor seeks judicial redress against the forced closure of its investment, there could arguably be a successful claim for the breach of a *physical* FPS clause worded similar to a Category 3 Model BIT.

Already, in relation to the COVID-19 pandemic, there has been discussion of invoking the FPS clause in relation to circumstances arising out of a host State's response to the pandemic.[98] A host State's failure to take effective

[98] Massimo Benedetteli, Caterina Coroneo&NicolòMinella, *CouldCOVID-19 emergency measures give rise to investment claims? First reflections from Italy*, GLOB. ARB. REV. (Apr. 15, 2020),

measures to protect the health of employees of a foreign investment is just one way in which a widely-worded FPS clause (even if limited to *physical* protection and security) could be harnessed by an investor.

Thus, the types of claims that could be brought under a widely-worded *physical* FPS clause are broader in scope than what would typically be understood as direct physical damage. The success of such claims will depend on the ability of the investor to convince the tribunal of the causal relationship between the alleged breach and the *physical* protection and security of an investment.

V. Conclusion

Although it appears that there is a global movement towards restricting FPS clauses to a *physical* formulation, the use of vague wording in these clauses could inadvertently open up the doors to claims related to *legal* protection and security as well. A good example of the type of wording that would enable such ingress is the "*relating to*" prefix used in Category 3 Model BITS as discussed above.

Admittedly, this conclusion is based on an analysis of model BITs. This is because the model BIT of a country is generally a more accurate representation of its policy (as opposed to BITs which can reflect the difference in the bargaining power of the Contracting States). Notwithstanding this, the issue of vague wording of *physical* FPS clauses is one that could plague BITs as well. For example, in line with the language of the 2016 Indian Model BIT (a Category 3 Model BIT), the 2018 Belarus-India BIT defines 'full protection and security' as "*relating to physical security of investors and to investments made by the investors*".[99]

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*available at*https://globalarbitrationreview.com/article/1222354/could-covid-19-emergency-measures-give-rise-to-investment-claims-first-reflections-from-italy.

[99] Belarus-India BIT 2018, art. 3(2), *available at*https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5724/download.

While the authors are not aware of any investment arbitrations where investors have sought to claim a breach of a *physical* FPS clause on the basis of a violation of the procedural or substantive *legal* security of the investment, the authors believe that there is potential for such an argument to be made (and to potentially be made successfully) in cases of broadly-worded FPS clauses. Based on the above, it behoves States to pay greater attention when drafting FPS clauses to ensure that the outcome meets their intent.

FORK IN THE ROAD IN INVESTMENT DISPUTES

Sergiy A. Voitovich[*]

Abstract

*Some investment treaties provide that once the dispute has been submitted to the court of the host State or to international arbitration, the choice of one of these procedures will be final. Such provisions are called 'fork in the road' ["**FITR**"] provisions. In this paper, based on a review of the major cases dealing with FITR provisions, the author suggests some thoughts on the nature of the FITR concept and practical methods of addressing FITR-based arguments in investor-State disputes. In the author's view, ideally the 'triple identity test' and the 'same fundamental basis' test should be jointly applied to the analysis of case-specific FITR issues. Apparently, the most tenable decision would be if both tests show the same result. While the triple identity test with all its formalism, has clear criteria, the same fundamental basis test needs clarification. Based on some arbitral decisions, the author considers that the fundamental basis should include both the factual and the legal/normative basis for the claims to be considered essentially the same.*

I. The rationale and interest served by FITR

Forum selection provisions in investment treaties indicate the routes for claimants to protect their investment rights by way of domestic litigation or international arbitration. Some investment treaties say that if the dispute has been submitted to the court of the host State or to arbitration provided

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in the treaty, the choice of one of these procedures will be final.[1]Such provisions are called "*fork in the road*" provisions, and they reflect the Latin maxim *electauna via, non daturrecursus ad alteram*.

As held by one tribunal, "*[t]he right to choose once is the essence of the 'fork-in-the-road' rule*".[2] Therefore, once the way has been selected, "*the party waives its right to seek relief through the unchosen fora*".[3]

At the outset, it is crucial to understand the rationale behind the FITR concept, and whose interests, i.e. the investor's or the host State's, it serves.

Apparently, an FITR clause is a protective tool used by host States against claimant-investors. Some tribunals consider the FITR clause a matter of public policy of the host State.[4]Moreover, since re-litigation of matters is not in line with established general principles of law such as *res judicata* and *lis pendens*, FITR provisions are intended to ensure that a single forum adjudicates a particular issue.

At the same time, a pro-claimant negotiator on an investment treaty would hardly support an FITR approach as it is too rigid and inflexible for investors who might prefer having various litigation routes, rather than a single route, for protecting their rights in a host State. As shown below, the

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1 *E.g.*, Agreement on the promotion and reciprocal protection of investments, S. Afr.-Zim., art. 7(3), Nov. 27, 2009 ("If the investor submits the dispute to the competent court of the host Party or to international arbitration mentioned in sub-Article (2), the choice shall be final.").

2 M.C.I. Power Grp. L.C. & New Turbine, Inc. v. Republic of Ecuador, ICSID Case No. ARB/03/6, Award, ¶ 181 (July 31, 2007) [*hereinafter* "M.C.I. Power Grp."].

3 INT'L BAR ASS'N, CONSISTENCY, EFFICIENCY AND TRANSPARENCY IN INVESTMENT TREATY ARBITRATION 18 (2018).

4 *See* Emilio AgustínMaffezini v. Kingdom of Spain, ICSID Case No. ARB/97/7, Decision on Jurisdiction, ¶ 63 (Jan. 25, 2000); Toto Costruzioni Generali S.p.A. v. Republic of Leb., ICSID Case No. ARB/07/12, Decision on Jurisdiction, ¶ 207 (Sept. 11, 2009) [*hereinafter* "Toto"].

modern treaty practice knows of more liberal waiver-based clauses.[5] This seems to be a matter for discussion between States in a treaty-making process.

Commentators note that one of the main purposes of investment arbitration is to avoid the use of domestic courts which are not an attractive forum for investors due to potential partiality by the host State judiciary.[6] However, it is not unusual for a local company of the investor to apply first to domestic courts, for example, to challenge an administrative action (e.g. revocation of license or termination of concession) before the commencement of the investor-State arbitration.

As mentioned above, it is usually argued that the purpose of FITR is to avoid multiple/parallel proceedings in various fora on the same dispute.[7] This approach is based on the presumption that multiple proceedings are perceived as having negative consequences for investment arbitration.[8]

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5 *Seeinfra* Part II on "no-U-turn" or "waiver" clauses which generally state that the right of an investor to have recourse to arbitration is subject to the condition that the investor discontinues its domestic court proceedings on the same subject matter.

6 *See, e.g.*, Christoph Schreuer, *Interaction of International Tribunals and Domestic Courts in Investment Law*, *in* 4 CONTEMPORARY ISSUES IN INTERNATIONAL ARBITRATION AND MEDIATION: THE FORDHAM PAPERS 71 (Arthur W. Rovine ed., 2010).

7 H&H Enters. Inv., Inc. v. Arab Republic of Egypt, ICSID Case No. ARB/09/15, Excerpts of Award, ¶ 367 (May 6, 2014) [*hereinafter* "H&H Enterprises"] (wherein the Tribunal noted that the purpose of the FITR provision is "to ensure that the same dispute is not litigated before different fora"); Supervision y Control S.A. v. Republic of Costa Rica,ICSID Case No. ARB/12/4, Award, ¶¶ 294, 297 (Jan. 18, 2017) [*hereinafter* "Supervision y Control"] (wherein the Tribunal noted that FITR and similar provisions are used "to avoid the duplication of procedures and claims, and therefore to avoid contradictory decisions" and "to avoid conflicting decisions and eliminate the possibility of obtaining double recovery for the same acts.").

8 *See* Olesya V. Kryvetska, Multiple Proceedings in the Disputes between Foreign Investor and State 55, 72 (2019) (unpublished thesis, Taras Shevchenko National University of Kyiv); Supervision y Control, ICSID Case No. ARB/12/4, Award, ¶ 293 (Jan. 18, 2017) (wherein the Tribunal stated that "[t]he existence of national courts and international arbitration as mechanisms for resolving disputes can generate a significant risk of duplication of claims and a problem in determining what is the proper dispute resolution mechanism for disputes that may arise during the investment period.").

However, it may be reasonably asked whether multiple proceedings always have a negative effect (such as abuse of process[9] or inconsistent arbitral decisions on the same subject),[10] or by providing investors with additional possibilities to defend their rights in host States, multiple proceedings may in some instances have a positive effect for doing justice?

If a choice has to be made between an investor-State claim and a domestic court claim, an investor would plausibly consider initiating a less expensive and time-consuming domestic claim (e.g. an administrative claim challenging the revocation of a license);[11] even realising that the chances for success of such a claim against the host State may be quite limited. If it turns out within a rather short period (e.g. one year) that such claim is unsuccessful, but an international claim, with all its burdens and risks, still has chances for a better result, the question arises – whether it is fair to prohibit the disappointed investor to make further attempt towards bringing an international claim.

Alternatively, it is very unlikely that an investor would first file an expensive international claim, and if it fails after several years of the proceedings, initiate a domestic claim.

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9 Ampal-Am. Isr. Corp. v. Arab Republic of Egypt, ICSID Case No. ARB/12/11, Decision on Jurisdiction, ¶ 331 (Feb. 1, 2016) (wherein the Tribunal took the following view on abuse of process with respect to parallel proceedings: "[i]n the Tribunal's opinion, while the same party in interest might reasonably seek to protect its claim in two fora where the jurisdiction of each tribunal is unclear, once jurisdiction is otherwise confirmed, it would crystallise in an abuse of process for in substance the same claim is to be pursued on the merits before two tribunals. However, the Tribunal wishes to make it very clear that this resulting abuse of process is in no way tainted by bad faith on the part of the Claimants as alleged by the Respondent. It is merely the result of the factual situation that would arise were two claims to be pursued before different investment tribunals in respect of the same tranche of the same investment.").

10 *See* Mark Friedman, *Treaties as Agreements to Arbitrate – Related Dispute Resolution Regimes: Parallel Proceedings in BIT Arbitration*, *in*INTERNATIONAL ARBITRATION 2006: BACK TO BASICS? 545 (Albert Jan Van den Berg ed., 2007).

11 *See*Alex Genin, E. Cred. Ltd., Inc. & A.S. Baltoil v. Republic of Est., ICSID Case No. ARB/99/2, Award, ¶¶ 47, 58 (June 25, 2001) [*hereinafter* "Alex Genin"].

Professor Schreuer reasonably suggests that the FITR provision "*does not apply to every legal action taken in domestic courts that relates to the investment dispute before the international tribunal*".[12] Otherwise, "*[t]he investor would have to sit still and endure any form of injustice passively on pain of losing its access to international arbitration. In particular, the investor would have to forego appeals against administrative action that are subject to preclusive time limits under domestic law*".[13]

A balanced approach to the interests of investors and host States in investment treaties dictates a more flexible concept of the forum-selection clause. The use of earlier mentioned waiver-based provisions in some investment treaties seems to be a reasonable reflection of this approach.

The next part of this paper will discuss the various approaches to interpretation of the FITR clauses and similar treaty provisions.

II. FITR and similar clauses in investment treaties

The variety of treaty formulations gives ground for the classification of FITR and similar provisions into several types.[14] For instance, a traditional FITR clause says that once an investor has made a choice between the competent court of the host State and international arbitration, such choice is final.[15]

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12 Christoph Schreuer, *Travelling the BIT Route of Waiting Periods, Umbrella Clauses and Forks in the Road*, 5 J. WORLD INV. & TRADE 231, 248–249 (2004).

13 *Id.*

14 *See, e.g.*, Markus A. Petsche, *The Fork in the Road Revisited: An Attempt to Overcome the Clash Between Formalistic and Pragmatic Approaches Clash Between Formalistic and Pragmatic Approaches*, WASH. U. GLOBAL STUD. L. REV. 391, 397–398 (2019) (for suggested classification of the FITR clauses).

15 *E.g.*, Agreement on the promotion and reciprocal protection of investments, Leb.-It., art. 7, Nov. 7, 1997, *available at*https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/1688/download. Article 7 reads as follows:
"In case of disputes regarding investments between a Contracting Party and an investor of the other Contracting Party, consultations will take place between the Parties concerned with a view to solving the case, as far as possible, amicably.

On the other hand, unlike a traditional FITR clause, some more flexible forum selection provisions of investment treaties say that the right of an investor to have recourse to arbitration is subject to the condition that the investor discontinues its domestic court proceedings on the same subject matter. Such provisions are called "*no-U-turn*" or "*waiver*" clauses.[16]

For example, Article 13(4) of the Turkey-Australia Bilateral Investment Treaty ["**BIT**"] envisages: "*As a precondition to electing arbitration under paragraph 13(2), the investor must waive any right it may have to initiate or continue proceedings on the same matter before judicial or administrative bodies of either Party*". Similarly, Article 8(4) of the Israel-Ukraine BIT provides: "*Unless otherwise agreed, an investor who has submitted the dispute to national jurisdiction may have recourse to the arbitral tribunals mentioned in paragraph 2 of this Article so long as a judgement has not been delivered on the subject matter of the dispute by a national court. For the sake of clarification, the right of an investor under this paragraph shall apply provided that the investor discontinues the proceedings on the subject matter before the national court*". The Netherlands Model BIT of 2018 also provides that

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If these consultations do not result in a solution within six months from the date of written request for settlement, the investor may submit the dispute, at his choice, for settlement to:

the competent court of the Contracting Party in the territory of which the investment has been made; or

the International Center for Settlement of Investment Disputes (ICSID) provided for by the Convention on the Settlement of Investment Disputes between States and Nationals of the other States, opened for signature at Washington, on March 18, 1965, in case both Contracting Parties have become members of this Convention; or

an ad hoc arbitral tribunal which, unless otherwise agreed upon by the Parties to the dispute, shall be established under the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL).

The choice made as per subparagraphs a, b, and c herein above is final."

[16] *See,e.g.*, UNITED NATIONS CONF. ON TRADE & DEV., *Scope And Definition*,2 SERIES ON INTERNATIONAL INVESTMENT AGREEMENTS 89 (2011).

domestic court proceedings relating to the same measures must be withdrawn or discontinued prior to a claim to arbitration.[17]

In *Supervision y Control S.A.* v. *Republic of Costa Rica*, a forum selection provision of this type was characterised as a provision based on the concept of waiver. The Tribunal found that Article XI(3) of the Spain-Costa-Rica BIT[18] stipulated a waiver provision.[19] The Tribunal explained that to avoid the risk of having contradictory decisions, investment treaties use two methods: the FITR and the concept of waiver. Under the second method, once the investor chooses international arbitration, the exercise of any claim before another dispute resolution mechanism must be waived.[20]

A similar forum selection provision was considered in *Infinito Gold Ltd.* v. *Costa Rica.* The Respondent highlighted the "*unusual*" provision in Article XII(3)(d) of the Canada-Costa Rica BIT, which was "*similar to (but broader*

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17 *See* Joep Wolfhagen& Natalie Sheehan, *New model BIT goes beyond consultation draft and introduces sweeping changes for investors*, INT'L L. OFF. (Nov. 22, 2018), *available at*https://www.internationallawoffice.com/Newsletters/Arbitration-ADR/Netherlands/Freshfields-Bruckhaus-Deringer-LLP/New-model-BIT-goes-beyond-consultation-draft-and-introduces-sweeping-changes-for-investors?utm_source=ILONewsletter&utm_medium=email&utm_content=Newsletter 2018-11-22&utm_campaign=Arbitration&ADRNewsletter.

18 Agreement on the promotion and reciprocal protection of investments, Costa Rica-Spain, art.XI(3), July 8, 1997, 2079 U.N.T.S. 413 ("Once an investor has submitted the dispute to an arbitral tribunal, the award shall be final. If the investor has submitted the dispute to a competent court of the Party in whose territory the investment was made, it may, in addition, resort to the arbitral tribunals referred to in this article, if such national court has not issued a judgment. In the latter case, the investor shall adopt any measures that are required for the purpose of permanently desisting from the court case then underway.").

19 Supervision y Control, ICSID Case No. ARB/12/4, Award, ¶ 297 (Jan. 18, 2017).

20 *Id.* ¶ 294; *See also* Javier Ferrero, *Tribunal dismisses investor's claims because of breach of admissibility requirements under the applicable BIT in the ICSID case Supervisión y Control S.A. v. Republic of Costa Rica*, GLOB. ARB. NEWS (June 20, 2017), *available at* https://globalarbitrationnews.com/tribunal-dismisses-investors-claims-because-of-breach-of-admissibility-requirements-under-the-applicable-bit-in-the-icsid-case-supervision-y-control-s-a-v-republic-of-costa-rica-06202017/.

than)" an FITR clause.[21] The relevant part of the provision reads as follows: "*An investor may submit a dispute as referred to in paragraph (1) to arbitration in accordance with paragraph (4) only if: ... (d) in cases where Costa Rica is a party to the dispute, and no judgement has been rendered by a Costa Rican court regarding the measure that is alleged to be in breach of this Agreement*".[22]

The Respondent noted that Article XII(3)(d) was asymmetric: "*It only applies to cases in which Canadian investors contest measures regarding which a Costa Rican court has issued a judgment, not cases brought by Costa Rican investors against measures taken by Canada. This shows that this provision was specifically negotiated with the Costa Rican judiciary in mind*".[23] In turn, the Claimant insisted that Article XII(3)(d) was not an FITR provision, on the grounds that it was not designed to make investors choose between domestic and international remedies, but simply encouraged without mandating the exhaustion of local remedies.[24]

The Tribunal did not characterise the provision of Article XII(3)(d) either as an FITR or a waiver-based clause, but, after the analysis of the terms "*judgment*" and "*measure*" against the facts of the case, found that the Claimant's claims were not barred by Article XII(3)(d) of the BIT.[25]

Both a traditional FITR clause and a waiver-based clause are aimed at avoiding duplication of litigations on the same matter in domestic courts and international arbitration. The difference is that a traditional FITR is more restrictive in relation to an investor's choice of route, while a waiver clause is more flexible and gives more possibilities to protect an investor's rights.

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21 Infinito Gold Ltd. v. Republic of Costa Rica, ICSID Case No. ARB/14/5, Decision on Jurisdiction, ¶ 256 (Dec. 4, 2017).
22 *Id.* ¶ 144.
23 *Id.* ¶ 258.
24 *Id.* ¶ 278.
25 *Id.* ¶ 298.

On the other hand, a different approach altogether is used in the Energy Charter Treaty ["**ECT**"]. The forum selection clause of the ECT does not expressly say that a choice of the procedure is final. Instead, a Contracting State may submit a special declaration having an FITR effect.[26] Such Contracting States are listed in Annex ID entitled "*List of Contracting Parties Not Allowing an Investor to Resubmit the Same Dispute to International Arbitration at a Later Stage under Article 26*".[27] In one case, such a written Statement by Italy was called "*Italy's 'fork-in-the-road' declaration*".[28]

Another variation of a forum selection clause can be gauged from Article 26 of the International Centre for Settlement of Investment Disputes ["**ICSID**"] Convention, which reads as follows: "*Consent of the parties to*

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26 Energy Charter Treaty, art. 26(2)–(3), Dec. 17, 1994, 2080 U.N.T.S. 100. Article 26(2) and 26(3) read as follows:
"(2) If such disputes cannot be settled according to the provisions of paragraph (1) within a period of three months from the date on which either party to the dispute requested amicable settlement, the Investor party to the dispute may choose to submit it for resolution: (a) to the courts or administrative tribunals of the Contracting Party to the dispute; (b) in accordance with any applicable, previously agreed dispute settlement procedure; or (c) in accordance with the following paragraphs of this Article.
(3) (a) Subject only to subparagraphs (b) and (c), each Contracting Party hereby gives its unconditional consent to the submission of a dispute to international arbitration or conciliation in accordance with the provisions of this Article.
(b)(i) The Contracting Parties listed in Annex ID do not give such unconditional consent where the Investor has previously submitted the dispute under subparagraph (2)(a) or (b). (ii) For the sake of transparency, each Contracting Party that is listed in Annex ID shall provide a written statement of its policies, practices and conditions in this regard to the Secretariat no later than the date of the deposit of its instrument of ratification, acceptance or approval in accordance with Article 39 or the deposit of its instrument of accession in accordance with Article 41."

27 *See* Khan Resources v. Mongolia, Case No. 2011-09, Decision on Jurisdiction, ¶ 387 (Perm. Ct. Arb. July 25, 2012), *available at* http://www.italaw.com/sites/default/files/case-documents/italaw4268.pdf [*hereinafter* "Khan Resources"] (wherein the Tribunal noted that Mongolia was listed in Annex ID of the ECT as one of the States that had restricted their unconditional consent to submit disputes to international arbitration to those disputes that had not been previously submitted to the courts of the Contracting Party).

28 Greentech Energy Sys. A/S, et al. v. Italian Republic,SCC Case No. V (2015/095),Final Award, ¶ 201 (Dec. 23, 2018), *available at*https://www.italaw.com/sites/default/files/case-documents/italaw10291.pdf [*hereinafter* "Greentech Energy"].

arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy. A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention" (emphasis added). In other words, once the ICSID is seized, other remedies including domestic litigation on the same matters are excluded. The exclusive character of consent to ICSID arbitration may give rise to a debate on whether the matters before ICSID are the same as the matters before the domestic court of the host State.[29]

Lastly, some FITR provisions in BITs reflect modern trends observable in investment treaty disputes. For instance, an FITR clause in the 2017 Columbia Model BIT refers to the "*same fundamental basis*" of judicial and arbitration claims.[30] The approach of various tribunals considering this concept has been discussed in the next part of this paper.

III. Methods applied by arbitral tribunals

Conceptually, the known case law divides between the pro-investor position of the tribunals mostly based on a strict interpretation of the *triple identity test*[31] and the tribunals' support of respondent States based on the

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29 *See, e.g.*, *infra* Part IV(R) the analysis in United Util. (Tallinn) B.V. &AktsiaseltsTallinnaVesi v. Republic of Est., ICSID Case No. ARB/14/24, Award (June 21, 2019), *available at* https://www.italaw.com/sites/default/files/case-documents/italaw10648.pdf [*hereinafter* "United Utilities"].

30 Colombia Model Bilateral Investment Treaty 2011, arts. 3, 4,*available at*http://www.mincit.gov.co/temas-interes/documentos/model-bit-2017.aspx. Articles 3 and 4 read as follows:
"A claim may not be submitted to a Court of Law or Arbitration under this Article when a Claimant Investor is either directly or indirectly through its Investment in the case of an Enterprise, party to judicial or arbitral proceedings within the Host Party, that refer to the same fundamental basis, or could result in the same reparation to the claimant.
Once the Claimant Investor has submitted the dispute to a competent tribunal of the Host Party or any of the arbitration proceedings stated above, the choice of the procedure shall be final."

31 *E.g.*, Khan Resources, Case No. 2011-09, Decision on Jurisdiction, ¶¶ 390–396 (Perm. Ct. Arb. July 25, 2012).

"*same fundamental basis*" approach.[32] However, each case has its specific circumstances, and it would be an oversimplification to say that a tribunal should either apply the triple identity test or the same fundamental basis approach. Probably, the most tenable decision would be if both tests show the same result.

A. The triple identity test

The traditional triple identity test verifies whether the legal actions in domestic court and international arbitration have the same parties, object, and cause of action. In one of the early ICSID cases, *Benvenuti&Bonfant*v. *Congo*,"*the Tribunal declared that there could only be a case of lis pendens where there was identity of the parties, object and cause of action in the proceedings pending before both tribunals*".[33] In some cases, "*legal basis*" is used instead of "*cause of action*,"[34] and "*issues*" instead of "*object*".[35]

In a number of cases favourable to the claimants, only some elements of the triple identity test were found sufficient by the tribunals to reach a conclusion. For example, if the object of the claims is clearly not identical, it may be futile for a tribunal to analyse other elements of the test.[36]

The opponents may say that the triple identity test is too formalistic and may disregard that the claims in question are substantially identical, due merely, to the formalistic difference of the parties or normative sources. For instance, in one case, the Respondent State argued that "*to assess whether there is identity of the parties, the Tribunal should analyse the economic reality of the corporate structure of the different entities present in the various procedures in question.*

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32 *E.g.*, Pantechniki S.A. Contractors &Eng'rs v. Republic of Alb., ICSID Case No. ARB/07/21, Award, ¶¶ 61–62 (July 30, 2009) [*hereinafter* "Pantechniki"].

33 S.A.R.L. Benvenuti&Bonfant v. People's Republic of the Congo, ICSID Case No. ARB/77/2, Award, ¶ 1.14 (Aug. 8, 1980).

34 *E.g.*, Charanne& Constr. Inv. v. Kingdom of Spain, SCC Case No. V (062/2012), Final Award, ¶ 399 (Jan. 21, 2016) [*hereinafter* "Charanne and Construction Investment"].

35 *E.g.*, M.C.I. Power Grp., ICSID Case No. ARB/03/6, Award, ¶ 176 (July 31, 2007).

36 *E.g.*, Total S.A. v. Argentine Republic, ICSID Case No. ARB/04/1, Decision on Liability, ¶ 443 (Dec. 27, 2010) [*hereinafter* "Total S.A."].

Indeed, if this was not the case 'any Claimant company could modify its corporate structure, using intermediary companies, subsidiaries, and ultimately restructuring its participation in the corporate chain, to justify inapplicability of the triple identity test with regard to the identity of the party'".[37]

On this point, one tribunalnotes that "*[a] strict application of the triple identity test would deprive the fork in the road provision of all or most of its practical effect*".[38]

Similarly, another tribunal, is of the view that the strict application of the triple identity test "*removes all legal effects*" from FITR clauses, "*which contravenes the effect utile principle applicable to the interpretation of treaties*". What ultimately matters for the application of FITR clauses "*is that the two relevant proceedings under examination have the same normative source and pursue the same aim*".[39]

In order to make the relevant test more flexible, it was suggested to use a kind of double identity test when "*the sameness of a dispute would be determined – in addition to the identity of the parties – either by reference to the object of proceedings, or else by the proceedings' 'equivalence in substance'*".[40]

B. <u>The same fundamental basis test</u>

On the other hand, the advantage of the triple identity test is that the borderline between claims is made on clear criteria, unlike the other more liberal, but likely more vague approach[41] which focuses on fundamentally the same factual and normative bases.

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37 Charanne and Construction Investment, SCC Case No. V (062/2012), Final Award,¶ 406 (Jan. 21, 2016).

38 Chevron Corp. & Texaco Petrol. Co. v. Republic of Ecuador (II), Case No. 2009-23, Third Interim Award on Jurisdiction and Admissibility, ¶¶ 4.76-4.77 (Perm. Ct. Arb. Feb. 27, 2012) [*hereinafter* "Chevron Corporation"].

39 Supervision y Control, ICSID Case No. ARB/12/4, Award, ¶ 330 (Jan. 18, 2017).

40 *See, e.g.*, Vid Prislan, Domestic courts in Investor-State Arbitration: Partners, Suspects, Competitors 377, ¶ 10.2.2 (June 27, 2019) (Doctoral thesis, University of Leiden), *available at*https://openaccess.leidenuniv.nl/bitstream/handle/1887/74364/10.pdf?sequence=16.

41 Petsche, *supra* note 14, at 391 (wherein it is also noted that the clash is "between formalistic and pragmatic approaches."); Petsche, *supra* note 14, at 394–395 ("However, they have also

This more liberal test means that if a domestic claim and an international claim are "*fundamentally same*"claims, this would be sufficient to support the jurisdictional objection of a respondent State based on the FITR clause. The same fundamental basis test as applied in *Pantechniki* v. *Albania* ["**Pantechniki**"] split the case law on FITR.[42]

The Pantechniki tribunal held that the relevant test was expressed by the America-Venezuela Mixed Commission in the Woodruff case in 1903 i.e. "*whether or not 'the fundamental basis of a claim' sought to be brought before the international forum is autonomous of claims to be heard elsewhere*". The Tribunal noted that "*the same facts can give rise to different legal claims*," while "*the similarity of prayers for relief does not necessarily*" indicate an identity of causes of action. The Tribunal believed that to determine whether claims have the same normative source is necessary. However, the Tribunal warned against rapid decisions based on "*abstract*" statements, by observing as follows: "*The frontiers between claimed entitlements are not always distinct. Each situation must be regarded with discernment.*"[43]

The "*fundamentalbasis*" test raises several questions. *First*, whether the basis under consideration is legal or factual, or both? *Second*, what comprises the *essence of claims*:the facts, the relief, the cause of action? *Third*, in what way should it be established that the claim before an arbitral tribunal has an "*autonomous*"existence from the claim brought before a domestic court? The author has searched the answers to these questions in the arbitral decisions discussed below and summarised his understanding in the last part entitled '*Conclusions'*.

(and rightly so) pointed out that the fundamental-basis test is vague and that it does not therefore ensure a high degree of legal certainty and predictability.").

42 Pantechniki, ICSID Case No. ARB/07/21, Award, ¶¶ 61–62 (July 30, 2009).

43 *Id.*

C. Other approaches

Tribunals also apply other methods for establishing whether the compared claims are identical. For instance, a dividing line between breaches of contract and breaches of the treaty is often suggested. It is quite usual for claimants to say that the claims brought to domestic court are related to the breaches of contract, while the claims submitted to international arbitration are relating to the breaches of the treaty, in an attempt to avoid being barred by virtue of FITR provisions.[44] The tribunal in one case noted: "*A purely contractual claim will normally find difficulty in passing the jurisdictional test of treaty-based tribunals, which will of course require allegation of a specific violation of treaty rights as the foundation of their jurisdiction*".[45] However, contractual claims may be interlinked with treaty claims, which makes the differentiation practically difficult.[46]

Another dividing line may be drawn between a breach of the treaty and a dispute related to the investment under the treaty, which is considered to be broader.[47] The ad hoc committee in *Vivendi* v. *Argentine Republic* took the view that the initiation of proceedings in the administrative courts would prima facie constitute a choice of forum under the FITR clause of the France-Argentina BIT "*if that claim was coextensive with a dispute relating to investments made under the BIT*".[48] The Committee in particular held: "*Article 8 deals generally with disputes 'relating to investments made under this Agreement between one Contracting Party and an investor of the other Contracting Party.' It is those disputes*

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44 *See, e.g.*,Toto, ICSID Case No. ARB/07/12, Decision on Jurisdiction, ¶ 208 (Sept. 11, 2009).

45 Occidental Expl. & Prod. Co. v. Republic of Ecuador, LCIA Case No. UN3467, Final Award, ¶ 52 (July 1, 2004), 12 ICSID Rep. 59 (2007) [*hereinafter* "Occidental Exploration"]; *seealso*Joy Mining Mach. Ltd. v. Arab Republic of Egypt, ICSID Case No. ARB/03/11, Award on Jurisdiction, ¶ 58 (Aug. 6, 2004).

46 *See, e.g.*, Occidental Exploration, LCIA Case No. UN3467, Final Award, ¶ 81 (July 1, 2004), 12 ICSID Rep. 59 (2007).

47 *See*Compañiá de Aguas del Aconquija S.A. & Vivendi Universal S.A.v. Argentine Republic,ICSID Case No. ARB/97/3, Decision on Annulment, ¶ 55 (July 3, 2002).

48 *Id.*

which may be submitted, at the investor's option, either to national or international adjudication. Article 8 does not use a narrower formulation, requiring that the investor's claim allege a breach of the BIT itself. Read literally, the requirements for arbitral jurisdiction in Article 8 do not necessitate that the Claimant allege a breach of the BIT itself:it is sufficient that the dispute relate to an investment made under the BIT".[49] This analysis has been based on the textual interpretation of the particular FITR provision.

Below is a brief analysis of the major cases: (i) supporting investor interests and (ii) where the respondent States have been successful on the FITR issue. By this time, statistically, investors have prevailed. However, the *Pantechniki* award and further similar decisions in favour of host States, while still in the minority, have brought more intrigue to the FITR analysis.

IV. Selected cases favourable to investors

There are several cases where claimants have been successful as far as the interpretation of FITR clauses is concerned. While in some cases, the analysis by tribunals was limited to identifying parties, objects or claims as not identical, this does not take away from the importance of the findings,[50] as most cases clearly concerned different factors.

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49 *Id.*

50 With reference to the triple identity test, three tribunals have dismissed the Respondents' FITR objections: Hulley Enters. Limited (Cyprus) v. Russian Federation, Case No. 2005-03/AA226, Interim Award on Jurisdiction and Admissibility, ¶¶ 597–599 (Perm. Ct. Arb. 2009) [*hereinafter* "Hulley Enterprises"]; Hulley Enterprises, Case No. 2005-03/AA226,Final Award, ¶¶ 1271-1272 (Perm. Ct. Arb. 2014); Yukos Universal Ltd. (Isle of Man) v. Russian Federation, Case No. 2005-04/AA227, Interim Award on Jurisdiction and Admissibility, ¶¶ 598–600 (Perm. Ct. Arb. 2009) [*hereinafter* "Yukos Universal"]; Yukos Universal, Case No. 2005-04/AA227,Final Award, ¶¶ 1271–1272 (Perm. Ct. Arb. 2014); Veteran Petro. Ltd. (Cyprus) v. Russian Federation, Case No. 2005-05/AA228, Interim Award on Jurisdiction and Admissibility, ¶¶ 609-611 (Perm. Ct. Arb. 2009) [*hereinafter* "Veteran Petroleum"]; Veteran Petroleum, Case No. 2005-05/AA228, Final Award, ¶¶ 1271-1272 (Perm. Ct. Arb. 2014). The *ad hoc* committee, in one known ICSID case, briefly mentioned that the Tribunal, based on the triple identity test, dismissed the FITR challenge of the Respondent State to its jurisdiction (Victor Pey Casado & President Allende Found.

A. Olguín v. Paraguay

In *Olguín*v. *Paraguay*, the Tribunal did not find evidence that the Claimant had irrevocably elected to bring a claim to the courts of the host State similar to the ICSID claim. The Claimant's request for a declaratory judgment of bankruptcy and liquidation of a commercial corporation, mentioned by the Respondent, could not, in the view of the Tribunal, "*have the same juridical effect as a claim against the Republic of Paraguay*".[51] Therefore, the Respondent's jurisdictional objection was dismissed.

B. Champion Trading v. Egypt

The Tribunal in *Champion Trading* v. *Egypt* rejected the Respondent's defence based on the FITR clause solely due to the different parties (the Egyptian company and its shareholders) in the domestic and ICSID proceedings, holding that the treaty should be interpreted "*in good faith in accordance with the ordinary meaning expressed therein*". It was further held that this interpretation in good faith "*excludes from ICSID arbitration only those disputes where the ICSID claimant is also the claimant in the national proceedings*".[52]

C. Azurix v. Argentina

In *Azurix*v. *Argentina*, which dealt with the termination of a concession contract, the Tribunal noted that neither of the parties to arbitration was a party to the proceedings before the local courts, and added that Argentina was not a party to any domestic proceedings in question.[53] Also, the Tribunal noted "*the differentiation of the claims*," such as the administrative

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v. Republic of Chile, ICSID Case No. ARB/98/2, Decision on the Application for Annulment of the Republic of Chile, ¶¶ 43-45 (Dec. 18, 2012)).

51 Eudoro Armando Olguín v. Republic of Para., ICSID Case No. ARB/98/5, Decision on Jurisdiction, ¶ 30 (Aug. 8, 2000), 6 ICSID Rep. 156 (2006) (unofficial translation from Spanish).

52 Champion Trading Co., Ameritrade Int'l, Inc. v. Arab Republic of Egypt, ICSID Case No. ARB/02/9, Decision on Jurisdiction, ¶ 3.4.3 (Oct. 21, 2003), 10 ICSID Rep. 400 (2006).

53 Azurix Corp. v. Argentine Republic, ICSID Case No. ARB/01/12, Decision on Jurisdiction, ¶ 90 (Dec. 8, 2003), 10 ICSID Rep. 416 (2006) [*hereinafter* "Azurix Corporation"].

appeals to domestic court over the termination of the concession agreement, on the one hand, and the ICSID claim concerning investment in an Argentinian subsidiary, on the other hand, and rejected the FITR objection of the Respondent State.[54]

D. Enron v. Argentina

In *Enron* v. *Argentina,* the Claimants argued that the parties and the subject matter of the claims before the local courts and before ICSID were different. The Tribunal held that "*even if there was recourse to local courts for breach of contract this would not prevent resorting to ICSID arbitration for violation of treaty rights, or that in any event, as held in Benvenuti&Bonfant, any situation of lis pendens would require identity of the parties*". The Tribunal also noted that, in the present case, the Claimants have not made submissions before local courts and "*[t]he conditions for the operation of the principle electauna via or 'fork in the road' are thus simply not present*".[55]

E. Total S.A. v. Argentina

In *Total S.A.* v. *Argentina*, the Claimant objected to the FITR-based argument of the Respondent State "*because the present arbitration was initiated before the domestic litigation so that its claim concerning this issue must be viewed as predating the domestic proceedings*". The Claimant explained that "*its specific claim against Argentina's demand for the tax payment at issue is ancillary to [its] initial arbitration request, to which it was added when Argentina requested payment of those taxes in 2006, while these proceedings were pending*".[56] The Tribunal had no difficulty in finding that the two proceedings had a different object, and held as follows: "*The object of the arbitration before this Tribunal is the alleged breach of the [France-Argentina] BIT by Argentina's demand for retroactive tax payment; the claim before Argentina's domestic courts is that the demand is in breach of Argentina's law. Further, the Claimant in the domestic proceedings for amparo is Total's subsidiary,*

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[54] *Id.* ¶ 92.

[55] Enron Corp. & Ponderosa Assets, L.P. v. Argentine Republic, ICSID Case No. ARB/01/3, Decision on Jurisdiction, ¶¶ 95-98 (Jan. 14, 2004), 11 ICSID Rep. 273 (2007).

[56] Total S.A., ICSID Case No. ARB/04/1, Decision on Liability, ¶ 443 (Dec. 27, 2010).

Total Austral, and not Total itself. It is the Tribunal's view therefore that Article 8.2 of the BIT is not applicable".[57]

F. Charanne and Construction Investments v. Spain

In *Charanne and Construction Investments*v.*Spain*,[58] the Respondent referred to "*a flexible interpretation of the triple identity test developed by some recent decisions of international tribunals*".[59] The Tribunal dismissed the Respondent State's objection that the Claimants, by bringing local administrative proceedings and a proceeding before the European Court of Human Rights ["**ECHR**"], triggered the FITR provision of the ECT and were precluded from bringing the case before an investor-State tribunal. The Tribunal considered, in particular, that there was no substantial identity of parties in the local proceedings and the ECHR as required under the triple identity test.[60] Consequently, it was unnecessary "*to examine the arguments of the Parties as to the subject identity and identity of legal basis, since it would not change the decision of the Arbitral Tribunal in this respect*".[61]

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57 *Id.*

58 Charanne and Construction Investment, SCC Case No. V (062/2012), Final Award, ¶¶ 398-410 (Jan. 21, 2016).

59 *Id.* ¶ 404.

60 *Id.* ¶ 408 (the tribunal concluded that "[w]hile it is true that the Claimants are part of the same group of the company Grupo T-Solar and of the company Grupo Isolux Corsan S.A., this is insufficient to consider that there is a substantial identity of the parties, even under a flexible interpretation of the triple identity test. For that to be the case it would have been necessary to demonstrate that the Claimants enjoy decision-making powers in Grupo T-Solar and Grupo Isolux Corsan S.A. in such a way that these companies have been in reality intermediary companies. This demonstration has not been provided. Neither has it been alleged that the corporate structure of the group of the claiming parties has been designed or modified with a fraudulent purpose to allow the Claimants to avoid the fork in the road provision of the ECT.").

61 *Id.* ¶ 410.

G. Hassan Awdi, Enterprise Business Consultants, Inc. and Alfa El Corporation v. Romania

The Tribunal's finding, in *Hassan Awdi, Enterprise Business Consultants, Inc. and Alfa El Corporation* v. *Romania*,[62]was based on grounds different from the identity of the parties or objects of claims. In the Tribunal's view, the FITR provision "*is meant to avoid that by resorting initially to the State courts and then to arbitration under the BIT, the investor tries its case a second time should it be not satisfied with the outcome of the first attempt before the local courts*".[63] Noting that the local court proceeding was annulled due to the Claimants' failure to pay court fees and pleadings did not happen before the domestic courts, the Tribunal rejected Romania's challenge and found that there was no parallel litigation, and hence no room for application of the FITR provision.[64]

While the above decisions provide an insight into the issue, other tribunals have provided a more detailed analysis of FITR.

H. Alex Genin v. Estonia

In *Alex Genin*v. *Estonia*, the Estonian Innovation Bank ["**EIB**"] filed a claim to national court and then its shareholders brought their claim to arbitration.[65] Estonia argued that, by electing to litigate their disputes in the Estonian courts, the Claimants had exhausted their right to re-litigate the same disputes in the other forum.[66]

The Tribunal did not expressly mention the triple identity test, but actually applied this approach. Two questions were analysed: *first*, to what extent the issues litigated in domestic courts were identical to those raised in the ICSID arbitration and *second*, was it proper to consider EIB and the

62 Hassan Awdi, Enter. Bus. Consultants, Inc. & Alfa El Corp. v. Rom., ICSID Case No. ARB/10/13, Award (Mar. 2, 2015).
63 *Id.* ¶ 203.
64 *Id.* ¶¶ 204–205.
65 Alex Genin, ICSID Case No. ARB/99/2, Award, ¶¶ 47, 58, 321, 333 (June 25, 2001), 6 ICSID Rep. 241 (2006).
66 *Id.* ¶ 321.

Claimants "*as a 'group' and to view EIB's legal acts in Estonia as an 'election of remedy' for the group as a whole?*"[67]

The Tribunal found that the lawsuits undertaken by EIB in Estonia, relating to the purchase by EIB of the branch of another bank and to the revocation of EIB's license, were not identical to the Claimants' "*cause of action in the 'investment dispute' that they seek to arbitrate in the present proceedings*".[68] The Tribunal also indicated the distinction between the causes of action brought by EIB in Estonia and by the Claimants in the "*investment dispute*" in the ICSID.[69] The Tribunal held that certain aspects of the facts that gave rise to the dispute in ICSID "*were also at issue in the Estonian litigation*". However, "*the 'investment dispute' itself was not*," and the Claimants, therefore, were not "*barred from using the ICSID arbitration mechanism*".[70]

As to the second question, the Tribunal concluded that the actions taken by EIB in Estonia regarding the losses suffered by EIB due to the alleged misconduct of the Bank of Estonia "*certainly affected the interests of the Claimants, but this in itself did not make them parties to these proceedings*".[71]

I. CMS v. Argentina

In *CMS* v. *Argentina*, the Respondent State contended that the Claimant triggered the FITR provision of the respective BIT.[72]The Claimant submitted thatthe parties and the subject matter of the local and ICSID disputes were different, as the local claim concerned the contractual arrangements under the license while the investor's claims related to the affected treaty rights. The Tribunal noted: "*Decisions of several ICSID tribunals*

67 *Id.* ¶ 330.
68 *Id.* ¶ 331.
69 *Id.* ¶¶ 330-332.
70 *Id.* ¶ 333.
71 *Id.* ¶ 331.
72 CMS Gas Transmission Co. v. Argentine Republic, ICSID Case No. ARB/01/8, Decision of the Tribunal on Objections to Jurisdiction, ¶¶ 77-82 (July 17, 2003), 7 ICSID Rep. 494 (2005).

have held that as contractual claims are different from treaty claims even if there had been or there currently was a recourse to the local courts for breach of contract, this would not have prevented submission of the treaty claims to arbitration".[73] The Tribunal also noted that, "*[b]oth the parties and the causes of action under separate instruments were different. Had the Claimant renounced recourse to arbitration, for example by resorting to the courts of Argentina, this would have been a binding selection under the BIT*".[74]

J. Middle East Cement v. Egypt

In *Middle East Cement* v. *Egypt*, the Claimant brought a case before the Egyptian courts regarding the alleged nullity of an auction and then referred the dispute to ICSID for arbitration. The Tribunal rejected the Respondent's argument on the forum selection clause because the dispute before the Egyptian courts and the one before the Tribunal were different.[75] In particular, the Tribunal noted that the FITR provisions of the respective BIT refers to "*such disputes*" as were specified in paragraph 1 of Article 10 of the BIT i.e. disputes "*between an investor of a Contracting Party and the Other Contracting Party concerning an obligation of the latter under this Agreement*".[76] The case brought by the Claimant before the Egyptian courts regarding the alleged nullity of the auction was not and could not be '*concerning*' Egypt's obligations under the BIT but only the validity of the auction under Egyptian national law.[77] The Tribunal's argument referring to the precise definition of an investor-State dispute under the BIT seems to be useful to Claimants in other arbitrations. For example, if an FITR clause expressly indicates that a treaty claim is a claim "*brought by an investor*," a claim brought to the host State court by a domestic legal entity connected with the investor will not trigger such an FITR clause.

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73 *Id.* ¶ 80.

74 *Id.* ¶¶ 80–81.

75 Middle E. Cement Shipping & Handling Co. S.A. v. Arab Republic of Egypt, ICSID Case No. ARB/99/6, Award, ¶¶ 71–72 (Apr. 12, 2002), 7 ICSID Rep. 178 (2005).

76 *Id.* ¶ 71.

77 *Id.*

K. Occidental v. Ecuador

An interesting analysis of the FITR issuecan be seen in the London Court of International Arbitration ["**LCIA**"] award, in *Occidental* v. *Ecuador*.[78] Ecuador argued that the Claimant had submitted four separate lawsuits to Ecuadorian courts that constituted an irrevocable choice to submit the dispute to the courts of the Respondent State in accordance with the FITR provision of the United States-Ecuador BIT. The Claimant relied on the triple identity test and further argued that the relief requested in the two separate disputes is different. It must be noted that, unlike some other cases under consideration, in this case, the Claimant had not submitted any contractual claims to either forum. It submitted the claims on its rights under the BIT to arbitration, while the claim to the courts of the Respondent State concerned an issue of interpretation of the tax legislation.

The Tribunal focused on the nature of the submitted dispute and took the view that if the nature of the dispute submitted to arbitration is treaty-based, "*the jurisdiction of the arbitral tribunal is correctly invoked*".[79] This situation, in the Tribunal's view, occurred where treaty-based issues came to arbitration and non-contractual domestic law questions were dealt with by local courts in Ecuador. The decisions adopted by Ecuadorian courts on matters of interpretation of the Ecuadorian Tax Law were "*of great help to this Tribunal in its own interpretation of both the Treaty and the relevant provisions of Ecuadorian law … It follows that the causes of action might be separate and the nature of the disputes different, yet they may both have cumulative effects and interact reciprocally*".[80]

There was one more reason for the Tribunal in this case to find that the FITR mechanism was not triggered in that dispute. The FITR clause, by its very definition, assumed that the investor had made a choice between alternative avenues. In the Tribunal's view, such a choice was required to

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78 Occidental Petro. Corp. & Occidental Expl. & Prod. Co. v. Republic of Ecuador, ICSID Case No. ARB/06/11, Award, ¶¶ 37(a), 38–63 (Oct. 5, 2012), 12 ICSID Rep. 59 (2007).

79 *Id.* ¶ 57.

80 *Id.* ¶ 58.

"*be made entirely free and not under any form of duress*". In the present case, the local tax law required the taxpayer to apply to the courts within the brief period of 20 days following the issuance of the resolution on value-added tax, which becomes final and binding if this is not done.[81] The Tribunal was of the view that in this case, "*the investor did not have a real choice. Even if it took the matter instantly to arbitration, which is not that easy to do, the protection of its right to object to the adverse decision of the SRI [tax authority] would have been considered forfeited if the application before the local courts were not made within the period mandated by the Tax Code*".[82]

L. M.C.I. Power Group L.C. and New Turbine, Inc. v. Ecuador

In *M.C.I. Power Group L.C. and New Turbine, Inc.* v. *Ecuador*, the Tribunal dismissed the Respondent's FITR based objection due to the specific circumstances of the case.[83] The Claimants alleged that they had not triggered the FITR clause because "*the claim before the Ecuadorian tribunals involved different parties and different issues and that the claim was not a free election of forum and was annulled without a decision being made on the Merits*".[84] The Tribunal held that the FITR issue was irrelevant in view of the fact that the suits to the Ecuadorian courts "*related to disputes that arose prior to the entry into force of the BIT. Thus, in accordance with the principle of the non-retroactivity of treaties, those disputes remain outside the temporal Competence of this Tribunal*".[85]

In this case, one more aspect is of interest. The Claimants argued that they had not triggered the FITR mechanism because the proceedings were annulled before the court could make a decision on the merits of the case.[86] The Tribunal found this argument irrelevant for purposes of determining jurisdiction because if a right to choose an option had been exercised in

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81 *Id.* ¶ 60.
82 *Id.* ¶ 61.
83 M.C.I. Power Group, ICSID Case No. ARB/03/6, Award, ¶¶ 171–189 (July 31, 2007).
84 *Id.* ¶ 175.
85 *Id.* ¶ 189.
86 *Id.* ¶ 177.

that case that would have been "*irrevocable, whether or not there had been a final decision on the Merits*".[87]

M. Toto v. Lebanon

In *Toto* v. *Lebanon*,[88]the Respondent State argued that the claims submitted to both the Lebanese Conseil d'Etat and the ICSID have the same aim of obtaining compensation for the extra costs incurred in the execution of the contract. The parallel proceedings could result in conflicting decisions.[89] The Tribunal applied the triple identity test and rejected the objection of the Respondent. It stated that claims arising out of the contract and treaty claims do not have the same cause of action.[90] Moreover, in this case the Claimant had recourse to domestic litigation based on the contractual forum selection clause. In the Tribunal's view, this could not exclude the jurisdiction of the Tribunal based upon the respective BIT.[91] The Tribunal also held that the contractual jurisdiction clause and the treaty jurisdiction clause "*are not mutually exclusive clauses*". The contractual jurisdiction clause applies to actions and matters that are violations of the contract; the treaty jurisdiction clause applies to actions and matters that constitute violations of the substantive treaty provisions "*even if the same actions and matters may give rise to breach of contract*".[92]

N. Chevron Corporation and Texaco Petroleum Company v. Ecuador (II)

In *Chevron Corporation and Texaco Petroleum Company* v. *Ecuador (II)*,[93] the same "*fundamental basis*" of two claims was under discussion. The Respondent submitted that "*in a situation where a claim in a local court is contract-based and a*

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87 *Id.* ¶ 182.
88 Toto, ICSID Case No. ARB/07/12, Decision on Jurisdiction, ¶¶ 203–217 (Sept. 11, 2009).
89 *Id.* ¶ 206.
90 *Id.* ¶ 211.
91 *Id.* ¶ 213.
92 *Id.* ¶ 214.
93 Chevron Corporation, Case No. 2009-23, Third Interim Award on Jurisdiction and Admissibility, ¶¶ 4.72–4.89 (Perm. Ct. Arb. Feb. 27, 2012).

claim in an arbitration is treaty-based, a tribunal should only exercise jurisdiction where the 'fundamental basis' of the contract and treaty claims are different".[94] The Claimants argued that these claims are "*fundamentally different,*"[95] and the "*investment dispute*" before the arbitral Tribunal had not been submitted to another forum. Further, the dispute in the domestic court was characterised by the Claimants as an "*environmental damage dispute*" rendering the FITR provision inapplicable.[96]

The Tribunal analysed what was required to establish "*sameness*" of two disputes.[97] It was clear to the Tribunal that the Claimants had not themselves submitted the dispute before this Tribunal to any other court.[98] This, due to the specific words of the FITR provision in this case, did not allow the FITR clause to be applied.[99]The Tribunal also concluded that the prayer for relief and the matters before the domestic courts and the Tribunal were not the same[100] and rejected the Respondent's FITR case.

O. The ideal test in AES Corporation and Tau Power B.V. v. Kazakhstan

The ideal case on the FITR provision would be the one in which the tribunal's finding satisfies both the triple identity test and the fundamental basis test.In *AES Corporation and Tau Power B.V.* v. *Kazakhstan* ["**AES Corporation**"],[101] the Respondent State relying on the *Pantechniki* award, argued that it was impermissible to bring claims before ICSID having the same "*fundamental basis*" as disputes which had already been submitted and

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94 *Id.* ¶ 3.80.
95 *Id.* ¶ 3.185.
96 *Id.* ¶¶ 3.131–3.132.
97 *Id.* ¶ 4.74.
98 *Id.* ¶ 4.79.
99 *Id.* ¶¶ 4.78, 4.80.
100 *Id.* ¶¶ 4.81–4.88.
101 AES Corp. & Tau Power B.V. v. Republic of Kaz., ICSID Case No. ARB/10/16, Award, ¶¶ 225–230 (Nov. 1, 2013).

ruled upon by the domestic courts.[102] The Claimants stated that the FITR clause did not operate to bar the Claimants' claims, because the dispute presented to this arbitral Tribunal was different from the disputes which were submitted to the Kazakh courtsby theAES Entitiesaffiliated to the Claimants.[103] The Tribunal took the view that the Claimants' claims, as submitted in the ICSID arbitration, although based on the same facts and on the same alleged basic wrongdoings by the Respondent, were different from the claims filed by the entities affiliated with Claimants with the Kazakh courts. This conclusion and the further finding that the claims in ICSID were not barred by any FITR provision, in the view of the Tribunal, satisfied both the triple identity test and the "*fundamentally the same [normative] basis*" test.[104] Importantly, the Tribunal emphasised that "*fundamentally the same basis*" means normative basis, rather than merely factual basis. Apparently, this approach puts stricter requirement to the notion of "*fundamental basis*".

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102 *Id.* ¶ 176.

103 *Id.* ¶ 179.

104 *Id.* ¶ 227–229. Paragraphs 228 and 229 read as follows:
"228. The key difference between the claims is as follows: through the court proceedings before the Kazakh courts, Claimants mainly sought to invalidate decisions of the competition authorities with regard to the listing of the AES Entities on the Monopoly Register and to challenge orders through which fines and penalties were imposed on the AES Entities for allegedly anti-competitive behavior. Claimants did so mainly by arguing that the relevant authorities had misapplied the relevant Kazakh competition law.
229. Claimants' claims in the present proceeding have a different dimension and meaning: While the implementation by the Kazakh authorities of the new Kazakh competition law plays an important role in the present proceedings, it does so only from a factual perspective in the sense that it is one of the factual causes for Claimants' treaty claims in the present ICSID proceedings. In other words, it is the result of the Kazakh court proceedings, i.e. the confirmation by Kazakh courts that the Kazakh competition law was applied correctly by the administrative authorities, which led Claimants to file a claim for breach of the protection allegedly afforded to Claimants under the ECT, BIT and 1994 FIL in connection with legitimate expectations arising out of and other assurances made in the Altai Agreement. Had the Kazakh courts decided differently, the treatment of Claimants under the law would have been different and the effect on Claimants' alleged legitimate expectations would also have been different."

P. Mobil Exploration v. Argentina

Certain elements of the triple identity test were used in *Mobil Exploration* v. *Argentina*,wherein the Claimants argued that the FITR clause applies only when the disputes before international tribunals and before local courts"*are between the same parties and involve the same purpose as well as the same cause of action*".[105] The objection to the admissibility of claims on the basis of FITR concerned the claims in relation to the so-called "*amparo* actions" which is a brief summary trial in the Argentine court with a limited purpose, "*to obtain the Statement of unconstitutionality or illegality of norms or a regulation*".[106] The Tribunal found "*it obvious that the sole purpose of the amparo actions was to declare Argentina's export restrictions and re-routing measures as unconstitutional and void under Argentine law*," and these domestic claims were not "*based on violations of the US-Argentina BIT*".[107] In the Tribunal's view, an ICSID tribunal does not have the power to declare an Argentine law unconstitutional or to grant an *amparo*. *Amparo* is not a precondition to claim damages which are sought in the ICSID proceedings. Thus, the *amparo* actions have a different cause of action, a different purpose, and object than the ICSID arbitration.[108]Accordingly, the Respondent's objection was dismissed.

Q. Greentech Energy Systems A/S, et al. v. Italian Republic

In *Greentech Energy Systems A/S, et al.* v. *Italian Republic,* the Respondent raised the FITR issue in the context of "*unconditional consent*" to arbitration under Article 26(2)-(3) of the ECT.[109] The Respondent contended that several Italian administrative court actions were brought by "*parties, including companies owned by Claimants*" regarding the matter at issue. The Respondent argued that a proper application of Article 26(3)(b)(i) would "*focus on the real*

105 *See* Mobil Expl. & Dev. Inc. Suc. Argentina & Mobil Argentina S.A. v. Argentine Republic, ICSID Case No. ARB/04/16,Decision on Jurisdiction and Liability, ¶ 139 (Apr. 10, 2013).
106 *Id.* ¶¶ 139, 141.
107 *Id.* ¶¶ 144–145.
108 *Id.* ¶ 145.
109 Greentech Energy Sys., SCC Case No. V (2015/095), Final Award, ¶ 195 (Dec. 23, 2018).

substance of the underlying rights as opposed to the form of the legal action".[110] Alternatively, as argued by the Respondent, the triple identity test would here be met, since the domestic cases were instituted by the Claimants' subsidiaries, the "*measures at stake are exactly the same as in these proceedings*", and the grounds include alleged violations of Article 10 of the ECT.[111] In response, the Claimants asserted that they have not commenced domestic litigation in Italy and are not participating in any domestic Italian case. The Tribunal found that the Respondent has not shown that the Claimants have previously submitted the present dispute to Italian courts or administrative tribunals and thus rejected the Respondent's FITR objection.[112] In particular, the Tribunal stated that it"*has not been persuaded to adopt a non-literal interpretation of ECT Article 26(3)(b)(i)*"and that "*the Italian subsidiaries of Claimants in this arbitration cannot be understood to be 'Investors' but are, instead, to be treated as 'Investments' which are located 'in the Area of' Italy*".[113]

R. United Utilities v. Estonia

In *United Utilities* v. *Estonia,*[114] the Tribunal considered whether it was necessary to engage in an exercise of construction of Article 26 of the ICSID Convention. The Tribunal concluded that the ICSID proceeding and the matter before the Estonian court were "*not substantially the same*". As a result, Article 26 of the ICSID Convention on the exclusion of non-ICSID remedies, in the Tribunal's view, did not enter into play.[115] Further, the Tribunal held that the remedies sought in this arbitration derived from a different normative source than those before the domestic courts.The Tribunal did not have difficulty in establishing thatthe Estonian courts had considered facts that were also before the Tribunal. However, the Estonian courts considered ASTV's (one of the Claimants) and the Estonian

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110 *Id.* ¶ 197.
111 *Id.*
112 *Id.* ¶ 205.
113 *Id.* ¶ 204.
114 United Utilities, ICSID Case No. ARB/14/24, Award (June 21, 2019).
115 *Id.* ¶ 464.

Competition Authority respective rights and obligations solely through the prism of Estonian law, and not the rights of ASTV as a foreign investor in Estonia pursuant to the relevant BIT and international public law.[116] Interestingly, the "*same factual basis*" of the domestic and ICSID proceedings did not prevent this Tribunal from upholding its jurisdiction.

V. Selected cases favourable to respondent States

A. Pantechniki v. Albania

In *Pantechniki,* the dispute arose from the severe civil disturbances in Albania in 1997, which caused damages to the Claimant which was forced to abandon its contractor's road work site. Albania argued that Article 10(2) of the Greece-Albania BIT, which provided for FITR, precluded the investor's claims filed in the ICSID arbitration because it had brought the "*same claim*" before the Albanian court.[117] Unlike the cases where a domestic claim is made by a local company and an international claim is brought by an investor, *Pantechniki* itselffiled both claims: *first*, to the domestic court, which was dismissed, and *second*, to the ICSID. In the course of the ICSID proceedings, the Claimant stated that it abandoned its challenge before the Supreme Court of Albania.[118]

In the defence, the Claimant stressed the difference between a contractual claim in the Albanian court and a treaty claim in the ICSID.[119] However, the Tribunal concluded that it was not sufficient for the Claimant to assert merely that the claim was founded on the treaty. The Tribunal noted that the domestic claim was clearly based on the contracts which "*allocated loss from incidents*" of 1997.[120] At the same time, the Tribunal had to determine whether the claim truly had "*an autonomous existence outside the contract*".[121] The

[116] *Id.* ¶ 465.
[117] Pantechniki, ICSID Case No. ARB/07/21, Award, ¶ 50 (July 30, 2009).
[118] *Id.* ¶ 27.
[119] *Id.* ¶¶ 54–55.
[120] *Id.* ¶ 63.
[121] *Id.* ¶ 64.

Tribunal found that there was no such autonomous existence, as to the extent that the prayer to the local court "*was accepted it would grant the Claimant exactly what it is seeking before ICSID – and on the same 'fundamental basis'*".[122] The Tribunal held that both claims concerned payment for contractual losses and were essentially the same. As the Claimant chose to take this matter to the Albanian courts, in the Tribunal's view, it could not later "*adopt the same fundamental basis as the foundation of a Treaty claim*".[123]

With all its innovative effect, the *Pantechniki* award has been criticised by some commentators. For example, it is argued that the same fundamental basis test and the related inquiries (as to the same normative source of the claims and an autonomous existence of the later claim) are "*inherently vague and ambiguous;*" as none of them is based on established legal terminology. It is also suggested that the sole arbitrator did not provide any explanations as to the meaning of these terms, and his approach lacked "*legal certainty and predictability*".[124] However, a similar approach was also used in several further cases, particularly, in *H&H Enterprises Investments, Inc.* v. *Egypt* and *Supervision y Control S.A.* v. *Costa Rica.*[125]

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122 *Id.* ¶ 67.

123 *Id.*

124 Petsche, *supra* note 14, at 418.

125 *See also* Transglobal Green Energy, LLC & Transglobal Green Panama, S.A. v. Republic of Panama, ICSID Case No. ARB/13/28, Award, ¶¶ 86–88 (June 2, 2016) (the Respondent State strongly relied on Pantechniki and H&H Enterprises arguing that Claimantswere precluded from pursuing their claims before ICSID under (i) the FITR clause of the BIT and (ii) Article 26 of the ICSID Convention. Panama argued that as the Claimants had already sought recourse for their claims in various domestic fora on the same fundamental basis as the claims brought before ICSID i.e. challenging the legality of the decision on termination of concession in domestic administrative litigation, the Claimants were not permitted to consent to ICSID arbitration. On the question of which test the Tribunal should apply to determine whether the FITR clause had been breached, Panama stated that the Tribunal should employ the "fundamental basis" test, rather than the triple identity test. In Panama's view, the triple-identity test would deprive the FITR clause of the BIT of practical effect in violation of Article 31 of the Vienna Convention on the Law of International Treaties). *See also* ¶118 (ultimately the Tribunal did not consider the FITR objection, as it upheld the other Respondent's objection to jurisdiction "on the ground of

B. H&H Enterprises Investments, Inc. v. Egypt

In *H&H Enterprises Investments, Inc.* v. *Egypt*,[126] the Respondent State prevailed on the basis of its FITR objection. Egypt strongly relied on the methodology applied by the *Pantechniki* tribunal arguing that (a) the treaty claim has the same fundamental basis as the claim submitted to the local courts; (b) the factual components of a treaty cause of action have already been brought before the local courts; and (c) the treaty claim does not truly have an autonomous existence outside the contract. The Respondent also submitted that the triple identity test deprives the FITR provision of genuine meaning and practical effect.[127]

In turn, the Claimant argued that its claims were fundamentally treaty claims not barred by the FITR clause.[128] The triple identity test was not met, "*even though the local proceedings and this arbitration involve the same parties, the causes of action are not the same, as the present arbitration involves treaty claims and not contract claims*".[129] The Claimant also argued that the factual basis of the claims and the relief being sought were different.

The Tribunal noted that in order to decide whether the Claimant's treaty claims were barred by the FITR clause, the Tribunal had to determine whether the treaty claims had "*the same fundamental basis as the claims submitted before the local fora*".[130] The Tribunal concluded that the basis for the Claimant's treaty claims and its contractual claims, which were founded, *inter alia*,on the option to buy, were *fundamentally the same*.[131]

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abuse by Claimants of the investment treaty system by attempting to create artificial international jurisdiction over a pre-existing domestic dispute.").

126 H&H Enterprises, ICSID Case No. ARB/09/15, Tribunal's Decision on Respondent's Objections to Jurisdiction (June 5, 2012).

127 *Id.* ¶¶ 70–71.

128 *Id.* ¶ 74.

129 *Id.* ¶ 78.

130 H&H Enterprises, ICSID Case No. ARB/09/15, Excerpts of Award, ¶ 369 (May 6, 2014).

131 *Id.* ¶ 360.

The Tribunal further noted that the triple identity test does not apply in this case as Article VII of the United States-Egypt BIT did not expressly require that the triple identity test be met before the FITR provision could be invoked. The triple identity test raised by the Claimant "*is based on its reading of arbitral jurisprudence as opposed to the specific language of the US-Egypt BIT and/or its interpretation*".[132] The Tribunal noted that it should not be allowed that form prevail over substance. According to this Tribunal, the language of Article VII of the BIT did not require specifically that the parties be the same. What mattered, in the Tribunal's view, was the subject matter of the dispute.[133] The Tribunal concluded that the domestic claim and the ICSID claim on expropriation "*share fundamentally the same factual basis*".[134] The Tribunal's emphasis on fundamentally the same factual basis differs from the positions of the *Pantechniki* tribunal (which noted that the same facts can give rise to different claims) and of the Tribunal in *AES Corporation* (which considered that "*fundamentally the same basis*" meant normative basis, rather than a factual one).

C. Supervision y Control S.A. v. Costa Rica

In *Supervision y Control S.A.* v. *Costa Rica,* the Tribunal applied the "*samefundamental basis*" test with respect to the forum selection provision of the Spain-Costa-Rica BIT based on the concept of waiver.[135] The Tribunal concluded that "*the disputes in both fora must be identical or have a significant overlap for the forum selection clause to be applicable*".[136]

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132 *Id.* ¶ 364.

133 *Id.* ¶¶ 367–368 (it was also raised whether the dispute resolution provision without the FITR clause from the Germany-Egypt BIT could be imported through the most-favoured-nation (MFN) clause in the US-Egypt BIT. The tribunal agreed with the Respondent that the MFN clause contained in the US-Egypt BIT could not be used to avoid the application of the FITR clause contained therein).

134 *Id.* ¶ 378.

135 Supervision y Control*,* ICSID Case No. ARB/12/4, Award, ¶¶ 293–335, 308(Jan. 18, 2017); *see also* the discussion of the waiver clause *supra* Part II.

136 Supervision y Control*,* ICSID Case No. ARB/12/4, Award, ¶ 295 (Jan. 18, 2017).

The Tribunal analysed two issues: regarding *first*, the parties that brought claims to the local proceeding and to ICSID, and *second*, the basis of the claims. On the first issue, the Tribunal found that the entity Riteve controlled by the Claimant "*is a corporate vehicle that acts according to the interests and instructions of Claimant,*" and "*that the proceeding initiated by Riteve before the Administrative Contentious Court must be considered as filed by Claimant*".[137]

On the second issue, the Tribunal concluded that what, in the end, matters for the application of FITR clauses is that the two relevant proceedings "*have the same normative source and pursue the same aim*". The Tribunal found that this was exactly the case.[138]Consequently, the Tribunal concluded that the claim to ICSID was inadmissible since the Claimant had already submitted the same claim to the local courts.

VI. Conclusions

As could be gleaned from the analysis of various cases pertinent to the present discussion, certain aspects of FITR provisions have become clear.

First, if the system of investment arbitration gets more pro-State, investors as potential claimants would simply refuse to bring claims in highly costly investment cases. For the sake of balance of interests between investors and host States, a more flexible forum selection clause based on the concept of waiver should take preference over a traditional, more rigid FITR provision in investment treaties.

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137 *Id.* ¶¶325, 329; Supervision y Control, ICSID Case No. ARB/12/4, Dissenting Opinion of Joseph P. Klock, ¶ 10 (the finding of the majority was strongly opposed in the dissenting opinion of arbitrator Klock who noted, among other things, that "[t]his case does not involve a frustrated litigant unhappy with a rejection of its relief in a local court who decides to try for a second bite at the apple.").

138 *Id.* ¶ 330.

Second, the triple identity test and the same fundamental basis test should be jointly applied to the analysis of case-specific FITR issues. Apparently, the most tenable decision would be if both tests show the same result.

Third, it is likely, however, that in some cases application of these tests will arrive at different results, for example, the triple identity test saying that the claims are different, while the same fundamental basis test showing that the claims are essentially the same. It is always useful to verify whether a domestic claim and an international claim are investment claims by their nature.

Further, in order to have a successful FITR case, investors should have to prove more than that the parties to the domestic proceedings and the parties to investor-State arbitration are different. A mere lack of identity of the parties may be insufficient for a positive finding on jurisdiction in this case. The investors must prove that the object and the cause of action of these claims are substantially different and that the claims as suchare substantially different.

Additionally, while the triple identity test with all its formalism has clear criteria, the same fundamental basis test needs clarification. Apparently, the fundamental basis should include both the factual and legal/normative bases for the claims to be essentially the same. The same underlying facts do not seem to suffice for a conclusion that the basis of claims is fundamentally the same. It is not unusual for the same facts to give rise to different claims.[139] The author finds it difficult to agree with an argument that the legal bases invoked in the different proceedings (violation of a treaty and violation of a contract governed by domestic law) should not be relevant for the purposes of the operation of FITR provisions due to potential "*overcompensation of claimants*".[140] As follows from many arbitral

[139] Pantechniki, ICSID Case No. ARB/07/21, Award, ¶ 62 (July 30, 2009) ("The same facts can give rise to different legal claims.").

[140] Petsche, *supra* note 14, at 427.

decisions, a legal/normative basis is one of the central criteria for establishing a "*sameness*" of claims which is a test for operation of FITR clauses. The risk of so-called "*overcompensation of claimants*" is a separate issue which may be resolved by courts and tribunals, for example, in the context of avoiding double recovery.

Moreover, it is also advisable to verify whether the claim before an arbitral tribunal has an "*autonomous existence*" from the claim brought before a domestic court. A careful interpretation of a particular FITR clause may be useful for this purpose. For example, if an FITR clause expressly indicates that a claim in question is a claim "*brought by an investor*," there is no doubt that the claim brought by an investor has an "*autonomous existence*" from a claim brought by another person, such as a local subsidiary of the investor or other entities which act on behalf of the investor.

Lastly, relief sought in the proceedings under comparison has been argued in several cases as a distinctive feature of the claims. For example, a domestic claim is aimed at the annulment of a governmental decision, while a treaty claim, instead of this, requests solely a monetary compensation for the harm made by the breaches of the treaty, including such governmental decisions. Such difference of the relief sought is likely to be taken into account along with other features of claims.

Not only facts, normative sources and relief are of essence. The *nature of claims* is of fundamental importance. For example, a difference between an investment claim in ICSID and an administrative claim in domestic court can be clearly seen. Only the claims for protection of the investment rights under a particular investment treaty fall within the ambit of a specific FITR. If an investor or associated persons file a domestic claim having a different purpose, such a claim may not trigger the FITR mechanism.

Thus, keeping these factors in mind, it is possible that more certainty can be infused into the practice of interpretation of FITR provisions in investment treaty arbitration.

A CONSERVATIVE MODEL OF ARBITRATION: THE RUSSIAN EXPERIENCE

Prof. Oleg Skvortsov[*]

Abstract

Between 2015-2019, large-scale arbitration reforms were carried out in Russia. As a result of these reforms, a conservative model of arbitration emerged. Simultaneously, Russian lawmakers rejected the liberal approach to arbitration that had prevailed in Russia for the previous 25 years. This article analyses the reasons and prerequisites for the reform and its consequences. In particular, it investigates the widespread phenomenon which has received the name "pocket arbitration". The role of the higher state courts that fought against pocket arbitration as well as anti-arbitration judicial practice resulting from the confrontation between the courts and arbitration are noted in this article. Special attention is paid to the ideology of conservative reform and its legal technique. The author assumes that each legal technique can be applied to regulate arbitration even within the framework of a liberal model, but it is their combination that creates a conservative model in the form of an integral regulatory system. The analysis results in the conclusion that an unfavourable atmosphere has been created in Russia for the consideration of disputes through arbitration.

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I. Introduction

Despite the relatively recent history of commercial arbitration[1] in Russia, being less than three decades old;[2] this institution has undergone such drastic changes that its new appearance is radically different from what was created in the early 1990s. Arbitration in Russia has evolved from an extremely liberal model to an extremely conservative model in which the State, having completed the reform of private justice, exercises total control over the activities of arbitral institutions. This supervision is carried out at all stages, beginning at the moment of their creation, continuing throughout the course of their activities, and even during the execution of arbitral awards.

Many reasons led to this sharp change in government policy as well as to the conservative ideology of the Russian legislature in relation to commercial arbitration. In order to identify these reasons and analyse the current regulatory model, this article in Part I provides a classification of arbitration into liberal, neutral, and conservative models. Part II describes the reform of arbitration from 2015 to 2019 and the reasons behind the creation of a conservative model of arbitration in Russia. Part III analyses

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1 This term is used in Russian law in two ways: (1) arbitration as state courts that consider economic disputes between entrepreneurs; (2) arbitration as a private court alternative to state courts or, in other words, classical arbitral tribunals in a way that they are understood worldwide. This double use of words often misleads lawyers who are not familiar with the legal system of the Russian Federation. In situations where we are talking about state arbitration courts, foreign lawyers may think that we are talking about private arbitration. Without going into explanations about the historical reasons that influenced this bilingual situation, we note that in this article, the author will try to explain each time, when it does not follow from the context, which body we are talking about – the state arbitration court or private commercial arbitration.

2 In this article, we consider Russian arbitration, starting from the 1990s, when Russia made the transition from a socialist economic model to a market economy. At the same time, we leave aside the previous Soviet period during which international commercial arbitration, which was under the control of the State, operated in the Union of Soviet Socialist Republics (USSR) to a limited extent. *See*ANDREY KOTELNIKOV, SERGEY KUROCHKIN & OLEG SKVORTSOV,ARBITRATION IN RUSSIA 1–7 (Andrey Kotelnikov, Sergey Kurochkin & Oleg Skvortsov eds., 2019) [*hereinafter* "KOTELNIKOV ET AL."].

anti-arbitration court practice and its impact on arbitration legislation. Part IV identifies the main ideas and legal techniques involved in the introduction of a conservative model of arbitration. Part V draws conclusions about the consequences of introducing a conservative model of arbitration in Russia.

II. Three models for the regulation of arbitration

In general, the practice of countries with developed market economies and well-established legal orders indicates a tendency to unify the national regulation of arbitration with generally recognised acts of international law. At the same time, national jurisdictions, depending on various objective and subjective factors, also contain very significant differences in the regulation of arbitration. Such differences determine national models of arbitration regulation.

Classifying on the basis of these differences allows us to identify three distinct models of arbitration regulation, with a certain degree of conditionality. These are the liberal, neutral, and conservative models. This classification is based on the degree of state control over arbitration activity and consequently, the degree of freedom enjoyed by arbitral institutions operating in a particular legal order.

In the liberal model, issues relating to arbitration are resolved by conditions prevailing objectively in the free market, whereas the conservative model is characterised by the free discretion of officials relying on a paternalistic approach to the sphere of private law in general and private justice in particular.

A. The liberal model

The harmonisation and unification of arbitration legislation in developed countries is generally based on the United Nations Commission on Intertional Trade Law [“**UNCITRAL**”] Model Law on International

Commercial Arbitration ["**Model Law**"],[3] which is generally liberal in its approach.[4] However, even if a national law does not reproduce the literal provisions of the Model Law, its liberalism is ensured as long as it enshrines the principles and ideals of party autonomy and free will of the arbitrating parties. Under the liberal model of arbitration, the State entrusts private arbitrators with the right to resolve private law disputes, and this trust involves giving arbitrators a broad discretion as well as giving up the day-to-day supervision of arbitration institutions.

In other words, the liberal model of arbitration regulation assumes minimal control over private justice by the State. State courts are usually only involved when enforcement is sought or an award is challenged. The powers of the court include refusing recognition if the award does not comply with minimum standards of the judicial procedure or violates public order. The grounds for setting aside an award usually coincide with the narrow list of grounds for refusing to enforce a foreign award established by the United Nations Convention on the Recognition and Enforcement

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

4 However, it should be borne in mind that the mere reproduction of the Model Law in national legislation does not make the arbitration system of a particular state liberal. It also requires an arbitration-friendly application of the law, a well-developed infrastructure that ensures the application of the law (including a community of lawyers with the appropriate skills, experience, and traditions) as well as the State's rejection of preferences in favour of certain arbitrations related to the authorities. For example, in Ukraine, the arbitration law is based on the Model Law; but in 1995, the law "on foreign economic activity" was adopted, according to which all disputes arising from foreign economic activity must be referred to the International Commercial Arbitration Court or the Maritime Arbitration Commission at the Ukrainian Chamber of Commerce and Industry. Thus, the legislation introduced a monopoly of these arbitral institutions for the resolution of foreign economic disputes, which undermines the liberal idea behind the Model Law. *See* Law of Ukraine on International Commercial Arbitration 1994 (Ukr.); Law of Ukraine on Foreign Economic Activity 1995, art. 38 (Ukr.).

of Foreign Arbitral Awards [“**New York Convention**”].[5] Thus, state courts do not interfere in the substance of the dispute.[6]

Lastly, the liberal model does not assume control of arbitration by executive authorities. In addition, the liberal model of arbitration does not require permission from the executive authorities to establish arbitral institutions and the creation of such organisations remains entirely in the power of interested persons independent of the state.

B. The neutral model

The neutral model of arbitration regulation is based on the principle that in addition to the limited supervisory role of state courts, self-regulation of arbitration institutions is carried out by the arbitration community. For this purpose, self-regulating organisations are created, whose members must be permanent arbitration institutions.

This model allows the State to exercise control over arbitral tribunals, not only through state courts, but also through the self-governing bodies of the arbitration community, which significantly saves the resources of the public authorities required for control.[7]

As a result of the implementation of the ideas of a neutral model of arbitration, a self-regulating organisation is responsible for the activities of arbitration institutions in place of the State. Thus, the neutral arbitration model creates a two-stage control system: the State controls the self-

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

[6] The examples for implementing a liberal arbitration model are the legislations of Sweden, Great Britain, France, and Austria.

[7] An example of implementing a neutral arbitration model is the legislation of Kazakhstan. In 2016, the Law of the Republic of Kazakhstan No. 488-V was adopted, which established the Arbitration Chamber of Kazakhstan, a non-profit organization that unites permanent arbitral institutions and arbitrators. The Arbitration Chamber organises the activities of arbitral institutions based on the principle of self-regulation and maintains a register of arbitrators of permanent arbitrations. *See* Arbitration Law, No. 488-V, (2016) Cap. 2 (Kaz.).

regulating organisation, while the self-regulating organisation oversees its members i.e. the arbitral institutions.

It is believed that the professional community is more effective in ensuring regulation as it has a greater capacity to combat abuse in the field of arbitration and a tangible interest in fighting for the purity of its ranks.

C. The conservative model

Conservative arbitration models are based on strict control of private justice by the State. According to research, Costa Rica, Ecuador, Nicaragua, Panama, Peru, Angola, Mozambique, Zambia, Uganda, Bahrain, Ukraine, and Uzbekistan are examples of countries with a conservative model of arbitration.[8]

The conservative model of arbitration regulation assumes that the executive authorities (usually the Ministry of Justice), in addition to the judiciary, have control over the administrative admission of arbitral institutions (including foreign arbitral institutions) to operate in the territory of a State or in respect of disputes between residents of that State. At the same time, the authorities, when allowing arbitration institutions to operate in the territory of the State, have broad and virtually unlimited discretion. For example, in Zambia, the Ministry of Justice has the power to refuse to register an arbitral institution if it finds that the number of such organisations is sufficient for the jurisdictional needs of the State.[9]

Among other things, the conservative model of arbitration prohibits residents of the State from applying to foreign arbitration centres for the

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8 *See* Galina Zhukova, *Arbitration institutes: legal status, creation, binding requirements and oversight*, 2/3 TRETEISKY SUD 55, 55–75 (2016) [*hereinafter* "Zhukova"]; *See also* Vladimir Khvalei, *Why Arbitration Reform in Russia Failed*, 11 ARB. J. 4 (2019), *available at*https://journal.arbitration.ru/upload/iblock/cc2/Arbitration.ru_N7_11_August2019_upd.pdf#page=6 [*hereinafter* "Khvalei"].

9 *See* Zhukova, *supra* note 8, at 74; *See also* Khvalei, *supra* note 8, at 7.

resolution of domestic disputes.[10] As it is known, the Model Law, as well as the national laws of the countries where the most recognised arbitration centres are located, do not contain restrictions on the possibility of submitting domestic disputes to foreign arbitral institutions. The conservative model of arbitration usually excludes this possibility, leaving the resolution of disputes under the control of the internal State jurisdiction.[11]

In some cases, the conservative model of national arbitration may mimic the liberal model. This is the case when a national law reproduces the provisions of the Model Law textually, but distorts its spirit and principles. This situation arises because many provisions of international law that are reproduced in national laws contain "*rubber*" concepts,[12] and make it possible to expand the boundaries of these concepts excessively. The most striking example is the concept of 'public order,' the boundaries of which are very mobile and can be extended very widely.[13] In States with a

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10 Alexander Katzendorn, *Arbitration in the Russian Federation – Latest amendments to the federal law*, LEGALMONDO (Apr. 9, 2019), *available at*https://www.legalmondo.com/2019/04/arbitration-russian-federation-latest-amendments-federal-law.

11 For example, after the 2019 Amendment, foreign arbitral institutions can administer local disputes between Russian companies only if they have a branch in Russia. *See* Federal'nyi zakonO vnesenii izmeneniy v Federal'nyy Zakon o Arbitrazhe (Arbitrazhnoye Razbiratel'stvo) v RF i Federal'nyy zakon RF o Reklame [Federal Law No. 531-FZ "On the Incorporation of Amendments to the Federal Law 'On Arbitration in the Russian Federation' and to the Federal Law 'On Advertising'"], SOBRANI ZAKONODATEL'STVA ROSIISKOI FEDERATSII [SZ RF] [Russian Federation Collection of Legislation], Dec. 27, 2018 (Russ.) [*hereinafter* "2019 Amendment"]; *see also* Vladimir Khvalei & Irina Varyushina, *Baker McKenzie International Arbitration Yearbook 2019-2020*, GLOB. ARB. NEWS (Jan. 1, 2020), *available at* https://globalarbitrationnews.com/baker-mckenzie-international-arbitration-yearbook-2019-2020-russia.

12 Raymond W. Mack & Richard C. Snyder, *The analysis of social conflict—toward an overview and synthesis*, 1(2) J. CONFLICT RESOL. 212 (1957), *available at*http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.817.4778&rep=rep1&type=pdf.

13 Matthew Gearing, *The Public Policy Exception – Is the Unruly Horse Being Tamed in the Most Unlikely of Places?*, KLUWER ARB. BLOG (Mar. 17, 2011), *available*

paternalistic approach to arbitration, it is through the immeasurable extension of the concept of 'public order,' that the meaning of the Model Law and the New York Convention is perverted. This is possible as there are no formal criteria that would restrict courts in interpreting this concept.

III. Russia's adoption of a conservative model of arbitration

Russia's arbitration laws have evolved in three phases. The Interim Regulation on Commercial Arbitration for the Resolution of Economic Disputes[14] regulated domestic arbitration from 1992 to 2002. From 2002 to 2015, arbitration was regulated by the Federal Law on Arbitration Courts in the Russian Federation ["**Law on Arbitration Courts**"].[15] Since 2015, the Federal Law on Arbitration in the Russian Federation ["**Law on Arbitration**"] has been in force.[16] In addition, the Federal Law on International Commercial Arbitration ["**Law on ICA**"] has been in force since 1993 and has been amended in 2013, 2015, and 2017.[17]

Until 2015, Russia had an extremely liberal model for regulating arbitration. This led to the mass-creation of permanent arbitral institutions. According

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*at*http://arbitrationblog.kluwerarbitration.com/2011/03/17/the-public-policy-exception-is-the-unruly-horse-being-tamed-in-the-most-unlikely-of-places-4/?doing_wp_cron=1596455474.7694749832153320312500.

14 Supreme Council of Russian Federation, Resolution on the Adoption of the Interim Regulation Commercial Arbitration for the Resolution of Economic Disputes, No. 3115-1, June 24, 1992 (Russ.).

15 ARBITRAZHNO-PROTSESSUALNYI KODEKS ROSSIISKOI FEDERATSII [APK RF] [Code of Arbitration Procedure] (Russ.) [*hereinafter* "Law on Arbitration Courts"].

16 Federal'nyy Zakon o Arbitrazhe (Arbitrazhnoye Razbiratel'stvo) v RF [Federal Law On Arbitration (Arbitral Proceedings) in the Russian Federation], SOBRANI ZAKONODATEL'STVA ROSIISKOI FEDERATSII [SZ RF] [Russian Federation Collection of Legislation] 2015, No. 382-FZ (Russ.) [*hereinafter* "Law on Arbitration"].

17 Federal'nyy Zakon RF o Mezhdunarodnyy Kommercheskiy Arbitrazh [Federal Law of the Russian Federation Law on International Commercial Arbitration], SOBRANI AKTOV PRESIDENTA I PRAVITELSTVA ROSIISKOI FEDERATSII [SAPP] [Collection of Acts of the President and Government of the Russian Federation] 1993, No. 5338-1 (Russ.) [*hereinafter* "Law on Interantional Commercial Arbitration"]; Oleg Skvortsov & Leonid Kropotov, *Arbitration Changes in Russia: Revolution or Evolution?*, 35(2) J. INT'L ARB. 253, 254 (2018) [*hereinafter* "Skvortsov et al."].

to experts' calculations, several thousand arbitral institutions were created in Russia by 2015.[18] At the same time, pocket arbitral institutions became widespread.

"*Pocket*" arbitral institutions are arbitral institutions that are created by commercial organisations to resolve disputes involving them or their affiliates. The founders of the commercial organisation directly fund pocket arbitrations, provide them with premises and necessary equipment, appoint the arbitrators and assign them cases that should be considered. Thus, the founders have the opportunity to influence the outcome of the arbitration.[19]

One of the types of pocket arbitral institutions were institutions created by large corporations[20] that imposed arbitration agreements on their counterparties, which mandated consideration of disputes by pocket arbitral institutions. Such pocket arbitration institutions were financially and organisationally dependent on the companies that created them. The founders of such arbitral institutions and their managers were able to appoint arbitrators and distribute cases among the arbitrators.[21]

These institutions were often used to implement illegal schemes that circumvented the prohibitions established by law. Such negative situations

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18 Ministry of Justice of the Russian Federation, Report on the activities of the Council for the improvement of arbitration proceedingsfor 2017 (July 13, 2016), *available at,* http://minjust.gov.ru/ru/deyatelnost-v-sfere-treteyskogo-razbiratelstva/otchety-o-deyatelnosti-soveta-po-sovershenstvovaniyu; K. E. Dobrynin, Topical issues of the development of the Institute of arbitration courts in the Russian Federation, Round Table, Federal Assembly of the Russian Federation, Federation Council (Apr. 17, 2014), *available at* http://council.gov.ru/activity/activities/roundtables/51077; Skvortsov et al., *supra* note 17, at 255.

19 RUSSIAN ARBITRATION CENTRE, ANNUAL REPORT 2017-18 51 (2018), *available at*https://centerarbitr.ru/wp-content/uploads/2018/08/Annual_Report17_18-1.pdf; Skvortsov et al., *supra* note 17, at 254–255.

20 Lorenzo Sasso, *The Russian Arbitration Reform: Between Lights and Shadows*, 8(2) RUSS. L. J. 79, 83–84 (2020) (arbitral institutions created by large Russian corporations such as Gazprom, Sberbank, Rosatom, LUKOIL, etc. were also called corporate arbitral institutions).

21 Skvortsov et al., *supra* note 17, at 255.

were especially frequent in the sphere of land and real estate turnover, as well as in corporate disputes. In addition, fictitious decisions made by arbitrators were used in bankruptcy cases to facilitate procedures for recognising the debt of an insolvent debtor.[22]

All these phenomena discredited the idea of arbitration and had a very negative impact on the attitude of public officials and judges to private justice.

Thus, one of the main reasons for the radical reform of arbitration and the creation of a conservative model of arbitration in Russia was the mass spread of pocket arbitration. This was facilitated by excessively liberal legislation, the almost complete refusal of the State to control arbitral institutions, and the absence of long-standing traditions that promote self-regulation in the field of arbitration. For example, the Law on Arbitration Courts allowed commercial organisations to create arbitral institutions.[23] This gave such commercial organisations the opportunity (directly or indirectly through their affiliates) to influence the formation of the arbitral tribunal and, ultimately, the adoption of the arbitral award.

The need to reform arbitration became particularly obvious to the Russian expert community in 2011. One of the main ideologists of the reform was the Russian journal, "*Arbitration court*" (*Treteiskiysud*), on the pages of which the first proposals for changing the system of arbitration regulation were formulated. At the initiative of the journal, an expert community was formed from among the leading experts in arbitration, which influenced the formation of public opinion. A survey conducted among the journal's

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22 *VS gave an algorithm for checking an arbitration award for fictitious debt*, PRAVO.RU (May 11, 2017), *available at* https://pravo.ru/review/view/140583; *The arbitration court was suspended from bankruptcy*, PRAVO.RU (Nov. 14, 2012), *available at* https://pravo.ru/news/view/79735.

23 Law on Arbitration Courts, [APK RF] [Code of Arbitration Procedure], art. 3 (Russ.).

readers showed that more than 80% of respondents were in favour of large-scale and radical changes to the existing arbitration system.[24]

Even the President of the Russian Federation joined the discussion on arbitration reform. He instructed the Government, together with business associations, to develop a set of measures for the development of arbitration.[25] Based on instructions from the President and the Government, the Ministry of Justice developed a concept for arbitration reform, which was formulated in the document entitled 'Complex of measures for the development of arbitration in the Russian Federation'.[26]

In the end, after lengthy discussions on various versions of the text of the draft laws, the Law on Arbitration was prepared, which was approved by the Federal Assembly and signed by the President of the Russian Federation. The new law was designed to eliminate the pocket arbitral institutions and the numerous abuses using arbitration that were taking place prior to the reforms.

As part of the implementation of this idea, it was decided that existing arbitral institutions would be abolished and only new arbitration institutions with permission from the executive power (Ministry of Justice) would be allowed.[27]

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24 KOTELNIKOV ET AL., *supra* note 2, at 8.

25 *List of instructions for the implementation of the Address to the Federal Assembly - cl. 3.1*, PRESIDENT OF RUSSIA (Dec. 22, 2012), *available at* http://www.kremlin.ru/acts/assignments/orders/17248.

26 Zhukova, *supra* note 8, at 27–49.

27 One of the main ideologists of the arbitration reform, Deputy Minister of Justice, Elena Borisenko, at a speech in the Federation Council directly stated that one of the goals of the reform was to reduce the number of arbitration courts. *See* E. A. Borisenko, Deputy Minister of Just., Current issues of the development of the institution of arbitration courts in the territory of the Russian Federation, Round Table, Federal Assembly of the Russian Federation, Federation Council (Apr. 17, 2014), *available at* http://council.gov.ru/activity/activities/roundtables/51077 [*hereinafter* "Borisenko"].

Another idea that was implemented during the reform process was to concentrate arbitration proceedings in a small number of arbitration centres. According to the reformers, the idea was for such centres to become arbitration hubs for international disputes. Therefore, all arbitration institutions that had received permission to operate were expected to focus on resolving both international and domestic disputes.[28] Moreover, it was the responsibility of the State to support the establishment of such arbitration centres as well as to encourage the business community to support them. However, the State has not done so very proactively and hence there are very few arbitral institutions in Russia today.[29] The 2019 amendments to the Law on Arbitration have also reinforced the conservative approach to arbitration in Russia in some ways.[30]

These changes have led to a significant restriction on the possibility of establishing arbitral institutions. Ultimately, they have led to the creation of a conservative model of arbitration in Russia, which is largely under the control and management of the State.

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28 Law on Arbitration, SOBRANI ZAKONODATEL'STVA ROSIISKOI FEDERATSII [SZ RF] [Russian Federation Collection of Legislation] 2015, No. 382-FZ, art. 44(18) (Russ.). In Russia, as in many other countries, there is a dualistic system of arbitration regulation, which separately regulates international commercial arbitration and domestic arbitration. For this purpose, as already mentioned, the Law on International Commercial Arbitration and Law on Arbitration were adopted. KOTELNIKOVET AL., *supra* note 2, at 15.

29 Alexander Vaneev, Dimitriy Mednikov & Maxim Kuzmin, *Russia*, EUROPEAN ARB. REV. 66 (2020).

30 Law on Arbitration, SOBRANI ZAKONODATEL'STVA ROSIISKOI FEDERATSII [SZ RF] [Russian Federation Collection of Legislation] 2015, No. 382-FZ, art. 44(1) (as amended by the 2019 Amendment) (Russ.). *See* 2019 Amendment, SOBRANI ZAKONODATEL'STVA ROSIISKOI FEDERATSII [SZ RF] [Russian Federation Collection of Legislation] Dec. 27, 2018, art. 1(4)(a) (Russ.). However, not all changes brought by this amendment can be considered conservationist in nature. *See* Marina Akchurina, *Changes to Russia's Arbitration Law Will Come Into Effect on 29 March 2019*, CLEARLY GOTTLIEB 1 (2019), *available at*https://www.clearygottlieb.com/-/media/files/alert-memos-2019/changes-to-russias-arbitration-law-eng.pdf [*hereinafter* "Akchurina"].

IV. Anti-arbitration court practice and its impact on arbitration legislation

The policy of the state courts in relation to arbitral institutions is no less important for the development of the latter than the legislation on arbitration. In this sense, it is customary to distinguish between pro-arbitration and anti-arbitration judicial policy, depending on how state courts support or restrict arbitration.

In the period up to 2006, the practice of Russian state courts was generally pro-arbitration, despite the fact that within the framework of liberal legislation, there were many abuses by arbitral institutions and arbitrators, such as partiality, breach of laws, and manipulation.[31] The approaches formulated by the higher courts created a favourable atmosphere in which state judges sought to support[32] arbitral institutions. The situation changed quite dramatically in 2006 with the arrival of the new leadership of the Supreme Arbitration Court of the Russian Federation.[33] The Supreme Arbitration Court of the Russian Federation, on the one hand, fought against pocket arbitration, and on the other hand, actively restricted the

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31 Skvortsov et al., *supra* note 17, at 255.

32 During this period of time, the higher courts adopted many judicial acts in support of arbitration: (1) Postanovleniye Plenuma Vysshego Arbitrazhnogo Suda RF [Decree of the Plenum of the Supreme Arbitration Court of the Russian Federation] June 11, 1999, No. 8 (Russ.); (2) Postanovleniye Verkhovnogo Suda RF [Decree of the Supreme Court of the Russian Federation] Feb. 16, 1998, No. 29 (Russ.); (3) Postanovleniye Prezidiuma Vysshego Arbitrazhnogo Suda RF [Decree of the Presidium of the Supreme Arbitration Court of the Russian Federation] Dec. 22, 2005, No. 98 (Russ.), etc.

33 From 1992 to 2014, the Supreme Arbitration Court of the Russian Federation was the highest judicial instance of one of the branches of the Russian judicial power – the system of state arbitration courts (the other highest instance was the Supreme Court of the Russian Federation). The Supreme Arbitration Court of the Russian Federation considered cases as a supervisory instance and also summarised judicial practice and made recommendations to lower courts. In 2014, the Supreme Arbitration Court of the Russian Federation was abolished and its functions were transferred to the Supreme Court of the Russian Federation. At the same time, the entire system of arbitration courts (first instance arbitration courts, appellate arbitration courts, and cassation arbitration courts) was preserved and reassigned to the judicial and administrative control of the Supreme Court of the Russian Federation.

possibility of arbitration of various categories of civil disputes. Therefore, state courts have thus far resisted the arbitration of disputes on real estate;[34] corporate disputes;[35]certain disputes on procurement of products for the State's needs;[36] investment disputes;[37] disputes on the lease of forest plots,[38] among others. The apotheosis of the confrontation between state courts and arbitration was the appeal of the Supreme Arbitration Court of the Russian Federation to the Constitutional Court of the Russian Federation with an application for recognition of the unconstitutionality of several provisions of Russian law permitting arbitration of real estate disputes.[39] The Constitutional Court of the Russian Federation rejected this application and, pointing to the constitutional nature of arbitration, recognised the right of arbitral tribunals to consider disputes about real

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34 Postanovleniye Prezidiuma Vysshego Arbitrazhnogo Suda RF [Resolution of the Presidium of the Supreme Arbitration Court of the Russian Federation] Nov. 13, 2012, No. 6141/2012 (Russ.).

35 Postanovleniye Prezidiuma Vysshego Arbitrazhnogo Suda RF [Resolution of the Presidium of the Supreme Arbitration Court of the Russian Federation] Jan. 30, 2012, No. 15384/2011 (Russ.).

36 Postanovleniye Prezidiuma Vysshego Arbitrazhnogo Suda RF [Resolution of the Presidium of the Supreme Arbitration Court of the Russian Federation] Jan. 28, 2014, No. 11535/2013 (Russ.). Amendments to the law on arbitration allowed the consideration of some types of procurement disputes by arbitration, but not all. *See* O. Yu Skvortsov, *Dispute on Purchase and Problem of Arbitrability*, 3/4 TRETEISKY SUD 25 (2018) [*hereinafter* "Skvortsov"].

37 Postanovleniye Prezidiuma Vysshego Arbitrazhnogo Suda RF [Resolution of the Presidium of the Supreme Arbitration Court of the Russian Federation] Apr. 3, 2012, No. 17043/2011 (Russ.).

38 Postanovleniye Prezidiuma Vysshego Arbitrazhnogo Suda RF [Resolution of the Presidium of the Supreme Arbitration Court of the Russian Federation] Feb. 11, 2014, No. 11059/2013 (Russ.).

39 Request of the Supreme Commercial Court of the Russian Federation to the Constitutional Court, at 12 (July 29, 2010). The request of the Supreme Arbitration Court of the Russian Federation, the case materials and expert opinions are published in the journal TRETEISKY SUD 74 (2011). *See* Dmitry Davydenko, *Arbitrability of Real Estate and Corporate Disputes under Russian Law: The Problem and its Context*, *in* ARBITRATION IN CIS COUNTRIES: CURRENT ISSUES 91–94 (2012).

estate.[40] However, the fact that the Constitutional Court of the Russian Federation 'came to the defence' of arbitration did not fundamentally affect the practice of the Supreme Arbitration Court of the Russian Federation and the Supreme Court of the Russian Federation, which continued their anti-arbitration approach in deciding disputes arising from challenges to arbitral awards and enforcement actions.[41]

In the anti-arbitration practice of the Supreme Arbitration Court of the Russian Federation, the concept of concentration of publicly significant elements should be given special significance. To some extent, this judicial theory has replaced the doctrine of public order. Its essence is that if there

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40 Postanovlenie Konstitutsionnogo Suda RF ot 26 maya 2011 g. [Ruling of the Russian Federation Constitutional Court of May 26, 2011 on case about check of constitutionality of provisions of paragraph 1 of article 11 of the Civil code of the Russian Federation, paragraph 2 of article 1 of the federal Law on Arbitration Courts in the Russian Federation, article 28 of the federal law on state registration of rights to immovable property and transactions therewith, paragraph 1 of article 33 and article 51 of the Federal law on mortgage (pledge of real estate) in connection with the request of the Supreme Arbitration Court of the Russian Federation], SOBRANIE ZAKONODATEL'STVA ROSSIISKOI FEDERATSII [SZ RF] [Russian Federation Collection of Legislation] 2011 (Russ.).

41 There are many examples of absurd anti-arbitration practices of state courts. For example, a model arbitration clause recommended by the International Court of Arbitration at the International Chamber of Commerce ["**ICC**"] was declared illegal by the Russian courts. In the opinion of the Russian state court, this clause is ambiguous and does not allow defining a forum for resolving the dispute, which is why it is defective. This decision of the state court is an indicator of ill-will towards arbitration on the part of state judges. In connection with this court decision, ICC President Alexis Mourre was even forced to write to the Chairman of the Supreme Court of the Russian Federation, Vyacheslav Lebedev, expressing his concern about the current situation and pointing out that this approach raises serious concerns about the violation of the rights of Russian individuals to justice. *See* Postanovlenie Plenuma Verkhovnogo Suda RF Priznaniye I Ispolneniye Resheniy Inostrannykh Sudov I Inostrannykh Arbitrazhey ot 21 sentyabrya 2017 g. [Russian Federation Supreme Court Ruling on the recognition and enforcement of decisions of foreign courts and foreign arbitral awards of Sept. 21, 2017] Biulleten' Verkhovnogo Suda RF [BVS] [Bulletin of the Supreme Court of Russian Federation] 2017, No. A40-176466 (Russ.), *available at*http://kad.arbitr.ru/Card/e14833d5-67ca-48a9-adff-78c46640dabe; CMS Russia, *Russian Courts point out flaws in ICC Standard Arbitration Clause*, LEXOLOGY (Dec. 18, 2018), *available at*https://www.lexology.com/library/detail.aspx?g=a57e928e-a06b-4557-bfc2-cc18d3236d1f.

is any public element in the relations between the parties (a company established by the State,[42] financing from the State's budget funds,[43] socially significant goals of the contract, etc.), then such a dispute cannot be submitted to arbitration.[44] State courts have de factoconsidered the existence of public elements in the relationship between the parties as rendering the dispute inarbitrable under the public policy exception. This concept has been fiercely debated,[45] and many law professors and legal practitioners have expressed opinions about its unfairness. Nevertheless, the theory of concentration of publicly significant elements has been firmly held and continues to be held by state courts.[46]

Thus, the Supreme Arbitration Court of the Russian Federation has adopted anti-arbitration policy and practice, and the approaches formulated by it have perpetuated the ideology of a conservative model of arbitration. This ideology was adopted by the Ministry of Justice, which subsequently

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42 Different courts have taken different views on this particular issue. *See* Ilya Kokorin & Wim A. Timmermans, *Arbitration Reform in Russia: Will Russia Become More Arbitration-Friendly?*, 22(2) TIJDSCHRIFT VOOR ARBITRAGE 50, 52 (2017).

43 Postanovleniye Prezidiuma Vysshego Arbitrazhnogo Suda RF [Resolution of the Presidium of the Supreme Arbitration Court of the Russian Federation] Nov. 17, 2014, No. A40-188599/2014 (Russ.), *available at*http://kad.arbitr.ru/Card/965d6ab2-6d63-49e6-99db-46101c6f1b44.

44 For a concentrated form presentation of this theory. *See* Skvortsov, *supra* note 36.

45 *See*M. S. Kalinin, *Arbitrability of disputes in the light of the Russian concept of* "*concentration of socially significant public elements*",*in*NEW HORIZONS OF INTERNATIONAL ARBITRATION 58–85 (A.V. Asoskov, A.N. Zhiltsov & R.M. Khodykin eds., 4th ed. 2018); O. Skvortsov, *Arbitrability of procurement disputes: the struggle of the civil approach and the theory of* "*accumulation of the public element*", 1(2) TRETEISKY SUD 113, 114 (2018); A. I. Muranov, *Public and private in arbitration. Analysis of the request of the Supreme Court of the Russian Federation to the Constitutional Court of the Russian Federation about the non-arbitrability of disputes in connection with the procurement by certain types of legal entities* 16 (2018).

46 Postanovleniye Verkhovnogo Suda RF [Decree of the Supreme Court of the Russian Federation] Mar. 3, 2015, No. 305-ЭС14-4115 (Russ.); Postanovleniye Verkhovnogo Suda RF [Decree of the Supreme Court of the Russian Federation] July 28, 2017, No. 305-ЭС15-20073 (Russ.); Postanovleniye Verkhovnogo Suda RF [Decree of the Supreme Court of the Russian Federation] Feb. 25, 2020, No. 305-ЭС19-19555 (Russ.).

implemented a reform based on the approaches developed by the Supreme Arbitration Court of the Russian Federation.[47]

V. Russia's conservative model: Legal techniques and methods

The creation of a conservative model of arbitration is based on a number of specific legal techniques characterised by the paternalistic influence of the State. Each of these legal and technical methods can be applied to regulate the liberal model, but it is their combined use that makes it possible to create a conservative model of arbitration.

A. Regulation of the internal organisation of arbitral institutions

The Law on Arbitration established provisions prescribing the procedure for organising the internal activities of arbitral institutions. As is known, the Model Law does not contain such provisions. Therefore, the provisions of Russian legislation have become novelties in the regulation of arbitration. Mandatory requirements were established in relation to (1) the procedure for establishing an arbitral institution; (2) a list of documents (list of arbitrators, rules, and regulations) to be adopted by the administrative body; and (3) the internal structure of the arbitral institution (including officers and committees that must be established).[48] The law also provides many

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[47] A kind of program document that combines the ideology of the Supreme Arbitration Court of the Russian Federation and the Ministry of justice was an article written for the magazine "The Law" jointly by the Deputy Minister of Justice Mikhail Galperin (an official responsible for arbitration reform) and a judge of the Supreme Court of the Russian Federation, Natalia Pavlova (who was also a former judge of the Supreme Arbitration Court of the Russian Federation, which formed the judicial policy on arbitration issues). *See* Mikhail L. Galperin & Natalia V. Pavlova, *What's Ahead for Arbitration?*, 8 ZAKON MAGAZINE [THE LAW] 126–139 (2019).

[48] Ukazy RF o Utverzhdeniye Pravil Predostavleniya Prava na Ispolneniye Funktsiy Postoyannoye Arbitrazhnoye Uchrezhdeniye I Polozheniya o Deponirovanii Reglamenta Postoyanno Deystvuyushchego Arbitrazhnogo Uchrezhdeniya [Decree of the Russian Federation on Approval of the "Rules on Granting of the Right to Perform the Functions of a Permanent Arbitral Institution" and of the "Regulation on Depositing of the Rules of a Permanent Arbitral Institution"], SOBRANI ZAKONODATEL'STVA ROSIISKOI FEDERATSII [SZ RF] [Russian Federation Collection of Legislation] June 25, 2016, No.

formal requirements for the internal organisation of an arbitral institution, which must be met by the founders (for example, the recommendation list must include at least 50% of arbitrators who have ten years of experience in civil disputes as state judges or arbitrators; among the arbitrators must be at least 30% persons with PhDs or doctor of law degrees, and so forth).[49] Compliance with a huge number of bureaucratic requirements creates almost insurmountable difficulties in the formation of arbitral institutions.[50] Further, setting such strict requirements for the experience of arbitrators included in the recommendation lists, among other things, undermines the future of Russian arbitration, since it prevents the involvement of young lawyers in arbitration proceedings who need to gain experience in this field.

B. Restrictions on establishing arbitral institutions

The Law on Arbitration prohibits commercial organisations from creating arbitral institutions. Since the law came into force, only non-profit organisations have the right to establish permanent arbitration institutions.[51] These non-profit organisations have special (limited) legal capacity and are entitled to carry out activities only for the organisation of arbitration proceedings. In addition, the creation of arbitral institutions by federal and regional state authorities, local governments, state and municipal institutions, state corporations and companies, political parties

577 (Russ.); Sergey Anatolievich Kurochkin, *Arbitration Reform in Russia: A General Overview*, 2017(1) INT'L COM. ARB. BULL. 180, 185 (2017).

49 Law on Arbitration, SOBRANI ZAKONODATEL'STVA ROSIISKOI FEDERATSII [SZ RF] [Russian Federation Collection of Legislation] 2015, No. 382-FZ, art. 47(3) (Russ.).

50 For example, the world's leading arbitrators, such as Pierre Tercier, Sigvard Jarvin, Karl-Heinz Böckstiegel, and John Beachy, refused to fill out the papers that were requested by the Ministry of Justice to confirm their seniority when they were included in the list of arbitrators of various Russian arbitral institutions. *SeeWhat do foreign arbitrators think about the requirements of the RF Ministry of Justice*, KOMMERSANT (Nov. 1, 2017), *available at*https://www.kommersant.ru/doc/3455596?from=doc_vrez.

51 Law on Arbitration, SOBRANI ZAKONODATEL'STVA ROSIISKOI FEDERATSII [SZ RF] [Russian Federation Collection of Legislation] 2015, No. 382-FZ, arts. 2(9), 44(1) (Russ.); Kokorin et al., *supra* note 42, at 51.

and religious organisations, as well as chambers of lawyers and notaries is prohibited.[52]

Another method of conservative regulation is to restrict international arbitral institutions that have not received permission from the Ministry of Justice of the Russian Federation to operate in Russia.[53] When establishing an arbitral institution, obtaining a permit for its activities from the Ministry of Justice is mandatory. Granting the Ministry of Justice the right to issue such permits is an extreme form of regulatory paternalism. The law also gives the Ministry of Justice a wide discretion. For example, when issuing an activity permit, the Ministry of Justice assesses "*the reputation of a non-profit organisation that creates an arbitration*",[54] "*the scale and nature of its activities that allow for a high level of organisation of the arbitration, including in terms of financial support for the creation and operation of an arbitral institution*",[55] *"a widely recognised reputation*"[56] (the only criteria for foreign arbitration institutions). All these concepts, being "*rubber*", allow unlimited discretion in decision making.

The decision of a foreign arbitral institution that has not received a business permit is equivalent to that of an ad hoc arbitration,[57] which, as discussed below, has a very narrow scope of competence. As a result of restrictions on the legal regime, such foreign arbitral institutions are also not entitled to consider, for instance, certain corporate disputes seated in Russia.[58]

C. Licensing system of the arbitration establishment

Under the conservative model, the clear notice system for creating arbitral institutions that existed from 1992 to 2015 was rejected, and a permissive

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52 Law on Arbitration, SOBRANI ZAKONODATEL'STVA ROSIISKOI FEDERATSII [SZ RF] [Russian Federation Collection of Legislation] 2015, No. 382-FZ, art. 44(2) (Russ.).

53 *Id.* art. 44; Skvortsov et al., *supra* note 17, at 257.

54 Law on Arbitration, SOBRANI ZAKONODATEL'STVA ROSIISKOI FEDERATSII [SZ RF] [Russian Federation Collection of Legislation] 2015, No. 382-FZ, art. 44(8)(4) (Russ.).

55 *Id.*

56 *Id.* art. 44(12).

57 Kokorin et al., *supra* note 42, at 50–57.

58 *Id.* at 51.

system for the implementation of dispute resolution activities was introduced. Before the reform, the creation of arbitral institutions was based on the decision of the founders, who only had to notify the state court. The fact of notification legitimised the newly created institution. After the reform, the procedure for creating arbitral institutions has become extremely complicated. The process of granting a license for establishing an arbitral institution goes through several stages. At the first stage, the officials of the Ministry of Justice carry out the verification of documents and evaluate them from the point of view of formal requirements. At the second stage, the documents are reviewed by the Council for Improvement of Arbitration at the Ministry of Justice of the Russian Federation ["**Council**"],[59] which issues a recommendation to the arbitration institution to conduct dispute resolution activities. At the third stage, the final decision is made by the Ministry of Justice of the Russian Federation, which issues the activity permit.[60]

D. Limitation on arbitrability of disputes

In the opinion of the author, the reform has narrowed the scope of arbitrability of disputes.[61] As known, determining arbitrability is one of the

59 The Council for the Improvement of Arbitration Proceedings has been established under the Ministry of Justice, which approves its composition. The Council is a public body and its members work free of charge. The Council consists of 50 members – representatives of state authorities, law professors, practicing lawyers, retired judges, and young professionals who have proven themselves in the legal field. The main function of the Council is to make recommendations on granting or refusing to grant the right to resolve disputes to arbitral institutions.

60 Until March 2019, the Government of the Russian Federation issued a permit for the activity of arbitral institutions. Since March 2019, the level of decision-making has been reduced and this function has been transferred to the Ministry of Justice of the Russian Federation. Akchurina, *supra* note 30, at 3; Law on Arbitration,SOBRANI ZAKONODATEL'STVA ROSIISKOI FEDERATSII [SZ RF] [Russian Federation Collection of Legislation] 2015, No. 382-FZ, art. 44 (Russ.).

61 However, this position is not undisputed. *See* Skvortsovet al., *supra* note 17, at 260; The Code of Commercial Procedure and the Code of Civil Procedure list non-arbitrable disputes; *See* Kommercheskiy Protsessual'nyy Kodeks Rossiiskoy Federatsii [KPK RF]

main instruments of the State's policy in relation to arbitration. By establishing a list of disputes that arbitral tribunals are allowed to decide upon, the State determines the scope of their activities.[62] Within the framework of the liberal model of arbitration, not only "*classic*" commercial disputes, but also disputes with a certain social significance such as disputes about real estate, public procurement, labour, inheritance and family disputes, and even disputes about compensation for damages caused by the violation of antitrust laws are recognised as arbitrable.[63] "*This differs from state to statereflecting the political, social and economic prerogatives of the state, as well as its general attitude towards arbitration.*"[64] As for the conservative model of arbitration, the State restricts the possibility of arbitration of many private (including commercial) disputes. At the same time, consideration of certain categories of disputes is possible only if special rules for their consideration are adopted. Thus, in Russia, consideration of certain categories of corporate disputes is possible only if the arbitral institution has separate rules for the consideration of corporate disputes (at the same time, the arbitration institution must develop and adopt general rules for the consideration of disputes).[65] The absence of such rules makes it illegitimate for arbitral institutions to consider corporate disputes.

E. The Prosecutor in the arbitration

Prosecutors have been granted the right to participate in arbitration proceedings, even if they did not participate in the conclusion of the

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[Commercial Procedure Code], art. 33(2) (Russ.); GRAZHDANSKII PROTSESSUAL'NYI KODEKS ROSSIISKOI FEDERATSII [GPK RF] [Civil Procedural Code], art. 22.1 (Russ.).

62 Kokorin et al., *supra* note 42, at 51.

63 *See*, *e.g.*, Olesya Petrol, *Arbitrability of Matrimonial Disputes*, *in*NEW HORIZONS OF INTERNATIONAL ARBITRATION 332-346 (A.V. Asoskov, A.N. Zhiltsov & R.M. Khodykin eds., 5th ed. 2019).

64 JULIAN DAVID MATHEW LEW QC, LOUKAS A. MISTELIS & STEFAN M. KRÖLL, COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION 199 (2003).

65 Law on Arbitration, SOBRANI ZAKONODATEL'STVA ROSIISKOI FEDERATSII [SZ RF] [Russian Federation Collection of Legislation] 2015, No. 382-FZ, arts. 44(6.2)(4), 45(2) (Russ.).

arbitration agreement.[66] In addition, the Prosecutor has the right to challenge the arbitration decision in the state court, even if they did not participate in the arbitration proceedings.[67] Prior to the reform, since 2012, state courts assumed that the Prosecutor had the right to challenge the decision of the arbitration institution if it affected the interests of public legal entities that did not participate in the arbitration.[68] As part of the reform, the Prosecutor was given the opportunity to participate in arbitration proceedings even if the parties object to it and the Prosecutor is not a party to the arbitration agreement.[69] Participation of the Prosecutor in arbitration is conditioned on the possibility of filing claims for invalidation of transactions made by state authorities of the Russian Federation, state authorities of subjects of the Russian Federation, local self-government bodies, state and municipal unitary enterprises, state institutions as well as legal entities in whose authorised capital (fund), there is a share of participation of the Russian Federation, subjects of the Russian Federation, or municipalities.[70]

F. Control by the Ministry of Justice

One of the most important elements of the conservative model of arbitration is granting the Ministry of Justice the right to exercise control over the activities of a permanent arbitration institution, including the possibility of applying to courts for the abolition of arbitral institutions that violate the requirements of the law. The Ministry of Justice is empowered

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66 ARBITRAZHNO-PROTSESSUALNYI KODEKS ROSSIISKOI FEDERATSII [APK RF] [Code of Arbitration Procedure] art. 40 (Russ.).

67 *Id.* arts. 40, 230(3) (Russ.).

68 Postanovleniye Plenuma VAS RF po Otdel'nym Voprosam Uchastiya Prokurora v Arbitrazhnom Protsesse [Resolution of the Plenum of the Supreme Commercial Court of the Russian Federation "On certain issues of participation of the Prosecutor in the arbitration process"], SOBRANI ZAKONODATEL'STVA ROSIISKOI FEDERATSII [SZ RF] [Russian Federation Collection of Legislation] Mar. 23, 2012, No. 15, Item 6 (Russ.).

69 Boris Romanovich Karabelnikov, *National Report for Russian Federation (2020)*, *in* ICCA INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION 93 (Lise Bosman ed., 2020).

70 Law on Arbitration Courts, [APK RF] [Code of Arbitration Procedure] art. 52(1) (Russ.).

to monitor the activities of a permanent arbitration institution. If gross repeated violations of the law are detected in the activities of the arbitral institution, the executive authority has the right to issue an order to terminate the activity within one month.[71] In case of failure to comply with this order, the executive authority has the right to apply to the court for termination of the arbitral institution.[72] However, it is not clear from the current regulations as to what is meant by "*gross violation of the law*". Thus, the Ministry of Justice still has broad discretionary powers that allow them to exercise significant supervisory power over arbitral institutions.

G. Restriction of ad hoc arbitration

As a result of the reform, the capacity of ad hoc arbitrations was significantly limited in comparison to institutional arbitration.[73] In the pre-reform period, ad hoc arbitrations were mostly beyond the control of the State. As a result, it was the ad hoc arbitrators who committed a significant number of violations of the law and caused the greatest distrust among the reformers.[74] During the reform process, it was decided to introduce different modes of institutional and ad hoc arbitration. At the same time, the scope of and the legal possibilities available for ad hoc arbitrations were reduced – especially in comparison with permanent arbitral institutions.

In particular, parties or arbitrators in ad hoc proceedings, unlike arbitral institutions, were not given the right to apply to a state court for assistance in administration, for example, in appointing arbitrators, for interim measures, or securing evidence.[75] In respect of a decision made by an ad

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71 Law on Arbitration, SOBRANI ZAKONODATEL'STVA ROSIISKOI FEDERATSII [SZ RF] [Russian Federation Collection of Legislation] 2015, No. 382-FZ, art. 48(3) (Russ.).

72 *Id.* ¶ 4.

73 The lack of confidence in *ad hoc* arbitration on the part of conservative reformers was so great that during the discussion of the draft law, proposals were made to completely ban *ad hoc* arbitration. *See* Borisenko, *supra* note 27.

74 Skvortsov et al., *supra* note 17, at 255.

75 Law on Interantional Commercial Arbitration, SOBRANI AKTOV PRESIDENTA I PRAVITELSTVA ROSIISKOI FEDERATSII [SAPP] [Collection of Acts of the President and

hoc arbitral tribunal, an agreement of the parties on its finality (prohibition on right to challenge) has not been allowed.[76] Further, ad hoc arbitrators do not have the right to consider corporate disputes.[77] In addition, there are legal restrictions on advertising ad hoc arbitration. Lastly, the Law on Arbitration also prohibits organisations that are not permanent arbitration institutions from performing administrative functions for ad hoc arbitrations.[78]

H. Prohibition on international arbitration between domestic parties

One of the elements of the conservative arbitration model is to limit the possibility of submitting domestic disputes between residents to international commercial arbitration located outside the Russian Federation. In Russia, in the pre-reform period, there was a contradictory practice[79] on this issue. However, after the reform, on the instructions of

Government of the Russian Federation] 1993, No. 5338-1, art. 27 (Russ.); Law on Arbitration, SOBRANI ZAKONODATEL'STVA ROSIISKOI FEDERATSII [SZ RF] [Russian Federation Collection of Legislation] 2015, No. 382-FZ, art. 30 (Russ.); Skvortsov et al., *supra* note 17, at 261.

76 Law on Interantional Commercial Arbitration, SOBRANI AKTOV PRESIDENTA I PRAVITELSTVA ROSIISKOI FEDERATSII [SAPP] [Collection of Acts of the President and Government of the Russian Federation] (1993), No. 5338-1, art. 34(1) (Russ.); Law on Arbitration, SOBRANI ZAKONODATEL'STVA ROSIISKOI FEDERATSII [SZ RF] [Russian Federation Collection of Legislation] 2015, No. 382-FZ, art. 40 (Russ.); Skvortsov et al., *supra* note 17, at 261.

77 Law on Arbitration Courts, [APK RF] [Code of Arbitration Procedure] art. 225.1(5) (Russ.); Skvortsov et al., *supra* note 17, at 261.

78 Law on Arbitration, SOBRANI ZAKONODATEL'STVA ROSIISKOI FEDERATSII [SZ RF] [Russian Federation Collection of Legislation] 2015, No. 382-FZ, art. 44(20) (Russ.). This provision has been amended by the 2019 Amendment, as a consequence of which, awards rendered in violation of the prohibition are at risk of being set aside. *See*2019 Amendment, SOBRANI ZAKONODATEL'STVA ROSIISKOI FEDERATSII [SZ RF] [Russian Federation Collection of Legislation] Dec. 27, 2018. *See also*Taisiya Vorotilova & Vladimir Khvalei,*Russia is now finally closed for arbitration administered by foreign institutions*, ARB. J. (Mar. 12, 2019), *available at*https://journal.arbitration.ru/ru/analytics/russia-is-now-finally-closed-for-arbitration-administered-by-foreign-institutions.

79 *See* Postanovleniye Verkhovnogo Suda RF [Decree of the Supreme Court of the Russian Federation] Mar. 22, 2010, No. 3174/2010 (Russ.); Postanovleniye Verkhovnogo Suda RF [Decree of the Supreme Court of the Russian Federation] June 19, 2012, No. 1831/2012

the Ministry of Justice, one of the leading experts in this field prepared an expert opinion which concluded that it was unacceptable to submit disputes between Russian companies to international arbitration seated outside Russia, without permission from the Ministry of Justice.[80] It is obvious that this conclusion will be used for the ideological justification of conservative policy on this issue.

I. Inapplicability of antitrust law

As a result of the reform, there was a refusal to consider the activities of bodies that administer arbitration as a type of service provision. This entailed a refusal to apply competition law to their activities.[81] In conditions where the established arbitral institutions are more or less controlled by the State, this leads to monopolisation in the field of arbitration. Moreover, the law includes provisions prohibiting advertising of arbitration by those who have not received permission to perform the functions of a permanent arbitration institution. This prohibition also applied to ad hoc arbitrations.[82] Such prohibitions made it almost impossible for new arbitration institutions to enter the market unless they were supported by the State. In connection with this regulatory system, lawyers note that such monopolisation of arbitration proceedings severely reduces both administrative efficiency and

(Russ.); Postanovleniye Verkhovnogo Suda RF [Decree of the Supreme Court of the Russian Federation] Feb. 10, 2014, No. 17046/2013 (Russ.);*See* Vladimer Khvalei, Andrey Gorlenko, Alexander Muranov, Roman Khodykin, D. Litvinsky, Mikhail Ivanov, Alexei Dudko, Natalia Chumak, G. Zhukova, Gleb Sevastyanov & Sergey Budylin, *Domestic disputes are the domain of national arbitration?*,THE LAW 3, 12–27 (2017);Anton Vladimirovich Asoskov, *Can Purely Domestic Disputes Without a Foreign Element Be Referred to Foreign Arbitration?,* 8 ZAKON 115–123 (2017) [*hereinafter* "Asoskov"].

80 The ideas of this conclusion were outlined in the following article. *See*Asoskov, *supra* note 79.

81 Law on Arbitration, SOBRANI ZAKONODATEL'STVA ROSIISKOI FEDERATSII [SZ RF] [Russian Federation Collection of Legislation] 2015, No. 382-FZ, art. 44(1)(1) (Russ.).

82 Federal'nyy Zakon RF o Reklame [Federal Law of the Russian Federation on Advertising], SOBRANI ZAKONODATEL'STVA ROSIISKOI FEDERATSII [SZ RF] [Russian Federation Collection of Legislation] Mar. 13, 2006, No. 38-FZ, art. 30.2 (Russ.).

independence and does not contribute to the creation of a "*world-class arbitration institution*" in Russia.[83]

J. The arbitration decision must be legitimised by a state court

The Law on Arbitration does not consider arbitration decisions as an independent basis for making an entry in public registers that record rights to certain types of property. The law stipulates that entries in legally significant registers (the register of rights to real estate, the register of rights to securities, the register of intellectual property rights, pledge registers, etc.) are made only if there is a writ of execution issued on the basis of a decision made by a state court.[84] Thus, the State's distrust of arbitration takes the form of paternalistic control, which presupposes the legitimation of the arbitration award through its verification by a state court.

K. The rejection of regional arbitration

The abolition of regional arbitral institutions has become one of the ideological goals of the reform, which involves the creation of "*strong, internationally recognized arbitration courts*" in a highly centralised environment.[85] All five arbitral institutions are located in Moscow. At the same time, under the auspices of the Ministry of Justice, these central arbitration institutions with headquarters in Moscow create regional offices, which in practice turn out to be unviable due to the lack of authority of local businesses. At the

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[83] Khvalei, *supra* note 8, at 15, 17.

[84] Law on Arbitration, SOBRANI ZAKONODATEL'STVA ROSIISKOI FEDERATSII [SZ RF] [Russian Federation Collection of Legislation] 2015, No. 382-FZ, art. 43 (Russ.).

[85] In Russia, there is a term that describes this process – 'vertical power'. This term covers centripetal trends in all areas of public relations including arbitration. *See* Hugh Barnes, *Dictating the Law in Putin's Russia: Hyper-legalism and "Vertical Power"*, *in* DICTATORSHIP OR REFORM? THE RULE OF LAW IN RUSSIA 4 (2006); Alena Ledeneva, *Behind the Façade: 'Telephonic Justice' in Putin's Russia*, *in* DICTATORSHIP OR REFORM? THE RULE OF LAW IN RUSSIA 32 (2006).

same time, regional arbitral institutions that existed for decades did not receive permission to operate and ceased their activities.[86]

L. <u>The dependence of the arbitrator from the management</u>

The adoption of these reforms led to the creation of a system of internal organisation in which the arbitrator is significantly dependent on the management of the arbitral institution. The same can be viewed as a manifestation of a paternalistic approach to arbitration. Among other things, this is reflected in the fact that the Law on Arbitration requires that each arbitral institution must have a committee for the appointment of arbitrators.[87] In this case, the Jesuit method[88] of appointing arbitrators is provided. Herein, the nominating committee is elected by the arbitrators from the recommended list of arbitrators, and the recommended list of arbitrators is formed by the management of the arbitration institution. This allows the management of an arbitration institution to effectively influence arbitrators through their appointment procedures in specific cases.[89]

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86 A strong public response was caused by the refusal of the Ministry of Justice to issue a permit to the Siberian arbitration court. This arbitration institution has existed for more than 25 years, considering hundreds of cases a year. Its authority in the business community and among experts in arbitration was not questioned. However, the Ministry of Justice considered that the Siberian arbitration court does not have a generally recognized reputation, and therefore cannot engage in arbitration proceedings. *See* Anna Zanina, *Until the Ministry of justice becomes uncomfortable, nothing will change*, KOMMERSANT (Nov. 1, 2017), *available at* https://www.kommersant.ru/doc/3454660.

87 Law on Arbitration, SOBRANI ZAKONODATEL'STVA ROSIISKOI FEDERATSII [SZ RF] [Russian Federation Collection of Legislation] 2015, No. 382-FZ, art. 47(4) (Russ.).

88 The Jesuit approach involves duplicity in achieving goals.

89 The case of Alexander Muranov, a well-known arbitrator and Professor at the Moscow State Institute of International Relations, was actively discussed in Russia. Muranov very sharply criticised the leadership of the Chamber of Commerce and Industry of the Russian Federation, which created the International Commercial Arbitration Court, and as a result was excluded from the list of arbitrators of this institution. Muranov appealed to the state court for the illegality of his exclusion from the list of arbitrators, but lost the case. Nevertheless, the public feels sympathy for Muranov for his principled position pointing to the abuses committed by the leadership of the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation.

M. State control and supervisory authorities in arbitration proceedings

Participation of the State and supervisory bodies in cases related to the enforcement of arbitral awards in the territory of the Russian Federation is an extreme method of enforcing a conservative approach to arbitration. At the same time, there has been a clash between the roles of executive and judicial authorities.[90] For instance, the Chairman of the Supreme Court of the Russian Federation formulated a recommendation[91] to lower courts to involve the state service, *Rosfinmonitoring*,[92] in court sessions. The *Rosfinmonitoring* would consider applications for challenging decisions of foreign courts and foreign arbitral institutions and for enforcing such decisions. In addition, in practice, state courts involve the federal tax service as a third party in this category of cases. State courts often involve such authorities on their own initiative.[93] The courts either do not comment on the reasons for involving these authorities or use general wording, such as: "*in order to comply with the control to counteract the legalization (laundering) of proceeds from crime [...]*"[94] or based on the "*suspicious*" procedural behaviour of the applicant in the case.[95]

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90 In this case, the conflict between the executive and judicial authorities is seen in the fact that the court assumes functions that are not typical of it. Thus, the court, rather than the executive, initiates the involvement of state bodies in the judicial process. State authorities are passive. This situation deprives the court of impartiality, since it takes the position of one of the parties.

91 Alexey Chernyshev, *The Supreme Court will streamline the execution of decisions of foreign courts*, KOMMERSANT (Sept. 26, 2018), *available at* https://www.kommersant.ru/doc/3752831.

92 Rosfinmonitoring (federal financial monitoring service) is a federal executive body of Russia that performs functions to counteract the legalisation (laundering) of proceeds from crime and the financing of terrorism.

93 E.O. Kondratenko, *Participation of control and Supervisory bodies in disputes related to the execution of decisions of arbitration courts on the territory of the Russian Federation*, 117/118 TRETEISKY SUD 227, 228 (2019).

94 Postanovlenie VAS RF Chelyabinsk Oblast ot 13 aprelya 2018 g. No. A76-38304/2017 [Ruling of the Highest Arbitration Court of the District of Chelyabinsk of July 7, 2020, No. A76-38304/2017] (Russ.).

95 Postanovlenie VAS RF Mordovia Oblast ot 25 sentyabrya 2018 g. No. A39-4089/2018 [Ruling of the Highest Arbitration Court of the District of Mordovia of Sept. 25, 2018, No. A39-4089/2018] (Russ.).

VI. Conclusion

The reform has caused sharp discussion within the Russian arbitration community. A significant section of lawyers, both academicians and practitioners, disapproved the changes that led to the introduction of a conservative model of arbitration in Russia.[96]

In practice, the reform resulted in the abolition of several thousand arbitral institutions and significant restrictions on international commercial arbitration. In the post-reform period, only five Russian arbitration institutions[97] and two foreign arbitration institutions[98] received permission to operate. The sphere of arbitration has come completely under the control of the Ministry of Justice, which monitors the activities of arbitral tribunals.

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96 Yu. V. Kholodenko, *Arbitration Proceedings: Reform or Destruction?*, 112 TRETEISKY SUD 28–31 (2017); A. I. Zaitsev, *Cons of the reformed arbitration proceedings in Russia*, 112 TRETEISKY SUD 37–48 (2017); M. E. Morozov, *The Arbitration is dead, long live ad hoc*, 112 TRETEISKY SUD 49–55 (2017); Khvalei, *supra* note 8, at 4–19; Alexander Muranov, "*Russian*" *Institute of Modern Arbitration and* "*Russian*" *Arbitration Center: Examining Their Role in Russian Arbitration, GONGO-Structures?Declarations and Reality, How the Hierarchies of State Power Affect Arbitration in Russia,* ZAKON RU71 (June 2, 2020), *available at* https://disk.yandex.ru/i/qizc9vyg5VWStQ; G.V. Sevastianov, *The Ups and Downs of Alternative Dispute Resolution in Russia: Key Outcomes of a Difficult Year*, 119/120 TRETEISKY SUD 11–16 (2019); D. N. Volosov, *On the Margins of the Arbitration Reform. Arbitrations to Get a Choice: To Nowhere or to Never*, 2/3 TRETEISKY SUD 26, 36 (2016); M. A. Yaremenko, *Arbitration Law: Practical Issues in the Absence of Practice*, 2/3 TRETEISKY SUD 76 (2016); G. V. Sevastianov, *The Cold Breath of the Arbitration Reform*,TRETEISKY SUD 6–10 (2016).

97 (1) Russian arbitration centre at the Autonomous nonprofit organization "Russian Institute of modern arbitration"; (2) Arbitration centre at the all-Russian public organization "Russian Union of Industrialists and entrepreneurrs"; (3) National centre for sports arbitration of the Autonomous non-commercial organization "Sports Arbitration Chamber"; (4) Maritime Arbitration Commission at the Chamber of Commerce of the Russian Federation; (5) International Commercial Arbitration Court at Trading-Industrial Chamber of the Russian Federation. *See* Karabelnikov, *supra* note 69, at 1–104.

98 The two institutions were the Hong Kong International Arbitration Centre (HKIAC) and the Vienna International Arbitral Centre (VIAC). Jack Ballantyne, *VIAC becomes second institution licensed in Russia*, GLOBAL ARB. REV. (July 15, 2019), *available at* https://globalarbitrationreview.com/article/1195175/viac-becomes-second-institution-licensed-in-russia.

While the Ministry of Justice has, by policy, sought to support several arbitral institutions, which, according to the ideologists of the reform, ought to match the level of the world's leading arbitration centres, in practice, the authorised arbitrators are far from the level of leading arbitration centres such as the London Court of International Arbitration, the ICC International Court of Arbitration, Arbitration Institute of the Stockholm Chamber of Commerce, etc.

At the same time, in order to make arbitration available throughout the vast territory of Russia, the Ministry of Justice is encouraging the development of a network of arbitration institutions. Arbitral institutions that have received permission to operate have started opening regional offices that attract leading experts from the region to resolve disputes.[99]

Although the reform has achieved a number of positive results, the negative consequences, according to many academic and practising lawyers, have been much more noticeable. As they say in Russia, "*along with the dirty water from the bath, the child was thrown out*".

Thus, the Russian Federation has created a conservative model for regulating arbitration. The State controls arbitral institutions in the course of all their activities: from the moment of their creation to the execution of the award. At the same time, the main focus is not so much on judicial as on administrative control, which also implies broad discretion of the executive authorities.

These circumstances make the Russian jurisdictional system an extremely unattractive forum for resolving private disputes. Foreign companies are reluctant to settle disputes in Russia. On the other hand, Russian companies prefer to look for foreign forums to resolve disputes with their foreign

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[99] However, this practice appears to be temporary. It does not contribute to the stability of arbitration since it is based on the popularity of the capital's lawyers and ignores the authority of local lawyers.

counterparts. The growing criticism following the negative experience of introducing the conservative arbitration model in Russia must serve to alert reform ideologues to reconsider their views. It seems that at this stage of development of Russian arbitration law, the conservative model of arbitration should be abandoned. It would seem that a more rational approach would be based on a neutral model, in which the regulation of arbitration is carried out on the principles of self-regulation and the State has limited control over arbitration through the procedure of enforcement of arbitral awards.

MORE RIGHTS FOR MORE PEOPLE?: THE STRUGGLE OF INDEPENDENT CONTRACTORS TO ARBITRATE EMPLOYMENT CLAIMS AGAINST INTERNATIONAL ORGANISATIONS

Luis Bergolla[*]

Abstract

*This article discusses an arbitration that took place under the Employment Arbitration Rules ["**Employment Rules**"] of the American Arbitration Association ["**AAA**"], in which I was the Claimant's pro bono attorney. The parties to this arbitration were an individual and her employer—an international organisation based in the United States. This article focuses on the organisation's argument that the parties' different nationalities and the individual's post-employment relocation outside the U.S. rendered the dispute 'international'. Accepting this characterisation would have been fatal to the arbitration to the extent that each party would have been responsible for 50% of the arbitrator's fees and arbitration costs under the AAA's International Arbitration Rules—something prohibitive for most employee-claimants—whereas under the Employment Rules only the organisation would have been financially responsible. Unfortunately, when the AAA decided to administer the case under the Employment Rules, the organisation asserted its immunity of jurisdiction and withdrew from the*

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arbitration. Contrasted with the recent arbitration cases in which the workers of large corporations have sought to annul arbitration clauses, this case speaks about an individual who, unable to have her day in court, struggled—and failed—to preserve her right to settle her employment claims in arbitration.

I. Introduction

After finishing her graduate studies in 2008, Joana[1] ["**Joana**" or "**Claimant**"] accepted an offer to intern with a certain international organisation ["**Organization**" or "**Respondent**"] in Washington D.C. ["**Washington**"]. The prospect of acquiring her first professional experience and the possibility of securing a permanent staff position with the Organization prompted her to relocate to the United States. Following the internship, Joana was offered a three-month independent consultant contract.

This was the first in a long series of contracts. Indeed, Joana would sign 46 similar contracts over the course of her relationship with the Organization. Despite the control the Organization always exercised over Joana being consistent with an employer-employee relationship, each of these contracts invariably called her an independent contractor. Each of these contracts contained identical arbitration agreements, which were silent on the applicable arbitration rules.

After almost ten years of being classified as an independent contractor, the Organization told Joana that it was ready to normalise her employment status. Despite this promise, in late 2018, the supervisor told Joana that she had not been selected to keep her job and that her contract of ten years was being terminated with immediate effect and "*that [was] it*".[2]

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1 "Joana" is a fictional name used to preserve the Claimant's real identity.

2 From Claimant's recollection conveyed in the attorney-client intake interview with the author.

Following a series of unsuccessful attempts to have her claims adjudicated through the Organization's internal administrative procedure,[3] Joana commenced an arbitration pursuant to the Employment Rules.[4] Throughout this article and for the sake of simplicity, I shall refer to this case as *Joana* v. *Organization,* or by its short form, *Joana*.

Soon after the filing of Joana's request for arbitration, the AAA sent a letter to the parties stating that the outcome of the preliminary administrative review was to apply the AAA Commercial Arbitration Rules[5] ["**Commercial Rules**"] along with the Employment/Workplace Fee Schedule[6] ["**Employment Fee Schedule**"] to this dispute.[7] Suddenly, however, the International Centre for Dispute Resolution ["**ICDR**"][8]—not the AAA—followed up with a letter to the parties,[9] assigning the case to an international case manager and indicating that the Procedures for Large, Complex Commercial Disputes[10] would apply to this case given the

3 *See* Claimant's petition for an administrative hearing with the Organization's Secretary-General (Jan. 29, 2018) (on file with author); *see also* Memorandum from the Organization's Human Resources, denying Claimant's petition of hearing (Feb. 28, 2018) (on file with author) [*hereinafter* "HR Memorandum"].

4 American Arbitration Association (AAA), Employment Arbitration Rules 2009, *available at* https://www.adr.org/sites/default/files/EmploymentRules_Web_2.pdf [*hereinafter* "AAA Employment Arbitration Rules"].

5 AAA, Commercial Arbitration Rules 2013, *available at*https://adr.org/sites/default/files/Commercial%20Rules.pdf [*hereinafter* "AAA Commercial Arbitration Rules"].

6 AAA, Employment/Workplace Fee Schedule: Cost of Arbitration 2019, *available at*https://www.adr.org/sites/default/files/Employment_Fee_Schedule1Nov19_0.pdf [*hereinafter* "Employment Fee Schedule"].

7 *See* E-mail from the AAA Employment filing team to the counsel (Jan. 11, 2019) (on file with author).

8 International Centre for Dispute Resolution (ICDR) is the AAA's branch for the administration of international disputes. *See* ICDR, *available at* https://www.icdr.org.

9 *See* Letter from the ICDR case manager (Jan. 25, 2019) (on file with author).

10 AAA, Procedures for Large, Complex Commercial Disputes 2013, *available at*https://adr.org/sites/default/files/Commercial%20Rules.pdf.

amounts at stake.[11] This decision likely prompted a letter from the Organization disregarding the AAA/ICDR's prior determinations regarding the applicable rules and declaring its intention to apply for security for costs and attorneys' fees pursuant to Article 34 of the ICDR Rules ["**International Rules**"].[12] Without providing any authority in support, the Organization's external counsel concluded that this was "*undoubtedly an 'international' dispute*".[13] The Claimant opposed categorically.

This article argues that a broadly-worded AAA arbitration clause, like the one present in Joana's contracts, cannot prevent individual claimants from arbitrating employment-related claims against the Organization who drafted the ambiguous clause. Below, I discuss the arguments that I advanced in *Joana* acting as Joana's pro bono attorney. The arguments reported in this article are published with Joana's prior informed consent[14] and absent any language of confidentiality in the arbitration agreement.[15]

The balance of this article is as follows. Part II explains the role that the AAA/ICDR played in the case and Parts III to V discuss the main arguments regarding the non-internationality of employment disputes against the Organization. Finally, in Part VI, I offer a few policy

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11 The Claimant's total claim for damages for employment misclassification, breach of implied employment contract, constructive discharge, and employment discrimination, among others, exceeded $1,000,000.

12 ICDR, International Arbitration Rules 2014, *available at* https://www.adr.org/sites/default/files/ICDR%20Rules_0.pdf [*hereinafter* "International Rules"].

13 *See* Letter from the Organization's external counsel to the AAA/ICDR (Jan. 29, 2019) (on file with author).

14 *See* E-mail from the Claimant to the author (May 31, 2019) (on file with author).

15 *See* discussion *infra* Part III (reproducing the arbitration agreement present in Joana v. Organization); *see also* 2GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 2264 (2009) (citing United States of America v. Panhandle Eastern Corp., 118 F.R.D. 246 (C.D. Cal. 1998) for the proposition that U.S. courts have generally appeared reluctant to recognize an implied obligation of confidentiality arising out of arbitration agreements).

recommendations highlighting the issues that still warrant additional research, and then I conclude.

II. Obstacles to claiming and the erratic role of the AAA

Joana encountered multiple obstacles in her search for redress for the violation of her employment rights. *First*, the Organization denied her petition for an administrative hearing indicating that only those whom the Organization considers its "*staff*" were entitled to them.[16]*Second*, when the independent contractors realise that arbitration is the only option for dispute resolution contemplated in their contracts, it becomes clear to them that retaining a lawyer is essential. Yet, lawyers are expensive in Washington and are typically unwilling to take this type of employment misclassification cases against the Organization on a contingency fee basis. Similarly, third-party arbitration funders are also reluctant to fund these cases, as discussed below in further detail, given the slim chances of success in enforcing an arbitral award against an international organisation.

In this environment, pro bono lawyers are probably one of the last resources through which similarly situated claimants can proceed with their claims in arbitrations against international organisations. After many unsuccessful attempts to retain a lawyer,[17] I finally accepted to represent Joana on a pro bono basis.[18]

As noted previously, the Organization's main defence in *Joana* was to challenge the commencement of the arbitration under the Employment Rules. The Organization also objected to the AAA's preliminary

16 *See* HR Memorandum,*supra* note 3.

17 The Claimant visited at least three lawyers, but all declined to take her case on contingency fee basis. One attorney offered his services upon the payment of a $5,000 retainer that the Claimant could not afford.

18 At the time Joana v. Organizationwas filed, I was a newly admitted attorney in the District of Columbia (the seat and the applicable law to the arbitration). That I accepted to represent the Claimant on a pro bono basis means that I did not receive any compensation for this representation.

determination to administer this case under the Commercial Rules along with the Employment Fee Schedule.[19] According to the Organization, this decision was inadequate and impermissible in a case that was, in its opinion, "*clearly international*".[20]

Neither the Employment Rules nor the International Rules provide for the procedure that must be followed when a party disputes the administration of the arbitration under certain arbitration provisions. Rule 5(c) of the Commercial Rules, however, says that in such cases, the arbitration must continue "*in accordance with the arbitration provision submitted by the initiating party subject to a final determination by the arbitrator*".[21] In the case at hand, instead of affirming its preliminary decision subject to the arbitrator's review, the AAA/ICDR invited the parties to provide commentaries as to the rules applicable to the case.[22] In its commentaries, the Organization reiterated its position that the dispute was international while citing to no authority in support of the application of the International Rules.[23] The Claimant instead submitted a substantial brief in support of administering the arbitration pursuant to the Employment Rules—never under the International Rules.[24]

The AAA/ICDR case manager escalated the parties' contentions to the ICDR International Administrative Review Council ["**IARC**"]. Based on the parties' previous submissions, the IARC sided with the Claimant and determined that the arbitration was to proceed under the Employment

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19 *See supra* note 13.
20 *Id.*
21 AAA, Commercial Arbitration Rules, *supra* note 5, r. 5(c).
22 *See* E-mail from the ICDR case manager (Jan. 30, 2019) (on file with author).
23 *See* Letter from the Organization's external counsel to the AAA/ICDR (Feb. 14, 2019) (on file with author).
24 *See* Letter from the Claimant's counsel to the AAA/ICDR (Feb. 14, 2019) (on file with author).

Rules and the Employment Fee Schedule.[25] Parts III to V summarise the Claimant's (arguably)[26] successful arguments to defeat the Organization's first attempt to end this arbitration before the hearing on the merits even took place.

III. Only domestic employment arbitration rules should apply to the arbitration of purely domestic employment disputes

Subject matter appropriateness is perhaps the obvious reason why the Employment Rules and the Employment Fee Schedule should always apply to domestic employment disputes. But this is not the only reason. The Employment Rules together with the Employment Fee Schedule were designed to preserve the employees' due process rights by placing the arbitration's financial burden entirely on the employers.[27] Yet, the correct application of the Employment Rules is not always straightforward. To illustrate this last point, consider the arbitration clause present in Joana's contracts:

> "*Upon written notice by either Party to the other, any dispute between the Parties arising out of this Contract may be submitted to either the Inter-American Commercial Arbitration Commission or the American Arbitration Association, for final and binding arbitration in accordance with the selected entity's rules. The law applicable to the arbitration proceedings shall be the law of the District of Columbia, USA and the language of the arbitration shall be English.*"(emphasis added)

While seemingly functional, the critical shortcoming of this arbitration agreement is that it fails to specify which of the many AAA arbitration rules

25 E-mail from the ICDR case manager containing the letter from the International Administrative Review Council (IARC) (Feb. 27, 2019) (on file with author).

26 Unfortunately, the IARC's decision was unmotivated.

27 Employment Fee Schedule, *supra* note 6 (capping the employee's filing fee at $300; placing the burden of paying the $750 case management fee entirely on the employer; and making the latter responsible for paying the arbitrator's fees unless in cases where the parties agree otherwise).

should apply to the arbitration. But this alone should not be fatal to the arbitration inasmuch as all AAA/ICDR arbitration rules contain provisions designed to cure this kind of silence in the arbitration agreement. Unfortunately, the very fact that each of the different AAA arbitration rules contains similar provisions clouds the limited guidance that they were intended to provide. That is why I now try to unpack the AAA/ICDR's official position on this issue by looking at the relevant provisions, one at a time:

1. Rule 1 of the Employment Rules says:

> "*The parties shall be deemed to have made these rules a part of their arbitration agreement whenever they have provided for arbitration by the American Arbitration Association (hereinafter "AAA") or under its Employment Arbitration Rules and Mediation Procedures <u>or for arbitration by the AAA of an employment dispute without specifying particular rules*</u>. […]*"(emphasis added).

2. Rule 1 of the AAA Commercial Rules states:

> "*The parties shall be deemed to have made these rules a part of their arbitration agreement whenever they have provided for arbitration by the American Arbitration Association (hereinafter AAA) under its Commercial Arbitration Rules <u>or for arbitration by the AAA of a domestic commercial dispute without specifying particular rules</u>. […]*"(emphasis added).

3. Article 1(1) of the International Rules also contains similar language:

> "*Where parties have agreed to arbitrate disputes under these International Arbitration Rules ("Rules"), <u>or have provided for arbitration of an international dispute by the International Centre for Dispute Resolution (ICDR) or the American Arbitration Association (AAA) without designating particular rules</u>, the arbitration shall take place in accordance with these Rules as in effect at the date of commencement of the arbitration, subject to modifications*

> *that the parties may adopt in writing. The ICDR is the Administrator of these Rules.*" (emphasis added).

In *Joana*, the Respondent obviously relied on Article 1(1) of the International Rules in support of its argument that these rules—not the Employment Rules—should have applied to the case given the international nature of the dispute. Conversely, the Claimant cited to Rule 1 of the Employment Rules in support of applying these rules. This part of the article continues to focus on the appropriateness of applying the Employment Rules to cases similar to *Joana*.[28]

From the Claimant's perspective, the curing language in Rule 1 of the Employment Rules is particularly relevant. In order to activate this provision, it is critical to ascertain whether the dispute that the parties agreed to arbitrate is, in fact, an "*employment dispute*". But what is an employment dispute after all?

The AAA's website for Employment Arbitration gives the following answer:

> "*Disputes can arise out of an employer plan (the employer has drafted a standard arbitration clause for use with all its employees) or an individually-negotiated employment agreement or contract (the employee has had the ability to negotiate the terms and conditions of the employment agreement) or an independent contractor (working or performing as an individual and not incorporated) and a business or organization and the dispute involves work or work-related claims, including any statutory claims*."[29] (emphasis added)

[28] *See* discussion *infra* PartsIV and V (discussing in further detail the impropriety of applying the International Rules to this type of cases).

[29] *SeePractice Areas: Employment Arbitration under AAA Administration*, AM. ARB. ASS'N, *available at* https://www.adr.org/Employment.

Similarly, the introduction to the Employment Rules includes the following language:

> "*These dispute resolution procedures were developed for arbitration agreements contained in employee personnel manuals, an employment application of an individual employment agreement, independent contractor agreements for workplace disputes and other types of employment agreements or workplace agreements, or can be used for a specific dispute. They do not apply to disputes arising out of collective bargaining agreements.*"[30] (emphasis added)

In *Joana*, the Claimant was an individual independent contractor whose claims were, by definition, work or employment-related (i.e. employment misclassification, breach of employment contract, constructive discharge, etc.). The Employment Rules would thus have applied effectively and fairly to Joana's case. Notwithstanding, the asterisk appended to Rule 1 of the Commercial Arbitration Rules generates additional ambiguity:

> "*Beginning October 1, 2017, AAA will apply the Employment Fee Schedule to any dispute between an individual employee or an independent contractor (working or performing as an individual and not incorporated) and a business or organization and the dispute involves work or work-related claims, including any statutory claims and including work-related claims under independent contractor agreements. A dispute arising out of an employment plan will be administered under the AAA's Employment Arbitration Rules and Mediation Procedures. A dispute arising out of a consumer arbitration agreement will be administered under the AAA's Consumer Arbitration Rules.*"[31](emphasis added)

With this language, the AAA suggests again that either the Employment Rules or the Commercial Rules could apply to the arbitration of work-related disputes. In *Joana*, the Claimant argued that the Commercial Rules

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30 *See* AAA, Employment Arbitration Rules, *supra* note 4, at 9.

31 *See* AAA, Commercial Arbitration Rules, *supra* note 5, art. 1.

should not be applied to her case in lieu of the Employment Rules because her claims had nothing to do with the obligations set forth in her written contracts. In other words, the Claimant was suing for the breach of an employment contract implied-in-fact.

The doubts that the AAA introduces with the conflicting language flagged in this part of the article dissipate where the Organization, as in *Joana*, uses standard contract forms to memorialise the relationships with all of its performance contractors (*contratosporresultado*) ["**CPRs**"]. It is generally understood that CPRs cannot negotiate the terms of their contracts for these standard contracts are the quintessential example of an adhesion contract. An adhesion contract is one that is so one-sided for the strong party that the weak party must sign or else decline.[32] In short, a CPR has no more control over the wording of the arbitration clause placed within the Organization's standard contract than a consumer does when she opens a bank account or a brokerage account. The standard contract form(s) present in *Joana* derive from the Organization's internal deliberation process and is publicly available.[33] To the extent that arbitration constitutes a meaningful alternative forum for dispute resolution available to the CPRs, the publicity of the arbitration clause is probably being used to justify the grant of immunity and privileges that the Organization enjoys under U.S. law. This point is discussed in further detail in Part VI below.

That the Organization uses contracts of adhesion invariably for the hiring of every CPR can reasonably be construed as the equivalent to the sort of

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32 Rob Jagtenberg & Annie de Roo, *Employment Disputes and Arbitration an Account of Irreconcilability, with Reference to the EU and the USA*, 68 ZBORNIK PFZ 171, 175-176 (2018) ("[…] arbitration clauses can increasingly be found in individual contracts, but the terms of these contracts are not genuinely negotiated. Rather, they follow a set model imposed by the employer; these are contracts of adhesion. For a candidate aspiring to a job position under suchconditions with an employer, it is often simply a case of 'Take it or leave the building.'One could say that a referral to arbitration emanating from a clause in an adhesion contract comes effectively down to mandatory arbitration. […]").

33 *See* the Organization's standard contract form (on file with the author).

employment plans alluded to in the asterisk that adorns Rule 1 of the Commercial Rules.[34] According to the AAA, an employment plan is one whereby "*the employer has drafted a standard arbitration clause for use with all of its employees*".[35] That is why the Claimant in *Joana* argued that the Employment Rules should apply to her case despite the deficiency of the arbitration clause and the ambiguity introduced by the AAA's conflicting language signalled before.

For these reasons, the Claimant asked the AAA/ICDR to change its original preliminary determination—to apply the Commercial Rules—and to start administering her arbitration pursuant to the Employment Rules. In the alternative, the Claimant urged the AAA/ICDR to affirm its preliminary determination to apply the Commercial Rules along with the Employment Fee Schedule subject to the arbitrator's review. Simultaneously, the Claimant urged the AAA/ICDR to dismiss the Organization's request to administer her matter under the International Rules. The next part explains the reasons why the International Rules should not apply to this kind of cases.

IV. A dispute shall be deemed domestic where the parties' place of business and "place for delivery and/or performance of the work"is the same

The Respondent in *Joana* posited that Article 1(1) of the International Rules was dispositive of the issue of the applicable rules because the Claimant was a national of a Latin American country now residing outside the U.S. and the Organization was an "*entity in Washington, D.C.*"[36] According to the Organization, the parties' connection with different states at the time of the arbitration rendered the dispute "*undoubtedly*" international.[37] The reason behind this defence strategy is clear. As a sophisticated party, the

34 *See supra* note 28.
35 *See supra* note 29.
36 *See* s*upra* note 13.
37 *Id.*

Organization knew that the application of Article 34 of the International Rules would have been fatal to the *Joana* arbitration simply because the Claimant—as most similarly situated CPRs—could not afford the cost of an international arbitration.

The foregoing presents a complex dichotomy. As I noted previously, that an independent contractor is not able to defray the cost of an international arbitration against her employer is a due process problem that is best solved by applying the Employment Rules. On the other hand, from a policy perspective, the type of economic consideration raised by the Organization's defence should be the least of the reasons to rule out the application of the International Rules. Nevertheless, the Organization's position regarding the internationality of the dispute in *Joana* leaves a number of analytical holes that I try to cover next for the sake of the argument.

As explained in Part III, the parties in *Joana* did not expressly grant authority to the AAA/ICDR to apply the International Rules to their arbitration. In light of the silence in the arbitration agreement, the question was whether the dispute between the parties to this arbitration was an "*international dispute*" within the meaning of Article 1(1) of the International Rules. The answer to this question is intrinsically difficult[38]and by all means not as obvious as the Organization suggested.[39]

The International Rules do not define the term "*international dispute*" and the AAA/ICDR's position on the issue is not clear either.[40] Fortunately, specialised commentators do provide guidance regarding the course that the ICDR has followed in similar past cases.

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[38] *See* MARTIN F. GUSY, FRANZ T. SCHWARZ & JAMES M. HOSKING, A GUIDE TO THE ICDR INTERNATIONAL ARBITRATION RULES 20, ¶ 1.79 (2011).

[39] *See* s*upra* note 13.

[40] *Seesupra* note 12.

Gusy et al., for example, note that the ICDR commonly sends a letter[41] to the parties stating the two criteria that are used to define what an international dispute is: (i) "*analyzing the nationality or [the] residence of the parties*"; and (ii) "*thenature of the dispute*".[42] (emphasis added). The same commentators stress that the nationality of the parties is not the critical element for determining the dispute's "*internationality*", for an arbitration "*between parties resident of the same country could be genuinely or intrinsically international*".[43] In fact, better indicators of the so-called internationality are the objective factors related to the second criterion above—"*the nature of the dispute*".[44] In other words, a dispute between "*parties resident of the same country could be genuinely or intrinsically international*" where the contract that binds them calls for performance abroad.[45]

Stated differently, the residence of the parties is as good an indicator of the dispute's internationality as the parties' citizenship or nationality; and the different places of residence or nationalities of the parties are not as strong an indicator of internationality as the objective international connections the contract has or lacks with more than one country.

The analysis presented so far is not free of nuanced interpretations and criticism. Nevertheless, most commentators[46] agree when they refer to

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41 *See* GUSYET AL., *supra* note38, at 20-21, ¶ 1.81. In Joana v. Organization, the ICDR did not send a letter containing this kind of language to the parties.

42 *Id.*

43 *Id.* at 21, ¶ 1.84 (noting the example of "two companies from the same jurisdiction relating to a contract to be performed abroad").

44 *See* FOUCHARD, GAILLARD, GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION 51, § 2, ¶ 99 (Emmanuel Gaillard & John Savage eds., 1999) (these factors are what Fouchard et al. call "objective factors of internationality" and consider them necessary and sufficient for the dispute to be intrinsically international).

45 *See* GUSYET AL.,*supra* note38, at 21, ¶ 1.84.

46 *See*REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION 10, ¶ 1.32 (Nigel Blackaby, Constantine Partasides, Alan Redfern & Martin Hunter eds., 6th ed. 2015) [*hereinafter* "REDFERN AND HUNTER"]; GUSYET AL.,*supra* note 38, at 21, ¶ 1.85 (specifically referring to the scenario where the arbitration agreement is silent as to the set of applicable AAA arbitration rules).

Article 1(3) of the United Nations Commission on International Trade Law Model Law on International Commercial Arbitration[47] ["**Model Law**"] as the guiding beacon on the issue of internationality of a dispute. For example, Article 1(3) says:

"*(3) An arbitration is international if:*

(a) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States; or

(b) one of the following places is situated outside the State in which the parties have their places of business:

(i) the place of arbitration if determined in, or pursuant to, the arbitration agreement;

(ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or

(c) the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country.

(4) For the purposes of paragraph (3) of this article:

(a) if a party has more than one place of business, the place of business is that which has the closest relationship to the arbitration agreement;

(b) if a party does not have a place of business, reference is to be made to his habitual residence." [omissis] (emphasis added).

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

Roth's commentary on the Model Law is helpful to unpack the wealth of information contained in Article 1(3)-(4) of the Model Law. Accordingly, it is important to note that Article 1(4)(a) considers a party's place of business the place with the closest relationship with the arbitration.[48] For an individual without a place of business, the relevant place is that of her habitual residence.[49] Another important provision that would render an arbitration "*international*" would be a foreign situs.[50]Finally, a critical factor to render a dispute "*international*" is the place of performance. On this point, Roth refers to *Fung Sang Trading Ltd.* v. *Kai Sun Sea Products & Food Co. Ltd.*[51] ["**Fung Sang**"] as the leading authority. In *Fung Sang*, the court held that an arbitration with most of its elements set in Hong Kong (parties, applicable law, and payment) was nonetheless international where the delivery of the goods was to take place in China.[52]

In *Joana*, the Respondent was a *sui generis* international organisation, which, by definition, is incapable of being "*incorporated*" or having the nationality or citizenship of any country. By that same logic, an international organisation is also incapable of having the same or a different nationality as any individual person. Therefore, the inquiry into the parties' nationalities in *Joana* was not an adequate approach to ascertain the internationality of the dispute. Instead, in line with Article 1(3)(a) of the Model Law, what was relevant in that case was to determine the parties' place of business at the time of signing the relevant CPR contracts.

By the same token, the Organization's non-incorporation could not mean that it did not or could not have a place of business. Much to the contrary,

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48 *See* Marianne Roth, *UNCITRAL Model Law on International Commercial Arbitration*, *in* PRACTITIONER'S HANDBOOK ONINTERNATIONAL COMMERCIAL ARBITRATION 963, ¶ 14.37 (Frank-Bernd Weigand ed., 2d ed. 2009).

49 *See id.*

50 *Id.* at 963, ¶ 14.39.

51 Fung Sang Trading Ltd. v. Kai Sun Sea Products & Food Co. Ltd. [1991] 2 HKC 526 (H.K.).

52 Roth, *supra* note 48, at 964, ¶ 14.41.

the Organization may well have had—indeed has—numerous places of business. Washington, for one, was arguably the Organization's principal place of business because it has its principal headquarters ["**HQ**"] there and conducts the overwhelming majority of its activity from there.

Admittedly, the *Joana* arbitration could have been deemed international based on the Organization's multiple places of business in the territories of most of its member states. For purposes of the *Joana* arbitration, however, Article 1(4)(a) of the Model Law considers the place that has the strongest connection with the arbitration agreement as the relevant place of business. For the Organization, in this case, that place was Washington. Consistent with this, every contract between Joana and the Organization mentions the HQ as "*the place for performance and/or delivery of the 'work'*".[53] Similarly, the contracts, as well as the arbitration agreements, both designate D.C. Law as the governing law.[54]

On the other hand, as an individual, Joana could not have a place of business. Although, *arguendo*, if one were to accept the Respondent's logic and consider Joana as a non-incorporated entity working as an independent contractor for the Organization, then Joana too may have had a place of business. And that place of business would also have been Washington because Article 1(4)(b) of the Model Law considers the individual's 'habitual residence' analogous to an incorporated entity's place of business. In fact, throughout the parties' entire working relationship, Joana had fixed her domicile in Washington.

As it is the case with similarly situated CPRs who are not U.S. citizens or permanent residents, Joana held a G-4 visa that the Organization itself sponsored and procured.[55] This visa obliged Joana to establish her domicile

53 *See* s*upra* note 33.

54 *Id.*

55 *See* OFF. FOR. MISSIONS, ACCREDITATION POLICY HANDBOOK6–7 (U.S. State Dep't Dipl. Note 16-886, June 7, 2016), *available at*https://www.state.gov/wp-

in Washington's metropolitan area. The G-4 visa also constrained Joana to work exclusively and full-time for the Organization.[56]Thus, there is no doubt that the Claimant was present and domiciled in Washington at all relevant times.

The local nature of the parties' relationship in *Joana* was also apparent from the way the parties performed under the contracts. As mentioned previously, the place for performance and/or delivery of the work was the HQ. In fact, Joana physically worked at the HQ for approximately ten years. There, she shared office space with other Organization staff and was provided with a workstation that included a computer and other resources. Furthermore, the Organization compensated Joana for her work with payments issued in the U.S. currency that were deposited into her U.S. checking account. Additionally, during the course of her employment relationship, Joana received constant supervision and direction from her Washington-based supervisors. Finally, Joana performed the overwhelming majority of her duties just as any other employee stationed at the HQ. On a few occasions, the Organization designated Joana to represent it in meetings held outside the United States.

In sum, at all relevant times, both parties in *Joana* had their respective places of business/residence in Washington, the city in which they conducted a purely local employment-related relationship that spanned almost ten years. That is why, as in *Joana*, neither the nationality of similarly situated CPRs nor their relocation outside the U.S. following their termination[57] should have any bearing over the internationality of the dispute.

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content/uploads/2019/05/Diplomatic-Note-18-1686-Accreditation-Policy-Handbook.pdf.

[56] *See also 9 FAM 402.3-7(B) (U) G Visa Classifications (b)*, FOR. AFF. MANUAL: U.S. DEP'T OF STATE, *available at*https://fam.state.gov/fam/09FAM/09FAM040203.html.

[57] A very likely event as upon being terminated, non-U.S. CPRs typically lose their eligibility to continue in the United States under a G4 visa.

But there is at least one additional argument to make against the internationality of this kind of dispute based on an ambiguous or vaguely drafted arbitration agreement.

To interpret an arbitration agreement that is silent on the applicable arbitration rules as an agreement to submit employment-related claims to arbitration under the International Rules would be contrary to the common law rule, *contra proferentem*,that a court should construe an ambiguous contract term against the party who drafted it.[58]

As the sole drafter of the arbitration agreement, all the Organization needs to do—if it wants to ensure that arbitrations like *Joana* are conducted under the International Rules—is to specify that the Organization only consents to arbitrate pursuant to those rules. Of course, such a blanket imposition on an adhesion contract would reflect poorly on an international organisation that gives the option to arbitrate "*any claims*"[59] as a "*quid pro quo*"[60]of sorts for the privileges and absolute immunities that it enjoys under the laws of the host country and which it so conveniently invoked in Joana's arbitration.

To recapitulate, the internationality of a dispute has little to do with the parties' nationalities, place of business, or residence, and a whole lot more with the nature of the dispute. The facts in *Joana* support a finding that the nature of the dispute was purely domestic. Moreover, a party cannot reap the benefits of an ambiguous clause it drafted to the detriment of the other party.

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58 *See* Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 62 (1995), 115 S. Ct. 1212 (1995) *as cited in* 1 GARY B. BORN,INTERNATIONAL COMMERCIAL ARBITRATION 1063–64 (2009).

59 *See* arbitration agreement reproduced in Part III of this article.

60 William M. Berenson, *Squaring the Concept of Immunity with the Fundamental Right to a Fair Trial: The Case of the OAS*, *in*THE WORLD BANK LEGAL REVIEW 133 (Hassane Cissé, Daniel D. Bradlow & Benedict Kingsbury eds., 2011).

The following Part V discusses how the unenforceability of arbitral awards against the Organization renders the "*international*" characterisation of the underlying disputes illusory or superfluous.

V. A dispute should not be deemed international where the resulting award cannot be enforced under international conventions

According to Redfern and Hunter, the ability to obtain a final and binding award is the main motivation that parties have for taking their disputes to international arbitration and bearing the expense that is associated with this form of dispute resolution.[61]In this vein, the arbitrators' main duty is to hand down an award that is internationally enforceable.[62]Accordingly, the AAA/ICDR acknowledges that the main advantage of arbitrating under the International Rules is that such an arbitration would lead to the making of an internationally enforceable award.[63]For practical purposes, that an award is internationally enforceable means that the award falls under the New York Convention[64] or the Panama Convention[65] [collectively referred to as the "**Conventions**"].

Under the current international arbitration regime, the award that would have resulted from *Joana* could not have been enforced under the Conventions. This important indicator of the dispute's internationality—enforceability—fails to materialise in cases where, as the Organization

61 *See* REDFERN AND HUNTER, *supra* note 46, at 501, ¶ 9.01.

62 *Id.* at 502, ¶ 9.04.

63 *SeeICDR, Rules, Forms & Fees*, INT'L CTR. FOR DISP. RESOLUTION,*available at*https://www.icdr.org/rules_forms_fees (noting that "[t]he ICDR Rules were created with and maintain UNCITRAL Rule philosophies that empower parties and arbitrators to control their own process. The results have allowed for ICDR awards to be enforced in jurisdictions around the world.").

64 *See* United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 330 U.N.T.S. 38 [*hereinafter* "New York Convention"]; 9 U.S.C. §§ 201–08 (1970).

65 *See* Inter-American Convention on International Commercial Arbitration, Jan. 30, 1975, 1438 U.N.T.S. 245 [*hereinafter* "Panama Convention"]; 9 U.S.C. §§ 301–07 (1990).

noted in *Joana*,[66] the respondent enjoys privileges and immunities that shield it from being sued in the national courts of the U.S.[67] Moreover, a panoply of international instruments further entitles the Organization to the same privileges and absolute immunity of jurisdiction that it enjoys in the U.S. in virtually every country in which the Organization has offices, holds assets, or otherwise "*does business*".

Indeed, the Organization derives its absolute immunity in the U.S. from the International Organizations Immunities Act of 1945 ["**IOIA**"] and the Headquarters Agreement with the U.S. government.[68] Similarly, at least 13 of the Organization's member states have entered into a multilateral agreement[69]granting the Organization immunity of jurisdiction in the following terms:

> "*Article 2. The Organization and its Organs, their property and assets wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except insofar as in any particular case the immunity has been expressly waived. It is understood, however, that no such waiver of immunity shall make the said property and assets subject to any measure of execution.*
>
> *Article 3. The premises of the Organization and of its Organs shall be inviolable. Their property and assets, wherever located and by whomsoever held, shall be immune from search, requisition, confiscation, expropriation and any other form of interference, whether by executive, administrative, judicial or legislative action*." (emphasis added).

66 *Seesupra* note 13.

67 *Id.*

68 *See* Headquarters Agreement Between the Organization […] and the Government of the United States of America (on file with author).

69 *See* list of multilateral agreements granting immunity of jurisdictionto the Organization (on file with author).

An additional 23 member States have entered into bilateral agreements with the Organization granting the latter full immunity from jurisdiction. The following article is a typical example of these agreements:

> "*Article 7. The Secretariat and its Office, as well as their property, funds and assets, wherever located and by whomever held, shall enjoy in Jamaica immunity from judicial and administrative process, except in those particular cases in which such immunity is expressly waived by the Secretary General of the Organization […]. No such waiver, however, shall make the said property, funds and assets subject to any measure of execution*."[70]

Therefore, the hypothetical enforceability of an arbitration award under the Conventions cannot justify treating the underlying dispute in any case against the Organization as "*international*".

Notwithstanding the unenforceability of arbitration awards against the Organization on account of immunity, there is one additional reason to deny the enforceability of an employment-related arbitration award under the Conventions. At least according to one court, inasmuch as employment disputes concern the internal administration of international organisations, such disputes are deemed non-commercial.[71] Following this reasoning, disputes like the one present in *Joana* are non-commercial, and therefore, the resulting awards would fall outside the scope of the Conventions, regardless of the dispute's internationality.[72]In sum, arbitral awards,

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[70] *See* Agreement Between the General Secretariat of the Organization […] and The Government of Jamaica on the Functioning in Kingston of the Office of the Secretariat in Jamaica (on file with author).

[71] *See* Broadbent v. Organization of American States, 628 F.2d. 27 (D.C. Cir. 1980) (U.S.).

[72] *See* New York Convention, *supra* note 64, art. I(3) (the United States signed the New York Convention with the following reservation: "The United States of America will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the United States."); *see also* Panama Convention, *supra* note 65, art. 1 (as the names indicates, the Inter-American Convention on International Commercial Arbitration only applies to commercial arbitration awards).

especially if employment-related, are unenforceable against the Organization.

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As noted previously, the foregoing arguments were tested in *Joana*. The IARC sided with the Claimant and decided to revert the AAA/ICDR's preliminary determination to run the *Joana* arbitration under the Commercial Rules.[73] In so doing, the IARC determined that the rules applicable to that case were the Employment Rules and the Employment Fee Schedule.[74] Unfortunately, as I noted previously, one can only speculate as to the persuasiveness of the arguments presented in this article because the IARC decision was unmotivated. I discuss the Organization's reaction to this determination in the following Part VI.

VI. More rights but not for all people: The Organization walks away from the arbitration

In response to the IARC determination, the Organization submitted a series of letters to the arbitral institution threatening to withdraw from the *Joana* arbitration if the AAA/ICDR did not reconsider its decision.[75] The Organization's reasoning for repudiating the arbitration boils down to the idea that arbitrating this matter under the Employment Rules "*would be wholly inconsistent with the privileges and immunities afforded to the Organization […] pursuant to its treaty with the United States, which unambiguously grants the Organization […] [']exclusive jurisdiction over the resolution of any and all disputes and matters arising out of, related to, or deriving from employment in, by, or with the Organization […].[']*"[76] In its final plea, the Organization engages in a series of blatant mischaracterisations such as that the Organization "*never consented*

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[73] *See* s*upra* note 25.

[74] *Id.*

[75] *See* Letter from the Organization in response to the IARC decision (Mar. 12, 2019) (on file with author); Letter from the Organization, following the AAA/ICDR's confirmation of the IARC decision (Mar. 26, 2019) (on file with author).

[76] *See* 'Final Letter' from the Organization (Apr. 12, 2019) (on file with author).

to arbitrate what the ICDR has […] decided to recharacterize as an employment dispute"[77] and this decision by the ICDR "*vitiates any consent that the Organization […] gave to participate in these proceedings*".[78]

At this point, the Organization proceeded to warn that "*the immunities afforded to the Organization under the Headquarters Agreement, particularly with respect to employment disputes, prevent the enforcement of an arbitral award of this nature in United States courts*".[79] To top it all, the Organization concluded its admonition to the AAA/ICDR and the Claimant with a statement that speaks for itself:

> "*The Organization […], in good faith, commits to final and binding arbitration in its commercial contracts precisely to avoid the need for any post-award enforcement proceedings*".[80]

This statement evidences that the Organization is either unable to understand the most basic tenets of arbitration law as well as the law of privileges and immunities, or else it understands them well and decided to ignore the rules that bind most litigants, as they did in *Joana*.

For whatever purpose, this behaviour raises the issue of whether an arbitration agreement, of which an international organisation is a signatory, constitutes a waiver of the right to invoke its immunities. This issue was not particularly relevant in *Joana* because the non-participation of the Organization in the arbitration did not prevent the constitution of the sole-arbitrator tribunal and the Claimant did not seek to compel arbitration when, as noted below, the Respondent failed to pay the arbitrator's fees. I feel, however, that addressing the interplay between organisational

77 *Id.*
78 *Id.*
79 *See* s*upra* note 75.
80 *See* s*upra* note 76.

immunity and waiver is important for the generality of future arbitration cases that may be brought against the Organization.

In their article on international organisations and immunity, Professors Gaillard and Pingel-Lenuzza readily conclude that an arbitration agreement constitutes a waiver on the part of the organisation of the right to invoke its immunity before the arbitral tribunal.[81] The authors point to the dominant view that the existence of dispute resolution alternatives like arbitration is precisely what justifies the absolute immunity that international organisations are often accorded.[82] According to this view, international organisations should not be allowed to have it both ways; that is, to maintain absolute immunities that they can invoke to interfere with the mechanisms that are supposed to counterbalance that immunity in the first place.[83]

Pierre Schmitt notes that international organisations like the United Nations generally—but not always—add non-waiver language to their standard arbitration clauses.[84] When such language is absent, the issue of the international organisation's immunity of jurisdiction is likely to emerge in court.[85] Schmitt references two cases in which French and Swiss courts disposed of the issue of waiver of organisational immunity in different ways.[86] In *UNESCO* v.*Boulois*["**UNESCO**"], the UNESCO refused to appoint an arbitrator thereby impeding the proper functioning of the arbitration.[87] The Paris Court of Appeals held that the UNESCO could not

81 Emmanuel Gaillard & Isabelle Pingel-Lenuzza, *International Organisations and Immunity from Jurisdiction: to Restrict or to Bypass*, 51 INT'L & COMP. L. Q. 1, 12 (2002).

82 *See id.* at 3.

83 *See id.* at 4.

84 PIERRE SCHMITT, ACCESS TO JUSTICE AND INTERNATIONAL ORGANIZATIONS: THE CASE OF INDIVIDUAL VICTIMS OF HUMAN RIGHTS VIOLATIONS 180 (2017).

85 *Id.* at 181.

86 *Id.* at 181–82.

87 *See* Cour d'appel [CA][regional court of appeal] Paris, 14e ch. A, June 19, 1998, REVUE DE L'ARBITRAGE1999,343(Fr.) *as cited in*SCHMITT, *supra*note 84, at 181.

be allowed to defeat the *pacta sunt servanda*principle as it had waived its immunities in entering into an arbitration agreement.[88] The Court concluded that allowing the UNESCO to invoke its immunity to defeat the arbitration would have constituted a denial of justice as well as a human rights violation pursuant to Article 6(1) of the European Convention on Human Rights.[89]

Conversely, in *GroupementFougerolle and Consorts* v. *CERN* ["**CERN**"], the Swiss Federal Supreme Court held that the arbitration agreement alone did not amount to a waiver of the international organisation's immunity.[90] Unlike *UNESCO*, the proceedings in *CERN* were initiated by a private party for the annulment of an arbitral award obtained against an international organisation.

In *International Tin Council* v. *Amalgamet, Inc.*,an international organisation headquartered in the United Kingdom petitioned a court in the state of New York to stay the arbitration that had been initiated against it in New York for breach of contract.[91] The Court dismissed the petition finding, in relevant part, that the grant of immunity enjoyed by the Petitioner in the host country did not extend to the U.S., and even if it did, the immunity had been waived by virtue of the arbitration agreement. In sum, despite the diverging holdings, the three courts sought to preserve a similar value: to ensure the arbitral instance remains undisturbed by either the international organisation or the private party.[92]

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88 *Id.* at 344.

89 *Id.*

90 *See* Tribunal fédéral [TF] [Federal Supreme Court] Dec. 21, 1992, 118 Ib 562 (Switz.) *as cited in*SCHMITT, *supra* note 84 at 182.

91 Int'l Tin Council v. Amalgamet, Inc., 524 N.Y.S.2d 971 (Sup. Ct. N.Y. Co. 1988) (U.S.) [*hereinafter* "Tin Council"].

92 For a detailed commentary on Tin Council, *see* Steven R. Ratner, *International Tin Council v. Amalgamet Inc. 524 N.Y.S.2d 971,* 82 AM. J. INT'L L. 837 (1988).

Reading these three cases together, one can appreciate how the courts can restrict on a case-by-case basis the scope of the immunity of international organisations and reinforce the effectiveness of arbitration. In other words, the recommendations that Gaillard and Pingel-Lenuzza posited as alternatives[93] do not necessarily need to be mutually exclusive if the courts take a position more or less deferential to the immunity of international organisations. It remains to be tested in the U.S. courts whether an international organisation can be compelled to arbitrate if, as the Organization in *Joana,* it invokes immunity and fails to pay the arbitration fees.

Arbitral institutions also can do their part in solving the issue of non-waiver of organisational immunity. Schmitt notes how the Permanent Court of Arbitration, having enacted its 'Optional Rules for Arbitration between International Organizations and Private Parties'[94] modelled after the UNCITRAL Arbitration Rules, is one of such examples.[95] The solution provided in Article 1(2) of these Optional Rules is simple: agreement to arbitrate under the Optional Rules constitutes a waiver of the organisation's right to invoke its immunity of jurisdiction.[96]

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Despite the Organization's efforts to defeat the arbitration in *Joana*,an arbitrator was appointed, and a preliminary hearing took place. The Organization did not participate in this preliminary hearing despite the arbitrator's assurances that such an appearance would not constitute a

93 *See* Gaillard & Pingel-Lenuzza, s*upra* note 81, at 4.

94 Permanent Court of Arbitration, Model Arbitration Clauses: For Use in Connection with the Permanent Court of Arbitration Optional Rules for Arbitration between International Organizations and Private Parties, *available at* https://docs.pca-cpa.org/2016/02/Model-Arbitration-Clauses-for-Use-in-Connection-with-the-Permanent-Court-of-Arbitration-Optional-Rules-for-Arbitration-between-International-Organizations-and-Private-Parties.pdf.

95 *See* SCHMITT, *supra*note 84, at148.

96 *Id.*

waiver of any arbitrability defences. The Organization only responded with a note to the case manager indicating that "*the position of the General Secretariat in respect of [the Joana] arbitration as expressed in [its] communications dated […] remain[ed] unchanged*".[97] Shortly thereafter, the ICDR case manager wrote an e-mail indicating that because the Organization had failed to make a deposit to cover the arbitrator's compensation as is stipulated in the Employment Fee Schedule, the Claimant was invited to advance the arbitrator's fees. For a case like this, the arbitrator's fees were estimated to run anywhere between $4,500 and $20,000. Because the Claimant could not afford to pay the arbitrator's steep fees, the arbitrator closed the case for lack of payment.[98]

VII. Conclusion

Independent contractors beware! The avenues for obtaining redress for the violation of their employment rights can be extremely limited if not inexistent. The Organization is prepared to deploy unorthodox legal strategies to prevent independent contractors from airing their claims both internally and externally. The double layer of protection afforded to the Organization under the IOIA and the Headquarters Agreement with the government of the U.S. makes it impossible for a claimant to compel arbitration against the Organization in the U.S. courts. The Organization, however, will concentrate its efforts on shifting the financial burden of the arbitration to the claimants. While *Joana* proves that the Organization's attempt to accomplish this strategy by turning the arbitration into an international dispute will not bear fruit, the Organization can always achieve the same goal by resorting to the privileges and immunities that it enjoys under the U.S. laws.

This article makes two policy recommendations. First, the AAA/ICDR should publicly explain the institution's position after the *Joana* arbitration for the benefit of similarly situated claimants who trust the arbitration

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97 *See* E-mail from the Organization to the ICDR case manager (May 17, 2019) (on file with author).

98 Joana v.Organization, Arb. Ord. No. 2 (Aug. 21, 2019) (on file with author).

clause in their contracts as their only guarantee of redress if their employer violates their employment rights. The second recommendation is simple and entirely within the Organization's power to implement: revise the arbitration clause discussed in this article so as to indicate the specific arbitration rules under which the Organization is willing to arbitrate.

Future empirical research needs to address two important research questions that remain unanswered. Why did it take the Organization so long in *Joana* to advance what is probably its bread-and-butter immunity defence? And why more CPRs have not sued the Organization for what strikes as one perverse employment misclassification scheme? Regarding the first question, I venture to speculate that because this was a case of first impression both for the Organization and the AAA, having prevailed on the 'internationality' argument would have been a more desirable outcome for the Organization. As to the second question, I cannot be sure as to one specific factor; rather, a mix of personal, financial, and reputational factors may be at the root of the problem.

LIMITATION PERIOD FOR THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

Guiqiang Liu[*]

Abstract

*When seeking the recognition and enforcement of foreign arbitral awards, the limitation period is one of the factors that award creditors need to consider. The limitation period, however, varies significantly in different countries. This article conducts a comprehensive survey of the limitation periods in the Contracting States of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards ["**New York Convention**"] by studying relevant legislation, case law, and survey reports. The author argues that the current diversified practice on limitation periods among the Contracting States undermines certainty and predictability in international commercial transactions, and at the same time, prejudices commercial parties' interest. To solve the problem, the article proposes three solutions. First, the best approach is to harmonise limitation periods at the international level by providing a uniform limitation period in the New York Convention. Second, another viable approach is to urge the Contracting States to provide specific limitation periods in their domestic laws, so as to provide a clear and predictable time for both award creditors and award debtors. Alternatively, with no further changes at either the international or the domestic level, the only option for award*

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creditors would be to seek enforcement in another forum or enforce the arbitral awards in the form of judgments in certain jurisdictions.

I. Introduction

For commercial parties who choose to settle their disputes through arbitration, winning a favourable award is only half the battle. Sometimes, the losing party may refuse to perform the arbitral tribunal's decision, and under such a circumstance, one of the steps that award creditors can take is to seek enforcement of the arbitral award before national courts.[1] Enforcement of foreign arbitral awards has thus become a new battlefield for both parties.[2]

To promote the recognition and enforcement of arbitral awards worldwide, the United Nations Conference on International Commercial Arbitration adopted the New York Convention in 1958, which has been honoured as the "*most successful international instrument in the field of arbitration*".[3] Even though the New York Convention has achieved great success in the past six decades, there are still many unsettled issues that may hinder the enforcement of arbitral awards, and the issue of limitation periods is one of them.[4]

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1 *See*REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION 607 (Nigel Blackaby, Constantine Partasides, Alan Redfern & Martin Hunter eds., 6th ed. 2015); *see also* Le Nguyen Gia Thien, *Time Limit to File Petition for the Recognition and Enforcement of Foreign Arbitral Awards: A Comparative Perspective*, 35(1) ASA BULL. 95, 97 (2017) [*hereinafter* "Thien"].

2 *See*Sumru Akter, *Flipping the Hourglass: Time Limits for the Recognition and Enforcement of Foreign Arbitral Awards*, *in*60 YEARS OF THE NEW YORK CONVENTION: KEY ISSUES AND FUTURE CHALLENGES 85, 86 (Katia Fach Gómez & Ana M. Lopez-Rodriguez eds., 2019).

3 *See* M. J. Mustill, *Arbitration: History and Background*, 6(2) J. INT'L ARB. 43, 49 (1989).

4 Considering 164 countries have ratified the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 6, 1958, 330 U.N.T.S. 3 [*hereinafter* "New York Convention"], this article mainly focuses on the recognition and enforcement of foreign arbitral award under the regime of the New York Convention.

Limitation periods (also known as statutes of limitations,[5] time limits,[6] time limitations,[7] and prescription periods)[8] are a controversial issue during the process of enforcing foreign arbitral awards under the New York Convention. The New York Convention is silent on whether Contracting States can refuse to enforce foreign arbitral awards on the grounds of the expiration of a limitation period.[9] In practice, however, the Contracting States have "*diversified laws and practices*" on limitation periods,[10] and divergences exist in characterisation, the applicable law to determine the limitation period, its duration, its commencement as well as its interruption, suspension, and extension.

The issue of limitation period has begun to receive more attention from scholars and practitioners in recent years. For instance, Gary Born noticed that even though the New York Convention does not provide any limitation period for enforcing foreign arbitral awards,[11] many Contracting States have imposed such limitation for enforcement.[12] For an arbitral

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5 *See* George A. Bermann, *Recognition and Enforcement of Foreign Arbitral Awards: The interpretation and Application of The New York Convention by National Courts*, *in*RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS: THE APPLICATION OF THE NEW YORK CONVENTION BY NATIONAL COURTS 67-68 (George A. Bermann ed., 2017).

6 *See* Andreas Börner, *Article III*, *in*RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS: A GLOBAL COMMENTARY ON THE NEW YORK CONVENTION 126–127 (2010) [*hereinafter* "Börner"]; Akter, *supra* note 2, at 85-97; Thien, *supra* note 1, at 95 – 107.

7 *See*GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 3725–3730 (2d ed. 2014).

8 *See* María Blanca Noodt Taquela, *Interpretation and Application of the New York Convention in Argentina*, *in*RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS: THE APPLICATION OF THE NEW YORK CONVENTION BY NATIONAL COURTS 92 (George A. Bermann ed., 2017).

9 BORN, *supra* note 7, at 3725.

10 *See* United Nations Commission on International Trade Law, Report on the survey relating to the legislative implementation of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958), at 3, U.N. Doc. A/CN.9/656 (2008) [*hereinafter* "UNCITRAL Report"].*Seealso* Akter, *supra* note 2 at 86.

11 BORN, *supra* note 7, at 3726.

12 *Id.*

award whose limitation period has expired, he proposed that the award creditors can seek a foreign court judgment confirming the award and then apply for the enforcement of that foreign judgment.[13] Robert Morgan also noticed that limitation periods may bar the enforcement of foreign arbitral awards,[14] and in some jurisdictions, limitation periods may be ambiguous.[15] He worried that the ambiguity and uncertainty would "*be of little comfort*" to award creditors.[16] Lecturer Le Nguyen Gia Thien compared various statutes and case law on limitation periods in civil law and common law countries.[17] He made a very interesting argument that Vietnam's amendment to the Code of CivilProcedure in 2015, which provides a clear and longer limitation period for enforcement, may increase Vietnam's attraction amongst commercial parties who are seeking the enforcement of arbitral awards worldwide.[18] Further, in a recent book chapter, SumruAkter introduced various practices on limitation period across the world.[19] She observed that many countries failed in providing express limitation periods in their domestic laws,[20] and the lack of clear guidance may result in "*contradicting interpretations and uncertain enforcement regime*".[21]As a solution, Akter "*strongly*" proposed that Contracting States provide a clear limitation period in their domestic laws so as to increase commercial parties' foreseeability.[22]

Based on these earlier studies, this article seeks to provide a comprehensive analysis of the application of limitation periods for enforcement in different

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13 *Id.* at 3729–3731.

14 Robert Morgan, *Tick, Tock - Limitation Periods and the Enforcement of Arbitral Awards*, 12 ASIAN DISP. REV. 113, 115 (2010).

15 *Id.*at 115 ("*Yugraneft* dispels ambiguity as to the applicability of limitation periods in jurisdictions where the enforcement of Convention awards is sought").

16 *Id.*

17 Thien, *supra* note 1, at 100–106.

18 *Id.* at 107.

19 Akter, *supra* note 2, at 89–94.

20 *Id.* at 89.

21 *Id.* at 94.

22 *Id.* at 97.

States, by looking to their legislative provisions and court judgments as well as relevant academic literature. The article proceeds in four parts.

Part II starts by analysing a threshold question and concludes with the observation that it does not contravene the New York Convention if the Contracting States refuse to enforce foreign arbitral awards by reason of the expiration of the limitation period. Part III continues to discuss the applicable law to determine the limitation period and mainly analyses three choice of law rules: *lex fori*, *lex causae*, and *lex loci arbitri*. Part IV considers the duration of the limitation period, the commencement of the limitation period and the factors that may interrupt, suspend, or extend the same. Part V argues that Contracting States' diversified practice on limitation periods undermines certainty and predictability in international commercial transactions. In the author's opinion, the most ideal approach to solve this problem is to provide a uniform limitation period in the New York Convention so as to eliminate the divergences. Another practicable approach is specifying the limitation period for the enforcement of a foreign arbitral award in domestic law. Without further measures taken at both international and domestic levels, the author opines that award creditors need to realise the importance of limitation periods and identify the specific limitation period in the enforcing State. By being aware of the same, if the limitation period for enforcement has expired in the enforcing State, the last available approach for award creditors is to try and enforce the award in another forum where a longer limitation period is provided or in the form of a judgment in certain jurisdictions.

II. Limitation period under the New York Convention: another ground for refusing enforcement?

The New York Convention does not impose any limitation period on enforcement proceedings.[23] As for the grounds for refusal of recognition and enforcement of foreign arbitral awards, Article V contains an exclusive

[23] *See*BORN, *supra* note 7, at 3725.

and narrow list of exceptions to the Contracting State's duty to recognise and enforce foreign arbitral awards, among which a limitation period is not clearly stated.[24] Therefore, a threshold question is whether the New York Convention allows for refusal of enforcement based on expiration of the limitation period.

There are probably two grounds that may justify the imposition of a limitation period on enforcement proceedings. *First*, it is argued that the limitation period may cause a public policy issue, especially where extremely long or extremely short limitation periods could harm vulnerable parties' interest.[25]*Second*, under Article III of the New York Convention, the Contracting States may follow local rules of procedure to enforce foreign arbitral awards. If a limitation period belongs to the enforcing States' "*rules of procedure*," it seems natural for Contracting States to refuse enforcement by reason of the expiration of a limitation period. Therefore, the threshold question turns to two separate questions: *first*, whether the expiration of Contracting States' limitation period constitutes a violation of public policy and *second*, whether the limitation period falls into the scope of "*rules of procedure*".

A. Limitation period as public policy under Article V of the New York Convention

Article V of the New York Convention contains an exclusive list of the grounds for refusing enforcement, among which public policy is the only ground that arguably justifies the application of a limitation period to refuse

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[24] The grounds for refusing enforcement under the New York Convention include: 1) incapacity or invalidity of the arbitration agreement; 2) lack of proper notice of the arbitrator's appointment or lack of an opportunity to present its case; 3) the award deals with matters outside the scope of the arbitration agreement; 4) the tribunal was not composed in accordance with the arbitration agreement; 5) the suspension or setting aside of the award; 6) non-arbitrability; and 7) violation of public policy. *See* New York Convention, *supra* note 4.

[25] Morgan, *supra* note 14, at 115.

enforcement.[26] As mentioned before, inadequate or lengthy limitation periods could prejudice parties' interest, thus raising public policy concerns.[27] A Japanese scholar once noted that, for a foreign judgment whose limitation period has expired, a Japanese court may refuse to enforce it out of public policy concern.[28] Although the enforcement of foreign judgments differs from the enforcement of foreign arbitral awards, the rationale behind the limitation period would be the same, or, at least, can be considered for reference.

Refusing enforcement on the ground of public policy, however, is sometimes debatable. Because even if limitation period may raise public policy concern, it does not mean that the violation of local rules on limitation period equals the violation of public policy. As admitted by the same Japanese scholar earlier mentioned, a foreign judgment that is time-barred by Japanese law may still be enforced in Japan.[29]

To clarify the difference between the violation of local rules on limitation period and the violation of public policy, this article focuses on the scope and objective of public policy under the New York Convention. As noted by a prestigious scholar, public policy is one of the most controversial bases for refusing enforcement of foreign arbitral awards.[30] In most cases, "*public policy is a very unruly horse, and when once you get astride it you never know where it will carry you*".[31] For thisreason, the New York Convention's structure and objectives are "*strongly against the notion that Contracting States would be free to define national public policy expansively*".[32] Accordingly, many national courts tend to interpret public policy narrowly and thus the violation of local

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26 *Seesupra* note 24.
27 *See* Morgan, *supra* note 14, at 115.
28 *See* Toshiyuki Kono, *Country Report Japan*, *in*RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS IN ASIA 114 (Adeline Chong ed., 2017).
29 *Id.* at 114–15, n.56.
30 *See*BORN, *supra* note 7, at 1250.
31 *See* Richardson v. Mellish [1824] 130 Eng. Rep. 294 C.P. (Burrough, J.) (Eng.).
32 *See*BORN, *supra* note 7, at 3662.

mandatory rules does not necessarily constitute the violation of public policy. For instance, a United States federal court once held that refusing enforcement based on public policy is justified only when the "*forum state's most basic notions of morality and justice*" have been violated.[33] Similarly, in *Traxys Europe S.A.* v.*Balaji Coke Industry Pvt Ltd.*,[34] the Australian court considered public policy as the "*fundamental, core questions of morality and justice*" in the forum state.[35] Further, in *Adviso NV* v. *Korea Overseas Constr. Corp.*,[36] the Korean court took a comparable approach, concluding that only when Korea's "*good morality and other social order*" is prejudiced, will the Korean court refusethe recognition and enforcement of the award.[37] Thus, under the above interpretations, public policy is normally described as "*the guardian of the forum state's most basic moral certitude or policies*" and "*the forum state's most basic notions of morality and justice*".[38] Therefore, in the phase of arbitral award enforcement, even though the expiration of a limitation period may violate the Contracting State's law, this does not necessarily constitute a violation of public policy.

B. Limitation periods as "rules of procedure" under Article III of the New York Convention

As earlier mentioned, Article III of the New York Convention provides that Contracting States shall enforce foreign arbitral awards in accordance with the enforcing States' "*rules of procedure*".[39] Whether limitation period falls within the scope of Article III depends on the interpretation of "*rules of procedure*". Generally, "*rules of procedure*" is interpreted as enforcing States'

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33 Parsons & Whittemore Overseas Co. v. Societe Generale De L'Industrie Du Papier (RAKTA), 508 F.2d 969, 974 (2d Cir. 1974) (U.S.).

34 *Traxys Europe SA v Balaji Coke Industry Pvt Ltd(No 2)*[2012] FCA 276 (Austl.).

35 *Id.* ¶ 105.

36 *See* Adviso N.V. v. Korea Overseas Constr. Corp., Supreme Court [S. Ct.], 6363, Feb. 14, 1995 (S. Kor.), *reprinted in* 21 Y.B. COMM. ARB. 612–616 (Albert Jan van den Berg ed., 1996).

37 *Id.* at 614.

38 *See* Byung Chol Yoon & Brian C. Oh, *The Standards for Refusing to Enforce An Arbitral Award on Public Policy Grounds: A Korean Case Study*, 6 ASIAN INT'L ARB. J. 64, 68 (2010).

39 *See* New York Convention, *supra* note 4, art. III.

procedural laws, and therefore, the enforcing State's law shall govern the procedural issues during enforcement.[40] Following this interpretation, if the limitation period is characterised as a procedural matter, the enforcing state is allowed to refuse enforcement of time-barred foreign arbitral awards based on its procedural laws.[41]

Limitation periods, however, are not necessarily a procedural issue. Most civil law jurisdictions, e.g., Germany and the Netherlands, characterise limitation periods as substantive.[42] For States where the limitation period is characterised as substantive, imposing a limitation period on enforcement seems to violate the New York Convention since Article III allows Contracting States to apply only local procedural laws rather than local substantive laws.[43] Therefore,

interpreting "*rules of procedure*" as local procedural laws would lead to a situation of non-uniformity under the New York Convention. An application for enforcement of a foreign arbitral award may be time-barred in Contracting States where limitation periods are characterised as a procedural issue;[44] while that same application would not be refused in Contracting States where limitation periods are characterised as substantive. This situation would "*render established national practices meaningless, especially those that regulate limitation expressly for enforcement of awards*".[45]

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40 *See* Börner, *supra* note 6, at 119.

41 *See* Yugraneft Corp. v. Rexx Mgmt. Corp., [2010] 1 S.C.R. 649, ¶ 16 (Can.) [*hereinafter* "Yugraneft Corp."].

42 Ingeborg Schwenzer & Simon Manner,*The Claim is Time-Barred: The Proper Limitation Regime for International Sales Contracts in International Commercial Arbitration*, 23 ARB. INT'L 293, 296 (2014).

43 Yugraneft Corp., [2010] 1 S.C.R. 649, ¶ 16 (Can.).

44 *Id.*

45 *See* Akter, *supra* note 2, at 87.

In *YugraneftCorpRexx Management Corp.* ["**Yugraneft Corp.**"],[46] the Supreme Court of Canada solved the characterisation issue by interpreting "*rules of procedure*" as the enforcing State's "*domestic law*,"[47] which includes both procedural and substantive laws. The facts of the case are straightforward: Yugraneft won a favourable arbitral award against Rexx Management on September 6, 2002.[48] On January 27, 2006, Yugraneft sought to enforce this arbitral award in Alberta, Canada.[49]Rexx resisted the enforcement, claiming that the two-year limitation period for enforcement as provided under the Alberta Limitation Act has expired.[50] In this case, the first question raised before the Canadian court was whether the New York Convention allows local rules on limitation period provided in Alberta laws to apply. The Canadian court answered affirmatively and reached the conclusion based on three reasons.

First, the Court primarily analysed the context and purpose of the New York Convention to find that it "*was designed to be applied in a large number of States*" and "*intended to interface with a variety of legal traditions*".[51] Judge Rothstein observed that the drafters were fully aware of the divergence in characterising limitation periods among different States when drafting the New York Convention, and the drafters should foresee that the term "*rules of procedure*" under Article III may include limitation periods in States where limitation periods are regarded as procedural.[52] Judge Rothstein then concluded that the drafters did not restrict the States' ability to impose limitation periods on enforcement with the knowledge that some States

46 *See* Yugraneft Corp., [2010] 1 S.C.R. 649 (Can.).
47 *Id.* ¶ 18.
48 *Id.*
49 *Id.* ¶ 3.
50 *Id.*
51 *Id.* ¶ 19.
52 *Id.* ¶ 20.

would do so, showing that the drafters intended to take a "*permissive approach*" to the applicability of the local limitation period.[53]

Second, the Court believed that the imposition of a limitation period on enforcement under the New York Convention accorded with Contracting States' practice. To support this argument, Judge Rothstein referred to two reports conducted by the International Chamber of Commerce ["**ICC**"] and the United Nations Commission on International Trade Law ["**UNCITRAL**"], which indicated that "*at least 53 Contracting States, including both common law and civil law States, subject the recognition and enforcement of foreign arbitral award to some kind of time limit*".[54]

Last but not the least, the Court found subjecting enforcement to limitation periods is also supported by leading scholars in the field of arbitration. Judge Rothstein mentioned that scholars "*appear to take it for granted that Article III permits the application of limitation periods to recognition and enforcement proceedings*," which, in the eyes of the Judge, suggested that the imposition of limitation period on enforcement is not a "*controversial matter*".[55]

From the reasons provided above, it seems the second reason given by Judge Rothstein is the most persuasive one. As already noted by Judge Rothstein, when interpreting an international treaty, the Vienna Convention on the Law of Treaties requires the Court to take Contracting States' "*subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation*" into consideration.[56] Given the fact that many Contracting States have their own limitation periods for enforcement proceedings, it seems unreasonable to deny their practice, especially when

53 *Id.*

54 *See* Yugraneft Corp., [2010] 1 S.C.R. 649, ¶ 21 (Can.) (quoting Int'l Chambers Comm. (ICC), Guide to National Rules of Procedure for Recognition and Enforcement of New York Convention 343–346 (ICC Pub. No. 727, ICC Spec. Supp. 2008)).

55 *See* Yugraneft Corp., [2010] 1 S.C.R. 649, ¶ 22 (Can.).

56 *See* Vienna Convention on the Law of Treaties art. 31(3), May 23, 1969, 1155 U.N.T.S. 331.

some States have specified a limitation period for enforcement proceedings in their domestic laws or case law.[57]

The interpretation of "*rules of procedure*" in *Yugraneft Corp.* justified the application of limitation periods in enforcement proceedings. According to the Court's interpretation, the characterisation of a limitation period in a Contracting State is "*immaterial*,"[58] and Contracting States may refuse to enforce foreign arbitral awards based on their domestic rules on limitation periods.[59] In *Norman Bard et Shirley Bard* v. *Randall S. Appel* ["**Norman Bard**"],[60] the Superior Court of Quebec followed the interpretation in *Yugraneft Corp.*, holding that the Contracting States of the New York Convention are allowed to"*impose local time limits on the recognition and enforcement of foreign arbitral awards if they so wished*".[61]

In summary, the New York Convention can be said to allow Contracting States to refuse enforcement of foreign awards for the expiration of limitation periods. The ground for refusal, however, is not the public policy exception in Article V. This is because, under the New York Convention, the public policy exception mainly focuses on enforcing State's fundamental policy as well as basic morality and social order, while the expiration of limitation can hardly be considered as a violation of such policy or order. The Contracting States, however, can refuse to enforce time-barred awards based on Article III, since, as per what Canada's Supreme Court has decided in the leading case of *Yugraneft Corp.*, "*rules of procedure*" under Article III can be interpreted as including local rules on limitation period.

57 *Seeinfra* Part IV(A).
58 *See* Yugraneft Corp, [2010] 1 S.C.R. 649, ¶ 28 (Can.).
59 *Id.* ¶ 18.
60 *See*Norman Bard et Shirley Bard v. Randal S. Appel, [2015] Q.C.C.S. 4752 (Can. Que.), *reprintedin*41 Y.B. COMM .ARB.355–356 (Albert Jan Van den Berg ed., 2017) [*hereinafter* "Norman Bard"].
61 *Id.* at 356.

III. Law applicable to determine limitation period

Since Contracting States can impose local limitation periods on recognition and enforcement proceedings, the award creditors need to determine what the enforcing State's limitation period is. The first step is to clarify the enforcing State's law applicable to determine limitation periods. According to the practice of Contracting States, there are basically three approaches to determine the applicable law: 1) the *lex fori* approach; 2) the *lex causae* approach; and 3) the *lex arbitri* approach.

A. Lex fori

Many Contracting States determine the limitation period according to the *lex fori* or the law of the forum where enforcement is sought. For instance, in *Yukos Capital S.A.R.L. (Luxembourg)* v. *OAO Tomskneft VNK* ["**Yukos Capital**"],[62] Yukos Capital sought to enforce an ICC arbitral award in Russia. One of the claims that OAO Tomskneft VNK made was that Yukos Capital had missed the deadline for submitting its application for enforcement.[63] The Russian court, applying the three-year limitation period stipulated in Russian law, determined that the limitation period for enforcement has not expired.[64] Similarly, in *Shanghai Jwell Machinery Co. Ltd.* v.*RetechAktiengesellschaft*["**Jwell**"],[65] the Chinese court applied the limitation period stipulated in Chinese Civil Procedure Law to determine whether Jwell's application for enforcement had missed the deadline.[66]

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62 *See* Yukos Capital S.à r.l. (Lux) v. OAO Tomskneft VNK, Postanovlenie VAS RF Tomsk Oblast ot 7 iyulya 2010 g. No. A67- 1438/2010 [Ruling of the Highest Arbitration Court of the District of Tomsk of July 7, 2020, No. A67- 1438/2010] (Russ.), *reprinted in* 35 Y.B. COMM. ARB. 435–437 (Albert Jan van den Berg ed., 2010) [*hereinafter* "Yukos Capital"].

63 *Id.* ¶ 27.

64 *Id.*

65 Shanghai Jwell Machinery Co., Ltd v. Retech Aktiengesellschaft, Guiding Case No. 37 (Jud. Comm. of Sup. People's Ct. Dec. 18, 2014) (China) (transl. *available at*https://cgc.law.stanford.edu/wp-content/uploads/sites/2/2015/09/GC37-English.pdf [*hereinafter* "Jwell"].

66 *Id.* at 6-8.

According to the report conducted by UNCITRAL, the forum laws that regulate the limitation period can be found in a variety of sources including but not limited to arbitration statutes, civil codes or laws of civil procedure, limitation acts, etc.[67] or their equivalents.[68]

B. Lex causae

In jurisdictions where the limitation period is characterised as substantive, the applicable limitation period is determined by the *lex causae*(the law applicable to the merits of the dispute).[69] Courts that take the *lex causae* approach normally determine the applicable limitation period through two steps: *first*, the courts would determine the *lex causae* based on their country's conflict of laws rules[70] and *second*, if the *lex causae*is foreign law, the courts need to apply the foreign law's limitation period to enforce the foreign arbitral award.[71] If the *lex causae* is the law of the enforcing State, then the courts would apply its own substantive rules on limitation periods.[72] Taking Portugal as an example, if the law of Portugal is the *lex causae*, the limitation period for enforcement of foreign arbitral awards before a Portuguese court

67 UNCITRAL Report, *supra* note 10, at 3.
68 *Id.*
69 *See* Bermann, *supra* note 5, at 68.
70 *See* Akter, *supra* note 2, at 90.
71 *Id.*
72 *Id.*

is 20 years.[73] Courts in Bulgaria,[74] Czech Republic,[75] Hungary,[76] Poland,[77] Slovenia,[78]and Uruguay[79] are also said to follow this approach.[80]

When the *lex causae*is foreign law but cannot be proved or ascertained, the enforcing State may apply its own laws on the limitation period. In *Norman Bard*,[81] the Superior Court of Quebec held that the applicable law to the limitation period is the law applicable to the merits of the dispute.[82] In this case, the law governing the disputes was Florida law. However, since the Claimants neither pleaded nor proved the law of Florida, which was supposed to be applied, the Court finally decided to apply the ten-year limitation period provided under Quebec law.[83]

Compared with the *lex fori* approach, *lex causae* may "*create a procedural hurdle and extend the duration of the proceedings*" because the court would need to ascertain the applicable foreign law if the *lex causae* is not the law of the enforcing State.[84]

C. Lex arbitri

Some Contracting States determine the limitation period pursuant to the law of the place where the award was made. Chile and Finland are argued

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73 *See* Bermann, *supra* note 5, at 68.
74 *See* ICC, *ICC Guide to National Rules of Procedure for Recognition and Enforcement of Foreign Awards under the New York Convention*, Bulgaria, ¶ C6, ICC DIGI. LIBR., *availableat*https://library.iccwbo.org/dr-enforcementguide.htm[*hereinafter* "ICC Enforcement Guide"].
75 *See* Akter, *supra* note 2, at 91 (citing ICC, *ICC Guide to National Rules for Recognition and Enforcement of Awards under the New York Convention*, 23 ICC BULL. SPL. SUPP. 10 (2012)[*hereinafter* "ICC Supplement"]).
76 ICC Enforcement Guide, *supra* note 74, Hungary, ¶C6.
77 *Id.* Poland, ¶C6.
78 Bermann, *supra* note 5, at 68.
79 *Id.*
80 *Seeid.*; Akter, *supra* note 2, at 68.
81 *See*Norman Bard, 41 Y.B. COMM .ARB. 355–356 (Albert Jan Van den Berg ed., 2017).
82 *Id.* at 356.
83 *Id.*
84 *See* Akter, *supra* note 2, at 91–92.

to apply *lex arbitri* as the law applicable to the limitation period for enforcement.[85] In addition, the arbitral award will be incapable of being enforced in Romania[86] and Syria[87] if the application for enforcement of an award issued by a New York Convention State is time-barred under the law of that country.[88] The rationale of the *lex arbitri* approach is that "*an award arguably becomes unenforceable if the enforcement time limit in the lex arbitri has expired*".[89] Therefore, the enforcing court would look to the limitation period of the *lex arbitri* to determine whether to enforce the award. It should be noted that not all States haveadopted the *lex arbitri* rule. Case law show the Netherlands is one of the countries that does not follow such approach. In *Kompas Overseas Inc.* v. *OAO SevernoeRechnoeParokhodstvo*["**Kompas Overseas**"], Kompas Overseas Inc. ["**Kompas**"] commenced three separate arbitral proceedings before the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation ["**ICAC**"].[90] In the third arbitral proceeding, the ICAC rendered an award in favor of Kompas on March 26, 2002.[91]OAO SevernoeRechnoeParokhodstvo ["**OAO**"] refused to comply with the

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85 *Id.* at 92; *see also* ICC Enforcement Guide, *supra* note 74, Chile, ¶ C6.

86 ICC Enforcement Guide, *supra* note 74, Romania, ¶ C6. There is a controversy regarding the limitation period for enforcement in Romania. According to the ICC Enforcement Guide, there is no limitation period imposed on the application for enforcement, and a foreign arbitral award would not be enforced if it is time-barred based on the law of the country where the arbitration is seated. However, a scholar once noted that, according to Article 705(1) of the Romanian Civil Procedure Code, a three-year limitation is applicable when award creditors seek the enforcement of a foreign arbitral award. *See* Radu Bogdan Bobei, *Interpretation and Application of the New York Convention in Romania*, *in* RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS: THE APPLICATION OF THE NEW YORK CONVENTION BY NATIONAL COURTS 791 (George A. Bermann ed., 2017).

87 UNCITRAL Report, *supra* note 10, at 22.

88 *See* UNCITRAL Report, *supra* note 10, at 22;*see also* ICC Enforcement Guide, *supra* note 74, Romania, ¶ C6.

89 *See* Akter, *supra* note 2, at 92.

90*See* LJN: BW7066, Rechtbank Amsterdam 10 mei 2012 (Kompas Overseas Inc./OAO Severnoe Rechnoe Parokhodstvo (N. River Shipping Co.)) (Neth.), *reprinted in* 35 Y.B. COMM. ARB. 277, 278 (Albert Jan van den Berg ed., 2012) [*hereinafter* "Kompas Overseas"].

91 *Id.*

award and sought annulment of the arbitral award.[92] On May 19, 2005, after OAO's several unsuccessful attempts to annul the award, the ICAC confirmed that the arbitral award had become final.[93] Kompas then sought enforcement of the arbitral award in the Netherlands. According to Russian law, the limitation period for enforcement of foreign arbitral awards is three years.[94] However, according to the Dutch Civil Code, the limitation period for enforcement in the Netherlands is 20 years.[95] Based on Russian law, OAO claimed the arbitral award was no longer enforceable since the limitation period for enforcement in Russia had expired. The Amsterdam Court of First Instance refused to adopt OAO's argument, holding that "*[e]ven if it is correct that the right of Kompas to enforce the arbitral award in the Russian Federation has expired, this does not mean that this right has expired also under Dutch law*".[96]

IV. Calculation of the limitation period

After clarifying the law applicable to determine limitation period, the award creditors then need to determine the specific limitation period for enforcement in the enforcing State. Three factors would influence the calculation of limitation period: the duration of limitation period, the date from which the limitation period begins to run, and whether there are factors that interrupt, suspend, or extend the limitation period.

A. Duration of limitation period

Contracting States' practice on the limitation period varies significantly. Some jurisdictions do not impose any limitation period on enforcement proceedings; for the States that specify limitation period for enforcement

92 *Id.*
93 *Id.* at 279.
94 ARBITRAZHNO-PROTSESSUALNYI KODEKS ROSSIISKOI FEDERATSII [APK RF] [Code of Arbitration Procedure], art. 246 (Russ.).
95 Kompas Overseas, 35 Y.B. COMM. ARB. 281 (Albert Jan van den Berg ed., 2012).
96 *Id.*

proceedings, the limitation period ranges from three months to 30 years, and the most frequent limitation periods are three, six, and ten years.[97]

A few Contracting States prescribe specific limitation periods for enforcement proceedings. States like Kazakhstan,[98] Kyrgyzstan,[99] Latvia,[100]Lithuania,[101] Russia,[102] Thailand,[103] the U.S.,[104]Ukraine,[105] Uzbekistan,[106] and Vietnam,[107] all impose a three-year limitation period on actions to enforce foreign arbitral awards.

Most commonly, some States' statutes do not impose specific limitation periods on proceedings to recognise and enforce foreign arbitral awards. In this case, there are probably four possibilities for the application of a limitation period.

First, there may be no limitation period for enforcement of foreign arbitral awards, and award creditors may apply for enforcement at any time,

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97 *See* UNCITRAL Report, *supra* note 10; *see also* ICC Enforcement Guide, *supra* note 74.

98 *See*CIVIL PROCEDURE CODE, art. 253(3) (2015) (Kaz.)("The application for issuing an enforcement order shall be filed no later than three years from the date when the term for the voluntary execution of the arbitration award expires.").

99 *See* UNCITRAL Report, *supra* note 10, at 17.

100 *See*CIVIL PROCEDURE LAW, § 636 (1998) (Lat.).

101 *See*CODE OF CIVIL PROCEDURE, art. 387 (2002) (Lith.).

102 *See*ARBITRAZHNO-PROTSESSUALNYI KODEKS ROSSIISKOI FEDERATSII [APK RF] [Code of Arbitration Procedure], art. 246 (Russ.).

103 *See* Arbitration Act, B.E. 2545, § 42 (2002) (Thai.).

104 *See* 9 U.S.C. § 207; *see also*RESTATEMENT (THIRD) OF THE U.S. LAW OF INTERNATIONAL COMMERCIAL ARBITRATION§ 4.30 cmt. (a)(iii).

105 *See* UNCITRAL Report, *supra* note 10, at 23.

106 *See id.* at 24.

107 *See*CODE OF CIVIL PROCEDURE, art. 451 (2015) (Viet). There may be a slip of pen regarding the limitation period in the English version of Vietnam's 2015 Code of Civil Procedure, *available at*https://www.wipo.int/edocs/lexdocs/laws/en/vn/vn083en.pdf. The English version offers a "*3 months*" limitation period. However, according to an article, the limitation period under the 2015 Code of Civil Procedure of Vietnam should be "*3 years*". *See* Thien, *supra* note 1, at 106.

provided the delay is not excessive.[108] Although Contracting States can impose a limitation period on enforcement based on "*rules of procedure*" under Article III of the New York Convention, they are not required to do so.[109] According to an UNCITRAL report, a significant number of States do not impose limitation periods for enforcement of foreign arbitral award, including Algeria, Bahrain, Belgium, Botswana, the Czech Republic, Dominica, Iran, Luxemburg, Malta, San Marino, Saudi Arabia, Slovakia, Sweden, Turkey, Uganda, and Venezuela.[110]

Second, some States determine the limitation period for enforcement by combining statutory law and case law. In some common law countries, the issue of limitation period is governed by their respective limitation acts. Rather than providing a specific limitation period for enforcement of foreign arbitral awards, the limitation acts only provide limitation periods for general causes of action. Under such a circumstance, case law help to clarify the definite limitation period applicable to enforcement proceedings. Taking Canada's Alberta Province as an example, the Alberta Limitation Act provides two main limitation periods for different causes of action: *first*, a ten-year limitation period for the enforcement of a remedial order based on a "*judgment or order for the payment of money*";[111] and *second*, a two-year limitation period for the enforcement of a "*general*" remedial order.[112] The Alberta Limitation Act, however, does not make it clear which limitation period applies to enforcement of foreign arbitral awards. In *Yugraneft Corp.*, the Supreme Court of Canada clarified that an arbitral award is not a remedial order based on a judgment or a court order, which means that an application for enforcement of a foreign arbitral award is subject to the

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[108] E.g., although Israeli law does not impose limitation period for the enforcement, Israeli court may refuse to enforce a foreign arbitral award if there are excessive delays in submitting the application for enforcement. *See* Akter, *supra* note 2, at 92.

[109] *See* BORN, *supra* note 7, at 3727.

[110] *See* UNCITRAL Report, *supra* note 10, at 11–24.

[111] *See* Limitations Act, R.S.A. 2000, c L-12, § 11 (Can.).

[112] *See Id.* § 3.

general two-year limitation period.[113] With the interpretations in *Yugraneft Corp.*, the limitation period for enforcement in Alberta thus has become clear. Some other States, including Brunei,[114]Cayman Islands,[115] Ireland,[116] Kenya,[117] Malaysia,[118] Singapore,[119] and the United Kingdom,[120] also belong to this category.

Third, some States tend to impose the limitation period that is applicable to the enforcement of judgments by analogy.[121] Taking China as an example, Article 239 of Chinese Civil Procedure Law only provides a two-year limitation period for the enforcement of foreign judgments.[122] As for the limitation period for the enforcement of foreign arbitral awards, the Chinese Supreme People's Court provided that the limitation period applicable to enforcement of foreign judgment also applies to foreign

113 *See* Yugraneft Corp., [2010] 1 S.C.R. 649, ¶ 44 (Can.).
114 Limitation Act, (2000) Cap. 14, 34 § 46 (Brunei).
115 Limitation Law (1996 Revision), No. 12 of 1991, § 9 (Cayman Is.).
116 Statute of Limitations, 1957 (Act No. 6/1957), §§ 11, 75 (Ir.); *see* UNCITRAL Report, *supra* note 10, at 17.
117 Limitation of Actions Act (Rev. 2012), Cap. 22 § 4(1) (Kenya).
118 Limitation Act 1953 (1981 Revision), No. 254, § 6 (Malay.).
119 Limitation Act, Cap. 163, § 6(1)(c) (Sing.).
120 Limitation Act 1980, c. 58, § 7 (Eng.).
121 *See*BORN, *supra* note 7, at 3725.
122 *See* Civil Procedure Law of the People's Republic of China (promulgated by Order No. 44 of the President of the People's Republic of China, Apr. 9, 1991) (2017 revision), art. 239 (China) ("The limitation period for submission of an application for enforcing judgment shall be two years. The termination or suspension of the limitation period for submission of an application for enforcement shall be governed by the provisions of law on the termination or suspension of the limitation of action.").

arbitral awards.[123] In Cameroon,[124] Colombia,[125] Croatia,[126] Estonia,[127] Lebanon,[128] Luxembourg,[129] there is no specific limitation period applicable to the action for recognising and enforcing foreign arbitral awards, and it is argued that limitation period applicable to actions for the enforcement of judgments also applies to foreign awards.

Fourth, the limitation period becomes far more complicated in civil law jurisdictions. Some civil law jurisdictions have argued to apply the general limitations period, mostly found in the civil code or its equivalent, to actions for recognition and enforcement proceedings. These States include Argentina,[130] Bolivia,[131] Costa Rica,[132] Panama,[133] Peru,[134] and Qatar.[135] Some civil law countries, however, believe that the limitation period is a substantive issue and will be governed by the law applicable to the merits of the dispute rather than the law of the forum.[136] Thus, thegeneral limitation period provided in their civil codes will only apply when their domestic law governs the merits of the arbitral disputes.[137] In Switzerland,

123 *See* Interpretations of the Supreme People's Court concerning the "Civil Procedure Law of the People's Republic of China", art. 547 (China) (the time period for a party concerned to apply for recognition and enforcement of a legally binding judgment or ruling rendered by a foreign court or a foreign arbitration award shall be governed by Article 239 of the Law of Civil Procedure.).

124 *See* ICC Enforcement Guide, *supra* note 74, Cameroon, ¶C6.

125 *Id.* Colombia, ¶C6.

126 *Id.* Croatia, ¶C6.

127 *Id.* Estonia, ¶C6.

128 *Id.* Lebanon, ¶C6.

129 *Id.* Luxembourg, ¶C6.

130 Bermann, *supra* note 5, at 68.

131 ICC Enforcement Guide, *supra* note 74, Bolivia, ¶C6.

132 *Id.* Costa Rica, ¶C6.

133 *Id.* Panama, ¶C6.

134 *Id.* Peru, ¶C6.

135 *Id.* Qatar, ¶C6. *See also*Kompas Overseas, 35 Y.B. COMM. ARB. 277–281 (Albert Jan van den Berg ed., 2012) (wherein the court decided the 20-year limitation period under art. 3:324 BW (Neth.) applied to application for enforcement of foreign arbitral award.).

136 Akter, *supra* note 2, at 90.

137 *Id.*

for example, if Swiss law is the *lex causae*, the application for enforcement of a foreign arbitral award should be filed within ten years.[138] Pursuant to the German Civil Code, the applicable limitation period for enforcement of foreign arbitral award is argued to be 30 years if German law is the *lex causae*.[139] States like Bulgaria, Cyprus, Hungary, and Poland also take this approach.[140]

B. Commencement of limitation period

Regarding the date that limitation periods begin to run, Contracting States' practice also varies greatly. Inconsistencies may even exist within the same country.

i.Accrual of cause of action

In some common law countries, the limitation period starts to run when the cause of action accrues. Taking the U.K. as an example, Section 7 of the Limitation Act 1980 provides that the action to enforce an award shall not be brought after the expiration of six years from the date on which the cause of action accrued.[141] Lagos State of Nigeria also requires that the limitation period for enforcement begin to run from the date on which the cause of action accrued.[142] A question that arises here is when does the cause of action "*accrue*"? Regarding the interpretation of this term, English and Nigerian courts have taken different approaches thus far.

English courts hold that an arbitral award creates a new cause of action and the cause of action accrues when the award debtor fails to perform its obligation under the award. In *AgrometMotoimport Ltd.* v.*Maulden Engineering*

138 *See*SCHWEIZERISCHES ZIVILGESETZBUCH [ZGB], CODE CIVIL [CC], CODICE CIVILE [CC] [CIVIL CODE] Dec. 10, 1907, SR 210, RS 210, art. 137(2) (Switz.) [*hereinafter* "Swiss Civil Code"].

139 *See*BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE], § 197(1)(2) (Ger.) [*hereinafter* "German Civil Code"].

140 *See* ICC Enforcement Guide, *supra* note 74.

141 *See* Limitation Act 1980, c. 58, § 7 (Eng.).

142 Limitation Law of Lagos State (1994) Cap. 118, § 8(1)(d) (Nigeria).

Co. Ltd. ["**Agromet**"],[143] the award creditor obtained a favourable award in 1980 and sought enforcement in 1983. The award debtor argued that cause of action accrued in 1976 when the Defendant refused to obey the distributorship agreement, and therefore, the award creditor's application was time-barred by the six-year limitation period.[144] Judge Octon opined that the action to enforce an award is an independent cause of action which is distinct from the cause of action for initiating arbitration proceedings.[145] Thus, the cause of action under Section 7 of the Limitation Act 1980 accrued when the Defendant failed to honour the award. In *International Bulk Shipping and Services Ltd.* v. *Minerals and Metals Trading Corporation of India* ["**International Bulk Shipping**"],[146] the Court held that "*the six year limitation period began whenever the claimants became entitled to enforce the award; in legal terms, when his cause of action arose*".[147] Seven years later, in *Good Challenger Navegante S.A.* v.*Metalexportimport S.A.* ["**Good Challenger**"],[148] the Court of Appeal reaffirmed the holdings in *Agromet*as a "*common ground*".[149] The Court clarified that the limitation period for enforcement starts to run "*from the date when the paying party is in breach of its implied obligation to pay the award*,"[150] rather than "*from the date upon which the award is made or published*".[151]

Unlike the English courts, the Nigerian courts maintain that the cause of action for enforcement proceedings accrues when the cause of action for

143 *See* Agromet Motoimport Ltd. v. Maulden Engineering Co. (Beds) Ltd. [1985] 2 All ER 436 (Eng.), *reprinted in* 12 Y.B. COMM. ARB. 523–525 (Albert Jan Van den Berg ed., 1987) [*hereinafter* "Agromet Motoimport"].

144 *Id.* at 523.

145 *Id.* at 525.

146 Int'l Bulk Shipping & Servs. Ltd. v. Mins. & Metals Trading Corp. of India [1996] 1 All ER 1017 (Eng.) [*hereinafter* "Int'l Bulk Shipping and Services"].

147 *Id.* at 118.

148 Good Challenger Navegante S.A. v. Metalexportimport S.A. [2003] EWCA (Civ.) 1668 (Eng.) [*hereinafter* "Good Challenger"].

149 *Id.*¶9, citing Agromet Motoimport, 12 Y.B. COMM. ARB. 523–525 (Albert Jan Van den Berg ed., 1987).

150 *Id.*

151 *Id.*

initiating arbitration proceedings arises. In *Murmansk Steve Steamship* v. *Kano Oil Millers Ltd.* ["**Murmansk**"],[152] the award creditor, in 1972, sought to enforce a foreign arbitral award rendered in 1966. The original dispute arose in 1964. The Supreme Court of Nigeria refused to enforce the award on the ground that the limitation period started to run in 1964, and thus the six-year limitation period for enforcement had already expired.[153] In 1977, the Supreme Court of Nigeria was again invited to determine when the cause of action for enforcement accrued in *City Engineering Ltd.,* v. *Federal Housing Authority*["**City Engineering**"],[154] and the Court followed the approach taken in *Murmansk*, holding that the limitation period begins from the date on which the cause of action for arbitration arises.[155]

In *Murmansk* and *City Engineering*, although the Supreme Court of Nigeria only addressed the accrual of the cause of action issue in the context of Lagos State's Limitation Act, it is believed these judgments reflect Nigeria's general judicial position towards limitation periods.[156] Nigeria's interpretation regarding the accrual of cause of action has been criticised. As Judge Octon mentioned in *Agromet*, interpreting accrual of the cause of action as the original breach of contract would lead to a "*surprising result*"[157]: the limitation period for enforcement would have already expired if an arbitral award was made more than six years after the breach.[158] The Court in *International Bulk Shipping* also observed that "*it cannot seriously be argued that the cause of action arose before the awards were published*".[159] The Nigerian Court's interpretation may also harm arbitration's role as an efficient dispute

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152 *See* Murmansk State S.S. Line v. Kano Oil Millers Ltd. [1974] All NLR 893 (Nigeria), *reprinted in* 7 Y.B. COMM. ARB. 349–350 (Pieter Sanders ed., 1982).

153 *Id.* at 350.

154 City Eng'g Ltd. v. Fed. Hous. Auth. [1997] 9 NSCC 590 (Nigeria).

155 *Id.*

156 *See*Adebayo Adaralegbe, *Limitation Period for the Enforcement of Arbitral Award in Nigeria*, 22(4) ARB. INT'L 613, 623 (2006).

157 Agromet Motomport, 12 Y.B. COMM. ARB. 525 (Albert Jan Van den Berg ed., 1987).

158 *Id.*

159 *See* Int'l Bulk Shipping, [1996] 1 All ER 1017, 1022 (Eng.).

resolution mechanism since the losing party, who would be reluctant to enforce the unfavourable award, may take every measure to keep the arbitration proceeding running so as to have the limitation period for enforcement expire.[160]

While the Nigerian courts have not changed their position reflected in *Murmansk* and *City Engineering,* the legislators of Nigeria seem determined to take a new approach. On February 1, 2018, the Nigerian Senate passed the Arbitration and Conciliation Act (Repeal and Enactment) Bill to amend the existing Nigerian Arbitration and Conciliation Act.[161] Regarding the calculation of limitation period for enforcement of foreign arbitral award, the Bill suggested exclusion of the *period between the commencement of the arbitration and the date of the award*".[162] In this way, even if the limitation period for enforcement started to run from the date that the dispute leading to arbitration arose, the "*surprising result*" that Judge Octon worried about would no longer exist.

In addition to the U.K. and Nigeria, Australia,[163] Brunei,[164] Cayman Islands,[165] Ireland,[166] Kenya,[167] Malaysia,[168] Singapore,[169] and Trinidad and

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160 *See* Adaralegbe, *supra* note 156, at 621.

161 Dr. Ademola Bamgbose, *The proposed amendment of Nigeria's Federal Arbitration Law could see the arbitration landscape in Nigeria improve significantly,* PRACTICAL L. BLOG (Feb. 20, 2020), *available at*,http://arbitrationblog.practicallaw.com/the-proposed-amendment-of-nigerias-federal-arbitration-law-could-see-the-arbitration-landscape-in-nigeria-improve-significantly/.

162 *Id.*

163 E.g., *Limitation Act 1985*, s 11(1) (Austl.); *Limitation Act 1969No 31* (NSW) s 20(1); *Limitation of Actions Act 1974* (Qld) s 10(c).

164 Limitation Act (2000) (Cap. 14), § 11 (Brunei).

165 Limitation Law (Revision 1996), No. 12 of 1991, § 9 (Cayman Is.).

166 Statute of Limitations, 1957 (No. 6/1957), §§ 11, 75 (Ir.). *See also* UNCITRAL Report, *supra* note 10, at 17.

167 Limitation of Actions Act (Rev. 2012), Cap. 22§4(1) (Kenya).

168 Limitation Act 1953 (1981 Revision), No. 254, § 6(1) (Malay). *See also* UNCITRAL Report, *supra* note 10, at 18.

169 Limitation Act, Cap. 163, § 6(1)(c) (Sing.).

Tobago[170] also calculate the limitation period from the date when the "*cause of action accrued*". In *Antclizo Shipping Corp.* v. *Food Corp. of India*,[171] the Supreme Court of Western Australia held that the "*limitation period begins to run when award debtor fails to perform payment obligation under the award within a reasonable period*".[172] In *Hallen* v. *Angleda*,[173] the Court of New South Wales also mentioned that the six-year limitation period[174] is "*not concerned with a limitation on components ofthe cause of action giving rise to the arbitration, but with the cause of action to enforce an Award*".[175] As for other countries like Brunei,[176] Cayman Islands, Ireland, Kenya, Malaysia, Singapore,[177] and Trinidad and Tobago,[178] for the lack of case law, it is not clear which approach they follow to determine when the cause of action "*accrued*".

ii.The discoverability rule

170 Limitation of Certain Actions, Cap. 7:09, § 3(1)(b) (Trin. & Tobago).

171 *Antclizo Shipping Corp. v Food Corp. of India* [1998] WASC 342 (Austl.).

172 Richard Garnett & Michael Pryles, *Recognition and Enforcement of Foreign Awards under the New York Convention in Australia and New Zealand*, 25 J. INT'L ARB. 899, 902 (2008).

173 *Hallen v Angledal* [1999] NSWSC 552 (Austl.) [*hereinafter* "Hallen"].

174 *Limitation Act 1969 No 31* (NSW) s 20 (Austl.).

175 Hallen, [1999] NSWSC 552, ¶¶ 34–36 (Austl.).

176 The limitation period for enforcement in Brunei is unclear. Brunei's Limitation Act provides that "an action to enforce an award ... shall not be brought after the expiration of six years from the date on which the cause of action accrued". According to the ICC Enforcement Guide, the six-year limitation period in Brunei starts to run "from the date on which the judgment became enforceable". *See* ICC Enforcement Guide, *supra* note 74, Brunei, ¶C6. However, as per the UNCITRAL report, there is no limitation period for enforcement of foreign arbitral award in Brunei. See UNCITRAL Report, *supra* note 10, at 12.

177 When a limitation period begins to run is also debatable in Singapore. The ICC Enforcement Guide indicates that it starts "from the date on which it becomes binding on the parties". *See* ICC Enforcement Guide, *supra* note 74, Singapore, ¶C6. The UNCITRAL Report states the limitation period begins to run from the date when the arbitral award is made. See UNCITRAL Report, *supra* note 10, at 22.

178 Trinidad and Tobago is said to follow the United Kingdom's approach in Agromet Motoimport, 12 Y.B. COMM. ARB. 523–525 (Albert Jan Van den Berg ed., 1987). *See* UNCITRAL Report, *supra* note 10, at 23.

The discoverability rule is also considered by some courts to determine the commencement of limitation period.[179] Under the discoverability rule, the limitation period begins to run when the award creditor discovers that the award debtor has assets or appears in the enforcing state.[180]In *Jwell*,[181] Shanghai Jwell, the award creditor, sought to enforce an award made by the China International Economic and Trade Arbitration Commission ["**CIETAC**"] on September 18, 2006. After an unsuccessful attempt for enforcement before a Swiss court, Jwell discovered that the award debtor's machinery was on exhibition in Shanghai on July 30, 2008. On the same day, Jwell applied to a Shanghai court to enforce the award.[182]Retech objected to the enforcement by claiming that Jwell's application for enforcement has exceeded the six-month limitation period under Chinese Civil Procedure Law.[183] The Shanghai court held that under Chinese law the award creditors obtain the right to request civil compulsory enforcement of an arbitral award when the award debtor fails to perform the obligation under that award.[184] Thus, enforcement jurisdiction is the basis and precondition of an award creditor's right to request civil compulsory enforcement.[185] The Court stated that the Shanghai court did not obtain enforcement jurisdiction until July 30, 2008 since neither the award debtor nor its property appeared in China before then. The Court concluded that the limitation period for enforcement began to run when the court's enforcement jurisdiction was confirmed, which was the date on which the award creditor discovered the property available for enforcement in China.[186] In the end, the Shanghai court decided that the limitation period

179 Akter, *supra* note 2, at 93.
180 *Id.*
181 Jwell, Guiding Case No. 37 (Jud. Comm. of Sup. People's Ct. Dec. 18, 2014) (China).
182 *Id.* at 4.
183 *Id.*
184 *Id.* at 7
185 *Id.*
186 *Id.* at 8.

began to run on July 30, 2008 and Jwell's application for enforcement was not time-barred.

It should be noted that the discoverability rule followed by the Shanghai court in *Jwell* does not mean it would apply to all enforcement proceedings before Chinese courts. According to the Chinese Civil Procedure Law, the two-year limitation period shall be calculated from the last day of the period specified by the legal document for its performance; if the legal document specifies that it shall be performed in separate stages, the time limit shall be calculated from the last day of the period specified for each stage of performance.[187]

The Supreme Court of Canada also adopted the discoverability rule. In *Yugraneft Corp.*, Yugraneft won a favourable arbitral award on September 6, 2002 and applied for enforcement on January 27, 2006.[188] The Court reasoned that:

> "*[...] it is not infrequent for the parties to an international arbitration to have assets in a number of different states or jurisdictions within a federal state. An arbitral creditor cannot be presumed to know the location of all of the arbitral debtor's assets. If the arbitral creditor does not know, and would have no reason to know, that the arbitral debtor has asset in a particular jurisdiction, it cannot be expected to know that recognition and enforcement proceedings are warranted in that jurisdiction. Thus...once an arbitral creditor had learned, exercising reasonable diligence, that the arbitral debtor possessed assets in that jurisdiction.*"[189]

iii.The date when the award is made

[187] Civil Procedure Law of the People's Republic of China (promulgated by Order No. 44 of the President of the People's Republic of China, Apr. 9, 1991) (2017 revision), art. 239. (China).

[188] Yugraneft Corp., [2010] 1 S.C.R. 649, at ¶ 2–3(Can.).

[189] *Id.* ¶61.

Some States calculate the limitation period from the date on which the arbitral award is rendered or made. According to the ICC Enforcement Guide, Jordan[190] and Kuwait[191] provide a 15-year limitation period from the date of the issuance of the award. Peru requires a ten-year limitation period from the date on which the foreign award is rendered.[192] Similarly, in Italy, the limitation period for filing an application to enforce a foreign arbitral award begins to run from the date on which the award is made.[193]

Under the Federal Arbitration Act ["**FAA**"] of the U.S., an action to enforce a foreign New York Convention award in the U.S. is subjected to a three-year limitation period, beginning to run when the award is made.[194] The disputes surrounding this provision mainly focus on the meaning of the word "*made*". In *Seetransport Wiking Trader Schiffarht-gesellschaft MBH & Co.* v.*NavimpexCentralaNavala*["**Seetransport Wiking**"],[195] the Court of Arbitration of the ICC issued interim and final awards in favour of Seetransport Wiking Trader Schiffarht-gesellschaft MBH ["**Seetransport**"] on November 2, 1982 and March 26, 1984, respectively. Dissatisfied with the outcome, NavimpexCentralaNavala ["**Navimpex**"] appealed to the Court of Appeal of Paris for annulment, and the same was dismissed on March 4, 1986.[196] Later, on March 28, 1988, Seetransport sought to enforce the ICC award in the U.S.[197] Regarding the question of whether

190 ICC Enforcement Guide, *supra* note 74, Jordan, ¶ C6.
191 *Id.* Kuwait ¶C6.
192 *Id.* Peru ¶C6.
193 Bermann, *supra* note 5, at 67. When the limitation period starts to run seems to be debatable in Italy. According to the ICC Enforcement Guide, the limitation period for enforcement in Italy is ten years "from the date on which a court action can be brought". *See* ICC Enforcement Guide, *supra* note 74, Italy, ¶ C6.
194 *See* 9 U.S.C. § 207. *See also*RESTATEMENT (THIRD) OF THE U.S. LAW OF INTERNATIONAL COMMERCIAL ARBITRATION § 4.30 cmt. (a)(iii).
195 *See* Seetransport Wiking Trader Schiffarhtsgesellschaft MBH & Co., Kommanditgesellschaft v. Navimpex Centrala Navala, 989 F.2d 572, 581 (2d Cir. 1993) (U.S.).
196 *Id.*
197 *Id.*

Seetransport's application for enforcement was time-barred, Seetransport argued the word "*made*" means "*became final*," which in the present case is the date on which the Paris court dismissed Navimpex's appeal.[198]Navimpex contended that an award is "*made*" when the award is decided by the arbitrators.[199] The U.S. court, by analysing the term's literal meaning under the FAA, finally accepted Navimpex's interpretation and found the application for enforcement to be time-barred.[200]

iv.<u>The date when the award comes into force</u>

Some other States calculate the limitation period from the date that the award comes into force. For example, Vietnam's law provides the time limit is running from the day when the award enters into force.[201] Similarly, in *Yukos Capital*, the Arbitrazh (Commercial) Court of the Tomsk District of Russia decided that foreign arbitral awards may be presented for mandatory enforcement no later than three years from the date on which it came into force.[202] The limitation period in Latvia also starts to run from the day when the award has lawful effect.[203]

v.<u>The date when award creditors receive the award</u>

In some jurisdictions, the limitation period does not run until the award creditor receives the award. For instance, in *Noy Vallesina Engineering Spa* v. *Jindal Drugs Limited Company* ["**Noy Vallesing**"],[204] the High Court of Bombay applied a three-year limitation period for the recognition and enforcement of an ICC award that began to run from the day on which the prevailing party received the award, rather than the day on which the award

198 *Id.* at 581.
199 *Id.*
200 *Id.*
201 *Id.*
202 *See*Yukos Capital, 35 Y.B. COMM. ARB. 437 (Albert Jan van den Berg ed., 2010).
203 *See*UNCITRAL Report, *supra* note 10, at 18.
204 *See* Noy Vallesina Eng'g Spa v. Jindal Drugs Ltd. Co., 2006 (5) Bom CR 155, ¶ 10 (India) [*hereinafter* "Noy Vallesina"].

entered into force.[205] In Mexico, if the ten-year limitation period is applied for enforcement of foreign arbitral award, it will begin running from the date the final award is notified to the party requesting enforcement of the award.[206] According to one scholar, the limitation period in France also begins to run from the date of notification of the award to the parties.[207]

vi. Other methods

In addition to the methods mentioned above to calculate the commencement of limitation periods, there are still other approaches taken in different jurisdictions. In Thailand, the limitation period starts to run when the award becomes enforceable.[208] Albania requires that limitation period starts running from the date the award becomes final.[209] Costa Rica is unusual in making the date on which the limitation period begins to run depend on the date the award becomes binding under the *lex arbitri*.[210] According to the law of Ecuador, the award creditor needs to first apply for recognition within ten years from the moment the award becomes *res judicata* in accordance with the law of the place of arbitration.[211] The award creditor can then seek enforcement within ten years from the moment the award is recognised in Ecuador.

C. Interruption, suspension, and extension of the limitation period

Whether there are factors that interrupt, suspend, or extend the limitation period also matters significantly in determining the limitation period for enforcement. However, both Contracting States' legislation and relevant case law seldom provide detailed information regarding the interruption,

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205 *Id.* ¶ 10 (India).
206 ICC Enforcement Guide, *supra* note 74, Mexico, ¶ C6.
207 *See* Akter, *supra* note 2, at 90.
208 Thien, *supra* note 1, at 104.
209 ICC Enforcement Guide, *supra* note 74, Albania, ¶ C 6.
210 *Id.* Costa Rica, ¶ C6.
211 *Id.* Ecuador, ¶ C6 citing Civil Code, arts. 2414, 2415 (Ecuador).

suspension, and extension of limitation periods. Most of the relevant discussions can only be found in particular cases or academic literature.

Interruption of the limitation period means that a new limitation period begins after the original one was interrupted by some factor.[212] Such interruption may happen due to the award debtor's acknowledgement or partial payment.[213] In *Good Challenger*,[214] one of the issues before the Appeal Court was whether a 1998 telex message from the losing party agreeing to honour the award amounted to a written and signed acknowledgement within the meaning of the Limitation Act 1980 so as to bring the enforcement action within the time-bar set by the statute. The Court resolved the issue in the affirmative.

In addition, an award creditor's application for enforcement also constitutes an interruption of the limitation period. In *LuganaHandelsgesellschaftmbH*v. *OAO Ryazan Metal-Ceramic Instrument Factory*,[215] the Russian court decided the limitation period was interrupted when Lugana "*made submission of a statement of claim*" for enforcement.[216] In *Norman Bard*,[217] the award creditor applied to the Quebec Court on June 1, 2015 to enforce an award rendered on December 4, 2002.[218] Appel, the award debtor, was declared bankrupt in 2003. On October 2, 2003, Norman Bard, the award creditor, obtained a judgment from the Bankruptcy Court for the Eastern District of New

212 *Id.*

213 *See* Akter, *supra* note 2, at 93; *see also* Lafi Mohammad Mousa Daradkeh, Recognition and Enforcement of Foreign Commercial Arbitral Awards Relating to International Commercial Disputes: Comparative Study (English and Jordanian Law) 93 (Feb. 2005) (unpublished Ph.D. dissertation, University of Jordan), *available at*http://etheses.whiterose.ac.uk/494/2/DX231171.pdf.

214 *See*Good Challenger, [2003] EWCA (Civ.) 1668 (Eng.).

215 *See* Lugana Handelsgesellschaft mbH (Ger.) v. OAO Ryazan Metal-Ceramic Instrument Factory (Russ.) ot 2 fevralya 2010 g. No. 13211/09 [Ruling of the Presidium of the Highest Arbitration Court of the Russian Federation of February 2, 2010, No. 13211/09], *reprinted in* 35 Y.B. COMM. ARB. 429–431 (Albert Jan van den Berg ed., 2010).

216 *Id.*

217 *See* Norman Bard, 41 Y.B. COMM. ARB. 356 (Albert Jan Van den Berg ed., 2017).

218 *Id.*

York, stating that Appel's bankruptcy did not exempt him from his obligation under the award ["**Bankruptcy Judgment**"].[219] According to the Quebec Civil Code, the filing of a judicial application before the expiry of the prescriptive period constitutes a civil interruption.[220] The Superior Court of Quebec held that Norman Bard's application for the Bankruptcy Judgment constitutes "*filing of a judicial application*"[221] under the Quebec Civil Code, and therefore, interrupts the limitation period for enforcement of the arbitral award.

Suspension of limitation period may occur when award creditors withdraw their application for enforcement. In *O'KEY Logistics LLC* v. *Guangdong SouthFortune Import & Export Co., Ltd.*,[222] O'KEY Logistics sought to enforce an arbitral award before a Chinese court. The award was made on December 8, 2010. On April 19, 2012, O'KEY Logistics first filed an application to enforce the award. Later, on November 5, 2012, O'KEY withdrew the application for the reason that it would take a long time to get the relevant evidence certificated and notarised. On January 24, 2013, more than two years after the award was made, O'KEY Logistics submitted its application for enforcement again.[223] The Guangzhou Intermediate People's Court held that O'KEY's withdrawal of application for enforcement led to the suspension of the limitationperiod. Therefore, O'KEY's application filed on January 24, 2013 did not exceed China's two-year limitation period under the Chinese Law of Civil Procedure.

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219 *Id.*

220 *See* Civil Code of Quebec, S.Q. 1991, c. 64, art. 2892 (Can.) ("The filing of a judicial application before the expiry of the prescriptive period constitutes a civil interruption, provided the demand is served on the person to be prevented from prescribing not later than 60 days following the expiry of the prescriptive period.").

221 Norman Bard, 41 Y.B. COMM. ARB. 355–356 (Albert Jan Van den Berg ed., 2017).

222 *See* O'KEY Logistics LLC v. Guangdong SouthFortune Import & Exp. Co., Ltd., (2013) Sui Zhongfa Minsi Chuzi No. 12 (The Guangzhou Intermediate People's Court of Guangzhou Dec. 3, 2013) (China).

223 Id. ¶ F.

In the U.S., the three-year limitation period for recognition of New York Convention awards is subject to the federal doctrine of equitable tolling. A limitation period can be tolled if the award debtor has wrongfully impeded the award creditor's ability to seek recognition, or if extraordinary circumstances prevented the award creditor from seeking recognition despite diligent efforts.[224]

Extension of limitation period happens after the original limitation period expires under certain circumstances. One scholar mentioned that one of the circumstances that extends the limitation period is when the award debtor gives a false statement about its financial circumstances or its assets.[225]

V. A call for more certain and predictable limitation periods in international commercial arbitration

Parts III and IV of this article reveal how diverse the legislation and practices are among Contracting States. The diversified legislation and practices can influence an award creditor's right for remedy, especially when the award creditor's application for enforcement is time-barred. Furthermore, it may impact arbitration's status as an effective dispute resolution mechanism since all the advantages of arbitration, e.g., "*expedition, efficiency, convenience of enforcement*," will be less attractive to commercial parties when the arbitral award cannot be enforced due to varying and unclear practices regarding limitation periods in different states.[226] In Part V(A), this article argues that the ideal approach is to provide a uniform limitation period in international instruments. Part V(B) agrees with Akter's proposal that national legislators shall specify the

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[224] *See* Everplay Installation Inc. v. Guindon, 2009 U.S. Dist. LEXIS 113054 (D. Colo. Dec. 2, 2009), 2009 WL 4693884 (D. Colo. Dec. 2, 2009) (U.S.).

[225] *See* IHAB AMRO, RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS IN THEORY AND IN PRACTICE: A COMPARATIVE STUDY IN COMMON LAW AND CIVIL LAW COUNTRIES 408 (2d. 2014).

[226] *See* Morgan, *supra* note 14.

limitation periods applicable to the enforcement of foreign arbitral awards in their domestic legislation. Part V(C) suggests that award creditors must take the limitation period into serious consideration when applying for enforcement before foreign courts. By doing so, when the limitation period for enforcement has expired pursuant to enforcing State's law, the award creditor can still try to enforce the award in another forum or enforce the award in the form of a judgment.

A. The ideal approach: uniform limitation period in an international instrument

For certainty and predictability, some scholars and institutions have urged for a uniform limitation period for the enforcement of foreign arbitral award in international instruments. This suggestion has been considered by the Working Group on International Contract Practices ["**Working Group**"] which has provided two approaches to include a limitation period provision in the Model Law on International Commercial Arbitration ["**Model Law**"].

The first approach is providing a uniform five-year limitation period for enforcement of foreign arbitral awards, along with the conditions that calculate the running and cessation of the limitation period. This approach needs to consider "*whether a request to a court for enforcement in any State should cause the cessation of the running of the limitation period or whether the cessation is to be confined only to the State where the request for enforcement is made*".[227] Following this approach, the Working Group designed the following draft provision:

> "*Article G, Alternative A*
>
> *(1) The limitation period for enforcement of the arbitral award shall be [five] years from the date when the award was received by the party requesting the*

[227] *See*U.N. Secretariat, Model Law on International Commercial Arbitration: Possible Further Features and Draft Articles of a Model Law, ¶ 42, U.N. Doc. A/CN.9/WG/II/WP.41 (Jan. 12, 1983).

enforcement. The limitation period shall cease to run when that party requests a court in any State that the arbitral award be enforced, provided that he has taken all reasonable steps to ensure that the other party is informed of the request for enforcement.

(2) Where enforcement proceedings have ended without success for reasons other than the merits of the request for enforcement, the limitation period shall be deemed to have continued to run. If, at the time such enforcement proceeding ended, the limitation period has expired or has less than one year to run, the party requesting enforcement shall be entitled to a period of one year from the date on which the enforcement proceeding ended."[228]

The second approach suggests a fixed limitation period which would run continuously without a possibility of cessation or extension of its running.[229] A draft provision of this approach suggested by the Working Group provides as follows:

"*Article G, Alternative B*

Enforcement of the arbitral award may not be requested after [ten] years from the date when the award was received by the party requesting the enforcement."[230]

Reaching a uniform limitation period for enforcement of foreign arbitral awards is not easy. As noted by the Working Group, "*many legal systems already had rules on the period for enforcement of arbitral awards, either by assimilating for this purpose arbitral awards to court judgments or by special legislation. Harmonization of these rules would be difficult to achieve since they were based on the differing national policies closely linked to the procedural law as aspects of States*".[231]

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228 *Id.* ¶ 45.
229 *Id.* ¶ 44.
230 *Id.* ¶ 45.
231 *See*HOWARD M. HOLTZMANN& JOSEPH NEUHAUS, A GUIDE TO THE UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION: LEGISLATIVE HISTORY AND COMMENTARY 1157 (1989).

Due to the consideration of national policies behind the limitation period, most international treaties seldom provide a uniform limitation period for enforcement. Rather, they prefer to leave this issue to be determined by the Contracting States.

The difficulty in achieving a uniform limitation period is also reflected in the Draft New York Convention, presented by Professor Van den Berg in 2008, in which a limitation period for enforcement of foreign arbitral awards is not included. Under the section "*Provisions Not Included in the Draft Convention*," it is explained that the limitation periods vary considerably among States, ranging from six months in China to 20 years in the Netherlands.[232]

B. <u>The practical approach: providing a clear and reasonable limitation period in domestic law</u>

Many States do not specify the limitation period for enforcement of foreign arbitral awards in domestic laws, making the limitation period for enforcement a highly controversial issue. This situation has arisen frequently in India. Article 136 of the Indian Limitation Act 1963 provides a 12 year limitation period for the "*execution of any decree of any civil court*" when the decree becomes enforceable.[233] Meanwhile, Article 137 stipulates that for any other application for which no limitation period is provided elsewhere, the limitation period is three years from the time when the right to apply accrues.[234] As a result, which limitation period applies to the enforcement of foreign arbitral award has become a controversial issue among the Indian courts.

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[232] *See*ALBERT JAN VAN DEN BERG, HYPOTHETICAL DRAFT CONVENTION ON THE INTERNATIONAL ENFORCEMENT OF ARBITRATION AGREEMENTS AND AWARDS 15 (2009), *available at*http://newyorkconvention1958.org/index.php?lvl=notice_display&id=2873&opac_view=1.

[233] Limitation Act, No. 36 of 1963, art. 136 (India).

[234] *Id.* art. 137.

The High Courts of Bombay, Madras, and Delhi have discussed the applicable limitation period in separate cases but drawn different conclusions. In *Noy Vallesina*, the High Court of Bombay held that an arbitral award is "*deemed to be a decree only when the court to which the application is made for enforcement of the foreign award is satisfied that the foreign award is enforceable*".[235] Under this approach, the limitation period for filing an action to enforce a foreign arbitral award would be three years as stipulated in Article 137.[236] Further, once the Indian Court decides that the foreign award is enforceable as a decree, then award creditors can seek to enforce the same within 12 years based on Article 136 of the Limitation Act. In*Compania Naviera SODNOC* v. *Bharat Refineries Ltd.* ["**Compania Naviera**"],[237] the High Court of Madras took a different approach and held that a foreign award is already stamped as a decree under the scope of Article 136.[238] Thus, the award creditors can apply for enforcement within 12 years from the date the award becomes enforceable.[239] In the past few years, the view taken in *Compania Naviera*has gained more recognition among Indian courts. In *Imax Corporation v.ECity Entertainment (I) Pvt. Ltd.*[240] and *Cairn India Ltd & Ors v. Government of India*,[241] the Indian courts agreed with *Compania Naviera* that the limitation period for enforcement of foreign arbitral award is 12 years as provided in Article 136. At first glance, it seems that the court split on limitation period has come to an end in India. However, in the recent case *Bank of Baroda v. Kotak Mahindra Bank Ltd.* ["**Bank of Baroda**"],[242] the

235 *See* Noy Vallesina, 2006 (5) Bom CR 155, ¶ 8 (India).
236 *Id* ¶ 9.
237 Compania Naviera 'SODNOC' v. Bharat Refineries Ltd., AIR 2007 Mad. 251 (India).
238 *Id.*¶ 42.
239 *Id.*
240 Imax Corp. v. ECity Ent. (I) Pvt. Ltd., (2018) 18 SCC 313 (India).
241 Cairn India Ltd. & Ors. v. Gov't of India, OMP (EFA) (COMM.) No. 15/2016 (decided by the Delhi High Court on Feb. 19, 2020) (India).
242 Bank of Baroda v. Kotak Mahindra Bank Ltd., Civil Appeal No. 2175 of 2020 (decided by the Supreme Court of India on Mar. 17, 2020) (India) [*hereinafter* "Bank of Baroda"].

Indian Supreme Court's decision has "*reopened the limitation conundrum*".[243] In *Bank of Baroda*, the Supreme Court held that Article 136 "*only deals with decrees passed by Indian courts*",[244] which means a foreign arbitral award is not a "*decree*" under Article 136 and the 12-year limitation period will not be applicable to enforcement of foreign arbitral awards. It can be predicted that ambiguity and controversy surrounding the limitation issue will continue to exist in India.

As discussed in Part IV(A), only a few States have specific limitation periods for the enforcement of foreign arbitral awards in domestic law. In some jurisdictions, whether there is a limitation period and if so, what is the limitation period applicable to the enforcement of foreign arbitral award is unclear, which in turn leads to contradicting opinions among experts and judges.[245] For example, except for the inconsistencies mentioned before, controversies over the limitation period largely exist in France,[246]

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[243] Smriti Shukla & Yash Raj, *Supreme Court Reopens the Limitation Period for Enforcement of Foreign Awards*, INDIACORPLAW (Apr. 9, 2020) *available at*, https://indiacorplaw.in/2020/04/supreme-court-reopens-the-limitation-period-for-enforcement-of-foreign-awards.html.

[244] Bank of Baroda,Civil Appeal No. 2175 of 2020, ¶ 36.

[245] Akter, *supra* note 2, at 92.

[246] The limitation period for enforcement of foreign arbitral awards in France is controversial. There is no specific limitation period for enforcement of foreign arbitral awards. Some argue that the five-year limitation period under Article 2224 of the Civil Code shall apply to actions to enforce foreign arbitral awards. See ICC Enforcement Guide, *supra* note 74, France ¶ C6. *See also* Akter, *supra* note 2, at 90, citing CODE CIVIL [C. CIV.] [CIVIL CODE] art. 2224 (Fr.); ICC Supplement, *supra* note 75, at 168. Some others believe the five-year limitation period under Article 2224 is irrelevant. Accordingly, the party seeking recognition and enforcement can request enforcement any time. *See*AMRO, *supra* note 225, at 410.

Germany,[247] and Switzerland.[248] Under such circumstances, both the award creditors who seek to enforce the arbitral award and the award debtors who prepare to rebut award creditors' application would get lost in various limitation periods. The need for certainty and predictability in international commercial transactions requires that Contracting States provide a clear and reasonable limitation period in their domestic law.

Providing clear limitation period means that the Contracting States must specify limitation periods for enforcement of foreign arbitral award in domestic laws. This proposal is strongly advised by Akter in her noted book chapter.[249] The relevant domestic laws can be, including but not limited to arbitration acts, laws of civil procedure, limitation acts, or any legislation that implements the New York Convention.[250] In 2015, Vietnam amended its Code of Civil Procedure to improve its legal procedures, and Article 451 now clearly provides for a three-year limitation period running from the day when the award enters into force for enforcing foreignarbitral award.[251]

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247 Regarding the limitation period for enforcement of foreign arbitral awards in Germany, some argue the 30-year limitation period under Article 197(1)(2) of the German Civil Code shall apply, because recognition and enforcement equals to a claim for performance of debt or a legal action to reclaim ownership of real rights from the award debtor. *See* Thien, *supra* note 1, at 101. Some argue there is no limitation period for enforcement of foreign arbitral awards in Germany, and the party seeking recognition and enforcement can bring its application whenever it considers appropriate. See AMRO, *supra* note 225, at 410; Bermann, *supra* note 5, at 68. The third opinion argues that the German court will apply its own conflict of law rules to determine the *lex causae* and apply the limitation period under that law. If the *lex causae* is German law, then the 30-year limitation period would apply to proceedings for recognition and enforcement of foreign arbitral award. See Börner, *supra* note 6, at 127; Akter, *supra* note 2, at 91.

248 *See* Akter, *supra* note 2, at 90–91 (Akter argues the limitation period for enforcement of foreign arbitral awards in Swiss is subject to *lex causae*. When the *lex causae* is Swiss law, the ten-year limitation period under Article 137(2) of the Swiss Civil Code applies.); *see* Thien, *supra* note 1, at 100 (Thien seems to believe that the ten-year limitation period would apply regardless of whether Swiss law is the governing law.)

249 Akter, *supra* note 2, at 97.

250 UNCITRAL Report, *supra* note 10, at 3.

251 Thien, *supra* note 1, at 106.

This amendment is believed to "*help Vietnam stand out as a more arbitration friendly jurisdiction*".[252]

Specifying a reasonable limitation period for enforcement of foreign arbitral awards means avoiding extremely long or extremely short limitation periods and providing a proper date for the commencement of the limitation period.[253] As discussed in Part IV(B), the Nigerian Court's erstwhile approach[254] to interpret "*accrual of cause of action*" as "*the date of the dispute leading to arbitration arose*" is unreasonable, because under this approach, the limitation period for enforcement may expire before the award creditor can apply for enforcement. Thus, being aware of this problem, the Nigerian legislators have made some changes in the Arbitration and Conciliation Act (Repeal and Enactment) Bill, proposing to exclude the "*period between the commencement of the arbitration and the date of the award*" when calculating the limitation period.[255] This amendment undoubtedly would improve the reasonableness of Nigeria's practice on limitation period. In addition, federal countries need to consider whether to provide a uniform limitation period at the federal level like the U.S. or to allow each State to regulate the limitation period under different states laws like Canada. For the purpose of achieving certainty and predictability, the U.S. model is preferable. Critique regarding the Supreme Court of Canada decision in*Yugraneft Corp.* also mentioned that "*it makes no sense for Canada to have a collection of different limitation periods when our largest trading partner, the United States, has one limitation period for the recognition and enforcement of foreign arbitration awards*".[256]

C. The alternative approaches

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252 *See* Thien, *supra* note 1, at 97.
253 *Id.* at 99.
254 *Seesupra* notes 152–162 and accompanying text.
255 *Id.*
256 *See* Jonnette Watson Hamilton, *Much Ado about Little: The Supreme Court's Decision in Yugraneft Corp. v. Rexx Management Corp.*, ABLAWG.CA (Jun 4, 2010), *available at*https://ablawg.ca/2010/06/04/much-ado-about-little-the-supreme-court%E2%80%99s-decision-in-yugraneft-corp-v-rexx-management-corp/.

Award creditors who endeavour to enforce arbitral awards in foreign countries need to realise the importance of a limitation period during the enforcement proceedings. *First*, they need to determine the enforcing States' relevant legislation and practices to make sure that their applications for enforcement are filed within the required time frame. Additionally, in situations where the limitation period for enforcement has expired in the enforcing State, they can still try to enforce the arbitral award in another forum where a longer limitation period is provided, or they can seek to enforce the arbitral award in the form of a judgment in a certain jurisdiction, such as the U.S.

i.Understanding Contracting States' divergent practice on limitation period

When considering the recognition and enforcement of foreign arbitral awards, the award creditors and their lawyers need to judge whether their application for enforcement is time-barred in the enforcing state. Basically, there are four steps to follow.

First, the limitation period can raise choice of law issues. As discussed in Part III, there are basically three approaches to determine the applicable law to limitation period. Many States adopt the *lex fori* approach, and some States, mostly common law countries, adopt the *lex causae*approach. In addition, some States follow *lex arbitri* approach and would apply the limitation period of the State where the award was rendered.

Second, after identifying the law applicable to the limitation period, the award creditors can determine the duration of the limitation period by examining enforcing States' legislation and case law. The Contracting States regulate limitation periods through different legislation and impose various limitation periods on the application for enforcement. Some Contracting States do not impose a limitation period;[257] other States prescribe specific

[257] *Id.*

limitation periods for enforcement, and the periods range from three months to 30 years.[258]

Third, when the limitation period starts to run matters significantly in judging whether the application was time-barred. In this regard, inconsistencies also arise as to the date that the limitation period begins to run. Some States believe the limitation period is running when the "*cause of action accrued*". For States that follow the discoverability rule, the limitation period will not start to run until the award debtor is found to appear or have property in the enforcing States. Additionally, there are many different approaches taken to commence the running of the limitation period, including the date when the award is made, the date when the award attains legal force, the date when the award becomes enforceable, the date when award creditors receive the award, the date award becomes final, etc.

Last but not the least, the award creditors also need to pay attention to the factors that interrupt, suspend, or extend the limitation period for enforcement. These factors, however, are ambiguous since they are mainly discussed in academic literature and are rarely found in Contracting States' legislation and case law.[259]

ii.Enforcing arbitral awards in the form of foreign judgments

In some States where the limitation period for enforcing foreign judgments is longer than enforcing foreign arbitral awards, the award creditor may seek to turn the arbitration award into a judgment and then seek enforcement of the judgment.[260] In *Commissions Import Export S.A.* v. *Republic of the Congo* ["**Commissions Import Export S.A.**"], the Commissions Import Export

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258 UNCITRAL Report, *supra* note 10, at 3.

259 For example, some scholars believe an award debtor's acknowledgement or partial payment may lead to the interruption of limitation period. *See* Akter, *supra* note 2, at 93; *see also* Daradkeh, *supra* note 213. *See*AMRO, *supra* note 225 (Amro holds that limitation period may be extended if award debtors give false statement(s) about their financial circumstances or assets).

260 BORN, *supra* note 7, at 3729–3730.

S.A. ["**Commission Import**"], the Plaintiff, successfully obtained the enforcement of a limitation-expired arbitral award in the form of foreign judgment.[261] In 2000, Commission Import won a favorable arbitral award in France.[262] Pursuant to FAA, an application for enforcement of foreign arbitral award in the U.S. must be filed "*[w]ithin three years after an arbitral award falling under the [New York] Convention is made*".[263] Nine years after the issuance of the arbitral award, however, Commission Import failed to seek award enforcement. In 2009, Commission Import obtained a judgment from the English High Court, which recognised the French arbitral award and ruled that the arbitral award is enforceable in the same manner as an English judgment.[264] Later, Commission Import commenced court proceeding before the U.S. District Court for the District of Columbia, applying for enforcement of the English judgment. According to the District of Columbia's Uniform Foreign-Country Money Judgments Recognition Act ["**D.C. Judgment Act**"], "*[a]n action to recognize a foreign-country judgment must be commenced within the earlier of the time during which the foreign-country judgment is effective in the foreign country or 15 years from the date that the foreign-country judgment became effective in the foreign country*".[265] Thus, the central issue before the U.S. court turned to whether the three-year limitation period under the FAA, a federal law, pre-empts the longer period under the D.C. Judgment Act, a state law.

The Court of Appeals for the District of Columbia, by referring to the U.S. Supreme Court's decision in *Hines v. Davidowitz,*[266] first identified that the federal law would preempt state law when the state law "*stands as an obstacle*

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[261] Comm'ns Imp. Exp. S.A. v. Republic of the Congo & Caisse Congolaise d'Amortissement, 757 F.3d 321 (D.C. Cir. 2014) (U.S.) [*hereinafter* "Commissions Import"].

[262] *Id.* at 323.

[263] *See* 9 U.S.C. § 207; see *also*RESTATEMENT (THIRD) OF THE U.S. LAW OF INTERNATIONAL COMMERCIAL ARBITRATION § 4.30 cmt. (a)(iii).

[264] Commissions Import, 757 F.3d 325 (D.C. Cir. 2014) (U.S.)

[265] Uniform Foreign-Country Money Judgments Recognition Act of 2011, Feb. 24, 2012, D.C. Law 19-86, § 2(b), 58 DCR 11186, § 15-369 (Colum.).

[266] Hines v. Davidowitz, 312 U.S. 52 (1941) [*hereinafter* "Hines"].

to the accomplishment and execution of the full purpose and objectives of Congress".[267] After examining the objectives of the FAA, the U.S. court held that the "*basic purpose*" of FAA was to "*implement the New York Convention*",[268] and the "*overriding purpose*" of FAA is to "*facilitate international commercial arbitration by ensuring…valid arbitral awards are enforced*".[269] The U.S. court thus concluded that enforcing the English judgment based on state law accords with FAA's objective and "*pose no obstacle*" to its purpose.[270] Therefore, the U.S. court decided that the English judgment that confirmed the French award was enforceable. Following the decision in *Commissions Imp.*, when the limitation period for the enforcement of arbitral awards has expired, the award creditors may seek to enforce the award in the form of judgment in the U.S.

iii.Enforcing arbitral award in another forum

The New York Convention does not impose restrictions on the number of times a prevailing party can seek to enforce an award.[271] As noted by leading scholars, the fact that an application to enforce an arbitral award was time-barred in one State does not necessarily mean the award cannot be enforced in another.[272] Thus, if an arbitral award was refused enforcement in one Contracting State, the award creditor can still seek to enforce the award in another forum where the law provides no limitation period or a longer limitation period for the enforcement of foreign arbitral awards.[273]

VI. Conclusion

No one wants to fail at the final hurdle, and especially not award creditors who have spent millions of dollars to secure a favourable arbitral award. Although the New York Convention itself is silent on whether the expiration of a limitation period constitutes a ground for refusing

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267 Commissions Import, 757 F.3d 326 (D.C. Cir. 2014) citing Hines, 312 U.S. 52 (1941).
268 *Id.*
269 *Id.* at 330.
270 *Id.* at 329.
271 *SeeThien*, *supra* note 1, at 99.
272 *See*BORN, *supra* note 7, at 3729.
273 *See* Akter, *supra* note 2, at 93.

enforcement, the purpose of the New York Convention and Contracting States' practice tend to justify the imposition of limitation periods on enforcement. In practice, award creditors may fail at the final hurdle because their applications for enforcement exceeded the limitation period. To solve the uncertainty caused by Contracting States' varying limitation periods, it is argued to provide a uniform limitation period at the international level. As an alternative, legislators need to consider specifying specific limitation periods for enforcement of foreign arbitral awards. Finally, as a last resort, award creditors can also seek to enforce the arbitral award in the form of judgments or enforce the award in other forums where no limitation period or a longer limitation period is provided. By considering these options and giving due importance to the question of limitation, parties can avoid disappointing ends to their committed pursuit of favourable arbitral awards.

INDEPENDENCE AND IMPARTIALITY OF ARBITRAL TRIBUNALS: LEGALITY OF UNILATERAL APPOINTMENTS

Udian Sharma[*]

Abstract

*An independent and impartial arbitral tribunal is one of the cornerstones of arbitration law. Apropos of this, the unilateral appointment of arbitrators raises a reasonable apprehension of partiality and bias, resulting in a collapse of the arbitral process. This article will attempt to analyse the law of asymmetrical clauses present in arbitration agreements, thus questioning the unfettered right of a party to appoint arbitrators solely. This article shall compare the principles of contractual laws qua the principle of equity, through legislative intent and judicial interpretations of unequal clauses. Further, the contemporary developments under the Arbitration and Conciliation Act, 1996 ["**Arbitration Act**"], along with the significant judicial pronouncements on the issue of unilateral appointment of arbitrators shall also be critically examined. The article shall also examine the ambiguity and the conflict created by divergent decisions of the courts, while discussing the international jurisprudence on this issue. This article concludes by proposing to achieve a system of 'faceless tribunals', through the advancement of arbitral institutions and the use of artificial intelligence in the appointment of arbitral tribunals, which can reduce the presumption of partiality.*

I. Introduction

It is a settled principle of curial law that arbitration is a creature of contract, and the parties are bound by the terms of the arbitration agreement as

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prescribed in the contract. The procedure of appointment of arbitrators is a primary and essential part of the entire arbitral process. While such procedure in arbitration agreements usually allows each party to choose a co-arbitrator to constitute the tribunal, there are instances wherein the agreement may provide an unfettered right of appointment to only one party.

The Arbitration and Conciliation Act, 1996[1] ["**1996 Act**"] is bound by the universal principles of natural justice, which embody the maxim of *nemo judex in causa sua* (no one can be a judge in their own cause).[2] Impartiality of the adjudicator is one of the most fundamental tenets of any dispute resolution mechanism. Naturally, a person who has an interest in the outcome or decision of the dispute must not have the sole power to appoint arbitrators.[3]

The appointment clause in an arbitration agreement can either provide for appointment of arbitrators through mutual consent where both parties have an equal right to nominate one arbitrator each of their choice or through a unilateral appointment where only one party has the sole and exclusive right to appoint the arbitrator(s) of its choice. The latter form of appointments unequivocally creates doubt regarding the independence and impartiality of the person appointed as the arbitrator, arguably violating the principles of natural justice. According to Russell, an arbitrator is "*neither more nor less than a private judge of a private court. An arbitrator derives its powers wholly from the private law of contract and accordingly the nature and exercise of these powers must not be*

1 Arbitration and Conciliation Act, No. 26 of 1996 (India) [*hereinafter* "1996 Act"].

2 Supreme Court Advocates-on-Record Ass'n & Anr. v. Union of India, (2016) 5 SCC 808, ¶¶ 10–11 (India).

3 Shivani Khandekar & Divyansh Singh, *Independence and Impartiality of Arbitrators: Are We There Yet?*, KLUWER ARB. BLOG (Nov. 14, 2017),*available at*http://arbitrationblog.kluwerarbitration.com/2017/11/14/independence-impartiality-arbitrators-yet/.

contrary to the proper law of the contract or the public policy, bearing in mind that the paramount public policy is that freedom of contract is not lightly to be interfered with".[4]

The author, through this article, focuses on the independence and impartiality of the arbitral process, and in particular, addresses the legal consequences of arbitration clauses containing unilateral appointment of arbitrators. This article is divided into four parts. The following part, i.e. Part II, deals with the legislative intent on the subject matter of the article while traversing through various statutes which deal with impartiality in the arbitral process and unequal arbitration clauses. Part III deals with the national and international judicial developments on the subject and the dilemma that surrounds it. Part IV discusses the different measures and solutions adopted by international arbitration institutions. The author, in Part IV(C) of this article, proposes the use of artificial intelligence in the arbitral process to achieve a system of 'faceless tribunals'. In Part V, the author concludes by pointing out the urgent need for the legislature and/or the judiciary to step in to settle the controversial dispute of unilateral appointment of arbitrators.

II. Legislative intent to preserve the independence and impartiality of arbitral tribunals

The tests of independence and impartiality of an arbitral tribunal are governed by the respective substantive and procedural laws; even then, the concepts of independence and impartiality can co-exist. Alan Redfern and Martin Hunter in their book Law and Practice of International Commercial Arbitration noted that there is a point of view in considering the two terms as being the "*opposite side of the same coin*".[5] Independence, on one side, refers to the arbitrator's relationship with one of the parties; impartiality, on the other side, "*is considered to be connected with an actual or apparent bias of an*

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4 DAVID ST. JOHN SUTTON, JUDITH GILL QC & MATTHEW GEARING QC, RUSSELL ON ARBITRATION 104 (20th ed. 1982).

5 ALAN REDFERN & MARTIN HUNTER, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 201 (4th ed. 2004).

arbitrator either in favour of one of the parties or in relation to the issues in dispute".[6] The two terms are "*usually joined together as a term of art*".[7] Apropos of this, the essence of an arbitral process lies in the independence of an arbitral tribunal's relationship with the parties, the power to adopt its own procedures and the absence of intervention from courts during the adjudication of the dispute. Further, the need for an impartial arbitral tribunal precedes the want of independence, as there can be instances where an adjudication process is procedurally not absolutely independent, albeit it is required to be mandatorily impartial.

Indian laws and international laws do not explicitly define the procedures to determine the independence and impartiality of an arbitral tribunal. However, various national and international jurisdictions have developed systems of checks and balances to maintain the independence and impartiality of an arbitral tribunal, which are the fundamental safeguards for the parties during the adjudication of disputes.

A. Historical analysis

Prior to the promulgation of the 1996 Act, the law on arbitration in India was substantially contained in three enactments, namely the Arbitration and Conciliation Act, 1940 ["**1940 Act**"];[8] the Arbitration (Protocol and Convention) Act, 1937;[9] and the Foreign Awards (Recognition and Enforcement) Act, 1961.[10]

The position under the erstwhile 1940 Act was that a party could commence proceedings in court by moving an application under Section 20 for the appointment of an arbitrator.[11] Further, Section 11 of the 1940 Act contained a judicial safeguard through which the court was given the power

6 *Id.*
7 *Id.*
8 Arbitration Act, No. 10 of 1940 (India) [*hereinafter* "1940 Act"].
9 Arbitration (Protocol and Convention) Act, No. 6 of 1937 (India).
10 Foreign Awards (Recognition and Enforcement) Act, No. 45 of 1961 (India).
11 1940 Act, No. 10 of 1940, § 20 (India).

to remove an arbitrator in certain circumstances, including in cases of partiality or bias either during the pendency of arbitration proceedings or after its conclusion.[12]

The new 1996 Act is based on the United Nations Commission on International Trade Law Model Law on International Commercial Arbitration ["**Model Law**"].[13] In the face of the necessitude of time, the Law Commission of India proposed amendments thereto to be more responsive to the contemporary exigencies and to attract foreign businesses and investors towards India in the changing economic scenario.

The Model Law had sought to maintain absolute independence and impartiality of the arbitrator.[14] Article 12(1) of the Model Law provides for special features which include an arbitrator's commitment towards independence and impartiality.[15] Article 13(1) and (2) of the Model Law,[16] read with Article 12, provide for a challenge to an arbitrator on the ground

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12 *Id.* § 11 reads as under:
"Power to Court to remove arbitrators or umpire in certain circumstances:
(1) The Court may, on the application of any party to a reference, remove an arbitrator or umpire who fails to use all reasonable dispatch in entering on and proceeding with the reference and making an award.
(2) The Court may remove an arbitrator or umpire who has misconducted himself or the proceedings.
(3) Where an arbitrator or umpire is removed under this section, he shall not be entitled to receive any remuneration in respect of his services.
(4) For the purposes of this section the expression "proceeding with the reference" includes, in a case where reference to the umpire becomes necessary, giving notice of that fact to the parties and to the umpire."

13 United Nations Commission on International 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* "Model Law"].

14 Koorosh H. Ameli, *Impartiality and Independence of International Arbitrators*, 27-28 REVUE DE RECHERCHE JURIDIQUE 89–109 (1999); *see also*HOWARD M. HOLTZMANN & JOSEPH E. NEUHAUS, A GUIDE TO THE UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION: LEGISLATIVE HISTORY AND COMMENTARY 478 (1989).

15 Model Law, *supra* note 13, art. 12(1).

16 Model Law, *supra* note 13, art. 13(1)–(2).

of "*justifiable doubts as to her impartiality or independence*" and for an opportunity to the arbitrator to either withdraw her name as the arbitrator or otherwise to decide on the challenge.[17] Further, Article 13(3) of the Model Law provides the party failing in its challenge before the arbitral tribunal with an additional remedy before the court or the other authority specified in Article 6.[18] Such safeguards ensure that the principles of natural justice are followed while maintaining party autonomy.

The Statement of Objects and Reasons appended to the Bill that was proposed for the 1996 Act stated that the general law of arbitration contained in the 1940 Act had become out-dated.[19] Section 11 of the 1940 Act, as mentioned earlier, provided courts as the only forum for making an application for the removal of an arbitrator.[20] Thus, when the 1996 Act came into force repealing the 1940 Act, Section 13 of the 1996 Act[21] omitted the judicial safeguard provided in Section 11 of 1940 Act, redefining the challenge procedure, and in effect, curbing the Model Law provision for adopting the erstwhile course altogether.

Therefore, in this regard, the legislature through the enactment of the 1996 Act took a significant departure from the Model Law and the 1940 Act.

B. The 1996 Act and its amendments

The legislature, through the 1996 Act, placed a few safeguards to preserve the independence and impartiality of arbitrators. Even before the amendments to the 1996 Act, it has been a valid ground under Section 12(3)(a) of the 1996 Act to challenge the appointment of the arbitral tribunal if circumstances exist that give rise to justifiable doubts as to its

17 Hasmukhlal H. Doshi & Anr. v. J. M.L. Pendse & Ors., 2000 SCC OnLine Bom 242, ¶¶ 9, 11 (India).

18 Model Law, *supra* note 13, art. 13(3); Sunil Gupta, *No Power to Remove a Biased Arbitrator Under: The New Arbitration Act of India*, 2000(3) SCC J. 1 (2000).

19 Sundaram Fin. Ltd. v. NEPC India Ltd., AIR 1999 SC 565, ¶ 8 (India).

20 1940 Act, No. 10 of 1940, § 11 (India).

21 1996 Act, No. 26 of 1996, § 13 (India).

independence or impartiality.[22] However, as discussed earlier, this challenge can only be before the constituted arbitral tribunal, with no right of appeal before the courts.

The 246th Law Commission Report ["**Report**"],[23]*inter alia*, proposed changes to promote the neutrality of arbitrators to maintain the independence and impartiality of the arbitral process. The Report led to the enactment of the Arbitration and Conciliation (Amendment) Act, 2015 ["**2015Amendment Act**"],[24] which radically changed the landscape of the appointment of arbitrators, amongst other things. Section 11(8) of the 1996 Act now provides that the court while appointing an arbitrator may obtain a disclosure in writing from the prospective arbitrator in terms of Section 12(1) of the 1996 Act, with regard to any qualifications required by the parties and other considerations which are likely to secure the appointment of an independent and impartial arbitrator.

The 2015 Amendment Act has thus widened the grounds of challenge to the composition of the arbitral tribunal under Section 12 of the 1996 Act by providing that a person may be challenged as an arbitrator if such person fails to make necessary disclosures when approached in connection to their appointment as an arbitrator. Therefore, the person must categorically state her (direct or indirect) existing or past relationship with any of the parties in relation to the subject matter of the dispute. The relationship can be financial, business related, professional, or of any other nature which may

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22 *Id.* § 12(3)(a) ("An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his independence or impartiality").

23 Law Commission of India, Report No. 246 – Amendments to the Arbitration and Conciliation Act*,* 1996, at 46–49 (2014), *available at*http://lawcommissionofindia.nic.in/reports/Report246.pdf.

24 Arbitration and Conciliation (Amendment) Act, 2015, No. 3 of 2016 (India) [*hereinafter* "2015 Amendment Act"].

give rise to justifiable doubts about the arbitrator's independence and impartiality.[25]

The legislature, by way of the 2015 Amendment Act, adopted the international practices of the IBA Guidelines on Conflict of Interest ["**IBA Guidelines**"].[26] The IBA Guidelines enumerate examples of possible conflicts of interests, which are divided into three lists, namely, the Red List, which is further divided into waivable and non-waivable lists, the Orange List, and the Green List.[27] Following the IBA Guidelines, the legislature introduced an exhaustive mechanism of checks and balances in the form of introduction of three schedules, namely, the fifth, sixth, and seventh schedules in the 1996 Act.

These schedules are briefly described as under:

- The Fifth Schedule guides in determining whether circumstances exist which give rise to justifiable doubts as to the independence or impartiality of an arbitrator;

- The Sixth Schedule specifies the form for disclosure to be made by the arbitrator; and

- The Seventh Schedule specifies the categories of persons who shall be ineligible to be appointed as arbitrators.

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25 Shweta Sahu, Moazzam Khan & Payal Chatterjee, *Legitimacy of Arbitral Appointments in India*, KLUWER ARB. BLOG (Nov. 3, 2018), *availableat*http://arbitrationblog.kluwerarbitration.com/2018/11/03/legitimacy-arbitral-appointments-india/; *see also* 2015 Amendment Act, No. 3 of 2016, § 8 (India).

26 HRD Corp. v. GAIL (India) Ltd., (2018) 12 SCC 471 (India).

27 Khaled Moyeed, Clare Montgomery & Neal Pal, *A Guide to the IBA's Revised Guidelines on Conflicts of Interest,*KLUWER ARB. BLOG (Jan. 29, 2015), *available at*http://arbitrationblog.kluwerarbitration.com/2015/01/29/a-guide-to-the-ibas-revised-guidelines-on-conflicts-of-interest/?doing_wp_cron=1596221860.2151229381561279296875.

Therefore, by virtue of the 2015 Amendment Act, the legislature attempted to maintain the independence and impartiality of an arbitrator appointed by the parties, specifically by inserting exclusion categories for persons to be appointed as arbitrators.

III. <u>The dilemma surrounding unilateral appointment of arbitrators</u>

A. <u>Proactive role of the judiciary</u>

The amendments brought in by the 2015 Amendment Act reflect the sanguine approach of the legislature to maintain the independence and impartiality of arbitral tribunals. However, this step cannot be termed as a comprehensive approach towards ensuring absolute impartiality. Thus, the courts while dealing with petitions under Section 11 or Section 14 of the 1996 Act are often faced with various impediments.

It is trite to say that if one party is allowed to appoint the arbitral tribunal unilaterally, that party will always be at an advantageous position in comparison to the other party, which may lead to a potentially partial set up of the arbitration proceedings.

Further, Section 25 of the 1996 Act allows an arbitral tribunal to enter reference and adjudicate the disputes ex parte in case of default of either party to appear or communicate their respective statements without sufficient cause.[28] However, where one party has an unfettered right to appoint arbitrators of its choice as per the mutually agreed terms of the arbitration agreement, an ex parte adjudication by the arbitral tribunal so constituted may gravely prejudice the rights of the other party.

In the recent landmark judgment in the case of *Perkins Eastman Architects DPC* v. *HSCC (India) Ltd.* ["**Perkins Eastman**"],[29] the Supreme Court of India discussed the unsettled issue of the validity of unilateral appointment

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[28] 1996 Act, No. 26 of 1996, § 25 (India).

[29] Perkins Eastman Architects DPC & Ors. v. HSCC (India) Ltd., 2019 SCC OnLine SC 1517 (India) [*hereinafter* "Perkins Eastman"].

of arbitrators. The Supreme Court declared the unilateral arbitrator appointments to be invalid in the light of the 2015 Amendment Act, and thus held as follows:

> "*The reason is clear that whatever advantage a party may derive by nominating an arbitrator of its choice would get counter balanced by equal power with the other party. But, in a case where only one party has a right to appoint a sole arbitrator, its choice will always have an element of exclusivity in determining or charting the course for dispute resolution. Naturally, the person who has an interest in the outcome or decision of the dispute must not have the power to appoint a sole arbitrator.*"[30]

In the *Perkins Eastman* case, a contract was entered into between the parties, which contained an elaborate 'Dispute Resolution' clause. The clause provided, *inter alia*, that any dispute or difference shall be referred to arbitration before a "*sole arbitrator appointed by the Chief Managing Director*" of the Respondent. The Supreme Court relied heavily on its previous decision rendered by a full bench in *TRF Limited* v. *Energo Engineering Projects Ltd.* ["**TRF Limited**"],[31] which had held the unilateral appointment of the Managing Director of one party, or his nominee, as an arbitrator to be invalid.

The Supreme Court in *TRF Limited*, while quashing the clause, placed reliance on the doctrine of agency i.e. *qui facit per aliumfacit per se* (she who acts through another does the act herself).[32] The Supreme Court further rightly held that once an appointee had become ineligible to act as an

30 *Id.* ¶ 21.

31 TRF Limited v. Energo Eng'g Projects Ltd., (2017) 8 SCC 377 (India).

32 *See* Firm of Pratapchand Nopaji v. Firm of Kotrike Venkata Setty & Sons & Ors., (1975) 2 SCC 208, ¶¶ 8, 9 (India); *see also* Walter Bau AG, Legal Successor, of the Original Contractor, Dyckerhoff & Widmann A.G. v. Municipal Corp. of Greater Mumbai, (2015) 3 SCC 800, ¶¶ 9, 10 (India).

arbitrator, its unrestricted power to appoint a nominee also ceases.[33] The rationale of the Court in setting aside the appointment clause was drawn from the fact that the Managing Director, having interest in the dispute, represented the interests of one party, thus making him ineligible to be appointed as an arbitrator, or to even appoint a nominee as an arbitrator.

Similarly, this issue was looked into by the Delhi High Court in *Proddatur Cable TV Digi Services* v. *SITI Cables Network Ltd.* [“**Proddatur Cable**”].[34] The Petitioner in this case had challenged the power of the Respondent *to unilaterally appoint the arbitrator as provided under the arbitration agreement. The Delhi High Court, relying on the decision in Perkins Eastman, held that a person having an interest in the outcome of the dispute cannot unilaterally appoint a sole arbitrator.*[35] *Thus, the Court* declared that the mandate of the appointed arbitrator had terminated *de jure and appointed a new arbitrator.*[36]

Therefore, on the one hand, the judgment in *TRF Limited* merely settled the proposition of law that a disqualified or ineligible person cannot appoint a nominee as an arbitrator, leaving the question of unilateral appointment of third-party arbitrators unanswered. On the other hand, the judgment in *Perkins Eastman* failed to occupy the field in regard to unilateral and asymmetrical clauses in an arbitration agreement, leaving scope for further interpretation, as will be discussed in Part III(G) below.

B. Determination of bias under the 1996 Act

As the contractual laws are private in nature, unequally placed parties are bound by any unequal terms of the contract, unless such terms are

33 Puneet Vyas, *Unilateral Appointment: Continued Dilemma Initiated by TRF*, SSRN (Dec. 13, 2019), *available at*https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3486689.
34 Proddatur Cable TV Digi Servs. v. SITI Cables Network Ltd., 2020 SCC OnLine Del 350 (India).
35 *Id.* ¶ 23.
36 *Id.* ¶ 28.

specifically barred by law.[37] There being no explicit restrictions on one party to unilaterally appoint the arbitral tribunal under the provisions of the 1996 Act, such unilateral clauses are considered binding on the parties.

However, the character of the clause for the appointment of an arbitrator in an arbitration agreement should ideally be bilateral, not unilateral. Both parties to the dispute must be given an opportunity to equally and fairly select an arbitrator. An asymmetrical clause containing waiver of one party against a particular right raises serious doubts over the nature of the relationship of the contracting parties. The issue of legality and validity of asymmetrical clauses often stems from the unequal bargaining power between the parties in the absence of equality and fairness in their relationship.

As mentioned earlier, Section 12 (as amended by the 2015 Amendment Act) sets out the grounds under which the appointment of an arbitrator can be challenged. Section 13(3) states that if there is a challenge to the appointment of an arbitrator, the arbitral tribunal must decide the challenge. Bias has been defined as a "*preconceived opinion, or a predisposition or predetermination to decide a case or an issue in a particular manner*".[38] Under Section 12(1) and 12(2) of the 1996 Act, an arbitrator is bound to disclose circumstances which may give rise to justifiable doubts about her impartiality or independence. These disclosures are important for the parties to assess whether an arbitrator is biased and thus incapable of providing an impartial and independent adjudication of the dispute concerned. Failing such disclosure, a challenge can lie under Section 12(3) of the 1996 Act. Pursuant to a challenge, the arbitrator can either withdraw

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37 Nishanth Vasanth & Rishabh Raheja, *Examining the Validity of Unilateral Option Clauses in India: A Brief Overview*, KLUWERARB. BLOG (Oct. 20, 2017), *available at*http://arbitrationblog.kluwerarbitration.com/2017/10/20/examining-validity-unilateral-option-clauses-india-brief-overview/?doing_wp_cron=1597326578.4179279804229736328125.

38 State of West Bengal & Ors. v. Shivananda Pathak & Ors., (1998) 5 SCC 513 (India); *see also* Manak Lal v. Prem Chand, AIR 1957 SC 425 (India).

as an arbitrator or the other party may agree to the challenge thereby terminating the appointment.[39] If neither happens, the tribunal decides the challenge.

It can certainly be inferred that the arbitrators will not be willing to accept the challenge as such doubts on their impartiality and/or independence directly relate to their integrity. The 1996 Act is thus superficial in this regard, and by allowing the tribunal to decide the challenge to an arbitrator sitting on that tribunal itself, gravely prejudices the parties during an arbitration proceeding.

It is pertinent to note that the parties to a dispute may also expressly waive the right to challenge an arbitrator upon becoming aware of the circumstances of possible bias.[40] There can also be a circumstance under which a party may move the court to terminate the mandate of an arbitrator under Section 14 of the 1996 Act for failure or impossibility of the arbitrator to act, through which the court may be in a position to examine the real possibility of bias.[41] However, from a bare perusal of Section 14, it cannot be said that the courts can strike down a clause for the unilateral appointment of an arbitrator on grounds of impartiality – which can only be challenged at the post-award stage in a petition under Section 34 of the 1996 Act.[42]

Therefore, such an eventuality of unilaterally appointing an arbitrator will result in irreversible consequences and, eventually, the failure to maintain

39 1996 Act, No. 26 of 1996, § 13 (India).
40 1996 Act, No. 26 of 1996, proviso to § 12(5) (India); Bharat Broadband Network Ltd. v. United Telecoms Ltd., (2019) 5 SCC 755 ¶¶ 15, 20 (India) [*hereinafter* "Bharat Broadband"].
41 West Haryana Highways Projects Pvt. Ltd. v. National Highway Authority of India, 2017 SCC OnLine Del 8378, ¶¶ 24, 28 (India).
42 State of Arunachal Pradesh v. Subhash Projects & Mktg. Ltd. & Anr., 2006 SCC OnLine Gau 57, ¶ 32 (India) [*hereinafter* "Subhash Projects"].

independence and impartiality – a situation neither statutorily conceived nor countenanced.[43]

C. Equity versus non-intervention

Where a petition is filed under Section 11 of the 1996 Act, particularly in cases where the challenge is against the unfettered power of one party to appoint an arbitrator and the court intervenes by setting aside the appointment clause and adopting its own procedure for appointment of the arbitrator, it fails to comply with the provisions of the non-obstante clause enshrined under Section 5 of the 1996 Act.[44] The quintessence of an arbitration agreement is that the parties are supposed to be directed to arbitration, abiding by the terms and clauses of that arbitration agreement. The Chief Justice or his designate are to act purely in an administrative capacity while deciding a petition under Section 11 of the 1996 Act.[45]

This must be read in light of the principle of *kompetenz-kompetenz*[46] and Article 5 of the Model Law which place emphasis on minimal interference of the courts. The excessive intervention of courts in arbitration cases is a situation of judicial overreach which goes against the tenets of arbitral law. Such judicial overreach also defeats the purpose of maintaining party autonomy in arbitration.

However, on the other hand, to meet the ends of justice, the intervention of the court is extremely essential in cases where one party's right can prejudice and bind the other party by virtue of unequal bargaining power positions. Such abuse of power cannot be allowed, especially in judicial and quasi-judicial forums which are governed by the principle of equity. Arbitration clauses containing unilateral modes of appointment of

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43 *Id.*

44 1996 Act, No. 26 of 1996, § 5 (India) ("Extent of judicial intervention: Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part.").

45 Konkan Ry. Corp. Ltd. v. Rani Constr. Pvt. Ltd., (2002) 2 SCC 388, ¶¶ 22–23 (India).

46 Khandekar & Singh, *supra* note 3.

arbitrators can result in a partial and biased adjudication of disputes. Thus, the courts must exercise their powers to set aside such clauses, and thereby adopt their own procedures of appointment.

For instance, the Supreme Court while hearing a petition filed by a State government under Section 11 of the 1996 Act, in *State of Bihar* v. *Brahmaputra Infrastructure Ltd.* ["**Brahmaputra Infra**"],[47] dealt with a provision which afforded unilateral powers to the government in regard to the tenure of the members of an arbitral tribunal.[48] The Court, while relying on the doctrine of pleasure, held that a provision which deals with the tenure of the Chairman and other members of the arbitration tribunal at the pleasure of the Government is inconsistent with the constitutional scheme, particularly Article 14 of the Constitution of India, 1950.[49] The Court observed that if the party to the dispute terminates the service of such member, it would directly interfere with the impartiality and independence expected from such member. The Supreme Court also struck down the provision of the State legislation on the basis of it being manifestly arbitrary and contrary to the rule of law. This doctrine of manifest arbitrariness has been discussed by the Supreme Court in the case of *Shayara Bano* v. *Union of India,*[50] wherein it remarked that a provision of law would be manifestly arbitrary if it lacked a clear determinative principle or encapsulated a capricious or irrational measure.

The Patna High Court has extensively followed the rationale of *Brahmaputra Infra* in petitions filed under its writ jurisdiction, or under Section 11 of the 1996 Act. This was done in the cases of *Rajesh Singh* v. *State of*

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47 State of Bihar v. Brahmaputra Infrastructure Ltd., (2018) 17 SCC 444 (India) [*hereinafter* "Brahmaputra Infrastructure"].

48 Bihar Public Works Contracts Arbitration Tribunal Act, Act No. 21 of 2008, § 4(3)(b) (India).

49 Brahmaputra Infrastructure, (2018) 17 SCC 444, ¶ 7 (India).

50 Shayara Bano v. Union of India, (2017) 9 SCC 1, ¶ 101 (India).

Bihar,[51] *Priyanshu Kumar Ranjan* v. *The Bihar State Food and Civil Supplies Corporation Limited,*[52] *Sarvesh Security Services Pvt. Ltd.* v. *Office of the Principal Chief Conservation of Forest,*[53] *Bhaibhaw Construction Pvt. Ltd.* v. *State of Bihar,*[54] *BLG Construction Services Pvt. Ltd.* v. *State of Bihar,*[55] *Bhaibhaw Construction Pvt. Ltd.* v. *State of Bihar,*[56] *M/s. Arjun Engicon Pvt. Ltd.* v. *State of Bihar,*[57] *Kamladitya Construction Pvt. Ltd.* v. *State of Bihar,*[58] and *Hindustan Steelworks Constructions Ltd.* v. *Union of India.*[59] The Patna High Court, in these matters, has consistently appointed neutral arbitrators and set aside the asymmetrical clauses which gave unfettered powers to government agencies in the appointment process. Therefore, the benefits of *Brahmaputra Infra* have resulted in a level playing field in the state of Bihar, which indicates the proactive approach of the judiciary to side with the principle of equity in cases of unequal arbitration clauses.

Further, in *Northern Railway Administration* v. *Patel Engineering Company Limited,*[60] the Supreme Court held that although Section 11 of the 1996 Act emphasises on adherence to the terms of the arbitration agreement, the court need not uniformly follow the same. Instead, the court must pay due

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51 Rajesh Singh v. State of Bihar, Civ. Writ Jurisdiction, Case No. 192 of 2020 (decided by the Patna High Court on Feb. 20, 2020) (India).

52 Priyanshu Kumar Ranjan v. Bihar State Food & Civil Supplies Corp. Ltd., Request Case No. 19 of 2020 (decided by the Patna High Court on Feb. 26, 2020) (India).

53 Sarvesh Sec. Servs. Pvt. Ltd. v. Off. of Principal Chief Conservator of Forest, Request Case No. 9 of 2020 (decided by the Patna High Court on Feb. 26, 2020) (India).

54 Bhaibhaw Constr. Pvt. Ltd. v. State of Bihar, Request Case No. 8 of 2020 (decided by the Patna High Court on Feb. 26, 2020) (India).

55 BLG Constr. Servs. Pvt. Ltd. v. State of Bihar, Request Case No. 5 of 2020 (decided by the Patna High Court on Feb. 26, 2020) (India).

56 Bhaibhaw Constr. Pvt. Ltd. v. State of Bihar, Request Case No. 1 of 2020 (decided by the Patna High Court on Feb. 26, 2020) (India).

57 M/s. Arjun Engicon Pvt. Ltd. v. State of Bihar, Request Case No. 182 of 2019 (decided by the Patna High Court on Feb. 26, 2020) (India).

58 Kamladitya Constr. Pvt. Ltd. v. State of Bihar, Request Case No. 178 of 2019 (decided by the Patna High Court on Feb. 26, 2020) (India).

59 Hindustan Steelworks Constr. Ltd. v. Union of India, Request Case No. 169 of 2019 (decided by the Patna High Court on Feb. 26, 2020) (India).

60 N. Ry. Admin. v. Patel Eng'g Co. Ltd., (2008) 10 SCC 240 (India).

regard to the qualifications stipulated in the agreement for the persons to be appointed as arbitrators. The Bombay High Court in the case of *Siddhi Real Estate Developers* v. *Metro Cash*[61] has similarly held that:

> "*[T]he courts should as far as possible preserve the sanctity of party autonomy and defer to the appointment procedure agreed to between the parties whilst at the same time retaining a discretion to appoint such arbitrators as may be deemed fit to 'meet the end of justice'… It may also be that an order to follow the appointment procedure is likely to result in a 'stalemate' or otherwise 'the interests of justice may require that the appointment procedure ought not to be followed'. In all such cases, the courts are not powerless to ignore the appointment procedure and appoint an independent tribunal outside the appointment procedure.*"[62]

Therefore, it can be inferred that the judiciary has adopted a proactive role to curb the practice of unilateral appointment of arbitrators by intervening at the time of reference to maintain the independence and impartiality of the arbitration proceedings, thus siding with the principle of equity over the laws of non-intervention.

D. Principle of party autonomy in contractual laws

The freedom to enter into a contract and to determine the terms of that contract is the essence of party autonomy, which is a non-intrusive right, unless the specific condition is explicitly barred by law. Consequently, parties have the right to mutually agree over the terms of appointment of an arbitrator in a dispute resolution clause. Party autonomy gives the parties the freedom to choose the method of appointment of an arbitrator, seat, or

[61] Siddhi Real Estate Developers v. Metro Cash & Carry India Pvt. Ltd. & Anr., 2014 SCC OnLine Bom 623 (India).

[62] *Id.* ¶ 8.

venue of the arbitration, applicable laws, and procedure.[63] Moreover, Section 19(2) of the 1996 Act permits the parties to adopt any procedure to be followed for the arbitration proceedings.[64]

The issue of maintaining a balance between the principle of party autonomy and the principle of equity, while dealing with clauses relating to unilateral appointment of arbitrators, has troubled courts ever since. Accordingly, the legislature through the 2015 Amendment Act has created safeguards to ensure that the appointed arbitrator is impartial, particularly through the Fifth and the Seventh Schedules of the 1996 Act.

The Supreme Court's reasoning in the decision of *Perkins Eastman* and *TRF Limited* was to maintain impartiality in arbitral proceedings by restricting one party's right to solely appoint an arbitrator. Although this reasoning pierced through the principle of party autonomy, it rightly upheld the principles of equity and fairness. By appointing a sole arbitrator and quashing the unilaterally appointed arbitral tribunal, both the parties are put on the same pedestal, which leads to an impartial adjudication of the dispute and thus a fair trial.

The issue of invalidity of unilateral appointment of an arbitrator was also dealt with by a single-judge bench of the Delhi High Court in *Bhartia Cutler Hammer Ltd.* v. *AVN Tubes Ltd.*,[65] which throws valuable light on the issue of party autonomy and asymmetrical clauses. The Court observed that the arbitration agreement gave a right of reference to arbitration and appointment of an arbitrator to only one party and the decision of the arbitrator so appointed was made final and binding on both parties. The Court held that such agreement is unilateral and lacks mutuality of contract

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63 SIMON GREENBERG, CHRISTOPHER KEE & J. ROMESH WEERAMANTRY, INTERNATIONAL COMMERCIAL ARBITRATION: AN ASIA PACIFIC PERSPECTIVE 305 (2011).

64 1996 Act, No. 26 of 1996, § 19(2) (India) ("Subject to this Part, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting its proceedings.").

65 Bhartia Cutler Hammer Ltd. v. AVN Tubes Ltd., 1991 SCC OnLine Del 322 (India).

and as such, was not enforceable in a court of law.[66]This judgment was later affirmed by a Division Bench of the Delhi High Court.[67]

An issue that can be derived from the above judgment is whether such a condition in the arbitration agreement is a valid condition capable of enforcement under the Indian laws, or the same is hit by Section 28 of the Indian Contract Act, 1872.[68] Section 28 of the Indian Contract Act, 1872 provides that agreements in restraint of legal proceedings will be void.[69]

The Delhi High Court, while setting aside a unilateral clause of an arbitration agreement in the case of *Emmsons International Ltd.* v. *Metal Distributors (UK) & Ors.*,[70] observed that "*such type of absolute restriction is clearly hit by the provisions of Section 28 of the Contract Act besides it being against the public policy*".[71]

Therefore, the challenge against the unilateral appointment of arbitral tribunals is mainly on the count that such appointments are against the morality, conscionability, and validity of arbitration agreements. The task of the courts is to maintain a tryst between equity and private laws while dealing with such unequal clauses. This dilemma, in turn, gives more power and reasons to courts to intervene in confidential disputes between the parties casting a shadow over the effectiveness of arbitration as an alternative dispute resolution mechanism. Hence, there is a pressing need

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66 *Id.* ¶ 5.

67 A.V.N. Tubes Ltd. v. Bhartia Cutler Hammer Ltd., 1992 SCC OnLine Del 81 (India).

68 Vasnth & Raheja, *supra* note 37.

69 Indian Contract Act, No. 9 of 1872, § 28 (India) ("Agreements in restraint of legal proceedings, void- Every agreement, (a) by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, (b) by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, or (c) which extinguishes the rights of any party thereto, or discharges any party thereto, from any liability, under or in (d) respect of any contract on the expiry of a specified period so as to restrict any party from enforcing his rights, is void to that extent.").

70 Emmsons Int'l Ltd. v. Metal Distrib. (U.K.) & Ors., 2005 SCC OnLine Del 17 (India).

71 *Id.* ¶ 15.

to nip these unilateral appointment clauses in the bud to stop a potential problem even before it develops.

E. Contracts between private parties and governmental authorities – selection of arbitrators from fixed panels

Private parties, especially individuals, have a lesser scope of negotiation while entering into a contract with a governmental entity or a public sector undertaking. It is also standard practice for governmental entities to include general conditions of contract which emphasise their dominant position.[72] These contracts, which contain rigid and archaic general conditions, are called 'standard form contracts'. When private parties succeed in the tender process, they often enter into such contracts without protest against the presence of any 'standard' asymmetrical clauses.

Consequently, the terms of an arbitration agreement which form part of the general conditions of these dotted line contracts, are often not negotiated by private parties.[73] As such, asymmetrical and unequal clauses are missed in the fine print of these standard form contracts. Therefore, courts across jurisdictions have strictly ruled against such unreasonable and unilateral clauses and have observed that "*it is settled law that if a contract or a clause in a contract is found unreasonable or unfair or irrational one must look to the relative bargaining power of the contracting parties*".[74]

Similarly, the procedure for appointment of an arbitrator by the dominating party either unilaterally or from a panel is often a non-negotiable term in a standard form contract. Once a dispute arises, these entities appoint

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72 Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 95HARV. L. REV. 1174 (1983).

73 Superintendence Co. of India Pvt. Ltd v. Sh. Krishan Murgai, (1981) 2 SCC 246 (India).

74 Life Ins. Corp. of India v. Consumer Educ. & Res. Ctr., (1995) 5 SCC 482, ¶ 47 (India); *see also* Central Inland Transp. Corp. Ltd. v. Brojo Nath, 1986 AIR 1571 (India); *see also* Gillespie Bros. & Co. Ltd. v. Roy Bowles Transp. Ltd. [1973] 1 Lloyd's Rep. 10 (Eng.).

arbitrators from a panel of their retired officers as per the terms of the arbitration agreement. These arbitration agreements are also commonly used by public entities or by banking, finance, and insurance sectors.

The clauses for unilateral appointment of an arbitrator not only elucidate the colourable nature of the arbitration agreement but are also in the teeth of the doctrine of *contra proferentem* in contracts. The doctrine of *contra proferentem* states that any clause considered to be biased or ambiguous should be interpreted against the interests of the party that created, introduced, or requested that such a clause be included.[75]

Such a threat to the independence and impartiality of the arbitral tribunal has been dealt with by the Indian courts with two divergent views and reasoning. One limb of the decisions takes a proactive role in striking down such unilateral appointment clauses and provides similar reasoning as rendered by the Supreme Court in *Perkins Eastman* and *TRF Limited*.

For instance, the Supreme Court in *Bharat Sanchar Nigam Limited* v. *Motorola India Pvt Ltd.*[76] held that as the Petitioner-Department which was entitled to appoint an arbitrator as per the arbitration agreement was the one which had imposed liquidated damages on the Respondent-Contractor, allowing the same party to appoint the arbitrator would defeat the principles of natural justice.[77]

The Jammu and Kashmir High Court in *Tramboo Joinery Mills Pvt. Ltd.* v. *Commissioner/Secretary to Govt. & Ors.*[78] and the Gauhati High Court in *Panihati Rubber Limited* v. *The Principal Chief Engineer, Northeast Frontier*

75 Bank of India v. K. Mohan Das, 2009 (5) SCC 313, ¶ 47 (India).
76 Bharat Sanchar Nigam Ltd. v. Motorola India Pvt. Ltd., (2009) 2 SCC 337 (India).
77 *Id.* ¶ 16.
78 Tramboo Joinery Mills Pvt. Ltd. v. Comm'r/Sec'y to Gov't & Ors., 2014 SCC OnLine J&K 55 (India) [*hereinafter* "Tramboo Joinery"].

Railway[79]have recently taken a more proactive role by quashing the unilateral appointment of the arbitrators and appointing neutral arbitrators in their place, while observing that the courts have a right to appoint independent and impartial arbitrators from a list other than the one mentioned in the arbitration agreement.[80]

However, the other limb of decisions provides reasoning that party autonomy is the norm in arbitration laws and judicial intervention an exception. The mutually agreed terms for the appointment procedure cannot be interfered with by the courts. Moreover, the eligibility of the panel unilaterally selected by one party will go through the eligibility test set out under the provisions of Section 12 of the 1996 Act.

The Supreme Court in 2017, in the case of *VoestalpineSchienen GmbH* v. *Delhi Metro Rail Corporation Ltd.* ["**VoestalpineSchienen**"],[81]was posed with an issue regarding the appointment of an arbitral tribunal, where one party (private contractor) was forced to choose limited names from a panel which was unilaterally selected by the other party (a government entity). The Petitioner-Contractor challenged the arbitration clause on the ground that the panel was selected solely by the Respondent-Department, which would lead to impartiality of the arbitral tribunal. The Supreme Court observed that the parties have to abide by the mutually agreed terms of the contract. Interestingly, on merits, the Court declared the choices in the panel to be too small a number and stressed on the need for a broad-based panel. The Court, even though with an intention to "*send positive signals to the international business community, in order to create healthy arbitration environment and conducive arbitration culture in this country*,"[82] failed in considering that even with a broad-based panel, the candidates unilaterally selected for the panel by the

79 Panihati Rubber Ltd. v. Principal Chief Eng'r Northeast Frontier Ry., 2016 SCC OnLine Gau 69 (India).
80 Tramboo Joinery, 2014 SCC OnLine J&K 55, ¶ 47 (India).
81 Voestalpine Schienen GmbH v. Delhi Metro Rail Corp. Ltd., (2017) 4 SCC 665 (India).
82 *Id.* ¶ 30.

Respondent-Department might still be compromised during the arbitral proceedings.

Thus, the inclusion of unequal clauses in an arbitration agreement, specifically pertaining to unilateral appointment of arbitrators, should be read against the party that inserted such a biased clause, and the courts should intervene by appointing a neutral arbitral tribunal. This exercise will dilute the unfettered powers of the dominant party, leading to the independent and impartial adjudication of disputes.

F. International jurisprudence

Article 12(2) of the Model Law states that "*an arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence*". If a challenge against an arbitrator is successful, the arbitral tribunal will be reconstituted in accordance with the rules governing the arbitration proceedings.

The United States Supreme Court in the much-celebrated case of *Commonwealth Coatings Corp.* v. *Continental Casualty Co.*,[83] regarding the importance of independence and impartiality of arbitrators, held that:

> "*[W]e should, if anything, be even more scrupulous to safeguard the impartiality of arbitrators than judges, since the former have completely free rein to decide the law as well as the facts and are not subject to appellate review. We can perceive no way in which the effectiveness of the arbitration process will be hampered by the simple requirement that arbitrators disclose to the parties any dealings that might create an impression of possible bias.*"[84]

Similar to the Indian statutory laws for arbitration, a number of international statutes also do not explicitly define the standards for the

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83 Commonw. Coatings Corp. v. Cont'l Casualty Co., 393 U.S. 145 (1968) (U.S.).

84 *Id.* ¶ 3.

impartiality and independence of arbitrators, particularly in reference to unilateral appointment of arbitrators. In international commercial arbitrations, the issue regarding equal treatment of parties during the arbitration process has been a controversial and hence an extremely contentious topic.

In the case of *Societes BKMI et Siemens* v. *SocieteDucto*,[85] the Paris Court of Appeal upheld a clause where the right to appoint the arbitral tribunal was with the Defendants, prejudicing the Claimant. However, the French Court of Cassation overturned the decision of the Paris Court of Appeal and held that:

> "*In light of Articles 1502 para. 2, and 1504 of the New Code of Civil Procedure and Article 6 of the Civil Code; Whereas the principle of the parties being equal in appointing arbitrators falls under public policy; which can only be waived only after the dispute has arisen.*"[86]

The French Court of Cassation, in the case of *X* v. *Banque Privee Edmond de Rothschild Europe*,[87] held that a unilateral option clause is void for creating a *potestative* condition, which is contrary to the French law. A *potestative* condition is that which makes the execution or performance of the agreement to depend on a condition precedent, which is entirely in the power of one of the contracting parties.[88] Such unfair conditions and terms go against the ethos of contractual laws as well.

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85 Cour de cassation [Cass.] [supreme court for judicial matters] 1e. civ., Jan. 7, 1992, Bull. civ. I, No. 2 (Fr.).

86 *Id.* ¶ 6.

87 Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Sept. 26, 2012, Bull. civ. I, No. 983 (Fr.).

88 Vernon V. Palmer & Andre L. Pauche, *A Review of the Louisiana Law on Potestative Conditions*, 47 TUL. L. REV. 284 (1973).

Similarly, the Presidium of the highest arbitration court of the Russian Federation, in the case of *Russian Telephone Company* v. *Sony Ericsson Mobile Communications Rus,*[89] held that such unilateral option clauses in an arbitration agreement are invalid and unenforceable, due to them being fundamentally unequal.[90] The Court also held that one-sided option clause violated the principle of procedural equality of the parties.

On the other hand, in *Wilson Taylor Asia Pacific Pte Ltd* v. *Dyna-Jet Pte Ltd,*[91]while upholding the validity of a one-way arbitration option clause, the Singapore Court of Appeal observed that if there exists a valid arbitration agreement between the parties and the said arbitration agreement is not null and void, inoperative, or incapable of being performed, then the courts cannot set aside such one-way option clauses. Likewise, U.S. courts have considered the unilateral clauses in an arbitration agreement to be in line with the principle of party autonomy.[92]

Therefore, in comparison to international courts, the Indian courts through the decisions rendered in *Perkins Eastman* and *TRF Limited*, amongst others, have projected a proactive and a much more dynamic approach towards dealing with unequal and unilateral clauses in an arbitration agreement, by intervening and setting aside asymmetrical arbitration clauses and by adopting own procedures for appointment of arbitrators.

G. Developments post-Perkins Eastman– conflicting outcomes

The decision rendered by the Supreme Court in *Perkins Eastman* in 2019 was a step forward towards achieving independence and impartiality in

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89 Postanovlenie Prezidiuma VAS RF ot 19 iyun 2012 g. No. 1831/12 [Ruling of the Presidium of the Highest Arbitration Court of the Russian Federation of June 19, 2012, No. 1831/12] (Russ.).

90 Cole Rabinowitz, *Fate of the Unilateral Option Clause Finally Decided in Russia*, N.Y.U. J. INT'L L. POL. (Apr. 10, 2013), *available at*https://www.nyujilp.org/fate-of-the-unilateral-option-clause-finally-decided-in-russia/.

91 Wilson Taylor Asia Pacific Pte Ltd. v. Dyna-Jet Pte Ltd. [2017] SGCA 32 (Sing.).

92 M.A. Mortenson Co. v. Saunders Concrete Co., Inc., 676 F.3d 1153, 1158 (8th Cir. 2012) (U.S.).

arbitration proceedings. However, the decision has a few limitations and reservations attached to it, which makes the law of appointment of arbitral tribunals vulnerable.

The Supreme Court, while declaring the arbitration clause invalid on the basis of reasonable apprehension of bias, quashed the entire arbitration proceedings along with the award. This implies that the applicability of a future decision like *Perkins Eastman* would also be retrospective, and as such, similar decisions would apply in cases where the arbitral tribunal has entered reference and also where the award has already been published. The Supreme Court erred in even specifying the category of cases which deserve to be exempted from this straitjacket formula, as will be discussed below.

While dealing with the applicability of Perkins Eastman, the Delhi High Court in *Proddatur Cable* referred to a decision of the Supreme Court in *Bharat Broadband Network Limited* v. *United Telecoms Limited* ["**Bharat Broadband**"] to decide the fate of pending arbitrations.[93] In the case of B*harat Broadband*, the Supreme Court held that as soon as any court adjudicates on the issue of the mandate of an arbitrator, Section 14 of the 1996 Act will operate, thus leading to the termination of the mandate de jure.[94]

There exist situations where one party may have consented to the unilateral appointment of an arbitrator, either by formal consent or by an act of acquiescence, for instance, where the non-appointing party without protest participated in the arbitral proceeding by filing their response or claims. There can also be a situation where the non-appointing party had failed to resist the appointment at the constitution of the tribunal, but questioned

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93 Bharat Broadband, (2019) 5 SCC 755 (India).

94 *Id.* ¶ 17; *see also* Naval Sharma & Saurajay Nanda, *Arbitrations by Unilaterally Appointed Arbitrators: In Jeopardy?*, MONDAQ (Mar. 19, 2020), *available at*https://www.mondaq.com/india/arbitration-dispute%20resolution/904892/arbitrations-by-unilaterally-appointed-arbitrators-in-jeopardy.

the unilateral appointment when it challenged the award in a petition filed under Section 34 of the 1996 Act. However, such challenges would be barred by virtue of the doctrine of estoppel, which means that a non-appointing party is estopped from challenging the appointment of the arbitrator later, once it has accepted the arbitral tribunal's jurisdiction and competency by participating in the arbitration proceedings without coercion or misrepresentation.[95]

In light of these limitations, Indian courts soon started distinguishing the *Perkins Eastman* decision on merits. The full bench of the Supreme Court in the case of *Central Organisation for Railways Electrification* v. *M/s. ECI-SPIC-SMO-MCML (JV)* ["**Central Organisation for Railway**"],[96]held contrary to the reasoning of the judgments in the cases of *TRF Limited* and *Perkins Eastman*. The Court upheld the mutually agreed asymmetrical procedure for appointment of an arbitrator. This decision was in line with the reasoning rendered by the Supreme Court in *VoestalpineSchienen*. The Court, however, directed the Petitioner-Department to send a 'fresh' panel of four retired railway officers, and the Respondent-Contractor was asked to select the arbitral tribunal from the said panel.[97] The Supreme Court while allowing the appeal of the Railway Department, quashed the High Court's appointment of a sole arbitrator.

While the *Central Organisation for Railway*, one can say, is a clear case of deviation from *Perkins Eastman*, further signs of such deviation could also be gathered during the course of a recent matter in the case of *Subha Gopalakrishnan* v. *M/s. Karismaa Foundations Pvt. Ltd.*[98] ["**Subha**

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95 New India Assurance Co. v. Dalmiya Iron & Steel Co. Ltd., 1964 SCC OnLine Cal 34, ¶ 10 (India).

96 Central Org. for Rys. Electrification v. M/s. ECI-SPIC-SMO-MCML (JV), 2019 SCC OnLine SC 1635 (India).

97 *Id.* ¶ 40.

98 Subha Gopalakrishnan v. M/s. Karismaa Founds. Pvt. Ltd., SLP(C) No. 30404 of 2019 (decided by the Supreme Court on Jan. 8, 2020) (India) [*hereinafter* "Subha Gopalakrishnan"].

Gopalakrishnan"].[99] The case concerned unilateral appointment of an arbitrator by the Respondent Company, which was made as per the arbitration agreement. The Petitioner relying on the decision in *Perkins Eastman* sought intervention of the Court to invalidate the mandate of the arbitrator, even though the arbitration proceedings were initiated and the Petitioner had started active participation in the arbitration hearings. The Madras High Court rejected the Section 11 petition filed by the Petitioner on the ground that the sole arbitrator[100] – before whom the Petitioner had also submitted herself by participating in the proceedings – had already entered reference. The Madras High Court relied on the proposition of law that when the arbitral tribunal has entered reference with respect to the dispute between the parties, constitution of another arbitral tribunal in respect of those same issues, would be without jurisdiction.[101] Aggrieved by the decision of the High Court, the Petitioner approached the Supreme Court. However, the matter resulted in what can be called *in limine* disposal, since the Petitioner decided to withdraw its petition with the permission of the Supreme Court.

Before the Petitioner could withdraw its petition, three main arguments were raised by the author on behalf of the Respondent Company before the Supreme Court: *first*, that the Petitioner had already participated in the arbitral proceedings, hence is estopped to challenge the appointment of the arbitrator. *Second*, the rationale of *Perkins Eastman* should not be made

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[99] It is pertinent to state here that the author represented the Respondent Company (M/s Karismaa Foundations Pvt. Ltd.) in the case of *Subha Gopalakrishnan* before the Supreme Court. Reluctance of the Bench to apply the rationale of *Perkins Eastman* could be inferred from the fact that the Court allowed the petitioner to withdraw its petition. We as lawyers perceived this as dilution of the stance taken by the Supreme Court on the issue of unilateral appointment of arbitrators in *Perkins Eastman* and also as our success in making it possible for the Respondent to continue with the arbitration.

[100] Mrs. Subha Gopalakrishnan v. M/s. Karismaa Founds. Pvt. Ltd. & Ors., O.P. No. 711 of 2017 (decided by the Madras High Court on Sept. 6, 2019) (India).

[101] *See* Antrix Corp. Ltd. v. Devas Multimedia Pvt. Ltd., (2014) 11 SCC 560 (India); *see also* Som Datt Builders Pvt. Ltd. v. State of Punjab & Ors., 2005 SCC OnLine P&H 891 (India).

applicable to the pending arbitration proceedings where both parties have participated in arbitral hearings, without protest. *Third*, the finding of *Perkins Eastman* could be distinguished on merits, on the basis of the type of the appointment clauses present in the arbitration agreements. However, due to withdrawal of the petition, *Subha Gopalakirshna* became a missed opportunity for clear and further deliberation on the rationale of *Perkins Eastman* by the apex court.[102] However, it can be argued that the very fact that the Petitioner decided to withdraw and the apex court allowed it, is a clear enough sign that rationale of *Perkins Eastman* needs reconsideration.[103]

Further, in the cases of *SMS Ltd.* v. *Rail Vikas Nigam Limited* ["**SMS Ltd.**"][104]and *BVSR-KVR (Joint Ventures)* v. *Rail Vikas Nigam Limited* ["**BVSR-KVR**"],[105]where the appointment procedures in the respective arbitration agreements were similar to the one present in *Central Organisation for Railway*, the Delhi High Court chose to rely on the ratio of *Perkins Eastman* instead and thereby appointed an independent sole arbitrator by declaring the unilateral appointment clause to be invalid and biased.

The Delhi High Court, in *SMS Ltd.* and *BVSR-KVR*, relied on the decision of a concurrent bench in *Assignia-VIL-JV* v. *Rail Vikas Nigam Limited*,[106] wherein the Delhi High Court had held that the Respondent-Department could not appoint its retired or serving employees as arbitrators, as it would defeat the very purpose of the 2015 Amendment Act. The Court found that it was duty bound to secure the appointment and to remove any justifiable

102 A.K. Awasthi, *Stare Decisis and Supreme Court*, 30 JUD. TRAINING & RES. INST. J. 77–81 (Dec. 2008).

103 The author opines that, even though the author was successful in defending the rights of the Respondent in the case of *Subha Gopalakrishnan* before the Supreme Court, the Court's *in limine* disposal consequently led to a further dilution of the issue of unilateral appointment of arbitrators in India.

104 SMS Ltd. v. Rail Vikas Nigam Ltd., 2020 SCC OnLine Del 77 (India).

105 BVSR-KVR (Joint Ventures) v. Rail Vikas Nigam Ltd., 2020 SCC OnLine Del 456 (India).

106 Assignia-VIL-JV v. Rail Vikas Nigam Ltd., 2016 SCC OnLine Del 2567 (India).

doubts as to the independence and impartiality of the arbitrator, and therefore, appointed a neutral arbitral tribunal of three arbitrators.

Therefore, different courts have interpreted the judgments of *Perkins Eastman* and *Central Organisation for Railway* as per their own understanding of the rationale of these judgments. The courts have either distinguished these decisions on merits or have relied upon them mechanically without close examination. This has resulted in conflicting decisions, which are treated as precedents for the issue involving unilateral appointments creating further uncertainty on the issue.

IV. The way forward

A. Taking away the absolute immunity of arbitrators

As the cases of professional misconduct by arbitrators increased,[107] the questions against arbitral immunity arose. The blanket immunity granted to arbitrators shields them from perceived misconduct.[108] In an arbitration process, proving the bias of the arbitral tribunal post-reference is extremely difficult. However, in a case where bias is proved against the arbitrator the only solution is to remove the arbitrator and appoint a new one. There needs to be penal and tortious consequences against persons who attempt to violate the independence and impartiality of an arbitral process.

This can be done by taking away the absolute immunity granted to arbitrators and imposing sanctions on them in cases of gross misconduct.

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[107] Susan D. Franck, *The Liability of International Arbitrators: A Comparative Analysis and Proposal for Qualified Immunity*, 20 N.Y.L SCH. J. INT'L & COMP. L. 1 (2000).

[108] Prathima R. Appaji, *Arbitral Immunity: Justification and Scope in Arbitration Institutions*, 1(1) INDIAN J. ARB. L. 63–74 (July 2012), *available* at http://www.ijal.in/sites/default/files/IJAL%20Volume%201_Issue%201_Prathima%20 Appaji.pdf.

The unilateral appointment of an arbitral tribunal gives rise to the presumption of bias towards the party who solely appointed the arbitral tribunal. Thus, unilateral appointment prima facie raises doubts against the independence and impartiality of the arbitration process. Mere removal of a biased arbitrator will not put an end on the dominant party's attempt to appoint a favourable arbitral tribunal.

Further, the remedies adopted by Indian courts against a partial arbitrator are mostly limited to the removal of such arbitrator. The courts in these circumstances have, however, also set aside the arbitration proceedings and the award in the past. During the process of biased unilateral appointment and subsequent removal by the courts, the prejudiced party suffers irreparable loss of time and money. Thus, in cases of grave partiality and bias, the prejudiced party should be entitled to monetary damages from the offending arbitrator and the erring party. This will act as a deterrent against the arbitrators who recklessly abuse their powers.

B. System of 'faceless tribunals'

Independence, fairness, impartiality, and neutrality are the indispensable qualities of an arbitrator.[109] The reasonable apprehension of partiality and bias is understood to be more in cases of unilateral appointments than in neutral appointments. There is a dire need to have access to new institutional arbitration centres, as the number of commercial arbitration cases increase. Such mechanisms will bring in more transparency in the appointment process which, in turn, will ensure the independence and impartiality of the arbitral tribunal.

In this regard, the Government of India in 2017 constituted a ten-member High Level Committee ["**High Level Committee**"] to review the

[109] Subhash Projects, 2006 SCC OnLine Gau 57, ¶ 29 (India); *see also* Yashwith Constr. (P) Ltd. v. Simplex Concrete Piles India Ltd., 2008 SCC OnLine AP 826, ¶ 12 (India).

institutionalisation of arbitration mechanism and suggest reforms thereto.[110] The High Level Committee noted that the 2015 Amendment Act created undue hardship for its users, for instance, by the delays in the arbitration process caused by the extensive involvement of the courts.[111] Thereby, the High Level Committee report suggested amendments to the 1996 Act specifically aimed at promoting institutional arbitration in India, citing examples of the appointment mechanisms in Singapore, Hong Kong and the United Kingdom. Furthermore, the suggestions included, *inter alia*,setting up of an autonomous body styled by the Arbitration Promotion Council of India ["**APCI**"], having representatives from all stakeholders for grading arbitral institutions in India. The APCI, in turn, will recognize professional institutes providing for training and accreditation of arbitrators.

Considering the recommendations of the High Level Committee, the legislature through the Arbitration and Conciliation (Amendment) Act, 2019 ["**2019 Amendment Act**"] inserted 'Part IA – Arbitration Council of India'.[112] The Arbitration Council of India is required to grade the arbitral institutions and arbitrators and provide accreditation, amongst other things.[113] These steps are meant to bring about a paradigm shift from the current perception of partiality of arbitral tribunals and delay in resolution of commercial disputes in India to it being viewed as an investor-friendly

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110 Government of India, Report of the High Level Committee to Review the Institutionalisation of Arbitration Mechanism in India (July 30, 2017), *available at*http://legalaffairs.gov.in/sites/default/files/Report-HLC.pdf.

111 Mridul Godha & Kartikey M., *The New-Found Emphasis on Institutional Arbitration in India*,KLUWER ARB. BLOG (Jan. 7, 2018), *available at*http://arbitrationblog.kluwerarbitration.com/2018/01/07/uncitral-technical-notes-online-dispute-resolution-paper-tiger-game-changer/?doing_wp_cron=1597346999.8069019317626953125000.

112 Arbitration and Conciliation (Amendment) Act, 2019, No. 33 of 2019 (India) [*hereinafter* "2019 Amendment Act"].

113 *Id.* § 10; 1996 Act, No. 26 of 1996, § 43D (India).

destination, which will ensure the independence and impartiality of arbitral tribunals without the involvement of courts.

Encouraging and promoting the use of arbitral institutions will create a system of faceless tribunals by removing the option of selecting the arbitrator. The term 'faceless tribunals' envisages a process where arbitral institutions will have specialised persons on board, and through a system of randomised selection, the arbitral tribunal will be constituted by the institution without the involvement of the parties. The arbitrators selected will then be scrutinised on the basis of Section 12 and the Fifth and the Seventh Schedules of the 1996 Act, as amended and inserted by the 2015 Amendment Act respectively.

The 2019 Amendment Act, *inter alia*, amended Section 11 of the 1996 Act, empowering the Supreme Court and the high courts to designate arbitral institutions for the process of appointment of arbitrators.[114] Prior to this amendment also, the Supreme Court,[115] in a pro-arbitration move, had instructed the Mumbai Centre for International Arbitration to appoint an arbitrator in an international dispute, in exercise of its powers under Section 11 of the 1996 Act (as amended by the 2015 Amendment Act).[116]This

[114] 2019 Amendment Act, Act No. 33 of 2019, § 3 (India) amended § 11 of the 1996 Act. Section 3 reads as follows:
"In section 11 of the principal Act,–
(i) after sub-section (3), the following sub-section shall be inserted, namely:—
'(3A) The Supreme Court and the High Court shall have the power to designate, arbitral institutions, from time to time, which have been graded by the Council under section 43-I.'".

[115] Sun Pharm. Indus. Ltd., Mumbai v. M/s Falma Organics Ltd. Nigeria, 2017 SCC OnLine SC 1200, ¶ 3 (India).

[116] Ayushi Singhal, *Appointment of Arbitrators in India – Finally Courts Divest Some Power*, KLUWER ARB. BLOG (Sept. 5, 2019), *available at*http://arbitrationblog.kluwerarbitration.com/2017/09/05/appointment-arbitrators-india-finally-courts-divest-power/?doing_wp_cron=1597346249.0300669670104980468750.

decision marked the first time that a court invoked Section 11 to designate an institution to assist with the appointment of an arbitrator.[117]

Such references to neutral institutions will ensure that appointments are impartial and curb the unfettered right of parties to unilaterally appoint arbitrators.

C. Use of artificial intelligence for appointment of arbitrators

The use of the phenomenal advancements in information technology has not yet affected the world of arbitration. With the rise of commercial arbitrations across the globe between internationally placed parties, there is a need for arbitral institutions to put technology at the forefront with an aim to reduce the workload and assist the parties in the arbitration process.

Artificial Intelligence [“**AI**”] is now a reality. The arbitration institutions should start investing in software with built-in AI features, for every aspect related to the arbitration process. Around the world, various law firms have started using AI as a method of determining effective case strategies, research and case outcomes.[118] AI can also be used by the arbitral institutions for effectively organising and storing the pleadings and document of the parties, while maintaining complete confidentiality.

Most importantly, AI can be used for selection of arbitrators from a pool of empanelled persons. This feature can first select a list of persons from the pool who possess specialisation in the field of that particular dispute and then filter persons who are statutorily exempted from being arbitrators in relation to a specific set of parties. This will ensure that a system of

[117] Nicholas Peacock, Donny Surtani & Kritika Venugopal, *MCIA Recognised by the Supreme Court of India as an Appointing Institution*, HSF NOTES (Aug. 3, 2017), *available at*https://hsfnotes.com/arbitration/2017/08/03/mcia-recognised-by-the-supreme-court-of-india-as-an-appointing-institution/.

[118] Alberto Acevedo Rehbein, *Artificial intelligence in international arbitration: from the legal prediction to the awards issued by robots*, GARRIGUES NEWSL. (Feb. 2, 2019), *available at*https://www.garrigues.com/en_GB/new/artificial-intelligence-international-arbitration-legal-prediction-awards-issued-robots.

faceless tribunal is achieved which, therefore, will maintain absolute independence and impartiality of arbitral tribunals.

V. Conclusion

The quintessence of an arbitration process is to maintain the independence and impartiality of the arbitral tribunal. Unilateral clauses in arbitration agreements result in reasonable apprehension of partiality and bias. The pristine rule of adjudicative ethics rests on the premise that the arbitral tribunal permitted by the law to try cases and controversies must not only be unbiased, but must also avoid even the appearances of bias.[119] It is, therefore, extremely crucial to ensure that the arbitration process follows the highest standards of impartiality. The author thus suggests that the process of appointment of the arbitral tribunal must incorporate the system of faceless tribunals by embracing the use of AI in the selection process.

The lack of clarity arising from the silence of statutory law on the issue of unilateral appointments of arbitrators has led to grave uncertainty. Further, as no singular decision of the Supreme Court occupies the field in this regard, it has resulted in conflicting decisions of the Supreme Court and various high courts. This ambiguity and conflict in decisions questions the legality of the appointments of arbitral tribunals by courts. This uncertainty is in the teeth of the legislative intent of maintaining the independence and impartiality of an arbitrator.

Therefore, it is imperative upon the legislature to step in to settle the debate and/or for the courts to seize the opportunity to revisit and settle the law on unilateral clauses in arbitration agreements. The much-awaited conclusion to this dispute should definitely uphold the fundamental tenets of arbitration and contractual laws by putting an end to such unequal and unilateral appointments.

[119] Subhash Projects, 2006 SCC OnLine Gau 57 (India).

JURISDICTIONAL ISSUES IN INDIAN ARBITRATION CASES: A UNIFORMIZED APPROACH

Soumil Jhanwar[*]

Abstract

One of the major goals of the legal regime of arbitration is the elimination of the need for courts in resolving arbitrable disputes. However, court assistance is very frequentin arbitration. This may be for conducting procedural supervision or testing substantive validity. In light of this, the determination of the court with valid jurisdiction is crucial. This determination is a two-step process. First, one needs to determine the seat of the arbitration. Then, the appropriate court must be decided on the basis of the law of the seat. Both steps of the process are very complex and have led to various conflicting judgments in India. This article attempts to provide rationally sound and normatively defensible tests for the determination of the seat and the appropriate court. In Part I, the article looks at the conflicts in the determination of the seat where an agreement does not explicitly mention a seat. In Part II, the article looks at the domestic conflicts in determination of jurisdiction. The aim of the article is to uniformize these two determinations in order to make the law more predictable.

I. The seat of arbitration

The most important rule of drafting an arbitration agreement is to clearly mention a seat of arbitration. The seat is of high importance as it decides the law that would govern the substantive validity and the procedure of an arbitration. Further, it decides the legal system and courts whose

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jurisdiction the arbitration will be subject to.[1] However, it is often found that parties fail to mention any specific seat in their arbitration agreements. This necessitates the usage of other factors in determination of the seat. The following sub-part analyses the apex court's usage of various factors in determination of the seat in the absence of specific stipulation of the same. The next sub-part assesses the relevance of the venue of an arbitration in determination of the seat.[2]The third sub-part proposes a unique six-part test to determine the seat in such cases. The last sub-part applies this test to major Supreme Court judgments on the determination of the seat, in order to examine its practical utility.

A. The divide at the Supreme Court

The landmark judgment of *Bharat Aluminium Co.* v. *Kaiser Aluminium Technical Services* ["**BALCO**"] had explained the concept of the seat of arbitration in detail.[3] It hadalso overruled *Bhatia International*v. *Bulk Trading SA*["**Bhatia International**"], holding that Indian courts can only apply Part I of the Arbitration and Conciliation Act, 1996 ["**Arbitration Act**"] to an arbitration seated in India[4] and that an arbitration can only have one seat.[5] However, the five-judge bench controversially held that the judgment would only apply to contracts drafted after the date of its pronouncement.[6] This meant that many post-*BALCO* cases would still have to use the *Bhatia International* principle[7] to determine the applicability of Part I of the

1 GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 2053 (2d ed. 2014) [*hereinafter* "BORN"].

2 This is because, as it would be discussed, the Indian Supreme Court is greatly divided on the importance of the venue in determination of the seat of an arbitration.

3 *See* Bharat Aluminium Co. v. Kaiser Aluminium Tech. Servs., Inc.(2012) 9 SCC 552, ¶¶ 71–76, 95–117 (India) [*hereinafter* "BALCO"].

4 *Seeid.* ¶¶ 194–196 (it is important to note that *BALCO*uses the word "place" for the "seat" of arbitration).

5 *Id.* ¶¶ 100, 110, 136–143, 153.

6 *Id.* ¶ 197.

7 *See* Bhatia Int'l v. Bulk Trading S.A., (2002) 4 SCC 105, ¶¶ 21, 32 (India) [*hereinafter* "Bhatia International"] (the *Bhatia International* principle was that the Indian Courts will exercise jurisdiction over interim applications and challenges resulting from arbitrations, unless the

Arbitration Act. However, the apex court, in subsequent cases, has subtly circumvented the approach in *Bhatia International* in excluding the jurisdiction of Indian courts, even in the absence of any "*implied exclusion*" of the Part I.[8] Thus, the *BALCO* approach has indirectly been applied.[9] This approach may be challenged on grounds of stare decisis as *BALCO* and *Bhatia International*, being judgements of higher benches, would be binding on them.[10] However, it would be imprudent to do so, especially in light of the important purpose these cases seek to achieve.[11] In any case, the *BALCO* position was reaffirmed by the 2015 amendment to the Arbitration Act, which clarified that Part I is applicable to arbitrations seated outside India only in some exceptional circumstances.[12] The apex court has also

intention of the parties was to expressly or impliedly oust the jurisdiction of Indian courts. This means that the Indian Courts would exercise concurrent jurisdiction, along with the courts of the seat of the arbitration).

8 *See, e.g.*,Videocon Indus. Ltd. v. Union of India, (2011) 6 SCC 161, ¶¶ 16–18, 23 (India); Dozco India (P) Ltd. v. Doosan Infracore Co. Ltd., (2011) 6 SCC 179, ¶ 20 (India) [*hereinafter* "Dozco India"]; Reliance Indus. Ltd. and Anr v. Union of India, (2014) 7 SCC 603, ¶¶ 45, 51, 53, 57(India) [*hereinafter* "Reliance Industries 2013"]; Harmony Innovation Shipping Ltd. v. Gupta Coal India Ltd., (2015) 9 SCC 172, ¶¶ 45, 50–53 (India) [*hereinafter* "Harmony Innovation"]; Union of India v. Reliance Indus., (2015) 10 SCC 213, ¶ 20 (India) [*hereinafter* "Reliance Industries 2015"] (while in each of these cases, there may have been an implied choice of a foreign seat, there had been no "implied exclusion" of Part I of the Arbitration and Conciliation Act, No. 26 of 1996 (India) [*hereinafter* "Arbitration Act"]. The reasoning in these judgements seems to be that the choice of a foreign seat automatically excludes the application of Part I. However, in *Bhatia International*, the apex court had held that a choice of foreign seat does not preclude jurisdiction of Indian courts. Thus, an implied or express choice of another seat cannot be understood as an implied exclusion of jurisdiction of Indian Courts. The approach of "choice of one is exclusion of another" was rather proposed in *BALCO*, which does not apply to these cases).

9 *See*BALCO, (2012) 9 SCC 552, ¶¶ 77, 89, 198 (India) (this is because *BALCO*'s ratio was also that Part I cannot be applied to foreign seated arbitrations).

10 *See*Central Board of Dawoodi Bohra Cmty. & Anr. v. State of Maharashtra, (2005) 2 SCC 673, ¶¶ 5, 12 (India) (the judgments of larger benches are binding on the smaller ones).

11 *See* BALCO, (2012) 9 SCC 552, ¶¶ 136-143, 153 (India) (the purpose is avoidance of multiplicity and complexity in legal proceedings and upholding comity).

12 *See*Arbitration Act, No. 26 of 1996, § 2(f) (India) (this was a partial reaffirmation of the *BALCO*position, as it implied that the arbitrations seated outside India cannot be interfered with otherwise); *See* Arbitration Act, No. 26 of 1996, § 87 (India) (however, it is unclear whether this partial reaffirmation applies to contracts entered into before *BALCO*.

stopped differentiating between pre-*BALCO* and post-*BALCO* contracts while analysing cases.[13] Thus, it is clear that the *Bhatia International* principlestands ineffective in India today, and the courts can only interfere with arbitral proceedings if the seat of arbitration is situated in India. However, this does not mean that the determination of jurisdiction of Indian courts has become any easier over time. The determination of seat remains a very complex process and may involve multiple considerations.

The Supreme Court stands divided on the relevance of the venue in the determination of seat. In *Roger Shashoua*v. *Mukesh Sharma*["**Roger Shashoua**"], the contract had provided the venue to be London and the governing law to be Indian law but had not mentioned the seat of arbitration.[14] The Court declared London to be the seat, borrowing from the reasoning of the High Court of the United Kingdom deciding the same matter.[15] This was because, *first*, the contract had provided that the arbitration be conducted in accordance with the International Chamber of Commerce ["**ICC**"] Rules of Arbitration ["**ICC Rules**"]. The choice of supranational rules for governing the proceedings meant that the ICC could determine the place/seat of the arbitration.[16] In the absence of any formal

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This is because Section 87 had only barred retrospective application of the amendment to proceedings initiated before 2015); Hindustan Constr. Co. Ltd. v. Union of India, (2019) SCC OnLine SC 1520, ¶ 57 (India) [*hereinafter* "Hindustan Construction"] (further, even this bar on retrospective application was struck down by the Supreme Court as being manifestly arbitrary).

13 *See* Union of India v. Hardy Expl. & Prod. (India) Inc., (2019) 13 SCC 472, ¶ 23 (India) [*hereinafter* "Hardy Exploration"].

14 Roger Shashoua v. Mukesh Sharma, (2017) 14 SCC 722, ¶¶ 69–70 (India) [*hereinafter* "Shashoua India"].

15 Roger Shashoua v. Mukesh Sharma [2009] EWHC (Comm) 957 [33]–[34] (Eng.) [*hereinafter* "Shashoua UK"].

16 *See*International Chamber of Commmerce (ICC), Rules of Arbitration 1998, art. 14(1), *available at*https://www.jus.uio.no/lm/icc.arbitration.rules.1998/portrait.pdf [*hereinafter* "ICC Rules 1998"] (while Article 14(1) of the ICC Rules 1998 mentioned the word 'place', it is well-established that for the purpose of the provision, 'place' means the seat of the arbitration. It is important to note that the ICC Rules 1998 would apply as the agreement

declaration by the ICC on the place/seat of an arbitration, the Court assumed that the ICC had decided London to be the seat.[17] *Second*, London is internationally regarded as an ideal seat for arbitral awards due to the legal framework of England being favourable to arbitration. Thus, the parties, being rational businesspersons, would have intended London to be the seat.[18] The Court, therefore, did not rely on the approach followed in *Bhatia International*.

In *Imax Corporation* v. *E-City Entertainment (India) (P) Ltd.* ["**Imax Corporation**"], the Supreme Court dealt with a similar factual scenario and reached the same decision.[19] However, the rationale employed was different. The Court used the *Bhatia International* approach and held that the express choice of the ICC Rules meant that the parties intended to exclude the jurisdiction of India's courts.[20]

In 2018, the apex court in *Union of India* v. *Hardy Exploration* ["**Hardy Exploration**"] dealt with a factual situation which was similar to those in *Roger Shashoua* and *Imax Corporation*. The governing law was Indian, the venue was Kuala Lumpur, and the proceedings were to be governed by the United Nations Commission on International Trade Law Model Law on International Commercial Arbitration, 1985 ["**Model Law**"].[21] However, the three-judge bench differed from the previous two benches, in holding

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was signed in 1998 and the arbitral proceedings had begun before the 2012 Rules came into being. Currently, the 2017 ICC Rules are available for use by parties).

17 Shashoua India, (2017) 14 SCC 722, ¶¶ 29–30, 69–72 (India).

18 *Id.* ¶¶ 37, 46.

19 Imax Corp. v. E-City Entm't (India) (P) Ltd., (2017) 5 SCC 331, ¶¶ 31–33 (India) [*hereinafter* "Imax Corporation"].

20 *Id.* ¶¶ 28, 31, 33.

21 Hardy Exploration, (2019) 13 SCC 472, ¶¶ 26–27 (India); *See* United Nations Commission on International 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* "Model Law"] (the Model Law is similar to the ICC Rules as it also gives the arbitral tribunal the right to decide the seat if the parties have not already specified it).

that the determination of venue cannot automatically be used to infer a decision on seat, in the absence of other relevant concomitant factors coinciding with the venue.[22] The Court also held that the Model Law does not automatically confer the status of seat on the pre-decided venue, as it prescribes careful consideration of convenience of the parties in determination of the seat.[23] The Court held that the award could be challenged in Indian courts.[24] However, it provided no rationale for or analysis on why the substantive law must be seen as the relevant criterion for deciding the seat.[25]

In *BGS SGS Soma JV* v. *NHPC Ltd.*[“**BGS SGS Soma**”], the Court opined that the bench in *Hardy Exploration* had erred in ignoring *Roger Shashoua*while determining the seat.[26] The Court used venue and institutional arbitration rules to reach its conclusion.[27] The Court opined that whenever the venue has been mentioned along with the words ‘shall be held’ or ‘arbitration proceedings’,[28] it would, in fact, be interpreted that the venue was intended to be the seat of the arbitration.

Most recently, in *Mankastu Impex Private Limited* v. *Airvisual Ltd.* [“**Mankastu Impex**”], the Court acknowledged the conflicting positions

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22 *See*Hardy Exploration, (2019) 13 SCC 472, ¶¶ 29–30 (India).

23 *Seeid.* ¶¶ 29–30 (meaning thereby that the arbitral tribunal did not have complete discretion in deciding the matter).

24 *See id.* ¶¶ 33–34 (this, in light of *BALCO*, implies that India is the seat of the arbitration).

25 *See supra* text accompanyingnotes 3–13 (while one may contend that the Court decided this based on the *Bhatia International* principle, this contention would be erroneous for two reasons: (1) the judgment does not hint at the *BhatiaInternational* principlebeing used or applied; and (2) the *BhatiaInternational* approach has been watered down by subsequent judgments).

26 *See* BGS SGS Soma JV v. NHPC Ltd., 2019 SCC OnLine SC 1585, ¶¶ 93–96 (India) [*hereinafter* “BGS SGS Soma”].

27 *Id.* ¶¶ 98–99.

28 *See id.* ¶ 89 (according to the Court, this would be because it would imply that all the proceedings are to be held at that particular place).

of law that persist in the country.[29] In this case, the arbitration agreement had provided for the proper law to be Indian and the exclusive jurisdiction of the courts of India.[30] However, the Court decided that the seat was situated in Hong Kong because it was mentioned as the "*place*". The rationale was that the clause had mentioned that the arbitration "*shall finally be resolved by arbitration administered*" in Hong Kong.[31] This was held to have conferred the status of "*seat*" on Hong Kong.[32] The Court seemed to have followed the *BGS SGS Soma* approach of the use of contractual language in relation to the venue, in the determination of seat.

B. Relevance of the venue

Evidently, the aforementioned judgments evince no clear unified test or position of law. One common thread amongst all of them is their detailed discussion on the importance of the venue of an arbitration.[33] Thus, it must be assessed whether the venue should be the paramount consideration in the determination of seat.

It will be pertinent to look at the factors usually considered while determining the venue of an arbitration. *First*, geographical neutrality is very important. Venues are usually neutral locations so that one party is not unnecessarily advantaged during the proceedings.[34]*Second*, convenience of the parties is relevant. A venue must be a location which is convenient for

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29 *See* Mankastu Impex Pvt. Ltd. v. AirVisual Ltd., 2020 SCC OnLine SC 301, ¶¶ 10, 13, 14 (India) [*hereinafter* "Mankastu Impex"].

30 *Id.* ¶¶ 8–9.

31 *Id.* ¶ 21.

32 *Id.* ¶¶ 19–23.

33 *See*, *e.g.*, ShashouaIndia, (2017) 14 SCC 722, ¶¶ 63–74 (India); Hardy Exploration, (2019) 13 SCC 472, ¶¶ 22–36 (India); BGS SGS Soma, 2019 SCC OnLine SC 1585, ¶ 64 (India).

34 REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION LAW: STUDENT VERSION 166 (Nigel Blackaby, Constantine Partasides, Alan Redfern & Martin Hunter eds., 6th ed. 2015) [*hereinafter* "BLACKABY ET AL."]; Loukas A. Mistelis, *Arbitral Seats – Choices and Competition*, *in*INTERNATIONAL ARBITRATION AND INTERNATIONAL COMMERCIAL LAW: SYNERGY, CONVERGENCE AND EVOLUTION 376–377 (Stefan M. Kröll, Loukas A. Mistelis, Pilar Perales Viscasillas, Vikki M. Rogers eds., 2011) [*hereinafter* "Mistelis"].

both the parties to access.[35] *Third*, the venue must have necessary facilities for the smooth conduct of an arbitration.[36]

In contradistinction, the most important aspect in determining the seat is the legal framework and the efficiency of courts of the seat.[37] While convenience of the parties may also be a consideration, it is not as crucial as the legal framework itself.[38] It is evident that the overall considerations in the determination of seat and venue differ. Further, the choice of substantive law may also be indicative of the choice of seat in some cases.[39]

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35 JULIAN DAVID MATHEW LEW QC, LOUKAS A. MISTELIS & STEFAN M. KRÖLL, COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION 361 (2003); MISTELIS, *supra* note 34, at 376–377.

36 BLACKABY ET AL., *supra* note 34, at 288.

37 *See* BORN, *supra* note 1, at 2053 (the legal framework of the seat of an arbitration is of much relevance as it determines the national legislation applicable to an arbitration, the jurisdiction and scope of interference of courts; the internal functioning of an arbitration, and the law determining the validity of the arbitral proceedings and the agreement to arbitrate); White & Case & School of Int'l Arb., Queen Mary Univ. of London, 2010 International Arbitration Survey: Choices in International Arbitration, *available at*http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2010_InternationalArbitrationSurveyReport.pdf [*hereinafter* "2010 International Arbitration Survey Report"]; BLACKABY ET AL., *supra* note 34, at166–167; H. HOLTZMANN, *The Importance of Choosing the Right Place to Arbitrate An International Case*, *in*PRIVATE INVESTORS ABROAD – PROBLEMS AND SOLUTIONS IN INTERNATIONAL BUSINESS 183, 192–197 (M. Bender ed., 1977); Parties usually prefer a seat that has consistency in laws, predictability in outcomes and expediency in legal proceedings. *See*, *e.g.*, C v. D [2007] EWCA (Civ) 1282 [16], [30] (Eng.) [*hereinafter* "C v. D"]; Fiona Trust & Holdings Corp. v. Privalov [2007] UKHL 40 [6] (appeal taken from Eng.) [*hereinafter* "Fiona Trust"].

38 *See id.*; BORN, *supra* note 1, at 2052–2053; Michael Hwang, SC & Fong Lee Cheng, *Relevant Considerations in Choosing the Place of Arbitration*, 2 ASIAN INT'L ARB. J. 195, 201 (2008); Kazuo Iwasaki, *Selection of Situs: Criteria and Priorities*, 2 ARB. INT'L 57, 57–60 (1986).

39 *See* BORN, *supra* note 1, at 1617 (this is when the parties would have assumed that the substantive law would govern the whole agreement including the arbitration agreement); Hardy Exploration, (2019) 13 SCC 472 ¶ 36 (India); Sumitomo Heavy Indus. Ltd. v. ONGC Ltd., (1998) 1 SCC 305, ¶¶ 15–17 (India) [*hereinafter* "Sumitomo"]; Nat'l Thermal Power Corp. v. Singer Corp., (1992) 3 SCC 551, ¶¶ 49–50 (India) [*hereinafter* "NTPC-Singer"].

Hence, in the case of conflict between substantive law and venue, there needs to be a deeper analysis.[40]

The apex court has attempted to use phrases like "*shall be administered at*" and "*arbitral proceedings shall be held at*" to hold that the intent was to confer the status of seat on the venue.[41] However, this is manifestly erroneous, as seat of an arbitration is a legal concept and not a geographical one.[42] The choice of venue cannot be used to automatically imply a choice of seat, especially in the presence of other indicators that may point to the contrary.[43]

Admittedly, internationally, high importance is attached to the venue in determination of the seat.[44] However, this has often been because of the other concomitant factors being attached to the venue.[45] These other

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40 *See, e.g.*,Hardy Exploration, (2019) 13 SCC 472, ¶¶ 34–35 (India); Enercon Gmbh v. Enercon India, (2014) 5 SCC 1, ¶¶ 40, 90, 92, 113, 130 (India) [*hereinafter* "Enercon"]; Braes of Doune Wind Farm (Scotland) Ltd. v. Alfred McAlpine Bus. Sers. Ltd. [2008] EWHC (TCC) 426 [12], [14] (Eng.) [*hereinafter* "Braes of Doune"].

41 *See* Shashoua India, (2017) 14 SCC 722, ¶¶ 45, 65 (India); Mankastu Impex, 2020 SCC Online SC 301, ¶¶ 22–23 (India).

42 BORN, *supra* note 1, at 1595–1597 (this assertion will be elaborated upon further in Part II(B)).

43 *See* cases cited in *supra* note 40.

44 *See*, *e.g.*, Shashoua UK, [2009] EWHC (Comm) 957 [26]–[34] (Eng.); Shashoua India, (2017) 14 SCC 722, ¶¶ 69–75 (India); Imax Corporation, (2017) 5 SCC 331, ¶ 33 (India) ; C v. D, [2007] EWCA (Civ) 1282 [16], [30] (Eng.); Atlas Power v. NTDC [2018] EWHC (Comm) 1052 [38]–[49] (Eng.) [*hereinafter* "Atlas Power"].

45 In Shashoua India, (2017) 14 SCC 722, ¶¶ 69–72 (India), Shashoua UK, [2009] EWHC (Comm) 957 [33] (Eng.) and Atlas Power, [2018] EWHC (Comm) 1052 [47] (Eng.), the venue was declared as the seat as such prescription was supported by the choice of supranational rules of arbitration. In C v. D, [2007] EWCA (Civ) 1282 [1], [16], [30] (Eng.) and Shashoua UK, [2009] EWHC (Comm) 957 [34] (Eng.), the Court used the rationale of the general normative superiority of the London courts and the concept of Bermuda Arbitration to hold that in the absence of other factors, London should be the seat. In C v. D, [2007] EWCA (Civ) 1282 [16]–[17] (Eng.), the Court also used the fact that English law would govern the agreement to arbitrate to hold England as the seat. In Imax Corporation, (2017) 5 SCC 331, ¶ 12 (India), the Tribunal had decided upon a seat and thus that was upheld. *See* cases cited in *infra* note 52.

aspects of an arbitration agreement must be analysed, along with the venue and the substantive law in order to determine the seat.

C. The proposed test

In addition to the venue, various other factors might be important in the determination of the seat. These factors must be ranked in the order of their similarity and affinity with the seat. The factors that are highly indicative of the choice of seat are ranked higher. A six-step test is proposed to look at these factors in a hierarchical manner.[46]

Step 1: The arbitration clause may grant exclusive jurisdiction to the courts of a country[47] or provide that a specific national legislation would govern an arbitration.[48] As stated, seat is a legal concept. Determination of national legislation is akin to determination of the seat.[49] Further, determination of seat is also the same as saying that a specific country's courts will have exclusive jurisdiction.[50] Conferment of exclusive jurisdiction must also lead the inference of determination of seat. These positions are not contradictory as usually national legislations provide for jurisdiction of the

46 Every further step is only to be used when the prior steps do not help in determination of the seat.

47 Braes of Doune, [2008] EWHC (TCC) 426[4]–[8] (it was mentioned that the courts of England will have exclusive jurisdiction; this was held to imply that London is the seat).

48 *See, e.g.,* Bharat Aluminium Co. v. Kaiser Aluminium Tech. Servs., Inc. (2016) 4 SCC 126, ¶¶ 3–4 (India) [*hereinafter* "BALCO II"] (the contract stated that English Arbitration law would apply); Enercon, (2014) 5 SCC 1, ¶ 114 (India)(it was mentioned that the Arbitration Act would apply).

49 BALCO II, (2016) 4 SCC 126, ¶¶ 12, 16 (India); Enercon, (2014) 5 SCC 1, ¶¶ 97, 101, 147, 152 (India); *see also*Naviera Amazonica Peruana SA v. Compania International de Seguros del Peru [1988] 1 Lloyd's Rep. (CA) 116 (Eng.) [*hereinafter* "Naviera Amazonica"].

50 Braes of Doune, [2008] EWHC (TCC) 426 [4]–[8] (Eng.); *See, e.g.,* BALCO, (2012) 9 SCC 552, ¶¶ 106, 110 (India) (affirming Braes of Doune and ShashouaUK); A v. B, [2007] 1 Lloyd's Rep. 237 [111] (Eng.) (many cases have also recognized that determination of seat is akin to the exclusive jurisdiction of the courts of a country).

same country's courts exclusively.[51] Thus, if national legislation or exclusive jurisdiction is mentioned, that shall automatically decide the seat.[52]

Step 2: In the absence of such prescriptions, it must be seen whether the substantive law and the venue of the arbitration lie in the same country. Parties may choose substantive law, while presuming that it will apply to the arbitral proceedings as well.[53] At the same time, geographic convenience is a factor that is common in the determination of seat and venue, which may in some cases lead to concurrence of both.[54] While substantive law or venue alone may not be individually sufficient, their concurrence raises a strong presumption that the law of the chosen country would also be the *lex arbitri*.[55] This is because parties are assumed to be rational businesspersons, who could not have intended to involve multiple laws and locations when a simpler approach is possible.[56]

Step 3: When the substantive law and venue indicate different locations, the law governing the arbitration agreement must be looked at. This is because determination of the law governing the arbitration agreement depends on factors that are very similar to the factors used in determination

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51 Arbitration Act, No. 26 of 1996, § 2(1)(e)(i)–(ii) (India); Arbitration Act, 1996, c. 23, § 105 (U.K.); Arbitration Act 2001, § 2(1) (Sing.).

52 *See* Union of India v. McDonnell Douglas Corporation [1993] 2 Lloyd's Rep. 48 (Eng.) [*hereinafter* "McDonnell Douglas"] (while in some cases the express stipulation of legislation may not be taken as determination of the seat, such is only because of an express choice of a conflicting seat); Naviera Amazonica [1988] 1 Lloyd's Rep. (CA) 116 (Eng.) (similarly, when another seat is clearly provided, an exclusive jurisdiction would not decide the seat); U & M Mining Zambia Ltd. v. Konkola Copper Mines plc [2013] EWCH 260 [25], [38], [45], [47]–[48] (Eng.).

53 NTPC-Singer, (1992) 3 SCC 551, ¶¶ 15, 22–23, 49–50 (India); Hardy Exploration,(2019) 13 SCC 472, ¶¶ 34–36 (India); Sumitomo, (1998) 1 SCC 305, ¶¶ 15–17 (India).

54 *See* cases cited in *supra* note 44.

55 *See, e.g.*, Eitzen Bulk A/S v. Ashapura Minechem Ltd., (2016) 11 SCC 508, ¶ 33 (India) [*hereinafter* "Eitzen Bulk"]; Dozco India, (2011) 6 SCC 179, ¶¶ 4, 15, 18 (India).

56 NTPC-Singer, (1992) 3 SCC 551, ¶ 15 (India); C v. D, [2007] EWCA (Civ) 1282 [1], [16], [30] (Eng.); Fiona Trust, [2007] UKHL 40[6] (appeal taken from Eng.); Shashoua India,(2017) 14 SCC 722, ¶ 69 (India).

of a seat.[57] While choosing each of these laws, the parties will be conscious of their treatment of arbitrability, validity of an agreement, strict compliance to (or flexible interpretation of, as the case may be) the contractual timelines, and treatment of costs, amongst others.[58] The law governing an arbitration agreement also coincides with the *lex arbitri* in most cases.[59]

Step 4: The aforementioned factors have been used to infer the implied intention of the parties in the determination of seat. In the absence of such factors, one needs to look for factors that do not imply an obvious choice of seat. Next, one must look for the stipulation of supranational rules. Supranational rules usually provide for the tribunal to determine an arbitral seat.[60] In such cases, the tribunal may be better suited to choose a seat

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57 *See*BLACKABY ET AL., *supra* note 34, at 159–163; BORN, *supra* note 1, at 2088; C v. D, [2007] EWCA (Civ) 1282 [22], [26], [28] (Eng.); Enka Insaat ve Sanayi AS v. OOO Insurance Co. Chubb [2020] EWCA (Civ) 574 [35]–[40] (Eng.) [*hereinafter* "Enka"]; *Sul América Cia Nacional de Seguros SA v. Enesa Engenharia SA* [2012] EWCA (Civ) 638 [18], [32] (Eng.) [*hereinafter* "Sul América"]; Habas Sinai Ve Tibbi Gazlar Istihsal Endustrisi AS v. VSC Steel Co. Ltd. [2014] 1 Lloyd's Rep. 479 [101] (Eng.) [*hereinafter* "Habas Sinai"]; Ian Glick & Niranjan Venkatesan, *Choosing the Law Governing the Arbitration Agreement*, *in*JURISDICTION, ADMISSIBILITY AND CHOICE OF LAW IN ARBITRATION: LIBER AMICORUM MICHAEL PRYLES 131, 141–150 (Neil Kaplan & Michael Mosereds., 2018) (this is because there are many overlaps in the purposes of the law governing the arbitration agreement and the law of the seat, and that they are generally assumed to have intended to be the same).

58 *See* Glick & Niranjan, *supra* note 57, at 136, 142 (this is because both these laws may simultaneously affect all these issues).

59 C v. D, [2007] EWCA (Civ) 1282 [22], [26], [28] (Eng.); *Sul América,* [2012] EWCA (Civ) 638 [18], [32] (Eng.); Enka, [2020] EWCA (Civ) 574 [35]–[40] (Eng.); Habas Sinai, [2014] 1 Lloyd's Rep. 479 [101] (Eng.).

60 ICC Rules of Arbitration 2017, art. 19(1), *available at*https://cdn.iccwbo.org/content/uploads/sites/3/2017/01/ICC-2017-Arbitration-and-2014-Mediation-Rules-english-version.pdf.pdf; London Court of International Arbitration (LCIA), Arbitration Rules 2014, art. 16.1, *available at*https://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2014.aspx; Permanent Court of Arbitration (PCA), Arbitration Rules 2012, art. 18(1), *available at*https://docs.pca-cpa.org/2015/11/PCA-Arbitration-Rules-2012.pdf; UNCITRAL Arbitration Rules 2010, G.A. Res. 65/22, art. 18; International Centre for Dispute Resolution (ICDR), Arbitration Rules 2014, art. 13, *available at*https://www.adr.org/sites/default/files/ICDR%20Rules_0.pdf; Hong Kong International Arbitration Centre (HKIAC), Administered Arbitration Rules 2018, art.

because of its expertise and impartiality.[61] This does not contravene party autonomy as institutional rules are chosen by parties themselves,[62] and moreover, all major institutional rules subject the choice of seat to an express choice by parties themselves.[63] Determination through such rules has been validly recognized by courts as seat.[64]

Step 5: In the absence of other factors, if only either of the substantive law or the venue has been mentioned in an agreement, then the mentioned place must be determined as the seat.[65] While both these factors counterbalance each other, the presence of only one of them would raise a strong presumption of seat, in the absence of the other. Again, this is because parties are to be understood as rational businesspersons who would not unnecessarily choose conflicting laws and locations.[66]

Step 6: In all the other cases, the intent of the parties must be traced through other surrounding factual scenarios. This would mean that a "*subtle intent*" test would need to be applied in order to resolve this conflict. The test would involve a combined analysis of the language of the contract

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14(1), *available at* https://www.hkiac.org/sites/default/files/ck_filebrowser/PDF/arbitration/2018_hkiac_rules.pdf; Singapore International Arbitration Centre (SIAC), Rules of Arbitration 2016, art. 21, *available at* https://www.siac.org.sg/our-rules/rules/siac-rules-2016.

61 BORN, *supra* note 1, at 2094–2096; Anibal Sabater, *When Arbitration Begins Without A Seat*, 27(5) J. INT'L ARB. 443, 466 (2010).

62 10% of ICC Arbitrations use institutional rules to determine seat. *See* Int'l Chamber of Com., *2012 Statistical Report*, 24(1) ICC CT. BULL. 5, 14 (2013).

63 *See* sources cited in *supra* note 60.

64 *See*, *e.g.*,Shashoua UK,[2009] EWHC (Comm) 957 [27] (Eng.); Shashoua India, (2017) 14 SCC 722, ¶¶ 67–71 (India); Eitzen Bulk, (2016) 11 SCC 508 ¶¶ 26–29, 32 (India); Atlas Power, [2018] EWHC (Comm) 1052 [47]–[49] (Eng.).

65 *See* BGS SGS Soma, 2019 SCC Online SC 1585, ¶ 64 (India); NTPC-Singer, (1992) 3 SCC 551, ¶¶ 49–50 (India).

66 NTPC-Singer, (1992) 3 SCC 551, ¶ 15 (India); C v. D, [2007] EWCA (Civ) 1282 [1], [3], [16], [30] (Eng.); Fiona Trust, [2007] UKHL 40 [6] (appeal taken from Eng.); Shashoua India,(2017) 14 SCC 722 ¶ 69 (India).

(implied intent),[67] the analysis of the surrounding facts (closest connection),[68] and normative comparison of the two locations (normative superiority).[69] Thus, in such cases, the case as a whole would need to be looked into to determine the intention of the parties.[70]

D. Retrospective application of the test

For this test to be useful, it must help simplify the determination of seat. In *Mankastu Impex*, the parties had mentioned that the courts of New Delhi would have the exclusive jurisdiction over any proceedings.[71] Using Step 1, this would negate the need to even look at the venue of the proceedings and confer the status of seat on New Delhi. In *BGS SGS Soma*, the contract

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67 *See* Harmony Innovation, (2015) 9 SCC 172, ¶¶ 20, 37–38 (India); Shashoua India, (2017) 14 SCC 722, ¶ 72 (India); McDonnell Douglas, [1993] 2 Lloyd's Rep. 48 (Eng.).

68 This is akin to the usage of the closest and most real connection test in light of the factual scenario, as against contractual prescriptions. *See*Enercon, (2014) 5 SCC 1, ¶¶ 98, 130–135 (India); NTPC-Singer, (1992) 3 SCC 551, ¶¶ 16–17, 44 (India); Naviera Amazonica, [1988] 1 Lloyd's Rep. (CA) 116 (Eng.); Sul América, [2012] EWCA (Civ) 638 [5], [6], [13], [15] (Eng.).

69 *See* C v. D, [2007] EWCA (Civ) 1282 [1], [16], [30] (Eng); Shashoua UK, [2009] EWHC (Comm) 957 [33] (Eng.).

70 The final test is:

(1) If the agreement prescribes the exclusive jurisdiction of courts of a country or the governance of arbitration by the arbitration law of a country, then that country becomes the seat of the arbitration;
(2) Subject to the first step, if the venue and the substantive law coincide, then the substantive law will also be the *lex arbitri*;
(3) Subject to the first two steps, if the parties have decided on a law governing the agreement to arbitrate, then that law will be the law of the set;
(4) Subject to the first three steps, if the seat has been expressly decided by the tribunal by using the chosen supranational rules of arbitration, then the same shall be finalised as the valid seat of the arbitration;
(5) Subject to the first four steps, if only either of substantive law or venue is given, then that factor must be seen as the conclusive determination of seat;
(6) Subject to the first five steps, the adjudicator must look at: the language of the contract; the surrounding facts of the case and the normative comparison of the conflicting locations. These factors must be collectively used to discern the subtle intention of the parties for the determination of seat.

71 Mankastu Impex, 2020 SCC Online SC 301, ¶¶ 26–27(India).

had only mentioned the venue of arbitration.[72] In such a case, it is obvious that Step 5 of the test would be used to hold that the venue is, in fact, the seat of the arbitration.

In *Hardy Exploration*, different venue and governing laws had been mentioned. While the Model Law was to govern the arbitral proceedings, the tribunal had not determined the seat.[73] In this scenario, the subtle intent test must be used, in furtherance of Step 6. As a matter of fact, both the parties were Indian. Moreover, Malaysia is not an arbitration hub like London. Thus, India should be the seat in such a scenario. Alternatively, it could also be argued that since the supranational rules provided for the determination of seat in consideration of the "*convenience of parties*," India should be the seat.[74]

In factual scenario of *Roger Shashoua*, one may use the Tribunal's determination of seat under Step 4 of the test to infer London as the seat. However, the Tribunal had, in fact, not even considered the question of seat.[75] Thus, Step 6 would be applied to look at the subtle intent test. Mukesh Sharma was Indian, whereas Roger Shashoua was English. In such a situation, the normative comparison of India and London would imply that the parties wanted London as the seat.[76] Thus, London should be the seat.

In *Imax Corporation*, the seat had categorically been determined in pursuance of the ICC Rules by the Tribunal.[77] Thus, Step 4 would make London the seat. In *Enercon Gmbh.* v. *Enercon India* ["**Enercon**"], the governing statute

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72 BGS SGS Soma, 2019 SCC Online SC 1585, ¶ 3 (India).
73 Hardy Exploration, (2019) 13 SCC 472, ¶¶ 25–26 (India).
74 This is because it would be more convenient for both the parties to hold the proceedings in India.
75 Shashoua India, (2017) 14 SCC 722, ¶ 68 (India).
76 This is because London is internationally renowned as an ideal seat for arbitration.
77 Imax Corporation,(2017) 5 SCC 331, ¶ 18 (India).

was mentioned as India,[78] thus Step 1 would apply directly to make India the seat. In *Eitzen Bulk A/S* v.*AshapuraMinechem Ltd.*, Step 2 would be used to make England the seat, as both the substantive law and the venue were in England.[79] In both the *Reliance Industries* cases,[80] since the governing law of the arbitration agreement was English, the use of Step 3 would make London the seat.

With the exception of *Mankastu Impex*, the use of the test has thus led to identical conclusions as those arrived at in the actual cases. The exception of *Mankastu Impex* is justified. This is because the conferment of the status of seat on Hong Kong completely ousted the jurisdiction of the Delhi courts.[81] This rendered Clause 17.1 of the contract ineffective and redundant.[82] This was in manifest disregard of the express intention of the parties and thus, cannot be held to be the correct interpretation. This shows that the varied and often conflicting tests in various cases must be replaced with this simple six-part test in order to assess the intention of the parties in determination of the seat.[83] This would simplify and uniformize the

78 Enercon, (2014) 5 SCC 1, ¶ 107 (India).

79 Eitzen Bulk, (2016) 11 SCC 508, ¶ 2 (India).

80 Reliance Industries 2013, (2014) 7 SCC 603, ¶ 7 (India); Reliance Industries 2015, (2015) 10 SCC 213, ¶ 2 (India).

81 *See*Mankastu Impex, 2020 SCC Online SC 301, ¶¶ 26–27 (India) (this is because all the disputes were to be resolved by arbitration).

82 *Seeid.* ¶ 26. Further, it must be emphasized that contracts must be interpreted in such a manner that none of the clauses are rendered redundant. *See*, *e.g.*, M Arul Jothi v. Lajja Bal, (2000) 3 SCC 723, ¶ 10 (India); Insil Hydro Power & Manganese Ltd. v. State of Kerala, (2019) SCC OnLine SC 1194, ¶ 37 (India).

83 This is a very simplified test and thus may be subject to exceptions. The exclusive jurisdiction to the courts of a country may not be as important in cases where the arbitration clause in itself is extremely narrow. The mention of a national legislation may not be relevant when it is evident that such has been done only for procedural aspects of the law and not the supervisory aspects. *See*, *e.g.*, McDonnell Douglas [1993] 2 Lloyd's Rep. 48 (Eng.); Process and Indus. Dev. Ltd. v. Federal Republic of Nigeria [2019] EWHC (Comm) 2241 (Eng.); *See* BLACKABY ET AL., *supra* note 34, at 158–159 (the law governing the agreement to arbitrate may not be important when it is merely chosen to be in line with the substantive law of the contract); Mistelis, *supra* note 34 (venue may not be relevant when it is solely chosen for the purpose of convenience or neutrality); C v. D, [2007]

process of determination of the seat, as it has generally proven to be in line with the outcomes that have been rationalised by the apex court using different tests. But the determination of seat is not the end of the process of jurisdictional determination. If the seat is determined to be India, the next big question is: which court within India would exercise jurisdiction over the relevant arbitral proceedings?

II. Domestic conflicts in determination of jurisdiction

Various sections of the Arbitration Act enable parties to go to a "*court*" for legal remedy.[84] Section 2(1)(e)(i) and 2(1)(e)(ii) mention that the appropriate court would be the court "*having jurisdiction to decide the questions forming the subject matter of the arbitration if the same had been the subject matter of a suit*".[85] While most of the other parts of the Arbitration Act are borrowed from the Model Law, the definition of "*court*" in India is unique. The following sub-part looks at the various tests used by the Supreme Court in the determination of the correct meaning of "*court*". The second sub-part proposes the ideal approach to be used for this determination, by analysis of various cases.

A. Tests used by the Supreme Court

The meaning of "*court*" has been contentious since the inception of the new arbitration regime in 1996. The earliest cases indicated that the words "*questions forming subject matter of the arbitration*" connoted the issues that led

EWCA (Civ) 1282 [1], [16], [30] (Eng.) (substantive law may not be relevant when it is clear that the parties could not, being rational businesspersons, have intended the same in the scenario); Hardy Exploration, (2019) 13 SCC 472, ¶¶ 32–34 (India) (determination through institutional rules may not be important when the tribunal does not follow the rules in determining the seat or determines an absurd seat). Thus, while using the test one would need to look out for the factors that negate the importance of any element of the test. This can be done by looking at why any specific element has been chosen. The test is flexible and can be altered accordingly.

84 Arbitration Act, No. 26 of 1996, §§ 8, 9, 13, 14, 27, 29A, 34 (India).

85 *Id.* §§ 2(1)(e)(i)–2(1)(e)(ii) (India) (the arbitration act differentiates between international commercial arbitrations and other arbitrations while defining courts. However, the definitions are almost identical with only the superiority of the court changing).

to the arbitration.[86]Thus, the earlier interpretation required the court to assume that the parties were bringing those issues straight to a court of law, with a deeming fiction of non-existence of the arbitral award itself.[87] This would require the court to test jurisdiction on the basis of the Code of Civil Procedure, 1908 ["**CPC**"] or the Letters Patent, as the case may be.[88] Thus, the test would be whether the relevant court presides over the location of the cause of action or the location[89] of the respondent.[90] This test is based on the golden rule of interpretation,[91] and shall be referred to as the 'CPC Test'.

However, the CPC Test received a setback after the judgment in *BALCO*.[92] The five-judge bench in *BALCO* opined that Section 2(1)(e) must be interpreted keeping in mind the principle of party autonomy enshrined in

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86 Khaleel Ahmed Dakhani v.Hatti Gold Miners Co. Ltd., (2000) 3 SCC 755, ¶ 6 (India) [*hereinafter* "Khaleel Ahmed"]; JSW Steel v. Jindal Praxair Oxygen Co. Ltd, (2006) 11 SCC 521, ¶¶ 66–68 (India) [*hereinafter* "JSW Steel"]; Swastik Gases (P) Ltd. v. Indian Oil Corp. Ltd., (2013) 9 SCC 32, ¶ 28 (India) [*hereinafter* "Swastik Gases"]; Fountain Head Developers v. Maria Arcangela Sequeira, 2007 SCC Online Bom 340, ¶¶ 6–7, 10–16 (India).

87 *Id.*; *See* Vaden v. Discover Bank, 556 U.S. 49, 129 S. Ct. 1262 (2009), ¶ (b) [*hereinafter* "Vaden"] (this test is very similar to the "look through" jurisdiction approach suggested by the US Supreme Court in the *Vaden* case).

88 Khaleel Ahmed, (2000) 3 SCC 755, ¶ 6 (India); JSW Steel, (2006) 11 SCC 521, ¶¶ 19, 32, 36–37, 66–68 (India); Swastik Gases, (2013) 9 SCC 32, ¶¶ 28–29 (India).

89 *See* CODE CIV. PROC. (1908), § 20 (India) (providing that the location of the respondent includes the residence (in case of a person), main office (in case of a company) and place of conduct of business of the respondent).

90 *See* CODE CIV. PROC. (1908), §§ 19–20 (India); Letters Patent of the High Court of Judicature at Calcutta (1862), § 12 (India); Letters Patent of the High Court of Judicature at Madras (1865), § 12 (India); Letters Patent of the High Court of Judicature at Bombay (1866), § 12 (India) (for example, if the cause of action of a contractual breach only existed in New Delhi, the defendant resided in Mumbai, the seat of the arbitration was Kolkata and the venue of the arbitration was Chennai, then only courts of New Delhi and Mumbai would have the jurisdiction).

91 *See*FRANCIS BENNION, STATUTE LAW 81–82 (1980) (according to Bennion's Golden Rule of interpretation of statutes, the statute must be interpreted literally, unless such interpretation leads to an absurdity. Since in this case, the literal interpretation does not seem to lead to an absurd outcome, the same interpretation must be used).

92 BALCO, (2012) 9 SCC 552 (India).

Section 20 of the Arbitration Act.[93] The two courts having concurrent jurisdiction would, therefore, be the court where the cause of action is located and the court where the arbitration takes place.[94] This shall be referred to as the '*BALCO*Test'.[95]

The leading case interpreting *BALCO* is that of *Indus Mobile Distribution Pvt. Ltd.* v. *Datawind Innovations Pvt. Ltd.* ["**Indus Mobile**"].[96]In *Indus Mobile*, the performance of the contract was supposed to be in Delhi and Chennai, and the contract conferred exclusive jurisdiction on the courts of Mumbai.[97] The seat of arbitration was held to be in Mumbai. The Court used certain parts of *BALCO* to interpret that the seat of arbitration is akin to an exclusive jurisdiction clause.[98] Thus, the courts presiding over the seat would have exclusive jurisdiction.[99] However, the Court did not take note of the specific test in *BALCO* itself, which was a different and a wider

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93 *Seeid.* ¶ 96 (thus, according to the Court, the "subject-matter" of an arbitration also included the venue, apart from the cause of action).

94 *Id.* (the Court also gave an example in furtherance of this. In a case where the causes of action arose in different cities, but the arbitration proceedings had been conducted in New Delhi, there would be simultaneous jurisdiction of the courts presiding the cause of action and those in New Delhi).

95 This test has also been used in several landmark high court cases. *See*, *e.g.*, Konkola Copper Mines v. Stewarts & Lloyds of India Ltd., 2013 SCC Online Bom 777, ¶¶ 56–59 (India) [*hereinafter* "Konkola Copper Mines"]; Antrix Corp. v. Devas Multimedia, 2018 SCC Online Del 9338, ¶¶ 51–53 (India) [*hereinafter* "Antrix Corporation"].

96 Indus Mobile Distrib. Pvt. Ltd. v. Datawind Innovations Pvt. Ltd., (2017) 7 SCC 678 (India) [*hereinafter*"Indus Mobile"].

97 *Id.* ¶¶ 2, 21.

98 *Id.* ¶¶ 10, 13, 17, 19.

99 *See* Konkola Copper Mines, 2013 SCC Online Bom 777, ¶¶ 56–59 (India); BGS SGS Soma, 2019 SCC Online SC 1585, ¶¶ 56–61 (India) (the Court also gave an example in furtherance of this. In a case where the causes of action arose in different cities, but the arbitration proceedings had been conducted in New Delhi, there would be simultaneous jurisdiction of the courts presiding the cause of action and those in New Delhi); *id.* ¶¶ 19–20 (while in *Indus Mobile*, the Court does discuss the freedom of choice of parties when multiple courts have jurisdiction, the rationale provided by the Court is that decision on the seat is tantamount to decision on exclusive jurisdiction. For the purpose of this article, it is assumed that the Court decided that the courts of the seat will have exclusive jurisdiction, even when there is no exclusive jurisdiction clause).

test.[100] The Court expressly precluded any scope of application of the principles of the CPC in determination of jurisdiction.[101] The test in *Indus Mobile* will be called the 'Seat Test'.

Emkay Global Financial Services v. *Girdhar Sondhi*["**Emkay Global**"]had a similar factual scenario and the Supreme Court reached the same outcome in that case.[102] However, the Court's reasoning was centred around the exclusive jurisdiction clause and not the seat.[103] It is unclear what the Court would have done, had the seat clause and the exclusive jurisdiction clause mentioned different places. The Court does not seem to lay down a specific test.

In *Brahmani River Pellets Ltd.* v. *Kamachi Industries Ltd.* ["**Brahmani River Pellets**"], while the venue of the arbitration was in Bhubaneshwar, the cause of action arose in Chennai as the pellets were to be delivered in Chennai.[104] The Court borrowed the importance of the "*venue*" from the *BALCO* judgment.[105] The Court then analysed the judgment of the Supreme Court in *Reliance Industries Ltd. and Anr.* v. *Union of India*[106]to indicate that the venue would be equivalent to the seat.[107] The Court

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100 *See*BALCO, (2012) 9 SCC 552, ¶¶ 125–130 (India) (while *BALCO*did say that seat was akin to exclusive jurisdiction clause, the discussion was only focused on which country the arbitration would be challenged in. The Court did not use this test for the domestic determination of jurisdiction, as that would have depended on the prescription by the national legislation. The Court's determination of the location of challenge was based on its interpretation of the statute and not on the basis of general principles. The apex court in *Indus Mobile*seemed to have ignored this distinction).

101 *See* Indus Mobile, (2017) 7 SCC 678, ¶ 19 (India) (this includes jurisdiction of the place of cause of action which was not excluded by *BALCO*).

102 *See* Emkay Global Financial Services v. Girdhar Sondhi, (2018) 9 SCC 49, ¶¶ 2–4 (India) [*hereinafter* "Emkay Global"] (even in this case, Mumbai was prescribed as the seat. Further, an exclusive jurisdiction clause conferred jurisdiction on the courts of Bombay).

103 *Id.* ¶¶ 8, 9.

104 *See* Brahmani River Pellets Ltd. v. Kamachi Industries Ltd., (2019) SCC OnLine SC 929, ¶¶ 2–4 (India).

105 *Id.* ¶ 12.

106 *See* Reliance Industries 2013, (2014) 7 SCC 603 (India).

107 *Id.* ¶ 15.

concluded that the decision on the venue is akin to conferment of exclusive jurisdiction.[108] Thus, the Madras High Court was held to have erred in entertaining a challenge. However, this test was quite different from the *BALCO* Test, as *BALCO* had granted concurrent jurisdiction to courts presiding over the cause of action as well.[109] The test in *Brahmani River Pellets* shall be called the 'Venue Test'.

Recently, in *BGS SGS Soma*,[110] the apex court disagreed with the interpretation of *BALCO* by both the Delhi and the Bombay High Courts,[111] in holding that the courts of the seat will have exclusive jurisdiction over arbitral proceedings. Interpreting an arbitration clause which declared "*New Delhi/Faridabad*" as the venue, the Court held that this amounts to the declaration of a seat.[112] It was further held that since there were no arbitral proceedings held in Faridabad and all awards were signed at New Delhi, the seat was evidently situated at New Delhi.[113] Then, following the Seat Test, exclusive jurisdiction was held to be conferred on the courts of New Delhi.[114] This was despite the Faridabad courts presiding over the location of the cause of action.[115] The Court also held that the *BALCO* Test was erroneous as the determination of the seat automatically confers exclusive jurisdiction.[116] In another case with a similar factual scenario,[117] another three-judge bench of the apex court relied on *BGS SGS*

108 *Id.* ¶¶ 18–19.

109 Applying this test, the Madras High Court would have had valid jurisdiction.

110 BGS SGS Soma, 2019 SCC Online SC 1585 (India).

111 Konkola Copper Mines, 2013 SCC Online Bom 777 (India); Antrix Corporation, 2018 SCC Online Del 9338 (India).

112 BGS SGS Soma, 2019 SCC Online SC 1585,¶¶ 98–101 (India) (the reasons for this shall be discussed in the next sub-part).

113 *Id.* ¶¶ 100–102.

114 *Id.* ¶¶ 98–102.

115 *Id.* ¶ 23.

116 *Id.* ¶¶ 50–54, 60–62.

117 *See* Hindustan Const. Co. v. NHPC, 2020 SCC OnLine SC 305, ¶ 3 (India) (in this case, the cause of action arose in Faridabad. However, the seat was mentioned to be New Delhi. The proceedings were first initiated in Faridabad. The argument was that Faridabad courts

Soma to hold that the courts of New Delhi would have exclusive jurisdiction, even though the cause of action had arisen in Faridabad.[118] The following table summarizes the aforementioned tests:

Test Name	Supreme Court Cases	Places Having Jurisdiction
CPC Test	*Khaleel Ahmed* (2J);[119] *JSW Steel* (2J);[120] *Swastik Gases* (3J)[121]	Location of cause of action of the dispute; or location of residence of the defendant; or location where the defendant carries on business.
BALCO Test	*BALCO Case* (5J)	Location of cause of action of the dispute; or the venue of the arbitration.
Seat Test	*Indus Mobile* (2J); *BGS SGS Soma* (3J); *Hindustan Construction Co.* (3J)[122]	Seat of the arbitration has the exclusive jurisdiction.
Does not seem to lay	*Emkay Global* (2J)	Test was unclear; but it was held that the parties are free to provide for

would have exclusive jurisdiction by virtue of Section 42 of the Arbitration Act. This was refuted by the Court.)

118 *Id.* ¶¶ 3–6.

119 Khaleel Ahmed, (2000) 3 SCC 755 (India).

120 JSW Steel, (2006) 11 SCC 521 (India).

121 Swastik Gases, (2013) 9 SCC 32 (India).

122 Hindustan Construction, 2020 SCC OnLine SC 305 (India).

down a specific test		exclusive jurisdiction separately.
Venue Test	*Brahmani River Pellets* (2J)	Courts presiding over the venue have exclusive jurisdiction

B. The ideal approach

The enunciation of the Seat Test by various judgments makes one thing clear: the benches have failed to appreciate the concept of the seat of an arbitration.[123] The seat of an arbitration is not a physical or a geographical concept, but a legal one.[124] Meaning thereby, the seat does not refer to a place, but rather refers to a system of laws that would govern the arbitration.[125] Therefore, when it is said that the seat confers exclusive jurisdiction, it merely means that only one legal system can govern the arbitration proceedings.[126] Thus, irrespective of whether the seat is mentioned to be Mumbai, Delhi, Kolkata, or India, it only connotes that the parties intended Part I of the Arbitration Act to govern their arbitration procedure and validity. After choosing the Arbitration Act, the domestic jurisdiction must be determined by using the relevant provisions of the Arbitration Act itself.

This would indicate that the CPC Test would be correct as it uses a literal interpretation of the statute. However, such a test would ignore some important considerations. For instance, the *BALCO* Test interprets Section

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123 The significant exception to this is the case of BALCO, (2012) 9 SCC 552 (India).

124 BORN, *supra* note 1, at 1538; GEORGIOS PETROCHILOS, *PROCEDURAL LAW IN INTERNATIONAL ARBITRATION* 65 (2004); ROBERT M. MERKIN, *ARBITRATION LAW* ¶¶ 1.29–1.30 (2013).

125 *Id.*; *see* BLACKABY ET AL., *supra* note 34, at 166–167 (thus, the word seat is a misnomer. *Lex arbitri* is the proper term to be used for the seat).

126 *See*BALCO, (2012) 9 SCC 552, ¶¶ 194–197 (India) (this is manifest in the discussion in *BALCO* wherein the Court overruled *Bhatia International*'s position that the provisions of Part I of the Arbitration Act can be used in foreign seated arbitrations).

2(1)(e) to confer jurisdiction on the courts at the venue as well, apart from the courts presiding over the cause of action.[127] Venue is an important consideration for grant of jurisdiction because it is a convenient and neutral place.[128] It makes logical sense to also allow parties to litigate at such a convenient and neutral place. The strong reasons backing both the CPC Test and the *BALCO* Test (which includes venue) lead to two important questions: *first*, whether it is prudent to confer concurrent jurisdiction on multiple courts; and *second*, if yes, what must be the various considerations for determination of jurisdiction.

The Indian civil litigation system follows the doctrine of *dominus litis* in order to grant limited discretion to the plaintiff in the determination of jurisdiction.[129] In furtherance of this principle, a plaintiff must generally be allowed to choose a convenient forum for initiation of proceedings, amongst several rationally justifiable but normatively indistinguishable forums. Further, the use of the phrase "*a court*" instead of "*the court*" in various provisions indicates that an applicant is free to approach one amongst multiple designated courts,[130] thus incorporating the *dominus litis* principle. Moreover, if jurisdiction is exclusively conferred on a single court for all the applications, then Section 42 of the Arbitration Act would be rendered redundant and ineffective.[131] Section 42 ties any application arising out of an arbitration to the court where the first application with respect to the same dispute had been made.[132] But if all applications are anyway

127 BALCO, (2012) 9 SCC 552, ¶ 96 (India).

128 Mistelis, *supra* note 34, at 376–377.

129 Krishna Veni Nagam v. Harish Nagam, (2017) 4 SCC 150, ¶ 13 (India); Indian Overseas Bank v. Chemical Constr. Co., (1979) 4 SCC 358, ¶ 16 (India); Dhannalal v. Kalawatibai, (2002) 6 SCC 16, ¶¶ 23, 25 (India).

130 Arbitration Act, No. 26 of 1996, §§ 9, 34, 37, 42 (India).

131 *See* Antrix Corporation, 2018 SCC Online Del 9338, ¶ 59 (India).

132 *See* Arbitration Act, No. 26 of 1996, § 42 (India); State of Maharashtra v. Atlanta Ltd., (2014) 4 SCC 619, ¶ 29 (India) (Section 42 says that once any application arising out of an arbitration agreement is made to a court, such court shall exclusively deal with all further applications. The visible purpose behind this is to avoid inconvenience by preventing a situation whereunder the parties would file different applications with respect to the same

required to be made exclusively to one designated court under Section 2(1)(e), then such tying of later applications to the same court under Section 42 is rendered redundant.[133] Such teleological redundancy of provisions must be avoided while interpreting statutes.[134] Section 42 can only serve a purpose if Section 2(1)(e)(i) and 2(1)(e)(ii) confer concurrent jurisdiction on multiple courts.[135] Thus, both the practice of civil litigation and the principles of statutory interpretation indicate that Section 2(1)(e) must be held to confer concurrent jurisdiction on multiple courts, rather than exclusive jurisdiction on one designated court. After having answered the first question in the affirmative, it is important to determine the various factors that must be used for the determination of jurisdiction of these courts.

The considerations must include the "*cause of action*", as it is covered within the definition of "*subject-matter*" of the arbitration and that of the suit.[136] The location of the cause of action is also important as it is the place where evidence is located.[137] While an arbitral challenge itself does not require the court to peruse any evidence outside of the records of the tribunal,[138] evidence may be required in interim proceedings.[139] Further, in exceptional circumstances, evidence may be introduced even at the stage of challenge.[140]

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dispute before different courts. Section 42 ties all the later applications in a dispute (after the first application) to the same court as the first application, so as to avoid such chaos).

133 This is because even if Section 42 had not existed, there would anyway be only one court where the parties could go for all applications.

134 Calcutta Gas Co. (Proprietary) Ltd. v. State of West Bengal, 1962 Supp (3) SCR 1, ¶ 9 (India); Hardeep Singh v. State of Punjab (2014) 3 SCC 92, ¶ 42 (India).

135 *See* Antrix Corporation, 2018 SCC Online Del 9338, ¶ 59 (India).

136 *See* Khaleel Ahmed, (2000) 3 SCC 755, ¶ 6 (India); JSW Steel, (2006) 11 SCC 521, ¶¶ 66–68 (India);Swastik Gases, (2013) 9 SCC 32, ¶ 28 (India); BALCO, (2012) 9 SCC 552, ¶ 96 (India).

137 DINSHAH FARDUNJI MULLA, THE CODE OF CIVIL PROCEDURE § 20.12 (2011).

138 Arbitration Act, No. 26 of 1996, § 34(2)(a).

139 *See id.* §§ 8, 9, 13, 14, 27, 29A.

140 *See, e.g.*,Canara Nidhi v. M. Shashikala, (2019) 9 SCC 462, ¶ 19 (India); Emkay Global, (2018) 9 SCC 49, ¶¶ 13, 21 (India) (citing Fiza Developers & Inter-Trade (P) Ltd. v. AMCI (India) (P) Ltd., (2009) 17 SCC 796, ¶¶ 14, 17–18, 21, 24, 31 (India)).

Thus, the cause of action must be one of the considerations. Further, even the location of the respondent must be read into Section 2(1)(e)(i) and 2(1)(e)(ii). This is because Section 2(1)(e)(i) and 2(1)(e)(ii) ask the court to fictionally assume that a civil suit is being filed.[141] In India, the location of the respondent is necessarily one of the places with concurrent jurisdiction in all civil suits.[142] Moreover, the location of the respondent is a fair consideration, as the principle of *dominus litis* is an equitable counterbalance to it.[143] Hence, the respondent's location of residence and business must also be valid considerations. As stated above, venue must also be a relevant consideration as it is a place of convenience and neutrality. While Section 2(1)(e)(i) or 2(1)(e)(ii) does not explicitly mention "*venue*", it can be interpreted into the sections as one of the locations of 'causes of action' for any arbitral application.[144] Such interpretation was used in *BALCO* to incorporate venue in the test.[145]

The final test that is arrived at is a combination of the *BALCO* Test and the CPC Test, whereby concurrent jurisdiction is conferred on the basis of the venue; the causes of action; and the location of the respondent. Further, in pursuance of established civil jurisprudence, the parties may, at their discretion, confer exclusive jurisdiction on any of these courts.[146] Notably however, this test comes with a caveat. Hypothetically, it is possible for all

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141 *See* text accompanying *supra* notes 86–91 (as discussed, the "look through" approach needs to be used, by deeming that the case directly went to a civil court).

142 CODE CIV. PROC. (1908), §§ 16–20 (India).

143 Since the ultimate choice of forum is anyway granted to the petitioner, it will not be unfair to her/him to include the location of the defendant as one of the locations. If this is, in fact, chosen as the location for proceedings, it would be fair to both the parties. This is because it is already convenient to the respondent, and the petitioner has also actively chosen the same place for the proceedings.

144 *See*BALCO, (2012) 9 SCC 552, ¶ 96 (India).

145 *Id.*

146 Hakam Singh v. Gammon (India) Ltd., (1971) 1 SCC 286, ¶ 3 (India) [*hereinafter*"Hakam Singh"]; ABC Laminart v. AP Agencies, (1989) 2 SCC 163, ¶ 19 (India);Swastik Gases, (2013) 9 SCC 32, ¶ 19 (India); B.E. Simoese Von Staraburg Niedenthal v. Chhattisgarh Inv. Ltd., (2015) 12 SCC 225 (India).

three of the aforementioned factors to be located outside India, despite India being the seat of arbitration.[147] Having said that, this problem cannot be resolved by use of any of the four pre-existing tests either.[148] Since, in such cases, all the locations in India would stand at par, any pre-determined location of exclusive jurisdiction must be given precedence.[149] This is because party autonomy is of high importance in arbitration.[150] In the absence of such a clause, places within India with good international

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[147] Hypothetical scenario: A bag manufacturer in Pakistan enters into a contract with a jute textile mill in Bangladesh. The contract is for the supply of jute through the seas. The venue of the arbitration is held to be Hong Kong as the arbitration is to be held in accordance with the Hong Kong International Arbitration Centre (HKIAC) Rules. However, the contract categorically provides that the seat of the arbitration is India, Indian Arbitration Act would govern the proceedings and the courts of India would have exclusive jurisdiction over the dispute. This decision may have been made as the law of arbitration is more settled in India and the parties are less comfortable with Hong Kong authorities.

[148] When the seat is mentioned to be "India", even the Seat Test would not be of use. Moreover, the other reasons for discarding the Seat Test have already been discussed. Other tests involve the 3 factors already discussed (cause of action, respondent's location, and venue), which are anyway not helpful in such a scenario.

[149] *See*Hakam Singh, (1971) 1 SCC 286, ¶ 4 (India). One may argue that this goes against the principle in *Hakam Singh*. However, one must use the Golden Rule of interpretation in this scenario. It is absurd that the courts of the seat do not have any jurisdiction, thus the statute must be purposively interpreted. The only other reasonable interpretation would be that all the courts in the country would have simultaneous jurisdiction (as none of them is prescribed). In such cases, the exclusive jurisdiction clause must be held valid in light of the *Hakam Singh* principle. Moreover, judgments must not be read in a pedantic manner and one must look at the intent behind the judgment rather than the strict language of it. *See, e.g.,* Amar Nath Om Prakash v. State of Punjab, (1985) 1 SCC 345, ¶ 11 (India); Union of India v. Amrit Lal Manchanda, (2004) 3 SCC 75, ¶¶ 14–18 (India); BGS SGS Soma, 2019 SCC OnLine SC 1585, ¶¶ 43–45 (India).

[150] ARJUN GUPTA, SAHIL KANUGA & VYAPAK DESAI, *Blessed Unions in Arbitration: An Introduction to Joinder and Consolidation in Institutional Arbitration*, 4(2) INDIAN J. ARB. L. 134, 136, 142, 144, 149 (2016), *available at*http://www.ijal.in/sites/default/files/IJAL%20Volume%204_Issue%202_Arjun%20 Gupta%20et%20al.pdf; *See* CHARLES CHATTERJEE, *The Reality of Party Autonomy Rule in International Arbitration*, 20(6) J. INT'L ARB. 539, 557 (2003) (in the absence of specific provisions of law to the contrary, any decision on ambiguous matters in arbitration must be made based on party autonomy).

connectivity and reputable courts may be granted default jurisdiction.[151] In any case, this gap is for the legislature to fill and the proposed test suffices to uniformize existing jurisprudence.

III. Conclusion

This article has highlighted the inconsistency in the tests used by the Supreme Court in the determination of domestic and international jurisdiction of courts to entertain arbitration cases. Such inconsistency is generally undesirable in law.[152] Further, such inconsistencies would deter parties from choosing India as the seat of arbitration and using Indian supranational rules of arbitration,[153] the use of which is likely to bring in significant revenue for the government. Thus, it is very important to uniformize the law of arbitration in India.

In Part I, this article has proposed a six-step test to simplify the determination of the choice of seat, in the absence of a specific stipulation. The proposed test hierarchically looks at all the factors that are the most akin to a seat of arbitration, in order to arrive at a conclusion. Admittedly, the test is extremely simplified and is subject to certain exceptions, as discussed above. However, the test is generally of high utility in the determination of seat, as is evident from its application on major Supreme Court judgments. The article has also listed the situations in which the test needs to be suitably altered to fit the necessary requirements.

In Part II, this article has proposed that the domestic jurisdiction in arbitration cases must be simultaneously conferred on multiple courts i.e.

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151 *See*Fiona Trust, [2007] UKHL 40 [66] (appeal taken from Eng.); NTPC-Singer, (1992) 3 SCC 551,¶ 15 (India) (these could be the courts of New Delhi and Bombay. The reasoning behind this is that the parties are assumed to be rational businesspersons who are presumed to prefer convenience in proceedings and competence of the adjudicator. This reasoning is used in deciding jurisdictional disputes in commercial law matters).

152 LON FULLER, THE MORALITY OF LAW 79–80 (2d. ed. 1969).

153 *See*2010 International Arbitration Survey Report, *supra* note 37, at 17–23 (this is because parties prefer to determine countries as seats that have predictable positions of law, to escape from arbitrariness of the legal process).

the courts presiding over the venue, the causes of action and the respondent's location. This would not lead to inconvenience to parties, as Section 42 firmly establishes that the court approached first ousts all other courts in the future. Further, this would be in consonance with the civil law principle of *dominus litis*.

Both the proposed tests will help the judiciary in simplifying and uniformizing the process of determination of seat jurisdiction and domestic jurisdiction. While the article has addressed only a narrow part of the largely convoluted arbitration jurisprudence in India, it aims to be a small stepping-stone in the uniformization of arbitration law in India. It will indeed be interesting to see how the Supreme Court resolves the conflicts highlighted above.

VIRTUAL ARBITRATION: THE IMPACT OF COVID-19

David Bateson[*]

Abstract

The need of the international community to resolve their disputes during the COVID-19 pandemic has resulted in a sudden increase in the number of arbitrations taking place virtually. Governments have imposed containment measures, making it impossible to conduct in-person arbitrations. Several concerns have been raised regarding the adequacy of present-day procedural frameworks to accommodate virtual arbitrations, witness testimonies, and cross-examination taking place virtually, and limitations of new technologies, and issues arising therefrom. This note addresses these concerns in light of the various soft law instruments that were already in place or have been developed to facilitate the transition to virtual arbitrations as the 'new normal'. In addition to serving as guidelines on how to conduct arbitrations, take evidence, and handle witness testimonies and cross-examinations, these soft law instruments ensure that the rights of the parties are not prejudiced as a result of arbitrations taking place virtually. Lastly, after listing some of the platforms available to the parties for conducting virtual arbitrations and features thereof, this note concludes with some remarks on how the 'new normal' impacts the future of arbitration.

I. Introduction

COVID-19 is an unpredictable global health crisis and a challenge for international arbitration. Travel restrictions, quarantine notices, and lockdowns have made it impossible globally to conduct in-person hearings

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for the foreseeable future, and substantial hardship can be caused if hearings are adjourned indefinitely, with an extended period of financial uncertainty. For many commercial concerns and advisers, the crisis has caused immense difficulties, raising further liquidity concerns. Dispute resolution cannot stop, and options have to be explored for existing and future disputes to be resolved under the current conditions. One option to proceed is having issues decided "*on the papers*", i.e. when a dispute is decided on the basis of written pleadings, documents and submissions without any oral hearing. Where this approach might not be appropriate, particularly in arbitrations involving high value claims and complex issues,[1] technology gives the means and keeps international arbitration going by virtual hearings. While such technical possibilities existed before the crisis, in the wake of COVID-19, they have become the main focus. Fortunately, international arbitration by nature is flexible, innovative, and adaptive to the needs of the present day. This note examines what arbitrators need to consider in the new era regarding the option of holding virtual hearings.

II. Procedural frameworks for virtual hearings

With regard to the procedural fairness requirement of arbitration, the starting point for consideration must be the legal framework within which arbitral proceedings and hearings take place. Under all popular institutional rules, for example, the International Chamber of Commerce ["**ICC**"] Arbitration Rules, 2017 ["**ICC Rules**"];[2] United Nations Commission on International Trade Law ["**UNCITRAL**"] Arbitration Rules, 2013 ["**UNCITRAL Arbitration Rules**"];[3] London Court of International Arbitration Rules, 2014 ["**LCIA Rules**"],[4] and under the general statutory

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1 JULIAN DAVID MATHEW LEW QC, LOUKAS A. MISTELIS & STEFAN M. KRÖLL,COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION 535 (2003).

2 International Chamber of Commerce (ICC), Rules of Arbitration 2017, art. 22(2) [*hereinafter* "ICC Rules"].

3 United Nations Commission on International Trade Law (UNCITRAL), Arbitration Rules 2013, art. 17(1).

4 London Court of International Arbitration (LCIA), Arbitration Rules 2014, art. 19.2.

powers in most seats, for example, Sections 19 and 24 of the (Indian) Arbitration and Conciliation Act, 1996 ["**Arbitration Act**"], the tribunal is granted wide powers to direct the procedures as it wishes, which should include the choice of holding a virtual hearing. Some of the rules expressly provide for a hearing to take place by telephone or videoconferencing that does not require physical presence of the participants, whilst others do not specifically refer to this, but do not prohibit it either.[5] Nonetheless, the Case Management Techniques under the ICC Rules and Singapore International Arbitration Centre, 2016 ["**SIAC Rules**"] on emergency arbitrators cater to the possibility of virtual hearings.[6]

The wide existing procedural powers of the tribunal are subject to the general duties and obligations of the tribunal which are embodied in Section 18 of the Arbitration Act titled "*Equal treatment of parties*," which states that "*[t]he parties shall be treated with equality and each party shall be given a full opportunity to present his case*". Holding a virtual hearing essentially relates to the right to be heard and the right to be treated equally, which are both covered in Section 18 of the Arbitration Act.

A. Right to be heard

The right to be heard means that in arbitral hearings, parties must be granted sufficient opportunity to present their case i.e. to allege facts, present legal reasoning, and to produce evidence on relevant facts.[7] It is one of the most fundamental and universally recognised rights, and a violation of this right will render an award unenforceable as a violation of public

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5 Singapore International Arbitration Centre (SIAC), Rules of Arbitration 2016, r. 24 [*hereinafter* "SIAC Rules"]; ICC Rules, *supra* note 2, art. 26.

6 ICC Rules, *supra* note 2, app. IV(h); SIAC Rules, *supra* note 5, sched. 1, ¶ 7.

7 Gabrielle Kaufmann-Kohler & Thomas Schultz, *The Use of Information Technology in Arbitration*, JUSLETTER, Dec. 2005, at 37, *available at*http://lk-k.com/wp-content/uploads/The-Use-of-Information-Technology-in-Arbitration.pdf[*hereinafter* "Kaufmann-Kohler & Schultz"]; CHRISTOPH LIEBSCHER, THE HEALTHY AWARD: CHALLENGE IN INTERNATIONAL COMMERCIAL ARBITRATION 243–273, 344 (2003).

policy.[8] In the laws governing the arbitration procedure, three main positions can be found. Either (a) there exists no right to an oral hearing;[9] (b) there is a right to oral hearing, but it can be waived as under Article 24(1) of the UNICTRAL Model Law on International Commercial Arbitration;[10] or (c) the procedural power of the tribunal to decide whether an oral hearing is held is subject to the parties' agreement in the arbitration agreement. These regulations thereby serve the purpose to distinguish between oral hearings and written proceedings. Considering, in addition, that the meaning of "*oral hearing*" cannot be equated strictly with an in-person hearing,[11] it follows that the right to be heard does not guarantee a right to an oral, in-person hearing in all circumstances.[12] In fact, the exchange of arguments or evidence is made orally in both an in-person hearing and a virtual hearing, with the mere difference that the communication is transmitted either with or without technological tools.

Consequently, the right to be heard is not ordinarily a legal obstacle for virtual hearings. Nevertheless, the tribunal should always seek to obtain the parties' consent before it decides to proceed with holding a virtual hearing in order to ensure that the award is not rendered unenforceable.[13] Nonetheless, if the tribunal proceeds with a virtual hearing over the

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8 RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS: A GLOBAL COMMENTARY ON THE NEW YORK CONVENTION 387 (Herbert Kronke, Patricia Nacimiento, Dirk Otto & Nicola Christine Port eds., 2010).

9 For example, Switzerland. *See* Bundesgericht [BGer] [Federal Supreme Court] July 1, 1991, 117 ENTSCHEIDUNGEN DES SCHWEIZERISCHEN BUNDESGERICHTS [BGE] II 346.

10 UNCITRAL Model Law on International Commercial Arbitration, art. 24(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).

11 Yvonne Mak, *Do Virtual Hearings Without Parties' Agreement Contravene Due Process? The View from Singapore*, KLUWER ARB. BLOG (Aug. 2, 2020), *available at*http://arbitrationblog.kluwerarbitration.com/2020/06/20/do-virtual-hearings-without-parties-agreement-contravene-due-process-the-view-from-singapore/?doing_wp_cron=1594274573.4666559696197509765625.

12 *See*, *e.g.*, Dirk Otto & Omaia Elwan, *Article V(2)*, *in*KRONKE ET AL., *supra* note 8, at 345–414.

13 Mak, *supra* note 11.

objection of one party, as long as parties are given equal opportunity to present their case, the author suggests an award is unlikely to be rendered unenforceable.

B. Right to equal treatment

With regard to the right to equal treatment, the decision to hold a virtual hearing affects generally both parties in an equivalent manner. However, issues may arise because of possible differences between the technological capabilities of the parties, both with regard to the availability of the new Information Technology ["**IT**"] tools and the skills to use them.[14] To avoid such issues, particularly during the COVID-19 crisis, the tribunal should use its existing procedural powers with due proportion, and organise the procedure in agreement with the parties in a manner which ensures that the proceedings are not disrupted by the use of the new IT tools and that both parties can effectively take part in the virtual hearing. In fact, as more people are working remotely from home via virtual platforms due to the COVID-19 outbreak, it is likely that parties and advisers will already be able to cope with the new IT tools having collected substantial experience since the crisis started.

Therefore, resorting to virtual hearings raises surprisingly few legal issues in the context of arbitral proceedings. As long as sensible actions are taken by the tribunal, neither the right to be heard nor the right of equal treatment would be violated by holding virtual hearings.

Moreover, for proper exercise of the tribunal's procedural powers, guidance to the best practice of virtual hearings can be found in the impressive number of existing soft law instruments on videoconferencing of witnesses, which give a very useful framework for almost all of the practical problems inherent in taking virtual evidence. Needless to say, the scope and nature of a virtual hearing are different compared to the mere taking of evidence.

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[14] Kaufmann-Kohler & Schultz, *supra* note 7.

However, this impressive body of guidelines provides high standard templates as a basis from which principles can be derived and developed in greater depth for conducting full virtual hearings.[15]

The body of resources comprises of the following:

1. The Hague Conference Draft Guide to Good Practise on the Use of Video-Links under the Evidence Convention, 2019,[16] contemplates procedural steps and other considerations before the taking of evidence through videoconferencing.

2. The ICC Commission Report on Information Technology in International Arbitration, 2018,[17] provides a framework that practitioners may refer to for the use of different forms of IT tools in a cost-effective and efficient manner, to identify the possible issues that may arise, and follow the international best practices for the same.

3. The Chartered Institute of Arbitrators Guidelines for Witness

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15 Janet Walker, *Virtual Hearings – The New Normal*, GLOB. ARB. REV. (Mar. 27, 2020), *available at*https://globalarbitrationreview.com/article/1222421/virtual-hearings-%E2%80%93-the-new-normal [*hereinafter* "Walker"]; Simon Rainey QC & Gaurav Sharma, *Arbitration Hearings… and the Corona 'New Normal' Ten Golden Rules: or the easy path to your Virtual Hearing*, QUADRANT CHAMBERS (Mar. 30, 2020), *available at*https://www.quadrantchambers.com/news/arbitration-hearings-and-corona-new-normal-ten-golden-rules-or-easy-path-your-virtual-hearing [*hereinafter* "Rainey & Sharma"].

16 Hague Conference on Private International Law, Draft Guide to Good Practice on the Use of Video-Link under the Evidence Convention 2019, *availableat* https://assets.hcch.net/docs/e0bee1ac-7aab-4277-ad03-343a7a23b4d7.pdf.

17 ICC Commission, Report on Informational Technology in International Arbitration 2017, *available at*https://iccwbo.org/content/uploads/sites/3/2017/03/icc-information-technology-in-international-arbitration-icc-arbitration-adr-commission.pdf.

Conferencing in International Arbitration, 2019,[18] provides a practical note for parties, arbitrators and witnesses for preparing and presenting evidence through videoconferencing. It includes a checklist, standard directions and specific directions to ensure its application in different situations, and to preserve the quality of evidence.

4. The commentary on the revised text of the IBA Rules on the Taking of Evidence in International Arbitration, 2010,[19] supplements the rules by providing additional information for practitioners.

5. The Seoul Protocol on Video Conferencing in International Arbitration, 2020,[20] provides for international best practice in arbitration through videoconferencing, while addressing due process concerns, confidentiality problems, and practical difficulties.

As mentioned earlier, the key question to be answered in conducting virtual hearings is the enforceability of the subsequent award.[21] The author would venture to suggest there should be no impediments if the above guidelines are observed, but local laws should always be checked.

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18 Chartered Institute of Arbitrators (CIArb), Guidelines for Witness Conferencing in International Arbitration 2019, *available at*https://www.ciarb.org/news/ciarb-s-new-guidelines-for-witness-conferencing-in-international-arbitration/.

19 *Newly revised IBA Rules on the Taking of Evidence in International Arbitration*, INT'L BAR ASS'N, *available at*https://www.ibanet.org/ENews_Archive/IBA_30June_2010_Enews_Taking_of_Evidence_new_rules.aspx.

20 Korean Commercial Arbitration Board (KCAB) International, Seoul Protocol on Video Conference in International Arbitration 2020, *available at*https://globalarbitrationreview.com/digital_assets/9eb818a3-7fff-4faa-aad3-3e4799a39291/Seoul-Protocol-on-Video-Conference-in-International-Arbitration-(1).pdf [*hereinafter* "Seoul Protocol"].

21 Andrew Foo, *No further questions?*, SOC'Y OF CONSTR. L. (Mar. 27, 2020), *available at*https://www.scl.org.sg/public-resources/161-resources/articles.

III. Current practice of virtual hearings

Fortunately, technology for virtual hearings already exists and the experiences with the mass deployment of the new technological tools in the pandemic have been promising.[22] In general, there are two different options at use in the market.

First, many arbitration centres have facilities to conduct virtual arbitration in an "*all-in-one*" platform. For example, Maxwell Chambers in Singapore and the International Arbitration Centre in London have collaborated with the provider Opus 2 to offer parties an integrated platform for case preparation and electronic hearing solutions. The cloud-based platform enables access to materials from anywhere and online collaborations in a single connected environment.[23] Similarly, the Arbitration Place Virtual of theArbitration Place in Canada,[24] the Australian Disputes Centre Virtual of the Australian Disputes Centre in Australia,[25]and other similar platforms alsohave the facilities to conduct virtual hearings. The Draft Procedural Order for the Use of Online Dispute Resolution Technologies,[26] published by the Australian Centre for International Commercial Arbitration, also

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22 Walker, *supra* note 15.

23 *Maxwell Chambers Offers Virtual ADR Hearing Solutions*, MAXWELL CHAMBERS*available at*https://www.maxwellchambers.com/2020/02/18/maxwell-chambers-offers-virtual-adr-hearing-solutions; Arunn Ramadoss, *Maxwell Chambers bring virtual ADR solutions to Singapore with Opus 2*,OPUS 2 INSIGHT (Aug. 2, 2020), *available at*https://insight.opus2.com/maxwell-chambers-collaborate-with-opus-2-to-bring-virtual-adr-solutions-to-singapore; *Virtual Hearings*, OPUS 2,*available at*https://www.opus2.com/en-sg/virtual-hearings.

24 *Arbitration Place Virtual – eHearings*, ARB. PLACE, *available at*https://www.arbitrationplace.com/arbitration-place-virtual-ehearings.

25 *Australian Disputes Centre Virtual*, AUSTRALIAN DISP. CTR., *available at*https://www.disputescentre.com.au/adc-virtual.

26 Australian Centre for International Commercial Arbitration,Draft Procedural Order for Use of Online Dispute Resolution Technologies in ACICA Rules Arbitrations 2016, *available at*https://acica.org.au/wp-content/uploads/2016/08/ACICA-online-ADR-procedural-order.pdf.

provides guidance on how hearings may be conducted with video conferencing or the Cisco WebEx Meeting Center.[27]

Second, virtual hearings are also being conducted through online platforms and applications that provide video conferencing through the live transmission of video and audio data between different locations coupled with setting up multiple parallel meeting rooms or 'chat' groups for the various counsel and tribunal teams and their internal communication.[28] Such services are prominently provided by Zoom, Microsoft Teams, Skype for Business, and BlueJeans which all offer user-friendly, easy-to-go solutions.

Not only tribunals, but domestic courts in different countries have also shifted matters to remote hearings, as illustrated by the following examples: *first*, from February 2020 onwards, a number of Japanese civil courts have adopted the submission of video evidence in virtual court hearings in order to eliminate the burden of trial participants travelling and the impact of changing court dates on participants. This includes collecting evidence between the courts and different lawyers' offices which are all in different locations connected by Microsoft Teams.[29]*Second*, in China, on August 18, 2017, the Hangzhou Internet Court was established as a pilot project for a digital court, and one year later, two other such courts were set up in Beijing

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27 Joachim Delaney, *The Show Must Go On: Alternative Dispute Resolution and Litigation During COVID-19 in Australia*, BAKER MCKENZIE (Mar. 26, 2020), *available at*https://www.bakermckenzie.com/en/insight/publications/2020/03/alternative-dispute-resolution-covid19.

28 Rainey & Sharma, *supra* note 15.

29 *Start of a New Operation for Controversial Issue Management using IT tools such as Web Conferences*, CTS. IN JAPAN (Aug. 2, 2020), *available at*https://www.courts.go.jp/about/topics/webmeeting_2019/index.html; *Expediting Japan's Civil Court Proceedings with adoption of Microsoft Teams*, MICROSOFT (Aug. 2, 2020), *available at*https://news.microsoft.com/apac/2020/01/29/expediting-japans-civil-court-proceedings-with-adoption-of-microsoft-teams.

and Guangzhou.[30] In these courts, all legal procedures including case filing, trial, and ruling delivery are conducted online applying blockchain technology in combination with big data and cloud storage.[31] Transcripts are generated electronically by a voice identification software.

In its white paper titled 'Chinese Courts and Internet Judiciary' dated December 4, 2019,[32] the Supreme Peoples' Court of China revealed that the three courts had heard 118,764 internet-related disputes as of October 31, 2019, of which more than 88,000 were concluded. It also described that the courts took 45 minutes on average in an online hearing and 38 days in concluding a case in total.

Some of the benefits of virtual court hearings are listed as follows:

- Recognisability of the facial expressions of participants who are not physically present during the evidentiary proceedings in court;
- Case participants can use the virtual conferencing feature to participate in evidence proceedings from remote locations such as law firms;
- Virtual document sharing and concurrent editing features that allow parties to include additional claims to the evidentiary proceedings summary drafted by the court in order to provide a more consistent document; and

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30 Guodong Du & Meng Yu,*China Establishes Three Internet Courts to Try Internet-Related Cases Online: Inside China's Internet Courts Series-01*, CHINA JUST. OBSERVER (Dec. 16, 2018), *available at* https://www.chinajusticeobserver.com/insights/china-establishes-three-internet-courts-to-try-internet-related-cases-online.html.

31 Guodong Du & Meng Yu, *Big Data, AI and China's Justice: Here's What's Happening*, CHINA JUST. OBSERVER (Dec. 1, 2019), *available at* https://www.chinajusticeobserver.com/a/big-data-ai-and-chinas-justice-heres-whats-happening.

32 *White paper reveals how courts are using internet to improve efficiency,*SUP. PEOPLE'S CT. CHINA (Dec. 6, 2019), *available at*http://english.court.gov.cn/2019-12/06/content_37528024.htm.

- Availability of a virtual screen-sharing feature for all parties to identify and view relevant documents (such as contracts and documents clarifying the disputed issues) as though they are physically in the same place, enabling document confirmation, discussion, and negotiation of key issues.

Further, due to the COVID-19 crisis, in March 2020, the Vis Moot (East) was conducted virtually using Microsoft Teams supported by eBram, a Hong Kong-based not-for-profit start-up. The virtual competition comprised of 71 teams and 250 arbitrators from all over the globe and from different time zones. In April, 2020, the even larger Vis Moot 2020 took place by using the online dispute resolution platform, Immediation,[33] andvideo-links for the first time ever, giving the best practice example for working virtually and safely in the current circumstances.[34] The move to a virtual event was strikingly described during the opening ceremony as a result of being "*forced to think about the 'new normal*'".Further, the fact that traditional dispute resolution is now being reinvented as a consequence of the pandemic was also appreciated.[35]

Another recent development in light of the developing COVID-19 crisis is the American Arbitration Association's update dated March 17, 2020, which encourages parties to explore alternative hearing capabilities, explicitly including the use of video teleconferencing that allows for remote participation in hearings.[36] Similar approaches can be found by courts in

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33 IMMEDIATION, *available at* https://www.immediation.com/.

34 Neil Kaplan, *How we must adapt to COVID-19*, GLOB. ARB. REV. (Mar. 29, 2020), *available at*https://globalarbitrationreview.com/article/1222179/kaplan-how-we-must-adapt-to-covid-19.

35 *Virtual Vis Mooting and Recalibrating for the Future*, LONDON CT. INT'L ARB. (Aug. 2, 2020), *available at* https://lcia.org/News/virtual-mooting-and-recalibrating-for-the-future.aspx.

36 *See* American Arbitration Association–International Centre for Dispute Resolution (AAA–ICDR), *AAA-ICDR COVID-19 Resource Center*, *available at*https://go.adr.org/covid19.html?_ga=2.266173005.351640490.1584719392-888347822.1584719391; Raid Abu-Manneh, Menachem M. Hasofer, B. Ted Howes, Dany Khayat & Yu-Jin Tay, *Impact of Covid-19 in International Arbitration*, MAYER BROWN (Mar.

different countries to keep the litigation process on track, as can be seen from following illustrations:

- After the courts had been closed in Hong Kong for more than two months from January 29, 2020 with a general adjournment of all proceedings, the judiciary announced that it would make greater use of video conferencing facilities to ensure justice during the crisis by the Guidance Note dated April 2, 2020,[37] stating that "*[t]he essence is to replicate as closely as practically possible the core requirements of court*" and that "*[r]emote hearings using video technology preserve most of the benefits of an oral hearing, allowing parties and their legal representatives and the court to interact with each other on a real-time basis*".

- In the United Kingdom, on March 18, 2020, Her Majesty's Courts and Tribunal Service declared that courts will start holding trials and hearings through video conferencing during the current health crisis, and it justified this step by saying that running courts and tribunals are an essential public service to ensure justice.[38] A Guidance Note[39]and the Practice Direction 51Y[40] have been introduced,

20, 2020), *available at*https://www.mayerbrown.com/en/perspectives-events/publications/2020/03/impact-of-covid19-in-administered-arbitrations.

[37] Judiciary of Hong Kong Special Administrative Region of the People's Republic of China,Guidance Note for Remote Hearings For Civil Business in the High Court, *available at* https://www.judiciary.hk/doc/en/court_services_facilities/guidance_note_for_remote_hearings_phase1_20200402.pdf; Antonia Croke & Nigel Sharman, Hogan Lovells, *Hong Kong Courts in Lockdown – How Technology is Helping with Dispute Resolution in the time of COVID-19*, JD SUPRA (Aug. 2, 2020), *available at* https://www.jdsupra.com/legalnews/hong-kong-courts-in-lockdown-how-51811.

[38] Her Majesty's Courts & Tribunal Services, *HMCTS telephone and video hearings during coronavirus outbreak*, GOV.UK (Mar. 18, 2020), *available at*https://www.gov.uk/guidance/hmcts-telephone-and-video-hearings-during-coronavirus-outbreak.

[39] *Id.*

[40] MINISTRY OF JUSTICE,PRACTICE DIRECTION 51Y – VIDEO OR AUDIO HEARINGS DURING CORONAVIRUS PANDEMIC2020 (U.K.), *available at*

providing for remote hearings (by video or audio) by using either the Justice Video Service or Skype for Business. The latter provider was only added during the crisis to give staff and judges a more quick and flexible capacity. After the Supreme Court building was closed for the foreseeable future, from March 24, 2020 onwards, it switched to video conferencing to hear cases, and conducted the matter of *Fowler (Respondent)* v. *Commissioners for Her Majesty's Revenue and Customs (Appellant)* as a virtual hearing by video-link for the first time in its history.[41]

- During the height of the outbreak in February, 2020, the Supreme People's Court of China ordered "*courts at all levels to guide litigants to file cases or mediate disputes online, encouraging judges to make full use of online systems for litigation, including those for case filing and ruling delivery, to ensure litigants and their lawyers get better legal services and protection*". In addition, the Supreme People's Court promoted the use of 'mobile micro court' on the social media platform WeChat to support the courts in conducting trials over the internet.[42] Acknowledging the prevalence of mobile phones and the WeChat application, it is a well-structured WeChat Mini Program that litigants and judges can use to conduct online litigation activities such as filing, service, hearing, evidence exchange, and mediation via mobile phone upon the employment of facial recognition, remote audio and video systems, e-signature, and other technologies. It is available in 12 provinces and cities.[43]

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http://www.justice.gov.uk/courts/procedure-rules/civil/rules/part51/practice-direction-51y-video-or-audio-hearings-during-coronavirus-pandemic.

[41] *See* Fowler v. Comm'rs for HM Revenue & Customs [2020] UKSC 22 (Eng.).

[42] Ben Knowles & Maurice Kenton, *COVID-19 Global: Arbitration and court impacts*, CLYDE & CO. (May 1, 2020), *available at* https://www.clydeco.com/insight/article/covid-19-impact-on-courts-and-arbitration.

[43] *Chinese courts urged to promote online services amid virus battle*, SUP. PEOPLE'S CT. CHINA (Feb. 19, 2020), *available at* http://english.court.gov.cn/2020-02/19/content_37533789.htm; *Internet court handles cases despite coronavirus epidemic*, SUP. PEOPLE'S CT. CHINA (Mar. 11, 2020),

IV. Adapting to the new technology

Most arbitrators were not familiar with full virtual hearings before the COVID-19 crisis set off, and concerns of technical, procedural and arbitral nature were raised. However, the new technology offers promising features which can serve in particular the needs of virtual hearings in arbitration.

A. Challenges and risks

Indeed, while on an exceptional basis, remote participation of a single or few participants at in-person hearings is not an unfamiliar concept to international arbitration, the new challenge is different as parties, counsels, and arbitrators are faced with carrying out a full hearing on a virtual basis, which represents a different level and intensity in the use of new IT tools.[44]

The challenges and concerns expressed in technical regards, therefore, include the requirement of connectivity for each participant, which goes along with the fact that the system is only as good as the weakest link, and there is no magic solution for participants located in places with poor connectivity.[45] Another such challenge is the need to avoid technical failures upfront and during the virtual hearing, combined with the new necessity to define who immediately addresses technical issues when everyone is in separate locations. Technical breakdowns are a real issue, but, in fact, the risk that they occur can be significantly reduced by implementing a strict set of chronological steps and measures to be taken, such as testing the equipment beforehand, a test conference with all participants in advance, and fallback solutions in case of disruptions. The latter is prudently encouraged by Article 6 of the Seoul Protocol on Video Conferencing in International Arbitration. With regard to technical assistance, virtual hearings might involve a new kind of tribunal secretary, who acts as a technical advisor participating and addressing all technical needs. Many

available at http://english.court.gov.cn/2020-03/11/content_37534291.htm; *Chinese Courts and Internet Judiciary*, SUP. PEOPLES' CT. CHINA 69-70 (Dec. 4, 2019), *available at*http://english.court.gov.cn/pdf/ChineseCourtsandInternetJudiciary.pdf.

44 Walker, *supra* note 15.

45 Kaplan, *supra* note 34.

arbitration centres offering virtual hearings include such a technological operator in their service. All of these measures should be determined by a procedural order of the tribunal and, if possible, in agreement with the parties.[46]

Another logistical problem which is often raised is the challenge to manage participation from various time zones, with participants located around the globe, forcing some or all parties to sit at unsociable hours, and thus creating an imbalance between the parties.[47] These issues are neither new nor unknown to tribunals, as they have already appeared in the past with regard to management conferences and procedural hearings, which usually take place on video call. These issues have been smoothly resolved, either in agreement with the parties or by way of the tribunal's directions.

Other concerns are more specifically related to arbitration in terms of its basic elements and the decision-making process. Regarding the latter, evaluating witness testimony, particularly under cross-examination, with the loss of in-person observation is the major focus and, consequently, so is the ability to assess the credibility and strength of the witness evidence. There is also the possibility and the risk that witness statements are influenced unnoticed by a coach or a script hidden from the tribunal's view.[48] However, these worries are not completely new and are elaborated upon in the existing soft law instruments on videoconferencing of witnesses mentioned above with reasonable solutions, such as a camera that can be controlled by the tribunal.[49]

With regard to virtual hearings, the issue that currently appears to be more pressing is the impact on privacy and cybersecurity when using new IT

46 Kaufmann-Kohler & Schultz, *supra* note 7; Rainey & Sharma, *supra* note 15.
47 Walker, *supra* note 15.
48 *Id.*
49 Seoul Protocol, *supra* note 20, art. 1.

tools.[50] To avoid such conflicts, it is important to carefully examine the extent of the user's consent to the collection of data given according to the privacy policy of the respective platform. While the professional "*all-in-one*" solutions of many arbitration centres provide a set of given rules tailor-made for the needs of arbitration, the video-conference applications which are widely used in all different kinds of professions and exchanges are often new kids on the block which have become popular just recently. Thus, it is advisable to always enquire carefully about the security measures incorporated in the software one plans to use, and cross-check if there are any warnings either regarding the privacy policy, or the host's capacity to monitor the activities of attendees, such as, attention tracking or user tracking.[51]Some of the products on the market provide encrypted data, two-factor authentication, and cloud-based backups with no standing access to customer data. These features may be preferred for the security and privacy of arbitrations.[52]

Thus, a tribunal needs to carefully consider availability, usability, and security when adopting the new technological tools but all of these conditions are no obstacles on the pathway to virtual hearings.

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[50] Lindsay Oliver, *What you should know about online tools during the COVID-19 crisis*, ELEC. FRONTIER FOUND. (Mar. 19, 2020), *available at* https://www.eff.org/deeplinks/2020/03/what-you-should-know-about-online-tools-during-covid-19-crisis.

[51] *Id.*; Jane Wakefied, *Coronavirus: Zoom is in everyone's living room – how safe is it?*, BBC NEWS (Mar. 27, 2020), *available at* https://www.bbc.com/news/technology-52033217; Natasha Gillezeau, *Mind that Zoom in the work-from-home boom*, AUSTL. FIN. REV. (Mar. 24, 2020), *available at*https://www.afr.com/technology/later-are-zoom-video-meetings-giving-up-business-secrets-20200324-p54ddd; *Coronavirus: Zoom under increased scrutiny as popularity soars*, BBC NEWS, Aug. 2, 2020, *available at*https://www.bbc.com/news/business-52115434.

[52] *Id.*; Ravie Lakshmanan, *COVID-19: Hackers begin exploiting Zoom's overnight success to spread malware*, THE HACKER NEWS (Mar. 30, 2020), *available at*https://thehackernews.com/2020/03/zoom-video-coronavirus.html; Hannah Murphy, *Zoom admits user data 'mistakenly' routed through China*, FIN. TIMES, Apr. 4, 2020, *available at* https://www.ft.com/content/2fc518e0-26cd-4d5f-8419-fe71f5c55c98.

B. Technological possibilities

In the past years, technological possibilities have advanced tremendously, and the new IT tools feature possibilities exceeding the conventional video calls used for case management conferences and other procedural hearings. Moreover, many of the new features are ideally suited for the needs of arbitration, such as real-time transcripts generated electronically and simultaneous recording and translating of the hearing which can be spread easily and quickly to all participants right after the virtual hearing. As far as scanning the room with many participants and observing several participants in rapid succession are said to be key features of in-person hearings,[53] the new technology also permits up to 49 or even more participants to be displayed in a mosaic of images with the option for expanding the image of individual participants such as those who are speaking.[54] In addition, relevant documents can be displayed on-screen, with images of the participants and integration of the PowerPoint or multimedia presentations that are often used by experts. Further, video platforms accommodate breakout rooms for the parties and the tribunal either for one-to-one conversations or as a group.

V. The 'new normal' and the future?

In the wake of COVID-19, all participants in the arbitration process must be flexible and bold in examining whether holding a virtual hearing offers a viable solution to overcome the travel restrictions and to avoid long deferral of scheduled in-person hearings. As the extraordinary circumstances of COVID-19 are affecting the running of businesses, it is a logical consequence that it will also impact the way disputes are resolved. In countries such as Singapore and China, courts have already introduced virtual hearings to ensure smooth functioning of the judicial system during

53 Walker, *supra* note 15.

54 Kaplan, *supra* note 34.

the crisis. Similarly, due to the new technological tools, the arbitration community is also well-equipped and well-placed to carry on.

As mentioned earlier, in case virtual hearing is an option, the tribunal should always seek to obtain the parties' consent before proceeding in order to avoid potential challenges to enforcement. While these challenges may not be ultimately successful, they still serve to prolong the process of dispute resolution. Further, regarding the procedure, the tribunals can find a useable framework to build on the existing soft law instruments on witness evidence by video conferencing. Undoubtedly, more developments will come in the near future regarding full virtual hearings. In particular, a tribunal should by way of procedural orders, implement a set of procedural steps to reduce the risks of technological failures and balance the logistical hardships for all participants in a fair manner. Issues to be addressed include recording, technical aspects, managing witnesses and exhibits, the hearing schedule and logistics, test runs, potential technical failure, and costs.[55] Taking into account privacy and security issues, the tribunal should decide in agreement with the parties which specific provider is chosen, depending on the specific features that are needed.

While virtual hearings were once considered an exceptional solution, without other viable solutions at hand due to the COVID-19 crisis, the arbitration community is already in the midst of the new virtual experiment. It is being conducted on a trial-and-error basis with multiple challenges and new risks, but best guidance will be provided through the experience gained in the upcoming months, and many of the practical issues will be resolved soon. From its early beginnings, one of the strengths of arbitration was its character of being an informal option of dispute resolution that can adapt to the specific needs of a dispute and its parties. Historically, arbitration has been a pioneer of procedural and technological innovation among other

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[55] Maxi Scherer, *Remote Hearings in International Arbitration: An Analytical Framework*, 37(4) J. INT'L ARB. 12–13 (2020).

things with electronic filing and service of documents, long before such features were introduced in court proceedings.[56] Without a doubt, as more people work remotely, the use of virtual technologies will improve in terms of reliability and efficiency to meet the higher demand. Clearly, the COVID-19 crisis is changing the way international arbitration works, and the 'new normal' may be different even when the pandemic is over. Virtual hearings may not be the only option in the future, but they might become an equal alternative to in-person hearings, which are unattractive due to costs and time efficiency. Thus, the pandemic may accelerate a permanent shift to a more digital and virtual arbitration.

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[56] Matthew Croagh, Gemma Thomas & Rahul Thyagarajan, *Online Dispute Resolution and electronic hearings: Arbitration in motion*, *in*NORTON ROSE FULBRIGHT,INTERNATIONAL ARBITRATION REPORT 5–8 (2017), *available at*, https://www.nortonrosefulbright.com/-/media/files/nrf/nrfweb/imported/20170925---international-arbitration-report---issue-9.pdf?la=en&revision=c9a5375e-5aff-4a71-a492-18c9305047d6.

"IF IN DOUBT, DISCLOSE?": ARBITRATOR CONFLICTS, CHALLENGES AND REPERCUSSIONS

*Robert S. Pé**

Abstract

In view of the increase in challenges being raised against arbitrators, this note examines two real-life case studies with opposite outcomes to consider their differences in context and to explore the importance of disclosure.

I. Introduction

Challenges against arbitrators are on the increase. Without doubt, a successful challenge can have a devastating impact. This note considers two recent real-life case studies in which the parties, counsel, and Tribunal members have been anonymised and the facts adjusted very slightly for anonymity and simplicity. In one, the arbitrator eventually stood down in the face of a compelling challenge and in the other, the arbitrator resisted and prevailed. This note identifies the key differences and the common themes that emerged in these two cases.

II. Case Study I

A. The factual background

The arbitration was seated in Singapore and conducted under the 2012 International Chamber of Commerce ["**ICC**"] Rules of Arbitration ["**ICC**

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Rules"]. It arose from a shareholders' agreement relating to the business of setting up and operating a luxury hotel project. Under the shareholders' agreement, the Claimant was entitled to various rights including a right to exercise a put option should certain default events take place, including, *inter alia*, failure to complete construction of the hotel project by a specific date.

The Claimant commenced the arbitration in 2016 and a three-member tribunal was constituted. The Claimant was represented by, among others, a leading international law firm ["**ILF**"]. A merits hearing took place in 2018 and the Tribunal rendered a Partial Award in April 2019. The Tribunal found in favour of the Claimant and ordered the Respondents to pay damages. The Tribunal reserved various matters, including interest and costs, to a future award.

In June 2019, after rendering of the Partial Award, the co-arbitrator designated by the Respondents made a disclosure to the parties. He informed them that earlier in 2019, he had been instructed to act as local counsel for a consortium in connection with the enforcement of an interim award in a wholly unrelated dispute between a sovereign government on the one hand and the consortium on the other ["**local enforcement proceedings**"]. The partner of ILF, who had been acting as lead counsel for the Claimant in the arbitration, also served as international counsel to the consortium in the unrelated enforcement proceedings.

Following the disclosure, the Respondents asked the co-arbitrator a series of questions. In his responses, he indicated, among other things, that the enforcement proceedings had been listed in March 2019 and that he had also been approached by the consortium to represent them in related arbitration proceedings ["**other arbitration proceedings**"]. He understood that ILF were appearing in those other arbitration proceedings on behalf of one of the companies that was part of the consortium.

B. The Challenge

The Respondents brought a challenge against the co-arbitrator in July 2019 under Article 14 of the ICC Rules. The co-arbitrator initially rejected the challenge, as did the Claimant, which filed detailed submissions through ILF. An interesting feature of this challenge is that it was made by the Respondents against the co-arbitrator whom they had designated.

C. The Respondents' position

The Respondents' challenge against the co-arbitrator was based on two main grounds, namely the "*ongoing professional relationship with Claimant's counsel*" and the "*lack of disclosure*". By accepting his role as local counsel in the enforcement proceedings, the co-arbitrator had assumed a co-counsel relationship with ILF. He compounded the conflict of interest by also acting as co-counsel with ILF in the other arbitration proceedings. The Respondents stated that it was a serious conflict of interest for the co-arbitrator to be acting together with ILF on two significant mandates while also serving as co-arbitrator in the arbitration. These circumstances cast doubt on his impartiality and called into question his independence.

The Respondents stated that if they had been aware of this co-counsel relationship between the co-arbitrator and ILF at the start of the arbitration, they would never have nominated him as arbitrator or accepted his appointment. They observed that his acceptance of instructions as co-counsel with ILF in the other arbitration proceedings took place just six weeks after the Tribunal in the first arbitration had rendered the Partial Award in favour of the Claimant. The Respondents observed that it could reasonably be assumed that the co-arbitrator's acceptance of the co-counsel relationship in the other arbitration proceedings must have been under discussion for a significant period of time beforehand and the co-arbitrator's lack of disclosure had deprived them of a chance to object to his continuing role in their arbitration. The Respondents further stated that the fact that the co-arbitrator had a relationship with ILF before the Partial Award had been

rendered and the fact that the Partial Award was overwhelmingly in favour of the Claimant may have had some bearing on his being instructed in the other arbitration proceedings. All of the above circumstances called into question the co-arbitrator's independence in the eyes of any fair-minded observer and gave rise to reasonable doubts as to his impartiality.

The Respondents stated that the co-arbitrator's failure to disclose his relationship with ILF since at least March 2019 was a violation of Article 12(1) of the United Nations Commission on International Trade Law Model Law on International Commercial Arbitration ["**Model Law**"], which provides as follows:[1]

> "*When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties unless they have already been informed of them by him.*"

The Respondents indicated that arbitrators have a responsibility to avoid situations that may lead to a conflict of interest. Therefore, the co-arbitrator was under an on-going duty to disclose any potential conflict, and he should have disclosed the conflict immediately. They further stated that the appropriate time to disclose this information was on or before March 2019, by when he had been engaged by the consortium for the enforcement proceedings.

In light of the above, the Respondents invited the co-arbitrator to step down immediately, failing which they invited the ICC International Court of Arbitration ["**ICC Court**"] to remove him.

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1 United Nations Commission on International Trade Law, Model Law on International Commercial Arbitration, art. 12(1), 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).

D. The Claimant's position

The Claimant stated that the challenge was unsustainable and asserted that ILF had virtually no professional contact, let alone *relationship*, with the co-arbitrator prior to the initiation of the arbitration. The Claimant stated that ILF had had prior contact with the co-arbitrator on only two occasions: (i) in 2003 when they had engaged him as a local law expert for a different arbitration with a completely different set of ILF lawyers; and (ii) several years ago when ILF had acted against the co-arbitrator in a different arbitration. ILF had never nominated the co-arbitrator for appointment as arbitrator and had never worked with him as counsel except for the then current co-counsel role in connection with the other arbitration proceedings. The Claimant stated that the terms of that engagement were finalised only in July 2019, after the Partial Award had been rendered and only five days prior to the Respondents' challenge. The Claimant disputed the assertion that the relationship between ILF and the co-arbitrator in the enforcement proceedings was that of co-counsel. It further stated that ILF had not had an active role in the co-arbitrator's engagement in the enforcement proceedings or the other arbitration proceedings – both the engagements had been initiated by the underlying client.

In light of the above, the Claimant stated that there was no failure by the co-arbitrator to make disclosure and no delay in his doing so.

E. Admissibility of the Challenge

For a challenge to be admissible in the context of an ICC arbitration, it must be filed by a party "*either within 30 days from receipt by that party of the notification of the appointment or confirmation of the arbitrator, or within 30 days from the date when the party making the challenge was informed of the facts and circumstances on which the challenge is based if such date is subsequent to the receipt of such notification*".[2]

[2] International Chamber of Commerce (ICC), Rules of Arbitration 2012, art. 14(2).

The challenge was based on the co-arbitrator's additional disclosure of June 2019. The Respondents submitted the challenge in July 2019, one day before the 30-day time limit expired. The challenge was, therefore, admissible.

F. The justifiable doubts test

Given that the arbitration was seated in Singapore, the parties agreed that the applicable test was the justifiable doubts test. This has been summarised as follows:

> "*The arbitrator's appointment may be challenged only if circumstances exist which give rise to justifiable doubts as to his impartiality or independence or he does not possess the qualifications agreed to by the parties. Such circumstances include a personal, business or professional relationship with the parties to the dispute, or an interest in the outcome of the dispute. The standard of bias or partiality that has been applied by the Singapore courts is whether a reasonable and fair-minded person sitting in court and knowing all the facts would have a reasonable suspicion that a fair trial for the applicant would not be possible*".[3]

Under this test, the relevant question is whether a reasonable and fair-minded person would entertain a reasonable suspicion that the relevant circumstances might result in the arbitral proceedings being affected by apparent bias if the arbitrator was not removed or view the relevant circumstances as bearing on the tribunal's impartiality in the resolution of the dispute before it. The assumption is that the reasonable and fair-minded person possesses all the relevant facts available to the decision-maker at the time of the determination of the challenge and not merely the facts known to the party bringing the challenge.

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[3] Lawrence Boo, *International and Domestic Arbitration in Singapore*, *in* ARTICLES ON SINGAPORE LAW ¶ 4.2.11 (2005).

G. Analysis and outcome

The relationship between the co-arbitrator and ILF can be summarised as follows:

1. The local enforcement proceedings related to the enforcement of a partial award issued in unrelated arbitration proceedings;

2. The co-arbitrator had been and was representing the consortium in the local enforcement proceedings but was not being instructed by ILF in those proceedings;

3. ILF was representing that same party—the consortium—in the other arbitration proceedings;

4. The co-arbitrator had recently agreed to serve as lead counsel in the same other arbitration proceedings and that he would take instructions from ILF; and

5. The co-arbitrator's agreement to serve as lead counsel in the other arbitration proceedings occurred after he had made the additional disclosure in the first arbitration.

There was disagreement between the co-arbitrator and the Respondents as to whether there had been, and was, a co-counsel relationship between the co-arbitrator and ILF in the local enforcement proceedings. Despite the disagreement as to the nature of the relationship in the local enforcement proceedings, it was not disputed that the co-arbitrator and ILF were now representing the same client in proceedings related to the local enforcement proceedings, namely the other arbitration proceedings.

Regardless of whether the co-arbitrator and ILF had a co-counsel relationship in the enforcement proceedings, it was clear that the co-arbitrator was aware by some point in March 2019 of ILF's involvement in the aforementioned proceedings. He chose to make disclosure only in June 2019 i.e. around 3 months after his involvement started and shortly after

the Tribunal in the arbitration had rendered its Partial Award. Even if there was no failure to disclose, there was at least a delay in making the disclosure. The ICC Court has in the past accepted challenges where it found that the relationship between an arbitrator and a law firm is current and on-going.[4] It is, therefore, not surprising that, on the eve of the Court's consideration of the challenge, the co-arbitrator resigned of his own accord. He really had no choice at that stage; the repercussions were likely to be very substantial. The Respondents had initiated setting aside proceedings against the Partial Award, and the co-arbitrator's resignation in the face of their challenge would have greatly bolstered the prospects of the award being set aside.

III. Case Study II

A. The factual background

There were two connected arbitrations, both seated in Hong Kong and both pursuant to the 2018 Hong Kong International Arbitration Centre ["**HKIAC**"] Administered Arbitration Rules ["**HKIAC Rules**"]. The first arose out of a guarantee in respect of an International Swaps and Derivatives Association, Inc. ["**ISDA**"] Master Agreement and the second arose out of the Master Agreement itself.

The Claimant was a company incorporated in England and Wales and was represented in the two arbitrations by a major international law firm and a major law firm from the People's Republic of China ["**PRC**"]. In the first of the two arbitrations, the Respondent was a PRC company, and in the second, the Respondent was a Hong Kong company. The Respondents were represented by a Hong Kong solicitors' firm in both arbitrations.

In its Notices of Arbitration, the Claimant designated an English barrister as the first arbitrator. In their Answers, the Respondents designated a PRC lawyer as the second arbitrator. After adopting a list-procedure, the co-

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[4] *Challenge and Disqualification on the Ground of Independence Issues*, *in* 24 KAREL DAELE, CHALLENGE AND DISQUALIFICATION OF ARBITRATORS IN INTERNATIONAL ARBITRATION 299–301 (2012).

arbitrators designated a Hong Kong Senior Counsel as the Presiding Arbitrator. The designee did not make any kind of disclosure in his Declaration of Acceptance and Statement of Availability, Impartiality and Independence. In the absence of any objections from the parties, the HKIAC confirmed the candidate as the Presiding Arbitrator, thereby constituting the arbitral tribunal.

The Claimant filed an application in the first arbitration for interim anti-suit relief in relation to the proceedings commenced by the Respondents against the Claimant and an affiliate of the Claimant before an Intermediate People's Court in the PRC. When the Respondents filed their submissions in opposition to the Claimant's application for anti-suit relief, it became clear that their legal team included not only the solicitors' firm but also two barristers from outside that firm, namely a Senior Counsel and a Junior Counsel from the same barristers' chambers as the Presiding Arbitrator. The Claimant noted from public sources that the Presiding Arbitrator and the Respondents' Junior Counsel had acted as co-counsel in a number of cases and had co-presented two seminars, including one on anti-suit relief given to the solicitors' firm that was now representing the Respondents. The Claimant also noted that both the Presiding Arbitrator and the Respondents' Senior Counsel were on the Pupillage Committee of their chambers. The Claimant sought further details from the Presiding Arbitrator in relation to each of those matters as well as the nature and extent of his relationship and interaction with the Respondents' Senior and Junior Counsel over the past five years.

The Presiding Arbitrator responded to the Claimant's request for information and confirmed that the Respondents' Senior and Junior Counsel were members of the same chambers as him, disclosed copies of the materials used in the two seminars, and provided further information regarding his relationship and interaction with the Respondents' Senior and Junior Counsel. The Claimant requested that the Respondents confirm certain details of their engagement of the Senior and Junior Counsel in both

arbitrations and certain other information relating to the seminar on anti-suit relief they had given to the solicitors' firm that was now representing the Respondents. The Respondents confirmed that they intended to instruct the Senior and Junior Counsel to appear at the hearing of the anti-suit injunction application in the first arbitration and to advise on matters relating to both arbitrations. The Respondents provided some of the information requested by the Claimant about the above seminar.

B. The Challenge

On September 18, 2019, the Claimant filed a Notice of Challenge against the Presiding Arbitrator on the basis that there were justifiable doubts as to his impartiality and independence. The Presiding Arbitrator indicated that he would not withdraw from the Arbitral Tribunal unless the Respondents agreed with the Challenge. The Respondents indicated that they did not agree with the Challenge and filed an Answer to the Notice of Challenge.

C. The Claimant's position

The Claimant relied on the following facts in support of its Challenge:

1. The Presiding Arbitrator and the Respondents' Junior Counsel had given a seminar to the Respondents' solicitors two months before the appointment of the Presiding Arbitrator in the two arbitrations. Based on a report available on the website of the barristers' chambers, the seminar was a closed-door event, attended by a few people from the solicitors' firm, including the lead partner on the Respondents' legal team. The seminar included a discussion of a Hong Kong case which was of direct relevance to the Claimant's anti-suit injunction application.

2. The Presiding Arbitrator had a close relationship with the Respondents' Senior and Junior Counsel. In the case of the Senior Counsel, this was supported by the fact that he and the Presiding Arbitrator both sat on their chambers' Pupillage Committee. In the case of the Junior Counsel, this was supported by the fact that she

had spent three months of her pupillage with the Presiding Arbitrator, they had acted as co-counsel in four cases in the past three years, and they had co-presented at the two seminars.

3. The Presiding Arbitrator had failed to make disclosures on three occasions:*first*, prior to or at the time of his appointment on April 25, 2019; *second*, when the Claimant submitted its anti-suit injunction application in the first arbitration on July 23, 2019; and *lastly*, when the Respondents submitted their opposition to the Claimant's application on August 16, 2019 making the involvement of the Respondents' Senior and Junior Counsel apparent.

The Claimant submitted that the above facts had *cumulatively* given rise to justifiable doubts as to the impartiality and independence of the Presiding Arbitrator in the eyes of an objective, fair-minded, and informed observer. The Claimant also contended that the Presiding Arbitrator's answers to the Claimant's enquiries had been inadequate and incomplete.

D. The Respondents' position

The Respondents submitted that the Challenge should be dismissed at the outset. Their primary position was that the Challenge was made out of time. The Claimant became aware of the circumstances giving rise to the Challenge on at least August 16, 2019 (when the Respondents in the first arbitration filed their submissions in response to the anti-suit injunction application, thereby identifying their Senior and Junior Counsel) or at the latest by August 31, 2019 (when the Claimant first made enquiries about the Presiding Arbitrator's impartiality and independence). The Notice of Challenge should have been submitted on August 31, 2019 or at the latest

by September 15, 2019.[5] There was no reason to justify any extension of time for the submission of the Notice of Challenge on September 18, 2019.[6]

In the event that the HKIAC decided that the Challenge was made in time or that the time limit for submitting the Challenge should be extended, the Respondents referred to *Laker Airways Inc.* v. *F.L.S. Aerospace Ltd.* ["**Laker Airways**"] in which the English Commercial Court had dismissed a party's application to remove an arbitrator on the basis that the arbitrator and the barrister representing a party came from the same barristers' chambers.[7] The Respondents also referred to the IBA Guidelines on Conflicts of Interest in International Arbitration ["**IBA Guidelines**"].[8] The parties were not bound by the IBA Guidelines and merely used them for reference. The Guidelines are not legal provisions and do not represent the position under Hong Kong law but they have found broad acceptance among the international arbitration community. The Respondents relied on paragraph 4.3.4, which lists the following circumstance on the Green List:[9]

> "*[t]he arbitrator was a speaker, moderator or organiser in one or more conferences, or participated in seminars or working parties of a professional, social or charitable organisation, with another arbitrator or counsel to the parties.*"

5 Hong Kong International Arbitration Centre (HKIAC), Administered Arbitration Rules 2018, art. 11.7 [*hereinafter* "HKIAC Arbitration Rules"].

6 *Id.* art. 21.2 (which permits the tribunal to extend time limits in certain cases).

7 Laker Airways Inc. v. F.L.S. Aerospace Ltd. [2000] 1 WLR 113 (Eng.).

8 International Bar Association (IBA), IBA Guidelines on Conflicts of Interest in International Arbitration 2014 [*hereinafter* "IBA Guidelines"].

9 The IBA Guidelines set out various potential circumstances and allocate them to a Non-Waivable Red List, a Waivable Red List, an Orange List and a Green List. A circumstance on the Green List does not require disclosure and does not preclude an individual from serving as arbitrator.

The Respondents submitted that such a circumstance could never lead to disqualification or require disclosure under the objective test in General Standard 2 of the IBA Guidelines.[10]

E. The Presiding Arbitrator's position

The Presiding Arbitrator considered that, as a matter of principle, there were no good grounds to support a perception of lack of impartiality. He indicated that he had adjudicated both as Deputy High Court Judge and arbitrator in numerous cases in which members of his chambers had appeared. He did not consider that his impartiality and independence were in any way affected. He pointed out that the position should be reviewed in the context of these two arbitrations, which involved sophisticated and professional parties and lawyers. Participating at seminars and in legal discourse on any particular topic, whether or not arbitration-related, was not a ground to support a perception of bias.

F. Admissibility of the Challenge

The HKIAC Rules provide that:[11]

> "*A party who intends to challenge an arbitrator shall send notice of its challenge within 15 days after the confirmation or appointment of that arbitrator has been communicated to the challenging party or within 15 days after that party became aware of the circumstances mentioned in Article 11.6*."

An HKIAC Practice Note on Challenges to Arbitrators ["**HKIAC Practice Note**"] sets out the procedure for submitting and determining a challenge to an arbitrator and provides that:[12]

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10 IBA Guidelines, *supra* note 8, Gen. Stand. 2(c) (which provides that "[d]oubts are justifiable if a reasonable third person, having knowledge of the relevant facts and circumstances, would reach the conclusion that there is a likelihood that the arbitrator may be influenced by factors other than the merits of the case as presented by the parties in reaching his or her decision").

11 HKIAC Arbitration Rules, *supra* note 5, art. 11.7.

12 HKIAC, Practice Note on Challenges to Arbitrators 2019, ¶ 2.1.

"*A party wishing to challenge an arbitrator shall submit, within 15 days… after the party became aware of the circumstances giving rise to the challenge, a Notice of Challenge…*"

The Claimant's letter dated August 31, 2019 raised reasonable enquiries with the Presiding Arbitrator, and it was appropriate for the Claimant to await a response from him before reaching a decision on launching a Challenge based on cumulative factors. The 15-day period under the HKIAC Practice Note, therefore, ran from the date of the Presiding Arbitrator's response to the enquiries of the Claimant i.e. from September 3, 2019. The Claimant's Notice of Challenge dated September 18, 2019 was hence submitted within time. Even if the Claimant were out of time, it would have been appropriate to allow an extension because any delay was minimal and not such as to cause undue prejudice to the Respondents.

G. The justifiable doubts test

The HKIAC Rules provide as follows:[13]

"*Any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence, or if the arbitrator does not possess qualifications agreed by the parties, or if the arbitrator becomes de jure or de facto unable to perform his or her functions or for other reasons fails to act without undue delay. A party may challenge the arbitrator designated by it or in whose appointment it has participated only for reasons of which it becomes aware after the designation has been made.*"

To assess "*if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence*," the test in Hong Kong is that stated by the Hong Kong Court of First Instance in *Jung Science Information Technology Co., Ltd* v. *ZTE Corporation*, which is "*whether an objective fair-minded and informed observer,*

13 HKIAC Arbitration Rules, *supra* note 5, art. 11.6.

having considered the relevant facts, would conclude that there was a real possibility that the Tribunal was biased".[14]

H. Analysis and outcome

The applicable test referred to above represents a high threshold. The first of the three cumulative factors on which the Claimant relied was the seminar given by the Presiding Arbitrator and the Respondents' Junior Counsel to the lawyers from the Respondents' solicitors' firm. It is normal for barristers and solicitors to hold such private events at which they discuss recent developments in the law. The fact that someone says something at one of these private events on a particular issue of law does not commit that person to decide a future case in a particular way, and participants are aware of this fact. Such discussions are beneficial for the development of law, and if challenges were allowed based on this ground, it would have an unhelpful chilling effect.

The second factor on which the Claimant relied was that the Respondents' barristers were members of the same chambers as the Presiding Arbitrator and had a close relationship with him. The Claimant had sought to distinguish the *Laker Airways* case[15] in which the challenge was based merely on the fact that the arbitrator and the counsel of one of the parties belonged to the same chambers, and not on any particular/specific facts related to their relationship. This had, in fact, prompted the court to declare that barristers are "*independent self-employed practitioners*" and that there are too many of them within the same chambers to have even basic interaction. Finally, the Court held that there can be no presumed imputation of knowledge between them to justify the removal of the arbitrator. The Claimant submitted that, unlike the challenge in that case, the Claimant's Challenge in this case was based on various specific features of the Presiding Arbitrator's relationship with the Respondents' Senior and Junior

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14 Jung Sci. Info. Tech. Co., Ltd. v. ZTE Corp., [2008] 4 H.K.L.R.D. 776, ¶ 50 (C.F.I.) (H.K.).

15 Laker Airways Inc. v. F.L.S. Aerospace Ltd. & Anr. [2000] 1 WLR 113 (Eng.).

Counsel. The specific features were that the Presiding Arbitrator and the Respondents' Senior Counsel sat together on their chambers' Pupillage Committee and that the Junior Counsel had done three months of pupillage with him, acted as his co-counsel on four recent cases and delivered the seminar with him (and another member of their chambers). However, it appeared that the Presiding Arbitrator was not currently acting as co-counsel with either of the Respondents' counsel on any cases. His relationship with each of them appeared typical of that shared by members of the same barristers' chambers and entirely proper and appropriate.

The Claimant had cited, among other authorities, International Commercial Arbitration by Gary B. Born, in which Mr. Born states as follows:[16]

> "*…In recent years, this structure and setting has significantly evolved, with barristers' chambers increasingly engaging in common promotional, training and other professional activities comparable to those of law firms. As a consequence, conclusions regarding barristers' independence must be reexamined in light of the realities of contemporary practice. That reexamination has occurred in several recent cases, with some authorities now holding that, at least in international cases, the relationship between members of a barristers' chambers are relevant to an arbitrators' independence in much the same manner that relationships within law firms are relevant.*"

The aforementioned text is accompanied by a footnote in the book consisting of several cases – one of which,[17] an ICSID case, had also been cited by the Claimant in its submissions. However, the said case was clearly not on all fours with the situation in the two arbitrations. The same footnote continued to refer to another case as follows:[18]

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[16] GARY B. BORN,INTERNATIONAL COMMERCIAL ARBITRATION 1894 (2d ed. 2014).

[17] *Hrvatska Elektroprivreda d.d. v. Republic of Slovn.,* ICSID Case No. ARB/05/24, Order Concerning the Participation of Counsel (May 6, 2008).

[18] BORN, *supra* note 16, n.1389.

> "…*But see Decision in LCIA Ref. No. UN97/X11 of 5 June 1997, 27 Arb. Int'l 320 (2011) (dismissing challenge based on respondent's counsel and arbitrator being from same chambers, noting that claimant and its counsel were familiar with organization of barristers' chambers in England).*"

In the current case, the Claimant's counsel were clearly familiar with the organisation of barristers' chambers in Hong Kong. The Claimant itself was domiciled in England and Wales and one would expect it to be familiar with the organisation of barristers' chambers there and also in Hong Kong.

The third of the three cumulative factors on which the Claimant relied was that the Presiding Arbitrator had failed to disclose the first two factors and had failed to address the reason for the non-disclosure and to adequately explain the circumstances around the first and second factors. However, neither of those factors appeared in the IBA Guidelines' Non-Waivable Red List or Waivable Red List. These lists are non-exhaustive and detail specific situations that, depending on the facts of a given case, give rise to justifiable doubts as to the arbitrator's impartiality and independence. An example of a situation on the Non-Waivable Red List is where "*[t]he arbitrator or his or her firm regularly advises the party, or an affiliate of the party, and the arbitrator or his or her firm derives significant financial income therefrom*".[19] An example of a situation on the Waivable Red List is where the arbitrator currently represents or advises one of the parties or an affiliate of one of the parties.[20]

Looking at all three factors, they were clearly not sufficient individually or cumulatively to justify a successful challenge, and the Challenge was thus rightly rejected.

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19 IBA Guidelines, *supra* note 8, Non-Waivable Red List, ¶ 1.4.

20 IBA Guidelines, *supra* note 8, Waivable Red List, ¶ 2.3.1.

IV. Conclusion: if in doubt, disclose?

Challenges to arbitrators must be decided on their own individual facts, and as the above case studies demonstrate, fact patterns can be complex and nuanced. Fine distinctions can make the difference between allowing a challenge and rejecting it. In the first of these two case studies, it was clear that the co-arbitrator and the Claimant's counsel had been acting for a common client in a local enforcement proceedings and that there was now an on-going co-counsel relationship in the other arbitration proceedings. In the second case study, the Presiding Arbitrator had, in the past, acted as co-counsel with the Respondents' Junior Counsel, but was not currently doing so. This was a key difference between the two cases, but common questions arose around the duty of arbitrators to disclose matters that might be viewed as giving rise to conflicts of interest.

In this context, although the IBA Guidelines are non-binding in nature, unless otherwise agreed by the parties, they provide helpful guiding principles. In the second case study, the private nature of the seminar given by the Presiding Arbitrator and the Respondents' Junior Counsel meant that it was unclear whether or not it fell within the IBA Guidelines' Green List, which reads as follows:[21]

> "*The arbitrator was a speaker, moderator or organiser in one or more conferences, or participated in seminars or working parties of a professional, social or charitable organisation with another arbitrator or counsel to the parties.*"

Arguably, it would have been prudent for the Presiding Arbitrator to disclose the details of the seminar once he became aware of the involvement of the Respondents' Junior Counsel in the two arbitrations.

[21] IBA Guidelines, *supra* note 8, ¶ 4.3.4.

The Presiding Arbitrator's relationship with the Respondents' Junior Counsel fell within the IBA Guidelines' Orange List, which provides that:[22]

> "*The arbitrator and another arbitrator or counsel for one of the parties in the arbitration, currently act or have acted together within the past three years as co-counsel.*"

According to the IBA Guidelines, the Presiding Arbitrator, therefore, had a duty to disclose his relationship with the Respondents' Junior Counsel once he became aware of her involvement in these two arbitrations. Arguably, he did not discharge that duty or did not discharge it sufficiently promptly.

However, the 'Practical Application of the General Standards' of the IBA Guidelines provides that:[23]

> "*[…] a later challenge based on the fact that an arbitrator did not disclose such facts or circumstances should not result automatically in non-appointment, later disqualification or a successful challenge to any award…non-disclosure cannot make an arbitrator partial or lacking independence; only the facts or circumstances that he or she did not disclose can do so.*"

Notwithstanding this, the maxim "*if in doubt, disclose*" can sometimes be helpful if it causes arbitrators to apply their minds so as to avoid embarrassment or far worse.

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22 *Id.* ¶ 3.3.9.

23 *Id.* pt. II, ¶ 5.

N.V. INTERNATIONAL AND THE CONFOUNDING CASE OF LIMITATION FOR ARBITRATION APPEALS IN INDIA

*Anhad S. Miglani**

Abstract

*The Arbitration and Conciliation Act, 1996 ["**ArbitrationAct**"] was enacted with a view, inter alia, to develop a fair and efficient system of arbitration in India, with minimal judicial intervention. Yet, ironically, in balancing the interests of fairness against the need for efficiency, judicial intervention sometimes becomes inevitable. The Supreme Court, recently faced with a similar situation, was called upon to decide on the contours of the limitation period applicable to arbitration appeals under the Arbitration Act. Highlighting efficiency and speedy resolution as the foundation of India's arbitration regime, the Court laid down a law favouring seemingly restrictive and technical considerations at the expense of certain settled legal principles. In light of the same, this note is an attempt to analyse and evaluate the rationale behind the decision and the implications thereof on parties, proceedings and the law itself.*

I. Introduction

The recent decision of the Indian Supreme Court in *M/s N.V. International* v. *State of Assam*[1] ["**NV International**"] has caused more than a ripple effect for present and potential appellants in pursuit of their remedies under Section 37 of the Arbitration Act.[2] The judgment, a mere six paragraphs, has, undoubtedly, immediate implications for arbitration appeals in India.

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1 M/s N.V. Int'l v. State of Assam & Ors., (2020) 2 SCC 109 (India) [*hereinafter* "NV International"].

2 Arbitration and Conciliation Act, No. 26 of 1996, § 37 (India) [*hereinafter* "Arbitration Act"] (providing for the orders from which an appeal may lie to a court).

However, more critically, the Court seems to have gone down a dangerously vague path of statutory interpretation, whereby the language of the statute and the intent of the legislature have been given a go-by for reasons not seemingly justifiable as per settled law and established legal principles.

Upholding the dismissal of an appeal under Section 37 on the ground of delay, the Supreme Court has read in and established sudden and rather restrictive contours on the applicability of the law of limitation to arbitration appeals. Following an earlier decision rendered in *Union of India* v. *Varindera Construction* ["**Varindera Construction**"],[3] the Court laid down that the period of 90 days hitherto made applicable to Section 37 appeals through the Limitation Act, 1963 ["**Limitation Act**"] could only be extended by a maximum period of 30 days. Shorn of any detail or discussion, the primary reason given for such an absolute approach was that an appeal, being a continuation of the original proceeding (i.e. the application under Section 34 for setting aside an award), is liable to be subjected to the same procedural rigour as the latter. Of course, the Arbitration Act's intended object of speedy resolution of arbitral disputes is also a stated justification behind the decision rendered by the bench headed by Nariman J.[4]

II. A chequered judicial record

It must be pointed out that the muddle of conflicting judicial precedent around this issue of limitation under the Arbitration Act is probably as old as the statute itself. In the opinion of the author, the same seemingly has had much to do with the fact that the provision for appeals provided under Section 37 prescribes no statutory time limit for the same to be filed. Contrasted with the strict timeframe prescribed for the original proceedings

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[3] Union of India v. M/s Varindera Constr. Ltd., (2018) 7 SCC 794 (India) [*hereinafter* "Varindera Construction"].

[4] NV International, (2020) 2 SCC 109, ¶ 4 (India).

under Section 34,[5] and coupled with the Arbitration Act's stated intent of providing a speedy and efficient dispute resolution mechanism, the lack of a similar rigour of time in respect of appeals under Section 37 is an issue that even the Supreme Court has continued to grapple with.

In one of the earliest decisions on the very same question, the Bombay High Court in *ONGC* v. *Jagson International* ["**Jagson**"] had held that since Section 37 of the Arbitration Act provided for no period of limitation within which to file an appeal, the same was clearly a deliberate legislative omission, and thus no such time limit could be judicially read into it.[6]The Court considered the crucial fact that since such limits had been expressly provided for in other provisions under the same part of the same Act, including in Sections 11, 13, 16, and 34, the legislative intent behind excepting appeals filed under Section 37 from such rigour was clearly made out.[7] Such an approach found its basis in the judgment rendered by a three-judge bench of the Supreme Court in *UttamNamdeoMahale*v. *Vithal Deo*,[8] wherein in the absence of a prescribed period of limitation under a provision of a special law, the law of limitation was held to be inapplicable. A similar decision was delivered by another three-judge bench in *L.S. Synthetics* v.*Fairgrowth Financial Services*.[9]

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5 Arbitration Act, No. 26 of 1996, § 34 (India) (Section 34(3) provides that an application thereunder for setting aside an arbitral award may not be made after three months of the date of receipt of the award by a party. The proviso to the sub-section provides that on showing sufficient cause, the said time can further be extended by the court for a period of 30 days, but not thereafter).

6 Oil & Natural Gas Comm'n v. Jagson Int'l Ltd.,AIR 2005 Bom 335 (India) [*hereinafter* "Jagson"].

7 *Id.* ¶ 14; Arbitration Act, No. 26 of 1996, §§ 11, 13, 16 (India) (Section 11 deals with the appointment of arbitrators. Specific time limits are given in case parties wish to approach the courts for appointment. Section 13 provides for a provision to challenge an arbitrator. A time limit of 15 days from the date of constitution or of knowledge is provided for thereunder. Similarly, a jurisdictional challenge under Section 16 can only be made before or at the time of submission of the statement of defence).

8 Uttam Namdeo Mahale v. Vithal Deo & Ors.,AIR 1997 SC 2695, ¶ 4 (India).

9 L.S. Synthetics Ltd. v. Fairgrowth Fin. Servs. Ltd., AIR 2005 SC 1209 (India).

Subsequently, however, at least in the context of arbitration, this position of law appears to have changed with the Supreme Court's judgment in *Consolidated Engineering Enterprises* v. *Principal Secretary, Irrigation Department* ["**Consolidated Engineering**"].[10] By liberally interpreting Section 43 of the Arbitration Act, it was held by Raveendran J., in his concurring judgment, that the Limitation Act would apply to all proceedings under the Arbitration Act, except where it was specifically excluded. It was noticed that the Arbitration Act did not expressly exclude the applicability of the limitation statute, but merely contained some departures from it.[11] Accordingly, the Limitation Act was held to apply to appeals under Section 37, and the ruling in *Jagson*hence stood impliedly overruled. As a consequence thereof, and in line with Section 29(2) of the Limitation Act,[12] it can be inferred that even Section 5 of the Limitation Act[13] came to be applied by courts to condone delays in filing appeals under Section 37. The same made complete legal and logical sense: once the Limitation Act was held to be applicable to all proceedings under the Arbitration Act, it could only have been so *in toto*, subject only to clear exclusions i.e. where the provisions itself provided a specified period of limitation.[14] However, with the ruling in *NV International*, this seemingly sound position of law – that

10 M/s Consol. Eng'g Enters. v. Principal Sec'y, Irrigation Dep't & Ors., (2008) 7 SCC 169 (India) [*hereinafter* "Consolidated Engineering"].

11 *Id.* ¶ 42.

12 *See* Limitation Act, No. 36 of 1963, § 29(2) (India) ("Where any special or local law prescribes for any suit, appeal or application a period of limitation different from the period prescribed by the Schedule, the provisions of Section 3 shall apply as if such period were the period prescribed by the Schedule and for the purpose of determining any period of limitation prescribed for any suit, appeal or application by any special or local law, the provisions contained in Sections 4 to 24 (inclusive) shall apply only in so far as, and to the extent to which, they are not expressly excluded by such special or local law.").

13 *Id.* § 5 (allowing courts to extend the period of limitation, if sufficient cause is shown for the delay).

14 The use of the term "but not thereafter" in Section 34 of the Arbitration Act was held to be an unambiguous bar to the application of Section 5 of the Limitation Act and the courts' power to condone delays thereunder. *See* Union of India v. Popular Constr. Co.,(2001) 8 SCC 470, ¶ 12 (India).

had come to be accepted by courts all over the country for more than a decade[15] – has suddenly been altered.

III. Section 5: the source of the power

What is pertinent to note at the outset is that unlike the case of Section 34, the Supreme Court in *N.V. International* has not excluded the applicability of the provisions of the Limitation Act to appeals filed under Section 37 of the Arbitration Act. Rather, an outer limit of 30 days has been read into the courts' discretionary power to condone delays under Section 5 of the Limitation Act.[16] In this context, it is important to look at the precise wording of Section 5, which is reproduced as follows:

> "***5. Extension of prescribed period in certain cases—****Any appeal or any application, other than an application under any of the provisions of Order XXI of the Code of Civil Procedure, 1908 (5 of 1908), may be admitted after the prescribed period if the appellant or the applicant satisfies the court that he had sufficient cause for not preferring the appeal or making the application within such period.*"[17]

It may be noted that the provision does not provide for any outer limit beyond which the courts are absolutely barred to admit matters – all that is required is the existence of a 'sufficient cause'. In fact, it has time and again been recognised and upheld by the Supreme Court itself that, in condoning delays under Section 5, what is important is not the length of the delay, but the acceptability of the explanation for sufficient cause.[18] The same has been, and continues to be, a well-settled principle applied by courts in exercising their discretion under the provision, and for good reason. Litigants may be prevented from approaching courts within the prescribed

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15 M/s Patel Unity Joint Venture v. N. E. Elec. Power Corp. Ltd., (2018) 4 NEJ 505, ¶ 3 (India); Oil & Natural Gas Corp. v. M/s Dinamic Corp., (2013) 1 MH. L.J. 94, ¶ 6 (India) [*hereinafter* "Dinamic Corporation"].

16 NV International, (2020) 2 SCC 109, ¶ 5 (India).

17 Limitation Act, No. 36 of 1963, § 5 (India).

18 State of Nagaland v. Lipok AO & Ors., (2005) 3 SCC 752, ¶¶ 8, 9 (India).

time for a multitude of reasons, not all of which may necessarily be attributable to them. Even otherwise, ordinarily, no litigant stands to benefit by a delay in approaching a court. Therefore, in order to advance the interest of substantial justice, the need to liberally construe the term 'sufficient cause' has been espoused and adopted.[19] Furthermore, it has been repeatedly held that the rules of limitation are not meant to destroy the rights of parties and that "*when substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred for the other side cannot claim to have vested right in injustice being done because of a non-deliberate delay*".[20]

It is clear that, in circumscribing the discretionary power of courts under Section 5 to an outer limit of 30 days in respect of arbitration appeals, the decision in *NV International* runs contrary to the explicit wording of the statutory provision as well as well-established judicial precedent and policy guiding the law of limitation in India. Intriguingly, the stated rationale for judicially engrafting such a specific bar of limitation is to effectuate the apparent legislative intent of speedy dispute resolution under the Arbitration Act. Yet, the fact that the legislature itself did not think it necessary to bring in such a limit, despite otherwise having brought in two substantial amendments to the scheme of the Arbitration Act, seems to have gone unnoticed. In fact, the decision in *VarinderaConstruction*, the ratio of which has guided the Court in *NV International*, had been rendered much before the latest amendment made to the Arbitration Act in 2019.[21] In the author's opinion, the fact that the Parliament chose not to take that judicial

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[19] Collector, Land Acquisition, Anantnag v. Mst. Katiji, AIR 1987 SC 1353, ¶ 3 (India).

[20] *Id.* ¶ 3.

[21] The Arbitration and Conciliation (Amendment) Act, 2019, No. 33 of 2019 (India) received the assent of the President on August 9, 2019. *Inter alia*, a new time limit to complete pleadings has been introduced by inserting sub-section (4) to Section 23 of the Arbitration Act. Even the language of Section 37 itself was amended, and a non-obstante clause has since been inserted therein. However, no time frame was introduced within which to file the appeal.

pronouncement into account while amending the Arbitration Act ought to have weighed in with the Court before judicially reading in such a limit.

IV. The interpretative standard applied

The Apex Court, time and again, has categorically held that the Arbitration Act is a complete, self-contained code, intended to establish an exhaustive framework for arbitration.[22] The import of the same has also succinctly been brought out in the concluding paragraphs of the judgment in *Fuerst Day Lawson* v. *Jindal Exports Ltd.*,[23] wherein it is stated:

> "*Once it is held that the Arbitration Act is a self-contained code and exhaustive, then it must also be held, using the lucid expression of Tulzapurkar, J., that it carries with it 'a negative import that only such acts as are mentioned in the Act are permissible to be done and acts or things not mentioned therein are not permissible to be done'*."

Hence, it is abundantly clear that interpolation of the kind done in *NV International* stands in apparent conflict with the interpretative standard otherwise made applicable to the Arbitration Act. Even otherwise, the same is in stark contrast to well-established canons of statutory interpretation under common law, as accepted by the courts as well.

Maxwell's treatise, On the Interpretation of Statutes, states that a law, otherwise complete and unambiguous, should not be construed on the basis of the legislature's assumed intent.[24] It is stated that the same would amount,not to construing the law, but to altering it. Accordingly, a legislation as comprehensive as the Arbitration Act or a provision as clear as Section 5 of the Limitation Act is thus required to be understood as complete in all respects. The scope of judicial innovation must, therefore, be severely restricted. Moreover, it is also a recognised principle of

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22 P. S. Sathappan v. Andhra Bank Ltd., (2004) 11 SCC 672, ¶ 10 (India); Kandla Exp. Corp. v. OCI Corp., (2018) 14 SCC 715, ¶ 20 (India).

23 Fuerst Day Lawson Ltd. v. Jindal Exp. Ltd.,AIR 2011 SC 2649, ¶ 89 (India).

24 PETER BENSON MAXWELL, ON THE INTERPRETATION OF STATUTES 6 (2d ed. 1883).

interpretation that if the words of a provision are clear and unambiguous, the same have to be given effect to, and that there can be no assumption of a defect or an omission.[25] In other words, in the absence of a clear finding to the contrary, the legislature is presumed to have intended to mean what it has plainly expressed (or not expressed).[26] In this light, it is hard to contemplate how the Court reached the decision that it did, in judicially circumscribing the discretionary power under Section 5 of the Limitation Act with respect to Section 37 appeals.

Interestingly, Salmond, while explaining the maxim *expressio unis estexclusioalterius* (i.e. expression of one is the exclusion of another), makes use of an example that seems appropriate to quote here:

> "*Suppose that a statue makes two provisions, A and B, both of which would normally be taken to have a certain implication. Now suppose, further, that the statute expresses this implication for A, but fails to express it for B. According to this maxim, the implication which would normally hold for B is impliedly negatived by the failure to express it, having regard to the fact that it is expressed for A.*"[27]

The legislature has provided for specific time limits in respect of various proceedings under the Arbitration Act, including for the original objection petition under Section 34, but has not imposed any such restriction on appeals under Section 37. Consequently, such an omission should have been treated to be deliberate, and the Court ought to have left any change to the wisdom of Parliament alone.[28] Remarkably, if viewed through this lens, Deshmukh J.'s dicta in *Jagson*appears to have laid down the most sound

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25 Afcons Infrastructure Ltd. v. Cherian Varkey Constr. Co. (P) Ltd.,(2010) 8 SCC 24, ¶ 13 (India).

26 *Id.* ¶ 3.

27 SIR JOHN W. SALMOND & P.J. FITZGERALD, SALMOND ON JURISPRUDENCE 134 (12th ed. 1966).

28 Especially since no such change was introduced despite two far reaching amendments to the Arbitration Act in 2016 and 2019.

position of law (though the same has been subjected to criticism on account of not having considered Section 29 of the Limitation Act).[29] Yet, in the opinion of the author, notwithstanding the applicability of the Limitation Act,reading such a limit into Section 5 of the Limitation Act, as has been done in *NV International*, is, by the same standard, a case of judicial overreach.[30]

In fact, while scrapping similar judicially enacted bars of limitation, albeit in the context of a criminal trial, a bench of seven judges of the Supreme Court in *P. Ramachandra Rao* v. *State of Karnataka* has held, in no ambiguous terms, that the same would be tantamount to judicial legislation.[31] It was, thus, held to be impermissible under the constitutional framework. What is noteworthy is that the Constitution Bench, on that ground, disapproved of judicially enacted timeframes read in by courts to protect an accused's right of speedy trial in criminal offences. Now, unless the Court in *NV International* has placed the Parliament's apparent intention of speedy arbitration in India on a standard even higher than an accused's fundamental right to a speedy trial involving questions of life and liberty, there seems to be little justification for deviating from the clear line of precedent set by much larger benches.

V. The basis in law

Every decision of a court of law has invariably to be based on reason i.e. it has to have a basis in law. The same is, in a sense, a means to the end sought to be achieved through a judicial order. Likewise, both in *Varindera Construction* as well as in *NV International*, the aim of giving effect to the legislative intention behind the Arbitration Act (i.e. the end sought to be

[29] Dinamic Corporation, (2013) 1 Mah.L.J. 94, ¶ 8 (India).

[30] There was no anomaly that was sought to be rectified by reading in a 30-day limit into Section 5. In fact, the apparent anomaly of Section 37 not having any limitation period stood corrected by the decision in *Consolidated Engineering*, and as such, the Limitation Act came to be applied harmoniously with the provisions of the Arbitration Act.

[31] P. Ramachandra Rao v. State of Karnataka, AIR 2002 SC 1856, ¶ 33 (India).

achieved) has primarily been achieved by placing reliance on a decision of the Federal Court[32] in *Lachmeshwar Prasad Shukul*v.*Keshwar Lal Chaudhuri* ["**Lachmeshwar**"][33] (i.e. the means), in the following words:

> "*Given the fact that an appellate proceeding is a continuation of the original proceeding, as has been held in Lachmeshwar Prasad Shukul and Others vs. Keshwar Lal Chaudhuri and Others, AIR 1941 Federal Court 5, and repeatedly followed by our judgments, we feel that any delay beyond 120 days in the filing of an appeal under Section 37 from an application being either dismissed or allowed under Section 34 of the Arbitration and Conciliation Act, 1996 should not be allowed[…]*"[34]

While the Court in *Lachmeshwar*did state that an appeal was, in a sense, a re-hearing of the original proceeding,[35] it is pertinent to note that the decision was given in a completely different context. The decision was rendered in respect of the substantive law of the dispute and not a procedural law like limitation. The question before the Federal Court was whether legislative changes brought about pending an appeal could be taken into account by an appellate court. Affirming the same, it was held that, on admission of the appeal, the matter became sub judice again as a final adjudication on the rights of the parties was yet to take place.[36] Consequently, it was stated that an appellate court in such a case was bound to apply the law as it existed on the date it administered the judgment. Therefore, the bench headed by Sir Maurice Gwyer C.J. upheld the appellants' entitlement to the benefit under Section 7 of the new Bihar Money Lenders Act, 1939, notwithstanding the fact that the same was not even in the law-books when the lower court had decided the matter. It is in this context then, that the ratio of *Lachmeshwar*is

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32 The Federal Court was the pre-independence precursor to the Supreme Court of India. It was established in 1937 under the provisions of the Government of India Act, 1935.

33 Lachmeshwar Prasad Shukul v. Keshwar Lal Chaudhuri, AIR 1941 FC 5 (India) [*hereinafter* "Lachmeshwar"].

34 Varindera Construction,(2020) 2 SCC 111, ¶ 4 (India).

35 Lachmeshwar, AIR 1941 FC 5, 103 (India).

36 *Id.*

required to be seen – it dealt with the applicability of substantive law in the context of legislative changes brought about to the same during the pendency of appeals.

Nothing in the *Lachmeshwar*judgment can be said to mandate appellate procedure to conform to the procedural laws applicable to an original proceeding. In fact, such an interpretation taken to its logical conclusion effectively renders the Second Division[37] of the Schedule to the Limitation Act, nugatory. The mere fact that even the statute of limitation draws a clear distinction between original proceedings and appeals (and provides for different periods of limitation for both) is enough to suggest that the reliance placed on the *ratio decidendi* of *Lachmeshwar*is entirely out of context. In fact, looked at from another angle, the judgments in *NV International* and *Varindera Construction* are also seemingly self-contradictory in light of their own reasoning – if the law applicable to original proceedings were also to be applied to appeals arising therefrom, the 120-day limit could not have been imposed at all. This is because the law applicable to the proceedings at the time would be the *Consolidated Engineering* regime, whereby Section 5 of the Limitation Act would have been available to potential appellants without any outer limit. Alternatively, the Court's reliance on *Lachmeshwar*is equally misplaced owing to the fact that the Limitation Act, including Section 5, is not applicable to proceedings under Section 34 of the Arbitration Act. Therefore, by the Court's own rationale, it could not have used the same to prescribe a grace period of 30 days for the appeal under Section 37.

In this sense, perhaps a better way would have been for the Supreme Court to do away with the applicability of the Limitation Act to Section 37

[37] The Second Division in the Schedule provides for specific limitation periods for filing appeals against orders passed in original proceedings, including those for which periods of limitation are separately prescribed under the First Division in the same Schedule. *See* Limitation Act, No. 36 of 1963 (India).

completely, and instead apply the same standard by citing Section 34 itself as the basis for the same.

VI. Some important technicalities

In any case, by virtue of Article 141 of the Indian Constitution,[38] *NV International* is now the law of the land. Yet, it appears that its application by appellate courts (under Section 37 of the Arbitration Act) might still not be as seamless as desired. In laying down the law, the Supreme Court seems to have overlooked a couple of discrepancies, which although seemingly trivial at first, might have a significant bearing on the rights of parties under the Arbitration Act.

First, in purportedly applying the same standard as Section 34 to appeals under Section 37 of the Arbitration Act, the actual period provided for under the former seems to have been missed. The time limit for filing an application under Section 34 of the Arbitration Act is "*three months*" which is further extendable by 30 days. Therefore, the said limit can potentially range from 119-122 days, depending on the months in question.[39] Fixing an outer limitation period of 120 days does not seem to be in consonance with the Court's own reasoning based on the dicta culled out from *Lachmeshwar*. Interestingly though, it appears that the initial limit of 90 days was taken from the Limitation Act, while applying the rigour of the outer limit of 30 days from Section 34 of the Arbitration Act. This is even more incongruous, not only with fundamental legal principles, but with the basis of the decision itself.

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38 *See* INDIA CONST. art. 141 (wherein it is specifically provided that the law declared by the Supreme Court is binding on all other courts in the country. The provision is, in a sense, a constitutional codification of the doctrine of stare decisis).

39 Faced with the exact same question in the year 2010, the Supreme Court had categorically held that three months could not always be counted as 90 days and the same would depend on the months involved. *See*State of Himachal Pradesh v. M/s Himachal Techno Eng'rs, (2010) 12 SCC 210, ¶¶ 14-18 (India).

Second, the import of the introduction of the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 ["**Commercial Courts Act**"] has not been considered by the decisions in *NVInternational* or *VarinderaConstruction*. Although, presumably, both cases seem to deal with matters arising prior to its commencement, nonetheless, in the opinion of the author, a distinction ought to have been drawn by the apex court while laying down such an absolute and unqualified position of law. The distinction is important because of the procedure laid down in the Commercial Courts Act with respect to Section 37 of the Arbitration Act. This is in addition to the fact that with the "*specified value*" under the Commercial Courts Act having been reduced to a mere three lakh rupees,[40] most arbitration proceedings are now inevitably required to be governed by it. While Section 10 of the Commercial Courts Act vests commercial courts with jurisdiction in relation to arbitration matters arising out of the Arbitration Act, Section 13 explicitly provides for appeals under Section 37 of the Arbitration Act to be governed as per the conditions provided thereunder, one of which is a limitation period of 60 days. While the judgment in *NV International* may possibly be distinguished on account of the inapplicability of the Commercial Courts Act thereto, there is no certainty about how High Courts across the country will interpret the same, especially in light of the broad and authoritative language that the decision is couched in. Furthermore, even in matters to which the Commercial Courts Act would apply, the limitation period provided for under Section 34 of the Arbitration Act remains the same. Consequently, it may not be as easy for courts to deviate from the Supreme Court's dicta in cases where the Commercial Courts Act is applicable.

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[40] *See* Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, No. 4 of 2016, § 2(i) (India) (the pecuniary jurisdiction of courts under the Commercial Courts Act was reduced from Rupees One Crore to only Rupees Three Lakhs, by way of an amendment made to the Arbitration Act in 2018).

VII. Conclusion

At the core of the judicial process lies the ability to weigh a plethora of considerations pitted against each other to arrive at a 'just conclusion'. While such considerations may be many, the inescapable basis of a judicial decision is always the underlying law and the context of its application. Accordingly, insofar as arbitrations seated in India are concerned, any decision has to be ultimately based on the provisions of the Arbitration Act.

While it is true that courts should aim to give effect to the legislative intent and policy behind an enactment, the same should always be subject to the clear wording of the statute, as well as be in line with principles of uniformity, consistency and the value of precedent. As Salmond has noticed, "*too much regard for policy and too little for legal consistency may result in a confusing and illogical complex of contrary decisions*".[41]Moreover, it is also counter-intuitive that in arriving at a just conclusion under law, technical and procedural rigours be allowed to limit the rights of a party to get a decision on the merits of the dispute itself.

While the pronouncements in *NV International* and*Varindera Construction* might help in reducing the time taken in Section 37 proceedings, the same will inevitably be at the cost of litigants oblivious to the prospect of a sudden change in law to their detriment. Many of them might not even have control over the time being taken to file a Section 37 appeal. Accordingly, it would appear that the long-settled position of law as laid down in *Consolidated Engineering* perfectly balanced the legitimate interests of parties against policy considerations. The same should ideally have been the case at least till the time the Parliament made an explicit change to the Act. Nevertheless, if now the decision in *NV International* is indeed to stand, it is the opinion of the author that the same must be held to apply only prospectively, in the ultimate interests of justice and fairness.

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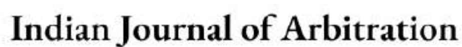
41 SALMOND & FITZGERALD, *supra* note 27, at 188.


Indian Journal of Arbitration Law
ISSN: 2320-2815

PUBLISHED BY:
THE REGISTRAR
NATIONAL LAW
UNIVERSITY, JODHPUR
NH-62, MANDORE,
JODHPUR- 342304
RAJASTHAN (INDIA)

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