IJAL

Indian Journal of Arbitration Law

Volume 10, Issue 2 | January 2022 | ISSN: 2320-2815

EDITORIAL

ARTICLES

INDIAN JOURNAL OF ARBITRATION LAW

Cite as
10(2) INDIAN J. ARB. L. 1 (2022)

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

This page has been left blank intentionally.

CONTENTS

INDIAN JOURNAL OF ARBITRATION LAW

CHANGE TO IMPROVE, NOT TO UNHINGE—A CRITIQUE OF THE INDIAN APPROACH TO INTERNATIONAL ARBITRATION

Aditya Singh Chauhan[1] *& Aryan Yashpal*[2]

Abstract

Arbitration in India has been constantly evolving, especially since the enactment of the Arbitration and Conciliation Act, 1996. The policy surrounding arbitration and its acceptability in the Indian framework has been much debated. But the manner in which such policy is extrapolated to India often comes the expense of the rule of law. A pattern of judiciary taking the forefront in shaping the policy—even at the risk of diverging from the legislative intent—and a constant disaccord between the legislature and judiciary resulting in repeated changes to the law has been a malady afflicting arbitration in India. This has worsened in the past decade with the visible pressure by the international arbitration community towards adopting the so-called "pro-arbitration" values. The term "pro-arbitration" also remains largely subjective and the perspectives in this context often depend on which of the multiple stakeholder in the arbitral framework is viewing them. The proliferation of stakeholders and the growth of arbitration in India has not necessarily translated into it being an arbitration-friendly jurisdiction. This editorial critically analyses the causal role of the judiciary and legislature, and their discordant approach

1 Aditya Singh Chauhan is the Editor-in-Chief of the Indian Journal of Arbitration Law and Convenor of the Centre for Advanced Research and Training in Arbitration Law. He can be reached at c.adityasingh@outlook.com. The authors are thankful to Dr. Nidhi Gupta (Faculty Advisor, Indian Journal of Arbitration Law; Executive Director, Centre for Advanced Research and Training in Arbitration Law) for her invaluable guidance on this topic.

2 Aryan Yashpal is the Editor-in-Chief of the Indian Journal of Arbitration Law and Convenor of the Centre for Advanced Research and Training in Arbitration Law. He can be reached at aryan.yashpal@nlujodhpur.ac.in.

convoluting the Indian arbitration jurisprudence, and attempts to pave way for India to meet its goal of being recognised globally as an arbitration-friendly seat.

I. International arbitration and rule of law

Rule of law consists of certain formal and procedural principles that confine the exercise of power by the governmental institutions and act as a safeguard against arbitrariness.[3] Sundaresh Menon defines it as "*a set of values generally recognized as essential to the proper functioning of a legal and political system.*"[4] Its most crucial contribution is ensuring that the citizenry has faith in the legal machinery devised by the state to protect their rights and interests. In the context of international arbitration involving parties from different jurisdictions and subject to foreign substantive laws, the rule of law and procedural guarantees are pivotal. The users of arbitration require certain integrity of legal procedures to enable them to have trust and confidence in a country's legal system and the dispute resolution mechanism itself. This integrity can only be ensured if the laws are general in design and prospective in application, certain and predictable, and meet the expectations of constancy.[5] These expectations are compromised by repeatedly amending the statute, diverging from the well-thought-out recommendations by the researchers, and incorporating poorly drafted provisions.

Further, in common law jurisdictions, courts play an indispensable role in the development of law. Rule of law becomes particularly relevant when we are dealing with the doctrine of precedents—with the judge-made laws filling in the gaps. As Jeremy Waldron states, "*legal practice and legal decision-making should be such as to give rise to expectations, [which] should, by and large, be*

---

3 *The Rule of Law*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Jun 22, 2016), *available at* https://stanford.io/3CMQ70M.

4 Sundaresh Menon, *Arbitration's Blade: International Arbitration and the Rule of Law*, 38(1) J. INT'L ARB. 1, 3 (2021).

5 Fuller has identified eight formal requirements of rule of law. *See* Colleen Murphy, *Lon Fuller and the Moral Value of the Rule of Law*, 24 LAW AND PHILOSOPHY 240, 240–241 (2005).

respected by other legal decisionmakers."[6] However, the judiciary, while interpreting and applying a law, must also act within the confines of the statute. It must not assume the role of the legislature or engage in unfettered legal realism. Over the years, some courts have taken purposive interpretation of statutes to an extreme—moulding the law to not what the draftsmen of the legislation may have intended, but what is perceived as "*arbitration friendly*" or "*pro-arbitration*" internationally. In India, this has also lead to continuous back and forth between the legislature and judiciary at the expense of stability of law. Meanwhile, the assurances of party autonomy and non-interference have become all show, as many arbitral awards still get set aside after courts delve into the merits of the dispute.

The above-stated expectations from both legislature and judiciary are fundamental in parties' choice of law governing the arbitration. They come at the expense of what may be considered "*pro-arbitration*"—a term which lacks clarity and debate. George Bermann defines this term as reflected in "*the tendency of participants in international arbitration, when faced with a practice or policy of relevance to arbitration practice, to ask themselves whether that practice or policy is favourable to arbitration.*"[7] Since legal realism underpins the pro-arbitration approach, it often trades-off legitimacy. For example, extension of arbitration agreement to non-consenting non-signatories by arbitral tribunals in order to ensure efficiency and convenience.[8] It is an exercise best undertaken by courts, contrary to the prevalent practice. However, in order to retain the hint of legitimacy, the theories for extending the arbitration agreement to non-signatories are often based on consent, albeit implied.

---

6 Jeremy Waldron , *Stare Decisis and the Rule of Law: A Layered Approach*, 111(1) MICH. L. REV. 1, 11 (2012).

7 George A. Bermann, *What does it mean to be 'pro-arbitration'?*, 34(3) ARB. INT'L 341 (2018).

8 *Id.* at 347.

But, at times, the limits of the pro-arbitration approach must be discussed and identified. Bermann recognises that it often entails a trade-off between competing pro-arbitration values, and "*privileging a particular pro-arbitration value may easily prejudice one or more others[.]*"[9] The result may be seemingly "*pro-arbitration*" when viewed from one lens, but anti-arbitration when viewed from another.[10] This is because the term "*pro-arbitration*" is subjective and its interpretation is often supplemented by the interests of the stakeholders in arbitration, such as arbitral institutions, arbitrators, third-party service providers, or even governments. An example of this is the call for increased transparency in commercial arbitration at the expense of confidentiality, which has contributed much to its success. There has been an attempt to force transparency into commercial arbitration by, *inter alia*, advocating for "*opt-in*" rather than "*opt-out*" confidentiality provisions[11] and including provisions making publication of awards as the default option,[12] despite the users preferring otherwise.

This editorial calls for an increased emphasis on rule of law by the Indian legislature and judiciary, and a careful and restricted approach when determining "*pro-arbitration*" values. Part II primarily analyses a recent instance of judicial creativism by the Indian judiciary which are passively accepted (and even welcomed) by the arbitration community as "*pro-arbitration.*" Part III highlights the instability and unpredictability due to repeated amendments of the statute, and the need of forethought when drafting or amending the law. Finally, Part IV provides the concluding remarks.

---

9 *Id.* at 348.

10 *Id.*

11 *See, e.g.,* Constantine Partasides & Simon Maynard, *Raising the Curtain on English Arbitration*, 33 ARB. INT'L. 197, 201–202 (2017).

12 *See, e.g.,* International Chamber of Commerce (ICC), Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration (Jan. 1, 2021), ¶ 58, *available at* https://bit.ly/37I84Cb.

II. Indeterminate position of law and creativism

The Indian judiciary, undoubtedly, has made significant contributions in development of arbitration jurisprudence in India. These contributions often are result of adoption of "*pro-arbitration*" approach by judges. This is primarily enabled by the indeterminate and continually changing position of law on a number of issues. Such decisions are widely welcomed by the arbitration stakeholders such as arbitrators, practitioners and institutions, who often claim that they would go a long way in establishing India as a global seat of arbitration. However, the manner in which these contributions are made will have consequences that are often remain unaddressed.

One such instance is the recognition and enforcement of emergency awards in India. In much heated debate in *Amazon.com NV Investment Holdings LLC* v. *Future Retail Ltd.*, the Indian courts (Delhi High Court and Supreme Court) enabled enforcement of emergency awards arising out of India-seated arbitrations—not recognised under the Arbitration and Conciliation Act, 1996 ["**Arbitration Act**"] and denied recognition by the legislature despite having many opportunities—under Section 17 of the Arbitration Act.[13] In doing so, the Courts not only placed incorrect reliance on the previous judicial pronouncements on related issues and ran counter to the legislative intent, but the stance taken also poses a question of why the enforcement of emergency awards arising out of foreign-seated arbitrations is not supported by the statutory machinery and requires indirect enforcement.[14] It compromises on the rule of law and opens the door for repeatedly changing position of law, thereby creating an unpredictable and uncertain arbitration environment that is generally avoided by the international clients seeking a neutral forum to resolve their disputes

[13] *See generally* Amazon.com NV Investment Holdings LLC v. Future Retail Ltd., 2021 SCC OnLine SC 557 (India).

[14] *See* Aditya Singh Chauhan, *Pushing Arbitral Boundaries To Pave Way For Emergency Arbitration*, 2 YOUNG MCIA NEWSLETTER (forthcoming 2022).

without any extraneous issues impacting such resolution. The Supreme Court has undoubtedly adopted a "*pro-arbitration*" approach with an aim to make India an arbitration-friendly jurisdiction. However, in this instance, like many others, not only is deviation from the legislative stance bit too sharp, the concerns for clarity, certainty and predictability in law have also been seriously compromised. Such an approach harms India's reputation as an arbitration-friendly jurisdiction in the long run, and invites increased scepticism towards arbitration.

This part of the editorial focuses on another such effort of the Supreme Court of India in enhancing party autonomy with a decision on the issue of whether two Indian parties can choose a foreign seat and whether an award obtained from such a foreign seated arbitration will be considered a foreign award, especially in those situations where the subject matter of the contract has no foreign element involved. Interestingly, the Court answered both the issues in affirmative although by taking a big leap in statutory interpretation and with introduction of a completely new definition of the term "*international*" for two parts of the same statute.

The Arbitration Act creates a dichotomy between India-seated and foreign-seated arbitrations. The former is governed by Part I of the Arbitration Act, while the latter by Part II which gives effect to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 ["**New York Convention**"] and the Geneva Convention on the Execution of Foreign Arbitral Awards, 1927 provisions for enforcement of foreign awards. Both Parts are mutually exclusive, and only some provisions of Part I are applicable for foreign-seated arbitration by virtue of Section 2(2).[15]

[15] Arbitration and Conciliation Act, No. 26 of 1996, § 2(2) (India) ("This Part shall apply where the place of arbitration is in India: [Provided that subject to an agreement to the contrary, the provisions of sections 9, 27 and clause (a) of sub-section (1) and sub-section (3) of section 37 shall also apply to international commercial arbitration, even if the place of arbitration is outside India, and an arbitral award made or to be made in such place is enforceable and recognised under the provisions of Part II of this Act.]").

The definition of the term "*international commercial arbitration*" pre- and post-Arbitration and Conciliation (Amendment) Act, 2015 ["**2015 Amendment**"] suggests that an arbitration cannot be considered international merely by choice of foreign seat.[16] Further, after promulgation of the Arbitration Act, it can safely be presumed that Indian has adopted a territorial definition of foreign award envisaged under the New York Convention. This Convention, despite being concerned with international commercial arbitration, does not include definition of the term "*international commercial arbitration.*" However, it envisages that an award maybe considered a foreign award if it is obtained outside the territories of the enforcing country. Article 1 provides for the scope of the New York Convention, recognising foreign awards as binding in order to enforce them in accordance with Article III.[17] It is purposefully silent on what "*arbitral awards made in the territory of another state*" or "*arbitral awards not considered as domestic awards*" entail, leaving it to the discretion of the relevant Contracting State in which enforcement is sought.

In *PASL Wind Solutions (P) Ltd.* v. *GE Power Conversion (India) (P) Ltd.* ["**PASL**"],[18] the Supreme Court ruled on the issue of whether two Indian parties can choose a foreign seat of arbitration and the award arising out of such arbitration can be considered a foreign award enforceable under Part II of the Arbitration Act. At the outset, it must be noted that the Appellant

---

16 *Id.* § 2(1)(f) (the term "international commercial arbitration" is defined under this Section as "an arbitration relating to disputes arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India and where at least one of the parties is– (i) an individual who is a national of, or habitually resident in, any country other than India; or (ii) a body corporate which is incorporated in any country other than India; or (iii) an association or a body of individuals whose central management and control is exercised in any country other than India; or (iv) the Government of a foreign country[.]").

17 *See* Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. I(1), June 10, 1958, 330 U.N.T.S 38.

18 PASL Wind Solutions (P) Ltd. v. GE Power Conversion (India) (P) Ltd., 2021 SCC OnLine SC 331 (India) [*hereinafter* "PASL"].

in this case did not object to the Procedural Order allowing the arbitration between two Indian companies to be seated in Zurich. It was only after an unfavourable award was made that this issue was raised at the stage of enforcement.[19] The Respondent that had raised this issue before the tribunal, which had then ruled as stated above in the Procedural Order, albeit on a then-unsettled position of Indian law.[20]

The New York Convention applies to an arbitration agreement which results in a foreign award and if it has a "*foreign element*" or "*flavour involving international trade and commerce.*"[21] Section 44 of the Arbitration Act provides a broad definition of a "*foreign award,*" listing its common elements.[22] The section uses the expression "*unless the context otherwise requires*" to clarify that the definition provided in the section should be applied as a normal rule, but should be departed from when the context so requires. It was argued that the context of Section 44 requires the award sought to be enforced under Part II to have arisen out of an international commercial arbitration. The issue before the Court was whether the context requires it to import the definition of "*international commercial arbitration,*" as contained in Section 2(1)(f) in Part I. It held that the definition in Part I is party-centric, which cannot be imported to Section 44, which is party-neutral and seat-centric.[23] Thus, for the applicability of Section 44, nationality, domicile or residence of parties is irrelevant.

Reference was also made to Section 2(2) of the Arbitration Act, which makes certain provisions in Part I applicable to "*international commercial*

---

19 *Id.* ¶ 17.

20 *Id.* ¶ 5.

21 UNCITRAL SECRETARIAT GUIDE ON THE CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS (NEW YORK, 1958) 40 (2016) (*citing* Gas Authority Of India Ltd. v. Spie Capag, S.A., (1994) 1 Arb LR 429 (India)).

22 Arbitration Act, § 44.

23 PASL, 2021 SCC OnLine SC 331, ¶¶ 38, 50 (India).

arbitrations," when the place of arbitration is outside India.[24] The Court ruled that Parts I and II are mutually exclusive, and Section 2(2) does not furnish a bridge between the two Parts.[25] It observed that the context of Section 2(2) requires the term "*international commercial arbitrations*" to be read in a seat-centric, not party-centric sense.[26] It follows that the provisions of Part I applicable to foreign-seated "*international commercial arbitrations,*" including the provision for court-ordered interim reliefs, will be applicable to foreign-seated arbitrations between Indian parties[27] or, for lack of a better term, to "*non-international foreign arbitrations.*" Thus, the term "*international commercial arbitration*" has been given different definitions in the context of Parts I and II, and also within Part I in the context of Sections 2(1)(f) and 2(2).

The multiplicity of definitions of the same term has been created despite the prior legal position not leading to any absurdity. Indeed, the approach favours party autonomy and arbitration, but at what cost? The "*definitions*" section in a statute sets forth the key terms and provides their meaning as intended by the legislature, which may even differ from their common usage. These key terms and their definitions are to be applied to the entire statute or, in the present case, at least to the relevant Chapter or Part.[28] Even otherwise, the text of the statute is construed as a whole—since statutes often contain inter-related parts—and there must be a presumption of consistent usage, i.e., a particular term bears only one possible meaning when used elsewhere in the statute wherever such meaning is compatible,[29] unless contrary is expressly specified. In fact, in this very context, in

---

24 *See* Arbitration Act, § 2(2).

25 PASL, 2021 SCC OnLine SC 331, ¶ 37 (India).

26 *Id.* ¶ 38.

27 *Id.* ¶¶ 38, 100.

28 Section 44 of the Arbitration Act uses the expression "In this Chapter," indicating that the definition of "international commercial arbitration" contained in Section 2(1)(f) might not apply to Chapter I of Part II. *See Id.* ¶ 60.

29 *See* ANTONIN SCALIA & BRYAN GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 275–283 (2012).

Barminco Indian Underground Mining Services LLP v. *Hindustan Zinc Ltd.*, the Rajasathan High Court has observed that "*[g]enerally definition clause is not restrictive of its applicability to a particular part - it applies to whole of the Act*" and otherwise would result in "*anomaly, incongruity and absurdity.*"[30] It noted the conditions that can warrant departure from plain meaning of the text,[31] and held that "*[u]pon reading of expression "Part" used in sub-section (1) of Section 2 as "Act," the definition clause will naturally be applicable to the entire Act, notwithstanding the expression used in subsection (2) of Section 2.*"[32] As previously noted, the *PASL* Court, in effect, accords different treatment to the definition of "*international commercial arbitration*" even within Part I of the Arbitration Act, which was not the intent of the legislature.

The Court also relied on a number of previous judicial pronouncements to support its ruling.

First, in *Atlas Exports Industries Ltd.* v. *Kotak & Co.* ["**Atlas**"],[33] where a foreign award arising out of an arbitration between two Indian parties was enforced under Foreign Awards (Recognition and Enforcement) Act, 1961. However, this decision was in the context of Sections 23 and Section 28 of the Indian Contract Act, 1872, and dealt with the contention that excluding remedy under ordinary Indian law contravened public policy.[34] The Supreme Court held that "*[t]he case at hand is clearly covered by Exception 1 to*

---

30 Barminco Indian Underground Mining Services LLP v. Hindustan Zinc Ltd., 2020 SCC OnLine Raj 1190, ¶¶ 87–88 (India) [*hereinafter* "Barminco"].

31 *Id.* ¶¶ 89–90 (*citing* G.P. SINGH, PRINCIPLES OF STATUTORY INTERPRETATION 158 (14th ed. 2016), which states that "a court would only be justified in departing from the plain words of the statute when it is satisfied that : (1) there is clear and gross balance of anomaly; (2) Parliament, the legislative promoters and the draftsman could not have envisaged such anomaly, could not have been prepared to accept it in the interest of a supervening legislative objective; (3) the anomaly can be obviated without determent to such legislative objective; (4) the language of the statute is susceptible of the modification required to obviate the anomaly.").

32 *Id.* ¶¶ 91–92.

33 Atlas Exports Industries Ltd. v. Kotak & Co., (1999) 7 SCC 61, ¶ 5 (India).

34 *Id.* ¶ 10.

Section 28."[35] The Court further observed that the parties did not raise this contention before or during the arbitration proceedings, before the High Court while raising objections to enforcement, or in the letters patent appeal filed before the Division Bench.[36] Thus, "*[s]uch a plea is not available to be raised by the appellant Atlas before this Court for the first time.*"[37] Further, in this case, there was at least some foreign element present as the goods were supplied from Hong Kong, by a Hong Kong-incorporated company, through an Indian-incorporated company.[38]

Second, in *Sasan Power Ltd.* v. *North American Coal Corp. Ltd.* ["**Sasan**"],[39] the Madhya Pradesh High Court held that it is permissible for two Indian companies to arbitrate out of India. The case involved an agreement between an Indian company and American company, all rights, liabilities and obligations whereof were later assigned to an Indian subsidiary of the American company by an assignment agreement.[40] Post-assignment, it was argued, that the agreement became one between two Indian companies, thereby ousting the application of Part II of the Arbitration Act.[41] However, in this case, as was also later observed by the Supreme Court, there was no question of two Indian parties choosing a foreign law governing the arbitration.[42] This is because the dispute required the examination of rights and obligations of the American company as well under the first agreement

35 *Id.* ¶ 11.
36 *Id.* ¶ 11.
37 *Id.*
38 *Id.* ¶ 1.
39 Sasan Power Ltd. v. North American Coal Corp. (India) (P) Ltd., (2015) SCC Online MP 7417, ¶ 56 (India).
40 *Id.* ¶ 5.
41 *Id.* ¶ 8.
42 Sasan Power Ltd. v. North American Coal Corp. (India) (P) Ltd., (2016) 10 SCC 813, ¶ 24 (India).

and the assignment agreement, and thereby a foreign element was involved.[43]

Third, in *GMR Energy Ltd.* v. *Doosan Power Systems India* ["**GMR Energy**"],[44] the Delhi High Court held that Indian parties can choose a foreign seat. This decision incorrectly relied on *Atlas*, which deals with Section 28 of the Indian Contract Act, 1872, and *Sasan*, which clearly involved a foreign element and made no determination whether Indian parties can choose a foreign seat.[45] Further, in this case, the defendant was a wholly-owned subsidiary of a Korean company, which also negotiated a payment schedule for the outstanding debt and entered into a Memorandum of Understanding with the plaintiff.[46] Thus, even this case involved a foreign element that can arguably justify two Indian parties choosing a foreign law governing the arbitration.

It can thus be concluded that *PASL* was one of the first case where two Indian parties had chosen a foreign seat with absolutely no foreign element involved,[47] except for the choice of law governing the arbitration itself constituting a foreign element. Relying on *Sasan* and *GMR Energy*, the Supreme Court also overruled *Seven Islands Shipping Ltd.* v. *Sah Petroleums Ltd.*[48]and *Addhar Mercantile Pvt. Ltd.* v. *Shree Jagadamba Agrico Exports Pvt. Ltd.*

---

43 *Id.* ¶ 25.

44 GMR Energy Ltd. v. Doosan Power Systems India, 2017 SCC OnLine Del 11625, ¶¶ 29–33, 41–43 (India) [*hereinafter* "GMR Energy"].

45 *See* Shalaka Patil, *Delhi High Court's decision in GMR v. Doosan: Two steps forward, two steps back?*, KLUWER ARBITRATION BLOG (Jan. 1, 2018), *available at* http://arbitrationblog.kluwerarbitration.com/2018/01/01/delhi-high-courts-gmr-v-doosan-two-steps-forward-two-steps-back.

46 GMR Energy, 2017 SCC OnLine Del 11625, ¶ 5 (India).

47 *See* Barminco, 2020 SCC OnLine Raj 1190, ¶ 57 (India) (the Rajasthan High Court dealt with the issue of maintainability of an application under Section 9 of the Arbitration Act—wherein the arbitration between two Indian parties was seated in Singapore—albeit not dealing with the issue of two Indian parties choosing a foreign seat.).

48 Seven Islands Shipping Ltd. v. Sah Petroleums Ltd., (2012) 5 Mah LJ 822 (India).

["**Addhar**"][49] decisions of the Bombay High Court, where *TDM Infrastructure Pvt. Ltd.* v. *UE Development India Pvt. Ltd.* ["**TDM Infrastructure**"][50] was relied upon to disallow two Indian parties from choosing a foreign law governing the arbitration. *TDM Infrastructure*, while ruling that "*Section 28 of the 1996 Act is imperative in character in view of Section 2 (6) thereof,*" decided in the context of Section 11 of the Arbitration Act.[51] This was thus not seen as setting a binding precedent. But the views taken in aforesaid judgments of the Bombay High Court that relied on *TDM Infrastructure* deserved an in-depth consideration on their own merit.

Addhar involved two Indian parties and the arbitration agreement provided for the seat to be either India or Singapore, with English law to be applied in case of the latter.[52] The Bombay High Court relied on the obiter in *TDM Infrastructure* that Indian parties are not permitted to derogate from Indian law and otherwise would be opposed to public policy,[53] and ruled that the arbitration will be conducted in India and, in accordance with Section 28(1)(a), the arbitral tribunal will apply the Indian law.[54] While it was held that the seat of arbitration was India, the issue in *Addhar* pertained to the choice of substantive law and not the law governing the arbitration. The *PASL* Court was silent on whether two Indian parties can choose a foreign substantive law, but overruling of *Addhar* might be viewed by some as a cue to opt for this option in a non-international foreign arbitration.

The *PASL* Court then addressed the question of whether two Indian parties choosing a foreign seat would be opposed to public policy under

---

49 Addhar Mercantile Pvt. Ltd. v. Shree Jagadamba Agrico Exports Pvt. Ltd., 2015 SCC OnLine Bom 7752 (India) [*hereinafter* "Addhar"].

50 TDM Infrastructure Pvt. Ltd. v. UE Development India Pvt. Ltd., (2008) 14 SCC 271 (India).

51 *See id.* ¶¶ 23, 36.

52 Addhar, 2015 SCC OnLine Bom 7752, ¶¶ 3–4 (India).

53 *Id.* ¶ 8

54 *Id.* ¶ 9.

Section 23 of the Indian Contract Act, 1872. It noted that "*[t]he elusive expression "public policy" appearing in section 23 of the Contract Act is a relative concept capable of modification in tune with the strides made by mankind in science and law.*"[55] Referring to a plethora of judicial pronouncements,[56] it concluded that the parties' freedom of contract has to be balanced with "*clear and undeniable harm to the public,*" even when a particular dispute does not fall under the "*crystallised principles enumerated in well-established 'heads' of public policy.*"[57] As regards the provisions said to reflect public policy, it held: (1) Exception 1 to Section 28 of the Indian Contract Act, 1872 saves arbitration from being in restraint of legal proceedings, without any reference to nationality of the parties,[58] (2) Section 28(1)(a) of the Arbitration Act does not make any reference to arbitration between two Indian parties being conducted in a foreign seat and ought not be interpreted as such,[59] and (3) Section 34(2A) of the Arbitration Act would not apply when the arbitration is seated outside India, as the parties agreed to "*two bites at the cherry, namely, the recourse to a court or tribunal in a country outside India for setting aside the arbitral award passed in that country on grounds available in that country […], and then resisting enforcement under the grounds mentioned in section 48.*"[60]

In its justification, it relied on international comity, recourse under Section 48 of the Arbitration Act, and the balancing act between freedom of contract and harm caused to public as the saving graces.[61] The Court also held that party autonomy would prevail as the agreement between the parties does not contravene any mandatory provisions of Indian law or breach fundamental policy of India.[62] But it is generally understood that

55 PASL, 2021 SCC OnLine SC 331, ¶ 79 (India).
56 *See id.* ¶¶ 79–88.
57 *Id.* ¶ 89.
58 *Id.* ¶ 90.
59 *Id.* ¶ 92.
60 *Id.* ¶ 100.
61 *Id.* ¶¶ 98–100.
62 *Id.* ¶¶ 88–91.

grounds for setting aside or their right to challenge an arbitral award provided under Section 34 of the Arbitration Act are non-derogable and cannot be waived by parties' consent. The Indian courts are likely to favour this position. The ground of patent illegality to set aside an arbitral award, provided under Section 34(2A), is applicable in domestic arbitrations.[63] It follows the party-centric definition provided under Section 2(1)(f). Following *PASL*, by choosing a foreign seat, two Indian parties can avoid the application of the patent illegality ground. In effect, Section 34(2A) should be derogable. Why should two Indian parties then not be allowed to exclude its applicability by agreement even where India is the seat?

***

The approach adopted by the Indian judiciary in this instance (and many others) is considered pro-arbitration and pro-party autonomy. However, it comes at the cost of diverging from the ordinary meaning of terms and risks running contrary to the legislative intent. It also creates many new and unresolved issues that will be subject of litigation in the future. Further, the position of law on such issues may undergo another change either by subsequent judicial pronouncements or amendments due to the tenuous reasoning adopted by the courts to validate their conclusions. In order for India to truly become a successful global seat of arbitration, its legislature and judiciary must work together towards creating a more conducive environment for arbitration in India, which has to be free from the popular opinion of which "*pro-arbitration*" values are more desirable.

III. Need for well-thought-out provisions

The steps taken by Indian legislature towards arbitration has also created much instability over the past decade, which is undesirable for any jurisdiction looking to make its mark as a popular seat of arbitration globally. The occasional tussle between the legislature and judiciary

63 Arbitration Act, § 34(2A).

resulting in repeated changes in the law has far-reaching consequences. The confusion that was created as regards the prospective application of the Arbitration and Conciliation (Amendment) Act, 2015 illustrates this point clearly.[64] The amendment removed the automatic stay on enforcement of arbitral awards and made significant changes to the grounds for setting aside arbitral awards, but did not clarify whether these changes would apply to the court proceedings in relation to arbitrations that were commenced prior to the date of its entry into force.[65] The subsequent judicial pronouncements solidified the position that it would be applicable for all such court proceedings commenced after the amendment came into force, irrespective of when the arbitrations were commenced.[66] This position was then reversed by the Arbitration and Conciliation (Amendment) Act, 2019 ["**2019 Amendment**"], which had consequences on the court proceedings related to pre-amendment arbitrations that were commenced post-amendment, after the judiciary had given the green flag.[67] For instance, the enforcement petitions in such cases, filed parallelly for awards arising out of arbitrations pending determination on annulment, became infructuous.[68] The tussle, however, still continued, as the provision of the 2019 Amendment that brought about this change was then declared unconstitutional and was accordingly struck down by the Supreme Court.[69]

Another instance, albeit not culminating into a tug of war between legislature and judiciary thus far, is the Arbitration and Conciliation (Amendment) Ordinance, 2020, which was a precursor to the Arbitration and Conciliation (Amendment) Act, 2021 ["**2021 Amendment**"]. Section 36 of the Arbitration Act was amended to state that the court "*shall stay the*

64 *See generally* Suraj Prakash, Aditya Singh Chauhan & Keshav Tibarewalla, *Recourse Against Arbitral Awards in India: Navigating Murky Waters*, 2020(2) INT'L COM. ARB. REV. 52, 61–65.
65 *Id.*
66 *Id.*
67 *Id.*
68 *Id.*
69 *Id.*

award unconditionally" pending disposal of the annulment proceedings if it is satisfied that a *prima facie* case is made out that the arbitration agreement, the contract forming the basis of the award, or the making of the award was induced or effected by fraud or corruption.[70] This amendment was largely an unwelcome surprise to the arbitration stakeholders, brought about without any prior consultations and not emanating from any visible need for a change to the national arbitration law in this regard.[71] Further, it was introduced first though an ordinance, absent any apparent urgency. Its timing has been called "*suspicious,*" as it was introduced prior to the commencement of the enforcement hearings arising in relation to the Antrix Corporation Ltd. and Devas Multimedia Pvt. Ltd. arbitration, wherein the Permanent Court of Arbitration at the Hague had ruled against the Indian government.[72] The retrospective effect given to this amendment further solidifies this suspicion.[73] Needless to say, such an unexpected and aggressive move by the government erodes the rule of law and sets India decades backwards in its quest to be recognised as an arbitration-friendly seat.

In addition to the arbitrary nature of the aforesaid amendment, it has been drafted in haste apparently without any regard to its impact on the arbitration environment in India. A *prima facie* evaluation over allegations of fraud and corruption is typically grossly insufficient. Not only are they difficult to prove, but they also require detailed review of arguments and evidence.[74] Such an approach would encourage parties to employ dilatory tactics and derail enforcement, "*without the risk of security or other conditions*

---

70 Arbitration and Conciliation (Amendment) Act, No. 3 of 2021, § 2 (India).

71 Payaswini Upadhyay, *A Change To The Arbitration Law Whose Purpose Is Unclear*, BQ PRIME (Nov. 24, 2020), *available at* https://bit.ly/3wIOheu.

72 *Id.*

73 *See* Arbitration Act, Explanation to the Proviso to § 36(3).

74 Gary Born, Steven P. Finizio & Shanelle Irani, *Recent Amendments to Arbitral Laws: India and Singapore*, WILMERHALE (Dec. 15, 2020), *available at* https://bit.ly/3MzxPE1 [*hereinafter* "Born, Finizio & Irani"].

acting as a check."[75] Further, the amendment did not address any existing problem with the interpretation or application of Section 36 of the Arbitration Act. The courts, upon application by the parties, have the option to attach conditions and stay enforcement, and record their reasons in writing.[76] But while creating a separate class of cases—where fraud or corruption is involved—for the grant of stay on enforcement by including the proviso to Section 36, the legislature created new issues of interpretation. The phrase "*shall stay the award unconditionally*" may be interpreted as introducing a mandatory stay on enforcement, albeit where *prima facie* case of fraud or corruption is established to the satisfaction of the court, or as removing any judicial discretion to attach conditions when granting a stay on enforcement.[77]

Another good illustration that evinces the need for well-thought-out provisions to be introduced by the Indian legislature when amending the statute is the provision dealing with confidentiality. Section 42A of the Arbitration Act—inserted by the 2019 Amendment—imposes a duty of confidentiality on arbitrators, parties and institutions. The only exception provided is when disclosure of information in the arbitral award is necessary for its implementation or enforcement. Interestingly, public interest may additionally be introduced as an exception, despite Section 42A containing a non-obstante clause. In *R.S. Sravan Kumar* v. *Central Public Information Officer*,[78] information regarding the legal team representing Antrix Corporation Ltd., the commercial arm of Indian Space Research Organisation, in an international arbitration and the fees charged, *inter alia*, was sought through an application under Right to Information Act, 2005. The Central Information Commission allowed the application since the

---

75 *Id.*

76 Arbitration Act, § 36(3).

77 Born, Finizio & Irani, *supra* note 72.

78 R.S. Sravan Kumar v. Central Public Information Officer, Department of Space, Bengaluru, 2019 SCC OnLine CIC 9981, ¶ 2 (India).

information concerned expenditure by a public authority,[79] which, the authors submit, is in contravention of Section 42A.

Blind advocacy of confidentiality is not appropriate; a balance needs to be struck between confidentiality and transparency, while keeping in mind the contribution of the former. In India, the confidentiality provision is severely lacking. In addition to its restricted scope, it leaves no room for party autonomy. The Srikrishna Committee Report, which recommended the provision, provides little to no guidance on the limits to confidentiality.[80] While it refers to the confidentiality provision in the Hong Kong Arbitration Ordinance and implied duty of confidentiality in Singapore and United Kingdom,[81] Section 42A of the Arbitration Act does not provide for the common law exceptions to confidentiality or allow the courts to carve out such exceptions. This provision has been heavily criticised on numerous other inadequacies—for instance, it does not provide an opt-out option (thereby undermining party autonomy) or consequences for violation, and is inapplicable to witnesses, etc.—and is likely to be amended in the future.

As a result of similar provisions that have contributed to the ambiguity in the position of law and have been left open for interpretation by the courts, the Arbitration Act has been amended several times in one decade. This approach has often resulted in parties having to undergo lengthy court proceedings due to ambiguities in the procedural law and has made arbitration in India inefficient. These instances evince the necessity for adequate forethought to be exercised when introducing or amending provisions, and a lack thereof at present.

---

79 *Id.* ¶ 7.

80 Ministry of Law & Justice, Government of India, Report of the High Level Committee to Review the Institutionalisation of Arbitration Mechanism in India (2017), at 71–72, *available at* https://bit.ly/3LA4SXi.

81 *See id.*

IV. Conclusion

As Bermann states, "*[t]he present time, in which the arbitration enterprise, rightly or wrongly, is coming under attack as just about never before, is an especially apt moment for expanding our notion of what is and what is not pro-arbitration.*"[82] In the Indian context, it is reflected in the decision-making by the Indian judiciary. While seemingly "*pro-arbitration,*" the approach highlighted in the course of this editorial harms India's prospects of being recognised globally as an arbitration-friendly seat. While arguably being influenced by and accommodating the competing interests of the various stakeholders and, in effect, appeasing the international community, the Indian judiciary has developed the Indian arbitration jurisprudence in line with the popular values, but has done so at the expense of certainty, stability, predictability and legitimacy—even going against the legislative intent at times—thereby compromising on the rule of law. The Indian legislature, on the other hand, has not only brought repeated changes to the law, but has done so in a heedless manner on many instances. This has resulted in the need for the judiciary to intervene time and again.

A stable and organised approach should be taken by both the judiciary and legislature when bringing changes to the Indian arbitration landscape. India should adopt a policy which is tailored for its own legal system and enhances arbitration's legitimacy. It is time for India to leave the pro-arbitration bandwagon and shift its focus towards rule of law, as is required in its current state. The focus should not be to ensure that India is a "*pro-arbitration*" jurisdiction, but rather a reliable jurisdiction with stable positions of law, while promoting the rule of law and not falling seriously out of step with extrinsic values which are of fundamental importance to the Indian legal system.

82 Bermann, *supra* note 5, at 352.

INDIAN JOURNAL OF ARBITRATION LAW

THE APPLICABLE STANDARDS FOR GRANTING INTERIM INJUNCTIONS IN INDIA-SEATED INTERNATIONAL COMMERCIAL ARBITRATIONS

Michael Hwang[1] *& Akash Srivastava*[2]

Abstract

With the rise in the international recognition and legitimacy of international arbitration, parties in international commercial arbitrations have increasingly started to request interim injunctions from arbitral tribunals instead of knocking on the doors of domestic courts for assistance. However, there has been considerable debate regarding the standards that tribunals should apply when determining whether interim injunctions should be granted. This article specifically focuses on the standards that India-seated tribunals should adopt in international commercial arbitrations. The authors first examine the standards as adopted by Indian courts when granting interim injunctions, in comparison to the standards adopted in most other common law jurisdictions, before positing that these are the appropriate standards to be adopted by India-seated tribunals in international commercial arbitrations.

---

1 Michael Hwang (michael@mhwang.com), Senior Counsel (Supreme Court of Singapore), BCL, MA (Oxford), Honorary LLD (Sydney), International Arbitrator (based in Singapore). The first author has previously written on local standards being the applicable standards for granting interim injunctions in Singapore-seated international commercial arbitrations. *See* Michael Hwang, *The Applicable Standards for the Granting of Interim Injunctions in International Commercial Arbitrations Seated in Singapore,* 1 SING. ARB. J. 30 (2021). This article suggests a similar approach to the task of ascertaining applicable standards for India-seated international commercial arbitrations.

2 Akash Srivastava (akashsrivastava.adv@gmail.com) is an India-qualified lawyer, with an LL.M. in International Arbitration and Dispute Resolution from the National University of Singapore.

I. Introduction

The importance of an arbitral tribunal's power to grant interim injunctions is well known. It helps the tribunal to safeguard parties' rights and preserve the matter until a final decision is rendered. Injunctions, in simple terms, require or refrain a person from doing something, such as transferring or selling goods by imposing a stay on the sale, or preserving or changing the status quo.[3]

This power of the tribunal—being a matter of procedure—is normally regulated by the *lex arbitri*, otherwise known as the law of the seat. However, the issue regarding the applicable standards for granting interim injunctions in international commercial arbitration is still widely debated. Even though most institutional rules allow tribunals to grant interim relief, they usually do not prescribe the standards that tribunals should adopt.[4]

That said, parties can expressly stipulate in their agreement the criteria that would govern the grant of an interim injunction and most seats will recognise such choice by virtue of recognizing the principle of party autonomy.[5] However, this is not usually the case in practice. While parties

---

[3] ALI YESILIRMAK, PROVISIONAL MEASURES IN INTERNATIONAL COMMERCIAL ARBITRATION 186 (2005) [*hereinafter* "YESILIRMAK"].

[4] International Chamber of Commerce (ICC) Arbitration Rules 2021, art. 28; International Centre for Dispute Resolution (ICDR) International Arbitration Rules 2021, art. 27; Singapore International Arbitration Centre (SIAC) Rules 2016, rule 30; Hong Kong International Arbitration Centre (HKIAC) Administered Arbitration Rules 2018, art. 23; London Court of International Arbitration (LCIA) Arbitration Rules 2020, art. 25. Albeit purely in the context of investor-state arbitration, a different approach is taken in the proposed amendments to the ICSID Rules under Rule 47, laying down the procedure and circumstances under which interim relief would be provided by a tribunal. *See* International Centre for Settlement of Investment Disputes, *Proposals for Amendment of the ICSID Rules* 54–55 (Working Paper No. 4, 2020).

[5] Christopher Boog, *The Laws Governing Interim Measures in International Arbitration*, *in* CONFLICT OF LAWS IN INTERNATIONAL COMMERCIAL ARBITRATION 427 (Franco Ferrari & Stefan Kröll eds., 2019) [*hereinafter* "Boog"] ("Consistent with the principle of party autonomy (and subject to any mandatory provisions of law), the parties are free to agree on either the law governing the prerequisite for granting interim relief or to stipulate

may often expressly provide in their commercial agreements for certain contractual provisions to be capable of enforcement by injunctions, they do not normally spell out the standards for the granting of interim injunctions, unless the counsel for the parties, after commencement of the arbitration, expressly agree between themselves to request the tribunal to apply particular standards.

In this article, the authors will only discuss the applicable standards for "*interim injunctions*" which term will also include "*interlocutory injunctions,*" and no other forms of provisional relief, which may require separate consideration of the applicable standards.

This article, in Part II, explores the standards adopted by Indian courts when granting interim injunctions. Part III examines and critically evaluates international standards. Finally, in Part IV, the article concludes by making a case for Indian local standards to also be applicable to India-seated tribunals when granting such injunctions in international commercial arbitrations.

II. Interim Injunctions in India

A. Relevant provisions for granting interim injunctions

Indian courts have the power to grant interim or temporary injunctions under Order 39 of the Code of Civil Procedure, 1908 ["**CPC**"] when the disputed property runs the risk of being wasted, alienated, or damaged. The courts are also empowered to grant interim injunctions in support of arbitration proceedings under Section 9(1)(ii)(d) of the Arbitration and Conciliation Act, 1996 ["**Arbitration Act**"].[6]

directly or indirectly such prerequisite. Where the parties have agreed on a specific law or set of rules to apply, such agreement prevails.").

6 Arbitration and Conciliation Act, No. 26 of 1996, § 9(1)(ii)(d) (India) [*hereinafter* "Arbitration Act"] ("Interim measures, etc., by Court (1) A party may, before or during arbitral proceedings or at any time after the making of the arbitral award but before it is

The power to grant interim injunctions has also been provided to arbitral tribunals seated in India under Section 17(1)(ii)(d) of the Arbitration Act.[7] That said, the legislation does not expressly provide the standards that should be adopted by arbitral tribunals when granting such injunctions. In cases where parties have expressly agreed upon the applicable standards for granting interim injunctions (which are not in conflict with the mandatory rules of the seat of the arbitration), the tribunal will be required to adopt the standards so agreed. This would be in consonance with Section 19(2) of the Arbitration Act, which states that "*parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting its proceedings*." However, as pointed out earlier, such agreement is rarely (if ever) seen in practice.

Under Section 19(3) of the Arbitration Act, the tribunal conducts the proceedings in the manner it considers appropriate, and thus, in the absence of an express agreement between the parties regarding the applicable standards, the tribunal will either apply (a) the standards adopted by national courts, i.e., "*local standards,*" or (b) "*international standards,*" which are derived from international arbitration practice and are transnational in nature.

B. Standards adopted by Indian courts when granting interim injunctions

In India, applicants seeking interim relief are generally required to establish: (i) a *prima facie case* in its favour; (ii) that the balance of convenience is in

enforced in accordance with section 36, apply to a court – (ii) for an interim measure of protection in respect of any of the following matters, namely – (d) interim injunction or the appointment of a receiver.").

7 Arbitration Act, § 17(1)(ii)(d) ("Interim measures ordered by arbitral tribunal – (1) A party may, during the arbitral proceedings, apply to the arbitral tribunal – (ii) for an interim measure of protection in respect of any of the following matters, namely: (d) interim injunction or the appointment of a receiver.").

favour of granting the interim measure; and (iii) that irreparable injury would be caused to the plaintiff if the relief requested is not granted.[8]

However, most of the other common law countries follow the requirements laid down in Lord Diplock's judgment in the 1975 decision of the House of Lords in *American Cyanamid Co.* v. *Ethicon Ltd.*[9] ["**American Cyanamid**"] setting out the test for a court to grant an interim injunction:

a. there is a serious question to be tried with a real prospect of success;

b. damages will not be adequate compensation to the applicant for any losses caused if the injunction were not granted; and

c. the balance of convenience lies in favour of granting the injunction.

Lord Diplock's judgment—which substituted the "*prima facie case*" approach adopted prior to 1975[10]— was considered to be a revolutionary development in the common law of civil procedure.[11] It is important to note what exactly was the nature of the change to English (and hence Commonwealth) law on interim injunctions brought about by *American Cyanamid*. The change was mainly in the first test, which was seen as the gateway to consideration of the other two factors listed above. Lord Diplock's judgment in that case identified the then existing practice adopted by English courts with regard to the gateway test as:

> "*[T]he supposed rule that the court is not entitled to take any account of the balance of convenience unless it has first been satisfied that if the case went to*

---

8 Promod Nair & Shivani Singhal, *Interim Measures*, *in* ARBITRATION IN INDIA 145, 149 (Dushyant Dave, Martin Hunter, Fali Nariman & Marike Paulsson eds., 2021) [*hereinafter* "Dave et al."].

9 American Cyanamid Co. v. Ethicon Ltd., [1975] UKHL 1 [*hereinafter* "American Cyanamid"].

10 The principal cases establishing or following the "*prima facie*" approach are set out in Lord Diplock's judgment.

11 Christine Gray, *Interlocutory Injunctions Since Cyanamid*, 40(2) CAMBRIDGE L. J. 307 (1981).

> *trial upon no other evidence than is before the court at the hearing of the application the plaintiff would be entitled to judgment of a permanent injunction in the same terms as the interlocutory injunction sought.*"[12]

He then went on to say:

> "*[…] there is no such rule. The use of such expressions as "a probability", a "prima facie case?', or a strong prima facie case", in the context of the exercise of a discretionary power to grant an interlocutory injunction leads to confusion as to the object sought to be achieved by this form of temporary relief.* ***The court no doubt must be satisfied that the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried****.*
>
> *[…]*
>
> *So unless the material available to the court at the hearing of the application for an interlocutory injunction fails to disclose that the plaintiff* ***has any real prospect of succeeding in his claim for a permanent injunction at the trial****, the court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought.*"[13] (emphasis added)

In India, prior to the decision in *American Cyanamid*, courts generally followed the "*prima facie case*" test that would entail assessing the applicant's chances of success without delving into the merits.[14] When the *American*

---

12 American Cyanamid Co. [1975] UKHL 1, ¶ 4.

13 *Id.* ¶¶ 4–5.

14 Aditya Swarup, *The Prima Facie Standard for Interim Injunctions in India,* 4 NLUD STUDENT L. J. 20, 37 (2017) [*hereinafter* "Swarup"], *citing* K.E. Mohammed Aboobacker v. Nanikram Maherchand Paramannad Maherchand, 1957 SCC OnLine Mad 133 (India) ("The plaintiff must make out a prima facie case in support of his application for the ad-interim injunction and must satisfy the Court that his legal right has been infringed and in all probability will succeed ultimately in the action."); Bishamber Nath Jaithy v. Municipal Committee, Delhi,

Cyanamid decision was rendered, Indian courts immediately recognised the decision and started applying it when considering requests for interim injunctions.[15] However, over time, some Indian courts became critical of the decision in *American Cyanamid* because it replaced the *prima facie case* test of the strength of the applicant's case with the concept of "*a serious question to be tried.*"[16] These Indian courts were critical of the *American Cyanamid* test because, instead of considering the facts and circumstances of each case, the "*serious question to be tried*" test entailed not evaluating the relative

AIR, 1926 Lah 589(3), ¶ 3 (India) ("[T]he rule that before the issue of a temporary injunction the Court must satisfy itself that the plaintiff has a *prima facie* case, does not mean that the Court should examine the merits of the case closely and come to a conclusion that the plaintiff has a case in which he is likely to succeed. This would amount to prejudging the case on its merits. All that the Court has to see is that on the face of it the person applying for an injunction has a case which needs consideration and which is not bound to fail by virtue of some apparent defect."); Gopal Krishan Kapur v. Ramesh Chander, 1973 R.L.R. 542, ¶ 19 (India) ("The function of the Court when called upon to consider if the plaintiff has a prima facie case for the grant of an interim protection or not is to determine the limited question if the material placed before the Court would require investigation but it is not open to the Court to either subject the material to closer judicial scrutiny for the purpose of deciding if on account of any inherent characteristics of the situation or the probabilities, the plaintiff may not succeed in his contention. Such an investigation would be clearly a transgression of the limits of the functions of the Court and would be both unreasonable and unfair because the suit being at a preliminary stage."); *see also* Seth Banarsi Dass Gupta v. B.B. Bindal, 1981 SCC OnLine Del 150 (India).

15 Purna Investments v. Southern Steelmet Alloys, 1977 SCC OnLine Kar 136, ¶ 10 (India) (the High Court of Karnataka opined that an applicant needed to prove that he had "a serious question to be tried" instead of a "strong prima facie" case); *see also* Gobind Pritamdas Malkani v. Amarendra Nath Sircar, 1978 SCC OnLine Cal 169, ¶ 16 (India); Amal Kumar Mukherjee v. Clarian Advertising Service Ltd., 1979 SCC OnLine Cal 240, ¶ 8 (India).

16 Lord Diplock rejected the "prima facie case" test, and replaced it with "a serious question to be tried," observing, among other things, that "[i]t is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations." *See* American Cyanamid, [1975] UKHL 1.

strength of the merits of the case as a general rule.[17] In *Gujarat Bottling Co. Ltd.* v. *Coca Cola Co.*,[18] the Supreme Court of India pronounced that courts would grant interlocutory injunctions by applying the following tests:

> "*(i) whether the plaintiff has a prima facie case; (ii) whether the balance of convenience is in favour of the plaintiff; and (iii) whether the plaintiff would suffer an irreparable injury if his prayer for interlocutory injunction is disallowed.*"[19]

---

[17] *See, e.g.,* Amar Talkies v. Apsara Cinema, ILR 1982 MP 462, ¶ 473 (India) ("It is a settled principle that a temporary injunction can be granted if the plaintiff has a prima facie case, the balance of convenience is in plaintiff's favour and the plaintiff would suffer an irreparable injury if the injunction is not granted. Recently, the House of Lords in [American Cyanamid], has held that there was no rule of law that the Court was precluded from considering whether, on a balance of convenience, an interlocutory injunction should be granted unless the plaintiff succeeded in establishing a prima facie case or a probability that he would be successful at the trial of the action. All that was necessary was that the Court should be satisfied that the claim was not frivolous or vexatious, i.e. that there was a serious question to be tried. This case clearly made a departure from the settled rule that the plaintiff has to make out a prima facie case […]. But the decision of the House of Lords has since been criticised, distinguished and explained in several cases by the Court of Appeal […]. Therefore, the case has to be read in the light of the peculiar circumstances of that case.").

[18] Gujarat Bottling Co. Ltd. v. Coca Cola Co., (1995) 5 SCC 545, ¶ 43 (India).

[19] *Id.* ¶ 43 ("The grant of an interlocutory injunction during the pendency of legal proceedings is a matter requiring the exercise of discretion of the court. While exercising the discretion the court applies the following tests — (i) whether the plaintiff has a *prima facie case*; (ii) whether the balance of convenience is in favour of the plaintiff; and (iii) whether the plaintiff would suffer an irreparable injury if his prayer for interlocutory injunction is disallowed. The decision whether or not to grant an interlocutory injunction has to be taken at a time when the existence of the legal right assailed by the plaintiff and its alleged violation are both contested and uncertain and remain uncertain till they are established at the trial on evidence. Relief by way of interlocutory injunction is granted to mitigate the risk of injustice to the plaintiff during the period before that uncertainty could be resolved. The object of the interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial. The need for such protection has, however, to be weighed against the corresponding need of the defendant to be protected against injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated. The court must weigh one need against another and determine where the "balance of

Subsequently, in *Colgate Palmolive Ltd.* v. *Hindustan Unilever Ltd.*,[20] the Supreme Court of India opined that, when considering requests for interim injunctions, the courts could assess the strength of the applicant's case on the basis of the evidence on record, without delving into unresolved and contested factual issues. The effect of this judgment was that eventually this exception (of assessing the strength of the case) became the norm with various subsequent judgments of the Supreme Court of India extending it.[21] For instance, in *M. Gurudas* v. *Rasaranjan*[22] ["**Gurudas**"], the Supreme Court clarified that an applicant seeking an interim injunction would be required to:

a. establish a *prima facie* case, which would be determined as a finding on fact;

b. have a favourable balance of convenience; and

c. prove that irreparable injury—which normally cannot be compensated in terms of money—would be caused if the request is not granted.

convenience" lies. [See: Wander Ltd. v. Antox India (P) Ltd. [1990 Supp SCC 727], (SCC at pp. 731-32.)] In order to protect the defendant while granting an interlocutory injunction in his favour the court can require the plaintiff to furnish an undertaking so that the defendant can be adequately compensated if the uncertainty were resolved in his favour at the trial.").

20 Colgate Palmolive Ltd. v. Hindustan Unilever Ltd. (1999) 7 SCC 1 (India).

21 Swarup, *supra* note 12, at 45, *citing* Sree Jain Swetambar Terapanthi v. Phundan Singh, (1999) 2 SCC 377 (India) (if an interim injunction is granted without considering the *prima facie case* standard, it could be reversed); S.M. Dyechem Ltd. v. Cadbury (India) Ltd., (2000) 5 SCC 573 (India) (the Supreme Court examined the strength of the parties' case instead of the American Cyanamid principles).

22 M. Gurudas v. Rasaranjan, (2006) 8 SCC 367, ¶¶ 18–19, 21 (India).

The above test inscribed in *Gurudas* is still valid in India.[23] This was clarified by the Madras High Court in *Flywheel Logistics Solutions Pvt. Ltd.* v. *Hinduja Leyland Finance Ltd.*,[24] where the court reiterated:

> "*[…] there can, therefore, be no quarrel that the Tribunal, like a Court under Section 9(1) is, therefore, legally mandated to test the case of the applicant with reference to the well-known parameters of a) prima facie case b) balance of convenience and c) irreparable loss before granting an order of injunction.*"[25]

Despite the general acceptance of the *American Cyanamid* test throughout the common law world, the above-mentioned test as set out in *Gurudas* gradually became the general practice in India.[26] The approach of Indian courts in this regard shifted from considering "*a serious question to be tried,*" which it did in the early days of recognizing *American Cyanamid*, to

---

23 *See* Seema Arshad Zaheer v. Municipal Corporation Of Greater Mumbai, (2006) 5 SCC 282, ¶ 30 (India) ("The discretion of the court is exercised to grant a temporary injunction only when the following requirements are made out by the plaintiff : (i) existence of a *prima facie case* as pleaded, necessitating protection of the plaintiff's rights by issue of a temporary injunction; (ii) when the need for protection of the plaintiff's rights is compared with or weighed against the need for protection of the defendant's rights or likely infringement of the defendant's rights, the balance of convenience tilting in favour of the plaintiff; and (iii) clear possibility of irreparable injury being caused to the plaintiff if the temporary injunction is not granted. In addition, temporary injunction being an equitable relief, the discretion to grant such relief will be exercised only when the plaintiff's conduct is free from blame and he approaches the court with clean hands".); Mandali Ranganna v. T. Ramachandra, (2008) 11 SCC 1, ¶ 21 (India) ("While considering an application for grant of injunction, the court will not only take into consideration the basic elements in relation thereto viz. existence of a *prima facie case*, balance of convenience and irreparable injury, it must also take into consideration the conduct of the parties".).

24 Flywheel Logistics Solutions Pvt. Ltd. v. Hinduja Leyland Finance Ltd., 2020 SCC OnLine Mad 20614, ¶ 30 (India).

25 *Id.* ¶ 28.

26 Dave et al., *supra* note 6, at 149 *citing* Gujarat Bottling Co. Ltd v. Coca Cola (1995) 5 SCC 545 (India); *see also* Best Sellers Retail (India) Pvt. Ltd. v. Aditya Birla Nuvo Ltd., (2012) 6 SCC 792, ¶¶ 26, 29–30 (India); Kishoresinh Ratansinh Jadeja v. Maruti Corporation, (2009) 11 SCC 229, ¶ 36 (India); Morgan Stanley Mutual Fund v. Kartik Das, (1994) 4 SCC 225, ¶¶ 36–38 (India).

considering the *prima facie case* threshold of the strength of the case. In a way, Indian courts have returned to the pre-*American Cyanamid* legal space, where Indian courts were of the opinion that "*injunctions are too frequently issued,*"[27] and it was "*difficult for the Court to pass an order on the application for a temporary injunction without to a certain extent prejudging the case […],*"[28] owing to the many frivolous suits that were filed in courts.[29]

The "*prima facie case*" test has been applied by Indian courts for a number of decades and has slowly become a part of Indian jurisprudence. The test is also internationally recognized and has been applied by tribunals when granting interim injunctions, for instance in International Chamber of Commerce ["**ICC**"] Case No. 9301 and ICC Final Award No. 5804.[30] However, it is not clear (for lack of a sufficient body of consistent case law) how widely this test has been adopted in international commercial arbitrations (as opposed to International Centre for Settlement of Investment Disputes ["**ICSID**"] or International Court of Justice ["**ICJ**"] cases). In the authors' view, for reasons to be explained in the remainder of this article, the *prima facie case* test is the appropriate standard to be applied by India-seated tribunals when granting interim injunctions, provided such tribunals believe that the standards applied by Indian courts should be applied by Indian arbitration tribunals without modification.

It is beyond the remit of this article to discuss in full the respective differences between the *American Cyanamid* test and the Indian test for granting interim injunctions in court cases. What is important to note is that, depending on whether the main thesis of this article is accepted, vis-à-vis that tribunals seated in India should apply Indian standards for

27 Ismail v. Tayaballi Essaji, 1929 SCC OnLine Sind JC 30, ¶ 44 (India).

28 Vithal v. Dawoo, 1928 SCC OnLine MP 156 (India), *cited in* Swarup, *supra* note 12, at 25.

29 Swarup, *supra* note 12, at 24–26.

30 YESILIRMAK, *supra* note 1, at 178, *citing* ICC Interim Award no. 9301 of 1997 (unpublished); ICC Final Award 5804 of 1989, 4(2) ICC INT'L. CT. ARB. BULL. 76 (1993).

granting injunctions in arbitration cases rather than any other interim standards, tribunals and counsel in India-seated arbitrations should focus on the question: what are Indian standards for purposes of granting interim injunctions in arbitration (as opposed to court) cases? Should they be the standards applied in Indian courts, or some other standards unique to arbitration?

III. International Standards for Granting Interim Injunctions

A. Examining international standards

A differing approach from that of the authors also exists. According to this view, when considering applications for interim injunctions, tribunals should not look at local standards—which are applicable to court-ordered interim injunctions—as they are irrelevant in this regard, but should instead consider certain *sui generis* sources of law, which are derived from international sources, i.e., previous arbitral awards on similar issues and academic commentaries.[31]

This view has largely been propounded by Gary Born. He notes that generally, "*most international arbitral tribunals will order provisional measures only where the party requesting such relief has made showings of (a) a risk of serious or irreparable harm to the claimant; (b) urgency; and (c) no prejudgment of the merits.*"[32] However, it is pertinent to note that he moves on to recognise that some tribunals require the claimants to establish a *prima facie case* and a favourable balance of hardships.[33]

---

31 GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION 2645–66 (3d ed. 2021) [*hereinafter* "BORN"]. Some other commentators have put forth similar views. *See* Boog, *supra* note 3, at 409–458. However, Boog's preferred application of international standards is different from the approach of Born, as will be explained later.

32 *Id.* at 2650.

33 *Id.* ("Stated generally, most international arbitral tribunals will order provisional measures only where the party requesting such relief has made showings of (a) a risk of serious or irreparable harm to the claimant; (b) urgency; and (c) no prejudgment of the merits, while some tribunals also require the claimant to establish (d) a *prima facie case* on the merits; (e)

Born has explored the facets of these so-called international standards, and discussed the reasons why these standards should be applied by tribunals. He has written:

> "*An international arbitral tribunal is not a national court and its powers, and the standards for exercising those powers, are not coterminous with national courts. Rather, the arbitrators' remedial authority, and the standards it should apply in exercising that authority, are defined by sui generis sources of law developed for, and applicable to, international arbitration.*
>
> *[…]*
>
> *These international sources are consistent with the parties' reasonable expectations, because they ensure that (a) a single, uniform standard will be applied to requests for provisional measures in an arbitration; (b) a single, uniform standard will apply to the same sorts of requests regardless what the seat of the arbitration may be; and (c) the standard for provisional relief will be tailored to international arbitral procedures, rather than to the procedures of a national court system. This approach also reduces the importance of choice-of-law questions and encourages uniform results, both of which are important objectives of the arbitral process.*"[34]

He also notes that the absence of any expressly laid out standards from the national arbitration legislations is indicative of the fact that the source of such standards is not the *lex arbitri* but some other legal sources.[35] He believes that these standards are not "*logically connected*" to the *lex arbitri,* and that parties opt for a particular seat for reasons of practical convenience and neutrality, and rarely intend that this choice will have an impact on the

---

a *prima facie case* on jurisdiction; and (f) a balance of hardships weighing in its favour."); *see also* Stephen Benz, *Strengthening Interim Measures In International Arbitration*, 50(1) GEO. J. INT'L L. 143, 151–64 (2018).

34 *Id.* at 2646–47.

35 *Id.*

substantive standards for granting any provisional relief.[36] In his opinion, prescribing any substantive standards "*binding on arbitral tribunals seated on local territory is unnecessary and unwise,*" because it would threaten the development of "*better-formulated*" and "*more nuanced*" international standards.[37]

Christopher Boog also favours the adoption of international standards, noting that it is a "*business-oriented approach*" that fosters "*uniform results, providing a degree of legal certainty and predictability and ultimately buttressing the parties' trust in the arbitral procedure*."[38] In his opinion, "*standards for granting interim relief in international arbitration are to be determined pursuant to the following cascade: (i) mandatory provisions of law; (ii) the law chosen by the parties; (iii) international arbitration standards; and, (iv) in exceptional cases, the lex causae to the extent that it specifies standards for granting interim relief*."[39]

In particular, Boog argues in favour of treating Article 17A of the 2006 Edition of the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration ["**Model law**"][40] as a codification of "*international standards*" for the granting

---

36 *Id.*

37 *Id.* at 2648.

38 Boog, *supra* note 3, at 428; *see also* Nathalie Voser, *Interim Relief in International Arbitration: The Tendency Towards a More Business- Oriented Approach*, 1 DISPUTE RES. INT'L. 171, 184 (2007) ("recent developments in international arbitration show a growing tendency to apply a more business-oriented approach and thus to depart from the strict and formal requirements of the state courts.").

39 *Id.* at 426–27.

40 United Nations Commission on International Trade Law (UNCITRAL), Model Law on International Commercial Arbitration, art. 17 A, 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) ("Conditions for granting interim measures (1) The party requesting an interim measure under article 17(2)(a), (b) and (c) shall satisfy the arbitral tribunal that: (a) Harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and (b) There is a reasonable possibility that the requesting party will succeed on the merits of

of interim injunctions.[41] Article 17A(1)(b) (sets out the applicable test for the granting of an interim measure: "*There is a reasonable possibility that the requesting party will succeed on the merits of the claim. The determination on this possibility shall not affect the directions of the arbitral tribunal in making any subsequent determination.*"

This approach of adopting international standards has seen increasing acceptance in the international arbitration community, and it is now not uncommon for parties to seek injunctions on the basis of these standards. That said, for purposes of this article, the question remains whether local standards are the appropriate standards to be applied in determining the grant of interim injunctions in India.

B. A critique of international standards

While the idea of a set of uniform international standards may sound attractive at first blush, the authors suggest that, not only are there significant difficulties in defining and applying these standards in practice, but their application may also lead to uncertain and unpredictable outcomes.

As a preliminary point, the authors respectfully disagree with the contention that there is no logical connection between the standards for granting interim injunctions and the law of the arbitral seat. The seat is normally carefully chosen by the parties' legal advisers, keeping in mind that the *lex arbitri* governs all matters of arbitral procedure (including the legal remedies for interim relief, the most common of which would be interim

---

the claim. The determination on this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determination. (2) With regard to a request for an interim measure under article 17(2)(d), the requirements in paragraphs (1)(a) and (b) of this article shall apply only to the extent the arbitral tribunal considers appropriate." (emphasis added)). Note that the underlined words above more closely resemble the American Cyanamid test of "a serious question to be tried," instead of the "prima facie case" test or the standards propounded by Born. *See supra* note 32 and accompanying text.

41 Boog, *supra* note 3, at 428–29.

injunctions). In view of this, there is certainly a "*logical connection*" between the *lex arbitri* and the standards for granting injunctions. The *lex arbitri* determines the procedures to be applied to arbitrations which are seated in a chosen country, and all parties who choose the seat will (in the vast majority of cases) have been advised of the significance of that choice in respect of all matters relating to arbitration enacted by the law of the seat.

It is also pertinent to note that, unlike most investor-state arbitrations (which encompass public international law considerations not normally applicable to international commercial arbitrations), the proceedings and decisions in most international commercial arbitrations are confidential, and thus there is the practical difficulty of accessing the sources of case law to formulate these international standards. The only consistent source (in limited numbers) is the anonymised ICC reports of procedural orders of ICC tribunals, which rarely cite authority for the principles the tribunals apply, since these orders concern interlocutory applications, and are not awards determining issues on the merits.

Furthermore, unlike the standards adopted by local courts, there is limited consensus on what constitutes international standards. Considered by some commentators as reflecting "*the standard for the granting of interim relief applied by many national courts and arbitral tribunal,*"[42] Article 17A of the Model Law is often classified as "*generally accepted legal principles,*"[43] and provides the only available published standards with some international standing. In support of the same, Boog has argued that "*[n]ational arbitration rules drafted on the basis*

[42] JACOB GRIERSON & ANNET VAN HOOFT, ARBITRATING UNDER THE 2012 ICC RULES: AN INTRODUCTORY USER'S GUIDE 161 (2012).

[43] Shahla Ali & Tom Kabau, *Article 17A Conditions for Granting Interim Measures*, *in* UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION: A COMMENTARY 343, 344 (Ilias Bantekas, Pietro Ortolani, Shahla Ali, Manuel A. Gómez & Michael Polkinghorne eds., 2020); *see also* Alan Tsang, *Transnational rules on interim measures in international courts and arbitrations*, INT'L. ARB. L. R. 35 (2011).

of these harmonized standards may well serve as a valid foundation for determining the prerequisites for ordering interim measures in an international arbitration."[44]

Notwithstanding the above, these standards have only been adopted by a few Model Law jurisdictions,[45] and even some commentators who are in favour of applying international standards, such as Born, note that this formula "*makes no provision for parties' agreements on the standard of proof, omits any reference to urgency, unduly focuses "irreparable" harm on monetary damages (as distinguished from non-monetary relief), imposes a single standard for differing types of interim relief and omits reference to security for costs.*"[46] For these and other reasons, unlike Boog, Born does not advocate using Article 17A of the Model Law to fix the standards for granting interim injunctions (and possibly not even for other interim measures). These differences perhaps raise the question of whether there are any truly internationally accepted standards that are regularly and consistently applied by arbitral tribunals in granting interim relief.

In summary, the lack of access to past arbitral procedural orders and awards (which are even rarer, owing to the fact that awards rarely grant interim injunctions and normally grant permanent relief), and the lack of consensus as to what constitutes international standards, together indicate that there is a practical difficulty in formulating international standards. The usual source of case law on interim injunction would be reports of cases from the ICJ (which deal with issue of public international law, rather than private international law), reports of ICSID tribunals (which deal with investment treaty law cases), or the anonymised ICC reports of commercial cases

---

44 Boog, *supra* note 3, at 429.

45 According to one study on the adoption of the revised art. 17, out of the 111 territories surveyed, 13 territories have adopted in full, two territories have mostly adopted, nine territories are similar and nine territories are similar in parts. *See* PETER BINDER, INTERNATIONAL COMMERCIAL ARBITRATION AND MEDIATION IN UNCITRAL MODEL LAW JURISDICTIONS 803–810 (4th ed. 2019).

46 Born, *supra* note 32, at 2648, fn. 266.

(which tend to lack context and not examine issues of legal principle in depth when deciding procedural issues).

In addition to the issue of formulating these standards, the problem regarding their application is also relevant, since different injunctions are applicable in different situations and accordingly, one set of standards cannot be applied to every situation. For instance, there are exceptions to the *American Cyanamid* standard even where that standard is the default rule. An application for a *Mareva* injunction is judged by the standard of "*a good arguable case,*"[47] which is higher than the American Cyanamid "*serious question to be tried*" standard, since it imposes a comparatively heavier burden on the injuncted party.[48] In a similar vein, injunctions restraining parties from calling on performance bonds have a significantly higher threshold, as compared to other injunctions, since they are callable on demand subject only to production of one or more specific certification of certain facts, and are also considered to be much less susceptible to restraint by injunction, as they are generally considered (at least by common law courts) to be the "*life-blood of international commerce.*"[49] Thus, a tribunal needs to determine the standards and the burden of proof that an applicant must demonstrate to be granted an injunction. This determination is included in the tribunal's reasoning in its decision, but since these decisions are confidential in international commercial arbitration, other arbitral tribunals will rarely be able to derive any guidance in this regard. That said, these are of course examples from the England & Wales jurisprudence, which may not

47 A "good arguable case" has been defined as "one which is more than barely capable of serious argument, but not necessarily one which the judge considers would have a better than 50 per cent chance of success." *See* Ninemia Maritime Corporation v. Trave Schiffahrtsgesellschaft mbH & Co. [1984] 1 All ER 398 (Eng.).

48 Polly Peck International Plc v. Nadir [1992] EWCA Civ 3 (Eng.).

49 *See* Ouais Group Engineeer & Contracting v. Saipem SPA [2013] EWHC 990 (Comm) ¶ 45 (Eng.), and other cases cited in Michael Hwang, *The Applicable Standards for the Granting of Interim Injunctions in International Commercial Arbitrations Seated in Singapore*, 1 SING. ARB. J. 30, ¶ 24 (2021).

necessarily lead to similar findings by Indian courts that still follow the *prima facie case* test. However, the factual scenarios described here are situations which are likely to be considered by the Indian courts, and local standards will emerge to provide standards which the Indian courts will deem appropriate to meet Indian commercial circumstances, and accordingly guide India-seated tribunals. Notwithstanding this, it is clear that it would take significant research to find a consistent pattern of international jurisprudence in the area of international commercial arbitration to find similar guidance from decided cases.

In view of the above, it is clear that adopting these so-called international standards, instead of local standards, would likely lead to unpredictability and uncertainty. This would in turn lead to the tribunal applying whatever standards it deems appropriate, and possibly arriving at an outcome that would depart from the parties' expectations.

However, two observations may be made to show that the differences between:

i. Indian standards;
ii. English (i.e. American Cyanamid) standards; and
iii. International standards

are not in fact as stark as portrayed above.

First, one thing that may be said in favour of international standards (from the Indian viewpoint) is that these standards appear to require a stronger threshold of scrutiny of the strength of the Applicant's case (whether the Applicant is the Claimant or the Respondent). Such cases, as have been reported from international tribunals, seem to emphasize the term "*prima facie*" in terms of the strength of the Applicant's case, which is (at least at first sight) stronger than the *American Cyanamid* test of "*a serious case to be tried*." It may be that Indian tribunals will find more affinity with

international standards in terms of the "*prima facie*" test than the English case law based on *American Cyanamid*. Indeed, the likelihood is that Indian tribunals will (at least in the earlier stages of development of Indian jurisprudence in this field) follow the pronouncements of the Indian Supreme Court on the *prima facie case* test, which will then make them more closely attuned to international standards than to English case law. So, whether or not Indian tribunals declare that they are applying international standards or Indian standards, they may in fact be applying the same test in practice.

Second, there is also another way of comparing international standards with Indian standards and the *American Cyanamid* test. Taking a look at Boog's approach of using the Model Law (2006 Edition) to reflect "*international standards,*" Article 17A(b) states that one of the critical elements that need to be satisfied to qualify for interim relief is as follows:

> "*There is a reasonable possibility that the requesting party will succeed on the merits of the claim. The determination on this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determination.*"

This formulation does not look too far away from the *American Cyanamid* test of "*a serious question to be tried*" and appears as to be less stringent test than a "*prima facie case.*" Hence, the adoption of the Model Law test is arguably consistent with *American Cyanamid*, and also consistent with Boog's version of international standards (although Born strongly argues against the recognition of Article 17A of the Model Law as being representation of international standards).[50]

50 BORN, *supra* note 32, at 2648-49.

IV. Conclusion: Making a case for the application of local standards in India-seated international commercial arbitrations

Apart from the issues concerning international standards as described above, the authors believe that, in India-seated international commercial arbitrations, there is a strong case to be made for applying the local standards of the law of the seat.

First, it is pertinent to note that in India, prior to the Arbitration and Conciliation (Amendment) Act, 2015 ["**2015 Amendment**"], Section 17(1) of the Arbitration Act did not provide tribunals with the specific power to issue interim injunctions, but instead provided that "*[u]nless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order a party to take any interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject-matter of the dispute.*"

In 2014, the Law Commission of India ["**Law Commission**"] observed as follows:

> "*Section 17 is an important provision, which is crucial to the working of the arbitration system, since it ensures that even for the purposes of interim measures, the parties can approach the arbitral tribunal rather than await orders from a Court. The efficacy of section 17 is however, seriously compromised given the lack of any suitable statutory mechanism for the enforcement of such interim orders of the arbitral tribunal.*"[51]

In this regard, the Law Commission recommended the addition of the words "*any order issued by the arbitral tribunal under this section shall be deemed to be an Order of the Court for all purposes and shall be enforceable under the Code of Civil Procedure, 1908 in the same manner as if it were an Order of the Court,*" and

[51] Law Commission of India, The 246th Report on the Amendments to the Arbitration and Conciliation Act, 1996, ¶ 46, *available at* http://lawcommissionofindia.nic.in/reports/Report246.pdf [*hereinafter* "246th Report"].

additionally, recommended providing explicit power to the tribunal to grant interim injunctions.[52]

The recommendations were accepted by the 2015 Amendment. Section 17(1)(ii)(d) of the Arbitration Act now empowers a tribunal to grant interim injunctions in arbitral proceedings, and Section 17(2)[53] makes the orders of a tribunal enforceable in the same way as an order of the court under the CPC.

Section 17(1)(ii)(e) of the Arbitration Act further provides that "*the arbitral tribunal shall have the same power for making orders, as the court has for the purpose of, and in relation to, any proceedings before it.*" It is noteworthy that, although pursuant to Section 19(1) a tribunal is not bound by the Indian Evidence Act of 1872 or the CPC, the Law Commission did note that the changes made to Section 17 of the Arbitration Act were to "*provide the arbitral tribunal the same powers as a civil court in relation to grant of interim measures.*"[54]

On the basis of the above, it is clear that the Law Commission's recommendations were modelled on the powers of Indian courts to grant interim injunctions and (by implication) the principles applied by Indian courts in granting such injunctions, since the remedy of interim injunctions in arbitration is not given to India-seated tribunals by Indian common law. The authors have earlier described how the issue of interim injunctions was the subject of a specific recommendation by the Law Commission of India in 2014, which was implemented by the Indian legislature by the introduction of sections 17(1)(ii)(d) and 17(2) of the Arbitration Act. Thus, it would be within the reasonable expectation of both the parties and the

---

52 *Id.* at 51.

53 Arbitration Act § 17(2) ("Subject to any orders passed in an appeal under section 37, any order issued by the arbitral tribunal under this section shall be deemed to be an order of the Court for all purposes and shall be enforceable under the Code of Civil Procedure, 1908 (5 of 1908), in the same manner as if it were an order of the Court.").

54 246th Report, *supra* note 49, at 51.

tribunal to exercise that power in the same manner that the courts would exercise it.

In addition to the applicability of local standards on the tribunal's power to grant interim relief, they are also applicable on the power of the courts to grant interim relief under Section 9 of the Arbitration Act. In this regard, the Indian Supreme Court in *Adhunik Steels* v. *Orissa Manganese and Minerals Pvt. Ltd.*[55] held that this power was not "*totally independent of the well-known principles governing the grant of an interim injunction that generally govern the courts in this connection.*"[56] Subsequently, the Gujarat High Court in *Essar Oil Ltd.* v. *United India Insurance Co.*[57] reiterated the view of the Supreme Court of India, by conducting "*a detailed analysis of the very possibility of incorporating other statutes which are supplementary to the Arbitration Act, building up the argument that where there is a procedural need or lacunae, other acts can be interpreted in furtherance of the Act.*"[58] The fact that there is a procedural need and a lacuna regarding the applicable standards for granting interim injunctions under the Arbitration Act may be a practical reason for India to adopt the well-known principles set out under the CPC for the granting of interim injunctions by India-seated arbitrations.

Second, the *prima facie case* test is globally recognized and has been relied upon by tribunals when considering requests for injunctions.[59] In this regard, it has been noted by Redfern and Hunter that "*[t]raditionally, arbitrators have looked to concepts common to most legal systems in the granting of such measures – such as the need to establish a prima facie case on the merits and the risk of serious and*

55 Adhunik Steels v. Orissa Manganese and Minerals Pvt. Ltd., (2007) 7 SCC 125 (India).
56 *Id.* ¶ 21.
57 Essar Oil Ltd. v. United India Insurance Co., 2014 SCC OnLine Guj 6737 (India).
58 Sarthak Malhotra & Sujoy Sur, *Standards Applicable To Interim Reliefs In India: A Comprehensive Analytical Investigation*, 5(1) INDIAN J. ARB. L., 183, 192 (2016).
59 YESILIRMAK, *supra* note 1, at 178, *citing* ICC Interim Award no. 9301 of 1997 (unpublished); ICC Final Award 5804 of 1989, 4(2) ICC INT'L CT. ARB. BULL. 76 (1993).

irreparable harm."[60] Thus, the *prima facie* test itself is possibly a candidate with sufficient international standing to qualify as an archetypal form of international standard, especially to parties, counsel and arbitrators coming from civil law countries.

Third, there are also clear practical benefits to applying the standards prescribed by the arbitration law of the seat, such as greater legal certainty, transparency and predictability. Unlike arbitration proceedings—where the awards and orders are inaccessible, owing to their confidential nature—court judgments are public, and thus both the parties and tribunal will possess a clear view of the standards to be applied to the particular types of interim injunctions, and to the particular circumstances. Applying a set of well-known and well-established standards holds immense practical benefits, since, by definition, applications for interim injunctions in arbitrations will be filed under circumstances of urgency. Counsel will be briefed and given little time to prepare their applications to the tribunal, most of which will be occupied with taking instructions on the factual history of the case leading up to the need for an interim injunction, and preparing the application papers. Little time will be available for the counsel involved to undertake legal research on the proper international standards applicable for interim injunctions (unless they have had previous experience of making such applications applying such standards). If they were to undertake urgent research on the appropriate international standards, they would have to read, for example, over a hundred pages of text from Born's treatise (and many of the citations of authorities in the footnotes). On the other hand, if the counsel instructed are based in India, they will be familiar with the standards adopted by Indian courts for the granting of interim injunctions. This may well be why the legislature has not sought to set out such standards in the Arbitration Act, in the expectation (and wish) that,

[60] REDFERN & HUNTER ON INTERNATIONAL ARBITRATION 315 (Nigel Blackaby, Constantine Partasides, Alan Redfern & Martin Hunter eds., 6th ed. 2015).

since India-seated tribunals are given the same powers of issuing interim injunctions (as described earlier) as the courts, it would be natural for India-seated tribunals to apply Indian standards when granting interim injunctions (which is an Indian remedy with Indian characteristics, such as departing from the *American Cyanamid* principles).

Adopting Indian standards would give both counsel and tribunals the benefit of having the accumulated knowledge and experience contained in the vast Indian jurisprudence on the subject. This will inform and enable relevant submissions, which will be easily understood and more likely to be appreciated by the tribunal in terms of simplicity and understanding of the law. Tribunals can also be assured that the crux of most disputes—the facts—will be the focus of arguments. Moreover, the applicant party would effectively be armed with a better view of the relative strength of its case and the predictability of the outcome of its application for an interim injunction.

The authors neither contend that the standards applied by Indian courts should mandatorily be applicable to all international commercial arbitrations seated in India, nor that the parties cannot contract out of these standards. Instead, they submit that, on the basis of the discussion above, especially the use of the term "*interim injunction*" in Section 17(1)(ii)(d) of the Arbitration Act (which is a term not derived from international arbitration rules but from domestic court practice), Indian standards are mandatory in the sense that it was clearly the legislative intention that these standards should be applicable by default in the absence of an express agreement between the parties to apply international standards (or indeed any other standards).

THE MEANING OF VICTORY: DAMAGES IN THE SPANISH RENEWABLE ENERGY CASES

Carlos Molina Esteban[1]

Abstract

The Spanish renewable energy cases are a unique phenomenon in which over 50 investment arbitration cases have been filed based on a common set of legislative measures modifying and repealing the regulatory regime created under Royal Decree 661/2007. A majority of published awards have been decided in favour of investors, yet quantum determinations in these cases vary significantly. This article analyses the Spanish renewable energy cases from a damages' perspective, aiming to find similarities and differences as to how these tribunals calculate damages. In doing so, it answers the following key questions: What different conclusions do tribunals reach regarding quantum? Why do they reach such conclusions? What parameters do tribunals take into account? Do determinations regarding such parameters affect the damages awarded? The findings on quantum can turn a case decided in favour of the investor into a pyrrhic victory. This proposition is showcased uniquely well in the Spanish context since all these cases share a common legislative canvas.

I. Introduction

[1] Carlos Molina Esteban: Double Degree in Law and Business Administration at ESADE Law & Business School, Barcelona; LLM in Transnational Arbitration and Dispute Settlement at Sciences Po Law School, Paris; Attorney at B. Cremades & Asociados, Madrid at the moment of submission of this article. This text is based on the personal opinion of the author and does not necessarily reflect the views of the law firm with which he is associated or any of the clients of that firm.[Editor's Note: This article reflects the state of the author's knowledge on October 30, 2021 and has not been modified or altered by the author since that date.]

The Spanish cases on renewable energies ["**Spanish Cases**"] have had a decisive impact on the arbitration landscape in Spain. Over 50 investment arbitration cases amounting to an aggregate 7.5 to 8 billion Euro have been filed on the basis of a single legislative measure, the Royal Decree 661/2007,[2] and a single treaty, the Energy Charter Treaty ["**ECT**"]. This is a unique phenomenon in investment arbitration altogether.

While much has been written about these cases, the present article aims to analyse them not from the perspective of merits, but that of quantum. As the author will examine over the course of this article, the facts surrounding most of the Spanish Cases pose some very interesting questions relating to damages; for instance, have all awards reached similar conclusions when it comes to damages? If not, how have particular assumptions regarding key valuation parameters influenced final determinations on quantum? And how do such parameters interact with each other?

This article aims to answer some of these questions. At the outset, this article provides a primer on damages **[Part II]**, and then briefly presents the sequence of legislative reforms that led to Spain's investment arbitration debacle **[Part III]**. It subsequently analyses some of the most interesting decisions regarding quantum **[Part IV]**. Finally, it draws conclusions as to how tribunals have decided on quantum in the Spanish Cases and to what extent the consideration of specific valuation parameters influenced the damages awarded **[Part V]**.

---

2 Names of Spanish norms will be cited using the following abbreviations: (i) "OM" stands for Orden Ministerial, a statutory regulation adopted by ministerial departments (in this case the Ministry of Industry, Energy and Tourism), (ii) "R.D." stands for Real Decreto, a statutory norm emanating from the government complementing or developing laws, (iii) "R.D.L" or "R.D.-Ley" stands for Real Decreto Ley, a norm emanating from the government with the force of law. This norm can theoretically only be adopted in cases of "extraordinary and urgent necessity" and has to be validated ex post by parliament, and (iv) "Ley" or "Law" means a statutory rule with force of law emanating from the legislative power.

II. A primer on damages

While this article does not aim to explain in detail how damages are calculated in investment arbitration, it will review some of the basic principles and practices, which might help understand the reasoning of the tribunals in the Spanish Cases.

First, we should keep in mind that in all cases decided in favour of the investor, tribunals found the State to be in breach of the fair equitable treatment standard ["**FET**"] contained in Article 10(1) of the ECT. The ECT does not, however, contain rules on compensation for breaches of such standard.[3] Accordingly, tribunals assess damages on the basis of customary international law. Under such standard, damages aim to repair the consequences of a breach or unlawful act. As such, the principle of *restitutio in integrum* is prevalent. As stated by the Permanent Court of International Justice in the oft-cited, *Factory at Chorzów (Germany* v. *Poland)* ["**Factory at Chorzów**"], "*reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed.*"[4] Article 31.1 of the International Law Commissions' Articles on State Responsibility ["**Articles on State Responsibility**"] further establishes that "*[t]he responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.*"[5] As stated by some tribunals, such as *Lemire* v. *Ukraine*, this requires

3 In fact, the Energy Charter Treaty (ECT) only contains rules on compensation for expropriation contained in Article 13(1) of the ECT.

4 Factory at Chorzów (Ger. v. Pol.), Judgment, 1928 P.C.I.J. (ser. A) No. 17, at 47 (Sept. 13, 1928). According to the Factory at Chorzów case, restitution as a payment of a sum compensating for the loss should only be granted if restitution in kind is not possible.

5 Int'l Law Comm'n, Draft Articles on the Responsibility of States for Internationally Wrongful Acts with Commentaries on its Fifty-Third Session, U.N. Doc. A/56/10 (2001), *reprinted in* [2001] 2 Y.B. INT'L COMM'N 30, 107, U.N. Doc. A/CN.4/SER.A/2001/Add.1, art. 31.1.

compensating as per Article 36.2 of the Articles on State Responsibility, i.e., "*any financially assessable damage including loss of profits insofar as it is established.*"[6]

In order to implement this basic principle in the calculation of damages, as put by Irmgard Marboe, "*[i]t is necessary to create a hypothesis to how the financial situation of the injured party 'in all probability' would be in the absence of the unlawful act. Then this hypothetical situation must be compared with his or her actual situation.*"[7] This must, however, be translated into a valuation method.

Marboe describes two main categorizations of valuation methods, *first*, the so-called subjective-concrete valuation, which requires methods reflecting the concrete loss incurred by the concerned person, not being primarily oriented to determine the market value as a basis for damages and, *second*, the abstract-objective valuation, which requires determining the market value of the investment be it through stock prices, multiples, or, more notably, the Discounted Cash Flow ["**DCF**"] method.[8] As we will explore below, the latter DCF method has been more widely used in the Spanish Cases[9] and will be the only valuation method that the author will now address in some detail.

According to this methodology, damages are calculated as a difference between the cash flows the investment would have generated without the breach of a given treaty (the so-called "*But-For scenario*") and the cash flows received in reality (the real scenario). The calculation of both scenarios requires a forecasting exercise in which, *inter alia*, past performance, company's business plans, value drivers, and economic circumstances[10] are

6 Joseph Charles Lemire v. Ukraine (II), ICSID Case No. ARB/06/18, Award, ¶ 151 (Mar. 28, 2011).

7 IRMGARD MARBOE, CALCULATION OF COMPENSATION AND DAMAGES IN INTERNATIONAL INVESTMENT LAW 38 (2d. 2017) [*hereinafter* "MARBOE"].

8 *Id.* at 40–41.

9 In fact, as the author will explain later, they have found only one case which does not use the DCF method for valuation purposes.

10 MARBOE, *supra* note 6, at 244–256.

considered in order to estimate the future cash flows the investment would have generated both with and without (i.e., But-For) the treaty breach. The results of both scenarios are then compared with each other at a given point in time in order to assess damages.[11]

While the calculation of an asset's value using DCF is a complex and case-specific matter, the general formula used to calculate, for example, a company's current value of equity is as follows:

$$\text{Current Value}=CF_1/(1+r)^1+ CF_2/(1+r)^2+\ldots+CF_n/(1+r)^n+ TV_n/(1+r)^n$$

Thus, the current equity value calculated using DCF is the sum of projected cash flows (CF_1 to CF_n) discounted at the discount rate (r),[12] adding the discounted terminal value ["**TV**"] on top of it. As stated by Marboe, depending on the specificities of the case, TV can either be the going concern value, if there are future prospects for the investment or the liquidation value.[13]

Having explained the foregoing, the author will now address the legislative change that prompted many tribunals to reach the conclusion that Spain had breached the FET standard contained in the ECT. This will help us

---

11 *Id.* at 256.

12 *Id.* at 262–264. As stated by Marboe, the discount rate incorporates the systematic (market or diversifiable) risk. The undiversifiable or company specific risk is incorporated into the Cash Flow calculation. The so-called Weighted Average Cost of Capital (WACC) is often used as a discount rate. WACC incorporates two elements: Cost of Debt, usually the market rate a given company is paying on its debt, and Cost of Equity which can broadly be described as the return shareholders can expect to receive from their investment in the company. The calculation of the Cost of Equity is one of the trickier parts of the DCF analysis, requiring an extensive explanation of the Capital Asset Pricing Model (CAPM). Addressing this here would exceed the scope of this article. Lastly, the calculation of WACC requires multiplying the cost of each capital source by its relevant weight, then adding both products together.

13 *Id.* at 260. In the Spanish cases on renewable energies, as discussed in Part IV of this article, plants were deemed to have a specific operational lifetime, taken into account for valuation purposes.

understand how tribunals have applied this theoretical framework to the facts surrounding the Spanish Cases.

III. What happened? Spain's legislative framework

A. Spain's legislative framework (2007)

The regime created by R.D. 661/2007 does not exist in a vacuum but was preceded by several legislative steps aiming to make investment in the renewable energy sector more attractive. The author will present them briefly below.

The inception of a "*special regime*" applicable to *inter alia* renewable energy plants is found in Article 27 of the Law of the Electrical Sector, 1997 ["**LSE 1997**"],[14] Article 28 whereof further established that such plants may enjoy a different treatment according to their "*particular specificities.*"

While renewable energy production was marginal at that point in time, this was set to change in 2001, when, as a result of European Union ["**EU**"] Directive 2001/77/EC, Spain acquired a specific commitment with the EU to bring renewable energy production to encourage greater consumption of electricity produced from renewable energy sources.[15] In particular, Member states acquired an obligation to adopt and publish a report setting national indicative targets for renewable energy consumption; the European Commission being tasked with assessing the consistency of these targets with the global indicative target of 12 per cent of gross national energy consumption.[16]

In 2004, Spain undertook specific reforms to comply with these objectives, starting with the enactment of R.D. 436/2004, which established that companies under the special regime would be able to sell energy: (1) by

14 Law of the Electrical Sector (B.O.E. 1997, 285) (Spain).
15 Council Directive 2001/77/EC, art. 3, 2001 O.J. (L 283) 33 (EC).
16 *Id.* art. 3(4).

ceding it to the distributor company at a fixed regulated price;[17] or (2) by selling the energy freely in the market receiving an incentive[18] and a premium[19] on top of the obtained price. These measures did not, however, have the intended effect as the incentives they provided were considered to be too low and fluctuating to attract meaningful investments.[20]

In 2005, pursuant to *inter alia* EU Directive 2001/77/EC, Spain introduced the "*Renewable Energies Plan in Spain 2005–2010*" ["**PER**"],[21] which established an ambitious objective of bringing renewable to constitute 29.4 per cent of total production by 2010.[22] Importantly, however, this plan also mentioned the concept of "*the rate return of a typical or model plant,*" which was situated at an Internal Rate of Return ["**IRR**"] of around seven per cent.[23] As the author will examine infra, this concept would be of key importance, given that the 2013 regime would be based on the expected return of a "*typical facility*."

To achieve its objective, the Spanish Government passed its "*star*"-reform, which effectively constitutes the basis for all investment claims against

---

17 R.D. 436/2004, Establishing the Methodology for Updating and Systematising the Legal and Economic Regime of Electric Energy Production in the Special Regime art. 22 (B.O.E. 2004, 75) (Spain).

18 *Id.* art. 25.

19 *Id.* art. 24.

20 General Secretariat of Energy, Directorate General for Energy Policy and Mines, *La Energía en España 2004*, at 115, table 8.5, *available at* https://energia.gob.es/balances/Balances/LibrosEnergia/Energia_2004.pdf. It should be noted that the Spanish Supreme Court issued various decisions upholding the legality of the reforms contained in Royal Decree 463/2004. The Supreme Court thus indicated that legislative change in the renewable energy compensation scheme was possible.

21 This Plan was a revised version of the earlier "Renewable Energies Plan in Spain 2000-2010."

22 The Instituto para la Diversificación y Ahorro de la Energía (IDAE), Plan de Energías Renovables en España 2005–2010 (Aug. 8, 2005), at 7.

23 *Id.* at 274.

Spain: R.D. 661/2007.[24] This norm created a stable incentive system which guaranteed high returns for producers under the special regime, *inter alia*, renewable energy producers, who enjoyed the following:

- A priority access to the grid.[25]
- An option to either sell their electricity at a fixed rate (fixed option) or at a variable price (variable option) with the possibility of obtaining a premium on top of the market price.[26] If the market price was high enough to cover production costs, the premium would not be paid (upper limit), it would be paid, however, if the market price fell below a certain threshold (lower limit).
- A guarantee that this incentive system would be applicable for the entire operational lifetime of each facility.[27]

Shortly after the enactment of the R.D. 661/2007, the LSE 1997 was amended,[28] and in 2008 the *Instituto para la Diversificación y Ahorro de la Energía* (IDAE) further tried to attract investors by issuing a pamphlet under the slogan "*the sun can be yours.*"[29]

B. Spain's legislative framework (2013)

24 R.D. 661/2007, Regulating Electricity Production Under the Special Regime (B.O.E. 2007, 126) (Spain).

25 *Id.* art. 17(e).

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

27 Under article 44(1) of R.D. 661/2007 tariffs and premiums, as well as the upper and lower limits would be adjusted by reference to fuel price indexes and the Consumer Price Index (CPI). Furthermore, article 44(3) provided that from 2010 onwards all these elements would be reviewed, however a "reasonable return" would always be guaranteed.

28 Law 17/2007, modifying Law 54/1997 of the Electrical Sector, to Adapt it to Parliament and Council Directive 2003/54/CE concerning Common Rules for the Internal Market in Electricity (B.O.E. 2007, 160) (Spain).

29 While not critical to the calculation of damages, this pamphlet was later used by investors to prove the State's representations to them.

These measures were very successful in attracting investors. As a result, by 2010, renewable energies had become an important source of energy production in Spain.[30] At the same time, however, these measures led to the accumulation of an enormous tariff deficit. Tariff deficit can be defined as the (negative) difference between the regulated price a given utility producer is allowed to charge (the so-called tariff) and its cost per unit.[31] Such deficit "*is accumulated due to the fact that the regulated tariffs which should cover the systems' operating costs, including e.g., support to renewables, are either set too low or not allowed to increase at a pace that covers rising production or service costs.*"[32]

Under the circumstances of the 2008 crisis, the Spanish Government sought to control this gaping tariff deficit and, consequently, modified the regime created by the R.D. 661/2007. For the purpose of damages, it is critical to understand that the 2007 regime was not repealed immediately by a single measure. Instead, a plethora of measures slowly cut back on the benefits provided by the R.D. 661/2007 from 2009 to 2013 and only then, from 2013 to 2014, was it abolished completely.

As explained in Part IV.B, this opens an interesting debate as to which measure exactly was the one that *broke the camel's back,* leading to a potential infringement of the FET standard. This had a crucial impact on damages assessment, which is why we will now briefly present the chronology of

30 The Instituto para la Diversificación y Ahorro de la Energía (IDAE), Resumen del Plan de Energías Renovables 2011–2020 (July 26, 2011), at 5–6, figures 2.1 & 2.2. By 2010 renewable energies represented 13.2 per cent of total energy consumption and 33.3 per cent of total electric production.

31 Alan V. Deardorff, *Deardorffs' Glossary of International Economics*, UNIV. MICH., *available at* http://www-personal.umich.edu/~alandear/glossary/t.html.

32 Asa Johannesson Linden, Fotios Kalantzis, Emmanuelle Maincent & Jerzy Pienkowski, *Electricity Tariff Deficit: Temporary or Permanent Problem in the EU?*, EUROPEAN ECONOMY, ECONOMIC PAPERS 534 7 (2014).

events that led to the eventual repeal and substitution of the framework created by R.D. 661/2007.[33]

The first measure affecting the 2007 regime was R.D.L. 6/2009, which sought to create mechanisms to finance the tariff deficit and created a registration mechanism for plants under the special regime.[34] Access to the tariffs and premiums of R.D. 661/2007 was made dependent on the fulfilment of certain administrative and financial conditions.[35]

In 2010–2013 several measures were introduced; these, while still altering the 2007 regime, did not go as far as the later 2013–2014 measures. Tribunals often referred to these as "*Regulatory Framework II*." These were as follows:

- R.D.L. 1614/2010,[36] limited the amount of equivalent working hours being eligible to receive a premium for wind and thermoelectric plants.[37] R.D.L. 14/2010,[38] did the same thing for solar power plants.

- R.D. 1565/2010,[39] partially amended R.D. 661/2007, establishing further technical requirements in order to "*guarantee the functioning of*

---

33 This does not aim to be a complete compendium of all measures affecting the regime created under R.D. 661/2007, but merely covers some of the most important norms.

34 R.D.L. 6/2009, Approving Specific Measures in the Energy Sector and the Social Bonus (B.O.E. 2009, 111), arts. 1 & 4 (Spain).

35 *See, e.g., id.* art. 4.2.

36 R.D. 1614/2010, Regulating and Amending Certain Aspects Regarding Electricity Generation Using Solar Thermoelectric and Wind (B.O.E. 2010, 298) (Spain).

37 *Id.* art. 2. This article includes a chart stating how many yearly hours have a right to a premium for each installation type. If a given plant functions beyond those hours, the electricity produced in those additional operation hours will be barred from receiving a premium.

38 R.D.L. 14/2010, Establishing Urgent Measures for the Correction of the Tariff Deficit in the Electricity Sector (B.O.E. 2010, 312) (Spain).

39 R.D. 1565/2010, Regulating and Amending Certain Aspects Related to the Activity of Generating Electricity Under the Special Regime (B.O.E. 2010, 283) (Spain).

the system"[40] and limiting the number of years during which photovoltaic plants would be subject to the regulated tariffs under R.D. 661/2007 to twenty five.[41]

- Fiscal Measures for Energy Sustainability Law 2012[42] ["**FMES 2012**"] imposed a seven per cent tax on the total value of all energy introduced into the national grid by all producers.

- R.D.L. 1/2012,[43] made the incentives created by RD 661/2007 inapplicable to unregistered and new plants[44] and suspended registration of new facilities with the pre-assignment registry.[45]

- R.D.L. 2/2013 modified the remuneration scheme under the variable option.[46] Some investors found that this change constituted an effective elimination of such option.[47]

In 2013–2014, the most far-reaching measures were implemented. These measures were collectively referred to as "*Regulatory Framework III*" by many tribunals, which largely considered these measures to breach FET:

---

40 *Id.* Exposición de motivos.

41 *Id.* art 3.

42 Fiscal Measures for Energy Sustainability Law, art. 8, B.O.E. 2012, 312 (Spain).

43 R.D.L. 1/2012, Suspending the Procedures for Pre-Allocation of Remuneration and Abolishing Economic Incentives for New Installations For the Production of Electrical Energy From Cogeneration, Renewable Energy Sources and Waste (B.O.E. 2012, 24) (Spain).

44 *Id.* art. 3.

45 *Id.* art. 4.

46 R.D.L. 2/2013, On Urgent Measures in the Electrical System and the Financial Sector (B.O.E. 2013, 29), art. 2 (Spain).

47 *See, e.g.,* Infrastructure Services Luxembourg S.à.r.l. and Energia Termosolar B.V. (formerly Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V.) v. Kingdom of Spain, ICSID Case No. ARB/13/31, Award, ¶ 144 (June 15, 2018) [*hereinafter* "Antin"].

- R.D.L. 9/2013[48] repealed R.D. 661/2007,[49] substantially changing the incentive system for renewable energies, creating a system providing "*specific remuneration*" based on "*standard costs*" per unit of power plus "*standard operating costs*" of a "*typical plant,*" the latter term being defined as "*an efficient and well-managed company.*"[50] It aimed to offer producers a "*reasonable return.*"[51]

- Law of the Electrical Sector, 2013 ["**LSE 2013**"][52] superseded L.S.E 1997, formally eliminating the distinction between the ordinary and the special regimes. Some investors also argued that this Law eliminated the priority access to the grid and priority of dispatch that producers under the special regime had enjoyed until then.[53]

Spain further carried out the implementation of LSE 2013 in 2014 via the following measures:

- R.D. 413/2014,[54] defined the concept of the *typical facility,*[55] establishing criteria to apply the new remuneration regime to each installation type and explaining in detail how such remuneration should be calculated.

48 R.D.L. 9/2013, Adopting Urgent Measures For Guaranteeing the Financial Stability of the Electricity System (B.O.E. 2013, 167) (Spain).
49 *Id.* Disposición derogatoria única.
50 *Id.* art. 1.2.
51 *Id.* Disposición adicional primera.
52 Law of the Electrical Sector (B.O.E. 2013, 310), art. 6 (Spain).
53 *See, e.g.,* Antin, ICSID Case No. ARB/13/31, Award, ¶ 150 (June 15, 2018) *citing* Law of the Electrical Sector (B.O.E. 2013, 310), art. 26.1 (Spain).
54 R.D. 413/2014, Regulating the Activity of Electricity Production From Renewable Energy, Cogeneration and Waste (B.O.E. 2014, 140) (Spain).
55 *Id.* art. 13.

- O.M. IET/1045/2014,[56] which established remuneration parameters for renewable energy producers. It further set out that the reasonable rate of return under R.D.L. 9/2013 amounted to an IRR of 7.398 per cent, which was later updated to 7.09 per cent. Note that this metric was, in fact, very similar to that provided by the PER back in 2005. Furthermore, this figure of an IRR of 7.398 per cent influenced the findings on the merits and quantum of many tribunals.

Importantly, the new regime created in 2013–2014 established that past payments made under the 2007 regime would be taken into account in order to calculate the subsidies to be perceived under the new regime. As explained by the Tribunal in *RREEF Infrastructure (G.P.) Ltd. and RREEF Pan-European Part IV Infrastructure Two Lux S.à r.l.* v. *Kingdom of Spain* ["**RREEF**"][57] and further expounded by the Tribunal in the *BayWa r.e. Renewable Energy GmbH and BayWa r.e. Asset Holding GmbH* v. *Spain* ["**BayWa**"], these measures have "*the effect of clawing back remuneration to which the investor had a right at the time the payment was made,*"[58] such retroactivity applying since the day of the enactment of R.D.L. 9/2013.[59]

---

56 O.M. IET/1045/2014, Approving the Remuneration Parameters For Standard Facilities, Applicable To Certain Electricity Production Facilities Based On Renewable Energy, Cogeneration and Waste (B.O.E. 2014, 150) (Spain).

57 RREEF Infrastructure (G.P.) Ltd. and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain, ICSID Case No. ARB/13/30, Decision on Responsibility and on the Principles of Quantum, ¶¶ 328–329 (Nov. 30, 2018) [*hereinafter* "RREEF"].

58 BayWa r.e. Renewable Energy GmbH and BayWa r.e. Asset Holding GmbH v. Kingdom of Spain, ICSID Case No. ARB/15/16, Decision on Jurisdiction, Liability and Directions on Quantum, ¶ 495 (Dec. 2, 2019) [*hereinafter* "BayWa"].

59 BayWa, ICSID Case No. ARB/15/16, Jurisdiction, Liability and Directions on Quantum, ¶ 335 (Dec. 2, 2019); BayWa, ICSID Case No. ARB/15/16, Award, ¶¶ 19–20 (Jan. 25, 2021).

Having analysed the Spanish legislative framework and its evolution, the author will analyse arbitral precedents on the matter, focusing on how tribunals calculated costs based on these facts in Part IV of this article.[60]

IV. The Spanish cases on renewable energies

An analysis on every single parameter used by each tribunal in the Spanish Cases to determine damages would far surpass the scope of this article. Instead, this article focuses on some overarching discussion points analysed by close to all tribunals, namely: (i) the choice of valuation method, (ii) the determination of which measures constituted a violation of the ECT, (iii) the assessment of the valuation date, (iv) the acceptance of historic losses (or lack thereof),[61] and (v) the expected lifetime of the plants.[62]

All of these parameters have a key impact on valuation in general, and DCF calculation in particular (as explained in our in Part II): (i) affects the very method used to calculate damages, different valuation methods being susceptible of yielding different results; (ii) establishes which measures should be taken into account in the calculation of the But-For Scenario and which shouldn't, accordingly affecting, for example, the calculation of cash flows, (iii) sets the point in time in which damages should be calculated, affecting both, the condition of the investment and the information available to determine its value, (iv) entails analysing whether damages prior to the valuation date should be considered, and (v) establishes the overall timeline for the calculation and the amount of cash flows to consider.

60 The author will focus his analysis on cases decided in favor of the investor, since cases won by the state (*inter alia* Charanne, Isolux and Stadtwerke München) did not award any damages to investors.

61 As we will see, points (iii) and (iv) are closely related.

62 Moreover, the author will not be analyzing each single case (many of the Spanish renewable energies cases still being pending). Instead, he will analyze the cases contained in *infra* Table 1.

Having stated this, the author analyses the Spanish Cases in the following sub-Parts.

A. The valuation method used

As mentioned earlier, DCF is the valuation methodology most widely used in the Spanish Cases. However, its application has been a contentious issue.

In a substantial number of cases, Spain made an argument that the DCF methodology should not be used, alleging, *inter alia*, that given the long life cycles of the plants, such method would offer "*a high level of uncertainty*"[63] and that the use of this methodology would be contrary to relevant decisions of the Spanish Supreme Court.[64] Furthermore in some cases such as *Masdar Solar & Wind Cooperatief U.A.* v. *Kingdom of Spain* ["**Masdar**"],[65] *Infrastructure Services Luxembourg S.à.r.l. and Energia Termosolar B.V. (formerly Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V.)* v. *Kingdom of Spain* ["**Antin**"],[66] and *Watkins Holdings S.à r.l.* v. *Kingdom of Spain* ["**Watkins Holdings**"],[67] Spain argued that the lack of a sufficient financial record for the plant made a cash flow projection untenable. Accordingly, Spain found that an investment-based valuation method should be used instead of DCF.[68] Such a valuation method entails finding the value of

---

63 Eiser Infrastructure Ltd. and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain, ICSID Case No. ARB/13/36, Final Award, ¶ 436 (May 4, 2017) [*hereinafter* "Eiser"]. *See also* Antin, ICSID Case No. ARB/13/31, Award, ¶ 597 (June 15, 2018).

64 Antin, ICSID Case No. ARB/13/31, Award, ¶ 593 (June 15, 2018); BayWa, ICSID Case No. ARB/15/16, Decision on Jurisdiction, Liability and Directions on Quantum, ¶ 604 (Dec. 2, 2019); Novenergia II - Energy & Environment (SCA) (Grand Duchy of Luxembourg), SICAR v. Kingdom of Spain, SCC Case No. 2015/063, Final Award, ¶ 773 (Feb. 15, 2018) [*hereinafter* "Novenergia"].

65 Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain, ICSID Case No. ARB/14/1, Award, ¶ 539 (May 16, 2018) [*hereinafter* "Masdar"].

66 Antin, ICSID Case No. ARB/13/31, Award, ¶ 619 (June 15, 2018).

67 Watkins Holdings S.à r.l. v. Kingdom of Spain, ICSID Case No. ARB/15/44, Award, ¶¶ 658–660 (Jan. 21, 2020) [*hereinafter* "Watkins Holdings"].

68 *See, e.g.,* Masdar, ICSID Case No. ARB/14/1, Award, ¶ 571 (May 16, 2018); Antin, ICSID Case No. ARB/13/31, Award, ¶ 609 (June 15, 2018); BayWa, ICSID Case No.

different component parts, with their sum determining the value of the overall object. In order to do this, all assets and liabilities are revalued to their current values, with the difference between assets and liabilities being the value of the object.[69]

Spain's arguments in favour of using an investment-based valuation method were, for the most part, dismissed by the tribunals.[70] Most of them gave special weight to the widespread acceptance of the DCF method (both in professional literature and by arbitral tribunals),[71] further finding that the financial record of the plants was generally sufficient to establish sound cash flow projections.[72] As explained in *Eiser Infrastructure Ltd. and Energía Solar Luxembourg S.à r.l.* v. *Kingdom of Spain* ["**Eiser**"],[73] *Masdar*,[74] and *Watkins*

ARB/15/16, Decision on Jurisdiction, Liability and Directions on Quantum, ¶ 606 (Dec. 2, 2019).

69 MARBOE, *supra* note 6, at 201–202.

70 Novenergia, SCC Case No. 2015/063, Final Award, ¶¶ 817–818, 820 (Feb. 15, 2018); Eiser, ICSID Case No. ARB/13/36, Final Award, ¶ 465 (May 4, 2017); Foresight Luxembourg Solar 1 S.Á.R1., et al. v. Kingdom of Spain, SCC Case No. 2015/150, Final Award, ¶ 477 (Nov. 14, 2018) [*hereinafter* "Foresight"].

71 Novenergia, SCC Case No. 2015/063, Final Award, ¶ 818 (Feb. 15, 2018); Eiser, ICSID Case No. ARB/13/36, Final Award, ¶ 465 (May 4, 2017); Foresight, SCC Case No. 2015/150, Final Award, ¶ 478 (Nov. 14, 2018); PV Investors v. Spain, PCA Case No. 2012-14, Final Award, ¶¶ 691–692 (Feb. 28, 2020) [*hereinafter* "PV Investors"].

72 Novenergia, SCC Case No. 2015/063, Final Award, ¶ 820 (Feb. 15, 2018) (operating history of 8 years); Masdar, ICSID Case No. ARB/14/1, Award, ¶ 581 (May 16, 2018) (operating history of less than 5 years); PV Investors, PCA Case No. 2012-14, Final Award, ¶ 691 (Feb. 28, 2020); InfraRed Environmental Infrastructure GP Ltd. v. Kingdom of Spain, ICSID Case No. ARB/14/12, Award, ¶ 535 (Aug. 2, 2019) [*hereinafter* "InfraRed"]; Cube Infrastructure Fund SICAV and others v. Kingdom of Spain, ICSID Case No. ARB/15/20, Decision on Jurisdiction, Liability and Partial Decision on Quantum, ¶ 478 (Feb. 19, 2019) [*hereinafter* "Cube"].

73 Eiser, ICSID Case No. ARB/13/36, Final Award, ¶ 465 (May 4, 2017). The Eiser Award was annulled on the grounds of improper constitution of the arbitral tribunal and serious departure from a fundamental rule of procedure. This had mainly to do with the existence of undisclosed ties between claimant's appointed arbitrator and claimant's quantum experts. While this is a fundamental development, we believe that the Tribunal's findings on merits and quantum still are useful for our analysis.

74 Masdar, ICSID Case No. ARB/14/1, Award, ¶ 582 (May 16, 2018).

Holdings,[75] renewable energy power plants rely on a simple business model, generating energy pursuant to mostly stable parameters. As put by *Foresight*, the DCF model suits "*the PV industry because of the predictability of PV facilities*."[76]

Novenergia II - Energy & Environment (SCA) (Grand Duchy of Luxembourg), SICAR v. *Kingdom of Spain* ["**Novenergia**"] further mentions that the DCF methodology was particularly well-suited for assessing regulated businesses such as the one at hand.[77] This reinforced the idea that even with a limited financial record, it was possible to estimate the plant's future cash flows accurately.

Lastly, the tribunals found that the Spanish Supreme Court's judgements on the matter were "*irrelevant and of no assistance to the evaluation of damages,*"[78] given that the tribunals rely on and have to assess damages on the basis of international law.[79]

An interesting exception to the foregoing is *NextEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.V.* v. *Kingdom of Spain* ["**NextEra**"]. In this case, the Tribunal found that, given the extremely limited financial record (the plants had been in operation for less than a

---

75 Watkins Holdings, ICSID Case No. ARB/15/44, Award, ¶ 689 (Jan. 21, 2020).

76 Foresight, SCC Case No. 2015/150, Final Award, ¶ 478 (Nov. 14, 2018).

77 Novenergia, SCC Case No. 2015/063, Final Award, ¶ 820 (Feb. 15, 2018); Similarly, Cube, ICSID Case No. ARB/15/20, Decision on Jurisdiction, Liability and Partial Decision on Quantum, ¶ 478 (Feb. 19, 2019) ("[The Tribunal] considers that this method [DCF], now well established in the practice of international investment tribunals, is appropriate in the present case. The Claimants' analysis focuses on the performance of specific plants which had an operating history, even if relatively short, in a highly-regulated industry; and it addresses the specific impact of the disputed measures in terms of the loss of cash flows to those plants.").

78 Novenergia, SCC Case No. 2015/063, Final Award, ¶ 819 (Feb. 15, 2018). *See also* Masdar, ICSID Case No. ARB/14/1, Award, ¶¶ 579–580 (May 16, 2018); Eiser, ICSID Case No. ARB/13/36, Final Award, ¶ 465 (May 4, 2017).

79 Novenergia, SCC Case No. 2015/063, Final Award, ¶ 819 (Feb. 15, 2018).

year), it was improper to use the DCF method.[80] Therefore, damages had to be assessed on the basis of the investment-based methodology instead.[81] The Tribunal concluded that "*Claimants are entitled to damages based on a return on the capitalized value of their assets as of 30 June 2016 on the basis of the [Weighted Average Cost of Capital] ["**WACC**"] of the Termosol Plants plus a premium of 200 bps.*"[82]

All in all, it is clear that, despite the exceptions such as *NextEra*, tribunals have preferred the DCF method over investment-based methods.[83] *Novenergia* is especially clear in stating that the DCF method is considered by many as the "*preferred method for valuation of income-earning assets.*"[84] Having established this, the author will now examine how tribunals have applied the DCF methodology in the Spanish Cases.

B. Measures breaching the FET standard and the date of the breach

As explained in Part II, providing general explanation of damages, the calculation of damages requires the comparison between the real scenario and the scenario "*But-For*" the treaty breach. Now, the question is what exactly constituted a breach of the ECT in the eyes of the Tribunals?

As mentioned earlier, the Spanish Cases focus their discussion on whether Spain's behaviour constituted a breach under the FET standard contained in Article 10(1) of the ECT. While the breach of other substantive protections such as expropriation under Article 13 of the ECT or the ECT

80 NextEra Energy Global Holdings B.V. & NextEra Energy Spain Holdings B.V. v. Kingdom of Spain, ICSID Case No. ARB/14/11, Decision on Jurisdiction, Liability and Quantum Principles, ¶¶ 643–647 (Mar. 12, 2019) [*hereinafter* "NextEra"].

81 *Id.* ¶ 650.

82 *Id.* ¶ 678.

83 Even *NextEra* recognized that the DCF methodology "is frequently invoked in investor-State arbitrations and has been applied by Tribunals." *See* NextEra, ICSID Case No. ARB/14/11, Decision on Jurisdiction, Liability and Quantum Principles, ¶ 643 (Mar. 12, 2019).

84 Novenergia, SCC Case No. 2015/063, Final Award, ¶ 818 (Feb. 15, 2018).

umbrella clause were invoked by some claimants,[85] these claims were largely unsuccessful. Most tribunals established that, while states can modify legislation, investors having no basis for an expectation that a given regime will remain unaltered,[86] Spain had breached the FET standard since it had "*eliminated a favorable regulatory regime previously extended to Claimants and other investors to encourage their investment in CSP. It was then replaced with an unprecedented and wholly different regulatory approach, based on wholly different premises.*"[87] Tribunals, such as that of *Novenergia*, further labelled the legislative change as "*radical and unexpected,*"[88] while *NextEra* mentions how the "*regime was fundamentally and radically changed,*"[89] being "*substantially different*"[90] from the regime under which the investment was made.

However, this does not put an end to our analysis. As explained previously in Part III, Spain's legislative framework experienced several changes between 2009 and 2014. This raises an important question as to which measures exactly constitute a fundamental and radical change that breaches the FET standard and which ones are covered by a state's right to regulate? This question, besides being fundamental to the calculation of the But-For scenario, is also of key importance to determine the valuation date. This is because most tribunals decided to set the valuation date (i.e., the date when

85 *E.g.,* Eiser, ICSID Case No. ARB/13/36, Final Award, ¶ 352 (May 4, 2017); Foresight, SCC Case No. 2015/150, Final Award, ¶¶ 423–431 (Nov. 14, 2018); Novenergia, SCC Case No. 2015/063, Final Award, ¶¶ 759–763 (Feb. 15, 2018); Cube, ICSID Case No. ARB/15/20, Decision on Jurisdiction, Liability and Partial Decision on Quantum, ¶¶ 452–454 (Feb. 19, 2019).

86 *E.g.*, Eiser, ICSID Case No. ARB/13/36, Final Award, ¶ 362 (May 4, 2017); NextEra, ICSID Case No. ARB/14/11, Decision on Jurisdiction, Liability and Quantum, ¶ 584 (Mar. 12, 2019); InfraRed, ICSID Case No. ARB/14/12, Award, ¶ 406 (Aug. 2, 2019); Antin, ICSID Case No. ARB/13/31, Award, ¶ 555 (June 15, 2018). As we will examine later Masdar, albeit having factual differences to other cases, is a notable exception to this.

87 Eiser, ICSID Case No. ARB/13/36, Final Award, ¶ 365 (May 4, 2017).

88 Novenergia, SCC Case No. 2015/063, Final Award, ¶ 695 (Feb. 15, 2018).

89 NextEra, ICSID Case No. ARB/14/11, Decision on Jurisdiction, Liability and Quantum, ¶ 599 (Mar. 12, 2019).

90 *Id.* ¶ 598.

damages start to be determined by projecting the cash flows forward through the usage of the DCF methodology) on the date they found the FET standard to have been breached. This, in turn, influences the analysis of the historic damages.[91] The author will analyse all of the above in due order.

Starting with the analysis as to which measures breached the FET standard, it must be pointed out that, while all claimants were affected by a common set of norms cutting back on the 2007 regime, tribunals have found different answers to the question at hand.

First, a substantial number of tribunals seem to agree that the 2013–2014 measures were the ones "*crossing the line*" and violating the FET standard.[92] The *Novenergia* tribunal is particularly clear about this. After listing all measures undertaken by Spain from 2010 to 2013, it found that the 2010 measures did not, in the Tribunal's view, "*fall outside the acceptable range of legislative and regulatory behaviour*."[93] Likewise, the *Novenergia* tribunal found that R.D. 2/2013 did not constitute a breach of FET, as it was not egregious

---

91 *See, e.g.,* Antin, ICSID Case No. ARB/13/31, Award, ¶¶ 667, 674 (June 15, 2018); Cube, ICSID Case No. ARB/15/20, Decision on Jurisdiction, Liability and Partial Decision on Quantum, ¶¶ 429, 482 (Feb. 19, 2019); Watkins Holding, ICSID Case No. ARB/15/44, Award, ¶¶ 570, 688 (Jan. 21, 2020).

92 Novenergia, SCC Case No. 2015/063, Final Award, ¶¶ 688–691, 697 (Feb. 15, 2018); Eiser, ICSID Case No. ARB/13/36, Final Award, ¶¶ 388–389, 418 (May 4, 2017); Antin, ICSID Case No. ARB/13/31, Award, ¶ 560 (June 15, 2018); Foresight, SCC Case No. 2015/150, Final Award, ¶ 398 (Nov. 14, 2018); NextEra, ICSID Case No. ARB/14/11, Decision on Jurisdiction, Liability and Quantum, ¶¶ 597–601 (Mar. 12, 2019). The Tribunal seems point out that the measures breaching the FET standard would be those identified as "Regulatory Framework III" which would include R.D.L. 2/2013, R.D.L. 9/2013, R.D. 413/2014, and Ministerial Order IET/1045/2014. *See id.* ¶ 523. InfraRed, ICSID Case No. ARB/14/12, Award, ¶¶ 454–456 (Aug. 2, 2019) (the Tribunal points out the L.S.E 2013 as the measure causing losses to the Claimants).

93 Novenergia, SCC Case No. 2015/063, Final Award, ¶ 688 (Feb. 15, 2018) (*citing* Summit Generation Ltd. and AES-Tisza Erömü Kft v. Republic of Hungary, ICSID Case No. ARB/07/22, Award, ¶ 9.3.73 (Sept. 23, 2010)).

enough to satisfy such standard.[94] At the same time, the Tribunal did not assess FMES 2012, over which it found that it lacked jurisdiction[95] (most other Tribunals addressing FMES 2012 allegations arrived to the same conclusion).[96] Accordingly the *Novenergia* award found that R.D.L. 9/2013, R.D. 413/2014, O.M. IET/1045/2014, and LSE 2013 (i.e., the Regulatory Framework III measures) were the measures breaching the FET standard.[97] The Tribunal in *Cube Infrastructure Fund SICAV* v. *Kingdom of Spain* ["**Cube**"] is even more specific in finding that "*the date of the breach*" was "*when the new regime presaged by R.D.L. 9/2013 was given concrete form by R.D. 413/2014 and MO IET/1045/2014.*"[98]

Watkins Holdings, while also finding that the FET standard was breached by the 2013–2014 measures, expressly mentions that not the measures individually but "*the Respondent's course of conduct in enacting the Disputed Measures [ranging from 2012–2014] in particular RDL 9/2013, Law 24/2013, RD 413/2014, Ministerial Order 1045/2014, taken as a whole*" violated the FET standard, stating that the violation crystallized on June 20, 2014, with the approval of O.M. IET/1045/2014.[99] Thus, *Watkins Holdings*, while reaching a similar conclusion that the FET standard was violated in 2014, looks at the FET breach from a slightly different perspective, not identifying that a specific measure "*crossed the line*" and breached FET (the other measures being covered by a State's "*right to regulate*"), but rather finding that a chain or accumulation of actions "*taken as a whole*" constituted the breach.

94 Novenergia, SCC Case No. 2015/063, Final Award, ¶ 689 (Feb. 15, 2018).

95 *Id.* ¶ 690.

96 *See, e.g.,* NextEra, ICSID Case No. ARB/14/11, Decision on Jurisdiction, Liability and Quantum, ¶¶ 372–373 (Mar. 12, 2019); (Spain) Foresight, SCC Case No. 2015/150, Final Award, ¶ 247 (Nov. 14, 2018).

97 Novenergia, SCC Case No. 2015/063, Final Award, ¶ 697 (Feb. 15, 2018).

98 Cube, ICSID Case No. ARB/15/20, Decision on Jurisdiction, Liability and Partial Decision on Quantum, ¶ 429 (Feb. 19, 2019).

99 Watkins Holdings, ICSID Case No. ARB/15/44, Award, ¶ 570 (Jan. 21, 2020).

Other awards, such as *Masdar*, go much further, establishing that the "*Claimant had legitimate expectations that the benefits granted by R.D. 661/2007 would remain unaltered.*"[100] This would mean that any derivation of the 2007 regime would infringe the FET standard. It is a more hardline approach, understandable, in part, under the circumstances of the case, since in *Masdar*, the investor had received specific commitments from the Ministry of Industry, Tourism, and Business that the plants "*qualified under the R.D. 661/2007 regime for their 'operational lifetime'.*"[101]

A slightly similar approach was adopted in *9REN Holding S.a.r.l* v. *Kingdom of Spain* ["**9REN**"], where the Tribunal "*substantially adopt[ed] the list of violations alleged by the Claimant,*"[102] which appear to include measures from 2010 all the way through 2014.[103] Nonetheless, it should be noted that 9REN does not assume that any change to the 2007 regime would breach the FET standard. In fact, a majority of the Tribunal believes that analysis of quantum should take into account "*the risk that a regulatory reduction in the FIT tariff would eventually be found by an investor state Tribunal not to have violated the ECT and therefore not to give rise to compensation.*"[104] Therefore, the Tribunal,

---

100 Masdar, ICSID Case No. ARB/14/1, Award, ¶ 521 (May 16, 2018).

101 *Id.* ¶¶ 519–520. Note that while Masdar is unique in that the investor was afforded "specific commitments" by the state the letters sent by the Ministry do not substantially expand or add on what was already stated in RD 661/2007, they seem to rather just repeat or mirror what was stated in the norm. It is thus debatable whether these commitments warrant treating Masdar differently to other investors investing under the same conditions and the same timeline. This seems to be the view of the Tribunal in 9REN, which stated "those letters simply confirmed what was already in RD 661/2007 and were issued after not before the claimant in that case made its investment. In the Tribunal's view, the clear and specific "guarantee" in RD 661/2007 satisfies the requisite degree of "specificity"" (*See* 9REN Holding S.a.r.l v. Kingdom of Spain, ICSID Case No. ARB/15/15, Award, ¶ 299 (May 31, 2019) [*hereinafter* "9REN"]).

102 9REN, ICSID Case No. ARB/15/15, Award, ¶ 309 (May 31, 2019).

103 *Id.* ¶ 300.

104 *Id.* ¶ 412(h).

by majority, concluded that some amount of regulatory risk should be reflected in the Award.[105]

BayWa, on the other hand, is more restrictive, finding that the only measure breaching the FET standard was the clawback of remuneration established under R.D.L. 9/2013, i.e., the fact that future payments under the new regime would take into account past payments made under the 2007 regime.[106] *RREEF* is similar to *BayWa* in that it finds that "*[t]he Respondent is in breach of its obligation under the ECT for the retroactive application of the new regime.*"[107] But *RREEF* also finds that Spain breached its obligation to offer the investor "*a reasonable return*" given that the "*return per plant is lower than the WACC +1% as defined by the Tribunal.*"[108] The Tribunal in *Infracapital F1 S.à r.l. & Infracapital Solar B.V.* v. *Kingdom of Spain* ["**Infracapital**"] reached a similar conclusion.[109]

Lastly, *PV Investors* v. *Kingdom of Spain* ["**PV Investors**"] offers yet another perspective. This Tribunal—like others which were decided in favour of the State such as in *Stadtwerke München GmbH, RWE Innogy GmbH* v. *Kingdom of Spain* ["**Stadtwerke München**"][110]—decided that, given that continuous changes to the regulatory framework had been implemented since the very inception of the special regime in the LSE 1997[111] and that the Spanish courts consistently held such changes to be in accordance with Spanish

105 *Id.* ¶ 395 (the dissenting arbitrator found that no adjustment for regulatory risk should be made).

106 BayWa, ICSID Case No. ARB/15/16, Decision on Jurisdiction, Liability and Directions on Quantum, ¶ 496 (Dec. 2, 2019).

107 RREEF, ICSID Case No. ARB/13/30, Decision on Responsibility and on the Principles of Quantum, ¶ 600(2) (Nov. 30, 2018).

108 *Id.* ¶ 600(3).

109 Infracapital F1 S.à r.l. and Infracapital Solar B.V. v. Kingdom of Spain, ICSID Case No. ARB/16/18, Decision on Jurisdiction Liability and Directions on Quantum, ¶¶ 820, 822(5), 793(d), 793(e) (Sept. 13, 2021) [*hereinafter* "Infracapital"].

110 Stadtwerke München GmbH, RWE Innogy GmbH, and others v. Kingdom of Spain, ICSID Case No. ARB/15/1, Award, ¶¶ 271-281 (Dec. 2, 2019).

111 PV Investors, PCA Case No. 2012-14, Final Award, ¶ 602 (Feb. 28, 2020).

Law,[112] investors could not reasonably expect an immutable legal framework. Hence, the only guarantee offered by Spain would have been that of providing a reasonable rate of return.[113] The Tribunal seems to envisage this "*reasonable return*" as a regulatory limit, i.e., Spain could legislate as long as the investor received a reasonable return on the investment, otherwise FET would be breached.[114] According to the Tribunal, this completely changes the logic as to how damages valuation should take place. Instead of having to assess liability first and then calculate damages "*in this particular case the quantification of the harm, if any, informs the finding on liability*."[115] Thus, instead of identifying specific measures breaching FET, the Tribunal (1) calculated the IRR that would have arisen for the plants in a scenario without the measures (estimated at seven per cent),[116] (2) calculated the IRR in the actual scenario,[117] and concluded that "*for 10 out of the 19 Claimant entities […], the IRR with the Disputed measures in place is below 7%.*"[118] In consequence, the Tribunal held that "*by reducing the reasonable rate of return below 7%, Spain acted unreasonably and disproportionately and hence violated FET. Therefore, the Claimant entities whose IRR with the Disputed Measures are lower than 7% are entitled to compensation,*"[119] which amounted to a total of 91.1 million Euro.[120]

112 *Id.* ¶ 611.
113 *Id.* ¶ 616.
114 *Id.* ¶ 619.
115 *Id.* ¶ 648.
116 *Id.* ¶¶ 709–710.
117 *Id.* ¶ 846.
118 *Id.* ¶ 847.
119 *Id.*
120 *Id.* ¶ 848. The Tribunal calculated compensation on a per-entity basis, 91,1 million Euro is the sum of all such compensations. It should be noted that the Claimant's in PV Investors had initially asked for a compensation amounting to USD 2.2 billion. Such negligible compensation arising from such a huge case can arguably be considered a victory for the State.

All in all, while a majority of tribunals seem to find that the 2013–2014 measures (i.e., Regulatory Framework III) were the ones breaching the FET standard, there are some tribunals that held otherwise, some found that all measures deviating from the 2007 regime breached FET. Others, however, found that only the remuneration clawback and/or the absence of a "*reasonable return*" infringed the ECT FET standard. An exception to the above is *PV Investors*, which found that no measure in particular breached FET. Instead, the economic effect of the measures altogether was such that it did not afford the Claimant a reasonable return on their investment, this being a breach of FET.

The above fits quite well into the framework created by Sergey Ripinsky for the Spanish Cases.[121] Ripinsky bases his analysis on (at the time) four cases (*Eiser*, *Novenergia*, *Antin*, and *Masdar*). He finds that, given that most tribunals decided that Spain could alter the 2007 framework as long as such change was not radical and fundamental, decisions on quantum should not be calculated under the assumption that the But-For scenario would be the "*pure*" 2007 regime.[122] First of all, he suggests that measures found not to be in breach of FET should be factored in, in the calculation of the But-For scenario.[123] This is a logical conclusion, consistent with the basic principles under *Factory at Chorzów* case, and it seems to have been applied by most tribunals. However, Ripinsky finds that the early awards he analysed looked at the new regime under the 2013–2014 measures "*as a whole*." An alternative approach would be dissecting the measures to find which aspect thereof breached FET.[124] Decisions such as *BayWa* appear to follow the latter approach in finding that only one aspect of a measures, i.e., the remuneration clawback, infringed FET, with all other measures having

121 Sergey Ripinsky, *Damages Assessment in the Spanish Renewable Energy Arbitrations: First Awards and Alternative Compensation Approach Proposal*, TDM 2 (2020).

122 *Id.* at 12.

123 *Id.* at 14–16.

124 *Id.* at 16.

to be included in the calculation of the But-For scenario. Ripinsky offers yet another alternative valuation approach: in situations in which a tribunal finds that Spain was only obliged to offer a "*reasonable return*" to investors, it should independently calculate such a reasonable rate, taking into account the specificities of each plant.[125] This reasonable return would be the But-For scenario that should then be compared with the real scenario.[126] Awards such as *PV Investors* seem to broadly follow this approach. Lastly, Ripinksy argued that tribunals may decide to calculate the But-For scenario on the basis of the pure 2007 regime, reducing such figure by a percentage "*representing the arbitrator's informed judgment – the extent, to which Spain went overboard.*"[127] While this approach would be the easiest to calculate, no tribunal to date seems to have followed it, probably on the basis that this approach is "*not rigorous from the financial-analysis perspective.*"[128]

The author is of the opinion that the "*approaches*" created by Ripinsky offer an excellent framework to categorize the Spanish Cases from a damages' perspective. In consequence, the author's analysis will be based on the following categories:

1. Tribunals finding that the FET standard was breached by the 2013–2014 measures "*as a whole,*" and that prior measures have to be factored in for the calculation of the But-for scenario. These include *Novenergia*, *Eiser*, *Antin*, *Watkins Holdings*, *Foresight*, *NextEra*, *Cube*, and *InfraRed Environmental Infrastructure GP Ltd.* v. *Kingdom of Spain* ["**InfraRed**"].

2. Tribunals finding that even the Regulatory Framework II (again taken as a whole) measures breached FET, consequently using something

125 *Id.* at 18.
126 *Id.*
127 *Id.* at 19.
128 *Id.*

close to the "*pure*" 2007 regime as the basis of their calculation of the But-for scenario. These include *Masdar* and, in part, *9REN*.[129]

3. Tribunals finding that only a specific aspect of the 2013–2014 regime breached FET. For instance, the remuneration clawback constituting the breach of the FET standard. These include *BayWa* and partially[130] *RREEF* and *Infracapital*.

4. Tribunals which considered that Spain breached FET because it failed to provide a "*reasonable rate of return*", such return having to be calculated independently by the tribunal. These include *PV Investors* and partially *RREEF* and *Infracapital*.

This categorization will serve our subsequent analysis. As will be examined in Parts IV.C and IV.D, the conclusions we reached in this section will play a major role in the choice of both the valuation date and the inclusion or exclusion of historic damages.

C. The determination of the valuation date

The determination of the valuation date plays a key role in valuation. As stated by Marboe, "*the value of an object changes constantly in the course of time. Furthermore, economic, social and political developments have a direct influence on it.*"[131] In consequence, the choice of valuation date affects both, the condition of

[129] We should take into account that, while 9REN seems to consider the Regulatory Framework II measures in its "list of violations," the majority of the Tribunal find that not all measures reducing the tariff would breach the ECT and that a regulatory risk should be considered in quantum assessment.

[130] RREEF and Infracapital do agree that the remuneration clawback breached the FET standard, however they also consider (in a similar fashion to PV Investors) that Spain failed to provide a reasonable rate of return, this also breaching FET. Thus, these two awards could be considered a "hybrid" between categories 3 and 4. The author decided to include them under 3 because PV Investors is rather unique in that it analyses quantum first and then goes on to decide whether, on the basis of its calculations, a breach of FET existed.

[131] MARBOE, *supra* note 6, at 129.

a given asset and the information available to determine its value.[132] The choice of a valuation date is often tied to whether the valuation is conducted on an *ex ante* or an *ex post* basis.[133] An *ex ante* valuation is one which only considers information available at the moment of a particular historic date (such as the date of the breach), while an *ex post* valuation is one that incorporates information after such date and until the date in which the valuation exercise is carried out.[134] Consequently, the two most used valuation dates are the date of the breach, commonly used in expropriation cases, and the date of the award, mostly used in non-expropriation cases.[135] Choosing the latter valuation date helps in arriving as closely as possible at full reparation,[136] however, given the length of arbitration proceedings, market volatility (for example, due to economic crisis) risks to "*result in large swings in value.*"[137] When it comes to FET breaches, many tribunals seem to have used an *ex-ante* approach, the valuation date either being the date of the first characterized violation of the standard[138] or the date corresponding to a culmination of events characterized as a breach of FET.[139]

---

132 *Id.*

133 ARIF H. ALI & DAVID L. ATTANASIO, INTERNATIONAL INVESTMENT PROTECTION OF GLOBAL BANKING AND FINANCE: LEGAL PRINCIPLES AND ARBITRAL PRACTICE 348–349 (2021) [*hereinafter* "ALI & ATTANASIO"].

134 *Id.* at 349.

135 *Id.* at 349–350. *See also* MARBOE, *supra* note 6, at 149.

136 MARBOE, *supra* note 6, at 149.

137 ALI & ATTANASIO, *supra* note 132, at 350.

138 Infracapital, ICSID Case No. ARB/16/18, Decision on Jurisdiction, Liability and Directions on Quantum, ¶ 819 (Sept. 13, 2021); Greentech Energy Systems A/S v. Italian Republic, SCC Case No. V 2015/095, Final Award, ¶ 565 (Dec. 23, 2018); SAUR International SA v. Republic of Argentina, ICSID Case No. ARB/04/4, Award, ¶¶ 165, 255–256 (May 22, 2014); Talsud S.A. v. United Mexican States, ICSID Case No. ARB(AF)/04/4, Award, ¶ 12.43 (June 16, 2010); Sempra Energy International v. Argentine Republic, ICSID Case No. ARB/02/16, Award, ¶ 209 (Sept. 28 2007).

139 Watkins Holdings, ICSID Case No. ARB/15/44, Award, ¶¶ 679–680 (Jan. 21, 2020); Crystallex International Corp. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB(AF)/11/2, Award, ¶ 855 (Apr. 4, 2016); Enron Corp. & Ponderosa Assets, L.P. v.

As the author will now examine, the tribunals in the Spanish Cases have been fairly consistent (despite some exceptions) in applying an *ex ante* valuation approach, setting the valuation date in June 2014.

First, most tribunals finding that the 2013–2014 measures were the ones breaching the FET standard also established that the valuation date should be June 20, 2014, which is the date when O.M. IET/1045/2014 was published and claimants considered the damage to their investment to have been consolidated.[140] A substantial number of tribunals thus found that the date of the FET breach was also the valuation date. As put by *InfraRed*, "*[t]he Tribunal is satisfied that the breach of the ECT crystallized in June 2014 and this is the appropriate moment at which to value Claimant's losses*."[141] In a similar fashion, *9REN*[142] and *Foresight*[143] used June 30, 2014 as the valuation date. This was the date of the last audited accounts of the companies, being in close temporal proximity to the date of the last measure breaching the FET standard (i.e., O.M. IET/1045/2014).[144] *Watkins Holdings* contains a fairly detailed explanation of its findings regarding the valuation date. The Tribunal established that, in accordance with *Azurix Corporation* v. *Argentine Republic* and *Enron Corporation and Ponderosa Assets, L.P.* v. *Argentine Republic*, in a situation in which a series of actions "*as an aggregate*" breached FET, the

Argentine Republic, ICSID Case No. ARB/01/3, Award, ¶ 405 (May 22, 2007) [*hereinafter* "Enron Corp."].

140 Eiser, ICSID Case No. ARB/13/36, Final Award, ¶¶ 427, 437 (May 4, 2017); Antin, ICSID Case No. ARB/13/31, Award, ¶¶ 641–642, 666 (June 15, 2018); Cube, ICSID Case No. ARB/15/20, Decision on Jurisdiction, Liability and Partial Decision on Quantum, ¶¶ 429, 482, 534 (Feb. 19, 2019); InfraRed, ICSID Case No. ARB/14/12, Award, ¶ 576 (Aug. 2, 2019).

141 InfraRed, ICSID Case No. ARB/14/12, Award, ¶ 576 (Aug. 2, 2019).

142 9REN, ICSID Case No. ARB/15/15, Award, ¶ 406 (May 31, 2019).

143 Foresight, SCC Case No. 2015/150, Final Award, ¶ 489 (Nov. 14, 2018).

144 9REN, ICSID Case No. ARB/15/15, Award, ¶ 406 (May 31, 2019), ("The Tribunal accepts 30 June 2014 as an appropriate Date of Assessment, having regard to the enactment of the New Regulatory Regime on 10 June 2014 and the convenience of evaluating data as of the end of the second quarter of the 2014 financial year.")

valuation date should be the "*watershed*" moment or when "*the most serious damage arose in connection with the Disputed Measures.*"[145] Consistently with its findings on the merits, the Tribunal found that O.M. IET/1045/2014 was both, the measure concluding or crystallizing the breach of FET and the one causing the most serious damage to the investment.[146] Thus, the valuation date was set on June 20, 2014.[147]

Novenergia, however, followed a completely different approach using September 15, 2016, the cut-date established by the Claimant's valuation expert, as the valuation date.[148] This is one of the few instances in the Spanish Cases where something in the line of an *ex post* valuation approach seems to have been used by tribunals. The award does not contain an extensive explanation as to why this valuation date was chosen. Instead, the Tribunal seems to have been largely in agreement with the DCF model presented by Claimant,[149] which uses this valuation date. This choice of valuation date logically led the Tribunal to the conclusion that compensation for historic damages was due in this case (since all damages prior to September 2016 were historic losses). However, since the Tribunal found that not all measures introduced by Spain violated the FET standard, it deduced the losses caused by some of these measures from the amount of due compensation.[150] Similarly, *NextEra* used June 30, 2016 as a valuation date.[151] Once again, this is the date of the updated calculations of the

145 Watkins Holdings, ICSID Case No. ARB/15/44, Award, ¶ 679 (Jan. 21, 2020) (*citing* Azurix Corp. v Argentine Republic, ICSID Case No. ARB/01/12, Award, ¶¶ 417–418 (July 14, 2006) *and* Enron Corp., ICSID Case No. ARB/01/3, Award, ¶ 405 (May 22, 2007)).

146 *Id.* ¶ 680.

147 *Id.* ¶¶ 680–681.

148 Novenergia, SCC Case No. 2015/063, Final Award, ¶ 838 (Feb. 15, 2018).

149 *Id.* ¶¶ 837–838.

150 *Id.* ¶¶ 838–840.

151 NextEra, ICSID Case No. ARB/14/11, Decision on Jurisdiction, Liability and Quantum Principles, ¶ 678 (Mar. 12, 2019).

Claimants.[152] The Tribunal used this date since the Respondent "*did not raise any objection to the 30 June 2016 valuation date.*"[153] Nonetheless, we should keep in mind that this case used an investment-based and not an income-based methodology.

Regarding the cases that considered even the 2010 measures to have breached the FET standard, both *Masdar* and *9REN*[154] seem to support establishing June 2014 as the appropriate valuation date. *Masdar* is clear in stating that this date is "*better suited to provide [full reparation for Respondent's breach] as it uses hindsight and historical experience until Ministerial Order IET 1045/2014 implemented the new regime.*"[155] Furthermore, this choice of valuation date would be justified by the fact that it was in this moment that "*the parameters for the new regime [were] fully defined and enable[d] us to forecast what the remuneration would be.*"[156]

Delving into the third category of cases—those that establish that the clawback of remuneration was the one breaching the FET standard—the tribunals in *BayWa* and *RREEF* did, at first, not reach a definitive conclusion on the determination of the valuation date nor on valuation in general. They found that calculating the economic value of the remuneration clawback in a standalone fashion was difficult. *BayWa* tribunal declares that it was not able "*despite its best efforts, to quantify the amount.*"[157] Consequently, the Tribunal decided that the Parties, with the assistance of their experts, should seek to reach an agreement on the

152 *Id.* ¶ 613.
153 *Id.* ¶ 652.
154 9REN, ICSID Case No. ARB/15/15, Award, ¶ 406 (May 31, 2019).
155 Masdar, ICSID Case No. ARB/14/1, Award, ¶ 606 (May 16, 2018).
156 Masdar, ICSID Case No. ARB/14/1, Award, ¶ 606, (May 16, 2018) quoting the Claimant's expert.
157 BayWa, ICSID Case No. ARB/15/16, Decision on Jurisdiction, Liability and Directions on Quantum, ¶ 616 (Dec. 2, 2019).

economic impact of the clawback.[158] It should be noted that no general agreement was reached by the Parties and their experts.[159] Consequently, the Tribunal decided that July 13, 2013 was the appropriate valuation date (when R.D.L. 9/2013 came into force).[160] Given that *BayWa* found that only the introduction of the remuneration clawback breached FET, it was thus following an *ex ante* valuation approach, the valuation date being the date of the breach. *RREEF* also found itself unable to determine the effect of the clawback,[161] and directed the parties to seek an agreement on the matter.[162] However, in *RREEF*, the experts agreed on a number of points, *inter alia*, that a DCF analysis should be carried out taking June 30, 2014 as the valuation date.[163] This was taken into consideration by the Tribunal in its final determination of damages.[164] Similarly, *Infracapital* agreed that June 2014 was the appropriate valuation date, being that in which "*Spain enacted the final June 2014 Order that culminated with the Disputed Measures, other Tribunals having utilized the June 2014 date for valuation.*"[165]

Lastly, *PV Investors* contains an interesting and detailed discussion regarding the valuation date. The Tribunal pondered whether to set the valuation date at the date of the award, as the Claimant suggested, in an *ex post* valuation, or whether it was to set the valuation date at the date of the breach in an *ex ante* valuation.[166] The Tribunal considered that an *ex ante* valuation "*appears particularly appropriate when the consequences of a later evolution of prices, interest rates,*

158 *Id.*
159 BayWa, ICSID Case No. ARB/15/16, Award, ¶ 9 (Jan. 25, 2021).
160 Consistent with Claimant's allegations.
161 RREEF, ICSID Case No. ARB/13/30, Decision on Responsibility and on the Principles of Quantum, ¶ 592 (Nov. 30, 2018).
162 *Id.* ¶¶ 597–598.
163 RREEF, ICSID Case No. ARB/13/30, Award, ¶ 19 (Dec. 11, 2019).
164 *Id.* Award, ¶¶ 19–20.
165 Infracapital, ICSID Case No. ARB/16/18, Decision on Jurisdiction, Liability and Directions on Quantum, ¶ 819 (Sept. 13, 2021). The Tribunal cites Antin and Foresight as Awards which also used the June 2014 valuation date.
166 PV Investors, PCA Case No. 2012-14, Final Award, ¶ 720 (Feb. 28, 2020).

or other inputs are unrelated to the impugned measures."[167] In this case, interest rates had been abnormally low during a prolonged period following the economic crisis.[168] This was unrelated to Spain's measures on renewable energies and "*was mainly due to the evolution of the financial markets and to macroeconomic conditions.*"[169] Accordingly, the Tribunal chose an *ex ante* valuation, selecting June 30, 2014 as the valuation date.[170]

All in all, it would appear that the vast majority of the tribunals consider O.M. IET/1045/2014 as the valid reference point for the determination of the valuation date. Most tribunals found that June 20, 2014 was the correct valuation date, while others set the valuation date at the end of that same quarter of the 2014 financial year, i.e., June 30, 2014. The latter approach seems to be based on "*the convenience of evaluating data as of the end of the second quarter of […] 2014.*"[171] Consequently, the tribunals in the Spanish Cases seem to overwhelmingly have chosen an *ex ante* in lieu of an *ex post* valuation approach. The reasons laid out in *PV Investors* likely are also applicable to other cases.[172] In fact, even *BayWa*, which set the valuation date on July 13, 2013, seems to have chosen an *ex ante* valuation, choosing to set the valuation date at the date of the breach (i.e., the remuneration clawback under R.D. 9/2013). The only clear outliers to this trend seem to be *Novenergia* and *NextEra*, which chose September 15, 2016 and June 30, 2016 respectively as their valuation date (closer to an *ex post* valuation). Both awards incorporated the fact that they did not find all measures introduced by Spain a breach of FET into their quantum assessment: *Novenergia* does

167 *Id.* ¶ 721.

168 This also affected the periodic revision of returns, which was linked to the evolution of the interest rates. PV Investors, PCA Case No. 2012-14, Final Award, ¶ 722 (Feb. 28, 2020).

169 *Id.*

170 *Id.* ¶ 723.

171 9REN, ICSID Case No. ARB/15/15, Award, ¶ 406 (May 31, 2019).

172 Since they refer to macroeconomic circumstances, which are a part of the factual background of all cases.

so by subtracting the effect of certain measures from their damages calculation, while *NextEra* considers that given that "*Regulatory Framework I is not the proper basis for determining loss in this case,*" the value of the assets should be capitalised at a rate of the WACC + 200 bps and not WACC + 300 bps, as suggested by Claimants.[173] However, it would appear that in contrast to *PV Investors*, these awards incorporate (to some extent) the effects of circumstances occurring after June 2014, such as the presence abnormally low interest rates, which, according to *PV Investors*, were caused by exogenous factors.

D. The compensation of historic losses

Both, the decision as to which legislative measures breached the FET standard and the determination of the valuation date, had a very important effect on another key aspect of quantum assessment: the compensation of so-called historic damages, i.e., damages which arise before the valuation date.

Most awards finding that the 2013–2014 measures were the ones breaching the FET standard of the ECT also refused to compensate investors for historic damages and compensated them only for the future cash flows from June 2014 onwards. According to the reasoning of these decisions, prior measures were within the spectrum of a state's legitimate legislative powers. In this sense, *Eiser* establishes that "*[t]he Tribunal has not found that the piecemeal changes made by Respondent prior to [June 2014] […] violated ECT. Accordingly, this portion of the Claimant's damages claim dealing with historical losses […] must fail.*"[174] A similar approach was also followed in *Antin*,[175]

[173] NextEra, ICSID Case No. ARB/14/11, Decision on Jurisdiction, Liability and Quantum, ¶¶ 664–666 (Mar. 12, 2019).

[174] Eiser, ICSID Case No. ARB/13/36, Final Award, ¶ 459 (May 4, 2017).

[175] Antin, ICSID Case No. ARB/13/31, Award, ¶ 667 (June 15, 2018).

Foresight,[176] *Cube*,[177] and *Watkins Holdings*.[178] The *Foresight* award deserves further attention, since it points out that "*the exclusion of all historical losses may include certain losses prior to the Date of Assessment that are attributable the retroactive effect of the New Regulatory Regime*."[179] Notwithstanding this, the Tribunal found that, in order to compensate these damages, the isolated effect of the remuneration clawback would have to be calculated. Given that this information was not provided, no damages were awarded on this basis.[180] This, however, does not detract from the significance of the fact that the Tribunal in *Foresight* seemed open to award historic damages on the basis of the remuneration clawback. The author will pick up on this point when analysing the third category of cases. Lastly, it should be mentioned that *Novenergia* is one of the few cases compensating historical damages. Given that this case set its valuation date in September 2016, the Tribunal first calculated damages (both historical damages and loss of fair market value),[181] then calculated the economic effect of measures it found not to have breached the FET standard,[182] and lastly deducted the latter from the former.[183] *Novenergia*, consistent with its findings on merits, only accepted compensating historic damages for the effect of the "*Regulatory Framework III*" measures up to September 2016.

---

176 Foresight, SCC Case No. 2015/150, Final Award, ¶¶ 536–538 (Nov. 14, 2018). The Tribunal at Foresight does not seem to rule out historic damages completely. Instead, it seems to suggest that while the effects of R.D. 1565/2010, R.D.L. 14/2010, R.D.L. 2/2013, and Law 15/2012 should be excluded from the assessment of damages, prior historical damages such as those arising from the remuneration clawback could have been taken into account, had the Claimant provided the Tribunal with a breakdown of the individual economic impact of each of the disputed measures.

177 Cube, ICSID Case No. ARB/15/20, Decision on Jurisdiction Liability and Partial Decision on Quantum, ¶ 482 (Feb. 19, 2019).

178 Watkins Holdings, ICSID Case No. ARB/15/44, Award, ¶ 688 (Jan. 21, 2020).

179 Foresight, SCC Case No. 2015/150, Final Award, ¶ 538 (Nov. 14, 2018).

180 *Id.*

181 Novenergia, SCC Case No. 2015/063, Final Award, ¶ 838 (Feb. 15, 2018).

182 *Id.* ¶ 840.

183 *Id.* ¶ 841.

Masdar, on the other hand, held that even the 2010 measures breached the FET standard. Given that the valuation date was set in June 2014, the Tribunal decided that historic damages should be compensated.[184] *Masdar* based its calculation of historic damages on the Claimant's submissions.[185] In regard to *9REN*, the Tribunal did not address historic damages in an individualized manner, however, some paragraphs in the award seem to indicate that historic damages were taken into consideration and compensated.[186]

Regarding the third category of cases, the Tribunal in *BayWa* does not appear to have taken into account historical damages, since it set the valuation date on July 9, 2013 (i.e., arguably at the moment of the breach, in which the clawback was introduced).[187] In *RREEF*, given that the Tribunal also found that the Respondent was in breach of FET because of its failure to guarantee a reasonable rate of return, it found that the assessment of the economic impact of the clawback had to be considered in the determination of the reasonableness of the return. Accordingly, there

184 Masdar, ICSID Case No. ARB/14/1, Award, ¶¶ 650–652 (May 16, 2018).

185 *Id.* ¶ 652.

186 9REN, ICSID Case No. ARB/15/15, Award, ¶ 413 (May 31, 2019). While discussing adjustments to the calculations of the Claimant's quantum experts, the Tribunal finds that "the FTI calculation […] failed to take into account a number of significant contingencies, including the 7% [tax on the value of the production of electrical energy (TVPEE)] revenue tax [a 2012 measure], the lack of a "stability guarantee" in RD 1578/2008, the increase in O&M costs after 2012 and an illiquidity discount." This suggests that valuation parameters prior to the valuation date and, hence, historic damages were taken into consideration by the Tribunal. Further evidence of this can be found in *id.* ¶ 416 wherein the Tribunal adopts the quantum asserted by the Claimant (including historic losses) reducing it by 20 per cent by (i) removing the claim to reimbursement of the TVPEE, (ii) reducing the expected operating life of the facilities, (iii) eliminating tariff protection for one of the plants, (iv) incorporating discounts for illiquidity and regulatory risk. In consequence, it appears that all other historic damages were included into the 41.76 million Euro awarded by the Tribunal.

187 BayWa, ICSID Case No. ARB/15/16, Award, ¶¶ 44–48 (Jan. 25, 2021). Claimant's proposed valuation model does not seem to include historic damages, neither does the Respondent nor the Tribunal.

was no need to compensate specifically for the clawback, since this would entail double compensation for the same damage.[188] Thus, no historic damages seem to have been considered under *RREEF*.[189] Lastly, *Infracapital* found that past remuneration cannot be clawed back and that "*any amount that may have been applied by Respondent in detriment of Claimants should be compensated.*"[190] It is uncertain whether this could include historic damages. In principle, the historic damages that could potentially arise out of the remuneration clawback would be those corresponding to the July 2013 (entry into force of R.D.L. 9/2013) to June 2014 (valuation date) period.[191] Nonetheless, it should be noted that a transitory regime covers the period between the entry into force of R.D.L. 9/2013 and the other measures developing the Regulatory Framework III.[192] According to such a regime, clawbacks corresponding to the 2013–2014 period would be regularised

188 RREEF, ICSID Case No. ARB/13/30, Decision on Responsibility and on the Principles of Quantum (Nov. 30, 2018), ¶ 590 ("since the retroactive application of the new regime is duly taken into account for assessing the reasonableness of the return, there is no reason to compensate specifically for the retroactivity imposed by the Respondent since it is found in breach of its obligation to insure a reasonable return of the Claimants. Otherwise: this would result in compensating twice for the same damage.").

189 While not expressly stated in the Award, paragraphs 45 and 46 seem to hint in this direction. *See* RREEF, ICSID Case No. ARB/13/30, Award, ¶¶ 45–46 (Dec. 11, 2019).

190 Infracapital, ICSID Case No. ARB/16/18, Decision on Jurisdiction, Liability and Directions on Quantum, ¶ 820 (Sept. 13, 2021).

191 The effect of the remuneration clawback would still be felt in cash flows arising after valuation date, but these would not be considered historic cash flows.

192 R.D.L. 9/2013, Disposición adicional primera establishes that the clawback applies since the entry into force of the R.D.L., which was on 14 July 2013. Nonetheless, the Disposición transitoria tercera sets out a transitory regime in which several norms, including R.D. 661/2007 will be applied until the approval of further norms creating the 2013-2014 regulatory framework. Under this transitory regime, energy producers under the special regime might receive a payment on account for such remuneration. However, upon approval of the norms developing the Regulatory Framework III, facilities having received said payment on account will have to regularize it according to the new remuneration methodology.

from June 2014 onwards, i.e., most of the effects of the clawback would be felt after June 2014—and, thus, after the valuation date.

Finally, in *PV Investors*, the Tribunal once again had to decide whether the computation of losses, in the scenario without measures,[193] must take the remuneration clawback into account.[194] The Tribunal found that "*it would not be admissible to deduct past profits when calculating an investor's remuneration going forward,*" therefore rejecting the remuneration clawback.[195] It should be noted that in *PV Investors*, the rejection of the clawback did not occur during the discussion of merits, but during the discussion of quantum. In consequence, the Tribunal did not take into account the historic effect of the clawback in the calculation of its "*But-For*" scenario.[196]

In conclusion, it appears that tribunals have, by and large, refused to compensate investors for historic damages. This seems to be a consequence of the fact that most tribunals have decided to situate the valuation date at the date of the breach. Given that measures prior to 2013 were found to be consistent with the obligations under the ECT, no damages arising from such measures could be compensated. Following the same logic, however, awards (such as *Masdar* and *9REN*) that found even the 2010–2013 measures (Regulatory Framework II) breached the FET standard, compensated historic losses, since they found the losses caused by Regulatory Framework II to be unlawful and thus compensable. Lastly, in regard to the remuneration clawback, since it was introduced in July 2013, in theory, some historic damages from July 2013 until the valuation date[197]

193 This term is used by the Tribunal instead of the "But-for" scenario given that at this moment the Tribunal has not yet assessed whether a breach of FET took place.

194 PV Investors, PCA Case No. 2012-14, Final Award, ¶ 811 (Feb. 28, 2020).

195 *Id.* ¶ 812.

196 *Id.* ¶ 817. The Tribunal followed Claimant's allegations that past profits should not be considered in the calculation of the scenario without measures but found that Respondent's methodology for computing this should be selected.

197 For the most part, a valuation date in June 2014 was chosen.

could exist. Nonetheless, the existence of a transitory regime in R.D.L. 9/2013 should be taken into consideration.

E. The expected operating lifetime of the plants[198]

This was yet another area of contention in the awards. Assumptions regarding the expected operational lifetime of the facilities impact the amount of cash flows the investors will receive, thereby affecting valuation. Tribunals in the Spanish Cases did not hesitate to reduce the expected operating lifetime of plants estimated by claimants. *Eiser*,[199] *Antin*,[200] and *Masdar*[201] reduced such lifetime from 40 years used by claimants to 25 years. *RREEF*,[202] *BayWa*,[203] *Watkins Holdings*,[204] *InfraRed*,[205] and *Infracapital*[206] further agree that the expected lifetime of the plants should be 25 years. Interestingly, the Tribunal in *BayWa* maintained the 25-year mark even though the investment consisted of wind power plants, which use different underlying technology to that of the other cases (which involved mainly concentrated solar power ["**CSP**"] plants). The same is also true for *RREEF*, which also invested in the wind power industry by indirectly acquiring an equity share in three project companies with activity in that sector.[207] Regarding CSP plants, the estimated lifetime of 25 years appears

198 The determination of plant's expected operating lifetime is in no way linked to the measures each Tribunal found to be in breach of the ECT FET clause. Accordingly, this section will not be systematized according to the categories of cases we identified earlier.

199 Eiser, ICSID Case No. ARB/13/36, Final Award, ¶¶ 451–452 (May 4, 2017).

200 Antin, ICSID Case No. ARB/13/31, Award, ¶¶ 713–714 (June 15, 2018).

201 Masdar, ICSID Case No. ARB/14/1, Award, ¶¶ 617–618 (May 16, 2018).

202 RREEF, ICSID Case No. ARB/13/30, Decision on Responsibility and on the Principles of Quantum, ¶ 549 (Nov. 30, 2018).

203 BayWa, ICSID Case No. ARB/15/16, Decision on Jurisdiction, Liability and Quantum, ¶¶ 483–484 (Dec. 2, 2019).

204 Watkins Holdings, ICSID Case No. ARB/15/44, Award, ¶ 708 (Jan. 21, 2020).

205 InfraRed, ICSID Case No. ARB/14/12, Award, ¶ 573 (Aug. 2, 2019).

206 Infracapital, ICSID Case No. ARB/16/18, Decision on Jurisdiction, Liability and Directions on Quantum, ¶¶ 743–744 (Sept. 13, 2021).

207 RREEF, ICSID Case No. ARB/13/30, Decision on Responsibility and on the Principles of Quantum, ¶ 142 (Nov. 30, 2018).

to be consistent with Spanish legislation such as R.D. 1578/2008,[208] and R.D. 661/2007,[209] which established that CSP plants would receive higher remuneration under R.D. 661/2007 during the first 25 operation years.[210] *BayWa* does not seem to have followed the same logic since wind power plants under R.D. 661/2007 would only receive higher remuneration during the first 20 years.[211]

Cube[212] and *Foresight*,[213] on the other hand, decided to lower the expected lifetime of the plants from the 35 years suggested by the claimants to 30 years. As explained in *BayWa*, this discrepancy with the 25-year expectancy assumed by a majority of the tribunals might be tied to the fact that Cube's investment consisted of photovoltaic power ["**PV**"] plants and hydro plants, the latter having a longer life expectancy.[214] In fact, it appears that awards regarding PV plants commonly used a 30-year life expectancy.[215] *Infracapital*, which assumed a 25-year life expectancy, being an exception to this.[216] The awards do not explain in detail why a longer useful operating

---

208 R.D. 1578/2008, on Remuneration for the Production of Electricity using Photovoltaic Solar Technology for Facilities after the Deadline for Maintaining the Remuneration for such Technology under R.D. 661/2007 (B.O.E. 2008, 234), art. 11.5.

209 B.O.E. 2007, 126, art. 36.

210 *Id.* arts. 2(1)(b) & 36.

211 *Id.*

212 Cube, ICSID Case No. ARB/15/20, Decision on Jurisdiction, Liability and Partial Decision on Quantum, ¶¶ 312–314 (Feb. 19, 2019). Note that in Cube the investment consisted of both photovoltaic plants and hydro plants.

213 Foresight, SCC Case No. 2015/150, Final Award, ¶ 517 (Nov. 14, 2018).

214 BayWa, ICSID Case No. ARB/15/16, Decision on Jurisdiction, Liability and Quantum, ¶ 483 (Dec. 2, 2019).

215 Novenergia, 9REN and PV Investors, all cases dealing with PV plants, assumed a 30-year life expectancy. Novenergia, SCC Case No. 2015/063, Final Award, ¶¶ 838–839 (Feb. 15, 2018); PV Investors, PCA Case No. 2012–14, Final Award, ¶ 651 (Feb. 28, 2020); 9REN, ICSID Case No. ARB/15/15, Award, ¶ 416 (May 31, 2019).

216 Infracapital, ICSID Case No. ARB/16/18, Decision on Jurisdiction, Liability and Directions on Quantum, ¶¶ 743–744 (Sept. 13, 2021). The case concerns PV plants as can be seen at *id.* ¶ 110.

life was usually assumed for PV plants when compared to CSP plants.[217] Once again, the 30-year estimation is, however, consistent with R.D. 661/2007, which establishes that PV plants will receive higher remuneration during the first 30 operation years.[218] Nonetheless, according to some research, PV plants seem often to have shorter life cycles than CSP Plants.[219]

We lack detailed knowledge of both the record of the arbitration and the technicalities surrounding the determination of a plant's useful life to give our opinion as to which useful operating life should be used for PV plants or CSP Plants. What remains clear, however, is that tribunals seem to have followed R.D. 661/2007 in their estimation of the useful life of the facilities regardless of the technology type. This seems to have led virtually all tribunals to conclude that valuation should be based on the assumption of either a 25 or 30-year life expectancy.

V. Conclusions

The following table summarizes the main results of the author's analysis, further displaying the amounts claimed by claimants and awarded by tribunals on a per-case basis. The cases that may be considered as "*outliers*" are marked in yellow. This table further groups cases in the categories the author identified before on the basis of Ripinsky's analysis and showcases the amounts of damages claimed and damages awarded, and the ratio of

---

217 Indeed, Awards which discussed the matter, such as Foresight merely observed that neither Claimant's nor Respondent's experts had expertise on the determination of the useful life of PV facilities. Based on the evidence in the record, the Majority of the Tribunal considered that Respondent's assumption of a useful operating life of 30 years is more reasonable; Foresight, SCC Case No. 2015/150, Final Award, ¶ 517 (Nov. 14, 2018).

218 B.O.E. 2007, 126, arts. 2(1)(b) & 36.

219 J. Hernández-Moro & J.M.Martínez-Duart, *Analytical model for solar PV and CSP electricity costs: Present LCOE values and their future evolution*, 20 RENEW. SUSTAIN. ENERGY REV. 119–132 (2013); C. Parrado, A. Marzo, E. Fuentealba & A.G. Fernández, *2050 LCOE improvement using new molten salts for thermal energy storage in CSP plants*, 57 RENEWABLE SUSTAIN. ENERGY REV. 505–514 (2016).

damages awarded to damages claimed (last column). Furthermore, the total sum claimed and awarded, and the ratio of damages awarded/claimed have been calculated for each category of cases.

Table 1

	Valuation Method	***Measures breaching FET***	***Valuation Date***	***Historic losses***	***Operational Lifetime of the Plants***	***Damages claimed (in mill. EUR)***	***Damages awarded (in mill. EUR)***	***%***
Eiser *May 4, 2017*	DCF	2013/2014 measures	June 2014	No	25 years	196	128 (annulled Award)	65%
Novenergia *Feb. 15, 2018*	DCF	2013/2014 measures	Sept. 2016 (date of the latest available calculations)	Yes	30 years	61.3	53.3	87%
Antin *June 15, 2018*	DCF	2013/2014 measures	June 2014	No	25 years	148	112	76%
Foresight *Nov. 14, 2018*	DCF	2013/2014 measures (the measures as an aggregate breached FET)	June 2014	No	30 years	58.2	39	67%
Cube *Feb. 19, 2019*[220]	DCF	2013/2014 measures	June 2014	No	30 years	74.08	33.7	45%

[220] Date of the Decision on Jurisdiction, Liability and Partial Decision on Quantum.

NextEra *Mar. 12, 2019*[221]	Investment-based methodology	The collective effect of the 2013–2014 measures	June 30, 2016 (date of the latest available calculations)	-	-	521.4	290,6	56%
InfraRed *Aug. 2, 2019*	DCF	2013/2014 measures (specific mention of Ley 24/2013)	June 2014	No	25 years	75.7	28.2	37%
Watkins Holdings *Jan. 21, 2020*	DCF	2013/2014 measures	June 2014	No	25 years	123.9	77	62%
Mean %								62%
Masdar *May 16, 2018*	DCF	Alterations of the 2007 regime	June 2014	Yes	25 years	179	64.5	36%
9REN *May 31, 2019*	DCF	Alterations of the 2007 regime	June 2014	Yes[222]	30 years	52.2	41.76	80%
Mean %								58%
	DCF	The remuneration clawback and failure to provide a	June 2014	No (no specific compensation for the clawback)	25 years	265	59.6	22%

[221] Date of the Decision on Jurisdiction, Liability and Quantum Principles.
[222] The matter was not analyzed in detail by the Tribunal.

RREEF[223] *Nov. 30, 2018*		reasonable rate of return						
BayWa[224] *Dec. 2, 2019*	DCF	the remuneration clawback	July 2013	No (the effects of the remuneration clawback are reversed)	25 years	74	22,006	30%
Infra capital[225] *Sept. 13, 2021*	DCF (implicitly)	The remuneration clawback and failure to provide a reasonable rate of return	June 2014	No (the effects of the remuneration clawback are reversed)	25 years	TBD	TBD	-
Mean %								26%
PV Investors *Feb. 28, 2020*	DCF	No measure in particular, Spain partially failed to provide a reasonable rate of return	June 2014	No (the effects of the remuneration clawback are reversed)	30 years	1900	91.1	5%

As is evident from the table, not a single tribunal awarded claimants the full amount of their claim. The proportion of the claim that the tribunals decide

[223] Date of the Decision on Responsibility and on the Principles of Quantum.

[224] Date of the Decision on Jurisdiction, Liability and the Directions on Quantum.

[225] Award not yet available. This is the date of the Decision on Jurisdiction, Liability and Directions on Quantum.

to award, however, varies greatly from case to case, and from category to category.

As analysed, the bulk of the awards found that the 2013–2014 (Regulatory Framework III) measures were the ones breaching the FET standard. On an average, tribunals in this category awarded around 62 per cent of the amounts claimed. Now, this figure should be approached with caution, given that great variability exists amongst these awards. Some awards such as *Novenergia* and *Antin* awarded over three-fourths of the claimed damages, while *InfraRed*, *Cube*, and *NextEra* awarded around half or less of the claimed damages. *NextEra*, the "*biggest*" case in this category in terms of quantum, awarded a total of 56 per cent of the claimed damages. This could be explained by the fact that *NextEra* followed an investment-based methodology. Such methodology often does not properly reflect many assets and liabilities and does not consider "*the value of the entity as a whole.*"[226] *Novenergia* yielded investors the highest percentage of their claim at 87 per cent. This could, in part, be explained by the choice of a later valuation date. Even though the effect of the measures found not to be in breach of FET was taken into consideration during the calculation of historic damages, the choice of an *ex post* valuation affected the information available to determine its value. In the words of *PV Investors*, the choice of a later valuation date means taking into account "*later evolution of prices, interest rates, or other inputs.*"[227]

Regarding the cases that found that even measures prior to 2013–2014 breached the FET standard, one might expect these tribunals to award a higher percentage of the amounts claimed by investors. This seems to be the case for *9REN*, but not for *Masdar*, which only awarded a little over a third of the damages claimed by the Claimants. This might be due to the effect of the adjustment of several parameters which the author has not

[226] MARBOE, *supra* note 6, at 201–203.
[227] PV Investors, PCA Case No. 2012-14, Award, ¶ 721 (Feb. 28, 2020).

analysed in this article, such as the application of an illiquidity discount, adjustments to the expected revenues, or adjustments of the discount rate.[228]

On the other hand, the awards finding that only specific aspects of the 2013–2014 reforms, such as the remuneration clawback, breach the FET standard, award only a small percentage of the claimed damages (24 per cent on average). This is logical since the bulk of the 2013–2014 measures —which were also included in the claimants' claims— were incorporated into the calculation of the But-For scenario. Just the remuneration clawback was factored out of such calculation. Awards such as *RREEF*, which also considered that Spain had breached the FET standard by failing to provide a reasonable rate of return, further yield a low ratio of damages awarded to damages claimed. It should be kept in mind that *REEFF* found that the compensation arising from Spain's failure to provide a reasonable rate of return absorbed the compensation deriving from the remuneration clawback.

Unsurprisingly, *PV Investors*—an award finding that no measure in particular breached FET and that Spain only breached FET by failing to provide a reasonable rate of return for some of the Claimant entities—has the lowest ratio of damages awarded to damages claimed. This was the biggest damages claim against Spain at 1.9 billion Euro and while the case was technically decided in favour of the investor, only damages amounting to five percent of the original claim were awarded. As described by Spanish media,[229] this may be seen as a "*victory*" for Spain.

---

228 Masdar, ICSID Case No. ARB/14/1, Award, ¶¶ 653–654 (May 16, 2018).

229 Spanish newspaper "El Confidencial" reported that Spain was opening the figurative "champagne bottle" in its renewable energy troubles, given that the largest claim against Spain was "left in nothing"; *See* R. MÉNDEZ, ESPAÑA ABRE EL CHAMPÁN EN LA GUERRA REMOVABLE: UN ARBITRAJE DE 2.000 MILLONES QUEDA EN NADA, El Confidencial (Feb. 29, 2020).

Lastly, regarding the expected operating lifetime of the plants, it would appear that tribunals assuming a 25-year lifetime, on average, seem to have awarded a lower percentage of the claimed damages (at 46.95 per cent) when compared to tribunals assuming a 30-year life expectancy (56.85 per cent). This difference might not seem substantial; however, we should consider that *PV Investors*, which awarded the lowest percentage of claimed damages out of any of the analysed cases, is a case assuming a 30-year operating life expectancy. If we were to eliminate the effects of this outlier, then we would find that the average ratio of damages awarded to damages claimed for the cases assuming a 30-year life expectancy skyrockets to 69.86 per cent. This is not surprising given that many of the awards assuming a 25-year life expectancy do so by rejecting claimant's assumptions of 40-year life expectancy. In consequence, there is a 15-year gap between the life expectancy assumed by the claimant and that assumed by the tribunal. By contrast, in the awards assuming a 30-year life expectancy, claimants had often assumed only a 35-year life expectancy. Thus, the gap between the claimant's and the tribunal's life expectancy assumptions is much smaller in those cases where a 30-year life expectancy was adopted by the tribunal. This also means that the spread between damages claimed and damages awarded will often be larger for cases assuming a 25-year life expectancy.

As a conclusion to this article, the author must remind the readers of the fundamental importance of damages in international arbitration. As the Latin aphorism states, *ubi remedium, ibi ius* (where there is a remedy, there is a law). Indeed, in the context of investor-state arbitration, compensation determines what a "*win*" for an investor exactly means. Consequently, as analysed, decisions regarding seemingly technical issues of damages calculation and valuation, such as using an earlier or later valuation or using one valuation methodology and not another can have huge impacts on decisions on quantum, turning an award decided in favour of the investor into a pyrrhic victory or, even worse, into a *de facto* defeat for the investor. The Spanish renewable energy cases showcase this fact particularly well,

since they shared a common legislative background yet gave rise to a whole plethora of different approaches to valuation and damages calculation—some awards compelling the respondent to pay up to 87 per cent of the claimed amounts, others finding that only five per cent of the damages claimed should be compensated.

ARBITRATION VERSUS WRIT PETITION AGAINST THE STATE ENTITIES IN INDIA: HOW TO RESOLVE THE JURISDICTIONAL CONUNDRUM?

Harshal Morwale[1]

Abstract

Imagine two different forums with two independent bases of jurisdiction, governing two different obligations between the same parties, and granting the same remedy. This exact situation lies at the heart of the unique interplay between writ petitions and arbitration clauses in the contracts with State entities in India. The jurisdictional overlap between writs and arbitral tribunals is the root of various problems explored in this article. To avoid this jurisdictional overlap, it is argued that the Courts entertaining writ petitions must create an objective criterion to differentiate between contractual and constitutional claims. They must refer the parties to arbitration in case of contractual claims while reserving the writ remedies for constitutional cases. In order to achieve the abovementioned objective, this article builds upon a solution from practice in investment arbitration and proposes a two-step test whereby the focus would not only be on the foundation of the obligation allegedly breached by the state entity but also on the object of the claim of the private party. This test will allow Courts to effectively enforce arbitration clauses as well as preserve the sanctity of the writ jurisdiction.

I. Introduction

Arbitrating with State entities remains a highly analysed subject, particularly from a foreign investment law perspective. However, a recent judgment of

[1] Advocate (India); LL.M. (MIDS Geneva); Associate at a premier Indian law firm, New Delhi.

the Supreme Court of India[2] ["**Supreme Court**"] has triggered the discussion on the interplay between commercial arbitration with State entities and constitutional law. While related issues have been dealt with in numerous cases before,[3] the issue of whether to entertain writ petitions[4] against state entities despite the presence of an arbitration clause has returned to the spotlight with this judgment.

At the outset, this article outlines and analyses the recent Supreme Court ruling, which purports that the existence of an arbitration clause in a contract with a state entity does not oust the writ jurisdiction of the High Court under Article 226 of the Constitution of India **[Part II]**,[1] post which the nature and scope of writ petitions in India is discussed **[Part III]**. It then outlines the types of state-related contracts in India **[Part IV]**, and discusses the relevance of Section 8(1) of the Arbitration and Conciliation Act, 1996 ["**Act**"] vis-à-vis writ petitions **[Part V]**. The article then evaluates the potential issues related to the discussed ruling, such as the lack of the doctrines of *lis pendens* and *res judicata* **[Part VI],** as well as the overlap between contractual claims and constitutional law claims **[Part VII]**. Finally, the article outlines a potential solution in the form of a two-step

---

2 Unitech Ltd. v. Telangana State Indus. Infrastructure Corp., (2021) SCC OnLine SC 99 (India) [*hereinafter* "Unitech"].

3 State of Uttar Pradesh v. Bridge & Roof Co., (1996) 6 SCC 22 (India) [*hereinafter* "Bridge & Roof"]; Harbanslal Sahnia v. Indian Oil Corp., (2003) 2 SCC 107 (India) [*hereinafter* "Harbanslal Sahnia"]; ABL Int'l Ltd. v. Export Credit Guar. Corp. of India, (2004) 3 SCC 553 (India) [*hereinafter* "ABL Int'l"]; Union of India v. Tantia Constr., (2011) 5 SCC 697 (India) [*hereinafter* "Tantia Const."]; Joshi Tech. Int'l v. Union of India, (2015) 7 SCC 728 (India)[*hereinafter* "Joshi Technologies"]; Ram Barai Singh v. State of Bihar, (2015) 13 SCC 592 (India) [*hereinafter* "Ram Barai Singh"]; State of Uttar Pradesh v. Sudhir Kumar Singh, (2020) SCC OnLine SC 847 (India) [*hereinafter* "Sudhir Kumar Singh"].

4 A writ petition is an action against the state/state entities filed before the Supreme Court or any High Court to enforce constitutional rights and fundamental rights or to seek redress against any injury or illegality caused due to contravention of the ordinary law. *See* DURGA DAS BASU, INTRODUCTION TO THE CONSTITUTION OF INDIA 133 (20th ed. 2011) [*hereinafter* "DURGA DAS BASU"].

test to resolve the jurisdictional overlap and streamline the claims **[Part VIII]** before concluding **[Part IX].**

II. Supreme Court: Arbitration clauses do not oust the writ jurisdiction

The question of whether the writ jurisdiction under Article 226 of the Constitution of India ["**Constitution**"] can survive alongside an arbitration agreement has been the subject of intricate judicial scrutiny over the years.[5] However, the issue persists and manages to reach the Supreme Court time and again. The Supreme Court recently dealt with this issue in *UNITECH Ltd.* v. *Telangana State Industrial Infrastructure Corporation (TSIIC)* ["**Unitech case**"], which led to a curious outcome.[6]

The factual matrix of the Unitech case emanates from a Development Agreement between a real estate development company, *UNITECH Ltd.* ["**Petitioner**"], and *Andhra Pradesh State Industrial Infrastructure Corporation*, which later became the *Telangana State Industrial Infrastructure Corporation* ["**Respondent**"], an entity of the State of Telangana.

According to the Development Agreement, the Respondent was required to allot plots of land to the Petitioner in order to carry out infrastructure development. The Petitioner was also required to make payments pursuant to the Development Agreement in order to obtain the plots of land. The Petitioner made the required payments at the specified intervals. However, the Respondent was unable to allot the land because the said land was tied up in litigation, which the state consequently lost. The tender released by the respondent prior to the signing of the Development Agreement

5 Bridge & Roof, (1996) 6 SCC 22 (India).
6 Unitech, (2021) SCC OnLine SC 99 (India).

explicitly stated that if the respondent could not allot the requisite land, the received contractual payments would be returned but without interest.[7]

The Petitioner then filed a writ petition under Article 226 of the Constitution requesting the single bench of the High Court to order the respondent to refund the contractual payments made together with the interest. Among other things, the respondent argued that there was an alternative remedy in the form of an arbitration clause in the Development Agreement, making the writ petition unmaintainable. The Respondent's argument was rejected, and the single bench held that the writ petition seeking *mandamus*[8] was maintainable.[9] On appeal, the division bench of the High Court reached the same conclusion.[10]

The Supreme Court agreed with the single and division bench of the High Court and held that the presence of an arbitration clause does not oust the writ jurisdiction under Article 226 of the Constitution.[11] The Supreme Court, further, held that whether public remedy would be suitable in the private law matters should be decided on a case-by-case basis. Finally, it was held that the respondent as a state entity was always under the obligation of fairness and equality under Article 14 of the Constitution, which it did not fulfil.

The Supreme Court relied on a number of precedents stating that the arbitral jurisdiction and writ jurisdiction are not mutually exclusive because the obligation under Article 14 of the Constitution to be enforced through

---

7 *Id.*

8 A writ of mandamus is issued by a court to "compel performance of a particular act by a lower court or a governmental officer or body." *See* HENRY CAMPBELL BLACK, BLACK'S LAW DICTIONARY 1113 (4th ed. 1968).

9 Unitech Ltd. v. Telangana State Indus. Infrastructure Corp., (2018) SCC OnLine Hyd 1921, ¶ 59 (India).

10 Telangana State Indus. Infrastructure Corp. v. Unitech Ltd., (2019) SCC OnLine TS 3424, ¶ 14 (India).

11 Unitech, (2021) SCC OnLine SC 99, ¶ 41 (India).

the writs, is independent and separate from the obligations enshrined in the contract.[12]

III. Nature and scope of writ jurisdiction in India

The term "*writ*" is defined as "*a court's written order, in the name of a state or other competent legal authority, commanding the addressee to do or refrain from doing some specified act.*"[13] In India, writ petitions are a public law litigation framework that enable the enforcement of the duties of the State or State entities, constitutional rights, and fundamental rights, etc.[14]

Writs are a common law construct originating in England. As noted by the Supreme Court in the case of *Rupa Ashok Hurra* v. *Ashok Hurra*,[15]

> "*In English law there are two types of writs - (i) judicial procedural writs like writ of summons, writ of motion etc. which are issued as a matter of course; these writs are not in vogue in India and (ii) substantive writs often spoken of as high prerogative writs like writ of quo warranto, habeas corpus, mandamus, certiorari and prohibition […] [that] are frequently resorted to in Indian High Courts and the Supreme Court.*"[16]

The writ jurisdiction in India emanates from two separate provisions of the Constitution. Article 32 of the Constitution governs the writ jurisdiction of the Supreme Court, and Article 226 governs the writ jurisdiction of the High Courts. The scope of the Supreme Court's writ jurisdiction under

---

12 *Id.*; Harbanslal Sahnia, (2003) 2 SCC 107 (India); ABL Int'l, (2004) 3 SCC 553, ¶ 52 (India); Ram Barai Singh, (2015) 13 SCC 592 (India); Sudhir Kumar Singh, (2020) SCC OnLine SC 847 (India).

13 *See* HENRY CAMPBELL BLACK, BLACK'S LAW DICTIONARY 1784 (4th ed. 1968).

14 *See generally* Roychan Abraham v. State of Uttar Pradesh, (2019) SCC OnLine All 3935 (India).

15 Rupa Ashok Hurra v. Ashok Hurra (2002) 4 SCC 388, ¶ 6 (India); *See generally* Christopher Forsyth & Nitish Upadhyaya, *The Development of the Prerogative Remedies in England and India: The Student Becomes the Master?*, 23(1) NAT'L L. SCH. INDIA REV. 77 (2011).

16 *Id.*

Article 32 is limited and enables parties to approach the Supreme Court for the enforcement of rights conferred by Part III of the Constitution, which concern the fundamental rights, including the Right to Equality (Articles 14–18), the Right to Freedom (Articles 19–22), etc.

On the other hand, the scope of the High Courts' writ jurisdiction under Article 226 is broader than the Supreme Court's jurisdiction under Article 32. Under Article 226, the High Courts can issue writs not only to enforce the rights conferred by Part III of the Constitution but also "*for any other purposes*." The phrase "*for any other purpose*s," entails a wide range of matters, including the possibility for the parties to seek "*redress against any injury or illegality caused due to contravention of the ordinary law*."[17] Therefore, for issuing a writ under Article 226 of the Constitution, there need not necessarily be a breach of a specific constitutional or fundamental right. Any injury inflicted by the State or a State entity in the breach of ordinary law would be enough for the issuance of the writ.[18] It is interesting to note that this broad jurisdiction of the High Courts under Article 226 to issue writs for "*any other purposes*" would entail several different legal issues, which might not exclusively be public law matters and could have a mixed public-private character.[19]

In terms of potential respondents in writ petitions, the Supreme Court has clarified that writ petitions can be entertained against entities that constitute State under Article 12 of the Constitution,[20] which states:

---

17 DURGA DAS BASU, *supra* note 3.

18 ERBIS Eng'g Co. Ltd. v. State of West Bengal, 2011 SCC OnLine Cal 835, ¶ 9 (India).

19 Example of cases involving public–private character are writ petitions against private institutions discharging public functions. *See* S.C. Sharma v. Union of India, 2007 SCC OnLine Del 1403, ¶ 16 (India).

20 Pradeep Kumar Biswas v. Indian Inst. of Chemical Biology, (2002) 5 SCC 111, ¶ 71 (India); Fed. Bank Ltd. v. Sagar Thomas, (2003) 10 SCC 733 (India).

> "*In this part, unless the context otherwise requires, the State includes the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India*."[21]

The phrase "*other authorities*" brings various state-related entities under the ambit of writ jurisdiction. To determine whether a particular entity is the "State" under Article 12 and consequently amenable to writ jurisdiction, the Supreme Court has outlined various factors to be considered, such as: (i) whether the entire share capital of the corporation is held by the Government; (ii) whether the financial assistance of the State is so much as to meet almost entire expenditure of the corporation; (iii) whether the corporation enjoys a monopoly status which is State-conferred or State-protected; (iv) whether there exists deep and pervasive State control; (v) whether the functions of the corporation are of public importance and closely related to governmental function; and (vi) whether a department of the Government has been transferred to a corporation.[22]

In summation, it can be said that writ jurisdiction in India provides a unique public law remedy to private individuals against the State or State entities, which enables the private individuals to enforce their fundamental rights, the State's duties or even seek redressal against the violation of ordinary law by the State or State entity.

IV. Types of state-related contracts in India

Before diving deeper into the issues relating to the overlap between arbitral jurisdiction and writ jurisdiction, it is essential to outline the kinds of State-related contracts that exist in India. There are three kinds of contracts in India that involve State or State entities – constitutional contracts, statutory

---

21 INDIA CONST., art. 12.

22 Ramana Dayaram Shetty v. Int'l Airport Auth. of India, (1979) 3 SCC 489 (India); GM, Kisan Sahkari Chini Mills Ltd. v. Satrughan Nishad, (2003) 8 SCC 639 (India).

contracts, and purely commercial contracts. The constitutional contracts (government contracts) are governed by Article 299 of the Constitution and are "*made in the exercise of the executive power*" of the Union of India or the relevant State governments.[23] Since the formal and substantive basis of the constitutional contracts is the Constitution, actions such as writ petitions are maintainable in relation to disputes arising out of such contracts.[24]

Statutory contracts are contracts made in the exercise of the power conferred upon a specific governmental authority under a statute. Additionally, such contracts incorporate the specific terms and conditions specified in the relevant statute.[25] In the case of statutory contracts, if the State entity breaches the terms of the contract, it would mean that it has breached the obligations conferred by the statute. Since the statute is a public law instrument, in case of breach of a statutory obligation, a public law remedy through a writ petition would be maintainable.[26]

Finally, there are purely commercial contracts between the State/State entities and private parties, where the terms of the contracts govern the rights and liabilities of the parties.[27] While the article attempts to focus on the third kind, i.e., the purely commercial contracts between the State/State entities and the private parties; it is worth highlighting that the lines between the abovementioned kinds of contracts have constantly been blurring.[28] The characterisation is often influenced by the Court's perception of the kind

---

23 INDIA CONST., art. 299.

24 Joshi Technologies, (2015) 7 SCC 728, ¶¶ 57, 59 (India).

25 India Thermal Power Ltd. v. State of Madhya Pradesh, (2000) 3 SCC 379, ¶ 11 (India); Jaypee Kensington Boulevard Apartments Welfare Ass'n v. NBCC (India) Ltd, (2021) SCC OnLine SC 253 (India).

26 Verigamto Naveen v. Gov't of Andhra Pradesh, (2001) 8 SCC 344, ¶ 21 (India).

27 Radhakrishna Agarwal v. State of Bihar, 1977 AIR 1496, ¶ 12 (India) [*hereinafter* "Radhakrishna"]; Noble Resources Ltd v. State of Orissa, (2006) 10 SCC 236, ¶ 16 (India).

28 *See generally* Ravindra Kumar Singh, *Adjudicating the Public–Private Law Divide: The Case of Government Contracts in India*, 50(1) VERFASSUNG UND RECHT IN ÜBERSEE LAW AND POLITICS IN AFRICA, ASIA AND LATIN AMERICA 54 (2017).

of contract that the State has executed and would depend upon the facts of each case. In other words, in the process of characterising the contract, there is no straitjacket formula to determine whether the contract or the dispute arising out if it inherently involves a public law element.[29] Therefore, sometimes it is challenging to precisely define the kind of contract, i.e., subject to litigation through the writ petition as the characterisation is fact-intensive.

V. Relevance of Section 8(1) of the Indian Arbitration Act vis-à-vis writ petitions

At the outset, it is worth exploring the relevance of Section 8 of the Arbitration and Conciliation Act, 1996 ["**Arbitration Act**"], which is based on Article 8 of the United Nations Commission on International Trade Law ["**UNCITRAL**"] Model Law on International Commercial Arbitration ["**Model Law**"]. Section 8(1) of the Arbitration Act states that:

> "*A judicial authority, before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party to the arbitration agreement or any person claiming through or under him, so applies not later than the date of submitting his first statement on the substance of the dispute, then, notwithstanding any judgment, decree or order of the Supreme Court or any Court, refer the parties to arbitration unless it finds that prima facie no valid arbitration agreement exists.*"

The necessary elements for the application of Section 8(1) are: (i) an action before a judicial authority; (ii) which is subject to an arbitration agreement; and (iii) request for referral to arbitration is filed before the date of submitting the first statement of substance on the dispute.

[29] Gopal Glassworks Ltd. v. Union of India, (Gujarat HC) Special Civil Application No. 11916 of 2012, ¶ 10.5 (India).

The term "*judicial authority*" is quite broad and could extend its umbrella over all the Courts, including the Supreme Court and High Courts (collectively referred to as "Constitutional Courts"), and bring them under the ambit of Section 8(1). Similarly, the term "*action*" is broad and encompasses any action, including a lawsuit and a writ petition.[30] The indication provided by such analysis is that a request for referral to arbitration may be made in the subsistence of a writ action. However, no reference to such request for referral has been made in the Unitech case despite its potential potency in supporting the respondents' arguments regarding the maintainability of the writ petition. Consequently, neither the High Court nor the Supreme Court discussed the application of Section 8(1) to the case at hand, making it unclear whether a different outcome could have been expected if reliance were placed on this provision to enforce the arbitration agreement.

Having stated the above, the interplay between Section 8(1) and writ petitions is unclear. As such, Section 8(1) is primarily directed towards actions filed before domestic civil/commercial courts. Therefore, it is worth considering the interaction between Section 8(1) and domestic civil/commercial courts. It is worth pointing out that Section 8(1) applies to claims where the judicial authority and the arbitral tribunal have *prima facie* concurrent jurisdiction over the matter. This is apparent from the language of Section 8(1), which states that "*an action*" before a judicial authority must be "*[…] brought in a matter which is the subject of an arbitration agreement […]*" and that application for referral to arbitration has to be filed "*[…] not later than the date of submitting his first statement on the substance of the dispute […].*" It has been held that the first statement on the substance in this context, would be the written statement.[31] The obligation, as well as

30 *Action*, BLACK'S LAW DICTIONARY 49 (4th ed. 1968).

31 Sharad P. Jagtiani v. Edelweiss Securities Ltd., (2014) SCC OnLine Del 4015, ¶ 15 (India). Under Indian law, the written statement means the statement of defence.

the timeline to file the written statement, is triggered only when summons are issued against the defendant.[32] In turn, the summons can be issued only after the proper institution of the lawsuit,[33] which is further dependent upon the plaintiff satisfying *prima facie* jurisdictional parameters.[34] Hence, the first statement on the substance of the dispute cannot be filed without the court being satisfied of the *prima facie* jurisdiction. Therefore, the judicial authority approached under Section 8(1) and the arbitral tribunal will naturally have *prima facie* concurrent jurisdiction.

On the other hand, the settled position of law as reiterated in the *Unitech* case, is that the writ jurisdiction exists independently of the arbitration agreement.[35] Therefore, it is hard to imagine how Section 8(1) will apply to the writ petition, given that there is no *prima facie* concurrent jurisdiction between the arbitral tribunal and the Constitutional Courts. Simply put, writ jurisdiction is anchored to the constitution and governs the constitutional obligations as well as public law obligations. On the contrary, the arbitral jurisdiction is anchored to the arbitration agreement and exclusively governs the obligations relating to and arising out of the contract.

There appears a presumption that if writ jurisdiction under Article 226 of the Constitution has been preferred, then there must have been a breach of an obligation originating in the Constitution. In other words, in the *Unitech* case, when the Supreme Court answered in the affirmative the question of maintainability of the writ petition in the presence of an arbitration agreement, reliance was exclusively placed on the origin of the obligations of the State/State entity, which was found to be constitutional.[36]

---

32 CODE CIV. PROC., No. 5 of 1908, Order VIII, r. 1 (India) [*hereinafter* "CODE CIV. PROC."].
33 *Id.* Order V, r. 1.
34 *Id.* § 16; *Id.* Order IV, r. 1; *Id.* Order VII, r. 11. Under Indian law, the plaint means the statement of claim. *See also Plaint*, BLACK'S LAW DICTIONARY 1308 (4th ed. 1968).
35 Unitech, (2021) SCC OnLine SC 99 (India).
36 *Id.*

Interestingly, in various cases, including the *Unitech* case, the scope of Article 226 of the Constitution was the issue in question and yet only the breach of constitutional obligations was argued and ruled upon.[37] This is particularly noteworthy because, as mentioned above, the scope of the High Court's writ jurisdiction under Article 226 of the Constitution goes beyond the Constitution and empowers the High Courts to redress "*any injury or illegality caused due to contravention of the ordinary law*."[38] Therefore, while the scope of Article 226 is being scrutinised constantly, the impact of arbitration clauses on the broad jurisdiction conferred by Article 226 remains uncertain.

In any case, the approach of solely considering the obligations of the respondent in establishing jurisdiction could result in the enforcement of contractual claims under the garb of breach of constitutional obligations. In order to avoid such issues, there is a need to independently and objectively identify whether the relief requested by the private party through a writ petition would remedy the contractual breach.

It is a well-recognized principle that writs are an extraordinary remedy and must be exercised judiciously.[39] Allowing contractual breach claims relying on the breach of constitutional law obligations through writs could become a slippery slope and unleash a barrage of proxy constitutional claims for remedying the contractual breach. This issue has been discussed in detail in the latter part of the article (see Part VII below).[40]

VI. *Lis pendens* and *res judicata* vis-à-vis arbitration and writ petition

37 ABL Int'l, (2004) 3 SCC 553 (India); Sudhir Kumar Singh, (2020) SCC OnLine SC 847 (India); Unitech, (2021) SCC OnLine SC 99 (India).

38 DURGA DAS BASU, *supra* note 3.

39 Indian Tobacco Corp. v. State of Madras, AIR 1954 Mad 549, ¶ 6 (India).

40 *See* discussion *infra* Part VII.

While the Supreme Court ruled that the presence of an arbitration clause in a contract with a state entity does not oust writ jurisdiction,[41] it did not deal with the effects of the interplay between both the forums. The ruling could have far-reaching effects in terms of exposing the State/State entities to multiple parallel claims.

Let us consider the following scenarios:

(i) An arbitral tribunal constituted prior to filing the writ petition (simultaneous arbitration and writ petition).

(ii) An arbitral tribunal constituted after filing the writ petition (simultaneous arbitration and writ petition).

(iii) An arbitral tribunal constituted after the decision on the writ petition.

(iv) A writ petition filed after the rendering of the arbitral award.

In scenarios (i) and (iii), it is not clear how the issue of parallel or simultaneous proceedings is to be dealt with in the case of arbitration and writ petition. A flurry of practical questions emerges in this context, such as – should either forum exercise any deference towards another? Should the High Court hearing a writ petition filed under Article 226 of the Constitution evaluate whether there is a constitutional law obligation at stake in the case, given that the arbitral tribunal is already constituted? Is the arbitral tribunal required to exercise any deference to the fact that the claim was initially filed before the High Court or the Supreme Court?

All of the above questions are tough to answer, because of the lack of clarity on whether there is a concept of *res sub judice* or *lis pendens*[42] between the

41 *Id.*

42 *Lis pendens* is a civil law principle which refers to a lawsuit currently under consideration before a forum. The common law equivalent of *lis pendens* is *res sub judice*, which is codified

courts and arbitration. This is because arbitration is detached from local litigation and civil procedure framework governing civil court practices that generally provide for the application of doctrines of *res judicata* and *lis pendens*.[43] From a practical standpoint, one way around this issue could be for one of the parties to get an anti-arbitration injunction or an anti-suit injunction. This would exclude the parallel proceedings before their germination.

However, this leads to a bigger question – whether anti-suit injunctions can oust the writ jurisdiction of the Constitutional Courts, particularly given that anti-suit injunctions are enforceable against the party and not the forum?[44] Moreover, an anti-suit injunction can be applied only when two forums share concurrent jurisdiction,[45] which is not the case with writ petitions and arbitration. Additionally, since writ remedies are anchored to the Constitution, even when a writ petition is filed after the arbitral tribunal

---

under Section 10 of the CODE CIV. PROC. The doctrine of *res sub judice* provides that "if an issue is already pending before a judicial authority, the same issue, if it comes subsequently before another judicial authority, should not be proceeded with." *See* Sidharth Sharma, *The Chief Justice's Power to Appoint Arbitrators Under the Indian Arbitration Act*, 23(5) J. INT'L ARB. 467 (2006); *See also* AARON FELLMETH & MAURICE HORWITZ, GUIDE TO LATIN IN INTERNATIONAL LAW 179 (2009) [*hereinafter* "FELLMETH & HORWITZ"].

43 Arbitration and Conciliation Act, No. 26 of 1996, § 19(1) (India) [*hereinafter* "Arbitration Act"]; CODE CIV. PROC., §10 (India). The current legal position can be contrasted with the older position. Section 41 of the Arbitration Act 1940 stated that the CODE CIV. PROC. shall apply to all arbitration-related court proceedings. The Supreme Court had interpreted this provision broadly and held that CODE CIV. PROC. would apply to arbitral proceedings as well. *See* K.V. George v. Sec'y to Govt., Water & Power Dep't, (1989) 4 SCC 599 (India) [*hereinafter* "K.V. George"]. While various aspects of K.V. George have been referred and relied upon by the Delhi High Court in a recent case, the High Court specifically reiterated the principles of Section 19(1) of the Arbitration and Conciliation Act, 1996 that CODE CIV. PROC. does not apply to the arbitral proceedings. *See* Gammon India v. National Highways Auth., (2020) SCC OnLine Del 659 (India) [*hereinafter* "Gammon India"]. Therefore, the K.V. George precedent on CODE CIV. PROC.'S applicability to arbitration proceedings can be considered overruled *sub silentio*.

44 BLACK'S LAW DICTIONARY (11th ed. 2019).

45 Modi Entm't Network v. WSG Cricket, 2003 AIR SC 1177, ¶ 10 (India).

is constituted, arguably, the Constitutional Courts may still evaluate issues pertaining to constitutional obligations of the State entity. Furthermore, in the case of an India-seated arbitration, it is unlikely that an Indian trial court will grant an injunction at the outset and restrain a party from filing or pursuing a writ petition, given that writ remedies are a cornerstone of the Indian constitutional system.[46]

A further problem arises when an arbitral tribunal is constituted after the writ petition has been filed. The key question in this context is whether the arbitral tribunal should take a deferential view since the action is pending before the Supreme Court or the High Court? Arguably, since an Arbitral Tribunal's jurisdiction emanates from the arbitration agreement, it does not necessarily have to exercise any deference as long as the jurisdictional requirements of the arbitration agreement are fulfilled. Since neither of the fora is required to defer to another, the situation appears to be a fertile ground for parallel proceedings.

At the same time, it is necessary to examine – to what extent are the arbitral and writ proceedings parallel? Arbitral proceedings, like civil trial procedures, include evidentiary proceedings involving detailed consideration of both documentary and oral evidence. On the other hand, writ petitions rarely involve any evidentiary proceedings and operate mainly on the basis of affidavits and counter affidavits[47] submitted by the parties.[48] Therefore, arbitral proceedings and writ proceedings can be simultaneous but not parallel as the procedural scope of both the proceedings is different.

---

46 Nirmalendu Bikash Rakshit, *Right to Constitutional Remedy: Significance of Article 32*, 34 ECON. POL. WKLY. 2379 (1999).

47 Affidavits are a voluntary declaration of facts written down and sworn to by the declarant before an officer authorized to administer oaths. BLACK'S LAW DICTIONARY 80 (4th ed. 1968). A counter affidavit is an affidavit made to contradict and oppose another affidavit. *Id.* at 419.

48 N.S. Bindra, *Writ of Mandamus: Disputed Question of Fact*, 2 SCC (JOUR) 24 (1972); Bharat Singh v. State of Haryana, 1988 4 SCC 534 (India).

From a policy perspective, there is an argument to be made in favour of dismissing a writ petition when arbitration has been initiated on the grounds that an arbitral tribunal is in a better position to appreciate the factual nuances of the case and is, therefore, a more appropriate forum for adjudication of fact-intensive issues emanating from a commercial contract. Such an argument would also be in line with the general legal principle that writ petitions should not be entertained in cases that "*demand an elaborate examination of evidence to establish the right to enforce which the writ is claimed.*" [49]

Let us move to scenario (iii) and take the recent *Unitech* case as an example.[50] In the *Unitech* case, the Court, by allowing the writ petition, essentially ordered the State entity to repay the contractual money with interest since the contract was repudiated. If the Court had rejected the writ petition, would the petitioner still be entitled to arbitrate? Conversely, should the respondent State entity be allowed to go to arbitration after an adverse decision against it, under the writ petition? There are no clear-cut answers because there is no doctrine of *res judicata*[51] operating in cases where the matter has been decided by the Court and the arbitral tribunal has been constituted subsequently.[52] Although it is worth pointing out that under Indian law that "*the principles of res judicata apply to the arbitral proceedings*."[53] However, this *res judicata* effect is purported to operate between two

---

49 Thansingh Nathmal v. Superintendent of Taxes, 1964 AIR SC 1419 (India); *See also* Gunwant Kaur v. Bhatinda Municipality, (1969) 3 SCC 769 (India).

50 Unitech, (2021) SCC OnLine SC 99 (India).

51 *Res judicata* is a principle whereby a matter upon which a final and binding judgment has already been passed is precluded from further re–litigation to avoid conflicting judgments on the same matter. The doctrine bars the "same parties from litigating a second lawsuit on the same claim, or any other claim arising from the same transaction or series of transactions and that could have been—but was not—raised in the first suit." BLACK'S LAW DICTIONARY 1470 (4th ed. 1968); *See also* FELLMETH & HORWITZ, *supra* note 41, at 252.

52 *Contra,* discussion *supra* note 42.

53 Gammon India*,* (2020) SCC OnLine Del 659, ¶ 35 (India).

different arbitral tribunals. There is a lack of clarity on the issue of *res judicata* effect between an arbitral tribunal and a judicial Court.

Separately, under scenario (iv), if the writ petition is filed after the rendering of an arbitral award, there is a further point of concern. What if one of the parties lose in arbitration and then try to relitigate the issues before the Constitutional Courts by filing a writ petition? In such a case, the Courts would need to balance the constitutional remedies with the annulment remedy provided under Section 34 of the Arbitration Act to avoid re-litigation of the same issues. A similar situation arose in the recent case where the Supreme Court took an arbitration-friendly approach and refused to entertain the writ petition.[54]

It is emphasised that these issues have a significant impact on dispute resolution with State entities as a whole. The absence of the doctrines of *lis pendens* and *res judicata*, together with the existence of the possibility of filing a writ petition to obtain a contractual remedy, would not only give private parties multiple bites at the cherry, but also expose the State entities to simultaneous claims.

On the other hand, there is an argument to be made that even if there were the concepts of *lis pendens* and *res judicata* between courts and arbitral tribunals, these issues would not arise as the proceedings before both the forums have separate origins and independent legal existence. For an action to be excluded on the grounds of *lis pendens* or *res judicata*, it has to satisfy the triple identity test, i.e., the identity of the parties (*persona*), the identity of the object (*petitum*), and the identity of the ground (*causa petendi*) need to be the same.[55] Given the separate origins of the writ jurisdiction and

---

54 Bhaven Constr. v. Sardar Sarovar Narmada Nigam, (2021) SCC OnLine SC 8, ¶ 26 (India).

55 CODE CIV. PROC., §§ 10, 11 (India); Andanur Kalamma v. Gangamma, (2018) 15 SCC 508, ¶ 21 (India); Kristomonee Dossee v. Denobundhoo Chowdhry, (1877) ILR 2 Cal 153, ¶ 6 (India); Harshad Pathak & Pratyush Panjwani, *Parallel Proceedings in Indian Arbitration Law: Invoking Lis Pendens*, 34(3) J. INT'L ARB. 509, 539 (2017).

arbitration, the *causa petendi* would be different, and therefore, the triple identity test will not be satisfied. Hence, there is no possibility of *res judicata* and *lis pendens* between the matters pending before or decided by the Constitutional Courts and arbitral tribunals.

However, there is a potential for significant overlap between the remedies that could be granted in a writ and obtained from an arbitral tribunal. In fact, the Supreme Court has previously ruled that contractual matters are not barred from writ jurisdiction if they are sufficiently justified.[56] These overlaps are particularly concerning because the private parties would have the opportunity to obtain the same remedy twice, separately from different forums. Such overlaps, if not addressed, would defeat the overarching purpose of *lis pendens* and *res judicata*.

VII. Overlap between contractual remedies and writ remedies

Under Indian law, there is a duality of substantive standards governing State entities acting in a commercial capacity. According to the settled legal position,[57] State entities are, essentially, subject to dual standards of accountability, i.e., contractual standard and administrative/constitutional standard for the same relationship.

It is interesting to compare the abovementioned Indian legal position with French administrative law, under which State entities cannot arbitrate.[58] Therefore, as a general rule, private parties need to approach the designated administrative courts to resolve contractual disputes with the State entities

---

56 ABL Int'l, (2004) 3 SCC 553, ¶ 52 (India); K. N. Guruswamy v. The State of Mysore, 1954 AIR 592, ¶ 17 (India).

57 Unitech, (2021) SCC OnLine SC 99 (India).

58 CODE DE PROCEDURE CIVILE [C.P.C.] [CIVIL PROCEDURE CODE], art. 2060(1) (Fr.) [*hereinafter* "CODE DE PROCÉDURE CIVILE"]; PHILLIPE FOUCHARD & BERTHOLD GOLDMAN, FOUCHARD GAILLARD GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION 313–314 (Emmanuel Gaillard & John Savage eds., 1999).

under French law.[59] However, it is worth mentioning that State entities with industrial or commercial character or undertaking a professional activity can be permitted to arbitrate through a decree or a statutory provision.[60] Furthermore, French law recognizes two separate bodies of contract law—Administrative Contract Law and Private Contract Law.[61] The identity of the State entity as a party to the contract results in the application of Administrative contract law and excludes the application of Private contract law.[62] Therefore, even when the State entities are allowed to arbitrate, the arbitral tribunal must apply the administrative contract law.[63] Hence, the forum (arbitral tribunal or administrative courts) does not affect the law governing the obligation of the State entity under French law.

On the other hand, as mentioned earlier, under Indian law, there is a dual standard of accountability for State entities entering a contract with private parties. It is argued that this dichotomy of standards governing the accountability of the state entity is conceptually rooted in the modern-day Indian legal system's formative reliance on English law.[64] Under English law, unlike French law, there is no separate body of government or

---

59 Kyum Lee, Florian Dessault, Aida Taban & Pierre Tricard, *The Dispute Resolution Review: France*, THE L. REV. (Feb 17, 2022), *available at* https://thelawreviews.co.uk/title/the-dispute-resolution-review/france.

60 CODE DE PROCEDURE CIVILE, art. 2061 (Fr.).

61 Joseph Minattur, *French Administrative Law*, 16(3) J. INDIAN L. INST. 364, 372 (1974); Ching-Lang Lin, *Arbitration in Administrative Contract: Comparative Law Perspective* 79 (June 30, 2014) (Ph.D. dissertation, Institut d'Etudes Politiques de Paris), *available at* https://spire.sciencespo.fr/hdl:/2441/46qcqc7kdq8klrqco8mqr24l0p/resources/2014iepp0023-lin-ching-lang-these.pdf.

62 *See generally* Claude Goldman, *An Introduction to the French Law of Government Procurement Contracts*, 20 GEO. WASH. J. INT'L L. & ECON. 461 (1987).

63 Tribunal des Conflits [TC] [Court of Conflicts], Apr. 11, 2016, Rec. Lebon 4043 (Fr.); *Administrative Courts and International Arbitration*, CONSEIL D'ÉTAT (Nov. 10, 2016), *available at* https://www.conseil-etat.fr/en/news/administrative-courts-and-international-arbitration.

64 M.P. JAIN, INDIAN CONSTITUTIONAL LAW 14 (Jasti Chelameswar & Dama Seshadri Naidu eds., 8th ed. 2017); H. PATRICK GLENN, LEGAL TRADITIONS OF THE WORLD 260 (2d ed. 2004).

administrative contract law.[65] Therefore, all contracts, private and public, are governed by the same private contract law.[66] Consequently, under English law, the jurisprudence of judicial review (akin to writ petitions in India) developed independently alongside arbitral jurisprudence.[67]

Be that as it may, the juxtaposition of French law with Indian law reasserts a critical feature of State entity contracts. The State/State entities entering commercial contracts act in a hybrid capacity, with one foot in the public law sphere and another in the private law sphere. This brings back the practical dilemma and a long-standing conflict to the fore.[68] While there is a need to maintain oversight on the State entities through constitutional law, the law cannot close its eyes towards the State entities' freedom of contract.[69] The possibility of choosing a contractual dispute resolution forum such as arbitration for disputes arising out of this hybrid relationship only adds to the complexity of the situation.

The precarious consequences emanating from the above assessment are quite visible in the Indian legal context. As mentioned earlier, in India, there exists a dichotomy of substantive standards governing the State entities entering into contracts. Consequently, the breach of a specific standard reflects in the choice of a specific forum. On the one hand, if the State/State entity breaches a constitutional standard, the breach would be justiciable before the Constitutional Courts. On the other hand, if the State/State

---

65 Colin Turpin, GOVERNMENT PROCUREMENT AND CONTRACTS 97–98 (1989) *as cited in* Hop Dang, *The Applicability of International Law as Governing Law of State Contracts*, 17 AUSTL. INT'L L. J. 133, 151 (2010); *See also* Gabriela Shalev, *Government Contracts in Israel*, 18(1) PUB. CONT. L. J. 34, 41 (1988).

66 *See* sources cited *supra* note 64.

67 Stavros Brekoulakis & Margaret Devaney, *Public-Private Arbitration and the Public Interest under English Law*, 80 (1) MOD. L. REV. 22, 36–37 (2017).

68 Umakanth Varottil, *Government Contracts*, *in* THE OXFORD HANDBOOK OF THE INDIAN CONSTITUTION 975 (Sujit Choudhry, Madhav Khosla & Pratap Bhanu Mehta eds., 2016).

69 Tata Cellular v. Union of India, (1994) 6 SCC 651, ¶ 94 (India); Kerala State Electricity Bd. v. Kurien E. Kalathil, (2000) 6 SCC 293, ¶ 11 (India); *see also id.*

entity breaches a contractual standard, the breach would be justiciable before the arbitral tribunal. It is accepted that the sole fact that the relationship between the state entity and the private party is contractual should not be a bar for the Constitutional Courts to exercise writ jurisdiction over the matters of gross injustice. To quote Justice Altamas Kabir's words:

> "*Injustice, whenever and wherever it takes place, has to be struck down as an anathema to the rule of law and the provisions of the Constitution*."[70]

At the same time, it is hard to ignore that, despite this dichotomy of standards, the available remedies under writs and arbitration can overlap. Let us take the recent *Unitech* case as an example.[71] In this case, the State entity was ordered to return the contractual payments received with interest. This ruling was based on the grounds that the respondent State entity had refused to fulfil its contractual obligations and it breached the principles of fairness and equality, which form a part of Article 14 of the Constitution. While the reliance on breach of constitutional obligations is accepted, the remedy ordered by the Supreme Court that the respondent shall return the contractual payments with interest is a classic case of damages against the repudiation of the contract.[72] It is argued that the remedy against repudiation was also available and perhaps better suited before the arbitral tribunal.

It is worth mentioning that the Supreme Court has itself previously ruled that Constitutional Courts should not entertain purely contractual matters,[73]

---

70 Tantia Constr., (2011) 5 SCC 697, ¶ 34 (India).

71 Unitech, (2021) SCC OnLine SC 99 (India).

72 Indian Contract Act, No. 9 of 1872, §§ 39, 73 (India) [*hereinafter* "Indian Contract Act"]; *see also* DINSHAW FARDUNJI MULLA, THE INDIAN CONTRACT ACT 152, 217 (Anirudh Wadhwa ed., 13th ed. 2011) [*hereinafter* "MULLA"].

73 Kulchhinder Singh v. Hardayal Singh Brar, 1976 AIR 2216, ¶ 12 (India) [*hereinafter* "Kulchhinder Singh"]; Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust v. R. Rudani, 1989 AIR 1607 (India).

particularly in the existence of an exclusive choice of forum such as arbitration.[74] The emphasis here is on the word "*should*". Since writs are a discretionary remedy,[75] the Courts retain the residual power to make the final call on whether to entertain a writ petition on a "*case-by-case*" basis. The *Unitech* judgment is case in point.

The purpose of highlighting this issue is to underline the need to develop an appropriate demarcation between constitutional remedies and contractual remedies and move away from the subjectivity that exists at this point. It is argued that there is a need to filter out the contractual claims at the outset and separate them from constitutional claims to preserve the sanctity of the Constitutional Courts as well as the principles of party autonomy underlying the choice of arbitration as the exclusive contractual dispute resolution forum. Moreover, private parties cannot be allowed to approbate and reprobate on their choice of forum just because the other party to the contract is a state entity and there are alternate forums available to litigate same cause of action.

However, such a demarcation is easier said than done because the lines between the private and public functions of the State entities are not always straightforward. In fact, the Supreme Court has previously acknowledged the hurdles in the process of drawing precise boundaries between the public and private law aspects of the State's functions.[76]

Indeed, the exclusive and non-arbitrable nature of constitutional issues emanating from Article 14 (equality before law) of the Constitution was recently evaluated and settled in the case of *Board of Control for Cricket in India* v. *Deccan Chronicle Holdings Ltd.* ["**Deccan Chronicles**"].[77] Additionally, the

74 Bridge & Roof, (1996) 6 SCC 22, ¶ 21 (India).
75 K.S. Rashid & Sons v. Income Tax Investigation Comm'n, 1954 AIR SC 207, ¶ 4 (India).
76 Joshi Tech., (2015) 7 SCC 728 (India).
77 Board of Control for Cricket in India v. Deccan Chronicle Holdings Ltd., 2021 SCC OnLine Bom 834, ¶ 226 (India) [*hereinafter* "Deccan Chronicle Holdings Ltd."].

recent Supreme Court decision in the landmark *Vidya Drolia* case affirmed the non-arbitrability of public law issues.[78] These recent decisions, in addition to the constantly blurring lines between the public and private characterization of State/State entity contracts,[79] will lead to uncertainty. This uncertainty, in turn, could create trepidations in the minds of the potential arbitral tribunals regarding the issues of arbitrability in matters involving State entities that could potentially cut across or even tangentially touch the public law space.

Notwithstanding the above, it is submitted that the process of demarcation for the purposes of establishing writ jurisdiction has been challenging because, until this point, the Courts have taken an obligation-centric view of the claims i.e., whether the constitutional obligation was violated. It is submitted that there lies an opportunity to also take an object-centric view of the claim, i.e. whether the object of the claim is to obtain a contractual remedy. It is argued that in order to deal with these issues more efficiently, a holistic approach needs to be developed, by considering object and obligation together.

The Indian jurisprudence is not entirely unfamiliar with the holistic approach of combining object and obligations. In *Suganmal* v. *State of Madhya Pradesh*,[80] the five-judge Constitutional Bench of the Supreme Court emphasized on examining the breach of obligation of the State entity together with the object of the claim in order to determine the suitability of writ remedy.[81] In this case, the petitioner's claims were not about the legality of the action or breach of obligation. Instead, the petitioner claimed refunds after the illegality of the State's act was established separately. The Supreme Court ruled that a writ petition must only be maintained when the petitioner

78 Vidya Drolia v. Durga Trading Corp., (2021) 2 SCC 1, ¶ 35 (India).
79 *See supra* note 27.
80 Suganmal v. State of Madhya Pradesh, 1965 AIR SC 1740, ¶ 9 (India).
81 *Id.*

challenges the legality of the State/State entity's acts and requests the refund as a remedy for the State/State entity's acts.[82] In essence, the Supreme Court relied on a more holistic way of viewing the claims while entertaining the writ.

In the following part, the author builds upon the idea of combining obligations with objects and proposes a two-step test to filter out purely contractual claims. The demarcation resulting from the proposed test would not only enable the Courts to appreciate the issues more perspicaciously but also provide the arbitrators with some much-needed clarity when faced with the contractual issues intersecting with public law aspects.

VIII. Two-step *prima facie* characterisation test

In light of the problems highlighted above, it is proposed that a two-step *prima facie* characterisation test be applied to filter out purely contractual claims and enable the Constitutional Courts to primarily entertain the constitutional matters. This test is to be applied specifically in the cases where a writ petition has been filed despite there being an arbitration clause in a contract between a State entity and a private party.

As per the proposed test, first, the origin of the obligation which has been allegedly breached must be considered, and then the object of the claim must be considered. The test requires answering the following:

1. Whether the obligation relied upon in the writ petition is constitutional?

2. If yes, whether the object of claim in the writ petition is the vindication of contractual rights?

82 *Id.*

If the obligation is contractual, then the object would clearly be contractual as well. Such claims should be excluded from the first step itself and referred to arbitration. Indeed, this aligns with the settled position of law that contractual obligations should not be enforced through writ petitions.[83]

On the other hand, if the obligation is constitutional, then the second step must be undertaken. This is because the sole application of the first step could potentially result in the success of the claims that rely on the breach of constitutional obligation but result in a contractual remedy. This will have a chilling effect not only on the relevance of arbitration but also on the principles of party autonomy that permit a contractual choice of forum. Hence, the second step of the test is crucial.

Under the second step, after considering the nature of the obligation, the object of the claim must be considered. If the object of the claim is the vindication of contractual rights, then the claim should be characterized as contractual and referred to arbitration. If the object of the claim is the vindication of constitutional rights, then the claim should be characterized as constitutional and be entertained as such.

It is accepted that constitutional law issues are not arbitrable, as clarified by the Bombay High Court in the recent *Deccan Chronicles* case.[84] However, as noted earlier, under Indian law, state entity is governed by dual and concurrent standards of accountability– contractual and constitutional. Therefore, in applying the proposed test, when a writ petition relying on constitutional obligations with an underlying contractual objective is not entertained and an arbitral tribunal is constituted, the tribunal will not adjudicate upon constitutional obligations. Rather, the arbitral tribunal will

---

83 Radhakrishna, (2006) 10 SCC 236, ¶ 19 (India); Kulchhinder Singh, 1976 AIR 2216, ¶ 12 (India).

84 Deccan Chronicle Holdings Ltd., 2021 SCC OnLine Bom 834, ¶ 191 (India).

adjudicate upon the breach of the contractual obligations and grant a contractual remedy.

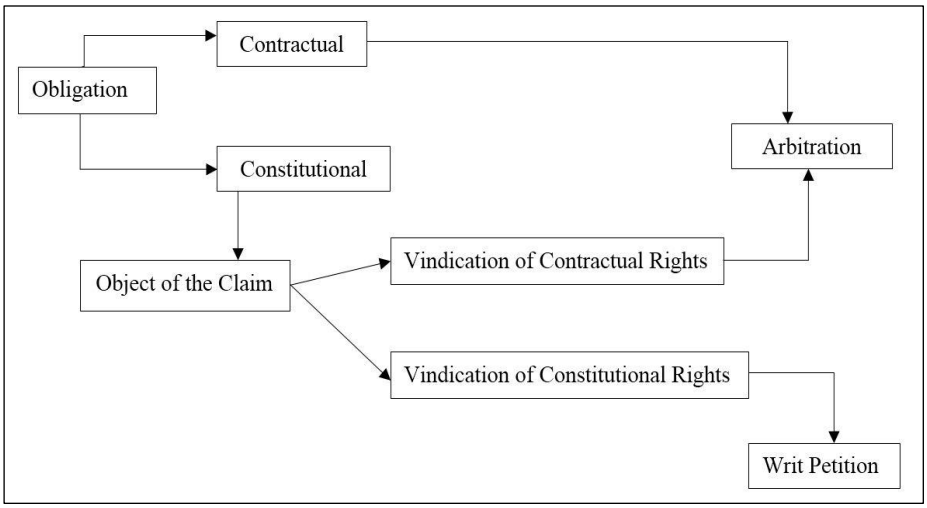

Figure 1: Graphical representation of the two-step prima facie characterization test

Obligation	**Objective**	**Forum**
Contractual		Arbitration
Constitutional	Contractual	Arbitration
Constitutional	Constitutional	High Court/Supreme Court (Writ Petition)

Table 1: Tabular representation of the two-step prima facie characterization test

The proposed two-step *prima facie* characterisation test is an extrapolation of practice that is commonly found in the investment arbitration context, whereby certain investment arbitral tribunals have refused to entertain claims that, even though anchored in an investment treaty, were about the scope of rights and duties in the contract and had a contractual objective

behind them.[85] This solution from investment arbitration practice is particularly relevant for the jurisdictional overlap between arbitration and writ petitions because a similar problem exists on the investment arbitration plane.

Many times, foreign investors and entities of the host State have a contract providing for commercial arbitration as a dispute resolution forum.[86] Simultaneously, there exists an investment treaty between the host State and the foreign investor's home State, providing for investment arbitration as the forum for dispute resolution.[87] In such a situation, a foreign investor essentially has two forums to enforce two different obligations between the same parties. Similar to the Indian constitutional law practice,[88] the prevalent investment arbitration practice suggests that the contract would govern contractual obligations, and the treaty would govern treaty obligations.[89] However, there remains a question of whether the treaty obligations can be enforced by requesting contractual relief?

As a solution to this problem, certain investment tribunals have ruled and certain scholars have argued in favour of only allowing the claims for the vindication of treaty rights to cross the metaphorical bridge to reach an

---

85 Compania de Aguas del Aconquija S.A. and Vivendi Universal (formerly Compagnie Generale des Eaux) v. Argentine Republic, ICSID Case No. ARB/97/3: Decision on Annulment, 19(1) ICSID REV. – FOREIGN INV. L. J. 89, 130 (2004) [*hereinafter* "Vivendi Annulment"]; Société Générale de Surveillance S.A. v. Republic of Phillipines., ICSID Case No. ARB/02/6, Decision on Jurisdiction, ¶ 155 (Jan. 29, 2004); ZACHARY DOUGLAS, THE INTERNATIONAL LAW OF INVESTMENT CLAIMS 363 (2009) [*hereinafter* "ZACHARY DOUGLAS"].

86 *See generally* Stephen Donnelly, *Conflicting Forum–selection Agreements in Treaty and Contract*, 69(4) INT'L COMP. L. Q. 759 (2020).

87 *Id.*

88 Radhakrishna, (2006) 10 SCC 236, ¶ 19 (India).

89 Vivendi Annulment, ICSID Case No. ARB/97/3: Decision on Annulment, 19(1) ICSID REV. – FOREIGN INV. L. J. 89, 130 (2004).

investment tribunal and staying the claims for the vindication of contractual rights.[90]

While it is accepted that the origins of the jurisdiction of the investment arbitral tribunals and Constitutional Courts are fundamentally different, both forums share a common objective, i.e. holding the State or State entity accountable for its acts and omissions.[91] Over and above this common objective, and perhaps partly owing to it, there exists a jurisdictional overlap between the Constitutional Courts and investment arbitral tribunals, which has been the subject of intricate analysis by scholars.[92] Indeed, this overlap is a clear example of similarities between both the forums.[93] Therefore, the transposition of a relevant solution from investment arbitration practice into constitutional practice is logical.

However, one might argue that the application of investment arbitration principles to constitutional law predicaments would not be appropriate

---

90 *Id*.; *see also* El Paso Energy Int'l Co. v. Argentine Republic, ICSID Case No. ARB/03/15, Decision on Jurisdiction, ¶ 65 (Apr. 27, 2006); *See also* Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V. v. Republic of Paraguay, ICSID Case No. ARB/07/9, Decision of the Tribunal on Objections to Jurisdiction, ¶¶ 154, 160 (May 29, 2009); *See also* Toto Costruzioni Generali S.p.A. v. Republic of Lebanon, ICSID Case No. ARB/07/12, Decision on Jurisdiction, ¶ 202 (Sept. 11, 2009); Berk Demirkol, *Non–treaty Claims in Investment Treaty Arbitration*, 31(1) LEIDEN J. INT'L L. 59 (2017).

91 Stephan Schill, *The Virtues of Investor–State Arbitration*, EJIL:TALK! (Nov. 19. 2013), *available at* https://www.ejiltalk.org/the-virtues-of-investor-state-arbitration; DURGA DAS BASU, *supra* note 3, at 131 *et seq*.

92 GABRIELLE KAUFMANN–KOHLER & MICHELE POTESTÀ, INVESTOR–STATE DISPUTE SETTLEMENT AND NATIONAL COURTS: CURRENT FRAMEWORK AND REFORM OPTIONS 33 (2020); SANTIAGO MONTT, STATE LIABILITY IN INVESTMENT TREATY ARBITRATION GLOBAL CONSTITUTIONAL AND ADMINISTRATIVE LAW IN THE BIT GENERATION 12 (2009).

93 Stephan Schill, *International Investment Law and Comparative Public Law: An Introduction, in* INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW 15 (Stephan W. Schill ed., 2010); David Schneiderman, *Investment Arbitration as Constitutional Law: Constitutional analogies, linkages, and absences*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL ARBITRATION 421 (Thomas Schultz & Federico Ortino eds., 2020).

because the investment arbitral tribunals have been argued to have a hybrid public-private character.[94] On the other hand, generally, the Constitutional Courts deal with public law issues that are exclusive and non-arbitrable in nature. A response to this argument lies in Article 226 of the Constitution, which makes the constitutional mandate of the High Courts in India unique. As noted earlier, the broad jurisdiction of the High Courts under Article 226 to issue writs for "*any other purposes*" would cover legal issues beyond the public law realm and could entail issues with a mixed public-private character. Therefore, the above argument does not apply to writ petitions before the High Courts under Article 226 of the Constitution.

From a policy perspective, it is emphasised that the Courts, as well as the investment arbitral tribunals, cannot ignore the interests of transnational commerce and, therefore, must give effect to the collective will of the parties and the principle of *pacta sunt servanda* by upholding the contractual dispute resolution clauses.[95] Through the proposed two-step test, the Constitutional Courts will not only be able to enforce the contractual dispute resolution clauses but also preserve the plenary and prerogative nature of the writ remedies.

IX. Conclusion

As stated at the outset, the issue of whether to entertain a writ petition against a State entity in the presence of an arbitration clause, despite being analysed and decided multiple times, still persists. It has been ruled numerous times that the State entity's constitutional obligations would be separate from contractual obligations, which is why an arbitration clause cannot vitiate writ jurisdiction. On the other hand, it has also been ruled

---

94 Zachary Douglas, *The Hybrid Foundations of Investment Treaty Arbitration*, 74(1) BRIT. Y.B. INT'L L. 152 (2003); *see also* Anthea Roberts, *Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System*, 107(1) AM. J. INT'L L. 45 (2013).

95 ZACHARY DOUGLAS, *supra* note 84; Indian Contract Act 1872, § 28, exception 1; *See also* MULLA, *supra* note 71, 126.

that when a *forum specialis* such as arbitration has been designated in the contract, purely contractual claims would be better suited before that forum. However, there remains a gap as to which claims would be purely contractual and which constitutional. This essentially opens the door for contractual claims relying on the breach of constitutional obligations to be entertained through writ petitions.

This gap exists because of the obligation-centric view of the Courts, wherein the origin of the obligation allegedly breached by the State/State entity is the sole driver of the nature of the claim and the choice of appropriate forum. The obligation-centric view can potentially allow writ remedies in the claims which argue breach of constitutional obligations but have a contractual objective behind them. This is particularly concerning in the cases where there is an arbitration clause in the contract with the state entity.

To resolve this problem, a two-step test has been proposed. This test moves away from the traditional obligation-centric approach towards a holistic approach, covering the obligation of the State entity as well as the object of the claim. In the process, the test enables the achievement of the collective purpose of the Indian legislative drive to make India an arbitration hub. At the same time, the test is in line with the extraordinary and discretionary nature of writ remedies, which need to be exercised judiciously.

A MINI-REFERENCER FOR THE INDIAN LAW ON DELAY AND DAMAGES IN CONSTRUCTION ARBITRATION

Chitransh Vijayvergia[*]

Abstract

*Delay and disruptions are a common occurrence in the completion of the projects under a construction contract. This leads to non-completion of the project within the stipulated period of time, thus attracting liquidated damages and termination clauses of the contracts. This application of the liquidated damages clause or the termination clause of the contracts by the employers sometimes gives rise to disputes wherein the contractor contends that the levy of liquidated damages or the termination was improper. These disputes include, but are not limited to, whether time was of the essence of the contract, whether the employer had the right to terminate the contract, whether proper notice was given to the contractor that damages will be levied for delayed performance, whether granting of extension amounted to a waiver of the right to levy damages, whether the employer suffered any actual loss to claim damages, whether the employer itself caused delay in performance, etc. In India, Sections 55, 63 and 74 of the Indian Contract Act, 1872 ["**ICA**"] are at the heart of the discussion on resolution of these disputes. Therefore, the article attempts*

[*] Chitransh Vijayvergia is a B.A. LLB (Hons.), batch of 2020 graduate from the National University of Advanced Legal Studies, Kochi. He is currently working as an Associate (Litigation and Dispute Resolution) at Panicker & Panicker Advocate, New Delhi. Concurrently, he is also working as a Law Clerk-cum-Research Assistant with Hon'ble Justice KSP Radhakrishnan (Former Judge, Supreme Court of India). The views expressed in this article are those of the author alone and do not necessarily represent the view of Panicker & Panicker Advocates. For any discussion related to this article, the author may be approached at chitransh.vijay@outlook.com.

to answer a range of questions which are frequently witnessed in construction arbitration matters in India.

I. Introduction

Construction contract is an expansive term that can be used for contracts ranging from road, bridge, or, ship-building contracts, to a refit contract or even a construction management contract and much more. However, the first step in the formation of all construction contracts is the invitation to a tender document.[1] In the construction industry, *tender* is a term used to refer to "*an offer to perform or carry out works on a construction project.*"[2] This offer is susceptible to the same standards as any other offer and, thus, must be unconditional and definite.[3] However, unlike general offers under the ICA,[4] an offer in the form of a tender must be made at a proper place and time, and in the requisite format to the concerned person, while conforming with the terms of obligations. Further, it should be by a person who is capable of, and willing to perform his obligations.[5]

The tender processes may be public or private, depending on the nature of work, and the nature of the organisation releasing the tender. Once the bidding process is complete, the contract is entered into which determines the scope of work, the duration of work, and other related terms and conditions for the successful completion of the contract. One of the most familiar clauses found in these contracts is that of *liquidated damages* ["**LD**"], the purpose of which is to compensate the injured party for the loss

1 B.S. PATIL & S.P. WOOLHOUSE, B.S. PATIL'S BUILDING AND ENGINEERING CONTRACTS 1 (7th ed. 2020) [*hereinafter* "B.S. PATIL & S.P. WOOLHOUSE"].

2 CYRIL CHERN, THE LAW OF CONSTRUCTION DISPUTES 54 (3d ed. 2020) [*hereinafter* "CYRIL CHERN"].

3 *Id.*

4 Indian Contract Act, No. 9 of 1872, INDIA CODE (2022) (India) [*hereinafter* "Contract Act"].

5 *See* Tata Cellular v. Union of India, (1994) 6 SCC 51 (India), ¶ 69; *see also* R.S. Daikho v. State of Manipur, (2018) 1 BC 166 (India).

suffered by it due to the actions of the other party(ies) to the contract.[6] This clause comes into action if there is any delay on the part of the contractor in completing the work within the agreed-upon period, or failing to complete it at all.[7] The applicability of this clause depends on the language of the specific clause, and other related conditions of the contract.[8] While the language of this clause may differ from contract to contract, there exist internationally accepted standard form contracts like the *Fédération Internationale des Ingénieurs-Conseils* form,[9] which is often used as a base for the drafting of construction contracts.[10]

Looking into it from the Indian perspective, for instance, the National Highways Authority of India and Oil and Natural Gas Corporation Ltd. ["**ONGC**"] have their own standard form contracts,[11] and so does the defence sector for the procurement of construction agreements.[12] These

---

6 B.S. PATIL & S.P. WOOLHOUSE, *supra* note 1, at 341.

7 *See* Maharashtra State Electricity Distrib. Co. Ltd. v. M/s. Datar Switchgear Ltd., (2018) 3 SCC 133, ¶ 22 (India).

8 *See* M/s Hind Constr. Contractors v. State of Maharashtra, (1979) 2 SCC 70, ¶¶ 7–10 (India) [*hereinafter* "Hind Const."].

9 *See* FÉDÉRATION INTERNATIONALE DES INGÉNIEURS–CONSEILS (FIDIC), CONSTRUCTION CONTRACT (2d ed. 2017) [*hereinafter* "FIDIC Red Book"].

10 *See Standard Form Contracts: FIDIC*, PINSENT MASONS (Aug. 12, 2011), *available at* https://www.pinsentmasons.com/out-law/guides/standard-form-contracts-fidic.

11 For the National Highways Authority of India (NHAI), *see Engineering Procurement and Construction (EPC) Agreement*, MINISTRY OF ROAD TRANSPORT & HIGHWAYS (Mar. 5, 2019), https://morth.nic.in/sites/default/files/Revised_standard_EPC_Agreement_for_NH_and_Centrally_sponsored_road_works_proposed_to_be_implemented_on_EPC.pdf; for ONGC, *see Integrated Materials Management Manual*, OIL AND NATURAL GAS CORPORATION LTD. (Feb. 1, 2015), *available at* https://www.ongcindia.com/wps/wcm/connect/e46e8491-cf11-4394-af4a-5d5868526786/Integrated+MM+Manual_Updated+upto_04.10.2018.pdf?MOD=AJPERES&CACHEID=ROOTWORKSPACE-e46e8491-cf11-4394-af4a-5d5868526786-mpnYymo.

12 *Defence Procurement Manual*, GOVERNMENT OF INDIA, MINISTRY OF DEFENCE (2009) https://www.mod.gov.in/sites/default/files/DPM2009.pdf [*hereinafter* "Defence Procurement Manual"].

agreements lay down the rights and obligations of both the parties to the contract, *viz.* the contractor as well as the employer. While most of the obligations under the contracts are pinned on the contractors, the one that stands out is the duty to complete the work within the agreed timeframe. On the other hand, the obligations of the employers are mostly limited to providing the contractors with the facilities to complete the work on time and to make the payments on time as per the contract.[13]

Like any other contract, the violation of the clauses of the construction contracts by either of the parties gives rise to a dispute. From a bird's eye view, the disputes are related to the levy of LD; or the invocation of the performance guarantee of the contractor by the employer; or withholding of an amount by the employer, without any substantial justification. However, when looked into in detail, the aforesaid disputes arise from a bundle of smaller disputes, which include, but not limited to: whether time was of the essence of the contract;[14] whether the extension/non-extension of the contract period was justified;[15] whether the employer had the right to terminate the contract;[16] whether proper notice was given to the contractor that damages will be levied for delayed performance;[17] whether granting of extension amounted to a waiver of the right to levy damages;[18]

---

13 *The Role of the Owner in the Construction Project: Doing More Than Writing Checks*, STIMMEL LAW, *available at* https://www.stimmel-law.com/en/articles/role-owner-construction-project-doing-more-writing-checks.

14 *See* Hind Constr., (1979) 2 SCC 70, ¶¶ 7–8 (India).

15 *See* Arosan Enter. Ltd. v. Union of India, (1999) 9 SCC 449, ¶ 16 (India) [*hereinafter* "Arosan Enter."].

16 M/s. Citadel Fine Pharm. v. M/s. Ramaniyam Real Estates Pvt. Ltd., (2011) 9 SCC 147, ¶¶ 55–56 (India).

17 *See* Oil & Natural Gas Corp. Ltd. v. Soconord OCTG, 2014 SCC OnLine Bom 1277, ¶ 42 (India) [*hereinafter* "ONGC Soconord"].

18 *See* Oil & Natural Gas Corp. Ltd. v. Saw Pipes, (2003) 5 SCC 705, ¶¶ 67–74 (India) [*hereinafter* "ONGC"].

whether the employer suffered any actual loss to claim damages;[19] whether the damages levied were extraordinary;[20] whether the employer itself caused a delay in performance,[21] etc.

In addition to the contract which serves as the foundation for determining the liability of the parties, in India, these above-mentioned issues are governed by the ICA. While the construction contracts will have to undergo the scrutiny of all the provisions of the ICA, the most frequently applicable provisions for determination of liquidated damages are embedded under Chapters IV, V and VI of the ICA, wherein, Sections 55, 63 and 74 are at the heart of the discussion.[22]

In this article, the author conducts an in-depth study of the aforementioned issues leading to disputes in construction contracts, and provides a comprehensive view of the present legal position in India. For the purpose of this article, the author presents his ideas in six parts. Part II discusses the issues pertaining to the significance of time in the performance of the contracts and reciprocal promises. Part III analyses whether an extension of time to perform the contract amounts to a waiver of the right to levy LD

---

19 *See* Kailash Nath Assoc. v. Delhi Dev. Auth., (2015) 4 SCC 136, ¶¶ 31, 32, 34–37, 43.6 (India) [*hereinafter* "Kailash Nath Assoc."].

20 *See* McDermott Int'l Inc. v. Burn Standard Co. Ltd., (2006) 11 SCC 181 (India) [*hereinafter* "McDermott Int'l Inc."].

21 *See* J.G. Eng'r Pvt. Ltd. v. Union of India, (2011) 5 SCC 758 (India) [*hereinafter* "J.G. Eng'r"].

22 Achintya Rawal, *The Changing Landscape Of Construction Arbitration*, MONDAQ (Nov. 5, 2019), https://www.mondaq.com/india/arbitration-dispute-resolution/860526/the-changing-landscape-of-construction-arbitration; *Construction Disputes in India*, NISHITH DESAI ASSOCIATES (Apr. 2020), *available at* https://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research_Papers/Construction-disputes-in-india.pdf; Binsy Susan, Akshay Sharma & Amogh Srivastava, *Construction Arbitration: India*, GLOBAL ARBITRATION REVIEW (June 28, 2021), https://globalarbitrationreview.com/insight/know-how/construction-arbitration/report/india; *see* Badrinath Srinivasan, *The Law on Time as Essence in Construction Contracts: A Critique*, 8(1) RGNUL FIN. & MERCANTILE L. REV. 1 (2021) [*hereinafter* "Badrinath Srinivasan"].

by the employer. Part IV studies the consequences of the breach of contract in the form of LD and consequential damages, and also explores the avenues whereby the contractor can claim from the employer for the latter's delay or for additional work undertaken by the former. Part V delves into the aspect of sub-contractor's rights and liabilities in a construction contract as though generally the contract of the Contractor with the sub-contractor and the one with the Employer are different breach of either by any of the parties involved will have an adverse impact on the performance of the other contract. Concluding remarks are presented in Part VI.

II. What are the implications of non-performance of the contract within the stipulated period of time on the levy of LD?

As mentioned in Part I, the tenders or the contracts ought to provide a proper time and place for the performance of the contract in construction matters. In such contracts, the employer may require the performance on a particular date or within a specific number of days/working days or months, or even years from the effective date of the contract.[23]

Sections 46 to 49 of the ICA deal with the various scenarios for the performance of the contract when there is uncertainty regarding the time and place of performance. The general principles are: *first*, that when no time and place is specified in the contract then the contractor has to fulfil his obligations within a reasonable period of time, wherein, a reasonable period would be as per the specific industry standards, and the nature of the work.[24] *Second*, if no application is to be made for performance by the employer, and where the time is specified, then the contractor is obliged to deliver the work at the usual place of business of the employer during the usual hours of business, at the agreed upon time.[25] *Third*, if the contract

23 B.S. PATIL & S.P. WOOLHOUSE, *supra* note 1, at 300.
24 Contract Act, § 46.
25 Contract Act, § 47.

requires an application by the employer, and where the time is specified, then the contractor is obliged to deliver the work at the requested place and time upon receiving an application for performance.[26] *Fourth*, if no application is to be made for performance by the employer, and no place is specified, the contractor is obliged to request the employer to fix a reasonable time and place for the performance of the contract.[27]

If the timelines mentioned in the contractual clauses or the manner of performance as provided under the above-mentioned provisions of the ICA are not met, leading to a delay in performance or non-performance of the contract, it gives rise to a breach of contract. Once it is established that there was a breach of contract by either of the parties to the contract, the LD clause and the termination clause of the contract would come into action. However, the applicability of these clauses depends and varies based on the nature of the contract, i.e., whether time was of the essence of these contracts or not.

A. When is time of the essence of the contract and when is it not?

The law relating to whether time is of the essence of a contract or not has been taken up for consideration by the Indian courts in myriad cases. Time has been considered to be of the essence in the contracts of commercial nature like those of sale of goods,[28] and not to be of essence in cases pertaining to immovable property,[29] with exceptions based on the intention of the parties.[30] However, when it comes to construction contracts, which is also a commercial contract in its broader meaning, the courts have shied away from imposing the same standards to the construction contracts

26 Contract Act, § 48.

27 Contract Act, § 49.

28 Ratilal M. Parikh v. Dalmia Cement and Paper Mktg. Co. Ltd., AIR 1943 Bom 229, ¶ 17 (India) [*hereinafter* "Ratilal M. Parikh"]; *see* China Cotton Exporters v. Biharilal Ramcharan Cotton Mills Ltd., AIR 1961 SC 1295, ¶¶ 6, 8 (India).

29 *See* Govind Prasad Chaturvedi v. Hari Dutt Shastri, (1977) 2 SCC 539, ¶ 6 (India).

30 *See* Chand Rani v. Kamal Rani, (1993) 1 SCC 519, ¶ 25 (India).

where time has generally been considered not to be of the essence of the contract.[31]

Courts have laid down various tests to determine whether time would be of the essence in commercial contracts, like the presence of an extension of time clause;[32] or the presence of clauses levying LD for each day/week/month of delay.[33] In doing so, the courts have gone beyond the plain language of the contract to interpret the real intention of the parties; inasmuch as, the courts, on occasions, have held that despite there being an express mention in the contract that time is of the essence, it is not necessary that it is actually of the essence. These cases are discussed herein below:

i. *A holistic reading of the contract in Hind Construction Contractors v. State of Maharashtra ["**Hind Construction**"]*

The dispute, in this case, arose out of a contract dated July 12, 1955, wherein the contractor undertook to complete the construction within twelve months, i.e., by July 4, 1956.[34] However, due to various circumstances, the work could not be completed within the stipulated time, owing to which, the contractor sought an extension of time for the performance of the contract.[35] This request for an extension was denied by the employer who elected to terminate the contract on the basis that Clause 2 of the 1955 Contract, which provided that the time will be the essence of the contract.[36] While terminating the contract, the employer invoked the performance guarantee and reserved the payment of the bills to the contractor.[37]

---

31 McDermott Int'l, (2006) 11 SCC 181, ¶¶ 85–6 (India).

32 Hind Constr., (1979) 2 SCC 70, ¶¶ 7–9 (India); Arosan Enter., (1999) 9 SCC 449, ¶¶ 13–14 (India).

33 Hind Constr., (1979) 2 SCC 70, ¶¶ 7–9 (India).

34 *Id.* ¶ 2.

35 *Id.*

36 *Id.* ¶¶ 2–5.

37 *Id.* ¶ 4.

The questions of law to be decided by the Hon'ble Supreme Court of India were whether the time was of the essence of the contract in the case, and whether the termination of the contract was legal.[38]

While the contract under Clause 2 expressly provided that the time was of the essence of the contract, the court went on to read into other provisions of the contract to determine the real intention of the parties. On perusal of the contract, the Court found two relevant clauses, *viz.* a clause providing for levy of LD for each week of delay by the contractor, and a clause pertaining to the extension of time for performance of the contractor by the employer.[39]

In light of the above two clauses, the Court opined that since the contract itself systematically provides for an extension of time in certain contingencies, it cancels out the express mention of time being of the essence. Thus, the SC laid down two tests for determining whether the time is of the essence of the contract, *viz.* presence of an extension of time clause, and levying of LD for the delay.[40]

However, it is to be noted here that the Court might have overreached its powers under the law.[41] The general principle of law is that in the interpretation of a contract, a court has to respect the plain language of the contract, and it is only when the plain language of the contract is ambiguous in nature that the reference has to be made to other provisions of the contract to determine the real intention of the parties.[42] In Hind Construction, there was an express stipulation under Clause 2 that time is

38 *Id.* ¶¶ 7–8.
39 *Id.* ¶¶ 8–9.
40 *Id.* ¶¶ 7–10.
41 *See* Badrinath Srinivasan, *supra* note 22.
42 *See* Abdulla Ahmed v. Animendra Kissen Mitter, AIR 1950 SC 15 (India); *see also* Central Bank of India Ltd. v. Hartford Fire Ins. Co. Ltd., AIR 1965 SC 1288 (India); Modi & Co. v. Union of India, AIR 1969 SC 9 (India); Pravash Chandra Dalui v. Biswanath Banerjee, 1989 Supp (1) SCC 487 (India); ONGC, (2003) 5 SCC 705 (India).

of the essence; but, as mentioned above, the court interpreted it on the basis of other clauses of the contract. It is also of prime importance here, that if the contract provides for an extension of time only for a small duration, it indicates towards time being of the essence rather than not being of the essence.[43] That the mere forbearance of the employer and allowing of additional time so that the work could be completed, should not be considered as rendering ineffective the express provision relating to the time being of the essence.[44]

Irrespective of the above, the decision of the Supreme Court in *Hind Construction* has been upheld by various courts, and it holds prime importance in any case for determination of whether time was of the essence or not.[45]

ii. *Extension of the principle in Arosan Enterprises Ltd v. Union of India ["**Arosan Enterprises**"]*

While the Supreme Court did not refer to its previous decision in *Hind Construction* here, it came to a similar conclusion that when the employer voluntarily extends the time for performance of the contract, time cannot be of the essence of the contract irrespective of any express stipulation to this extent.[46]

Unlike *Hind Construction*, the contract in this case did not expressly state that time was of the essence of the contract, and it was only provided that the supply of the items shall be made before a particular date.[47] Further, it had a self-contradictory clause for termination and extension of time in the

43 *See* Devender Kumar v. Parsvnath Realcon Pvt. Ltd., No. 13 of 2019, decided on Jan. 16, 2020 (Real Est. Regulatory Comm'n, Delhi) (India).

44 *See* ONGC, (2003) 5 SCC 705 (India).

45 *See* K.S. Vidyanadam v. Vairavan, (1997) 3 SCC 1 (India); *see also* Chand Rani v. Kamal Rani (1993) 1 SCC 519 (India); Citadel Fine Pharm., (2011) 9 SCC 147 (India).

46 Arosan Enter., (1999) 9 SCC 449 (India), ¶¶ 13–4.

47 *Id.* ¶ 2.

same provision, which read as: "*in case of delay the seller was to be deemed to be in contractual default with a right to the buyer to cancel the contract. The buyer could however extend the delivery period at a discount as may be mutually agreed between the buyer and the seller.*"[48] By interpreting these clauses of the contract, the Court opined that if the contract itself provides for an extension of time, time cannot be termed as the essence of such a contract.[49]

While the ratio in both *Hind Construction* and *Arosan Enterprises* is the same, the approach taken by the Supreme Court in *Arosan Enterprises* could be justified due to the absence of any express stipulation under the contract that time was of the essence. The clause in *Arosan Enterprises* merely provided that the delivery has to be done by a particular date, but there was no urgency portrayed by any other clause under the contract in the absence of any express stipulation, thus, leading to ambiguity. Hence, reference to other clauses of the contract, and specially the wordings of the extension of time clause was sound, unlike *Hind Construction*, wherein, the Supreme Court deviated from the plain language of the contract.

iii. *Presumption for construction contracts in McDermott International Inc. v. Burn Standard Co. Ltd. ["**McDermott International**"]*

Though in this case, the employer did not allege that the time was of the essence of the contract, the Court, while discussing the issue regarding levy of LD, discussed the scope of Section 55 of the ICA. Relying upon the decision in *Hind Construction* and *Arosan Enterprises*, the Court noted that due to the presence of an extension of time clause and levy of LD for each week of delay clauses, time was not the essence of the contract and, thus, the case fell within the ambit of paragraph two of Section 55.[50]

48 *Id.*
49 *Id.* ¶ 14.
50 McDermott Int'l Inc., (2006) 11 SCC 181, ¶¶ 31, 83–88 (India).

The Court in this case, however, went a step further and held that "*in construction contracts generally time is not of the essence of the contract*,"[51] thus closing all the options for the employer to rescind the contract under Section 55, even if the contractor has not done any work till the completion of the agreed upon date under the contract. Therefore, the only two options left with the employers if the work is not completed within the stipulated time period are: *first*, serve a notice on the contractor expressly making time of the essence of the contract and terminate the contract on non-completion even on the extended date;[52] and *second*, proceed on the basis of the second paragraph of Section 55 and grant extensions and levy damages as per the contract, without the option to rescind the contract, unless the condition(s) to terminate the contract under the contract is satisfied.[53]

B. What is the impact of time being the essence of the contract on termination and liquidated damages clauses?

Section 55 of the ICA deals with the effect of failure to perform the work within a stipulated period, as agreed under the contract between the parties. These effects can be sub-divided into three scenarios: *first*, if time is of the essence of the contract and the contractor fails to perform it within the time, then the contract becomes voidable and the employer has the option to terminate it on completion of the period and claim liquidated damages;[54] *second*, if time is not the essence of the contract, then the contract does not become voidable on failure to perform within the stipulated time period, but the employer still has the right to levy LD as per the terms of the contract;[55] and, *third*, if time is of the essence but the employer agrees to accept a delayed delivery, then in such a case the contract is not voidable.

---

51 *Id.* ¶ 86.

52 B.S. PATIL & S.P. WOOLHOUSE, *supra* note 1, at 330–1.

53 Anand Constr. Works v. State of Bihar, 1973 SCC OnLine Cal 87, ¶ 27 (India) [*hereinafter* "Anand Constr. Works"]; McDermott Int'l Inc., (2006) 11 SCC 181, ¶ 85 (India).

54 Contract Act, § 55, ¶ 1.

55 Contract Act, § 55 ¶ 2.

However, to claim LD, the employer is obligated to provide the contractor with a reasonable notice that the former is reserving the right to levy LD from a particular date despite the extension of time.[56]

Therefore, it is amply clear that irrespective of whether the time is of the essence of the contract or not, the employer is eligible to claim liquidated damages from the contractor for any delay caused in the performance of the contract.[57] Thus, it is only the additional right to terminate the contract which is provided to the employer when time is of the essence of the contract.[58]

However, it is the quantum, the procedure, and the timeline of levying LD which is affected in such cases. Where time is of the essence of the contract, the employer can either terminate the contract on the very date fixed under the contract and claim the maximum possible damages under the contract; or grant an extension while serving a notice upon the contractor that the work has to be completed by a stipulated extended date, but the employer will levy LD damages, which can either start from the original completion date or from the extended date.[59]

On the other hand, when time is not of the essence of the contract, the employer is under no obligation to serve a notice to reserve the right to levy LD and can start levying the damages from the agreed upon date under the contract.[60] This is because when time is not of the essence, the contract is not voidable and therefore the pre-condition of serving a notice is not activated.[61] The pre-condition is applicable only in scenarios covered by

---

56 Contract Act, § 55, ¶ 3.

57 Anand Constr. Works, 1973 SCC OnLine Cal 87, ¶ 27; McDermott Int'l Inc., (2006) 11 SCC 181, ¶ 85.

58 Hind Constr., (1979) 2 SCC 70, ¶ 10 (India).

59 *Id.* ¶¶ 7–10.

60 *See* Anand Constr. Works, 1973 SCC OnLine Cal 87 (India).

61 Contract Act, § 55, ¶ 2.

Paragraph 3 of Section 55, which deals with contracts wherein time is of the essence which is clear from the opening lines of the third paragraph "*[i]f, in case of* ***a contract voidable*** *on account of the promisor's failure to perform his promise at the time agreed*," wherein, ambit of "*voidable contract*" is provided in the first paragraph of Section 55.[62]

C. How can time be made the essence of the contract where it was originally not?

For the contracts which fall under the second paragraph of Section 55, though the employer cannot rescind the contract on non-performance of the contract by the original agreed upon date, it does not mean that the employer has to keep extending the contract until it is completed.[63] While there is no specific provision under the ICA allowing for it,[64] the Indian courts have manifested that upon exhaustion of the original time period, the employer can serve a notice on the contractor specifically mentioning the new date of completion and that time is of the essence therein.[65] This notice has to be served in unequivocal terms,[66] and the terms and conditions have to be mutually agreed upon by the parties either expressly or impliedly, i.e., it cannot be a unilateral extension of performance by either of the parties.[67]

It is also to be noted here that the extended period of time also has to be one that is reasonable, and is such that the contractor is able to finish the

62 Contract Act, § 55, ¶ 3.

63 N. Sundareswaran v. Sri Krishna Ref., AIR 1977 Mad. 109, 114 (India).

64 *See* Burn & Co. Ltd. v. H.H. Thakur Shaheb Sree Lukhdirjee, 1923 SCC OnLine Cal 82 (India).

65 *See* Mulla Badruddin v. Master Tufail Ahmed, 1960 SCC OnLine MP 170 (India).

66 *See* Tandra Venkata Subrahmanayam v. Vegesana Viswanadharaju, 1967 SCC OnLine AP 7, ¶ 7 (India).

67 *See* Claude-Lila Parulekar v. Sakal Papers (P) Ltd., (2005) 11 SCC 73 [*hereinafter* "Claude-Lila Parulekar"].

work within the extended time period.[68] Therefore, for grant of extension, under the notice the employer has to take into consideration other facts and circumstances of the case.[69]

Once such notice is served, the contract becomes voidable at such extended date, and thus falls under paragraph one of Section 55. If the contractor fails to complete the work on such extended date as well, the employer has the power to rescind the contract on such extended date while levying the maximum liquidated damages provided for under the contract.[70]

For instance, the Defence Procurement Manual provides for levy of liquidated damages:

> "*[A] sum equivalent to 0.5% (zero point five percent) of the unfinished/undelivered/unfulfilled part of Contract for each week of delay beyond duration of Work specified in Article 8.1, subject to a maximum of 10% (Ten percent) of the Contract Price.*"[71] (emphasis added)

Therefore, applying the above principle here, if the work is not completed by the contractor on the extended date as well, the employer can rescind the contract and levy LD to the tune of 10 per cent of the contract price.

On the other hand, if time is not made the essence of the contract even while granting extensions, the contract still remains in the category specified under paragraph two of Section 55. Therefore, the employer would not get the option to rescind the contract even at the extended date and will again have the option to either make time of the essence and rescind it at the

---

68 *See* Dipnarain Sinha v. Dinanath Singh, 1980 SCC OnLine Pat 8 (India); Claude-Lila Parulekar, (2005) 11 SCC 73, ¶ 10 (India).

69 CHITTY ON CONTRACTS 1106 (H.G. Beale ed., 28th ed. 1999) [*hereinafter* "CHITTY ON CONTRACTS"].

70 Hind Constr., (1979) 2 SCC 70, ¶ 10 (India).

71 GOV'T OF INDIA, MINISTRY OF DEFENCE, *Defence Procurement Manual – 2009 (Revenue Procurement)*, https://www.mod.gov.in/sites/default/files/DPM2009.pdf.

further extended date; keep levying liquidated damages as under the contract; or satisfy the conditions for termination of the contract as provided under the contract itself. Since the provision does not restrict the employer from levying LD even when time is not of the essence, there is no bar to levy LD.[72] However, this levy is subject to the issue of whether the employer has waived its right to levy LD or not while extending the time,[73] which will be discussed in Part III of this article below.

D. What is the nature of the notice to be sent to the contractor for reserving the right to levy LD?

When time is of the essence of the contract, and the employer elects to extend the time for the performance of the contract instead of rescinding or terminating the agreement, paragraph three of Section 55 becomes applicable. The plain language of the provision itself provides that the employer has the right to levy LD on a simple pre-condition that he shall serve a notice on the contractor while extending the time, stating that he is reserving the right to levy LD despite the extension.[74]

The Section is silent as to the nature of the notice which has to be served on the contractor. The courts have held that the employer must serve a notice clearly indicating their intention to levy LD as per the contract while extending the period of contract.[75] However, it is neither necessary for the

---

72 Contract Act, § 55, ¶ 3.

73 *See* State Trading Corp. of India v. Campagnie Française d'Importation et de Distrib., [1983] 2 Lloyd's Rep. 679 (U.K.).

74 Contract Act, § 55, ¶ 3 ("**Effect of acceptance of performance at time other than that agreed upon** – If, in case of a contract voidable on account of the promisor's failure to perform his promise at the time agreed, the promisee accepts performance of such promise at any time other than that agreed, the promisee **cannot claim compensation for any loss occasioned by the non–performance of the promise at the time agreed, unless, at the time of such acceptance, he gives notice to the promisor of his intention to do so**." (emphasis added)).

75 PN Writer & Co. Pvt. Ltd. v. Mesuka Eng'g Co. Pvt. Ltd., 2015 SCC OnLine Bom 4695, ¶¶ 40–1 (India); Union of India v. Chenab Constr., 2019 SCC OnLine Del 10515, ¶¶ 31–36, 39 (India).

employer to do an in-depth study of what all losses they might suffer due to the delay in performance, nor is it necessary to quantify their losses and provide a specific number which it would claim as LD.[76] Rather, it is sufficient for the employer to generally reserve its right to claim damages on account of delay at the time of extension of the contract.[77]

To summarise, when time is of the essence, the employer can either rescind the contract if the work is not performed by the agreed upon date and levy maximum damages under the contract, or extend the contract keeping time of the essence and reserve the right to levy LD from the original date or from the extended date. On the other hand, when time is not of the essence, the employer cannot rescind the contract, but can only levy LD for the delay in completion. However, by serving a notice, they can rescind the contract by making time of the essence at the extended date of completion.

III. Does extension of time for performance of the contract amounts to a waiver under the ICA?

When an extension is granted by the employer to the contractor for completing the work beyond the stipulated date of performance, as discussed in the preceding section, the extension becomes binding in nature.[78] The extension renders the time clause of the original contract ineffective, which is then substituted by the extended time period and any other terms and conditions which the parties mutually agree to at the time of extension.[79]

This power to extend the time for performance of the contract is derived from Section 63 of the ICA, which reads as follows:

---

76 ONGC v. Soconord OCTG, 2014 SCC OnLine Bom 1277, ¶¶ 40 (India).
77 *Id.* ¶¶ 40–42.
78 *See* Aryan Mining & Trading Corp. Ltd. v. BN Elias & Co. Ltd., AIR 1959 Cal 472, ¶ 38 (India).
79 *See* ONGC, (2003) 5 SCC 705 (India).

> "***63. Promisee may dispense with or remit performance of promise*** *– Every promisee may dispense with or remit, wholly or in part, the performance of the promise made to him,* ***or may extend the time for such performance****, or may accept instead of it any satisfaction which he thinks fit.*"[80] (emphasis added)

The extension of time can be either before or after the expiry of the stipulated time period under the contract,[81] and the effective date for levying of liquidated damages would then be the final date to which the contract was extended.[82] However, this levy of LD is subject to whether the extension of time amounted to a waiver of the right to levy LD, or was a mere forbearance on the part of the employer who reserved the right to levy LD despite the extension(s).[83]

A. What amounts to a waiver?

A waiver can be defined as "*an intentional relinquishment of a known right or advantage, benefit, claim or privilege which except for such waiver the party would have enjoyed.*"[84] Though a waiver can be either express or implied,[85] it must portray the clear intention of the employer,[86] which then amounts to an agreement between the parties.[87] Thus, a mere forbearance on the part of

---

80 Contract Act, § 63.

81 *See* Mahadeo Prasad Singh v. Mathura Chaudhari, AIR 1931 All 589 (India); *see also* Central Bank of India v. Guruviah Naidu & Sons (Leather) Pvt. Ltd., AIR 1992 Mad 139 (India); but *see* Trimbak Gangadhar Ranade v. Bhagwandas Mulchand, (1898) 23 Bom 348 (India).

82 *See* Muhammad Habidullah v. Bird & Co., AIR 1922 PC 178 (India); *see also* Ratilal M Parikh, *supra* note 28; Paper Sales Ltd. v. Chokhani Bros, AIR 1946 Bom 429 (India); Aryan Mining, AIR 1959 Cal 472 (India).

83 *See* Keshav Lal Lallubhai Patell v. Lalbhai Trikumlal Mills Ltd., AIR 1958 SC 512 (India).

84 P. Dasa Muni Reddy v. P. Appa Rao, (1974) 2 SCC 725, ¶ 13 (India).

85 *See* Bruner v. Moore, [1904] 1 Ch 305 (U.K.).

86 *See* Waman Shrinivas Kini v. Ratilal Bhagwandas & Co., AIR 1959 SC 689 (India).

87 Krishna Bahadur v. Purna Theatre, (2004) 8 SCC 229, ¶¶ 9–10 (India).

the employer leading to extension of time would not amount to a waiver of right to levy LD as provided under the contract.[88]

To determine whether the extension in fact amounted to a waiver, the facts and circumstances have to be looked into. For instance, if the employer has been consistently following up with the contractor regarding the progress of the work, and has done his part of the promise, but the contractor still fails to deliver on time resulting in the employer being forced to extend the time for performance, then the extension might not be considered a waiver of right to levy LD.[89]

The language of Section 63 is that the "*promisee may dispense with or remit,*" which makes it clear that the employer can waive certain contractual rights at his discretion and there is no requirement of any additional consideration or any agreement to that extent.[90] The only requirement is that the extension of time should be mutual and not unilateral.[91] These extensions amount to concessions in favour of the contractor who is given an additional opportunity to finish the work within the mutually agreed extended period of time.[92] Since the contractor is agreeing to the extension of time clause of the contract, the related terms and conditions like levy of LD from a particular date are also ought to be agreed to by him at the time of acceptance of extension.[93] Therefore, it is safe to state that an extension of

---

88 *See* Anandram Mangturam v. Bholaram Tanumai, AIR 1946 Bom 1 (India); *see also* Maharashtra State Elec. Distrib. Co. Ltd. v. Datar Switchgear Ltd., Appeal No. 166/2009 in Arbitration Petition No. 374/2004, decided on 19 Oct 2013 (Bom) (India).

89 CHITTY ON CONTRACTS, *supra* note 69, at 1106; *see* Charles Rickards Ltd. v. Oppenheim, [1950] 1 All ER 420.

90 Jagad Bandhu Chatterjee v. Nilima Rani, (1969) 3 SCC 445, ¶ 5 (India).

91 *See* Venkateswara Minerals Firm v. Jugalkishore Chiranjitlal Firm, AIR 1986 Kant 14 (India); *see also* VR Mohankrishnan v. Chimanlal Desai & Co., AIR 1960 Mad 452 (India); Bali Ram Dhote v. Bhupendra Nath Banerjee, AIR 1978 Cal 559 (India); Claude–Lila Parulekar, (2005) 11 SCC 73 (India).

92 *See* N Sundareswaran v. Sri Krishna Refineries, AIR 1977 Mad 109 (India).

93 Himachal Futuristic Commc'n Ltd. v. BSNL, 2015 SCC OnLine Del 8760, ¶ 28 (India).

time is not necessarily a waiver of right to levy LD, subject to the scrutiny of the intention and the conduct of the parties.

B. What is the position of law with respect to waiver in cases of government contracts affecting general interests of the public?

Under Indian law, the right to waiver of a party is also affected by the type of interest which forms the subject-matter of waiver, *viz.* public or private.[94] The question to be asked to differentiate between a public and private right here is that:

> "*[W]hether the right which is renunciated is the right of party alone or of the public also in the sense that the general welfare of the society is involved. If the answer is latter then it may be difficult to put estoppel as a defence. But if it is right of party alone then it is capable of being abnegated either in writing or by conduct.*"[95]

The basic principles of waiver are that the waiver can only be voluntary or intentional relinquishment of those rights which were existing at the time of waiver, and were rights of the one waiving it.[96] Thus, if any element of public interests is involved in a contract and one of the parties waives such public right, then such waiver cannot be given effect to irrespective of any express mention of a waiver.[97]

On the other hand, if it is a private right arising out of a mere commercial transaction, then waiver or surrender of a right or advantage which the waiving party could have enjoyed under the original contract is tenable in law.[98]

---

94 All India Power Eng'r Fed'n v. Sasan Power Ltd., (2017) 1 SCC 487, ¶¶ 14–25 (India) [*hereinafter* "Sasan Power"].

95 Indira Bai v. Nand Kishore, (1990) 4 SCC 668, ¶ 5 (India) [*hereinafter* "Indira Bai"].

96 P. Dasa Muni Reddy v. P. Appa Rao, (1974) 2 SCC 725, ¶ 13 (India).

97 Indira Bai, (1990) 4 SCC 668, ¶ 5 (India); Sasan Power, (2017) 1 SCC 487, ¶ 25 (India).

98 Lachoo Mal v. Radhey Shyam, (1971) 1 SCC 619, ¶ 6 (India).

Therefore, the real question to be answered here is whether the rights under a construction contract entered into by a government entity falls under the category of public rights or private rights. In general, construction contracts are considered to be of commercial nature.[99] Thus, when a contract is entered into subsequent to a government tender, the resulting transaction is a commercial contract.[100] While the equality in tendering process has been considered a matter of public interest and writ jurisdiction has been made applicable to it, the same has been done based on the right to equality enshrined under Article 14 of the Indian Constitution.[101] However, a writ petition for enforcement of a contract or remedy for a breach of contract might not be maintainable for the simple reason that the rights and obligations of the parties enshrined under a commercial contract are not their fundamental rights or rights of the public at large, and the transaction is fairly private and commercial in nature.[102]

Therefore, it would be a stretch to say that all the constructions entered into by the government organisations are immune from the law of waiver embedded under Section 63 of the ICA. Thus, in such cases as well, the arbitrator will have to determine the legality of levy of LD based on the facts and circumstances of the case and on the basis of the wordings of the specific contract.[103] Further, if the arbitrator deviates from the express language of the contract or the holistic reading of the contract,[104] and allows

---

99 JOHN ADRIAANSE, THE NATURE OF CONSTRUCTION CONTRACTS, IN CONSTRUCTION CONTRACT LAW 1 (4th ed. 2016).

100 B.S. PATIL & S.P. WOOLHOUSE, *supra* note 1, at 195.

101 *See* R.D. Shetty v. Int'l Airport Auth., (1979) 3 SCC 489 (India).

102 *See* G. Ram v. Delhi Dev. Auth., AIR 2003 Del 120, ¶ 20 (India).

103 *See* ISPAT Eng'g & Foundry Works v. Steel Auth. of India Ltd., (2001) 6 SCC 347 (India); *see also* Rajasthan State Mines & Minerals Ltd. v. Eastern Eng'g Enter., AIR 1999 SC 3627 (India).

104 *See* Shyama Charan Agarwala & Sons v. Union of India, (2002) 5 SCC 444 (India); *see also* State of Rajasthan v. Nav Bharat Constr. Co., (2006) 1 SCC 86 (India).

or disallows levy of LD out of kindness,[105] the award would be liable to be set aside as it would be outside his jurisdiction.

C. Can LD be levied even after grant of multiple extensions of time by the employer?

As discussed above, since time has not been considered generally to be of the essence in construction contracts, the employer cannot rescind the contract if the contractor fails to deliver the work within the stipulated timeframe.[106] Thus, the only two options with the employer are to serve a notice making time of the essence, or simply grant extensions until the work is completed, both of which require extension of time. Can in such a situation then the employer be deemed to have waived its right to levy LD? A simple answer to this would be based on the serving/non-serving of the notice, as the courts have held that the claims filed by employer for levy of LD due to delay in completion by the contractors when the employer has not served a notice are untenable in law, as they fail the conditions laid down under Section 55.[107]

However, the above can be true only if the contract falls under the category of third paragraph of Section 55, wherein, an express obligation is put on the employer to serve a notice reserving the right to levy LD if it is extending the time for performance in a contract wherein time was of the essence. Thus, for construction contracts, which are generally governed by the second paragraph of Section 55, the law could be different depending on the facts and circumstances of the case. This question of law has been conclusively answered by the Indian courts in a series of cases, have been discussed herein below:

---

105 *See* Govt. of Andhra Pradesh v. P.V. Subba Naidu, AIR 1990 NOC 90 (AP) (India).

106 Hind Constr., (1979) 2 SCC 70; Arosan Enterprises, (1999) 9 SCC 449 (India).

107 M/s Kailash Nath & Assoc. v. New Delhi Municipal Comm., ILR (2002) 1 Delhi 441, ¶¶ 5, 11–16 (India) ["*Kailash Nath v. NDMC*"].

i. *Single extension in ONGC* v. *Saw Pipes [*"***ONGC***"*][108]

The contract in this case was for the procurement of equipment for offshore oil exploration and a specific date was provided under the contract for delivering the same.[109] Owing to circumstances like labour strikes, the equipment could not be delivered on the said date and the contractor sought an extension of 45 days, which was granted by the employer with a specific condition that the clause for levy of LD will still be applicable and the contractor would be liable for the amount as pre-assessed under the contract.[110] The employer subsequently deducted certain amounts from the final payment towards levy of LD, aggrieved by which, the contractor invoked the arbitration clause.[111] While the Arbitral Tribunal ordered the employer to refund the LD amount, the Supreme Court set aside the arbitral award and allowed for the levy of LD.[112]

Thus, in this case, the Court allowed for levy of LD even where extension was granted as it was based on the request of the contractor, and the employer reserved its right to levy LD at the first instance itself.[113] Therefore, the extension of time did not amount to a waiver of right to levy LD.

It is to be noted here that though the decision of the Supreme Court in ONGC has been overruled by subsequent cases, it is only the ratio with respect to the interpretation of the term "*public policy of India*" and its applicability to foreign awards which has been overruled, and the

108 ONGC, (2003) 5 SCC 705, ¶¶ 33–4, 43, 64–9 (India).
109 *Id.* ¶¶ 32–33.
110 *Id.* ¶¶ 34, 43.
111 *Id.* ¶ 34.
112 *Id.* ¶¶ 64–75.
113 *Id.* ¶¶ 34, 43.

observations in the judgement pertaining to domestic arbitration still hold good in law.[114]

ii. *Multiple extensions in Chennai Metropolitan Water Supply & Sewerage Board v. Aban Constructions Pvt. Ltd.*[115]

The general conditions of the contract in this case provided that the time was of the essence of the contract, but due to the presence of extension of time and liquidated damages clauses, the Court found that time was not the essence of the contract. In the factual circumstances of the case, the construction projects were for a specific period, but the contract was completed only after a grant of a total of four extensions. While granting the first extension, the employer did not reserve the right to levy LD, but it reserved the right to levy while granting the subsequent extensions.

The Arbitral Tribunal ordered the refund of the amount levied as LD by the employer, but relying on the decision of the Supreme Court in *ONGC*, the Madras High Court held that the employer was eligible to levy LD from the second extension onwards. This was because the employer had reserved the right to levy at the time of the second and the subsequent extensions, but could not levy it for the duration of the first extension in the absence of any reservation. Therefore, the general principle remains the same that during the grant of extension of time, the employer has to reserve their right to levy LD in order to claim damages at the rates decided under the contract for the delay in performance of the contract.

The above position of law as propounded by the Supreme Court in *ONGC* and expanded in *Chennai Metropolitan Water Supply & Sewerage Board* v. *Aban Constructions Pvt. Ltd.*, has been further upheld in a series of cases, wherein

---

114 Sri Lal Mahal Ltd. v. Progetto Grano Spa, (2014) 2 SCC 433, ¶¶ 28–30 (India); Vijay Karia v. Prysmian Cavi E Sistemi SRL, (2020) 11 SCC 1, ¶¶ 39–41 (India).

115 Chennai Metro. Water Supply & Sewerage Bd. v. Aban Constr. Pvt. Ltd., 2006 SCC OnLine Mad 486, ¶¶ 26–33 (India).

the courts have: *first*, upheld the decision of the arbitral tribunal allowing employer to levy LD even when multiple extensions are granted because the right to levy LD was reserved;[116] *second*, set aside the arbitral awards which required refund of the amount levied as LD by the employer due to delay in performance;[117] and *third*, reversed the decision of the lower courts requiring the employer to refund the amount deducted by it in the form of LD for delay in completion of the construction project.[118]

IV. How can the parties claim liquidated damages once a breach of contract is established?

Levy of liquidated damages is a consequence of a breach of contract by either of the parties to a contract.[119] Therefore, once it has been determined that there was a breach of contract on the part of the contractor and the employer has crossed the barriers of Sections 55 and 63 of the ICA to be eligible to claim liquidated damages, then Chapter VI of the ICA is attracted.[120] Under this Chapter, Section 73 discusses the concept of unliquidated damages, which allows for reasonable compensation to the aggrieved party for any loss which it has suffered due to the actions of the other party;[121] Section 74 makes the provision for claiming liquidated

116 BWL Ltd. v. MTNL & Anr., 2007 SCC OnLine Del 1199, ¶¶ 22–35, 38–40 (India); Escorts Commc'n Ltd. v. Union of India, 2009 SCC OnLine Del 1426, ¶¶ 7–9, 12, 13, and 24 (India); Himachal Futuristic Commc'n Ltd. v. BSNL, 2015 SCC OnLine Del 8760, ¶¶ 31–36 (India); Philips Elec. India Ltd. v. Union of India Through Director General of Health Serv., 2018 SCC OnLine Del 12638, ¶¶ 10–12 (India).

117 BSNL v. Haryana Telecom Ltd., 2010 SCC OnLine Del 1120, ¶¶ 17–30 (India).

118 GAIL (India) Ltd. v. Punj Lloyd Ltd., 2017 SCC OnLine Del 8301, ¶¶ 30–38 (India).

119 State of Karnataka v. Shree Rameshwara Rice Mills, (1987) 2 SCC 160 (India); BSNL v. Motorola India (P) Ltd., (2009) 2 SCC 337, ¶ 24 (India); J.G. Eng'r, (2011) 5 SCC 758, ¶¶ 19–21 (India).

120 *See* Kailash Nath v. NDMC., ILR (2002) 1 Delhi 441, ¶ 15 (India).

121 *See* Chunilal V. Mehta & Sons Ltd. v. Century Spg. and Mfg. Co. Ltd., AIR 1962 SC 1314, 1319, ¶ 11 (India).

damages, the tune of which has been pre-estimated in the contract itself;[122] and Section 75 enables the party rescinding the contract to claim damages as agreed upon in the contract, thus when read with Section 55, the employer rescinding the contract when time is the essence has the right to claim liquidated damages under Section 75.[123]

A. Is the party claiming liquidated damages required to prove actual loss to levy LD?

The basic purpose of damages is to compensate the aggrieved party for the loss suffered by it due to the conduct of the party in breach of the contract,[124] and thus, to put the innocent party in the same position had the breach not occurred.[125] Thus, the general principle remains that the aggrieved party can claim damages only for those losses which were in the reasonable contemplation of the parties at the time of entering into the contract or at the time when the breach occurred.[126]

Thus, for determining the quantum of LD to be levied, the courts first have to determine that a breach has occurred and then assess the damages which arise out of the breach, as these are two different concepts which require separate adjudication.[127] This determination is only within the adjudicatory

122 *See* Dunlop Pneumatic Tyre Co. Ltd. v. New Garage and Motor Co. Ltd., [1914] UKHL 1 [*hereinafter* "Dunlop Pneumatic Tyre"]; *see also* Fateh Chand v. Balkishan Das, AIR 1963 SC 1405 (India) [*hereinafter* "Fateh Chand"].

123 *See* Mirza Javed Murtaza v. U.P. Financial Corp., AIR 1983 All 234, 241, ¶ 16 (India).

124 ALI D. HAIDAR AND PETER BARNES, DELAY AND DISRUPTION CLAIMS IN CONSTRUCTION: A PRACTICAL APPROACH 9 (3d ed. 2018).

125 Robinson v. Harman, (1848) 1 Exch. 850, 855; Attorney General of the Virgin Islands v. Global Water Assoc. Ltd., 2021 AC 23, ¶¶ 35–36.

126 *See* Hadley v. Baxendale, [1854] EWHC Exch J70 [*hereinafter* "Hadley"].

127 State of Karnataka v. Shree Rameshwara Rice Mills, (1987) 2 SCC 160 (India); BSNL v. Motorola India (P) Ltd., (2009) 2 SCC 337, ¶ 24 (India); J.G. Eng'r, (2011) 5 SCC 758, ¶¶ 19–21 (India).

powers of the court, which cannot be handed over to either of the parties to the contract.[128]

i. Analysing the plain language of Section 74 of the ICA

Emerging from the above principles, is the law enshrined under Section 74 of the ICA, which reads as follows:

> "***74. Compensation for breach of contract where penalty stipulated for– When a contract has been broken****, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the* ***party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby****, to receive from the party who has broken the contract* ***reasonable compensation not exceeding the amount so named*** *or, as the case may be, the penalty stipulated for*."[129] (emphasis added)

From the plain language of the provision itself, it is clear that there is no burden of proof on the party claiming LD, to prove that any actual loss has been suffered by it due to the breach of the contract by the party at fault. However, the Supreme Court in *Fateh Chand* v. *Balkishan Das* ["**Fateh Chand**"], has opined that Section 74 "*does not justify the award of compensation when in consequence of the breach no legal injury at all has resulted, because compensation for breach of contract can be awarded to make good loss or damage which naturally arose in the usual course of things, or which the parties knew when they made the contract, to be likely to result from the breach*" (emphasis added).[130] Similar position, among others, was also taken by the Delhi High Court,[131] Bombay High Court,[132]

---

[128] *See* J.G. Eng'r, (2011) 5 SCC 758 (India); *see also* Tulsi Narayan Garg v. M.P. Road Dev. Auth., 2019 SCC OnLine SC 1158 (India).

[129] Contract Act, § 74.

[130] Fateh Chand, AIR 1963 SC 1405, ¶ 10 (India).

[131] *See* Kailash Nath v. NDMC, ILR (2002) 1 Delhi 441 (India).

[132] *See* Union of India v. Motor & Gen. Sales Ltd., 2016 SCC OnLine Bom 6787, ¶ 17 (India).

and Kerala High Court[133] in later cases, wherein these Courts were of the opinion that the aggrieved party can claim the liquidated damages provided under the contract, given that the damages suffered by that party are realistically close to the actual damages sustained. Thus, the courts read into Section 74 an additional qualification which was not intended by the legislation in the first place.

ii. *Actual loss need not be proved if there is genuine pre-estimate of loss.*

While the Indian courts on certain occasions have required the party claiming liquidated damages to prove actual losses, as observed above, there is a series of decisions which provides that the actual loss need not be proved if it is a genuine pre-estimate of damages, and if it is not possible to prove actual losses. These sets of decisions will be discussed in this sub-section.

a. Position of law in common law jurisdiction

The ideal example of a factual scenario where it would not be possible to determine and quantify actual loss is the 20th century decision of the House of Lords in *Clydebank Engineering and Shipbuilding Co. Ltd.* v. *Don Jose Ramos Yzquierdo y Castenada.*[134] Here, the Spanish Government entered into a contract with Clydebank Engineering for the building of four military torpedo boats, the delivery of which was to be done within a stipulated period of time, failing which, a decided amount would be levied as LD for each week of delay.[135] The boats, however, were delivered after a great

133 *See* State of Kerala v. United Shippers and Dredgers Ltd., 1982 SCC OnLine Ker 112, ¶ 18 (India).

134 Clydebank Eng'g & Shipbuilding Co. Ltd. v. Don Jose Ramos Yzquierdo y Castenada, [1905] AC 6, 9–13, 15–6, 20.

135 *Id.* at 7.

amount of delay, owing to which, the Spanish Government levied LD as per the formula under the contract.[136]

Aggrieved by the levy of LD, the contractor approached the courts submitting that since these were military vessels, they did not have any commercial value and the non-availability of the same could not possibly lead to any actual loss being suffered by the Government.[137] However, the House of Lords noted that the very existence of the warship and capability to be used would prove that the party would suffer loss if they were deprived of it, and, thus, was of the opinion that it is difficult to prove actual loss in this case.[138] Therefore, the levy of LD was upheld as it was considered a genuine pre-estimate of damages rather than a penalty *in terrorem*, as alleged by the Appellant.

The observation made by the House of Lords to this extent is of utmost importance to determine in which cases it is not possible to quantify the losses:

> "*The subject-matter of the contracts, and the purposes for which the torpedo-boat destroyers were required, make it extremely improbable that the Spanish Government ever intended or would have agree that there should be inquiry into, and detailed proof of, damage resulting from delay in delivery. The loss sustained by a belligerent, or an intending belligerent, owing to a contractor's failure to furnish timeously warships or munitions of war,* ***does not admit of precise proof or calculation****; and it would be preposterous to expect that conflicting evidence of naval or military experts should be taken as to the probable effect on the suppression of the rebellion in Cuba or on the war with America of the*

[136] *Id.* at 8.
[137] *Id.* at 11–2.
[138] *Id.* at 12.

defenders' delay in completing and delivering those torpedo-boat destroyers."[139] (emphasis added)

The above legal position has been further upheld by the courts in England on various occasions.[140] In *Dunlop Pneumatic Tyre Co. Ltd.* v. *New Garage & Motor Co. Ltd.*,[141] however, the House of Lords went a step further to expressly state that irrespective of an express mention by the parties in the contract that the damages are liquidated damages and not penalty, the court has to look into the actual intention of the parties in light of the nature of the contract.[142] This would ensure that no *in terrorem* damages or penalty is levied in the guise of liquidated damages, as the party claiming damages would in fact be claiming damages for things which they didn't suffer actual loss for.[143] This in turn would be against the basic principles of compensation, *viz.* putting the innocent party in the same position as if the breach did not happen.

b. Position of law in India

The wording of the provision of law in India for levy of LD, i.e., Section 74, is different from the one in England,[144] in as much as there is an express mention in the Indian provision that the party complaining of the breach is entitled to levy LD "*whether or not actual damage or loss is proved to have been caused thereby.*"[145] However, the position of law prevalent in India right now

139 *Id.* at 20.

140 *See* Lord Elphinstone v. Monkland Iron & Coal Co. Ltd., & Liquidators, (1886) 11 AC 332; *see also* Soper (Pauper) v. Arnold, (1889) 14 AC 429; Comm'r of Public Works v. Hills, (1906) AC 368; Rowland Valentine Webster v. William David Bosanquet, (1912) AC 394.

141 *See* Dunlop Pneumatic Tyre, [1914] UKHL 1.

142 *Id.* at 86–7.

143 *Id.*

144 *See* Fateh Chand, AIR 1963 SC 1405, ¶ 8 (India).

145 Contract Act, § 74.

is more in line with the English position than the one taken in Fateh Chand or the *Kailash Nath* Delhi High Court decisions.

The law in India with respect to this point of law can be traced back to the 1934 decision of the Calcutta High Court in *Mahadeoprasad* v. *Siemens (India) Ltd.*, wherein the Court opined that the estimating of damages by the parties in the contract in itself is a sufficient evidence of damages.[146] That the only thing which is not a conclusive evidence is the sum mentioned in the contract as liquidated damages, which if proved unreasonable or excessive, can be reduced.[147] However, the burden of proof in such cases would still be on the party aggrieved by the levy of damages to prove that the sum mentioned is excessive in nature and unreasonable.[148]

This position was expressly stated by the Supreme Court in its 1969 decision of *Maula Bux* v. *Union of India*, wherein it noted as follows:

> "*It is true that in every case of breach the person aggrieved by the breach is not required to prove actual loss or damage suffered by him before he can claim a decree, and* ***the Court is competent to award reasonable compensation in case of breach even if no actual damage is proved to have been suffered in consequence of the breach of contract****. … In case of breach of* ***some contracts it may be impossible for the Court to assess compensation arising from breach****, while in other cases compensation can be calculated in accordance with established rules*."[149] (emphasis added)

146 *See* Mahadeoprasad v. Siemens (India) Ltd., AIR 1934 Cal 285 (India).

147 *Id.*

148 Constr. & Design Serv. v. Delhi Dev. Auth., (2015) 14 SCC 263, ¶¶ 14–7 (India) [*hereinafter* "Const. & Design Serv."].

149 Maula Bux v. Union of India, (1969) 2 SCC 554, ¶ 6 (India).

The above-mentioned point of law is now an established position of law, which has been upheld time and again by the Supreme Court,[150] the Delhi High Court,[151] as well as the Bombay High Court[152] the relevant portions of which are not extracted here to avoid repetition.

B. How to determine whether the method of levying LD in the contract is a genuine pre-estimate of losses or is in the nature of a penalty?

One of the most common issues observed in a construction arbitration matter is the challenge to the method of levying the liquidated damages as defined in the contract. It is a common argument of the contractors that the liquidated damages levied by the employer are unreasonable and fall under the category of penalties, and thus, the latter can claim only a reasonable amount based on the actual losses instead of claiming the maximum leviable LD under the contract.[153]

The simple reason for the above argument being that genuine pre-estimate of losses are recoverable under the law, but levy of damages in the form of penalty is not.[154] This categorisation is a matter of construction, which has to be derived from the reading of the terms and conditions of the specific contract.[155] The basic principle is that if the amount claimed as LD is

150 ONGC, (2003) 5 SCC 705, ¶¶ 64–72 (India); BSNL v. Reliance Comm'n Ltd., (2011) 1 SCC 394, ¶¶ 47–9, 53 (India); Kailash Nath Assoc., (2015) 4 SCC 136, ¶ 43 (India); Constr. & Design Serv., (2015) 14 SCC 263, ¶¶ 14–7 (India).

151 Rama Associates (P) Ltd. v. Delhi Dev. Auth., 1998 SCC OnLine Del 409, ¶¶ 19, 25, 31–33 (India); BWL Ltd. v. Mahanagar Tel. Nigam Ltd., 2007 SCC OnLine Del 1199, ¶ 39 (India); Herbicides (India) Ltd. v. Shashank Pesticides P. Ltd., 2011 SCC OnLine Del 2249, ¶ 20 (India).

152 Mascon Multiservices & Consultants Pvt. Ltd. v. Bharat Oman Ref. Ltd., 2014 SCC OnLine Bom 4832, ¶¶ 72–81 (India); Raheja Universal Pvt. Ltd., Mumbai v. BE Billimoria & Co. Ltd., Mumbai, 2016 (5) Mh LJ 229, ¶¶ 7–11 (India) [*hereinafter* "Raheja Universal"].

153 *See* Fateh Chand, AIR 1963 SC 1405.

154 *Id.*

155 *See* Commr. of Public Works v. Hills, 1906 AC 368 (PC).

extravagant, unconscionable, and disproportionately large, then it shall operate as a penalty.[156]

Thus, the courts have considered the clauses providing for a fixed amount as a payment for even the minutest of breaches, to be penalties.[157] On the other hand, if the clause provides for a particular reasonable percentage of levy of damages for each week or day of delay, then those have been considered a genuine pre-estimate of loss.[158]

C. What is the impact of contributory delays on the part of the party claiming LD on the levy of LD?

The language of the contracts generally just provides for the levy of damages by the employer in case there is a delay in completion of the project or failure to complete the project by the contractor.[159] However, this levy of damages for delay in completion has an implied rider on it in the form of contributory delays on the part of the employers.

One of the duties of an employer under the ICA is to provide the contractors with all the facilities necessary to complete the work.[160] Further, arguably, the main duty of an employer under an actual construction contract is to make the payments to the contractor on time to procure the necessary raw materials, labour, etc. If the employer thus fails to fulfil these responsibilities and any other time sensitive reciprocal promises it made to the contractor under the contract, and there indeed is a delay in completion due to the same, then it amounts to contributory delay.[161]

156 *See* Dunlop Pneumatic Tyre, [1914] UKHL 1.
157 *See* Fateh Chand, AIR 1963 SC 1405 (India).
158 *See* ONGC, (2003) 5 SCC 705 (India).
159 *See, e.g., Defence Procurement Manual*, *supra* note 12, cl. 8, at 177.
160 Contract Act, §§ 37, 51, 52, 53.
161 *See* J.G. Eng'r, (2011) 5 SCC 758 (India).

The position taken by the Indian courts in cases of contributory delays is quite straightforward. The courts have considered the impact of the delays caused by the employer on the final delay in completion of the project, and have deducted the amount levied as LD for the period of delay caused by the employer as well. Further, the courts have allowed levy of damages only for the period of delay which is solely attributable to the contractor.[162] Moreover, if the delay is completely attributable to the employer and there is no fault of the contractor, then the former can neither claim the liquidated damages as provided for in the contract, nor can they set aside the contract for non-completion.[163]

D. Can the aggrieved party claim consequential damages in addition to the liquidated damages provided for in the contract?

Consequential losses can be understood as special losses which are related to the circumstances of the particular case.[164] While liquidated damages are the pre-estimated or the pre-agreed upon rates at which damages would be levied in case of a breach or violation of the contract, consequential losses are the reasonable damages which the employer may claim from the contractors if they suffer any direct losses due to the actions of the contractor.[165] The additional test to justify levying of the consequential losses would be to determine whether at the time of entering into the contract, such losses or damages were in the contemplation of the parties.[166]

Under the Indian law, there is no restriction on claiming consequential losses in addition to the LD given that the employer can prove actual losses which go beyond the maximum leviable LD under the contract, and that

---

162 *Id.* ¶¶ 22–3; Raheja Universal, 2016 (5) Mh. L.J. 229, ¶¶ 7–11 (India); Fateh Chand, AIR 1963 SC 1405 (India); Kailash Nath v. NDMC, ILR (2002) 1 Delhi 441, ¶¶ 5, 11–6 (India).

163 J.G. Eng'r, (2011) 5 SCC 758, ¶¶ 19, 22–3 (India).

164 *See* Hadley, [1854] EWHC Exch J70.

165 Daichi Sankyo v. Malvinder Singh, (2018) 247 DLT 405, ¶¶ 110–27 (India) [*hereinafter* "Daichi Sankyo"].

166 *Id.*

such losses are not too remote and are directly arising out of the actions of the contractor.[167]

However, it is also to be noted here that the mere terming of certain damages clause in a contract as *consequential damages* does not amount to such losses being actually consequential.[168] Just like the interpretation of a liquidated damages clause, as laid down in *Hind Construction*, a clause for consequential damages will also have to be read in consonance with other terms of the clause and other provisions of the contract. Therefore, if the consequential losses are in the form of a genuine pre-estimate of loss which arise out of violation of a contract in the usual course of things, those might not indeed be consequential losses but merely liquidated damages.[169]

E. In what circumstances can a contractor claim damages against the employer?

A little infrequent, but not unprecedented is a scenario where the contractors also come forward to claim damages from the employer for the loss incurred by the former due to the conduct of the latter. These claims generally arise in cases wherein the major part of the delay in completing the work is attributable to the employer, due to which, the contractor had to work for a longer duration and indulge his resources for such duration at an additional cost. For instance, these claims of a contractor may arise due to the delay in handing over of the work site in time by the employer to the contractor;[170] breaches and violations of the contract on the part of

---

167 *Id.*; State of Kerala v. K Bhaskaran, (1984) SCC OnLine Ker 198, ¶¶ 11–3, 19 (India); McDermott Int'l Inc., (2006) 11 SCC 181, ¶¶ 116–120 (India).

168 Daichi Sankyo, (2018) 247 DLT 405, ¶¶ 110– 127 (India).

169 *Id.*

170 *See* Roberts v. Bury Comm'r, (1870) LR 5 CP 310; *see also* Miller v. London County Council, [1934] All E.R. Rep 657; Cowell v. Rosehill Racecourse Co. Ltd., (1937) 56 CLR 605, 621; Uttar Pradesh State Elec. Bd. v. Om Metals & Minerals Ltd., 2000(3) RAJ 32 (SC) (India); I.N. DUNCAN WALLACE, HUDSON'S BUILDING AND ENGINEERING CONTRACTS 596 (10th ed. 1979).

the employer;[171] delay in issuing of drawings to complete the agreed upon scope of work;[172] delay in supply of items to be procured by the employer;[173] and delay in making payments,[174] among others.

Every construction contract would have some sets of reciprocal promises, and if the employer fails to properly complete these promises, it gives rise to a cause of action in favour of the contractor.[175] If the breach on part of the employer is such that it renders the project unworkable by the contractor, the latter has the right to set aside the contract and claim damages for the time and money spent by him on the attempt to complete the work. If the breach and delay on the part of the employer is such that the contractor can still complete the work, he can choose to complete the work and claim damages for the overhead and additional costs incurred by him to complete the project at the delayed time.[176] These damages may also be in the form of providing payment to the contractor at the revised rates at which he had to procure the items due to the delay by the employer.[177] The contractor would also be entitled to a refund of the security amount deposited by him with the employer if the contract was terminated due to the delay and breaches of the employer.[178]

---

171 I.N. DUNCAN WALLACE, CONSTRUCTION CONTRACTS: PRINCIPLES AND POLICIES IN TORT AND CONTRACT 116 (1986); *see* P.C. Sharma v. D.D.A, 2006 (1) RAJ 521 (Del) (India).

172 *See* Krishna Bhagya Jala Nigam Ltd. v. G. Harishchandra Reddy, (2007) 2 SCC 720 (India); *see also* State of U.P. v. Ram Nath Int'l Const. Pvt. Ltd., (1996) 1 SCC 18 (India).

173 *See* Union of India v. Indian Proofing & Gen. Indus., 1998 (Supp) Arb LR 181 (India).

174 *See* Hyderabad Mun. Corp. v. M. Krishnaswami Mudaliar, (1985) 2 SCC 9 (India).

175 *See* G.M. Northern Rly. v. Sarvesh Chopra, (2002) 4 SCC 45 (India).

176 *See* Kishan Chand v. Union of India, 1999(1) RAJ 510 (Del) (India).

177 *See* State of Karnataka v. R.N. Shetty & Co., AIR 1991 Kant 96 (India); *see also* Mun. Corp. of Greater Mumbai v. Jyoti Const. Co., 2003(3) Arb LR 489 (India); Puranchand Nangia v. Delhi Dev. Auth., 2006 (2) Arb LR 456 (Del) (India).

178 *See* Delhi Dev. Auth. v. U. Kashyap, 1999 (1) Arb LR 88 (India).

However, in order to claim damages, the contractor will have to prove actual losses,[179] as the construction contracts generally don't have a pre-estimate of losses which can be levied by the contractor on the employer in case of the latter's delay in fulfilment of the reciprocal promises. While some amount of guessing work would be admissible in quantifying the damages, the contractor would be required to adduce some evidence of the losses suffered by him.[180]

V. How do the sub-contractors fit into the relationship between the contractor and the employer?

While the tender document provides the job of the completion of the construction project to one of the bidders who ultimately becomes the contractor, it is a common occurring in the construction contracts that the contractors indulge sub-contractors to complete various parts of the work.[181] These sub-contractors are indulged by the contractors via separate agreements, which are related contracts but do not form part of the main agreement with the employer. These sub-contracts can be understood to be entered into on the basis of the main contracts itself because the former won't come into existence if not for the latter.[182]

However, when looked at closely, the arbitration clauses of the main contracts would generally have only the main contractor and the employer

---

179 *See* Ennore Port Ltd. v. Skanska Cementation India Ltd., 2008 (2) Arb LR 598 (Mad) (India).

180 *See* A.S. Sachdeva & Sons v. Delhi Dev. Auth., 1996 (1) Arb LR 148 (Del) (India).

181 Andrew John Milner, *Subcontracts in the UK Construction Industry: An Investigation into the Root Causes of Disputes*, UNIVERSITY OF SALFORD SCHOOL OF THE BUILT ENVIRONMENT (Mar. 2019), https://usir.salford.ac.uk/id/eprint/52464/1/Milner_DEBEnv_Thesis_Salford_FINAL.pdf; Lew Yoke–Lian, S. Hassim, R. Muniandy & Law Teik–Hua, *Review of Subcontracting Practice in Construction Industry*, 4 IACSIT INT'L J. ENG'G & TECH. 442 (2012).

182 Stavros Brekoulakis & Ahmed El Far, *Subcontracts and Multiparty Arbitration in Construction Disputes*, GLOBAL ARBITRATION NEWS (Oct. 31, 2019), *available at* https://globalarbitrationreview.com/guide/the-guide-construction-arbitration/third-edition/article/subcontracts-and-multiparty-arbitration-in-construction-disputes.

as the parties and provide only them the right to refer the matter to arbitration. Therefore, in India at least, the sub-contractors are not provided the right to invoke the arbitration clause of the main contract in case they have suffered any losses due to the acts of the employer.[183] This is owing to the simple fact that the sub-contractors are non-signatories to the arbitration agreement.

A. What is the position of non-signatories to an arbitration clause in India?

It is an established principle of law that a contract gives rise to *rights in personam* which the parties exercise only against each other and not the world at large; and as a corollary, these rights cannot be exercise against them by the world at large.[184] Moreover, consent is the cornerstone of arbitration and the tribunal derives its jurisdiction from such consent.[185] Therefore, applying these principles, it would be safe to say that only the parties to an arbitration agreement can be bound to arbitrate under it.[186]

The Indian law pertaining to the position of non-signatories has evolved drastically over the years. The Arbitration and Conciliation Act, 1996 ["**Arbitration Act**"] which governs arbitrations in India has undergone significant changes in view of the Arbitration and Conciliation (Amendment) Act, 2015 ["**Amendment Act**"].[187] Section 2(1)(h) of the Act defines a *party* as a "*party to an arbitration agreement*."[188] Section 8 of the Act

183 *See* discussion *infra* Part V.A.

184 MINDY CHEN-WISHART, CONTRACT LAW, 31, 33 (5th ed. 2015).

185 William W. Park, *Non–Signatories and International Contracts: An Arbitrator's Dilemma, in* MULTIPLE PARTY ACTIONS IN INTERNATIONAL ARBITRATION 1, 2 (R. Doak Bishop ed., 2009).

186 *See* MD Army Welfare Hous. Org. v. Sumangal Serv. (P) Ltd., AIR 2004 SC 1344, ¶ 58 (India); *see also* Sundaram Fin. Ltd. v. NEPC India Ltd., (1999) 2 SCC 479, ¶¶ 14, 18 (India).

187 Arbitration and Conciliation (Amendment) Act, No. 3 of 2016 (India).

188 Arbitration and Conciliation Act, No. 26 of 1996, § 2(1)(h) (India).

also empowers courts to refer parties to arbitration where a valid arbitration agreement between the parties exists, in the realm of domestic arbitration. However, Section 8, as amended by the Amendment Act, now empowers the courts to refer the matter to arbitration if a "*party to the arbitration agreement or any person claiming through or under him*"[189] applies for a referral of the matter to arbitration. Thus, it now allows non-signatories to an arbitration agreement to approach an arbitral tribunal.[190]

However, this was not originally the position, as the Supreme Court in the first decade of the 21st century did not allow reference to arbitration by non-signatories. In the 2003 decision of the Supreme Court in *Sukanya Holdings Pvt. Ltd.* v. *Jayesh H Pandya*,[191] ["**Sukanya Holdings**"], it observed that causes of action against different parties cannot be bifurcated in a single arbitration and that an arbitration agreement will only bind the parties which have entered into the same. This case clearly suggests that party autonomy was considered to be supreme and judicial interpretation was in favour of excluding the non-signatories irrespective of the commercial intent between the contracting parties.

While the decision in *Sukanya Holdings* was passed in the context of domestic arbitration, the Supreme Court in *Sumitomo Corporation* v. *CDS Financial Services* ["**Sumitomo Corporation**"],[192] which involved matters of international commercial arbitration also came to a similar decision despite the fact that the reference was made under Section 45 which provided "*one of the parties or any person claiming through or under him*"[193] to refer the matter to arbitration. The Supreme Court declined to refer non-signatories to arbitration stating that any reference to arbitration necessarily had to be

189 *Id.* § 8.
190 *See* Ameet Lalchand Shah v. Rishabh Enter., (2018) 15 SCC 678, ¶¶ 24–25 (India).
191 *See* Sukanya Holdings Pvt. Ltd. v. Jayesh H. Pandya, AIR 2003 SC 2252, ¶¶ 16–17 (India).
192 *See* Sumitomo Corp. v. CDS Fin. Serv., AIR 2008 SC 1594, ¶¶ 20–21 (India).
193 Arbitration and Conciliation Act, 1996, § 8.

between *parties* as defined under Section 2(1)(h) of the Arbitration Act. The error in this decision lies in the wording of Section 45 itself, which provides for reference to arbitration upon a request of any person claiming through or under a party. The only basis available for refusing referral under Section 45 is if the agreement in question is found to be null and void, inoperative, or incapable of being performed. None of these were considered in this case.

Fortunately, the decision in *Sumitomo Corporation* was overruled by the Supreme Court in its subsequent decision in *Chloro Controls India Pvt Ltd*. v. *Severn Trent Water Purification Inc.* ["**Chloro Controls**"].[194] Here, the SC noted that the wording employed in Section 45 of the Act was on the same lines as that in Article II of the Convention on Recognition and Enforcement of Foreign Arbitral Awards, and at a substantial variance to the wording of Section 8 of the Arbitration Act, which only allows parties to the dispute to refer the matter to arbitration. The use of the term *any person* was construed as evincing the intention of the legislature to broaden the scope of Section 45. Therefore, the Supreme Court referred the matter for adjudication by an arbitral tribunal. In essence, the *Chloro Controls* case is a high watermark of judicial insistence in the sphere of extension of arbitration agreements to non-signatories.

This above principle laid down under the *Chloro Controls* case was further extended to group of companies by the Supreme Court in its decision in *Mahanagar Telephone Nigam Ltd* v. *Canara Bank*.[195] In this case, the Court held that the courts can refer non-signatory group companies to a single composite arbitration if special circumstances are proved. This group of

---

194 *See* Chloro Controls India Pvt. Ltd. v. Severn Trent Water Purification Inc., (2013) 1 SCC 641, ¶ 57 (India) [*hereinafter* "Chloro Controls"].

195 *See* Mahanagar Tel. Nigam Ltd. v. Canara Bank, 2019 SCC OnLine SC 995, ¶¶ 10.3–10.5 (India).

companies doctrine was relied upon by the Telangana High Court[196] and Calcutta High Court,[197] in recent judgments, and thus, elaborates on the current position of law in India.

While the above decisions provided the non-signatories the right to be referred to an arbitral tribunal, the Court in *Cheran Properties Ltd.* v. *Kasturi and Sons Ltd.*[198] made it clear that an arbitral award may be binding on a third party if such party falls within the meaning of *parties and persons claiming under them* under Section 35 of the Arbitration Act. Therefore, under the Indian law, courts have allowed the non-signatories to refer a matter to arbitration and have also enforced the arbitral awards against the non-signatories.

B. Whether sub-contractors fall under the category of "persons claiming through or under" as provided under Section 8 and Section 45 of the Arbitration Act?

Despite the above position of law giving the non-signatories the right to refer the matter to arbitration, the question that remains to be answered is whether the sub-contractors would fall under the category of "*persons claiming through or under*" the main contractor. While the Court in *Chloro Controls* allowed making of the non-signatories a party to the arbitral proceedings, it was contingent on the fact that those non-signatories formed part of a group of companies and that they gave their consent to be a part of the arbitral proceedings.[199]

However, what is to be noted from the language of Section 8 and Section 45 of the Arbitration Act is that though an application to refer the parties

196 *See* Tecpro Sys. Ltd. v. Telangana State Power Generation, 2019 SCC Online TS 1658 (India).

197 *See* IL&FS Fin. Serv. v. Aditya Khaitan, TA No. 12 of 2019 & CS No. 177 of 2019 (order dated Sept. 3, 2019) (India).

198 *See* Cheran Prop. Ltd. v. Kasuri and Sons Ltd., (2018) 16 SCC 413, ¶ 29 (India).

199 Chloro Controls, (2013) 1 SCC 641, ¶¶ 143–158 (India).

to the arbitration agreement to a dispute may be initiated by a *party to the arbitration agreement or any person claiming through or under him*, the courts can only *refer the parties to arbitration.*" This makes it amply clear that though an application to initiate arbitration can be filed by a non-signatory also. A non-signatory cannot come forward and just initiate arbitration against the parties to the arbitration clause and become a party to the dispute.[200] The law only allows inclusion of the non-signatories in the arbitration proceedings arising out of the main contract if the original parties as well as the non-signatories agree.[201] The simple reason for this being that the rights of any non-signatory to the main contract, which is a signatory to a subsidiary or a related contract, may get affected due to a decision rendered by any court in a dispute arising out of the main contract.[202]

However, it is to be noted here that there is an extremely strong burden of proof on the non-signatory to prove that it is a "*party claiming through or under,*" of the original parties to the main arbitration contract, and would have to show that the adjudication of disputes between the original parties to the arbitration agreement will have a direct impact on the non-signatory.[203]

Therefore, as per the current Indian law, a sub-contractor who is a non-signatory to the arbitration agreement between the main contractor and the employer cannot initiate arbitration proceedings against the employer for seeking any reliefs against the conduct of the employer, which has resulted in a loss to such sub-contractor. Further, any reliefs which the sub-

[200] Payal Chawla & Hina Shaheen, *Can non–signatories be compelled to arbitrate in Domestic Arbitrations?*, BAR & BENCH (Aug. 22, 2017), *available at* https://www.barandbench.com/columns/non-signatories-domestic-arbitrations.

[201] Chloro Controls, (2013) 1 SCC 641, ¶ 66 (India).

[202] *Id.* ¶ 104.

[203] *Id.* ¶¶ 143–158.

contractor intends to claim against the main contractor would be governed by the sub-contract, and vice-versa.

The ideal of example of the latter situation in the preceding paragraph is that of the *McDermott International*. In this case, the main contractor (Burn Standard) obtained a project for off-shore oil and gas production from a government employer (ONGC) and then the main contractor entered into a sub-contract with the petitioner (McDermott). Due to various delays in completion of the work by the main contractor the timelines for procurement of the services from the sub-contractor were delayed, due to which, the sub-contractor had to incur increased overhead costs, decrease of profit, and additional management costs.[204] Therefore, the sub-contractor invoked the arbitration clause of the sub-contract claiming damages from the main contractor. Since the main contractor was responsible for delay and disruptions leading to various additional costs to the sub-contractor, the main contractor was made responsible for compensating the same.

The corollary of the decision in *McDermott International* would be a situation where due to the delay by the sub-contractor, the main contractor could not complete the project on time. Therefore, in such a scenario, whatever damages the main contractor had to pay to the employer, he would be eligible to get indemnified for the same from the sub-contractor provided that there is a clause to such an extent in the sub-contract.[205] Thus, as per the present legal position in India, the employer and the sub-contractor would not be mandatorily referred to arbitration and it would depend only on the consent of both the parties.

C. Does any other jurisdiction allow sub-contractors to directly initiate arbitration against the Employer?

[204] McDermott Int'l Inc., (2006) 11 SCC 181, ¶¶ 31–32 (India).
[205] *See* Hall Constr. Co., Inc. v. Beynon, 507 So. 2d 1225 (Fla. 5th DCA 1987).

As discussed above, the Indian law as of now does not allow the sub-contractors to directly initiate arbitration proceedings against the employer. However, a discussion on this topic would be incomplete without going through the findings of the United States Supreme Court in its recent decision in the matter of *GE Energy* v. *Outokumpu Stainless.*[206] In this case, the main contractor and the original employer entered into three construction contracts and then the main contractor entered into a sub-contract with the Petitioner, wherein, the latter was to design, manufacture, and supply motors for the cold rolling mills. Accordingly, the sub-contractor delivered the goods which were then installed at the premises of the employer. Meanwhile, the original employer was taken over by the Respondents who then moved against the sub-contractor before the courts, claiming damages because the items installed by the sub-contractor stopped working causing serious damage to the Respondent.

When the matter went to the courts, the sub-contractor applied to the courts to refer the matter to arbitration based on the arbitration clauses of the three contracts entered into between the main contractor and the original employer. The U.S. Court of Appeals, Eleventh Circuit, was of the opinion that it would be unfair to the non-signatory if it is not allowed to compel arbitration because the signatory parties have often succeeded in enforcing their claims and arbitral awards on the non-signatories.[207] Thus, unlike the position in India, it allowed the sub-contractor to compel arbitration against the employer despite it being a non-signatory to the original arbitration agreements between the main contractor and the employer.[208]

---

206 *See* GE Energy Power Conversion France SAS, Corp. v. Outokumpu Stainless USA, LLC, U.S. Supreme Court Case No. 18–1048, Slip. Op. 590 U. S. (June 1, 2020) [*hereinafter* "GE Energy Power"].

207 *See* McBro Planning & Dev. Co. & McCarthy Bros. Co. v. Triangle Elec. Constr. Co., Inc., 741 F. 2d 342 (11th Cir. 1984).

208 *See* GE Energy Power, U.S. Supreme Court Case No. 18–1048, Slip. Op. 590 U. S.

The judgement is a highly welcomed one in the field of international commercial arbitration. The judgement would be a seminal one for bringing uniformity in the resolution of disputes arising out of multi-tiered commercial arrangements like that of sub-contracting, i.e., especially in the construction field. This decision not only allows better access to out of court resolution of disputes by non-signatories, but it also opens up the possibility of resolution of disputes arising out of international commercial agreements before a single international arbitration tribunal.

D. Does the type of sub-contractor impact the liability of the main contractor for any delay in disruptions in the completion of the project?

Sub-contractors can be broadly categorized into two: *first*, the sub-contractors who are directly and independently appointed by the main contractor himself in order to complete some parts of the construction project, known as the domestic sub-contractors; and, *second*, the sub-contractors, which have been suggested by the employer or chosen by the main contractor out of a list provided by the employer, knows as the nominated sub-contractors.[209]

While the law on domestic sub-contractors is quite straightforward, that, since those are the sub-contractors appointed by the main contractor out of his free will to complete the project, any delay caused by such a sub-contractor would be attributable to the main contractor himself, and he would not be provided with the defence that the delay was caused by the sub-contractor and not him.[210] This, however, does not affect the right of the main contractor to claim damages from the domestic sub-contractor as

[209] CYRIL CHERN, *supra* note 2, at 127.

[210] *Id.* at 129–131; *see Courts clarify the law on main contractors' liability for sub–contractors' negligence – vicarious liability and non–delegable duties*, WOMBLE BOND DICKINSON (Mar. 13, 2017), *available at* https://www.womblebonddickinson.com/uk/insights/articles-and-briefings/courts-clarify-law-main-contractors-liability-sub-contractors.

per the sub-contract through, which the latter's services were procured by the former.

On the other hand, the law related to nominated sub-contractor is not developed in India. An example of such nominated sub-contractors would be the Original Equipment Manufacturers ["**OEM**"], as provided under the Defence Procurement Manual.[211] The contractors are required to procure all goods and services for the specific contract undertaken by them from certain authorised OEMs only, and the responsibility of coordinating the delivery of goods and services by such OEMs is also that of the contractor only. In such a scenario, thus, if the OEMs cause delay and disruption, then liabilities of the main contractor may differ.

As the jurisprudence on this subject is not well-developed in India, reference is drawn from the foreign jurisdictions. In the United Kingdom, the courts have been of the opinion that if the nominated sub-contractor fails to do the work on time, or complete the work at all, then it is the duty of the employer to nominate a replacement sub-contractor who will then undertake the work.[212] It is to be noted here that the main contractor would not be liable to pay any damages for delay in completion of work arising due to the time lost in such re-nomination and completion of the pending work.[213]

Similar position was taken by the courts in Dubai as well, wherein, the Court of Cassation held in express terms, that "*when the subcontractor is selected by the employer or its consultants, the employer shall be liable for any delay in the performance of the subcontracted part and the main contractor shall not be liable for any delay fines if*

---

211 *See* Defence Procurement Manual, *supra* note 12.

212 *See* Fairclough Bldg. Ltd. v. Rhuddlan Borough Council, (1985) 30 BLR 26.

213 *See* North West Metro. Reg'l Hosp. Bd. v. TA Bickerton & Son Ltd., [1970] 1 All ER 1039 [*hereinafter* "North West Metro. Reg'l Hosp. Bd."].

they can prove that the delay is caused by such subcontractor and the main contractor played no part in the delay."[214]

Therefore, the liability of the main contractor with respect to the nominated sub-contractors is very limited, provided that the main contractor is able to establish that there was no delay on his part.[215]

VI. Conclusion

From the above discussion, it is amply clear that Sections 55, 63 and 74 of the ICA are at the forefront of the discussion related to delay, disruptions, and damages in construction arbitration in India. While the prima facie reading of the provisions of the ICA or even the provisions of the individual contracts may portray a picture where the law might seem to be favour the employer, this is quite far from the practical truth.

While Section 55 provides the employers the right to rescind the contract in case of a delay and non-completion of a project within the stipulated period of time, the express observation of the Supreme Court in the *McDermott International*, that, in construction contracts time is generally not of the essence of the contract, puts serious barriers in the application of this provision.[216] This hindrance in exercising the right to set aside the contract despite the express stipulation under the contract that time would be of the essence runs contrary to the interests of the employers.

The alternative provided under the Section 55, that when time is not of the essence the employer can claim, LD looks like an easy way out for the employer for claiming damages. However, when read with the provisions of Section 63 of the ICA, it shows the true picture. As, in light of the *McDermott International* judgment, time is not considered to be of essence of

214 *See* Dubai Court of Cassation, Case No. 266/2008 (March 17, 2009).
215 *See* North West Metro. Reg'l Hosp. Bd., [1970] 1 All ER 1039.
216 McDermott Int'l Inc., (2006) 11 SCC 181, ¶ 86 (India).

construction contracts, therefore, the only option left with the employers is to extend the contract and hope that the contractor will ultimately complete the project. However, this extension could be construed as a waiver of the right to levy liquidated damages unless the employer expressly reserves the right to claim damages while granting the extension and make the terms clear to the contractor.[217] Thus, this works as a double-edged sword against the employer who on the one hand is forced to continue with the project as it cannot be terminated under Section 55, and, on the other hand, he might not be entitled to claim damages if there is an implied waiver due to granting of extensions.

Further, this levy of LD itself is also contingent on whether there was contributory delay on the part of the employer or not. If it is proved that there was even a slightest of delay on the part of the employer, irrespective of the amount of delay and disruptions caused by the contractor, the employer would not be entitled to LD for the specific period of delay, where he played a role no matter how small.[218]

Arguably, the law on Section 74 is in the favour of the employer in as much as he is given the liberty not to prove actual loss if it is established that the LD levied by him as per the contract were a genuine pre-estimate of loss. However, this burden of proof has not been exhausted completely and the law states that it is only if the loss suffered is impossible to prove that the employer is exonerated of such proof.[219] Therefore, in normal circumstances involving commercial transactions and construction projects for commercial purpose where actual losses can be proved, there is an additional burden put on the employer. This is despite the express agreement between the contractor and the employer that in case of a breach

---

217 *See* Kailash Nath v. NDMC, ILR (2002) 1 Delhi 441 (India).

218 J.G. Eng'r, (2011) 5 SCC 758, ¶¶ 19, 22, 23 (India); Raheja Universal, 2016 (5) Mh LJ 229, ¶¶ 7–11 (India).

219 Kailash Nath Assoc., (2015) 4 SCC 136, ¶ 43 (India).

of the contract, the contractor would be liable to pay a certain stipulated amount according to a particular method.

Thus, the Indian law in its current form is institutionally supporting delay and disruptions of construction projects by providing layered safeguards to the contractors even against the actions of the employers, which are provided for under the contract itself.[220] The excessive reading into the text of the contracts as epitomised by the decisions in *Hind Construction*, *Fateh Chand* and *McDermott International*, has altered the basic application of the construction contracts and has directly gone against the express intention of the parties, and, thus, requires reconsideration in light of principles of party autonomy in contract making.

While it would be unfair to say that the courts were completely incorrect in conducting a holistic reading of the contract to come to its conclusion in cases like *Hind Construction*, then the generalisation of law that where LD are to be paid at a certain rate for a particular amount of delay in days then time would not be the essence of the contract is arguably a stretch and needs a revisit. This has led to a scenario where the employers are devoid of a statutory right to set aside the contract despite expressly agreeing that time would be of the essence.[221] It is also pertinent to note here that the intention of the parties in providing for levy of damages for each day/week of delay may also be arising out of the time sensitive nature of the project, and could indicate towards the fact that the delivery of the construction project in time is valuable to the employer.

Though the law provides for making time the essence of the contract in construction contracts also, the initial extension of time which has to be provided and the contingency of the contractor agreeing to the same, proves to be a hindrance to the timely completion of the project. Ultimately,

---

220 *See* Badrinath Srinivasan, *supra* note 22.

221 *See* Hind Constr., (1979) 2 SCC 70 (India).

this impacts the interests of the employer who is neither getting the delivery on time, nor is allowed to terminate the contract on the agreed upon completion date due to non-completion by the contractor, nor is able to claim liquidated damages for the extension period.

All the above-mentioned riders on the exercise of rights of the employer ultimately work as a relief for the contractor who can very conveniently hide under any of these layers of tests provided for termination or claiming of liquidated damages by the employer. Therefore, there is a need to revisit certain basic concepts of the ICA, as highlighted above in the concluding remarks. These changes, which would work as a deterrent against the delays by the contractors, are necessary in order to promote efficiency on the part of the contractors and to ensure that construction projects are completed timely.

THE USE OF MEDIATION FOR THE SETTLEMENT OF INVESTMENT DISPUTES

Sébastian Manciaux[1]

Abstract

"It might well be found when the Convention came into operation, that conciliation activities under the auspices of the Centre proved more important than arbitral proceedings."[2] *These words pronounced in 1963, by Aron Broches in Addis Ababa at one of the World Bank's meetings for the negotiation of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ["**ICSID Convention**"]—(known as the Washington Convention) which was to create the International Centre for Settlement of Investment Disputes ["**ICSID**"]—did not prove to be prophetic. As a flagship institution for the settlement of investment disputes, ICSID has effectively offered conciliation and arbitration as means of dispute settlement since its entry into force in 1966. Since its establishment in 1966 to June 30, 2021, ICSID had administered a total of 838 cases. Among these, only thirteen were requests for conciliation, and they were either under the procedure provided for by the ICSID Convention (eleven cases) or under its additional mechanism (two cases). Translated into percentages, the result is just over 1.5 percent.*

---

1 The author is a Professor of Law (Maître de conférences) at the University of Burgundy (Bourgogne) and a member of the CREDIMI, Centre de Recherche sur le Droit des Investissements et des Marchés Internationaux (Research Centre on Investment and International Trade Law).

2 ICSID, HISTORY OF THE ICSID CONVENTION, Vol. II–1, 242 (2001).

I. Introduction

The statistics provided by the International Chamber of Commerce ["**ICC**"] and the London Court of International Arbitration ["**LCIA**"] are similar as well. While the ICC conciliation activity has become anecdotal nowadays, the ICC arbitration system, since its creation, has been accompanied by a widely used conciliation procedure (80 percent of the cases) before the Second World War.[3] The ICC announced that in 2020, out of 946 cases registered, mediation and other amicable dispute resolution procedures represented approximately about 8 percent of the total, without distinguishing in these data between commercial and investment disputes.[4] The LCIA, which does not make this distinction either, announced, that in 2020, a total of 444 cases were referred to it. Out of this, 407 had been registered for arbitration and three had been put up for mediation.[5]

Addressing the issue of recourse to mediation for the settlement of investment disputes, even by extending it to the use of conciliation, which will be considered as equivalent for the purposes of this study,[6] means dealing with a phenomenon whose advent has been announced for ages,[7]

---

3 On this issue, *see* E.A. Schwartz, *La conciliation internationale et la CCI*, BULL. ICC INT'L. CT. ARB., 5(2) 99 (1994); Eduardo Silva Romero, Emmanuel Jolivet & Florian Grisel, *Aux origines de l'arbitrage commercial contemporain: l'émergence de l'arbitrage CCI* (1920–1958), REV. ARB. 403 (2016).

4 *See* INT'L CHAM. COMM., *ICC Dispute Resolution Statistics: 2020*, *available at* https://iccwbo.org/publication/icc-dispute-resolution-statistics-2020/.

5 *See* LCIA, *2020 Annual Casework Report*, *available at* https://www.lcia.org/News/lcia-news-annual-casework-report-2020-and-changes-to-the-lcia-c.aspx.

6 Conciliation and mediation are two alternative dispute resolution methods by which a third party (the conciliator or the mediator) attempts to bring the parties to an amicable settlement of their dispute through an agreement between them. The more or less active role of this third party in reaching an amicable settlement (proposal or not of an amicable solution) depends more on the attitude of the parties and the personality of this third party than on the name given to the procedure. Moreover, the terms mediation or conciliation are used interchangeably in the field of international dispute resolution, as the following developments show.

7 In addition to the prophecy of Aaron Broches cited above, *see, e.g.,* L. Nurick & S.J. Schnably, *The First ICSID Conciliation: Tesoro Petroleum Corporation v. Trinidad and Tobago*, 1

but whose concrete manifestations are so episodic and discreet that they are difficult to detect, to the point that they hardly interest the most informed observers, at least in French-speaking doctrine.[8]

Apart from their very modest use, mediation and/or conciliation procedures do not appear to have encouraging results in the settlement of investment disputes. The results of the procedures conducted under the aegis of the ICSID are thus disappointing. Out of nine completed procedures, two were promptly withdrawn at the request of the parties (average duration of one year),[9] and the other seven resulted in the issuance of a report by the Conciliation Commission ["**Commission**"] (average duration of sixteen months since the constitution of this Commission), which on six occasions noted the impossibility of reaching an agreement

ICSID REV.–FILJ 340 (1986), who are surprised from the very first lines of their article at the low recourse to ICSID conciliation compared to what was expected.

8 *But see* Ali Bencheneb, *La conciliation et la médiation en droit des affaires internationales*, *in* REGARDS CROISÉS FRANCO MAGHRÉBINS SUR LES MODES ALTERNATIFS DE RÈGLEMENT DES CONFLITS, REVUE FRANCO MAGHRÉBINE DE DROIT, 2014, N°21, 259–274; W. Benhamida, *Litiges relatifs aux investissements internationaux et modes alternatifs de règlement des différends: un nouveau champ d'exploration*, *in* LA MÉDIATION EN MATIÈRE CIVILE ET COMMERCIALE (2012). The literature in English is much more developed. One can quote, but not exhaustively, Jack J. Coe Jr., *Towards a Complimentary Use of Conciliation in Investor–State Disputes – A Preliminary Sketch*, 12 U.C. DAVIS J. INT'L L. POL'Y 7 (2005) [*hereinafter* "Jack J. Coe"]; E. Van Ginkel, *Toward Mandatory ICSID Conciliation, Reflections on Professor Coe's Article on Investor–State Conciliation*, in RESHAPING THE INVESTOR–STATE DISPUTE SETTLEMENT SYSTEM – JOURNEYS FOR THE 21ST CENTURY 3 (Anna Joubin-Bret & Jean E. Kalicki eds. 2015) [*hereinafter* "E. Van Ginkel"]; S. Franck, Integrating Investment Treaty Conflict and Dispute Systems Design, 92 MINN. L. REV. 161 (2007); S.M. Schwebel, *Is Mediation of Foreign Investment Disputes Plausible?,* 22 ICSID REV.–FILJ 237 (2007); J.W. Salacuse, *Is There a Better Way? Alternative Methods of Treaty–Based, Investor–State Dispute Resolution*, 31 FORDHAM INT'L L. J. 138, 162 (2008); J. Coe, *Settlement of Investor–State Disputes through Mediation – Preliminary Remarks on Process, Problems and Prospects*, *in* ENFORCEMENT OF ARBITRAL AWARDS AGAINST SOVEREIGNS 73 (R.D. Bishop ed., 2009).

9 In both cases, the conciliation procedure aimed at reaching a settlement of the dispute was probably successful because it resulted in the settlement of the dispute outside the conciliation procedure.

between the parties.[10] Further, two of these conciliation procedures were followed by an arbitration procedure, which, led to an extension of the duration of the dispute.[11]

In view of this hardly encouraging panorama, the activity of the Multilateral Investment Guarantee Agency ["**MIGA**"]—another international organisation under the aegis of the World Bank—is an exception. Though mediation is absent from the text of the Convention Establishing the Multilateral Investment Guarantee Agency ["**MIGA Convention**"] that took place in Seoul in 1985, and led to the creation of MIGA—disputes between MIGA and insured investors are settled by arbitration under Article 58 of the MIGA Convention—an informal and low-profile *MIGA's* Dispute Mediation Service created in 1996.[12] MIGA's primary purpose is to offer its good offices for the amicable settlement of a dispute arising in connection with an investment insured by it, in order to avoid having to compensate the foreign investor for a proven loss. MIGA's "*proactive facilitation efforts*" take many forms, including representations to the host state of the consequences that would result from a dispute with the foreign investor made public because of its jurisdiction. MIGA acts either as a facilitator, or as a mediator,[13] in the resolution of disputes. In a document dated October, 2015, MIGA boasted an excellent success rate, revealing that it had intervened in nearly hundred cases almost always successfully with two exceptions.[14] This result certainly explains why MIGA now

10 ICSID, *The ICSID Caseload Statistics (Issue 2020–2)*, at 8, 9, 15, *available at* https://icsid.worldbank.org/sites/default/files/publications/The%20ICSID%20Caseload%20Statistics%20%282020-2%20Edition%29%20ENG.pdf. More detailed data is presented in the Annex.

11 *See* Annex.

12 *En ce sens v. Ch. Leathley*, *in* INTERNATIONAL DISPUTE RESOLUTION IN LATIN AMERICA: AN INSTITUTIONAL OVERVIEW 266–267 (2007).

13 MULTILATERAL INVESTMENT GUARANTEE AGENCY (MIGA), *Dispute Resolution and Claims*, *available at* https://www.miga.org/Documents/Dispute_Resolution_and_Claims.pdf.

14 *Id.*

accepts offers to mediate disputes concerning foreign investments that it had not handled before. MIGA has published reports on a few cases in which it has intervened successfully, such as a dispute between the Italian company Idreco S.r.l and the Argentine Republic, or a dispute between forty-two claimants (including Greek citizens) and Ethiopia over expropriations during the time of Mengistu's government.[15] MIGA, however, makes it clear that it intervenes on a selective basis and mentions nothing of the failures it has suffered. For example, in the case brought before the ICSID in the matter of *ABCI Investments N.V.* v. *Republic of Tunisia Ltd.*, two MIGA mediation procedures were attempted—one before the arbitration procedure was registered by the ICSID, and the other after the arbitral tribunal rejected the objection to its jurisdiction raised by the defendant State. Both attempts at mediation were unsuccessful.[16]

No other institution active in the settlement of investment disputes reports on the good results it achieves through mediation. It is, therefore, difficult to speak of success. There are of course causes for this, and understanding them can provide lessons for the future. Therefore, the following reflections will begin with (I) an analysis of the causes of the failure observed, which will be followed by (II) proposals to encourage the use of mediation.

II. Reasons for the failure

There are various reasons for the failure of mediation. On a first look, it will be noted that the instruments of mediation are diverse, but suffer from poor visibility (A). The second pitfall, which undoubtedly stems from the

[15] MIGA, *Legal Services*, *available at* https://www.miga.org/sites/default/files/archive/Documents/Page83-85.pdf.

[16] The author of these lines should point out that he acted as counsel to ABCI in this litigation from 2005 to 2008.

first—while certainly more important—is the scarcity of clauses providing for the use of mediation in the settlement of investment disputes (B).

A. The Low Visibility of Mediation Instruments

Numerous instruments have been issued to provide a framework for the settlement of international disputes through mediation or conciliation. Some of these instruments are specific to the settlement of investment disputes, while others are broader in their scope, but are undoubtedly applicable to disputes relating to an investment transaction. While there may not be a plethora of instruments organising mediation, there is no shortage of them either. This in fact is not the problem. Rather, at issue is that these instruments are issued by institutions that are primarily known for their arbitration activity, and the same obscures the offer of mediation or conciliation that these institutions provide. To illustrate this point in a non-exhaustive manner, reference may be made to the following:

- The ICSID Convention alongside arbitration;
- The ICC and its Mediation Rules, which are far less well-known than its Arbitration Rules;[17]
- The United Nations Commission on International Trade Law ["**UNCITRAL**"] and its Conciliation Rules, which are far less well-known than its work in the field of arbitration (UNCITRAL Model Law on International Commercial Arbitration and UNCITRAL Arbitration Rules 2010);[18]

[17] International Chamber of Commerce (ICC), Rules of Arbitration 2021.

[18] United Nations Commission on International Trade Law (UNCITRAL) Conciliation Rules 1980, *available at* http://www.uncitral.org/uncitral/fr/uncitral_texts/arbitration/1980Conciliation_rules.html.

- The International Bar Association ["**IBA**"] and its Rules for Investor-State Mediation;[19]

- The LCIA and its Mediation Rules.[20]

All these institutions which propose instruments for the settlement of disputes through mediation or conciliation (regulations issued by the institution or even the ICSID Convention Arbitration Rules) are first and foremost known for their activities in the field of arbitration, a subject on which they prefer to speak. For these institutions, the settlement of disputes refers more to arbitration than to mediation. This may be unfortunate, but that is the way it is.

Other institutions less marked with the seal of arbitration, intervene for the settlement of investment disputes. This is the case of MIGA, which offers an informal mediation service to reduce the possibility of irremediable claims that would oblige it to compensate the insured investor. However, this service which was initially created only for investors who were beneficiaries of the MIGA insurance, and then offered on a selective basis to other investors is not well known. It is not clear whether MIGA wishes to institutionalise this service, which would then compete with the activity of its sister institution, the ICSID.

In recent years, however, initiatives have been taken to develop the use of mediation or conciliation for the settlement of investment disputes. The International Mediation Institute ["**IMI**"], a non-governmental organisation working to develop mediation as a means of dispute settlement, has set up a working group dedicated to mediation for the

---

19 International Bar Association (IBA) Rules for Investor–State Mediation 2012, *available at* https://www.ibanet.org/MediaHandler?id=C74CE2C9-7E9E-4BCA-8988-2A4DF573192C.

20 London Court of International Arbitration (LCIA) Mediation Rules (2020), *available at* https://www.lcia.org/Dispute_Resolution_Services/lcia_mediation_rules_2020.aspx.

settlement of investor-state disputes (Investor-State Mediation Task Force) which published a document in September, 2016, highlighting the skills required of persons likely to be appointed as mediators for the settlement of this type of dispute.[21] The Energy Community, an international organisation set up in October, 2005 in Athens between the European Union and Eastern European countries,[22] created a Dispute Resolution and Negotiation Centre in October 2016, which places mediation at the centre of its mechanism.[23] The Centre for Effective Dispute Resolution (CEDR), a non-governmental organisation based in London, stated in 2009 that investment-receiving states must strengthen the legal framework for the amicable settlement of investment disputes.[24]

Will these initiatives the list of which is not exhaustive bear fruit? It is to be hoped that they will, but it should be noted that while they aim, notably, to combat the lack of visibility of mediation as a means of settling investment disputes, they do not address—with the exception of the CEDR—the central problem, which is the lack of clauses providing for recourse to conciliation or mediation in the instruments regulating international investments.

---

21 INT'L MED. INST., *IMI Competency Criteria for Investor–State Mediators*, IMI (Sept. 16, 2016), *available at* https://www.imimediation.org/wp-content/uploads/2017/07/IMI-IS-Med-Competency-Criteria625483FINAL-19-September-2016.pdf.E**rror! Hyperlink reference not valid.**

22 For more information on this international organisation, *see* its website, ENERGY COMMUNITY, *available at* https://www.energy-community.org/aboutus/whoweare.html.

23 We the following argument find in the explanatory memorandum to the act creating this Centre (2016/3/ECS): "Noting that alternative dispute settlement methods such as mediation and conciliation are gaining importance as alternatives to litigation and arbitration, especially due to their focus on preserving the relationship between the parties, their flexible approach and their minimal costs."

24 On this work, *see* M. Stevens & B. Love, *Investor–State Mediation: Observations on the Role of Institutions*, *in* 3 CONTEMPORARY ISSUES IN INTERNATIONAL ARBITRATION AND MEDIATION – THE FORDHAM PAPERS 389 (2010). *See* also the website of this organisation.

B. Little or poorly planned recourse to mediation

The purpose of the instrument for the settlement of investment disputes is the offer to settle investment disputes expressed by states in investment treaties in the broadest sense, be it Bilateral Investment Treaties ["**BIT**"], Free Trade Agreements containing investment provisions or other forms of international agreements. It must be acknowledged that mediation is almost always ignored in the dispute settlement offer made by states in these treaties, as noted in two recent studies, one published in November, 2012 by the Organisation for Economic Co-operation and Development (OECD) analysing one thousand six hundred and sixty of these treaties concluded by fifty-four States,[25] and the other published in 2014 by the United Nations Conference on Trade and Development.[26] The vast majority of investment treaties contain a dispute settlement clause providing for an attempt to settle the dispute directly between the parties, before a jurisdictional means of dispute settlement (arbitration or recourse to state courts) can be implemented.[27] There are, however, a few international treaties and investment laws that reserve a place for mediation

---

25 Joachim Pohl, Kekeletso Mashigo & Alexis Nohen, *Dispute settlement provisions in international Investment agreements: a large sample survey*, OECD INV. DIV. (2012) 18, *available at* https://www.oecd.org/investment/investment-policy/WP-2012_2.pdf.

26 *Investor–State Dispute Settlement, UNCTAD Series on Issues in International Investment Agreements II*, UNCTAD/DIAE/IA/2013/2, 60–62 (2014).

27 By way of illustration, Article 8 of the Agreement between the Government of the French Republic and the Government of the Republic of Tunisia concerning the Reciprocal Encouragement or Protection of Investments, Tun.–Fr., Oct. 20, 1997 reads as follows:
"Any investment dispute between one of the Contracting Parties and a national or company of the other Contracting Party shall, as far as possible, be settled amicably between the two parties concerned. If such a dispute has not been settled within six months from the time it was raised by either party to the dispute, it shall be submitted at the request of either party to arbitration by the International Centre for Settlement of Investment Disputes (ICSID) established by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, signed in Washington on 18 March 1965."

as an alternative to arbitration, or as a prerequisite to arbitration, or even as the sole alternative to state courts.

Among the instruments proposing the use of mediation or conciliation as an alternative to arbitration, there are already a few BITs, including the one concluded in 2000 between the Netherlands and Uganda, Article 9 of which reads as follows:

> "*Each Contracting Party hereby consents to submit any legal dispute arising between that Contracting Party and an investor of the other Contracting Party concerning an investment of that investor in the territory of the former Contracting Party to the International Centre for Settlement of Investment Disputes for settlement by conciliation or arbitration under the Convention on the Settlement of Investment Disputes between States and Nationals of other States, opened for signature at Washington on 18 March 1965.*"[28] (emphasis added)

It is also possible to cite the old Tunisian law of 1969 on investments, Article 20 of which reads as follows:

> "*Any dispute between the foreign investor and the Government arising out of the investor's act or any action taken by the Government against the investor shall be settled in accordance with arbitration and conciliation procedures.*
>
> *These are the procedures provided for:*
>
> *- or within the framework of bilateral investment protection agreements concluded between Tunisie and the State of which the investor is a national;*

[28] Agreement on encouragement and reciprocal protection of investments between the Republic of Uganda and the Kingdom of the Netherlands, Uganda–Neth., art. 9, Mar. 18, 1965, *available at* https://investmentpolicy.unctad.org/international–investment–agreements/treaty–files/2091/download. Underlined by us. Such provisions are also found in some of the BITs concluded by Japan, such as the BIT signed with Uzbekistan on August 15, 2008.

> *- or within the framework of the International Convention for the Settlement of Relative Disputes aux Investments between States and Nationals of other States, convention ratified by law no. 66-33 of 3 May 1966*."[29] (emphasis added)

Other state legislations continue to offer this choice, such as the Jordanian Investment Law currently in force.[30] Where arbitration and conciliation are offered as means of settlement of investment disputes, the choice between these two methods is implicitly or expressly left to the most diligent party, i.e., almost always to the investor. Further, it also seems that the investor prefers to opt for arbitration. Thus, Article 20 of this Tunisian law of 1969 (since abrogated), served as the basis for two procedures before the ICSID, and these were two arbitration procedures.[31]

In a few other texts, recourse to conciliation or mediation *before* arbitration is either a *possibility* or an *obligation*.

It is a *possibility* which is also recommended, and is one of the methods of amicable settlement (consultation, negotiation) referred to in the "*cooling-off*" period of the dispute by Article 23 of the 2004 Model BIT proposed by the United States:

---

29 Investment Law 2016, art. 20 (Tunis.).

30 The Investment Law (Law No. 30 of 2014) art. 43 (Jordan) ("The investment disputes between the Governmental parties and the investor will be settled amicably within a maximum period of six months, otherwise the two parties to the dispute may resort to the Jordanian courts, settle disputes according to the Jordanian Arbitration Law or resort to alternative means for resolving disputes by mutual agreement of both parties."). For a more explicit choice in favour of conciliation (ICSID), *see*, the previous version of the Jordanian law (1995 Law), as cited by W. BENHAMIDA, INTERNATIONAL INVESTMENT DISPUTES AND ALTERNATIVE DISPUTE RESOLUTION: A NEW FIELD OF EXPLORATION, at 298 [*hereinafter* "BENHAMIDA"].

31 Business Ghaith R. Pharaoh v. Tunisia, ICSID Case No. ARB/86/1; ABCI v. Tunisia, ICSID Case No. ARB/04/12.

> "*In the event of an investment dispute, the claimant and the respondent should initially seek to resolve the dispute through consultation and negotiation, which may include the use of non- binding, third-party procedures.*"[32]

Recourse to conciliation or mediation before being able to initiate arbitration proceedings is in other cases an *obligation*, a solution retained by the new Tunisian investment law of 2016. Indeed, in a Title VI entitled "*Settlement of Disputes,*" Article 23 of the 2016 Tunisian Investment Law, provides:

> "*Any dispute arising between the Tunisian State and the investor in connection with the interpretation or application of the provisions of this law shall be settled through conciliation procedures unless one of the parties waives it in writing.*
>
> *The parties are free to agree on the procedures and rules governing conciliation.*
>
> *Failing this, the rules of the United Nations Commission on International Trade Law on conciliation shall apply.*
>
> *Where the parties conclude a compromise agreement, the said agreement shall take the place of law with regard to the parties who undertake to execute it in good faith and as soon as possible.*"[33] (emphasis added)

Article 24 of the same law then provides that it is only in the event of failure of the negotiation procedure that foreign investors, unlike Tunisian

---

32 Treaty between the Government of the United States of America and the Government of [Country] concerning the Encouragement and Reciprocal Protection of Investment (2004), art. 23. *See* Agreement Between Japan and The Republic of Colombia for the Liberalization, Promotion and Protection of Investment, Japan–Colom., Sept. 12, 2011. This provision has inspired other States, as it is found almost identically in the BIT concluded in 2011 between Colombia and Japan, Article 26.1 of which reads as follows: "In the event of an investment dispute, the disputing parties shall, as far as possible, settle the dispute amicably through consultations and negotiations which may include the use of non–binding and third–party procedures."

33 Investment Law 2016, art. 23 (Tunis.).

investors (unless the latter have made an *objectively international* investment), may initiate arbitration proceedings, if they have the agreement of the Tunisian State for this purpose.

Finally, conciliation or mediation may be the *only* alternative means of dispute settlement provided for, with a good example of the same being the BIT concluded on May 23, 1975 between Tunisia and South Korea, Article 8 of which reads as follows:

> "*Pursuant to the Convention on the Settlement of Investment Disputes Relating to Investments signed on 18 March 1965 and at the request of a national or legal entity of either Contracting Party who considers that he has suffered damage as a result of non-observance of the provisions of this Agreement, the other Contracting Party undertakes forthwith and irrevocably to submit to the conciliation procedure.*
>
> *This commitment implies the renunciation of the requirement to exhaust beforehand the recourse to the administrative and judicial courts*."[34]

It should be noted that the commitment made by the states parties to this Treaty is only to submit to the conciliation procedure, not to reach an amicable settlement of the dispute. It is an obligation of means, not of result. It cannot, therefore, be concluded that conciliation (ICSID in this case) is the exclusive means of settling disputes falling within the scope of

[34] Accord Entre le Gouvernement de la République de Corée et le Gouvernement de la République Tunisienne Relatif a l'encouragement et la Protection Reciproque des Investissements, S. Kor.–Tunis., art. 8, Nov. 8, 1975, *available at* https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/1839/download [*hereinafter* "S. Kor.–Tunis. BIT"]. A few other BITs contain similar provisions. *See* Agreement between the Government of the Kingdom of Sweden and the Government of the Republic of India for the Promotion and Reciprocal Protection of Investments, Swed.–India, art. 9, July 4, 2000, *available at* https://investmentpolicy.unctad.org/international–investment–agreements/treaty–files/1602/download. This is the case of Article 9 of the BIT concluded in 2000 between India and Sweden, which also provides for the use of conciliation (under the UNCITRAL Rules) as a means of dispute settlement.

this Treaty.[35] In the event of failure of the conciliation, which is always possible, the unsatisfied party remains with the possibility to implement the dispute settlement procedure under ordinary law, i.e., to refer the matter to the competent state court. It should not be forgotten that the success of a conciliation or mediation procedure depends on the goodwill of the parties to the dispute. This fundamental characteristic is both a strength, and a weakness of these methods of dispute settlement. This characteristic must be taken into account when considering how to encourage the use of one of these amicable means of settling investment disputes.

III. Encouraging the Use of Mediation

There are advantages to using mediation. The outcome of the procedure is, on average, quicker and cheaper; and the mediation procedure has the undeniable attraction of remaining under the control of the parties to the dispute.[36] As long as the parties are in the process of trying to settle their dispute amicably, they retain control over the course of the procedure—whether it be its pace, its outcome, or the issues to be dealt with. Keeping control of the dispute rather than leaving it to a third party who will decide its outcome is traditionally seen as an advantage of mediation over jurisdictional methods of dispute resolution, illustrated by the adage that "*a bad settlement is better than a good trial*." Developing the use of mediation, therefore, appears to be desirable and is a stated objective of many legislators and institutions. However, developing the use of mediation presupposes the removal of (A) legal obstacles, and (B) political and psychological reluctance.

---

35 *Contra* BENHAMIDA, *supra* note 29, at 294–296, which presents this procedure as being exclusive of any other.

36 A unanimous observation noted by all the authors. *See, e.g.,* CHRISTOPHER SCHREUER, THE ICSID CONVENTION: A COMMENTARY 444–445 (2d. ed. 2009).

A. Removing legal obstacles

Unfortunately, there are many legal obstacles that hinder the development of mediation. In order to overcome them, it would be advisable to multiply the number of clauses providing for recourse to mediation or conciliation by taking necessary care during their drafting. The beginning and end of this procedure, which is very dependent on the will of the parties, should then be better supervised. Finally, care should be taken not to make this procedure subject to the jurisdiction of the courts to the detriment of its voluntary nature, a tendency already denounced by Philippe Fouchard at the time.[37]

As has been pointed out, the first legal obstacle to the development of mediation in the settlement of investment disputes is the lack of provisions for its use. Admittedly, nothing prohibits—in the silence of the applicable texts—a host State and a foreign investor at the dawn of their dispute, from deciding to set up a mediation procedure; for example, during the period of attempted amicable settlement provided for by most of the treaties in force.[38] However, experience shows that if a mediation clause has not been provided beforehand, the chances of such a procedure being initiated are much lower. In the nine conciliation procedures conducted under the auspices of the ICSID for which we know of the instrument that allowed

[37] Philippe Fouchard, *Alternative Dispute Resolution and Arbitration. L'évolution des modes de règlement des litiges du commerce international*, OECD, *available at* http://www.oecd.org/internet/consumer/1878948.pdf. In the same vein and in relation to the settlement of investment disputes, *see* BENHAMIDA, *supra* note 29, op. cit. at 307–309; XIMENA BUSTAMANTE, *Investor State Mediation, reflections on its feasibility from a process perspective*, in NEW DIRECTIONS IN INTERNATIONAL ECONOMIC LAW IN MEMORIAM THOMAS WÄLDE, 284 (Todd Weiller & Freya Baetens eds. 2011).

[38] In this sense, *see* United Nations Conference on Trade and Development, *Investor–State Dispute Settlement, UNCTAD Series on Issues in International Investment Agreements II*, UNCTAD/DIAE/IA/2013/2, 2014, at 62–64.

this procedure, the conciliation procedure was in each case provided for in a provision that existed prior to the emergence of the dispute.[39]

Referring to mediation in a text means drawing the attention of the parties to the dispute to the possibility of using it. But drawing the parties' attention to this dispute settlement mechanism is not enough, especially if one wants to impose mediation or conciliation as a preliminary step towards a jurisdictional settlement of the dispute. The dispute settlement clause must be carefully drafted with this in mind, avoiding any ambiguity, such as the one recently discovered in an old, but little-known multilateral treaty, the Agreement on Promotion, Protection and Guarantee of Investments among Member States of the Organisation of the Islamic Conference ["**APPI-OIC Treaty**"]. Proposed for signature in 1981 by the fifty-seven Member States of the Organisation of the Islamic Conference ["**OIC**"], the APPI-OIC entered into force in February, 1988. At present, the Trade Preferential System of the OIC ["**TPS – OIC**"] has been signed by 33 OIC Member States and 25 have ratified it.[40] The long Article 17 of **APPI-OIC** Treaty relating to the settlement of disputes between investors and host States begins with an introductory paragraph worded as follows:

> "*Until an Organ for the settlement of disputes arising under the Agreement is established, disputes that may arise shall be entitled through conciliation or arbitration in accordance with the following rules and procedures.*"

---

39 Dispute settlement clause in the contract or inserted in a treaty or investment law. *See* Annex.

40 Agreement for Promotion, Protection and Guarantee of Investments among the OIC Member States, Organisation of the Islamic Conference, Feb. 1988, *available at* https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2399/download [*hereinafter* "APPO–OIC Treaty"]. The 25 OIC Member States that have ratified the APPO–OIC Treaty are as follows: Burkina Faso, Cameroon, Egypt, Gabon, Guinea, Indonesia, Iran, Jordan, Kuwait, Lebanon, Libya, Mali, Morocco, Oman, Pakistan, Palestine, Qatar, Saudi Arabia, Senegal, Somalia, Sudan, Tunisia, Turkey, Uganda, United Arab Emirates and United States of America.

As the body in question has not yet been set up, the investor has access to conciliation and arbitration. Article 17 of the APPI-OIC Treaty is not unambiguous because while this introductory paragraph seems to give the choice between recourse to conciliation or arbitration, the following paragraphs make conciliation (presented in the first subdivision)[41] the prerequisite for arbitration (presented in the second subdivision).[42] The English version of the text is equally ambiguous,[43] and this provision has already been interpreted by an arbitral tribunal as offering the possibility for the investor to have direct recourse to arbitration. Indeed, the dispute settlement mechanism provided by the APPI-OIC Treaty has already been used once, in a case between a Saudi Arabian National, Mr. Hesham T. M. Al-Warraq, and the Republic of Indonesia. In this case, the arbitral tribunal was constituted applying the UNCITRAL Arbitration Rules. In its decision on jurisdiction rendered on June 21, 2012, the Tribunal opined that pending

41 *Id.*; Article 17(1) of the APPI–OIC Treaty reads as follows:
"Pending the establishment of a body for the settlement of disputes arising from this Agreement, any disputes that may arise shall be settled by conciliation or arbitration in accordance with the following rules.
1. Conciliation
(a) If both parties to the dispute have agreed to resort to conciliation, the agreement should include a description of the dispute, the requests of both parties to the dispute and the name of the conciliator chosen by both parties. The parties concerned may request the Secretary–General to select the conciliator;
(b) The conciliator's task shall be limited to reconciling the different points of view and making proposals likely to lead to a solution acceptable to the parties concerned. The conciliator will submit a report within the time limit determined by the task to be carried out, which will be notified to the parties concerned. This report cannot be opposed to both parties in the event that the dispute is brought before the judicial authorities."

42 The latter part of Article 17(1) of the APPI–OIC Treaty reads as follows:
"(a) If the two parties to the dispute have failed to reach an agreement as a result of their recourse to conciliation, or if the conciliator fails to submit his report within the specified time limit, or if the two parties do not agree on the proposed solutions, each party shall have the right to refer the dispute to the Arbitral Tribunal for decision.
(b) Arbitration proceedings shall commence with a notification by the party making a request for arbitration to the other party to the dispute, explaining the nature of the dispute and the name of the arbitrator it will appoint. The other party […]."

43 APPI–OIC Treaty, *supra* note 39.

the establishment of the body referred to in Article 17 of the APPI-OIC Treaty, the same Article does indeed constitute an offer of arbitration that can be implemented by investors who can avail themselves of this Treaty.[44] More specifically, the arbitrators decided that the investor claimant has under this Treaty—three possibilities: either conciliation, arbitration (choice made by the Claimant in the case of *Hesham T. M. Al Warraq* v. *Republic of Indonesia*), or conciliation, and then in case of failure of the latter, arbitration. Was this the wish of the drafters of the APPI-OIC Treaty? One may doubt it, but the clumsiness in the drafting of Article 17 has opened the door to another interpretation.

Better supervision of the beginning and the outcome of the procedure in order to be able to override a lack of will—or even ill will on the part of one of the parties—is another way forward. It should be noted immediately that the remedies proposed here are by their very nature limited because of the predominant role played by the goodwill of the parties for the success of a mediation or conciliation procedure but it is possible to mitigate certain risks.

At the outset of the proceedings, it is the possible inertia of a party that can be circumvented by setting up the organ of the proceedings without its assistance. More specifically, it is a question of providing for a method of appointing the mediator or setting up the Conciliation Committee while overcoming the lack of cooperation in this respect by one of the parties. Thus, in the absence of agreement of the parties on this matter, the institution may appoint the missing mediator(s) or conciliator(s), as a modality provided, for example, in Article 30 of the ICSID Convention in the case of ICSID and in Article 5.2 of the ICC Mediation Rules–provided

[44] Hesham T.M. Al Warraq v. Republic of Indon., Award on Respondent's Preliminary Objections to Jurisdiction and Admissibility of the Claims, ¶ 81 (June 21, 2012), *available at* https://www.italaw.com/sites/default/files/case-documents/italaw3174_0.pdf.

that there is an agreement between the parties on the use of mediation or conciliation as the sole or preliminary means of settling their dispute.

Once appointed, the mediator or conciliator may invite both parties, including the most reluctant one, to at least attend an initial meeting to explore the chances of success of an attempt at an amicable settlement.

It is then possible to oblige the parties to pursue in good faith the mediation or conciliation procedure in an attempt to reach an amicable settlement of their dispute. This is undoubtedly what is expressed in the aforementioned provision of Article 8 of the BIT concluded on May 23, 1975 between Tunisia and South Korea by which the States parties to the Treaty undertake, at the request of an investor from the other state party "*to submit to the conciliation procedure*." It should be noted that the obligation is not bilateralised—it does not weigh on the foreign investor and remains unclear.

The commitment to participate in a conciliation procedure does not require that a settlement of the dispute be reached in this way. It cannot be required of any party whatsoever that they reach (under what constraint?) an amicable settlement of their dispute. It would then be wise to specify the contours of this obligation to participate in the procedure and ensure that the parties attend at least the first meeting organised by the mediator or conciliator; make at least one serious proposal for an amicable settlement and/or participate for a minimum period of time in the procedure, etc. The fact remains that it is possible to oblige the parties to an investment dispute to attempt to settle it through mediation or conciliation. In the latter case, it is advisable to provide for a two-stage mechanism in the event of a dispute arising: first, recourse to mediation or conciliation, and then, if this fails, recourse to a jurisdictional method of dispute settlement, in particular, arbitration. With such a mechanism, attempting to settle the dispute by means of mediation or conciliation for the minimum agreed period would

be a prerequisite, failure to comply with which would lead to the premature declaration of inadmissibility of the request for arbitration.[45] In reality, therefore, it is merely a marginal adjustment of the current overwhelming trend followed in investment treaties and laws, which consists of providing for an informal attempt to settle the dispute amicably before submitting it to a tribunal, whether state or arbitral.[46] It may be considered that the intervention of a third party in the dispute at the stage of attempting to settle it amicably would give the dispute a better chance of success, insofar as the refusal by one of the parties to attempt to settle it amicably will be noted by that third party. Although the reasons for the failure of his or her mission are not communicated to the court (a general rule laid down, for example, by Article 34 of the ICSID Convention), the prior intervention of a mediator, or a conciliator, will have drawn the attention of both parties to the existence of the dispute, its contours, and the consequences of its failure to settle amicably.

The outcome of the mediation or conciliation procedure could also be improved. First of all, it is necessary to make clear what will happen next if the mediation or conciliation fails. Foreseeing the possibility of the failure of the mediation or conciliation by announcing the next procedure may be seen as an anticipation of this failure, but this risk may be counterbalanced by highlighting the advantages of mediation in relation to what awaits the parties in the subsequent procedure.

Above all, it is necessary to give effect to the amicable settlement reached if the procedure is successful. The risk here is that one of the parties may refuse to implement the settlement agreement reached by the parties,

---

45 On this question of the consequences of not respecting the procedural steps prior to arbitration, *see* Ali Bencheneb, *La conciliation et la médiation en droit des affaires internationales*, *in* REGARDS CROISÉS FRANCO MAGHRÉBINS SUR LES MODES ALTERNATIFS DE RÈGLEMENT DES CONFLITS, REVUE FRANCO MAGHRÉBINE DE DROIT 259–274 (2014).

46 *Id.*

rendering the entire procedure followed so far unnecessary. However, it has to be noted that several solutions exist to the same.

First is to assimilate the settlement agreement concluded to an arbitral award, thus giving it the authority of *res judicata*, allowing it to be enforced in the event of non-execution by one of the parties. This solution has been adopted by the California International Arbitration and Conciliation Act, (CIACA),[47] which is not without its problems because it is not clear whether most jurisdictions around the world, when asked to enforce such an *award* under the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, would agree to recognise the "*award*."[48] Under French law, the parties to a conventional mediation procedure may apply for the approval of the settlement agreement they have reached, thereby making the agreement enforceable. However, all parties to the settlement agreement must agree for the same,[49] and the effectiveness of this mechanism outside the European Union remains unanswered.[50]

Inserting the agreement of the parties in an arbitral award (known as an award of agreement between the parties) is another solution, but it presupposes the existence of an arbitral procedure. However, dispute

47 E. Van Ginkel, *supra* note 7.

48 *Id.*

49 Décret n° 2012–66 du 20 janvier 2012 relatif à la résolution amiable des différends [Decree n° 012–66 of 20 Jan. 2012 relating to the amicable resolution of disputes], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Jan. 20, 2012.

50 CODE DE PROCEDURE CIVILE [C. CIV.] [CIVIL PROCEDURE CODE], art. 1535 (Fr.); Décret n° 2012–66 du 20 janvier 2012 relatif à la résolution amiable des différends [Decree n° 012–66 of 20 Jan. 2012 relating to the amicable resolution of disputes], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Jan. 20, 2012, art. 2; Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters, 2008 O.J. (L. 136), 3–8 recalls the implementation of European Directive 2008/52/EC of May 21, 2008 on certain aspects of mediation in civil and commercial matters, which only has effect in relation to the Member States of the European Union.

resolution institutions that offer arbitration and conciliation (or mediation) as a means of settling disputes, force the parties to choose one or the other proceeding, without allowing the parties to conduct both at the same time. The first sentence of Article 26 of the ICSID Convention thus provides that "*[C]onsent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy.*" On reading the rest of this Article, it appears that the other remedies referred to are first and foremost domestic, administrative or judicial remedies. But the broad wording chosen undoubtedly makes it possible to go beyond this and include mediation and conciliation procedures. It might, however, be interesting to allow an arbitration procedure and a conciliation procedure to be carried out at the same time in order to allow an amicable agreement, if reached between the parties through the consultation procedure, to be inserted in the award made at the end of the arbitration procedure as provided in Article 43 of the ICSID Arbitration Rules. This proposal, which is not new,[51] requires a number of precautions to be taken to ensure the integrity of the two parallel proceedings.[52] Despite the additional costs that it could generate, it is not without its appeal.[53]

The entire doctrine agrees on the weakness represented by the uncertainties relating to the legal force of the settlement agreement reached, which is a real obstacle to recourse to mediation or conciliation. It is interesting in this respect to note that the ICSID Convention is concerned with the recognition and enforcement of arbitral awards made under the aegis of the ICSID (Articles 53 to 55 of the ICSID Convention), but not with the follow-up given to the recommendations issued by a Conciliation Commission (Article 34 of the ICSID Convention), in particular when they

51 Jack J. Coe, *supra* note 7; E. Van Ginkel, *supra* note 7.

52 *Id.*

53 These costs should not, however, be higher than those of proceedings in which arbitration succeeds mediation or conciliation. And be lower if an amicable agreement is reached before the outcome of the arbitration proceedings.

note the agreement reached between the parties. Should an international approval procedure not be created, within the ICSID or even beyond, to confer binding and enforceable force on the provisions of the agreement reached between the parties at the end of the international mediation or conciliation procedure? This question is currently being considered by UNCITRAL, whose working group is considering an "*instrument relating to the enforcement of international trade agreements resulting from conciliation*;"[54] but the outcome is uncertain.

However, the establishment of such a procedure is unlikely to be sufficient to bring about much wider use of mediation in the settlement of investment disputes, as, political and psychological reluctance will still remain.

B. Overcoming Political and psychological hurdles

There is a time for litigation and a time for mediation. The success or failure of a mediation or conciliation procedure will indeed depend on the state of mind of the parties; a state of mind that evolves over time. Just as sociologists and psychologists, lawyers can testify to this reality.[55]

In addition to this psychological obstacle common to all mediation procedures, there is also a political obstacle that is particularly present during mediation or conciliation procedures. In these procedures, one of the recognised advantages of mediation or conciliation also faces a disadvantage due to the divisive and emblematic nature of litigation relating to international investments. Such disputes almost always originate from a request by a foreign investor complaining about the conduct of the host State. It is a confrontation between the defence of a private interest and the general interest, which the defendant State would generally drape itself in.

---

54 *See* UNCITRAL's website, *available at* http://www.uncitral.org/uncitral/fr/commission/working_groups/2Arbitration.html.

55 *See, e.g.,* S.M. Schwebel, *Is Mediation of Foreign Investment Disputes Plausible?*, 22 ICSID REV. FILJ, 237–240 (2007).

A successful mediation will then require each party to abandon part of its claims, to compromise in order to reach an agreement—made of reciprocal concessions—with the other party. The contours of the transactional act that brings a solution to the dispute are defined (or at least accepted) by the parties to the dispute. The parties to the dispute are, therefore, the creators of the agreement that resolves the dispute, and they bear the paternity of it.

It is then possible to reproach the representatives of the parties, and in particular, those of the defendant State, for the very existence of a transaction or at least its content:

- "*How were you able to compromise on the general interest?*"
- "*How is it that you have accepted the other party's demands to such an extent at the expense of those that you should have made prevail?*"
- "*Why didn't you opt for a jurisdictional method of dispute resolution whose outcome could have been more advantageous to us?*"

Accusations of collusion with the opposing party, or even corruption, are then not far off. So, how can we make those who were not involved in the mediation process understand—those who hear about this case without having the slightest legal knowledge and/or without measuring the economic and political stakes, in a context of widespread mistrust of those who are leading us—that the solution adopted was the best one, that it was the one that best preserved the interests of the State?[56] We should also point out here the very strong reticence that exists in French public law towards any process leading to the payment by a public law entity of sums that it does not owe.[57]

---

[56] *Id.* at 241. *See also* BENHAMIDA, *supra* note 29, at 307.

[57] The Council of State decided more precisely in the Mergui judgment (EC, 19 March 1971, No. 79962, *ECR* p. 235) that "legal persons governed by public law must never be ordered

In view of these perils, in the current context, resorting to mediation for the representatives of the parties (and especially for the representatives of the State) is, therefore, risky. The solution that allows one to evade his or her responsibility as a representative of one of the parties is then to entrust the settlement of the dispute to a third party who will resolve it without the parties' agreement, and this third party can only be the judge or the arbitrator. Recourse to a judicial method of dispute resolution transfers the task of settling the dispute—and the responsibility that accompanies it – to a third party. Further, if the decision handed down is perceived as unsatisfactory, the third party may be blamed and the representatives of the parties,[58] may be blamed less easily.

Until the risk described above is precisely circumscribed (because it seems impossible to eliminate it), resorting to mediation or conciliation to settle a dispute relating to foreign investment may be perceived as presenting a greater risk than the benefits it provides. This is certainly the greatest obstacle to the development of amicable means of dispute settlement in international investment law. Further, on this last aspect of the problem addressed in this article, like Giovanni Drogo scanning the Tartar desert from the top of Fort Bastiani,[59] I see little sign of the hoped-for change.

---

to pay a sum which they do not owe". The term "condemned" refers much more to the outcome of judicial proceedings than to a settlement agreement between two parties, but the situation in which a legal person may be required to pay a sum of money following mediation or conciliation is close to that referred to in this decision of the Council of State. On this subject, *see* R. FERAL, *Le point de vue du juge administrative*, *in* L'ORDRE PUBLIC ET L'ARBITRAGE, E. LOQUIN & S. MANCIAUX, 42 TRAVAUX DU CREDIMI, 205, 213 (2014).

58 The same concern often leads the representatives of the parties to choose counsels and arbitrators from among the best known, in order to clear them in the event of an unfavourable outcome: "we don't understand, we had chosen the most reputable counsels – the arbitrators".

59 DINO BUZZATI, THE DESERT OF THE TARTARS (1940).

Annex

List of conciliation proceedings conducted under the aegis of ICSID

1. *SEDITEX Engineering Consultancy for the textile industry m.b.h.* v. *Democratic Republic of Madagascar* (CONC/82/1)

- Conciliation provided for in a contract;
- Case registered on October 5, 1982; and
- Rescission at the request of the parties on 20 June 1983 before the constitution of the Conciliation Commission

2. *Tesoro Petroleum Corporation* v. *Trinidad and Tobago* (CONC/83/1)

- Conciliation provided for in a contract;
- Case registered on August 26, 1983;
- Conciliation Commission set up (single member) on January 6, 1984; and
- Settlement accepted by the parties and procedure closed (Report of the Conciliation Commission rendered on November 27, 1985, pursuant to Article 33 of the Conciliation Rules).

3. *SEDITEX Engineering Beratungsgesellschaft für dieTextilindustrie m.b.H.* v. *Madagascar* (CONC/94/1)

- Conciliation provided for in a contract;
- Case registered on June 13, 1994;
- Conciliation Commission set up (3 members) on September 23, 1994; and
- Report of the Conciliation Commission delivered on July 19, 1996.

4. *TG World Petroleum Limited* v. *Republic of Niger* (CONC/03/1)

- Conciliation provided for in a contract;
- Case registered on December 8, 2003; and

- Rescission at the request of the parties on April 8, 2005 before the constitution of the Conciliation Commission.

5. *Togo Electricity* v. *Republic of Togo* (CONC/05/1)
   - Instrument allowing conciliation unknown;
   - Case registered on May 20, 2005;
   - Conciliation Commission set up (3 members) on September 21, 2005;
   - Report of the Conciliation Commission delivered on April 6, 2006; and
   - Arbitration proceedings registered on April 10, 2006, *Togo Electricité and GDF-Suez Energie Services* v. *Republic of Togo* (ARB/06/7), which resulted in an award and subsequent annulment proceedings concluded in September 2011.

6. *Shareholders of SESAM* v. *Central African Republic* (CONC/07/1)
   - Conciliation provided for in a contract;
   - Case registered on August 13, 2007;
   - Conciliation Commission set up (3 members) on February 4, 2008; and
   - Report of the Conciliation Commission delivered on August 13, 2008.

7. *RSM Production Corporation* v. *Republic of Cameroon* (CONC/11/1)
   - Conciliation provided for in a contract;
   - Registered on September 19, 2011;
   - Conciliation Commission set up (3 members) on February 17, 2012;
   - Report of the Conciliation Commission delivered on June 11, 2013; and

- Arbitration proceedings registered on July 1, 2013 (withdrawal at the request of the parties following the amicable settlement registered on January 19, 2016).

8. *Hess Equatorial Guinea, Inc. and Tullow Equatorial Guinea Limited* v. *Republic of Equatorial Guinea* (CONC(AF)/12/1)

- Conciliation provided for in the contract;
- Affair registered on May 15, 2012;
- Suspension of the procedure until January 31, 2018, Conciliation Commission not yet constituted; and
- Currently pending.

9. *Republic of Equatorial Guinea* v. *CMS Energy Corporation and others* (CONC(AF)/12/2)

- Conciliation provided for in the contract;
- Case registered on June 29, 2012;
- Conciliation Commission constituted (single member) on July 6, 2012; and
- Report of the Conciliation Commission delivered on May 12, 2015.

10. *Xenofon Karagiannis* v. *Republic of Albania* (CONC/16/1)

- Conciliation provided for by the Greek-Albanian BIT (1991) and the Albanian law of 1993;
- Case registered on May 16, 2016;
- Conciliation Commission not yet constituted as at January 2021; and
- Currently pending.

11. *Société d'Energie et d'Eau du Gabon* v. *Gabonese Republic* (CONC/18/1)

- Conciliation provided for in a contract;
- Case registered on March 30, 2018;

- Conciliation Commission (3 members) constituted on April 30, 2018; and
- Report of the Conciliation Commission delivered on September 19, 2018.

12. *La Camerounaise des Eaux (CDE)* v. *Republic of Cameroon and Cameroon Water Utilities Cooperation (CAMWATER)* (CONC/19/1)

- Conciliation provided for in a contract;
- Case registered on May 24, 2019;
- Conciliation Commission (3 members) constituted on September 4, 2019; and
- Pending (the Conciliation Commission held a hearing on conciliation by videoconference on November 30, 2020).

13. *Barrick (Niugini) Ltd* v. *State of Papua New Guinea* (CONC/20/1)

- Conciliation provided for in a contract;
- Case registered on July 22, 2020;
- Conciliation Commission (1 member) constituted on January 7, 2021 following appointment by the Chairman of the Administrative Council; and
- Currently pending.

Indian Journal of Arbitration Law
ISSN: 2320-2815

PUBLISHED BY:
THE REGISTRAR
NATIONAL LAW UNIVERSITY, JODHPUR
NH-62, MANDORE,
JODHPUR- 342304
RAJASTHAN (INDIA)

E-Mail : ijal@nlujodhpur.ac.in,
nlu-jod-rj@nic.in
Phone No. : +91-291-2577530,
2577526