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DATA PROTECTION, CYBERSECURITY AND INTERNATIONAL ARBITRATION: CAN THEY RECONCILE?

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Abstract

*For the past few years, international arbitration has been on an upward surge. It has grown exponentially, becoming a preferred forum of dispute settlement. Simultaneously, data protection and cybersecurity have been at the fore of discussion globally, with the enactment of the General Data Protection Regulation ["**GDPR**"] in the European Union ["**EU**"], the right to privacy being declared a fundamental right in India, and jurisdictions like India modelling their law on the GDPR. The time has come for the intersection of both these fields to be considered seriously. The International Council for Commercial Arbitration ["**ICCA**"] and the International Bar Association ["**IBA**"] have formed a task force to investigate the question of data protection in international arbitration, and a Cybersecurity Protocol has been released by the ICCA in conjunction with the New York City Bar Association ["**NYC Bar**"] and International Institute for Conflict Prevention and Resolution ["**CPR**"]. These positive developments show the way forward for arbitration and data protection. In this paper, the authors analyse these developments, assess the status of data protection and information security in arbitration, and provide some suggestions about the way forward.*

I. Introduction

The right to privacy was first advocated by Samuel Warren and Louis Brandeis in their article on "The Right to Privacy" published in 1890.[1] They argued that privacy was a "right to be let alone" as instantaneous photographs and newspaper enterprises began invading the sacred precincts of private and domestic life.[2] In 1948, the Universal Declaration of Human Rights ["**UDHR**"] declared the right to privacy as a fundamental right.[3]

Meanwhile, the EU sought to develop its privacy law in the form of Data Protection Directive 95/46/EC ["**Directive**"] in 1995.[4] The Directive sought to protect the processing of personal data of individuals, but required that the EU Members come up with their own national laws pursuant to the Directive.[5] Thereafter, the European Commission sought to unify data protection law across the EU through the GDPR. The GDPR aims to harmonize 27 national regulations on data

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1 Samuel Warren & Louis Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

2 *Id.* at 195.

3 G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948), art. 12.

4 Directive 95/46/EC, of the European Parliament and of the Council of 24 October 1995 on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data, 1995 O.J. (L 281) 31 [*hereinafter* "EU Directive"]; Consolidated Version of the Treaty on the Functioning of the European Union, art. 288, Oct. 26, 2012, 2012 O.J. (C 326) [*hereinafter* "TFEU"].

5 EU Directive, *supra* note 4, art. 4(1).

protection into one, improve data transfer rules for EU citizens outside the EU, improve user control over data and guarantee a stronger protection of personal data.[6]

In India, data protection was not given similar importance until very recently. The government amended the Information Technology Act, 2000 which provided citizens a right to be compensated for improper disclosure of information.[7] Subsequently, the Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011 imposed additional requirements on business and commercial entities for collection and disclosure of sensitive personal data.[8] In 2016, the Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act was passed, which required the telecom and the financial services sectors to keep their customers' personal information confidential.[9] In 2017, the Supreme Court of India delivered the landmark judgment, *Justice K.S. Puttaswamy (Retd.)* v. *Union of India*, which held that the right of privacy is a fundamental right emanating from Article 21 of the Indian Constitution.[10] The court pronounced that the protection of informational privacy from both the State and private actors was necessary and for the common good, and was catalytic in providing for a robust regime of data protection in India.[11] Thereafter, the government of India constituted a Committee of Experts under the Chairmanship of Justice B.N. Srikrishna to prepare a report on the draft Data Protection Bill, 2018, which submitted a draft of the Personal Data Protection Bill in July, 2018 ["**2018 Bill**"].[12] The Ministry of Information and Technology solicited comments and suggestion on the 2018 Bill from various stakeholders, and based on the suggestions, the Union Cabinet cleared the Personal Data Protection Bill, 2019 [the "**Bill**"].[13] The Bill is currently awaiting a report from the Joint Parliamentary Committee after which it shall be debated and discussed in the parliament.[14]

International arbitration often has actors and players that handle personal data from varied jurisdictions. Owing to different national regimes, transfer of data across the borders through different layers and heavy penalisation for non-compliance with data protection laws, it becomes imperative that international arbitration arms itself with a robust and consistent framework for data protection. This paper seeks to highlight how multiplicity in data protection regimes and the lack of arbitration specific data protection laws can create complications and confusion in

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6 European Commission Press Release IP/12/46, Commission Proposes a Comprehensive Reform of Data Protection Rules to Increase Users' Control of their Data and to Cut Costs for Business (Jan. 25, 2012).

7 The Information Technology Act, 2000 (as amended by the Informational Technology Amendment Act, 2008), No. 21 of 2000, §§ 43A. 72A. (India).

8 Information Technology (Reasonable security practices and procedures and sensitive personal data or information) Rules, 2011, G.S.R. 313(E) (India).

9 Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act, 2016, No. 18 of 2016, § 29. (India).

10 Justice K.S. Puttaswamy (Retd.) v. Union of India, (2017) 10 SCC 1, ¶ 188 (India) [*hereinafter* "Puttaswamy."].

11 *Id.* ¶ 190; WHITE PAPER OF THE COMMITTEE OF EXPERTS ON A DATA PROTECTION FRAMEWORK FOR INDIA 4 (2018).

12 COMMITTEE OF EXPERTS UNDER THE CHAIRMANSHIP OF JUSTICE B.N. SRIKRISHNA, A FREE AND FAIR DIGITAL ECONOMY: PROTECTING PRIVACY, EMPOWERING INDIANS [*hereinafter* "Srikrishna Committee Report"]; Personal Data Protection Bill, 2018 (India).

13 Personal Data Protection Bill, No. 373 of 2019 (India) [*hereinafter* "PDP Bill"].

14 Arindrajit Basu & Justin Sherman, *Key Global Takeaways From India's Revised Personal Data Protection Bill*, LAWFARE (Jan. 23, 2020), *available at* https://www.lawfareblog.com/key-global-takeaways-indias-revised-personal-data-protection-bill.

international arbitration. For this purpose, the authors have focussed on how (two recent legislations,) the 2019 Indian Bill on Personal Data Protection and the GDPR, affect international arbitration.

This paper is divided into six parts. **Part II** explains the EU's GDPR, its basic principles, concepts and requirements in the context of international arbitration. Thereafter, **Part III** analyses the Roadmap provided by the ICCA-IBA Joint Task force which guides various participants in international arbitration regarding data protection. It shall also analyse privacy rules of arbitral institutions and delve into the protocol on cybersecurity in International Arbitration published by the ICCA, the NYC Bar and the CPR with the support of the Permanent Court of Arbitration ["**PCA**"] and analyse privacy rules of arbitral institutions as well. In **Part IV**, the authors shall discuss the Indian Data Protection Bill, 2019 and the consequences for international arbitration, if any. **Part V** then contemplates fundamental questions regarding the multiplicity of data protection regimes and its impact on international arbitration. Finally, the authors provide their conclusions in **Part VI**.

II. The General Data Protection Regulation

In 2018, the GDPR took effect, replacing the Directive which came into force in 1995 in the EU. The GDPR seeks to strengthen the protection of the individual's right to personal data protection and considers it a fundamental right.[15] The GDPR establishes the following basic principles:[16]

(i) That personal data shall be processed in a fair, lawful and transparent manner (lawfulness, fairness and transparency);
(ii) That personal data shall be collected for specific, explicit and legitimate purpose and cannot be further processed in a manner that is not compatible with such purposes (purpose limitation);
(iii) That personal data shall be adequate, relevant and limited to the purposes necessary for which they are processed (data minimisation);
(iv) That personal data shall be accurate and up-to-date (accuracy);
(v) That personal data shall not be stored for longer than is necessary for the purposes for which the personal data is processed (storage limitation);
(vi) That personal data shall be processed in a manner that ensures appropriate security of the personal data, which includes protection against unauthorized or unlawful processing (integrity and confidentiality); and
(vii) Responsibility of the controller to demonstrate compliance with the above six principles (accountability).

15 Regulation 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), pmbl. (1), 2016 O.J. (L 119) [*hereinafter* "GDPR"].

16 *Id.* art. 5.

The GDPR places various obligations upon the data controller. It defines a 'controller' as any person, authority, agency or body which determines the means and purposes of the processing[17] of personal data[18] and a 'processor' as a person or any other authority, agency or body which processes data on behalf of the controller.[19] Additionally, a controller or processor is considered to be established in the EU if it exercises effective and real activities through stable arrangements in the EU.[20]

As per Opinion 1/2010 on the concepts of "controller" and "processor", solicitors and barristers could be considered as controllers.[21] Drawing the same analogy, the ICCA-IBA Roadmap to Data Protection in International Arbitration ["**Roadmap**"] states that parties, their legal counsels, arbitrators and arbitral institutions may be considered controllers (also referred to as "Arbitral Participants").[22]

Arbitral Participants would therefore be required to fulfil certain key requirements. The GDPR requires the consent of the 'data subject' to the processing of his/her personal data[23] and assuming that Arbitral Participants are controllers, they will have the primary responsibility to demonstrate that the data subject consented to the processing.[24] They will also have the obligation to inform the data subject about the processing of his/her personal data,[25] keep record of processing activities,[26] handle requests for exercising the data subject's rights[27] and implement appropriate measures to ensure security of the personal data that is processed.[28] Moreover, Arbitral Participants will have to notify the supervisory authority within 72 hours in case of a data breach.[29]

International arbitration is document intensive. Even before the matter is taken up by the arbitral tribunal, parties have to collect documents (which falls under the definition of 'processing') and inevitably contain personal data. Parties also communicate with solicitors, legal counsels, experts, opposing party, arbitrators etc. and transfer certain personal data to them. Parties shall have to

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17 Processing has been defined as "any operation or set of operations which is performed on personal data or on sets of personal data, whether or not by automated means, such as collection, recording, organisation, structuring, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, restriction, erasure or destruction." *See* GDPR, *supra* note 15, art. 4(2).

18 *Id.* art. 4(7); The GDPR defines personal data in a very broad manner. Personal data would mean "any information relating to an identified or identifiable natural person ('data subject'); an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person." *See id.* art. 4(1).

19 *Id.* art. 4(8).

20 *Id.* recital 22.

21 *Opinion of the Working Party on the Protection of Individuals with regard to the processing of personal data on the "concepts of "controller" and "processor""* 2010 WP 169 28.

22 THE ICCA-IBA JOINT TASK FORCE ON DATA PROT. IN IN INT'L ARB., THE ICCA-IBA ROADMAP TO DATA PROTECTION IN INTERNATIONAL ARBITRATION 9 (2020) [*hereinafter* "ICCA-IBA ROADMAP"].

23 GDPR, *supra* note 15, art. 6(1).

24 *Id.* art. 7(1).

25 *Id.* art. 12, 13 and 14.

26 *Id.* art. 30.

27 *Id.* art. 15-22.

28 *Id.* art. 32.

29 *Id.* art. 33(1).

ensure compliance at each stage. Once such data is transferred, the relevant Arbitral Participant shall have to ensure that the personal data is still compliant with the GDPR as well.

A peculiar feature of the GDPR is the provision with respect to transfer of data outside the EU. It requires an 'adequacy decision' to be made by the European Commission regarding a third country's level of protection.[30] In case a third country's data protection is considered 'adequate', such a transfer will be treated like transmission of data within the EU and the data exporter need not provide additional safeguards.[31] So far, the European Commission has recognized countries such as U.S.A (limited to Privacy Shield framework),[32] Canada, Japan, Switzerland, New Zealand, Uruguay, Isle of Man, Jersey, Andorra, Faroe Islands, Guernsey, Israel and Argentina as providing adequate protection.[33] India also plans to approach the EU for an 'adequacy' status once it passes its Personal Data Protection Bill, 2019.[34]

Alternatively, in the absence of an 'adequacy decision', a data exporter may still transfer data by employing appropriate safeguards and if there are enforceable rights and effective legal remedies available to the data subject. Such safeguards include binding corporate rules, standard data protection clauses, and approved code of conduct or certification mechanisms with binding and enforceable commitments of the controller or the processor in the third country.[35]

Finally, in the absence of an 'adequacy decision' and safeguards, the GDPR allows for derogation, *inter alia*, if such transfer is necessary for the establishment, exercise or defence of a legal claim.[36]

As per the Roadmap, the legal claims derogation will be applicable to international arbitration.[37] However, the transferor of such data will still have to ensure that the level of protection guaranteed under the GDPR is not undermined.[38] For instance, the transferor will have to ensure that transfer of personal data is adequate, relevant and limited to what is necessary with the purpose of processing such data.[39] Arbitral Participants are advised to identify and document at the outset of the proceedings the data that will be needed to be processed and the lawful basis that the Participants may rely on.[40] While the GDPR does consider consent as a valid ground for data

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30 GDPR, *id.* art. 45.

31 *What Rules Apply if my Organisation Transfers Data outside the EU?*, EUR. COMM'N, *available at* https://ec.europa.eu/info/law/law-topic/data-protection/reform/rules-business-and-organisations/obligations/what-rules-apply-if-my-organisation-transfers-data-outside-eu_en.

32 The EU-US Privacy Shield Framework came up in 2016 to replace the US-EU Safe Harbor Framework. It creates a mechanism to comply with data protection requirements when transferring personal data from the EU to the United States of America. *See EU-U.S. Privacy Shield Framework Principles*, U.S. DEP'T OF COMM. (2016), *available at* https://www.privacyshield.gov/servlet/servlet.FileDownload?file=015t00000004qAg.

33 *Adequacy Decisions*, EUR. COMM'N, *available at* https://ec.europa.eu/info/law/law-topic/data-protection/international-dimension-data-protection/adequacy-decisions_en.

34 Megha Mandavia, *India to Approach the EU Seeking 'Adequacy' Status with the GDPR*, ECON. TIMES (July 30, 2019), *available at* https://tech.economictimes.indiatimes.com/news/internet/india-to-approach-the-eu-seeking-adequacy-status-with-the-general-data-protection-regulation/70440103.

35 GDPR, *supra* note 15, art. 46(2).

36 *Id.* art. 49(1)(e).

37 ICCA-IBA ROADMAP, *supra* note 22, at 12.

38 GDPR, *supra* note 15, art. 44.

39 *Guidelines 2/2018 on Derogation of Article 49 under Regulation 2016/679*, EUR. DATA PROT. BD., 12 (May 25, 2018), *available at* https://edpb.europa.eu/sites/edpb/files/files/file1/edpb_guidelines_2_2018_derogations_en.pdf.

40 ICCA-IBA ROADMAP, *supra* note 22, at 18.

processing, Participants may look for other lawful grounds as consent can be refused or withdrawn at any time.[41] Other issues with consent as a lawful basis have been identified by the Roadmap and discussed below.

A concern that still remains is regarding the application of the GDPR. The GDPR has expanded the territorial scope of EU's data protection regime. The GDPR applies to the processing of personal data[42] by a controller or a processor established *in the EU*[43] or where the processing activities are relating to the offering of goods or services to *individuals in the EU*.[44] Further, the NAFTA Tribunal, constituted by the PCA with an EU arbitrator, in *Tennant Energy* v. *Canada* has held that arbitration under the NAFTA, a treaty to which the EU is not a party, does not come within the material scope of the GDPR,[45] despite the Roadmap considering otherwise due to the extra-territorial reach of the GDPR.[46] Interestingly, the Tribunal did not consider that it was constituted by the PCA, an international organisation,[47] and would thus, be subjected to the transfer rules as per the GDPR.[48]

Such contrary holdings shall surely add to the uncertainty regarding the application of the GDPR; Arbitral Participants would be advised to err on the side of caution and incorporate the protection required under the regime as data infringement would cost a fine between €10 to €20 million or 2 to 4% of worldwide annual revenue.[49]

A more detailed discussion on the data protection concerns that arise in arbitration has been conducted by the ICCA and IBA based on the GDPR. This has been analysed in the following section.

III. Guiding International Arbitration through Data Protection Regimes and Cybersecurity Issues

The ICCA and the IBA formed a joint task force to investigate the application of data protection principles in international arbitration.[50] A draft was released for public consultation in February, 2020. The Roadmap uses the GDPR as the basis for its inferences, since it is amongst the most "comprehensive and onerous" regulations in place in the world.[51] Using the principles of the

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41 *Id.* at 17.

42 The GDPR defines personal data as "any information relating to an identified or identifiable natural subject", *see* GDPR, *supra* note 15, art. 4(1).

43 *Id.* art. 3(1).

44 *Id.* art. 3(2)(a). It also applies to monitoring of behaviour of data subjects in the European Union, *see id.* art. 3(2)(b).

45 *See* Tennant Energy, LLC (U.S.A.) v. Gov't of Can., PCA Case No. 2018-54, Tribunal's Communication to the Parties (Perm. Ct. Arb., 2019). Article 2(a) elaborates upon the material scope of the GDPR ("This Regulation does not apply to the processing of personal data in the course of an activity which falls outside the scope of Union law"). Interestingly, the tribunal did not consider that it was constituted by the Permanent Court of Arbitration, an international organisation (art. 4(26)), and would thus, be subjected to the transfer rules as per the GDPR (art. 42).

46 *See id.* art. 3; ICCA-IBA Roadmap, *supra* note 22, at 7-8.

47 GDPR, *supra* note 15, art. 4(26).

48 *Id.* art. 42.

49 *Id.* art. 83(2)(a).

50 *ICCA-IBA Joint Task Force on Data Protection in International Arbitration Proceedings*, INT'L COUNCIL FOR COMM. ARB., *available at* https://www.arbitration-icca.org/projects/ICCA-IBA_TaskForce.html.

51 *Id.* at 3.

GDPR, the Roadmap addresses data protection concerns which may arise in arbitration and devises 'practice tips' to assist professionals navigate such concerns.

On the specific point of cybersecurity, the ICCA has, in conjunction with the NYC Bar Association and the International Institute for Conflict Prevention and Resolution and with the support of the PCA, released the Protocol on Cybersecurity in International Arbitration ["**the Protocol**"].[52] This Protocol sets out principles of cybersecurity and is intended to act as a guide for information security risks and measures which can be implemented in arbitration. It does not contain a one-size-fits-all approach and allows parties to individualise the measures as per their requirements.[53]

This section analyses the Roadmap and the Protocol's directions for participants of international arbitration.

A. The ICCA-IBA Roadmap on Data Protection in International Arbitration

One of the primary concerns associated with data protection in arbitration is whether any type of arbitration is excluded from the application of data protection regulations. The answer to this question will generally vary from jurisdiction to jurisdiction. For example, in the EU, the GDPR excludes the processing of personal data when it is done outside the scope of EU law,[54] which may be the case in an arbitration where parties have chosen non-EU law to govern their dispute. However, as has been pointed out in the Roadmap, due to the extra-territorial reach of the GDPR,[55] if any of the Arbitral Participants are subject to the GDPR, they will have to process data in accordance with it.[56]

A distinction may also be drawn with respect to the type of arbitration. For example, in case of an investor-State arbitration, an international organisation may be at the helm, for example the International Centre for Settlement of Investment Disputes ["**ICSID**"] or the PCA. The question then arises – are such organisations excluded from the application of data protection law? The Roadmap states that in such cases, there may be special privileges or immunities in the treaties that constitute these international organisations, as a result of which arbitrators and counsel may be excluded from the scope of data protection laws.[57] For example, the Convention for the Pacific Settlement of International Disputes, 1899, provides members of the PCA with diplomatic immunities and privileges.[58] This is echoed in the Convention for the Pacific Settlement of International Disputes, 1907.[59] However, whether these privileges and immunities would protect arbitrators from data protection regulations is an unsettled question.

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52 ICCA-NYC BAR-CPR CYBERSECURITY PROTOCOL FOR INTERNATIONAL ARBITRATION, ICCA-NYC BAR-CPR WORKING GROUP ON CYBERSECURITY IN ARBITRATION (2020), *available at* https://www.arbitration-icca.org/media/14/76788479244143/icca-nyc_bar-cpr_cybersecurity_protocol_for_international_arbitration_-_print_version.pdf [*hereinafter* "ICCA-NYC BAR-CPR PROTOCOL"].

53 *Id.* at 7, 16.

54 *See* GDPR, *supra* note 15, art. 2(a).

55 *See id.* art. 3.

56 ICCA-IBA ROADMAP, *supra* note 22, at 7-8.

57 *Id.* at 37.

58 Convention for the Pacific Settlement of International Disputes art. 24, July 29, 1899, 1 A.J.I.L. 103 (1907).

59 Convention for the Pacific Settlement of International Disputes art. 46, Oct. 18, 1907, 2 A.J.I.L. Supp. 43 (1908).

The Roadmap is applicable to 'Arbitral Participants', which includes the parties, their counsel, the arbitrators, and arbitral institutions. However, the information in the Roadmap may also be pertinent to other entities involved in an arbitration, such as tribunal secretaries, experts, and other service providers.[60] Therefore, the inferences drawn in the Roadmap have to be assessed with regards to the impact they will have on Arbitral Participants and associated entities.

While the Roadmap specifies certain entities which may be involved in the arbitration and therefore affected by data protection obligations, there may be other entities who have access to data in an arbitration. These include third party funders, who may be financially supporting the claim of an impecunious claimant. Could third party funders be classified under 'service providers'?[61] While this is an unanswered question in the Roadmap, it does state that when arbitration-related information containing personal data[62] is shared with a third party, this constitutes processing,[63] which requires compliance with data protection law. Therefore, in an arbitral proceeding, where each entity involved collects some personal data from the other (claimant from the respondent, tribunal from the parties, experts from the parties, and so on), data protection obligations would be incumbent upon them. Arbitral Participants ought to be cognizant of these obligations from the outset and develop a framework to comply with them.

Another pertinent point highlighted by the Roadmap is that of third country data transfers. The GDPR stipulates conditions for third country transfers, which have been discussed above. These restrictions become particularly relevant when considered in light of jurisdictions which have data localisation regimes in place. For example, the Reserve Bank of India released norms in April 2018 which require system providers operating payment systems to ensure that all payments data are stored in a system only in India ["**RBI Notification**"].[64] The RBI has also clarified that data may be shared with overseas regulators, if so required, depending upon the nature and origin of transaction with due approval of the RBI.[65] Similarly, Vietnamese law stipulates that domestic and foreign service providers on telecommunication networks and on the Internet, and cyberspace service providers carrying out activities of collecting, using, analysing and processing personal data, data about users' relationships and data generated by them, must store such data in Vietnam for a specified period.[66]

Let us consider a situation where an Indian payments operator (such as Paytm) is involved in a dispute with a foreign party, with the International Court of Arbitration at the International

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60 ICCA-IBA Roadmap, *supra* note 22, at 2.

61 The Roadmap provides "e-discovery experts, information technology professionals, court reporters, translation services, etc." as examples of service providers.

62 GDPR, *supra* note 15, art. 4(1).

63 *Id.* art. 4(2). It is relevant to note that processing includes collection and storage. Therefore, in a situation where the third party funder collects identifiable information relating to a natural person, they would have to comply with data protection obligations.

64 RESERVE BANK OF INDIA, Storage of Payment System Data, RBI/2017-18/153 DPSS.CO.OD No.2785/06.08.005/2017-2018 (Apr. 6, 2018.). However, it ought to be noted that this restriction applies only to domestic operations. For cross border payment transactions, the data may also be stored abroad. *See Frequently Asked Questions, Storage of Payment System Data*, RESERVE BANK OF INDIA, *available at* https://m.rbi.org.in/Scripts/FAQView.aspx?Id=130 [*hereinafter* "FAQ"].

65 *See* FAQ, *id.* item 7.

66 Law on Cybersecurity, No: 24/2018/QH14, art. 26(3) (2018) (Viet.).

Chamber of Commerce ["**ICC**"] administering the dispute. It is conceivable that Paytm would have transfer some amount of personal data (for example, with relation to its employees) abroad for the adjudication of the dispute. Whether the ICC would be considered an 'overseas regulator' for the purposes of the RBI Notification is unclear. Further, obtaining approval of the RBI would be a time-consuming roadblock in the arbitration. The Roadmap takes note of the possibility of such restrictions and advises that Arbitral Participants identify these at the outset and devise steps to transfer data in compliance with them.[67] However, in the absence of an exception pertaining to legal proceedings, it is unclear how data transfers can take place in compliance with data localisation norms. Clearer regulations would pave the way for smoother arbitral proceedings, and in this regard, it may be beneficial for jurisdictions to consider a straightforward legal derogations exception for data transfers in their data protection regulations.

The Roadmap also acknowledges certain data protection principles, which it considers universal[68] - consisting of fair and lawful processing, proportionality, minimisation, purpose limitation, data subject rights, accuracy, data security, and transparency. It analyses the issues that could arise with respect to the application of these principles in the context of an arbitration. For example, the GDPR considers 'consent' to be a lawful basis of processing.[69] Consent under the GDPR must be freely given, specific, informed, and an unambiguous indication of the data subject's agreement to the processing of their personal data. Also, this consent can be withdrawn at any point.[70] While this seems straightforward, the Roadmap does not consider consent to be an appropriate basis for processing[71] – it raises a variety of issues.[72]

Consider a situation where a data subject gives consent for his data to be processed by a company. A dispute later arises and is taken to arbitration, where the data subject's data is processed. In this situation, the consent given earlier is not 'specific' as it is not given for the purposes of the arbitration, and it is also not 'informed', as the data subject could not have known about the arbitral proceeding. Consent is needed specifically for the *particular* transfer or category of transfers in question. Informed consent requires that the subject is adequately informed of the circumstances of the processing in advance.[73] In an arbitration, it may be difficult to predict how personal data may need to be processed, and obtaining specific consent for each transfer or each processing would be an overwhelmingly difficult task. The fact that consent may be withdrawn at any point further complicates matters. In a situation where an employee of a company has given crucial testimony, their withdrawal of consent for the processing of their personal data (which would be included in their testimony), could collapse a party's case.

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67 ICCA-IBA ROADMAP, *supra* note 22, at 14.

68 *See,* GDPR, *supra* note 15, art. 12-22; Lei No. 13,709 de Aug.14 de Agosto de 2018, DIÁRIO OFICIAL DA UNIÃO [D.O.U] de 15.8.2018, art. 6 (Braz.) *in* ICCA-IBA ROADMAP, *supra* note 22, at 14.

69 GDPR, *supra* note 15, art. 6(1)(a).

70 *Id.* recital 32.

71 ICCA-IBA ROADMAP, *supra* note 22, at 17.

72 *Id.*

73 *Working document on a common interpretation of Article 26(1) of Directive 95/46/EC of 24 October 1995*, 2093/05/EN WP 114, at 12 (Nov. 25, 2005), *available at* https://ec.europa.eu/justice/article-29/documentation/opinion-recommendation/files/2005/wp114_en.pdf.

Therefore, even if an arbitration agreement between parties contains a 'consent for data processing and transfer' clause, this would likely not cover all the possible instances of processing and transfer that may arise in the course of an arbitration.[74] What then, would be the lawful basis of processing? The Personal Data Protection Act, 2012, of Singapore provides a list of circumstances where personal data can be processed without consent.[75] One of these is that the collection is necessary for any investigation or proceedings, if it is reasonable to expect that seeking the consent of the individual would compromise the availability or the accuracy of the personal data.[76] Hong Kong law contains a similar provision.[77] The term 'proceedings' would squarely cover arbitral proceedings.[78] Thus, if personal data is being processed for the purposes of an arbitration in Singapore or Hong Kong, specific consent would not be required. In Singapore, processing without consent may also be permitted if the collection is necessary for the provision of legal services by the organisation to another person or for the organisation to obtain legal services.[79] This would cover cases where a law firm or legal counsel collects personal data of individuals (who may not be directly associated with the case) without their specific consent. However, not all jurisdictions have rules pertaining to derogation from the rule of consent in case of legal claims. For example, the GDPR only contains derogations for transfers of personal data to third countries or international organisations, not for the general purpose of processing.[80] Parties would therefore have to be cognisant of the legal bases for processing in the jurisdiction where they are processing data and where consent is the primary basis, efforts will have to be made to obtain such consent (as specifically as possible) from the very outset of the proceedings.

Data minimisation is an important principle of data protection, which requires that personal data be adequate, relevant, and limited to what is necessary for the purpose for which it is processed.[81] This principle is based on the objective of necessity and relevance – i.e. that the personal data collected should be limited to what is *necessary* for the specified purpose. Further, the personal data should be *relevant* to the processing.[82] The Roadmap highlights several issues that could arise in arbitration as a result: preparing for a proceeding often involves collecting information about all possible individuals related to the transaction. In such a situation, law firms or counsel could end

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74 ICCA-IBA ROADMAP, *supra* note 22, at 17.

75 *See* Personal Data Protection Act, No. 26 of 2012, sch. 2 (Sing.) [*hereinafter* "Singapore PDPA"].

76 *Id.* ¶ 1(e).

77 Personal Data (Privacy) Ordinance, (1995) Cap. 486, § 60B (H.K.): "Personal data is exempt from the provisions of data protection principle 3 if the use of the data is— (a) required or authorized by or under any enactment, by any rule of law or by an order of a court in Hong Kong; (b) required in connection with any legal proceedings in Hong Kong; or (c) required for establishing, exercising or defending legal rights in Hong Kong" [*hereinafter* "HK PDPO"].

78 *See* Singapore PDPA, § 1 (Sing.): "proceedings" means any civil, criminal or administrative proceedings by or before a court, tribunal or regulatory authority that is related to the allegation of —(a) a breach of an agreement; (b) a contravention of any written law or any rule of professional conduct or other requirement imposed by any regulatory authority in exercise of its powers under any written law; or (c) a wrong or a breach of a duty for which a remedy is claimed under any law."

79 *Id.* sch. 2.

80 *See* GDPR, *supra* note 15, art. 49.

81 *See id.* art. 5; HK PDPO, sch. 1, item 1(1).

82 Guidelines 4/2019 on Article 25 Data Protection by Design and by Default, EUR. DATA PROT. BD, 19 (Nov. 13, 2019), *available at* https://edpb.europa.eu/sites/edpb/files/consultation/edpb_guidelines_201904_dataprotection_by_design_and_by_default.pdf.

up collecting information about hundreds of employees.[83] Another issue that arises is the number of people who will have access to that data – this may include third party funding organisations, expert witnesses, institutional arbitration case managers, etc. For the purposes of protecting personal data, arbitral institutions and law firms should adopt a policy of pseudonymising or anonymising personal data from the outset.[84]

The GDPR provides, under Article 15, that the data subject has the right to obtain information from the controller *inter alia* as to whether their personal data is being processed, the purposes of the processing, and the recipients to whom the personal data will be disclosed.[85] In an arbitration, personal data of employees, contractors, suppliers, etc. may be used for the purposes of a claim. However, it may not be strategically prudent for a data controller (say, one of the parties in the arbitration) to reveal how that personal data is being used in the arbitration. This could compromise both the confidentiality of the arbitration as well as the arbitral strategy of the parties, in addition to being damaging for business relations.[86] For this purpose, a balance needs to be achieved between the need for transparency and confidentiality. Confidentiality has now become an oft-cited reason to prefer arbitration over litigation. The Roadmap, once again, suggests addressing data subject rights at the outset of the proceedings and putting in place a protocol for the same.[87]

B. The Protocol on Cybersecurity

Party autonomy is prioritised in the approach of the Protocol, as parties would be best apprised of their specific requirements and would have the greatest interest in ensuring information security.[88] The tribunal would have the power to decide information security measures, but should defer to the parties' agreement,[89] except in some specific instances, such as when third parties or the interest of the tribunal is concerned.[90] The tribunal is also entitled to resolve disputes and can impose costs or sanctions in this regard.[91] However, the Protocol advises the negotiation of a specific dispute settlement mechanism to cover post-arbitration disputes to address a situation where the tribunal may have become *functus officio*.[92]

Pertinently, the Protocol raises the issue of arbitral institutions and their capabilities for handling information security. The Protocol recommends collaboration between the arbitral participants and the institution to ensure that the measures adopted by them are consistent with the rules, practices and capabilities of the institution.[93] India has displayed a commitment towards strengthening institutional arbitration with the Arbitration and Conciliation (Amendment) Act, 2019, and the New Delhi International Arbitration Centre Bill, 2019. Information security in

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83 ICCA-IBA ROADMAP, *supra* note 22, at 21.
84 *Id.*
85 GDPR, *supra* note 15, art. 15.
86 Avinash Pooroye & Ronan Feehily, *Confidentiality and Transparency in International Commercial Arbitration: Finding the Right Balance*, 22 HARV. NEGOT. L. REV. 275, 278 (2017).
87 ICCA-IBA ROADMAP, *supra* note 22, at 26.
88 ICCA-NYC BAR-CPR PROTOCOL, *supra* note 52, principle 9.
89 *Id.*
90 *Id.* principle 11.
91 *Id.* principle 13.
92 *Id.*
93 *Id.* principle 4(c).

arbitration ought to be a priority for the government to avoid the challenges that arise as a result of the lack of a strong data protection law.

The Protocol further advises that information security measures be decided on the basis of the risk profile of the dispute, assessing existing security practices, and the infrastructure and capabilities of the parties.[94] Schedule B of the Protocol discusses risk factors in great detail, comprising of *inter alia* the nature of the information (personal data, sensitive data, health data, trade secrets, payment information, etc.), the identity of the parties, the concerned industry, and the value of the dispute.[95] Analysing these risk factors could significantly assist the parties formulate effective information security measures for their disputes, which mitigate risk. Sample information security measures are provided in Schedule C of the Protocol.

The Protocol provides sample language for information security measures in Schedule D.[96] Importantly, however, the Protocol *does not* recommend including information security measures in their arbitration agreement, given that between the conclusion of the agreement and the initiation of the dispute, cyber risks, technology, and available measures may significantly differ.[97] Further, the measures should depend on the risk profile of the dispute.[98]

On the whole, the Protocol provides a holistic understanding of cybersecurity for arbitration. It covers possible risks and measures comprehensively. It may benefit arbitral institutions to develop information security polices which take a cue from this Protocol.

A perusal of the websites of two major arbitral institutions – the Singapore International Arbitration Centre ["**SIAC**"] and the Hong Kong International Arbitration Centre ["**HKIAC**"] – does not reveal a dedicated data protection policy. The Privacy Policy on SIAC's website is primarily concerned with users of the website, and there is no specific information on the information security measures taken by the institution during arbitrations.[99] Further, the Policy was last updated in 2014.[100] SIAC may benefit from updating this to reflect the sea-change in the global conversation on data protection, especially in light of the GDPR. Similarly, though the HKIAC has taken expedient measures to administer arbitrations during the outbreak of COVID-19, and these measures include expansive e-hearing facilities.[101] However, no information has been provided on the protection of data which is transmitted via virtual hearings, security measures for virtual hearing rooms, and security of software. Further, the authors could not locate a privacy policy on the HKIAC website. This is especially concerning considering that the HKIAC hears disputes pertaining to the Belt and Road Initiative, which would undoubtedly contain confidential information concerning different States. It is worth noting that during the consultation process on

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94 *Id.* principle 6.
95 *See id.* sch. B.
96 *See id.* sch. D.
97 *Id.*
98 *Id.*
99 *See Privacy Policy*, SING. INT'L ARB. CTR., *available at* https://www.siac.org.sg/privacy.
100 *Id.*
101 *See Virtual Hearings*, H.K. INT'L ARB. CTR., *available at* https://www.hkiac.org/content/virtual-hearings.

the proposed amendments to the HKIAC Administered Arbitration Rules, 2013,[102] the Hong Kong Privacy Commissioner for Personal Data ["**PCPD**"] had highlighted the sensitive nature of documents in an arbitration and the need for steps to protect their security.[103] In relation to the proposed online repository as a means of service of documents,[104] the PCPD noted that encryption was necessary to ensure the security of data.[105] Further, the PCPD highlighted the conflict between the confidentiality of arbitration as provided under Article 45 of the HKIAC Rules and the right of the data subject to access data under the Hong Kong Personal Data (Privacy) Ordinance.[106] However, these concerns have not been addressed in the 2018 edition of the HKIAC Rules. n these times, it is urged that arbitral institutions formulate policies to tackle information security during virtual *and* physical hearings, as well as security of their websites.

Further, with the onset of COVID-19, many arbitral hearings had to go online unexpectedly. With one of the main video-call applications being embroiled in cybersecurity issues,[107] the arbitral community around the world needs to consider how information security must be addressed in remote arbitration. The GDPR, for instance, requires appropriate measures to be taken to ensure security – this includes ensuring ongoing confidentiality, integrity, availability and resilience of processing systems and services.[108] Before beginning an arbitral proceeding, Arbitral Participants should ensure that the data being collected and processed for the purposes of the arbitration is stored in a safe location and the confidentiality of the arbitration is not compromised. This may involve carefully examining the security arrangements of any online data rooms and remote hearing applications which may be used during the arbitration and would require deployment of specialised resources (like information technology professionals). This will often mean that the infrastructure used by the Arbitral Participants to secure the arbitration ought to be state of the art. However, this poses serious questions of accessibility. Take for example India – the government wishes to make the country an 'arbitration hub' and further institutionalise arbitration.[109] The government is also the biggest litigant in India.[110] However, whether even the government has the resources to ensure security of data is questionable, and this is evidenced by lapses in the past.[111] The choice of arbitration as the preferred dispute resolution mechanism by other, smaller entities (such as Small and Medium Enterprises ["**SMEs**"]) will be hindered by the lack of appropriate cybersecurity

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102 Now in force as Hong Kong International Arbitration Centre Administered Arbitration Rules, Nov. 1, 2018 [*hereinafter* "HK IAC Rules"].

103 PCPD's Submission in response to the Public Consultation on the Proposed Amendments to the 2013 HKIAC Administered Arbitration Rules, PRIVACY COMMN'R FOR PERS. DATA, ¶ 4, *available at* https://www.pcpd.org.hk/english/enforcement/response/files/Submissions_to_HKIAC_29092017.pdf [*hereinafter* "PCPD Submission"].

104 HK IAC Rules, *supra* note 102, art. 3(1)(e), 2018.

105 PCPD Submission, *supra* note 103, ¶ 5.

106 *See* HK PDPO, § 18.

107 Charlie Wood, *Zoom's security and privacy problems are snowballing*, BUS. INSIDER (Apr. 1, 2020), *available at* https://www.businessinsider.in/tech/enterprise/news/zooms-security-and-privacy-problems-are-snowballing/articleshow/74934074.cms.

108 GDPR, *supra* note 15, art. 32.

109 The Arbitration and Conciliation (Amendment) Act, 2019., No. 33 of 2019, statement of objects and reasons (India).

110 LAW COMMISSION OF INDIA, REPORT NO. 230, REFORMS IN THE JUDICIARY – SOME SUGGESTIONS, ¶ 1.25 (2009).

111 Gautam S. Mengle, *Major Aadhaar data leak plugged: French security researcher*, THE HINDU (Mar. 20, 2019), *available at* https://www.thehindu.com/sci-tech/technology/major-aadhaar-data-leak-plugged-french-security-researcher/article26584981.ece.

infrastructure. Such concerns merit consideration at an international level, keeping in mind the resources of developing nations.

IV. The Indian Personal Data Protection Bill, 2019

The 2019 Indian Bill is largely drawn from the EU's GDPR. Its application is based on the principle of territoriality and passive personality, nationality and extra-territorial jurisdiction based on the 'effects doctrine'.[112]

The Bill defines personal data to mean data relating to any characteristic, trait, attribute or any other feature of the identity of a natural person, directly or indirectly identifiable, and includes inferences drawn from such data as well. The Bill also refers to 'data principal' i.e., a natural person to whom the personal data relates to,[113] 'data fiduciary' who determines the purpose and means of processing of personal data which includes a company or an individual as well.[114] The Bill creates a relationship between a data principal and data fiduciary based on trust,[115] which is the hallmark of a fiduciary relationship.[116] Thus, lawyers and arbitrators may be considered as data fiduciaries for the purpose of arbitral proceedings.

Further, the Bill applies to the processing[117] of personal data (i) if such data has been collected, disclosed, shared or otherwise processed within the territory of India (territoriality), (ii) by the State, an Indian company, any citizen of India or any person or body of persons incorporated or created under Indian law (nationality), and includes processing of personal data by (iii) data fiduciaries or data processors not present within the territory of India, if the processing is – in connection with a business or a systematic activity of offering goods and services to data principles or with any activity which involves profiling of data principles within the territory of India (effects doctrine). Thus, Indian arbitrators, arbitral institutions and arbitral proceedings in India would clearly be required to comply with the data protection regime created under the Bill, depending upon whether they can be treated as data fiduciary or data processor.

First, every lawyer and arbitrator can only process data for a clear, specific and lawful purpose and restricted to only the specified purpose for which it was collected.[118] *Second*, they shall process personal data in a fair and reasonable manner that ensures privacy of the data principal[119] and for the purpose consented to by the data principal.[120] *Third*, personal data shall be collected only to the extent that is necessary for the purpose of processing.[121] *Fourth*, personal data shall be stored only

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112 SRIKRISHNA COMMITTEE REPORT, *supra* note 12, at 19.

113 PDP Bill, § 3(14).

114 *Id.* § 3(13); The Bill further covers 'data processor' who processes personal data on behalf of the data fiduciary, *see* § 3(15).

115 Puttaswamy, (2019) 1 SCC 1, ¶ 224.

116 SRIKRISHNA COMMITTEE REPORT, *supra* note 12, at 8; *see also* Central Board of Secondary Education & Anr. v. Aditya Bandopadhyay & Ors., (2011) 8 SCC 645, ¶ 21 (India).

117 Processing has been defined as "an operation or set of operations performed on personal data, and may include operations such as collection, recording, organisation, structuring, storage, adaptation, alteration, retrieval, use, alignment or combination, indexing, disclosure by transmission, dissemination or otherwise making available, restriction, erasure or destruction." *See* PDP Bill, § 3(31).

118 PDP Bill, § 4.

119 *Id.* § 5(a).

120 *Id.* § 5(b).

121 *Id.* § 7.

for as long as is necessary.[122] *Finally*, lawyers and arbitrators shall also have to issue a notice to the data principal about the collection of data prior to the collection.[123]

A key concern that has been raised with respect to the Bill is whether it will apply to arbitral proceedings at all due to the proposed Section 36(b) and (c) of the Bill.[124] As per Section 36(c) of the Bill, processing of personal data by any court or tribunal in India necessary for the exercise of any judicial function will not attract the application of the Bill. The Supreme Court of India in *Associated Cement Companies Ltd.* v. *P.N. Sharma & Ors.*, held that an authority is said to exercise judicial function when it is empowered by the State to determine the rights of two or more contending parties with regard to a matter in controversy conclusively.[125] However, the court went on to hold that while the Arbitration Act (1940) vested an arbitrator with some of the trappings of a court, yet it cannot be termed as a tribunal as the arbitrator derives its power by virtue of an agreement.[126] Thus, the exemption under this clause shall not be applicable to arbitral proceedings.

Nevertheless, the proposed Section 36(b) on exemption may be applicable to arbitral proceedings. As per the said provision, disclosure of personal data necessary for enforcing any legal right or claim, seeking any relief, defending any charge, opposing any claim, or obtaining any legal advice from an advocate in any impending legal proceeding, shall be exempted from the application of the Bill. In *General Officer Commanding & Ors.* v. *CBI & Ors.*, the Supreme Court of India defined legal proceedings to mean proceedings regulated or prescribed by law in which a judicial decision may be given. In other words, it means proceedings in a court of justice by which a party pursues a remedy which a law provides but does not include administrative and departmental proceedings.[127] Further, the court had also noted arbitral proceedings to be legal proceedings.[128] Thus, most obligations under the Bill save those provided under Section 4 (i.e., no processing of personal data save for specific, clear and lawful purpose) and 24 (i.e., security safeguards) of the Bill shall not apply to arbitral proceedings.

In the following section, the authors attempt to provide guidance and analyse concerns that may be raised during an arbitral proceeding, in the backdrop of the EU's GDPR and the 2019 Indian Bill.

V. International Arbitration: A Potpourri of Data Protection Regimes

A typical international arbitration involves multiple actors from various jurisdictions across the world. As data protection regimes tend to follow their nationals (extra-territoriality), compliance with various national data protection laws can be complex and puzzling. For instance, a dispute between an EU and an Indian party before arbitrators appointed by an arbitral institution in Singapore would trigger the protections contained in all the three jurisdictions. As data would be

122 *Id.* § 9.

123 *Id.* § 5(a).

124 *See* Tarun Krishnakumar, *Data Protection in India and Arbitration: Key Questions Ahead*, KLUWER ARB. BLOG (Apr. 16, 2019), *available at* http://arbitrationblog.kluwerarbitration.com/2019/04/16/data-protection-in-india-and-arbitration-key-questions-ahead/.

125 Associated Cement Companies Ltd. v. P.N. Sharma, AIR 1965 SC 1595, ¶ 46 (India).

126 *Id.*

127 General Officer Commanding & Ors. v. CBI & Ors., AIR 2012 SC 1890, ¶ 12 (India).

128 *Id.*

transferred across jurisdictions with different kinds of protection, Arbitral Participants will necessarily have to demonstrate compliance at all stages of transfer.

In the collection of documents and preparing a case for oneself, the parties shall have to ensure that they comply with their own national data protection regimes. Additionally, if parties are involved in activities outside their national territory, then they shall have to ensure compliance with other domestic regimes as well. The ICCA-IBA Roadmap suggests identifying the applicable national laws for all the Arbitral Participants.[129] The EU party may be permitted to transfer personal data to the Indian party without the 'adequacy decision' and appropriate safeguards due to the legal claims' exception. Nonetheless, it will still have to ensure that the protection guaranteed to an EU data subject under the GDPR is upheld. Further, the EU party will have to cull for relevance, and provide for redaction or pseudonymisation of personal data as well as confidentiality.[130] Meanwhile, and assuming the application of the Bill, the Indian party shall have to ensure that such data is processed for specific, clear and lawful purpose. Further, the Indian party shall have to implement de-identification, encryption, protect the integrity of the data and prevent misuse, unauthorized access to, modification, disclosure or destruction of personal data.[131]

This may be particularly challenging in case of SMEs. SMEs face difficulties in international disputes as opposed to large corporations due to lack of resources and infrastructure.[132] The already complex and multi-layered process of complying with multiple data protection laws would act as a further impediment for SMEs to expand themselves internationally.

Moreover, the arbitral institution will be considered as an organization (controller/data fiduciary) as well and will have to ensure compliance with the Singapore Personal Data Protection Act, 2012. The Roadmap recommends providing an express notice to the arbitrator that his personal data would be processed for the purposes of the arbitral proceedings and may be transferred to third countries.[133] In case of an arbitrator from Singapore, this would require compliance with the protection guaranteed under the Act unless exempted by the Commission.[134]

The Roadmap further suggests the consideration of basis and necessity for inclusion of personal data at the time of drafting the award and take steps to minimise the inclusion of personal data in the Award.[135] Nonetheless, the arbitral award may still contain personal data which shall have to be processed under the relevant data protection laws of the Arbitral Participants. This may also be difficult in investor-State arbitrations, where transparency is of greater importance. Should the data

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129 ICCA-IBA ROADMAP, *supra* note 22, at 34.

130 Guidelines 2/2018 on Derogation of Article 49 under Regulation 2016/679, EUR. DATA PROT. BD., 10, 11 (May 25, 2018), *available at* https://edpb.europa.eu/sites/edpb/files/files/file1/edpb_guidelines_2_2018_derogations_en.pdf.

131 PDP Bill, § 24(1).

132 Petra Butler & Gary Born, Bilateral Arbitration Treaties: An Improved Means of International Dispute Resolution, UNCITRAL 9, *available at* https://www.uncitral.org/pdf/english/congress/Papers_for_Programme/104-BORN_and_BUTLER-BATs_An_Improved_Means_of_International_Dispute_Resolution.pdf.

133 ICCA-IBA ROADMAP, *supra* note 22, at 39.

134 Singapore PDPA, § 26(1).

135 ICCA-IBA ROADMAP, *supra* note 22, at 44.

subject remain identifiable, appropriate measures ought to be taken to process it in compliance with applicable laws.[136]

The Roadmap further recommends the use of a 'data protection protocol' – a document through which parties agree on how data protection will be applied in a particular context, which could allocate responsibilities for data protection compliance during the arbitration.[137]

Data protection in accordance with the applicable law ought to be the foremost consideration for Arbitral Participants, given the far-reaching consequences that breach of data protection laws have (such as massive fines under the GDPR and Indian Personal Data Protection Bill). Accordingly, the Roadmap advises that data protection be addressed in the first procedural conference so as to allow Arbitral Participants to discuss applicable laws and measures for compliance.[138]

VI. Conclusion: The Way Forward for Secure Arbitration

The transnational nature of arbitration and constant data flows make it a high-risk field in terms of data protection. Presently, the international and domestic data protection and cybersecurity framework for arbitration is woefully inadequate, and this could lead to bigger challenges in the future. Arbitral institutions across the world are expanding their scope, be it the SIAC releasing its Investment Arbitration Rules, the HKIAC hearing Belt and Road Initiative disputes, or Indian arbitral institutions hoping to strengthen their capabilities. As they expand their scope, the quantum of data and cases which they handle will also rise. For example, the SIAC handled 343 new cases as of 2016. In 2017, their active caseload was about 650 cases.[139] In light of this, institutions ought to make concerted efforts to ensure their data protection and information security practices are up to the mark. With virtual hearings becoming more popular, this will be of crucial importance for the future of arbitration.

The GDPR was a massive overhaul of the European data protection framework, with effects rippling across the globe due to its extra-territorial application. Jurisdictions like India are modelling their potential data protection regulations around the GDPR, and it is undeniable that the GDPR provides a high threshold for data protection. In light of this, the arbitration community ought to develop specific practices and guidelines which are tailor-made to the needs of this dispute settlement mechanism. Regard must be had to the recommendations and practice tips of the Roadmap developed by the ICCA and IBA.

An important concern is that of infrastructure and accessibility. Often, the protection of data and information security requires state of the art infrastructure, which might be an expensive investment for smaller businesses, institutions, and even the governments of some countries. The Commonwealth Secretariat Report has revealed that its Member States are willing to negotiate a

136 *Id.* at 43.
137 *Id.* at 41.
138 *Id.* at 40.
139 *Statistics*, SINGAPORE INTERNATIONAL ARBITRATION CENTRE, *available at* https://www.siac.org.sg/2014-11-03-13-33-43/facts-figures/statistics.

form of Bilateral Investment Treaty especially in light of the difficulties faced by SMEs.[140] It would be beneficial if the Commonwealth and the international community develop an arbitration treaty that specifically incorporates data protection and cybersecurity concerns. This shall improve the accessibility of arbitration as a dispute resolution mechanism and to provide some certainty with regards to standards of protection. Such a treaty also becomes important because of the nature of arbitration as a cross-border dispute resolution mechanism. Domestic data protection laws are not sufficient to cover all aspects in an *international* arbitration (such as transfer of data, access requests, etc.); further, the conflict between several national legislations adds to the uncertainty associated with data protection in arbitration, and while the Roadmap is highly informative, it is not binding.

Such a mechanism could provide for: *first*, a standard rule for aspects such as third country data transfers, standards of personal data processing, access controls, and other data protection and information security measures. *Second*, such a treaty could be useful for providing an international standard for security infrastructure to be used in arbitration. *Third*, drawing inspiration from the Paris Accord, such a treaty could make provisions for 'data protection/information security finance', whereby countries provide aid to one another to improve their data protection and security infrastructure. This would greatly improve the accessibility of arbitration across the world, and governments would have more confidence in taking their disputes to investor-State forums (or in domestic arbitrations with contractors) without the fear of data leaks. The treaty could be open to signature by international organisations (such as arbitral institutions, ICSID, and PCA) as well as nation States. Importantly, such a treaty must contain a provision on the prevailing system where provisions of the treaty conflict with national law.

Lastly, the IBA and UNCITRAL have been instrumental in providing uniformity in the sphere of international arbitration. In the absence of an international framework for data protection in arbitration, perhaps there is a role for them in this sphere to develop guidelines and principles to govern this extremely uncertain aspect of international arbitration. These could further be adopted by arbitral institutions. The promise of confidentiality would be in vain if risks of data breaches remain.

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140 Prof. (Dr.) Petra Butler, Findings of the Commonwealth Study on International Arbitration, Centre for Advanced Research and Training in Arbitration Law (CARTAL Lecture Series, National Law University, Jodhpur) (Feb. 10, 2020) (transcript available with the authors).

FIVE RECURRING PROBLEMS IN INTERNATIONAL ARBITRATION: THE RELATIONSHIP BETWEEN COURTS AND ARBITRAL TRIBUNALS

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Abstract

In recent years, five recurring problems regarding the relationship between courts and tribunals have gained prominence due to case law developments. These run the gamut from preliminary issues with the arbitration agreement to disputes at the enforcement stage. This article examines these problems in detail, with a view to shed new light on the question of what it means for a jurisdiction to be "pro-arbitration". The authors argue that the oft-repeated binary categorisation of "pro-arbitration" and "anti-arbitration" jurisdictions is too broad-brush. Instead, there is no easy answer to what constitutes a truly "pro-arbitration" approach, and no one-size-fits-all approach to being a "pro-arbitration" jurisdiction.

I. Introduction

The relationship between national courts and arbitral tribunals is an evergreen topic that has generated much discussion.[1] In this article, we take a closer look at five recurring problems that have gained fresh currency due to case law developments from various jurisdictions. *First*, when can parties appeal from a tribunal's decision to a court (or vice versa), or to another tribunal? *Second*, how does the availability of court review of the tribunal's jurisdiction under Article 16(3)[2] of the UNCITRAL Model Law ["**Model Law**"] affect the availability of other avenues to challenge the tribunal's jurisdiction, such as setting-aside proceedings under Article 34 or enforcement proceedings under Article 36? *Third*, what can a party do when it is on the receiving end of a foreign judgment, when it would prefer to arbitrate the dispute or enforce an award? *Fourth*, when, if ever, should awards annulled at the seat be enforced by the national courts of another jurisdiction, under Article V(1)(e) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ["**NYC**"]? *Fifth*, when can enforcement be refused under Article V(1)(d) of the NYC? By examining the approaches to these five specific problems, some insight can be gained into the overarching question of whether there is truly a dichotomy between jurisdictions that are "*pro-arbitration*" and "*anti-arbitration*."

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1 *See*, *e.g.*, Elizabeth Gloster, *Symbiosis or Sadomasochism? The relationship between the courts and arbitration*, 34(3) ARB. INT'L 321 (2018); Emmanuel Gaillard, *Coordination or chaos: Do the principles of comity, lis pendens, and res judicata apply to international arbitration?*, 29(3) AM. REV. INT'L L. 205 (2019).

2 United Nations Commission on International Trade Law (UNCITRAL), Model Law on International Commercial Arbitration art. 16(3), 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"].

II. Problem 1: Exploring the Possibility of Appeals to and from Arbitral Tribunals

In arbitration, as parties have made their bed, so they must lie in it. Those who opt for arbitration "*must live with the decision of the arbitrator, good or bad. Commercial parties appoint arbitrators for their expertise and experience – technical, legal, commercial or otherwise.*"[3] This part of the article examines the ways that parties may get around the notion of "no merits review"[4] of an award, and conversely, whether arbitration may provide additional recourse when parties are unhappy with the result of litigation.

A. Appealing against an Arbitral Award

The questions for consideration are – *first*, what are the circumstances in which a national court will entertain an appeal on the merits against an arbitral award, and *second*, whether parties can agree to an appeal mechanism from one tribunal to another.

B. Appeals to a National Court

International arbitration awards cannot generally be judicially reviewed on the merits.[5] Parties are entitled to a fair decision, but not necessarily a correct one.[6] However, there is at least one well-established exception that parties should pay attention to: appealing an arbitration award on a point of law. While not contemplated by the Model Law, this is an option under Section 69 of the English Arbitration Act 1996 ["**UKAA**"],[7] and items 5 and 6 of Schedule 2 to the Hong Kong Arbitration Ordinance ["**HKAO**"].[8] Singapore is also considering the amendment of its international arbitration statute to allow appeals on points of law on similar grounds.[9]

Provisions allowing for appeals on points of law serve the public interest in re-introducing important questions of law to be decided by the courts, rather than behind closed doors in arbitration.[10] The approaches under the statutes mentioned are broadly similar, with parties being permitted to appeal to the court only on a question of law arising out of an award. An appeal may not be brought unless all parties agree, or with the leave of the court. If leave is sought, the test requires, amongst others, that "*the decision of the tribunal be obviously wrong or the question is one of general public importance and the tribunal's decision is at least open to serious doubt*".[11] The main difference is that the HKAO distinguishes between domestic and international arbitration, with automatic opt-in to

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3 TMM Division Maritima SA de CV v. Pacific Richfield Marine Pte Ltd., [2013] 4 SLR. 972, ¶ 65 (Sing.).

4 Generally, the substantive merits of the decision rendered an arbitral tribunal cannot be reviewed by a court or any other tribunal.

5 Jessica L. Gelander, *Judicial Review of International Arbitral Awards: Preserving Independence in International Commercial Arbitrations*, 80(2) MARQ. L. REV. 625, 627 (1997).

6 GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 3170 (2d ed. 2014) [*hereinafter* "BORN"].

7 Arbitration Act, 1996, c. 6, § 69 (Eng.) provides that "Unless otherwise agreed by the parties, a party to arbitral proceedings may (upon notice to the other parties and to the tribunal) appeal to the court on a question of law arising out of an award made in the proceedings. An agreement to dispense with reasons for the tribunal's award shall be considered an agreement to exclude the court's jurisdiction under this section." [*hereinafter* "UKAA"].

8 Arbitration Ordinance, (2011) Cap. 609, sch. 2, items 5, 6 (H.K.) [*hereinafter* "Hong Kong Arbitration Ordinance"].

9 Sebastian Perry*, Singapore considers allowing appeals on questions of law* (Apr. 15, 2019), GLOBAL ARB. REV., *available at* https://globalarbitrationreview.com/article/1190225/singapore-considers-allowing-appeals-on-questions-of-law. This procedure is already available in domestic arbitration, where the right to appeal applies unless excluded by parties. The proposed amendment in international arbitration would apply on an opt-in basis.

10 The Right Hon. The Lord Thomas of Cwmgiedd, Lord Chief Justice of England and Wales Lord, The Bailii Lecture 2016, ¶ 23 (Mar. 9, 2016), *available at* https://www.judiciary.uk/wp-content/uploads/2016/03/lcj-speech-bailli-lecture-20160309.pdf.

11 Hong Kong Arbitration Ordinance, sch. 5, item 4(c); UKAA, § 69(3)(c).

items 5–6 of Schedule 2 available only for domestic arbitration.[12] The HKAO also provides for deeming provisions in subcontracting cases if the opt-in provisions apply to the head contract.[13]

Parties who wish to appeal under this route should note the following practical points:

First, the key determinant would be the selection of the seat, i.e., the *lex arbitri*. Only if the relevant statute contemplates appeals to a national court on a point of law will such a right of recourse be countenanced.

Second, the preconditions for invoking this right of appeal must be considered. For instance, a party may be required to exhaust all available arbitral processes of review and any available recourse under national law (for e.g., "*correction of award or additional award*").[14] They should also be mindful of any inadvertent waivers, such as by agreeing to dispense with the reasons for a tribunal's award (which stands to reason, as a court cannot be expected to scrutinise a non-speaking award).[15] Logically, the appeal mechanism would also not be available if parties agree that the tribunal may decide *ex aequo et bono* (from equity and conscience), because there simply would be no question of law for the court to determine.

Third, the parties must consider whether the appeal mechanism applies on an opt-in or opt-out basis,[16] and if the former, it ought to be clarified at which stage the agreement should be made. It may be worthwhile including an opt-in provision at the outset in drafting the arbitration agreement, or at the latest, before the award is rendered, to avoid the need to obtain leave of court. Parties seeking to appeal against an arbitral award on a point of law, without the other party's consent, face an uphill task due to the stringent requirements of the test for grant of leave. The numbers speak for themselves: In 2017, 56 applications for leave were brought under Section 69 of the UKAA, permission for leave was granted in ten cases, and only one case was successful (which was a significant improvement from the previous year!).[17]

C. Appeals to an Appellate Arbitral Tribunal

Given the narrow circumstances in which appeals to national courts may be made on the merits, an alternative would be to include an appellate arbitration clause. Such clauses permit the parties, if dissatisfied with the decision of a first arbitral tribunal, to appeal to another tribunal.[18] Appellate arbitration clauses can take various forms, such as a two-tier arbitration clause where parties assemble their own preferred appeal mechanism. An example of this is the clause in *Centrotrade*:[19]

12 Hong Kong Arbitration Ordinance, § 100.

13 *Id.* § 101.

14 UKAA, § 70(2).

15 *See id.* § 69(1).

16 In opt-in cases, the appeal mechanism is available only if parties so provide in their arbitration agreement (as would be the case under the proposed amendments to Singapore's International Arbitration Act). In opt-out cases, the appeal mechanism is available by default, unless parties contract out. *See id.* § 69(1).

17 Commercial Court Users' Group, *Meeting Report* 1 (Mar. 13, 2018), *available at* https://www.judiciary.uk/wp-content/uploads/2018/04/commercial-court-users-group-report.pdf.

18 Prachi Aggarwal, *Multi-tier Arbitration Clauses*, RMLNLU L. REV. BLOG (Oct. 25, 2017), *available at* https://rmlnlulawreview.com/2017/10/25/multi-tier-arbitration-clauses/; Gracious Timothy Dunna*, Supreme Court in Centrotrade 2016: Too Quick to Nod at the Validity of the Two-Tier Arbitration Clause?*, 14(1) ASIAN INT'L ARB. J. 58 (2018).

19 M/s Centrotrade Minerals and Metals Inc v. Hindustan Copper Ltd., (2017) 2 SCC 228, ¶ 3 (India) [*hereinafter* "Centrotrade II"].

> *"Arbitration – All disputes or differences whatsoever arising between the parties […] shall be settled by arbitration in India through the arbitration panel of the Indian Council of Arbitration in accordance with the Rules of Arbitration of the Indian Council of Arbitration[…]*
>
> *If either party is in disagreement with the arbitration result in India, either party will have the right to appeal to a second arbitration in London, UK in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce[.]*"[20]

Alternatively, parties may incorporate in their arbitration agreement an institutional arbitration procedure, such as those offered by the International Institute for Conflict Prevention and Resolution, 2007 ["**CPR Appeal Procedure**"], the Judicial Arbitration and Mediation Services Comprehensive Arbitration Rules and Procedure, 2014 ["**JAMS Appeal Procedure**"], or the American Arbitration Association Appellate Arbitration Rules, 2013 ["**AAA Appeal Procedure**"].

i. Validity of Appellate Arbitration Clauses

A preliminary issue is whether such clauses will be regarded as valid by national courts, and if so, for what purposes. The Supreme Court of India recently held in the affirmative when it had to occasion to consider the question in *Centrotrade Minerals and Metals Inc* v. *Hindustan Copper Ltd.*[21] ["**Centrotrade (II)**"]. The decision is significant because the Indian Arbitration and Conciliation Act, 1996 ["**ACA**"] is based on the provisions of the Model Law.[22]

In *Centrotrade (II)*, the appellate arbitration clause was in the form provided as an example above. The court rejected the submission that the latter part of the clause which set out the appellate mechanism, was contrary to Indian law. *First*, the court disagreed that the right to file an appeal can only be created by statute and not by an agreement between the parties. That holds true for litigation, but not non-statutory appeals that can be dealt with without resorting to court processes.[23] *Second*, the validity of appellate arbitration clauses is supported by background materials such as the Explanatory Note by the UNCITRAL Secretariat on the Model Law and the Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration: Report of the Secretary-General ["**Analytical Commentary**"]. *Third*, the principle of party autonomy supports the acceptance of appellate arbitration clauses.[24]

The clause in *Centrotrade (II)* was upheld even though it provided for arbitration under the rules of the Indian Council of Arbitration ["**ICA**"] in the first instance, and International Chamber of Commerce ["**ICC**"] arbitration on appeal. But such "Frankenstein" clauses[25] are not always workable, especially where parties incorporate an institutional arbitration procedure. For instance, the JAMS Appeal Procedure only applies to awards that have been rendered under the JAMS

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20 Shivansh Jolly, *Supreme Court of India Upholds Validity of Appellate Arbitration Clauses*, KLUWER ARB. BLOG (Feb. 16, 2017) *available at* http://arbitrationblog.kluwerarbitration.com/2017/02/16/supreme-court-india-upholds-validity-appellate-arbitration-clauses.

21 Centrotrade II, (2017) 2 SCC 228.

22 Arbitration and Conciliation Act, No. 26 of 1996, pmbl. (India) [*hereinafter* "Indian Arbitration Act"].

23 Centrotrade II, (2017) 2 SCC 228, ¶ 14.

24 *Id.* ¶ 40.

25 So-called because they are assembled of a mish-mash of parts and may not function as envisaged, much like the eponymous monster.

Arbitration Rules.[26] The CPR Appeal Procedure applies to "*any binding arbitration conducted in the United States*, *pursuant to the CPR Rules for Non-Administered Arbitration or the CPR Administered Arbitration Rules […] or otherwise.*"[27] What happens if the first-tier clause is valid but the appellate mechanism is not?

One would imagine that the courts, by applying the principle of effective interpretation, will adopt a very forgiving approach and uphold at least the first-tier arbitration clause once they find an intention to arbitrate – recall *Lucky-Goldstar Ltd.* v. *Ng Moo Kee Engineering*,[28] where the clause referred to non-existent rules of arbitration, and there was uncertainty as to the arbitral institution and place of arbitration. In this case, it was held that the clause was not "*inoperative or incapable of being performed*" and that the intention of the parties to arbitrate was clear. A counter argument would be that parties had intended to arbitrate *conditional upon* having the right to appeal to an appellate tribunal, and the lack of the latter makes the clause unworkable. However, such an argument is unlikely to succeed: if courts are willing to accept even "*bare*" arbitration clauses,[29] (as they have in certain pro-arbitration jurisdictions),[30] there is no reason why they would not do the same when only the appellate portion of the clause is in doubt. Hence, it is quite likely that appellate arbitration clauses will be found workable regardless of their form, even if they are contrary to specific institutional appellate arbitration procedures.

But that begs a logically prior question. Assuming that the first-instance arbitration is seated in country 'X', the appellate arbitration in country 'Y', and the substantive law of the contract is that of country 'Z', which law determines whether the arbitration agreement is valid? The threshold issue is whether the *Sulamerica* approach[31] applies, i.e., where the arbitration agreement forms part of the main contract, parties are presumed to have intended the same law to govern both the underlying contract and the arbitration agreement.[32] If so, the law governing the arbitration agreement is that of country Z. However, the *Sulamerica* approach is not universally adopted, and an alternative approach is to apply the law of the seat to assess the validity of an arbitration agreement.[33] The latter approach, however, would pose another problem: *which* seat's laws would be relevant – those of country X (where the first-instance arbitration is seated) or Y (where appellate arbitration is seated)? The better view is that it would be the law of the country where the first-instance arbitration is seated, i.e., country X. The contrary view entails some circularity because country Y would only be the seat *if* the clause were valid and encompassed the possibility of an appellate arbitration, but the very question here is whether that clause is valid. But what if

26 Theodore K. Cheng, *Merits-Based Review of Arbitration Awards: A Potentially "Appealing" Option*, 22(2) N.Y. STUDENT BAR ASS'N NY LITIGATOR 21, 22 (2017).

27 International Institute for Conflict Prevention and Resolution [CPR] Appellate Arbitration Procedure, r. 1.1, 2015.

28 Lucky-Goldstar Int'l (H.K.) Ltd. v. Ng Moo Kee Eng'g, [1993] 2 H.K.L.R. 73C. (H.C.) (H.K.).

29 Bare arbitration clauses do not mention the place of arbitration nor the means of appointing arbitrators. Darius Chan, *How Should "Bare" Arbitration Clauses Be Enforced by the Courts?*, KLUWER ARB. BLOG (Apr. 11, 2017), *available at* http://arbitrationblog.kluwerarbitration.com/2017/04/11/how-should-bare-arbitration-clauses-be-enforced-by-the-courts/.

30 *See*, *e.g.*, KVC Rice Intertrade Co. Ltd. v. Asian Mineral Res. Pte Ltd., [2017] 32 S.G.H.C. 43–48 (Sing.).

31 Sulamerica CIA Nacional de Seguros S.A. v. Enesa Engenharia S.A. [2012] EWCA Civ. 638 (Eng.).

32 Ashurst, *Which law governs the arbitration agreement: the law of the seat or the underlying contract*? (Feb. 7, 2017), *available at* https://www.ashurst.com/en/news-and-insights/legal-updates/which-law-governs-the-arbitration-agreement-the-law-of-the-seat-or-the-underlying-contract/.

33 *See*, *e.g.*, FirstLink Inv. Corp. Ltd. v. GT Payment Pte Ltd., [2014] SGHCR. 12 (Sing.); *Cf.* BCY v. BCZ, [2017] 3 SLR 357 (Sing.).

the arbitration agreement is valid only under the laws of country Y? This might be resolved by applying the validation principle, which is that the validity of an arbitration clause will be upheld if it is valid under *any* of the potentially applicable laws (here, any of countries X, Y, or Z), even if it is invalid under all the other potentially applicable laws.[34] All things considered, courts are likely to uphold the validity of appellate arbitration clauses.

ii. Practical Considerations in Deciding whether to agree to Appellate Arbitration Clauses

Deciding on whether to agree to appellate arbitration clauses involves weighing various considerations. Without such a clause there might be greater speed and finality in the arbitral process,[35] but parties would have to live with the outcome, unless the award can be challenged on due process or other grounds. On the other hand, the security of having a right of appeal against the award might be the very reason why parties accept a one-member tribunal for disputes that might have otherwise warranted a three-member tribunal, thus leading to time and cost savings.[36] Speed and finality are also not a given, if the counterparty tries to set aside the award or plays cat-and-mouse with enforcement.[37] Determining whether to include such clauses would, therefore, require careful gauging of the counterparty's track record, the state of the parties' relationship, and other relevant indicia.

We also highlight the following practical considerations:

First, parties should note that institutional rules chosen by them might provide for specific grounds or standards of appeal.[38]

Second, if an appellate arbitration clause is adopted, there is a question as to whether the seat court of the first-instance award can entertain applications for setting aside or enforcement pending the award being reviewed on appeal. We agree with the view that this should be disallowed as it would contradict the principles of judicial economy and efficiency when an appellate arbitration clause has been agreed upon by the parties.[39] There is also the concern of the appellate arbitration award being rendered nugatory or futile, if enforcement efforts have caused irremediable damage.

Third, parties should note when the limitation period for seeking to set aside an award commences (if they have not selected institutional appellate procedures that provide for this).[40] Would this be from the date of the first award or appellate award? This is significant because the timeline can in some cases be as short as three months. The answer to this question might well be found in Article 34(3) of the Model Law,[41] which states:

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34 Gary Born, *The Law Governing International Arbitration Agreements: An International Perspective*, 26 SING. ACAD. L. J. 814, ¶ 51 (2014).

35 Though it should be noted that problems of speed and finality might be mitigated if parties also set a mutually acceptable time limit for invoking the arbitral appeal mechanism.

36 Theodore K. Cheng, *supra* note 26, at 21, 32.

37 *See*, *e.g.*, the long-running Astro v. Lippo saga spanning Singapore and Hong Kong.

38 *See*, *e.g.*, under AAA's Optional Appellate Arbitration Rules, r. A-10 (2013), the award must contain "*material and prejudicial*" errors of law or have "*clearly erroneous*" determinations of fact.

39 *Validity of Appellate Arbitration Clauses*, INT'L ARB. INFO. (Feb. 28, 2017), *available at* https://www.international-arbitration-attorney.com/validity-appellate-arbitration-clauses.

40 Shivansh Jolly, *supra* note 20.

41 Model Law, *supra* note 2, art. 34(3).

> *"An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received* ***the award*** *or, if a request had been made under Article 33, from the date on which that request had been disposed of by the arbitral tribunal."* [emphasis added]

On a plain reading of Article 34(3), the time to set aside the first-instance and appellate awards will run from their respective times of receipt. Might this pose a problem for applicants who fear they will be out of time to challenge the first award, if this is upheld on appeal? It is no answer to say that a party can challenge the appellate award, because the grounds for challenge might not apply in a transferable way – a breach of natural justice in the first proceedings would not affect the appellate proceedings. The solution, perhaps, is to first commence setting aside proceedings for the first award in the seat court and have those proceedings stayed pending determination by the appellate tribunal. It may also be argued that any grant of a stay on the first award may be more palatable if it would include the payment of the full award amount, possibly into an escrow account, to extinguish liability pending the decision by the appellate tribunal. While this solution is a little cumbersome, inelegance is preferable to a party challenging the Article 34(3) timeline and finding, to its dismay, that it is non-extendable.[42]

D. Appealing from a National Court Decision to an Arbitral Tribunal

The final issue in this section is whether parties can appeal against the decision of a national court to an arbitral tribunal. The issue arises from a clause that featured in *ST Group Co. Ltd.* v. *Sanum Investments Ltd. appeal* ["**Sanum (SGCA)**"].[43] The clause, reproduced below, provided for the parties to refer any disputes to mediation, and then either to the "*Resolution of Economic Dispute Organisation*" or the Laotian courts:

> *"If one of the parties is unsatisfied with the results of the decision or judgment of the above procedure, the Parties shall mediate and, if necessary, arbitrate such dispute using an internationally recognized mediation/arbitration company in Macau, SAR PRC".*[44]

While the Singapore Court of Appeal acknowledged that the clause may lead to appeals against concluded national proceedings using an arbitral tribunal, it declined to adjudicate upon the validity of such a clause given that it would be a matter to be decided under the governing law of the agreement, that being Lao law.[45]

There are strong arguments against such clauses being upheld. *First*, is there even a "*dispute*" to be sent to arbitration? The tribunal might well determine, in the exercise of its competence under Article 16 of the Model Law, that the court's decision is *res judicata*. A ruling of a competent court would conclusively resolve a dispute, subject to any possible appeals to national appellate courts.

Second, it is questionable whether the parties could engraft, by their own fiat, a separate branch of appeals to an arbitral tribunal onto the appellate decision-tree. A "*dispute*" over a national court decision potentially falls under the non-arbitrability doctrine; national courts are meant to be the final arbiters of legal disputes within their jurisdiction. It is inherently objectionable that the decision of a national court as a manifestation of state authority should be appealable to arbitrators,

42 *See*, *e.g.*, BXS v. BXT, [2019] SGHC(I) 10, ¶¶ 37–41 (Sing.).
43 ST Group Co. Ltd. and Ors. v. Sanum Inv. Ltd. and Anr., [2019] SGCA 65 (Sing.).
44 *Id.* ¶ 8.
45 *Id.* ¶¶ 70–74.

who are appointed at the whim of parties without any assurance of legal training or quality (for ad hoc arbitrations). In a similar vein, it could be argued that allowing parties to appeal to an arbitral tribunal against a national court's decision violates public policy.

Third, there are difficulties arising from the mismatch over what the court, versus the arbitrator, can adjudicate and pronounce upon. Leaving aside whether *the court decision* per se is a priori non-arbitrable regardless of subject matter, what happens if the court makes a ruling that affects third parties, or there is joinder of third parties in the course of proceedings? Can that part of the dispute be hived off and the rest sent to arbitration? Even if it could, what of the risk of potentially inconsistent findings of fact? Messy situations like these can be minimised by refusing to accept such arbitration clauses as valid, albeit that these may still arise in other circumstances (such as if the court decides to grant case management stays over certain parts of the dispute). Accordingly, it is suggested that such clauses should be void.

E. Conclusion on Problem 1

Provisions that provide either for appeal *against* an award to a court or tribunal, or for appeal from a court decision *to* an arbitral tribunal, test the limits to which courts in a broadly pro-arbitration climate will uphold party autonomy. In the authors' view, while the former should be (and is) given effect to as far as possible, the latter should not be allowed.

III. Problem 2: The Effect of Article 16(3) of the Model Law on Subsequent Challenges to the Tribunal's Jurisdiction

Article 16(3) of the Model Law entitles a party that is dissatisfied with a tribunal's *preliminary* ruling on jurisdiction to request, within thirty days, the curial court to decide the issue of jurisdiction again.[46] How does the availability of the Article 16(3) mechanism affect the parties' right to challenge jurisdiction at the setting-aside and enforcement stages? In many jurisdictions, a party's failure to raise an Article 16(3) challenge precludes any subsequent attempt to rely on the same ground.[47] Interestingly, recent decisions by the Singapore courts have gone the other way. This section will discuss the interpretation of Article 16(3) taken by the Singapore courts, and evaluate the attractiveness of this approach against competing views taken elsewhere.

A. Singapore's Interpretation of Article 16(3)

In *PT First Media TBK* v. *Astro Nusantara International BV* ["**Astro**"],[48] the Singapore Court of Appeal held that even where a party failed to *actively* raise jurisdictional objections under Article 16(3) of the Model Law in time, it was still open to such a party to raise those objections as a ground for *refusing enforcement* of the award (what the court referred to as a "*passive remedy*"). The court was satisfied, after analysing the *travaux préparatoires*, that the Model Law incorporates a "*choice of remedies*" system.[49] Given the differences in purpose and effect between setting aside applications

46 Model Law, *supra* note 2, art. 16(3) provides that "The arbitral tribunal may rule on a plea referred to in paragraph (2) of this article either as a preliminary question or in an award on the merits. If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty days after having received notice of that ruling, the court specified in article 6 to decide the matter, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award."

47 *See* Nata Ghibradze, *Preclusion of Remedies under Article 16(3) of the UNCITRAL Model Law*, 27(1) PACE INT'L L. REV. 345, 385-389 (2015).

48 PT First Media TBK v. Astro Nusantara International BV, [2013] SGCA 57 (Sing.) [*hereinafter* "Astro"].

49 *Id.* ¶ 65.

and refusal of enforcement proceedings, "*parties that do not actively attack an award remain able to passively rely on defences to enforcement.*"[50] After a perusal of the *travaux*, the Court observed that nothing suggested that Article 16(3), as another form of active challenge to a tribunal's decision on jurisdiction, was intended to be carved out from this "*choice of remedies*" system.[51] But the court left open the question of whether a party who failed to utilise the Article 16(3) challenge was still able to raise the same jurisdictional objection in *setting-aside* proceedings, although it expressed the tentative opinion that it would be "*surprised*" if the answer was in the affirmative.[52]

That question was revisited by the Court of Appeal in May 2019, albeit for non-participating respondents only. In *Rakna Arakshaka Lanka Ltd.* v. *Avant Garde Maritime Services (Pte) Ltd.* ["**Rakna**"],[53] Rakna Arakshaka Lanka Ltd. ["**RALL**"] did not participate in the arbitration at all due to its protest to the tribunal's jurisdiction. The tribunal issued a preliminary ruling stating that it had jurisdiction, to which RALL did not respond. After the final award was given in favour of Avant Garde Maritime Services (Pte) Ltd. ["**AGMS**"], RALL sought to set aside the award. The question was whether RALL was now precluded from raising the jurisdictional issue in setting-aside proceedings, given its failure to raise an Article 16(3) challenge earlier.

Reversing the decision of the High Court, the Court of Appeal held that a *non-participating party* in an arbitration was *not* precluded from applying to set aside an award on jurisdictional grounds, even if he had not raised those objections in an Article 16(3) challenge. Significantly, the court stated:[54]

> *"Art 16 [of the Model Law] requires parties to an arbitration to bring out their challenges to jurisdiction at an early point of the proceedings. But this requirement pre-supposes that parties are before the arbitral tribunal and that a party to an arbitration agreement who is served with a notice of arbitration by a counterparty has no option but to participate in the ensuing proceedings."*

The court reasoned that there is no clear legal duty on a respondent to participate in an arbitration that it believes was wrongly commenced against it. Accordingly, it would be wrong to force such a party to utilise the Article 16(3) mechanism despite its objections.[55] The court also relied on the Analytical Commentary,[56] which states that a non-participating party who did not "*submit a statement or take part in hearings on the substance of the dispute*" remains able to challenge jurisdiction in both setting aside or enforcement proceedings.[57]

These decisions are unlikely to be the last word from the Singapore courts on this point, but it is clear that there are at least two exceptions to the preclusive effect of Article 16(3) under Singapore

50 *Id.* ¶ 71.
51 *Id.* ¶¶ 104–105, 111, 115, 123.
52 *Id.* ¶¶ 130, 132.
53 Rakna Arakshaka Lanka Ltd v. Avant Garde Maritime Services (Pte) Ltd., [2019] SGCA 33 (Sing.) [*hereinafter* "Rakna"].
54 *Id.* ¶ 72.
55 *Id.* ¶ 73.
56 UNCITRAL Sey. Gen., *Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration: Rep. of the Secretary-General*, U.N. Doc. A/CN.9/264 (Mar. 25, 1985) [*hereinafter* "Analytical Commentary"].
57 *Id.* at 39.

law (subject to other doctrines like waiver and estoppel).[58] Where a respondent refuses to participate in the arbitration at all, he may still apply to set aside any award against him later on jurisdictional grounds. Moreover, even if a party chooses not to mount an active challenge to the tribunal's jurisdiction (under Article 16(3) or Article 34), it may resist enforcement on the same grounds.

B. Other Interpretations of Article 16(3)

Against the approach taken in Singapore, the prevailing view in Germany, Canada, Hong Kong, and Australia is that Article 16(3) is the *only* avenue for challenging a preliminary award on jurisdiction.[59] Nata Ghibradze, undertaking a comprehensive survey of the case law on Article 16(3), attributes this to "*the primary purpose behind the mechanism of early determination of jurisdictional issues, legal certainty and efficiency*."[60] In *China Nanhai Oil Joint Service Corporation Shenzhen Branch* v. *Gee Tai Holdings Co. Ltd.* ["**China Nanhai Oil**"], the Hong Kong High Court stated in *obiter* that "*if you do not seek the view of the court [under Article 16(3)], then you cannot raise the matter subsequently at [the] enforcement stage*."[61] The Supreme Court of Quebec, in *Compagnie Nationale Air France* v. *Libyan Arab Airlines* ["**Compagnie**"], held that Article 943.1 of the Quebec Code of Civil Procedure (the equivalent of Article 16(3)) was the sole means of contesting the tribunal's preliminary ruling on jurisdiction – thus, excluding both setting aside and refusal of enforcement options.[62]

There is some support in the *travaux préparatoires* for this view. In particular, the Analytical Commentary and Working Group Reports show that the drafters' concerns behind Article 16 of the Model Law were in ensuring that any jurisdictional objections were raised early. It was stated by the UN Secretariat, in a comment on Article 16(3):[63]

> *"Where the arbitral tribunal rules as a preliminary question that it has jurisdiction, article 16(3) provides for instant court control in order to avoid unnecessary waste of money and time. […] In those less common cases where the arbitral tribunal combines its decision on jurisdiction with an award on the merits, judicial review on the question of jurisdiction is available in setting aside proceedings under article 34 or in enforcement proceedings under article 36."*

This comment leaves the effect of not utilising Article 16(3) ambiguous, but it has been suggested that these words indicate the drafters' intention of carving out Article 16(3) from the "*choice of remedies*" system.[64]

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58 Astro, [2013] SGCA 57, ¶¶ 199–202 (Sing.). It is stated in ¶ 200 that "the concept of waiver and estoppel are distinct. Broadly speaking, waiver of rights occurs when a party has indicated that it will be relinquishing its rights. Estoppel, however, requires something more. The party invoking the estoppel must typically show that it had relied on the representations of the other party to its detriment".

59 *See* Ghibradze, *supra* note 47, at 385–389; Remigius Oraeki Chibueze, *The Adoption and Application of the Model Law in Canada – Post-Arbitration Challenge*, 18(2) J. INT'L ARB. 191, 200–201 (2001).

60 Ghibradze, *supra* note 47, at 385–389.

61 China Nanhai Oil Joint Service Corporation Shenzhen Branch v. Gee Tai Holdings Co. Ltd., [1994] 3 H.K.C. 375, 676–677 (H.C.) (H.K.).

62 Compagnie Nationale Air France v. Libyan Arab Airlines, [2000] R.J.Q. 717 (Can. Que.); Ghibradze, *supra* note 477, at 387.

63 *UNCITRAL Model Law on International Commercial Arbitration: Note*, U.N. Doc. A/CN.9/309, *reprinted in* [1988] 19 UNCITRAL Y.B., U.N. Doc. A/CN.9/SER.A/1988, ¶ 25.

64 Ghibradze, *supra* note 47, at 384; BORN, *supra* note 6, at 3019, where the author states, "As discussed above, the better view is that positive jurisdictional rulings are properly characterised as awards, generally subject to annulment, recognition and enforcement like other awards, but national court authority on the subject remains divided."

In our view, the divergent approaches taken by the jurisdictions outlined above (as well as eminent commentators)[65] demonstrate – and stem in part from – the ambiguity of the drafters' intention. Absent any clear direction in the Model Law or the *travaux préparatoires*, a principled interpretation of Article 16(3) must consider what this provision sets out to achieve in the entire context of the scheme and purpose of the Model Law.

C. How Far should a Failure to Raise an Article 16(3) Challenge Preclude Setting Aside or Refusal of Enforcement on the Same Grounds?

i. Failure to Raise Article 16(3) should not Preclude Resisting Enforcement on Jurisdictional Grounds

Though much has been said about the drafters' intentions of expediting jurisdictional challenges, the structure and provisions of the Model Law do not suggest that jurisdiction is a question best reserved only to the seat court, or that any jurisdictional questions must be resolved quickly within a predefined time frame. That the ground for *refusing recognition and enforcement* of an award for lack of jurisdiction exists in Article 36 of the Model Law, in tandem with Article V(1) of the NYC, suggests that leeway is given to the enforcing court to examine the question of jurisdiction for itself regardless of deference to the seat court.[66] If so, there is no good reason why Article 16(3) must be carved out from the "*choice of remedies*" system, such that the enforcing court cannot consider the question of jurisdiction simply because it has been the subject of a *preliminary* ruling by the tribunal.

The contrary view (i.e., that failing to raise Article 16(3) precludes resisting enforcement on jurisdictional grounds) would introduce an arbitrary imbalance in the scheme of remedies in the NYC and Model Law. Everything would turn on whether the tribunal decides to issue its decision on jurisdiction as a preliminary ruling, or together with the merits in a final award.[67] If the tribunal addresses its jurisdiction only in a final award, Article 16(3) would not apply and a respondent has not one, but two chances to raise the jurisdictional objection (in setting aside, or refusing enforcement). On the other hand, if the tribunal chooses to issue a preliminary ruling, a dissatisfied party must invoke Article 16(3) or be bound by the tribunal's decision. But why should a respondent in the latter case be penalised by losing its passive remedy on the jurisdictional point, simply due to the form taken by the tribunal's jurisdictional ruling?

ii. Failure to Raise Article 16(3) should Generally Preclude Setting Aside Applications on Jurisdictional Grounds except in Exceptional Circumstances

In contrast to affirming the availability of passive remedies despite a failure to mount an Article 16(3) challenge, we suggest a more nuanced approach as far as setting aside applications are

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65 For commentators more inclined to the view that Art. 16(3) is not preclusive, *see*, *e.g.*, HOWARD HOLTZMANN & JOSEPH NEUHAUS, A GUIDE TO THE 2006 AMENDMENTS TO THE UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION: LEGISLATIVE HISTORY AND COMMENTARY 479 (2015); INT'L COUNCIL FOR COMM. ARB., INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION 84 (Jan Paulsson ed., 1990); *Cf.* KLAUS BERGER, INTERNATIONAL ECONOMIC ARBITRATION 365 (1993).

66 *See* Dallah Real Estate and Tourism Holding Co. v. Ministry of Religious Affairs, Govt. of Pakistan [2010] UKSC 46, ¶ 103 (Eng.). Lord Mance noted "Nor is there anything to support Dallah's theory that the New York Convention accords primacy to the courts of the arbitral seat, in the sense that the supervisory court should be the only court entitled to carry out a re-hearing of the issue of the existence of a valid arbitration agreement […] There is nothing in the Convention which imposes an obligation on a party seeking to resist an award on the ground of the non-existence of an arbitration agreement to challenge the award before the courts of the seat".

67 UNCITRAL, 2012 DIGEST OF CASE LAW ON THE MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION, art. 16, ¶ 14, at 79.

concerned: A party who fails to invoke Article 16(3) should generally be precluded from relying on the same annulment ground, *except* in circumstances where the Article 16(3) mechanism was not reasonably available.[68]

There is force in the view that a respondent who could have raised an Article 16(3) challenge, but chose not to do so, should not be allowed to raise the same objection in setting aside later. Both Article 16(3) and annulment lead to a final determination by the seat court on the tribunal's jurisdiction.[69] Since Article 16(3) was drafted to discourage a party from sitting on jurisdictional objections, it ought to have preclusive effect on any attempt to raise (at setting aside) a jurisdictional objection that could reasonably have been raised earlier.[70]

But there are situations where a party cannot sensibly be expected to have recourse to Article 16(3). It is undesirable to impose a blanket rule that Article 16(3) definitively precludes any later challenge under Article 34. In *Rakna*, the Singapore Court of Appeal stated without qualification that a "*non-participating respondent*" is one exception to the preclusive effect of Article 16(3).[71] On the facts, though *Rakna* dealt only with a fully non-participating respondent, who did not engage in the arbitration at all (beyond sending letters to the Singapore International Arbitration Centre ["**SIAC**"]) and had made clear its intention to stay away from the beginning. As commentators have pointed out, it may be useful to analyse the position of different types of non-participants:[72]

1. For *fully non-participating* respondents, like in *Rakna*, these parties did not engage in the arbitral process at all, and it would be clear to the claimant in such cases that the respondent cannot be said to have waived its right to object to the tribunal's jurisdiction.[73] By not participating, these respondents also do not contribute to the wasted costs and time in the arbitration.[74] Fully non-participating respondents would not run afoul of the purpose of Article 16(3), i.e., to require parties to bring their jurisdictional objections early instead of waiting until the award was rendered.

2. For *partially non-participating* respondents, however, the position is less clear. It may very well depend on how far the respondent chose to participate in the arbitral process before

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68 *See*, *e.g.*, Hanseatisches Oberlandesgericht Hamburg [HansOLG] [Hanseatic Higher Regional Court Hamburg] Nov. 8, 2001, CLOUT Case No. 562, 6 Sch. 04/01 (Ger.), where a party that had not raised any jurisdictional objection before the arbitral tribunal was later allowed to do so in setting-aside proceedings, because it had not been properly informed of the commencement of the arbitration.

69 Arts. 16(3) and 34(2)(a)(i) of the Model Law both subject the tribunal's power to rule on its own competence to final judicial control: *see* Analytical Commentary, *supra* note 56, at 122, ¶¶ 11–12.

70 *See*, *e.g.*, the SGCA's obiter statements in Astro, [2013] S.G.C.A. 57, ¶ 130 states that the court would be "surprised if a party retained the right to bring a setting-aside application on a ground which they could have raised via other active remedies before the supervising court at an earlier stage when the arbitration was still ongoing".

71 Rakna, [2019] SGCA 33, ¶ 74.

72 Darius Chan, *Is Article 16(3) of the Model Law a 'One-Shot Remedy' for Non-Participating Respondents in International Arbitrations?*, KLUWER ARB. BLOG (Sept. 5, 2018), *available at* http://arbitrationblog.kluwerarbitration.com/2018/09/05/article-163-model-law-one-shot-remedy-non-participating-respondents-international-arbitrations-2; Albert Monichino QC, *The Problem with Rakna: The Scope of the Preclusive Effect of Article 16(3) of the Model Law*, 31 SING. ACAD. L.J. 349, ¶ 38 (2019) [*hereinafter* "Monichino"].

73 Astro Nusantara International BV v. PT Ayunda Prima Mitra, [2013] 1 SLR 636, ¶ 133 (Sing.); *See also* Analytical Commentary, *supra* note 57, at 122, ¶ 9, where despite the view that the failure to raise the Art. 16(3) challenge in time precludes any arguments on jurisdiction later on, it is stated that such arguments "would remain applicable and of practical relevance to those cases where a party raised the plea in time but without success *or where a party did not participate in the arbitration*".

74 Monichino, *supra* note 72, ¶ 40.

stepping out. It has been suggested that a respondent who participates in the arbitration to contest the tribunal's jurisdiction, and who immediately steps out of the proceedings after the tribunal renders a preliminary ruling unfavourable to it, arguably did not prolong the dispute or contribute to wasted costs despite its limited participation.[75] We would, however, point out that there is nothing unfair about requiring a respondent who willingly participated in a preliminary hearing on jurisdiction to use the *full* range of measures available to challenge jurisdiction immediately, including invoking the Article 16(3) challenge.

D. Conclusion on Problem 2

The extent to which Article 16(3) precludes subsequent attempts to set aside or resist enforcement of an award on jurisdictional grounds varies by jurisdiction. Some jurisdictions, such as the Singapore courts, adopt a somewhat more "*interventionist*" approach, and are inclined to allow parties more opportunities to challenge the tribunal's jurisdiction before the courts. On the other hand, other courts have been strict on limiting the parties' jurisdictional challenge to Article 16(3). It is difficult to say which is truly a more "*pro-arbitration*" view. Arguably, both approaches can be justified on upholding either speed and finality, or ensuring the correctness of jurisdictional decisions, in the arbitral process. Therefore, in selecting the arbitral seat and potential places for subsequent enforcement of the award, parties should consider the legal position of these courts on the effect of Article 16(3) beforehand, and take steps to safeguard their right to challenge the tribunal's jurisdiction before the court.

IV. Problem 3: The Availability of Anti-Enforcement Injunctions from Seat Courts

Two recent English and Singapore cases affirm a very restrictive approach to the grant of anti-enforcement injunctions ["**AEI(s)**"], requiring "*exceptional circumstances*" beyond the threshold considered for the grant of anti-suit injunctions ["**ASI(s)**"]. What can a party do when it is faced with a foreign judgment, when it would prefer to arbitrate the dispute or enforce an award? There are several potential options, which this part of the article will explore after giving a brief overview of the two types of injunction and the cases on this.

A. Definitions

ASIs restrain ongoing court proceedings. They can be issued in pre-award situations to restrain a party from commencing litigation in breach of an arbitration agreement, as well as in post-award situations to restrain a party from challenging the award outside the seat, or litigating claims that have already been determined in arbitration.[76] The focus here is on ASIs granted in breach of an arbitration clause, i.e., "*contractual*" ASIs. AEIs, on the other hand, come into the picture after a foreign court issues a judgment. They restrain a party from *relying on or enforcing* that foreign judgment.[77] The difference between ASIs and AEIs is usefully thought of as: the former concerns the *working* of a foreign court and the latter with their *output*.[78]

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75 *Id.* ¶¶ 44–45.

76 Terna Bahrain Holding Co. WLL v. Al Shamsi and Ors. [2013] 1 Lloyd's Rep. 86 (Eng.); Michael Wilson and Partners Ltd. v. Emmott [2018] EWCA (Civ.) 51 (Eng.).

77 Ecobank Transnat'l Inc. v. Tanoh [2015] EWCA (Civ.) 1309 (Eng.) [*hereinafter* "Ecobank"].

78 *Id.* ¶ 91.

B. The Authorities – Two Recent Cases from England and Singapore

In *Ecobank Transnational Inc* v. *Tanoh* ["**Ecobank**"],[79] Ecobank and Mr. Tanoh were parties to an employment agreement containing an arbitration clause. In breach of that clause, Mr. Tanoh commenced proceedings in the courts of Togo and Cote d'Ivoire and obtained judgment in his favour. Subsequently, Ecobank obtained an *ex parte* interim injunction barring Mr. Tanoh from seeking recognition or enforcement of either foreign judgment.[80] The English Court of Appeal upheld the High Court's judgment discharging the interim injunction. Despite the fact that Mr. Tanoh's claims were brought in breach of the arbitration agreement and the bank had not submitted to the foreign courts,[81] an AEI was nonetheless refused.

The English authorities where AEIs were granted are "*few and far between*".[82] Such circumstances would include: (i) fraud on the part of the party obtaining the foreign judgment; (ii) where a judgment was obtained too quickly or secretly to enable an ASI to be obtained, and (iii) where a party could not have sought relief pre-judgment because either the exclusive jurisdiction agreement was reached post-judgment or he had no means of knowing that the judgment was being sought.[83] Further, delay in seeking injunctive relief was an important consideration, justified by a "*variety of reasons including the avoidance of prejudice, detriment and waste of judicial resources; the need for finality; and considerations of comity.*"[84] In the court's words, an applicant must act promptly and claim injunctive relief early, "*and should not adopt an attitude of waiting to see what the foreign court decides*".[85] Finally, the AEI was discharged because the bank could have sought an ASI at the outset of foreign proceedings but decided not to.

Sun Travels and Tours Pvt. Ltd. v. *Hilton International Manage (Maldives) Pvt. Ltd.* ["**Sun Travels**"],[86] concerned a Singapore-seated arbitration in which the tribunal rendered two awards against Sun. Hilton sought to enforce the award in the Maldives but ran into difficulties due to confusion about which Maldivian court had jurisdiction over enforcement. In the meantime, Sun commenced an action in the Maldives, essentially re-litigating the decided issues. Instead of immediately applying for anti-suit relief from the seat court, Hilton challenged the Maldivian action and failed. The Maldivian court issued judgment in favour of Sun. Hilton continued its attempt to enforce the awards, but enforcement was denied due to the Maldivian judgment.[87] Hilton appealed against the Maldivian judgment, while seeking (amongst others) a permanent ASI from the Singapore court to prevent Sun from relying on the Maldivian judgment. Instead of an ASI, an AEI was granted by the High Court,[88] but was later discharged by the Court of Appeal.

The Court of Appeal agreed with *Ecobank* that "*great caution*" should be exercised in granting AEIs because such an injunction would necessarily not have been sought promptly enough.[89] AEIs

79 *Id.*
80 *Id.* ¶ 24.
81 *Id.* ¶ 79.
82 *Id.* ¶ 118.
83 *Id.* ¶ 119.
84 *Id.* ¶¶ 126–127.
85 *Id.* ¶ 129.
86 Sun Travels and Tours Pvt. Ltd. v. Hilton Internat'l Manage (Maldives) Pvt. Ltd., [2019] SGCA 10 (Sing.) [*hereinafter* "Sun Travels"].
87 *Id.* ¶ 2.
88 *Id.* ¶ 43.
89 *Id.* ¶¶ 89-90.

would be granted only "*very sparingly*" and only where "*exceptional circumstances*" can be shown.[90] The test for when an AEI would be granted must be more stringent than that for ASIs because an AEI proscribes the enforcement of a foreign judgment on pain of contempt proceedings in the jurisdiction where the injunction is granted.[91] Granting an AEI would be "*comparable to nullifying the foreign judgment, […] when only the foreign court can set aside or vary its own judgments.*"[92]

Thus, to obtain an AEI, the applicant must show not only the breach of a legal right (i.e., breach of agreement),[93] but also "*exceptional circumstances*."[94] A non-exhaustive list of exceptional circumstances would include: (i) unconscionable conduct such as fraud, or (ii) when the applicant is not guilty of unconscionable delay, such as when it did not know of the foreign proceedings until delivery of the judgment.[95] However, the Singapore Court of Appeal did not consider the third exception in *Ecobank* (as discussed above) as a standalone ground.[96] The AEI was discharged because of Hilton's delay, which had resulted in the delivery of two Maldivian enforcement judgments and the filing of a Maldivian appeal.[97]

C. Discussion

i. Option 1: Argue against a Stricter Approach towards AEIs than ASIs

In jurisdictions where the matter has not been conclusively decided, the question arises whether a party should argue against a stricter approach towards AEIs compared to contractual ASIs, which are granted by default unless there are strong reasons not to.[98] The stricter approach towards AEIs is premised on the view that AEIs are more injurious to comity.

Comity in *Ecobank* was unpacked as comprising two facets: (i) comity vis-à-vis the prospective *enforcing* court, which has autonomy to decide whether to enforce a particular foreign judgment in accordance with its own law; and (ii) comity vis-à-vis the court *issuing* the foreign judgment, in terms of waste of foreign judicial resources.[99]

The first facet might be disputed. In *ICC Case No. 17176*,[100] the tribunal considered that an ASI is "*inherently more invasive*" than an AEI, i.e., that an ASI would be *more* injurious to comity than an AEI.[101] The logic is that an AEI does not cast aspersions on the competence of another court (as the pre-emptive nature of an ASI may be perceived to do), but only prevents the individual

90 *Id.* ¶ 121.
91 *Id.* ¶ 98.
92 *Id.*
93 Or, where non-contractual ASIs are concerned, vexatious or oppressive conduct.
94 Sun Travels, [2019] SGCA 10, ¶¶ 99, 105 where it is stated that the requirement of "*exceptional circumstances*" is traceable to the origins of an injunction as a form of equitable relief.
95 *Id.* ¶ 113.
96 *Id.* ¶ 104.
97 *Id.* ¶ 125.
98 Donohue v. Armco Inc [2002] 1 All ER 749.
99 Ecobank, [2015] EWCA (Civ.) 1309, ¶¶ 129, 132–133, 135.
100 ICC Case No. 17176, Final Award, [2016] 41 Y.B. COMM. ARB. 86–126 (Albert Jan Van den Berg ed.) (The tribunal had in a procedural order granted an interim AEI directing the respondents to refrain from enforcing any judgment rendered in state litigation for patent infringement claims before a final award was rendered in the arbitration. In its final award, it declined the grant of a permanent AEI because the situation had changed – the tribunal had in the final award found that the claimants could argue that they were licensed, with the consequence that the respondents would either withdraw their claims or the court would find that there was no infringement).
101 Maxwell Breana Obesi & Chrispas Nyombi, *Enforcement of anti-suit injunctions*, 36 EUR. COMPETITION L. REV. 513, 524–25 (2015).

respondent from enforcing a handed-down judgment. But that explanation arguably misses the point. ASIs are not regarded as injurious to comity because they cast aspersions on the competence of a foreign court, but because they indirectly interfere with foreign proceedings even if they do not purport to direct what a foreign court should do (because they act *in personam*).[102] On this view, AEIs would be equally (if not more) injurious to comity.

Whether the second facet can be challenged depends on how exactly the waste of resources is conceptualised. *Sun Travels* appears to have endorsed an approach where there will *always* be a waste of resources if the foreign court has issued a judgment. It rejected the argument that because one Maldivian judgment spanned two and half pages, the effort expended must have been negligible.[103] This approach is likely to be accepted unless a court is prepared to pass judgment on the effort expended by its foreign counterpart based on factors such as the complexity of the case and duration of the hearing.

On balance, the stricter approach to AEIs as opposed to ASIs, appears to be here to stay. In that light, it is also worthwhile recalling that even ASIs are not well-accepted across the common-civil law divide, being considered offensive in many quarters.[104]

ii. Option 2: Seek to Expand the Categories of "Exceptional Circumstances"

Next, a party seeking an AEI could seek to expand the categories of "*exceptional circumstances*." The main circumstance identified in *Sun Travels* is fraud, under the umbrella of unconscionable conduct (the other category appears to be a negative stipulation – it is necessary but insufficient for an applicant to have brought its claim in a timely manner). While *Ecobank* also identified fraud, it did not go so far as to use unconscionability as a unifying rationalising doctrine. Beyond fraud, what else might suffice? On the approach in *Sun Travels*, the categories are not closed as long as the defect in the procuring of the foreign judgment is traceable to unconscionable conduct.[105]

We suggest that unconscionability is *not* an appropriate unifying theme for the circumstances in which an AEI may be granted, notwithstanding the equitable roots of an injunction, because it is both over and under-inclusive. It is over-inclusive because unconscionability is associated with numerous doctrines, some of which transfer awkwardly to the grant of AEIs. For instance, a broad view of unconscionability may sometimes include duress or undue influence,[106] but it is odd to claim that there has been undue influence in the procuring of a foreign judgment. In other contexts, unconscionability appears to have been used as a synonym for dishonest or reprehensible conduct.[107]

102 Ecobank, [2015] EWCA (Civ.) 1309, ¶ 83; Sun Travels, [2019] SGCA 10, ¶ 69.
103 Sun Travels, [2019] SGCA 10, ¶ 123.
104 Obesi & Nyombi, *Recognition of anti-suit injunctions in civil and common law jurisdictions*, 36 EUR. COMPETITION L. REV. 473, 474 (2015).
105 Sun Travels, [2019] SGCA 10, ¶ 105 states as follows: "what is required for an AEI is exceptional circumstances tied to the notion of unconscionability and not exceptional circumstances in the abstract".
106 BOM v. BOK, [2018] SGCA 83, ¶ 118 (Sing.).
107 UKAA, § 68(2)(*g*) permits the court award to set aside an award procured by fraud; Celtic Bioenergy Ltd v. Knowles Ltd. [2017] EWHC 472, ¶ 103 (Eng.).

It is under-inclusive because it would exclude doctrines such as breach of natural justice,[108] which is a fairly uncontroversial ground for denying recognition and enforcement of a foreign judgment.[109] If such a judgment would be refused recognition and enforcement in any case, there would be no additional injury to comity (if indeed comity is the justification for a narrow test for granting AEIs) if an AEI were granted. It is also unclear whether the situation where a party could not have sought relief pre-judgment because the relevant agreement was reached post-judgment (accepted in *Ecobank*) can indeed be subsumed under unconscionable delay or fraud (as rationalised by *Sun Travels*). The better approach would therefore be the one in *Ecobank*, i.e., considering this as a standalone exception – if this exception ought to be recognised at all.

If the court does indeed accept that "*exceptional circumstances*" may be assessed on a case by case basis without reference to unconscionability as a unifying principle (or indeed, *any* unifying principle because analytical clarity in the form of a grand unifying design may not always be possible or appropriate in all cases), the potential scenarios where an AEI will be available will be much broader.

iii. Option 3: Accept alternatives to AEIs

Given the difficulties involved in seeking an AEI, it is also worthwhile for a party to consider whether to pursue alternative relief. It is no longer open to such a party to seek a stay of proceedings.[110] AEIs are, by definition, only necessary when foreign proceedings have concluded and judgment has been delivered. The viable alternatives are, thus, to pray: (i) that the breach of an arbitration agreement constitutes a defence to recognition and enforcement at common law, or (ii) for damages.

Dealing first with defences, breach of agreement is in some jurisdictions a statutorily recognised defence. For instance, under Section 32 of the Civil Jurisdiction and Judgments Act, 1982, a foreign judgment must be denied recognition and enforcement if the bringing of the foreign proceedings was "*contrary to an agreement under which the dispute in question was to be settled otherwise than by proceedings in the courts of that country*."[111] A similar mechanism operates under Section 5(3)(b) of Singapore's Reciprocal Enforcement of Foreign Judgments Act,[112] which deems a foreign court not to have had jurisdiction if the action was brought in breach of agreement. These provisions would cover arbitration agreements. But it is unclear how far this defence exists at common law or how far courts will be willing to extend the rationale of this defence beyond where its application is mandated by statute.

Alternatively, a party could seek damages for breach of arbitration agreement in lieu of an AEI. The reasoning in the case of ASIs, which applies by analogy to AEIs, runs thus that the arbitration clauses have both positive and negative aspects (i.e., taking the necessary steps to arbitrate, and an

108 With its two sub-rules of the right to be heard (*audi alteram partem*), and impartiality and independence (rule against bias).

109 Adams v. Cape Industries [1991] 1 All ER 929 (Eng.); Beals v. Saldanha [2003] 3 S.C.R. 416 (Can.).

110 Michelle Lee, *Anti-suit injunctions in aid of international arbitrations: A rethink for Singapore*, 27 SING. ACAD. L. J. 438, 442 (2015); Tiong Min Yeo, *The Contractual Basis of the Enforcement of Exclusive and Non-Exclusive Choice of Court Agreements*, 17 SING. ACAD. L. J. 306, 321 (2005).

111 Civil Jurisdiction and Judgments Act 1982, c. 27, § 32(1)(a) (Eng.).

112 Reciprocal Enforcement of Foreign Judgments Act 2001, § 5(3)(b) (Sing.).

undertaking not to sue other than in the agreed forum).[113] Thus, in principle, damages should be available for their breach.[114] Damages would compensate the innocent party for wasted legal costs in defending the parallel court proceedings,[115] and potentially, losses above and beyond such expenditure (e.g., the amount of loss equivalent to that expended in satisfying a foreign judgment that was successfully enforced).[116]

However, there are difficulties in claiming damages in lieu of an AEI, listed as follows:

First, it is not universally accepted that the breach of an arbitration agreement can found a claim for substantive damages,[117] because, in one view, arbitration agreements are procedural in nature.[118]

Second, who should the remedy of damages be sought from: the seat court or a tribunal?[119] The innocent party should opt for the latter because that would be consistent with his commitment to arbitrate,[120] but it is questionable whether under most institutional model clauses a tribunal can award damages for breach of the *arbitration agreement* as opposed to the main contract.[121] But this difficulty is surmountable by either rooting the tribunal's power to award damages for breach of arbitration agreement in the law applicable to the agreement in question,[122] or giving a broad approach to construction of the arbitration clause. Even so, damages in lieu of AEIs is evidently an imperfect remedy.

D. Conclusion on Problem 3

A party faced with a foreign judgment obtained in breach of an arbitration agreement may seek to obtain an AEI, but the conditions where an AEI are available are narrowly circumscribed. This seems to be the approach taken even in "*pro-arbitration*" jurisdictions such as England and Singapore. The importance of party autonomy and upholding parties' agreement to arbitrate seems to take a backseat to concerns of international comity. The alternative remedies of breach of agreement as a defence to enforcement and damages for breach of arbitration agreement have their own limitations. Neither is a perfect substitute for an AEI. Once again, therefore, the old adage holds true: prevention, through getting a stay or an ASI, is better than cure.

V. Problem 4: Enforcement of Arbitral Awards that have been Set Aside at the Seat

One aspect of international arbitration which invariably requires the assistance of national courts is in the recognition and enforcement of arbitral awards. An award is toothless if it cannot be enforced against the assets of the award debtor. The NYC was, therefore, enacted to provide

113 UST-Kamenogorsk Hydropower Plant JSC v. AES UST-Kamenogorsk Hydropower Plant LLP [2013] UKSC 35 (Eng.).

114 Paul Todd, *Damages for breach of an arbitration agreement*, 5 J. BUS. L. 404, 423 (2018).

115 Rahim Moloo, *Arbitrators Granting Antisuit Orders: When Should They and on What Authority*, 26 J. INT'L ARB. 675, 697–698 (2009).

116 Albert Dinelli, *The Limits on the Remedy of Damages for Breach of Jurisdiction Agreements: The Law of Contract meets Private International Law*, 38(3) MELB. U. L. REV. 1023, 1035 (2015).

117 *But see* Donohue v. Armco Inc [2002] 1 Lloyd's Rep. 425 (Eng.).

118 Jean Pierre-Fierens & Bart Volders, *Monetary Relief In Lieu of Anti-Suit Injunctions for Breach of Arbitration Agreements*, 9(34) REVISTA BRASILEIRA DE ARBITRAGEM 93, 96 (2012); Tiong Min Yeo, *The Contractual Basis of the Enforcement of Exclusive and Non-Exclusive Choice of Court Agreements*, 17 SING. ACAD. L.J. 306, 322 (2005).

119 Julio Cesar Betancourt, *Damages for breach of an international arbitration agreement under English arbitration law*, 34 ARB. INT'L 511, 529 (2018).

120 *Id.* at 529.

121 *Id.*

122 *Id.*

common legislative standards for court recognition and enforcement of foreign and non-domestic arbitral awards.[123] However, despite the attempts at harmonisation, there is substantial divergence over whether arbitral awards annulled by a seat court can nevertheless be enforced by the enforcing courts in another jurisdiction.

A. Different Approaches to Article V(1)(e) of the NYC

We take as our starting point Article V(1)(e) of the NYC, which states that recognition and enforcement of an award may be refused, if among other things:

> "*The award has not yet become binding on the parties, or* ***has been set aside*** *or suspended* ***by a competent authority of the country in which****, or under the law of which,* ***that award was made***." [emphasis added]

Some academics[124] and national courts[125] have interpreted Article V(1)(e) as imposing a *mandatory* obligation to refuse enforcement once an award has been set aside by the seat court. Some regard the term "*may be refused*" as an indication that the enforcement court still has the *discretion* to enforce an award notwithstanding that it may have been set aside by the seat court.[126]

These divergent approaches are well-illustrated by the case of *Nikolay Viktorovich Maximov* v. *Open Joint Stock Company "Novolipetsky Metallurgichesky Kombinat"* ["**Maximov**"].[127] The International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation issued an arbitral award for almost USD 300 million in favour of Mr. Maximov.[128] The award debtor, NMLK, applied to set aside the award in the Moscow court on the basis that two of the arbitrators had failed to disclose their connections to Mr. Maximov's expert witnesses. But the judge also based her decision on two other grounds which were not argued by the parties, in relation to the public policy of Russia and the non-arbitrability of the dispute.[129] Undeterred by the annulment at the seat court, Mr. Maximov sought enforcement of the award in Paris, Amsterdam and London.[130] The French courts concluded that, the fact that the award had been set aside by the Russian courts was not sufficient to refuse recognition in France; the award had been procured in accordance with the parties' agreed contractual method and it should, therefore, be recognised and enforced.[131] In contrast, the Dutch courts held that an award set aside at the seat can only be enforced in the Netherlands under exceptional circumstances, for e.g., if giving effect to the

123 Convention on the Recognition and Enforcement of Foreign Arbitral Awards Objectives, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3 [*hereinafter* "NYC"].

124 Albert Jan van den Berg, *Enforcement of Annulled Awards?*, 9(2) ICC BULL. 15 (1998) [*hereinafter* "Albert Jan van den Berg – Enforcement"].

125 Astro, [2013] SGCA 57, ¶¶ 76–77 (Sing.).

126 SIMON GREENBERG ET AL., INTERNATIONAL COMMERCIAL ARBITRATION: AN ASIA-PACIFIC PERSPECTIVE 66 (2011).

127 Nikolay Viktorovich Maximov v. Open Joint Stock Company (Novolipetsky Metallurgichesky Kombinat) [2017] EWHC (Comm.) 1911 (Eng.) [*hereinafter* "Maximov"].

128 *Id.* ¶ 1.

129 *Id.* ¶ 5.

130 *Id.* ¶ 10.

131 Mike McClure, *Enforcement of Arbitral Awards that have been Set Aside at the Seat: The Consistently Inconsistent Approach across Europe,* KLUWER ARB. BLOG (June 26, 2012), *available at* http://arbitrationblog.kluwerarbitration.com/2012/06/26/enforcement-of-arbitral-awards-that-have-been-set-aside-at-the-seat-the-consistently-inconsistent-approach-across-europe.

annulment judgment would violate Dutch public policy.[132] On the evidence before it, there were no such exceptional circumstances. A similar outcome was arrived at by the English court.[133] Mr. Maximov sought enforcement in London and argued that the Russian courts' setting aside judgments should not be recognised, as they were clearly biased. Enforcement was refused because there was no "*cogent evidence of bias*."[134]

B. Territorialism and Delocalisation

The willingness of the French courts to enforce the annulled award, and the corresponding reluctance of the English and Dutch courts to do the same, broadly correspond to the two main schools of thought on this issue. "*Territorialism*" holds that arbitration is inextricably tied to the seat, the law of the seat exclusively regulates the arbitration, and so seat-court annulment kills the award for good.[135] It ceases to have legal existence,[136] making subsequent enforcement a legal impossibility.[137] As explained by the Singapore Court of Appeal in the *Astro* case referred to in earlier sections: "*the contemplated erga omnes effect of a successful application to set aside an award would generally lead to the conclusion that there is simply no award to enforce.*"[138]

In contrast, the "*delocalisation*" theory holds that the seat of the arbitration is chosen only for convenience.[139] Arbitrators do not derive their powers solely from the seat's laws, but from the sum of all the legal orders that recognise the validity of the arbitration agreement and the award.[140] Therefore, the decisions of the seat court have no bearing on the validity of the underlying award, and an enforcing court is free to decide whether to enforce an award based on its own domestic laws. The delocalisation theory is championed most famously by the French courts. In *Arab Repub. of Egypt* v. *Chromalloy Aeroservs., Inc.* ["**Chromalloy**"], the Paris *Cour d'Appel* succinctly summarised the position thus:[141]

> *"[…] Considering finally that the award rendered in Egypt was an international award which by definition was not integrated into the legal order of that country such that its existence continues despite its nullification and that its recognition in France is not contrary to international public policy."*

C. Evaluating the Merits of Each Approach – No Satisfactory Solution?

i. Delocalisation

It may be argued that delocalisation is more consistent with the plain words of the NYC. The phrase "*may be refused*" suggests that an enforcing state retains the discretion to enforce an award even if it has been set aside by a competent authority of the seat. The French cases also rely on the

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132 Marike R. P. Paulsson, *Enforcement of Annulled Awards: A Restatement for the New York Convention?*, KLUWER ARB. BLOG (Dec. 21, 2017), *available at* http://arbitrationblog.kluwerarbitration.com/2017/12/21/enforcement-annulled-awards-restatement-new-york-convention.

133 Maximov, [2017] EWHC (Comm.) 1911.

134 *Id.* ¶ 63.

135 GREENBERG, *supra* note 126; FOUCHARD, GAILLARD, GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION 3 (Emmanuel Gaillard & John Savage eds., 1999) [*hereinafter* "FOUCHARD, GAILLARD & GOLDMAN"].

136 Albert Jan van den Berg, *Consolidated Commentary on the Court Decisions Concerning the New York Convention*, 28 Y.B. COMM. ARB. 562, 650 (2003); Albert Jan van den Berg – Enforcement, *supra* note 124, at 15, 16.

137 Albert Jan van den Berg – Enforcement, *supra* note 125, at 15, 16.

138 Astro, [2013] SGCA 57, ¶ 77.

139 Jan Paulsson, *Arbitration in Three Dimensions*, 60(2) INT'L & COMP. L. Q. 291, 298 (2011).

140 Emmanuel Gaillard, *The Enforcement of Awards Set Aside in the Country of Origin*, 14 ICSID REV. 16, 18 (1999).

141 Arab Republic of Egypt v. Chromalloy Aero Services, Inc., (1997) 26 Y.B. COMM. ARB. 691 [*hereinafter* "Chromalloy"]; Emmanuel Gaillard, *id.* at 25.

Article VII "*more favourable rights*" provision to refer to its own domestic laws on the recognition and enforcement of arbitral awards.[142] It should be noted that the French approach may not work in every country; for e.g., in jurisdictions that have incorporated Article V(1)(e) of the NYC into their own domestic laws there would no longer be a "*more favourable right*" in domestic law.[143] Moreover, delocalisation better accords with parties' intentions. By electing to arbitrate their dispute rather than submitting to the jurisdiction of any particular court, parties can be taken to have intended for extra-curial adjudication of their dispute. The "*territorialist*" approach contradicts parties' intentions as it over-emphasises the seat court.

However, a major drawback of the "*delocalisation*" approach is that it may severely detract from the finality and certainty of the arbitral decision, because it leaves the door open for the same issues to be re-litigated across multiple jurisdictions. One commentator has referred to these as "*floating awards*" which cannot be set aside once and for all,[144] and which encourages forum shopping as unsuccessful claimants attempt to get multiple bites at the cherry. The high potential for conflicting decisions creates "*systemic uncertainty*",[145] which undermines the harmonisation objectives of the NYC and the Model Law, in turn leading to higher transaction costs for commercial parties.[146]

In practice, however, these concerns might be somewhat overstated. Despite the fear of indefinite re-litigation, parties are realistically only concerned with the enforcement of awards in jurisdictions where the respondent has sizeable assets.[147] Once those have been exhausted, there need not be any legitimate concerns that further enforcement actions will be taken in other jurisdictions.

As for the risk of multiple conflicting decisions, this could in part be mitigated by the doctrine of issue estoppel. Issue estoppel typically arises when a foreign court of competent jurisdiction has decided on a specific issue between the same parties, which subsequently comes before another court for review.[148] Where there is an identity of parties and facts, issue estoppel may apply such that the parties are bound by the findings of the first court that hears the matter.[149] However, in the arbitration context, a distinction is sometimes drawn between decisions on distinctly domestic issues, such as public policy and arbitrability of disputes, and those which have a more international character, such as the interpretation of agreements or treaties.[150] Issue estoppel is less likely to arise

142 *See*, *e.g.*, Société Hilmarton Ltd v. Société Omnium de traitement et de valorisation, (1995) 20 Y.B. COMM. ARB. 663; Chromalloy, (1997) 26 Y.B. COMM. ARB. 691; Art. VII of the NYC, also referred to as the "more favourable right" provision, states that the provisions of the NYC do not deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law of the country where such award is sought to be relied upon. The French court relied on this provision to reason that the party seeking enforcement of the arbitral award could rely upon its own domestic arbitration law which does not list Art. V(1)(e) of the NYC as a ground for the refusal of enforcement.

143 *See*, *e.g.*, International Arbitration Act 2002, § 31(2)(f) (Sing.) [*hereinafter* "IAA"]; Indian Arbitration Act, § 48(1)(e); Arbitration Ordinance, (2011) Cap 609, § 87(1)(f) (H.K.).

144 Emmanuel Gaillard, *supra* note 140, at 40.

145 Sundaresh Menon, Chief Justice of Singapore, The role of the national courts of the seat in international arbitration, Keynote address at the 10th Annual International Conference of the Nani Palkhivala Arbitration Centre, New Delhi, ¶ 12 (Feb. 17, 2018) [*hereinafter* "Menon CJ's Keynote Address"].

146 Sundaresh Menon SC, *Transnational Commercial Law: Realities, Challenges and a Call for Meaningful Convergence*, SING. J. LEGAL STUD. 231, 243–244 (2013).

147 Emmanuel Gaillard, *supra* note 140, at 40.

148 Renato Nazzini, *Enforcement of International Arbitral Awards: Res Judicata, Issue Estoppel, and Abuse of Process in a Transnational Context*, 66 AM. J. COMP. L. 603, 616 (2018).

149 *See, e.g.*, Mills v. Cooper [1967] 2 All ER 100 (Eng.).

150 Diag Human SE v. The Czech Republic [2014] EWHC 1639 (Comm.) (Eng.).

in the former situation, given that the domestic courts of a particular jurisdiction would be best placed to decide such matters. Nevertheless, the application of issue estoppel would serve to reduce the instances of conflicting decisions on the same issues. It however remains to be seen whether such a typically common law doctrine will gain widespread adoption and acceptance in the civil law jurisdictions.

ii. Territorialism

The "*territorialist*" response is that the seat court's exclusive supervisory jurisdiction over the award would be futile if that decision need not be recognised in other enforcement jurisdictions. Further, this would efface the distinction between setting aside and refusal of enforcement.[151] Territorialism is not inconsistent with parties' intentions because the parties have willingly submitted to the supervisory jurisdiction of the seat court by agreeing on the seat of the arbitration (or, in a case where the choice of seat cannot be gleaned from the arbitration agreement, submitted to the jurisdiction of the tribunal to decide on the seat).

The main concern that arises from the territorialist approach is that it accords too much deference to the seat court in relation to matters which should be in the purview of each State's domestic courts. From an enforcing court's perspective, it is difficult to see why an award which does not offend the public policy of the enforcing court should not be given effect to – simply because the seat court finds it objectionable by local standards.

A few arguments against territorialism may be made. *First*, an enforcing court should not be hamstrung by the decision of the seat court on the status of the award, since the enforcing court has a strong interest in reviewing the award (it being the place where assets are actually seized).[152] *Second*, it would undermine confidence in international arbitration if even local standards (in the seat), that are perceived as improper or objectionable by the international community,[153] must invariably be given effect to. This problem is illustrated by the case of *Yukos Capital SARL* v. *OJSC Rosneft Oil Company* ["**Yukos**"],[154] which involved a Russian-seated arbitration. The tribunal rendered four awards in favour of Yukos against Rosneft. Rosneft successfully applied to set aside the awards before the Moscow *Arbitrazh* court.[155] Yukos nevertheless sought enforcement of the awards in Netherlands and England. Both the Amsterdam Court of Appeal and the English High Court held that the decision of the Moscow *Arbitrazh* court, setting aside the awards "*was a result of a partial and dependent judicial process.*"[156] The English High Court added that to recognise such a decision would offend "*basic principles of honesty, natural justice and domestic concepts of public policy*."[157] The *Yukos* case, therefore, demonstrates that there may be circumstances where it would be in the interests of justice to recognise an award even if it has been set aside.

151 Astro, [2013] SGCA 57, ¶ 77.
152 Emmanuel Gaillard, *supra* note 140, at 45.
153 Daniel Ang, *Enforcement of Arbitral Awards Set Aside at the Seat of Arbitration: The Way Forward for Art. V(1)(e) in Singapore*, 9 SING. L. REV. – JURIS ILLUMINAE 1, 8 (2018).
154 Yukos Capital S.A.R.L. v. OJSC Rosneft Oil Co. [2014] EWHC (Comm.) 2188 (Eng.).
155 *Id.* ¶¶ 1–2.
156 *Id.* ¶ 7.
157 *Id.* ¶ 20.

D. The Way Forward

Neither delocalisation nor territorialism presents a perfect approach. Delocalisation entirely disregards the decision of the seat court, generates uncertainty, and leads to wasted resources and costs due to re-litigation of a similar issue. On the other hand, strict territorialism unnecessarily restricts the capacity of an enforcement court to do justice under the right circumstances, as illustrated by the *Yukos* case.

The best way forward may be a middle path between the two approaches. Chief Justice Sundaresh Menon of the Supreme Court of Singapore, speaking extra-judicially at a conference in New Delhi, proposed what is essentially a two-step approach:[158]

1. The enforcing court should first decide whether it will recognise the seat court's annulment decision, by applying its own domestic rules on the recognition of foreign judgments. If the seat court's setting aside judgment is recognised, its decision should be respected, and enforcement should be refused.

2. If the foreign judgment is recognised, the next question is whether it raises an issue estoppel in the enforcement proceedings. If so, the seat court decision is the final word on that issue. Issue estoppel would likely arise where the seat court has made a decision on grounds with more "*transnational*" resonance, such as on the basis of procedural irregularities. Conversely, if the ground for setting aside is one that has a distinctly domestic flavour, the seat court's decision would not ordinarily be capable of founding an issue estoppel, and the enforcing court would be entitled to consider the matter afresh in accordance with its own domestic standards.

The grounds of setting aside under Article 34 of the Model Law that, in the authors' view, have greater "*transnational resonance*" are Article 34(2)(a)(ii) on improper notice or inability to present its case, Article 34(2)(a)(iii) on disputes outside the scope of submission to arbitration and Article 34(2)(a)(iv) on the tribunal's composition not according with the parties' agreement or *lex arbitri*. Conversely, the grounds under Article 34(2)(b) which involve arbitrability of disputes and public policy would be grounds for setting aside with a distinctly domestic flavour.

This proposed approach accords due deference to the decision of the seat court, in line with the "*territorialist*" approach, while also ensuring that the enforcement court retains discretion on matters involving its own domestic public policy, in line with the "*delocalisation*" theory. Such an approach also ensures that there is finality *only* when the decision of the seat court should properly be regarded as the final word on the matter. This would generally be in situations where the requirements for recognition and enforcement of a foreign judgment are met. For example, if a decision of the seat court is one that has not been arrived at through proper judicial processes, it would not be in the interest of parties for that decision to be accorded any sort of finality. Indeed, a foreign judgment which has been tainted by a breach of natural justice or unfairness would not likely be recognised in a foreign jurisdiction. In relation to issues of public policy, it should be each State's domestic courts which deliver the conclusive determination. Therefore, an enforcing court is unlikely to enforce a foreign judgment which has been decided purely on the basis of the domestic public policy of that jurisdiction. Ultimately, there is no utility to be derived from finality

158 Menon CJ's Keynote Address, *supra* note 145, ¶ 23.

simply for the sake of finality, and courts should be afforded the flexibility to consider afresh whether to enforce a foreign arbitral award notwithstanding that it has been annulled in the seat court in the appropriate situations.

The effectiveness of Menon CJ's proposed approach is, in the authors' view, bolstered by the Convention of February 01, 1971 on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters ["**Hague Convention**"], which was adopted by the Hague Conference on Private International Law on July 02, 2019.[159] The Hague Convention establishes common provisions on mutual recognition and enforcement of judicial decisions and leads to greater harmonisation and convergence in the recognition rules applied by each country. The Hague Conference presently has 83 members, including both civil and common law jurisdictions.

E. Conclusion on Problem 4

The extent to which a seat court's decision on the status of an award should be conclusive has long been uncertain. Pragmatists may contend that there is an incentive for national jurisdictions to take differing positions on this issue, precisely to market their attractiveness as an enforcement jurisdiction. Nevertheless, the authors believe that the more principled way forward is to tread the middle ground between pure territorialism and delocalisation – a unified approach which better aligns itself to the objectives of NYC.

VI. Problem 5: When can Enforcement be Refused under Article V(1)(d) of the NYC?

In our discussion of Problem 4 above, we touched on the enforcement court's residual discretion to allow enforcement even if a ground for refusal under Article V of the NYC has been made out, pursuant to the permissive language of Article V.[160] Following from the discretionary nature of Article V, the approach varies by jurisdiction. In the final part of this article, we examine the approaches taken *vis-à-vis* Article V(1)(d) of the NYC, which states that recognition and enforcement of an award may be refused if:

> "*The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place.*"[161]

Specifically, some enforcement courts have read in a requirement for the award debtor to show that there has been a *serious violation* of the parties' agreement, which in turn led to the award debtor suffering *material prejudice* (the material prejudice test) before enforcement will be refused. In contrast, other courts have held that *any* deviation from the parties' agreement, no matter how slight (the minimal deviation test), would warrant refusal of enforcement. These approaches have been discussed below.

A. The Material Prejudice Test

One example of an enforcement court which has applied the material prejudice test is the Singapore High Court in *Sanum Investments Limited* v. *ST Group Co, Ltd* ["**Sanum Investments**

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159 The Final Act of the Hague Convention was signed and adopted by the Hague Conference on Private International Law on July 2, 2019, HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW (July 8, 2019) *available at* https://www.hcch.net/en/news-archive/details/?varevent=687.

160 BORN, *supra* note 6, §§ 22.02 [A], 25.11 [A], and 26.03 [B][6].

161 NYC, *supra* note 123, art. V(1)(d).

(HC)"].[162] Two agreements were entered into between the parties: (1) a Master Agreement containing a multi-tiered dispute resolution clause providing for (amongst others) mediation followed by arbitration "*using an internationally recognised mediation/arbitration Company in Macau*",[163] and (2) a Participation Agreement entered into in conjunction with the Master Agreement, which provided for arbitration at the SIAC before a three-member tribunal.[164] The claimant commenced proceedings before a three-member tribunal seated in Singapore. Although the respondents objected and did not participate, the tribunal was satisfied that the dispute between the parties fell under the Participation Agreement, and eventually rendered an award in favour of the claimant.[165] The respondents sought to refuse enforcement relying on, amongst others, Article 36(1)(a)(iv) of the Model Law, which is the equivalent of Article V(1)(d) of the NYC.[166]

Disagreeing with the tribunal, the court concluded that the underlying dispute was governed solely by the Master Agreement, and the proper seat of the arbitration was Macau.[167] The appointment of a three-member tribunal was also not in accordance with the Master Agreement, because the Master Agreement was silent on this issue and the default position would be that prescribed by the chosen institutional rules (i.e., the SIAC rules which provided for a sole arbitrator).[168] Nonetheless, enforcement was not refused. Since the respondents had not produced any evidence of prejudice arising out of what the court characterised to be *procedural* irregularities, they had failed to discharge their burden of proof.[169] On appeal, the Singapore Court of Appeal accepted that *"lack of prejudice is not relevant to a jurisdictional challenge but would be relevant to a procedural challenge"*.[170] The Singapore Court of Appeal explained that such differing treatment of procedural and jurisdictional challenges is justified because of the need to avoid misusing the applicable procedural provisions as a basis for denying the award on the ground that there was a minor or incidental breach of an unimportant term in the arbitration agreement.[171] However, the Court of Appeal overturned the decision of the court below and held that it was not necessary for a party resisting enforcement of an award on the basis of a *wrongly seated arbitration* to demonstrate actual prejudice arising from the wrong seat.[172]

The material prejudice test has also been adopted in a line of cases from the United States District Courts. In *Compagnie des Bauxites de Guinee* v. *Hammermills, Inc.* ["**Hammermills**"],[173] the award debtor attempted to resist enforcement on the ground that the tribunal had breached the agreed arbitral procedure by inserting into the award the amount of legal costs to be assessed against a party after the draft award had been approved by the ICC International Court of Arbitration. The District Court rejected this contention, and held that the award should be set aside "*only if such violation worked substantial prejudice to the complaining party.*"[174] The test has also been adopted in the

162 Sanum Investments Limited v. ST Group Co., Ltd. & Ors., [2018] SGHC 141 (Sing.).
163 *Id.* ¶ 23.
164 *Id.* ¶ 24.
165 *Id.* ¶ 21.
166 *Id.* ¶ 111.
167 *Id.* ¶ 109.
168 *Id.* ¶ 110.
169 *Id.* ¶ 114.
170 *Id.* ¶ 93.
171 *Id.* ¶ 94.
172 *Id.* ¶ 103.
173 Compagnie des Bauxites de Guinee v. Hammermills, Inc., 724 F.2d 369 (1983) (U.S.).
174 *Id.* at 17.

District Court decision in *Karaha Bodas Company, LLC* v *Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*.[175]

B. The Slight Deviation Test

Other enforcement courts have adhered strictly to the parties' agreement and refused enforcement without requiring the award debtor to show serious breach of material prejudice.

In *Polimaster Ltd.* v. *RAE Systems, Inc.* ["**Polimaster**"],[176] the dispute resolution clause in the parties' agreement required the settlement of disputes by negotiation, and failing that, "*by means of arbitration at the defendant's side*," which the parties agreed referred to the geographical location of the defendant's place of business. The claimant in the arbitration correctly commenced arbitration against the respondent in California (the respondent's place of business), with the reservation that no counterclaims could be filed because, pursuant to the dispute resolution clause, counterclaims against the claimant could only have been filed in Belarus (the claimant's place of business). But the respondent did end up making several counterclaims, which the arbitrator declined to dismiss because it would be contrary to "*notions of fairness, judicial economy and efficiency*" to "*[p]rosecut[e] a claim with affirmative defences in one venue while simultaneously prosecuting counterclaims almost identical to the affirmative defences in another [venue]*."[177] The arbitrator dismissed the claims and allowed the counterclaim. The United States Court of Appeals for the Ninth Circuit, adopting a strict construction of the dispute resolution clause, held that the counterclaims should have been brought against the claimant in Belarus. The court "*must enforce the parties' agreement according to its terms, even if the result is inefficient.*"[178]

The approach taken by the court in *Polimaster* clearly prioritises party autonomy. Not only was the court unconcerned about whether the appellants had suffered material prejudice, it also disregarded the efficiency gains of having the entire matter heard in the same set of proceedings. We note here that the deviation from the parties' agreement in this case was in relation to the choice of the seat.

In the Hong Kong case of *China Nanhai Oil Joint Service Corporation Shenzhen Branch* v. *Gee Tai Holdings Co Ltd* ["**China Nanhai Oil**"],[179] refusal of enforcement was sought on the basis that parties had selected arbitrators from the Shenzhen list of arbitrators when the arbitration agreement specified for selection from the *Beijing* list. The Supreme Court of Hong Kong refused enforcement on this ground because the arbitrators technically did not have jurisdiction to decide the dispute,[180] though it should be noted that enforcement was ultimately allowed because the party objecting to enforcement had taken part in the arbitration despite being aware that the arbitrators were chosen from the wrong list.[181]

175 Karaha Bodas Co., LLC v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 190 F. Supp. 2d 936, [2002] (U.S.), *cited in* 27 Y.B. COMM. ARB. 814.

176 Polimaster Ltd. v. RAE Systems, Inc., 623 F.3d 832 (9th Cir. 2010) (U.S.).

177 *Id.* at 832, 835.

178 *Id.* at 832, 841.

179 China Nanhai Oil Joint Service Corporation Shenzhen Branch v. Gee Tai Holdings Co. Ltd., [1995] 2 H.K.L.R. 215. (H.C.) (H.K.)

180 *Id.* ¶ 36.

181 *Id.* ¶ 49.

Another example of a case where the court refused enforcement of an award due to the improper composition of the arbitral tribunal was *Encyclopaedia Universalis S.A.* v. *Encyclopaedia Britannica Inc.* ["**Universalis**"].[182] The clause provided that, amongst others, if the two arbitrators chosen by the parties could not reach consensus on a third arbitrator, the third arbitrator would be appointed by the Tribunal of Commerce of the Seine. The appellant prematurely requested the Tribunal of Commerce of the Seine to appoint a third arbitrator.[183] It was held that the premature appointment of the third arbitrator "*irremediably spoiled the arbitration process*."[184] The manner in which the third arbitrator was to be appointed was "*more than a trivial matter of form. Article V(1)(d) of the New York Convention itself suggests the importance of the arbitral composition, as failure to comport with an agreement's requirements for how arbitrators are selected [was] one of only seven grounds for refusing to enforce an arbitral award.*"[185] As the court noted:

> *"As to the complaint that this exalts form over substance, at the end of the day, we are left with the fact that the parties explicitly settled on a form and the NYC requires that their commitment be respected."*[186]

C. Reconciling the Authorities and a Way Forward

The material prejudice test approach is in line with the pro-enforcement aims of the NYC. By preventing relatively trivial deviations from the agreed arbitral procedure from resulting in the non-recognition of an award,[187] it, in the authors' view, prevents Article V(1)(d) from being used as a hair-trigger for non-recognition. The pro-enforcement approach in this regard reflects how procedural matters are generally subject to minimal curial intervention in arbitration.[188] On the other hand, the material prejudice test view has been criticised for detracting from party autonomy, because deviations from parties' agreed procedure may end up being disregarded more frequently. Party autonomy is yet another underlying principle of the NYC, as reflected in how the NYC does away with the previous requirement in Article 1(c) of the 1927 Geneva Convention on the Execution of Foreign Arbitral Awards that there be a departure from procedure as set out in *both* the parties' agreement *and* the *lex arbitri*. Against this, the converse would apply to the slight deviation test.

Having regard to the pros and cons of each test, we contend that the material prejudice test should be confined to cases where the alleged non-compliance is in relation to the parties' agreement on procedure. The slight deviation test should apply to jurisdictional defects and errors pertaining to the seat, in respect of which refusal of enforcement should be more readily granted. This would strike the appropriate balance between party autonomy and ensuring that awards are not refused enforcement too readily. As George A. Bermann argues, the procedural/jurisdictional distinction is significant not only because the policy of minimal curial intervention does not apply to jurisdictional defects, but also because it would be practically very difficult to affirmatively demonstrate prejudice for jurisdictional defects.[189] It is possible to determine "*what would have been*" for procedural errors that are discrete and contained events, but not so where the deviation from

182 Encyclopaedia Universalis S.A. v. Encyclopaedia Britannica, Inc., 403 F.3d 85 (2nd Cir. 2005) (U.S.).
183 *Id.* at 88.
184 *Id.* at 91.
185 *Id.*
186 *Id.*
187 Holding Tusculum BV v. Louis Dreyfus Holding SAS [2008] Q.C.C.S. 5904 (Can. Que.).
188 Born, *supra* note 6, at 3562.
189 George A. Bermann, *Honouring the Parties' Intent*, 1 ICC BULL. 13 (2019).

the agreement relates to tribunal composition (which depends on human interactions and dynamics).[190] Moreover, where the defect pertains to the selection of the seat, the loss of the right to seek annulment of the award that would eventually be rendered in a competent court of the agreed seat is *inherently* prejudicial.[191]

This approach would reconcile the cases mentioned above: in *Hammermills*, the material prejudice test applied because the defect was procedural. In *Polimaster*, the slight deviation test applied because the problem pertained to the seat, while in both *China Nanhai Oil* and *Encyclopaedia Universalis*, the slight deviation test applied because the alleged defect was with the composition of the tribunal. Indeed, none of the cases where awards were enforced, (notwithstanding some deviation from the parties' agreement in relation to procedural issues) involved deviations from the chosen seat, except the *Sanum Investments (HC)* case, which has been overruled by the Singapore Court of Appeal.

D. Conclusion on Problem 5

It is acknowledged that the line between a procedural and jurisdictional defect may not always be clear. For example, if the deviation from the parties' choice of seat affects little more than the procedural rules that are applied, should this still be regarded as a jurisdictional error when the effect is relatively trivial? Be that as it may, the authors think that the application of the material prejudice test in cases of procedural defects will ensure that arbitral awards are not set aside for trivial reasons, thereby maintaining the legitimacy and effectiveness of international arbitration.

VII. Conclusion

Hence in answer to the questions posed at the beginning:

1. Appeals to a national court may be permitted under statute, though these rarely succeed in practice. Appeals to an appellate tribunal are likely to be permitted. However, appeals from a national court to a tribunal should not be allowed.

2. Failure to request the seat court to determine the tribunal's jurisdiction under Article 16(3) of the Model Law should generally preclude later attempts to set aside the award on the same jurisdictional ground, unless the Article 16(3) mechanism is not reasonably available. But the failure to invoke Article 16(3) should not preclude reliance on the same ground to resist enforcement.

3. AEIs are difficult to obtain. The alternative remedies of breach of agreement as a defence to enforcement and damages for breach of arbitration agreement have their own limitations. Therefore, a party's best bet is to obtain a stay or an ASI.

4. A middle path should be struck between delocalisation and territorialism. The enforcing court should first decide whether it will recognise the seat court's annulment decision. If recognition is denied, it would not be constrained by the decision. If the foreign judgment is recognised, the next question is whether it raises an issue estoppel in the enforcement proceedings. If so, the seat court's decision has the final say.

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190 *Id.*

191 Bermann, *supra* note 189, at 14.

5. The material prejudice test should be confined to cases where the alleged non-compliance with the parties' agreement is a procedural one. The slight deviation test should apply to jurisdictional defects and errors pertaining to the seat, in respect of which refusal of enforcement should be more readily granted.

Extrapolating from these answers, although jurisdictions are sometimes identified as "*pro-arbitration*" or "*arbitration-friendly*," there is, in reality no jurisdiction that seeks to enforce foreign arbitral awards regardless of the circumstances of the particular case. While party autonomy can be given great weight and underpin a general stance of minimal curial intervention, there are always limits. For e.g., the Singapore courts have adopted a more sympathetic stance towards procedural breaches, by accepting the material prejudice test for refusing enforcement of an award under Article V(1)(d) of the NYC. This promotes the enforcement and recognition of awards, and bolsters the legitimacy and efficacy of international arbitration as a dispute resolution mechanism. But in the same vein, the Singapore courts have indicated that if an award has been set aside at the seat, it will accord primacy to the judgment of the seat court and refuse enforcement of the award. Other examples of approaches taken by the Singapore courts which are not, at first glance, regarded as strictly pro-arbitration include for example, adopting a narrow approach when deciding whether to grant an AEI even if there has been a breach of an agreement to arbitrate.

The authors are therefore of the view that to label a jurisdiction as being pro or anti-arbitration is a false dichotomy. Even a court which aims to be a "*promoter*" of arbitration has an equally important role as a "*regulator*" of the arbitral process. Indeed, for arbitration to flourish, it is of paramount importance for national courts to create laws which are fair and just, even if it means that party autonomy has to temporarily take a backseat.

Much like zombies, these perennial questions – and the broader controversy over the interaction between courts and tribunals – never die. And exactly like zombies, they gnaw at the brain. The debate will continue to rage. But in the meantime, we are pretty sure that the arbitration fraternity will keep calm and carry on.

THE NEW SWISS APPROACH TO THE RIGHT TO BE HEARD – BALANCING CHALLENGING FAIRNESS AND EFFICIENCY CONCERNS

Simon Gabriel[*] *& Andreas Schregenberger*[+]

Abstract

Based on recent jurisprudence by the Swiss Supreme Court on the parties' right to be heard, this article analyses how the focus on evaluating infringements of the right to be heard under Swiss lex arbitri *has shifted over time. Whereas some decades ago any infringement of the right to be heard led to the annulment of the arbitral award, the Swiss Supreme Court now requires that there be a potential impact on the substantive outcome of the case. As an analysis of pertinent jurisprudence in Austria, England and in relation to the International Centre for Settlement of Investment Disputes ["**ICSID**"] demonstrates, this appears to be in line with developments at the forefront of international arbitration. From a practical point of view, the new Swiss approach is likely to help tribunals increase procedural efficiency, one of the utmost concerns of modern arbitration. At the same time, parties may, in certain scenarios, run into evidentiary problems in annulment proceedings. As a potential remedy, parties may need to react timely with more specifically reasoned objections against any potential infringements of the right to be heard by arbitral tribunals. The authors trust that the new approach adopted by the Swiss Supreme Court will increase procedural efficiency in Swiss arbitration proceedings.*

I. Introduction

Procedural fairness is quintessential for every adjudication of a dispute. This holds true for international arbitration proceedings, whether they are conducted in India, Switzerland or elsewhere. Despite the universal recognition of the parties' right to be heard, arbitral awards are rarely successfully challenged on such basis.[1] In the view of State courts reviewing such challenges, not every violation of the parties' right to be heard should lead to an annulment. But what are the appropriate consequences of its violation? In particular, should an arbitral award only be annulled for a violation of the parties' right to be heard if it can be demonstrated that such an infringement was likely to have had an impact on the outcome of the award?

The Swiss Supreme Court, like other State courts dealing with setting aside proceedings,[2] has developed this practically relevant question for decades. Interestingly, it was more than once that the challenge by a professional tennis player made the Swiss Supreme Court reconsider and further refine its extensive case law on the right to be heard and the question of the appropriate

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1 *Cf.* Felix Dasser & Piotr Wójtowicz, *Challenges of Swiss Arbitral Awards – Updated Statistical Data as of 2017*, 36(2) ASA BULL. 279 (2018).

2 *Cf.* GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION 3255 (2d ed. 2014).

requirements for a successful challenge of an arbitral award in this regard.[3]

As a first step, this article will discuss earlier and more recent approaches of the Swiss Supreme Court on due process challenges of arbitral awards. In order to compare the Swiss approach internationally, the article will then go on to provide a brief overview of the challenge requirements in select international arbitration jurisdictions. This comparative overview is not intended to be comprehensive, but to serve as a comparative reference for the Swiss development. In the final section, we will analyse key factors which necessarily have to be considered in the context of this topic, such as the crucial balancing of fairness and efficiency. After all, the question of how the parties' right to be heard in international arbitrations shall be effectively protected is a key question not only for Switzerland, but also of general importance for the future success of international arbitration.

II. The Swiss Supreme Court's Approach to the Right to Be Heard

A. Legal Framework

As a general principle of fair procedural treatment under Swiss *lex arbitri*, the arbitral tribunal shall ensure equal treatment of the parties and the right of the parties to be heard in adversarial proceedings.[4] These principles are of a mandatory nature.[5] Although Switzerland is not a Model Law country (i.e. a signatory to the United Nations Commission on International Trade Law [UNCITRAL] Model Law on International Commercial Arbitration), the pertaining provision of Article 182(3) of the Swiss Private International Law Act ["**PILA**"] reflects the international minimum standards when it comes to due process.[6] A violation of the right to be heard is one of the few grounds under Swiss *lex arbitri*[7] on the basis of which an arbitral award may be challenged,[8] or refused recognition and enforcement.[9]

The PILA as such, however, is silent on the content of the parties' right to be heard and the requirements for a successful challenge as a consequence of a violation thereof. In practice, the case law developed by the Swiss Supreme Court is of outstanding importance. As the only forum

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3 *Cf.* Tribunale fédérale [TF] [Swiss Supreme Court] Mar. 22, 2007, BUNDESGERICHTSENTSCHEID [BGE] 133 III 235 (Switz.) [*hereinafter* "Cañas Decision"], *infra* § II(D); Bundesgericht [BGer] [Swiss Supreme Court] Jan. 29, 2019, 4A_424/2018 (Switz.) [*hereinafter* "Errani Decision"], *infra* § II(E).

4 *Cf.* LOI FÉDÉRALE SUR LE DROIT INTERNATIONAL PRIVÉ [SWISS PRIVATE INTERNATIONAL LAW ACT] Dec. 18, 1987, art. 182(3) (Switz.) [*hereinafter* "SWISS PRIVATE INTERNATIONAL LAW ACT" or "PILA"]: "Whatever procedure is chosen [by the parties and/or the arbitral tribunal], the tribunal shall assure equal treatment of the parties and the right of the parties to be heard in an adversarial procedure." (Informal translation).

5 *Cf.* CHRISTOPH MÜLLER & SABRINA PEARSON, SWISS CASE LAW IN INTERNATIONAL ARBITRATION, art. 182, ¶ 3.1 and cited case law (3d ed. 2019) [*hereinafter* "MÜLLER & PEARSON"]; STEFANIE PFISTERER, BASLER KOMMENTAR INTERNATIONALES PRIVATRECHT, art. 190, § 60 (Honsell et al. eds., 3d ed. 2013) [*hereinafter* "PFISTERER"].

6 *Cf.* United Nations Commission on International Trade Law (UNCITRAL), Model Law on International Commercial Arbitration arts. 18, 34 and 36, 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"]; MICHAEL E. SCHNEIDER & MATTHIAS SCHERER, *in* BASLER KOMMENTAR INTERNATIONALES PRIVATRECHT, art. 182, ¶ 49 (Honsell et al. eds, 3d ed. 2013).

7 The term "Swiss *lex arbitri*" used in this article refers to Chapter 12 of the Swiss Private International Law Act, which addresses *international* arbitrations in Switzerland.

8 *Cf.* SWISS PRIVATE INTERNATIONAL LAW ACT, art. 190(2)(d) (Switz.): "Proceedings for setting aside the award may only be initiated [...] where the principle of equal treatment of the parties or their right to be heard in an adversary procedure has not been observed." (Informal translation).

9 *Cf.* SWISS PRIVATE INTERNATIONAL LAW ACT, art. 194 (Switz.); United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards arts. 1(b), 1(d) and 2(v), June 10, 1958, 330 U.N.T.S. 38.

before which an arbitral award rendered in Switzerland may be challenged, it is the Swiss Supreme Court which has effectively shaped the contours of the right to be heard. This holds, in particular, true for the requirements to set aside an award due to infringements of the right to be heard.

As a matter of principle, the Swiss Supreme Court resorts to the guidelines and case law developed with a view to the provisions of the Swiss Federal Constitution and domestic law.[10] In doing so, the court follows a pragmatic approach, thereby allowing itself to adjust the scope of the right to be heard depending on the assessment of a particular case. Essentially, the right to be heard under Swiss *lex arbitri* entails the right of a party (i) to give its views on any and all circumstances pertinent for the decision; (ii) to support its legal points; (iii) to make motions; (iv) to present relevant evidence; (v) and to participate in any hearings.[11] These practical implications of the right to be heard are always to be understood as such being embedded in adversarial proceedings i.e. each party must be granted the opportunity to scrutinize the other party's arguments, to express its views thereon and to try to prove them wrong with its own allegations and means of evidence.[12]

Finally, it is important to note that the right to be heard encompasses a sender (party) and a recipient (arbitral tribunal) angle:[13] it may be violated when a party is prevented from effectively expressing its views in the proceedings ("active" violation; e.g., because the tribunal does not grant an opportunity to comment on a specific subject), as well as when the tribunal – for whatever reason – does not take any expressed views into consideration ("passive" violation; e.g., where an arbitral award is reasoned in detail, but does not address an argument raised by the party which is relevant to the outcome of the dispute).[14] In the words of the Swiss Supreme Court:

> "*The right to be heard […] does not require that an international arbitral award be reasoned. However, jurisprudence has inferred a minimum duty on arbitral tribunals to analyse and deal with the relevant issues. This duty is violated if an arbitral tribunal inadvertently or due to a misunderstanding fails to consider allegations, arguments, evidence or offers of evidence which have been raised by a party and are important for the award.*"[15] (Informal translation)

B. Formal Nature as Constitutional Guarantee

10 *Cf.* Tribunale fédérale [TF] [Swiss Supreme Court] Apr. 26, 2016, BUNDESGERICHTSENTSCHEID [BGE] 142 III 360, ¶¶ 4.1.1–4.1.2 (Switz.) ("The right to be heard, as guaranteed by art. 182(3) and 190(2)(d) PILA, does not in principle have a content different from that enshrined in constitutional law […]." and "However, the right to be heard in adversarial proceedings in Switzerland, far from being unlimited, is subject to significant restrictions in the field of international arbitration.") (Informal translations) [*hereinafter* "SFT 142 III 360"].

11 *Cf.* MÜLLER & PEARSON, *supra* note 5, art. 182, ¶ 3.3.1 and cited case law; JOACHIM KNOLL, ARBITRATION IN SWITZERLAND: THE PRACTITIONER'S GUIDE, art. 182, ¶ 32 (Arroyo ed., 2d ed. 2018); DANIEL GIRSBERGER & NATALIE VOSER, INTERNATIONAL ARBITRATION: COMPARATIVE AND SWISS PERSPECTIVES ¶¶ 905, 1620 (3d ed. 2016).

12 *Cf.* Tribunale fédérale [TF] [Swiss Supreme Court] Feb. 19, 2007, BUNDESGERICHTSENTSCHEID [BGE] 133 III 139, ¶ 6.1 (Switz.); MÜLLER & PEARSON, *supra* note 5, art. 182, ¶ 3.4 and cited case law.

13 *Cf. infra* § IV(C) and the corresponding chart.

14 *Cf.* Cañas Decision, BUNDESGERICHTSENTSCHEID [BGE] 133 III 235, ¶ 5.3; *infra* § II(D).

15 *Cf.* Errani Decision, 4A_424/2018, ¶ 5.2.1; MÜLLER & PEARSON, *supra* note 5, art. 182, ¶ 3.3.12 and cited case law.

By virtue of its express mention in the fundamental rights section of the Swiss Federal Constitution,[16] the right to be heard has an exceptionally strong footing in Swiss law as a procedural guarantee covering all legal proceedings.

The purpose of the right to be heard against its constitutional background is twofold: on the one hand, the right to be heard serves as a means of clarifying the facts of the case (presentation of the facts, taking of evidence), and thus, of establishing the truth in the process. On the other hand, the right to be heard should, in the sense of equality of arms, enable the parties to have a personal right to participate (*persönlichkeitsbezogenes Mitwirkungsrecht/droit personnel de participer*) in the process which leads to the issuing of the decision.[17]

According to its general importance as a fundamental right – vesting the parties with a right to *properly participate* – the right to be heard is regularly construed and referred to by the Swiss Supreme Court as a right of formal nature: its violation, thus, leads to the annulment of the contested decision irrespective of the chances of success of an appeal on the merits.[18] This also holds true in the field of international arbitration.[19]

This initial approach taken by the Swiss Supreme Court may be illustrated by its landmark decision in SFT 121 III 331, a dispute arising out of a service agreement for construction projects in Turkey.[20] The sole arbitrator based its decision on factual findings contrary to the submissions of both parties. More specifically, the sole arbitrator found that the agent had stopped rendering any services for the principal in June 1991, while the parties had submitted that services had been rendered by the agent even after June 1991. The finding of the sole arbitrator was, in his opinion, relevant to the outcome of the case under the legal concept of a synallagmatic relationship[21] between the parties. Accordingly, he concluded that for lack of services, no further consideration was owed by the principal to the agent after June 1991. In the challenge proceedings before the Swiss Supreme Court, the sole arbitrator, while admitting his error on the mentioned factual finding, submitted that his legal analysis had led to the same result i.e. that the agent had to conclude that the service agreement had (impliedly) been terminated by the principal.[22]

The Swiss Supreme Court ruled that the sole arbitrator had refused the agent's right to be heard by not taking note of its corresponding submission.[23] Moreover, the court stated that – due to

16 *Cf.* CONSTITUTION FÉDÉRALE [CST] [SWISS FEDERAL CONSTITUTION] Apr. 18, 1999, art. 29(2) (Switz.): "Each party to a case has the right to be heard." (Informal translation by the Swiss Federal Office of Justice).

17 *Cf.* MYRIAM A. GEHRI, BASLER KOMMENTAR SCHWEIZERISCHE ZIVILPROZESSORDNUNG, art. 53, ¶ 3 (Karl Spühler et al. eds., 3d ed. 2017).

18 *Cf.* Tribunale fédérale [TF] [Swiss Supreme Court] Mar. 23, 2011, 5A_791/2010, BUNDESGERICHTSENTSCHEID [BGE] 137 I 195, ¶ 2.2; PETER KARLEN & JULIA HÄNNI, *in* BASLER KOMMENTAR SCHWEIZERISCHE ZIVILPROZESSORDNUNG, art. 29 (BV), ¶ 32(a) (Karl Spühler et al. eds., 3d ed. 2017).

19 *Cf.* MÜLLER & PEARSON, *supra* note 5, art. 182, ¶ 3.3.1 and cited case law; *but see* BERNHARD BERGER & FRANZ KELLERHALS, INTERNATIONAL AND DOMESTIC ARBITRATION IN SWITZERLAND ¶ 1755 (3d ed. 2015).

20 *Cf.* Tribunale fédérale [TF] [Swiss Supreme Court] Apr. 25, 1995, BUNDESGERICHTSENTSCHEID [BGE] 121 III 331 [*hereinafter* "SFT 121 III 331"].

21 Under Swiss contract law, a synallagmatic relationship describes the situation where two performance obligations are in an exchange relationship ("*synallagma*"): one party promises its performance only because the other party promises something in return (*quid pro quo*), *cf.* BERNHARD BERGER, ALLGEMEINES SCHULDRECHT ¶ 285 (3d ed. 2018).

22 *Cf.* SFT 121 III 331, ¶¶ 3, 3(b).

23 *Cf. Id.* ¶ 3(b).

the formal nature of the right to be heard – the award had to be set aside irrespective of the prospects of success on the substantive level of the case "*since the actual meaning [of the formal procedural guarantee of the right to be heard] is not to ensure that the decision on the merits is free of errors in accordance with the cognition of the appellate court, but to guarantee the parties an independent assessment of the claims and factual assertions submitted to the court in conformity with the procedure.*"[24] (Informal translation)

C. Phase I: Emphasis on Formal Nature and its Implications

On the basis of the formal nature of the right to be heard, the Swiss Supreme Court developed its traditional approach with the two basic requirements for a successful challenge of an arbitral award:

First, the right to be heard does not protect the parties from erroneous decisions as such and, hence, not from a *substantive* denial of justice. The purpose of the right to be heard is not to ensure a flawless decision on the merits, but to protect the parties from a *formal* denial of justice in providing the parties with the possibility to participate in an independent assessment of their claims and submissions by the tribunal.[25] The Swiss Supreme Court specified this requirement as follows:

> "*A formal denial of justice only exists if the parties are prevented from participating in the process, influencing it and putting forward their point of view, and thus their right to be heard is effectively undermined by the obvious oversight. This alone justifies annulling the decision without regard to the substantive chances of success of the complaint, since the right to be heard does not guarantee substantive correctness but the right of the parties to participate in the decision-making process.*"[26] (Informal translation)

Second, not every (technical) violation of the right to be heard leads to a successful challenge. The hurdles for an effective denial of justice are higher. The Swiss Supreme Court intervenes only if a party succeeds in establishing that the error or inadvertence of the arbitral tribunal prevented it from presenting its arguments and the necessary evidence on an issue relevant to the proceedings:

> "*If the arbitral decision were set aside in the event of any obvious oversight, irrespective of the substantive prospects of success of the challenge, the Federal Supreme Court would have a cognition in the context of the arbitral complaint which it does not even have as a proper appeal instance in other proceedings […] Rather, the party concerned must demonstrate that the oversight of the court made it impossible for it to introduce and prove its point of view on an issue relevant to the proceedings.*"[27] (Informal translation)

Consequently, the initial test developed by the Swiss Supreme Court was for the party concerned to establish (only) that it was prevented, by error or inadvertence of the arbitral tribunal, from *presenting (and proving) its views* in respect of an *issue relevant to the proceedings*. In other words, the

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24 *Cf. Id.* ¶ 3(c).
25 *Cf. supra* § II(B); *Id.* ¶ 3(c).
26 *Cf.* Tribunale fédérale [TF] [Swiss Supreme Court] Sept. 10, 2001, BUNDESGERICHTSENTSCHEID [BGE] 127 III 576, ¶ 2(d) [*hereinafter* "SFT 127 III 576"].
27 *Cf. Id.* ¶ 2(f).

decisive factor was that a party has been *disadvantaged in the proceedings* and its right to participate had been devalued in such a way that it was, as a result, in no better position than if it had not been granted the right to be heard on a decisive question at all.[28] In turn, if it was established that the procedural conditions allowed the party to put forward its arguments and the tribunal took note of the party's submissions, the right to be heard was not affected.[29]

D. Phase II: Increased Requirements and Potential Causality

Although the constitutional footing of the right to be heard has remained the same, the initial test developed by the Swiss Supreme Court has evolved over time and become more stringent. The first major step in the direction of a more restrictive approach taken by the Swiss Supreme Court may be illustrated by the famous *Cañas* case of 2007,[30] which concerned a dispute between the professional tennis player, Guillermo Cañas (who would later challenge the award) and the Association of Tennis Professionals ["**ATP**"] arising out of a positive drug test during a tournament in Acapulco, Mexico.

In this case, the tennis player had put forward a number of subsidiary arguments before the Court of Arbitration for Sport ["**CAS**"], in the event that it rejected his main submissions. However, the arbitral tribunal did effectively ignore a number of these subsidiary arguments in its legal analysis. While the main submission refuted the allegation that he had committed any fault in connection with the reception of the tested drug, the subsidiary submissions addressed the non-compliance of any sanction with a number of allegedly applicable laws.[31]

First, the Swiss Supreme Court held that the concerned party has to establish that it was not heard on an *important point* (not only an issue relevant to the proceedings).[32] *Second*, the court established a new "double test" with a new requirement of potential causality:

> "*It is for the party concerned to establish, on the one hand, that the arbitral tribunal did not examine some of the facts, evidence or law that it had properly put forward in support of its submissions and, on the other hand, that those facts were of such nature as to affect the outcome of the dispute*."[33] (Informal translation)

The introduction of this new requirement had no negative impact on the success of the challenge in the case. The Swiss Supreme Court held that the subsidiary arguments made by the tennis player were likely to alter the outcome of the dispute, since they excluded the possibility of imposing any sanction on him. Their relevance could, hence, not be denied from the outset. In the view of the Swiss Supreme Court, the CAS had in its decision not sufficiently indicated (save for a timid reference to Delaware law in its summary of the appellant's legal pleadings) why it considered that the laws relied on by the appellant were not applicable in the present case.

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28 *Cf. Id.* ¶ 2(e); confirmed in Cañas Decision, BUNDESGERICHTSENTSCHEID [BGE] 133 III 235, ¶ 5.2; MICHELE ALBERTINI, DER VERFASSUNGSMÄSSIGE ANSPRUCH AUF RECHTLICHES GEHÖR IM VERWALTUNGSVERFAHREN DES MODERNEN STAATES 90 (2000).

29 *Cf.* Tribunale fédérale [TF] [Swiss Supreme Court] Dec. 10, 2002, 4P.207/2002, ¶ 4 and chart *infra* § IV(C).

30 *Cf.* Cañas Decision, BUNDESGERICHTSENTSCHEID [BGE] 133 III 235.

31 *Cf. Id.* ¶ 5.3.

32 *Cf. Id.* ¶ 5.2; interestingly, the Swiss Supreme Court refers to SFT 127 III 576, ¶ 2(f), although the passage herein refers to "*an issue relevant to the proceedings*".

33 *Cf. Id.* ¶ 5.2.

Consequently, it could not be excluded, so the court reasoned, that the omission was the result of an inadvertence on the part of the arbitral tribunal. The Swiss Supreme Court concluded that due to the formal nature of the right to be heard, the challenged award had to be set aside, regardless of the outcome of the effective analysis of the subsidiary legal pleadings put forward by the appellant.[34]

Although the Swiss Supreme Court formally introduced a new requirement to the initial test, its actual application in the *Cañas* decision shows that it did not effectively change the traditional approach of the Swiss Supreme Court: the violation of the right to be heard must be *relevant* for the decision, so that it can be proven to what extent the elements not taken into account *were eligible to have an impact* on the decision.[35] However, as the *Cañas* decision shows, a demonstration of the *causal connection* between the violation of the right to be heard and the outcome of the decision is not required. This "eligibility" test used to be applied by the tribunal until recently, including in another landmark decision on the right to be heard, SFT 142 III 360.[36]

Pursuant to very recent case law, however, this eligibility test has been replaced by an approach of a "hard" causality requirement.

E. Phase III: Emphasis on Interconnection with Outcome of the Award

Lately, the Swiss Supreme Court has issued two decisions setting a new framework for successful challenges due to infringements of the right to be heard.[37]

One of them, the *Errani Case*,[38] illustrates a second major shift by the Swiss Supreme Court to a more restrictive approach. In this case, a dispute between the professional tennis player Sara Errani (who would later challenge the award) and a sports organization (i.e., the Italian doping agency, NADO) arose out of a positive drug test. The CAS did not provide the tennis player with an opportunity to comment on the effects of the backdating of her suspension period from the date of the arbitral award. The Swiss Supreme Court held that, as the tennis player could not have expected that the CAS would rule seven months later than she had anticipated, and the arbitral tribunal had not offered her the opportunity to express her views on future effects of the backdating from the date of the CAS decision, the CAS had thereby violated her right to be heard.[39]

Surprisingly, the tennis player's challenge of the CAS decision was, nevertheless, unsuccessful. While the double test pursuant to the *Cañas* case as such remained essentially the same,[40] the Swiss Supreme Court put particular emphasis on the notion that the right to be heard is "*not an end in itself*" and thereby embedded the test in a new legal setting:

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34 *Cf.* Cañas Decision, BUNDESGERICHTSENTSCHEID [BGE] 133 III 235, ¶ 5.3.

35 *Cf.* PFISTERER, *supra* note 5, art. 190, ¶ 70.

36 *Cf.* SFT 142 III 360, dealing in particular with the right to reply (*Replikrecht*; *droit de réplique*).

37 *Cf.* Errani Decision, 4A_424/2018; Tribunale fédérale [TF] [Swiss Supreme Court] Apr. 18, 2018, 4A_247/2017 (Switz.).

38 *Cf.* Errani Decision, 4A_424/2018.

39 *Cf. Id.* ¶ 5.7.

40 *Cf. Id.* ¶ 5.2.2: "Thus, in addition to the alleged violation, the party allegedly affected by the arbitrators' inadvertence must demonstrate, on the basis of the grounds set out in the challenged award, that the facts, evidence or law which it had duly presented, but which the arbitral tribunal failed to take into consideration, were of such nature as to influence the outcome of the dispute." (Informal translation).

> "*Undoubtedly, the right to be heard is a constitutional guarantee of a formal nature. However, since it is not an end in itself, when it is not clear what influence its violation may have had on the procedure, there is no reason to set aside the challenged decision […]. This case law also applies, mutatis mutandis, to international arbitration*."[41] (Informal translation)

Applying this test to the facts of the *Errani* Case, the Swiss Supreme Court found that the appellant had failed to demonstrate that the violation of her right to be heard could have any impact on the decision of the CAS. The court reasoned as follows:

> "*However, the Court does not see what influence this violation may have had on the fate of the dispute. If she had been questioned by the Panel before it handed down its sentence, the appellant could certainly have claimed that her sporting performance had, in her view, been generally negative in the previous months and that a backdating would be less harmful to her. However, this would not have changed the fact that it was impossible to predict the athlete's future performance […]. Therefore, it is not demonstrated that the violation of the athlete's right to be heard could have had any impact on the solution adopted by CAS*."[42] (Informal translation)

With this decision, it becomes evident that the Swiss Supreme Court has changed its approach, compared to its initial stance that a violation of the right to be heard "*justifies annulling the decision without regard to the substantive chances of success.*"[43] The very notion of the formal nature of the right to be heard is to guarantee the formal participation of the parties. Under this notion, the substantive outcome of a dispute is secondary. This holds, in particular, true as the right to be heard is a personal right to participate in the decision-making process of the tribunal. Against this background, the right to be heard as such, indeed, appears in its initial interpretation by the Swiss Supreme Court as an end in itself.

The major impact of the *Errani* decision on the requirements for a successful challenge might be illustrated if the facts of the *Cañas* decision were to be examined under the new regime. In the *Cañas* decision, the Swiss Supreme Court held that regardless of the outcome of the effective analysis of the subsidiary legal pleadings, the award had to be set aside. If we look at the reasoning of the Swiss Supreme Court in the *Errani* decision, it is likely that the court would have run a *prima facie* analysis on the potential impact of the subsidiary legal pleadings on the outcome of the dispute.

F. First Conclusion

Originally, the right to be heard was considered as formal in nature in that a violation of the right to be heard had to result in the setting aside of the challenged decision, no matter whether the violation had adversely impacted the outcome of the case or not.

In the meantime, the right to be heard has – in two major shifts – moved away from such formal nature. Nowadays, the challenging party has to establish that the outcome of the dispute would

41 *Cf. Id.* ¶ 5.2.2.
42 *Cf. Id.* ¶ 5.7.
43 *Cf.* SFT 127 III 576, ¶ 2(d).

have been (practically) affected if the right to be heard had not been infringed. Consequently, the challenging party must not only establish that its right to be heard was violated in connection with an important issue of the case, but also effectively show that such violation was likely to have had an adverse impact on the outcome of the award. We understand that this is the case if the operative part of the award (in German: "*Dispositiv*") would have any different content, had the right to be heard not been violated.

This new approach taken by the Swiss Supreme Court has set the scene for a *de facto* change of the nature of the right to be heard. The referral by the Swiss Supreme Court to the constitutional right of formal nature is, therefore, at least questionable.[44] This major change has important implications. Thus, while the procedural efficiency has been strengthened, one of the core pillars of the right to be heard – the personal right to participate in the process of issuing the award – has been more and more undermined.

III. Selected International Developments

In the following section, three different challenge regimes of important international arbitration jurisdictions (or, in the case of ICSID, international dispute settlement systems) shall be briefly considered, specifically with regards to the nature of the right to be heard. In this way, the Swiss approach may be compared to international developments in this field.

A. Austria: No Requirement to Demonstrate Influence on Award

In Austria, as it is a Model Law country,[45] the parties to arbitration proceedings shall be treated fairly and each party shall be given the right to be heard.[46] Accordingly, the violation of the right to be heard is a ground for setting aside the award.[47] Like in Switzerland, statutory laws are silent on the content and scope of the right to be heard in international arbitration and the requirements for a successful challenge based on a violation thereof.[48] While the parties' right to be heard is mandatory in nature,[49] the Austrian Supreme Court generally takes a restrictive approach on the content of the parties' right to be heard in arbitration proceedings; pursuant to longstanding jurisprudence of the Austrian Supreme Court, the right to be heard is only infringed if a party was not able to present its case at all.[50]

We understand the majority of legal doctrine in Austria to submit that the challenging party is not required to demonstrate that the violation of its right to be heard had any effect on the

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44 *Cf.* Axel Buhr, *The Right to be Heard: A Constitutional Guarantee of No Formal Nature*, DRSK – DER DIGITALE RECHTSPRECHUNGS-KOMMENTAR [THE DIGITAL CASE LAW COMMENTARY] ¶ 20 (May 9, 2019).

45 *Cf. supra* § II(A).

46 *Cf.* ZIVILPROZESSORDNUNG [ZPO] [CIVIL PROCEDURE STATUTE] § 594(2) (Austria): "The parties shall be treated fairly. Each party shall be given a right to be heard." (Informal translation).

47 *Cf.* ZIVILPROZESSORDNUNG [ZPO] [CIVIL PROCEDURE STATUTE] § 611(2) (Austria): "An arbitral award shall be set aside if a party was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was for other reasons unable to present its case." (for an unofficial translation, *see* STEFAN RIEGLER, ARBITRATION LAW OF AUSTRIA: PRACTICE AND PROCEDURE, § 611 (Riegler et al. eds., 2007) [*hereinafter "*RIEGLER"]).

48 *Cf. supra* § II(A).

49 *Cf.* Reinmar Wolff, *Verzicht auf rechtliches Gehör im Schiedsverfahren*, *in* PRIVATAUTONOMIE UND IHRE GRENZEN IM WANDEL 172 (Michael Nueber et al. eds., 2015).

50 *Cf.* Oberster Gerichtshof [OGH] [Austrian Supreme Court] Feb. 23, 2016, 18 OCg 3/15p, ¶ 3.2(a) (Austria); Michael Nueber, *Neues zum rechtlichen Gehör im Schiedsverfahren*, 27 WIRTSCHAFTSRECHTLICHE BLÄTTER 130 (2013); ELISABETH LOVREK & GOTTFRIED MUSGER, *in* HANDBUCH SCHIEDSRECHT, ¶ 16.62 (Czernich et al. eds., 2018) [*hereinafter* "LOVREK & MUSGER"].

outcome of the proceedings.[51] This is against the background of the already very strict requirements set by the Austrian Supreme Court for the qualification of an instance of procedural misconduct by the tribunal as a "proper" violation of the parties' right to be heard.[52] As leading scholarship points out, it would be unreasonably burdensome for the party challenging the award to additionally prove that the violation of its right to be heard indeed caused it to lose the arbitration.[53]

Interestingly, one scholarly opinion postulates that it must be assessed by way of a plausibility check (in German: "*Plausibilisierung*"): whether the violation of the right to be heard had at least been "eligible" to influence the outcome of the proceedings. According to this view, the door to challenges of arbitral awards would otherwise be opened too wide, as the losing party would always find a circumstance that allegedly established a violation of its right to be heard.[54] This latter view, which has been expressly rejected by the Austrian Supreme Court,[55] might in theory be comparable to the eligibility test under the *Cañas* decision (as discussed above in Phase II).[56]

In sum, we understand that in Austria the overall discussion on the right to be heard in arbitration proceedings has so far focused on its content as such (i.e., is there any violation?) rather than on the requirements for a successful challenge in case of an actual violation (i.e., is there any causality between the violation and the outcome of the award?). Against this background, it is not surprising that neither the Austrian Supreme Court nor leading scholarship postulate that the party challenging the award, as a rule, has to demonstrate that the alleged violation of the right to be heard had a likely or any impact on the outcome of the award.

B. England: Requirement of Realistic Impact on Outcome

Like Switzerland, England is not a Model Law country.[57] Pursuant to Section 33 of the English Arbitration Act 1996 ["**Act**"], arbitral tribunals have to act fairly and impartially, giving each party a reasonable opportunity of putting its case and dealing with that of its opponent.[58] Although the Act is silent on the exact scope of the right to be heard, it has a more restrictive approach in comparison to the Model Law. Under English *lex arbitri*, the scope of the right to be heard must be determined by the considerations of *reasonableness*. As leading commentators explain:

> "*Such a term [i.e. the Model Law term "a full opportunity of presenting his case"] might have given the impression that a party was entitled to take as long as he required to explore*

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51 *Cf.* MARTIN PLATTE, *in* ARBITRATION LAW OF AUSTRIA: PRACTICE AND PROCEDURE, § 594 (Riegler et al. eds, 2007) (reference to Oberster Gerichtshof [OGH] [Austrian Supreme Court] Sept. 24, 1981, 7 Ob 623/81 (Austria)); RIEGLER, *supra* note 47, ¶ 38; LOVREK & MUSGER, *supra* note 50, ¶ 16.76, with a carve-out for cases where the irrelevance of the violation for the outcome of the proceedings was apparent on the basis of the reasoning of the award; MARTIN WIEBECKE ET AL., *in* HANDBUCH SCHIEDSGERICHTSBARKEIT, § 1512 (Torggler et al. eds., 2d ed. 2017).

52 *Cf.* Oberster Gerichtshof [OGH] [Austrian Supreme Court] Oct. 10, 2014, 18 OCg2/14i, ¶ 3.2 (Austria).

53 *Cf.* RIEGLER, *supra* note 47, ¶ 38; LOVREK & MUSGER, *supra* note 50, ¶ 16.76.

54 *Cf.* Dietmar Czernich, *Kriterien für die Aufhebung des Schiedsspruchs wegen mangelnden rechtlichen Gehörs*, 136 JURISTISCHE BLÄTTER 295, 300 (2014).

55 *Cf.* Oberster Gerichtshof [OGH] [Austrian Supreme Court] Feb. 23, 2016, 18 OCg 3/15p, ¶ 3.2(e) (Austria).

56 *Cf. supra* § II(D).

57 *Cf. supra* § II(A).

58 *Cf.* Arbitration Act 1996, § 33(1)(a) (Eng.) [*hereinafter* "English Arbitration Act 1996" or "Act"].

> *every aspect of his case, at absurd length if necessary. The term "a reasonable opportunity" conveys an objectively viewed balance of what is fair to the party, but is also compatible with expedition and economy.*"[59]

In the same vein, the respective ground for setting aside an arbitral award is interpreted very narrowly.[60] Pursuant to Section 68 of the Act, the failure of the tribunal to comply with its duties under Section 33 – and, hence, to honour the parties' right to be heard – may constitute a ground for setting aside the award,[61] in case such failure constitutes a "*serious irregularity affecting the tribunal, the proceedings, or the award.*"[62] A "*serious irregularity*" is understood as an irregularity which has caused or will cause substantial injustice to the applicant.[63] Generally, the test of substantial injustice will be fulfilled only in those cases where it can be said that what has happened is "*so far removed from what could reasonably be expected*" that the reviewing State court shall take action.[64]

The Act is silent on other requirements for a successful challenge, including whether the violation needs to have an impact on the outcome of the award. However, relevant case law suggests that mere "*technical*" violations of the right to be heard are not sufficient for a successful challenge. In *Warborough Inv. Ltd.* v. *S. Robinson & Sons (Holdings) Ltd.* ["**Warborough**"], the Court of Appeal of England and Wales held that the court deciding over the challenge shall assess how the infringed party would have argued its case if the violation of its right to be heard would not have taken place.[65] On such basis, the Court of Appeal of England and Wales concluded:

> "*In the instant case, I am not satisfied that the case which Mr. Gillott would have put had he been afforded the opportunity to submit a further report along the lines indicated in his witness statement would have been so different as to justify the conclusion that the lack of that opportunity in itself caused a substantial injustice, regardless of what the outcome of the arbitration would have been. Nor, for that matter, am I satisfied that the outcome in that event would have been materially different. Accordingly, I agree with the judge that the*

59 *Cf.* BRUCE HARRIS ET AL., THE ARBITRATION ACT 1996: A COMMENTARY § 33 (3d ed. 2003).

60 *Cf.* NEIL ANDREWS & JOHANNES LANDBRECHT, SCHIEDSVERFAHREN UND MEDIATION IN ENGLAND [ARBITRATION AND MEDIATION IN ENGLAND] 551 (2015).

61 *Cf.* English Arbitration Act 1996, § 68(2)(a).

62 *Cf.* English Arbitration Act 1996, § 68(1).

63 *Cf.* English Arbitration Act 1996, § 68(2).

64 *Cf.* DEPARTMENTAL ADVISORY COMMITTEE ON ARBITRATION LAW, 1996 REPORT ON THE ARBITRATION BILL, 1996 280 (1996), *cited with approval in* Warborough Inv. Ltd. v. S. Robinson & Sons (Holdings) Ltd. [2003] EWCA (Civ.) 751 [59] (Eng.) [*hereinafter* "Warborough"] ("The test of 'substantial injustice' is intended to be applied by way of support for the arbitral process, not by way of interference with that process. Thus, it is only in those cases where it can be said that what has happened is so far removed from what could reasonably be expected of the arbitral process that we would expect the court to take action. […] In short, [§ 68] is really designed as a long stop, only available in extreme cases where the tribunal has gone so far wrong in its conduct of the arbitration that justice calls out for it to be corrected."); HARRIS ET AL., *supra* note 59, §§ 68(d)(4), 68(e).

65 *Cf.* Warborough, [2003] EWCA (Civ.) 751 [57] (Eng.), with reference to Checkpoint Ltd. v. Strathclyde Pension Fund [2003] EWCA (Civ.) 84 [58] (Eng.) ("In my view, the approach has to be much more amorphous. The court should not make its own guess at the rental figure and make a comparison with the amount awarded. Rather, the court should try to assess how the [applicant] would have conducted his case but for the irregularity. It is the denial of the fair hearing, to summarize procedural irregularity that must be shown to have caused a substantial injustice. A technical irregularity may not. The failure to deal with a substantial issue probably will.") (emphasis added).

> *appeal fails on this question also*."[66] (Emphasis added)

Pursuant to such holding, we understand the test before the Court of Appeal of England and Wales to be twofold: *first*, the challenging party must demonstrate that the violation of its right to be heard has prevented it from putting forward a material point in addition to its existing presentation of the case. *Second*, such point (not brought to the arbitral tribunal's attention) might have likely influenced the outcome of the award. Accordingly, leading commentators postulate that one of the consequences of the *Warborough* case is the *necessity* to show that the procedural irregularity (which includes a violation of the right to be heard) is likely to have made a real difference on the result of the proceedings.[67]

However, further case law suggests that there is no need to demonstrate that the procedural irregularity would in any event have had an impact on the outcome of the award.[68] Rather, as pointed out by the High Court of Justice in *Cameroon Airlines* v. *Transnet Ltd.* ["**Cameroon Airlines**"], it needs to be demonstrated (only) that the procedural irregularity could *realistically* have an impact on the outcome of the award:

> "*[…] I do not think it needs to be shown that the outcome of a remission will necessarily or even probably be different but it does need to be established that the applicant has been unfairly deprived of an opportunity to present its case or make a case which had that not occurred might realistically have led to a significantly different outcome*."[69] (Emphasis added)

It appears that the English courts generally take a restrictive approach to both the content of the right to be heard, as well as the requirements for a successful challenge. Against this background, it is not surprising that, under the Act, the party challenging the award has to demonstrate that the alleged violation of the right to be heard could realistically impact the outcome of the award. Practically, this might, in our view, be comparable to the new test of the Swiss Supreme Court pursuant to the *Errani* Decision (as discussed above in Phase III), requiring the challenging party to demonstrate that the violation *likely* had an impact on the outcome of the award.[70]

C. ICSID: Requirement of Potential Impact on Outcome

The limited grounds for the annulment of an ICSID award are set out in Article 52 of the Convention on the Settlement of Investment Disputes between States and Nationals of other

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66 *Cf.* Warborough, [2003] EWCA (Civ.) 751 [58].

67 *Cf.* HARRIS ET AL., *supra* note 59, § 68(e), with further reference to Icon Navigation Corp. v. Sinochem Int'l Petroleum (Bahamas) Co. Ltd. [2002] EWHC 2812 (Comm) (Eng.) and Groundshire v. VHE Construction [2001] 1 Lloyd's Rep. 395 (Eng.).

68 *Cf.* Hussmann (Eur.) Ltd. v. Al Ameen Development & Trade Co. & Others [2000] 2 Lloyd's Rep. 83 [51] (Eng.) ("HCN submitted that the reasoning of Dr Al-Qasem in that part of his report which is complained of must have caused substantial prejudice because there was no rational basis upon which the tribunal could have found for HCN on the issue of commission. I do not agree. Although there are very powerful and persuasive arguments that, if the contract is construed in accordance with the principles of Saudi law, it is clear that no commission was due under the distributorship agreement in the circumstances; however, I cannot say that no tribunal could have reached a different view.") (emphasis added).

69 *Cf.* Cameroon Airlines v. Transnet Ltd. [2004] EWHC 1829 (Comm) [102] (Eng.) [*hereinafter* "Cameroon Airlines"]; Lorand Shipping Ltd. v. Davof Trading (Afr.) BV [2014] EWHC 3521 (Comm) [30] (Eng.) *quoted in* ANDREWS & LANDBRECHT, *supra* note 60, at 583 et seq.

70 *Cf.* § II(E).

States ["**ICSID Convention**"].[71] The forum deciding over applications for annulments is an ad hoc committee appointed by the Chairman of the Administrative Council.[72] One of the annulment grounds is a "*serious departure from a fundamental rule of procedure*".[73] The violation of a rule of procedure will be a ground for annulment only if two requirements are met: the departure from the rule must be serious and the rule concerned must be fundamental.[74] The right to be heard belongs to such category of fundamental rules.[75]

According to eminent scholars in this field, in order to be serious, the departure must be more than minimal; it must be substantial and must have had a material effect on the affected party. In other words, it must have deprived that party of the benefit of the rule in question *or* cause a tribunal to reach a result substantially different from what it would have awarded had such a rule been observed.[76] Accordingly, as set out in the annulment decision in *Victor Pey Casado and Foundation "Presidente Allende"* v. *Republic of Chile* ["**Pey Casado**"], there are basically two views relating to the "seriousness" of the departure:[77]

At least one (earlier) ad hoc committee has looked at the importance of the right involved.[78] In essence, it concluded that if the right is fundamental or substantial as such, the deprivation thereof is likely to jeopardize the legitimacy or integrity of the arbitral process. Against this background, we understand this ad hoc committee postulates that the violation of the right to be heard as such may already qualify as a serious departure, without the need of any (demonstrated) impact on the outcome of the award.

However, more recent ad hoc committees have opined that the departure must relate to an outcome-determinative issue in order to be serious.[79] This line of precedents focuses on the impact of the infringed right on the outcome of the proceedings. In the landmark case of *Wena*, the ad hoc committee held that the violation of a fundamental rule must have caused the arbitral tribunal to reach a "*result substantially different*" from what it would have awarded had such rule

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71 *Cf.* Convention on the Settlement of Investment Disputes between States and Nationals of other States, Oct. 14, 1996, 575 U.N.T.S. 159 [*hereinafter* "ICSID Convention"].

72 *Cf. Id.* art. 52(3).

73 *Cf. Id.* art. 52(1)(d): "Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds: […] that there has been a serious departure from a fundamental rule of procedure.".

74 *Cf.* CHRISTOPH SCHREUER, THE ICSID CONVENTION: A COMMENTARY, art. 52, § 227 (2001).

75 *Cf. Id.* art. 52, § 245.

76 *Cf. Id.* art. 52, § 230; LUCY REED ET AL., GUIDE TO ICSID ARBITRATION 165 (2d ed. 2011); Wena Hotels Ltd. v. Arab Republic of Egypt, ICSID Case No. ARB/98/4, Decision on the Application by the Arab Republic of Egypt for Annulment, ¶ 58 (Feb. 05, 2002) [*hereinafter* "Wena"].

77 *Cf.* Victor Pey Casado and Found. "Presidente Allende" v. Republic of Chile, ICSID Case No. ARB/98/2, Decision on the Application for Annulment of the Republic of Chile, ¶ 76 (Dec. 18, 2012) [*hereinafter* "Pey Casado"].

78 *Cf.* Maritime Int'l Nominees Establishment v. Republic of Guinea, ICSID Case No. ARB/84/4, Decision on the Application by Guinea for Partial Annulment, ¶ 5.05 (Dec. 22, 1989) [*hereinafter* "MINE"]; Pey Casado, ICSID Case No. ARB/98/2, ¶ 76(Dec. 18, 2012).

79 *Cf.* Wena, ICSID Case No. ARB/98/4, Decision on the Application by the Arab Republic of Egypt for Annulment, ¶ 58 (Feb. 5, 2002), with reference to MINE, ICSID Case No. ARB/84/4, Decision on the Application by Guinea for Partial Annulment, ¶ 5.05 (Dec. 22, 1989), *confirmed in* CDC Group plc v. Republic of the Sey., ICSID Case No. ARB/02/14, Decision of the ad hoc Committee on the Application for Annulment of the Republic of Sey., ¶ 49 (June 29, 2005) and Repsol YPF Ecuador, S.A. v. Empresa Estatal Petroleos del Ecuador (Petroecuador), ICSID Case No. ARB/01/10, Decision on the Application for Annulment, ¶ 8 (Jan. 8, 2007).

been observed.[80]

On such basis, we understand that there is a basic understanding among more recent ad hoc committees that "*in order for a departure from a fundamental rule of procedure to be serious, an applicant is not required to show that, if the rule had been respected, the outcome of the case would have been different or that it would have won the case. What an applicant must show is that the departure may have had an impact on the award.*"[81] (Emphasis added)

Certain ad hoc committees have concluded – sometimes impliedly[82] – that the departure may have had an impact on the award, if it concerned an issue that was determinative for the outcome of the case.[83]

In general, ad hoc committees have proven not to overly restrict the content and exact scope of the parties' right to be heard in a specific case. This might be against the background that the "*annulment system is designed to safeguard the integrity, not the outcome.*"[84] In this context, it has been voiced in legal doctrine that in the case of investment arbitration, where the arbitration arises from a dispute between a private party and a State or State entity, legitimacy concerns must prevail over finality (and efficiency concerns).[85]

Additionally, regarding the actual requirements of a successful application for annulment due to a violation of the parties' right to be heard, we understand ad hoc committees to generally take – similar to the Swiss Supreme Court – a pragmatic, and not an overly formalistic, approach. In any event, more recent decisions of ad hoc committees show that the party challenging the award has to demonstrate that the alleged violation of the right to be heard may have had a potential impact on the outcome of the award.

Although it is not possible to exactly match the standards set by the Swiss Supreme Court, we

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80 *Cf.* Wena, ICSID Case No. ARB/98/4, Decision on the Application by the Arab Republic of Egypt for Annulment, ¶ 58 (Feb. 5, 2002).

81 *Cf.* TECO Guat. Holdings LLC v. Republic of Guat., ICSID Case No. ARB/10/23, Decision on Annulment, ¶ 193 (Apr. 5, 2016); Pey Casado, ICSID Case No. ARB/98/2, Decision on the Application for Annulment of the Republic of Chile, ¶ 78 ("The applicant is not required to show that the result would have been different, that it would have won the case, if the rule had been respected. The Committee notes in fact that, in *Wena*, the committee stated that the applicant must demonstrate "the impact that the issue may have had on the award." The Committee agrees that this is precisely how the seriousness of the departure must be analyzed.") (emphasis added) and ¶ 307 (Dec. 18, 2012).

82 *Cf.* Amco Asia Corp., Pan Am. Dev. Ltd. and P.T. Amco Indon. (Amco) v. Republic of Indon., ICSID Case No. ARB/81/1, Decision on the Applications by Indon. and Amco respectively for Annulment and Partial Annulment of the Arbitral Award of June 5, 1990 and the Application by Indon. for Annulment of the Supplemental Award of October 17, 1990, ¶ 9.09 (Dec. 17, 1992), 1 ICSID Rep. 569 (1993) [*hereinafter* "Amco"].

83 *Cf.* Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Phil., ICSID Case No. ARB/03/25, Decision on the Application for Annulment of Fraport AG Frankfurt Airport Services Worldwide, ¶¶ 218, 230 (Dec. 23, 2010); Amco, ICSID Case No. ARB/81/1, Decision on the Applications by Indon. and Amco respectively for Annulment and Partial Annulment of the Arbitral Award of June 5, 1990 and the Application by Indon. for Annulment of the Supplemental Award of October 17, 1990, ¶ 5.22(a) (Dec. 17, 1992), 1 ICSID Rep. 569 (1993).

84 *Cf.* Hussein Nuaman Soufraki v. U.A.E., ICSID Case No. ARB/02/7, Decision of the ad hoc Committee on the Application for Annulment of Mr. Soufraki, ¶ 20 (June 5, 2007).

85 *Cf.* Alina Cobuz & Silviu Constantin, *Surviving an ICSID Award: Post-Award Remedies in ICSID-Arbitration – A Perspective of Contracting State's Interests*, 8 CZECH (& CENTRAL EUR.) Y.B. OF ARB. 41, ¶ 3.27 (2018) [*hereinafter* "Cobuz & Constantin"].

understand that such a test of a *potentially different* impact may be comparable to the eligibility test of the Swiss Supreme Court under the *Cañas* decision (as discussed above in Phase II), requiring the challenging party to demonstrate that the violation might theoretically have had an impact on the outcome of the award.[86] In turn, we understand this approach to be less stringent than the test of a *realistically different* impact as followed by the English High Court of Justice.[87]

IV. Legal Considerations on the Swiss Supreme Court's Present Approach

A. Strong Right to Be Heard in Line with International Standards for Challenge

The analysis of select international development yields two main conclusions regarding the Swiss approach to the parties' right to be heard:

First, the comparison with the interpretation of the right to be heard of other important international arbitration systems shows that parties enjoy, generally, a broad scope of the right to be heard under Swiss *lex arbitri*. This becomes particularly clear when we look at the jurisprudence in Austria, where it is constantly held that the right to be heard is only infringed if a party was not *at all* able to present its case, which, in practice, will very rarely be the case.[88] Also, under English *lex arbitri*, the concept of "*substantial injustice*" is in line with the legislators' intent to only cover extreme cases of injustice – for a very narrow interpretation of when an instance of procedural misconduct of the tribunal qualifies as a violation of the parties' right to be heard.[89] On the other hand, the extensive case law developed by the Swiss Supreme Court on the right to be heard shows that this fundamental procedural right is taken very seriously under Swiss *lex arbitri* due to its anchoring within the Swiss Federal Constitution.

Second, we submit that with the earlier approach taken by the Swiss Supreme Court under the *Cañas* decision, the requirements were – at least measured by its practical implications – comparable to the annulment standards set by certain ad hoc committees under ICSID. This is particularly interesting against the background that the integrity and legitimacy of the proceedings may have a higher standing in investment arbitrations than in commercial arbitrations.[90] This shows, in consequence, that the requirements set by the Swiss Supreme Court in the *Cañas* decision were, as a matter of principle, more relaxed than one might expect in the context of international commercial arbitration.

With the new approach taken under the *Errani* Case, the Swiss Supreme Court now applies a standard for a successful challenge, which is more similar to the standards set by the English courts. With London being one of the most important arbitration hubs in the world, the Swiss Supreme Court's recent jurisprudence is in line with international developments at the forefront of arbitration.[91]

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86 *Cf.* § II(D).
87 *Cf.* § III(B).
88 *Cf.* § III(A).
89 *Cf.* § III(B).
90 *Cf.* Cobuz & Constantin, *supra* note 85, ¶ 3.27.
91 *Cf.* BORN, *supra* note 2, at 3255, and in particular at 3257: "Despite this, the better view is that an award should ordinarily be annulled only if a tribunal's procedural error had a material effect on the arbitral process or the outcome in the arbitral award; the wrongful denial of an opportunity to be heard on an ancillary or incidental point

B. Development of Increased Procedural Efficiency

The new approach taken by the Swiss Supreme Court shifts the balance between the key principle of due process and the key postulate of time and cost efficiency. This is because the stringency of the requirements for a successful challenge – at least in theory – are an expressive denominator of how these two key drivers in international arbitration proceedings are to be balanced against each other.

Generally, a regime with less strict requirements for a successful challenge tends to encourage the party discontent with the outcome of the proceedings to challenge the award. In turn, arbitral tribunals under a challenge-friendly regime tend to be procedurally more cautious in order to avoid any potential risks of a challenged award. This might, depending on the case, substantially affect the efficiency and speed of the arbitration; arbitrators may, just for the sake of "good order", albeit without any relevance for their assessment of the merits, grant additional rounds of submissions or additional time for overdue submissions, summon witnesses where their testimony is not needed according to their assessment, etc. Simply put, the easier it is for parties to successfully challenge an arbitral award on the basis of due process concerns, the more cautious (and potentially inefficient) arbitral tribunals will be in order to avoid any potential violation of the parties' right to be heard.

In turn, the stricter the requirements for a successful challenge are, the lesser the parties may be inclined to challenge an award with an outcome unfavourable to them. Consequently, if the potential risk of a challenged award is generally lower, arbitral tribunals might feel encouraged to focus on the merits of the case rather than on "comforting" the parties for the sake of mere formality. As a matter of principle, efficient conduct of the proceedings might generally increase under a stricter challenge regime.

Whether the principle of due process or the postulate of time and cost efficiency is to be given more weight is ultimately a policy consideration. Policy considerations, in turn, depend on the specific balance of the key interests involved. When it comes to the nature of the right to be heard, the Swiss Supreme Court has, with its new approach, decided to give more weight to efficiency concerns than it did in the past.

In times where users of international arbitration are regularly faced with the manifold ramifications of "due process paranoia",[92] any tool or means to reduce the risk of overly cautious tribunals is to be welcomed. Thus, at least on a theoretical level, the new approach by the Swiss Supreme Court will help to increase the efficiency of arbitral proceedings in Switzerland. At the very least, such an approach takes on and supports the international endeavours to strengthen the much-needed efficiency of arbitration proceedings.

C. Potential Uncertainties and Risks

For a party willing to challenge an arbitral award based on a violation of its right to be heard, it will be necessary to convince the Swiss Supreme Court that such violation had an adverse impact

should not provide grounds for annulling an otherwise valid award. This requirement is express in some national arbitration legislation and has been adopted by the weight of judicial authority in other jurisdictions".

92 *Cf.* Shubham Jain, '*Public Policy' as the Root Cause of Due Process Paranoia: An Examination of the Statute and Court Decisions in India*, 6(2) INDIAN J. ARB. L. 145 (2018).

on the outcome of the award. What does that mean in practice? As a matter of principle, such demonstration must be based on (i) an anticipated alternative scenario in terms of facts and/or evidence, and (ii) the legal analysis of a potentially different legal outcome of the dispute taking into account such anticipated alternative scenario. In particular, the first element of this two-pronged test may come with considerable uncertainties as to its practical consequences.

In our view, an important distinction has to be drawn between an "active" and a "passive" violation of the right to be heard.[93] In the scenario of an active violation of the right to be heard, a party is prohibited from presenting certain aspects of its case as a result of procedural measures taken by the tribunal. This may, for instance, be the case if a party cannot submit an additional brief setting out its position on an important point. In this situation, it will not be possible for the party to demonstrate what information the additional brief would have contained, had it been filed. As a further example, if a witness whose testimony was requested by the challenging party is not being summoned by the tribunal, it is not possible (for anyone) to establish what the requested witness would have testified. In other words, no one can be asked to prove something which does not exist – this fundamental evidentiary principle is also known as "*negativa non sunt probanda*". The party burdened with such a task may speculate what might have happened but cannot demonstrate it. Taken further to the legal analysis of a potentially different legal outcome, it will additionally be impossible to demonstrate how the tribunal might have decided differently on the basis of such *negativa*. Hence, this scenario might in fact become problematic for the party challenging an award due to a violation of its right to be heard before the Swiss Supreme Court.

On the other hand, in the scenario of a passive violation of the right to be heard, although a party is not prohibited from presenting its case, the arbitral tribunal fails to consider allegations, arguments, evidence or proffered evidence raised by a party.[94] This was the case in the *Cañas* decision, where certain legal arguments made by the challenging party were ignored by the tribunal.[95] In our view, this scenario might be less problematic as the submission(s) by the party and the award's reasoning will generally provide sufficient material to demonstrate a violation of the right to be heard.

On the basis of these considerations, the implications of the new approach taken by the Swiss Supreme Court may be summarized as follows, in a somewhat simplified manner:

93 *Cf.* § II(A).
94 *Cf.* § II(A).
95 *Cf.* § II(D); SFT 121 III 331 where the sole arbitrator based its decision on factual findings contrary to the submissions by both parties); *supra* § II(B).

	Positive decision by the Arbitral Tribunal	*Negative decision by the Arbitral Tribunal*
Active Violation? (Party not able to present its case)	**No violation of the right to be heard** (e.g., party may submit an additional brief setting out its position on an important point).	Violation of the right to be heard **which is generally more difficult to demonstrate** under the new test (e.g., party may not submit an additional brief setting out its position on an important point).
Passive Violation? (Arbitral Tribunal fails to consider)	**No violation of the right to be heard** (i.e., outcome of the dispute and/or reasoning in the award takes into account party's position on an important point).	Violation of the right to be heard **which is generally <u>not</u> more difficult to demonstrate** under the new test (i.e., outcome of the dispute and/or reasoning in the award does not take into account party's position on an important point).

D. <u>Postulate for Reasoned Objections by Counsel</u>

Under Swiss *lex arbitri*, the party which considers itself to be affected by a violation of its right to be heard must immediately object and submit its complaints to the arbitral tribunal. Otherwise, such party runs the risk of forfeiting its right to be heard (for the respective issue).[96] Against the background of potential difficulties with *negativa*, it may be crucial for counsel not only to object, but to explicitly mention the reasons for their objections in the respective submission to the tribunal.

This consideration may be illustrated with a simplified example regarding the lapse of a prescription period. In case the party challenging the award has already pleaded that the claim of the opponent party had become time-barred due to prescription, but such claim is upheld by the tribunal in the final award and the issue of prescription is not addressed at all, it will be straightforward for the challenging party to establish that the tribunal engaged in a passive violation of its right to be heard.[97] On the other hand, if the challenging party was not granted any possibility to raise the issue of prescription in an additional brief (e.g., because this issue surfaced only in the hearing on the basis of a potentially different triggering point in the past), it will be impossible to demonstrate what it would have submitted if it had been granted leave to do so (*negativum*). In this scenario, counsel are, in our view, well-advised to immediately object to the arbitral tribunal's rejection of a request to grant an additional submission, by explicitly mentioning that the reason for the submission is the raising of the prescription issue. On such basis, counsel will be in a much better position in the challenge proceedings before the Swiss Supreme Court as it will, in principle, be comprehensible why the rejection by the tribunal had

96 *Cf.* Tribunale fédérale [TF] [Swiss Supreme Court] Sept. 7, 1993, BUNDESGERICHTSENTSCHEID [BGE] 119 II 386, ¶ 1(a); PFISTERER, *supra* note 5, art. 190, § 69.

97 *Cf.* §§ II(A) and IV(C).

an impact on the outcome of the award which was adverse for the challenging party.

V. Conclusion

The new approach of the Swiss Supreme Court towards a stricter challenge regime for violations of the right to be heard has consequences on different levels:

First, it will help arbitral tribunals which intend to conduct the proceedings in an efficient manner. This is in line with developments in important international arbitration centres, and the key postulate of procedural efficiency in international arbitration proceedings.

Second, although the new requirements have the potential of "formalistic" rejections of challenges on the basis of an improbable prejudice on the outcome of the award, however, we believe that the Swiss Supreme Court will – according to its longstanding pragmatic approach – further develop its rich case law, differentiating scenarios which may typically affect the outcome of the case.[98]

And finally, although the burden for parties willing to challenge the award has been raised, counsel will, in our view, have the opportunity – and maybe even the onus – to prepare themselves for a potential (subsequent) challenge by explicitly addressing the substantive argument behind the procedural request which was eventually rejected by the tribunal. This particularly holds true when it comes to procedural decisions by the tribunal preventing parties from presenting their case (active violations). From a wider perspective, this will discipline counsel to consider, right at the outset, the (technical) violations by the tribunal which might have an impact on the outcome of the proceedings. We expect this to add to more efficiently conducted international arbitration proceedings.

98 *Cf.* §§ I and II(A); MÜLLER & PEARSON, *supra* note 5, ¶ 3.3.

HARD QUESTIONS IN UNEASY TIMES: THE PROSPECT OF ENFORCING FOREIGN AWARDS APPLYING SHARI'A LAW IN AUSTRALIA

Thomas Burke & Kanaga Dharmananda †*

Abstract

*International arbitration under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ["**New York Convention**"] is the leading institution for the resolution of transnational disputes of a commercial character. Operating across interfaces between societies, polities, cultures, and as the vanguard mechanism of its kind, international arbitration must grapple not only with differences between legal systems, but also with divergent social values and cultural norms. Saudi Arabia's shift, over the past decade, towards becoming an arbitration-friendly jurisdiction, provides a timely opportunity to reflect. This paper raises, as a thought piece, the situation of enforcement of Saudi Arabia seated arbitral award in Australia, and the scope for resisting enforcement on public policy grounds. Saudi Arabia is an Islamic country with legal, political and social systems based on Shari'a law. The New York Convention permits a contracting State to refuse enforcement of an arbitral award where to grant enforcement would be contrary to public policy. This paper examines those aspects of Shari'a law which may be relevant to international commerce and dispute resolution and considers the likely impacts of Shari'a law on Saudi-seated arbitral awards. It then examines Australian judicial treatment of the public policy exception in order to distil the implications, if any, of Shari'a law on enforceability of Saudi-seated awards in Australia.*

I. Introduction

Edward Said, the great cultural scholar, in his seminal work 'Orientalism: Western Conceptions of the Orient', observed that the idea of the East, or the Orient, "*is an idea that has a history, tradition of thought, imagery, and vocabulary that have given it reality and presence in and for the West.*"[1] Said observed that the East had been home to some of Europe's oldest colonies, and a source of its languages and civilisations, but at the same time "*one of its deepest and most recurring images of the Other*", presenting itself as a contrast to its Western counterpart. In this approach, Said rests on the idea of the 'Other' as relevant to the definition of the West. The same way as there exists a relationship between the cultures of the East and the West, similarly, one must consider, unafraid, the nature and effect of Islamic law and its interaction with international commercial arbitration. It would be an error to proceed on the basis that the norms and approaches of one's own nation were to be granted a priori higher status as the repository of rectitude. In the context of international arbitration, such an approach would ignore the history of compromise that gave rise to the New York Convention, and subvert the destiny of international arbitration as the leading institution for the resolution of transnational disputes of a commercial character. Yet, a perplexing concern remains.

The concern attaches to the idea that certain practices or substantive laws may be of a character so problematic that the enforcing courts of another nation would find it morally reprehensible to

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1 EDWARD W. SAID, ORIENTALISM 5 (1995).

enforce an award that was the product, or enshrined the consequence, of such practices or laws. An extreme example illustrates the point. Assume that an arbitration in Alsatia, in accordance with its laws, was issued on the faith of testimony procured by bribery or torture. Few would contend that such awards should be enforced, given the apparent conflict with public policy.

Delicate issues arise when attention turns to legal systems that operate on ground norms that are different from one's own. In that regard, the engagement of the world with Islamic law will likely involve a number of complex and intricate issues. Indeed, an entire book has recently been written about this.[2] *Shari'a* law is applied in a number of countries. The application of those laws, in an international arbitration context, may, in certain circumstances, give rise to involute and intricate questions.

This paper, as a thought piece, seeks to raise for preliminary attention the situation of the enforcement of a Saudi Arabia seated arbitral award in Australia, and the scope for resisting enforcement on public policy grounds. Australia is chosen as the specimen enforcement jurisdiction for a number of reasons (besides the authors' familiarity with the jurisdiction), most significantly because it is a socially progressive and liberal society, but also a pro-enforcement jurisdiction for the purposes of international arbitration.[3]

The Kingdom of Saudi Arabia ["**Saudi Arabia**" or the "**Kingdom**"] is the second-largest oil producer in the world, and has the second-largest proven oil reserves of any nation.[4] In 2012, Saudi Arabia enacted a new arbitration law based on the UNCITRAL Model Law on International Commercial Arbitration, 1985 ["**Model Law**"],[5] a significant step towards creating an arbitration-friendly jurisdiction and encouraging foreign investment in the Kingdom.

The new law strictly applies "*[…] without prejudice to the provisions of Islamic Shari'a.*"[6] As a result, it is possible that Saudi courts of enforcement will continue to look suspiciously upon foreign arbitral awards, due to concerns that *Shari'a* law was not adhered to in the arbitral proceedings.[7] Businesses dealing with Saudi companies may contract, by choice, necessity, or negotiation, for arbitration in Saudi seats; this may also be an attempt to shore up the prospect of enforcement in Saudi Arabia. The issue which then arises is whether the resulting arbitral awards, affected by the restrictions and impositions of *Shari'a* law, will be enforceable in jurisdictions outside Saudi Arabia.

This paper begins by considering some effects of the imposition of *Shari'a* law on arbitral awards produced by tribunals seated within Saudi Arabia. We then analyse the Australian approach to

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2 *See* MARIA BHATTI, ISLAMIC LAW AND INTERNATIONAL COMMERCIAL ARBITRATION (2019).

3 Nick Longley & Brian Long, *Australia: International Arbitration 2019*, ICLG (Aug. 22, 2019), *available at* https://iclg.com/practice-areas/international-arbitration-laws-and-regulations/australia.

4 *What countries are the top producers and consumers of oil?,* US ENERGY INFORMATION ADMINISTRATION, *available at* https://www.eia.gov/tools/faqs/faq.php?id=709&t=6; *Oil Reserves by Country 2020*, WORLD POPULATION REVIEW (Feb. 26, 2020), *available at* http://worldpopulationreview.com/countries/oil-reserves-by-country.

5 Royal Decree No. M/34 (Approving the Law of Arbitration), 24/5/1433H, Apr. 16, 2012 (Saudi Arabia) [*hereinafter* "Royal Decree No. M/34"].

6 *Id.*

7 Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. V, June 6, 1958, 330 U.N.T.S. 38 [*hereinafter* "New York Convention"]. Article V of the New York Convention lists, among the limited grounds upon which enforcement of an arbitral award can be refused, the ground that "[…] [t]he recognition or enforcement of the award would be contrary to the public policy of [the enforcing country]."

public policy as a ground for refusing enforcement of arbitral awards. From this, we draw conclusions about the circumstances in which the impact of mandatory laws of *Shari'a* on Saudi awards is likely to affect their enforceability in Australia.

II. Saudi Arabia's Arbitration Law

Saudi Arabia acceded to the New York Convention in 1994.[8] The Kingdom has a long history of arbitration. In the mid to late 20th century, a series of controversial awards, including the decision in *Saudi Arabia* v. *Arabian American Oil Co.*,[9] caused significant discontent with international arbitration within the region, rooted in general concern amongst Saudi Arabians that Saudi law would not be applied to international arbitrations concerning oil, its most important natural resource.[10] Dissatisfied with the outcome of the case, the government passed a resolution in 1963 that prevented government instrumentalities from participating in arbitrations,[11] a move which marked a strong retreat from international arbitration.

Although Saudi Arabia enacted its arbitration law in 1983, in anticipation of its accession to the New York Convention, the system these laws created was rigid and allowed high levels of court interference at various stages of the proceedings to ensure compliance with *Shari'a*.[12] As a result, Saudi Arabia was not considered an arbitration-friendly jurisdiction, and international corporations were reluctant to rely on international arbitration when doing business in Saudi Arabia.[13]

The enactment of a new arbitration law on April 16, 2012 marked a momentous change for arbitration in the Kingdom.[14] The new 'Royal Decree Number M/34' ["**Law of Arbitration**"][15] is based on the Model Law, and brings its legal framework up to international standards in many respects.[16] For example, the Law of Arbitration now recognises the competence-competence principle, allowing an arbitral tribunal to rule on its own jurisdiction,[17] and the Saudi Centre for Commercial Arbitration ["**SCCA**"] was established in Riyadh in 2016.[18] However, the Law of Arbitration explicitly makes its provisions subject to the laws of *Shari'a*.[19] Article 2 states that the law applies "*without prejudice to the provisions of Islamic Shari'a.*"[20] The influence of *Shari'a* is pervasive in the new law, and many aspects of the proceedings, which are generally under the control of the parties, are made subject to the provisions of *Shari'a*. These include agreements as to the

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8 *Countries, Contracting States*, NEW YORK ARBITRATION CONVENTION, *available at* http://www.newyorkconvention.org/countries.

9 Saudi Arabia v. Arabian Am. Oil Co., (1963) 27 ILR 117.

10 Saud Al-Ammari & Timothy Martin, *Arbitration in the Kingdom of Saudi Arabia*, 30(2) ARB. INT'L 387, 388 (2014).

11 *Id.* at 389; Council of Ministers Resolution No. 58 (Restricting Right of Saudi Governmental Agency to Submit to Arbitration), 17/1/1383, June 25, 1963 (Saudi Arabia).

12 BHATTI, *supra* note 2, at 37; Al-Ammari & Martin, *supra* note 10, at 387, 389.

13 Kristin Roy, *The New York Convention and Saudi Arabia: Can a Country Use the Public Policy Defence to Refuse Enforcement of Non-Domestic Arbitral Awards*, 18(3) FORDHAM INT'L L. J. 920, 952 (1994).

14 Jean-Pierre Harb & Alexander Leventhal, *The New Saudi Arbitration Law: Modernization to the Tune of Shari'a*, 30 J. INT'L ARB. 113 (2013).

15 Royal Decree No. M/34.

16 Khalid Alnowaiser, *The New Arbitration Law and its Impact on Investment in Saudi Arabia*, 29 J. INT'L ARB. 723 (2012).

17 Harb & Leventhal, s*upra* note 14, at 6, 118; Royal Decree No. M/34, art. 20.

18 Caroline Kehoe et al., *Saudi Arabia: Arbitrating in the Kingdom of Saudi Arabia*, HERBERT SMITH FREEHILLS (Nov. 1, 2018), *available at* https://hsfnotes.com/arbitration/2018/11/01/arbitrating-in-the-kingdom-of-saudi-arabia.

19 Harb & Leventhal, *supra* note 14, at 115.

20 Royal Decree No. M/34, art. 2.

procedures of the arbitral tribunal,[21] and the substantive law governing the relationship between the parties.[22] If an award violates the provisions of *Shari'a*, a nullification action may be brought, and a competent court must nullify the award.[23] Likewise, an order to execute an award will be refused where the award violates the provisions of *Shari'a*.[24] The primacy of *Shari'a* law has been cemented by the SCCA rules,[25] as well as a new enforcement law enacted in 2013,[26] and has not been detracted from by the implementing regulations.[27] However, it is worth noting that if the award is divisible, the part not containing a violation of the provisions of *Shari'a* or public policy may be executed.[28] The provisions of *Shari'a* are, therefore, mandatory law in Saudi Arabia.[29] As a result, it should be anticipated that both, the arbitral process and content of arbitral awards will comply with *Shari'a*. This leads to concerns about the enforceability of commercial contracts by arbitration in Saudi Arabia. Conversely, as discussed here, this leads to concerns about the enforceability of arbitral awards issued from Saudi Arabian seats elsewhere.

III. Aspects of *Shari'a* Law

Shari'a is a broad and pervasive code of conduct that informs all aspects of society and human behaviour in Islam.[30] *Shari'a* is derived from the *Quran*, the practice of Mohammad (the *Sunna*), points of scholarly consensus (*Ijmaa*) and analogical inferences (*Qiyas*).[31] *Shari'a* is not interpreted consistently across the Islamic world, or even within the Sunni branch of Islam followed in Saudi Arabia.[32] The dominant school of interpretation in Saudi Arabia is the *Hanbali* school, the most conservative of the four schools of Sunni Islam.[33] This school unquestioningly accepts both the *Quran* and *Sunna*.[34]

Some provisions of *Shari'a*, such as *Jahala* (a prohibition on unclear terms), *Ghabn* (a rule against deceit), and *Wa'ad Ta'aqud* (a rule against 'agreements to agree'),[35] represent only minor departures from international principles and should not ordinarily be a cause for concern. However, some other *Shari'a* provisions do have the potential to affect the making of arbitral awards in Saudi Arabian seats. For example, the prohibition of *Riba,* which prevents charging of interest is interpreted in Saudi Arabia as prohibiting interest of any kind, not just unfair or usurious interest.[36]

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21 Royal Decree No. M/34, art. 25.
22 Royal Decree No. M/34, art. 38.
23 Royal Decree No. M/34, art. 50(2).
24 Royal Decree No. M/34, art. 50(2)(v).
25 Saudi Center for Commercial Arbitration (SCCA) Rules, art. 31(1), May 2016.
26 Royal Decree No. M/53 (Enforcement Law), 13/8/1433H, July 2, 2012 (Saudi Arabia); Caroline Kehoe et al., *supra* note 18.
27 Council of Ministers Decision No. 541/1438 (Implementing Regulations to the 2012 Saudi Arbitration Law), May 22, 2017 (Saudi Arabia).
28 Royal Decree Number M/34, art. 55(2)(b). This may have implications for awards which, for example, provide for damages as well as interest, in which case it could be speculated that the damages part would be executed, but not the interest part.
29 Abdulkadir Guzeloglu, *The Role of Sharia Law on the Enforcement of Arbitral Awards in the Kingdom of Saudi Arabia*, GUZELOGLU, *available at* https://www.guzeloglu.legal/uploads/pdf/99-2/3423R21.pdf [*hereinafter* "Guzeloglu"].
30 Harb & Leventhal, *supra* note 14, at 115.
31 *Id.*
32 Arthur Gemmell, *Commercial Arbitration in the Islamic Middle East*, 5(1) SANTA CLARA J. INT'L L. 169, 174-175 (2006).
33 *Id.* at 176.
34 *Id.*
35 Al-Ammari & Martin, *supra* note 10, at 406.
36 *Id.* at 406.

The rule has been relaxed in Saudi Arabia in some contexts (such as banking),[37] and in the words of one author, "*[t]he situation is truly vague and confusing to the extent that nobody is able to determine whether interest is legal or illegal*."[38]

In light of this, where parties provide for arbitration in Saudi Arabia, they must take into account the likelihood that their contract will be unenforceable to the extent that it provides for interest. An arbitration award which grants interest is likely to be seen as equivalent to a contract containing interest and may be nullified by a Saudi court.[39]

The prohibition on *Gharar,* meaning gambling or speculation, prevents the enforcement of contracts where the subject matter is uncertain or does not yet exist.[40] This rule has the potential to prevent the enforcement of certain types of contracts, including insurance contracts and trade in futures, although the Saudi government has relaxed this rule as far as insurance contracts are concerned.[41] The rule is likely to restrict the types of damages available for breach of contract; for example, damages for future profits are unlikely to be permitted.[42] As with *Riba,* arbitral awards which enforce or contain *Gharar* will be subject to nullification.[43]

There is a further rule of *Shari'a,* that, by virtue of its emotive valency, attracts much attention, concerning the legal capacity of females to give evidence. This provision has caused significant concern in the arbitration community, with regard to the morality of participating in,[44] or condoning[45] *Shari'a* based arbitration, further raising questions as to whether *Shari'a*-influenced awards will be, or should be, enforced by the courts of the Western countries.[46]

The rule concerning female testimony derives from the *Quran*, the principal source of *Shari'a.* Verse 2:282 of the *Quran* provides that in establishing financial or commercial matters, the testimony of either two males, or one male and two females is required.[47] This often leads to the inference that the testimony of a female is to be given less weight than that of a male.[48] This rule is an artefact of a time when women did not normally engage in commercial matters in Islamic societies, nor indeed in many Western societies.[49] In this regard, the historical position in the West ought not to be forgotten — where, for instance, women could not attest documents in French civil courts under

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37 Guzeloglu, *supra* note 29.

38 ABDULRAHMAN YAHYA BAAMIR, *SHARI'A* LAW IN BANKING AND COMMERCIAL ARBITRATION: LAW AND PRACTICE IN SAUDI ARABIA 168 (2010).

39 Royal Decree No. M/34, art. 50(2).

40 Al-Ammari & Martin, *supra* note 10, at 406.

41 Roy, *supra* note 13, at 948.

42 Al-Ammari & Martin, *supra* note 10, at 406.

43 Royal Decree No. M/34 art. 50(2).

44 Albert D. Spalding & Katherine Kim Eun-Jung, *Should Western Corporations Ban the Use of Shari'a Arbitration Clauses in their Commercial Contracts?*, 132(3) J. BUS. ETHICS 613 (2015).

45 *See generally* Richard Halmo, *Shari'a Law in Western Traditions: Irreconcilable Differences or an Endeavour in Religious Autonomy?*, L. SCH. Student Scholarship 231 (2013).

46 Saad U. Rizwan, *Foreseeable Issues and Hard Questions: Implications of U.S. Courts Recognizing and Enforcing Foreign Arbitral Awards Applying Islamic Law under the New York Convention*, 98(2) CORNELL L. REV. 493 (2013).

47 Nehaluddin Ahmad, *Women's Testimony in Islamic Law and Misconceptions: A Critical Analysis*, 6 RELIGION & HUM. RTS. 13 (2011).

48 BHATTI, *supra* note 2, at 115; Spalding & Kim, *supra* note 44, at 613, 618.

49 BHATTI, *supra* note 2, at 115, 116; Torki Al-Shubaiki, *The Saudi Arabian arbitration law in the international business Community: a Saudi perspective*, LONDON SCH. OF ECONOMICS 196 (2003) [*hereinafter* "Al-Shubaiki"].

the Napoleonic code until 1897.[50] The *Shari'a* rule survives and reportedly continues to be applied in Saudi Arabia to this day,[51] although the extent to which it applies, in practice, to international commercial arbitration proceedings is unclear.[52] It will depend on the circumstances whether the application of the rule will make a difference. The confidentiality of arbitral proceedings, combined with the limited number of published enforcement decisions coming out of Saudi Arabia, means that it is difficult to tell whether female testimony is *in practice* given less weight by arbitral tribunals seated in Saudi Arabia.

In theory, the rules of *Shari'a* are absolute and inflexible.[53] Moreover, an analysis of the Law of Arbitration leads to the conclusion that failure to comply with the rule would render an award subject to nullification by the Saudi courts.

Article 25 of Law of Arbitration states as follows:

> "*The two parties to arbitration may agree on procedures to be followed by the arbitration tribunal in conducting the proceedings, including their right to subject such proceedings to effective rules of any organization, agency or arbitration center within the Kingdom or abroad, provided said rules are not in conflict with the provisions of Shari'a.*"[54]

This is likely to encompass the rules of evidence, and therefore, it is logical to conclude that failure to comply with the rule concerning female testimony would subject the award to nullification under Article 50(1)(e) or 50(2) of the Law of Arbitration.[55] There have also been calls for a return to Islamic principles throughout the Muslim world, and for international arbitration to be more inclusive, in the sense of accommodating *Shari'a* law.[56] It follows that there is a significant risk and real possibility that arbitral tribunals seated in Saudi Arabia will follow the rule, and not accord full weight to the testimony of women in commercial matters. This particular aspect of *Shari'a* will, therefore, be the focus of the remainder of this paper, and its implications for enforceability examined in close detail.

IV. ***Shari'a* Law and Arbitration: Concerns**

As already noted, concerns about the intermixing of *Shari'a* with arbitration are by no means novel. The problem was perceived, and steps were taken to counter it.

It was observed in the study 'Dealing in Virtue' that attempts were made to establish an Islamic Arbitration Centre in Cairo to offer an alternative approach to arbitration, but:

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50 Al-Shubaiki, *supra* note 49, at 196; CODE CIVIL [C. CIV.] [CIVIL CODE] art. 37 (Fr.).

51 U.S. DEP'T OF STATE, BUREAU OF DEMOCRACY, H.R. and Lab., Saudi Arabia 2015 Human Rights Report, 35 (2015), *available at* https://2009-2017.state.gov/documents/organization/253157.pdf; *Arbitrary Detention and Unfair Trials in the Deficient Criminal Justice System of Saudi Arabia, Precarious Justice*, HUM. RTS. WATCH, app. ¶ 3 (March, 2010), *available at* https://www.hrw.org/reports/2008/saudijustice0308/saudijustice0308web.pdf.

52 BHATTI, *supra* note 2 at 116.

53 Béligh Elbati, *The recognition of foreign judgments as a tool of economic integration: views from the Middle Eastern and Arab Gulf countries*, *in* CHINA'S ONE BELT ONE ROAD INITIATIVE AND PRIVATE INTERNATIONAL LAW (2018).

54 Royal Decree No. M/34, art. 25.

55 *Id.* arts. 50(1)(e) and 50(2).

56 Faisal Kutty, *The Sharia Factor in International Commercial Arbitration*, 28 LOY. L.A. INT'L & COMP. L. REV. 565, 619 (2006).

> "*[I]n order to build legitimacy in the international community, the proponents of the new centre now emphasize how Islamic law will really lead to no difference in outcomes. Islamic contract law is reportedly the same in practice as that found in the civil systems, and even the lex mercatoria can be applied in any arbitrations that may make their way to the Islamic centre. The unmistakable theme is that almost all the differences – except perhaps the prohibition of interest – can be eliminated to gain international acceptance.*"[57]

For instance, in an article published in 2013, Saad Rizwan questioned whether arbitral awards from *Shari'a* jurisdictions could, or should be enforceable in the United States of America ["**US**"],[58] considering that, among other things, the provisions regarding female testimony were contrary to the equal protection rights in the 14th Amendment to the Constitution of the US.[59] Rizwan dismissed the idea of a blanket non-enforcement approach, primarily because such an approach would involve the judicial arm of the government venturing into foreign policy issues in violation of the 'political question' doctrine.[60] The US 'political question' doctrine holds, in essence, that issues that are fundamentally political (as opposed to legal) are not justiciable.

Rizwan further observes that a "*due process and equal protection analysis*" could be carried out by the courts of enforcement in limited circumstances, namely, where the party seeking to resist enforcement objected on those grounds during the arbitral proceedings.[61] He argued that this could be done even if it were contrary to the New York Convention, since constitutional rights trump obligations under international treaties when the two conflict.[62]

By contrast, Australia's constitution does not expressly guarantee an extensive set of human rights, and contains very few provisions which amount to rights protections.[63] As a result, it is doubtful whether a particular provision of the Constitution, expressed or argued to be capable of promoting gender equality, could be invoked to resist enforcement of arbitral awards in Australia.

Other concerns have also been raised. For instance, in a 2014 article,[64] Albert Spalding and Eun-Jung Kim considered the issues posed by *Shari'a* based arbitration from a corporate policy perspective. They grappled with the question of whether Western corporations – corporations based in Western countries and espousing Western values – should avoid engaging in *Shari'a*-based arbitration on moral grounds. The article begins by reiterating some of the concerns commonly raised about *Shari'a* generally and *Shari'a*-based arbitration specifically: human rights concerns, concerns that the rights of women and non-Muslims are not adequately protected and, concerns that decisions may be arbitrary due to the absence of a requirement to adhere to precedent or established principles. They consider whether, despite considerable incompatibilities, it remains

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57 YVES DEZALAY & BRYANT G. GARTH, DEALING VIRTUE – INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER 243 (1996).

58 Rizwan, *supra* note 46, at 493, 505.

59 *Id.* at 510.

60 *Id.* at 507.

61 *Id.* at 516.

62 *Id.* at 517, 518.

63 George Williams, *The Federal Parliament and the Protection of Human Rights*, PARLIAMENT OF AUST'L (May 11, 1999), *available at* https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp9899/99rp20.

64 Spalding & Kim, *supra* note 44, at 613.

justifiable for a Western corporation to engage with, or acquiesce to the determination of disputes in accordance with *Shari'a* law.

Spalding and Kim, controversially, consider arguments in favour of a corporate ban on *Shari'a* arbitration clauses, and in particular human rights arguments. They begin their discussion by noting that "*[a]dmittedly it does not fall to Western corporations to "fix" other cultures whenever there are differences that, when viewed through a Western cultural lens, appear to signify oppression of women, children, the poor, or other segments of the population.*"[65] Then, they assert that corporations do have a negative duty to refrain from participating in human rights violations. They acknowledge that the issues of gender inequality arising can be seen as "*irredeemably patriarchal, unassimilable to Western democracy and culture and, above all, a rejection of modernity when viewed through a Western lens,*" and that participation in *Shari'a* arbitration could, therefore, amount to a violation of the negative duty.[66]

They go on to posit that it might nevertheless be morally justifiable for a corporation to participate in *Shari'a*-based arbitration, drawing a comparison to the Catholic Church's continued practice of excluding women from the priesthood, and arguing that Catholics who disagree with this position can still participate in the Church without such participation being considered immoral.[67] Spalding and Kim apparently conclude that a corporation's primary duty is to uphold the interests of its stakeholders, not the interests of all persons who are affected by its actions, and that commercial contracts are not required to promote the human rights of all affected persons in equal measure.[68]

The matters raised by Spalding and Kim share a common thread with the concern of this paper in that both consider Western institutions directly or indirectly engaging with *Shari'a* legal systems and question whether that engagement is contrary to morality or unlawful.

Similarly, in 2013, Richard Halmo examined whether *Shari'a* law could exist within the constitutional frameworks of Western countries.[69] Halmo analysed the experiences of *Shari'a* integration in the United Kingdom ["**UK**"], Canada and US. His article is prefaced with a statement of the European Court of Human Rights that says "*Shari'a is incompatible with the fundamental principles of democracy.*"[70] Halmo proceeds to examine the validity of that statement.

Halmo claims that *Shari'a* law can exist within Western countries mostly "*through a laissez faire approach to religious arbitration law.*"[71] He argues that Muslims should have the religious autonomy to enter into arbitration agreements with *Shari'a* as the substantive law to be applied in cases where it would not affect the rights of others.[72] He acknowledges that "*the tension between Shari'a Law and [the] West stems not just from a politically ethno-centric fear of the Other, but also from a concern that Shari'a jurisprudence is, in many respects, at odds with Western approaches.*"[73]

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65 *Id.* at 613, 617.
66 *Id.* at 613, 618.
67 *Id.* at 613, 621.
68 *Id.* at 613, 621–622.
69 Halmo, *supra* note 45, at 3.
70 Case of Refah Partisi (The Welfare Party) v. Turk., 42 ILM 560 (2003).
71 Halmo, *supra* note 45, at 3.
72 *Id.* at 28–29.
73 *Id.* at 6.

A recurring theme in Halmo's analysis is consent and contractual autonomy. In examining the emergence of *Shari'a* courts in the UK, he argues that religious tribunals have existed in Britain for many years in the form of Jewish tribunals under the UK Arbitration Act, 1996. Halmo argues that the UK's Muslims should be given equal rights to engage in religious arbitration in equivalent tribunals, but saliently points to a central feature of those tribunals: that both sides must in every case *agree* to binding arbitration.[74]

Halmo examines religious arbitration panels in the USA, which find their legal basis in secular laws and general contractual principles.[75] These tribunals have come under attack, to the point where the State of Oklahoma in 2010 attempted to forbid the consideration of *Shari'a* principles by its courts, which would have made many *Shari'a* arbitration clauses unenforceable.[76] A constitutional challenge to those laws saw them struck down as violative of the First Amendment to the Constitution of the United States (which prevents the establishment of a state religion).[77] Thus, at least in the US, not only is arbitration in accordance with *Shari'a* principles generally permitted, but it is also, to an extent, a constitutionally protected right. Of course, there is a critical difference between protecting the enforceability of *Shari'a* arbitration clauses on one hand and enforcing *Shari'a* -based arbitral awards on the other.

There is one other matter to note. It has been suggested that some of the fundamental pillars of arbitration are themselves incompatible with *Shari'a*. This was refuted in a 2017 paper by Mutasim Alqudah,[78] who argued that the slow adoption of arbitration in Gulf countries had more to do with a general distrust for arbitration, and less to do with any fundamental inconsistency. The existence of conflicting schools of *Shari'a* law has been cited as a concern in the analogous context of enforcement of foreign judgments.[79] Even more intriguingly, there has been some debate about the contribution of Islam to the very creation of the institution of arbitration. A treatise published in 2013 by Jan Paulsson[80] records the various views, considering matters of apt translation, to conclude (correctly, with respect):

> "*The modern acceptance of arbitration in the Arab world is thus, in Mezghani's view, due more to increased confidence in successful nation-building than to a resurgence of forgotten traditions. For that matter, the purported traditions are little more than two vague legitimising observations: (i) arbitration is not proscribed by Islamic law and (ii) it is not a Western invention. Beyond this baseline – minimalist but nevertheless important – respect for accuracy demands that one recognizes that appeals to the past seek to establish 'une fausse continuté historique'. Furthermore, the classical sources of Islamic law do not treat arbitration as an important topic; those who assemble evidence of Islamic views of arbitration are thus exposed to the criticism that they have gathered scattered and inconclusive passages from texts having a quite different primary focus. Some classical authors were hostile to arbitration because it*

74 *Id.* at 14.
75 *Id.* at 26.
76 *Id.* at 27.
77 Awad v. Ziriax, 966 F. Supp. 2d 1198 (W.D. Okla. 2013) (U.S.).
78 Mutasim Alqudah, *The Impact of Shari'a on the Acceptance of International Commercial Arbitration in the Countries of the Gulf Cooperative Council*, 20(1) J. OF LEGAL, ETHICAL & REG. ISSUES (2017).
79 Elbati, *supra* note 53, at 231.
80 JAN PAULSSON, THE IDEA OF ARBITRATION 12 (2013).

> *could lead to decisions by persons not adequately versed in the Shari'a, or because it detracted from the rule of sovereigns; others accepted it only with respect to geographic zones where there were no judges.*" (citation omitted)

The recent acceptance of arbitration in Islamic jurisdictions has been a lukewarm embrace. As George Khoukaz observes in a 2017 article,[81] "*the fact that Muslim countries have signed the New York Convention does not necessarily bring any certainty in terms of enforcement of a dispute*."[82] For example, the public policy exemption is frequently invoked in Saudi Arabia and similar jurisdictions to avoid enforcement of foreign awards.[83] However, enforcement of foreign awards in *Shari'a* jurisdictions is not the concern of this paper.

The question of enforceability of *Shari'a*-based awards in Australia has yet to be tackled. Answering questions of enforceability of awards vesting or deploying *Shari'a* will require a close analysis of the public policy exception and its judicial treatment in Australia.

V. Australian Take on the Public Policy Exception

An important pillar of international arbitration is that courts are slow to refuse enforcement of an award which is valid on its face. This is reflected in the fact that Article V of the New York Convention sets out an exhaustive list of grounds for refusal.[84]Among those limited grounds, is the public policy exception: a court of enforcement may refuse to enforce an award where, doing so would be contrary to the 'public policy' of the said country.

In Australia, the public policy exception is implemented by Section 8 of the International Arbitration Act, 1974 ["**Act**"]:

> "*(7): In any proceedings in which the enforcement of a foreign award by virtue of this Part is sought, the court may refuse to enforce the award if it finds that:*
>
> *(a) the subject matter of the difference between the parties to the award is not capable of settlement by arbitration under the laws in force in the State or Territory in which the court is sitting; or*
>
> *(b) to enforce the award would be contrary to public policy.*
>
> *(7A): To avoid doubt and without limiting paragraph (7)(b), the enforcement of a foreign award would be contrary to public policy if:*
>
> *(a) the making of the award was induced or affected by fraud or corruption; or*
>
> *(b) a breach of the rules of natural justice occurred in connection with the making of the award.*"

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81 George Khoukaz, *Sharia Law and International Commercial Arbitration: The Need for an Intra-Islamic Arbitral Institution*, 2017(1) J. OF DISP. RESOL. 181 (2017).

82 *Id.* at 188, 189.

83 *Id.* at 189.

84 New York Convention, art. V.

Despite the elaborations given in the Act, public policy eludes immediate and precise definition.[85] As a result, we must closely consider the nature of public policy in the context of international arbitration, and examine how the public policy exception has been applied by Australian courts when it comes to considering the intersection between public policy and *Shari'a*.

Public policy takes into account the morals and social values of society, as well as the principles that underlie its written laws.[86] It is the most frequently argued ground for refusing enforcement, and varied and inconsistent interpretation of the public policy exception by national courts has been a major problem in the development of the system of international arbitration.[87]

There are various conceptions of public policy. Domestic public policy comprises the "*most basic notions of morality and justice*" in the place of enforcement.[88] In contrast, international public policy refers to "*[…] those standards or rules of a given state's domestic public policy that will also be applied by that state in an international context.*"[89] A third proposed concept of public policy is transnational public policy, which would represent "*[…] the existence of an international consensus as to universal standards or accepted norms of conduct that must always apply and provide limitations to public as well as private international relationships and transactions.*"[90] Public policy, as a ground for refusal of enforcement, has been held by Australian courts to refer to international public policy,[91] although the argument has been made that it should be taken to refer to transnational public policy.[92]

Public policy can be divided into substantive and procedural public policy rules. Substantive public policy rules include prohibitions arising from national systems of competition law, tax law, consumer law, currency controls, and embargoes and boycotts.[93] As a convenient illustration, many of the provisions of *Shari'a*, including *Riba* and *Gharar*, are likely to form part of the substantive public policy of Islamic nations. Examples of substantive public policy in Australia include rules against fraud and double recovery. On the other hand, procedural public policy includes rules of natural justice.[94] The *Shari'a* rules concerning female testimony may form part of the procedural public policy of Islamic nations.

The most common public policy ground for resisting enforcement of arbitral awards in Australia is breach of natural justice. The leading authority is the Full Court of the Federal Court of Australia's decision in *TCL Air Conditioner (Zhongshan) Co. Ltd.* v. *Castel Electronics Pty Ltd.*

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85 Pierre Mayer & Audley Sheppard, *Final ILA Report on Public Policy as a Bar to Enforcement of International Arbitral Awards*, 19(2) ARB. INT'L 249, 252 (2003).

86 Abdulaziz Mohammed Bin Zaid, The recognition and enforcement of foreign commercial arbitral awards in Saudi Arabia: comparative study with Australia 276 (Mar. 2014) (University of Wollongong).

87 Inae Yang, *A comparative review on substantive public policy in international commercial arbitration*, 70(2) DISP. RESOL. J. 49, 51 (2015).

88 Mark Buchanan, *Public Policy and International Commercial Arbitration*, 28 AM. BUS. L. J. 511, 513 (1998) [*hereinafter* "Buchanan"]; Parsons v. Whittemore Overseas Co. v. Societe Generale de L'Industrie du Papier, 508 F.2d 969, 974 (1974) (U.S.).

89 Buchanan, *supra* note 88, at 514.

90 *Id.*

91 *Id.* at 516; Mayer & Sheppard, *supra* note 85, at 249, 251; Traxys Europe SA v. Balaji Coke Industry Pty Ltd. [No. 2] [2012] 276 FCA 104, 105 (Austl.).

92 Buchanan, *supra* note 88, at 518.

93 Mayer & Sheppard, *supra* note 85, at 249, 256.

94 *Id.*

["**TCL**"].[95] In this case, the appellant sought to resist enforcement on public policy grounds, alleging three breaches of natural justice in the making of the award. The appellant argued that the "*proper approach was to examine the facts of the case afresh and revisit in full the questions which were before the arbitrators in order to evaluate whether or not probative material supported the factual conclusion.*"

In *TCL*, the primary judge had held that "*[…] the review by the Court did not involve examining the case afresh and revisiting in full all questions before the arbitrator. Rather, the extent of the enquiry depended on the circumstances in question.*"[96] On the question of when a breach of natural justice would constitute grounds to set aside an award, a narrow view was adopted by the court. The court held that "*[…] the asserted breach of the rules of natural justice must be of a sufficiently serious character to offend fundamental notions of fairness and justice before the relevant discretion under either Art 34 or Art 36 [of the Model Law] would be exercised.*"[97]

The Full Court in *TCL* upheld the primary judge's decision. The court held that public policy should be limited to "*[…] the fundamental principles of justice and morality of the state*"[98] and must be given a narrow meaning.[99] The court took a narrow view of natural justice as a ground for refusing enforcement, contending that "*[…] if the rules of natural justice encompass requirements such as the requirement of probative evidence for the finding of facts or the need for logical reasoning to factual conclusions, there is a grave danger that the international commercial arbitral system will be undermined by judicial review."*[100] Thus, it was held that although it is an error of law to make a finding of fact without probative evidence,[101] it does not necessarily constitute a breach of natural justice.[102]

The judgment in *TCL* has been followed as authority for a narrow view of natural justice as a public policy ground for refusing enforcement. The Full Court in *TCL* considered that natural justice was not necessarily limited to the rule necessitating fair hearing and the rule against bias.[103] Rather, it was found that the determinative question is whether there is demonstrated "*[…] real unfairness or real practical injustice*" in the making of the award.[104]

In *William Hare UAE LLC* v. *Aircraft Support Industries Pty Ltd.* ["**William Hare**"],[105] the Supreme Court of New South Wales (Darke J.) held that only one breach of natural justice was made out, out of many pleaded, being an award of a claim that was no longer pressed by the relevant party.[106] His Honour held that the part of the award affected by the breach of natural justice should be severed, and the rest of the award was enforced, unaffected.[107] His Honour followed the Full Court

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95 TCL Air Conditioner (Zhongshan) Co. Ltd. v. Castel Electronics Pty Ltd. [2014] FCAFC 83 (Austl.) [*hereinafter* "TCL Air Conditioner"].

96 *Id.* ¶ 13.

97 *Id.*

98 *Id.* ¶ 76.

99 *Id.* ¶ 80.

100 *Id.* ¶ 54.

101 *Id.* ¶ 82.

102 *Id.* ¶ 83.

103 *Id.* ¶ 88.

104 *Id.* ¶ 55.

105 William Hare UAE LLC v. Aircraft Support Industries Pty Ltd. [2014] NSWSC 1403 (Austl.) [*hereinafter* "William Hare"].

106 *Id.* ¶ 104.

107 *Id.* ¶ 137.

decision in *TCL*, finding that public policy was limited to "*the fundamental principles of justice and morality*" of the State,[108] and adopted a narrow view of natural justice.[109] This decision was unanimously upheld by the Court of Appeal.[110]

By way of comparison, in *Mango Boulevard Pty Ltd.* v. *Mio Art Pty Ltd.*,[111] the Queensland Court of Appeal overturned the primary judge's refusal to enforce an award where the arbitrator had introduced his own valuation methodology, which had not been pleaded by either party. The Court of Appeal held that the appellant had ample opportunity to respond to the new material but chose not to, so there was no "*real unfairness or real practical prejudice*".[112]

In *Sauber Motorsport AG* v. *Giedo van der Garde BV*,[113] the issue was whether there had been a breach of natural justice stemming from a misapprehension by the arbitral tribunal of the parties to the agreement. The Victorian Court of Appeal followed *TCL* in holding that because there was no real practical injustice or real unfairness, there was no breach of natural justice. In particular, it was asserted that the court would not entertain "*[…] a complaint as to a legal or factual conclusion which is, to use the words of the Full Court of the Federal Court in TCL, 'dressed up as a complaint about natural justice'*."[114]

In *ALYK (HK) Ltd.* v. *Caprock Commodities Trading Pty Ltd.*,[115] the award debtor alleged various breaches of natural justice as grounds for refusal of enforcement, including bias, and errors of law and procedure. The New South Wales Supreme Court followed *TCL*, holding that there was no real practical injustice or real unfairness, and therefore, no breach of natural justice. Slattery J. made it clear that the court would not allow findings of fact to be challenged under the guise of a natural justice challenge.[116]

On the other hand, in *Hui* v. *Esposito Holdings Pty Ltd.*,[117] the Federal Court (Beach J.) set aside an award where the arbitrator had made final decisions on substantial questions during a preliminary hearing without giving parties an opportunity to be heard. It was held that despite subsequent opportunities for the parties to be heard, the arbitrator was affected by prejudgment equating to bias.[118]

In *Gutnick* v. *Indian Farmers Fertiliser Cooperative Ltd.*,[119] the Victorian Supreme Court (Croft J.) suggested that enforcement may be refused where an award provides for double recovery, but found that the award in question did not provide for double recovery. The trial judge's finding of fact was unanimously upheld by the Court of Appeal in refusing leave to appeal, so the question of law did not arise for consideration.[120]

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108 *Id.* ¶ 41.
109 *Id.* ¶ 41.
110 Aircraft Support Industries Pty Ltd. v. Hare UAE LLC [2015] NSWCA 229 (Austl.).
111 Mango Boulevard Pty Ltd. v. Mio Art Pty Ltd. [2018] QCA 39 (Austl.).
112 *Id.* ¶¶ 75-86.
113 Sauber Motorsport AG v. Giedo van der Garde BV [2015] VSCA 37 (Austl.).
114 *Id.* ¶ 17.
115 ALYK (HK) Ltd. v. Caprock Commodities Trading Pty Ltd. [2015] NSWSC 1006 (Austl.).
116 *Id.* ¶ 19.
117 Hui v. Esposito Holdings Pty Ltd. [2017] FCA 648 (Austl.).
118 *Id.* ¶¶ 240-247.
119 Gutnick v. Indian Farmers Fertiliser Cooperative Ltd. [2016] VSCA 5 (Austl.).
120 *Id.*

On a review of Australian case law, breach of natural justice is by far the most common public policy ground for refusing enforcement, but courts will only refuse enforcement where there is 'real unfairness or real practical injustice' in the making of the award. Courts will not entertain a re-examination of the case put to the arbitrators and are wary of appeals on points of law dressed as natural justice arguments.

VI. Thinking about Saudi Awards

The Australian courts' approach to the public policy exception shows that the substantive content of an arbitral award will not ordinarily be reviewed. What matters is fairness in the making of the award. As a result, the *Shari'a* rules concerning interest and speculation should not affect enforceability, if the choice of law was clear, and there was no countervailing mandatory law applicable in Australia. This is fundamentally a matter of individual autonomy and freedom of contract. If the parties to a contract agree to forgo interest on damages, whether expressly or by selecting a governing law which prohibits interest, that agreement should be enforceable. If the parties to a contract desire to subject themselves to punitive damages, they may choose the laws of the United States of America, and their agreement should likewise be enforceable.[121]

On the other hand, the rules concerning female testimony pose a real risk to enforceability, both, as a matter of natural justice and due to wider normative values, assessments and perceptions of fairness.

Natural justice is traditionally bisected into the rule against bias and the right to be heard. In *Kioa* v. *West*,[122] the Australian High Court held that "*[…] the rules of natural justice are flexible, requiring fairness in all the circumstances.*"[123] It seems strongly arguable that affording a woman's testimony less weight than that of a man falls short of "*fairness in all the circumstances.*" Preferring one witness' testimony over that of another on a basis as arbitrary as gender may, depending on the circumstances, give rise to an apprehension of bias.

However, the circumstances in which courts are likely to refuse enforcement are probably few in number. This is for a number of reasons.

First, in line with the decisions in *TCL*, *ALYK* and *William Hare*, enforcement will only be refused if it can be shown that the award was actually affected by the breach,[124] meaning that the reduced weight given to female testimony must, to some extent, have influenced the outcome of the award.

Second, if a party to an arbitration does not object to the application of *Shari'a* evidentiary law during the arbitral proceedings, it is quite possible that they will be taken to have waived any right to object at the enforcement stage. This view was propounded by Rizwan, although he raises, by way of counterargument, the notion that the enforcing state may have a prevailing interest in ensuring due process as a matter of public policy or (in the US example) constitutional law.[125] It is also supported by a large body of Australian authority to the effect that failure to raise bias-related

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121 Jessica Fei, *Awards of Punitive Damages*, 2 STOCKHOLM ARB. REP. 33 (2003).
122 Kioa v. West (1985) 159 CLR 550 (Austl.).
123 *Id.* at 563.
124 TCL Air Conditioner, [2014] FCAFC 55, 83, 111 (Austl.); ALYK (HK) Lt.d v. Caprock Commodities Trading Pty Ltd., [2015] NSWSC 1006, 34 (Austl.); William Hare [2014] NSWSC 1403, 63, 103 (Austl.).
125 Rizwan, *supra* note 46, at 493, 515.

objections at the earliest opportunity will usually amount to a waiver of the right to object,[126] the principle behind which has been extended, for example, to circumstances in which a husband's testimony appeared to be favoured over that of a wife.[127] It is also supported by the wider principle that issues not agitated at trial cannot be raised on appeal.[128]

Third, there will be obvious difficulties in tracing the outcome of an award to particular decisions around weight of testimony. In *TCL*, it was stated that failure to accord weight to particular submissions did not necessarily constitute a breach of natural justice,[129] so it may be necessary to show that witness assessment based on gender was the reason for the decision. A court will not ordinarily re-examine the evidence in order to determine whether evidence was given proper weight.[130] While there may be a need to avoid the requirements of natural justice being reduced to a charade,[131] the determinative question remains whether there was actual unfairness in the making of the decision.[132]

It seems to us that Australian courts are unlikely to refuse enforcement for breach of natural justice except in circumstances where a male's evidence is preferred without any other justification, and where the outcome of the award is evidently affected by that preference. That may not be a palatable conclusion.

It is possible that a broader approach may be adopted due to the exceptional and emotive nature of the issue in question. Gender equality before the law is a central principle of Australian public policy. Australia signed the UN Convention on the Elimination of All Forms of Discrimination against Women in 1983,[133] and implemented it principally through the Sex Discrimination Act, 1984. All Australian states followed by enacting their own laws against gender discrimination, one example being Western Australia's Equal Opportunity Act, 1984. Australia also acceded to the Convention on the Political Rights of Women and has ratified the International Covenant on Civil and Political Rights.

It is unclear whether human rights treaties and conventions should apply to voluntary arbitration,[134] but it is conceivable that Australian courts might take into account the broader public policy of upholding gender equality. To enforce an affected award would indirectly discriminate against women by lending support to a regime which directly discriminates against women. Such an argument is yet to be made, but the moment for its making has arrived. We will need to watch this space.

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126 *See* Vakauta v. Kelly (1989) 167 CLR 568, 572 (Brennan, Deane & Gaudron JJ.) (Austl.); Smits v. Roach (2006) 227 CLR 423, 443 (Gleeson CJ, Heydon & Crennan JJ.) (Austl.).

127 Garden v. Gavin [No. 2] (2010) 43 Fam LR 383, 68-74 (Austl.).

128 Suttor v. Gundowda (1950) 81 CLR 418 (Austl.).

129 TCL Air Conditioner, [2014] FCAFC 83, 107 (Austl.).

130 *Id.* at 113.

131 *Id.* at 107.

132 *Id.* at 111.

133 *The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)*, AUSTRALIAN HUMAN RIGHTS COMMISSION (Dec. 14, 2012), *available at* https://www.humanrights.gov.au/convention-elimination-all-forms-discrimination-against-women-cedaw-sex-discrimination-international.

134 BHATTI, *supra* note 2, at 97-98.

VII. Conclusion

In Australia, the courts have maintained a strong pro-enforcement bias, and the Commonwealth Parliament has demonstrated its intent to limit public policy grounds to a breach of natural justice, fraud, and corruption. Nevertheless, there is a real possibility that some *Shari'a* rules, such as those concerning female testimony in commercial matters, will affect the enforceability of awards. Systematic discounting of particular evidence based on gender can be seen as depriving a party of a proper opportunity to present their case, and may constitute a breach of the principles of natural justice. This could, in some cases, render enforcement contrary to Australian public policy. It is possible, though less likely, that a court may, at some stage, take into account broader public policy considerations of gender equality.

The task of those concerned with the operation of the New York Convention, and the vitality of international commercial arbitration, is to see a way through the noise and distraction to determine how we ought to engage with *Shari'a* law. That task is for reverent hands and the reverence should extend not only to conceptions of efficiency, equality and fairness, but to recognized traditions and faiths. The challenge will be in finding the appropriate balance. In that quest, it would be beneficial to remember that the difference between one and the Other can be mere matters of geography or history. We ought to take up the task with the Chinese proverb in mind: *better a diamond with a flaw than a pebble without one*.

CAUSATION IN INTERNATIONAL INVESTMENT LAW: PUTTING ARTICLE 23.2 OF THE INDIA MODEL BIT INTO CONTEXT

Joachim Knoll[*] *& Tania Singla*[+]

Abstract

Causation has received little attention in international investment law even though it is an integral element of liability in investment disputes. This article uses the two dimensions of the causal inquiry, factual and legal causation as a framework for analysis, and explores how investment treaties and tribunals have addressed causation. Article 23.2 of the new India Model Bilateral Investment Treaty, which exhibits a novel approach to causation in treaty practice, must be seen in this context. As relationships among States and private investors grow more complex, other investment treaties may follow and set out specific standards of causation.

I. Introduction

In 2016, the Indian government adopted a new Model Bilateral Investment Treaty ["**Model BIT**"] as part of its endeavour to review its existing bilateral investment treaties ["**BITs**"] and evaluate its stance on investor-State arbitration. The Model BIT seeks to provide "*appropriate protection*" to foreign investors in India and Indian investors abroad while maintaining *"a balance between investor's rights and the [g]overnment's obligations.*"[1] It is intended to serve as the template for all future government negotiations for BITs and investment chapters.

The Model BIT marks a clean break from the minimalistic style of previous model BITs, providing significantly more detail with respect to both the definitions of substantive protections and provisions on dispute settlement.[2] The Indian government seeks to narrow the scope of protection by imposing rather strict definitions and including express safeguards for the host State's right to regulate. For instance, a notable manifestation in this respect is the absence of a Most Favoured Nation ["**MFN**"] provision from the Model BIT, a move that has been criticized for exposing foreign investment to the risk of discriminatory treatment.[3] In addition, foreign investors have to exhaust local remedies for at least five years before commencing international arbitration.[4] However, considering the backlog of cases within the Indian judicial system, this

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1 *See* Press Information Bureau, Ministry of Finance, Government of India, Model Text for the Indian Bilateral Investment Treaty (Dec. 16, 2015), *available at* https://pib.gov.in/newsite/PrintRelease.aspx?relid=133412; Model Text for the Indian Bilateral Investment Treaty, *available at* https://dea.gov.in/sites/default/files/ModelBIT_Annex_0.pdf [*hereinafter* "2016 India Model BIT"].

2 Saurabh Garg et al., *The Indian Model Bilateral Investment Treaty: Continuity and Change*, *in* RETHINKING BILATERAL INVESTMENT TREATIES – CRITICAL ISSUES AND POLICY CHOICES 77 (Kavaljit Singh & Burghard Igle eds., 2016).

3 Prabhash Ranjan & Pushkar Anand, *The 2016 Indian Model Bilateral Investment Treaty: A Critical Deconstruction*, 38 (1) NW. J. INT'L L. & BUS. 1, 24 (2017).

4 2016 India Model BIT, *supra* note 1, art. 15.2.

requirement constitutes an obstacle for foreign investors in India to access international arbitration and expeditiously resolve their disputes.

A remarkable provision in the Model BIT that has been subject to relatively little scrutiny so far is Article 23.2 (sub-clauses (d) and (e)), which relates to causation and the required directness and foreseeability of the loss suffered. Article 23.2 of the Model BIT states that:

> *"The disputing investor at all times bears the burden of establishing: (a) jurisdiction; (b) the existence of an obligation under Chapter II of this Treaty, other than the obligation under Article 9 or 10; (c) a breach of such obligation; (d) that the investment, or the investor with respect to its investment, has suffered actual and non-speculative losses as a result of the breach; and (e) that those losses were foreseeable and directly caused by the breach."*[5](emphasis added)

Under the law of international State responsibility, a State is liable only for the harm caused by its wrongful acts.[6] To establish liability, a sufficient causal link between the harm and an act attributable to the State must be proven to exist. Furthermore, to be compensable, the loss suffered must not be "*too indirect, remote, and uncertain to be appraised.*"[7]

While these general principles are well-established, the specific standards and tests to be applied when assessing causation are not. The international law rules governing State responsibility provide little specific guidance on how to tackle and balance the practical and policy considerations that have long influenced the determination of causation.[8] Few investment treaties identify any distinct standard for causation,[9] making express provisions such as Article 23.2 of the Model BIT all the more remarkable. In addition, international tribunals have not devised clear and commonly accepted standards governing causation.[10] Similarly, academic

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5 2016 India Model BIT, *supra* note 1, art. 23.2.

6 Report of the International Law Commission on the work of its fifty-third session, at 91, ¶ 9, U.N. Doc. A/56/10, *reprinted in* [2001] 2 Y.B. Int'l L. Comm'n 1, U.N. Doc. A/CN.4/SER.A/2001/Add.1 (Part 2) [*hereinafter* "Commentaries to the Draft ILC Articles"] ("the subject matter of reparation is, globally, the injury resulting from and ascribable to the wrongful act, rather than any and all consequences flowing from an internationally wrongful act.").

7 Commentaries to the Draft ILC Articles, *supra* note 6, ¶ 10 ("[C]ausality in fact is a necessary but not a sufficient condition for reparation. There is a further element, associated with the exclusion of injury that is too "remote" or "consequential" to be the subject of reparation. In some cases, the criterion of "directness" may be used, in others "foreseeability" or "proximity"").

8 Patrick Pearsall & J. Benton Heath, *Causation and Injury in Investor-State Arbitration*, *in* CONTEMPORARY AND EMERGING ISSUES ON THE LAW OF DAMAGES AND VALUATION IN INTERNATIONAL INVESTMENT ARBITRATION 1, 4 (Christina L. Beharry ed., 2018) [*hereinafter* "Pearsall & Health"]; *see also* IAN BROWNLIE, PRINCIPLES OF INTERNATIONAL LAW 446 (2003).

9 Pearsall & Health, *supra* note 8, at 11.

10 Ilias Plakokefalos, *Causation in the Law of State Responsibility and the Problem of Overdetermination: In Search of Clarity*, 26(2) EUR. J. INT'L L. 471, 476 (2015). For a more detailed discussion, *see* § II.

commentary relating to causation is far from unanimous with respect to such standards to be applied and, in any event, tends to focus on questions of quantum.[11]

This article analyses in **Part II** the two dimensions of causal inquiry, i.e., factual and legal causation, as conducted by investment tribunals and the impact of intervening acts on causation. **Part III** examines the role that investment treaties play in defining the test to be applied with respect to causation, with a particular emphasis on the Model BIT. **Part IV** offers concluding thoughts.

II. The Dimensions of Causation

Article 31(1) of the Articles on the Responsibility of States for International Wrongful Acts ["**ILC Articles**"] sets out the principle that a State is "*under an obligation to make full reparation for the injury caused by the internationally wrongful act.*"[12] Article 31(2) defines "*injury*" as "*any damage, whether material or moral, caused by the internationally wrongful act of a State.*"[13] These provisions codify the "*customary requirement of a sufficient causal link between conduct and harm*"[14] in the context of the law of State responsibility.

The causation inquiry in international law, like in many national legal systems, has two dimensions.[15] First, the loss suffered must be a natural consequence of the wrongful act (cause-in-fact or *factual causation*). Second, the wrongful act and the loss must be sufficiently proximate to allow compensation (cause-in-law or *legal causation*). Yet, there is no neat division between these two prongs of the inquiry.[16] Concepts such as contributory negligence show how intertwined they tend to be.[17]

A. Factual Causation

To establish factual causation, the damage must be shown to be a necessary consequence of the wrongful acts or omissions.[18] Different tests have been applied for this purpose.

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11 BORZU SABAHI, COMPENSATION AND RESTITUTION IN INVESTOR-STATE ARBITRATION: PRINCIPLES AND PRACTICE 170 (2011) [*hereinafter* "SABAHI"]; MARK KANTOR, VALUATION FOR ARBITRATION: COMPENSATION STANDARDS, VALUATION METHODS AND EXPERT EVIDENCE 105 (2008); SERGEY RIPINSKY & KEVIN WILLIAMS, DAMAGES IN INTERNATIONAL INVESTMENT LAW 135 (2008) [*hereinafter* "Ripinsky & Williams"]; BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 241 (1987).

12 G.A. Res. 56/83, annex, Articles on the Responsibility of States for International Wrongful Acts, art. 31(1) (Dec. 12, 2001) [*hereinafter* "ILC Articles"].

13 *Id.* art. 31(2).

14 *Report of the International Law Commission on the work of its fifty-second session*, 32 ¶ 97, U.N. Doc. No. A/55/10 30-34 (2000) *reprinted in* [2000] 2 Y. B. Int'l L. Comm'n 13, A/CN.4/SER.A/2000/Add.1 (Part 2)/Rev.1.

15 Plakokefalos, *supra* note 10, at 475*; see also* Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia, ICSID Case No. ARB/06/2, Award, ¶ 382 (Sept. 16, 2015); Biwater Gauff (Tanzania) Ltd. v. Tanzania, ICSID Case No. ARB/05/22, Award, ¶ 785 (July 24, 2008) [*hereinafter* "Biwater"]; Burlington Resources Inc. v. Republic of Ecuador, ICSID Case No. ARB/08/5, Decision on Reconsideration and Award, ¶ 333 (Feb. 7, 2017).

16 Pearsall & Heath, *supra* note 8, at 11.

17 *See* § C(ii) *infra.*

18 MARTIN JARETT, CONTRIBUTORY FAULT AND INVESTOR MISCONDUCT IN INVESTMENT ARBITRATION 44 (2019).

The most widely applied test for factual causation is the "*but for*" test, which poses the question of whether the damage would have occurred but for the wrongful act.[19] In other words, the respondent will be liable only if the damage would not have been caused without its act or omission that is being examined. It thus serves as an exclusionary test, eliminating factually irrelevant causes from consideration.[20]

International courts and tribunals have frequently applied this test, whether implicitly or explicitly.[21] In *Micula* v. *Romania*, the tribunal rejected, *inter alia*, the claim for lost profits because the claimants failed to prove "*with sufficient certainty that, but for [Romania's breach of the BIT], they would have earned profits they were allegedly deprived of.*"[22] According to the tribunal, the principle of full reparation under international law required that the victim of a tort be put in the same position it would have been in 'but for' the breach.[23] In *Chevron* v. *Ecuador*, the tribunal held that "*[i]n essence, the Claimants must prove the element of causation – i.e., that they would have received judgments in their favour as they allege 'but for' the breach by the Respondent.*"[24] The tribunal in *Suez* v. *Argentina* also adopted the hypothetical and counter-factual inquiry of the 'but for' test, albeit implicitly.[25]

More recently, the tribunal in *Bilcon* v. *Canada*[26] conducted its causation inquiry applying the 'but for' test. Relying on the *Bosnian Genocide*[27] case decided by the International Court of Justice ["**ICJ**"], the tribunal articulated the 'but-for' test as follows:

> "*In this regard, the test is whether the Tribunal is 'able to conclude from the case as a whole and with a sufficient degree of certainty' that the damage or losses of the Investors 'would in fact have been averted if the Respondent had acted in compliance with its legal obligations' under NAFTA.*"[28]

Despite its intuitive appeal, the 'but for' test has been subject to criticism for being simplistic and lacking nuance.[29] For some, it focuses unduly on speculation of what *might have* happened as

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19 Tory A. Weigand, *Tort Law – the Wrongful Demise of But For Causation*, 41(1) W. NEW ENG. L. REV. 75, 78 (2019).

20 Chisholm v. Liberty Mutual Group, [2002] 60 O.R. 3d 776, 217 (Can. Ont. C.A.).

21 *See, e.g.,* Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. Rep. 140, ¶ 462 (Feb. 26) [*hereinafter* "Bosnian Genocide"]; LG&E Energy Corp., LG&E Capital Corp. and LG&E Int'l Inc. v. Argentine Republic, ICSID Case No. ARB/02/1, Award, ¶ 48 (July 25, 2007).

22 Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania [I], ICSID Case No. ARB/05/20, Award, ¶ 1117 (Dec. 11, 2013).

23 *Id.* ¶ 917.

24 Chevron Corporation (USA) and Texaco Petroleum Company (USA) v. Republic of Ecuador, Case No. 34877, Partial Award on the Merits, ¶ 374 (Perm. Ct. Arb. 2010).

25 Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic, ICSID Case No. ARB/03/19, Award, ¶ 53 (Apr. 9, 2015).

26 Bilcon of Delaware et al. v. Government of Canada, Case No. 2009-04, Award on Damages (Perm. Ct. Arb. 2019) [*hereinafter* "Bilcon"].

27 Bosnian Genocide, Judgment, 2007 I.C.J. Rep. 140 (Feb. 26).

28 Bilcon, Case No. 2009-04, Award on Damages (Perm. Ct. Arb. 2019), ¶ 114 (The Bilcon tribunal rejected the claim for more than USD 440 million due to lack of certainty and awarded only the sunk costs to the investors, amounting to about USD 7 million plus interest).

29 Hillel David et al., *Proving Causation Where the But For Test is Unworkable*, 30 THE ADVOC. Q 216, 219 (2005); Richard W. Wright, *Causation in Tort Law*, 73 CAL. L. REV. 1735, 1775 (1985).

opposed to what *actually* happened.[30] For others, the test is unworkable in circumstances where multiple, concurrent causes contribute to the harm, or in cases of omissions.[31]

The 'Necessary Element of a Sufficient Set' ["**NESS**"] test offers a somewhat more nuanced approach. It posits that "[a] *particular condition is a cause of (contributed to) a specific result if and only if it was a necessary element of a set of antecedent actual conditions that was sufficient for the occurrence of the result*."[32] The test focuses not on whether the wrongful act was 'the' cause of the damage but on whether it was 'a' cause of the damage.[33] Unlike the 'but for' test, the NESS test captures different types of conduct as a cause of the damage. For this reason, some find it more appropriate for the complex factual scenarios that often arise in international law including in investment disputes.[34]

Yet, important authority advocates against the position that it could be sufficient for a claimant seeking to establish factual causation to show that a breach was one among several causes of the loss suffered. Namely, the ICJ in the *ELSI* case ruled that even though the breach at issue "*[n]o doubt (…) might have been one of the factors*" that had led to the loss, "*there were several causes acting together that led to the disaster to ELSI*."[35] It went on to apply an 'underlying cause test' to find that the "*underlying cause*" was not the breach, but rather the other causes that it had identified, in particular, the claimant's mismanagement of the business.[36]

Several investor-State tribunals have similarly focused on whether the conduct of the host State was the **dominant** or **primary cause** of the damage, especially where the factual matrix was complex and involved multiple causes. For instance, the tribunal in *Karkey Kardeniz* v. *Pakistan* concluded that the behaviour of the host State, which was in violation of an order of the tribunal, was the "*main cause*" of the claimed damages.[37] The tribunal in *Blusun* v. *Italy* found that the claimant had not discharged the burden of proof that "*the Italian State's measures were the operative cause of the Puglia Project's failure*".[38]

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30 Leon Green, *The Causal Relation Issue in Negligence Law*, 60(5) MICH. L. REV. 543, 556-557 (1962); David W. Robertson, *The Common Sense of Cause in Fact*, 75(7) TEX. L. REV. 1765, 1769 (1997).

31 Ernest J. Weinrib, *A Step Forward in Factual Causation*, 38 MOD. L. REV. 518, 522-523 (1975); *see also*, Plakokefalos, *supra* note 10, at 477.

32 Richard W. Wright, *Causation, Responsibility, Risk, Probability, Naked Statistics, and Proof: Pruning the Bramble Bush by Clarifying the Concepts*, 73 IOWA L. REV. 1001, 1019 (1988).

33 Plakokefalos, *supra* note 10, at 478.

34 *Id.*

35 Case Concerning Elettronica Sicula S.p.A. (U.S. v. It.), Judgment, 1989 15 I.C.J Rep. 15, ¶ 101 (July 20) [*hereinafter* "ELSI Case"].

36 *Id.* at 35.

37 Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pak., ICSID Case No. ARB/13/1, Award, ¶¶ 784–785, (Aug. 22, 2017).

38 Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic, ICSID Case No. ARB/14/3, Award, ¶ 394 (Dec. 27, 2016).

B. Legal Causation

The second prong of the causation inquiry – the test of legal causation – operates as a legal limit on liability by excluding indirect or remote harm; furthermore, it apportions liability in situations of an 'intervening cause', with the aim of ensuring fairness.[39]

Legal causation is a somewhat nebulous concept with no defined 'single verbal formula'.[40] Courts and tribunals have rather applied various criteria, such as 'foreseeability', 'remoteness', 'proximity', 'directness' or 'certainty'.[41] Two main standards are, however, commonly applied when assessing legal causation, i.e., directness of harm and reasonable foreseeability, both of which afford considerable discretion to tribunals.

The dominant approach applied in international law focuses on the directness of the harm[42] and on its reasonable foreseeability as a natural consequence of the wrongful act. The breaching party is, in principle, liable for such direct harm that it was in a position to reasonably anticipate as a consequence of its acts. Under this '**direct cause test**', only those acts that lead directly to the damage in question are held to have caused that damage. A loss qualifies as "direct" if it is the immediate consequence of the wrongful act.[43] By contrast, where intervening, concurrent forces have either extended the harm or caused the harm in combination with the original act, the loss suffered is an indirect consequence of that original act.

The second prevailing approach – the **proximate cause test** – assesses whether the damage was proximately caused by acts of the State.[44] A more flexible test, it distinguishes between "*proximate*" and "*remote*" causes of the loss, finding that no causation is given if the alleged cause is too remote.

While the direct cause test is the more traditional one,[45] international tribunals tend to allow themselves a larger degree of discretion by adding the application of the more fluid 'proximate cause test', effectively applying both tests in conjunction. For instance, the United Nations Compensation Commission, while expressly holding to compensate only "*direct losses*" within the meaning of Security Council Resolution 687 (1991), broadened this standard by applying a

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39 Stanimir Alexandrov & Joshua Robbins, *Proximate Causation in International Investment Disputes*, *in* YEARBOOK ON INTERNATIONAL INVESTMENT LAW AND POLICY 2008-2009 318 (Karl P. Sauvant ed., 2009).

40 Commentaries to the Draft ILC Articles, *supra* note 6, at ¶ 10.

41 *Id.*

42 *See* S.C. Res. 687, ¶ 16 (Apr. 3, 1991); Commentaries to the Draft ILC Articles, *supra* note 6, at ¶ 10.

43 *See* JOHN C.P. GOLDBERG & BENJAMIN C. ZIPURKSY, THE OXFORD INTRODUCTIONS TO U.S. LAW: TORTS 104–05 (2010).

44 Joseph Charles Lemire v. Ukraine, ICSID Case No. ARB/06/18, Award, ¶ 169 (Mar. 28, 2011) ("If it can be proven that in the normal cause of events a certain cause will produce a certain effect, it can be safely assumed that a (rebuttable) presumption of causality between both events exists, and that the first is the proximate cause of the other") [*hereinafter* "Lemire"]; *see also* Alexandrov & Robbins, *supra* note 39, at 321.

45 The directness standard can be traced back up to the famous Alabama Claims arbitration. *See* J. B. MOORE, HISTORY AND DIGEST OF INTERNATIONAL ARBITRATIONS 646 (1898) (classifying certain losses as "indirect", the arbitral tribunal concluded that these losses "do not constitute upon the principles of international law applicable to such cases a good foundation for an award of compensation").

proximate cause test in a considerable number of cases.[46] Other tribunals have followed a similar reasoning. As the United States-German Mixed Claims Commission expressed in one case:

> "*The use of the term [indirect damage] to describe a particular class of claim is inapt, inaccurate and ambiguous. The distinction sought to be made between damages which are direct and those which are indirect is frequently illusory and fanciful and should have no place in international law. The legal concept of the term 'indirect' when applied to an act proximately causing a loss is quite distinct from that of the term 'remote'. The distinction is important.*"[47]

The Commentary on Article 31 of the ILC Articles illustrates the mix of tests that is applied in determining causation, but it equally confirms the overriding importance of the so-called "remoteness test":

> "*Various terms are used to describe the link which must exist between the wrongful act and the injury in order for the obligation of reparation to arise. For example, reference may be made to losses 'attributable [to the wrongful act] as a proximate cause', or to damage which is 'too indirect, remote, and uncertain to be appraised', or to 'any direct loss, damage, […] or injury to foreign Governments, nationals and corporations as a result of' the wrongful act. Thus, causality in fact is a necessary but not a sufficient condition for reparation. There is a further element associated with the exclusion of injury that is too 'remote' or 'consequential' to be the subject of reparation. In some cases, the criterion of 'directness' may be used, in others 'foreseeability' or 'proximity'.*"[48]

Several tribunals have – when assessing legal causation – focused simply on whether there was a "*sufficient causal link*" between the breach of the treaty and the damage suffered by the investor.[49] Others realised that this test might not be sufficient. In *S.D. Myers* v. *Canada*, the tribunal used the sufficient link test in its First Partial Award only to elaborate in its Second Partial Award of October 21, 2002, as follows:

> "*In its First Partial Award, the Tribunal determined that damages may only be awarded to the extent that there is a sufficient link between the breach of a specific NAFTA provision and the loss sustained by the investor. Other ways of expressing the same concept might be*

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46 *See* Veijo Heiskanen, *The United Nations Compensation Commission*, *in* RECUEIL DES COURS DE L'ACADÉMIE DE DROIT INTERNATIONAL DE LA HAYE [COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW] 257, 334 (2002).

47 United States Steel Products Company, Costa Rica Union Mining Company, South Porto Rico Sugar Company v. Germany, 7 R.I.A.A. 62-63 (US-Ger. Mixed Cl. Comm'n 1923).

48 JAMES CRAWFORD, THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES 204-205 (2002).

49 S.D. Myers, Inc. v. Gov't of Can., Partial Award, Nov. 13, 2000, UNCITRAL Tribunal constituted under the North American Free Trade Agreement, ¶ 316; El Paso Energy International Company v. Argentine Republic, ICSID Case No. ARB/03/15, Award, ¶ 468 (Oct. 31, 2001); Duke Energy Electroquil Partners and Electroquil S.A. v. Republic of Ecuador, ICSID Case No. ARB/04/19, Award, ¶ 468 (Aug. 18, 2008); Biwater, ICSID Case No. ARB/05/22, Award, ¶ 779 (July 24, 2008); Crystallex International Corporation v. Bolivarian Republic of Venezuela, ICSID Case No. ARB(AF)/11/2, Award, ¶ 860 (Apr. 4, 2016).

> *that the harm must not be too remote, or that the breach of the specific NAFTA provision must be the proximate cause of the harm.*
>
> *[…] The focus is on causation, not foreseeability in the sense used in the law of contract. In contract law, foreseeability may limit the range of recoverability. That is not the case in the law of tort or delict. Remoteness is the key.*
>
> *Similarly, a debate as to whether damages are direct or indirect is not appropriate. If they were caused by the event, engage Chapter 11 and are not too remote, there is nothing in the language of Article 1139 that limits their recoverability*."[50]

The emphasis on directness and proximity of the alleged harm that was made by the tribunal in *S.D. Myers* v. *Canada* has also received praise in legal commentary.[51]

C. The Impact of Intervening Acts on Causation

An independent act that intervenes between the wrongful conduct and the damage, thus breaking the chain of causation, may absolve the author of the wrongful act of liability.[52] To do so, the intervening act must be sufficient to cause the damage by itself, and it must have been unforeseeable for the author of the original act.[53]

Intervening acts are critical to the direct cause test, as discussed in Section B. At the point where an intervening act enters the sequence of events to become a superseding cause, the liability may shift from the author of the original wrongful act to the intervening force. As recalled by the tribunal in *Lauder* v. *Czech Republic*:

> "*[e]ven if the breach* (…) *constitutes one of several 'sine qua non' acts, this alone is not sufficient. In order to come to a finding of a compensable damage it is also necessary that there existed no intervening cause for the damage. In our case the Claimant therefore has to show that the last, direct act, the immediate cause* (…) *did not become the superseding cause and thereby the proximate cause.*"[54]

Two principal factors are usually referred to as being prone to break the chain of causation: the conduct of a third party, and the claimant's contributory negligence.[55]

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50 S.D. Myers, Inc. v. Canada, Second Partial Award, Oct. 21, 2002, UNCITRAL Tribunal constituted under the North American Free Trade Agreement, ¶ 159.

51 Pearsall & Heath, *supra* note 9, at 11; Preliminary decisions, Decision No. 7, 26 R.I.A.A. 11-1210 (Eri.-Eth. Cl. Comm'n July 27, 2007) (considering various formulations, including "reasonableness," "proximate cause," "directness," and "foreseeability," and ultimately settling on a "proximate cause" standard that gives "weight to whether particular damage reasonably should have been foreseeable").

52 John Sherman Myers, *Causation and Common Sense*, 5 U. MIAMI L. REV. 238, 249 (1951).

53 *Id.*

54 Ronald S. Lauder v. Czech Republic, Final Award, Sept. 3, 2001, UNCITRAL Tribunal constituted under the Czech-U.S. BIT, ¶ 234 [*hereinafter* "Lauder"].

55 These two factors are recognized in general tort law of both common law and civil law systems. For common law examples, *see* McKew v. Holland & Hannen & Cubitts (Scotland) Ltd [1969] 3 All ER 162 (Eng.); Knightley v. Johns

i. The Conduct of a Third Party as an Intervening Cause

The impact of the conduct of a third party as an intervening cause is best demonstrated by oft-quoted twin cases of *CME* v. *Czech Republic* ["**CME**"] and *Lauder* v. *Czech Republic* ["**Lauder**"]. These are notorious for several reasons,[56] including that despite being based on the same factual matrix, the tribunals arrived at starkly different outcomes.[57] The cases are also illustrative of the decisive impact that different approaches to causation can have on liability and compensation, especially where the conduct of a third party is involved as a concurrent cause.[58]

CME, a Dutch company, had invested in the Czech Republic in the form of its majority shareholding in a locally established company, CNTS. CME had entered into an agreement with CET 21, a Czech company, which granted CNTS the exclusive right to use the TV broadcasting licence that had been granted by the Czech Media Council. Thereafter, the Czech Media Council adopted a series of measures in collaboration with Dr. Železný, the General Director of CNTS and Executive Director of CET 21 at the time, due to which CNTS lost its exclusive rights to the licence and CME, its investment. Based on these facts, two sets of arbitration proceedings were initiated; the first one by CME under the Netherlands-Czech Republic BIT and the second one by Mr Lauder, the ultimate American shareholder of CME, under the US-Czech Republic BIT. In both cases, the Czech Republic argued that it was not liable because "*no harm would have come to CME's investment without the actions of Dr. Železný.*"[59]

In *Lauder*, the tribunal accepted the Czech Republic's contention and found that the "*real cause for the damage*" was the conduct of Dr. Železný and CET 21, which was not attributable to the Czech Republic.[60] Further, it concluded that even though the Czech Republic had violated the BIT in 1993, the harm that was inflicted six years later through the intervening acts of Dr Železný was "*too remote*" to be sufficiently connected to the breach.[61]

The *CME* tribunal, on the other hand, rejected the Czech Republic's contention. Referring to the ILC Articles and their commentary,[62] the tribunal held that international law did not "*support the*

[1982] 1 WLR 349 (Eng.). For civil law, *see Introduction to French Tort Law*, BRIT. INST. OF INT'L & COMP. L., *available at* https://www.biicl.org/files/730_introduction_to_french_tort_law.pdf.

56 Stephan Wittich, *Joint Tortfeasors in Investment Law*, *in* INTERNATIONAL INVESTMENT LAW FOR THE 21ST CENTURY: ESSAYS IN HONOUR OF CHRISTOPH SCHREUER 709 (Christina Binder et al. eds., 2009).

57 CME Czech Republic B.V. v. Czech Republic, Partial Award, Sept. 13, 2001, UNCITRAL Tribunal constituted under the Czech-Neth. BIT [*hereinafter* "CME"]; Lauder, Final Award, Sept. 3, 2001, UNCITRAL Tribunal constituted under the Czech-U.S. BIT, ¶ 234.

58 SABAHI, *supra* note 11, at 173.

59 CME, Partial Award, Sept. 13, 2001, UNCITRAL Tribunal constituted under the Czech-Neth. BIT, ¶ 580.

60 Lauder, Final Award, Sept. 3, 2001, UNCITRAL Tribunal constituted under the Czech-U.S. BIT, ¶ 234.

61 *Id.* ¶ 235.

62 Commentaries to the Draft ILC Articles, *supra* note 6, Comment. to art. 31, ¶ 13 ("Unless some part of the injury can be shown to be severable in causal terms from that attributed to the responsible State, the latter is held responsible for all consequences , not being too remote, of its wrongful conduct").

reduction or attenuation of reparation of concurrent causes, except in cases of contributory fault."[63] Notably, the tribunal also relied upon general principles of domestic tort law,[64] in support of its conclusion:

> "*It is the very general rule that if a tortfeasor's behaviour is held to be a cause of the victim's harm, the tortfeasor is liable to pay for all of the harm so caused, notwithstanding that there was a concurrent cause of that harm and that another is responsible for that cause … In other words, the liability of a tortfeasor is not affected vis-à-vis the victim by the consideration that another is concurrently liable.*"[65]

Based on this analysis, the tribunal held that even though the conduct of Dr. Železný was a concurrent cause of the damage, CME was entitled to full compensation from the Czech Republic.[66]

The fundamental difference between the *Lauder* and *CME* awards lay in how the respective tribunals characterized the conduct of Dr. Železný, i.e., whether it was considered simply as a relevant cause, or whether it was an intervening cause that had broken the chain of causation between the original act and the damage caused to the claimant.

As relationships among States and private actors become more complex, tribunals in investment disputes will continue to be called upon to decide the relevance of intervening acts by third parties, hence potentially developing more fixed approaches to what is still a partly unsettled issue. This being said, the assessment to be made in this respect will inherently be fact-specific.

ii. Contributory Negligence

The principle of contributory negligence allows a judge to reduce the quantum of damages where the claimant's conduct has materially contributed to the harm suffered. As is the case in many national legal systems,[67] international law accepts contributory negligence as another manifestation of the theory of concurrent causes and hence as a factor to reduce the tortfeasor's liability in terms of the compensation owed.[68] It is embodied in ILC Article 39:

> "*In the determination of reparation, account shall be taken of the contribution to the injury by wilful or negligent action or omission of the injured State or any person or entity in relation to whom reparation is sought.*"[69]

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63 CME, Partial Award, Sept. 13, 2001, UNCITRAL Tribunal constituted under the Czech-Neth. BIT, ¶ 583.

64 *Id.* ¶ 582 ("This interference with ČNTS' business and the Media Council's actions and omissions in 1999 must be characterized similar to actions in tort."). *See also* Alexandrov & Robbins, *supra* note 39, at 335.

65 CME, Partial Award, Sept. 13, 2001, UNCITRAL Tribunal constituted under the Czech-Neth., ¶ 581, *citing* J.A. Weir, *Complex Liabilities*, *in* INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW 41 (A. Tunc ed., 1983).

66 CME, Partial Award, Sept. 13, 2001, UNCITRAL Tribunal constituted under the Czech-Neth., ¶¶ 582–85.

67 W.V.H Rogers, *Contributory Negligence Under English Law*, *in* UNIFICATION OF TORT LAW: CONTRIBUTORY NEGLIGENCE 57 (U. Magnus & M. Martin Casals eds., 2003).

68 Sergey Ripinsky, *Assessing Damages in Investment Disputes: Practice in Search of Perfect*, 10 J. WORLD INV. & TRADE 5, 15 (2009).

69 ILC Articles, *supra* note 12, art. 39.

Investor-State tribunals have considered the contributory negligence of the foreign investor in a number of cases. Similar to the famous quote in *Maffezini* v. *Spain* that "*Bilateral Investment Treaties are not insurance policies against bad business judgments*",[70] the tribunal in *MTD Equity* v. *Chile* ["**MTD Equity**"] distinguished between the damage suffered due to Chile's breach and that caused due to the claimants' own conduct, and found that "*[t]he BITs were not an insurance against the business risk*" and the claimants should "*bear the consequences of their own actions as experienced businessmen.*"[71] Consequently, the tribunal reduced the compensation payable by 50%.[72] The tribunal in *Azurix* v. *Argentina* adopted a similar approach, reducing the compensation payable because of the investor's negligence that resulted in overpaying for the concession.[73]

Not every contribution by the investor to the ultimate damage triggers a finding of contributory negligence. In *Occidental* v. *Ecuador* ["**Occidental**"], the tribunal emphasized that, in order to be relevant for the causation inquiry, the wrongful act of the investor must be "*material and significant.*"[74] More recently, the tribunal in *Burlington Resources* v. *Ecuador* found that two conditions must be satisfied: (i) the investor's act or omission should have been wilful or negligent; and (ii) it must have materially contributed to the damage.[75] The tribunal found that Ecuador had failed to discharge its burden of proof and therefore, dismissed its claim of contributory negligence.[76]

While the tribunal in *MTD Equity* reduced the damages by 50%, the *Occidental* tribunal held that a 25 per cent reduction was "*fair and reasonable in the circumstances.*"[77] The tribunals in *Yukos* v. *Russia* and *Copper Mesa* v. *Ecuador* reduced the compensation payable by 25% and 30% respectively.[78] None of these tribunals found it necessary to provide an objectively verifiable basis for their apportionment; nor could they have done so, rather, they based their decisions on "*the exercise of [their] wide discretion.*"[79]

III. Causation in Investment Treaties

Despite the variety of standards and approaches being applied by investor-State tribunals to the causation requirement, States rarely provide any guidance in this respect in the investment

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70 Emilio Agustín Maffezini v. Kingdom of Spain, ICSID Case No. ARB/97/7, Award, ¶ 64 (Nov. 13, 2000).

71 MTD Equity Sdn. Bhd. and MTD Chile v. Republic of Chile, ICSID Case No. ARB/01/7, Award ¶ 178 (May 25, 2004).

72 *Id.* ¶ 243.

73 Azurix Corp. v. Argentine Republic, ICSID Case No. ARB/01/12, Award, ¶ 243 (July 14, 2006).

74 Occidental Petroleum Corp. and Occidental Exploration and Production v. Republic of Ecuador, ICSID Case No. ARB/06/11, Award, ¶ 670 (Oct. 5, 2012) [*hereinafter* "Occidental"].

75 Burlington Resources Inc. v. Republic of Ecuador, ICSID Case No. ARB/08/5, Decision on Reconsideration and Award, ¶ 576 (Feb. 7, 2017).

76 *Id.* ¶ 585.

77 Occidental, ICSID Case No. ARB/06/11, Award, ¶ 687 (Oct. 5, 2012).

78 Yukos Universal Limited (Isle of Man) v. Russian Federation, Case No. 2005-04/AA 227, Final Award, ¶ 637 (Perm. Ct. Arb. 2014) [*hereinafter* "Yukos"]; Copper Mesa Mining Corporation v. Republic of Ecuador, Case No. 2012-2, Award, ¶ 6.102 (Perm. Ct. Arb. 2016).

79 Occidental, ICSID Case No. ARB/06/11, Award, ¶ 687 (Oct. 5, 2012); Yukos, Case No. 2005-04/AA 227, Final Award, ¶ 1637 (Perm. Ct. Arb. 2014).

treaties they enter into.[80] A notable exception is Canada, which has included references to causation, albeit very basic ones, in its investment treaties since the 1990s. For instance, Article XII(2) of the Canada-Costa Rica BIT provides that the investor bears the burden of proving that it has incurred loss "*by reason of, or arising out of, [the] breach*".[81] Many other Canadian BITs employ a similar formulation.[82]

The Canadian approach also found its way into the NAFTA Articles 1116 and 1117, which allow a foreign investor to seek compensation only for damage or losses that occur "*by reason of, or arising out of, [the] breach*".[83] Subsequent treaty practice of Mexico and the United States followed suit. In the case of Mexico, the shift quickly followed the NAFTA's entry into force in 1994, with several Mexican BITs from the late 1990s, such as the Mexico-Switzerland BIT (1995), the Mexico-Netherlands BIT (1997) and the Mexico-Austria BIT (1998) including references to causation.[84] When Mexico adopted its Model BIT in 2008, it incorporated the Canadian/NAFTA formulation in the dispute settlement provision, which states:

> "*An investor of a Contracting Party may submit to arbitration a claim that the other Contracting Party has breached an obligation set forth in Chapter II, and that the investor has incurred loss or damage by reason of, or arising out of, that breach*."[85]

This provision is identical to the dispute settlement provision in the Canadian Model BIT of 2004.[86] On the other hand, the dispute settlement provision in the 2004 United States Model BIT provides that the claim must be based on the respondent's breach and that "*the claimant has incurred loss or damage by reason of, or arising out of, that breach*".[87] Many of the BITs concluded by the United States since 2004 include an identical formulation.[88]

It appears that at least a rudimentary reference to causation such as the ones referred to above is gradually becoming more commonplace, even outside the treaty practice of the NAFTA parties.

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80 Pearsall & Heath, *supra* note 8, at 7.

81 Agreement for the Promotion and Protection of Investments, Can.-Costa Rica, art. XII(2), Mar. 18, 1998 .

82 *See, e.g.*, Agreement for the Promotion and Protection of Investments, Can.-Venez., art. XII(2), June 25, 1982; Agreement for the Promotion and Reciprocal Protection of Investments, Can.-Ecuador, art. XIII(2), Apr. 29, 1996; Agreement for the Reciprocal Promotion and Protection of Investments, Can.-Barb., art. XIII(2), May 29, 1996; Agreement for the Promotion and Protection of Investments, Can.-Croat., art. XII(2), Feb. 3, 1997; Free Trade Agreement, Can.-Colom., art. 819, Nov. 21, 2008; Agreement for the Promotion and Protection of Investments, Can.-Kuwait, art. 20(1)(b), Sept. 26, 2011; Agreement for the Promotion and Protection of Investments, Can.-Mong., art. 20(1)(2), Sept. 8, 2016.

83 North American Free Trade Agreement, Can.-Mex.-U.S., arts. 1116 and 1117, Dec. 17, 1992, 32 I.L.M. 289 (1993).

84 Agreement on the Promotion and Reciprocal Protection of Investments, Mex.-Switz., art. 2(2), July 10, 1995; Agreement on Promotion, Encouragement and Reciprocal Protection of Investments, Mex.-Neth., art. 2(2), May 13, 1998; Agreement on the Promotion and Protection of Investments, Mex.-Austria, art. 10(1), June 29, 1998.

85 *See, e.g.*, Mexican Model of Investment Promotion and Protection Agreement, art. 11(1), Dec. 2008.

86 *See, e.g.*, Canada Model Foreign Investment Protection and Promotion Agreement, art. 22(1), May 20, 2004.

87 *See, e.g.*, United States Model Bilateral Investment Treaty art. 24(1), 2004.

88 *See, e.g.*, Treaty concerning the Encouragement and Reciprocal Protection of Investment, Uru.-U.S., art. 24(1)(ii), Nov. 4, 2005; Agreement on the Establishment of a Free Trade Area, Oman-U.S., art. 10.15(ii), Jan. 19, 2006; Free Trade Agreement, Pan.-U.S., art. 10.16(ii), June 28, 2007; Free Trade Agreement, Kor.-U.S., art. 10.16(ii), June 30, 2007;); Treaty concerning the Encouragement and Reciprocal Protection of Investment, Rwanda-U.S, art. 24(1)(ii), Feb. 19, 2008.

The dispute settlement provision of the ASEAN Investment Promotion Agreement states that in addition to the breach, the claimant must show that "*the disputing investor in relation to its covered investment has incurred loss or damage by reason of or arising out of that breach.*"[89] The China-Korea BIT has yet another approach to causation; namely by including it in the definition of 'investment dispute':

> "*[A]n investment dispute is a dispute between one Contracting Party and an investor of the other Contracting Party that has incurred loss or damage by reason of, or arising out of, an alleged breach of this Agreement with respect to an investment of an investor of that other Contracting Party.*"[90]

However, none of these treaties specify the applicable standard or test for proving causation.[91] Against this background, Article 23.2 of the Indian Model BIT is all the more remarkable, in that it sets a specific standard by requiring an investor to prove:

> "*[…] (d) that the investment, or the investor with respect to its investment, has suffered actual and non-speculative losses as a result of the breach; and (e) that those losses were foreseeable and directly caused by the breach.*"[92]

Thus, not only does Article 23.2 expressly refer to causation, it also specifies:

(i) the nature of the losses that are compensable – "*actual and non-speculative losses*";

(ii) a hybrid standard for legal causation – "*directly caused by the breach*" and "*losses suffered were foreseeable*"; and

(iii) that the burden of proof lies with the investor.

Given the relevance of the standards and tests applied to causation, as well as the diversity of approaches actually adopted by investor-State tribunals as illustrated above, it is surprising that specific provisions, such as the one in Article 23.2 of the Model BIT, have not yet become more common in international treaty practice. India, for one, has already signed its first BIT that includes similar provisions on causation with Belarus in September 2018.[93] It can be expected that other jurisdictions will follow India's lead, given that precision as to standards of factual and legal causation serves the interests of the host State directly. Express provisions in the BIT can limit the scope of the liability of the host state *vis-à-vis* a foreign investor, much like the limitation of liability clauses that are commonplace in commercial contracts. Maybe even more importantly, they provide predictability to both host States and investors with respect to questions that would otherwise be the subject of diverging tests and standards.

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89 ASEAN Agreement for the Promotion and Protection of Investments art. 32, Feb. 26, 2009.
90 Agreement on the Promotion and Protection of Investments, China-Kor., art. 9(1), Sept. 7, 2007.
91 Ripinsky & Williams, *supra* note 11, at 138.
92 *See, e.g.*, 2016 India Model BIT, *supra* note 1, art. 23.2.
93 Treaty on Investments, Belr.-India, art. 23.2., Sept. 24, 2018.

IV. Concluding Remarks

Most investment tribunals conduct some form of a causation inquiry, whether implicitly or explicitly: first, a tribunal must examine the causal connection between the act and the harm on a factual level; and second, a tribunal must determine whether there are legal factors or intervening causes that limit or exclude the liability of the host State.

Tribunals employ various standards and tests for determining causation in their awards, thus confirming that the causal inquiry leaves a lot of room for interpretation and discretion. This is partly due to the absence of any specific standards of causation in investment treaties, which requires the tribunals to draw upon different sources such as the private law concepts of causation or the principles articulated in the ILC Articles, with varying results. While recent awards show more coherence in their causal analyses,[94] consensus, and the resultant predictability of legal outcomes, is yet to emerge.

One step towards more coherent and consistent reasoning in investment awards may be for host States to include legal standards for causation in their investment treaties as the Model BIT does in Article 23.2. It remains to be seen if and to what extent such specific guidance will affect the reasoning of investor-State tribunals and the outcome of claims brought based on treaties including such language. In any event, other jurisdictions may well follow India's lead and provisions like Article 23 may well gain traction in the negotiation of modern investment treaties.

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94 Biwater, ICSID Case No. ARB/06/18, Award, ¶¶ 157–208 (Mar. 28, 2011); Bilcon, Case No. 2009-04, Award on Damages, ¶¶ 168-176 (Perm. Ct. Arb. 2019).

THE INVESTMENT COURT SYSTEM UNDER THE EU-CANADA COMPREHENSIVE ECONOMIC AND TRADE AGREEMENT: PROPOSAL AND SOME UNADDRESSED ISSUES

*Ameyavikrama Thanvi**

Abstract

Investor-State dispute settlement ["***ISDS***"] *has been the preferred mechanism for resolution of disputes between foreign investors and States over the last few decades. However, despite the preference, the system has come under severe criticism in the recent past. Among numerous suggestions that have been floated to address the shortcomings of the system, a multilateral investment court proposed by the European Union* ["***EU***"] *and its Member States holds potential to bring about a paradigm shift in the way disputes are settled between foreign investors and sovereign States. The EU has, in fact, already incorporated provisions for such a court in some of its recent trade and investment treaties. For instance, the EU-Canada Comprehensive Economic and Trade Agreement proposes setting up an investment court system* ["***ICS***"] *and submitting their investment disputes to such a court. At the outset, this paper attempts to assess the model proposed by the treaty parties to this agreement by analysing the structure proposed for the court, its composition, the law applicable to proceedings before it and the nature of the decisions rendered by such an investment court. It then goes on to analyse the reasons for which the validity of the proposed court was challenged before the Court of Justice for the European Union* ["***CJEU***"] *and the reasoning provided by it to uphold validity of the proposed ICS. In the third part, the author has identified issues that have, thus far, been left unaddressed by the CJEU and which may cause hinderance in smooth functioning of the proposed model of investor-State dispute resolution. The author concludes that the proposed court system is merely a modified version of the prevalent ad-hoc arbitration with no real promise to be the panacea to the current ills of the system. The proposed court may lend legitimacy to the dispute-resolution process by giving sovereigns the authority to appoint judges but there is nothing to ensure that it would address the other issues faced by ISDS today, including quality and consistency of decisions rendered.*

I. Introduction

> "*Every teenager learns the hard lesson that with freedom comes responsibility. ISDS, as dispute resolution systems go, is in its teenage years, and as teenagers do it unnerves many who find its immaturity exacerbating at times.*"[1]

The EU, for one, seems to have had enough with the unfettered freedom enjoyed by the traditional mechanism of ISDS. To address the shortcomings of the prevailing system, the EU has been promoting the idea of a permanent multilateral court that would examine all investment

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1 Sophie Nappert, EFILA Inaugral Lecture: Escaping from Freedom? The Dilemma of an Improved ISDS Mechanism 15 (Nov. 26, 2015).

disputes. However, it seems that the practicalities of global diplomacy may not permit a sudden overhaul of the existing system.[2] The EU has thus adopted the policy of introducing a proto-version of the multilateral court in its investment agreements with its trading partners.

The EU's Comprehensive Economic and Trade Agreement ["**CETA**"] with Canada is one such agreement that envisages the new model of ISDS. It proposes a so-called two-tiered "Investment Court System" which purports to address the shortcomings of traditional ISDS such as concerns regarding legitimacy and lack of consistency in ruling.[3] While there are many sceptics globally with whom the idea of an investment court isn't agreeable, legitimate concerns and opposition have been raised against the ICS proposed under the CETA within Europe as well. The Kingdom of Belgium, in fact, sought an opinion from the CJEU on the validity of the CETA, and compatibility of the proposed ICS with the autonomy of the EU law. On April 30, 2019, the CJEU gave its final binding opinion, which held the ICS proposed under the CETA to be compatible with EU law.[4]

This paper, in the first part, examines the essential features of the proposed ICS under the CETA. In **Part II**, it addresses the opinions delivered by both, the Advocate General and the CJEU. The author studies the reasons provided in both, the opinions in favour of upholding the validity of the CETA and in favour of holding the ICS to be compatible with the EU law. In **Part III**, the author argues that even though the concept has been given a green light by the highest court in Europe, certain other concerns persist. *First*, it isn't entirely clear from the text of the CETA if the proposed ICS is indeed a court or just a modified version of traditional investor-State arbitration. *Second*, presuming it to be a court, can the opinion issued by such a "court" be enforced under the extant legal regime? *Third*, if the ultimate goal is to have a single multilateral court, how would the many proliferated courts under individual treaties reach the point of culmination? In this part, the author also argues that for the EU to be able to achieve its goal of a multilateral court, it will have to be party to every treaty itself. The author concludes by arguing that whatever the structure and function of the multilateral court may be in the future, the ICS proposed under the CETA is essentially only a modified version of traditional investor-State arbitration. In fact, for it to deliver its mandate of effective dispute resolution, it cannot be a court under the extant international legal regime.

II. The Investment Court System Under The CETA

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2 The discussions pertaining to the investor-State dispute settlement (ISDS) reforms are in progress. In the next meeting of the State representatives, the option of having a two-tier system which has an independent permanent/semi-permanent multilateral court is going to be considered. For the developments in this regard, *see Working Group III: Investor-State Dispute Settlement Reform*, UNITED NATIONS COMM'N ON INT'L TRADE L. (UNCITRAL) (Apr. 9, 2020), *available at* https://uncitral.un.org/en/working_groups/3/investor-state.

3 *See* Joint Interpretative Instrument on the Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union and its Member States pmbl., art. 6(g), Jan.14, 2017, 2017 O.J. (L 11) 3, *available at* https://eur-lex.europa.eu/legal-content/EN/TXT/?toc=OJ:L:2017:011:FULL&uri=uriserv:OJ.L_.2017.011.01.0003.01.ENG [*hereinafter* "CETA Joint Interpretative Instrument"].

4 Opinion 1/17 of the Full Court of Justice of European Union on Comprehensive Economic and Trade Agreement (Apr. 30, 2019), *available at* http://curia.europa.eu/juris/document/document.jsf?text=&docid=213502&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=4976548 [*hereinafter* "Opinion 1/17"].

The CETA was negotiated for eight years and finalised in 2014, but it underwent legal revision, which was completed in 2016.[5] This so-called "legal scrub"[6] of the CETA led to two noteworthy changes to the original text of its investment chapter. One of these revisions was the replacement of the proposed dispute resolution mechanism i.e., traditional investor-State arbitration with a two-tier tribunal, complete with appellate mechanism.[7] Another provision that underwent change was 'Applicable law and Interpretation'.[8]

However, the CETA was not the first European trade agreement to provide for an ICS. The development of a new dispute resolution mechanism in the CETA was an effect of a development in the EU-USA trade negotiations for the Transatlantic Trade and Investment Partnership ["**TTIP**"]. After public consultation, the European Parliament had asked that a new system of dispute settlement be defined with appointed judges.[9]

The EU has been pushing for reforming the dispute resolution mechanism to make good the shortfalls of the traditional investor-State dispute resolution, and has been working towards setting up a Multilateral Investment Court ["**MIC**"].[10] In 2018, the European Council issued the directives for undertaking negotiations to establish a MIC.[11] The tribunal proposed under the CETA is a step towards the ultimate goal of establishing a MIC.[12] In fact, the joint statement released by the EU Commissioner for Trade and Minister of International Trade for Canada, unequivocally stated that the modifications in the agreement reflect the desire of both parties to reform the "*investment protection and dispute resolution provisions and to continue working together…to pursue the establishment of a multilateral investment tribunal.*"[13] Nevertheless, it is unclear how this transition from tribunals under different Free-Trade Agreements[14] signed by the EU to a single MIC, will be effected.[15]

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5 *See* Comprehensive Economic and Trade Agreement, Can.-EU, Jan. 14, 2017, 2017 O. J. (L11) 23 [*hereinafter* "CETA"].

6 The term was used by the European Commission in its press release announcing the re-negotiated provisions of the CETA. *See CETA: EU and Canada agree on new approach to investment in trade agreement*, EUR. COMM'N (Feb. 29, 2016), *available at* http://trade.ec.europa.eu/doclib/press/index.cfm?id=1468.

7 *Id.*

8 *Id.*; *see also* Jarrod Hepburn, *CETA's New Domestic Law Clause,* EJIL: TALK! (Mar. 17, 2016), *available at* https://www.ejiltalk.org/cetas-new-domestic-law-clause/.

9 LAURA PUCCIO & RODERLCK HARTE, EUR. PARL. RESEARCH SERV., FROM ARBITRATION TO INVESTMENT COURT SYSTEM: EVOLUTION OF CETA RULES (2018).

10 *The Multilateral Investment Court Project*, EUR. COMM'N (Dec. 21, 2016), *available at* http://trade.ec.europa.eu/doclib/press/index.cfm?id=1608.

11 Council Directive 12981/17 of Mar. 20, 2018, Negotiating directives for a Convention establishing a multilateral court for the settlement of investment disputes, *available at* http://data.consilium.europa.eu/doc/document/ST-12981-2017-ADD-1-DCL-1/en/pdf; *see also* Cecilia Malmstrom, European Commissioner for Trade, A Multilateral Investment Court: a contribution to the conversation about reform of investment dispute settlement (Nov. 22, 2018), *available at* http://trade.ec.europa.eu/doclib/docs/2018/november/tradoc_157512.pdf.

12 CETA, *supra* note 5, art 8.29 provides that the parties shall pursue with other trading partners the establishment of a multilateral investment tribunal and appellate mechanism for the resolution of investment disputes.

13 PUCCIO & HARTE, s*upra* note 9; *see* CETA, *supra* note 5.

14 A dispute resolution mechanism similar to the one proposed under CETA has been incorporated in the Investment Protection Agreement, EU-Viet., June 30, 2019 [*hereinafter* "EU-VIPA"]; EU-VIPA, ch. 3(4), contemplates establishment of an 'Investment Tribunal System'; art. 3.38 establishes a tribunal to adjudicate disputes between investor of one party on one hand and the other state party on the other; art. 3.39 provides a permanent appellate tribunal to hear appeals from the tribunal of first instance. Moreover, much like the CETA, EU-VIPA also expressly registers the parties' intention to enter into negotiations for international agreement to establish a multilateral

A. Structure

What the CETA provides for is not a permanent standing structure but a two-tier system with the International Centre for Settlement of Investment Disputes ["**ICSID**"] as its Secretariat to provide it with the appropriate support.[16] It provides for a tribunal of first instance, which may decide disputes under any of the rules provided under Article 8.23(2). These rules include the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ["**ICSID Convention**"] and Rules of Procedure for Arbitration Proceedings, and the ICSID Additional Facility Rules if the conditions for proceeding pursuant to ICSID Convention and Rules do not apply;[17] the United Nations Commission on International Trade Law ["**UNCITRAL**"] Arbitration Rules or any other rules that the parties may agree to. The Tribunal is also permitted to draw up its own procedure.[18]

CETA creates an Appellate Tribunal to review the awards rendered[19] by the tribunal of first instance. The Appellate Tribunal has been granted the jurisdiction to uphold, modify or reverse a tribunal's award[20] not only on the basis of grounds for annulment as set out in Article 52 of the ICSID Convention,[21] but also on additional grounds. The first of these additional grounds is error in the application or interpretation of applicable law,[22] and second, manifest error in appreciation of facts including appreciation of domestic law.[23] Details regarding the Appellate Tribunal's functioning are to be determined by the CETA Joint Committee.[24] The CETA provides that the award made by the Appellate Tribunal shall be final and enforceable,[25] and its

investment tribunal; Investment Protection Agreement, EU-Sing., Oct. 15, 2018 [*hereinafter* "EU-SIPA"] similarly provides for establishment of investment court system with a tribunal of first instance and an appellate tribunal to adjudicate upon disputes between investors and State(s) party to the EU-SIPA, under art. 3.9 and 3.10; Likewise, the new deal on trade agreement reached between EU and Mexico, tentatively called the EU-Mexico Agreement, agreed in principle, aims to establish a "standing international investment court system composed of a Tribunal of First Instance and an Appeal Tribunal." *See New EU-Mexico Agreement, The Agreement in Principle*, EUR. COMM'N (Apr. 23, 2018), *available at* http://trade.ec.europa.eu/doclib/press/index.cfm?id=1833.

15 Celine Levesque, *The European Union Commission Proposal for the Creation of an "Investment Court System": The Q and A that the Commission Won't be Issuing*, KLUWER ARB. BLOG (Apr. 6, 2016), *available at* http://arbitrationblog.kluwerarbitration.com/2016/04/06/the-european-union-commission-proposal-for-the-creation-of-an-investment-court-system-the-q-and-a-that-the-commission-wont-be-issuing/.

16 CETA, *supra* note 5, art. 8.27.16.

17 *See* CETA, *supra* note 5, art. 8.23.4. The article clarifies that for a claim to be submitted under the Convention on the Settlement of Investment Disputes between States and Nationals of other States, Oct. 14, 1966, 575 U.N.T.S. 159 [*hereinafter* "ICSID Convention"] and ICSID Rules of Procedure for Arbitration Proceedings, Apr. 2006 [*hereinafter* "ICSID Arbitration Rules"], conditions laid down in art. 25(1) of the ICSID Convention must be satisfied.

18 CETA, *supra* note 5, art. 8.27.10.

19 *Id.* art. 8.28.1.

20 *Id.* art. 8.28.2.

21 *Id.* art. 8.28.2 (c).

22 *Id.* art. 8.28.2 (a).

23 *Id.* art. 8.28.2 (b).

24 *Id.* art. 8.28.7.

25 *Id.* art. 8.28.9(d); A final award issued pursuant to Section F is an arbitral award that is deemed to relate to claims arising out of commercial relationship of transaction for the purpose of art. I of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21.3. U.S.T. 2517 [*hereinafter* "New York Convention"]; and if a claim has been submitted pursuant to art. 8.23.2(a) i.e., under the ICSID Convention and Arbitration Rules, then the final award issued under this section shall qualify as an award under § 6 of the ICSID Convention.

execution shall be governed by the laws concerning execution of judgments or awards in force where the execution is sought.[26]

B. Composition of the Tribunal

This Tribunal shall be composed of fifteen members[27] such that five members[28] are from EU Member States, five are from Canada, and the remaining five are from a third country.[29] The members of the tribunal are to be appointed by the CETA Joint Committee[30] for a term of five years, renewable once.[31] The proposed court shall hear disputes in a division consisting of three members or one. Where the bench comprises of three members, it will be composed of one member of the EU, one of Canada, and be presided by a member of third nationality.[32]

While the CETA stipulates that an arbitral tribunal constituted to sit in appeal shall hear the matter in divisions of three,[33] it has left it to the Joint Committee to work out the details of the composition of the Appellate Tribunal.[34]

C. Applicable Law

One provision of the CETA, which has singularly brought maximum spotlight on the Agreement, is the provision regarding applicable law. Article 8.31 of the CETA provides that the tribunal shall apply the Agreement in accordance with the Vienna Convention on the Law of Treaties and other rules of international law applicable between the Parties.[35] Importantly, to address the issue of conflicting and inconsistent interpretation, it provides that in case of a conflict with regards to matters of interpretation of the provisions of the treaty, the Committee

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26 CETA, *supra* note 5, art. 8.41.4.

27 The Investment Court System proposed under CETA differs from similar tribunals proposed under the EU-VIPA and the EU-SIPA in terms of composition of the tribunal. While a tribunal under EU-VIPA will consist of nine members (EU-VIPA, *supra* note 14, art. 3.38.2), a tribunal under the EU-SIPA will consist of six members, subject to Joint Committee's decision of increasing or decreasing the membership (EU-SIPA, *supra* note 14, art. 3.9).

28 CETA, *supra* note 5, 59 n.9 states that each country could actually propose to appoint five members from any nationality. In such a case the member so appointed to the tribunal shall be considered a national of the party that proposed his or her appointment for the purpose of this article.

29 *Id.* art. 8.72.2.

30 *Id.* art. 26.1 established the CETA Joint Committee, akin to the Free Trade Commission under art. 2001 of the NAFTA. However, unlike the Free Trade Commission, the CETA Joint Committee is not mandated to be comprised only of cabinet level representatives of the parties. The CETA provides that the Joint Committee shall be co-chaired by the Minister for International Trade of Canada and Member of the European Commission responsible for Trade, of their respective designees. *Prima facie* it appears to be a more powerful body than the NAFTA Free Trade Commission, with greater responsibilities to address; *see* North Atlantic Free Trade Agreement art. 2001, Can.-Mex.-U.S., Dec. 17, 1992, 32 I.L.M. 289 (1993) [*hereinafter* "NAFTA"]. A similar provision also exists in the Free Trade Agreement between Canada and the State of the European Free Trade Association. art. 26 of the Free-Trade Agreement provides for a Joint Committee that has functions similar to the CETA Joint Committee; s*ee* Free Trade Agreement, Can.-Ice.-Liech.-Nor.-Switz, Jan. 26, 2008, *available at* https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/european-association-europeenne/fta-ale/index.aspx?lang=eng/. These Commissions have in the past generally proven beneficial in increasing predictability and thus promoting rule of law; *see also* Gabrielle Kauffman-Kohler, *Interpretative Powers of the Free Trade Commission and the Rule of Law*, *in* FIFTEEN YEARS OF NAFTA CHAPTER 11 ARBITRATION (Emmanuel Gaillard & Frederic Bachand, eds., 2011).

31 CETA, *supra* note 5, art. 8.27.5.

32 *Id.* art. 8.27.6.

33 *Id.* art. 8.28.5.

34 *Id.* art. 8.28.3 and art.8.28.7(f).

35 *Id.* art. 8.31.1.

on Services and Investment[36] may recommend that the CETA Joint Committee adopt an interpretation, which will be binding upon the Tribunal.[37]

Notably, the Tribunal shall have no authority to interpret the domestic law of the parties, and will have to treat it as a matter of fact.[38] In case the Tribunal interprets a provision of a domestic law of any of the disputing Parties, such an interpretation will not be binding on the courts or authorities of that Party.[39]

D. Procedure for Submission of Claim and Initiation of Adjudication

Under Article 8.23.1, a dispute may be submitted by an investor of a party to the CETA on its own behalf, or on behalf of a locally established enterprise which it owns or directly controls. When submitting a claim, the investor may propose that a sole member of the Tribunal hear the matter.[40] The disputing parties may also mutually agree for the matter to be heard by a sole member of a third country chosen randomly; however, such a request must be made before the Tribunal is constituted by the President of the Tribunal.[41] The President shall appoint the members of the Tribunal, who shall then compose the division of the Tribunal hearing the case within 90 days of receiving the claim.[42] Such a division shall be composed on a rotation basis, ensuring that the composition of the divisions is random and unpredictable, while giving equal opportunity to all members of the Tribunal to serve.[43]

In case the members of the Tribunal have not yet been appointed and 90 days of submission of the claim elapse, the Secretary-General of ICSID shall appoint a division of three members of the Tribunal at the request of either of the parties, unless the parties agree for the case to be heard by a sole arbitrator.[44] These appointments shall be made by random selection from the existing nominations, and the Secretary-General shall not appoint a member of the EU or Canada as Chair of the Tribunal.[45]

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36 *Id.* art. 8.44 established the Committee on Services and Investment which may "on agreement of the Parties, and after completion of their respective internal requirements and procedures: (a) recommend to the CETA Joint Committee the adoption of interpretations of this Agreement pursuant to art. 8.31.3; (b) adopt and amend rules supplementing the applicable dispute settlement rules, and amend the applicable rules on transparency. These rules and amendments are binding on a Tribunal established under this Section; (c) adopt rules for mediation for use by disputing parties as referred to in art. 8.20; (d) recommend to the CETA Joint Committee the adoption of any further elements of the fair and equitable treatment obligation pursuant to Article 8.10.4; and (e) make recommendations to the CETA Joint Committee on the functioning of the Appellate Tribunal pursuant to art. 8.28.8."

37 *Id.* art. 8.31.3.

38 *Id.* art. 8.31.2.

39 *Id.*

40 *Id.* art. 8.23.5.

41 *Id.* art. 8.27.9.

42 *Id.* art. 8.27.7.

43 *Id.*

44 *Id.* art. 8.27.17.

45 *Id.*

E. Nature of Proceedings and Decision Rendered

The CETA allows the claimant to submit a claim under four possible sets of rules, i.e., the ICSID Convention and Rules of Procedure for Arbitration, the ICSID Additional Facility Rules, the UNCITRAL Arbitration Rules, or any other rules that the disputing parties may agree to.[46]

Under both the ICSID Convention[47] and Article II of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ["**New York Convention**"],[48] for arbitration to commence, a primary requirement is written consent of the parties to arbitrate. The CETA fulfils that requirement by expressly recording the respondent State's consent to dispute resolution by the Tribunal and further clarifies that this consent shall satisfy the requirement of a written consent under Article 25 of the ICSID Convention, Chapter II of the ICSID Additional Facility Rules and Article II of the New York Convention.[49]

A claim may be brought before the Tribunal under Section F of CETA and other international agreements. However, should there be a potential overlap of compensation or a significant impact on the other international claim due to the decision of the Tribunal, then the CETA Tribunal shall either stay the proceedings or ensure that the other proceedings are taken into account when rendering the award.[50] In case of two claims with a common question of fact or law, the parties may seek consolidation of proceedings.[51] Moreover, a modified version of the UNCITRAL Transparency Rules apply to the proceedings, which entails making all list of documents public, as well as a public hearing.[52] The Tribunal may, after consultation with the disputing parties, even invite non-disputing parties to make oral or written submissions on interpretation of the Agreement.[53]

It is important to note that the CETA refers to the decision rendered by the Tribunal not as a decision, opinion or judgment, but as an "award".[54] Moreover, Article 8.41 discusses ways of "enforcement of award" and unequivocally proclaims that a final award issued by the Tribunal is the "arbitral award that is deemed to relate to claims arising out of a commercial relationship or transaction for the purposes of Article I of the New York Convention[55]."[56] If the claim was

46 *Id.* art. 8.32.3.

47 *See* ICSID Convention, *supra* note 17, art. 25(1), "The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally."

48 New York Convention, *supra* note 25, art. II, "Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration."

49 CETA, *supra* note 5, art. 8.25.

50 *Id.* art. 8.24.

51 *Id.* art. 8.43.

52 *Id.* art. 8.36.

53 *Id.* art. 8.38.2.

54 *Id.* art. 8.39.

55 New York Convention, *supra* note 25, art. I allows the ratifying party to declare at the time of signing, ratifying or acceding to the Convention that it 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 State making such declaration.

56 CETA, *supra* note 5, art. 8.41.5.

submitted for adjudication pursuant to the ICSID Convention, then according to the CETA, the "award" rendered by the Tribunal shall qualify as an award under Section 6 of the ICSID Convention.[57]

III. Challenge to the Validity of The ICS under CETA

A. EU's scepticism of CETA Belgian Compromise to Seek Opinion

While the EU's united voice gives it the bargaining power needed to push for its goal of reforming the ISDS at the international fora, the idea has faced much criticism within Europe. The European Association of Judges[58] has opposed the idea of the ICS on the ground of its possible incompatibility with the EU law. After the text of the CETA was finalized in 2014, it came under criticism from different quarters, with even some of EU's Member States joining the ranks of the critics. Notably, the text of CETA's investment chapter triggered a vivid debate in Germany,[59] where the opposition to CETA's investment chapter came from political parties, labour unions as well as non-governmental organizations.[60] A suit was filed before the Federal Constitution Court of Germany by complainants seeking a temporary injunction on provisional application of CETA.[61] It also requested the court to disallow the German member from approving the CETA during the EU Council vote.[62] It has also been suggested that the signing of the CETA was deferred in 2014, *inter alia*, because of opposition from Germany's Federal Minister for Economic Affairs and Energy.[63]

The Parliament of Wallonia in Brussels had been an early critic of the CETA.[64] On April 25, 2016, the Parliament of Wallonia passing a resolution listing its key problems with the CETA, and asking the federal Government of Belgium to seek an opinion under Article 218 of the

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57 *Id.* art. 8.41.6.

58 The European Association of Judges (EAJ) is one of the four regional groups comprising the International Association of Judges. It comprises judges from 44 countries. The Statement made by the EAJ was in the context of the court proposed under the Transatlantic Trade and Investment Partnership (TTIP). However, the similarity between the proposed Investment Court System (ICS) under the TTIP and the two-tier tribunals proposed under the CETA, make this statement relevant here. It is worth noting that the Statement concluded, "The European Union and its member states have a well-functioning judicial system which is capable of protecting the rights of an investor in all areas of law. It should be central to an international treaty on trade and investment, to apply this system to investors as the central body to safeguards its rights. Systems outside this judicial system, either on a basis of arbitration or as a new established International Investment Court System do have to prove that arbitrator or judges in these systems are selected, organized, remunerated and have a term of office which guaranties their personal independence and the independence of the system according to European and international standards. The EAJ is not satisfied that the proposed ICS do meet with this criteria (sic.)". *See* European Association of Judges, Regional Group of the International Association of Judges, Statement from the European Association of Judges on the Proposal from the European Commission on a New Investment Court System (Nov. 9, 2015), *available at* https://www.iaj-uim.org/iuw/wp-content/uploads/2015/11/EAJ-report-TIPP-Court-october.pdf.

59 Stephan W. Schill, *The German Debate on International Investment Law,* 16(1) J. WORLD INV. & TRADE (2015).

60 *Id.*

61 Susanna Villani, *Considerations on the Judgment of BVerfG on the Conclusion of CETA*, 17(1) EUR. TAX STUD. 235 (2017).

62 Jelena Baulmer, *Only a Brief Pause for Breath: The Judgment of German Federal Constitution Court on CETA*, INV. TREATY NEWS (Dec. 12, 2016), *available at* https://www.iisd.org/itn/2016/12/12/only-a-brief-pause-for-breath-the-judgment-of-the-german-federal-constitutional-court-on-ceta-jelena-baumler-baeumler/.

63 Stephan Schill, *A Question of Democracy: The German Debate on International Investment Law*, KLUWER ARB. BLOG (Mar. 2, 2015), *available at* http://arbitrationblog.kluwerarbitration.com/2015/03/02/the-german-debate-on-investor-state-dispute-settlement/.

64 Laurens Ankersmit, *Investment Court System in CETA to be Judged by the ECJ*, EUR. L. BLOG (Oct. 31, 2016), *available at* https://europeanlawblog.eu/2016/10/31/investment-court-system-in-ceta-to-be-judged-by-the-ecj.

Treaty on the Functioning of the European Union[65] ["**TFEU**"] on the issue of compatibility of the ICS with the EU Law.

Pursuant to the resolution, the Kingdom of Belgium submitted the following question for the Opinion of the Court:

> "*Is Chapter Eight ("Investments") Section F ("Resolution of investment disputes between investors and state") of the Comprehensive Economic and Trade Agreement between Canada, on one part, and the European Union, of the other part, signed in Brussels on 30 October 2016, compatible with the Treaties, including with fundamental rights?*"[66]

The Advocate General ["**AG**"] Yves Bot gave his Opinion[67] in the matter on January 29, 2019,[68] and the CJEU echoed his Opinion that Section F of Chapter 8 of the CETA is compatible with the EU law,[69] when it issued its binding Opinion on April 30, 2019.

The scope of the Opinion sought was very broad and so, for the purpose of this paper, the focus will only be on one of the issues addressed in the Opinion, i.e., compatibility of the CETA with the exclusive jurisdiction of the Court over definitive interpretation of EU law.

B. Reasons given by the Advocate General for Upholding Validity of the ICS vis-à-vis EU Law

The AG started by clarifying that preservation of the autonomy of the EU legal order is not synonymous with autarchy.[70] In accordance with the provisions of the TFEU,[71] the CETA will be integrated into the EU legal order and be a part of it in the same way as other sources[72] of EU legislation. The Opinion explains that "*in order for the constitutional autonomy of the EU legal order to be respected, it is essential that the international agreements concluded between the EU and third States do not*

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65 Treaties or of any rule of law relating to their application, or misuse of powers (Consolidated Version of the Treaty on the Functioning of the European Union, arts. 263(2),(4), Oct. 26, 2012, 2012 O.J. (C 236) [*hereinafter* "TFEU"]) provide the procedure to be followed when an agreement is to be negotiated and signed between the Union and third countries or international organisations. art. 218(11) provides, "A Member State, the European Parliament, the Council or the Commission may obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the Treaties. Where the opinion of the Court is adverse, the agreement envisaged may not enter into force unless it is amended or the Treaties are revised."

66 Request for an opinion submitted by the Kingdom of Belgium pursuant to Article 218(11) TFEU (Opinion 1/17), Oct. 30, 2017 O.J. (C 369).

67 TFEU art. 19 provides that the Court of Justice shall be comprised of judges from each Member State and shall be assisted by Advocates-General; TFEU art. 252 provides that there will be eight Advocate-Generals to assist the Court of Justice and it shall be duty of the Advocate-General, acting with complete impartiality and independence, to make, reasoned submissions on cases which, in accordance with the Statute of the Court of Justice of the European Union, require his involvement; *See also* NOREEN BURROWS & ROSA GREAVES, THE ADVOCATE GENERAL AND EC LAW (2007).

68 Opinion of Advocate General Bot delivered on Jan. 29, 2019 in Opinion 1/17, ECLI:EU:C:2019:72, *available at* http://curia.europa.eu/juris/document/document.jsf?text=&docid=210244&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=10811785.

69 Opinion 1/17, *supra* note 4.

70 *Id.* ¶ 59.

71 TFEU art. 216(2): "1. The Union may conclude an agreement with one or more third countries or international organisations where the Treaties so provide or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope. 2. Agreements concluded by the Union are binding upon the institutions of the Union and on its Member States.

72 Opinion 1/17, *supra* note 4, ¶ 60.

undermine the delicate balance struck between 'the international derivation and the specificity of the EU law"'.[73] However, the AG failed to explain what constitutes this delicate balance that needs to be maintained.

The AG opined that preservation of the EU legal order's autonomy requires that the essential character of the powers of the EU and its institutions remains unaltered; and that the procedure for resolving disputes will not have the effect of binding the EU and its institutions, in the exercise of their internal powers, to a particular interpretation of the rules of EU law.[74] Moreover, the AG held that by establishing a dispute settlement mechanism such as the one under the CETA, the EU intends to satisfy the demand for neutrality and speciality in resolution of disputes between investors and States.[75]

The AG distinguished the present case from that of *Slowakische Republik* v. *Achmea BV*[76] ["**Achmea**"] where the CJEU had held the arbitral tribunal to be incompatible with the EU law.[77] This distinction is based primarily on the basis of the text of the treaty forming the tribunal involved in the two cases.[78] The AG clarified that under the Netherlands-Slovak Bilateral Investment Treaty ["**BIT**"], the applicable law clause was such that it gave the arbitral tribunal the jurisdiction to interpret and apply the EU law. On the other hand, the CETA clearly states that the applicable law is the Agreement as interpreted in accordance with international law.[79] Moreover, domestic law of each party, *of which EU law forms part* (emphasis added), in the case of Member States, can be taken into account by the Tribunal only as a matter of fact,[80] thus differentiating the applicable law clause under the CETA from the one in the Netherlands-Slovak BIT, which allowed the tribunal to interpret the domestic law of the parties to the BIT. To find further support for the Tribunal proposed under the CETA, the AG in fact relies on a part of the CJEU's dicta in *Achmea*, that an "*international agreement providing for the establishment of a court responsible for interpretation of its provisions… is not in principle incompatible with EU Law.*"[81]

To emphasise the protection of the autonomy of the CJEU in terms of interpretation of EU law, the AG argued that the CETA contains sufficient guarantees to safeguard the role of the CJEU

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73 *Id.* ¶ 64.

74 *Id.* ¶ 67.

75 *Id.* ¶ 88.

76 Case C-284/16, Slowakische Republik v. Achmea BV, 2018 E.C.R. 158 [*hereinafter* "Achmea"].

77 *See generally* Guillaume Croisant, *CJEU Opinion 1/17 – AG Bot Concludes that CETA's Investment Court System is Compatible with EU Law*, KLUWER ARB. BLOG (Jan. 29, 2019), *available at* http://arbitrationblog.kluwerarbitration.com/2019/01/29/cjeu-opinion-117-ag-bot-concludes-that-cetas-investment-court-system-is-compatible-with-eu-law/.

78 Opinion 1/17, *supra* note 4, ¶ 106-113.

79 *Id.* ¶ 110; CETA, *supra* note 5, art. 8.31.1.

80 Opinion 1/17, *supra* note 4, ¶ 11.

81 *Id.* ¶ 111. *See also* Achmea, 2018 E.C.R. 158, ¶ 57 where the court relied on Opinion 1/91 of the Court of the European Union delivered pursuant to the second subparagraph of Article 228 (1) of the Treaty - Draft agreement between the Community, on the one hand, and the countries of the European Free Trade Association, on the other, relating to the creation of the European Economic Area (Dec. 14, 1991), *available at* https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61991CV0001, Opinion 1/09 of the Full Court of the European Union on Agreement creating a unified patent litigation system (Mar. 8, 2011), *available at* https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=ecli:ECLI:EU:C:2011:123 and Opinion 2/13 of the Full Court of the European Union on Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms (Dec. 18, 2014), *available at* https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=ecli:ECLI:EU:C:2014:2454.

as the ultimate interpreter of EU law.[82] The AG opined that the jurisdiction of the CETA tribunal is very narrowly circumscribed by Article 8.18.5, which provides that the Tribunal shall not decide claims that fall outside of the scope of the provision.[83] He thus clarified that the Tribunal under the CETA does not adversely affect the system since it is not intended to review the legality of acts of the EU.[84] The AG further explained how the CETA Tribunal does not have jurisdiction to annul a measure which it deems to be contrary to Chapter 8 of the CETA, and can only award monetary damages, or with the agreement of the parties, restitution of property.[85]

However, Article 8.31.2 provides, *"…any meaning given to domestic law by the Tribunal shall not be binding upon the courts or the authorities of that Party*." This provision presumes that there are bound to be circumstances when the Tribunal may find itself in a position wherein it has to interpret provisions of EU law out of necessity. The AG opined that this can happen only when there is no guidance in that regard within EU law, and if such an interpretation is in fact made, it will not be binding upon the authorities or courts of the EU.[86] Moreover, if an interpretation of EU law by the CETA Tribunal appears to be incorrect, the CJEU may, "*without triggering a breach of European Union of its international obligations, dismiss such an interpretation and adopt the interpretation which appears to it to be the most appropriate*."[87] Concerns raised about the Appellate Tribunal's authority to interpret the EU law have also been dismissed by the AG.[88]

To clarify the position of the Tribunal proposed under the CETA, the AG explained that this Tribunal will have no jurisdiction to rule on disputes internal to the EU, i.e., those involving direct application of EU law.[89]

Pertinently, the AG explained that the mechanism established under the CETA could be classified as "*quasi-judicial*", which retains certain imprints of arbitration.[90] The purpose of this mechanism is to guarantee neutrality and autonomy of resolution, as against the judicial systems of the parties.[91] Prejudices of individual States may, nevertheless, crop up at the time of enforcement of awards, based on the choice of arbitration rules made by the disputing parties.[92] Particularly, such a situation may surface in case of conflict with the public policy of the State in which enforcement of that award is sought.[93] However, as the AG has observed, the domestic courts have a limited role in this paradigm[94] and that the review in the event of conflict with public policy would not affect the autonomy of EU law.[95]

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82 Opinion 1/17, *supra* note 4, ¶ 116.
83 *Id.* ¶ 120.
84 *Id.* ¶ 124.
85 *Id.* ¶ 125.
86 *Id.* ¶ 139.
87 *Id.* ¶ 143.
88 *Id.* ¶ 181.
89 *Id.* ¶ 160.
90 *Id.* ¶ 165.
91 *Id.* ¶ 179.
92 *Id.* ¶ 181.
93 *Id.*
94 *Id.* ¶ 79.
95 *Id.*

C. Reasons given by the CJEU for Upholding the Validity of ICS vis-à-vis EU Law

The CJEU concurred with the AG in its Opinion, although with less detailed reasoning, and pronounced that the ISDS mechanism envisaged under the CETA is compatible with the EU legal order. At the outset, relying on its decision in the case concerning accession of the EU to the European Convention on Human Rights,[96] the CJEU reiterated the EU's capacity to conclude international agreements, from which the power to submit to the decision of a court created by such agreements necessarily follows.[97] The court held that the tribunal created under the CETA is such a court. However, for it to be compatible with EU law, it ought to be ensured that such an adjudicatory mechanism has no adverse effect on autonomy of the EU legal order.[98]

The CJEU acknowledged that the Tribunal established by the CETA is outside the judicial system of either of the parties, i.e., it stands outside the judicial system of Canada, EU or any of the Member States.[99] However, this does not *ipso facto* adversely affect the autonomy of the EU legal order.[100] Furthermore, the CJEU noted that for the autonomy of the EU legal order to be protected, *first*, the CETA cannot confer on the Tribunal any power to interpret or apply EU law other than the power to interpret and apply the provisions of CETA having regard to the rules and principles of international law applicable between the parties. *Second*, the CETA cannot structure the powers of the Tribunal in such a way that it may issue awards which have the effect of preventing the EU institutions from operating in accordance with the EU constitutional framework. In other words, since these tribunals stand outside the EU judicial system, they cannot have the power to interpret or apply EU law other than the provisions of the CETA, or to make awards that might have the effect of preventing the EU institutions from operating in accordance with the EU constitutional framework.[101]

The CJEU then went on to examine the jurisdiction of the tribunal under CETA, and observed that Section F of CETA ought to be distinguished from the draft agreement on creation of a unified patent litigation system,[102] which was previously declared to be incompatible with EU law.[103] While the applicable law in the unified patent litigation system included directly applicable community law, CETA limits the jurisdiction of the proposed Tribunal to the text of the Agreement.[104] It also distinguished the CETA Tribunal from the Tribunal under consideration in *Achmea*. The CJEU was of the view that, unlike a CETA Tribunal, the underlying investment

96 Opinion 2/13 of the Full Court on the Compatibility of Draft Agreement on Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms with TEU and TFEU, ¶ 182, ECLI:EU:C:2014:2454 (Dec. 18, 2014), *available at* https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62013CV0002.

97 Opinion 1/17, *supra* note 4, ¶ 106.

98 *Id.* ¶ 108 and 112

99 *Id.* ¶ 114.

100 *Id.* ¶ 115.

101 *Id.* ¶ 118.

102 *Id.* ¶ 123.

103 Opinion 1/09 of the Court of Justice for the European Union on the Compatibility of the Draft Agreement for Creation of a Unified Patent Litigation System with the Treaties (Mar. 8, 2011), *available at* https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62009CV0001&from=EN.

104 *Id.* ¶ 123-124.

agreement in *Achmea* "*established a tribunal that would be called upon to give rulings on disputes that might concern the interpretation or application of EU law*."[105]

It was also observed that if and when the CETA Tribunal is called upon to examine the compliance of a measure of the host State or by the EU, with the CETA, the Tribunal will have to undertake an examination of the effect of that measure.[106] However, the CJEU was of the opinion that though such an examination may indeed require that the domestic law of the respondent party be taken into account, it consists taking domestic law into account as a matter of fact,[107] and therefore, cannot be classified as equivalent to interpretation of domestic law by the CETA tribunal.

Clarifying the position of the Appellate Tribunal, the CJEU clarified that the CETA Appellate Tribunal will also not be called upon to interpret or apply the rules of EU law other than provisions of the CETA.[108] It acknowledged Article 8.28.2(b) of the CETA which states that the Appellate Tribunal may identify manifest errors in the appreciation of facts, including appreciation of relevant domestic law. However, the Appellate Tribunal has jurisdiction only to uphold, modify or reverse the Tribunal's award and as the applicable law is only the CETA and the principles of international law, it is clear that parties do not intend to confer the jurisdiction to interpret EU law upon the Appellate Tribunal.[109]

The CJEU also addressed the concern of some of the governments that in the course of examination of relevant facts, the Tribunal may be faced with a situation wherein a measure was adopted by the members pursuant to an EU legislation in public interest, but was challenged by an investor.[110] It was argued that in such a situation, the Tribunal might give a ruling on secondary EU law,[111] which would be a definitive decision and would adversely affect the exclusive jurisdiction of the Court over the definitive interpretation of EU law.[112] The CJEU, relying on Article 8.9.2, held that the discretionary powers of the CETA Tribunal and Appellate Tribunal do not extend to permitting them to call into question the level of protection of public interest determined by the Union.[113]

Thus, the CJEU concluded that Section F of Chapter Eight of the CETA does not adversely affect the autonomy of the EU.

IV. Issues Left Unanswered by the AG and the CJEU

Everything that one sees is a perspective, and everything that one reads is an opinion. Neither a perspective nor an opinion is the absolute truth, but they are all complete unto themselves.

105 *Id.* ¶ 126.
106 *Id.* ¶ 131.
107 *Id.*
108 *Id.* ¶ 133.
109 *Id.*
110 *Id.* ¶ 138.
111 Under EU law, the treaties establishing the EU such as TEU or TFEU are considered as primary law whereas legal instruments based on the treaties such as regulations, directives, decisions etc. are considered as secondary law. *See Sources of European Union Law*, EUR-LEX (Dec. 13, 2017) *available at* https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM:l14534.
112 *Id.* ¶ 138.
113 *Id.* ¶ 138, 154, 155 and 156

Nevertheless, their incompleteness gives space to reasonable minds to reasonably agree or disagree with them. The CJEU's opinion on the Tribunal proposed under CETA is no different. According to the author, while the opinion of the CJEU has established the validity of the CETA tribunal vis-à-vis EU law, some concerns have been left unaddressed.

A. Does the CETA propose a new model for a court or an improved form of arbitration?

In his Opinion, the AG emphatically attempted to differentiate the proposed Tribunal under the CETA from an investment arbitral tribunal, but conceded that this new proposed system retains certain imprints of the rules applicable to investment arbitration.[114]

The model of the ICS proposed under the CETA is prima facie ambiguous in that it aims to establish a permanent court replacing the ad hoc arbitration mechanism currently prevalent, but has features that are integral to traditional investor-State arbitration. For instance, the CETA provides for court-like features such as the creation of a list[115] of "*members*" of the Tribunal who will be retained with a fixed fee.[116] On the other hand, the claimant has a choice in the rules of procedure that it wishes to submit the claim under. More importantly, the options for available rules are established arbitration rules, and the decision rendered by the Tribunal is not called a judgment or an opinion, but rather a "*final award*" which is enforceable under the ICSID Convention and the New York Convention.[117] Moreover, as mentioned earlier, there is no permanent structure to house this proposed ICS; instead, the ICSID will be used as a secretariat and costs will be borne by the parties to the dispute.

Although there is no standard definition of investment-arbitration, but based on practice, certain essential features have been identified which may be helpful in assessing the true nature of the ICS proposed under the CETA: (i) it is a dispute settlement mechanism; (ii) it is based on the parties' voluntary submission; (iii) it is a private mechanism; (iv) the outcome is binding on the parties; and (v) the parties must play an active role in the selection of the arbitrators.[118]

The ICS proposed under the CETA is in fact a dispute resolution mechanism, and submission to it will be voluntary.[119] However, it cannot be categorised as a private mechanism such as an arbitral tribunal devised by private parties to settle their discords, which neither forms a part of the State's judicial apparatus nor a governmental decision maker.[120] Moreover, not all the disputing parties will play an active role in the selection of the arbitrators. That said, there exist dispute-resolution models wherein the adjudicators are pre-appointed without any input from the disputing parties and yet these have proved to be successful fora for arbitration. In terms of investor-State arbitration specifically, the Iran-US Claims Tribunal is a standing example of such

114 Opinion 1/17, *supra* note 4, ¶ 165.
115 CETA, *supra* note 5, art. 8.27.
116 CETA, *supra* note 5, art. 8.27.12.
117 CETA, *supra* note 5, arts. 8.39 and 8.41.
118 Gabrielle Kaufmann-Kohler & Michele Potesta, *Can the Mauritius Convention serve as a model for the Reform of Investor-State Arbitration in Connection with the Introduction of Permanent Investment Tribunal or an Appeal Mechanism* 35 (Geneva Ctr. for Int'l Disp. Settlement 2016).
119 CETA, *supra* note 5, arts. 8.22, 8.25.
120 Gabrielle Kaufmann-Kohler & Michele Potesta*, supra* note 118.

a mechanism, which has been called the most significant arbitral body in history.[121] The Tribunal was created by an international treaty,[122] and has jurisdiction over disputes between investors and States.[123] Further, the members are appointed by the States party to the treaty,[124] and its rules of procedure are based on the UNCITRAL Rules with some modifications.[125] However, its constitutive documents refer to the mode of dispute settlement as arbitration.[126]

There also exists another model of dispute resolution, namely the International Court of Justice ["**ICJ**"] Chambers, formed under Article 26 and 29 of the Statute of the ICJ.[127] The parties that bring disputes to the ICJ are allowed to choose the panel which shall hear their case from the existing members of the Court, and they can also choose ad hoc members, although the disputing parties' ability to choose ad hoc members is limited.[128] It has been argued that the parties have the ability to determine the rules applicable to the dispute while submitting the dispute to the ICJ.[129] When presenting a dispute before the Chambers, the ICJ Rules allow the parties to modify the Rules of the Court, thus giving the disputing parties the ability to choose the rules of procedure applicable to the dispute.[130] Thus, in a way, the ICJ possesses more characteristics of traditional arbitration than the Iran-US Claims Tribunal.[131]

In light of this comparison between two similar but distinct models, it can be safely concluded that the proposed ICS is closer in its nature to the Iran-US Claims Tribunal, which is essentially arbitration. One may, however, argue that arbitration does not provide for any appeals mechanism, whereas the ICS has a distinct Appellate Tribunal. This may be countered by the

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121 David D. Caron, *The Nature of the Iran-United States Claims Tribunal and the Evolving Structure of International Dispute Resolution*, 84(1) AM. J. INT'L L. 104 (1990).

122 Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran (Claims Settlement Declaration) (Jan. 19, 1981), *available at* http://www.iusct.net/General%20Documents/2-Claims%20Settlement%20Declaration.pdf.

123 *Id.* art. I.

124 *Id.* arts. II, III.

125 *Id.* art. III(2).

126 *Id.* art. I; *See also* TFEU, *supra* note 65, ¶ 133, at 38.

127 Statute of the International Court of Justice, art. 26, Apr. 18, 1946, 33 U.N.T.S. 993 [*hereinafter* "ICJ Statute"] ("1. The Court may from time to time form one or more chambers, composed of three or more judges as the Court may determine, for dealing with particular categories of cases; for example, labour cases and cases relating to transit and communications. 2. The Court may at any time form a chamber for dealing with a particular case. The number of judges to constitute such a chamber shall be determined by the Court with the approval of the parties. 3. Cases shall be heard and determined by the chambers provided for in this article if the parties so request."); *see* ICJ Statute, art. 29 ("With a view to the speedy dispatch of business, the Court shall form annually a chamber composed of five judges which, at the request of the parties, may hear and determine cases by summary procedure. In addition, two judges shall be selected for the purpose of replacing judges who find it impossible to sit.").

128 *Id.* art. 31.

129 John C. Guilds, *If it Quacks Like a Duck: Comparing the ICJ Chambers to International Arbitration for Mechanism of Enforcement*, 16(1) MD. J. INT'L L. & TRADE 43-82 (1992) (The author has argued that art. 38(1)(a) of the Statute of the ICJallows the parties to determine the applicable law to be used to settle their dispute. To substantiate his argument, he cites the example of the ELSI case where the Chamber strictly applied the facts of the dispute solely to the rules recognized by the government of Italy and United States, which were the disputing parties); *see also* David D. Caron, *supra* note 121.

130 Rules of the International Court of Justice, 2007 I.C.J. Acts & Docs. 91, art. 101 ("The parties to a case may jointly propose particular modifications or additions to the rules contained in the present Part (with the exception of Articles 93 to 97 inclusive), which may be applied by the Court or a Chamber if the Court or the Chamber considers them appropriate in the circumstances of the case.").

131 CETA, *supra* note 5, arts. 8.39 and 8.41.

fact that even the ICSID provides for post-award mechanisms[132] to address the concerns of the disputing parties regarding the arbitral award; and though arguably the Appellate Tribunal under the CETA may have wider jurisdiction than the annulment committee under the ICSID Convention,[133] yet, it too, does not have any power to authoritatively create or settle law.

Thus, the proposed Investment 'Court' System may have been inspired by the need of the European Commission to create a "*court*" to address the demands of the critics.[134] However, it is at most a hybrid mechanism, and at least, a modified version of traditional investor-State arbitration with modified treaty provisions.

B. Will the Awards Rendered by the ICS be Enforceable?

As discussed earlier, the CETA specifically provides for enforcement[135] of the "*final award*" issued by the Tribunal and aims to address possible hindrances that the award may face during the enforcement process, under the New York Convention as well as the ICSID Convention.

i. Enforcement under the New York Convention

The New York Convention provides for enforcement of arbitral awards made in the territory of a State other than the State where the enforcement is sought.[136] Further, it requires an agreement[137] in writing for the purpose of recognition and enforcement of the award. The New York Convention also gives the party acceding to it the right to reserve the application of the Convention to commercial relations under the national laws of that State.[138]

The CETA has attempted to make the award enforceable under the New York Convention by laying down that the final award issued pursuant to the terms of the CETA will be deemed to be an arbitral award related to claims arising out of commercial relationship or transaction, for the purpose of Article I of the New York Convention.[139]

The New York Convention covers within its ambit either awards rendered in the territory of another State or awards that are considered non-domestic within the territory where their enforcement is sought. The question that then arises is whether a decision by the ICS would be foreign in case the host State is not the State of enforcement.[140] Citing examples of successful enforcement of awards rendered by the Iran-US Claims Tribunal under the New York Convention, Bungenberg and Reinisch argue that there seems to be no reason for non-

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132 *See* ICSID Arbitration Rules, *supra* note 17, ch. VII.

133 The ICSID annulment committee has on occasion acted beyond its mandate by annulling awards on grounds of manifest error of law or failure of the tribunal to exercise jurisdictions. *See* Lise Johnson, *Annulment of ICSID Awards: Recent Developments*, INT'L INST. SUSTAINABLE DEV. (2010), *available at* https://www.iisd.org/pdf/2011/dci_2010_annulment_icsid_awards.pdf; *See also* ANTONIO PARRA, THE HISTORY OF ICSID (2d ed. 2012).

134 August Reinisch, *Will the EU's Proposal Concerning an Investment Court System for CETA and TTIP Lead to Enforceable Award? – The Limits of Modifying the ICSID Convention and the Nature of Investment Arbitration*, 19(4) J. INTL ECO. L. 761 – 86 (2016).

135 CETA, *supra* note 5, art. 8.41.

136 New York Convention, *supra* note 25, art. I(1).

137 *Id.* art. I(2).

138 *Id.* art. I(3).

139 CETA, *supra* note 5, art. 8.41.5

140 Marc Bungenberg & August Reinisch, *From Bilateral Arbitral Tribunals and Investment Courts to Multilateral Investment Court, in* EUROPEAN YEARBOOK OF INTERNATIONAL ECONOMIC LAW (2018).

enforcement of an award rendered by an international arbitral tribunal.[141] Moreover, they argue that the New York Convention explicitly provides for enforcement of an award rendered by a "*permanent arbitral body to which the parties have submitted*."[142] The Iran-US Claims Tribunal has already been subsumed as a permanent arbitral body,[143] and thus there appears no reason why the proposed investment court cannot be so subsumed within the scheme of the New York Convention.

One provision which raises some concern is that the execution of the award shall be governed by the laws concerning the execution of the award or judgment in force where the execution is sought.[144] Article V(2) of the New York Convention provides that recognition and enforcement of an award can be denied on the ground that the award is contrary to the public policy of the country where its enforcement is sought.[145] The public policy of every country, as well as its definition, varies in every jurisdiction. Moreover, the Joint Instrument for Interpretation of CETA, *inter alia*, provides that both parties have the right to regulate in public interest and that the EU, its Member States and Canada will therefore continue to have the ability to achieve the legitimate public policy objectives that their democratic institutions set, such as public health, social services, public education, safety, environment, public morals, privacy and data protection and the promotion and protection of cultural diversity.[146] Therefore, given the decentralized nature of interpretation and application of the New York Convention, there can be no certainty of consistent enforcement of the awards rendered by the ICS.[147]

ii. Enforcement Under the ICSID Convention

Enforcement under the ICSID Convention has an advantage over the New York Convention in the sense that the award would not stand the scrutiny of national courts on any ground. However, for a decision to be enforceable under the ICSID Convention, it has to be an award.[148] As in the case of enforcement under the New York Convention, the CETA jumps this hurdle by presuming that if a decision has been rendered pursuant to submission of claim under the ICSID Convention and Rules of Arbitration Procedure, such a "*final award*" shall qualify as an 'award' under Article 6 of the ICSID Convention.[149]

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141 *Id.* at 156–158.

142 New York Convention, *supra* note 25, art. I(2) provides, "The term "arbitral awards" shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted"; *See also* Marc Bungenberg & August Reinisch, *supra* note 140, at 153, ¶ 500.

143 *See*, *e.g.*, in the case of Ministry of Defense of the Islamic Republic of Iran v. Gould Inc., 969 F. 2d. 764 (9th Cir. 1992) (U.S.) the court first found that the award was subject to the New York Convention, as the requirements of the Federal Arbitration Act had been fulfilled (namely, that (i) the award arose out of a legal relationship which was (ii) commercial in nature and (iii) was not entirely domestic in scope). The court held that the award also satisfied the requirements of Article 1 of the New York Convention and was "made in the territory of another Contracting State" by a "permanent arbitral body". The Court also explained that the Claims Settlement Declaration, which established the Iran-United States Claims Tribunal as a mechanism for binding third-party arbitration, satisfied "the agreement in writing" standard under the New York Convention.

144 CETA, *supra* note 5, art. 8.41.4.

145 New York Convention, *supra* note 25, art. V(2).

146 *See* CETA, *supra* note 5.

147 N Jansen Calamita, *The (In)Compatibility of Appellate Mechanisms within the Existing Instruments of Investment Treaty Regime*, 18 J. WORLD INV. & TRADE 585 (2017).

148 ICSID Convention, *supra* note 17, art. 54.

149 CETA, *supra* note 5, art. 8.41.6.

The ICSID Convention establishes a particular self-contained model of investor-State arbitration. The CETA also establishes a unique model, which is quite different from the ICSID model. It provides for the possibility of application of ICSID Rules. As Calamita has argued,[150] it is important to note that while the ICSID Convention provides specific rules to establish a tribunal, the CETA replaces these rules entirely. Further, under the ICSID, review of an award is conducted by ad hoc annulment committees,[151] whereas the CETA provides for its own Appellate Tribunal. There is, therefore, doubt as to whether the award thus rendered by the ICS is even an award under the ICSID Convention.[152] Nevertheless, supporters of the new model have argued that these adaptations within the CETA may be treated as *inter-se* modifications to the ICSID Convention as applied to the EU, its Member States, and their trading partner under the CETA – in this case, Canada. Supporters have argued that such modification will not affect the enjoyment of the rights or obligations of other parties to the Convention or be incompatible with the object or purpose of the ICSID Convention as a whole.[153]

C. Multilateralising the Investment Court[154]

The CETA has now passed the first hurdle of scepticism against it inside the EU. However, the challenges of multilateralising[155] the ICS persist.

Measures for reforming ISDS are under consideration at UNCITRAL Working Group III, and the EU has repeatedly proposed the idea of a Multilateral Investment Court ["**MIC**"] during its proceedings.[156] So far, it has found some support,[157] although the support is not sufficient for the

150 New York Convention, *supra* note 25, art. V(2).

151 ICSID Convention, *supra* note 25, art. 52(3).

152 John C. Guilds*, supra* note 129.

153 August Reinisch, *Will the EU's Proposal Concerning an Investment Court System for CETA and TTIP Lead to Enforceable Award? – The Limits of Modifying the ICSID Convention and the Nature of Investment Arbitration*, 19(4) J. INT'L ECON. L. 761, 775 (2016); Gabrielle Kaufmann-Kohler & Michele Potesta*, supra* note 118.

154 C. Titi, *The European Union's Proposal for International Investment Court: Significance, Innovations and Challenges Ahead*, 14(1) TRANSNAT'L DISP. MGMT. 27 (2017) (The author explains, "The perspective of a multilateral court implies that not all countries can have appointed Judges and Members of the Appeal Tribunal. For this reason, it has been suggested that Judges should be appointed not by the treaty parties – this could work only bilaterally – but by a multilateral body that is deemed to represent the interests of the international community, such as in the example of the International Court of Justice's (ICJ) election of judges.").

155 Richard Baldwin, *Multilateralizing 21st Century Regionalism*, ORG. ECON. CO-OPERATION AND DEV. 31 (2014) ("Multilateralizing" refers to the phenomenon of making the ICS a, regional and globally, conducive and acceptable system. The phenomenon, in this context, focuses on accepting higher standards of transparency); *See generally* Iza Lejárraga, *Multilateralising Regionalism: Strengthening Transparency Disciplines in Trade* (Org. Econ. Co-operation and Dev. Trade Pol'y Paper No. 152 2013).

156 *Submission of the European Union and its Member States to UNCITRAL Working Group III on Establishing a Standing Mechanism for the Settlement of International Investment Disputes* (Jan. 18, 2019), *available at* http://trade.ec.europa.eu/doclib/docs/2019/january/tradoc_157631.pdf; *Submission of the European Union and its Member States to UNCITRAL Working Group III on Possible Work Plan for Working Group III* (Jan. 18, 2019), *available at* http://trade.ec.europa.eu/doclib/docs/2019/january/tradoc_157632.pdf.

157 UNCITRAL Secretariat, Submission from the Gov't of Morocco at the Third Working Group of UNCITRAL (Investor-State Dispute Settlement Reform) in its Thirty-Seventh Session, ¶¶ 8–9, U.N. Doc. A/CN.9/WG.III/WP.161 (Mar. 4, 2019) (Morocco has recently prepared a new model BIT which provides for submission of disputes to a "multilateral investment tribunal"); UNCITRAL Secretariat, Submission from the Gov't of Colombia at the Third Working Group of UNCITRAL (Investor-State Dispute Settlement Reform) in its Thirty-Eighth Session, ¶ 6, U.N. Doc. A/CN.9/WG.III/WP.173 (June 14, 2019); *See also* UNCITRAL Secretariat, Submission from the European Union and its Member States at the Third Working Group of UNCITRAL (Investor-State Dispute Settlement Reform) in its Thirty-Seventh Session, U.N. Doc. A/CN.9/WG.III/WP.159/Add.1 (Jan. 24, 2019).

MIC to be the only idea on the table. Nevertheless, it is necessary to note that the EU may, in fact be able to achieve its goal through its new agreements with the rest of the world. The CETA, as well as all the recent similar trade agreements entered into by the EU or purported to be entered into by the EU, carry a provision obliging the parties to the agreement to promote and persuade its trading partners for the development of an MIC.[158] Hence, even States that may not wish to be part of a multilateral court, if party to one of the Free Trade Agreements with the EU, may be required to promote the MIC as part of their treaty obligations.

The EU is an important trading partner in the global economy and thus, it could be challenging for individual nations to resist its diplomatic might. Nevertheless, even though Canada, Singapore, Vietnam and Mexico have already signed investment agreements with the EU that include a bilateral ICS, a number of the EU's major trading partners, including the USA and Japan, have expressed little support for the creation of an MIC.[159] For now, it remains to be seen if this dual diplomacy of the EU will prevail or fail.

D. Exclusiveness of Mixed Agreements

Members of the EU are some of the oldest players in the field of international investment agreements. Germany was, in fact, the first ever country to enter into a bilateral agreement with Pakistan in 1959.[160] However, since the Lisbon Reform,[161] foreign direct investment falls within the common commercial policy of the EU and has, accordingly, become a part of the 'exclusive competence' of the EU.[162] In other words, Member States have lost their competence to negotiate extra-EU bilateral investment agreements.

To harmonise the extant BITs that Member States may have with third States, the EU adopted Regulation 1219/2012.[163] This regulation provides that a BIT entered into between a Member State and a third country may enter into force, or continue to enter into force, until a BIT is entered into between the said third country and the EU.[164] Further, to amend an existing BIT, or to enter into a new BIT with a third State, Member States require authorization from the EU, which shall be granted subject to certain conditions.[165] The new competence of the EU does not,

158 CETA, *supra* note 5, art. 8.29; EU-VIPA, *supra* note 14, art. 3.41.

159 *Legislative Train Schedule, Multilateral Investment Court*, EUR. PARL. (May 20, 2019), *available at*, https://www.europarl.europa.eu/legislative-train/theme-a-balanced-and-progressive-trade-policy-to-harness-globalisation/file-multilateral-investment-court-(mic).

160 Jeswald W. Salacuse, *BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries*, 24(3) INT'L LAWYER 655 (1990).

161 The Treaty of Lisbon signed in 2009, reformed how EU institutions operate and decisions are taken. It also reformed EU's internal and external policies. This development is often colloquially referred to as the Lisbon Reform. *See* Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, Dec. 13, 2007, 2007 O.J. (C 306) 1.

162 TFEU arts. 3(1)(e), 206, 207.

163 Regulation (EU) No. 1219/2012, of the European Parliament and of the Council of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries 2012 O.J. (L 351).

164 *Id.* art. 3.

165 *Id.* art. 9(1) ("The Commission shall authorise the Member States to open formal negotiations with a third country to amend or conclude a bilateral investment agreement unless it concludes that the opening of such negotiations would: (a)be in conflict with Union law other than the incompatibilities arising from the allocation of competences between the Union and its Member States; …").

therefore, seem to legally require the Member States to automatically terminate the extra-EU BITs that they may be party to.[166]

Moreover, it is settled law that international agreements concluded by the EU, pursuant to the provisions of the treaties, constitute acts of the institution of the EU.[167] As such, these agreements are not only integral to the EU legal order,[168] but also prevail over the provisions of secondary EU legislation.[169]

Notably, however, the competence bestowed upon the Commission under the conferral system, is only to the extent of negotiating and concluding agreements vis-à-vis foreign direct investment. Neither the treaties nor the regulations adopted thereafter say anything about the dispute resolution mechanism that Member States may adopt in its dealings with a third State. This was confirmed by the CJEU in its landmark Opinion 2/15, wherein the court was asked to opine if the EU has the requisite competence to sign and conclude the Free Trade Agreement with Singapore alone.[170] The court concluded that while the Free Trade Agreement *per se* fell under the exclusive competence of the EU, certain chapters of it, including the chapter on investor-State dispute resolution, were exceptions and fell within the shared competence of the EU and the Member States.[171]

In Opinion 2/15,[172] the CJEU held that the EU needed Member States to individually ratify the part of the agreement concerning the dispute resolution mechanism.[173] Subsequently, the CJEU, in its judgment in *Achmea*, went on to hold that in the field of international relations, the EU's capacity to conclude international agreements necessarily entails the power to submit to the decision of a court which is created or designated by such agreements.[174] The Advocate General, in his opinion on the legality of the CETA, reiterated the CJEU's observation regarding the EU's capacity to submit itself to an international court. The AG, as well as the CJEU, distinguished the ICS proposed under the CETA from the Tribunal under consideration in *Achmea*. Specifically, the AG explained that the two differed on two separate counts *viz.,* the parties to the agreement constituting the tribunal, and the law applicable to the tribunal.[175] The underlying fear for this was the possible threat to the autonomy of EU law, and its preservation as a uniform and consistent legal order.

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166 Wenhua Shan & Sheng Zhang, *The Treaty of Lisbon: Half Way towards Common Investment Policy*, 21(4) EUR. J. INT'L L. 1049 (2010).

167 Case C-266/16, Western Sahara Campaign UK, The Queen v. Commissioners of Her Majesty's Revenue and Customs, Secretary of State for Environment, Food and Rural Affairs, 2018 E.C.R. 118, ¶ 45.

168 *Id.* ¶ 46; *see* Case 181-73, R. & V. Haegeman v. Belgian State, 1974 E.C.R. 00449; Case C-224/16; Aebtri v. Nachalnik na Mitnitsa Burgas, 2017 E.C.R. 880.

169 Opinion 1/17, *supra* note z4, ¶ 120.

170 Opinion 2/15 of the Full Court of Justice of European Union on the draft EU-Singapore Trade Agreement (May 16, 2017), *available at* http://curia.europa.eu/juris/document/document.jsf?text=&docid=190727&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=3014 [*hereinafter* "Opinion 2/15"].

171 *Id.* at ¶ 305.

172 This was the opinion delivered by the Full Court on whether the European Union had the competence to sign and conclude alone the Free Trade Agreement with Singapore.

173 Opinion 2/15, *supra* note 170, ¶ 292.

174 Achmea, 2018 E.C.R. 158, ¶ 57 (Relying on Opinion 1/91, Opinion 1/09 and Opinion 2/13).

175 Opinion 1/17, *supra* note 4, ¶ 110.

Moreover, while the CETA denies direct application of domestic law in the ICS or direct application of the CETA in domestic courts, nothing in the Agreement affects the authority of the domestic courts within the territory of Member States. There are studies suggesting that prior to the commencement of international arbitration, foreign investors in domestic courts overwhelmingly rely on domestic law and not on international investment law.[176]

From these facts, one is forced to conclude that while Member States still have the competence to enter into BITs, and even though they share competence for agreeing on a dispute resolution mechanism, Member States cannot agree to a dispute resolution mechanism similar to the one under the CETA without prior approval of the Union. This severely restricts a Member State's ability to freely enter into agreements with third countries. Not only do the Members not have the requisite authority to take a dispute out of their territory, a decision to do so may be averse to the autonomy of EU law as EU law now forms part of the Member States' domestic law.[177]

The varied nature of investment agreements may have helped the EU towards its goal of a common commercial policy, but it has definitely cast a cloud on the sovereign authority of Member States and would require serious reconsideration about the very nature of EU law.

V. Conclusion

Investor-State arbitration is a very young mechanism of dispute resolution that has experienced dizzying growth, almost making it seem as though ready to implode. Change and innovation are much needed for the system to survive and keep growing. Those making suggestions for changes propose both incremental and systemic changes. The EU finds itself in the latter category, with its proposal of an MIC. The idea of such a court as a panacea to all the ills that mar traditional investor-State arbitration is appealing.

However, as the proposed ICS in the CETA stands, it is reasonable to argue that it is necessarily a modified, or even improvised, version of traditional investor-State arbitration. Appointment of judges by the States that are party to the CETA may lend a certain amount of legitimacy to the dispute resolution process. However, it cannot necessarily ensure better or even consistent decisions. Moreover, as the international law regime stands, for its decisions to be enforceable, they cannot be orders of a "*court*", but need to be awards delivered by a tribunal.

The EU may hereon choose to either develop the ICS as a legal system for dispute resolution or develop it as an ad-hoc mechanism with more evolved rules to appease those that critique the prevalent practice of the investor-State dispute system. The factor that will be most determinative of this development going forward, would be the readiness of the nations of the world to let go of the freedom that traditional ISDS provides and embrace the jurisdiction of yet another court.

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176 Szilárd Gáspár-Szilágyi, *AG Bot in Opinion 1/17. The autonomy of the EU legal order v. the reasons why the CETA ICS might be needed*, EUR. L. BLOG (Feb. 6, 2019), *available at* https://europeanlawblog.eu/2019/02/06/ag-bot-in-opinion-1-17-the-autonomy-of-the-eu-legal-order-v-the-reasons-why-the-ceta-ics-might-be-needed/.

177 There is no official statement from the EU on this issue nor any argument from any of the institution of the EU. Nevertheless, the AG opines in Opinion 1/17 at ¶ 110 that EU law forms part of the domestic law of Member States. It is necessary to note here that to supplement his observation, the AG cites ¶ 4 of the judgment in Achmea, which interestingly is nothing but a mere reproduction of art. 8 of the erstwhile Agreement on encouragement and reciprocal protection of investments, Neth.–Slovk., Apr. 29, 1991.

AMICUS INTERVENTION IN INVESTOR-STATE DISPUTE SETTLEMENT SYSTEM: CHINESE REFORM AND FUTURE CONSIDERATIONS

*Xinglong YANG**

Abstract

One of the main criticisms levelled against the investor-State dispute settlement system ["**ISDS**"] *is the lack of a transparency regime in the dispute resolution process, particularly the limited opportunities for amicus curiae intervention. This article aims to analyse the recent developments regarding amicus intervention in ISDS proceedings in the People's Republic of China* ["**China**"]. *The analysis reveals that the current amicus intervention provisions under the new generation of Chinese investment agreements still impose several restrictions on amicus intervention in arbitral proceedings. To strike a better balance between the protection of the interests of both parties and the external interests, this article proposes procedures for when and how an amicus may participate in arbitral proceedings under future Chinese investment agreements. In addition, the article proposes that to ensure that maximum benefits can be realised from amicus participation, China should establish safeguards to provide amici with the access to relevant arbitral documents and oral hearings. However, achieving the above goal should not come at the expense of undermining the confidential and protected information of both parties.*

I. Introduction

For the past two decades, with the rapid development of international investment agreements, the protection of foreign investment has been substantially increased and investors have been normally granted a derivative right to commence investor-State arbitration against host States. In parallel, a virtual explosion of investor-State arbitration can also be seen around the globe.[1] For instance, as of December 31, 2019, the International Centre for Settlement of Investment Disputes ["**ICSID**"] had registered 745 cases under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ["**ICSID Convention**"] and Additional Facility Rules.[2] However, over the last decade, the ISDS system has been attracting substantial criticism due to the way in which it is structured and operates.[3] One of the main

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1 Michael Waibel et al., *The Backlash Against Investment Arbitration: Perceptions and Reality* (Allard Res. Commons, Working Paper No. 1, 2010), *available at* https://commons.allard.ubc.ca/cgi/viewcontent.cgi?article=1193&context=fac_pubs.

2 *The ICSID Caseload – Statistics Issue 2020-1*, INT'L CTR. FOR SETTLEMENT OF INV. DISP. (2019), *available at* https://icsid.worldbank.org/en/Documents/resources/The%20ICSID%20Caseload%20Statistics%202020-1%20Edition-ENG.pdf.

3 Fernando Dias Simões, *Myopic Amici? The Participation of Non-Disputing Parties in ICSID Arbitration*, 42(3) N.C.J. INT'L L. 1 (2017) [*hereinafter* "Simões"]; *A Response to the Criticism against ISDS*, EUR. FED'N FOR INV. L. & ARB. 4 (May 17, 2015), *available at* https://efila.org/wp-content/uploads/2015/05/EFILA_in_response_to_the-criticism_of_ISDS_final_draft.pdf.

criticisms that has been levelled against the system is the lack of a transparent regime in the investor-State dispute resolution process, especially the existence of limited opportunities for public participation, which is achieved by submission of amicus curiae briefs.[4]

Transparency has become increasingly important in investor-State disputes, as an investment claim against a State may refer to the State's judicial, executive, and legislative measures concerning issues of public interest, such as water, waste management, electricity, and gas or touch upon sensitive socio-political concerns such as environmental protection, which are normally absent from commercial arbitration.[5] For instance, in *Methanex Corporation* v. *United States of America* ["**Methanex**"],[6] the tribunal stated that the proceedings involved public interest because the dispute concerned the provision of public services and matters relating to health, which "*extend far beyond those raised by the usual transnational arbitration between commercial parties.*"[7]

Traditionally, the ISDS system was based on a decidedly "*commercial*" approach to dispute settlement favouring confidentiality and privacy.[8] Thus, the legitimacy of the dispute settlement mechanism is put at risk if the public cannot participate in decisions affecting their rights and interests.[9] However, in practice, investment arbitral tribunals may be reluctant to consider public policies supporting a State's regulations. Pursuant to the award in *Metalclad Corp.* v. *United Mexican States*, the state governor's Ecological Decree was not taken into account by the tribunal because "*a finding of expropriation on the basis of the Ecological Decree is not essential to the Tribunal's finding of a violation of NAFTA Article 1110*".[10] Therefore, the outcomes of investment disputes may often be heavily weighted against State interests.[11] When an award will potentially impact public interest, the general public has an interest in ensuring that the award is made "*using proper procedures and taking due account of public interests.*"[12] Also, suitable persons or entities, such as public interest groups and non-government organizations ["**NGO**"], may wish to intervene in the

4 Symposium, *Making the Most of International Investment Agreements: A Common Agenda* (2005), *available at* https://www.oecd.org/investment/internationalinvestmentagreements/36979626.pdf [*hereinafter* "Symposium"]; *Transparency and Third Party Participation in Investor-State Dispute Settlement Procedures* (Org. for. Econ. Co-operation and Dev., Working Paper No. 2005/01, 2005), *available at* https://www.oecd.org/daf/inv/investment-policy/WP-2005_1.pdf; Fiona Marshall, *Defining New Institutional Options for Investor-State Dispute Settlement*, INT'L. INST. FOR SUSTAINABLE DEV. 17-26 (Sept. 2009), *available at* https://www.iisd.org/pdf/2009/defining_new_institutional_options.pdf [*hereinafter* "Marshall"].

5 Ruth Teitelbaum, *A Look at the Public Interest in Investment Arbitration: Is it Unique? What Should We Do About It?*, 5 BERKELEY J. INT'L L. PUBLICIST 56 (2010); Daniel Magraw & Niranjali Amerasinghe, *Transparency and Public Participation in Investor-State Arbitration*, 15(2) ILSA J. INT'L. & COMP. L. 337, 339 (2209); *See* Simões, *supra* note 3 at 6; *See* Marshall, *supra* note 4 at 6.

6 Methanex Corp. v. United States of America, Decision of the Tribunal on Petitions from Third Persons to Intervene as "Amici Curiae", (Jan. 15, 2001), Arbitral Tribunal constituted under the North American Free Trade Agreement [*hereinafter* "Methanex"].

7 *Id.* ¶ 49.

8 Alessandra Asteriti & Christian J. Tams, *Transparency and Representation of the Public Interest in Investment Treaty Arbitration*, *in* INTERNATIONAL. INVESTMENT LAW AND COMPARATIVE PUBLIC LAW (2010).

9 *See* Marshall, *supra* note 4, at 5; Robert Argen, *Ending Blind Spot Justice: Broadening the Transparency Trend in International Arbitration*, 40(1) BROOK. J. INT'L L. 209 (2014) [*hereinafter* "Argen"].

10 Metalclad Corporation v. The United Mexican States, ICSID Case No. ARB(AF)/97/1, Award, ¶ 109-111 (Aug. 30, 2000) [*hereinafter* "Metaclad"].

11 Barnali Choudhury, *Recapturing Public Power: Is Investment Arbitration's Engagement of the Public Interest Contributing to the Democratic Deficit?*, 41 (3) VAND. J. TRANSNAT'L L. 775, 788 (2008) [*hereinafter* "Choudhary"].

12 *See* Simões *supra* note 3, at 5.

proceedings as "non-disputing parties" or "amicus curiae" by submitting their opinions on the public issues involved in the controversy.[13]

Amicus curiae, a commonly used Latin term that literally means "a friend of the court", is "*a person who is not a party to a law suit but who petitions courts or is requested by the court to file a brief in the action because that person has a strong interest in the subject matter.*"[14] In order to ensure that public interests involved in investment disputes are fully considered by tribunals, third parties who have no standing to participate as disputing parties have begun to petition tribunals to allow them to intervene as amicus curiae. For example, in *Suez, Sociedad General de Aguas de Barcelona, S.A., and Vivendi Universal S.A.* v. *The Argentine Republic* (Suez/Vivendi) ["**Suez**"],[15] five NGOs, representing the interests of millions of people, asserted that since the dispute centred on water and sewage services, any decision made in this case would potentially affect the whole community, and, therefore, necessitated submission of amicus briefs. After verifying the expertise and experience of the petitioners, the tribunal granted the NGOs the amicus status to file a joint submission to address the issues of public interest involved in the dispute.[16]

China has thus far been involved so far in at least eight ISDS cases, five of which are or were brought by Chinese investors[17] and three cases were brought against China as a respondent State.[18] Given China's increased role in inbound and outbound investments and its expanded web of international investment agreements for the last decade, the number of cases in which China is involved as the home or host State is quite low. China's rare involvement in ISDS proceedings not only reflects its lack of affinity for international arbitration and its preference for settling disputes through official negotiation but also shows foreign investors' concern over endangering future dealings with the Chinese government.[19] Most investment agreements concluded by China provide that an investment dispute can be arbitrated under the auspices of the ICSID. As pointed out by Professor Malanczuk, '*this reference implies that the relatively soft transparency elements that were introduced for ICSID proceedings by the reform in 2006 will equally apply to any ICSID proceedings involving China.*'[20]

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13 *See* Simões *supra* note 3, at 7.

14 *Amicus Curiae*, BLACK'S LAW DICTIONARY (8th ed. 2004).

15 Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. Argentine Republic, ICSID Case No. ARB/03/19.

16 Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. Argentine Republic, ICSID Case No. ARB/03/19, Order in Response to a Petition by Five Non- Governmental Organizations for Permission to Make an Amicus Curiae Submission, ¶ 21–28 (Feb. 12, 2007) [*hereinafter* "Suez/Vivendi"].

17 *See* Señor Tza Yap Shum v. The Republic of Peru, ICSID Case No. ARB/07/6; *see* China Heilongjiang Int'l Econ. & Tech. Coop. Corp., Beijing Shougang Mining Inv. Co. Ltd., and Qinhuangdaoshi Qinlong Int'l Indus. Co. Ltd. v. Mongolia, Case No. 2010-20 (Perm. Ct. Arb.); *see* Ping An Life Insurance Co. Ltd. and Ping An Ins. (Group) Co. Ltd. v. The Gov't of Belgium, ICSID Case No. ARB/12/29; *see* Sanum Inv. Ltd. v. Lao People's Democratic Republic, Case No. 2013-13 (Perm. Ct. Arb.); *see* Beijing Urban Construction Group Co. Ltd. v. Republic of Yemen, ICSID Case No. ARB/14/30.

18 *See* Ekran Berhad v. People's Republic of China, ICSID Case No. ARB/11/15; *see* Ansung Housing Co. Ltd. v. People's Republic of China, ICSID Case No. ARB/14/25; *see* Hela Schwarz GmbH v. People's Republic of China, ICSID Case No. ARB/17/19.

19 Matthew Hodgson & Adam Bryan, *Investment Treaty Arbitration in Asia: The China Factor*, *in* CHINA'S INTERNATIONAL INVESTMENT STRATEGY: BILATERAL, REGIONAL, AND GLOBAL LAW AND POLICY 437 (Julien Chaisse ed., 2019).

20 Peter Malanczuk, *China and The Emerging Standard of Transparency in Investor-State Dispute Settlement*, *in* TRADE DEVELOPMENT THROUGH HARMONIZATION OF COMMERCIAL LAW 94 (Vic. Univ. of Wellington, Hors Serie 2015).

To date, the admission of amicus curiae has generated broad debate among practitioners, scholars, and recent years have witnessed the Chinese government's attitude shift towards a more transparent proceeding in ISDS proceedings. The international investment arbitration community has extensively discussed the role played and the potential drawbacks caused by amicus curiae intervention in ISDS proceedings. However, although several Chinese professors have systematically reviewed the current law and practice of amicus curiae in the investment law system,[21] no commentary goes so far as to comprehensively examine the Chinese attitude towards the concept of amicus curiae in investment arbitration. Additionally, a growing number of States and arbitration institutions have started to incorporate provisions of amicus curiae into their recently concluded investment agreements or adopted investment arbitration rules.[22] However, no study has been conducted on the recent reforms introduced by China and their shortcomings. The purpose of this article, therefore, is to review the reforms on amicus intervention in the ISDS system, put forward by China. Moreover, although a movement towards the expansion of participatory rights of amicus intervention is noticeable in the Chinese investment treaties and arbitration rules, certain shortcomings continue to exist, which will be explored in detail in the next part. Confronting the shortcomings, the article will also propose several suggestions for China for negotiating new investment treaties with its counterparties to give a greater role to the participation of amicus curiae in the ISDS system.

II. Debate and Expansion of Amicus Curiae Intervention in the ISDS System

The last decade has witnessed debates on the legality of amicus curiae intervention through submission in the ISDS system. The debates primarily centre around issues of undue burden, privacy and confidentiality, legitimacy etc.[23]

The first argument against its use in ISDS proceedings is the undue burden caused by amicus briefs.[24] Accepting amicus briefs increases the burden of disputing parties because they would have to spend extra time and money to review the briefs addressing matters within or even beyond the scope of the dispute and/or those simply repeating the arguments provided by both disputing parties.[25] If the amicus goes beyond the submissions made in the written briefs, and seeks discovery of documents, evidence-taking, and participation in oral arguments, there could be an additional burden placed on the efficiency of the process.[26] Faced with this concern, commentators have argued, that the underlying investment agreement, arbitration rules, or the tribunal should clearly provide procedures for when and how an amicus may participate. For

21 *See* Qinglin Zhang, *Research on Third Party Intervention in International Investment Arbitration*, 190(11) J. JINAN U. (PHIL. & SOC. SCI.) 70-82 (2014); Xiaohong Liu & Xiaojun Yuan, *Third Party in Investment Treaty Arbitration*, 24(3) J. SHANGHAI U. OF INT'L BUS. & ECON. 17–29 (2017).

22 *See* Simões, *supra* note 3; *see* Symposium, *supra* note 4; *see* Marshall, *supra* note 4; Eric De Brabandere, *NGOs and the "Public Interest": The Legality and Rationale of Amicus Curiae Interventions in International Economic and Investment Disputes*, 12(1) CHI. J. INT'L. L. (2011) [*hereinafter* 'Brabandere"]; Eugenia Levine, *Amicus Curiae in International Investment Arbitration: The Implications of an Increase in Third-Party Participation*, 29 BERKELEY J. INT'L L. (2011) [*hereinafter* "Levine"]; Lucas Bastin, *The Amicus Curiae in Investor-State Arbitration*, 3 (1) CAMBRIDGE J. INT'L & COMP. L. 208-234 (2012); Olivia Bennaim-Selvi, *Third Parties in International Investment Arbitrations: A Trend in Motion*, 6(5) J. WORLD INV. & TRADE (2005) [*hereinafter* "Bennaim-Selvi"].

23 *See* Brabandere, *supra* note 22 at 85-133.

24 *See* Levine, *supra* note 22, at 219.

25 *Id.*

26 *See* Levine, *supra* note 22, at 219-220.

instance, a written brief should be permitted to be submitted only in the merits phase, with limitations on length of the submission to be made within the time period set up by the tribunal.[27] In any case, since amici are not experts invited to give their opinions to the dispute, they are not remunerable for the voluntarily intervention, and the tribunal receiving additional information would not direct costs to both disputing parties.[28] Thus, amicus submissions are unlikely to over burden the entire arbitral proceedings.

The second argument against amicus participation is based on the traditional features of confidentiality and privacy characteristic of arbitration, which lead parties to prefer submitting disputes to the court.[29] However, privacy considerations restrict the access of the general public to arbitral hearing and records, and the confidentiality consideration restricts what the disputing parties, the tribunal, and the arbitral institution may disclose to the public.[30] Thus, it has been argued that if a non-disputing party is permitted to participate in the ISDS proceedings, either through submitting amici brief or attending oral presentations, the privacy feature of arbitration will be undermined. Moreover, disclosing information, especially confidential or protected information, to a non-disputing party without the consent of the disputing parties to prepare amicus briefs would destroy the goals promoted by the feature of confidentiality. In addition, in *Aguas del Tunari* v. *Republic of Bolivia,*[31] the tribunal eventually denied amicus participation because both disputing parties unanimously opposed amicus participation in the proceedings. It is therefore suggested that, without the permission given by both parties to allow amicus participation, amicus intervention would against the concept of party autonomy.[32] However, as noted above, an investment claim refers to the host State's judicial, executive, and legislative measures concerning issues of public interest, which are normally absent from commercial arbitration. Therefore, the ISDS system strongly requires a transparent regime applicable to the proceedings. This transparent regime could enable the public to ensure that the award is rendered by using proper procedures and after taking due account of public interests, as well as provide genuine stakeholders an opportunity to submit their unique understanding to the tribunal. Indeed, a transparent regime cannot ignore the necessity to preserve confidential and protected information, and this concern can be dealt with quite easily. For instance, a document containing information to be regarded as confidential or sensitive can be redacted before its release to genuine stakeholders. Moreover, as oral hearings could involve confidential information, the tribunal can make logistical arrangements to hold the part of the hearing requiring protection in private.[33]

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27 Kyla Tienhaara, *Third Party Participation in Investment-Environment Dispute: Recent Development*, 16(2) REV. EUR. COMP. & INT'L ENVTL. L. 230, 240 (2007) [*hereinafter* "Tienhaara"].

28 *See* Bennaim-Selvi, *supra* note 22 at 804.

29 Valerie Li, *Protecting Confidentiality in Investor-State Arbitration, International Arbitration Law Network & Resources*, INT'L ARB. L. (Mar. 1, 2017), *available at* http://internationalarbitrationlaw.com/blog/protecting-confidentiality-in-investor-state-arbitration/.

30 *See* Argen, *supra* note 9 at 215.

31 Aguas del Tunari, S.A. v. Republic of Bolivia, ICSID Case No. ARB/02/3, Decision on Respondent's Objection to Jurisdiction (Oct. 21, 2005).

32 Letter from David D. Caron, President of the Tribunal, to J. Martin Wagner, Amicus Petitioner, *in re* Aguas del Tunari v. The Republic of Bolivia, ICSID Case No. ARB/02/3 (Jan. 29, 2003).

33 *See* Tienhaara, *supra* note 27, at 240.

Public interest represented by amicus curiae can either be general and related to human rights or environmental issues, or relatively specific, such as the representation of the rights of a particular social group affected by the tribunal's decision.[34] As Rubins suggested, allowing amicus intervention could potentially "re-politicize" disputes because "*the concern here is that third-party involvement could lead to the arbitration becoming a "court of public opinion.*"[35] Additionally, encouraging amicus participation would increase the pressure on both parties, especially the respondent State, to follow through on the substantive outcome of the case because the claim will be exposed to the public domain.[36] Alternatively, from another perspective, opening the door for amicus intervention would contribute to the transparency of ISDS proceedings. Amicus involvement could promote a general interest in procedural openness and ensure that the broader public does not perceive the arbitration as secretive.[37] Thus, amicus participation would infuse the arbitral proceedings with democracy and help reduce criticism concerning secrecy.[38] The debate on amicus intervention also involves discussions on independence and impartiality of arbitrators. On the one hand, judicial independence ensures the ability of the judiciary to produce fair and unbiased judgments while judges remain accountable to the public through open hearings and potential legislative override.[39] However, in the ISDS system, in the absence of tenure or financial security, an arbitrator may constantly "*bargain for new appointments and appropriate compensation*."[40]

Moreover, since an arbitrator can act as judge in one case and advocate in another, it has been suggested that the independence and impartiality of arbitrators might be in question. If an award is rendered under such a scenario, the decision cannot be overturned due to the lack of an appellate mechanism in the ISDS system.[41] In order to resolve the above concern, a sound solution to the lack of arbitrator accountability is to provide a transparent regime for arbitral proceedings. Granting third parties who may be directly impacted by a potential award with the right to offer their distinct arguments on public concerns or to participate in oral hearings would allow scrutiny and evaluation of the tribunal's work. Increasing the accountability of arbitrators could enhance the democratic nature of arbitral proceedings because accountability enables the public to hold the appointed arbitrators responsible for their actions.[42]

Another dispute regarding amicus intervention involves the legitimacy of third parties to participate in ISDS. It has been argued that third parties, especially NGOs, may have "*specific agendas and are not accountable to their own members, much less to the general public*,"[43] making their

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34 Christian Schliemann, *Requirements for Amicus Curiae Participation in International Investment Arbitration: A Deconstruction of the Procedural Wall Erected in Joint ICSID Cases ARB/10/25 and ARB/10/15*, 12(3) L. & PRAC. INT'L CTS. & TRIB. 374 (2013).

35 *See* Levine, *supra* note 22. at 220.

36 *Id.*

37 *See* Simões, *supra* note 3, at 288.

38 *See* Choudhury, *supra* note 11, at 818.

39 *Id.* at 819.

40 *Id.* at 820.

41 *Id.* at 819.

42 *See* Simões, s*upra* note 3, at 31.

43 *See* Tienhaara, *supra* note 27, at 239; C.H. Brower, *Structure, Legitimacy, and NAFTA's Investment Chapter*, 36(1) VAND. J. TRANSNAT'L. L. 73 (2003).

legitimacy to act in public interest questionable.[44] It has also been voiced that it is the respondent State that should act on behalf of the public.[45] In order to refute this argument, a commentator has pointed out that although the variety of arbitration rules require qualified persons to be appointed as arbitrators, this does not imply that they can understand all aspects of a dispute.[46] To protect parties against this, NGOs may have relevant expertise or experience and could provide relevant data about the actual public impact of investors' activities or regulatory States' action that is hard to obtain.[47] This perspective has been accepted in *Suez*, where the tribunal affirmed that, "*it is possible that appropriate non-parties may be able to afford the Tribunal perspectives, arguments, and expertise that will help it arrive at a correct decision.*"[48]

The need for different perspectives exists, despite the fact that under modern arbitration rules, for instance, under Rule 34 of International Centre for the Settlement of Investment Disputes Rules of Procedure for Arbitration Proceedings ["**ICSID Arbitration Rules**"],[49] tribunals are granted a broad discretionary power to gather information needed to resolve the case, which can be exercised by calling the disputing parties to produce the required information. This is because, in practice, for different reasons, respondent States may lack the relevant knowledge and expertise on issues relating to public interests, or both disputing parties may lack the appropriate incentives to submit all of the facts, legal arguments, and policy implications to the tribunal.[50] Therefore, granting a third party who has the relevant knowledge and expertise on public interest to make a submission would assist tribunals by providing scientific or technical arguments different from those of the disputing parties. Pursuant to this, the tribunal delivering the final award in *Biwater Gauff (Tanz.) Ltd.* v. *United Republic of Tanzania* ["**Biwater**"], recognized that the petitioners approached "*issues in this case with interests, expertise and perspectives that have been demonstrated to materially differ from those of the two contending parties, and as such have provided a useful contribution to these proceedings.*"[51] Although the amicus brief was useful, the award did not make clear how the perspectives offered by the petitioners had been applied and whether the brief had in any way impacted the outcome of the dispute. In the future, tribunals need to take the amicus petitions into account by "*at least summarizing the arguments contained therein and providing an explanation as to why they have or have not used those arguments within their legal reasoning*".[52]

A. Contemporary Developments and Justifications for Amicus Intervention in ISDS System

44 *See* Tienhaara, *supra* note 27, at 239.

45 *Id.*

46 Katia Fach Gómez, *Rethinking the Role of Amicus Curiae in International Investment Arbitration: How to Draw the Line Favorable for the Public Interest*, 35 FORDHAM INT'L. L. J. 510, 544 (2012) [*hereinafter* "Gomez"]; *see* Simões, *supra* note 3, at 9.

47 Epaminontas E. Triantafilou, *Is a Connection to the 'Public Interest' a Meaningful Prerequisite of Third Party Participation in Investment Arbitration?*, 5 BERKELEY J. INT'L. L. PUBLICIST 38, 44 (2010).

48 *See* Suez/Vivendi, ICSID Case No. ARB/03/19, Order in Response to a Petition by Five Non- Governmental Organizations for Permission to Make an Amicus Curiae Submission, ¶ 21.

49 International Centre for the Settlement of Investment Disputes Rules of Procedure for Arbitration Proceedings, r. 34(2), Apr. 2006 [*hereinafter* "ICSID Arbitration Rules"].

50 *See* Simões, *supra* note 3, at 9.

51 Biwater Gauff (Tanz.) Ltd. v. United Republic of Tanzania, ICSID Case No. ARB/05/22, Award, ¶ 359 (July 24, 2008).

52 *See* Schliemann, *supra* note 34, at 390.

Presently, the concept of amicus curiae is no longer a novelty under international investment law. Amicus curiae have been regularly granted the status to participate in investment arbitral proceedings based on three legal justifications.[53]

The first is a tribunal's inherent discretionary power to allow amicus intervention, which was established by the *Methanex* tribunal in 2001.[54] In *Methanex*, since the North American Free Trade Agreement ["**NAFTA**"] and the applicable arbitration rules, i.e., the United Nations Commission on International Trade Law ["**UNCITRAL**"] Arbitration Rules, failed to establish a mechanism governing amicus intervention, the tribunal, for the first time, under its discretionary power to regulate amicus intervention as a procedural issue of arbitral proceedings, pursuant to Article 15(1) of the UNCITRAL Arbitration Rules,[55] granted several NGOs the status to submit a joint brief concerning environmental issues within the scope of the dispute.[56] In 2003, the NAFTA Free Trade Commission ["**FTC**"][57] issued a joint statement titled "The NAFTA Statement of the Free Trade Commission on Non-Disputing Party Participation",[58] recommending the standards to be considered by tribunals while deciding amicus petitions. Since then, a growing number of NGOs who have a significant interest or defend public interests by representing various and changing persons or collectives have been positively contributing their unique perspectives, particular knowledge or insight to NAFTA tribunals.

In addition, outside the NAFTA context, ICSID tribunals have also granted genuine petitioners the status to submit written briefs based on their discretionary power to regulate amicus intervention as a procedural matter. For instance, in 2005, the *Suez* tribunal clarified that it had the power to regulate procedural questions in accordance with Article 44 of the ICSID Convention.[59] It held that it had the discretion to accept amicus briefs because the admission of the briefs fell within the scope of procedural questions.[60]

The second type of legal justification is a treaty provision allowing amicus participation through submitting briefs. For instance, pursuant to the model investment agreement released by the United States and Canada,[61] a qualified person or entity, who has significant interest in an

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53 Lucas Bastin, *Amici Curiae in Investor-State Arbitration: Eight Recent Trends*, 30(1) ARB. INT'L 125, 137 (2014).

54 *See* Methanex, Decision of the Tribunal on Petitions from Third Persons to Intervene as "Amici Curiae" (Jan. 15, 2001), Arbitral Tribunal constituted under the North American Free Trade Agreement.

55 United Nations Commission on International Trade Law ["UNCITRAL"] Arbitration Rules art. 15(1), 2010 provides "Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case."

56 *See* Methanex, Decision of the Tribunal on Petitions from Third Persons to Intervene as "Amici Curiae" (Jan. 15, 2001), Arbitral Tribunal constituted under the North American Free Trade Agreement, ¶ 52; *See* Brabandere, *supra* note 22, at 100.

57 Pursuant to North American Free Trade Agreement ["NAFTA"], art. 2001, the Free Trade Commission ["FTC"] composing cabinet level representatives of the NAFTA parties or their designees was established. One of the main functions of the FTC is that, in accordance with art. 1131 (2), any interpretations to the NAFTA provisions issued by the FTC shall be binding upon arbitral tribunals established under Chapter 11.

58 OFF. OF THE U.S. TRADE REP., NAFTA Statement of the Free Trade Commission on non-disputing party participation (Oct. 7, 2003), *available at* http://www.sice.oas.org/TPD/NAFTA/Commission/Nondispute_e.pdf [*hereinafter* "NAFTA Statement"].

59 *See* Suez/Vivendi, ICSID Case No. ARB/03/19, Order in Response to a Petition by Five Non- Governmental Organizations for Permission to Make an Amicus Curiae Submission, ¶ ¶ 10–16.

60 *Id.* ¶ 10.

61 United States Model Bilateral Investment Treaty, art. 28, 2012, *available at*

investment dispute, may petition the tribunal to grant him amicus status to intervene through submitting written briefs.

The third legal justification is when the arbitration rules provide for amicus participation. In 2006, the ICSID Administrative Council adopted the new amendments establishing the criteria to be considered by tribunals when deciding amicus petitions. Pursuant to the new ICSID Arbitration Rules, the most significant innovation was Rule 37(2), which explicitly grants tribunals the discretion to allow and consider amicus submissions.[62] As one commentator points out, the criteria set out in the amendments "*are virtually identical to those enumerated in the FTC Statement.*"[63] It is not surprising that the UNCITRAL Arbitration Rules do not adopt a transparent regime for arbitral proceedings because these Rules were drafted and primarily designed to address international commercial disputes between private parties. While the UNCITRAL Arbitration Rules emphasize upon confidentiality and privacy, such an emphasis is not suitable for the ISDS system, where private versus public interests are at stake. As discussed earlier, since allowing amicus participation falls within the scope of procedural questions pursuant to Article 15 of UNCITRAL Arbitration Rules, NAFTA tribunals have held that they have the discretionary power to allow amicus submissions. However, this acknowledgement is only limited to the framework of the NAFTA. Faced with the urgent demand to establish a more transparent regime in the ISDS system, in 2013, the UNCITRAL promulgated the UNCITRAL Transparency Rules in Treaty-Based Investor-State Arbitration ["**UNCITRAL Transparency Rules**"],[64] aiming to change the landscape of transparency in investor-State arbitration.[65] One of the key innovations set out by the UNCITRAL Transparency Rules is allowing a third party to make briefs before the tribunal where the brief would be helpful and relevant and would not unduly delay, interfere with, or increase the costs, of the proceedings.[66] The principle of transparency, especially through amicus intervention, established by the UNCITRAL Transparency Rules has been elevated into one of "*the global norms in international investment law*."[67]

III. China's Position on Amicus Submission in the ISDS System

In October 2013, when the United Nations General Assembly discussed the work of the UNCITRAL and its Rules on Transparency, the Chinese delegation acknowledged that arbitral transparency would reinforce "*social monitoring of the implementation of host countries' legislations related to foreign investment management, thus building the overall trust of the international community in investment arbitration mechanisms.*"[68] Although the admission of amicus curiae generated broad debate among practitioners, scholars, and parties involved in arbitral proceedings, since 2012, China has put

https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf; Canada Model Foreign Investment Promotion and Protection Agreement, art. 33(5), May 20, 2004, *available at* https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2820/download.

62 *See* ICSID Arbitration Rules, *supra* note 49, r. 37(2).

63 J. Anthony VanDuzer, *Enhancing the Procedural Legitimacy of Investor-State Arbitration Through Transparency and Amicus Curiae Participation*, 52 MCGILL L. J. 681, 717 (2007).

64 UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration, Apr. 1, 2014 [*hereinafter* "UNCITRAL Transparency Rules"].

65 *Id.* at 1.

66 *Id.* art. 4(1)–(6).

67 *See* Simões, *supra* note 3, at 31.

68 People's Republic of China Mission to the United Nations, Statement of Mr. Shang Zhen (Chinese Delegate) at the 68th Session of the United Nations General Assembly (Oct. 14, 2013).

forward reform regarding its position towards greater transparency and amicus curiae intervention in the ISDS system.

As to the first type of reform, the adoption of the Agreement between the Governments of Canada and the People's Republic of China for the Promotion and Reciprocal Protection of Investments ["**China-Canada FIPA**"][69] has been deemed to be the most progressive treaty China has so far accepted in the area of transparency in investor-state arbitration.[70] The China-Canada FIPA, for the first time in the history of Chinese investment agreements, acknowledges the right of a third party to participate in arbitral proceedings through making amicus briefs. As per Article 29, where a non-disputing party (either a person or an entity that is not a disputing party) has a significant interest in the arbitration, the tribunal may accept written submissions made by such a party after consultation with the disputing parties.[71] Similarly, the China-Australia Free Trade Agreement ["**China-Australia FTA**"][72] permits that the tribunal shall, upon the written agreement of the disputing parties, allow an interested party or an entity that is not a disputing party to file a written amicus brief addressing a matter within the scope of the dispute.[73] Although the China-Australia FTA has explicitly addressed the issue of amicus intervention, it is still within the disputing parties' power to make the final determination on whether or not to accept the voluntary involvement of an amicus.

As far as transparency related changes to arbitration rules are concerned, since 2016, a number of arbitration institutions, including the China International Economic and Trade Arbitration Commission ["**CIETAC**"], the Shenzhen Court of International Arbitration ["**SCIA**"], and the Beijing Arbitration Commission ["**BAC**"], have started to adopt and implement a set of procedural rules to provide a more transparent regime for dispute settlement between investors and states. With the expansion of international investment activities, the global need for investment arbitration is growing. Against such a background, Chinese commercial arbitration institutions therefore believe it necessary to promulgate a set of specialised arbitration rules for the settlement of investor-state disputes. In 2016, SCIA released the SCIA Arbitration Rules ["**2016 SCIA Rules**"],[74] which enable the Court to hear investor-State disputes. The Rules went into effect on December 1, 2016 and make SCIA the first arbitration institution in China to administer investor-State arbitration. Additionally, in accordance with Article 3 of the Rules, where the parties submit an investment dispute before SCIA, SCIA shall administer the case pursuant to the UNCITRAL Arbitration Rules and the SCIA Guidelines for the Administration of Arbitration ["**SCIA Guidelines**"] under the UNCITRAL Arbitration Rules.[75] All parties involved in the arbitration are bound to follow the SCIA Guidelines, which clarify how the UNCITRAL Arbitration Rules apply to SCIA cases. Thus, both disputing parties may select the

69 Agreement for the Promotion and Reciprocal Protection of Investments, Can.-China, Sept. 9, 2012 [*hereinafter* "Canada-China FIPA"].

70 Peter Malanczuk, *China and The Emerging Standard of Transparency in Investor-State Dispute Settlement*, *in* L'HARMONISATION DU DROIT COMMERCIAL FACTEUR DE DÉVELOPPEMENT DU COMMERCE [TRADE DEVELOPMENT THROUGH HARMONIZATION OF COMMERCIAL LAW], 19 HORS SERIE 94, 96 (2015).

71 *See* Canada-China FIPA, *supra* note 69, art. 29.

72 China-Australia Free Trade Agreement, China-Austl., Dec. 20 2015 [*hereinafter* "China-Australia FTA"].

73 *Id.* art. 9.16.3.

74 Shenzhen Court of International Arbitration Rules, Dec. 1, 2016 [*hereinafter* "SCIA Rules 2016"].

75 Shenzhen Court of International Arbitration Guidelines for the Administration of Arbitration under the UNCITRAL Arbitration Rules, Feb. 21, 2019 [*hereinafter* "SCIA Guidelines"].

UNCITRAL Transparency Rules as the arbitration rules to govern their case administered by SCIA. Subsequently, the 2016 SCIA Rules were replaced by the Shenzhen Court of International Arbitration Rules, 2019 ["**2019 SCIA Rules**"],[76] but the wording on the jurisdiction over investment arbitration remains unchanged under Article 2 of the revision.

On October 1, 2017, under the support of the China Council for the Promotion of International Trade, CIETAC implemented and adopted the International Investment Arbitration Rules of the CIETAC[77] ["**CIETAC Rules**"], specifically designed for the resolution of international investment disputes. In February 2019, BAC also released the BAC International Investment Arbitration Rules (Draft for Comments)[78] ["**BAC Rules**"] for public consultation. Pursuant to the above Rules, persons or entities who are neither parties to the dispute nor contracting States to the investment treaty may, after informing both disputing parties or the BAC in writing, be permitted as amici to submit briefs regarding particular issues within the scope of the dispute. In addition, the tribunal may, after having regard to the circumstances of the dispute or considering the views of both parties, invite a non-disputing party to make a submission on the disputed issues.[79] If there is a need for further clarification from the non-disputing party, the tribunal shall fix the period of time for submitting such a further written submission.[80] The above Rules show China's attempt to address the '*growing public concern over what is widely perceived as highly opaque procedure*'.[81] For investment treaties to which China is a party, Chinese investors may likely refer their claims to CIETAC or BAC for resolution. Once they agree on the above Rules to govern their claims, a suitable interested party or entity can be permitted to involve in the proceedings as an amicus.

China's reform on amicus intervention in arbitral proceedings follows many practices established by the NAFTA, the ICSID, as well as the UNICITRAL Transparency Rules. For instance, under the Canada-China FIPA, in order to be granted the right to intervene as an amicus, a non-disputing party shall first petition the tribunal for leave to grant the amicus status.[82] Under the CIETAC Rules, in determining whether to allow such a filing, the tribunal is required to take certain factors into account.[83] Additionally, the investment agreements as well as the CIETAC Rules require that a petitioner must be equipped with relevant expertise and experience on the issue he aims to address and be independent to both disputing parties.[84] Further, in order to justify his inclusion as a suitable party to intervene, the reforms require that the tribunal seriously considers whether the petitioner has a significant interest in the proceedings.[85] Moreover, in

76 Shenzhen Court of International Arbitration Rules, Feb. 2, 2019 [*hereinafter* "SCIA Rules 2019"].

77 China International Economic and Trade Arbitration Commission International Investment Arbitration Rules, Oct. 1, 2017 [*hereinafter* "CIETAC Rules"].

78 Beijing Arbitration Commission/Beijing International Arbitration Center Rules for International Investment Arbitration (Draft for Comment), Feb. 12, 2019 [*hereinafter* "BAC Rules"].

79 *See* CIETAC Rules, *supra* note 77, r. 44(2); BAC Rules, *supra* note 78, art. 36 (2).

80 *See* CIETAC Rules, *supra* note 77, r. 44(9); BAC Rules, *supra* note 78, art. 36 (7).

81 Jessica Fei et al., *Facilitating the Belt and Road: CIETAC Launches Investment Arbitration Rules,* HERBERT SMITH FREEHILLS (Dec. 4, 2017), *available at* https://hsfnotes.com/arbitration/2017/12/04/facilitating-the-belt-and-road-cietac-launches-investment-arbitration-rules/.

82 *See* Canada-China FIPA, *supra* note 69, annex C.29.

83 CIETAC Rules, *supra* note 77, art. 44 (4).

84 *See* Canada-China FIPA, *supra* note 69, annex C.29(1); China-Australia FTA, *supra* note 72, art. 9.16; *see* CIETAC Rules, *supra* note 77, r. 44(4).

85 *Id.*

order to ensure that the additional costs brought by the potential submission are a necessary price to pay, the amicus submission should only address a matter within the scope of the dispute. If the petitioner fails to meet these requirements, the tribunal is entitled to disregard the submission.[86] Besides the above conditions, the reform also requires that the submission should not disrupt the proceedings or unduly burden or unfairly prejudice either of the disputing parties.[87] Lastly, a disputing party is allowed to orally present its observations in case of any undue burden caused by an amicus brief.[88]

IV. China and the Expansion of Participatory Rights of Amicus

The participation of non-disputing parties in arbitral proceedings is not always restricted to making amicus submissions. Where a petitioner lacks enough information to prepare the written submission, the petition may contain a request to obtain key arbitral information from the tribunal.[89] Additionally, if a petitioner has a truly significant interest in the proceedings, he might be willing to make the necessary trip to attend the oral hearings and further provide oral arguments to the tribunal.[90] Although amicus involvement in the ISDS system is becoming more common nowadays, maintaining the confidential and private nature of arbitral proceedings remains the general rule.[91] For instance, under the ICSID Arbitration Rules, case documents cannot be disclosed to the public without the consent of both parties.[92] Thus, it would be difficult for amicus curiae to obtain key information since the disadvantaged party will always favour confidentiality.[93] Additionally, although Article 32(2) stipulates that the tribunal may allow an amicus to attend oral hearings, an objection by one party would render the amicus unable to engage in the oral hearings. Therefore, the revised Article is "*disappointing and of limited practical impact, as the opening of the hearings to amici can still be blocked by the parties.*"[94] As a result, though amici are not totally unaware of circumstances, they remain deprived in material respects.[95]

Bearing in mind the relatively limited transparency requirements contained in the ICSID Arbitration Rules, a movement towards the expansion of participatory rights of amicus curiae is already noticeable in the UNCITRAL Transparency Rules. *First*, pursuant to Article 3, three types of documents are categorized as follows: (i) documents that are to be mandatorily and automatically disclosed; (ii) documents that are to be mandatorily disclosed once any person requests their disclosure from the tribunal; and (iii) documents for which the tribunal has discretion regarding whether or not to order disclosure.[96] Once the documents listed in

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86 *Id.*
87 *Id.*
88 *Id.*
89 *See* Simões, *supra* note 3, at 14-15.
90 *Id.*
91 *Id.* at 13-14.
92 As per art. 48(5) of the ICSID Convention and art. 53(3) of the Arbitration (Additional Facility) Rules, 2006, the ICSID Secretariat cannot publish the award without the consent of both parties, but must make excerpts of the award public.
93 *See* Levine, *supra* note 22, at 217.
94 *See* Simões, *supra* note 3, at 14.
95 *Id.* at 16.
96 Lise Johnson & Nathalie Bernasconi-Osterwalder, NEW UNCITRAL ARBITRATION RULES ON TRANSPARENCY: APPLICATION, CONTENT AND NEXT STEPS 15, *available at* http://ccsi.columbia.edu/files/2014/04/UNCITRAL_Rules_on_Transparency_commentary_FINAL.pdf [*hereinafter* "Johnson & Osterwalder"].

paragraphs (i), (ii) and (iii) have been communicated to the depository from the tribunal, these documents shall be made available to the public in a timely manner.[97] Although the Rules impose a mandatory requirement concerning publication of documents, such a principle is subject to exceptions to transparency.[98] Additionally, Article 6 provides for a mandated public hearing for the presentation of evidence or for oral arguments. Where there is a need to protect the confidentiality of the information or the integrity of the arbitral process, the tribunal shall make arrangements to hold in private that part of the hearing requiring such protection.[99] A notable departure from other arbitration rules is that Article 6 requires hearings to be open, subject to three limitations: (i) to protect confidential information; (ii) to protect the "integrity of the arbitral process"; and (iii) for logistical reasons. No disputing party can veto open hearings.[100]

In line with the trend towards transparency in investor-State arbitrations, the ISDS provisions in the China-Canada FIPA, the China-Australia FTA and the CIETAC Rules incorporate a high degree of transparency in the arbitration process. Examples of China's attempt to increase transparency, and therefore the role of amicus curiae in the ISDS system have been illustrated above; but in order to ensure that amicus are truly providing unique arguments on matters within the scope of the dispute and are granted a chance to attend oral hearings, especially to provide oral opinions, there is a need to examine the current practices established in accordance with the reforms.

A. Access to Documents

As far as publication of documents is concerned, pursuant to the China-Canada FIPA, where a disputing party determines that it is in the public interest to do so and notifies the tribunal of that determination, all other documents, except the award, produced during the proceedings shall be made available in the public domain, subject to the redaction of confidential information.[101] Under the China-Australia FTA, the respondent State should make the request for consultations, notice of arbitration, orders, and awards of the arbitral tribunal available to the public.[102] In this regard, the provisions stop short of full transparency. However, other documents, including the pleadings, memorials and briefs, and minutes or transcripts of hearings of the tribunal, may be disclosed to the public if the respondent state agrees.[103] Additionally, only after prior consent is obtained from amicus curiae involved in the proceedings, can the written amicus submission submitted during the proceedings be disclosed to the public.[104] Since arbitral documents would be released to the public, any parties wishing to intervene in the proceedings would have sufficient information to prepare their submissions.

With respect to the access to arbitral documents by amicus curiae, the CIETAC Arbitration Rules can be deemed as the first document granting the tribunal the discretion to determine the matter in China so far. Pursuant to Article 44(10), the tribunal may order that an amicus be

97 UNCITRAL Transparency Rules, *supra* note 64, art. 3(4).
98 *Id.* art. 7.
99 *Id.* art. 6; *See* Johnson & Osterwalder, *supra* note 96, at 14.
100 UNCITRAL Transparency Rules, *supra* note 64, art. 6.
101 *See* Canada-China FIPA, *supra* note 69, art. 28 (1).
102 China-Australia FTA, *supra* note 72, art. 9.17
103 *Id.*
104 *Id.*

provided with access to relevant documents related to the proceedings as may be necessary for his participation in the arbitration.

Although the above rules concerning transparency and access to documents are regarded as key steps towards a greater role for amicus participation in the ISDS system, two main concerns need to be highlighted here. *First*, publication of key documents is still under the discretion of disputing States or tribunals. For instance, under the China-Canada FIPA, all relevant documents can be made available to the public where the respondent State determines that it is in the public interest to do so. Since the FIPA failed to define and confirm the scope of public interest, the respondent State may have a broad discretion over the determination of public interest. Moreover, under the CIETAC Rules, it is within the tribunal's discretion to decide what circumstances would constitute the necessity for preparing amicus briefs. Thus, in order to be granted access to key documents, an amicus has to carefully draft the reasons supporting its petition for obtaining necessary information. Moreover, there is concern over the delay of document disclosure since both treaties failed to establish a time period applicable to the disclosure of documents. Due to the time lag between the date of submitting the documents and the date on which they are posted, amicus curiae may lack necessary documents to prepare for their submission at the time when they plan to intervene in the proceedings.

B. Participation in Hearings

With respect to open hearings as well as the access for amicus curiae to participate in oral hearings, the China-Canada FIPA explicitly provides that if the respondent State, after consulting with the disputing investor, deems that open hearings could preserve the public interests involved in the proceedings, it may notify the tribunal that the oral hearings shall be opened to the public.[105] For the sake of the protection of confidential information, the tribunal may hold portions of hearings in camera.[106] Furthermore, under the China-Australia FTA, upon consultation with both disputing parties, the tribunal shall conduct hearings open to the public if consent is given by the respondent State.[107] However, any disputing party that intends to use information designated as protected information in a hearing shall so inform the tribunal, and the tribunal has the duty to protect that information by making appropriate arrangements.[108] Lastly, pursuant to Article 44(8) of the CIETAC Arbitration Rules, the tribunal may, if either disputing party so requests or the tribunal so decides, hold a hearing for amicus curiae to elaborate on or be examined on its written submissions. The rule established by the CIETAC is regarded as a ground-breaking development concerning the right of amicus curiae to participate in oral hearings.

In short, the two recent investment agreements, which have been concluded by China and analysed above, explicitly grant amici curiae the right to file briefs; but the practice of oral hearings being mandatorily open has not been established. Only upon the determination of public interest involved in the case by the respondent State, can the tribunal open the oral hearings to the public. Additionally, the CIETAC Rules do not go further to explain the

105 *See* China-Canada FIPA, *supra* note 60, art. 28(2).
106 *Id.*
107 China-Australia FTA, *supra* note 72, art. 9.17.3.
108 *Id.* art. 9.17.3.

possibility of amici making oral arguments on their submissions. As pointed out by one commentator: "*openness implies a form of active transparency - amici need to be able not only to 'see' what is going on but also to actively participate in the proceedings.*"[109] Nevertheless, the CIETAC Rules constitute a milestone relating to the access to arbitral documents as well as oral presentation to amicus submission for amicus curiae. In arbitral proceedings conducted under the Rules, a disputing party has no veto right to refuse oral presentation made by amicus curiae. This is because once another disputing party so requests, or the tribunal itself so decides, a chance for amicus curiae to elaborate on or be examined on its written submissions should be granted during the proceedings.[110]

V. Amicus Intervention in ISDS System in China: Future Considerations

China has so far concluded international investment agreements with nearly 140 States and regions.[111] Although the China-Australia FTA constitutes a landmark in the history of China's treaty practice on amicus intervention, the number of treaties containing amicus participation provisions is relatively modest. For agreements that have not incorporated amicus provisions, tribunals can rely on the governing arbitration rules to determine whether amicus status should be granted. If a dispute is arbitrated under recent amended or adopted arbitration rules, a genuine stakeholder has a better chance of being invited as an amicus to assist the tribunal with its relevant expertise and experience. If the governing arbitration rules fail to grant the tribunal the discretionary power to decide amicus petitions, petitioners may face uncertainty because not all tribunals favour openness and transparency, even if they have the inherent power to regulate amicus intervention as a procedural matter. China and Australia introduced the concept of amicus curiae into China-Australia FTA, but a tribunal may allow an amicus submission only upon the written agreement of the disputing parties.[112] Hence, although tribunal members may find that the unique perspectives provided by an amicus would assist them in the determination of a factual or legal issue within the scope of the dispute, any party who is in a disadvantaged position can veto the decision to accept the amicus brief. Such a practice is much more an '*onerous requirement and represents a significant barrier to third party participation in ISDS proceedings*'.[113] This article advocates that future Chinese investment agreements adopt the practice that it is the tribunal's discretion to consider amicus submission and that both disputing parties shall be given the right to provide their opinions but cannot veto the tribunal's decision on accepting an amicus submission.

The participation of amici in investor-State arbitration has been justified as a useful tool to assist tribunals' determination of legal and factual issues. In addition, allowing amicus intervention can '*enhance transparency and legitimacy of ISDS, which in turn enhances the rule of law*'.[114] However, it is also necessary to ensure that both parties will not be unduly burdened or unfairly prejudiced by such

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109 *See* Simões, *supra* note 3, at 22.

110 *See* CIETAC Rules, *supra* note 77, art. 44(4).

111 *International Investment Agreements Navigator*, UNCTAD INV. POL'Y HUB, *available at* https://investmentpolicy.unctad.org/international-investment-agreements/countries/42/china?type=bits.

112 China-Australia FTA, *supra* note 72, art. 9.16.3.

113 Letter from Kyla Tienhaara, Research Fellow, Australian National University to Committee Secretary Senate Foreign Affairs, Defence and Trade Reference Committee 10 (July 24, 2015).

114 Nicolette Butler, *Non-disputing Party Participation in ICSID Disputes: Faux Amici*, 66 NETH. INT'L L. REV. 143, 147, 176 (2019).

intervention. Furthermore, it is important for tribunals to preserve confidential information while allowing amici to be provided with access to relevant documents and oral hearings. China, thus, needs to strike a better balance between the protection of the interests of both parties and external interests, such as public interests or the significant interests of non-disputing parties. This article therefore proposes that it should be ensured that amicus submissions will not disrupt the proceedings or unduly burden or unfairly prejudice either disputing party. To achieve the above goal, procedures for when and how amici may participate in arbitral proceedings should be well-tailored under future Chinese investment agreements. In addition, to ensure that maximum benefits can be realised from amicus participation, China should incorporate safeguards to provide amici access to relevant documents and oral hearings. Indeed, achieving the above should not come at the expense of undermining the confidential and protected information of both parties.

A. Timing Concern of Filing Amicus Petitions and Submissions

As noted above, when a third party aims to participate in arbitral proceedings, a petition for leave to make submission should be made first. The time limit to petition for amicus status is determined by the stage the dispute has reached and the arbitral rules governing the arbitration. The two Chinese treaties studied above have failed to address the time component of a third party's petition. In *Chevron Corporation and Texaco Petroleum Corporation* v. *The Republic of Ecuador*,[115] two petitioners filed a joint petition to request permission from the tribunal to participate as amicus curiae during the jurisdictional phase. After considering the petition, the tribunal ruled that the arguments and perspectives submitted by the petitioners were not helpful to the tribunal during the jurisdictional phase since at that stage, the tribunal primarily focuses on whether it has jurisdiction over the investor-State dispute.[116] Based on this reasoning, the tribunal decided to exercise its discretion to not grant the petitioners the amicus status at this stage of the arbitration.[117] In short, when a petitioner has a strong basis to make a submission addressing matters within the scope of a dispute, choosing the appropriate time to intervene is essential since an amicus submission is unlikely to help the tribunal reach a decision on jurisdiction during the jurisdictional phase. Hence, a petition would be more suitable during the merits phase.

In practice, the above ruling does not simply imply that non-disputing parties may lack the capability to raise arguments on jurisdictional issues during the jurisdictional phase. Even though the tribunal in *United Parcel Service of America* v. *Government of Canada* has explicitly stated a procedural question is an unsuitable subject for amicus submissions,[118] several tribunals, of the opposite view, have granted the petitioners a chance to make arguments on issues of jurisdiction. In *Pacific Rim Cayman LLC* v. *Republic of El Salvador*, the petitioners filed a petition to reject the tribunal's jurisdiction because a strong public interest issue was raised during the jurisdictional phase of the arbitration.[119] After taking into account the arguments made by the petitioners, the

115 Chevron Corp. and Texaco Petroleum Corp. v. Republic of Ecuador, Case No. 2009-23, Procedural Order No. 8 (Perm. Ct. Arb. 2011).

116 *Id.* ¶ 19.

117 *Id.* ¶ 20.

118 United Parcel Serv. of Am. v. Gov't of Canada, ICSID Case No. UNCT/02/1, Decision of the Tribunal on Petitions for Intervention and Participation as Amici Curiae, ¶ 71 (Oct. 11, 2001) [*hereinafter* "United Parcel Service"].

119 Pac Rim Cayman LLC v. Republic of El Sal., ICSID Case No. ARB/09/12, Application for Permission to Proceed

tribunal decided to allow them to make a submission and required that this written submission take the form of the applicants' existing submission but it had to be "*edited with a view to assisting the Tribunal's determination of the jurisdictional issues raised by the Parties (not the merits).*"[120] In *Apotex Inc.* v. *The Government of the United States of America*, the tribunal acknowledged that "*it is perfectly conceivable that issues of jurisdiction might raise matters of public interest in themselves, on which non-disputing parties might be well-placed to provide assistance and perspectives or insights beyond those of the disputing parties.*"[121] Thus, pursuant to the above discussion, the suitable time for a genuine stakeholder to file their petition, either addressing substantive or procedural matters, should also be clarified in upcoming Chinese investment treaties.

B. Strict Criteria Applicable to Amicus Intervention

Nowadays, although the practice of setting up fixed criteria applicable to amicus intervention has been widely adopted by the modern investment treaties, for example, Canada's Model Bilateral Investment Treaty (2004), it is still difficult to create a harmonized approach for amicus participation in the investment treaty system.[122] Creating fixed criteria is essential because equal treatment to amicus petitions requires that the same procedures and standards be applicable to all amicus participations. Tribunals would have failed on their part to treat petitioners equally if they operate on different criteria for identical cases.[123] Additionally, establishing strict criteria would contribute to the predictability of law. This is important because it not only provides peace of mind for petitioners but also enables them to predict the consequences of their petitions.[124] With clear criteria set up by the agreement, it would be easier for petitioners to predict the tribunal's decision on their petition. Moreover, establishing criteria would promote the legitimacy of a procedural decision or order on amicus petitions since the practice of allowing amicus intervention would be governed by fixed standards established by the treaty rather than the uncertain standards of traditional commercial arbitration rules. Therefore, decisions with respect to petitions would be more acceptable among the petitioners.[125] In order to preserve the role played by amicus curiae in investment arbitration, China should seriously establish its own legal criteria in its subsequent investment treaties.

i. Expertise, Experience and Independence: Three Indispensable Factors

An interested petitioner normally aims to represent a large group of people with a common interest through their submission on factual and legal issues within the scope of the dispute. Therefore, the relevance of the submission in assisting the tribunal to render a better award can be seriously questioned if the petitioner lacks the required expertise and experience in the relevant field.[126]

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as Amici Curiae, § IV (Mar. 2, 2011).

120 Pac Rim Cayman LLC v. Republic of El Sal., ICSID Case No. ARB/09/12, Procedural Order No. 8 (Mar. 23, 2011).

121 Apotex Inc. v. Gov't of U.S., ICSID Case No. UNCT/10/2, Procedural Order No. 2 on the Participation of a Non-Disputing Party, ¶ 33 (Oct. 11, 2011).

122 *See* Levine, *supra* note 22, at 222.

123 Irene M. Ten Cate, *The Costs of Consistency: Precedent in Investment Treaty Arbitration*, 51 COLUM. J. TRANSNAT'L L.418, 448 (2013).

124 *Id.* at 453.

125 *Id.* at 455.

126 *See* Schliemann, *supra* note 34, at 378; Suez/Vivendi Order, ICSID Case No. ARB/03/19, Order in Response to a Petition by Five Non-Governmental Organizations for Permission to Make an Amicus Curiae Submission, ¶ 24

Moreover, a petitioner normally takes a clear position either in favour of the claimant investor or the defendant State, but a position taken by the petitioner does not necessarily mean that the submission could unfairly prejudice the opposing party if the petitioner is deemed as independent.[127] As pointed out by a commentator, the relevant question to assess whether an amicus petitioner remains independent is "*whether a relationship of control or the determinative influence of a party to the dispute on the writing of an amicus brief and therefore on its content can be ascertained.*"[128] The independence requirement has been included to ensure that the petitioner will truly be a friend of the tribunal as opposed to a friend of a party. In order to be considered as a suitable party with relevant expertise and experience to intervene in the proceedings pursuant to the reform made by China, petitioners should describe their membership, legal status, general objectives, and any organization that directly or indirectly controls them. Also, in order to confirm the independence of the petitioner, any direct or indirect affiliation with any disputing parties and any financial or other assistance provided by any government, persons, or organization must be disclosed and identified by the petitioner in the petition.[129] When a tribunal considers whether or not to grant the amicus status to a non-disputing party, the paramount concern should be that "*the intervening party takes part in the proceedings as a genuine "friend of the court"*.[130] A genuine friend to the investor-State arbitration aims to provide distinct expertise, perspectives, and arguments on important public interest issues to the tribunal. Therefore, a petition that is perceived to be "*politically motivated, frivolous, or potentially abusive of the process*"[131] should not be accepted. For subsequent investment treaties to be concluded by China, such a standard needs to be well-considered.

ii. Bringing a New and Special Legal or Factual Perspective

It has been highlighted that amicus intervention could impose an additional burden on the parties and arbitral proceedings, as well as lead to rising costs and delays.[132] If a non-disputing party's perspective is simply a repetition of the arguments provided by either of the disputing parties, the tribunal and disputing parties have to spend extra time and resources to review the repetition. Confronted with this concern, under the reform conducted by China, a perspective, particular knowledge or insight brought by the petitioner, that is different from that of the disputing parties, shall be deemed to be a key element in justifying amicus intervention.[133] The above reform is supported as, without a new and special legal and factual perspective, the petitioner would fail to fulfil the role ascribed to him of helping the tribunal reach a more legitimate award. Therefore, this practice should be introduced into future Chinese investment treaties.

iii. Significant Interest of a Petitioner

(Feb. 12, 2007).

127 Schliemann, *supra* note 34, at 378-380.

128 *Id.* at 380.

129 *See* Canada-China FIPA, *supra* note 69, annex C.39(1)(c)-(e); China-Australia FTA, *supra* note 72, art. 9.16.4; CIETAC Rules, *supra* note 77, art. 44(3).

130 Camilla Graham, *Amicus Curiae & Investment Arbitrations*, *in* 2 ADVOCATES FOR INTERNATIONAL DEVELOPMENT 6 (2012).

131 *Id.*

132 *See* Levine, *supra* note 22, at 219.

133 *See* Canada-China FIPA, *supra* note 69, annex C.39(1)(f); China-Australia FTA, *supra* note 72, art. 9.16.3; CIETAC Rules, *supra* note 77, art. 44(4).

As studied earlier, an investment dispute may involve public interests, such as environmental and health protection, human rights, sustainable development, etc.[134] When a petitioner has no direct interest in the outcome of a dispute but is equipped with relevant expertise and experience, it has been argued that such party is justified to intervene on the basis that it could "*defend a public interest by representing various and changing persons or collectives, affected "only" by a paradigmatic action embodied in a given, concrete dispute.*"[135] Although the two investment treaties and the CIETAC Rules have failed to explicitly require tribunals to ascertain that public interest is involved in the dispute, in practice, tribunals frequently require that the dispute should be a matter of public interest for petitioners to be admitted as amici.[136] For example, as indicated earlier, in *Suez*, the tribunal believed that the case involved significant public interests because the dispute centred around sewage systems and water distribution to millions of people, and any decision made by the tribunal would potentially affect the operation of those systems, and thereby, the public they serve.[137] Hence, for subsequent reform to be undertaken by China, and with the willingness of NGOs with a special interest, the tribunal should require that the dispute be a matter of public interest.

iv. Addressing Matters within the Scope of the Dispute

As indicated earlier, after an amicus has filed a brief, arbitrators and both parties have to comment on the unique perspectives contained therein, and the tribunal would also issue a procedural order or decision based on the petition. Thus, the amicus submission would entail extra fees for both parties. In order to render the international arbitral system more legitimate through transparency, these additional costs seem to be the necessary price to pay.[138] But where an amicus raises arguments addressing matters beyond the scope of the dispute, it will inevitably place an extra burden and increase additional costs on both the tribunal and the disputing parties. The ISDS system aims to resolve issues brought by the disputing parties, and since the resolution process is not a forum for debating wider socio-political, environmental or policy issues, an amicus submission should only address issues within the scope of the dispute.[139] Such a consideration requires that any arguments ventured by an amicus should be strictly related to the substantive or legal questions to be resolved in the arbitration. With respect to the reform made by China, amicus submissions should only address a matter within the scope of the dispute in order to ensure that the additional costs brought by an amicus submission is the necessary price to pay. If it fails to meet this requirement, the tribunal is entitled to disregard the submission.[140] Such a standard should continue to be followed in subsequent investment treaties concluded by China.

v. No Undue Burden or Unfair Prejudice to Any Party

134 *See* Gomez, *supra* note 46, at 543-544.

135 *See* Schliemann, *supra* note 34, at 374.

136 *Id.* at 373.

137 Suez/Vivendi, ICSID Case No. ARB/03/19, Order in Response to a Petition by Five Non-Governmental Organizations for Permission to Make an Amicus Curiae Submission, ¶ 19.

138 Eloïse Obadia, *Extension of Proceedings Beyond the Original Parties: Non-Disputing Party Participation in Investment Arbitration*, 22(2) ICSID REV. – FOREIGN INV. L. J. 349-379, 377 (2007).

139 *See* Graham, *supra* note 130, at 8.

140 *See* Canada-China FIPA, *supra* note 69, annex C.29; China-Australia FTA, *supra* note 72, art. 9.16.3; CIETAC Rules, *supra* note 77, art. 44(4).

Besides the above conditions, the current reform examined above also requires that an amicus submission should not disrupt the proceedings or unduly burden or unfairly prejudice either disputing party.[141] This standard reflects China's determination to respect the traditional features of arbitration aiming to provide a speedy, low-cost, and flexible dispute resolution for both parties. As commentators have suggested, even though amicus submissions would substantially impact the proceedings, establishment of procedural safeguards, such as time limits, the tribunal would ensure that the submission does not overly burden the proceedings.[142] For instance, the China-Canada FIPA adopted several procedural guarantees, including a requirement for timely submission, a limitation on the length of the brief and the requirement of setting out a precise statement supporting the amici's position on the issue.[143] The CIETAC Rules also explicitly grant the tribunal the discretion to determine the form and content of the submission.[144] Besides, amici usually take a clear position in favour of either the claimant investor or the respondent State; therefore, it has been argued that the submission would cause undue burden to the disadvantaged party. In practice, such concern can be easily dealt with since both the disputing parties are given a chance to present their observations on the brief. In the future, China also needs to follow the above practice of allowing a disputing party to present its observations on the amicus submission in case of any undue burden caused by an amicus brief.[145]

C. Access to Relevant Documents and Oral Hearings

In practice, the efficiency of amicus participation without access to arbitral documents is doubtful for the following reasons. *First*, without providing the key arbitral documents to genuine stakeholders, the limited information released by the respondent State or other private sources will be the only information available for amici to prepare their briefs.[146] The reliability of the information obtained from private sources will likely be questioned since it is not as precise and accurate as the information released by the official organs. Since potential amici lack the necessary information to fully understand the nature of the dispute and the issues raised therein, they may produce opinions based on inaccurate or incomplete information.[147] In addition, as amici have no information on whether the parties have already addressed their main concern or what perspectives they have already presented, it would be difficult for them to produce distinct arguments to the tribunal and address matters within the scope of the dispute.[148] As a result, disputing parties may have to make observations on briefs which are useless and repetitive.

The above consequence is in contrast to the well-established rule that an amicus should provide tribunals with arguments, perspectives and expertise that the parties may not provide and amicus submission should only address matters within the scope of the dispute.[149] Therefore, if amici are

141 *See* Canada-China FIPA, *supra* note 69, art. 29.

142 *See* Schliemann, *supra* note 34, at 380; United Parcel Service, ICSID Case No. UNCT/02/1, Decision of the Tribunal on Petitions for Intervention and Participation as Amici Curiae, ¶ 69.

143 *See* Canada-China FIPA, *supra* note 69, annex C.29(2).

144 *See* CIETAC Rules, *supra* note 77, art. 44(6).

145 *See* Canada-China FIPA, *supra* note 69, Annex C.29; China-Australia FTA, *supra* note 72, art. 9.16.4; CIETAC Rules, *supra* note 77, art. 44(7).

146 *See* Simões, *supra* note 3, at 20-21.

147 Nigel Blackaby & Caroline Richard, *Amicus Curiae: A Panacea for Legitimacy in Investment Arbitration?*, *in* THE BACKLASH AGAINST INVESTMENT ARBITRATION: PERCEPTIONS AND REALITY 253, 255 (2010); *see* Simões, *supra* note 3, at 20.

148 *See* Simões, *supra* note 3, at 20–21.

149 *Id.*

provided with essential documents, they will have a better opportunity of making an insightful contribution to the whole proceeding.[150] While the acceptance of amicus curiae briefs has become a common practice in the investment arbitration system, disclosure of documents appears to be far more difficult to achieve. As a result, the efficiency of amicus intervention will undoubtedly be limited.[151] In order to alleviate the above concern, China should seriously consider the necessity of disclosing relevant documents for amici to prepare their briefs. In order to prevent disclosure of any confidential and protected documents to amicus curiae, the disputing party that produces such documents shall advise the tribunal for their protection. The tribunal should strike an appropriate balance between preserving the confidentiality of protected documents and enhancing the systemic legitimacy of the ISDS system. When the tribunal holds that a protected document is essential for an amicus to draft his brief, a redacted version of the document should be made available to the amicus.

The debate on open hearings is still ongoing. The arbitration settlement itself aims to resolve the dispute between the disputing parties in a flexible manner, therefore, allowing amici to attend oral hearings, especially giving oral submissions and commenting on the disputing parties' evidence could definitely cause undue burden to the arbitral proceedings.[152] Also, parties may be worried that the confidentiality of the information or the integrity of the arbitral process will be undermined due to the amicus involvement in oral hearings. Bearing in mind the potential drawbacks, scholars have argued that given the general or specific public interests involved in investor-State arbitration, the public would be more accepting of an award if an amicus defending the interest is granted a chance to attend oral hearings.[153] Besides, giving amici the right to attend oral hearings could enable them to give oral arguments on their submissions and offer opinions on key evidence. As one commentator pointed out, why should all other presenters of fact or expertise be subject to questioning, so the tribunal can evaluate the persuasive value, but not the amici? In other words, if the very reason for allowing the submission is that the amicus curiae arguably offers some special factual knowledge or technical expertise, shouldn't the parties have an opportunity to test its assertions through cross-examination?[154] Hence, while negotiating new investment agreements with its counterparties, China needs to consider that it is the tribunal's power to decide for itself whether to permit amici's access to hearings. This could be achieved simply by introducing a provision granting the tribunal the discretion to hold a hearing for an amicus to elaborate on or be examined on its written submission if either party so requests or the tribunal so decides.

VI. Conclusion

For the last decade, amicus intervention has become a central concept in the investment arbitration lexicon because it increases the transparency, accountability, and openness of arbitral proceedings, assisting tribunals in reaching more legitimate awards.[155] Although, the adoption of

150 *Id.*

151 *Id.*

152 *See* Levine, *supra* note 22, at 219.

153 *See* Simões, *supra* note 3, at 31.

154 Jean E. Kalicki, *The Prospects for Amicus Submission, Outside the ICSID Rules*, KLUWER ARB. BLOG (Sept. 14, 2012), *available at* http://kluwerarbitrationblog.com/2012/09/14/the-prospects-for-amicus-submissions-outside-the-icsid-rules/.

155 Fernando Dias Simões, *A Guardian and a Friend: The European Commission's Participation in Investment Arbitration*, 25(2)

amicus curiae provisions into the investment agreements has increased in China in recent years, it has been done cautiously because of concerns regarding the cost, time efficiency, and confidentiality of the ISDS system. This caution is well-reflected under the China- Australia FTA because the decision to allow amicus submission is still within the power of both disputing parties. Against this backdrop, this article proposes that China should strike a proper balance between preserving the traditional features of arbitration and enhancing the systemic legitimacy of ISDS in the upcoming investment agreements. This requires China to acknowledge that it is the discretion of tribunals to allow or accept amicus submissions and that both disputing parties cannot veto their decision. In parallel, to ensure that both parties will not be unduly burdened or unfairly prejudiced by amicus submission, this article proposes a procedure for when and how non-disputing parties may participate in arbitral proceedings. Only upon satisfying the strict criteria suggested above is a non-disputing party entitled to be invited as a genuine friend to intervene in arbitral proceedings.

A recent study showed that amicus submissions might have a positive impact on the outcome of investment arbitrations.[156] However, because of lack of access to relevant documents or oral hearings for amici, whether they have a better opportunity to make insightful contributions to the whole proceedings is in question. To ensure that maximum benefits can be realised from amicus participation, this article proposes that China establish the practice of granting amici access to relevant documents and oral hearings under the future investment agreements. Once amici curiae are provided with relevant documents and granted a chance to make oral examinations on their submissions, they may perform their function with greater benefits to the parties, the arbitration community and the public.[157] However, achieving the above should not come at the expense of undermining the confidential and protected information of both parties. Recently, although tribunals are willing to accept amicus briefs, in the absence of explicit treaty provisions that require the tribunals to take into account the amicus briefs in the decision-making process, they might rarely refer to the submissions.[158] As a result, the impact of amicus submissions on final awards would be negligible. An amicus submission normally provides a unique perspective concerning the protection of public interests, so it is essential for the tribunal to take the submission into account by at least summarising the unique perspectives provided therein and providing a detailed explanation as to why it has or has not used this perspective in the legal reasoning.[159] Pursuant to the BAC Rules, one of the most important developments regarding amicus intervention is that the Rules explicitly allow the tribunal to refer to and rely on amicus submissions in its orders, decisions and awards.[160] Hence, while negotiating new investment agreements with the counterparties, China needs to raise the above concern for debate.

This article examines the current Chinese attitude towards amicus intervention in ISDS proceedings. Through the analysis, the article concludes that the current amicus provisions under

MICH. ST. INT'L REV. 233, 234 (2017) [*hereinafter* "Simões - *Guardian*"].

156 *See* Butler, *supra* note 114, at 176.

157 *See* Simões, *supra* note 3, at 31.

158 *See* Simões - *Guardian*, *supra* note 155, at 234; Schliemann, *supra* note 34, at 389; Butler, *supra* note 114, at 176.

159 *See* Schliemann, *supra* note 34, at 390.

160 *See* BAC Rules, *supra* note 78, art. 36(10).

Chinese investment treaties still impose several restrictions on amicus participation in arbitral proceedings. Thus, non-disputing parties may find it difficult to persuade tribunals to grant them sufficient arbitral information and consider their submissions. Since 2017, leading arbitration institutions in China have showed their willingness to allow amicus submissions to help them render better awards by granting amici the access to relevant arbitral information and oral hearings. In addition, recent years have witnessed that the European Union and the United States are more willing to grant amici sufficient documents to prepare for their briefs and the opportunity to participate in oral hearings. Therefore, it can be predicted that a movement towards the expansion of the participatory rights of amici will be more noticeable under new Chinese investment agreements.

ARBITRABILITY OF FRAUD: ANALYSING INDIA'S PROBLEMATIC JURISPRUDENCE

*Shivam Singh**

Abstract

*Arbitrability of fraud has consistently been the subject of immense judicial scrutiny by the Indian courts. Despite that, the final statement of Indian law on this point remains deeply disappointing, and is detrimental to the arbitration landscape in India. In this paper, the author shall demonstrate that the existing jurisprudence on this issue does not suitably deal with the controversy. The paper begins by outlining the scope of 'arbitrability'. It shall proceed towards tracing the judicial developments on the subject starting from pre-independence India. The paper shall then analyse the significant contemporary developments under the Arbitration and Conciliation Act, 1996 [the "**1996 Act**"], and critically examine how the existing precedents compel the courts to undertake an adjudication on merits at the pre-reference stage. The paper shall conclude by offering suggestions to reduce the judicial uncertainty on this point.*

I. Introduction

Globally, arbitration is the preferred mode of commercial dispute resolution since it offers timely relief, provides full expression to contractual autonomy, and ensures predictability of outcomes. Parties, incentivised by these advantages, insist upon the insertion of arbitration clauses in their contracts. Such clauses indicate that parties are ad idem that in the event disputes arise, they shall be resolved via arbitration. The arbitration mechanism helps them avoid the long-winded judicial process associated with civil courts.

The question that follows is whether all disputes are capable of being resolved via arbitration, and whether the insertion of an arbitration clause can remove all types of disputes from the ambit of judicial forums in favour of an arbitral tribunal. This question stands answered by the Indian Supreme Court in *Booz Allen and Hamilton Inc.* v. *SBI Home Finance Ltd.* ["**Booz Allen**"].[1] This verdict is also the first time that the Supreme Court ventured to explain the contours of 'arbitrability', a term that is nowhere defined in the 1996 Act or its preceding statutory enactments.

The Supreme Court employed a three-pronged test to determine 'arbitrability'. *First*, whether the dispute is capable of being resolved via arbitration. *Second*, whether the dispute is covered by the arbitration agreement. Finally, whether the parties have referred the dispute to arbitration.[2] In answering this three-pronged formulation, the apex court categorized disputes as arbitrable and non-arbitrable by classifying them into disputes which deal with rights *in rem* and rights *in personam*. It is relevant to note that while *rights in rem* are enforceable against the public at large, rights *in personam* are attached to specific person(s) alone.

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1 Booz Allen and Hamilton Inc. v. SBI Home Finance Limited and Ors., (2011) 5 SCC 532 [*hereinafter* "Booz Allen"].

2 *Id.* ¶ 34.

The Supreme Court via Justice R.V. Raveendran held that rights *in personam* are arbitrable, but *rights in rem* are non-arbitrable on the ground that rights *in rem* tend to have an impact on society at large, as they involve the adjudication of the entitlements of not only the parties *inter se* but against all people who might be claiming an interest in the property. *Per contra*, rights *in personam* are restricted to rendering a decision on private rights alone.[3] The direct impact of this reasoning was an affirmance of the conventional understanding that mere choice of parties to categorise a dispute as being covered by an arbitration clause would not necessarily mean that it is capable of being resolved by arbitration, and hence would not oust the jurisdiction of civil courts.

The Supreme Court, while laying down this flexible rule, also outlined certain disputes that are essentially non-arbitrable. A few examples of these non-arbitrable disputes are:

(i) disputes relating to rights and liabilities which give rise to or arise out of criminal offences;
(ii) matrimonial disputes relating to divorce, judicial separation, restitution of conjugal rights, child custody;
(iii) guardianship matters;
(iv) insolvency and winding up matters;
(v) testamentary matters (grant of probate, letters of administration and succession certificate); and
(vi) eviction or tenancy matters governed by special statutes where the tenant enjoys statutory protection against eviction and only the specified courts are conferred jurisdiction to grant eviction or decide the disputes.[4]

This classification as conceptualized in *Booz Allen*, though instructive, is also fluid in nature. The Supreme Court has sometimes chosen to shrink the scope of arbitrable disputes, and on at least one occasion, has grappled with the difficulties that may arise if the scope of arbitrability is expanded. In 2016, the Supreme Court, in *Vimal Kishore Shah and Others* v. *Jayesh Dinesh Shah and Others*[5] ["**Vimal Kishore Shah**"], added disputes arising out of trust deeds and the Indian Trusts Act, 1882 to the category of non-arbitrable disputes. The reason behind holding trust disputes to be non-arbitrable was that sufficient and adequate remedy is provided under the Indian Trusts Act itself.

Likewise, in 2018, the Supreme Court, while hearing a review petition in *Emaar MGF Land Limited* v. *Aftab Singh*[6] ["**Emaar MGF Land Limited**"], held consumer disputes to be non-arbitrable. It added an important clarification in holding that consumer disputes are capable of being arbitrated provided that the agreement contains an arbitration clause, but in situations wherein the consumer has first approached the consumer courts, then the judicial authority would be within its rights to refuse a reference to arbitration.[7] It also noted that it is only in cases

3 *Id.* ¶ 38.
4 *Id.* ¶ 36.
5 Vimal Kishore Shah and Ors. v. Jayesh Dinesh Shah and Ors., (2016) 8 SCC 788.
6 Emaar MGF Land Limited v. Aftab Singh, 2018 SCC Online SC 2771.
7 Nidisha Garg, *Consumer Disputes to be Non-Arbitrable: SC Lays to Rest the Controversy,* INDIACORPLAW (Oct. 31, 2019), *available at* https://indiacorplaw.in/2019/01/consumer-disputes-non-arbitrable-sc-lays-rest-controversy.html.

where specific remedies are provided for and opted by the aggrieved person that the court can deny reference to arbitration.

Further, two division benches of the Supreme Court have taken divergent views regarding the arbitrability of tenancy disputes. In 2017, the Supreme Court in *Himangi Enterprises* v. *Kamaljeet Ahluwalia,* ["**Himangni Enterprises**"] relying on *Natraj Studios (P) Ltd.* v. *Navrang Studios and Another*[8] ["**Natraj Studios**"] and *Booz Allen*, held that tenancy disputes involving questions of eviction and rent recovery shall be adjudicated by a civil court as opposed to an arbitral tribunal,[9] under the Transfer of Property Act, 1882 even when the Delhi Rent Act, 1995 (special legislation governing tenancy disputes) is not applicable.[10] In 2019, another division bench of the Supreme Court in *Vidya Drolia and Others* v. *Durga Trading Corporation*[11] ["**Vidya Drolia**"] doubted the correctness of the view expressed in *Himangni Enterprises.* It held that under the Transfer of Property Act, 1882, there was no specific bar vis-à-vis arbitrability of tenancy disputes,[12] as opposed to in *Vimal Kishore Shah*, wherein the doctrine of necessary implication effectively excluded the Trust Act from the ambit of arbitrability.[13] The Supreme Court, therefore, allowed the parties to continue with the arbitral proceedings and also referred this matter for adjudication by a larger bench of at least three judges.[14]

With this backdrop in mind, it is apt to examine how the Indian courts have historically approached the issue relating to arbitrability of fraud especially since *Booz Allen*, *Vimal Kishore Shah*, *Emaaar MGF Land Limited*, *Himangini Enterprises* and *Vidya Drolia* did not specifically exclude fraud from the ambit of arbitrable disputes.

II. Historical Analysis of Judicial Precedents

The legislations that preceded the 1996 Act were the Indian Arbitration Act, 1899 [the "**1899 Act**"] and the Arbitration and Conciliation Act, 1940. Application of the former was, however, limited to the Presidency towns, namely Bombay, Calcutta and Madras.[15] Under both these statutory enactments, Indian courts dealt with the issue of whether fraud falls within the ambit of arbitration or if it automatically stands excluded.

Section 19 of the 1899 Act is particularly relevant because it permitted the courts to stay legal proceedings. The stay could be granted in those situations where the parties had agreed to submit their disputes to arbitration, and the courts were satisfied that there was no sufficient reason as to why the matter should not be referred to arbitration. However, the judicial philosophy regarding arbitrability of fraud under the 1899 Act was influenced by a decision that predated its enactment.[16] In *Russel* v. *Russel* ["**Russel**"],[17] the English courts considered whether

8 Natraj Studios (P) Ltd. v. Navrang Studios and Another, (1981) 1 SCC 523.
9 Himangni Enterprises v. Kamaljeet Ahluwalia, (2017) 10 SCC 706.
10 *Id.*
11 Vidya Drolia and Ors. v. Durga Trading Corp., 2019 SCC Online SC 358.
12 *Id.* ¶ 26.
13 *Id.* ¶ 50.
14 *Id.* ¶ 36.
15 LAW COMM'N OF INDIA, REPORT NO. 246, AMENDMENTS TO ARBITRATION AND CONCILIATION ACT, 1996 (2014) [*hereinafter* "Law Commission Report"].
16 Parul Kumar, *Is Fraud Arbitrable? Examining the Problematic Indian Discourse,* 33(2) ARB. INT'L 249, 251 (2017) [*hereinafter* "Parul Kumar"].

allegations of fraud would exclude the operation of an arbitration clause, for the first time. The decision introduced a prima facie test to determine whether disputes could be referred to arbitration or not: the courts shall be entitled to refuse a reference to arbitration if there exists sufficient prima facie evidence to support the existence of fraud.

The decision in *Russel* formed the basis for the Indian courts to determine the competence of an arbitrator to adjudicate disputes concerning fraud. In *Narsingh Prasad Boobna and Others* v. *Dhanraj Mills*[18] ["**Narsingh Prasad Boobna**"], the Patna High Court, in 1943, while adjudicating a case under the Indian Arbitration Act, 1899, held that since prima facie sufficient evidence existed to indicate the existence of fraud, civil courts were better suited to adjudicate the dispute as opposed to an ordinary arbitrator. In 1938, the Madras High Court in *Laldas Lakshmi Das* v. *J.D. Italia* ["**Laldas Lakshmi**"], observed that in cases involving serious allegations of fraud, the party against whom such allegations have been made, has the right to ask the court that matters affecting his integrity should be decided in open court.[19] However, the court also noted that businessmen may not want to clear their character in open court in cases involving allegations of fraud and would rather submit to the jurisdiction of the arbitral tribunal.[20]

In 1929, the division bench of the Bombay High Court while hearing a dispute under the 1899 Act, in *Raneegunge Coal Association Ltd.* v. *Tata Iron and Steel Co Ltd*[21] adopted a completely different approach in contradistinction to *Laldas Lakshmi*, and the subsequent view of the Patna High Court in 1943. The Bombay High Court ruled that mere allegations of fraud would not be reason enough to stay suit proceedings under Section 19 of the 1899 Act without furnishing particulars of the fraud. The court also observed that a party cannot allege fraud merely based on a cause of action of fraud where the real cause of action is *ex contractu*. In doing so, it added heft to the then nascent belief that an arbitral tribunal is competent to adjudicate questions of law which may include but shall not be limited to questions of fraud.[22]

It was not until 1962 that occasion arose for the Indian Supreme Court, in *Abdul Kadir Shamsuddin Bubere* v. *Madhav Prabhakar Oak*[23] ["**Abdul Kadir**"], to examine the contours of arbitrability of fraud under the Arbitration and Conciliation Act, 1940. In this case, the trial court had declined to refer the parties to arbitration, after holding that allegations relating to fraud excluded arbitration as the mode of dispute resolution. The trial court's decision was reversed by the Bombay High Court, which held that the allegations that arose in the dispute were not allegations of fraud, and even if they were, were still not of a nature that would call upon the courts to refuse a reference to arbitration.

The Supreme Court, in appeal, laid emphasis on a threshold test for serious fraud. It held that when there are serious allegations of fraud which are made against a party, then the party which has been accused of fraud may desire that the case be tried in a civil court as opposed to via

17 Russel v. Russel [1880] 14 Ch D 471 (Eng.).
18 Narsingh Prasad Boobna and Ors v. Dhanraj Mills, AIR 1943 Pat. 53.
19 Laldas Lakshmi Das v. J.D. Italia, 1938 SCC Online Mad. 175.
20 *Id.* ¶ 2.
21 Raneegunge Coal Association Ltd v. Tata Iron and Steel Co. Ltd, AIR 1929 Bom. 119.
22 Parul Kumar, *supra* note 16, at 253.
23 Abdul Kadir Shamsuddin Bubere v. Madhav Prabhakar Oak, AIR 1962 SC 406 [*hereinafter* "Abdul Kadir"].

arbitration.[24] In these circumstances, the 'sufficient cause' requirement as contained in Section 20(4) of the Arbitration and Conciliation Act, 1940 would be met.[25] The court noted that the allegations merely touched upon fraudulent accounting entries and that was not reason enough to warrant interference with the arbitral proceedings.

The Indian Supreme Court's decision in *Abdul Kadir* has been the theoretical underpinning for subsequent decisions of the court in which it has sought to assess the seriousness of fraud, and whether that seriousness can be a basis to decline reference to arbitration.[26]

III. Significant Contemporary Developments: Quartet of Judicial Decisions

The Indian Arbitration Act, 1899 gave way to the Arbitration and Conciliation Act, 1940, and in 1996, the Arbitration and Conciliation Act, 1940 was replaced by the 1996 Act. When the 1996 Act was enacted, two significant activities had taken place. The UNCITRAL Model Law on International Commercial Arbitration was introduced in 1985 and economic liberalization took place in India in 1991. These twin factors necessitated the introduction of a new legislation that was in sync with the global commercial realities faced by India.

Under the 1996 Act, a quartet of major decisions has shaped the understanding of arbitrability of fraud. The first of these decisions came in 2009 with *N. Radhakrishnan* v. *Maestro Engineers and Ors.*[27] ["**N. Radhakrishnan**"], wherein the Supreme Court considered a case that originated under Section 8 of the 1996 Act.[28] Section 8 unambiguously provides that if there is an arbitration clause contained in an agreement, and if that agreement is produced in the original form or via a certified copy, then provided that it has been done at a stage not later than the filing of the written statement, the courts shall relegate the parties to arbitration. Despite such an unequivocal legislative command contained in Section 8, the Supreme Court chose not to refer parties to arbitration since it felt that serious allegations of fraud were at play. In doing so, it was guided by the 1962 decision of *Abdul Kadir* to hold that serious allegations of fraud should be tried by civil courts and should not fall within the ambit of arbitration.

This decision was the first major setback to the Indian arbitration landscape on the issue of arbitrability of fraud under the 1996 Act, for two significant reasons. First, it displayed unwillingness on the part of the courts to engage with the legislative mandate of Section 8 of the 1996 Act, which was extremely different from Section 20(4) of the Arbitration and Conciliation Act, 1940 that was in place when the Supreme Court decided *Abdul Kadir*.[29] Second, this decision displayed a trust deficit on part of the courts when it came to reposing faith in arbitral tribunals to adjudicate certain kinds of disputes.

In 2014, while adjudicating upon a Section 11[30] petition under the 1996 Act the Supreme Court adopted a diametrically opposite view in *Swiss Timing Limited* v. *Commonwealth Games 2010*

24 *Id.* ¶ 13.
25 *Id.* ¶ 14.
26 Parul Kumar, *supra* note 16, at 256.
27 N. Radhakrishnan v. Maestro Engineers and Ors., (2010) 1 SCC 72 [*hereinafter* "N. Radhakrishnan"].
28 The Arbitration and Conciliation Act, No. 26 of 1996, § 8.
29 Abdul Kadir, AIR 1962 SC 406.
30 The Arbitration and Conciliation Act, No. 26 of 1996, § 11 (India).

Organising Committee[31] ["**Swiss Timing**"]. The apex court appointed a sole arbitrator after expressly rejecting the argument that allegations of fraud would oust the jurisdiction of arbitration tribunal, and also held that the lodging of a criminal case would not bar reference to an arbitration tribunal. The Supreme Court in *Swiss Timing* held that the division bench verdict in *N Radhakrishnan* goes against the ruling in *Hindustan Petroleum Corporation. Ltd.* v. *Pinkcity Midway Petroleums*,[32] wherein the court emphasised on the mandatory language of Section 8 of the Arbitration Act in relation to reference to arbitration and accordingly, held *N Radhakrishnan per incuriam.*

The decision was extremely progressive for two key reasons: *first*, it prevented parties from utilizing criminal remedies to frustrate the initiation of arbitration. *Second*, it specifically recognized the *kompetenz-kompetenz* principle, and held that all objections regarding the jurisdictional ability of the arbitrator can be raised by the aggrieved party under Section 16 of the Arbitration and Conciliation Act, 1996. However, the decision does not hold the field, as it is against the judicial principles for a single judge to declare a larger bench's decision *per incuriam*.

In 2016, the Supreme Court was again considering a case that originated under Section 8 of the 1996 Act, in *A. Ayyasamy* v. *Paramasivam and Ors.*[33] ["**A. Ayyasamy**"]. It clarified the decision in *N Radhakrishnan* and impliedly over-ruled *Swiss Timing.* The apex court created a dual paradigm to adjudge the seriousness of fraud. It held that cases involving allegations of fraud *simpliciter* were capable of being resolved through arbitration, but disputes that dealt with complex fraud were incapable of being resolved via arbitration.[34] In doing so, it stated that mere allegations of fraud that only touched upon the internal affairs of the parties without any spill over effect on the public domain were cases of simple fraud, while situations of complex fraud arose in those cases wherein the allegations of fraud went to the root of the agreement or to the validity of the arbitration clause/agreement itself. After laying down this test, the Supreme Court noted that the case in question was one of alleged simple fraud and it, therefore, appointed an arbitrator.

The rationale of the Supreme Court's division bench decision in *A. Ayyasamy* has now been affirmed by a larger bench of three judges of the Supreme Court in the 2019 judgment of *Rashid Raza* v. *Sadaf Akhtar*[35] ["**Rashid Raza**"]. It is the view of the author that instead of doing away with the distinction between simple fraud and complex fraud, the court has endorsed this duality, and by virtue of it being a decision rendered in a larger composition than *A. Ayyasamy,* it has now become a binding precedent on the subject.

In *Rashid Raza*, while hearing an appeal against a Jharkhand High Court decision[36] that had rejected the Section 11 petition of the petitioner/appellant due to the perceived allegations of serious fraud, it took forward the decision of *A. Ayyasamy* and conceptualized a working two-part test: *first*, whether the plea of fraud permeates the entire contract as well as the arbitration agreement to render it void, and *second*, whether the fraud allegations merely relate to the parties'

31 Swiss Timing Ltd. v. Commonwealth Games 2010 Org. Comm., (2014) 6 SCC 677.
32 Hindustan Petroleum Corp. Ltd. v. Pinkcity Midway Petroleums, (2003) 6 SCC 503.
33 A. Ayyasamy v. Paramasivam and Ors., (2016) 10 SCC 386.
34 Amal K. Ganguli, *New Trend in the Law of Arbitration in India,* 60(3) J. INDIAN L. INST. 249, 263-264 (2018).
35 Rashid Raza v. Sadaf Akhtar, (2019) 8 SCC 710.
36 *Id.*

internal affairs or if they have an implication upon the public domain. After doing so, it held that the disputes in the present case were only of a character that related to allegedly fraudulent accounting entries that were capable of being resolved by taking recourse to arbitration. Similar to *Ayyasamy*, the Supreme Court appointed an arbitrator to adjudicate the disputes that arose between the parties.

It is the view of the author that although it was not expressly considered by the Supreme Court in *Rashid Raza,* its reasoning was perhaps sub-consciously affected by Section 11(6A) of the 1996 Act, which existed when the decision was rendered on September 4, 2019. Further, while this provision has now been repealed by the 2019 Amendment, but for the period that it existed from 2015 till its recent repeal, it restricted the scope of courts in declining references to arbitration. Under the now deleted provision, the courts were limited to examining whether a valid arbitration agreement was in place or not. Its specific repeal may enjoin the courts to undertake this inquiry. This shall not advance the cause of arbitration in India, since the courts may start summarily rejecting arbitration petitions by finding that the disputes are non-arbitrable.[37]

IV. Compulsory Pre-Reference Adjudication on Merits

There exists a clear divergence in terms of the views that the Supreme Court has adopted while dealing with arbitrability of fraud under domestic commercial arbitration and international commercial arbitration.

It is relevant to note that the decisions in *N Radhakrishnan*, *A. Ayyasamy* and *Rashid Raza* do not adequately consider the scope of Section 27 of the 1996 Act. As per Section 27, an arbitral tribunal may seek assistance in the recording of evidence. It is common knowledge that several arbitral tribunals already record copious amounts of evidence and deal with specialized issues, particularly in infrastructure/construction disputes. Therefore, the argument that issues of fraud require an appreciation of complex evidentiary issues is a red herring, and should be outrightly rejected by courts whenever they deal with issues relating to the arbitrability of fraud.[38] Further, these decisions are not in sync with the Law Commission of India's recommendation that had favoured making issues of fraud expressly arbitrable, and had also suggested legislative amendments to Section 16 of the 1996 Act.[39]

A direct but unfortunate effect of these decisions has been the compounding of the issue of judicial uncertainty *vis-à-vis* the arbitrability of fraud in domestic arbitrations. Though this dual classification of fraud simpliciter and complex fraud appears to be intuitively appealing, its appreciation by the courts is theoretically unsound and practically unworkable. The Law Commission's recommendations in favour of making fraud expressly arbitrable have been incorrectly ignored. Such an approach, in fact, increases judicial intervention in arbitration matters as opposed to decreasing it, and that is not in sync with the statement of the object and

37 Shivam Singh, *Arbitrability of Fraud: A Critique of India's Problematic Jurisprudence,* LIVE LAW (Oct. 31, 2019), *available at* https://www.livelaw.in/columns/arbitrability-of-fraud-a-critique-of-indias-problematic-jurisprudence-148206 [*hereinafter* "Shivam Singh"].

38 Shubham Jain & Prakshal Jain, *Arbitrability of Fraud in India – Is Ayyasamy only about "Seriousness"?*, INDIACORPLAW (Oct. 31, 2019), *available at* https://indiacorplaw.in/2017/12/arbitrability-fraud-india-ayyasamy-seriousness.html; *Id.*

39 LAW COMMISSION REPORT, s*upra* note 15.

reasons of the 1996 Act. Additionally, it enlarges the scope of discretion in terms of determining arbitrability as opposed to reposing faith in the arbitral tribunal for arriving at this conclusion.

In *National Insurance Co. Ltd.* v. *Boghara Polyfab Pvt. Ltd.*,[40] the Supreme Court held that courts do not have the power to rule upon the question of arbitrability at the stage of reference, and the same is the mandate of the arbitral tribunal under Section 16 of the Arbitration Act. Moreover, this exercise of judicial discretion is practically unworkable because the Supreme Court's understanding of what constitutes serious fraud and what constitutes simple fraud has been wavering. The Supreme Court passed a detailed judgment in *State of Bihar* v. *Divesh Kumar Chaudhary* ["**Divesh Kumar Chaudhary**"],[41] wherein the court considered over 250 anticipatory bail cancellation pleas filed by the State of Bihar and Bihar State Food and Civil Supplies Corporation Limited.

The Supreme Court noted that due to the Paddy Milling Scam, the state exchequer had suffered a financial hit of over 1500 crore rupees due to the well-orchestrated financial wrongdoing and criminal misappropriation of funds. To ensure complete justice, it established five special courts in Bihar and tasked them with the mandate of trying these offences.[42] The Supreme Court's decision clearly reveals that it was convinced about it being a sophisticated fraud requiring detailed investigation and adjudication. Its sequitur should have, therefore, been that the courts would accept the *A. Ayyasamy* dictum that cases of complex fraud are not arbitrable. However, the Supreme Court's decision in the next round of litigation clearly indicates a marked departure. In *Divesh Kumar Chaudhary*, numerous accused persons invoked arbitration clauses in their contracts with the Bihar State Food and Civil Supplies Corporation, which reached the Patna High Court via petitions under Section 11 of the 1996 Act.

In *Sadhna Kumari* v. *Bihar State Food and Civil Supplies Corporation Limited*[43] ["**Bihar State Food and Civil Supplies Corporation Ltd**"], the Patna High Court held that these matters were ripe for adjudication by arbitration and declined the Respondent's plea that the cases were incapable of resolution via arbitration. The decision was then assailed by the Bihar State Food and Civil Supplies Corporation Limited in the Supreme Court.[44] A plea was taken that the Patna High Court's decision gave a complete go-by to the principles enunciated in the *N. Radhakrishnan* and *A. Ayyasamy* case. Reference was made to the Supreme Court's own decision in *Divesh Kumar Chaudhary* to buttress the argument that the apex court's observation about it being a wide-ranging fraud constituted a bar upon the Patna High Court to appoint arbitrators in these matters. The Supreme Court was, however, unmoved by this contention and upheld the Patna High Court's impugned decision.[45] It is noteworthy that the same bench[46] of the Supreme Court considered the cases of *Divesh Kumar Chaudhary* and *Bihar State Food and Civil Supplies Corporation Ltd.*

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40 National Insurance Co. Ltd. v. Boghara Polyfab Pvt. Ltd., (2009) 1 SCC 267.
41 State of Bihar v. Divesh Kumar Chaudhary, (2018) 16 SCC 817.
42 Shivam Singh, *supra* note 37.
43 Sadhna Kumari v. Bihar State Food and Civil Supplies Corporation Limited, AIR 2017 Pat. 120.
44 Bihar State Food and Civil Supplies Corporation Ltd. and Ors v. Sadhana Kumari, SLP Civil No. 450/2018, Jan. 29, 2018 (SC).
45 Shivam Singh, *supra* note 37.
46 Coram: J. Adarsh Kumar Goel and J. Uday Umesh Lalit.

Notwithstanding the implied over-ruling of *Swiss Timing* by *A. Ayyasamy*, this decision of the Supreme Court brought itself closer to the decision of *Swiss Timing* and away from the verdict of *A. Ayyasamy*. In doing so, the Supreme Court did two clear things. *First*, it indicated an ideological alignment with the proposition in *Swiss Timing* that criminal prosecution should not be used as a tool to nix arbitration proceedings. *Second*, and more importantly, it showed an unwillingness to engage with the classification of simple fraud and complex fraud as enunciated in the *A. Ayyasamy* decision.

If fraud is made expressly arbitrable in keeping with the recommendation of the Law Commission, even then, a party that is objecting to the arbitrability of fraud shall have two remedies before it. These remedies can be availed at the pre-award stage and at the post-award stage.[47] The first remedy at the pre-award stage would be under Section 16 of the 1996 Act wherein a party can specifically object to an arbitrator's competence to hear a dispute involving elements of fraud. Further, referring the matters to arbitration, as opposed to declining references, would have a key advantage as it would be in sync with the commercial arbitration principle of *kompetenz-kompetenz* , which dissuades the courts from undertaking a preliminary test on arbitrability, especially when the same plea can also be raised before the arbitrator.

The second remedy would arise at the post-award stage under Section 34(2)(b)(ii) of the 1996 Act. An affected party may claim that the existence of fraud vitiates the award as it is in conflict with India's public policy.[48] The Supreme Court in cross-appeals arising in an international commercial arbitration case of *Venture Global Engineering LLC* v. *Tech Mahindra*[49] dealt with the question of whether fraud, if found to have been played by a party during the arbitration proceedings, will result in vitiating the arbitral proceedings, including the award, since it is contrary to public policy under Section 34 of the 1996 Act. The apex court bench of two judges differed with each other and the case was referred to a larger bench of three judges. While Justice Chelameswar held that the trial court had been unable to show how the award was induced by fraud, Justice Sapre took a different view and held that material non-disclosures by one party constituted fraud and it would render the proceedings void ab-initio.[50] This case has been placed before a larger bench of three judges and an authoritative pronouncement on this issue remains awaited.

The Indian Supreme Court in *World Sport Group (Mauritius) Ltd.* v. *MSM Satellite (Singapore) Pte Ltd.*,[51] had been fairly categorical in holding that even if issues of fraud were to arise in foreign-seated arbitrations, they would be arbitrable.[52] It specifically declined to accept the argument that the courts in *Abdul Kadir* and *N Radhakrishnan* had rejected references to arbitration when there

47 Janhavi Sindhu, *Fraud, Corruption and Bribery- Dissecting the Jurisdictional Tussle Between Indian Courts and Arbitral Tribunals*, 3(2) INDIAN J. ARB. L. 23–24 (2015) [*hereinafter* "Sindhu"].

48 Siddharth S. Aatreya, *Venture Global v. Tech Mahindra – Complicating the Public Policy Debate under Indian Arbitration Law*, INDIACORPLAW (Oct. 31, 2019), *available at* https://indiacorplaw.in/2018/09/venture-global-v-tech-mahindra-complicating-public-policy-debate-indian-arbitration-law.html.

49 Venture Global Engineering LLC v. Tech Mahindra Ltd., (2018) 1 SCC 656.

50 Anchit Oswal, *Impact of fraud on arbitral award: Indian Supreme Court at divergence,* SCC ONLINE BLOG (Oct. 31, 2019), *available at* https://www.scconline.com/blog/post/2018/02/01/impact-fraud-arbitral-award-indian-supreme-court-divergence/.

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

52 Shivam Singh, *supra* note 37.

were serious issues of fraud that required adjudication. It did so by holding that both, *Abdul Kadir* and *N Radhakrishnan,* were domestic arbitration cases and in deciding the present dispute under Section 45 of the Arbitration and Conciliation Act, 1996, it shall not rely upon domestic arbitration disputes.[53] This decision in some manner mirrors the rationale of *Bharat Aluminum Co.* v. *Kaiser Aluminium Technical Services Inc.*[54] ["**Bharat Aluminium Co.**"] which had overruled *Bhatia International* v. *Bulk Trading SA.*[55] In *Bharat Aluminum Co.*, the Supreme Court clearly held that Part I of the 1996 Act would apply to domestic arbitrations and Part II would apply to international commercial arbitrations.

The author is of the view that adopting two approaches in dealing with arbitrability of fraud in foreign seated arbitration and domestic arbitrations decelerates the steps being undertaken by India to emerge as an arbitration-friendly jurisdiction. To minimize judicial intervention in arbitration disputes, it is entirely conceivable that parties may simply have arbitration clauses that have a foreign destination as a seat of arbitration.[56] Although it is unlikely that this will take place in contracts wherein the agreed sum is a small amount, it is quite likely to occur if the parties have deep pockets and the contractual sum is a large one.

V. Conclusion

The dual classification of simple fraud and complex fraud as conceptualized by the Supreme Court in *A. Ayyasamy* and followed in *Rashid Raza* is not in sync with the best global practices.[57] The US Supreme Court in *Henry Schein Inc.* v. *Archer and White Sales Co.* ["**Henry Schein Inc.**"].[58] has unanimously endorsed the idea that arbitrability, as a threshold issue, must be decided by the arbitrator and not by a civil court.[59] It further held that even if a party were to plead that the reference to arbitration is "wholly groundless", the principle of *kompetenz-kompetenz* demands that the decision on this plea should be returned solely by the arbitrator as it is competent to rule upon its own jurisdiction.[60]

The formulation in *A. Ayyasamy* and *Rashid Raza* has not ensured predictability of outcomes, as can be seen by the discordant note struck in *Divesh Kumar Chaudhary* and *Sadhana Kumari.* A far more apt course of action would be to accept the 246th Law Commission Report and make all frauds expressly arbitrable by making amendments to Section 16 of the Arbitration and Conciliation Act, 1996. Such a move would provide a fillip to arbitration in India, and also closely mirror the trend seen in robust developed economies such as the United States, which after the *Henry Schein Inc.* decision have adopted an approach that reposes faith in arbitral tribunals, and erases the trust deficit that most Indian courts tend to display towards arbitrators.

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53 Sindhu, *supra* note 47, at 37.

54 Bharat Aluminum Co. v. Kaiser Aluminium Technical Services Inc., (2012) 9 SCC 552.

55 Bhatia International v. Bulk Trading S.A., (2002) 4 SCC 105.

56 Shivam Singh, *supra* note 37.

57 Fiona Trust and Holding Corporation v. Yuri Privalov [2007] UKHL 40 (Eng.); Prima Paint Corp. v. Flood and Conklin Mfg. Co., 388 U.S. 395 (1967); Shivam Singh, *supra* note 37.

58 Henry Schein Inc. v. Archer and White Sales Co., 139 S. Ct. 524 (2019) (U.S.).

59 Kingshuk Banerjee & Ritvik Kulkarni, *Reconsidering the Arbitrability of Tenancy Disputes in India,* BAR AND BENCH (Oct. 31, 2019), *available at* https://www.barandbench.com/news/reconsidering-the-arbitrability-of-tenancy-disputes-in-india.

60 Shivam Singh, *supra* note 37.

REGULATION OF THIRD PARTY FUNDING OF ARBITRATION IN INDIA: THE ROAD NOT TAKEN

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Abstract

*Third party funding ["**TPF**"] has become a necessary evil in the face of excessively high costs involved in both international and domestic arbitrations. Historically, TPF in litigation has been deemed to be illegal in most common-law jurisdictions owing to the application of the archaic doctrines of maintenance and champerty. Arbitration hubs such as Singapore and Hong Kong have recently implemented regulatory frameworks to recognise and accept TPF in arbitration and have abolished these archaic doctrines. A regulation of this funding mechanism promotes access to justice and allows meritorious claimants to advance their claims, despite the furore over its ethical, economic, and legal considerations. Through this article, the authors have sought to explore the benefits and the associated risks that are involved in TPF, while referring to the existing regulatory regimes across jurisdictions. This is done with the objective of examining the need for a regulatory framework in India as the lack of prohibition of this funding mechanism makes India a lucrative market for TPF. The Indian market may still be exposed to significant risks due to the lack of a regulation. Legislating on this vacuum in law could assist India in becoming the arbitration hub that it envisages itself to be.*

I. Introduction

International arbitration has become one of the most sought after dispute resolution mechanisms for cross-border disputes. One cannot turn a blind eye to the fact that prominent international arbitral institutions have ensured quality case management systems, impressive panels of arbitrators, and timely disposal of cases. However, many institutions have failed to address the extortionate costs[1] involved in an international arbitration, which at times, exceeds millions of dollars.[2] This often dissuades parties with potentially legitimate claims from pursuing them, due to the lack of available funds or alternatively, encourages them to opt for TPF in order to avail justice. Given the costs involved in an international arbitration proceeding, in the instances of both, international commercial arbitration and international investment arbitration,

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1 FOUCHARD GAILLARD GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION 686 (Emmanuel Gaillard & John Savage eds., 1999).

2 Bernard Hanotiau, *The Parties' Costs of Arbitration, in* 4 EVALUATION OF DAMAGES IN INTERNATIONAL ARBITRATION 213 (Yves Derains & Richard H. Kreindler eds., 2006).

most parties are compelled to consider various means to fund their claims, even before dwelling into the merits of their claims.[3]

The International Council on Commercial Arbitration-Queen Mary University Task Force on Third-Party Funding ["**Task Force**"], a joint task force of academicians and practitioners of arbitration laws, recognised the flourishing market for TPF and the benefits that would be reaped by all stakeholders in an international arbitration.[4] The Task Force[5] recently arrived at an exhaustive definition for 'TPF', which refers to an agreement by an entity that is not party to a dispute to provide a party (either claimant or respondent), an affiliate of that party or a law firm representing that party, funds or other material support in order to finance part or all of the cost of the proceedings, either individually or as part of a specific range of cases.[6] Such support or financing is either provided in exchange for remuneration or reimbursement that is wholly or partially dependent on the outcome of the dispute, or provided through a grant or in return for a premium payment.[7] In this financing method, an entity that is not a party to a particular dispute funds another party's legal fees or pays an order, award or judgment rendered against the party, or both.[8] The market for TPF has witnessed a global impetus, leading to the establishment of several institutional funding organizations.[9] The Task Force recognised the flourishing market for TPF and the benefits that would be reaped by all the stakeholders in an international arbitration.[10] The Task Force emphasised that the benefits of this system could only be realised if there was a greater consistency in the approach along with informed decision-making in addressing the issues that entail.[11]

The increased reliance on TPF arrangements has become a global phenomenon.[12] TPF arrangements are increasingly gaining traction, which has called for greater consistency in the approach followed with respect to them.[13] As third party funders gauge the funding agreement as an investment with a financial motive,[14] which requires extensive due diligence, an analysis of the merits of the claim, the likely damages that may arise,[15] and the prospects of enforcing the award

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3 Philippe Cavalieros, *In-House Counsel Costs and other Internal Party Costs in International Commercial Arbitration*, 30(1) ARB. INT'L 145 (2014).

4 ICCA & QMUL TASK FORCE ON THIRD-PARTY FUNDING, REPORT OF THE ICCA-QUEEN MARY TASK FORCE ON THIRD-PARTY FUNDING IN INTERNATIONAL ARBITRATION 3 (Apr. 2018), *available at* https://www.arbitration-icca.org/media/10/40280243154551/icca_reports_4_tpf_final_for_print_5_april.pdf [*hereinafter* "ICCA-QMUL REPORT"].

5 *Id.*

6 *Id.* at 50.

7 *Id.*

8 LISA BENCH NIEUWVELD & VICTORIA SHANNON SAHANI, THIRD-PARTY FUNDING IN INTERNATIONAL ARBITRATION 1 (2d ed. 2017).

9 *Id.* at 1277.

10 ICCA-QMUL REPORT, *supra* note 4, at 3.

11 *Id.*

12 James Clanchy, *Navigating the Waters of Third Party Funding in Arbitration*, 82(3) INT'L J. ARB., MEDIATION & DISP. MGMT. 222 (2016).

13 *See generally* GIAN MARCO SOLAS, THIRD PARTY FUNDING: LAW, ECONOMICS AND POLICY (2019).

14 Joe Tirado et al., *The Costs and Funding of International Arbitration*, *in* DEFINING ISSUES IN INTERNATIONAL ARBITRATION 289 (Julio César Betancourt ed., 2016).

15 *Id.*

that is finally arrived at through the arbitration proceeding,[16] this could certainly open a Pandora's box for unfair bargains. The party availing TPF might have significantly greater resources to dispute the claims and thereby afford a lengthy arbitration or potential litigation. There is also the probability of a third party funder's abuse of financial leverage against a vulnerable party, which would lead to 'unfair bargains' and an unwarranted interference in the arbitral proceedings.

Historically, TPF has been deemed illegal under common law due to the principles of champerty and maintenance.[17] These doctrines are still enforced, rendering TPF either as a tort or a crime in certain jurisdictions such as Ireland and Malaysia, and was an enforceable common law tort even in Singapore until 2017.[18] The position of TPF in civil law systems such as France and Belgium falls under a grey-area; but the practice is usually frowned upon.[19] However, these legal barriers have now been eroded in jurisdictions such as Australia, Germany, United Kingdom ["**UK**"], the United States of America ["**USA**"],[20] and most recently in Singapore and Hong Kong as well.[21] Due to the varying approaches adopted by different jurisdictions, a complexity for the international arbitration community has been created. There has been no consensus on the approach which should be adopted towards TPF.

Irrespective of these varying approaches, the demand for TPF has already created a marketplace for third party funders such as Burford Capital (USA), Juridica Investment Ltd. (UK), and Omni Bridgeway (Netherlands),[22] amongst several others. In essence, there is a demand and supply for TPF in international arbitration and this market has its own benefits and associated risks. For this reason, it must be regulated to mitigate the associated risks that may impede the transparency and confidentiality of arbitral proceedings and to further protect the interests of the opposing party.

Today, TPF has become an indispensable component of the international arbitration process, in order to finance the claims of impecunious claimants (or respondents), and providing funding to such party to an arbitration is no longer seen as a mere consequence of the costs of an international arbitration.[23] This article, in Part II, traces the historical roots of TPF through the long-standing doctrines of maintenance and champerty, followed by the recognition of the growing need for regulating TPF in the Indian context in Part III. Subsequently, the article

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16 Frank Garcia, *Third Party Funding as Exploitation of the Investment Treaty System*, 59(8) B.C. L. REV. 7 (2018).

17 NIEUWVELD & SAHANI, *supra* note 8, at 14.

18 Nadia Darwazeh & Adrien Leleu, *Disclosure and Security For Costs or How To Address Imbalances Created By Third-Party Funding*, 33(2) J. INT'L ARB. (2016).

19 NIEUWVELD & SAHANI, *supra* note 8, at 12.

20 *Id.*

21 Alastair Henderson et al., *Update: Singapore Passes Law to Legalize 'Third-Party Funding' Of International Arbitration and Related Proceedings*, HERBERT SMITH FREEHILLS ARB. NOTES (Jan. 11, 2017), *available at* https://hsfnotes.com/arbitration/2017/01/11/update-singapore-passes-law-to-legalise-third-party-funding-of-international-arbitration-and-related-proceedings.

22 Pia Eberhardt & Cecilia Olivet, *Profiting from Injustice: How Law Firms, Arbitrators and Financiers Are Fuelling An Investment Arbitration Boom*, CORP. EUR OBSERVATORY TRANAT'L INST. (Nov. 2012), *available at* https://www.tni.org/files/download/profitingfrominjustice.pdf.

23 Joe Tirado et. al., *supra* note 14, at 285.

identifies the existing concerns surrounding TPF and suggests the creation of a regulatory framework in the Indian context in Part IV. Finally, in Part V, the article draws to a close with the lessons India may derive from the prevailing regulatory regimes and the conceivable economic repercussions, before such a legislative framework is enacted.

II. Tracing the Roots of Third Party Funding

More than 70% of companies have stated that they chose to steer clear of meaningful, meritorious claims because of the impact of legal expenses.[24] In this regard, it becomes pertinent to evaluate the transition from the doctrines of maintenance and champerty under which litigation funding had been considered criminal or tortious to the abolition of such apparent wrongs in several jurisdictions to further facilitate access to justice.

A. History of the Doctrines of Maintenance and Champerty

The history of funding of claims can be contextualized and traced back to the common law doctrines of maintenance and champerty. Maintenance may be understood as an overarching doctrine which encompasses champerty as a type of maintenance.[25] Broadly, maintenance is the act of financial assistance being provided to a party to a dispute, without any expectation of receiving a share in the final amount that may be recovered in the instance that the party succeeds and without any interest in the outcome whatsoever.[26] On the contrary, champerty is the act of providing a similar financial backing, however, with the explicit expectation of receiving a share in the outcome of the dispute, if the party wins.[27]

In 1843, one of the most renowned British legal theorist and jurist, Jeremy Bentham, had opined upon the circumstances that paved the way for the doctrines of maintenance and champerty, and stated that they were initially introduced to try and curb mischief.[28] The seriousness or the negative perspective from which TPF was perceived is reflected in the statements of Jeremy Bentham, wherein he stated that such support in legal proceedings could be a mischief. He articulated: "*A mischief, (…) though a mischief not to be cured by such laws, was, that a man would buy a weak claim, in hopes that power might convert it into a strong one, and that the sword of a baron, stalking into court with a rabble of retainers at his feet, might strike terror into the eyes of a judge upon a bench.*"[29]

Traditionally, these doctrines established that funding of claims by third parties to the litigation was not only void ab initio, but also considered as tortious and criminal.[30] These acts were also

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24 BURFORD CAPITAL, BURFORD ANNUAL REPORT 2018 , at 10, *available at* https://www.burfordcapital.com/media/1526/bur-31172-annual-report-2018-web.pdf [*hereinafter* "BURFORD ANNUAL REPORT 2018"].

25 NIEUWVELD & SAHANI, *supra* note 8, at 14.

26 *Id.*

27 *Id.*

28 Lisa Bench Nieuwveld, *Third-Party Funding – Maintenance and Champerty – Where is it Thriving?*, KLUWER ARB. BLOG (Nov. 7, 2011), *available at* http://arbitrationblog.kluwerarbitration.com/2011/11/07/third-party-funding-maintenance-and-champerty-where-is-it-thriving.

29 *Id.*

30 NIEUWVELD & SAHANI, *supra* note 8, at 11-112.

rendered morally and ethically against public policy.[31] Maintenance and champerty were formally declared as unlawful in 1275 by the Statute of Westminster, through which a prohibition upon court officials from indulging in maintenance or champerty was introduced. The Statute also barred attorneys from abusing the litigation process.[32] The same was reiterated and developed further by various other Statutes.[33]

B. Dilution of the Doctrines of Maintenance and Champerty in the United Kingdom

The doctrines of maintenance and champerty were doubted or first observed as outdated in England in the 1908 case of *British Cash and Parcel Conveyors* v. *Lamson Store Service Co.*,[34] which displays a more progressive and accepting approach towards TPF. In this case, it was held by Lord Justice Fletcher Moulton that "*the truth of the matter is that the common law doctrine of maintenance took its origin several centuries ago and was formulated by text-writers and defined by legal decisions in such a way as to indicate plainly the views entertained on the subject by the courts of those days. But these decisions were based on the notions then existing as to public policy and the proper mode of conducting legal proceedings. Those notions have long since passed away, and it is indisputable that the old common law of maintenance is to a large extent obsolete.*"[35]

The liberalisation of the doctrine of maintenance and champerty was truly effectuated by Sections 13 and 14 of the Criminal Law Act, 1967,[36] which abolished them as crimes and torts ofmaintenance and champerty. However, Section 14(2)[37] provides that in case a contract violates public policy (and is therefore unenforceable), the abolition of liability for maintenance and champerty shall not affect such determination.[38] The Criminal Law Act, 1967 has through necessary and indirect implication paved the way for TPF in England and in other post-colonial countries, such that there is similar divergence from these principles, post their independence. Furthermore, the doctrine has evolved or been diluted in different ways in other common law jurisdictions. However, a law mirroring the departure from these antiquated doctrines has not been established in India in any statutory form.

C. Dilution of the Doctrines of Maintenance and Champerty in India

The position with respect to maintenance and champerty in India is clear, and the doctrines of maintenance and champerty are inapplicable in India as determined by the Privy Council in the

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31 *See id.*; *See also* Christopher Hodges et al., *Litigation Funding: Status and Issues* 12 (Ctr. for Socio-Legal Stud., Oxford and Lincoln L. Sch., U. Lincoln 2012), *available at* https://www.law.ox.ac.uk/sites/files/oxlaw/litigation_funding_here_1_0.pdf.

32 Statute of Westminster, The First 1275, 3 Edw. I c. 25, 28 & 33 (Eng.).

33 David Neuberger, Harbour Litigation Funding First Annual Lecture: From Barretry, Maintenance and Champerty to Litigation Funding ¶ 15 (May 8, 2013), *available at* https://www.harbourlitigationfunding.com/wp-content/uploads/2015/09/lord_neuberger_harbour_annual_lecture_8_may_2013.pdf; *See also* Percy H. Winfield, *The History of Maintenance and Champerty*, 35 L. Q. REV. 50, 56 (1919).

34 British Cash & Parcel Conveyors v. Lamson Store Service Co., [1908] 1 K.B. 1006 (Eng.).

35 *Id.* ¶¶ 1013-1014.

36 Criminal Law Act 1967, c. 58, §§ 13, 14 (Eng.).

37 *Id.* § 14(2).

38 NIEUWVELD & SAHANI, *supra* note 8, at 45.

case of *Ram Coomar Coondoo* v. *Chunder Canto Mookerjee*.[39] Here, the Privy Council held that "*the English laws of maintenance and champerty are not of force as specific laws in India*."[40] However, it was also laid down that the said doctrines would apply to an agreement which is inequitable, extortionate and unconscionable and not made with the bona fide objects of assisting a claim.[41] Therefore, they would only apply in limited situations to prevent individuals from gambling in litigation or encouraging frivolous litigation.

In the words of the arbitrator Dr. Gavan Griffith QC, a third party funder embraces a 'Gambler's Nirvana'.[42] The Transfer of Property Act, 1882, in fact, allows for the transfer of 'actionable claims',[43] while prohibiting the transfer of 'a mere right sue',[44] such that the practice of gambling over litigation may be prevented.[45] In the case of *Re: 'G' A Senior Advocate of the Supreme Court*,[46] it was observed by the Supreme Court of India that an agreement wherein a stake was held by a third party in the outcome of the litigation, would be legally unobjectionable and enforceable, if and only if, a lawyer was not involved. Consequently, there was nothing morally wrong which would shock the conscience and it would not violate public policy.[47] The conclusion was crystal clear that the rigid doctrines of maintenance and champerty do not apply in India and are only applicable against advocates. The same has also been given statutory force under Part VI of the Bar Council of India Rules wherein Rule 20 prohibits an advocate from entering into a fee arrangement on contingent on the outcome of a dispute[48] and Rule 21 prohibits an advocate from buying, trafficking, stipulating, or agreeing to receive any share or interest in an actionable claim.[49]

Most recently, in the case of *Bar Council of India* v. *A.K Balaji*,[50] the Supreme Court of India, observed that "*there appears to be no restriction on third-parties (non-lawyers) from funding the litigation and getting repaid after the outcome of the litigation.*"[51] Accordingly, the explicit restriction on financing the parties to the dispute is merely placed on the lawyers under the Bar Council Rules, such that a conflict of interest may be avoided and the professional standards of a lawyer are maintained. This limit on the interference from the lawyers prevents a situation where the final award may be set aside or deemed unenforceable under the auspices of 'public policy'.

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39 Ram Coomar Coondoo v. Chunder Canto Mookerjee, [1876] 2 AC 186, 208 (PC) [*hereinafter* "Ram Coomar Coondoo"].

40 *Id.*

41 *Id.* at 210.

42 RSM Prod. Corp. v. Saint Lucia, ICSID Case No. ARB/12/10, Decision on Saint Lucia's Request for Security for Costs, ¶ 13 (Aug. 13, 2014) [*hereinafter* "RSM Prod."].

43 Transfer of Property Act, No. 44 of 1882, § 130 (India) [*hereinafter* "Property Act"].

44 *Id.* § 6(e).

45 DR. AVTAR SINGH, TEXTBOOK ON THE TRANSFER OF PROPERTY ACT 39 (5th ed. 2016).

46 In Re: 'G', a Senior Advocate of the Supreme Court, AIR. 1954 SC 557.

47 *Id.* ¶ 11.

48 Bar Council of India (Standards of Professional Conduct and Etiquette) Rules, 1975, Gazette of India, pt. VI § II, r. 20 (Sept. 6, 1975).

49 *Id.* r. 21.

50 Bar Council of India v. A.K. Balaji, AIR 2018 SC 1382.

51 *Id.* ¶ 35.

The Arbitration and Conciliation Act, 1996 ["**Arbitration Act**"] is silent on the role of a third party funder in an arbitration. This aspect was neither regulated by the Arbitration and Conciliation (Amendment) Act, 2015, nor does it find any mention in Arbitration and Conciliation (Amendment) Act, 2019 ["**2019 Amendment**"]. Accordingly, it is pertinent to note that TPF is not *per se* illegal in India, but is a field of law that has missed the eye of the legislators. TPF as a financing practice has still not experienced any formal evolution and has neither been explicitly prescribed nor proscribed under the letter of law.

III. The Growing Need for Regulation of Third Party Funding in India

The United Nations resolution which endorses access to justice and recognises that all institutions are accountable to just, fair, stable and equitable laws[52] has been a pivotal justification for the development of TPF, as it allows a party with insufficient financial resources to beat the hurdles of exorbitant costs, if it does indeed have a meritorious claim.[53] The market for TPF has evolved from being a small and niche market[54] to a largely prevalent one, owing to the fact that dependency on arbitration as a dispute resolution mechanism has exponentially increased over the years. This increased demand for arbitration has prompted the consequent increase in the overall costs involved;[55] therefore, external financing is often relied upon by claimants, not only to lay off the risk of losing[56] but also to prevent capital from being tied up,[57] while the arbitral proceedings are underway. This is simply because cash-flow is the life force of a business.[58]

TPF has been proliferating in most common law jurisdictions, and recently in Singapore and Hong Kong. This is true not only for the impecunious claimants, but also for the States appearing in a proceeding.[59] Recently, Hong Kong welcomed TPF as an exception to the general bar on maintenance and champerty, through the Arbitration and Mediation (Third Party Funding) (Amendment) Ordinance, 2017.[60] Since these doctrines have been held to be inapplicable in India,[61] lucrative opportunities for this market to boom have been served on a silver platter. It is to be kept in mind that TPF in arbitration (if regulated wisely) has no impact on the arbitration proceedings;[62] it merely facilitates the smooth running of the process.

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52 G.A. Res. 67/1, Declaration of the High-Level Meeting of the General Assembly on the Rule of Law at the National and International Levels, ¶ 2 (Nov. 30, 2012).

53 Tara Santosuosso & Randall Scarlett, *Third-Party Funding in Investment Arbitration: Misappropriation of Access to Justice Rhetoric by Global Speculative Finance*, 60(9) B.C. L. Rev. 8, 10 (2019), *available at* https://lawdigitalcommons.bc.edu/bclr/vol60/iss9/5.

54 NIEUWVELD & SAHANI, *supra* note 8, at 11.

55 *Id.*

56 Duarte G. Henriques, *Arbitrating Disputes in Third-Party Funding*, 85(2) INT'L J. ARB., MEDIATION & DISP. MGMT. 171 (2019).

57 *See* NICK ROWLES-DAVIES, THIRD-PARTY LITIGATION FUNDING 15 (2014).

58 *Id.*

59 Eric De Brabandere & Julia Lepeltak, *Third-Party Funding in International Investment Arbitration*, 27(2) ICSID REV. 379 (2012).

60 Arbitration and Mediation (Third-Party Funding) (Amendment) Ordinance, No. 6 (2017) (H.K.) [*hereinafter* "HK TPF Ordinance"]

61 Ram Coomar Coondoo, [1876] 2 AC 186, 210 (PC).

62 *See* Oxus Gold v. Republic of Uzbekistan, Final Award, Dec. 17, 2015, Arbitral Tribunal constituted under the Arbitration Rules of the UNCITRAL, ¶ 127.

The public policy ideal of access to justice can be fostered through dispute financing for claimants who are unable to pursue their meritorious claims individually,[63] and by companies that seek to carry on with their business without affecting their stock in trade.[64] Furthermore, the uncertainty and upheaval in the market resulting from the global economic slowdown in 2008 allowed for several hedge funds and banks, which are not affected by erratic changes in the financial markets to rely on dispute financing,[65] leading to the dawn of arbitration as an investment or an asset class, by creating a secondary market in the claims.[66] Recently, the institutional framework of third party funders, which has grown in response to the burgeoning of TPF as a 'corporate finance', has led to entities with abundant cash reserves to finance dispute resolution.[67] These institutions finance the claims of claimants as a means to raise capital for general operating expenses, or for the expansion of the business as a whole.[68]

The perceived economic benefits in India, which is still seen as a developing country, would especially be advantageous to small businesses and companies which do not wish to allocate funds towards legal expenses,[69] despite having arbitration clauses in their contractual agreements. This is simply because of the risks that are posed by an uncertain legal proceeding which may pose an impediment, in case of an unfavourable award. The discernible risks would, therefore, be mitigated if the opportunity to avail funds from third parties is made known to such persons or businesses who are not necessarily impecunious.

As evidenced by the 2019 Amendment, the goal of the Parliament is to make India a hub of arbitration by adopting a pro-institutional arbitration framework.[70] This goal would certainly be advanced by adopting a regulatory framework addressing challenging issues like TPF that have been regulated across other institutional arbitration hubs. On that account, the time is ripe for a law governing and regulating the market for TPF, which is bound to mushroom. Legitimising TPF would give India a competitive advantage at a global level while competing with Singapore and Hong Kong as an arbitration hub in South East Asia. It would also mitigate the risks of forum shopping, keeping in mind the fact that TPF is neither prohibited nor regulated in India as non-regulation of TPF can potentially be abused by unscrupulous third party funders.

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63 Douglas R. Richmond, *Other People's Money: The Ethics of Litigation Funding*, 56(2) MERCER L. REV. 649, 659 (2005).

64 NIEUWVELD & SAHANI, *supra* note 8, at 11.

65 *Id.*

66 Charlie Lightfoot et al., *England and Wales*, GLOBAL ARB. REV. (Oct. 19, 2018), *available at* https://globalarbitrationreview.com/insight/the-european-arbitration-review-2019/1175823/england-wales.

67 NORTON ROSE FULBRIGHT, INTERNATIONAL ARBITRATION REPORT 3-4 (Sept. 2016), *available at* https://www.nortonrosefulbright.com/-/media/files/nrf/nrfweb/imported/international-arbitration-report---issue-7.pdf?la=en&revision=2b95e882-b426-4aa1-952e-6270bebf896b.

68 *Id.*

69 Jef De Mot et al., *Third-Party Funding and its Alternatives: An Economic Appraisal*, LEIDEN L. SCH. 3 (2016), *available at* https://ssrn.com/abstract=2747277.

70 Arbitration and Conciliation (Amendment) Act, No. 33 of 2019, Statement of Objects and Reasons [*hereinafter* "2019 Amendment"].

IV. Reconciling Existing Gaps in Third Party Funding

The benefits of TPF in the arbitral process have been widely discussed in several academic works,[71] and the access to justice that the funding mechanisms provide to the indigent parties is undeniably laudable.[72] However, when not regulated, TPF also creates certain imbalances between claimants and respondents, particularly, information asymmetry, as there exists no obligation to disclose any funding received by a third party. Furthermore, the predicament of "*arbitral hit-and-run*"[73] whereby the costs of arbitration become irretrievable because of the frivolous and inflated claims being engendered,[74] is an essential factor to ponder over, before advocating for its regulation. The obstacles in the way of a sound regulatory scheme for TPF and the viable solutions to these specifically highlighted problems are discussed below.

A. Risks Involved

i. Potential for Abuse

The proponents of TPF opine that it limits the scope of frivolous cases.[75] This would be true if we assume that institutional funding structures across jurisdictions would only invest in claims that would maximize the funders' prospects of a favourable outcome. Notwithstanding this, a recent United Nations Conference on Trade and Development Report revealed that TPF companies have an economic incentive through the creation of "*portfolio*" of claims to invest even in weak cases that have at least some chance of a high monetary award.[76] This, however, gives way for speculation and is a plausible taint on the reputation of a respondent State, i.e., in case of an investor-State dispute. TPF has been compared to drilling for oil,[77] which is a gamble considering that one discovery, after drilling several dry holes, can make all the difference.[78] This uncertainty in the recovery of costs from the claims that have been invested in further increases the overall 'costs' of an arbitral process. Furthermore, and more importantly, if a respondent procures an adverse costs award against an impecunious claimant who has placed reliance on TPF,[79] the respondent cannot ensure the enforcement of the award as the financier is not a direct party to the dispute between the respondent and the claimant.[80] This raises the issue of

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71 Courtney Barksdale, *All That Glitters Isn't Gold: Analyzing the Costs and Benefits of Litigation Finance*, 26 REV. LITIG. 707 (2007); *See generally* NIEUWVELD & SAHANI, *supra* note 8; *See also* Rachel Denae Thrasher, *The Regulation of Third-Party Funding: Gathering Data for Future Analysis and Reform* 11 (L. & J. Ams., Working Paper No. 9, 2018) [*hereinafter* "Thrasher"].

72 Nadia Darwazeh & Adrien Leleu, *supra* note 18, at 127.

73 RSM Prod., ICSID Case No. ARB/12/10, Decision on Saint Lucia's Request for Security for Costs, ¶ 33 (Aug. 13, 2014).

74 Nadia Darwazeh & Adrien Leleu, *supra* note 18, at 129.

75 *See* Susana Khouri et al., *Third Party Funding in International Commercial and Treaty Arbitration- a Panacea or a Plague? A Discussion of the Risks and Benefits of Third-Party Funding*, 4 TRANSNAT'L. DISP. MGMT. 5 (2011).

76 *See Recent Developments in Investor-State Dispute Settlement (ISDS)*, U.N. CONF. ON TRADE & DEV. 25 (May 2013), *available at* https://unctad.org/en/PublicationsLibrary/webdiaepcb2013d3_en.pdf.

77 George Kahale, III, *Is Investor-State Arbitration Broken?*, 7 TRANSNAT'L. DISP. MGT. 33 (2012).

78 *Id.*

79 William Kirtley & Koralie Wietrzykowski, *Should an Arbitral Tribunal Order Security for Costs When an Impecunious Claimant is Relying upon Third-Party Funding?*, 30 J. INT'L ARB. 17, 19 (2013).

80 Nadia Darwazeh & Adrien Leleu, *supra* note 18, at 131.

privity of contract between the funder and the claimant being funded. Such a situation is often referred to as 'arbitral hit-and-run'.[81]

The authors of this paper urge that the statutory provisions relating to 'security for costs', as provided under certain state amendments to Order XXV of the Code of Civil Procedure, 1908,[82] and also dealt under English law, particularly in the Civil Procedure Rules[83] and the Arbitration Act, 1996,[84] and in institutional rules such as the London Court of International Arbitration Rules,[85] be similarly adopted under the Indian Arbitration and Conciliation Act, 1996. Such an incorporation would allow the courts to uniformly demand for security from the third party funders, despite the privity.[86] Further, the English Arbitration Act lays down that if a peremptory order for security for costs order is not complied with, the claim is likely to be dismissed.[87] The incorporation of such a provision would allow for the preservation of the rights of both parties, i.e., the claimant's right to access to justice and the respondent's right to financial protection for their costs,[88] thereby reducing the risk for the potential 'arbitral hit-and-run' cases.

ii. The 'Public Policy' Dilemma

Like India, Australia had similarly inherited the doctrines on maintenance and champerty. However, today, litigation funding in Australia is a flourishing industry,[89] unlike the untapped market in India. In the cases of *Campbells Cash and Carry Pty. Ltd.* v. *Fostiff Pty. Ltd.*[90] and *Mobil Oil Australia Pty Ltd.* v. *Victoria*,[91] the question on the involvement of third party funders deeming a

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81 William Kirtley & Koralie Wietrzykowski, *supra* note 79, at 26.

82 CODE CIV. PROC. 1908, No. 5 of 1908, o. XXV, r. 3 (as amended in Gujarat, Maharashtra and Madhya Pradesh) (India). It reads as follows:
"3. Power to implead and demand security from third person financing litigation:
(1) Where any plaintiff has for the purpose of being financed in the suit transferred or agreed to transfer any share or interest in the property in the suit to a person who is not already a party to the suit, the Court may order such person to be made a plaintiff to the suit if he consents, and may either of its own motion or on the application of any defendant order such person, within a time to be fixed by it, to give security for the payment of all costs incurred and likely to be incurred by any defendant. In the event of such security not being furnished within the time fixed, the Court may make an order dismissing the suit so far as his right to, or interest in the property in suit is concerned, or declaring that he shall be debarred from claiming any right to or interest in the property in suit.
(2) If such person declines to be made a plaintiff, the Court may implead him as a defendant and may order him, within a time to be fixed by it, to give security for the payment of all costs incurred and likely to be incurred by any other defendant. In the event of such security not being furnished within the time fixed, the Court may make an order declaring that he shall be debarred from claiming any right to or interest in the property in suit.
(3) Any plaintiff or defendant against whom an order is made under this rule may apply to have it set aside and the provisions of sub-rules (2) and (3) of rule (2) shall apply mutatis mutandis to such application".

83 Civil Procedure Rules, r. 25.12, Apr. 26, 1999 (Eng.).

84 The Arbitration and Conciliation Act § 38(3), No. 26 of 1996 (India).

85 London Court of International Arbitration Rules, r. 25(2), Oct. 1, 2014.

86 Progas Energy v. Islamic Republic of Pakistan, [2018] EWHC 209 (Comm.), ¶¶ 35-43 (Eng.).

87 Arbitration Act 1996, c. 23, § 41(6) (Eng.).

88 Arkin v. Borchard Lines Ltd., [2005] EWCA (Civ.) 655, ¶ 41 (Eng.); *See also* William Kirtley & Koralie Wietrzykowski, *supra* note 79, at 21.

89 *Litigation Funding – Australian Market Research Report*, IBISWORLD, *available at* https://www.ibisworld.com.au/industry-trends/specialised-market-research-reports/advisory-financial-services/litigation-funding.html.

90 Campbells Cash & Carry Pty Ltd. v. Fostif Pty Ltd. (2006) 229 CLR 386, ¶¶ 146-149 (Austl.) [*hereinafter* "Campbells"].

91 Mobil Oil Australia Pty. Ltd. v. Victoria (2002) 211 CLR 1 (Austl.).

proceeding to be antithetical to public policy was answered in the negative. The Australian High Court, in both these cases, noted that possible questions of illegality and public policy may arise in relation to the fairness of the agreement.[92] It is also pertinent to note that no objective standard was laid down to determine the fairness of the agreement in either of these cases. In order to test such a funding agreement on the grounds of public policy and abuse of process, the courts would have to address three main issues. *First*, whether the agreement adversely affects the litigation process. *Second*, whether bargaining powers have been exercised fairly.[93] *Lastly*, whether the funder has exercised excessive control.[94] Accordingly, there exists no definitive test for the same and these are questions to be determined on a case-to-case basis.

It was also observed that setting an overarching rule would "*take too broad an axe to the problems that may be seen to lie behind the fears.*"[95] This helps understand the apprehension of the legislature in legitimising TPF in India given the long drawn conundrum around 'public policy' in the Indian arbitration scenario. Yet, this is not an excuse to delay the regulation of TPF.[96] While bearing in mind that these doctrines are meant to protect vulnerable parties, it is imperative that TPF is reconciled with the doctrine of public policy to ensure that the fairness of the funding agreements is maintained.

iii. Latent Conflicts of Interest

A third party funder may possibly have a pre-existing relationship with a member of the arbitral tribunal. In the event that there exists no obligation to disclose the name of the third party funder, this possibility would impact the transparency of the arbitral process and would also be antithetical to the principles of independence and impartiality of an arbitrator.

The Task Force has recommended that a party or its representative disclose the existence of a TPF arrangement along with the identity of the funder to the arbitral institution, either as soon as possible or after such an agreement is entered,[97] and this must not be subject to any legal privilege.[98] This would further mitigate the risk of non-enforcement[99] of the arbitral award. Furthermore, the International Chamber of Commerce Guidance Note on the Conduct of Arbitration lays down that arbitrators should disclose any relationships among arbitrators and with any entity that has a direct economic interest in the dispute along with any obligation to indemnify a party for the final award obtained.[100]

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92 Campbells, (2006) 229 CLR. 386, ¶ 92 (Austl.).
93 *Id.* ¶ 90.
94 *Id.* ¶¶ 88-89, 93.
95 *Id.* ¶ 91.
96 *See generally* Arthad Kurlekar & Gauri Pillai, *To be or not to be: the oscillating support of Indian courts to arbitration awards challenged under the public policy exception*, 32(1) ARB. INT'L 179-198 (2016).
97 ICCA-QMUL REPORT, *supra* note 4, at 81.
98 *Id.* at 117.
99 Victoria Shannon Sahani, *Judging Third-Party Funding*, 63 UCLA L. REV. 388, 440-45 (2016).
100 Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration, INTERNATIONAL CHAMBER OF COMMERCE 6 ¶ 28 (Jan. 01, 2019), *available at* https://iccwbo.org/publication/note-parties-arbitral-tribunals-conduct-arbitration/.

The long drawn discourse on whether the funding agreement should be disclosed or not, has often led to International Centre for Settlement of Investment Disputes ["**ICSID**"] tribunals ordering the disclosure based off the "*inherent powers*" of the tribunal to do so.[101] While the Singapore International Arbitration Centre ["**SIAC**"] lays down that the tribunal has the discretionary power to order disclosure of the funding agreement or the funder,[102] the Canada-European Union Trade Agreement ["**CETA**"] states that the TPF agreement must mandatorily be disclosed.[103] More recently, the amendment to Article 43 of the Milan Chamber of Arbitration Rules now expressly requires the disclosure of both the funding agreement as well as that of the funder's identity.[104]

The lack of regulation of disclosure requirements raises a serious dilemma over the confidentiality and transparency of arbitral proceedings,[105] however, the authors of this article verily believe that this dilemma may be resolved by requiring the disclosure of the existence of a funding agreement and the name of the funder. In this regard, it is interesting to note that Singapore imposes an obligation upon all practitioners to disclose to the court or arbitral tribunal and all other parties, the existence of TPF,[106] and the identity and address of any third party funder involved.[107]

Hong Kong, on the other hand, mandates disclosure of the TPF and the identity of such third party to the other parties in the arbitration and the arbitral tribunal at the time of commencement of the arbitration, if the funding was obtained on or before the commencement of proceedings or within 15 days of entering into the funding agreement, if such an agreement was entered into after the commencement of the arbitration proceedings.[108]

The authors of this paper propose that in the Indian scenario, the approach on disclosure adopted by Hong Kong be incorporated in the Arbitration Act and the rules pertaining to the professional conduct of the third party funders (as it imposes such an obligation directly on the party, unlike Singapore where the obligation is imposed on legal professionals through rules of professional conduct). Consequently, the Singapore approach on the conduct of the funders also does not cast an obligation on foreign practitioners and is also silent on the time frame within which such funding must be disclosed.

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101 *See* Eurogas Inc. & Belmont Res. Inc. v. Slovak Repub., ICSID Case No. ARB/14/14, Hearing on Provisional Measures (Mar. 17, 2015); *See also* Muhammet Çap & Sehil Insaat Endustri ve Ticaret Ltd. Sti. v. Repub. of Turkm, ICSID Case No. ARB/12/6, Procedural Order No. 3 (Jun. 12, 2015), *cited in* Christopher Boog & Philip Wimalasena, *The SIAC IA Rules: A New Player in the Investment Arbitration Market*, 6(1) INDIAN J. ARB. L. 73, 80 (2017).

102 Singapore International Arbitration Centre Investment Arbitration Rules, r. 24, Jan. 1, 2017 [*hereinafter* "SIAC Rules"].

103 Comprehensive Economic and Trade Agreement, Can.-EU, art. 8.26, Jan. 14, 2017, O. J. L11/23.

104 Arbitration Rules of the Milan Chamber of Arbitration, r. 43, Mar. 1, 2019.

105 Thrasher, *supra* note 71, at 11.

106 Legal Profession (Professional Conduct) Rules, r. 49A (1)(a), Nov. 18, 2015 (Sing.).

107 *Id.* r. 49(1)(b).

108 Arbitration Ordinance, (2011) Cap. 609, § 98-u (H.K.).

Therefore, the Hong Kong approach would be most suitable in terms of ensuring that there is no scope of the abuse of disclosure requirements. With respect to the disclosure of the funding agreement, an obligation to disclose the agreement in its entirety would not only conflict with a confidentiality clause of such an agreement (if any) but also risk exposing the funded parties' litigation strategy (such as quantification of claims, choice of counsel etc.). However, this would not be necessary, if an order for security for costs has been passed. In this regard, the authors of this paper maintain that disclosure of the funding agreement must be subject to the discretion of the tribunal.

iv. Conduct of the Funders

The incentive for funders to invest in claims despite the incalculable returns is discernible through the case of *Teinver* v. *Argentina*,[109] wherein the funding institution Burford Capital realized a 736% return on their invested capital.[110] This case manifests the perverse intent with which funders often offer their services, which are no longer limited to providing assistance in case of the precarious financial situation which the party is subjected to.[111] A regulation of the conduct of the third party funders, similar to the UK Code of Conduct for Litigation Funders ["**UK Code**"],[112] under which funders are self-regulated, would be necessitated if TPF were to be explicitly allowed. The UK Code tackles the capital adequacy of the funders, termination, and the control that funders have over the parties being funded, through the various responsibilities and the duties that the UK Code imposes.[113] Additionally, the IBA Guidelines on Conflicts of Interest, as revised in 2014, place an added onus on the funders to reveal whether there exists any conflict with the arbitrators presiding over the matter, despite the existing obligation of the arbitrators to investigate for conflicts.[114] The Code of Practice for Third-Party Funding of Arbitration in Hong Kong[115] adopts a self-regulating outlook for the third party funders to statutorily comply with[116] such that accountability is promoted.[117] Unlike the UK Code of Conduct, the Code of Practice of Hong Kong is mandatory and binding on all parties (including potential funders) and applies to all funding agreements.[118] Having a code of practice for the funders would prevent the abuse of the law, and maintain a check on the degree of control that the funders have over the process, to the effect that speculative funders do not take undue advantage of the market system under the guise of providing access to justice.

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109 Teinver S.A., Transportes de Cercanías S.A. & Autobuses Urbanos del Sur S.A. v. Argentine Republic, ICSID Case No. ARB/09/1, Decision (Dec. 21, 2011).

110 BURFORD ANNUAL REPORT 2018, *supra* ntoe 24, at 4.

111 Tara Santosuosso & Randall Scarlett, *supra* note 53, at 5.

112 *Code of Conduct for Litigation Funders*, ASSOC. OF LITIG. FUNDERS (Jan. 2018), *available at* http://associationoflitigationfunders.com/wp-content/uploads/2018/03/Code-Of-Conduct-for-Litigation-Funders-at-Jan-2018-FINAL.pdf.

113 Rachael Mulheron, *England's Unique Approach to the Self-Regulation of Third Party Funding: A Critical Analysis of Recent Developments*, 73(3) CAMBRIDGE L. J. 570-97 (2014).

114 IBA Guidelines on Conflicts of Interests in International Arbitration, Gen. Std. 7(d) (Oct. 23, 2014).

115 HK TPF Ordinance, No. 6, (2017) (H.K.).

116 Melody Chan, *Hong Kong*, *in* THE THIRD-PARTY LITIGATION FUNDING LAW REVIW 81 (Leslie Perin ed., 2018).

117 *Id.*

118 Code of Practice for Third-Party Funding of Arbitration, (2018) G.N. 9048, ¶ 1.2 (H.K.).

B. A Proposed Regulatory Framework for Third Party Funding in India

The report of a High-Level Committee, chaired by Justice B.N. Srikrishna,[119] recognised the existing regulatory regimes for TPF across arbitration-friendly jurisdictions such as Singapore, Hong Kong and Paris.[120] Furthermore, the systematic shift from the prohibition of TPF towards its regulation was also acknowledged as a prominent reason for the development of these jurisdictions as arbitration-hubs.[121] It may be speculated that guidelines regulating TPF shall be beneficial to the litigating parties, the third party funders and to the economy as a whole as it would open a window of opportunities for investments in India.

The 2019 Amendment Act aims at making India a hub for domestic and international arbitration.[122] Yet, it fails to address the contentious issue regarding the regulation of TPF. The formidable intentions of the Parliament require several hurdles to be overcome before the desired result of India establishing itself as a global arbitration hub can be achieved. The authors of this paper suggest that a holistic regulatory framework that governs TPF of arbitration, as adopted by the governments of Singapore and Hong Kong recently, be incorporated into the Arbitration Act to meet this objective of becoming an arbitration hub in the foreseeable future. Embracing such a regime would certainly bolster the attractiveness of India as a dispute resolution centre.[123] In this regard, it is the position of the authors of this article that a framework regulating TPF in India must entail the following features:

(i) A provision for ordering 'security for costs' and the consequences of non-compliance of such an order;
(ii) Mandatory disclosure of access to TPF and identity of the third party funder, though the disclosure of the details of the funding agreement may not be necessitated;
(iii) Discretionary power must be vested with arbitral tribunals to order disclosure of the funding agreements to ensure that there is no abuse of process and to ensure that funders do not exercise excessive control over the funded party; and,
(iv) Adopting a code of practice that a third party funder is mandated to adhere to.

The authors of this article concede that a proposal for adopting a code of conduct for third party funders may be vague at this juncture. The authors of this article have left a proposal in that regard open ended, as the formulation of a code of conduct could be done while emulating certain provisions from the code of conduct as adopted by the UK and Hong Kong, subject to the policy of the State and the parameters that the State would prefer to adopt for permitting and certifying this funding mechanism. Such a code of conduct would also change from time to time to ensure third party funders do not use oppressive means that would be contrary to public policy. Despite this, provisions for mandatory disclosure of the identity of the funder, a

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119 DEP'T OF LEGAL AFF., REPORT OF THE HIGH LEVEL COMMITTEE TO REVIEW THE INSTITUTIONALIZATION OF ARBITRATION MECHANISM IN INDIA 43 (2017).

120 *Id.*

121 *Id.*

122 *Changes in law needed to make India hub of arbitration: Ravi Shankar Prasad*, FIN. EXPRESS, Jul. 18, 2019, *available at* https://www.financialexpress.com/india-news/changes-in-law-needed-to-make-india-hub-of-arbitration-ravi-shankar-prasad/1648775; *See also* 2019 Amendment, *supra* note 70.

123 Peng Hou, *Financing arbitration in mainland China: Hong Kong's Legislation as a model*, 34(4) ARB. INT'L 593, 597 (2018).

provision for security of costs and a provision vesting discretionary power with arbitral tribunals to order disclosure of funding agreements is certainly the need of the hour.

V. Conclusion

The exorbitant costs involved in an international arbitration necessitate the procurement of financing through various vehicles, such that parties with seemingly authentic claims are not prejudiced and that they are provided with a reasonable opportunity to represent their case. The conflicting values at stake including the promotion of due process and justice to investors with no financial backing, on one hand and the possible promotion of gambling and speculation of cases on the other, contrary to public interest, are to be evaluated carefully before a definitive regulatory legislation is enacted.

The authors, while highlighting the global growth of the TPF market, have intended to suggest means to fill the gaps through an airtight legislative regulation in India. It is to be kept in mind that the potential for the market of TPF to have a far-reaching impact in India calls for the adoption of the recommendations of the Task Force, along with certain tailored modifications, which extensively discuss the procedural, ethical and policy related issues pertaining to TPF in international arbitration.

Although the primary purpose of the 2019 Amendment Act was to bolster India's vision to become a hub for domestic and arbitration[124] it fails to address the regulation of TPF while aggressively institutionalising arbitration.[125] Consequently, with the institutionalisation of arbitration in India, the regulation of TPF is now in the hands of prudent arbitral institutions as the government has missed the bus. Adopting such regulations would undoubtedly help in the pursuit of valid claims, both at a domestic and an international level and by not regulating TPF, the government has taken the road less travelled by and that has made all the difference.

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124 2019 Amendment, No. 33 of 2019, Statement of Objects and Reasons.

125 *Id.* § 10.

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