IJAL

Indian Journal of Arbitration Law

Volume 11. Issue 1 | January, 2023 | ISSN: 2320-2815

EDITORIAL

ARTICLES

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.

INDIAN JOURNAL OF ARBITRATION LAW

CONTENTS

INDIAN JOURNAL OF ARBITRATION LAW

THE BVI IAC ARBITRATION RULES 2021 – "A STATEMENT OF INTENT FOR THE FUTURE"

Alex Potts[*] *& Richard Evans*[†]

Abstract

*The British Virgin Islands ["**the BVI**"] is an asset holding jurisdiction for many international businesses. Companies incorporated in the BVI are often involved in international arbitrations administered by leading arbitral institutions. With the introduction of the BVI International Arbitration Centre ["**BVI IAC**"] and the BVI becoming a signatory to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 ["**New York Convention**"] in 2013, it became possible to conduct arbitrations (involving BVI entities) with the seat in the BVI and under the governance of the BVI IAC Rules. The note provides an analytical review of the recently updated BVI IAC Arbitration Rules 2021["**Rules**"]. In particular, the authors discuss the newly introduced procedure of the emergency arbitrator, expedited procedure, the joinder of third parties to an arbitration, procedures dealing with multiple arbitrations, introduction of the role of a tribunal secretary and other amendments. The comparative analysis of the Rules against the rules of other leading arbitration institutions will assist the readers in identifying the advantages of choosing the BVI IAC Arbitration Rules. The Rules have been characterised as "a statement of intent for the future"*[1] *due to the BVI IAC's re-confirmed commitment to a transparent, timely, efficient, and fair resolution of complex cross-border disputes.*

I. Introduction

On November 16, 2021, the BVI IAC issued an updated set of arbitration rules which by default apply to all arbitrations commenced after that date, unless the parties have specifically agreed otherwise.[2] The Rules build on the earlier version of the BVI IAC Arbitration Rules, 2016 ["**2016 Rules**"], which were based on the 2010 United Nations Commission on International Trade Law Arbitration Rules with amendments. Amongst the distinguished features of the 2016 Rules, which continue to be maintained in the new Rules, are provisions for enhanced confidentiality of BVI IAC arbitrations and the express ability of a party to apply for interim measures to courts in support of arbitration without seeking permission from the arbitral tribunal (and thereby maintaining their ability to create an element of surprise in the proceedings).[3]

* Alex Potts KC, FCIArb is the Head of Conyers' Cayman Islands Litigation and Restructuring department. He maintains a litigation and arbitration practice in the Cayman Islands, Bermuda, and the British Virgin Islands. He may be contacted at alex.potts@conyers.com.

† Richard Evans is a Partner in the Litigation and Restructuring Department of Conyers in the British Virgin Islands. He may be contacted at richard.evans@conyers.com.

1 British Virgin Islands International Arbitration Centre (BVI IAC) Arbitration Rules, 2021, Foreword by John Beechey CBE [*hereinafter* "BVI IAC Rules"].

2 *Id.* art. 1(2).

3 *Id.* Preamble.

The Preamble of the Rules records the commitment of the BVI IAC to transparent governance and Greener Arbitration. With the BVI IAC proudly joining the list of signatories of the Green Pledge,[4] the Rules proclaim the BVI IAC's commitment to take responsibly its environmental impact and facilitate virtual hearings and meetings. In practice, this is implemented by introducing a requirement to submit electronic copies of documents, maintaining, and storing files in electronic form, introducing remote hearings and meetings as an alternative option to live arbitrations, and reducing paper document flow where possible.[5]

The 2016 Rules, initially comprising of the Arbitration Rules (including the Preamble) and Annexes, have been amended and supplemented by three new Appendices and one new Annex. The new Appendices deal with the procedure of the emergency arbitrator (Appendix 1), the expedited procedure (Appendix 2) and the tribunal secretaries (Appendix 3). The Annexes (which may be amended from time to time by the BVI IAC) have been updated and now include the BVI IAC Model Arbitration Clause and the Model Clause for Expedited Procedure (Annex A), the Model Statement of impartiality, independence and availability of the arbitrator, the emergency arbitrator and the tribunal secretary (Annex B), the Schedule of fees and costs (Annex C) and provisions about a newly established BVI IAC Arbitration Committee, whose main role is "*to oversee the consistent application of the Rules and to monitor their use in practice*" (Annex D).[6] The BVI IAC may supplement the Rules by issuing practice notes.[7]

This note discusses the major amendments, including the introduction of an emergency arbitrator procedure under Part II, expedited procedure under Part III and tribunal secretaries under Part IV, and joinder, consolidation, single arbitration with multiple contracts and concurrent arbitrations under Part V. Other notable amendments are discussed in Part VI before concluding with a finding regarding the benefits of this updating of the Rules.

II. The Emergency Arbitrator

The introduction of an emergency arbitrator procedure is a welcome development and is in line with the introduction of such procedure by the arbitration rules of the leading arbitral institutions. It also fits well with the BVI's position as an asset holding jurisdiction, where urgent relief is often required, and where appropriate, granted. The emergency arbitrator procedure enables a party to seek urgent interim or conservatory measures before the formation of an arbitral tribunal without recourse to local courts and while maintaining confidentiality and privacy of the process. Provisions about the emergency arbitrator are consolidated in Appendix 1 and apply automatically if the arbitration agreement invoking the Rules was signed after the date when the Rules came into force unless the

4 The Green Pledge, CAMPAIGN FOR GREENER ARBITRATIONS, *available at* https://www.greenerarbitrations.com/greenpledge.

5 *See, e.g.,* BVI IAC Rules, arts. 1(8)(a), 1(8)(h) & 1(8)(j).

6 BVI IAC Rules, Foreword by John Beechey CBE.

7 *Id.* Preamble. As of July 25, 2022, the BVI IAC has not yet issued any practice notes.

parties have opted out from Appendix 1. In all other circumstances, the parties may expressly agree to apply Appendix 1 to the arbitration agreement.[8]

Although the Rules do not expressly state whether the emergency arbitrator is an arbitrator and/or part of an arbitral tribunal, there is no provision in the Rules which would suggest that this is not the case. With this in mind, while the Rules do clearly state that the emergency arbitrator is appointed by the Chief Executive Officer ["**CEO**"] of the BVI IAC, the procedure that the CEO should follow when making the choice is not expressly set out.[9] Presumably, general provisions set out in Article 7 of the Rules about the appointment of an arbitrator would apply, and the emergency arbitrator would be appointed by the CEO upon recommendation of the Arbitration Committee and with the assistance of the Secretariat.[10] Although the BVI IAC does maintain a register of arbitrators as required by the BVI Arbitration Act, 2013 ["**Act**"],[11] the CEO is not obliged to choose the emergency arbitrator from the panel of arbitrators. Total flexibility is thereby maintained.

The Rules require that the appointment of the emergency arbitrator be made no later than two days from the receipt of the complete request for the emergency arbitrator.[12] The emergency arbitrator is then obliged to render a decision within 14 days from receipt of the file, unless the time is extended either by the parties' agreement or by the Secretariat upon request of the emergency arbitrator.[13] Such commitment to a tight timetable puts the BVI IAC emergency arbitrator procedure in line with other leading arbitration rules.

The Rules expressly state that the emergency decision shall be made in the form of an order and contain provisions which discourage interpreting the emergency decision as being an arbitral award.[14] For example, while the Rules do require the emergency decision to provide reasons and prescribe that the decision shall be binding upon the parties,[15] there is no provision stating that the decision is final or that the emergency decision must indicate the seat of the emergency proceedings, both being immanent characteristics and requirements of an award.[16] The Rules expressly provide that the parties voluntarily undertake to comply with the emergency decision without delay suggesting that the nature of the emergency decision is contractual.[17] Lack of finality of the emergency decision is further re-confirmed by the provisions empowering the emergency arbitrator to revoke, modify or terminate the order upon a request by a party if there is a change in circumstances; the emergency decision may be revoked, modified or terminated by the arbitral tribunal and is not binding on the tribunal.[18] The

8 BVI IAC Rules, app. 1, art. 1.
9 *Id.* app. 1, art 4.
10 *Id.* art. 7(1).
11 British Virgin Islands Arbitration Act, 2013, § 100(1).
12 BVI IAC Rules, app. 1, art. 4(1).
13 *Id.* app. 1, art. 7(1).
14 *Id.* app. 1, art. 7(3).
15 *Id.* app. 1, arts. 7(3) & 8(1).
16 *Id.* arts. 39(2) & (6).
17 *Id.* app. 1, art. 8(1).
18 *Id.* app. 1, art. 8(5).

emergency decision automatically ceases to be binding if the notice of arbitration is not submitted 14 days after the request for the emergency decision was made.[19]

In some jurisdictions, such as Singapore and Hong Kong, the introduction of the emergency arbitrator was accompanied by statutory amendments of respective arbitration laws to provide a statutory footing to the procedure. In Singapore, the International Arbitration Act, 1994 was amended to expand the definition of an "*arbitral tribunal*" to cover the "*emergency arbitrator*",[20] and in Hong Kong, the Arbitration Ordinance contains a specific regime for enforcement of the emergency arbitrator's decision.[21] However, other jurisdictions, such as England, India and the United States, made no amendments giving way for precedents to shape the law. The question of the scope of applicability of the arbitration law to the emergency proceedings was recently considered by the Supreme Court of India and is far from theoretical because simply amending the definition of an arbitral tribunal may not be sufficient for the purposes of determining how (in scope) the arbitration law applies to the emergency proceedings.[22] It is yet to be seen whether the Act will be amended in due course to compliment the regime of the emergency arbitrator by extending the definition of the "*arbitral tribunal*" to the "*emergency arbitrator*", and/or clarifying the scope of application of the BVI Arbitration Act to the emergency proceedings and/or introducing specific provisions to deal with enforcement of the emergency relief in the BVI.

Last, but not the least, the party invoking the emergency proceedings is obliged to pay a fee of USD 28,000 to cover the administrative and emergency arbitrator's costs associated with the emergency arbitrator proceedings.[23]

III. The Expedited Procedure

Another key development relates to the introduction of the expedited procedure. The expedited procedure may be invoked if the arbitration agreement was concluded after the Rules came into force and if the parties have not opted out of the expedited procedure.[24]

Unlike the emergency arbitrator procedure, where urgency is key and the emergency proceedings take place within a short space of time before the formation of an arbitral tribunal, the expedited procedure is designed to expedite the entire arbitration and affects every stage of arbitration starting with the composition of an arbitral tribunal and ending with the issue of the award. Having said that, the Secretariat is only entitled to abridge the time limits set by the Rules, but not the contractually agreed deadlines.[25] With regards to the latter, the parties by adopting the Rules, expressly agree that Appendix 2 and the expedited procedure (including any time limits set out therein) shall prevail over the

19 *Id.* app. 1, art. 8(3)(b).
20 International Arbitration Act, 2020 Rev. Ed., § 2(1) (Sing.).
21 Arbitration Ordinance, Cap. 609, Part 3A (H.K.).
22 Amazon.com NV Inv. Holdings LLC v. Future Retail Ltd., 2022 (1) SCC 209.
23 BVI IAC Rules, app. 1, art. 10(1).
24 *Id.* arts. 2(3)(a) & 2(3)(b).
25 *Id.* app. 2, art. 4(1).

arbitration agreement.[26] However, this leaves the parties with a need to agree on any other time limits which might have been specifically agreed upon and not overridden by the Rules. Another important provision overriding the arbitration agreement relates to the composition of an arbitral tribunal. By default, the dispute shall be decided by a single arbitrator, unless the Arbitration Committee determines otherwise.[27] The long stop date provided in Appendix 2 for rendering the award is six months from the moment the Secretariat transmitted the arbitration file to the arbitral tribunal.

Under the terms of the Rules, the arbitration proceedings may be expedited only in a prescribed set of circumstances: (i) if the value of the arbitration (including claim, counter-claim and cross-claim) is less than USD 4.5 million, (ii) if the parties so agree or (iii) if there is an exceptional urgency as determined by the Arbitration Committee after considering the circumstances of the case and hearing the views of the parties.[28] The expedition of the arbitration procedure due to a reason of exceptional urgency is only available if the application is filed before the formation of an arbitral tribunal. In all circumstances described above and at any time of the proceedings the Arbitration Committee may decide that it is not appropriate to apply the expedited procedure.[29] It is not expressly stated in the Rules what test the Arbitration Committee shall apply, but most likely the Arbitration Committee shall be guided by the overriding objective of the expedited procedure, being the provision of a procedure that is "*timely, cost effective and fair, considering especially the amount in dispute and the complexity of the issues or facts involved*".[30]

Appendix 2 sets out several important procedural measures guaranteeing that the proceedings shall proceed in a timely and efficient manner. For example, the parties are not allowed without the tribunal's permission to submit new claim(s) or counterclaim(s).[31] The tribunal is expressly given the power to limit document production, length, scope and number of written submissions and witness and expert evidence.[32] Other powers of the sole arbitrator aimed at controlling the conduct of arbitration include the power to determine the dispute on paper without holding a hearing and based on documentary evidence without hearing from the witnesses and experts.[33] This is in stark difference from the usual position when the arbitral tribunal is obliged to hold a hearing at a request of a party.[34]

Finally, unlike the emergency proceedings which end up with an "*order*" which is as good as the parties' voluntary compliance, the expedited proceedings are concluded by the issue of an arbitral award, which is as good as the final arbitral award, but which may be confined to summary reasons.[35]

---

26 *Id.* app. 2, art. 1(1).
27 *Id.* app. 2, art. 3(1).
28 *Id.* app. 2, art. 2(1).
29 *Id.* app. 2, art. 2(4).
30 *Id.* app. 2, art. 1(2).
31 *Id.* app. 2, art. 4(2).
32 *Id.* app. 2, art. 4(4).
33 *Id.* app. 2, art. 4(5).
34 *Id.* art. 18(4).
35 *Id.* app. 2, art. 5(2).

IV. Tribunal Secretaries

The Rules formally introduce the role of a tribunal secretary, who in appropriate circumstances may be appointed at the discretion of an arbitral tribunal.[36] However, it is open for a party to object to the appointment of a tribunal secretary in which case the tribunal secretary shall not be appointed.[37]

The role of a tribunal secretary is confined to organisational, administrative and redactional tasks and under no circumstances the tribunal is permitted to delegate its decision-making functions to a tribunal secretary.[38] The tribunal secretary shall work under the tribunal's instructions and continuous supervision, it must submit a declaration of impartiality, independence and availability and comply with a duty of disclosure, which applies to the tribunal secretary as it applies to an arbitral tribunal.[39]

The tribunal secretary's remuneration is by default paid out of the tribunal's fees unless the parties agree otherwise. But in any event, the hourly rate charged by the tribunal secretary must not exceed USD 250 per hour.[40]

V. Joinder, Consolidation, Single Arbitration with Multiple Contracts and Concurrent Arbitrations

The Rules have been amended to allow, with all parties' consent, to join an additional third party to the arbitration proceedings, consolidate pending arbitration proceedings, submit a single notice of arbitration in respect of claims arising out of multiple contracts, and to conduct concurrent arbitral proceedings. This is an important and necessary development given that these questions are not regulated by the BVI Arbitration Act. While the Rules recognise and uphold the consensual theory for the joinder and various procedures dealing with multiple arbitrations, in certain circumstances, as provided in the Rules, upon recommendation of the Arbitration Committee or the arbitral tribunal (as the case may be) the steps can be taken without consent of all the parties involved.[41] The Rules provide that the parties waive, insofar as such waiver can be validly made, any right to object to the validity and/or enforcement of an arbitral award if such objection is made in relation to the use of any of the above procedures.[42]

Provisions relating to joinder and multiple arbitrations are of great use and assistance when disputes arise involving complex offshore structures with multiple companies undertaking and/or guaranteeing the performance of contracts. Especially, these procedures have proven to be of great importance in construction arbitrations where often the transactional relationship is structured in such a way that

36 *Id.* app. 3, art. 1(1).
37 *Id.* app. 3, art. 1(2)(d).
38 *Id.* app. 3, art. 3.
39 *Id.* app. 3, arts. 1(2)(b), 2 & 3(1).
40 *Id.* app. 3, art. 5(1).
41 *Id.* arts. 32(8), 33(6), 34(3) & 35(2).
42 *Id.* art. 37(2)

multiple companies perform different functions at different stages of complex large construction projects.

VI. Other Notable Amendments

Having considered the major developments, the importance of other amendments should not be overlooked or underestimated, and hence these developments have been discussed below.

Importantly, the Rules now contain an express power of the BVI IAC to interpret "*all provisions of the Rules*" and grant the arbitral tribunal the power to interpret provisions relating to its powers and duties.[43] The Rules provide that the arbitral tribunal's interpretation of its powers and duties shall prevail over the interpretation by the BVI IAC.[44]

Another important new provision relates to the effect of the decisions made by the BVI IAC in relation to administered arbitrations. The Rules state that the BVI IAC is not obliged to give reasons for its decisions and that such decisions are final, unless determined otherwise by the BVI IAC.[45] This provision, not being unique to arbitration rules in general,[46] brings into question the nature of the decisions of the BVI IAC and opens up a debate regarding whether or not the parties have mandated the BVI IAC to make any final decisions regarding any issues in dispute. The better view would be to treat such decisions of the BVI IAC as administrative by nature and not relating to the substance of the dispute, noting their finality as being an indication to the supervising court that decisions made by the BVI IAC and not taken lightly and should be respected by the court. It is yet to be seen whether such a view will be upheld by the courts in practice.

The Rules introduce a duty to disclose to the Secretariat, the arbitral tribunal (if constituted) and the opposing party (or other parties) the existence and identity of the third-party funder.[47]

The Rules contain an express waiver by the parties of "*their rights to any form of recourse or defence in respect of the setting-aside, enforcement and execution of any award, insofar as such waiver can validly be made*".[48] However, the Rules do maintain that if a waiver of execution concerns a waiver of immunity, such waiver must be explicitly expressed.[49]

There is a helpful clarification in the Rules that a party which paid the other party's share of the deposit may apply for an arbitral award seeking reimbursement of the respective share of the deposit.[50]

Finally, it is worthwhile repeating that the Rules establish the Arbitration Committee, which consists of a President, three Vice-Presidents and members and whose main role is to ensure consistent

43 *Id.* art. 1(5).
44 *Ibid.*
45 *Id.* art. 1(6).
46 *See, e.g.,* a similar provision in London Court of International Arbitration (LCIA), Arbitration Rules, 2020, art. 29.
47 BVI IAC Rules, art. 5.
48 *Id.* art. 37(3).
49 *Id.* art. 1(7).
50 *Id.* art. 46(4).

application of the Rules.[51] This mandate is implemented by the involvement of the Arbitration Committee in the composition of the arbitral tribunal, challenge of arbitrators, making a determination when joinder and procedure relating to multiple arbitrations cannot be agreed by all the parties, determination of the seat of the emergency proceedings if the parties are unable to agree, and deciding whether or not the exceptional urgency is made out if a party is applying for an expedited procedure. Importantly, the Arbitration Committee is not obliged to give reasons for its decisions, unless so required by the Rules, and its decisions are final.

VII. Conclusion

The 2021 Rules introduce several procedures all of which aim to enhance the efficiency and transparency of the dispute resolution process and equip the parties with the necessary tools to resolve their disputes timely, cost-effectively, and fairly. Now the parties that have agreed to resolve a dispute under the BVI IAC Rules may apply for emergency measures before the constitution of an arbitral tribunal without compromising the confidentiality and privacy that arbitral procedure has to offer. The parties are free to agree to expedite the arbitral proceedings, and the Rules aim to fast-track certain types of proceedings that would benefit from the expedition. The amendments provide clear rules for joinder, consolidation, single, and concurrent arbitrations. Other amendments, such as the commitment of the BVI IAC to Greener Arbitration, the introduction of a role of a tribunal secretary, the establishment of the Arbitration Committee, and imposing a duty of disclosure of the third-party funder indicate the Centre's growth, and maturity to administer complex arbitrations with transparency and commitment to uphold modern values of efficient, cost-effective, and fair alternative dispute resolution mechanism.

[51] *Id.* Annex D.

INDIAN JOURNAL OF ARBITRATION LAW

PUSHING ARBITRAL BOUNDARIES TO PAVE WAY FOR EMERGENCY ARBITRATION

Aditya Singh Chauhan[*]

Abstract

Emergency arbitration is not a new creature but has rebranded as such in the recent years. With most major institutional frameworks providing for and promoting emergency procedures, many national arbitration laws have been modified or interpreted to recognize this sui generis contractual machinery. Although it goes a long way, in genuine cases, to enable parties to obtain and efficaciously enforce urgent interim reliefs prior to the constitution of the tribunal, it ought not be done at the cost of legitimacy. The author asserts that forsaking legitimacy in the name of "pro-arbitration" approach has become the norm and demonstrates this by taking the example of the law surrounding the enforcement of emergency reliefs. This note, after brief yet comprehensive introduction to emergency arbitration, demonstrates that it can be further reformed. Finally, before concluding the discussion, it addresses the "elephant in the room," i.e., issues concerning enforcement of emergency reliefs, with a special focus on India.

I. Introduction to emergency arbitration

The avenue of emergency arbitration, made possible with the advent of institutional arbitration, allows parties to seek interim reliefs from a temporary sole arbitrator pending formation of the arbitral tribunal. Instead of asking national courts to maintain status quo, preserve evidence or protect assets after non-confidential and lengthy judicial proceedings (many a time in foreign jurisdictions), parties initiate emergency arbitration. It favours efficiency and party autonomy, and gives legitimacy to a third-party referee's decision, albeit by diluting due process.

In form, emergency arbitration first originated as "*opt-in*" rules, allowing urgent pre-arbitral provisional measures granted by a referee.[1] The next hurdle was to not treat decisions of such referees as mere contracts,[2] but to accord them the benefits of the arbitration machinery and *res judicata*. To achieve this, institutions have been criticised of re-branding—presenting a *sui generis* contractual mechanism with "*new packaging and using different labels*."[3]

---

[*] Aditya Singh Chauhan is an Associate at AZB & Partners, Mumbai, India and be reached at aditya.singh@azbpartners.com. He is also the Co-Chair (Publications) and Ambassador at Arbitrator Intelligence. He served as the Editor-in-Chief of the Indian Journal of Arbitration Law (IJAL) for Volume 10 and Convenor of the Centre of Advanced Research and Training in Arbitration Law (CARTAL) for 2021-2022. This note was placed second in the YMCIA Essay Competition 2022. The author would like to thank Dr. Nidhi Gupta for her guidance.

1 *See* International Chamber of Commerce (ICC) Pre-Arbitral Referee Rules 1990.

2 *See generally* Société Nationale des Pétroles du Congo v. Republic of Congo, Cour d'appel de Paris [Court of Appeal of Paris], Apr. 29, 2003 (Fr.).

3 *See* B. Baigel, *The Emergency Arbitrator Procedure under the 2012 ICC Rules: A Juridical Analysis*, 31(1) J. INT'L ARB. 1, 2, 9–15 (2014).

This ignited a debate on whether such decisions should be treated as contractual decisions[4] or jurisdictional ones deemed as court orders for enforcement.[5] For better or worse, emergency arbitration, as we know it today, has taken the form of default "*opt-out*" mechanism, forming a permanent part of the institutional arbitration framework and retaining its jurisdictional nature. It is a product of the need to fill a void relating to efficient pre-arbitral interim measures, success of out-of-court mechanisms to obtain them, and increased involvement of arbitral institutions.

This note covers two crucial areas in emergency arbitration that require reform. Part II analyses the divergences in emergency procedures to suggest balancing of parties' rights and interests. Part III proposes a stable and harmonised enforcement regime for emergency reliefs.

II. Divergence in emergency procedures and balancing of rights and interests

Even while sharing common elements, there are some divergences in emergency procedures across institutions. Some, for example, allow parties to challenge an emergency arbitrator's jurisdiction on lack of independence or impartiality only within a few days from the date of its appointment.[6] Any challenge raised later is likely to not be entertained to ensure a timely decision. This approach is justified more by the reasoning that the arbitral tribunal will, in any case, subsequently review the emergency decision, than by considerations of urgency. It can be argued that the short timelines are inadequate for parties to perform due diligence and be heard.

Another divergence pertains to the date of filing of the application for emergency arbitration. Some emergency procedures permit it even before a request for arbitration is filed, while others expressly require it to be filed concurrent with or subsequent to the request.[7] The former set-up is not without practical advantages. In cases involving pre-arbitral procedures, for example, dispute boards or mediation, or during cooling-off periods, a party can seek emergency relief, albeit only if a similar provisional measure cannot be granted under that procedure.[8]

Most rules provide that the mandate of the emergency arbitrator runs only until the main tribunal is formed.[9] This ends the risk of multiple proceedings and contradicting decisions of emergency

---

4 *Id.* at 4, 5. The American Arbitration Association (AAA) was the first institution to introduce emergency arbitration as a mandatory component in 2006.

5 *See* R. Alnaber, *Emergency Arbitration: Mere Innovation or Vast Improvement*, 35(4) ARB. INT'L 441, 458 (2019) [*hereinafter* "Alnaber"].

6 *Cf.* Singapore International Arbitration Centre (SIAC) Arbitration Rules 2016, sched. 1, ¶ 5 [*hereinafter* "SIAC Rules"], *and* Mumbai Centre International Arbitration (MCIA) Arbitration Rules 2016, r. 14.3 [*hereinafter* "MCIA Rules"], *with* 2021 International Chamber of Commerce (ICC) Arbitration Rules, app. V, art. 3(1) [*hereinafter* "ICC Rules"], *and* 2018 Hong Kong International Arbitration Centre (HKIAC) Administered Arbitration Rules, art. 11.7 & sched. 4, ¶ 7 [*hereinafter* "HKIAC Rules"].

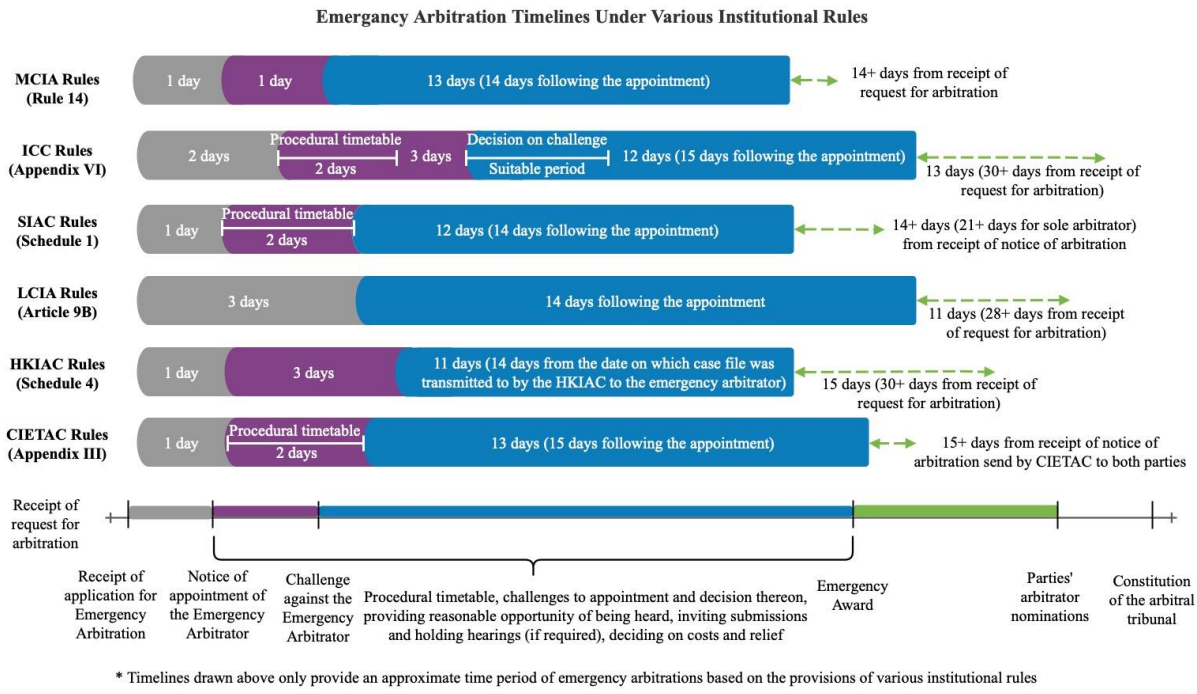
7 *Cf.* ICC Rules, app. V, art. 1(6), *and* HKIAC Rules, sched. 4, ¶ 1, *with* SIAC Rules, sched. 1, ¶ 1, *and* Korean Commercial Arbitration Board (KCAB) International Arbitration Rules 2016, app. 3, art. 1.1 [*hereinafter* "KCAB Rules"].

8 J. Petkute-Guriene, *Chapter 1: Access to Arbitral Justice in Construction Disputes (Dispute Board-Related Issues, Time Bar and Emergency Arbitration)*, *in* CONSTRUCTION ARBITRATION IN CENTRAL AND EASTERN EUROPE: CONTEMPORARY ISSUES 16 (C. Baltag & C. Vasile eds., 2019).

9 *See*, *e.g.*, MCIA Rules, r. 14.9; SIAC Rules, sched. 1, ¶ 10; China International Economic and Trade Arbitration Commission (CIETAC) Arbitration Rules 2015, app. III, art. 5.3 [*hereinafter* "CIETAC Rules"]; Asian International Arbitration Centre

arbitrator and arbitral tribunal, which, some contend, is "*overstated.*"[10] Indeed, having heard from both parties, the emergency arbitrator would be in a better position to decide on the urgent relief than a freshly constituted tribunal. The best approach in such cases is perhaps to let the duly constituted tribunal decide the fate of the emergency arbitrator.

It can be seen from such divergences that emergency procedures include some key procedural aspects of arbitration for arbitral legitimacy, but simultaneously undermine others. By and large, several concessions are made to enable such procedures to hit the mark and provide users with a mechanism to obtain emergency reliefs as efficiently as possible. The author has traced emergency arbitration timelines under some selected arbitral institutions below:



* Timelines drawn above only provide an approximate time period of emergency arbitrations based on the provisions of various institutional rules

Emergency arbitration procedures contain safeguards to ensure a fair outcome, *viz.* emergency arbitrators typically provide cross-undertaking in damages—just as courts would, before granting an injunction[11]—and apply a widely-accepted "*substantive standard*" to grant emergency relief.[12]

(AIAC) Arbitration Rules, r. 18.13 [*hereinafter* "AIAC Rules"]; KCAB Rules, app. 3, art. 3.7. *But cf.* HKIAC Rules, sched. 4, ¶¶ 13 & 18.

10 *See* Alnaber, *supra* note 5, at 459.

11 JANE JENKINS, INTERNATIONAL CONSTRUCTION ARBITRATION LAW 401 (3d ed. 2021).

12 E. Storskrubb, *Chapter 8: Emergency Arbitration: A Maturing and Evolving Procedure*, *in* 2 STOCKHOLM ARBITRATION YEARBOOK 121 (A. Calissendorff & P. Schöldström eds., 2020) [*hereinafter* "Storskrubb"].

Some institutions have codified the standard in their rules,[13] while most take a minimalist approach and trust arbitral discretion (often guided by national laws) on which standard to apply,[14] if at all.[15] Considering the wide scope for misuse of emergency arbitration, institutions should require arbitrators to follow a codified standard to bring about certainty of outcome.

III. Ensuring a stable enforcement regime for emergency reliefs

In addition to the procedures themselves, a stable and harmonised enforcement regime is another primary factor influencing users' choice. The issue of enforcement is the "*Achilles' heel*" of emergency arbitration.[16] Here, we must note: *first*, that the form and nomenclature of emergency arbitrator's decision is important—it may be recognised as an "*order*" or "*award*"[17]—as it has consequences on its enforceability before national courts. And *second*, that the recognition of such decisions under national laws is of primary significance—institutional recognition by itself is not enough; it is ultimately up to the legislature and courts.

Indeed, an emergency arbitrator must be treated akin to an arbitral tribunal. This gives its decision a legal foundation under the relevant *lex arbitri*. But, for enforcement purposes, such decisions lack finality[18]—they are only temporarily binding, subject to arbitral review, and not intended to undergo annulment proceedings. It must also be questioned if emergency arbitrators can be "*permanent arbitral bodies*."[19] The author further submits that the term "*award*" to refer to such decisions (or interim measures in general) is a misnomer,[20] albeit required by some national laws. Such decisions are thus unenforceable under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ["**New York Convention**"] in many jurisdictions.[21]

Admittedly, the United States' courts differ in approach, enabling such decisions to be "*final*," despite being subsequently re-opened by arbitral tribunals.[22] They are deemed to be "*sufficiently final*" as they are intended to protect the final award and must have teeth to serve their purpose. Some have gone

---

13 *See*, *e.g.*, HKIAC Rules, art. 23.4 & sched. 4, ¶ 11; AIAC Rules, r. 16.4.

14 *See*, *e.g.*, MCIA Rules, art. 14; ICC Rules, art. 29 & app. V, art. 6; SIAC Rules, r. 30 & sched. 1, ¶ 8; CIETAC Rules, app. III, art. 6; KCAB Rules, art. 32 & app. 3, art. 3.

15 *See* Alnaber, *supra* note 5, at 452 ("An emergency arbitrator will likely depend on these standards when a positive relief is sought rather than when a relief to preserve the status quo is sought[.]").

16 L. Markert & R. Rawal, *Emergency Arbitration in Investment and Construction Disputes: An Uneasy Fit?*, 37(1) J. INT'L ARB. 131, 134.

17 *See*, *e.g.*, MCIA Rules, r. 14.7; SIAC Rules, r. 30.1 & sched. 1 ¶ 8; HKIAC Rules, art. 23.3 & sched. 4, ¶ 12. *But see* ICC Rules, art. 29(2) & app. V, art. 6(1) (the emergency relief takes the form of an "order").

18 *See* Convention on the Recognition and Enforcement of Foreign Arbitral Awards, arts. I(1), June 10, 1958, 330 U.N.T.S 38 [*hereinafter* "NYC"] (it applies only for non-domestic awards that finally determine the rights of the parties).

19 *Id.* art. I(2).

20 *See generally* Jonathan Hill, *Is an Interim Measure of Protection Ordered by an Arbitral Tribunal an Arbitral Award?*, 9(4) J. INT'L DISPUT. SETTL. 590 (2018).

21 J. Sze Hui Low, *Emergency Arbitration: Practical Considerations*, 22(3) ASIAN DISP. REV. 109, 112–113 (2020) [*hereinafter* "Sze Hui Low"].

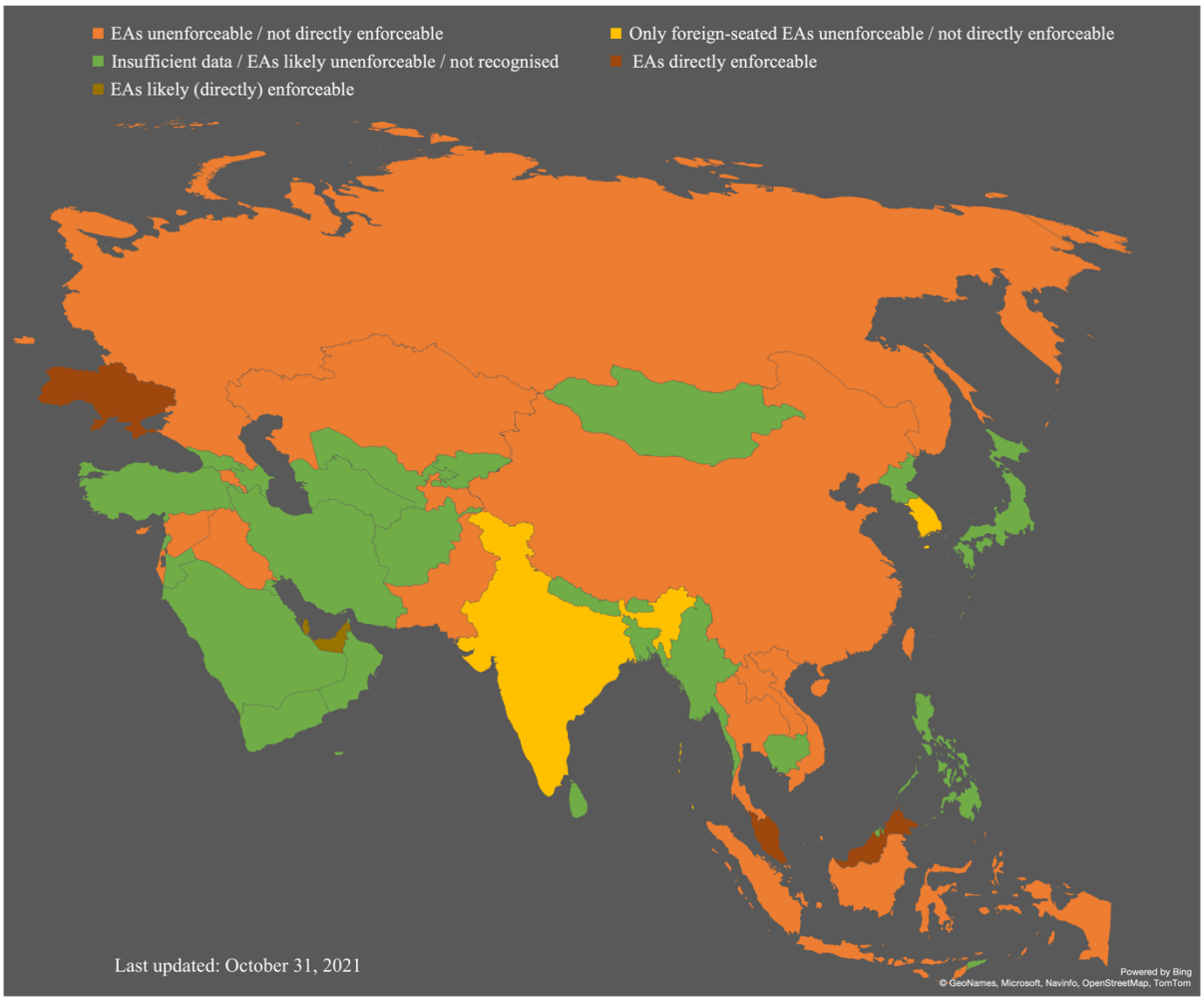
22 *See* Arrowhead Global Solutions v. Datapath Inc, 166 Fed. Appx. 39, 44 (4th Cir. 2006) (U.S.); Yahoo Inc. v. Microsoft Corporation, 983 F. Supp. 2d 310 (S.D.N.Y. 2013) (U.S.); Akash Srivastava, *Emergency Arbitration and India—A Long Overdue Friendship*, 10(1) IND. J. ARB. L., 98, 117 (2021).

so far as to call distinguishing between terms "*extreme and untenable formalism*."[23] The Canadian courts also seem to follow suit.[24] The author, however, submits that legitimate concerns of legality ought not be brushed aside as merely formalistic distinctions of label.

In addition to calling for a greater terminological rigour, the author advocates for express statutory recognition of emergency arbitration—while acknowledging its *sui generis* nature—and harmonisation globally to further uniformity and predictability. This can be accomplished by defining "*arbitral tribunal*" to include "*emergency arbitrator*" and incorporating the 2006 revisions of the United Nations Commission on International Trade Law Model Law on International Commercial Arbitration, 1985—addition of Articles 17H and 17I, which provide for enforcement of interim measures (even of foreign-seated arbitrations) and grounds for refusal respectively.[25]

Some jurisdictions such as Malaysia,[26] Hong Kong,[27] and Singapore (in both domestic[28] and international arbitration[29] governing laws) have statutory provisions expressly recognising emergency arbitration, in contrast to others like India[30] and South Korea.[31] Albeit, in both these countries, only the emergency reliefs in foreign-seated arbitrations are not directly enforceable. As things stand, emergency arbitrator's decisions remain unrecognised or unenforceable in many jurisdictions. The author has mapped the position in Asia on enforcement below:[32]

23 Publicis Communication v. True North Communications Inc., 206 F.3d 725, 728 (7th Cir. 2000) (U.S.).
24 *See* International Steel Services Inc. v. Dynatec Madagascar S.A., 2016 ONSC 2810, ¶¶ 36–39 (Can.).
25 UNCITRAL Model Law on Int'l Comm. Arbitration 1985 (as amended in 2006), arts. 17H & 17I [*hereinafter* "Model Law"].
26 *See* Arbitration Act 2005, Act 646, §§ 2(c), 19H & 19I (Malay.).
27 *See* Arbitration Ordinance, Cap. 609, §§ 22A & 22B(1) (H.K.).
28 *See* Arbitration Act, Cap. 10, §§ 2(1) & 28 (Sing.).
29 *See* International Arbitration Act, Cap. 143A, §§ 2(1) & 12 (Sing.).
30 *See infra* text accompanying notes 33–45.
31 *See* Arbitration Act, No. 14176 of 2016, arts. 18-7(1) (S. Kor.); Sze Hui Low, *supra* note 21, at 113.
32 Data available on file with author.



The case for express statutory recognition is best advanced by tracing the legal position in India. In brief, if the seat is foreign, such decisions are not directly enforceable under the New York Convention provisions in Part II of the Arbitration & Conciliation Act, 1996 ["**Arbitration Act**"].[33] Instead, an indirect, court-created mechanism is used, whereby such decisions are "*enforced*" as court-ordered interim measures under Section 9 of the Arbitration Act.[34] Albeit, in doing so, the courts apply an independent mind and perform their own analysis.[35]

Further, in *Ashwani Minda* v. *U-Shin Ltd.*, seeking a court-ordered interim relief under Section 9 of the Arbitration Act, after a failed attempt in a foreign-seated emergency arbitration, was disallowed.[36] This decision was affirmed on appeal,[37] and a special leave petition arising therefrom was dismissed.[38] Mere

33 Arbitration & Conciliation Act, No. 26 of 1996, pt. II (India).

34 HSBC PI Holdings (Mauritius) Ltd. v. Avitel Post Studioz Ltd., 2014 SCC Online Bom 102, ¶¶ 65, 99 (India); Raffles Design International India Pvt. Ltd. v. Educomp Professional Education Ltd., 2016 SCC OnLine Del 5521, ¶¶ 104–05 (India); Plus Holdings Limited v. Xeitgeist Entertainment Group Ltd., 2019 SCC OnLine Bom 13069 (India).

35 *See* cases cited *supra* note 34.

36 Ashwani Minda v. U-Shin Ltd., 2020 SCC OnLine Del 1648, ¶¶ 53–56 (India).

37 Ashwani Minda v. U-Shin Ltd., 2020 SCC OnLine Del 721, ¶ 44 (India) [*hereinafter* "Ashwini Minda"].

38 Ashwani Minda v. U-Shin Ltd., 2020 SCC OnLine SC 1123 (India).

dismissal of a special leave petition, however, has no consequence on any question of law and it should not be taken a precedent in support of emergency arbitration.

The author opines that these were more of equity-based, case-specific rulings,[39] preventing parties from taking inconsistent positions and misusing the provision for court-ordered interim reliefs. After all, Section 9 of the Arbitration Act ought not to be used to effect quasi-appeals against emergency orders. In the author's opinion, the rulings referred to above[40] do not lend support in recognising emergency arbitration—a *sui generis* contractual mechanism which must be recognised and included by the legislature itself—under statutory scheme of the Arbitration Act, especially so when the seat is India. They do not set in stone any legal position or arguably even indicate a trend.

Yet, in the context of India-seated arbitrations, the Supreme Court held in *Amazon.com NV Investment Holdings LLC* v. *Future Retail Ltd.* ["**Amazon**"] that the term "*arbitral tribunal*" under Section 2(1)(d) of the Arbitration Act includes "*emergency arbitrator*" if the parties agree to emergency procedures, thereby recognising its decision as an arbitral tribunal's order of interim measure under Section 17(1) of the Arbitration Act.[41] In this context, it may be relevant to note that the legislature was recommended twice[42] and had three opportunities[43] to recognise emergency arbitration, but decided against including provisions to that effect. The Supreme Court, despite accounting for the aforesaid, reasoned that the procedural autonomy inherent in the statutory scheme of the Arbitration Act would enable parties to choose emergency arbitration.[44] The Amazon judgment was unsurprisingly a welcomed move by arbitration practitioners in India. However, a pro-arbitration jurisdiction should also be free from any unexpected twists and turns.

In light of this, we must raise two questions: *first*, is being pro-emergency arbitration the same as being pro-arbitration? *Second*, should this be determined by the legislature or the judiciary?

Parties often cannot predict a long-term stable legal position in India on several issues. There is always a small possibility that decisions such as the Amazon judgment may result in a tug-of-war between legislature and judiciary, should the former react.[45] If such a back and forth takes place, it may destabilise India's standing as a pro-arbitration jurisdiction by creating a continually changing position of law. It is important for the legislature and judiciary to operate in harmony if India aspires become a globally recognised seat of international arbitration.

---

39 *See* Ashwini Minda, 2020 SCC OnLine Del 721, ¶ 49 (India).

40 *See* cases cited *supra* notes 34, 36–39.

41 Amazon.com NV Investment Holdings LLC v. Future Retail Ltd., 2021 SCC OnLine SC 557, ¶¶ 23, 24, 45, 68 (India) [*hereinafter* "Amazon"].

42 Law Comm'n of India, Report No. 246, Amendments to the Arbitration and Conciliation Act, 1996 (2014), at 37, *available at* https://bit.ly/3qB8zoV; Report of the High Level Committee to Review the Institutionalisation of Arbitration Mechanism in India (2017), at 76–77, *available at* https://bit.ly/3Tf52bs.

43 The Arbitration & Conciliation Act, No. 26 of 1996 has been amended times—in 2015, 2019 and 2021—after the recommendation was first made.

44 Amazon, 2021 SCC OnLine SC 557, ¶¶ 11, 21, 32, 40, 42 (India).

45 For example, previously, the repeated judicial and legislative overruling created an instable, continuously changing legal position on the retrospective application of Arbitration & Conciliation (Amendment) Act, 2015.

Additionally, it may be relevant to note that there is no good reason to treat emergency orders in India-seated arbitrations differently from those in foreign-seated arbitrations. Enforcement of emergency reliefs from the foreign-seated arbitrations, while possible indirectly, is grossly inefficient. Thus, only statutory recognition may resolve these issues and ensure predictability. The legislature should, therefore, follow suit and give statutory recognition to emergency arbitration.

Separately, while dealing with emergency reliefs, an issue that often comes before an emergency arbitrator and ultimately has a significant impact on enforcement is when an emergency relief is granted against non-consenting non-signatories by application of the "*group of companies*" doctrine. This arguably results in dilution of consent, considering the opt-out nature of emergency provisions. The author submits that the only avenue for seeking pre-arbitral interim relief in such cases should be through national courts. Admittedly, this is a departure from modern practice, but necessary nonetheless to respect the *inter partes* nature of emergency arbitration and further its legitimacy. It is perhaps on these considerations that the International Chamber of Commerce (ICC) Arbitration Rules have a specific provision to this effect.[46]

IV. Conclusion: The Way Forward

Emergency arbitration is a new creature—especially in Asia which owes significantly to the institutions for its creation. We must not overindulge emergency arbitration in its teenage for the sake of its stable foundation. Everyone will have their roles to play in its development: the institutions must acknowledge the imbalance of interests and compromise of procedural safeguards, and reform their rules to appropriately balance opposite party's rights; counsels will often use all tools at their disposal, but the emergency arbitrators must apply uniform standards and ensure that granting emergency relief remains an exception rather than a norm; the courts must ensure that they decide based on not just business but legal common sense—even judicial innovation must have legislative intent as its focal point; and, finally, the legislature must modify its laws to recognise emergency arbitration and provide a stable enforcement regime. Indeed, merely having a pro-arbitration judiciary is not enough to bring reforms; we also need legislative involvement to give them true legitimacy. The author also advocates for increased legal formalism, as unfettered legal realism is bound to take arbitration down the rabbit hole.

[46] *See* ICC Rules, art. 29(5).

INDIAN JOURNAL OF ARBITRATION LAW

FINANCIAL INDEPENDENCE OF THE COURT OF ARBITRATION FOR SPORTS: WHY CAN CAS BE CONSIDERED A TRULY INDEPENDENT BODY?

Reza Shahrokhi[*]

Abstract

In the world of sport, the Court of Arbitration for Sport ["**CAS**"] *has proved its importance and value in the resolution of sports-related disputes since its inception in 1984. However, the independence of this settlement body continues to be an ongoing issue due to its close links with the Olympic Movement. Although initial concerns about the interrelationship between CAS and this movement, particularly the International Olympic Committee* ["**IOC**"]*, have resulted in positive structural reforms, the ongoing issues associated with the independence of CAS continue to be invoked by athletes for challenging CAS awards. This article aims to analyse one of these issues, namely the funding system of CAS, to answer the question of whether CAS can be considered an independent settlement body or not.*

To approach this inquiry, the article first examines the relevant standards for assessing the independence of CAS. Afterwards, it evaluates whether the funding system of CAS affects its independence and suggests that because of the unique features of sports arbitration, the current funding system does not make CAS depend on the Olympic Movement. Finally, the article proposes some suggestions for refinement of the CAS funding system to enhance its independence.

I. Introduction

In response to the need for resolution of the growing number of international sports disputes, "*the idea of creating an arbitral jurisdiction devoted to resolving disputes*…"[1] has been presented by Matthieu Reeb. Subsequently, CAS was created by the IOC with the aim of dealing with crisis of legitimacy in the sports world.[2]

Contrary to other international sports organisations, CAS is a settlement body with jurisdiction to arbitrate any sport-related dispute.[3] CAS administers two types of arbitration procedures. The first type is the Ordinary Arbitration Procedure, which includes cases in which CAS decides disputes as a

[*] Reza Shahrokhi is an international arbitration trainee at De Brauw Blackstone Westbroek and a recent LL.M. graduate in International Civil and Commercial Law from Leiden University. Mr Shahrokhi also has an LL.M. in International Commercial Arbitration Law from Stockholm University and LL.B. from Shahid Beheshti University. Before commencing his studies at Leiden University, he was a legal assistant at National Iranian Gas Company. Reza may be contacted at r.shahrokhimilasi@umail.leidenuniv.nl.

1 Matthieu Reeb, *The Role and Functions of the Court of Arbitration for Sport (CAS)*, 2 INT'L SPORTS L. J. 23 (2002) [*hereinafter* "Matthieu Reeb"].

2 Michael Straubel, *Enhancing the Performance of the Doping Court: How the Court of Arbitration for Sport Can Do Its Job Better* 36 LOYOLA UNIV. CHICAGO L. J. 1206 (2005) [*hereinafter* "Michael Straubel"].

3 Rachell Downie *Improving the Performance of Sport's Ultimate Umpire: Reforming the Governance of the Court of Arbitration for Sport* 12 MELB. J. INT'L L. 12 (2011) [*hereinafter* "Rachell Downie"].

first instance court.[4] The second type is the Appeals Arbitration Procedure, in which CAS deals with disputes concerning the decisions of federations, associations or other sports-related bodies.[5]

The CAS arbitrations are usually seated in Switzerland. Consequently, the *lex arbitri* is the Swiss law, and the judicial review of CAS arbitral awards is subject to the Federal Supreme Court of Switzerland ["**the Court**"].[6] Accordingly, domestic courts do not have the authority to review the arbitral awards.[7]

Since the establishment of CAS, its independence from its founders and funders, the Olympic Movement, which is composed of the IOC, International Federations, and Association of National Olympic Committees, has been under considerable scrutiny.[8] In consequence of the conclusion of the Paris Agreement,[9] the CAS structure was reformed, leading to the establishment of the International Council for Arbitration for Sport ["**ICAS**"] as the managing body of CAS. The establishment of ICAS resulted in an improvement in the independence of CAS. Nevertheless, there are still a number of concerns regarding its independence that not only challenge the legitimacy of CAS, but also question whether CAS tribunals are capable of independently arbitrating disputes that involve members of the Olympic Movement. These issues have their roots in CAS's original self-governance and close financial links with the Olympic Movement.[10] Although CAS represents itself as independent vis-à-vis its funders, its independence has been the subject of several important decisions of the Federal Court. With regard to the issues raised in the Court's judgments, this article will critically analyse whether the funding system of CAS reduces its independence or not.

II. Independence of CAS: Independence Standards & CAS Funding System

Independence is the hallmark of a fair judicial process. It is the independence of the process that ensures the independence of the tribunal or adjudicatory forum in the minds of its members and the public.[11] For a tribunal or adjudicator to be independent, no connection must exist between them and the executive or regulatory body that adopts, implements, or enforces the rules.[12] Additionally, independence pertains to the ability of the adjudicator to form an opinion without being influenced by the structure or organisation participating in the process.[13] Given that the CAS dispute resolution system has developed organically under the control of the sports' governing bodies, including the federations, structural conflicts of interest and concerns about the independence of CAS can arise.

---

4 Jan Paulsson, *Arbitration of International Sports Disputes*, ENTM'T & SPORTS L. 16 (1993) [*hereinafter* "Jan Paulsson"].

5 Code of Sports-related Arbitration (CAS Code), § R. 27 (2021).

6 Federal Act on Private International Law (PILA), § 190 (2) (1987).

7 Marcus Mazzucco and Hilary Findlay, *The Supervisory Role of the Court of Arbitration for Sport in Regulating the International Sport System*, INT'L J. SPORT SOC. 135 (2010); Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 10 June 1958, 330 U.N.T.S. 38, Can. T.S. 1986 No. 43., art. V(1)(e) [*hereinafter* "New York Convention"].

8 Rachell Downie, *supra* note 3, at 6.

9 Agreement Related to the Constitution of the International Council of Arbitration for Sport, June 22, 1994, *available at* https://arbitrationlaw.com/sites/default/files/free_pdfs/ICAS%20Agreement.pdf [*hereinafter* "Paris Agreement"].

10 John Forster, *Global Sports Organizations and Their Governance*, 6 CORP. GOVERNANCE 73 (2006).

11 Leanne O'Leary, *Independence and impartiality of sports disputes resolution in the UK*, INT'L SPORTS L. J. 245 (2021) [*hereinafter* "Leanne O'Leary"].

12 Gillies v. Secretary of State for Work and Pensions, 1 WLR 781 (HL) (2006).

13 Leanne O'Leary, *supra* note 11.

The first step in examining the CAS's independence is to identify the appropriate standards, which are determined in this section. Further, this section also sheds light on the different financial links of CAS with the Olympic Movement.

A. What are the Most Appropriate Standards for Assessing the Independence of CAS?

While several standards would be appropriate, the most suitable one is found under Swiss law as it is the *lex arbitri* of CAS arbitrations. Further, by virtue of the ruling of the European Court of Human Rights ["**ECHR**"] in Tabbane v. Switzerland,[14] the fairness standard enshrined in Article 6 the European Convention on Human Rights ["ECHR"] may be applied as well. The Court held that parties waive the protections provided in Article 6 of the ECHR[15] when they enter freely into the arbitration agreement. However, in its considerations concerning the validity of the waiver, the ECHR distinguished between voluntary and compulsory arbitration. While parties in a voluntary arbitration can waive the protections accorded in Article 6 (1) of the ECHR, they cannot waive them in a compulsory arbitration.

In *Mutu and Pechstein* v. *Switzerland*, ECHR took the same position and held that "*[i]f arbitration is compulsory, in the sense of being required by law, the parties have no option but to refer their dispute to an arbitral tribunal, which must afford the safeguards secured by Article 6 (1) of the Convention.*"[16] In this case, the ECHR found that Mutu entered into the arbitration agreement voluntarily as he had the option of going to Court according to the applicable regulations for football players at the time.[17] However, the ECHR considered Pechstein's arbitration compulsory since her only option was to enter into the arbitration agreement or be unable to participate in competitions. It further stated that even though CAS arbitration had been imposed by a federation's regulations, and not by law, acceptance of CAS jurisdiction by Pechstein should be considered as compulsory arbitration.[18]

In light of the above, according to the Swiss law standards, arbitrations mandated by CAS have to offer protections enshrined in Article 6 of ECHR.

i. The independence standard under Swiss law

The Swiss Federal Law on International Private Law ["**PILA**"] does not define independence in any provision, while Article 180(1)(c) solely requires arbitrators to be independent. The violation of this mandatory rule results in a breach of Article 190(2)(a) of the PILA, whereby an illegal composition of an arbitral tribunal suffices for challenging an arbitral award. One of the factors that can impact the independence of arbitrators is the independence of the arbitral body administering the proceeding.[19]

In this regard, the Federal Court has stated that in order to evaluate whether a judicial body offers sufficient guarantees of independence, reference must be made to the principles provided for state

14 Tabbane v. Switzerland, 41069/12, EUR. CT. H.R. (2016), ¶ 29.
15 EUR. CONV. ON H.R., art. 6(1), guarantees the right to a fair hearing before an independent and impartial tribunal established by law.
16 Mutu & Pechstein v. Switzerland, 40575/10, 67474/10, ¶ 95 EUR. CT. H.R. (2018) [*hereinafter* "Mutu v. Switzerland"].
17 *Id.* ¶ 120.
18 *Id.* ¶ 115.
19 Leanne O'Leary, *supra* note 11.

courts in the Swiss Federal Constitution ["**the Constitution**"].[20] In doing so, no strict distinction should be drawn between the concepts of independence and impartiality.[21] Under Article 30(1) of the Constitution, every person whose case is being decided in judicial proceedings has the right to have this done by an independent and impartial court.

This principle "*makes it possible to challenge a judge whose situations are such as to cause doubt as to his impartiality; it [the principle] seeks, in particular, to avoid that some external circumstances may influence the decision in favour of or against a party. A challenge is not only justified when the judge's actual bias is established*"*… [and] it is sufficient that circumstances produce the appearance of prejudice and cast doubt over the judge's impartiality.*"[22]

As it can be seen, under Swiss jurisprudence, the fundamental understanding is that an arbitrator should have the same degree of independence as expected from state judges.[23] According to the Court's previous case law, CAS has been considered by the Court as a state court and its judgment as a court judgment.[24] Therefore, like a state court, CAS must present itself as an independent body and prevent external circumstances from influencing its arbitrators' independence. Otherwise, an appearance of prejudice is sufficient under Swiss law to challenge the independence of CAS and its tribunals.

The subsequent sections show how the Court has acknowledged the CAS awards as true awards[25] of an independent tribunal[26] and applied a very high standard of proof in assessing the independence of CAS, requiring the absence of independence to be definitively proven.[27]

ii. *The ECHR independence standard*

The independence requirement of the ECHR stipulated in Article 6(1) of the convention has often been determined based on the previous case law before the ECHR.[28] Article 6 also requires the independence of judicial bodies, in addition to tribunals. Under Article 6 of the ECHR, the independence of a body can be evaluated with respect to some criteria, such as "*the manner of appointment of its members and their term of office, the existence of guarantees against outside pressure, and the question of whether the body presents an* ***appearance of independence***".[29] In this regard, ECHR placed emphasis on the

---

20 Tribunal Fédéral [TF] [Swiss Federal Tribunal], May 27, 2004, 129 III 445 (Switz.), ¶ 3.3.3.

21 Tribunal Fédéral [TF] [Swiss Federal Tribunal], Oct. 29, 2010, 4A_234/2010 (Switz.), ¶ 3.3.1.

22 *Id.* ¶ 3.2.1 (emphasis added).

23 Matthias Leemann, *Challenging international arbitration awards in Switzerland on the ground of a lack of independence and impartiality of an arbitrator*, 29 ASA BULLETIN 10 (2011), at 16.

24 Tribunal Fédéral [TF] [Swiss Federal Tribunal], May 27, 2003, III ARRÊTS DU TRIBUNAL FÉDÉRAL SUISSE [TPF] 129 445 (Switz.), translated into English in MATTHIEU REEB, DIGEST OF CASE AWARDS III, 2001-2003, 545, 688 (2004); Matthias Scherer, *First Reference to the IBA Guidelines on Conflicts of Interest in International Arbitration: Case Note on Swiss Supreme Court Decisions 4A_506/2007 & 4A_528/2007*, 26 ASA BULLETIN 599 (2008) [*hereinafter* "Mathhias Scherier"].

25 Richard H McLaren, *Twenty-Five Years of the Court of Arbitration for Sport: A Look in the Rear-View Mirror*, 20 MARQUETTE SPORTS L. REV. 309 (2010).

26 *Id.*

27 Matthias Scherer, *supra* note 24.

28 EUR. CT. H.R., Guide on Article 6 of the European Convention on Human Rights - Right to a fair trial (civil limb) (Guideline) 49 (2013).

29 *Id.* 59 (emphasis added).

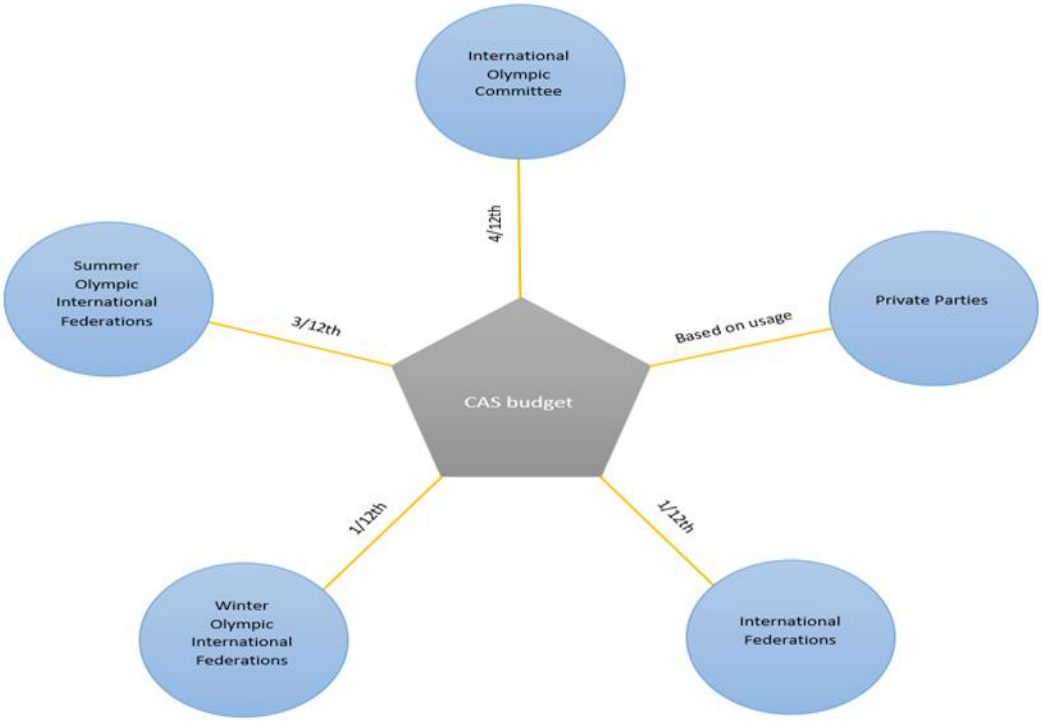
fact that "*justice must not only be done, it must also be seen to be done*", which has direct effects on the confidence the national courts in society must inspire in the public.[30]

Thus, it can be concluded that, like under the Swiss law, an appearance of lack of independence is sufficient for challenging the independence of an arbitral body under the ECHR framework.

B. How can the CAS funding system raise questions about its independence and capability to provide a fair arbitral proceeding?

The funding system of CAS is as follows:

The Funding System of CAS[31]



The vast majority of cases before CAS are Appeals Arbitration Procedure in which parties do not need to pay CAS's and arbitrators' fees, save for a filing fee. Therefore, as CAS itself should bear these costs, including arbitrators' fees, it has to find other funding sources to continue its operations. This issue was considered in the Paris Agreement, in which the top sports governing bodies agreed to make annual contributions to the CAS budget over the years.[32] In accordance with the agreement, one-third of the CAS budget is provided by the IOC, and other members of the movement provide the other two-thirds. As a result, it seems that CAS is almost dependent on the Olympic Movement for financial viability.

30 Mutu and Pechstein v. Switzerland, 40575/10, 67474/10, ¶ 95 EUR. CT. H.R. (2018), ¶ 143.

31 Paris Agreement, *supra* note 9.

32 Giulio Palermo, Anna Sokolovskaya, *Independence of CAS vis-à-vis its Funders and Repeat Users of its Services*, KLUWER ARB. BLOG (May 25, 2018), *available at* http://bit.ly/3VgSZKS [*hereinafter* "Giulio Palermo"].

III. How can the CAS funding system raise questions about its independence and capability to provide a fair arbitral proceeding?

As illustrated, the Olympic movement remarkably influences the CAS funding system. This external circumstance may cast doubt on the CAS's independence and, therefore, on its arbitrators' independence. In the following sections, these financial links of CAS with the Olympic movement would be analysed to evaluate whether CAS as an arbitral body provides sufficient guarantees of independence under the elaborated standards or not.

A. The Federal Court rang the bell: Why did the Funding System of CAS create some concerns?

In early 1990, there were some concerns that CAS might be dependent on the IOC due to the financial links between these two bodies. These concerns were voiced obiter in the judgment of the Swiss Federal Tribunal ["**Tribunal**"] in *Gundel* v. *FEI* ["**Gundel**"].[33] At that time, CAS was financed almost exclusively by the IOC.

In *Gundel*, the FEI imposed a fine and suspension on Elmar Gundel, a German equestrian competitor, due to his horse testing positive for drugs.[34] In 1993 Gundel appealed the FEI disciplinary decision to CAS. Although CAS reduced the penalties,[35] Gundel remained unsatisfied and challenged the validity of the award on the ground that CAS was not a genuinely independent arbitral body as it was controlled by Olympic institutions like FEI and the IOC.[36]

Rejecting Gundel's claim, the Tribunal found CAS to be independent of the Olympic institutions. The Court qualified CAS as a truly independent body, despite the financial links between CAS and IOC.[37] However, it also expressed its concern as an *obiter dictum*. The Tribunal referred to three main connections between IOC and CAS, one of them being that: "*1) the CAS was funded almost entirely by the IOC*".[38] Ultimately, it noted that "*it would be desirable for greater independence of the CAS from the IOC*."[39] This clear message was also taken into account by the CAS Secretary General.[40]

The Court's message was absolutely critical since the financial links between CAS and IOC had created concerns about the integrity of arbitral proceedings, and it is undeniable that if IOC had been a direct party in *Gundel*, the Court might very well have set aside the CAS award.[41] One can argue that the Court's approach is not reasonable since IOC fully funded CAS, and as one of the disputant parties

---

33 Louise Reilly, *An Introduction to the Court of Arbitration for Sport (CAS) & the Role of National Courts in International Sports Disputes*, J. DISP. RESOL. 63 (2012); Tribunal Federal [TF] [Swiss Federal Tribunal], Mar. 15, 1993, ARRÊTS DU TRIBUNAL FÉDÉRAL SUISSE [TPF] 119, 271 (Switz.).

34 Jan Paulsson, *supra* note 4, 14-15.

35 L v. IOC, Award of Nov. 29, 2002, CAS 2002/A/370 (1993) [*hereinafter* "L v. IOC"].

36 Matthieu Reeb, *The Court of Arbitration for Sport, in* MATTHIEU REEB, DIGEST OF CAS AWARDS I, 1986-1998 (1998) [*hereinafter* "Matthieu Reeb"].

37 Matthieu Reeb, *supra* note 1, 23.

38 Michael Straubel, *supra* note 2, 1209.

39 Matthieu Reeb, *supra* note 36, 570.

40 *Id.* xxvi.

41 James H. Carter, *The Law of International Sports Disputes, Speech to the Annual Meeting of the Indian Society of International Law* 4 (Nov. 2004), *available at* http://www.asil.org/pdfs/carterspeech0411.pdf.

was a member of the Olympic Movement, this circumstance would create an appearance of prejudice required under Swiss law and ECHR on the CAS independence.[42]

Contrary to this view, the author opines that the Court's position seems justifiable since, at that time, there were alternatives neither for CAS nor for its financing system; hence, the Court tried to acknowledge CAS as an independent court of arbitration and, meanwhile, sent shockwaves through CAS to amend its financing system.[43]

B. The 1994 Reforms

In light of *Gundel*, in 1994, IOC and other governing sports bodies agreed to modify the governance of CAS. This resulted in the signing of the Agreement related to the Constitution of the International Council of Arbitration for Sport ["**Paris Agreement**"], leading to some amendments to the structure of CAS. One of the major reforms was concerning the CAS funding system. By virtue of this agreement, CAS tried to reduce its financial dependence on the IOC by splitting its costs between the members of the Olympic Movement and private parties that used its service.[44]

Nevertheless, despite the new reforms, two main issues remained: First, while IOC diminished its contribution to the CAS budget to 1/3, it was still the most significant contributor. Second, the funding system was changed to a one-sided system rather than a balanced one since still the entire budget was provided by the top sports bodies.

C. The second challenge to the CAS funding system

Approximately ten years later, once again in *A. and B.* v. *IOC, ISF, and CAS*[45] ["**Lazutina**"], the Court was called to assess the CAS independence.

During the Salt Lake City Winter Olympic Games of 2002, two skiers' doping tests became positive, and consequently, both athletes[46] were banned for two years. Subsequently, IOC decided to disqualify the skiers and revoke the gold medal of Lazutina, obtained during the competition. The athletes filed appeals to CAS; however, unlike in the previous case, herein, the IOC was a direct party in the arbitral proceeding. CAS rejected the appeals and confirmed the imposed sanctions against the athletes.[47] An appeal was filed to the Federal Court, alleging that CAS could not be considered as an independent arbitral body in an arbitration involving IOC as a party.

In a nutshell, the appellants put forward three main arguments concerning the independence of CAS. This article only discusses the argument raised about the financial links of CAS. In this regard, the appellants argued that CAS and ICAS were financially dependent on IOC, and IOC had complete control over the financing of the ICAS and CAS. Also, they added that IOC would pay all the costs

42 Viktoriya Pashorina-Nichols, *Is the Court of Arbitration for Sport Really Arbitration?*, INT'L ARB. DISP. SETTLEMENT 37 (2015).
43 Daniel H Yi, *Turning Medals into Metal: Evaluating the Court of Arbitration of Sport as an International Tribunal*, ASPER REV. INT'L BUS. TRADE L. 298 (2006).
44 *Id.* 301.
45 Tribunal Fédéral [TF] [Swiss Federal Tribunal], May 27, 2004, 129 III 445 (Switz.).
46 The skiers in question were Larissa Lazutina and Olga Danilova.
47 L v. IOC, Award of Nov. 29, 2002, CAS 2002/A/370 (1993).

of the CAS arbitrators, including travel expenses and accommodation fees, when they were asked to sit in the ad hoc chambers during sports events. Hence, this would impact the CAS arbitrators' ability to act independently.[48] However, finding in favour of the IOC, the Court pointed out that "*the CAS is sufficiently independent vis-a-vis the IOC… in cases involving the IOC.*"[49]

The Court put forward three main arguments. First, it argued that solely one-third of the CAS annual budget was provided by the IOC, and other members of the Olympic Movement provided the other two-thirds of the funds allocated by the IOC to them every year.[50] However, this does not mean that IOC controlled the remaining two-thirds of the funds allocated to CAS since even if the IOC had not allocated the funds to the said organisations, they would find other sources to fulfil their obligations under the Paris Agreement. Also, the CAS funding by IOC did not affect the CAS arbitrators' independence since the costs of arbitrators in ad hoc chambers were covered by ICAS, but never by IOC.[51] Therefore, it can be concluded that this amount of contribution by IOC was admissible and would not threaten the CAS independence.

Second, the Court stated that there was no alternative to the financing system of CAS. This Court's argument was based on the unique feature of sports arbitration, which is quite different from other types of arbitration, including commercial arbitration. As explained by the Court, "*the financial capacity of the parties (the federation and the athlete sanctioned) is by far unequal (with rare exceptions) to the detriment of the person at the bottom of the pyramid, namely the athlete.*"[52] The author considers the Court's position reasonable since, due to this particular feature of sports arbitration before CAS, providing an alternative funding system for CAS seems to be rather tricky, and it is challenging to imagine who could CAS turn to obtain necessary fund to pay its cots, other than the sports organisations.

Third, the Court contended that even if a judicial body was financed by another organisation, it was independent, and there was no cause-and-effect relationship between the financing of a judicial body and its independence. This reasoning of the Court was based on a historical fact. The experience of governments demonstrates that they usually contribute to the budgets of national courts.[53] However, these contributions do not mean that the national courts and their judges lack independence.[54] The fact that supports this argument is that while the states provide budgets for national courts, the courts, in many cases, adjudicate against them. Based on that, the Court concluded that CAS was independent vis-à-vis IOC, even though the IOC was the most significant contributor to the CAS budget.

---

48 Emile Vrijman, *Experiences with Arbitration before the CAS: Objective Circumstances or Purely Individual Impressions?* In Ian S Blackshaw, Robert C R Siekmann et al. (eds.), THE COURT OF ARBITRATION FOR SPORT 1984–2004 (2006).

49 Matthew Mitten, *Judicial Review of Olympic and International Sports Arbitration Awards: Trends and Observations* PEPPERDINE DIS. RESOL. R. J. 53 (2009).

50 Charles Poncet, *The Independence of The Court of Arbitration for Sport,* 1 EUR. INT'L ARB. REV. (1) 48 (2012) [*hereinafter* "Charles Poncet"].

51 Arbitration Rules, CAS ad-hoc division for the Olympic Games, 2003, art. 22.

52 *Id.*

53 Kate Malleson, *Promoting Judicial Independence in the International Courts: Lessons from the Caribbean*, 58 INT'L. COMP. L. Q. (3) 676 (2009).

54 James W. Douglas, Roger E. Hartley, *State Court Budgeting and Judicial Independence: Clues from Oklahoma and Virginia*, 33(1) ADMIN. & SOC'Y 76 (2001).

Nevertheless, the author believes that the Court's reasoning may be criticised because the analogy drawn by the Court is not acceptable for two reasons. First, the procedures in litigation and arbitration are different, and each dispute settlement method has its own rules and features. Therefore, the parties are not treated the same in each method. In other words, there are some protections for a weak party in the proceedings before national courts making the position of parties more balanced, while this is not valid for the CAS arbitrations, and there is not any protection for athletes.

Further, the principal reason for the preservation of judicial independence in a domestic sphere is the renowned doctrine of separation of power between the various branches of a state, including legislative and executive.[55] However, in the context of CAS arbitration, there is no separation of power between CAS and the top sports bodies. These bodies effectively control ICAS through their participation in its funding and appointment mechanism, and ICAS also has complete control over CAS. This chain suggests a very hierarchical structure, opposing the horizontal structure among the state branches.

In conclusion, the author has the same position as that of court since the funcding system of CAS had improved since the enforcement of the Paris Agreement, and it was compatible with the specific features of sports arbitration. However, the analogy of national courts to CAS by the Court is not persuasive.

D. The third challenge to the CAS funding System

After *Lazutina*, it seemed that the Court's belief in the appropriateness of the CAS funding system had been confirmed by the athletes as well, and no one challenged this system. Surprisingly, in March 2017, another CAS award was challenged before the Federal Court by a sports club based on the annual contributions of an international federation to CAS.[56]

This case was concerning a sports arbitration between RFC Seraing, a Belgian third division football club ["**The Club**"], and FIFA with regards to a TPO agreement.[57] After initiating a disciplinary procedure, the FIFA Disciplinary Committee banned the Club from the registration of players and imposed a fine of CHF 1,50,000. The FIFA Appeal Committee confirmed this decision in 2016, and subsequently, an appeal was filed by the Club with CAS to vacate this decision. In March 2017, CAS upheld this decision while reducing one of the bans.[58] Ultimately, the Club challenged the award before the Court seeking the annulment of the award based on, inter alia, the financial dependence of CAS on FIFA.

---

55 Shimon Shetreet, *Judicial independence and accountability: core values in liberal democracies* in H P Lee (ed.) JUDICIARIES IN COMPARATIVE PERSPECTIVE 9 (2011).

56 Caroline Dos Santos, *Swiss Federal Supreme Court Confirms Independence of CAS, note on Decision 4A_260/2017 of 20 February 2018*, 36 ASA BULLETIN (2) 429 (2018); Bundesgericht [BGer] [Federal Supreme Court] Feb. 20, 2018, X. v. Fédération Internationale de Football Association, ARRÊTS DU TRIBUNAL FÉDÉRAL SUISSE [TPF] 4A_260/2017 (Switz.).

57 X v. International Federation of Association Football, Judgment of Feb. 20, 2018, Decision 4A_260/2017 [*hereinafter* "X v. FIFA"].

58 RFC Seraing v. Fédération Internationale de Football Association (FIFA), Award of March 9, 2017, CAS 2016/A/4490 (2017).

The Club claimed that with the development of FIFA, this federation had become a big client of CAS in terms of "*business volume*," which financially supported CAS by making significant financial contributions, and a considerable proportion of the turnover of CAS came from this client. It added that although the Court previously considered the relationships between CAS and IOC, the significant commercial relationship between CAS and FIFA – described by the Club as a mafia ("*une organisation mafieuse*") – had never been taken into consideration. It concluded that if CAS had issued an award against FIFA, it would lose one of its important clients, and this fact could impact the CAS's decisions to the detriment of parties opposed in a proceeding to FIFA. The Club also asserted that, unlike national judges, arbitrators and other employees of CAS would suffer direct financial consequences if FIFA were to give up its affiliation with CAS, inducing arbitrators to issue awards in favour of FIFA in disputes involving this federation.

In response, FIFA contended that the CAS independence was deeply analysed and confirmed in Swiss law. FIFA also rejected the Club's claim, providing that the CAS arbitrators had to be in favour of FIFA, and stated that in case FIFA had become a losing party, it would continue its affiliation with CAS so that the income of the arbitrators and other CAS's employees would not have to suffer. Acting through its Secretary General, CAS rejected the Club's assertion, arguing that FIFA had been involved in only approximately thirty-two per cent of CAS's cases, and its annual contribution was only CHF 1.5 million. This contribution was relatively modest compared to CHF 7.5 million paid by IOC out of the CAS's total annual budget of CHF 16 million. Thus, the Secretary-General concluded that if FIFA had decided to renounce its contributions, CAS's existence would not be jeopardised since the only consequence of the decrease in the CAS budget would be a reduction of its current size and changes in its services.

The Court decided that there was no reason to revisit its jurisprudence, the *Gundel* and *Lazutina* judgments.[59] By making a distinction between IOC and International Federations, the Court held that the CAS financial relationships with International Federations, including FIFA, had always been less problematic than the CAS relationships with IOC, and without compelling reasons, it would not be justifiable to categorise FIFA differently to other International Federations. The Court highlighted that FIFA's contribution of CHF 1.5 million to CAS was less than ten per cent of the CAS total budget, and this contribution remained significantly below the CHF 7.5 million paid by IOC. Hence, it ruled that the Club's assertations were not strong enough to justify a departure from the established case law.[60]

Further, the Court observed that the Club did not provide any statistical analysis or any other evidence, revealing that CAS would grant FIFA a preferential status when dealing with cases involving this federation.[61]

59 X v. FIFA, Judgment of Feb. 20, 2018, Decision 4A_260/2017, at 3.4.2.
60 *Id.*, at 3.4.3.
61 *Id.*

This decision was an important victory for CAS. Prior to the in-depth analysis of *Lazutina*, it is noteworthy that in Appeals Arbitration Procedure, parties do not need to pay CAS's and arbitrators' fees, and CAS itself should bear these costs.

However, one can argue that if in arbitrations before CAS, parties demand to pay the arbitration's fee, similar to the model adopted in commercial arbitration, not only would the CAS budget be provided from a sustainable resource, but also CAS would become more independent of the governing sports bodies. This argument seems unreasonable as sports arbitration before CAS has a unique feature. As also explained by the Court in *Lazutina*, in disciplinary proceedings before CAS, contributory capacities of parties are unequal, and while a sports body is located at the top of the pyramid, an athlete is located at the bottom trying to battle against that sports body. Therefore, if the model adopted in commercial arbitration applies to all proceedings before CAS, this would harm athletes and result in their being denied access to CAS. It results that there is no better alternative to the current form of CAS financing, and adopting the ordinary arbitrations' model, namely each party paying half of the advance on costs, would make athletes deprived of their right to a judicial remedy.

However, there is still a big challenge in the CAS Code concerning the payment of the advance on costs. It is well established that when an athlete starts a proceeding against FIFA before CAS, upon filing the request/statement of appeal, he will receive a letter from the CAS Secretariat, stipulating that, as a general rule, FIFA does not pay any advance on costs when a proceeding has been initiated against it.[62] This behaviour of FIFA is permissible according to Article R64 of the CAS Code, meaning that the claimant has to pay the full advance on costs.

From the author's perspective, this provision of the CAS Code and FIFA's behaviour are unacceptable for three main reasons. *First*, they may harm players and clubs with low budgets or insufficient means, limiting their access to CAS. *Second*, they are contrary to the Court's argument, providing that the CAS funding cannot be the same as the model adopted in commercial arbitration. *Third*, it is not justifiable that while FIFA pays about nine per cent of the CAS total budget, it does not contribute to the funding of an actual case. Consequently, modifying Article R64 of the CAS Code in the future is of paramount importance to avoid such behaviour from the federations.

Concerning the relationship between the funding of CAS and the independence of CAS and its members (arbitrators and employees), the Court took the same position as *the Lazutina judgment,* holding that there was no necessary connection between financing a judicial body and its independence. However, in the author's view, the roles of an international federation are not analogous to the roles and functions of a state and, inevitably, are not similar in their relationship with the judiciary. The central role of a state is to control its citizens on a wide variety of issues, and the judiciary body is one of the pillars of the state in performing this function.[63] However, the same is not valid for CAS as it is not a judiciary branch in the same sense. Therefore, it can be concluded that

62 Hansjörg Stutzer, Michael Bösch and Simon M. Hohler, *The Independence of CAS Confirmed*, THOUVENIN RECHTSANWALTE (Apr. 4, 2018), *available at* https://thouvenin.com/publication/the-independence-of-cas-confirmed/.

63 Gerard McCoy, *Judicial recusal in New Zealand, in* H P Lee (ed.) JUDICIARIES IN COMPARATIVE PERSPECTIVE 324 (2011).

sports federations are not identical to the legislative and executive branches of the state, and CAS is not comparable to the judiciary body.

In addition, one can argue that the Court rejected the Club's argument because it considered the issue of financing to be irrelevant to the issue of independence. Nevertheless, this conclusion seems to be incorrect. It seems the Court would assess the relationships between funding and independence case by case and would require proof of any assertation concerning the lack of independence.[64] The Court's position regarding FIFA's contribution seems unsurprising since the CHF 1.5 million contributed by FIFA was roughly ten per cent of the CAS total budget of CHF 16 million, which is significantly lower than the one-third contribution of IOC that had already been confirmed in the *Lazutina* case. Nevertheless, it is still questionable whether contributions beyond one-third can cast doubt on the CAS independence or not, and what level of contributions could be considered as possibly intimidating the independence of CAS.[65]

Moreover, based on the indirect contributions of FIFA, namely payment of the CAS's administrative fee, the Club raised a question on the CAS independence. Rejecting the allegation, the Court held that there was no evidence demonstrating that CAS would grant FIFA preferential status. However, like the direct contributions, it is unclear what level of indirect contributions can endanger the independence of this arbitral body.[66]

IV. Conclusion & Recommendations

Considering the foregoing analysis, the author concludes that it is undeniable that the current funding system of CAS creates some reasonable concerns for athletes that CAS may be in favour of its funder. Nevertheless, as the contributory capacity of athletes is far below that of the top sports organisation, for the time being, it is impossible to adopt other funding systems since they are not compatible with this unique feature of sports arbitration. Therefore, the current funding system of CAS*, per se,* does not create any doubt about its independence of CAS.

The author believes that diversifying the funding sources of CAS is a practical solution for reducing the concerns about its independence, which is discussed in the next part.

The suggestions attempt to draw an arbitration system for international sports disputes that satisfies the fundamental requirements of a fair proceeding. In this part, the main focus is on improving the CAS funding system, resulting in the improvement of the CAS independence.

In order to enhance the CAS financial independence, there is no other way but to amend the current funding system. Although ICAS was established to guarantee that "*CAS [would be] totally independent of IOC*",[67] in terms of funding, CAS still receives its entire budget from the IOC and other top sports

64 Giulio Palermo, *supra* note 32.

65 *Id.*

66 *Id.*

67 Darren Kane, *Twenty Years On: An Evaluation of the Court of Arbitration for Sport*, 4 MELBOURNE JOURNAL OF INTERNATIONAL LAW 618 (2003).

bodies. To reduce the CAS's reliance on the Olympic movement, one possible modification could be raising CAS's services fees,[68] including charges for filing,[69] arbitration,[70] and issuing advisory opinions.[71] Adopting this system could provide higher income for CAS while its dependence would be reduced since other sources for the CAS budget would be provided.

In addition, raising the charge for CASs provision of advisory opinion has some advantages. *"[T]he allocation of costs is perhaps the best means available to the CAS … to ensure that its Advisory Opinions are released into the public domain*."[72] Also, increasing the fee for issuing advisory opinions would ensure that this service does not become a cheap way for parties to have access to institutional legal advice.[73]

Nonetheless, this method can be criticised as it puts the athletes into a difficult situation. Many athletes, particularly those from developing countries, do not have high incomes and cannot afford to use the CAS services. Therefore, adopting this system may keep athletes deprived of having access to CAS.

Another possible modification is to dedicate a proportion of gains achieved during a sports competition to CAS, making a balanced system compared to the current system of funding. During sports competitions, not only do the governing sports bodies have some financial achievements, but also the athletes obtain several financial gains depending on their performance. Therefore, by charging a special fee on the financial gains in favour of CAS, a considerable part of its budget would be provided. This method of financing is of numerous benefits. First, a part of the CAS budget would be obtained indirectly from the committees and federations instead of their direct contributions.

Also, the application of this system does not impose a heavy burden on athletes and, meanwhile, would foster their trust in CAS as they also make contributions to its budget. Finally, more transparency would be provided concerning the monetary contributions, diminishing the suspicion of CAS being influenced by the sports bodies.

Finally, the third possible way to improve the CAS financial system is through the participation of athletes in CAS funding. In this model, every professional athlete who has been registered in a federation must pay a part of the compulsory contribution of his federation to CAS. For instance, since FIFA has to pay ten percent of CAS's annual budget, registered athletes and clubs should pay for half of this amount and FIFA should pay the remaining. This model also has the advantages of the previous one, while it would provide a more significant proportion of the budget. On the other hand, this model has the drawback that if the athletes refuse to fulfil their obligation, this would have detrimental effects on the financial viability of CAS and its operations.

---

68 Rachell Downie, *supra* note 3, 22.

69 COURT OF ARBITRATION FOR SPORT, Code of Sports-related Arbitration, § R64 (2022) [*hereinafter* "Code of Sports-related Arbitration"].

70 Code of Sports-related Arbitration, § R64.

71 Code of Sports-related Arbitration, § R66.

72 Richard McLaren, *CAS Advisory Opinions 188* in Ian S Blackshaw, Robert C R Siekmann and Janwillem Soek (eds.), THE COURT OF ARBITRATION FOR SPORT 1984–2004 (2006).

73 *Id.*

WHO IS THE ACTIVE INVESTOR?: TRIBUNALS' SEARCH FOR A TRUE INVESTOR

Maja Stanivukovic[*]

Abstract

*One of the fresh debates unfolding in the field of investment arbitration concerns the question whether "passive investors" enjoy protection of investment treaties. There are three awards that have been rendered during the last decade: Alapli Elektrik v. Turkey ["**Alapli Elektrik**"], Standard Chartered Bank v. Tanzania ["**Standard Chartered Bank**"] and Clorox Spain S.L. v. Venezuela ["**Clorox**"], where the tribunals have denied jurisdiction because shareholders, as purported investors, have not engaged in any investment activity. It could be argued that these awards have introduced a new requirement of an active investor that is being more and more often invoked by respondent States and discussed in practice. This article explores the origin of the requirement of an active investor, which may be traced to the views that there is an inherent meaning of investment, distinct from the ownership of property; its similarity with the requirement of an investor's contribution; and the reactions to this requirement in the subsequent arbitral practice.*

I. Introduction

One of the fresh debates unfolding in the field of investment arbitration concerns the question whether "*passive investors*" enjoy protection of investment treaties.[1]

Taking a stand on this debate presupposes a clear understanding of the meaning of "*passive investor*" and its necessary counterpart, the "*active investor*", in the context of the decisions that mention it.

As a starting point, it could be said that a "*passive investor*" is the one who holds a right defined as an investment in an investment treaty but has engaged in no activity to obtain such a right.

There are three awards that have been rendered during the last decade where the tribunals have denied jurisdiction because the claimants, as purported investors, had not engaged in any investment activity. These are *Alapli Elektrik* v. *Turkey*[2], *Standard Chartered Bank* v. *Tanzania*[3] and *Clorox Spain S.L.* v. *Venezuela*[4]. It could be argued that these awards have introduced a new requirement – the requirement of an active investor – that is being more and more often invoked by respondent States and discussed in practice.

---

[*] Prof. (Dr.) Maja Stanivukovic is a Professor of Law at the University of Novi Sad, Serbia, and, the President of the Belgrade Arbitration Center.

1 Jarrod Hepburn & Lisa Bohmer, *Analysis: Recent Award Highlights Debate over Whether Investment Treaties Protect Passive Investments – But Tribunal Sidesteps Discussing That Jurisprudence in Great Detail*, INV. ARB. REP. (May 31, 2019), *available at* https://www.iareporter.com/articles/analysis-recent-victory-for-clorox-against-venezuela-highlights-debate-over-whether-investment-treaties-protect-passive-investments-but-tribunal-sidesteps-discussing-that-jurisprudence.

2 Alapli Elektrik B.V. v. Republic of Turkey, ICSID Case No. ARB/08/13.

3 Standard Chartered Bank v. The United Republic of Tanzania, ICSID Case No. ARB/10/12.

4 Clorox Spain S.L. v. Bolivarian Republic of Venezuela, PCA Case No. No. 2015-30.

This article will explore the origin of the requirement of an active investor, which may be traced to the views that there is an inherent meaning of investment, distinct from ownership of property; its similarity with the requirement of a contribution; and the reactions to this requirement in the subsequent arbitral practice.

It is our preliminary assumption that the tribunals that have introduced the requirement of "*active investor*", did so in order to prevent treaty shopping in cases where the true investor would not have been eligible for protection. This assumption finds support in a monograph on treaty shopping, which treats the requirement of an active investor as a "*fact-sensitive element that has the potential to detect a possible abuse of the arbitration system, without explicitly naming it as such*."[5] The true investor could be, for example, a domestic national of the respondent State ("*round-tripping*", "*U-turn*")[6] or a national of a State that did not have an investment treaty with the respondent State.[7] The same requirement could also be needed in a third situation that does not occur so often, but is plausible when the actual investor is another State hiding behind the domestically incorporated company that appears as the investor and claimant but conducts no investment activity. The interposition of the "*passive investor*" is often the result of corporate restructuring. The need to develop a new doctrine is based on the non-availability of a direct route to tackle these forms of treaty shopping.

II. The Conventional Approach: Investment Equals Assets

In order for an investment tribunal to have jurisdiction *ratione materiae* over a dispute, it is necessary that the dispute, as defined in the statement of claim, relate to the claimant's investment. But what is an investment and how do we know that it is the claimant's investment? The meaning of investment is intuitively known to everyone,[8] but is not easy to define.

The meaning of the term "*investment*", which appears in the title of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States ["**ICSID Convention**"][9] and in all investment treaties, has become one of the most controversial issues as regards the determination of jurisdiction of not only ICSID tribunals, but also of other investment tribunals.[10] It has been subject to extensive debate and wide-ranging viewpoints.

---

5 JORUN BAUMGARTNER, TREATY SHOPPING IN INTERNATIONAL INVESTMENT LAW 158 (2016).

6 *See* M. SORNARAJAH, RESISTANCE AND CHANGE IN THE INTERNATIONAL LAW ON FOREIGN INVESTMENT 176 (2015). *See, e.g., Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, where the Ukrainian nationals channelled their investment through a Lithuanian shell company which initiated an ICSID arbitration against Ukraine pursuant to the Lithuania-Ukraine BIT, and *Phoenix Action Ltd.* v. *The Czech Republic,* ICSID Case No. ARB/06/5. where the original Czech investor sold its investment to an Israeli company, Phoenix Action, that was established and owned by him, to become capable of commencing an ICSID arbitration by relying on the Israel-Czech Republic BIT.

7 A well-known example is Aguas del Tunari, S.A. v. Republic of Bolivia, ICSID Case No. ARB/02/3.

8 *Memorandum of the Meeting of the Committee of the Whole*, *reprinted in II(2)* HISTORY OF THE ICSID CONVENTION 965, 972 (Feb. 16, 1995) (Aron Broches stated: "The large majority [of the Legal Committee preparing the draft ICSID Convention] had, […] agreed that while it might be difficult to define 'investment', an investment was in fact readily recognizable").

9 Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Mar. 18, 1965, 575 U.N.T.S. 159.

10 Emmanuel Gaillard, *Identify or define? Reflections on the Evolution of the Concept of Investment in ICSID Practice, in* INTERNATIONAL INVESTMENT LAW FOR THE 21ST CENTURY 403 (Christina Binder, Ursula Kriebaum, August Reinisch, Stephan Wittich eds., 2009).

The controversy began when most bilateral and multilateral investment treaties defined investment broadly, as any kind of asset owned or controlled by the investor. This definition was usually followed by a non-exhaustive enumeration of property and contractual and intellectual property rights that were included in the category of assets.

For example, the Energy Charter Treaty ["**ECT**"] contains an all-encompassing definition of investment covering assets "*owned or controlled directly or indirectly*", by a national of a contracting state.[11] Ownership of assets is apparently all that is required under the ECT.[12] Also, the control over assets, even if it is indirect, suffices in the absence of ownership.

When arbitrators strictly apply these broad treaty definitions of investment, the purported investor is often not required to prove any activity of investing to obtain such status. Arbitral awards confirm that "*owning*", "*holding*", or "*acquiring*" an investment suffices for the purposes of protection under certain Bilateral Investment Treaties ["**BITs**"].[13]

The award rendered in *Fedax* v. *Venezuela*[14] ["**Fedax**"] was the first ICSID award that considered at length the State's objection to jurisdiction on the ground of lack of an investment.[15] Venezuela had objected to the jurisdiction of ICSID on the ground that Fedax could not have been considered to have made an investment for the purposes of the ICSID Convention. Relying on the broad asset-based definition contained in the Netherlands-Venezuela BIT, the Tribunal proclaimed that endorsement of six promissory notes issued by the Republic of Venezuela, as a financial transaction undertaken by a Venezuelan company in favour of the Dutch claimant, falls under the definition of (the Claimant's) investment in the sense of the applicable BIT and the ICSID Convention[16]. According to the Tribunal, with every endorsement, the identity of the investor would change.[17] The Tribunal rejected the Respondent's objection that Fedax did not qualify as an investor because it had not made any investment "*in the territory*" of Venezuela.[18] The *Fedax* decision was criticized by eminent writers and arbitrators, some of them calling it an isolated case, an outlier.[19] Still, it influenced the understanding of the term investment in the initial years of investment arbitration.[20]

---

11 Energy Charter Treaty, Apr. 16, 1998, 2080 U.N.T.S. 100, art. 1(6).

12 Similar wording was also used in pre-2004 U.S. BITs. *See* BORZU SABAHI, NOAH RUBINS, DON WALLACE, JR., INVESTOR-STATE ARBITRATION 340 (2d ed. 2019).

13 CSOB A.S. v. The Slovak Republic, ICSID Case No. ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction ¶¶ 31-32 (May 24, 1999); Saluka Investments BV (The Netherlands) v. The Czech Republic, Partial Award, ¶¶ 205, 211 (Perm. Ct. Arb., Mar. 17, 2006) [*hereinafter* "Saluka Investments"].

14 Fedax N.V. v. The Republic of Venezuela, ICSID Case No. ARB/96/3.

15 MONIQUE SASSON, SUBSTANTIVE LAW IN INVESTMENT TREATY ARBITRATION: THE UNSETTLED RELATIONSHIP BETWEEN INTERNATIONAL LAW AND MUNICIPAL LAW 134 (2017).

16 Fedax N.V. v. The Republic of Venezuela, ICSID Case No. ARB/96/3, Decision of the Tribunal on Objections to Jurisdiction, ¶43.

17 Fedax N.V. v. The Republic of Venezuela, ICSID Case No. ARB/96/3, Decision of the Tribunal on Objections to Jurisdiction, ¶¶ 39-40 (July 11, 1997).

18 *Id.* ¶ 41.

19 *See* Abaclat et al. v. Argentine Republic, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, Dissenting Opinion of Georges Abi-Saab, ¶ 105 (Oct. 28, 2011).

20 RUDOLF DOLZER & CHRISTOP SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 66 (2d ed. 2012).

In *Saluka* v. *Czech Republic*[21] ["**Saluka Investments**"], the Tribunal rejected the argument that the Dutch claimant (and its Japanese parent company) did not intend to make any "*real investment*" in Czech Republic's banking sector, and that the acquisition of shares in a local bank by the Dutch company was designed as a short-term holding of shares with the purpose of recovering a profit from selling assets controlled by the Czech bank, Investiční a poštovní banka ["**IPB**"]. The Tribunal determined that the ownership of shares in a local bank qualified as an investment under the terms of the Czech-Netherlands BIT, irrespective of the fact that the shares were purchased as a portfolio investment and were initially purchased by the parent company, which subsequently transferred them to Saluka.[22] The Tribunal rejected the argument that Saluka itself invested nothing in IPB, "*but was merely a conduit for the investment made by Nomura*" (Japanese parent company), and was not itself a true investor.[23] The Tribunal opined that this argument relied on the definition of investment as an economic process which involved making a substantial contribution to the local economy or to the local company. However, such additional meaning could not be imported into the broad definition of investment set forth in Article 2 of the Czech-Netherlands BIT. Although the *chapeau* of Article 2 referred to "*every kind of asset invested*" [emphasis in the original], the use of that verb did not require the Claimant to prove that it satisfied any further substantive conditions with regard to investment, other than those in which investment was defined in that Article..[24]

Very early, the question arose in investment treaty arbitration as to whether an investment by a shell company used as a special purpose vehicle by a domestic investor, could be an investment eligible for protection under an investment treaty. The majority opinion in *Tokios Tokelés* v. *Ukraine* deemed that the holding of an investment was sufficient for the purposes of jurisdiction in a BIT arbitration.[25] The Tribunal refused to impose the origin-of-capital requirement, and accepted as a Lithuanian investment, the establishment of a company in Ukraine by a Lithuanian company that was ninety-nine per cent owned by Ukrainian nationals, and that invested capital originating from Ukrainian sources.[26] The Tribunal referred to the definition of "*investment*" in the Ukraine-Lithuania BIT as "*every kind of asset invested by an investor of one Contracting Party in the territory of the other Contracting Party*", and concluded that the requirement of origin of capital is clearly absent from the treaty text.[27] The origin of the invested funds did not matter, as long as the investor (the Claimant shell company) legally owned the investment.

The asset-based approach is based on purported consent of the contracting parties to the BIT. It is based on the assumption that the States would have introduced specific limitations to their consent,

21 Saluka Investments B.V. v. The Czech Republic, PCA Case No. 2001-04.
22 Saluka Investments B.V. v. The Czech Republic, Partial Award, ¶ 209 (Perm. Ct. Arb., Mar. 17, 2006).
23 *Id.*, ¶ 210.
24 *Id.*, ¶ 211.
25 Vladislav Djanic, *Looking Back: In Tokios Tokeles Case, Majority Upholds Jurisdiction Over Claim Against Ukraine Brought by Lithuanian Corporation that was Owned by Ukrainian Nationals, Prompting Chairman to Resign*, INV. ARB. REP. (Dec. 9, 2017).
26 *See generally id.*; Tokios Tokelés v. Ukraine, ICSID Case No. ARB/02/18, Decision on Jurisdiction, ¶ 77 (Apr. 29, 2004) [*hereinafter* "Tokios Tokelés"].
27 Tokios Tokelés, ICSID Case No. ARB/02/18, Decision on Jurisdiction, ¶¶ 74, 77.

if they wished.[28] By not introducing such limitations in express terms, they have made a deliberate choice,[29] and consented to be sued by companies and individuals of the other contracting state, who meet the formal requirements set forth in the definitions of investors and investments, regardless of their actual role is in the relevant investment transaction.

In *Saba Fakes* v. *Turkey* ["**Saba Fakes**"], the Tribunal stated that:

> "*Neither the ICSID Convention, nor the BIT make any distinction which could be interpreted as an exclusion of a bare legal title from the scope of the ICSID Convention or from the protection of the BIT.*"[30]

This sentence strongly suggests that a bare legal title suffices for the protection under these legal instruments.[31] There are also some more recent awards holding the same view.

In these early awards, investment tribunals have, by majority, taken a rather formalistic and blindfolded approach to finding an investment based on broad definitions of investment contained in various bilateral and multilateral treaties which allow plenty of space for treaty shopping. These formalistic interpretations of treaty definitions by the early awards tied the hands of investment tribunals that saw it necessary to enter into a more realistic economic analysis.

One of the recent endorsements of the sufficiency of the asset-based definitions was given in the annulment proceedings of the controversial *Yukos Universal Limited* v. *The Russian Federation*[32] ["**Yukos**"] awards. The Hague Court of Appeals has interpreted Article 1(6) of the ECT as not requiring the foreign investor to make an economic contribution to the host state. According to the Court of Appeals:

> "*The drafters of Article 1(6) ECT could have defined the term 'investment' more narrowly than they did, for example by requiring capital to flow from one contracting state to another, or requiring the foreign investor to make an economic contribution to the host state. It is clear from the wording of the Treaty, however, that only an 'asset based' definition, i.e. a non-exhaustive list of assets, will determine whether an investment within the meaning of the ECT is involved.*"[33]

---

28 Relja Radović, *Demystifying Consent, The Jurisdictional Framework of Investment Treaty Arbitration Revisited, dissertation*, UNIVERSITÉ DU LUXEMBOURG, PHD-FDEF-2019-03, 40-42 (May 29, 2019).

29 *See* Tokios Tokelés, ICSID Case No. ARB/02/18, Decision on Jurisdiction, ¶ 36 (Apr. 29, 2004).

30 Saba Fakes v. Republic of Turkey, ICSID Case No. ARB/07/20, Award, ¶ 134 (July 14, 2010). *See also* Veteran Petroleum Limited (Cyprus) v. The Russian Federation, PCA Case No. 2005-05/AA228, Interim Award on Jurisdiction and Admissibility, ¶ 477 (Perm. Ct. Arb., Nov. 30, 2009); RosInvestCo UK Ltd v. The Russian Federation, SCC Case No. V079/2005, Final Award, ¶¶ 381, 388 (Stockholm Chamber of Comm., Sept. 12, 2010), Yukos Universal Limited v. The Russian Federation, PCA Case No. 2005-04/AA227, Interim Award on Jurisdiction and Admissibility, ¶ 430 (Perm. Ct. Arb., Nov. 30, 2009); Alpha Projectholding GmbH v. Ukraine, ICSID Case No. ARB/07/16, Award, ¶¶ 343-45 (Nov. 8, 2010).

31 However, in *Saba Fakes*, the Tribunal concluded that the Claimant did not hold a legal title over the share certificates in the Turkish telecommunications company, and thus did not have an investment in Turkey. *See* Saba Fakes v. Republic of Turkey, ICSID Case No. ARB/07/20, Award, ¶ 135 (July 14, 2010).

32 Yukos Universal Limited v. The Russian Federation, PCA Case No. 2005-04/AA227.

33 Yukos Universal Limited (Isle of Man) v. The Russian Federation, Hague Ct. of Appeals Case No. 200.197.079/01, PCA Case No. 2005-04/AA227, Judgment of The Hague Court of Appeal (Unofficial English Translation), ¶ 5.1.9.5 (Perm. Ct. Arb., Feb. 18, 2020).

According to the Dutch court, the Russian Federation failed to demonstrate that an objective notion of investment, involving contribution, duration, and risk, applies to an investment within the meaning of Article 1(6) of the ECT.[34]

III. The Modern Approach: Investment implies something more than just property

The terms investment and assets (property) often appear together in the same treaty. An investment is often defined as any or every kind of asset, representing various forms of property. In a number of investment treaty cases, as discussed earlier in Part II, ownership of property in the host State was considered sufficient to prove the status of an investor and the existence of an investment. The tribunals did not inquire into the way the claimant had acquired its asset, nor whether it had an active role in the investment. But there is something more to an investment than just property.

Historically, international law was concerned with the protection of foreign property, or the property of aliens, as it was often termed in older texts. The focus of documents such as the 1959 Abs-Shawcross Draft Convention on Investment Abroad, the 1961 Harvard Draft Convention on International Responsibility of States for Injuries to Aliens, and the 1967 Organisation for Economic Co-operation and Development ["**OECD**"] Draft Convention on the Protection of Foreign Property was on the protection of property owned by foreigners, and not on the protection of investments.[35]

The ICSID Convention and the first BITs, on the other hand, focused on the protection of investments. This term conveyed a more proactive, development-oriented activity than mere holding of assets in another country.[36]

This replacement of property with investment as the subject of protection indicates that States party to those instruments were willing to accord special rights to foreigners, such as the right of foreign individuals and companies to initiate an arbitration against them, only if they were bringing into their territory (i.e., contributing) something of value for those States, for instance, commitment of productive capital or know-how, important for their development. This quid pro quo of investment treaty arbitration was noted by Douglas in his Rule 23:[37]

> "*The notion of a quid pro quo between a foreign investor and the host state is the cornerstone for the system of investment treaty arbitration. In exchange for contributing to the flow of capital into the economy of the host contracting state, the nationals of the other contracting state […] are given the right to bring international arbitration proceedings against the host contracting state and to invoke the international minimum standards of treatment contained in the applicable investment treaty. The conferral of this right reduces the sovereign risk attaching to the investment in the host state and hence investment treaties in this way can positively influence the*

---

34 *Id.* ¶ 5.1.9.4.

35 MONIQUE SASSON, *supra* note 15, at 126.

36 For the explanation of the main reasons for the replacement of "protection of alien property" with "investment protection". *See* Thomas W. Wälde, *Specific Nature of Investment Arbitration, the Introduction: The Reports of the Directors of Studies*, *in* NEW ASPECTS OF INTERNATIONAL INVESTMENT LAW 74-75 (Philippe Kahn & Thomas W. Wälde eds., 2004).

37 ZACHARY DOUGLAS, THE INTERNATIONAL LAW OF INVESTMENT CLAIMS 161 (2009) [*hereinafter* "DOUGLAS"].

> *decision making process for investments. This quid pro quo is implicit in the preamble of most investment treaties*;"[38]

There are, therefore, two aspects which the concept of investment covers: (1) the contribution by the investor that constitutes the investment, and (2) the rights and the value that derive from that contribution and that belong to the investor.[39]

The verb "*invest*" and the derived noun "*investment*" imply an economic activity being carried out by the investor in the host State,[40] while assets (property) acquired in the host State, although also called "*investments*" are the result of that activity.

Therefore, while definitions in investment treaties are focused on the rights and the value that contributions from investors may generate, those definitions are premised on the existence of a contribution.[41]

Some modern international treaties acknowledge the distinction that exists between the terms asset and investment. For example, the following definition of investment appears under Article 8.1 of the 2016 Comprehensive and Economic Trade Agreement ["**CETA**"] and under Article 9.1 of the 2018 Comprehensive and Progressive Agreement for Trans-Pacific Partnership ["**CPTPP**"]:[42]

> "*[I]nvestment means every kind of asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment*"
>
> (emphasis supplied)

Clearly, this provision implies that ownership or control of property is not enough, by itself, to qualify that property for treaty protection, but it must be established, in addition, that such property has the characteristics of an investment.

Also, some international arbitrators question whether the asset-based definitions of investment are definitions at all:

> "*115. […] the Respondent submits that France-Mauritius BIT does not contain a substantive definition of protected investments and that Article 1(1) merely lists possible forms that investments may take. The relevant test, according to the Respondent, is therefore not whether assets fall in a category of the list in Article 1(1), but rather whether they meet an inherent definition of investment under the Treaty.[…]*
>
> *117. The Tribunal is satisfied that this interpretation of Article 1(1) of the Treaty is correct. Looking at the plain wording of Article 1(1), it does not contain a definition of investments. Indeed, the term "definition" does*

---

38 *Id.*

39 Caratube International Oil Company LLP v. Republic of Kazakhstan, ICSID Case No. ARB/08/12, Award, ¶ 352 (June 5, 2012) *citing* Abaclat et al*.,* ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, ¶¶ 346-47 (Aug. 4, 2011).

40 MONIQUE SASSON, *supra* note 15, at 101.

41 Abaclat et al., ICSID Case No. ARB/07/5,Decision on Jurisdiction and Admissibility, ¶ 347 (Aug. 4, 2011).

42 Comprehensive Economic and Trade Agreement (CETA), Jan. 14, 2017, L 11/23, art. 8.1.

> *not even appear in Article 1(1). Rather, Article 1(1) only provides that the term "investments" - however to be defined - encompasses ("comprend") all types of assets ("toutes les catégories de biens"). Such a provision cannot play the gatekeeping role of establishing when a situation qualifies as an investment and when it does not. Nor can the non-exhaustive list of assets contained in Article 1(1) play such a role since, by its own terms, it only provides possible examples. The question of how to define investment therefore cannot be found in Article 1(1) or the Treaty. It has to be found in the objective and ordinary meaning of the term "investments".*"[43]
>
> (references omitted, emphasis added)

Consequently, the modern approach demands that while deciding whether there is an investment, the tribunal should not simply look into illustrative list of assets provided in the BIT and mechanically check whether the claimant holds/owns any such asset/property, but should also engage in a more subtle analysis of whether the acquired property rights result from a "*commitment of resources to the economy of the host state by the claimant entailing the assumption of risk in expectation of a commercial return*."[44] As rightly pointed out by one author: "*If, for example, a BIT lists bonds and loans as property rights, this does not necessarily make every loan or bond a protected asset, since a bond or loan will still have to qualify as an investment under the treaty.*"[45] Accordingly, the tribunal should check how the claimant acquired the assets to ascertain whether it holds a qualifying investment in the host state.

IV. Approaching the Objective Test: Investment has an Inherent Meaning

Efforts of arbitrators to define the meaning of the term investment have been originally undertaken to concretize the jurisdictional hurdle of "*arising directly out of an investment*" under Article 25(1) of the ICSID Convention. In contrast to the investment protection treaties, the ICSID Convention did not include a specific definition of the term investment.

In *Fedax,* the Tribunal enumerated the basic features of an investment, citing the leading commentary by Professor Christoph Schreuer as legal authority:

> "*The basic features of an investment have been described as involving a certain duration, a certain regularity of profit and return, assumption of risk, a substantial commitment and a significance for the host State's development.*"[46]

Another influential decision on jurisdiction was soon to follow. In *Salini* v. *Morocco* ["**Salini**"], the investment requirement was treated as an objective condition of the jurisdiction of ICSID.[47] The Tribunal complained that it would be easier to define an investment pursuant to the Convention, "*if*

---

43 Christian Doutremepuich and Antoine Doutremepuich v. The Republic of Mauritius, PCA Case No. 2018-37, Award on Jurisdiction, ¶¶ 115, 117 (Perm. Ct. Arb., Aug. 23, 2019).

44 This is the definition of investment that is proposed by Zachary Douglas in his Rule 23. *See* DOUGLAS, *supra* note 37, at 189.

45 MONIQUE SASSON, *supra* note 15, at 103.

46 Fedax, Decision on Jurisdiction, ¶ 43 (July 11, 1997), *citing* Christoph Schreuer, *Commentary of the ICSID Convention*, 11(2) ICSID REV. – FOREIGN INV. L. J. 372 (1996).

47 Salini Costruttori S.P.A. & Italstrade S.P.A v. Kingdom of Morocco, ICSID Case No. ARB/00/4, Decision of the Tribunal on Objections to Jurisdiction, ¶ 52 (July 31, 2001).

there were awards denying [ICSID's] jurisdiction on the basis of the transaction giving rise to the dispute".[48] However, as the Tribunal noted, the awards "*only very rarely turned on the notion of investment*". Then, citing another influential commentary by Emmanuel Gaillard, the Tribunal stated that:

> "*[t]he doctrine generally considers that investment infers: contributions, a certain duration of performance of the contract and a participation in the risk of the transaction (...). In reading the Convention's preamble, one may add the contribution to the economic development of the host State of the investment as an additional condition*."[49]

According to Gaillard and Banifantemi, "*the Salini test is ultimately based on nothing more than the economic definition of an investment or, in other terms, the ordinary meaning of the word*."[50]

In *Pantechniki* v. *Albania*, the sole arbitrator noted that "*the term 'investment' carries an 'inherent common meaning'*" that should be adopted to avoid unintended conflicts among treaties, and to make some useful and proper distinctions.[51]

Eventually, these efforts of the ICSID arbitrators impacted the area of non-ICSID investment arbitrations. The view that an investment has an inherent meaning has been vigorously espoused by the tribunal in *Romak* v. *Uzbekistan*[52] ["**Romak**"], an arbitration conducted under the United Nations Commission on International Trade Law ["**UNCITRAL**"] Rules.

In *Romak*, the Tribunal did not accept the Claimant's position that in order to establish that there is an investment, the Tribunal should simply confirm that Romak's assets fall within one of the categories listed in Article 1(2) of the Switzerland-Uzbekistan BIT. This Article was worded as follows:

> "*For the purpose of this Agreement:*
>
> *(2) The term 'investments' shall include every kind of assets and particularly:*
>
> *[…] (c) claims to money or to any performance having an economic value;*"[53]

Romak argued that its supply agreement with certain State-owned Uzbek companies for the supply of wheat and a Grain and Feed Trade Association (GAFTA) arbitral award rendered in pursuance of a dispute arising from the supply agreement, were investments within the meaning of Article 1(2), sufficient for the purposes of determining jurisdiction. The Tribunal disagreed with this approach and

---

48 *Ibid.*

49 *Id. citing* Emmanuel Gaillard, *Chronique des Sentences Arbitrales*, JOURNAL DU DROIT INTERNATIONAL 292 (1999) [*hereinafter* "Emmanuel Gaillard"].

50 Emmanuel Gaillard & Yas Banifantemi, *The Long March towards a Jurisprudence Constante on the Notion of Investment: Salini v Morocco*, *in* BUILDING INTERNATIONAL INVESTMENT LAW: THE FIRST 50 YEARS OF ICSID 109 (2015).

51 Pantechniki S.A. Contractors & Engineers (Greece) v. The Republic of Albania, ICSID Case No. ARB/07/21, Award, ¶¶ 46-47 (July 30, 2009). This inherent common meaning of investment, the sole arbitrator suggests, could be the one proposed by Zachary Douglas in his Rule 23. *See* ZACHARY DOUGLAS, *supra* note 28, at 189.

52 Romak S.A. (Switzerland) v. The Republic of Uzbekistan, PCA Case No. AA280,

53 Agreement between the Swiss Confederation and the Republic of Uzbekistan on the Promotion and Reciprocal Protection of Investments, Nov. 5, 1993, art. 1(2)(c).

dismissed the case for want of jurisdiction due to the fact that Romak had not made a protected investment in Uzbekistan.[54]

The Tribunal considered that "*[t]he term "investment" has a meaning in itself that cannot be ignored when considering the list contained in Article 1(2) of the BIT*,"[55] [emphasis added] and observed as follows:

> "*[T]he term "investments" under the BIT has an inherent meaning (irrespective of whether the investor resorts to ICSID or UNCITRAL arbitral proceedings) entailing a contribution that extends over a certain period of time and that involves some risk [...] By their nature, asset types enumerated in the BIT's non-exhaustive list may exhibit these hallmarks. But if an asset does not correspond to the inherent definition of 'investment', the fact that it falls within one of the categories listed in Article 1 does not transform it into an 'investment'*.[56]

The importance of this holding lies in the emphasis it places on the distinction between the terms "*assets*" and "*investments*". Both terms are used in BIT definitions of investments, but they are not identical, and should not be treated as synonymous. Although investment usually results in acquisition of assets, an acquired asset is not necessarily acquired by investing. The *Romak* tribunal has explained "*the ordinary meaning*" of these terms in the following manner:

> "*The 'ordinary meaning' of the term 'investments' is the commitment of funds or other assets with the purpose to receive a profit, or 'return', from that commitment of capital. The term 'asset' means property of any kind*."[57]

(references omitted)

As explained by the Tribunal in *Abaclat* v. *Argentina* ["**Abaclat**"]:

> "*[…] a contribution that extends over a certain period of time and that involves some risk has been understood as "an objective meaning" of the term investment*."[58]

(emphasis in original)

> "*[…] once such contributions are made, it is about protecting the fruits and value generated by these contributions*."[59]"*[…] A certain value may only be protected if generated by a specific contribution, and – vice versa – contributions may only be protected to the extent they generate a certain value, which the investor may be deprived of*."[60]

54 Romak S.A. (Switzerland) v. The Republic of Uzbekistan, PCA Case No. AA280, Award, ¶¶ 242, 243 (Perm. Ct. Arb., Nov. 26, 2009).
55 *Id* .¶ 180.
56 *Id.* ¶ 207.
57 *Id.* ¶ 177. To define these terms, the Tribunal referred to the Black's Law Dictionary.
58 Abaclat et al., ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, ¶ 370 (Aug. 4, 2011).
59 Abaclat et al., ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, ¶ 349 (Aug. 4, 2011).
60 Abaclat et al., ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, ¶ 350 (Aug. 4, 2011).

Cases emphasizing that an investment presupposes a contribution, such as *Romak*[61] and *Abaclat*, may be considered a predecessor of the requirement of an active investor, or a spark that has set it off.

V. Developing the Objective Test: Investment Requires a Sufficient Contribution by the Investor

Although the view expressed in *Saba Fakes* (discussed in Part II)[62] dominated the practice of investment arbitration for a while, there were more and more tribunals which, following the holding in *Romak*, ventured to look beyond the enumeration of assets contained in the BIT. More and more tribunals started to inquire into the existence of a sufficient contribution from which the holding of assets results, specifying that:

> "*BIT protection is not granted simply to any formally held asset, but to an asset which is the result of [the] flow of [private] capital. Thus, even though the BIT definition of "investment" does not expressly qualify the contributions by way of which the investment is made, the existence of such a contribution as a prerequisite to the protection of the BIT is implied.*"[63]

These tribunals expressly or implicitly distinguish between property and investment. A foreign-owned asset that is expropriated enjoys protection as a property right, but it attracts the protection of a BIT only if it also constitutes an investment, as defined in the BIT.[64]

Soon after the seminal decision in *Abaclat,* where the issue of a qualifying contribution had been in the centre stage, a line of cases followed where the tribunals insisted upon the requirement of consideration (payment) by the purported investor for acquiring the assets in the host country as a condition for the existence of an investment.[65] Three of them will be mentioned here in chronological order: *Caratube* v. *Kazakhstan*[66] ["**Caratube**"], *Quiborax* v. *Bolivia*[67] ["**Quiborax**"], and *KT Asia* v. *Kazakhstan*[68] ["**KT Asia**"].

It is important to emphasize that the "*contribution requirement*" discussed in those cases should not be confused with the *Salini* criterion of "*contribution to the host State's development*", as has been done by some

---

61 A recent decision following the reasoning of the *Romak* tribunal on the objective and ordinary meaning of investment even outside the ICSID framework is Christian Doutremepuich and Antoine Doutremepuich v. The Republic of Mauritius, PCA Case No. 2018-37, Award on Jurisdiction, ¶¶ 117-20 (Perm. Ct. Arb., Aug. 23, 2019).

62 *See supra* Part II.

63 Caratube International Oil Company LLP, ICSID Case No. ARB/08/12, Award, ¶ 351 (June 5, 2012).

64 MONIQUE SASSON, *supra* note 8, at 101.

65 JORUN BAUMGARTNER, *supra* note 2, at 150–55.

66 Caratube International Oil Company LLP v. The Republic of Kazakhstan, ICSID Case No. ARB/08/12.

67 Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplun v. Plurinational State of Bolivia, ICSID Case No. ARB/06/2.

68 KT Asia Investment Group B.V. v. Republic of Kazakhstan, ICSID Case No. ARB/09/8.

authors,[69] and some courts.[70] The confusion comes from the fact that the *Salini* award mentioned four criteria, of which the first and fourth were termed contribution:

> "*[t]he doctrine generally considers that investment infers: contributions, a certain duration of performance of the contract and a participation in the risk of the transaction (...) one may add the contribution to the economic development of the host State of the investment as an additional condition*."[71]
>
> (emphasis added)

The contribution, as understood in the awards that follow means "*a contribution of money or assets (that is, a commitment of resources)*",[72] and it is referred to in *Salini* as the first criterion.[73]

The sufficiency of contribution has been the object of some debate. In the first edition of his Commentary of the ICSID Convention, Christoph Schreuer outlined five characteristics that most investments would share.[74] One of them was that the commitment was substantial. This statement was then relied on in *Fedax*, which mentioned "*a substantial commitment*".[75] The commentators said that "*[o]f all of Schreuer's factors, this one seems the least convincing*" because the epithet "*substantial*" is highly subjective.[76] Some awards have rejected this feature as a criterion.[77] Nevertheless, as it will be seen, tribunals have gradually started to inquire into the monetary magnitude of a contribution. Schreuer mentioned *substantial commitment*, whereas tribunals today speak of a *substantial contribution* (combining *Fedax* and *Salini* language).

A. Caratube v. Kazakhstan

The term "*investment*" was analyzed in *Caratube* to determine whether the purported Claimant was a "*national of another Contracting State*" (here, the United States) despite formally being a company registered in Kazakhstan.[78] Pursuant to the U.S.-Kazakhstan BIT, in order to prove this, the Claimant

---

69 *See*, *for e.g.*, JORUN BAUMGARTNER, *supra* note 2, at 149, who cites KT Asia Investment Group BV v. Republic of Kazakhstan as one of the awards that has rejected the requirement of contribution in ¶ 171, whereas it is only the Salini criterion of contribution to the development of the host State that has been rejected in that paragraph.

70 *See* Yukos Universal Limited (Isle of Man), Hague Ct. of Appeals Case No. 200.197.079/01, PCA Case No. 2005-04/AA227, ¶¶ 5.1.9.3. *et seq.* (Perm. Ct. Arb., Feb. 18, 2020).

71 Salini Costruttori S.P.A. & Italstrade S.P.A, ICSID Case No. ARB/00/4, Decision on Jurisdiction, ¶ 52 (July 23, 2001), *citing* Emmanuel Gaillard, *supra* note 38, at 292.

72 Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplun v. Plurinational State of Bolivia, ICSID Case No. ARB/06/2, Decision on Jurisdiction, ¶ 219. Baumgartner in his treatise on Treaty Shopping in International Investment Law (2016) uses the term "*commitment of capital and other resources*". JORUN BAUMGARTNER, *supra* note 2, at 264.

73 On the origin of the first and second criterion of "contribution" in the Salini test, *see* Gaillard & Banifntemi, *supra* note 39, at 116.

74 CHRISTOPH H. SCHREUER, THE ICSID CONVENTION: A COMMENTARY 140 (2001).

75 *See* Fedax, Decision on Jurisdiction, ¶ 43 (July 11, 1997).

76 Noah Rubins, *The Notion of 'Investment' in International Investment Arbitration*, *in* ARBITRATING FOREIGN INVESTMENT DISPUTES: PROCEDURAL AND SUBSTANTIVE LEGAL ASPECTS 298-99 (Horn & Kroll eds., 2004).

77 Mihaly International Corporation v. Social Democratic Republic of Sri Lanka, ICSID case no. ARB/00/2, Award ¶ 51 (March 15, 2002); Pantechniki v. Albania, ICSID Case No. ARB/07/21, Award, ¶ 45 (July 30, 2009). For a more recent assessment, *see* Christian Doutremepuich & Antoine Doutremepuich v. The Republic of Mauritius, PCA Case No. 2018-37, Award on Jurisdiction ¶¶ 126, 132 (Aug. 23, 2019).

78 Caratube International Oil Company LLP v. The Republic of Kazakhstan, ICSID Case No. ARB/08/12, Award, ¶¶ 312, 359 (June 5, 2012).

needed to establish that it was itself an investment of its owner, Devincci Hourani, an American citizen.[79] Kazakhstan argued that

> "*[…] to satisfy the requirement of a contribution, the putative investor should show that it contributed a substantial financial resource or transfer of know-how, equipment and personnel. The price paid and a guarantee put up need to be substantial enough relative to the entire project to be considered an investment. Similarly, a nominal price paid for assets that purportedly amount to an investment raises doubts as to the existence of an investment and requires in-depth inquiry into the circumstances of the transaction.*"[80]

Already, in *Saba Fakes,* it was noted that a nominal price of only a few thousand U.S. dollars could not be reconciled with the significance of the underlying business, as expressed in the Claimant's valuation of the alleged investment.[81] This holding was echoed by the *Caratube* tribunal:

> "*[P]ayment of only a nominal price [for acquisition of the shares] and lack of any other contribution by the purported [American] investor must be seen as an indication that the investment [...] is not covered by the term 'investment' as used in the BIT, and thus is an arrangement not protected by the BIT*"[82]

> "*A putative transaction to pay US$ 6,500 for 92% for an enterprise into which over USD 10 million have been invested and for which later a relief of over USD 1 billion is sought calls for explanation and justification.*"[83]

Devincci Hourani was found to be the owner of 92% of Caratube's shareholding.[84] However, the requirement that he made a substantial contribution was not satisfied.[85] As a result, the Tribunal found that Caratube failed to prove that it was an investment of a U.S. national.

According to Kazakhstan, Devincci Hourani provided a front for the real parties in interest, a Lebanese company JOR Investments Inc. and its shareholders, including Hourani's brother Issam Hourani, a Kazakh national. Neither JOR, nor Issam Hourani possessed a nationality that could grant them access to ICSID arbitration.[86]

In the *Caratube* decision, the Tribunal agreed with the Claimant that the origin of capital used to make an investment is immaterial for jurisdictional purposes, subject to express provisions to the contrary.[87] However, the Tribunal added that:

---

79 This condition was provided in Article VI (8) of the Kazakhstan-U.S. BIT (1992) ("any company legally constituted under the applicable laws and regulations of a Party, ...that at the time immediately before the events which gave rise to the dispute was an investment of nationals or companies of the other Party, shall be treated as a national or company of such other Party […]").

80 Caratube International Oil Company LLP, ICSID Case No. ARB/08/12, Award, ¶ 411 (June 5, 2012).

81 Saba Fakes v. Republic of Turkey, ICSID Case No. ARB/07/20, Award, ¶ 139 (July 4, 2010).

82 Caratube International Oil Company LLP, ICSID Case No. ARB/08/12, Award, ¶ 435 (June 5, 2012).

83 *Id.* ¶ 437.

84 *Id.* ¶ 395.

85 *Id.* ¶ 495.

86 *Id.* ¶ 413.

87 *Id.* ¶ 355.

"*[T]here still needs to be some economic link between that capital and the purported investor that enables the Tribunal to find that a given investment is an investment of that particular investor*."[88]

B. Quiborax v. Bolivia

The Tribunal in *Quiborax* declined jurisdiction for the claim of one of the Claimants, an individual who had acquired his single share in the Bolivian company for free i.e. without making any payment in exchange for that share. The Tribunal found that there was no evidence that he personally made an original or any subsequent contribution to exploit the mining concessions that were granted to the company.[89] The fact that he received dividends demonstrated that he benefited from the investment, not that he had made a contribution.[90] As the Tribunal stressed, "*a distinction should be made between the objects of an investment, 'such as shares or concessions […] and the action of investing'*."[91] The holding of this tribunal was that shares do not suffice if acquired gratuitously.

C. KT Asia v. Kazakhstan

Jurisdiction was denied in *KT Asia* because the Claimant, a Dutch company, had acquired the investment (shares) in BTA Bank, a Kazakh company, at no cost, through a loan obtained from the seller which was never repaid. The Tribunal opined that:

"*[A] payment of a nominal price for a shareholding is but one aspect out of a number of factors that may assist in ascertaining the existence of an investment. However, in the factual reality of this case, the Claimant agreed to pay a fraction of their value to buy the BTA shares and ultimately paid nothing at all for their acquisition: the consideration was covered by a loan of which neither the capital nor the interest was ever paid*."[92]

In this case, both the purchaser (the Claimant) as well as the sellers of the shares (incorporated in the British Virgin Islands) were companies beneficially owned by a Kazakh national, Mr. Ablyazov. The Tribunal concluded that the Claimant was seeking credit for Mr. Ablyazov's initial contribution. In its view, the Claimant "*had made no contribution with respect to its alleged investment, nor was there any evidence on record that it had the intention or the ability to do so in the future*."[93] As a result, the Tribunal considered that the Claimant had not demonstrated the existence of an investment under the ICSID Convention or under the BIT.[94]

VI. Innovative Approach: Investment Requires an Active Investor

Mere holding of an investment made by someone else does not warrant protection in the opinion of some tribunals. It should be emphasized that tribunals are interpreting different texts and applying

---

88 *Ibid.*

89 Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplun v. Plurinational State of Bolivia, ICSID Case No. ARB/06/2, Decision on Jurisdiction, ¶ 232 (Sept. 27, 2012).

90 *Ibid.*

91 *Id.* 233.

92 KT Asia Investment Group B.V. v. Republic of Kazakhstan, ICSID Case No. ARB/09/8, Award, ¶ 203 (Oct. 17, 2013).

93 *Id.* ¶¶ 205-06.

94 KT Asia v. Kazakhstan was relied on by the Tribunal in Anglo-Adriatic Group Limited v. Republic of Albania, ICSID Case No. ARB/17/6, Award, ¶ 246 (Feb. 7, 2019), – which is another case where the Claimant could not prove that it has paid any consideration for the purported acquisition of shares in the host state company.

them to different facts. The differences in treaty language and the circumstances of each case cause different decisions on the existence of an investment. In one BIT, an investment may be defined as an asset owned or controlled by an investor, whereas in the other, the definition of investment may imply an activity. It may require the making of an investment, for example.

There are several cases in which the tribunals took a view, based on the text of the relevant treaties, that the claimant must prove its own active involvement in making the investment. The claimant must show that it had made an active contribution. Otherwise, the tribunal has no jurisdiction to decide upon the breaches of the BIT. Those arbitrators focused on the treaty language that required investment "*of an investor*" or "*made by an investor*" which, in their opinion, excluded passive investments. Already, in *Toto* v. *Lebanon*, the Tribunal observed that the concept of an investment "*implies an economical operation initiated and conducted by an entrepreneur using its own financial means and at its own financial risk, with the objective of making a profit within a given period of time.*"[95]

The requirement of active investment is similar to the requirement of sufficient contribution, but it is formulated in slightly different terms. It also starts from the assumption that ownership of assets is not enough in itself, but focuses on the *activity* of the owner, which is a broader term than contributing/committing capital. The owner of an asset in the territory of the respondent State is required to have been the active subject in the process of investing.[96]

The cases where investor activity was sought as a requirement will be discussed first, followed by an overview of awards where the distinction between active and passive investors was commented upon.

The invention of the requirement of "*active investment*" may be attributed to William (Rusty) Park, professor of law at Boston University and a distinguished and highly experienced arbitrator. Professor Park was appointed by the Chairman of the Administrative Council of ICSID to act as president of the Tribunal in the case of *Alapli Elektrik* initiated in 2008. Professor Park also presided over the arbitration initiated by Standard Chartered Bank against Tanzania in 2010 ["**Standard Chartered Bank**"].[97] In 2012, awards in both cases were dispatched to the parties; both of them denying jurisdiction based on the requirement of an active investor. However, in *Alapli Elektrik*, Professor Park remained alone in his conviction that the absence of active contribution was the reason why jurisdiction should be denied. His co-arbitrators were of different views. Professor Brigitte Stern agreed with him that there was no jurisdiction, but for different reasons,[98] while Marc Lalonde dissented. The split in majority views later led to a request for annulment of the *Alapli Elektrik* award. In *Standard Chartered Bank*, Professor Park achieved unanimity with Barton Legum and Professor Michael Pryles, both of whom shared his ideas on the need for an investor's active contribution.

---

95 Toto Costruzioni Generali S.p.A. v. The Republic of Lebanon, ICSID Case No. ARB/07/12, Decision on Jurisdiction, ¶ 84 (Sept. 11, 2009). The award was relied on in Alapli v. Turkey, together with Salini v. Morocco. *See* Alapli Elektrik B.V. v. Republic of Turkey, ICSID Case No. ARB/08/13, Excerpts of Award, ¶¶ 382, 384 (July 16, 2012).

96 Clorox Spain S.L. v. Bolivarian Republic of Venezuela, PCA Case No. 2015-30, Award, ¶ 802 (Perm. Ct. Arb., May 20, 2019).

97 Standard Chartered Bank v. The United Republic of Tanzania, ICSID Case No. ARB/10/12, Award (Nov. 2, 2012).

98 Alapli Elektrik B.V., ICSID Case No. ARB/08/13, Excerpts of Award, ¶¶ 312-313 (July 16, 2012).

A. Alapli Elektrik v. Turkey

Alapli Elektrik was an ICSID case initiated by a Dutch company on the basis of the Netherlands-Turkey BIT and the ECT. Jurisdiction was declined because the Claimant had "*no meaningful role contributing to the relevant host state project, whether by way of money, concession rights or technology*."[99] The case was described by the Tribunal as follows:

> "*A Turkish national, backed by an American multinational, seeing a dispute looming with his own government, established a Dutch entity which is claiming treaty protection for a proposed combined cycle power plant. The entirety of the financial contribution and technological know-how came from American backers, the GE Group, which advanced monies to realize an opportunity to provide equipment and services, taking all risk of loss if the Project never came to fruition. The Concession Contract, by which the host country agreed in principle to the Project's terms, was awarded to a Turkish company, Atam Elektrik.*"[100]

Arbitrator Park concluded that the Dutch company failed to contribute to the project.[101] All contributions to the project came from someone other than the Claimant. The capital and technology came from the American backers. Negotiations were conducted by the Turkish sponsors. The Concession Contract was obtained by a Turkish company. The requirement of an active investor was conceptualized in this award in the following terms:

> "*To be an investor a person must actually make an investment, in the sense of an active contribution. Status as a national of the other contracting state is not in itself enough. The Dutch entity […] has not demonstrated that it actually made any investment in Turkey, in the sense of a meaningful contribution to Turkey. To the extent that contributions were made, they came from nationals or companies of the United States and Turkey.*"[102]
>
> (emphasis added)

For Professor Park, the Claimant "*simply lacked the status of an investor, for want of any contribution to the Alapli Project*".[103] Professor Park referred to Oxford, Webster, and *Le grand* Robert dictionaries for the definition of investor, but also asserted that the foundational concept of active contribution was set forth in both, the Netherlands-Turkey BIT (1986) and the ECT. He found support for the concept in the words "*the flow of capital and technology*" (which must run as between the Contracting Parties) written in the preamble of the Netherlands-Turkey BIT and in the verb "*make*" that was used in Article 10(1) of the ECT.[104] Further support was found in the wording of both treaties that included the term "*of*" (i.e. investment "*of*" an investor).[105] According to Professor Park, on the basis of this word, "*the investor is assumed to be an entity which has engaged in the activity of investing in the form of making a contribution*" to the

99 Alapli Elektrik B.V., ICSID Case No. ARB/08/13, Excerpts of Award, ¶ 389 (July 16, 2012).
100 *Id.* ¶ 311. *See also* Alapli Elektrik B.V., ICSID Case No. ARB/08/13, Decision on Annulment, ¶ 162 (July 10, 2014), where the names of Turkish and American companies have been disclosed.
101 Alapli Elektrik B.V., ICSID Case No. ARB/08/13, Excerpts of Award, ¶ 337 *et seq.* (July 16, 2012).
102 *Id.* ¶ 350.
103 *Id.* ¶ 315.
104 *Id.* ¶¶ 352-54.
105 *Id.* ¶¶ 355-60.

host state, "*permitting characterization of that contribution as an investment 'of' the investor*".[106] This activity of investing is juxtaposed with "*the abstract existence of some piece of property, whether stock or otherwise.*"[107] Consequently, Atam Alapli (the Second Project Company) was not an investment "*of*" the Claimant because the Claimant did not engage in any activity of investing , it did not make any significant contribution to the Project.[108]

In the opinion of Professor Brigitte Stern, the fact that a Dutch company owned the shares of a Turkish company, was sufficient to consider that there was an investment, if not for the fact that this company was introduced into the investment chain at the time when important disagreements between the Turkish company and the Turkish authorities had already occurred. The introduction of the Dutch company at that particular time represented an abuse of the system of international investment protection.[109] According to Professor Stern, the Claimant had acquired the investment "*for the sole purpose of manufacturing international jurisdiction, at a time when the project was already in great difficulty and the facts that are at the root of the dispute with Turkey were already known to the Sponsors of the Project.*"[110]

The third, dissenting arbitrator was convinced that the Claimant had made a qualifying investment in Turkey. The Claimant had equity capital of U.S. $60,800, which it invested to acquire 50% equity in a Turkish company that detained valuable rights in the form of a concession contract. In the opinion of the dissenting arbitrator, the origin of the capital invested by the Claimant did not matter: "*whether Claimant has obtained its equity money through a bank loan, a lottery win, a gift from a benevolent friend or found it on the street, is totally irrelevant.*"[111]

The Claimant submitted a request for annulment of the *Alapli Elektrik* award, which was rejected in 2014.[112] Bernard Hanotiau was presiding over the Ad Hoc Committee. Perhaps the views of Professor Park had influenced him, as he was to take a stand that the Claimant was not an active investor in the *Clorox* case, initiated in 2015, where he was one of the co-arbitrators.

B. Standard Chartered Bank v. Tanzania

Jurisdiction was also denied in *Standard Chartered Bank* because the Claimant was unable to demonstrate its active participation in the investing process.[113] The case involved loans that had initially been granted by a consortium of Malaysian banks to a Tanzanian borrower, but were purchased in 2005 by a Hong Kong company, Standard Chartered Bank (Hong Kong) Limited ["**SCB HK**"].[114] The

106 *Id.* ¶358.
107 *Id.* ¶ 360.
108 Alapli Elektrik B.V., ICSID Case No. ARB/08/13, Decision on Annulment, ¶ 250 (July 10, 2014), citing Alapli v. Turkey, ICSID Case No. ARB/08/13, Excerpts of Award, ¶¶ 338-349, 362-380 (July 16, 2012).
109 *Id.* ¶390.
110 *Id.* ¶416.
111 Alapli Elektrik B.V., ICSID Case No. ARB/08/13, Dissenting Opinion of Marc Lalonde, ¶¶ 12-13 (July 12, 2012), *citing* Saipem S.p.A. v. Bangladesh, ICSID Case No. ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures, ¶ 106 (Jan. 19, 2007).
112 Alapli Elektrik B.V., ICSID Case No. ARB/08/13, Decision on Annulment (July 10, 2014).
113 Standard Chartered Bank v. The United Republic of Tanzania, ICSID Case No. ARB/10/12, Award (Nov. 2, 2012).
114 *Id.* ¶ 196.

Claimant, Standard Chartered Bank ["**SCB**"], was a United Kingdom-based company that owned and controlled the purchaser, SCB HK. The Tribunal had to determine whether "*the loans were investments 'of' [the] Claimant"* within the meaning of the U.K.-Tanzania BIT (1994)."[115] It should be remembered that it was established in the previous ICSID practice that loans could be qualified as investments.[116]

The U.K.-Tanzania BIT in Article 8(1) granted the tribunal jurisdiction over a dispute "*arising between that Contracting Party and a national or company of the other Contracting Party concerning an investment of the latter in the territory of the former.*"[117] The Claimant's argument was that the phrase "*investment of*" in Article 8(1) should be broadly interpreted to cover both directly and indirectly held investment.[118] The Claimant argued that it indirectly held/owned the loans provided to the Tanzanian company by virtue of its ownership and control over an intermediate company, SCB HK.[119]

The Respondent State argued that the expression "*investment of*" must be interpreted to require "*something more than indirect ownership*" and "*more than passive ownership*". According to the Respondent, the term "*investment*" implied some "*contribution, flow of funds or 'involvement.*"'[120]

In the section of the Award entitled "*Requirement of Investor's Active Contribution*"[121], the Tribunal noted that the U.K.-Tanzania BIT used two principal prepositions to connect investor and investment: "*of*" and "*by*" but no verb was associated with these prepositions that would allow to interpret a necessity of active relationship between the investor and the investment.[122]

Other provisions of the treaty, however, used the verb "*made*" (e.g. Article 1(a) referred to "*territory of the Contracting State in which the investment is made*").[123] According to the Tribunal, "*made*" was a verb that denoted an action and not just passive ownership.[124] A U.K.-based company did not obtain the status of an investor under the U.K.-Tanzania BIT simply by acquiring shares of a Hong Kong company that held a debt by a Tanzanian debtor. [125] The U.K.-Tanzania BIT did not define investment with the verbs "*own*" or "*hold*" but with the verb "made".[126] Also, Article 2 of the BIT contained the verb "*to invest*", which reinforced the interpretation that "*an active relationship between investor and investment.*" was required[127] The Tribunal interpreted the BIT:

---

115 *Id.* ¶ 197.

116 *See* Fedax, ICSID Case No. ARB/96/3, Decision of the Tribunal on Objections to Jurisdiction, ¶¶ 22, 29 (July 11, 1997). CSOB v. Slovak Republic, ICSID Case No. ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction, ¶ 91 (May 24, 1999).

117 Agreement between the United Kingdom of Great Britain and Northern Ireland and the Government of the United Republic of Tanzania for the Promotion and Protection of Investments, Aug. 2, 1996, art. 8(1).

118 Standard Chartered Bank v. The United Republic of Tanzania*,* ICSID Case No. ARB/10/12, Award, ¶ 139 (Nov. 2, 2012).

119 Id. ¶ 209.

120 *Id.* ¶¶ 210-11.

121 *Id.* ¶¶ 206–256.

122 *Id.* ¶ 221.

123 *Id.* ¶ 222.

124 *Id.*

125 *Id.* ¶ 200.

126 *Id.* ¶ 223.

127 *Id.* ¶ 229.

> "*230 […] to require an active relationship between the investor and the investment. To benefit from Article 8(1)'s arbitration provision, a claimant must demonstrate that the investment was made at the claimant's direction, that the claimant funded the investment or that the claimant controlled the investment in an active and direct manner. Passive ownership of shares in a company not controlled by the claimant where that company in turn owns the investment is not sufficient.*
>
> *231. The Tribunal is not persuaded that an "investment of" a company or an individual implies only the abstract possession of shares in a company that holds title to some piece of property.*
>
> *232. Rather, for an investment to be "of" an investor […], some activity of investing is needed, which implicates the claimant's control over the investment or an action of transferring something of value (money, know-how, contacts, or expertise) from one treaty-country to the other".*

Thus, the Tribunal *"concluded that protection of the UK-Tanzania BIT requires an investment made by, not simply held by, an investor. To be considered to have made an investment, SCB must have contributed actively to the investment.*"[128]

Applying the BIT to facts of the case, the Tribunal found no action by the Claimant contributing to the loans or to the power facility that was at the origin of the arbitration. The activity of purchasing the loans, which qualified as a relevant investment, was done by SCB HK alone, absent of any direction or control by the Claimant.[129] It was established that the Claimant had no involvement in the purchasing of the loans.[130]

The Tribunal stressed the importance of the reciprocal nature of the treaty. It "*would be unreasonable to interpret the BIT to permit a UK national with subsidiaries all around the world to claim entitlement to the UK-Tanzania BIT protection for each and every one of the investments around the world held by these daughter or granddaughter entities.*"[131]

C. Clorox Spain S.L. v. Venezuela

The latest in line of cases requiring some action from the Claimant is *Clorox*,[132] a Spain-Venezuela BIT case over the closing of manufacturing facilities of Clorox Venezuela in 2014, allegedly as a result of government measures, including price freezes on its products that accounted for 74% of its sales.[133] A U.S. entity in the Clorox group had established the Venezuelan subsidiary in the 1990s. In 2011, the shares in the Venezuelan subsidiary were transferred to Clorox Spain by its parent company as part of a corporate restructuring.[134]

---

128 *Id.* ¶ 257.

129 *Id.* ¶¶ 200, 260.

130 *Id.* ¶¶ 261. *See also* ¶ 197 ("No evidence presented in this arbitration demonstrates that Claimant took actions concerning the Tanzanian Loans that would confer the status of investor pursuant to the UK-Tanzania BIT.").

131 *Id.* ¶ 270.

132 Clorox Spain S.L. v. Bolivarian Republic of Venezuela, PCA Case No. 2015-30, Award (Perm. Ct. Arb., May 20, 2019). The language of the case was Spanish, and the arbitration was administered by the PCA. The award was published in Spanish only. The description of the case by the author is based on English and French reports of the case.

133 Sebastian Perry, *Clorox revives Claim against Venezuela*, GLOBAL ARB. REV., (May 29, 2020), *available at* https://globalarbitrationreview.com/article/1227355/clorox-revives-claim-against-venezuela.

134 *Id.* The date on which the transfer occurred was disputed between the parties.

The Respondent objected to jurisdiction on two grounds: on the one hand, the Respondent denied that Clorox Spain shareholding in Clorox Venezuela qualified as a protected investment (objection *ratione materiae*); on the other hand, it denied Clorox Spain had the status of an investor (objection *ratione personae*).[135] The Tribunal noted that those two objections were interdependent; they were "*two sides of the same coin*."[136]

The Spain-Venezuela BIT defined investments in the following manner in Article I(2):

> "*"Investments" means all types of assets, invested by investors of one Contracting Party in the territory of the other contracting party, and in particular, although not exclusively, the following:*
>
> (a) *shares securities, bonds and any other form of participation in companies*."

The Respondent argued that the phrase "*invested by investors of a Contracting Party*" suggested that a Spanish investor had to undertake an action of investing in Venezuelan territory.[137] Mere holding of assets or shares in a local company by a natural or legal entity of the contracting party was excluded from the scope of this definition if the action of investing had not been carried out by that entity.[138] Clorox Spain had made no contribution, and it had done "*nothing more than swap shares issued by it against shares in Clorox Venezuela S.A.*"[139] It was a shell company that had no other activity than holding shares in Clorox Venezuela.[140]

The Claimant, in turn, stressed that the BIT definition of an investor did not require an active contribution, and that in any case, Clorox Spain was involved in the management of Clorox Venezuela.[141] The Claimant also insisted on the fact that it had acquired 100% of the shares of Clorox Venezuela and had thereby met the definition of a protected investor.[142]

In May 2019, the Tribunal dismissed the case for lack of jurisdiction since the Claimant, Clorox Spain, had not made any action of investing. The Tribunal accepted that Clorox Spain was the owner of an investment in Venezuela and was thus prima facie eligible for protection under the BIT.[143] However, the Spain-Venezuela BIT limits protection to assets "*invested by investors.*"[144] The Tribunal believed that this required an action of investing by the Spanish investor.[145]

---

135 Clorox Spain S.L. v. Bolivarian Republic of Venezuela, PCA Case No. 2015-30, Award, ¶ 786 (Perm. Ct. Arb., May 20, 2019).
136 *Id.* ¶ 787.
137 *Id.* ¶ 788.
138 *Id.* ¶ 789.
139 *Id.* ¶ 790.
140 *Id.* ¶ 791.
141 *Id.* ¶ 792.
142 *Id.* ¶¶ 793-94.
143 *Id.* ¶¶ 794, 800.
144 *Id.* ¶800.
145 *Id.* ¶802.

The *Clorox* tribunal phrased the issue it needed to resolve in the following manner:

> "*The only issue that needs to be discussed in order to resolve the Respondent's objection is whether [Clorox Spain] made the investment it owns*." [146]

Therefore, the Tribunal centred on the relationship between the Spanish Claimant and the object of the alleged investment, the shares in Clorox Venezuela.[147] Without expressly referring to *Romak v. Uzbekistan*, the *Clorox* tribunal reiterated that "*an asset or right that is listed in a treaty does not necessarily constitute an investment protected by the Treaty by the mere fact that it is listed therein*."[148] Citing *Quiborax v. Argentina* (sic!), the Tribunal acknowledged the distinction between objects of an investment and the action of investing.[149] The holding of shares must result from an action of investing by the Claimant.[150]

In the present case, the Claimant was a subsidiary of the original investor. "[*T*]*he source of the capital, and know-how invested in Venezuela was Clorox Company and/or the Clorox International Company, two U.S. companies not protected by the Treaty*."[151] According to the Tribunal, the shares of Clorox Venezuela had been transferred to the Claimant (Clorox Spain) for no consideration (i.e. without payment) through a share swap.[152] The Tribunal did not accept the Claimant's argument that the counter-performance it provided for acquiring the shares was the delivery of its own shares to its parent company.[153] The acquisition of the shares by the Claimant must have been the result of a transfer of value, which was missing in this case.[154] But there was also a possibility that *Clorox Spain* invested in shares of Clorox Venezuela subsequent to the transfer of shares.[155] After examining that possibility, the Tribunal concluded that the Claimant had not invested in Clorox Venezuela:[156]

> "*While it has asserted that Clorox Venezuela had facilities, employees and activity, it has not proven that Clorox Spain contributed to or invested in such assets of Clorox Venezuela…*"[157]

Consequently, the Claimant did not *have* an investment protected by the BIT.[158] Emphasis is added on the word "*have*" used by the Tribunal in the cited paragraph, which usually denotes ownership. After establishing that the Claimant had not invested in Clorox Venezuela, the Tribunal concluded that the Claimant did not have (own) a protected investment.

---

146 *Id.* ¶ 794.
147 *Id.* ¶ 798.
148 *Id.* ¶ 807.
149 *Id.* ¶ 808.
150 *Id.* ¶ 815.
151 *Id.* ¶ 817.
152 Sebastian Perry, *supra* note 104.
153 Clorox Spain S.L. v. Bolivarian Republic of Venezuela, PCA Case No. 2015-30, Award, ¶ 830-831 (Perm. Ct. Arb., May 20, 2019).
154 *Id.* ¶¶ 824, 830.
155 *Id.* ¶ 818.
156 *Id.* ¶ 834.
157 *Ibid.*
158 *Id.* ¶ 835.

VII. Reception of the Requirement

The respondent States seem to have seized the opportunity to use the "*active investor*" requirement as new ammunition in their defences against the jurisdiction of investment tribunals. However, this argument mostly missed the mark. The commentators have already identified some cases where the "*active investor*" requirement was rejected.[159]

Thus, active role of the claimant as a requirement from *Standard Chartered Bank* was rejected in *Flemingo v. Poland*[160] on the basis of the wording of the India-Poland BIT (1996). The treaty provided for protection not only of investments that were "*established*", but also of investments "*acquired*" by the investor.[161] The majority in this case concluded that the indirect acquisition of shares in an existing company through a transaction operated outside of Poland constituted a protected investment under the BIT.[162] The majority cited *Saluka Investments* in support of the holding that it is not necessary for the claimant to actively operate the investment.[163]

In the *Garanti Koza* v. *Turkmenistan* award,[164] the Respondent's argument – based on *Standard Chartered Bank* – was rejected once again. The Respondent argued that to meet the definition of investment in the UK-Kazakhstan BIT, an investment must have been "*actually made*"[165] and "*actively made*" by the Claimant;[166] rather than being a situation of "*simple passive ownership*".[167] The Tribunal found that there was nothing in the BIT that would lead it to read in such a requirement.[168] Nevertheless, the Tribunal went through the exercise of verifying that Garanti Koza's investment was actively made and not merely held by a passive investor. The Tribunal established that Garanti Koza's did engage in investment activity in Turkmenistan. It negotiated a contract to build bridges in Turkmenistan, transferred resources required for performance of its contractual obligations into the country, and actually designed and built a number of highway bridges.[169] "[*I*]*t was not a mere passive investor*."[170]

In the same vein, the Tribunal in *Ampal-American Israel* v. *Egypt* refused "*to read into the Treaty restrictions such as those advanced by the Respondent to the effect that 'passive, indirect and very small' holdings cannot enjoy any protection under the Egypt-US BIT*."[171]

---

159 Jarrod Hepburn & Lisa Bohmer, *supra* note 1.
160 Flemingo DutyFree Shop Private Limited v. Republic of Poland, Award (Perm. Ct. Arb., Aug. 12, 2016).
161 *Id.* ¶¶ 306, 322, 324.
162 *Id.* ¶ 308. Jarrod Hepburn and Lisa Bohmer, *supra* note 1, at 2.
163 Flemingo DutyFree Shop Private Limited v. Republic of Poland, Award, ¶ 340 (Perm. Ct. Arb., Aug. 12, 2016).
164 Garanti Koza LLP v. Turkmenistan, ICSID Case No. ARB/11/20, Award (Dec. 19, 2016).
165 *Id.* ¶ 169.
166 *Id.* ¶¶ 169, 171.
167 *Id.* ¶ 231.
168 *Id.* ¶¶ 229-31.
169 *Id.* ¶ 232.
170 *Id.* ¶ 233.
171 Ampal-American Israel Corporation and others v. Arab Republic of Egypt, ICSID Case No. ARB/12/11, Decision on jurisdiction, ¶ 343 (Feb. 1, 2016).

Likewise, in *Kim* v. *Uzbekistan*, the Tribunal found that the BIT in question did not contain a distinction between active and passive investors, and did not require investors to be active.[172] Even if there was such a requirement, the Tribunal confirmed that the Claimants had an active role in the investment. The Tribunal distinguished *Standard Chartered Bank* on the basis that the claimants in *Kim* v. *Uzbekistan* had undertaken not just to hold financial interests in the local plants, but also to manage and develop those plants. It also distinguished *Alapli Elektrik* on the basis of the timing of the acquisition of shares.[173] Respondent's argument that investment arrangements depended on credit facilities for their financing and were not "*investments*" was also rejected.[174]

In *Eiser* v. *Spain*,[175] the Respondent objected that the funds that were invested in the solar plants were derived from the Claimant's limited partners in the investment fund, and were not the Claimant's own funds. This objection was rejected by the Tribunal on the basis that the origins of capital invested by an investor in an investment are not relevant for the purposes of determining jurisdiction.[176]

In *South American Silver* v. *Bolivia*, the Tribunal was split over this issue. While the majority considered that the indirect shareholding by the Claimant company was an investment protected by the treaty,[177] the dissenting arbitrator opined that an active involvement of the investor in the investment was needed, referring to *Caratube* and *Standard Chartered Bank* as authorities.[178] The majority distinguished the latter case on the basis of treaty language – the UK-Bolivia treaty in question did not contain the term "*made*" – and on the basis of control. As regards control, the Tribunal noted that the Claimant in *Standard Chartered Bank* did not acquire the controlling interest in the Tanzanian company, whereas South American Silver was the 100% owner of the shares of the three companies incorporated in the Bahamas, which were the owners of the company in Bolivia, the holder of the mining concessions.[179] The majority did not find that the word "*of*" figuring in Article 8(1) of the U.K.-Bolivia BIT implies direct property or excludes indirect investments.[180]

The Respondent asserted that if indirect investments were protected, the Tribunal had to consider that the Claimant's parent company was the investor. The Canadian parent company was the one who provided the funds, resources, and technologies for the mining operations, made the strategic decisions, and concluded the consulting contracts.[181] In other words, the Canadian company was the

---

172 Vladislav Kim and others v. Republic of Uzbekistan, ICSID Case No. ARB/13/6, Decision on Jurisdiction, ¶ 312 (March 8, 2017).

173 *Id.* ¶ 313.

174 *Id.* ¶¶ 334-35.

175 Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain, ICSID Case No. ARB/13/36, Final Award (May 4, 2017).

176 *Id.* ¶ 228, *citing* Tokios Tokelés, ICSID Case No. ARB/02/18, Decision on Jurisdiction, ¶¶ 77, 80 (April 29, 2004). *See also* Jarrod Hepburn and Lisa Bohmer, *supra* note 1.

177 South American Silver Limited v. Bolivia*,* PCA Case No. 2013-15, Award, ¶¶ 309-310 (Perm Ct. Arb. Aug. 30, 2018).

178 South American Silver Limited (Bermuda) v. The Plurinational State of Bolivia, PCA Case No. 2013-15, Dissenting Opinion of Osvaldo Cesar Guglielmino, ¶ 86 *et seq.* (Nov. 22, 2018).

179 *Id.* ¶ 331.

180 *Id.* ¶ 306.

181 *Id.* ¶ 313-14.

actual investor. The majority rejected this argument stating that jurisdiction did not depend on the origin of the capital:[182]

> "*Bolivia is asking the Tribunal to disregard the protected investment - SAS' indirect ownership of CMMK's shares and CMMK's ownership of the Mining Concessions - by analyzing who contributed the resources to the Project, an economic test that is not provided for anywhere in the Treaty*."[183]

In a dissenting opinion, Mr Osvaldo Cesar Guglielmino concluded that the Claimant, "*a shell company with negligible capital and a nominal and passive shareholding*", was not a protected investor under the treaty because, among other reasons, all it did was accept the shareholding in certain companies, which, in turn, had the shares of the Bolivian company holding the mining concessions; The Claimant had no active involvement in making the investment.[184] Its parent company, a Canadian company, which was not a party to the arbitration, had performed all of the relevant management and control activities with regard to the purported investment;[185] and the terms of the treaty did not afford protection to a purported investor who had a passive, nominal relationship with the purported investment, but only to an investor who was actively involved in the making of the investment.[186] He found that the rules of interpretation embodied in Article 31 of the Vienna Convention on the Law of Treaties ["**VCLT**"] lead to the conclusion that the the U.K.-Bolivia BIT does not afford protection to investments made by companies of third-party countries even if those investments are made through special purpose vehicles that are incorporated in one of the contracting parties.[187]

In *Theodoros Adamakopoulos* v. *Cyprus*, the dissenting arbitrator observed in the passing that the Cyprus-Greece BIT referred to investments "*made*" by investors of the other party, not simply "*held*" by them.[188] The sentence resembles the one from *Standard Chartered Bank*, although there was no citation to that case or to the "*active investor*" requirement. The observation was made in the context of opposing the majority's recognition of indirect investments.[189]

Several cases initiated by investors in solar power plants in the Czech Republic decided by the same arbitral tribunal in awards issued on the same date, acknowledged the interpretation of the verb "*made*" in *Standard Chartered Bank*, but distinguished Article 1(6) of the ECT from Article I(a) of the U.K.-Tanzania BIT on the basis that it does not contain the verb "*made*" and expressly provides for indirect

182 *Id.* ¶ 322.
183 *Id.* ¶ 334.
184 *Id.* 117.
185 *Id.* 74.
186 *Id.* ¶¶, 85.
187 *Id.* ¶¶ 148.
188 Theodoros Adamakopoulos v. Republic of Cyprus, ICSID Case No. ARB/15/49, Statement of Dissent of Professor Marcelo Kohen, ¶ 74 (Feb. 3, 2020).
189 *See also* Sergei Viktorovich Pugachev v. the Russian Federation, Award on Jurisdiction, ¶¶413-418 (18 June 2020), where the Tribunal held that the terms "made" and "held" do not have the same meaning, that the investment must be made by way of transfer of capital or the exchange of leading-edge technologies between the two States, and that the investment is made when the investor acquires any of the assets and rights listed in Article 1 of the BIT and a transfer of capital takes place.

control. The Tribunal also added a remark regarding the irrelevance of the origin of capital for assessing the degree of the investor's involvement:

> "*In any case, if a requirement as to the degree of involvement of the investor in the making of an investment were applicable, such requirement would not have any bearing upon the origin of the funds applied by the investors.*"[190]

The Russian Federation unsuccessfully invoked the requirement of "*active investor*" before The Hague Court of Appeal in the annulment action of the *Yukos* investment awards:

> "*5.1.9.1. The Russian Federation is of the opinion that it follows from various ECT provisions that a foreign investor must actively make an investment within the territory of a Contracting State. It refers, inter alia, to words 'the investor making an investment' and 'the investment is made'. It follows from this that there is only an investment within the meaning of the ECT if an investor contributes funds of foreign origin to the territory of a contracting state, or at least makes an economic contribution to the host state.*"[191]
>
> (emphasis in the original, references omitted)

The latest blow to the requirement of an active investor came from the judicial bench. On March 25, 2020, the Swiss Federal Tribunal in Lausanne set aside the UNCITRAL award that had declined jurisdiction in *Clorox*, assessing that the Tribunal had applied conditions not contained in the BIT, when it found that the Claimant had not made an "*active act of investment*" in Venezuela. According to the Swiss Federal Tribunal, it was sufficient under the BIT that an investor from one contracting State possessed assets in the territory of the other contracting State.[192]

The Swiss Federal Tribunal remanded the case to the arbitral Tribunal to address whether the transfer of the investment to the U.S. group's Spanish subsidiary (Clorox Spain) amounted to an abuse of rights, because Clorox U.S. had allegedly restructured the investment when the dispute was already foreseeable, with the purpose of bringing a claim under the BIT.[193]

In contrast, the concept of an active investor was accepted by the English High Court in the judgment deciding an application of Venezuela to set aside an order enforcing the award in *Gold Reserve* v. *Bolivarian Republic of Venezuela* ["**Gold Reserve**"].[194] The Court interpreted the wording of the Canada-

---

190 WA Investments-Europa Nova Limited v. Czech Republic, PCA Case No. 2014-19, Award, ¶ 269 (May 15, 2019). I.C.W. Europe Investments Limited v. Czech Republic, PCA Case No. 2014-22, Award, ¶ 214 (May 15, 2019); Voltaic Network GmbH v. Czech Republic, PCA Case No. 2014-20, Award, ¶ 206 (May 15, 2019).

191 Yukos Universal Limited (Isle of Man), Hague Ct. of Appeals Case No. 200.197.079/01, PCA Case No. 2005-04/AA227), Judgment of the Hague Court of Appeal (Unofficial English Translation), ¶ 5.1.9.1 (Perm. Ct. Arb., Feb. 18, 2020).

192 Tribunal Fédéral 4a_306/2019, Ruling of Mar. 25, 2020, ¶ 3.4.2.7.

193 *Id.* ¶ 3.4.2.8. *See* Sebastian Perry, *supra* note 104, at 4.

194 *See* Gold Reserve Inc. v. The Bolivarian Republic of Venezuela, [2016] EWHC 153 (Comm) (Eng.). However, in subsequent decisions, the English High Court distanced itself from the concept of active investor. First, in PAO Tatneft v. Ukraine, [2018] EWHC 1797 (Comm), ¶¶67-81 the Court rejected the argument that there must be an active relationship between the investor and the investment. The Court distinguished the holding from Gold Reserve on the grounds that it was dealing with the definition of "investor" rather than "investment", and that the wording of the Canada-Venezuela BIT was different than the wording of the Russia-Ukraine BIT. Nevertheless, the Court observed that even if there had to be an active relationship of this kind, Tatneft would have satisfied the requirement because it expended significant sums to acquire the shareholding in the US and Swiss companies which controlled the Ukrainian oil company. The same court

Venezuela BIT, which defined "*the investor*" as "*any enterprise incorporated or duly constituted in accordance with applicable laws of Canada, who makes the investment in the territory of Venezuela and who does not possess the citizenship of Venezuela*."[195] The arbitration concerned mining concessions and mining rights in Venezuela (the Brisas project) granted in 1988 to a Venezuelan company, which became a subsidiary of an American company in 1992.[196] Subsequently, the American company established Gold Reserve Inc. ["**GRI**'], a Canadian company, which the Respondent characterised as a "*shell company*".[197] GRI became the indirect owner of assets in Venezuela through corporate restructuring, which took place in 1998 through a share swap between the shareholders of the American parent and the shareholders of the Canadian subsidiary, with no capital expenditure. The corporate restructuring transaction was completed outside Venezuela and involved no transfer of capital into its territory.[198] The Canada-Venezuela BIT (1996) expressly recognized that an "*investment*" may be "*owned or controlled by an investor of one Contracting Party either directly or indirectly*".[199] However, relying on the definition of an investor from the BIT, Venezuela argued in the rejoinder that the making of an investment requires a "*contribution in economic terms*", and at the hearing that "*the ordinary meaning of the phrase 'who makes the investment in the territory' would appear to be one who positively and personally acts and effects the movement of capital or some other economic contribution - know-how, for example - into the territory of Venezuela*."[200] The Tribunal brushed off this argument, which was made rather late in the proceedings, stating that:

> "*Even if this were so, Respondent has previously acknowledged[…]that post-1999 the majority of funding came from Claimant. [...] Respondent had attempted to belittle this contribution as amounting to no more than a 'fund-raiser', and yet provision of funds (or 'capital') seems to be the crux of its definition of making an investment. [...] Claimant has stated that one of the reasons for incorporating the Canadian entity was to raise funds in Canada for its mining activities in Venezuela and most of the US$ 300 million invested in the so-called Brisas Project came through Canadian investors*."[201]

It is not stated in the *Gold Reserve* award whether the Respondent relied on *Alapli Elektrik* or *Standard Chartered Bank* in the arbitration.[202] However, in the annulment proceedings before the English High Court, Venezuela developed this argument and relied on both awards (as well as *KT Asia*).[203] The English High Court's interpretation of the words "*who makes the investment in the territory of Venezuela*" was receptive to the active investor argument, although the Court ultimately accepted the reasoning of the Tribunal regarding the Claimant's contribution. The Court noted that the term "*investment*" had

---

further rejected the *Romak* reasoning relied on by Korea as unpersuasive in the Republic of Korea v. Mohammad Reza Dayyani et alt. [2019] EWHC 3580 (Comm), ¶¶ 57-62, stating that the phrase "invested by" from Article 1 of the Korea-Iran BIT could not be interpreted to require an active commitment of resources by the investor.

195 Agreement between the Government of Canada and the Government of the Republic of Venezuela for the Promotion and Protection of Investments, June 25, 1982, Art. 1, cited in: *Id.*, ¶ 15.

196 Gold Reserve Inc. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB(AF)/09/1, Award, ¶¶ 3,11.

197 *Id.* ¶251.

198 Gold Reserve Inc. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB(AF)/09/1, Award, ¶ 256 (Sept. 22, 2014).

199 Agreement Between the Government of Canada and the Government of the Republic of Venezuela for the Promotion and Protection of Investments, Jan. 28, 1998, art. I(f).

200 *Id.* ¶ 271.

201 *Ibid.*

202 Clorox Spain S.L. v. Venezuela was initiated only after Gold Reserve v. Venezuela had been decided.

203 Gold Reserve Inc. v. The Bolivarian Republic of Venezuela, [2016] EWHC 153 (Comm), ¶ 29.

two distinct meanings in ordinary language –one was "*the contribution of resources to acquire an asset*", and the other "*the asset which was acquired by the act of investing.*"[204] Article 1 of the BIT relied on the second meaning and defined the "*investment*" as an asset.[205] However, the Courtcontinued, incorporating this definition into the definition of the "*investor*" contained in the same Article, i.e. defining an investor as the person "*who makes assets*" did not make sense. This could not have have been the intention of the parties.[206] The term "*makes the investment*" had to be construed in accordance with its ordinary meaning, which, according to the Court, includes "*the exchange of resources, usually capital resources, in return for an interest in an asset.*"[207] But, the Court remarked, "*the fact that a person has acquired an asset does not necessarily indicate that he has made an investment in that asset*."[208] The Court then referred to *Standard Chartered Bank*:

> "*The present relevance of the case is the light it casts on what is required in order for a person to make an investment. Mere passive ownership of an asset is insufficient. What is required is an active relationship between the investor and the investment. I agree that in the context of the BIT in this case a person can only be one who "makes the investment" if there is some action on his part. Passive holding of an asset by itself would not amount to making the investment. That is so, it seems to me, as a matter of the ordinary use of language.*"[209]

The Court was not persuaded that the share swap satisfied the test of "*making the investment*":

> "*Whilst GRI undoubtedly became the indirect owner or controller of the shares in CAB and of the Brisas Project I must conclude it did not at that time make an investment in the assets in respect of which the protection of the BIT was sought.*"[210]

However, the fact that GRI subsequently provided nearly U.S$300 million to fund the Brisas project was sufficient, and in the Court's judgment, GRI thereby made an investment in protected assets.[211] Although those assets were a non-protected investment prior to such expenditure (as they were originally made by a Venezuelan company and acquired by the Claimant without payment), the act of making the expenditure transformed them into a protected investment.[212]

This is what, according to the Court, distinguished the position of GRI from the position of SCB (U.K.) in *Standard Chartered Bank*. In contrast to SCB, who did nothing concerning the investment and had no control over SCB HK, GRI raised finance and provided funds for developing the Brisas Project. It also exercised control as it retained consultants and experts and concluded contracts in its own name in connection with that project.[213]

---

204 *Id.* ¶ 32
205 *Ibid.*
206 *Id.* ¶ 33.
207 *Id.* ¶ 35.
208 *Id.*
209 *Id.* ¶ 37.
210 *Id.* ¶44.
211 *Id.* ¶ 46.
212 *Id.* ¶ 48.
213 *Id.* ¶ 47.

Capital Financial Holdings Luxembourg SA v. *Republique du Cameroun*,[214] also seems to support the requirement of an active investor. In this case, the Tribunal cited *KT Asia* as authority to deny jurisdiction *ratione materiae* regarding an investment of a Luxembourg company in Cameroon. The Claimant was indirectly owned by a Cameroonian national. The Tribunal took the view that the term investment in the sense used by the ICSID Convention had an objective meaning, the definition of which was not left to the discretion of the parties.[215] Out of the four criteria mentioned by *Salini*, the Tribunal accepted that it is necessary to establish only two: that the party that requests protection made a *substantial* economic contribution and that they accepted to take a risk of economic nature.[216] The Tribunal added that the first criterion is closely related to the second one, as "*in the absence of substantial contribution, the investor runs no risk in connection with the operation*".[217] The substantial contribution (adjective "*substantial*" was added to the *Salini* formula) meant that the investor must bring in contributions of certain value into the host country, which did not necessarily have to be of a financial nature, but could also consist in other performances, such as furnishing of raw materials, work, or services, provided that they had an economic value.[218] The Tribunal referred to several earlier awards to support the view that the contribution could not be substantial if the investment was acquired for a nominal price, manifestly below the market price.[219]

Talking about the risk, the Tribunal opined that the investor had to make the contribution himself i.e. he had to *actively* finance a transaction; otherwise, he objectively bore no risk for the operation.[220] The investor could obtain the amount of the investment from third parties. However, the true question remained whether the person who acted had made the investment himself and bore the accompanying risks. At least in that respect, the origin of funds could not be completely ignored.[221] Finally, the Tribunal observed that the delimitation between the question of origin of the funds invested and the person that had made the investment was especially sensitive when the operation concerned several companies controlled by the same person or persons.[222] In that respect, the Tribunal found large similarity between the factual matrix of the case it had to decide and the one in *KT Asia*.[223] The Tribunal established that the acquisition of shares in the Commercial Bank Cameroon, a local Cameroonian bank, by the Claimant and two shareholder loans it granted to that bank, were transactions between companies in the same group controlled by the same person, who was, additionally, a national of Cameroon.[224] The amounts of loans granted by the Claimant to the bank were identical to the amounts of loans granted to the Claimant by its own shareholders.[225] These loans

214 Capital Financial Holdings S.A. v. Republique du Cameroun, Affaire CIRDI ARB/15/18, Award of the Tribunal (June 22, 2017).
215 *Id.* ¶ 416.
216 *Id.* ¶ 423.
217 *Id.* ¶425.
218 *Id.* ¶ 424.
219 *Id.* ¶ 427.
220 *Id.* ¶425.
221 *Id.* ¶ 426.
222 *Id.* ¶428.
223 *Id.*
224 *Id.* 455.
225 *Id.* ¶ 445.

were never reimbursed by the Claimant.[226] Also, the Claimant submitted no evidence that it had purportedly paid almost EUR 9 million for the acquisition of the bank's shares.[227] For those reasons, the Tribunal considered that the Claimant had made no substantial contribution, and did not bear any risk related to those transactions, and consequently did not make an investment within the meaning of the ICSID Convention.[228] Noting that the BIT contained a typical broad definition of investments which included, *inter alia*, shares issued by companies, claims and rights to any kind of performance having an economic value, the Tribunal stated that the transactions in question could not automatically be qualified as investments, solely on the basis of the fact that they fell under the categories of investments mentioned in the relevant provision.[229] The definition of investments contained in the BIT had to be interpreted bearing in mind the purpose of the BIT, which was to encourage foreign investments to Cameroon.[230] The bare acquisition of shares, without any contribution and without taking any risk by the Claimant, did not correspond to such an interpretation of investment.[231]

The Czech Republic also argued that the Germany-Czech Republic BIT (1990) applicable in the *A.M.F. Aircraft Leasing* v. *Czech Republic* case ["**A.M.F. Aircraft Leasing**"] required protected investors to "*engage in the act of investing*" or to "*actively invest*."[232] In this case, the Tribunal accepted that the ordinary meaning of the terms used in the BIT, such as "*to make an investment*", "*investments by investors*", and "*investments made by investors*" indicated that the investor had to act and effectively engage in the action of making the investment.[233] However, the Tribunal distinguished this case from *Standard Chartered Bank* and *Alapli Elektrik* on the basis of the factual matrix. According to the Tribunal, the factual matrix in the *A.M.F. Aircraft Leasing* case indicated that the Claimant directly made and owned its investment.[234] After applying the tests established by the *Standard Chartered Bank* and the *Alapli Elektrik* tribunals to the facts of the case, the Tribunal concluded that the claimant had actively invested in the Czech Republic.[235]

VIII. Who is "the active investor"?

The reason why tribunals sometimes reject jurisdiction, although the claimant owns property (usually a shareholding) in the territory of the respondent State, is that the tribunals in those cases become aware, after establishing the facts, that the claimant was not the real investor, and that the real investor or the real party in interest was someone who should not be protected under the relevant treaty. In

226 *Id.* ¶ 452.
227 *Id.* ¶ 449.
228 *Id.* ¶¶ 457, 459.
229 *Id.* ¶ 461.
230 *Id.* ¶¶ 461-462.
231 *Id.* ¶ 462.
232 A.M.F. Aircraft Leasing Meier & Fischer GmbH & Co. v. The Czech Republic, PCA Case No. 2015-15, Final Award, ¶¶ 421-428, 448-458 (Perm. Ct. Arb., May 11, 2020).
233 *Id.* ¶ 450.
234 *Id.* ¶¶453-54.
235 The Claimant, a German company, itself purchased the aircraft from Fischer Air by transferring the purchase price to the Czech company's account and it was the claimant that made the decision to buy the Aircraft and to lease them to Fischer air. *Id.* ¶¶ 455-58.

other words, the idea behind the active investor requirement is to prevent treaty shopping, without expressly naming it as such.[236]

Conscious of the prevailing formalistic interpretations of the treaty definitions of investment, which do not give them much leeway, the tribunals search for the terms in the treaty which may be interpreted so that the purported investor's assets, although enumerated in the BIT as examples of eligible investments, can nevertheless be denied the status of an investment.

In some instances, the result of this search is the wording of the treaty that uses "*active*" verbs, such as "*make*" and "*invest*". These words, according to the *Standard Chartered Bank,* imply some action in bringing about the investment, rather than purely passive ownership.[237]

The verbs used in the treaty are the centre piece of the analysis in *Clorox*. According to the Tribunal, it results from the wording of the treaty that its protection is limited to those assets that were invested by an investor of one contracting party in the territory of the other.[238] The following "*active*" verbs are used in the Spain-Venezuela BIT (1995): "*investments made [efectuadas] in its territory by investors of the other Contracting Party"* and *"investments carried out [realizadas] by investors of the other Contracting Party*".[239]

Of course, these verbs have been repeatedly used in BITs, but no one previously attributed a special meaning to them. The Swiss Federal Tribunal, deciding on the challenge of the *Clorox* award, was not convinced by this interpretation, and thought that there is no basis for deducing the requirement of an active investment from the phrase "*invested by investors*" that appears in the Spain-Venezuela BIT.[240] The Federal Tribunal opined that the BIT does not contain any requirements that go beyond the holding of assets by an investor of a contracting party in the territory of the other contracting party.[241] But the very basis for deducing such a requirement comes from the text of the Spain-Venezuela BIT, which defines investments as follows:

> "*'Investments' means any kind of assets invested by investors of one Contracting Party in the territory of the other Contracting Party and in particular, although not exclusively, the following assets:*
>
> *(a) shares, securities, bonds and any other form of participation in companies.*"[242]

If the enumerated assets are inserted into this definition (e.g., "*investments*" means shares invested by investors), the sentence would still not be synonymous with "*shares held by investors*". Therefore, as

---

236 JORUN BAUMGARTNER, *supra* note 2, at 158. On the conditions to find corporate or investment structuring and restructuring to amount to the abuse of process *see* Sanja Đajić, *Good Faith in International Investment Law and Policy*, *in* J. Chaisse et al. (eds.), HANDBOOK OF INTERNATIONAL INVESTMENT LAW AND POLICY, Springer Nature Singapore Pte. Ltd. 2020, pp. 1-34.

237 Standard Chartered Bank, ICSID Case No. ARB/10/12, Award, ¶¶ 221-25 (Nov. 2, 2012).

238 Clorox Spain S.L. v. Bolivarian Republic of Venezuela, PCA Case No. 2015-30, Award, ¶ 801 (Perm. Ct. Arb., May 20, 2019).

239 Clorox Spain S.L., PCA Case No. 2015-30, Award, ¶ 801 (Perm. Ct. Arb., May 20, 2019).

240 Decision of the Swiss Federal Tribunal, 4A_306/2019, Mar 25, 2020, ¶ 3.4.2.7.

241 *Ibid.*

242 Agreement between the Kingdom of Spain and the Republic of Venezuela on the Reciprocal Promotion and Protection of Investments, Sept 10, 1997, art. I(2).

confirmed by the English Court in the *Gold Reserve* case, the verb "*invested*" must have some other meaning, different from just holding assets.[243] It must have an objective ordinary meaning, which the Swiss Federal Tribunal failed to acknowledge.

Therefore, the interpretation of the words "*invested by investors*" as requiring action of some kind by the purported investor, remains persuasive. The annulled award in this case was fully consistent with the already established practice that requires contribution of some value, and does not content itself with the formal ownership of shares. In any case, Clorox Spain certainly did not invest any shares in Venezuela, as the ordinary meaning of these words would require. Nor did it "*invest*" any other type of assets in Venezuela.

Whether one agrees with it or not, the reach of the interpretation based on the use of "*active*" verbs is limited because there are many investment treaties that define investments by means of verbs "*own*", "*control*" or "*hold*". For example, in *Alapli Elektrik*, Professor Park considered it important that the word "*make*" is used in Article 10(1) of the ECT,[244] failing to notice or forgetting to mention that the same treaty also uses the verb "*own*" in its enumeration of assets that are deemed investments.[245] In some subsequent ECT cases, the "*active investor*" interpretation was rejected due to the use of the "*passive verbs*" in the ECT definition of investments.[246]

Another part of this interpretation relies on the preposition "*of*" connecting investment to a specific investor. According to Professor Park in the *Alapli Elektrik* case, reference to the investment "*of*" an investor connotes active contribution of some sort, "*an action of transferring something of value (money, know-how, contracts or expertise) from one treaty-country to another*".[247] The same definition is repeated in *Standard Chartered Bank*: for an investment to be "*of*" an investor, "*some activity of investing is needed, which implicates the claimant's control over the investment or an action of transferring something of value (money, know how, contacts or expertise) from one treaty-country to another*".[248] However, in *Standard Chartered Bank,* the Tribunal conceded that, with respect to the preposition "*of*", different meanings could be adduced. The phrase "*of*" could

---

243 Gold Reserve Inc. v. The Bolivarian Republic of Venezuela, [2016] EWHC 153 (Comm) (Eng.), ¶ 35.

244 Alapli Elektrik B.V., ICSID Case No. ARB/08/13, Excerpts of Award, ¶354 (July 10, 2014).

245 ECT, Article 1(6): "Investment" means every kind of asset, owned or controlled directly or indirectly by an Investor […]."

246 WA Investments-Europa Nova Limited, PCA Case No. 2014-19, Award, ¶ 269 (May 15, 2019); I.C.W. Europe Investments Limited, PCA Case No. 2014-22, Award, ¶ 214 (May 15, 2019); Voltaic Network GmbH, PCA Case No. 2014-20, Award, ¶ 206 (May 15, 2019). However, in Sunreserve Luxoco Holdings, S.À.R.L. (Luxembourg) et alt. v. Italy, SCC Arbitration V (2016/32) Final award, ¶752 (25 March 2020), the Tribunal based its interpretation of the term "Making of Investments" under Article 1(8) of the ECT on the active/passive distinction: "the ECT envisions the making of an investment as an active mode of doing as opposed to a passive method of being granted acquisition over assets. In other words, making an investment refers to the active conduct of establishing or acquiring investments."

247 Alapli Elektrik B.V., ICSID Case No. ARB/08/13, Excerpts of Award, ¶¶ 359-60 (July16, 2012).

248 Standard Chartered Bank, ICSID Case No. ARB/10/12, Award, ¶ 232 (Nov. 2, 2012). This interpretation of the preposition "of" is misunderstood in Kim v. Uzbekistan, para. 313 ("In Standard Chartered Bank, the respondent state argued that the claimants' investment was limited [sic] the holding of loans, securities and other financial claims. The tribunal accepted that these were investments 'of' the claimants and not investments 'by' the claimants." - references omitted), while the English High Court 's explanation is illuminating: "in order for the investment to be 'of' SCB (UK) it had to be made by and not simply held by investor."

either connote a contributory relationship ("*the plays of Shakespeare*"), or ownership ("*the house of Shakespeare*").[249]

According to the relevant awards, the purported investor must engage in some activity related to the investment. It is interesting to analyze how this activity is defined by the tribunals and to compare it to the line of cases requiring sufficient contribution. Professor Park in *Alapli Elektrik* qualifies making of an investment as an "*active contribution*"[250] and also as "*a meaningful contribution to Turkey*".[251] He finds that the Claimant "*never made a contribution to the Alapli Project sufficient to create for itself the status of an investor under either the ECT or the Netherlands-Turkey BIT*".[252] His reasoning seemingly relies on the lack of sufficient contribution. Examples of such a contribution are providing capital and technology, conducting negotiations, and obtaining a contract.[253]

However, in contrast to cases where the claimants paid a nominal price to acquire the shares in the local subsidiaries, or acquired them gratuitously, such as *Caratube* and *Quiborax,* Alapli Elektrik did make some transfers from its bank account in the Netherlands to its Turkish subsidiary.[254] Those transfers were not accepted by Professor Park as a transfer of value made by the Claimant to Turkey because the funds were not really the Claimant's funds, they originated from someone else.[255] Professor Park stated that:

> "*No general test is suggested with permissible funding sources. Rather, [...] the compelling point is simply that, on the unique facts of this case, Claimant made no relevant contribution to the Project. This was because [t]o the extent that contributions were made, they came from nationals or companies of the United States and Turkey*."[256]

In the annulment proceedings, the ad hoc committee understood that Professor Park based his decision on the finding that the Claimant had made no "*personal*" contribution, and had taken no risk in connection with the Alapli Project.[257] The hard and fast evidence of how the capital was transferred from Turkey to the Netherlands and then back to Turkey had shown that the Claimant was not the true investor; it was not investing its own capital, and that the capital did not originate from the Netherlands.

Professor Park attributed special importance to the origin of the capital, challenging the dogma of *Tokios Tokelés* v. *Ukraine*. He noted that the Claimant "*served as a mere conduit*" through which the American backers transmitted funds to the Turkish company, which held the project concession.[258] The American backers, rather than the Claimant, funded all capital for the shares held by the Claimant

---

249 *Id.* ¶ 216.
250 Alapli Elektrik B.V., ICSID Case No. ARB/08/13, Excerpts of Award, ¶¶ 350, 352, 359 (July 16, 2012)).
251 *Id.* ¶ 350.
252 *Id.* ¶ 337. *See also* Gold Reserve Inc. v. The Bolivarian Republic of Venezuela, [2016] EWHC 153 (Comm), ¶ 36 (Feb. 2, 2016).
253 *Id.* ¶ 338.
254 *Id.* ¶ 374.
255 *Id.* ¶¶ 338, 347.
256 *Id.* ¶ 349.
257 Alapli Elektrik B.V., ICSID Case No. ARB/08/13, Decision on Annulment, ¶¶ 159, 188, 217, 220 (July 10, 2014).
258 *Id.* 218.

as investment under the relevant treaties.[259] Through multiple bank transfers, American backers reimbursed each of the Claimant's asserted contributions to the Turkish company's statutory capital.[260] The Claimant "*never had any meaningful control over use of the funds, which were simply passed through its bank accounts*" and had no duty to reimburse them.[261] For this reason, the arbitrator concluded that the Claimant neither made any contribution, nor took any risk. However, Professor Park noted that his conclusion might have been different had the statutory capital of the Turkish company been derived from a loan made to the Claimant by the American backers.[262]

Alapli Elektrik was invoked in the *Yukos* annulment action as a case confirming (or inaugurating) the principle that investment treaties do not (or should not) protect U-turn constructs. However, considering the division of the majority arbitrators, The Hague Court of Appeal opined that this award was insufficient to prove the existence of such a principle.[263]

Consequently, Professor Park's opinion in *Alapli Elektrik* rests on the origin of capital rationale as much as it does on the lack of sufficient contribution. But the origin of capital is here taken as evidence of inactivity of the shell company. Being just an instrument in the hands of the true investor, a conduit through which the funds were transmitted, the shell company in this case simply could not prove that it was an active investor. Therefore, *Alapli Elektrik* follows *Caratube* in the assumption that the ownership of the invested capital is not totally irrelevant because "*there still needs to be some economic link between that capital and the purported investor that enables the Tribunal to find that a given investment is an investment of that particular investor.*"[264]

Confirmation of the assumption that the active investor theory in *Alapli Elektrik* was concerned with prevention of treaty shopping by the Turkish and American investors may be found in the comments made about "*legitimate*" passive investments. *Obiter dictum*, Professor Park mentioned a case where the acquisition of an investment "*without contribution*" would be legitimate. That would be the case where the original investor was also eligible for protection under the treaty:

> "*Nor does this case present the situation of one person stepping into the shoes of another which had already made a qualifying contribution, as might be the case for a child who inherits from a parent that has made the contribution prior to death. To the extent that the inheritance analogy has any impact in this case, Claimant would be stepping into the shoes of a Turkish national.*"[265]

---

259 Alapli Elektrik B.V., ICSID Case No. ARB/08/13, Excerpts of Award, ¶¶339-40 (July 16, 2012).

260 *Id.* ¶¶ 341, 372-78. The First Project Company (Atam Elektrik), a Turkish company, first made payments to the claimant, and the claimant then made payments to the Second Project Company (Atam Alapli), whose shares were the purported investments. American backers (GE Group) immediately reimbursed the capital payments to the First Project Company.

261 *Id.* ¶¶ 345-46.

262 *Id.* ¶ 342.

263 Yukos Universal Limited (Isle of Man), Hague Ct. of Appeals Case No. 200.197.079/01, PCA Case No. 2005-04/AA227), ¶ 5.1.8.9 (Perm. Ct. Arb., Feb. 18, 2020). The Court of Appeals did not refer to Venoklim Holding BV v. Bolivarian Republic of Venezuela, ICSID Case No ARB/12/22 Award (Spanish) (April 3, 2015), where the tribunal declined jurisdiction of a claim brought under the Netherlands-Venezuela BIT by a Dutch company on the grounds that the claimant was not a foreign investor because it was effectively controlled by Venezuelan nationals and companies.

264 Caratube, ICSID Case No. ARB/13/13, Award, ¶ 355 (June 5, 2012).

265 Alapli Elektrik B.V, ICSID Case No. ARB/08/13, Excerpts of Award, ¶ 351 (July 16, 2012).

Therefore, *Alapli Elektrik* could be understood as holding that acquiring assets without contribution of the claimant's own capital is not legitimate if the original investor was not eligible for treaty protection.[266]

The *Standard Chartered Bank* tribunal defines the activity of investment as the claimant "*doing something as part of the investing process, either directly or through an agent or entity under the investor's direction*"[267] and "*deciding to make the investment, funding the investment, or controlling or managing the investment after it was made*." [268] To benefit from the BIT's protection, "*a claimant must demonstrate that the investment was made at the claimant's direction, that the claimant funded the investment or that the claimant controlled the investment in an active and direct manner*."[269] On the particular facts of the case, the investment activity would have been the purchasing of the loans by the Claimant, or directing its subsidiary to purchase the loans, or exercising control over the acquired loans.[270]

It is evident that the definition of active involvement in *Standard Chartered Bank* is broader than in the *Alapli Elektrik*. While in *Alapli Elektrik* the want of the Claimant's own contribution was cited as the principal reason for declining jurisdiction, the *Standard Chartered Bank* award shows that some other form of participation in the investment process would suffice for an investment to be "*of*" the claimant.[271] The Tribunal in this case was faced not only with the lack of contribution of the Claimant's own capital, but also with the lack of any controlling or directional activity on the Claimant's part, connected to the acquisition or management of the investment. The Tribunal described it as the lack of "*an active relationship between the investor and the investment*."[272] The sole link that the Claimant relied on to prove the status of an investor was its indirect ownership of the assets.

Nevertheless, there is no inconsistency. If the *Standard Chartered Bank* definition of investment activities was applied in the *Alapli Elektrik* case, the conclusion would have been undoubtedly that *Alapli Elektrik*, as a subsidiary of the true investor, made no decisions, did not fund the investment, did not control, and did not manage the investment after it was made. Therefore, it was not an active investor. On the other hand, if the *Alapli Elektrik* definition of investment activity was applied in the *Standard Chartered Bank* case, the entity that made a meaningful contribution of its own capital to acquire the assets in Tanzania, the active investor, would have been SCB HK, and not its parent company.

The *Clorox* tribunal confirms that an investor's action is required, but this action does not necessarily have to be the action of creating something that did not exist before. It might as well be investing in

---

266 In Renée Rose Levy de Levi v. Republic of Peru, ICSID Case No. ARB/10/17, Award (Feb. 26, 2014), the claimant had acquired her shareholding in the Peruvian Bank BNM by assignment from her father. Both the claimant and her father were French nationals and the investment was protected by the France-Peru BIT from the outset. Since it was obviously not the purpose of the assignment to obtain access to BIT protection, the fact that the shares were acquired for free did not matter, and the claimant's holding was recognized as an investment. *See* JORUN BAUMGARNER, *supra* note 2, at 154.

267 Standard Chartered Bank, ICSID Case No. ARB/10/12, Award, ¶ 198 (Nov. 2, 2012).

268 *Id.* ¶ 228.

269 *Id.* ¶ 230.

270 *Id.* ¶¶ 260, 264-265.

271 *Id.* ¶ 232.

272 *Id.* ¶ 230.

an existing investment already made by a third party.[273] For instance, if subsequent to the transfer of the shares of Clorox Venezuela, Clorox Spain had granted a loan to that company, or injected certain funds into its modernization, this would have been recognized as an investment.[274]

It was an undisputed fact that Clorox Venezuela had facilities, employees, and manufactured products that were sold to Venezuelan companies and consumers. This demonstrated, according to the Tribunal, that there was an investment in Venezuela, but it did not demonstrate that there was an investment by the Spanish Claimant.[275] The investment created by American investors who did not enjoy the protection of a BIT was simply transferred to Clorox Spain by internal company restructuring without payment. This operation could not be described as an investment by Clorox Spain within the meaning of the BIT. But if Clorox Spain had paid "*a valuable and also real consideration*" for the acquisition of shares, or made some further transfer of value to its Venezuelan subsidiary, apparently, the existence of an investment would have been recognized.[276]

In this respect, *Clorox* is similar to other cases, such as *Quiborax* and *KT Asia,* where shares were acquired for free or for a nominal price and jurisdiction was denied for the lack of a sufficient contribution. However, the Tribunal distinguished *Quiborax*, stating that the Spain-Venezuela BIT did not impose a restrictive meaning of investment that would require a contribution in money, or in kind, to materialize at the time of obtaining the title to the invested assets. It was sufficient, but necessary, according to the Tribunal, that the acquisition of the asset by the alleged investor had been the result of a transfer of value "*that generally occurs at the time of obtaining the asset but could, depending on the circumstances of the case, be deferred over time*."[277]

If, hypothetically, a further investment was made subsequent to restructuring, the holdings in these two awards may clash. The funds that the subsidiary, Clorox Spain, would invest into the newly acquired company might very well come from its mother-company in the U.S., and would, in that case, not be regarded as contribution by the Claimant according to the *Alapli Elektrik* standards. Conversely, in *Alapli Elektrik*, Professor Park distinguished *Mobil* v. *Venezuela*[278] on the basis of the fact that the Claimants in that case (the Dutch Mobil Holding company – an entity that was interposed into the chain of ownership by actual investors subsequent to the initial investment) "*contributed their*

---

273 Clorox Spain S.L, PCA Case No. 2015-30, Award, ¶ 803 (Perm. Ct. Arb., May 20, 2019).

274 *Id.* ¶ 832-33.

275 *Id.* ¶ 814.

276 *Id.* ¶ 832-33, *citing* Gold Reserve Inc., ICSID Case No. ARB(AF)/09/1, Judgment of the English High Court of Justice on Enforcement, ¶ 262 (Feb. 2, 2016).

277 *Id.* ¶ 823.

278 *Id.* ¶¶ 385-86. In Mobil, the tribunal found jurisdiction under the BIT despite the respondent's contention that the Dutch claimant was a "corporation of convenience". The claimants had been enabled to bring the claim following a transfer of shares, since they "contributed their part" to the investments of the local subsidiary whose shares were acquired. *See* Venezuela Holdings B.V., et al. (formerly known as Mobil Corporation, Venezuela Holdings, B.V.) v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/07/27, ¶¶ 193-97, *cited in* KT Asia, ICSID Case No. ARB/09/8. Award, ¶ 198 (Oct. 17, 2013).

part to [the] investments".[279] However, the origin of the contributions by Dutch Mobil was not further examined in *Mobil* v. *Venezuela*.

Notwithstanding these differences, *Clorox* had several things in common with *Alapli Elektrik*. First, the fact that the true investor was not eligible for protection. What must have led the Tribunal to deny jurisdiction in *Clorox* was not so much the absence of consideration when acquiring the shares, as the fact that the investment was made by American investors who continued to own and control Clorox Venezuela through their 100% ownership of Clorox Spain: "*the source of the capital and know-how invested in Venezuela [are two United States companies] not protected by the Treaty*".[280]

The fact that the shares were acquired without payment, and that Clorox Spain remained passive in this operation showed that the true investors continued to be US companies.

Second, like *Alapli Elektrik*, *Clorox* involved corporate restructuring. The corporate restructuring that took place as a result of the transfer of shares was insufficient to transform Clorox Spain into an eligible investor. The protection was denied to Clorox Spain because it had not contributed to or invested its own funds in the assets of Clorox Venezuela. The Swiss Federal Tribunal found fault in this because the Spain-Venezuela BIT did not contain a denial of benefits clause.[281] However, it does not seem realistic to expect that the States should foresee every kind of treaty shopping that ingenious companies may devise. Moreover, it is well known that the denial of benefits clauses have been interpreted in ways that makes them extremely ineffective.[282] Structuring an investment so that it attracts the protection of a particular BIT from the outset seems less problematic than restructuring it subsequently so that the protection of the relevant BIT is to be captured post-factum, after the investment has already been made by an unprotected entity. In such circumstances, the arbitrators felt compelled to scrutinize the active or passive role of the claimant in implementing the investment.

One less persuasive layer of the active investor jurisprudence is that "*indirect*" investors are not necessarily excluded by this requirement. Although it seems from the *Alapli Elektrik* award that the investment must be the personal activity of the investor, the other two awards leave open the possibility that the relevant activity may be conducted by someone else on the investor's behalf.

In *Standard Chartered Bank,* the Claimant argued that mere indirect ownership was sufficient for the purpose of jurisdiction in an ICSID case, but the tribunal was not persuaded.[283] The Tribunal distinguished between the adjective "*indirect*" describing ownership, and implying that there are

279 Alapli Elektrik B.V., ICSID Case No. ARB/08/13, Excerpts of Award, ¶ 386 (July 16, 2012).

280 *Id.* ¶ 817.

281 Decision of the Swiss Federal Tribunal, ¶ 3.4.2.4.

282 *See* Petar Đundić, *Procesne pretpostavke za primenu klauzule o uskraćivanju pogodnosti u investicionoj arbitraži: zašto je teško reći ne? (Procedural Requirements for the Application of the Denial of Benefits Clause in Investment Arbitration: Why is it Hard to Say No?)*, 53(3) ZBORNIK RADOVA PRAVNOG FAKULTETA U NOVOM SADU, 933-54 (2019). JORUN BAUMGARTNER, *supra* note 2, at 116-19.

283 *Standard Chartered Bank*, ICSID Case No. ARB/10/12, Award, ¶¶ 247–48 (Nov. 2, 2012).

intermediate entities separating an asset from its ultimate owner, and the adverb "*indirectly*" which describes an action of making an investment, and implies that one person invests through another .[284]

The Tribunal admitted that an investment could be made indirectly through an entity that serves as a special purpose vehicle. [285] Such indirectly made investments, however, would still have to involve investing activity by a claimant, possibly performing direction or control. The Tribunal expressly reserved the position on whether jurisdiction would have existed, had the Claimant in that case actually engaged in the process of making the investment by funnelling funds through an intermediary, such as a special purpose vehicle.[286]

According to the *Clorox* tribunal, the link between an investor and an investment does not disappear as a result of indirect ownership of the investment. An investor can be the source of the capital invested in a territory and at the same time hold its investment through affiliated companies.[287] However, such a link does not exist without an action of investing by the alleged investor.[288] In this case, as the Tribunal observed, Clorox Spain was the subsidiary of the original investor.[289] What remains unanswered in these two awards is whether in a case like *Alapli Elektrik,* where the funds of the controlling investor were funnelled through an intermediary, that intermediary could (also) claim the status of an active investor on the basis of the mere transfer of the controlling investor's funds.

A common element of the three cases, as already stated, is the BIT wording requiring that the investment be made or invested "*in the territory*" by investors of one contracting party in the territory of the other contracting party. This is a territorial requirement that narrows the scope of application of the treaty.

However, the interpretation of the territorial requirement in the *Clorox* award could be criticized as less than persuasive. Considering the holding in *Clorox*, which relies, like the two preceding awards, on the absence of transfer of value,[290] one would expect that an active investor needed to transfer some value to the territory of Venezuela.[291] However, the *Clorox* tribunal expressly rejected this argument raised by Venezuela. The Tribunal cited Gold Reserve*,* where it was found that "*the ordinary meaning of the words 'making an investment in the territory of Venezuela' does not require that there must be a movement of capital or other values across Venezuelan borders*."[292] It seems that, in the Tribunal's view, the territorial requirement would be satisfied even if an existing investment in Venezuela was acquired by the

---

284 *Id.* ¶ 237.

285 *Id.* ¶ 198 ("[T]o constitute Claimant's status as treaty investor, so that the Loans may be considered investments 'of' Claimant, implicates doing something as part of the investing process, either directly or through an agent or entity under the investor's direction. No such actions were performed").

286 *Id.* ¶ 266.

287 *Clorox Spain S.L., PCA Case No. 2015-30, Award*, ¶ 804 (Perm. Ct. Arb., May 20, 2019).

288 *Id.* ¶¶ 804, 816.

289 *Id.* ¶ 817.

290 *Id.* ¶ 830.

291 Jarrod Hepburn and Lisa Bohmer, *supra* note 1, at 2-3.

292 Clorox Spain S.L., PCA Case No. 2015-30, Award, ¶¶ 824, fn. 380 (Perm. Ct. Arb., May 20, 2019); Gold Reserve Inc., ICSID Case No. ARB (AF)/09/1, Judgment of the English High Court of Justice on Enforcement, ¶ 260 (Feb. 2, 2016), which was cited for the same proposition in Flemingo, Award, ¶ 315 (Perm. Ct. Arb. Aug. 12, 2016).

Claimant by a transfer of value occurring outside of the host state i.e. if Clorox Spain had paid for the acquisition of shares by transfer of money to the U.S., for example.

In contrast, the presiding arbitrator in *Alapli Elektrik* emphasized the territorial requirement.[293] He said that the "*flow of capital and technology*" must "*run from the Netherlands to Turkey, not from the United States or some other third country*." The transfer of value must be from one treaty-country to another.[294] Emphasizing the need for reciprocity, he expressed his opinion that "*investment treaties are not intended as treaties with the world*", contradicting the view of arbitrators from *Aguas del Tunari* v. *Bolivia* that investment treaties: "*serve in many cases more broadly as portals through which investments are structured, organized, and, most importantly, encouraged through the availability of a neutral forum*."[295]

Ultimately, all three "*active investor*" cases have one feature in common: they do not accept that ownership of assets is enough to prove the status of an investor and reject the formal asset-based approach in answering the question whether the claimant made an investment. By requiring the investor to be active, they actually require that the claimant prove that it was the real investor, whether it is holding the assets resulting from investment, or not.

IX. Conclusion

The question whether "*passive investors*" enjoy protection of investment treaties has arisen in the practice of investment tribunals in the preceding decade as a result of intensified efforts of investors to restructure their investments so that they are covered by treaty protection on the one hand, and as a way to circumvent rather formalistic asset-based interpretations of the term "*investment*", on the other hand. The constellation in which this question arises can involve an entity that is established and directed by the true investor to implement the investment (the so-called "*special purpose vehicle*" or "*shell company*"), that conducts no activity of its own. It can also involve an entity that owns the actual investor, the so-called "*indirect investor*", that holds an indirect ownership interest but has conducted no activity regarding the relevant investment. The "*inactive*" entity eventually appears as a claimant in an investment arbitration, triggering the question whether it has made an investment in the sense of the relevant treaty. Faced with such factual constellations that they had to resolve, the tribunals in *Alapli Elektrik, Standard Chartered* Bank and *Clorox* adopted the view that the investor must make an active contribution to qualify the assets it owns as investments.

The requirement of an "*active investor*" is of limited utility to lawyers who are trying to defend States from the rapidly expounding number of treaty shoppers. First, it is highly dependent on the wording of the particular treaty: the definition of investment in the particular treaty should rest upon the verbs of activity rather than verbs of ownership; second, it clashes with some established precedents on the status of shell companies and on the origin of capital; and third, it has already been rejected by several tribunals and has now caused an annulment of an award before a Swiss court.

---

293 Alapli Elektrik B.V., ICSID Case No. ARB/08/13, Excerpts of Award, ¶ 350-53 (July 10, 2014).

294 *Id.*, ¶ 360.

295 Aguas del Tunari, S.A. v. Republic of Bolivia, ICSID Case No. ARB/02/3, Decision on Respondent's Objection to Jurisdiction, Oct. 21, 2005, ¶ 332.

Despite these limitations, the tribunals and arbitrators that introduced this requirement deserve credit for refreshing the analysis of what "*investing*" and "*investment*" really mean. They build upon the distinction between investment and property, between action and result, a distinction that needs to be preserved and contemplated on, so that the original purpose of the investment treaties remains uncompromised. The prospects for the wider acceptance of this requirement depend on which view will prevail in the long run: should the tribunals endeavour to prevent conspicuous treaty shopping using all available means, including the doctrine of "*active investor*", or should they rather stick to the conventional wisdom and accept any kind of foreign property as a foreign investment.

INDIAN JOURNAL OF ARBITRATION LAW

THE ROLE OF DOMESTIC PROCEDURAL RULES IN SETTING THE SCOPE FOR THE PRAYERS FOR RELIEF IN AN INTERNATIONAL COMMERCIAL ARBITRATION WITH A SWEDISH SEAT

Ylli Dautaj[*] *& Sarah van der Stad*[†]

Abstract

*A question that sometimes presents an unnecessary delay in an international commercial arbitration ["**ICA**"] is when, how, and whether domestic procedural rules should be applicable by analogy or be used for guiding purposes. In this note, the authors deal with the situation where international arbitrators are requested to dismiss a prayer for relief for not meeting the pre-requisites in the domestic code of judicial procedure. More specifically, the authors focus on declaratory relief.*

Even though the note is focused on a narrow question in Sweden, the authors believe that it may shed light on the practice in other jurisdictions. Moreover, the authors believe that it underscores important underlying theoretical and practical matters for practitioners and scholars alike.

The authors' position is that international arbitrators should not look at domestic procedural rules when assessing the admissibility of prayers for relief. If the lex arbitri and the arbitration rules are silent, that should not be treated as an invitation to analogise or draw guidance from the domestic procedural code. Instead, international arbitrators should exercise their broad discretionary powers in light of the key characteristics and the mental representation of ICA constituting an autonomous or at least a semi-autonomous dispute resolution regime.

I. Introduction

This note sheds light on the issue of whether domestic codes of judicial procedure should be either applicable by *analogy* or else *guiding* when arbitrators are requested to dismiss a prayer for relief in an ICA for not meeting the pre-requisites in the domestic code of judicial procedure. The authors will focus on ICA matters in Sweden, and therefore on arbitrators asked to consider the applicability of the Swedish Code of Judicial Procedure ["**Procedural Code**"] as a possible extension of the *lex arbitri*. More specifically, the authors will narrow their exercise here to focus on the request for a declaratory relief.

Even though the discussion focuses largely on Sweden and is limited to a discussion on a declaratory relief, the authors believe that it has practical significance for other pro-arbitration jurisdictions where a respondent may seek dismissal on similar grounds. Moreover, even though the discussion is limited to prayers for relief, in general, and declaratory relief, in particular, the problem formulation and reasoning can be applied in other situations where parties seek to shoehorn-in rules of domestic procedure in an ICA process. Apart from practical aspects, the discussion also underscores an

[*] Teaching Fellow, Durham Law School; Adjunct Professor, Penn State Law; Adjunct Faculty, Uppsala University; and Partner, DER Legal, Stockholm. He can be reached at ylli.dautaj@derjuridik.se.

[†] Associate, DER Legal, Stockholm. She can be reached at sarah.vanderstad@derjuridik.se.

important underlying theoretical issue; that is, whether ICA is free from domestic procedural intricacies and if so, to what extent, scope, and degree. The scholarly inclined reader may ask him or herself whether ICA is indeed an autonomous dispute resolution regime. For the arbitrator dealing with the objection, the pressing question is slightly different; that is, they must deal with how to exercise their powers and discretion when the *lex arbitri* and the arbitral rules are silent. Not all that, seldomly, this may include determining whether the domestic procedural rules can or should be applicable by analogy or for guiding purposes. The authors' unequivocal position is that arbitrators should not, as a general position, look at domestic procedural rules and that ICA is indeed largely autonomous. The authors' are not of the same semi-categorical position for purely domestic arbitrations.

Finally, the authors' are of the position that raising an inadmissibility argument in ICA on the basis of a domestic procedural rule should have practical and adverse consequences. Such unnecessary diversions should be reflected in the apportioning of costs. Apportioning costs to the party making such objections may serve as an instrumental whip in eliminating unnecessary back-and-forth that only frustrates the efficiency and expeditiousness of the arbitral procedure. In so doing, we may elevate ICA to be truer to its underlying key characteristics, including the avoidance of a specific legal order, improving speed, and reducing costs.

For illustrative purposes, the following is a typical scenario that unfortunately occurs every now and then. Party A commences arbitration against Party B requesting declaratory relief (e.g., declaring material breaches of a contract). In turn, Party B may invoke that Party A is abusing the process (e.g., building a case against another party or exercising a fishing expedition) or is bringing a superfluous claim (e.g., stating that the overreaching goal has already materialised), and therefore *inter alia* that the declaratory relief should be found inadmissible. Party B may also argue that Party A is seeking to establish a legal fact where there is no effective remedy as a consequence (i.e., that damage is a pre-requisite). Party B may argue that the costs for arbitration are unnecessary and unmotivated. In the Procedural Code, it is mentioned that declaratory relief may be adjudicated only if the legal matter in question is uncertain, and this uncertainty is to the detriment of the claimant.[1] The threshold is high and the burden of proof is cumbersome. Thus, a request for a declaratory relief requires a so-called "*declaratory interest.*" In a Swedish court procedure, without a declaratory interest, the claim shall be dismissed.[2] Thus, if a party requests the court to interpret a section in a contract, without requesting a specific remedy as a consequence (mostly compensation for damages, termination, penalties, liquidated damages, etc.), the request is often dismissed. For that reason, declaratory relief is not frequently sought in court. When sought, it is mostly dismissed. Conclusively then, if arbitrators in Sweden would follow the Procedural Code, the remedy of declaratory relief would be significantly limited in arbitration. Such is not an acceptable outcome in ICA, which is an autonomous procedure resting on the bedrock principle of party autonomy, i.e., a dispute based on a voluntary agreement entered into by commercial parties to settle their differences. In ICA, the parties pay out of their own means to settle their differences and are not relying on the public purse. This makes all the difference

1 13 ch. 2 § SWEDISH CODE ON CIVIL PROCEDURE (Svensk författningssamling [SFS] 1942:740) (Swed.).
2 13 ch. 3 § SWEDISH CODE ON CIVIL PROCEDURE (Svensk författningssamling [SFS] 1942:740) (Swed.).

in the world. Party B can instead challenge Party A on the merits and request the apportioning of costs on Party A accordingly. Moreover, if Party B agrees with the request, they can enter a settlement agreement or seek to shift the costs on Party A for an unnecessary procedure. Unfortunately, this is not the logic of obstructionists and those engaging in guerrilla tactics. Oftentimes, they seek to have their cake and eat it, too.

II. ICA: The Arbitrator in the Process

ICA is the preferred method of dispute resolution for commercial entities.[3] ICA is especially useful for commercial entities when redressing grievances stemming from transborder commerce, trade, and investment. The reasons as to why ICA is preferred are many, and they include, but are not limited to, the ease of enforcement, *avoidance of specific legal systems* and national courts, and *flexibility*.[4] Other traditional advantages include confidentiality and additional (greater) powers of arbitrators.[5] Within these characteristics, arbitrators have certain powers. Such powers include establishing the arbitral procedure and exercising their discretion in handling the dispute in an impartial, practical, purposive, and speedy manner, while never undercutting due process. In particular, arbitrators generally enjoy broad powers to establish the appropriate arbitral procedure as long as it is done within the realms of due process and equal treatment of the parties.[6] To put simply, in exercising their discretion to honour the key characteristics of ICA, arbitrators make the procedure more efficient and expeditious.

The jurisdiction, powers, and duties of an arbitrator arise from a "*complex mixture of the will of the parties* [i.e., '*party autonomy*'], *the law governing the arbitration agreement, the law of the place of arbitration* [i.e., '*lex arbitri*'], *and the law of the place in which recognition or enforcement of the award may be sought.*"[7] Thus, even if party autonomy is indeed the starting point, the "*balance of power, in effect, shifts from the parties to the arbitral tribunal.*"[8] Arbitrators have powers conferred by the parties, conferred by law (e.g. to determine procedural matters), and *common powers* of arbitrators.[9]

Conclusively, it can be said that arbitrators in ICA have wide discretionary powers when conducting the arbitral procedure. This is indeed by design. More importantly, it has stood the test of time due to

---

3 WHITE & CASE & QUEEN MARY SCHOOL OF INTERNATIONAL ARBITRATION, 2018 International Arbitration Survey: the Evolution of International Arbitration (2018), at 2, *available at* https://www.whitecase.com/sites/whitecase/files/files/download/publications/qmul-international-arbitration-survey-2018-19.pdf [*hereinafter* "WHITE & CASE (2018)"]; WHITE & CASE, 2021 International Arbitration Survey: Adapting arbitration to a changing world, *available at* https://www.whitecase.com/sites/default/files/2021-06/qmul-internationaxl-arbitration-survey-2021-web-single-final-v2.pdf.

4 WHITE & CASE (2018), *supra* note 3.

5 Nigel Blackaby, Constantine Partasides, Alan Redfern, and Martin Hunter, REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION 30 (6th ed., 2015).

6 *Id.* 309.; *See* also KAJ HOBÉR, INTERNATIONAL COMMERCIAL ARBITRATION IN SWEDEN 158 (1st ed. 2011) [*hereinafter* "HOBÉR"].

7 Blackaby et al., *supra* note 4 at 305.

8 *Id.* 307. See also HOBÉR, *supra* note 6, at 158 ("*The starting point for determining the arbitral tribunal's powers is the arbitration agreement and the lex arbitri, including powers with respect to the conduct of the arbitration proceedings*.").

9 Blackaby et al., *supra* note 4, at 306-319.

its veracity. By and large, contractually appointed experts are doing an expert job—the beneficiaries being its consumers and the rule of law.

III. ICA in Sweden

Sweden has a *strong rule of law* and is considered *a neutral liberal democracy that embraces capitalism*.[10] Thus, the *Swedish jurisdiction has had the right ingredients to perform as a world-leading pro-arbitration jurisdiction* and it has delivered in that capacity – primarily through the Arbitration Institute of the Stockholm Chamber of Commerce ["**SCC**"].[11] The SCC is one of the major service providers for institutional arbitration – commercial and investment – and competes globally for arbitration business.[12] SCC, on one hand, and the Swedish courts' liberal and pragmatic decisional law, on the other, has led the way in an unwavering pro-arbitration direction. *Swedish courts have made sure that the last link of the arbitral legal order remains effective* and that bogus challenges in post-award proceedings have been denied.[13] Leading scholars have rightly noted that:

> *"Sweden has a modern arbitration law and a very well-functioning legal system. A long tradition of arbitration practice gives it the foundation to offer not just reliable, but also a responsive, arbitration service. This is also reflected when it comes to recognition and enforcement of foreign arbitral awards."*[14]

Now to the topic for this note, i.e., the applicability of the Procedural Code vis-à-vis prayers for relief for arbitrations with a Swedish seat. Both domestic and international arbitrations will be briefly covered. Scholars and practitioners are divided on this point domestically speaking, but rather united on the matter as pertaining to ICA. Separating the ICA procedure from domestic intricacies, therefore detaching the process from the Procedural Code, should be the general rule for any pro-arbitration and trade-friendly jurisdiction.

IV. The Difference Between Domestic and International Arbitration

It is an undisputed fact that it is common for arbitral tribunals sitting in international arbitrations to grant declaratory relief or specific performance when requested by a party.[15] Sometimes the right is expressly provided for in the applicable arbitration rules or in the *lex arbitri*. But sometimes it is not, i.e., the law and rules are *silent*. The crux of the matter is whether the silence should be understood as: (a) a prohibition on the arbitrators' discretion, or (b) as a reference to the Procedural Code being applicable either by *analogy* or serving as *guidance*. In Nytt Juridiskt Arkiv 2000 s. 335, the Swedish Supreme Court noted that:

---

10 Ylli Dautaj, *Chapter 13: Sovereign Immunity from Execution of Foreign Arbitral Awards: Sweden's Liberal and Pragmatic Contribution*, in AXEL CALISSENDORFF, PATRIK SCHÖLDSTRÖM, 2 STOCKHOLM ARBITRATION YEARBOOK 234 (2020) [*hereinafter* "Ylli Dautaj"].

11 *Id.* 234.

12 *Ibid.*

13 *Ibid.*; The court rejects enforcement in very few cases. *See Compilation of enforcement decisions of the Court of Appeal (2000-2012)* in Ulf Franke, et al, INTERNATIONAL ARBITRATION IN SWEDEN 300-302 (Wolter Kluwer, 2013).

14 *Id.* 296; Ylli Dautaj, *supra* note 10 at 234.

15 Blackaby et al., *supra* note 4 at 523; Ewan McKendrick & Iain Maxwelly, Specific Performance in International Arbitration, 1 CHINESE J. COMP. L. (2), 195-220 (2013).

> *"Neither SML [i.e., the old arbitration act] nor the new law [i.e., the Swedish Arbitration Act] include any specific rules on procedure, and the [Swedish Code on Judicial Procedure] can only in limited scope be considered applicable by analogy."*[16]
>
> (translated from Swedish)

The authors believe that the question of prohibition on the arbitrators' discretion should be left without consideration, especially so in any pro-arbitration jurisdiction. The reason why a declaratory relief may be more cumbersome in terms of admissibility in court than, for example, damages, is due to the fact that the procedure is paid through the public purse. The public interest in, for example, interpreting two commercial parties' contracts is limited from an external stakeholder perspective. Potential backlog in courts would be another consequence. On the other hand, arbitration is a contractual undertaking, funded by the parties that voluntarily agreed to the process. Thus, the arbitrators should have an unequivocal power to find any prayer for relief admissible or inadmissible without having to look at the practices in domestic litigation.[17]

Whether the Procedural Code should be applicable by analogy or for guiding purposes, we can disagree with merit on either side. That being said, there should be a difference in position depending on if we are dealing with *domestic arbitration* or *international arbitration*. The authors are of the position that arbitrators in a purely domestic arbitration may exercise their discretion to, in some disputes, either apply the Procedural Code by analogy or else at least consider it for guiding purposes. Arbitrators in a domestic context may also exercise their discretion so as to reject such analogies or guidance. Either way, they would be sticking within their mandate and what was legitimately expected between the contractual parties. That said, the authors adhere to the latter position also for domestic arbitration matters.

Regardless of what the authors believe to be the case domestically; the position is very different in an international arbitration. The dispute is often *international* and/or the parties are often from different countries. In such matters, the arbitrators should not exercise their mandate to interpret the Procedural Code by analogy or even for guiding purposes when assessing the admissibility of prayer for relief. The authors will explain why below. Again, the authors focus on the Swedish context for illustrative purposes.

Former Chief Justice Stefan Lindskog is the leading scholar on domestic arbitration in Sweden, while Professor Kaj Hobér could lay claim as the leading scholar on ICA in Sweden.[18] Reading their respective positions is therefore a good stepping-point for further analysis. In Sections 4.3.2 and 4.3.3 of his seminal treatises, Lindskog comments as follows:

---

16 Nytt Juridiskt Arkiv [NJA] [Supreme Court Reports] 2000 p. 335 (Swed.).

17 *See, e.g.,* Gary B. Born, INTERNATIONAL ARBITRATION: LAW AND PRACTICE 3327 (3d ed., 2021).

18 *See* STEFAN LINDSKOG, SKILJEFÖRFARANDE - EN KOMMENTAR (2020) [hereinafter "STEFAN LINDSKOG"]; KAJ HOBÉR, INTERNATIONAL COMMERCIAL ARBITRATION IN SWEDEN (2021) [*hereinafter* "HOBÉR (2021)"].

> *"The fact that so few procedural rules are taken-up in the [Swedish Arbitration Act] leads to the question of whether and to what degree the rules of [the Procedural Code] are applicable. A generally applicable answer to that question could likely not be provided for.*
>
> *[...]*
>
> *Especially in international arbitration, the facts and circumstances can be such to motivate procedural handling that deviates from what is normal for the Swedish procedural order."*[19]
>
> (translated from Swedish)

The authors agree with Lindskog that international arbitration should be treated differently from domestic arbitration. Hobér makes a similar point where he states that:

> "*[i]t is generally accepted that the [Swedish Arbitration Act] must be applied autonomously, i.e., without recourse to the Procedural Code. This is particularly important if the arbitrators, the parties, or their counsel come from other jurisdictions.*"[20]

Lindskog goes on to states that "*it is important to understand that the Procedural Code […] not applicable to arbitrations in Sweden, not even by analogy; clearly, arbitration and court litigation are two different methods of resolving disputes, a fact which is recognized by the Swedish legislator.*"[21] Notwithstanding this, Hobér, makes the point, again which the authors agree with as a general matter, that arbitrators are free to look to the Procedural Code for guidance, but that it "*must not be mistaken for a general acceptance of applying the Procedural Code to arbitrations, not even in purely domestic arbitrations […].*"[22] It is a big difference between finding guidance as a matter of discretion and feeling the need to look at the Procedural Code. In light of this, the authors are of the view that arbitrators hearing ICA matters in Sweden should not entertain the Procedural Code at all, while arbitrators hearing domestic matters *could* look at the Procedural Code either analogously or for guiding purposes without undercutting its jurisdiction, powers, nor duties. Meanwhile, the authors would not be in favour of giving a role to the Procedural Code even in purely domestic matters.

Moving onto the topic for the note – seeking declaratory relief in an ICA matter with a Swedish seat. In such a situation, the Procedural Code's pre-requisites are not binding and should not be applied. In ICA, rendering a declaratory relief is common practice. The pre-requisites in the Procedural Code are meant to *inter alia* protect the public purse from expenditure assisting in clarifying positions stemming out of purely commercial and private matters (e.g., interpreting the meaning of a specific clause in a contract) or rendering judgments that may be hard, if not impossible, to enforce in the enforcement/execution stage (e.g., disclosure of documents or acting in a specific manner). In arbitration, parties have agreed to solve disputes privately through arbitration and pay accordingly.

---

19 STEFAN LINDSKOG, *supra* note 18, at sections 4.3.2 and 4.3.3.
20 HOBÉR (2021), *supra* note 11, at 185.
21 *Ibid.*
22 *Ibid.*

V. Seeking Declaratory Relief

The Swedish Arbitration Act ["**SAA**"] and SCC Arbitration Rules ["**SCC Rules**"] are silent on prayers for relief. The SAA has sixty sections in total and none deal with prayers for relief, let alone with declaratory relief. In contrast, the Procedural Code that has fifty-nine chapters and hundreds, if not thousands, of sections regulating court procedures in Sweden. In comparison to the SAA, the Procedural Code does deal with prayers for relief and with the scope of declaratory relief. Chapter 13 of the Procedural Code deals *inter alia* with the request for declaratory relief. In order to be granted a declaratory relief in Sweden, certain pre-requisites need to be met. Chapter 13, Section 2 of the Procedural Code states that:

> "*An action for a declaration of whether or not a certain legal relationship exists may be entertained on the merits if uncertainty exists as to the legal relationship, and the uncertainty exposes the plaintiff to a detriment.*
>
> *If the determination of the matter at issue depends upon the existence or non-existence of a certain disputed legal relationship, a request for a declaration thereon may be entertained.*
>
> *Actions for declaratory judgments may be entertained in other cases where legislation so prescribes*."[23]

Two pre-requisites are put forth: (i) there must be an uncertainty as to the legal relationship; and, (ii) this uncertainty must expose the plaintiff to a detriment.[24] The required *uncertainty* can be a consequence of a counterparty's attitude or from the assessment of a situation from a legal standpoint. The uncertainty of a legal relationship is considered to expose the plaintiff to a detriment as soon as it affects the plaintiff's actions, for example, financial planning. It is also required that the detriment must be proven to limit the plaintiff's opportunity or freedom to disposition, which is dependent on the disputed legal relationship. When these pre-requisites are met, the plaintiff is considered to have a declaratory relief.

As stated, the SAA and the SCC are silent on the subject-matter. In fact, the SAA has only one section that deals with the arbitrator's role in conducting the procedure. The one and only rule is of a general and overreaching character and is set forth in Section 21 of the SAA, which reads as follows:

> "*The arbitrators shall handle the dispute in an impartial, practical, and speedy manner. They shall act in accordance with the decisions of the parties, unless they are impeded from doing so.*"[25]

That being said, parties typically refer to institutional rules which include more detailed procedural guidance. In Sweden, parties mostly refer to the SCC Rules. However, the SCC Rules remain silent with respect to the scope of prayers for relief, too. Notwithstanding this, Article 2 of the SCC Rules clarifies that:

---

23 13 ch. 2 § SWEDISH CODE ON CIVIL PROCEDURE (Svensk författningssamling [SFS] 1942:740) (Swed.).

24 Even though this article mentions "*two*" pre-requisites, a declaratory relief can, according to the Procedural Code, only be given regarding the existence or non-existence of a concrete "*legal relationship*". For example, an abstract examination of a rule is therefore not permitted. One could potentially consider this a "*third*" pre-requisite.

25 21 § SWEDISH ARBITRATION ACT (Svensk författningssamling [SFS] 1999:116, 2018:1954) (Swed.) [*hereinafter* "SAA"].

> "*(1) Throughout the proceedings, the SCC, the Arbitral Tribunal and the parties shall act in an efficient and expeditious manner.*
>
> *(2) In all matters not expressly provided for in these Rules, the SCC, the Arbitral Tribunal and the parties shall act in the spirit of these Rules and shall make every reasonable effort to ensure that any award is legally enforceable.*"[26]

Article 2 should be read together with Article 23 of the SCC Rules which deals with the conduct of the arbitration. Article 23 reads as follows:

> "*(1) The Arbitral Tribunal may conduct the arbitration in such manner as it considers appropriate, subject to these Rules and any agreement between the parties.*
>
> *(2) In all cases, the Arbitral Tribunal shall conduct the arbitration in an impartial, efficient and expeditious manner, giving each party an equal and reasonable opportunity to present its case.*"[27]

Section 21 of the SAA (*lex arbitri*) together with Articles 2 and 23 of the SCC Rules makes it clear that arbitrators have broad discretionary powers to conduct the arbitration in the manner it considers appropriate. In doing, arbitrators have duties under the autonomous or semi-autonomous regime of ICA. Arbitrators are not bound by domestic intricacies. This is different from stating that they cannot be persuaded by pragmatic domestic procedural rules.

Now, attention must be drawn to the question put forth by this note, namely, whether international arbitrators sitting in Sweden should look at the Procedural Code by analogy or for guiding purposes. Exceptional scholars disagree. Lindskog writes that:

> "*A distinction should be made between rules that only concern the form of the procedure and rules that typically affect the outcome. In questions pertaining to rules of the latter kind, there should typically be no difference between arbitration and litigation.*"[28]
>
> (translated from Swedish)

Lindskog goes on and explicitly deals with the pre-requisites for prayers for relief, including declaratory relief. He is of the position that "*certain restrictions apply regarding the admissibility of prayers for relief.*"[29] With respect to declaratory relief in arbitration, he states that:

> *"In arbitral proceedings, as a starting point, the same restrictions should apply to bringing a declaratory relief as in a general court […] A claimant in an arbitration thus has a little right to bring a declaratory relief as a claimant in litigation, when there is a lack of declaratory interest."*[30]

---

26 Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce, 2017, art. 2 [*hereinafter* "SCC Rules"].
27 SCC Rules, art. 23.
28 Lindskog, *supra* note 11, at section 0–4.3.2.
29 Lindskog, *supra* note 11, at section III-0.3.1.1.
30 Lindskog, *supra* note 11, at section III-0.3.3.2.

(translated from Swedish)

However, we agree more with Hobér on this point. He states, inter alia, as already mentioned in the previous part of this paper, that "*it is important to understand that the Procedural Code is, however, not applicable to arbitrations in Sweden, not even by analogy; clearly, arbitration and court litigation are two different methods of resolving disputes, a fact which is recognized by the Swedish legislator.*"[31] Furthermore, in their concise guide to arbitration in Sweden, Oldenstam, Löf, et al write that:

> "*There are no explicit requirements as to how the request for relief should be formulated. An arbitral tribunal has the power to order performance, either of a specific action or payment of monies, and to grant injunctive and declaratory relief, if either of the parties so requests. Declaratory claims seeking to establish the existence of a certain fact or an alleged interpretation of a contract may also be granted by the arbitral tribunal. However, since the request for relief to some extent defines the limits of the arbitral tribunal's mandate, it has to be specified to such a degree that there is no doubt as to how the award is to be phrased if the relief is granted. The parties must explicitly and unequivocally state what they wish the arbitral tribunal to decide. An undefined request for 'appropriate relief' or similar is not sufficient.*"[32]

For obvious reasons, when dealing with declaratory relief, there is no mention of the Procedural Code. Put simply, in ICA matters with a Swedish seat, there is no need for a party to meet the pre-requisites of a legal question being *uncertain* and that such uncertainty *leads to a detriment*. There is no practice in ICA of requiring a *declaratory interest*. Like compensation for damages, the admissibility of a declaratory relief should be admissible almost *ipso facto*. If arbitrators nevertheless reason on admissibility, they should consider only whether the declaratory relief seeks a meaningful resolution of the parties' disagreement. At this stage, it is not the arbitrator's role to determine whether the resolution will carry effective consequences. It is sufficient that there is a disagreement that is meaningful. Some arbitrators try to identify the potential detriment. This is also largely subjective and leads to judging unnecessarily on the effective remedy of a declaratory order. Even though the pre-requisite of *detriment* is not as cumbersome as those found in the Procedural Code, it is nevertheless unnecessary as the element is largely subjective, and arbitration is a freely undertaken process. The parties are free to agree and disagree with respect to their legal relationship. There are other ways to sanction a superfluous and unnecessary proceeding, primarily through the apportionment of costs.

VI. Concluding Remarks

The authors' main argument is that international arbitrators should not, as a general position, look at domestic procedural rules when conducting the arbitral procedure, including when assessing the admissibility of prayers for relief.

Where the *lex arbitri* and the arbitration rules are silent on the prayers for relief, it should not be construed as a prohibition on the admissibility of declaratory relief. More than that, in an international

---

31 HOBÉR, *supra* note 11, at 185.

32 Robin Oldenstam, Kristoffer Löf Alexander Foerster, Azadeh Razani, Fredrik Ringquist & Aron Skogman, CONCISE GUIDE TO ARBITRATION IN SWEDEN 52 (2d ed., 2019).

arbitration, silence should not be construed as an invitation to interpret the domestic code of judicial procedure by *analogy* nor for *guiding* purposes. The silence should be seen in light of the arbitrators' wide discretionary powers to conduct the arbitration as it considers appropriate (within certain boundaries).[33]

In purely domestic arbitrations, however, the code of judicial procedure may be applied either by analogy or for guiding purposes. Arbitrators sitting in a domestic context may also reject such an exercise. The authors believe that the latter resonates better with the idea of arbitration, but others would disagree. The bottom line is this: declaratory relief is a commonly sought remedy, and international arbitrators should find such requests admissible almost *ipso facto*. Where a party seeks to obstruct the arbitral procedure by invoking inadmissibility by referring to the domestic code of judicial procedure in an ICA, such a request and conduct should be rejected, and sanctioned through the apportioning of costs.

[33] *See, e.g.*, 21 § SAA (Svensk författningssamling [SFS] 1999:116, 2018:1954) (Swed.); SCC Rules, art. 23.

INDIAN JOURNAL OF ARBITRATION LAW

PROMOTING EFFICIENCY OF ARBITRATION IN INDIA BY USING TECHNOLOGY

Meenal Garg[*]

Abstract

With the advent of COVID-19, the Indian legal system has been compelled to introduce more and more technological advancements into the dispute resolution game. While public forums have been welcoming technology with open arms, private adjudicative mechanisms like arbitration have had their own set of experiences and challenges in adopting these technological advancements, at least, as a necessity to deal with COVID-related circumstances. While many are aware of this obvious change in the functioning of Indian arbitrations, most are still oblivious of the extent of technological advancements available for use in arbitration and the consequential challenges arising from such usage. One point to be noted here is that any literature available on the subject tends to compare India with the position prevailing globally without considering the unique framework of the Indian arbitration landscape. Moreover, a lack of concrete literature and research into this area has prevented Indian arbitration players from benefitting from this "opportunity in disguise". This article considers the ground realities of the Indian arbitration regime and aims to produce findings relevant for stakeholders to adopt more technological tools as means to conduct arbitration proceedings effectively and efficiently.

I. Introduction

Technology is being used in international arbitration and at least to a limited extent, in the Indian arbitration regime. However, in the persistence of and after the pandemic the Indian courts have by and large not come across any issue arising from the use of technology in arbitration. Any literature available on the subject is either under the garb of online dispute resolution or deals with hypothetical possibilities regarding the use of technology in India. Moreover, there is no available literature that comprehensively deals with the impact of COVID-19 on Indian arbitration.

This lack of literature and jurisprudence on the use of technology in arbitration can be indicative of three possible scenarios. *First*, that arbitral tribunals seated in India are not routinely using technology and thus, there are no issues arising from the use of such technology that could possibly reach Indian courts. *Second*, that arbitral tribunals are using technology in a very limited sense and only to the extent that such usage is necessary to deal with the pandemic-related exigencies. Hence, more sophisticated issues do not arise for adjudication by the Indian courts. *Third*, technology may be used by the parties privately without disclosing the same to the arbitral tribunal and hence, the non-user party may not be aware of any issues arising out of the use of such technology. In any case, the existence of these three scenarios indicates that there is no available knowledge or research pertaining to the use of technology in Indian arbitrations.

[*] Associate, KN Legal, New Delhi. The author may be reached at meenal.garg95@gmail.com.

Since the confidentiality of arbitration proceedings is a general rule and much jurisprudence regarding the research topic has not reached Indian courts, the author has also undertaken a few consultations with some practitioners and subject experts regarding their experience with technology in India. Consultations have been carried out with Dr. Amit George (Advocate, High Court of Delhi), Mr. Anish Jaipuriar (Partner, AKS Partners, New Delhi), Mr. Garv Malhotra (Partner, Skywards Law, New Delhi and Visiting Faculty at NLSIU), Ms. Gunjan Chhabra (Partner, Adwitya Legal, New Delhi), Mr. Jeevan Ballav Panda (Partner, Khaitan & Co, New Delhi), Mr. Nitin Gupta (Managing Partner, the Law Chambers, New Delhi), Mr. Promod Nair (Senior Advocate, Karnataka High Court and Visiting Faculty at NLSIU), Ms. Shalaka Patil (Partner, Trilegal, Mumbai), Mr. Surjendu Sankar Das (AOR, Supreme Court of India), Mr. Tariq Khan (Registrar, International Arbitration and Mediation Centre, Hyderabad) and Mr. Vikas Mahendra (Partner, Keystone Partners, Bengaluru and Founder of CORD). These experts are arbitration practitioners and top law firm partners having experience in both domestic and international arbitration. It is imperative to mention here that these consultations have not been undertaken to give any empirical findings with respect to the extent of technological proliferation in Indian arbitration, but simply to understand the experiences and identify the issues faced by such practitioners.

This article has been divided into five parts. Part II identifies and summarises the use of technology in the international arbitration regime. This involves classifying the current technological tools into categories, examining the extent of use of each category of tools, and summarising associated global trends. Part III deals with the contemporary position of the Indian arbitration regime as regards the adoption of technology. Part IV outlines the present and future possible challenges regarding the use of technology in arbitration in India. These concerns are discussed under three headings, namely, legal concerns, practical concerns, and technological concerns. Part V embarks on an analytical study of the challenges proposed in Part IV and, by examining the data collected in Part II and III, offers suggestions for use of technology in India seated arbitrations.

II. Use of Technology in International Arbitration

Even before the advent of the COVID-19 pandemic, international arbitration lawyers had been using technological tools for various purposes. Technological tools are used simply because they are efficient in nature, and arguably cost effective. Thus, these advantages prompt the usage of technology in international arbitration. Another motivating factor is *necessity*, i.e., the pandemic. Owing to restrictions and difficulties in the cross-border movement of stakeholders, technology has also become a necessity in the global arbitral community. This part of the article identifies the key technologies available today and global trends as regards the use of technology to discover the extent of popularity of technology in international arbitration.

A. Available Technological Tools

Technology can be used for various purposes at the different stages of arbitration. These can be classified into four broad categories, namely, online tools, algorithm-based software, assistive technological tools, and app-based tools. There may be some overlap among certain tools, which may fit into more than one category.

i. Online Conduct of Arbitration Proceedings

This is the most common use of technology in arbitration in the current times. It involves the conduct of arbitral proceedings over a virtual platform and includes sending of documents via e-mail. Similarly, virtual arbitration hearings have been routinely used for case management conferences and preliminary hearings to set up a schedule and timelines for the various stages of arbitration.

To facilitate virtual hearings and online arbitration, many popular arbitral institutions like the Singapore International Arbitration Centre ["**SIAC**"] have offered a one-stop solution by collaborating with various service providers. Thus, they have introduced a common platform for the conduct of proceedings, sharing of documents etc.[1] This includes a mix of services like cloud storage software, video conferencing software etc.

In fact, as per one recent survey, the administrative support provided by an arbitral institution for the conduct of virtual hearings is the most prominent factor when deciding on arbitral institutions and rules.[2] This indicates the importance of the use of technology in arbitration.

ii. Algorithm-based software

Algorithm-based software or Artificial Intelligence ["**AI**"] technologies have been the most remarkable contemporary technological tool in the arbitration landscape. AI tools have opened new opportunities by providing services like data analytics software, amongst others.

Lawyers are already employing AI to conduct low-level legal tasks, such as reviewing contracts, researching case laws, and reducing due diligence tasks by screening evidence and eliminating unnecessary documents.[3] This has led to a significant reduction of time and costs which could be otherwise utilised to conduct other important tasks, such as preparation of arguments and pleadings. Another example is the use of software like 'ClauseBuilder®' to draft arbitration clauses.[4] Similarly, parties are using platforms like Arbitrator Intelligence to get reports on potential arbitrators to appoint the most qualified and suitable arbitrators according to preferences and rankings.[5]

Parties may be sceptical about using AI tools at the adjudication stage particularly because arbitration produces a binding award. Given the present level of sophistication of such technologies, it is theoretically possible that an error may find its way into the award, which may be irreversible. On the other hand, parties often use other technology-assisted techniques like e-negotiation and e-mediation during pre-arbitration stages as they do not necessarily lead to a binding outcome. Many such tools

---

1 David Bateson, *Virtual Arbitration: The Impact of COVID-19*, 9 INDIAN J. ARB. L. 159, 163 (2020); Chahat Chawla, *International Arbitration During COVID-19: A Case Counsel's Perspective*, KLUWER ARB. BLOG (June 4, 2020), *available at* http://arbitrationblog.kluwerarbitration.com/2020/06/04/international-arbitration-during-covid-19-a-case-counsels-perspective/.

2 *2021 International Adaptation Survey: Adapting Arbitration to a Changing World*, WHITE & CASE, *available at* https://www.whitecase.com/publications/insight/2021-international-arbitration-survey [*hereinafter* "WHITE & CASE"].

3 Daniele Verza Marcon, Erika Donin Dutra & Lukas da Costa Irion, *Artificial Intelligence in Arbitration: Should We Consider the Possibility of Decision-Rendering AI?*, 36 YOUNG ARB. REV. 14, 16 (2020).

4 *AAA-ICDR Technological Services*, AMERICAN ARBITRATION ASSOCIATION, *available at* https://www.adr.org/TechnologyServices/aaa-icdr-software-and-online-tools.

5 *About Us*, ARBITRATOR INTELLIGENCE, *available at* https://arbitratorintelligence.com/about/.

like 'Cybersettle' use sophisticated algorithms to provide optimal settlement options.[6] This can certainly enhance the effectiveness of pre-arbitration machinery.

One recent phenomenon related to AI is blockchain arbitration. Blockchain arbitration emerged as a corollary to the increase in the use of cryptocurrencies and smart contracts. In its essence, blockchain arbitration is a self-executing contract where various legal obligations of the parties are automatically triggered on fulfilment of certain conditions. The chief advantage of this system is that the award is made in cryptocurrency or any other value on blockchain technology. Thus, the award can become self-enforcing after certain conditions are met, thereby ameliorating the need for formal recognition and enforcement proceedings. Similarly, simpler steps like invocation of an arbitration clause, appointment of an arbitrator, etc., can be done through blockchain arbitration. Although this form of arbitration has not become entirely popular yet, there is evidence of players in the arbitration community practicing the same.[7] The most common service provider is CodeLegit, which has published its own set of rules that may be applied in blockchain arbitration.[8]

Amongst these various tools, a recent survey has revealed that among the various technological tools employed for dispute resolution, there has been a growth in the use of AI, with the most common form of use of AI being in technology-assisted document review.[9] Moreover, AI has attracted significant attention from the global arbitral community, with AI tools becoming *sine qua non* in big law firms. Small and mid-sized firms have also followed suit and started adopting these technologies.

iii. Assistive technologies

In the current scenario, cutting-edge technology such as speech recognition in translation or interpretation have the potential to render human translators or secretaries otiose. Although limited human intervention is required to supervise and ensure the accuracy of the data, assistive technologies have greatly improved the efficiency of arbitration proceedings. In fact, live transcription service providers like Fireflies[10] and Otter[11] have become more popular with the arbitration community especially after the advent of the COVID-19 pandemic. These platforms can be integrated into almost any virtual hearing platform, and these can provide substantially accurate transcription of the arbitration proceedings.

Another point to note here is that, unlike courtroom litigation, arbitration allows for procedural flexibility in making submissions and presenting arguments. Therefore, arbitration lawyers also employ basic technological tools like Microsoft PowerPoint to make their submissions, which may not be permitted in a conventional courtroom.

---

6 CYBERSETTLE, *available at* http://www.cybersettle.com/.

7 Pietro Ortolani, *The Impact of Blockchain Technologies and smart contracts on dispute resolution; arbitration and court litigation at cross-roads*, 24 UNIFORM L. REV. 430, 434-35 (2019).

8 *CodeLegit White Paper on Blockchain Arbitration*, GOOGLE DRIVE, *available at* https://docs.google.com/document/d/1v_AdWbMuc2Ei70ghITC1mYX4_5VQsF_28O4PsLckNM4/edit.

9 WHITE & CASE, *supra* note 2.

10 *Overview*, FIREFLIES, *available at* https://fireflies.ai/product/overview.

11 OTTER, *available at* https://otter.ai/.

iv. App-Based Technologies

With the emergence of smartphones and android operating systems, portable phones are fully functional computers available on the go. Today, all our daily activities are done through apps. Arbitration has not fallen behind and has adapted to suit the busy life of practitioners. However, apps have not yet become popular in the international arbitral community when compared with other forms of technology.

Many of the technological tools discussed in the previous sub-sections are also available in form of apps. For instance, simpler technologies like Google Translate and Microsoft PowerPoint are available in the form of mobile apps.

Some arbitral institutions also use apps to create a user-friendly platform to access their website and provide services. The most common example of this is the Dispute Resolution Services (DRS) app of the International Chamber of Commerce ["**ICC**"], which allows the user to seemingly access resources and arrange for bookings, meetings etc.[12] Similarly, the SIAC launched an app in 2011 to access its website.[13] However, to the author's understanding, this app is not in vogue these days. Law firms, private organisations and other entities have launched their own apps providing access to a host of arbitration resources which can be accessed on the go.[14]

B. Global Key Developments

Given the abundance of available technological tools, the next question that immediately arises is in assessing how popular these tools are in the international arbitration landscape. Globally, there have been some key developments with respect to the use of technology in arbitration. Of course, some of these are in the aftermath of the pandemic. Nevertheless, all these trends point to the increasing tendency of using technology in arbitration.

i. Initiatives by Arbitral Institutions

In response to the pandemic, many arbitral institutions, including the Hong Kong International Arbitration Centre,[15] and the Chartered Institute of Arbitrators,[16] have issued guidance notes to facilitate virtual hearings. These guidance notes are in the nature of 'clarifications', expressly stating that virtual conferencing is compatible with the existing institutional rules. On the other hand, arbitral

---

12 *4 Reasons to Download the New ICC DRS App*, ICC (Sept. 18, 2019), *available at* https://iccwbo.org/media-wall/news-speeches/4-reasons-to-download-the-new-icc-drs-app/.

13 John Savage, *SIAC Arbitration: Some Strong 2010 Numbers & an App*, KLUWER ARB. BLOG (Feb. 24, 2011), *available at* http://arbitrationblog.kluwerarbitration.com/2011/02/24/siac-arbitration-some-strong-2010-numbers-and-an-app/.

14 *See, e.g., DIA (Damages in International Arbitration) App Launch for the Americas and Europe,* INT'L COUNCIL COM. ARB. (Nov. 4, 2021), *available at* https://www.arbitration-icca.org/dia-damages-international-arbitration-app-launch-americas-and-europe; *Covington's Arbitration App Lays Key Resources at Practitioners' Fingertips*, COVINGTON (July 23, 2015), *available at* https://www.cov.com/en/news-and-insights/news/2015/07/covingtons-arbitration-app-lays-key-resources-at-practitioners-fingertips.

15 *HKIAC Guidelines for Virtual Hearings*, HONG KONG INT'L ARB. CTR. (May 14, 2020), *available at* https://www.hkiac.org/sites/default/files/ck_filebrowser/HKIAC%20Guidelines%20for%20Virtual%20Hearings_3.pdf.

16 *Guidance Note on Remote Dispute Resolution Proceedings*, CHARTERED INST. ARB. (2020), *available at* https://www.ciarb.org/media/8967/remote-hearings-guidance-note.pdf.

institutions like the London Court of International Arbitration,[17] and ICC,[18] have released a new version of their rules that expressly incorporates the role of virtual hearings, electronic signatures etc. Apart from this, almost all arbitral institutions are encouraging dialogue on the subject through webinars, conferences etc., to increase awareness and encourage the use of technology in arbitration.[19]

v. Initiatives by States

Mere amendment of institutional arbitral rules is not enough to legitimise the use of technology in arbitration. Since arbitration is a seat-centric concept, the use of technology cannot be permitted unless and until the seat or the enforcing state recognises such proceedings.

Historically, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ["**New York Convention**"] does not expressly provide for the use of technology, except for the formation of arbitration agreements through the exchange of telegrams.[20] Some jurisdictions, such as Hong Kong, have extended this definition to include arbitration agreements formed by the exchange of e-mails or other modes of data interchange.[21] However, in the past few years, some countries like the United Arab Emirates,[22] Netherlands[23] Jordan,[24] etc., have provided for the use of technology in their laws by recognising the usage of video conferencing, electronically signed awards etc, in arbitral proceedings.

Apart from the legislative efforts, the judiciary around the globe has also been proactive in encouraging the use of technology in arbitration. For instance, courts in the USA,[25] Austria,[26] and Egypt,[27] have held that there is no indefeasible right to a physical hearing, and virtual hearings do not raise any due process concerns or result in unequal treatment of parties. It is imperative to mention here that courts have not expressly ruled with regards to any other issue arising out of the use of technology in arbitration. However, use of technology has also been encouraged in ordinary court proceedings. For instance, the Justice Division of the High Court in the United Kingdom ["**U.K.**"] Court in *Pyrrho Investments* v. *MWB Property*,[28] permitted the use of predictive coding technology for filtering electronic documents, subject to a common protocol agreed upon by the parties. Since arbitration by its very

---

17 *LCIA Arbitration Rules, 2020*, LONDON COURT OF INT'L ARB. (Oct. 1, 2020), *available at* https://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2020.aspx.

18 *ICC Arbitration Rules, 2021*, INT'L CHAMBER COM. (Jan. 1, 2021), *available at* https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/.

19 *See, e.g., Technology in Arbitration*, CHARTERED INST. ARB., *available at* https://ciarb.org/events/technology-in-arbitration/.

20 Convention on the Recognition & Enforcement of Foreign Arbitral Awards arts. II & III (2), June 10, 1958, 330 U.N.T.S. 38.

21 Arbitration Ordinance, (2011) Cap. 609, § 19(4) (H.K.).

22 Federal Law No. 6 of 2018 on Arbitration, Art. 28(2)(b) (U.A.E.).

23 Art. 4:1072b Rv (Neth.).

24 Arbitration Law, No. 31 of 2001, Art. 10(a) (Jordan).

25 Carlos Legaspy v. Fin. Indus. Regulatory Auth., No. 1:20-cv-4700 (N.D. Ill., 2020).

26 Oberster Gerichtshof [OGH] [Supreme Court] July 23, 2020, 18 ONc 3/20s, *available at* https://www.ris.bka.gv.at/Dokumente/Justiz/JJT_20200723_OGH0002_018ONC00003_20S0000_000/JJT_20200723_OGH0002_018ONC00003_20S0000_000.pdf (Austria).

27 Mah. kamat al-Naqd. [Court of Cassation], case no. 18309, session of 27 Oct. 2020 of 17 Feb. 1972, year 1442 (Egypt).

28 Pyrrho Inv. v. MWB Prop., [2016] E.W.H.C. 256 ¶ 33 (Ch.) (U.K.).

nature is a consensual process, it is reasonable to imply that the courts would have a pro-technology attitude towards the use of technology in arbitration, if consensual and adequate operating procedures are adopted. Recently, the Sao Paulo District Court stayed the enforcement of an arbitral award on the ground that the arbitration proceedings were tainted by cyber hacking.[29]

vi. Research suggesting increase in the use of technology

The 2018 Queen Mary survey indicated that 60% of the answering respondents had "*always*" or "*frequently*" used videoconferencing room technologies in their arbitral proceedings.[30] Moreover, the 2021 version of the survey has indicated an increase in the use of AI technologies in arbitration.[31] Interestingly, this survey has also displayed that the degree of use of video conferencing and hearing rooms has more or less remained the same,[32] implying that the use of such technologies has reached the saturation point and has already become the industry norm in the international arbitration community.

Recognising these developments, some global bodies have also published reports, guidelines, protocols etc., dealing with various aspects of technology in arbitration. For instance, the Seoul Protocol on Video Conference in International Arbitration,[33] has become the talk of the town, especially when the subject is the use of video conferencing in arbitration. Similarly, the International Council for Commercial Arbitration – New York City Bar Association – International Institute for Conflict Prevention and Resolution Cybersecurity Protocol for International Arbitration,[34] deals with important data privacy and technological issues, which may arise from the use of technology in arbitration.

Lastly, the U.K. Jurisdiction Taskforce has recently published its Digital Dispute Resolution Rules for the resolution of blockchain disputes. Here, blockchain arbitration has been proposed to be a substitute for the current escrow mechanism.[35]

---

29 Cosmo Sanderson, *Brazilian Pulp Award Leads to Cyber Hack Challenge*, GLOBAL ARB. REV. (Apr. 12, 2021), *available at* https://globalarbitrationreview.com/cybersecurity/brazilian-pulp-award-leads-cyber-hack-challenge, *cited in* Niccolò Landi, *Remote Hearings: Observations on the Problem of Personal Data Protection and Cybersecurity*, ICCA REPORTS NO. 10 127 (2022), *available at* https://cdn.arbitration-icca.org/s3fs-public/document/media_document/ICCA-Reports-no.%2010_Right-to-a-Physical-Hearing7%20Nov2022.pdf.

30 *2018 International Arbitration Survey: The Evolution of International Arbitration*, QUEEN MARY UNIV. OF LONDON 32 (2018), *available at* http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey-report.pdf.

31 WHITE & CASE, *supra* note 2.

32 *Id.* 2.

33 *Seoul Protocol on Video Conference in International Arbitration is Released*, KCAB INT'L (Mar. 18, 2020), *available at* http://www.kcabinternational.or.kr/user/Board/comm_notice_view.do?BBS_NO=548&BD_NO=169&CURRENT_MENU_CODE=MENU0025&TOP_MENU_CODE=MENU0024.

34 *ICCA-NYC Bar –CPR Protocol on Cybersecurity in International Arbitration*, INT'L COUNCIL COM. ARB. (2019), *available at* https://cdn.arbitration-icca.org/s3fs-public/document/media_document/icca-nyc_bar-cpr_cybersecurity_protocol_for_international_arbitration_-_print_version.pdf.

35 UK Jurisdiction Taskforce, *Digital Dispute Resolution Rules*, LAWTECH UK (2021), *available at* https://35z8e83m1ih83drye280o9d1-wpengine.netdna-ssl.com/wp-content/uploads/2021/04/Lawtech_DDRR_Final.pdf.

Thus, it is evident that technology has penetrated almost all stages of dispute resolution, including pre-arbitration and post-arbitration stages. Although the pace of adoption of various technological tools may vary, it is amply clear that the international arbitral community is rapidly adopting technology in arbitration. There is extensive academic discussion as regards the pros and cons of technology in arbitration, which are not explored within this article. However, the increasing discourse and development at all fronts indicates the importance of technology in international arbitration.

III. Contemporary Use of Technology in Indian Arbitration Regime

A. A Bird's Eye View of Indian Arbitration Landscape and Technology Law

The Indian arbitration framework is governed by the Arbitration and Conciliation Act, 1996 ["**the Act**"].[36] The Act is divided into four broad parts. Part I governs the arbitrations seated in India, irrespective of the nationality of the parties. Part II deals with the recognition and enforcement of foreign arbitration awards. Part III deals with conciliation and Part IV deals with miscellaneous provisions.

As far as technology law is concerned, it is governed by the Information and Technology Act, 2000 ["**IT Act**"].[37] The preamble to the IT Act states that it is a statute enacted to "… *provide legal recognition for transactions carried out by means of electronic data interchange and other means of electronic communication*…"[38] A cursory reading of the IT Act provides legal recognition to electronic records, wherever such records are required to be in writing,[39] and digital signatures.[40] Thus, any interaction of technology with arbitration in India would require an examination of the IT Act.

B. Adoption of Technologies

i. Historical Recognition

The Supreme Court of India had recognised the role of e-mail at various stages of arbitration almost two decades before the pandemic. In the case of *Grid Corporation of Orissa* v. *AES Corporation*,[41] the Supreme Court held that while appointing the third arbitrator, it is not necessary that the two party-appointed arbitrators physically meet or give their decision in writing. It was held that it is sufficient if the third arbitrator is communicated of his appointment by any mode,[42] which may be extended to include communication by e-mail. Similarly, the Court has also upheld the validity of arbitration agreements formed through an exchange of e-mails without the actual signing of a physical document.[43] In 2015, Section 7(4)(b) of the Act was amended to include arbitration agreements formed through "*electronic means*." The 246th Law Commission noted that this amendment was proposed to

36 Arbitration & Conciliation Act, 1996, No. 26 of 1996 (India) [*hereinafter* "Arbitration Act"].
37 Information & Technology Act, 2000, No. 21 of 2000 (India).
38 *Id.* Preamble.
39 *Id.* § 4.
40 *Id.* § 5.
41 Grid Corp. of Orissa v. AES Corp., (2002) 7 SCC 736.
42 *Id.* ¶ 23.
43 Trimex Int'l v. Vedanta Aluminium Ltd., 2010(1) S.C.A.L.E. 574, ¶ 49; Shakti Bhog v. Kola Shipping, (2009) 2 S.C.C. 134, ¶ 14–17.

bring the Act in conformity with the United Nations Commission on International Trade Law Model Law on International Commercial Arbitration.[44]

ii. Shift to Virtual Hearings

Social distancing has already compelled arbitral tribunals and arbitral institutions across the globe to switch over to tech-savvy arbitral proceedings, which are primarily conducted using video conferencing technologies. In the Indian context, there is no statutory embargo regarding the conduct of arbitral proceedings via video conferencing or other means of technology. Section 19(2) of the Act allows the parties to agree upon the procedure of conduct of arbitral proceedings. Similarly, Section 19(3) of the Act enables the arbitral tribunal to conduct the proceedings in any manner it deems appropriate in case there is no agreement between the parties regarding the conduct of proceedings. Recently, the Delhi High Court has also affirmed this position and has held that no party has an indefeasible right to a physical hearing or a virtual hearing, and the sole discretion as to the manner of hearing rests with the arbitrator.[45]

Apart from this, new domestic players like Centre for Online Resolution of Disputes (CORD),[46] and ODRWays Solutions Private Limited (Sama),[47] have also introduced specific platforms with facilities like breakout rooms etc., to facilitate the shift from physical arbitration to virtual hearings.

One practitioner who is a currently a partner in the dispute resolution wing of an India based full-service law firm, had noted that though virtual arbitrations have found their way into the Indian arbitration landscape, arbitral tribunals are always ready to switch back to physical hearings. This is because in international arbitrations, parties from various jurisdictions are involved. Therefore, it is feasible to employ video conferencing to save costs and time. On the other hand, in domestic arbitrations, parties are usually operating around the seat of arbitration and, hence, it is easier to shift to physical arbitration.

iii. Ad Hoc Protocols for the conduct of arbitration

Most practitioners including law firm partners, Senior Advocates, independent practitioners specializing in domestic and international commercial arbitration noted that due to the absence of any guiding institutional rules, most arbitrators do not agree on any *ex-ante* protocol for the conduct of arbitration proceedings, which certainly poses as a hindrance to the smooth conduct of virtual arbitration proceedings. However, some exceptions to this general position came to light during consultations with practitioners. The most common exception was the degree of experience and willingness of the counsels of both parties.

One practitioner who is currently the Managing Partner of a dispute resolution law firm based out of New Delhi, pointed out that as a general practice, the counsel for one party proposes a protocol which may be followed throughout the arbitration. Subsequently, the counsel for the other party may suggest

---

44 *246th Report of Law Commission on Amendments to the Arbitration & Conciliation Act, 1996*, LAW COMM'N INDIA 42 (Aug. 2014), *available at* https://lawcommissionofindia.nic.in/reports/Report246.pdf [hereinafter "LAW COMM'N INDIA"].

45 Result Serv. v. Signify Innovations India (O.M.P. (I) (Comm.) 23 of 2021, decided on May 17, 2021, Delhi HC).

46 *About Us*, CORD, *available at* https://resolveoncord.com/about-us/.

47 *About Us*, SAMA, *available at* https://www.sama.live/about-us.php.

certain changes to the proposed protocol, and finally, a mutually consented protocol would be agreed upon by the parties. The sophistication of such protocols depends upon the skill of the practitioners. Nevertheless, these protocols usually cover the choice of video conferencing platform, submission of pleadings etc.

Another exception that was disclosed is that arbitrators with heavy caseloads have drafted their own protocols addressing major issues which they have faced in their arbitrations, and these protocols are implemented as procedural guidelines. It was pointed out by one of the practitioners who is currently the Managing Partner of a dispute resolution law firm based out of New Delhi that in a case, the presiding arbitrator had implemented a protocol based on SIAC guidelines.

iv. *Marginal shift towards Documents-only arbitration*

Section 29B of the Act enables the parties to opt for fast-track arbitration, where the parties can submit all their pleadings along with relevant documents, and the award is made on the basis of these documents and pleadings, without any opportunity of an oral hearing. The principal advantage of fast-track arbitration is that the award must be made within six months from the date on which the arbitral tribunal enters into reference, thereby resulting in considerable time and cost savings. Despite this advantage, it has been seen that parties rarely opt for fast-track arbitration in India.[48]

In this respect, it is noteworthy to mention that even prior to the outburst of the COVID-19 pandemic, the National Internet Exchange of India (NIXI) was the only body in India which resolved all disputes through such a "documents only" arbitration. All disputes pertaining to *.in* domain names are mostly resolved through e-mail, such that all submissions and documents are submitted via e-mail and even the award is pronounced online, often without any opportunity of oral or virtual hearing.[49] Such a mechanism has ensured minimal disruption in the resolution of domain name disputes in COVID-19 times. Another independent practitioner and former senior associate at a leading Indian law firm, who also acts as an arbitrator, noted that in less complex and low-value disputes, parties may agree to documents-only, arbitration and employ case management software etc., where all the documents are uploaded and the final award is pronounced online.

v. *Rare Use of other technologies*

During consultations with various practitioners, law firm partners, senior advocates and top management of various Indian arbitral institutions who have vast experience in handling both domestic and international commercial arbitration as both arbitrator and counsel, it was found that most arbitral tribunals have switched to virtual hearings as a means of necessity. Moreover, a practitioner revealed that the use of mobile applications is not very prevalent except for organising the calendar, calculating billable hours, etc.

---

48 Alipak Banerjee, Sahil Kanuga & Payal Chatterjee, *Fighting an Arbitration in Times of Distress: An Indian Perspective*, BAR & BENCH (Apr. 22, 2020), *available at* https://www.barandbench.com/columns/fighting-an-arbitration-in-times-of-distress-an-indian-perspective.

49 *INDRP Rules of Procedure*, IN REGISTRY (June 28, 2005), *available at* https://www.registry.in/indrprulesprocedure.

However, it was also found that apart from video conferencing, other technologies like transcription services, predictive coding, etc., were not being used even if the practitioner and/or arbitrator is routinely using such technologies in international arbitration.

Some practitioners also revealed that other technologies usually involved the use of live transcription services and that too in very exceptional circumstances, provided, they had enough budget and consent of all parties to use these technologies. Nevertheless, the practitioners affirmed the fact that the use of such technologies leads to cost savings.

One practitioner opined that it could lead to cost savings of up to eight times the cost that would have been incurred on manpower in doing the same task. Furthermore, these technologies were found to be efficient with minimal errors.

vi. Limited or no role of Court-Annexed Arbitral Institutions

In case of an *ad hoc* arbitration, if the parties are unable to agree upon the appointment of the arbitrator, recourse must be taken under Section 11(6) of the Act for the appointment of the arbitrator. As per this provision, in the case of a domestic arbitration, such an application is made to the respective High Court, and in the case of an international commercial arbitration seated in India, the application is made to the Supreme Court. Once the arbitrator is appointed, such courts usually direct their affiliated centres to conduct the proceedings (at the request or with the consent of both the parties). For instance, in Delhi, the proceedings are administered by the Delhi International Arbitration Centre ["**DIAC**"]; in Punjab & Haryana, the proceedings are administered by the Chandigarh Arbitration Centre; in Orissa, the proceedings are administered by the Orissa Arbitration Centre; and in Karnataka, the proceedings are administered by the Arbitration Centre of Karnataka Arbitration Centre, and so on.

Pre-COVID, these institutions mostly provided a physical venue for hearing, a commonplace to store documents, and performed ancillary functions. However, consultations with various practitioners, law firm partners, senior advocates and top management of various Indian arbitral institutions who have vast experience in handling both domestic and international commercial arbitration as both arbitrator and counsel revealed that after COVID-19, whilst most privately managed arbitral institutions have efficiently adapted their working, court-annexed arbitral institutions have become redundant in as much as they have not provided any support for virtual hearings, guidance notes, etc. At the same time, it was also noted that since majority of the Indian arbitration caseload is handled by court-annexed arbitral institutions, initiatives by private arbitral institutions have made little difference in the conduct of arbitral proceedings.

Moreover, court-annexed arbitral institutions continue to be relevant today only when there is a need for physical hearings for examination of witnesses, submission of documents, etc. Amongst these observations, DIAC has emerged to be an exception as practitioners stated that it has been proactive in arranging the logistics of a virtual hearing. Nevertheless, in comparison to court proceedings and private arbitral institutions, practitioners and law firm partners having significant experience in

handling complex arbitrations in the pre-COVID era as well as during COVID expressed their general disappointment as these institutions have not even introduced the concept of e-filing.

The rules for these institutions are also drafted by a committee of their supervisory high court. In this respect, no endeavour has been made to update these rules to provide for the use of technology. For instance, the Gujarat High Court had recently published The Arbitration Centre (Domestic and International), High Court of Gujarat Rules, 2021 ["**Gujarat Rules**"].[50] In spite of experiencing virtual arbitrations, the Gujarat Rules provide for a physical set-up of arbitration by using phrases like "*oral hearing*,"[51] instead of "*hearing*", and submission of "*copies*"[52] of pleadings, instead of "*submission of pleadings*" etc. This indicates ignorance on part of state authorities in the use of technology in Indian arbitration, and further points to the same not being a priority.

vii. Effect of Electronically Executed Arbitration Clauses on related Court Proceedings

As already noted, an arbitration agreement through the exchange of e-mails is recognised under the Act. However, it is difficult to imagine a scenario where the parties separately send e-mails for the purpose of entering into an arbitration agreement. Nowadays, most commercial contracts contain arbitration clauses. An exchange of the contract documents containing the arbitration clause and acceptance through e-mail would be covered by this clause.

With the advent of COVID-19, an increasing number of contracts and documents are being signed, executed, and published online. This raises a question as to what happens if the contract is issued on a public platform in the form of a public tender and the lowest bidder electronically signs the same to create a binding contract that contains an arbitration clause. Although arbitration is not concerned with the concept of territorial jurisdiction as the arbitrator derives their jurisdiction from the arbitration agreement, the Act provides for various situations where court intervention is required.[53] These state courts operate on the concept of territorial jurisdiction and hence, it is imperative to examine the effect of technology on these proceedings.

The online execution of a contract can have an impact on the court proceedings under the Act, which is slowly being explored by the courts. For instance, the Calcutta High Court declined to exercise its jurisdiction under Section 9 of the Act because under Section 13(3) of the IT Act, an electronically issued document is deemed to be issued from the place where such person ordinarily carries its business.[54] In this case, since the place of business fell outside the original side jurisdiction of the Calcutta High Court, the Court dismissed the application for lack of jurisdiction.

---

50 Arbitration Centre (Domestic & International), High Court of Gujarat Rules, 2021, Gujarat Government Gazette, pt. IV-C (Feb. 15, 2021).

51 *Id.* Rule 34.1

52 *Id.* Rules 24.3 & 25.5.

53 *See, e.g.,* Arbitration Act, §§ 9, 11.

54 Golden Edge Eng'g v. B.H.E.L., AIR 2020 Cal. 217.

Similarly, the Punjab and Haryana High Court has held that in the absence of a seat clause, the court exercising jurisdiction over the place of business, by applying Section 13 of the IT Act, would have jurisdiction to entertain an application under Section 11(6) of the Act.[55]

Thus, it may be concluded that any adoption of technology in Indian arbitration has been a consequence of the pandemic. However, this transition has been slow as the purpose of such adoption is to meet urgent exigencies. The use of technologies apart from video conferencing has found its way into Indian arbitrations, but only in exceptional circumstances. The positive takeaway that emerges from the research is that even though the Indian arbitral community has had limited exposure to technology, users of such technology seem to recognise the benefits arising from the use of such technology and are ready to endorse more usage of technology in Indian arbitrations.

IV. Challenges

In the previous part, it has been identified and affirmed that India is not regularly using technology in arbitration when compared with international standards. This is because of various problems and concerns associated with the use of technology. Whilst some of these concerns may have been noticed in the previous part, this part will identify the existing and potential challenges in the employment of technology in the Indian arbitration regime.

A. Legal Concerns

It is pertinent to mention here that till date, Indian courts have not frequently confronted any legal issue arising solely because of the use of technology or virtual hearings in arbitration. On the other hand, it has been seen that courts around the globe have increasingly been facing such concerns and, therefore, it would be useful to identify and comment upon possible legal objections that may arise from the use of technology in India-seated arbitrations.

i. Unequal Treatment of Parties

Some concerns have been raised with regards to the impact of technology on the equal treatment of parties.[56] Section 18 of the Act states that parties to the dispute must be treated equally. A white paper had noted that this issue may arise due to the use of different audio and video equipment by the parties, or where one party may be present in person and one party may be present virtually.[57] During consultation with practitioners and law firm partners having significant experience in handling complex arbitrations in the pre-COVID era as well as during COVID, it was found that such an issue is usually not raised in Indian arbitrations. Furthermore, such an issue has not cropped up before the Indian courts, but this lack of clarity certainly poses as a hindrance to the use of technology.

---

55 Kundan Rice Mills v. Nat'l Commodities Derivative Exch., 2011 SCC Online P&H 4058.

56 Sonal Kumar Singh, Anish Jaipuriar & Sayantika Ganguly, *Artificial Intelligence in Arbitration: Revolutionary or Impractical*, MONDAQ (Jan. 19, 2021), *available at* https://www.mondaq.com/india/arbitration-dispute-resolution/1027248/artificial-intelligence-in-arbitration-revolutionary-or-impractical.

57 Centre for Arbitration & Research, *Virtual Arbitration in India: A Practical Guide*, MNLU MUMBAI 35 (2020), *available at* https://mnlumumbai.edu.in/pdf/Virtual%20Arbitration%20in%20India,%20CAR%20MNLU%20Mumbai.pdf [*hereinafter* "Centre for Arbitration & Research"].

ii. Fair & Reasonable Opportunity to present one's case

It has been seen that conducting virtual hearings is the only viable option left before tribunals to conduct arbitral proceedings during the pandemic. However, it is possible that virtual hearings may pose public policy concerns during enforcement of awards made consequent to such proceedings. To illustrate, suppose an arbitral tribunal fixes a hearing via video conferencing, which is opposed by one party on the ground of lack of digital copies of relevant documents, and the tribunal rejects such opposition and proceeds with virtual arbitral proceedings. The objecting party may now argue before the court that it was denied full and equal opportunity to present its case and, therefore, an award passed consequent to a virtual hearing is liable to be set aside. Conversely, suppose one party requests for a virtual hearing and the arbitral tribunal insists on a physical hearing, the same may result in undue delay and misconduct on the part of the arbitral tribunal to conduct the arbitration proceedings. Apart from these difficulties, virtual hearings may also pose *due process* concerns, which may be raised before the enforcing court under the Act.

In India, a domestic arbitral award can be set aside only if a specific ground is made out under Section 34 of the Act. In this respect, denial of equal opportunity of being heard is an explicit and valid ground to set aside an arbitral award.[58] Similarly, unexplained and inordinate delay in the making of an award is also a ground for setting aside an award.[59] These two grounds create a paradoxical situation. On the one hand, undue insistence on virtual physical hearings during COVID-19 could prove to be problematic as it may amount to the denial of equal opportunity of being heard. On the other, indefinitely delaying the proceedings solely on the ground of COVID-19 may constitute as inordinate delay.

iii. Lack of Clarity on Confidentiality

Confidentiality is a hallmark benefit of arbitration. However, previously, Indian law did not expressly provide for the confidentiality of arbitral proceedings. It was only in 2019 that Section 42A was introduced in the Act, which provided for the confidentiality of arbitral proceedings.[60] However, the wordings of Section 42A have raised concerns with respect to the effectiveness of this provision. It has been pointed out that only arbitrators, arbitral institutions and parties are bound by this provision, and not tribunal secretaries, witnesses, etc.[61] Another issue related to confidentiality is its effect on non-signatories. Non-signatories are not "*parties*"[62] to the arbitration agreement, but they are still impleaded as parties to the arbitration in certain situations. It has been opined by commentators that the wordings of Section 42A would not cover such non-signatories.[63]

In response, this author is not in complete agreement with this comment. This is because there is a whole line of jurisprudence specifying when non-signatories may be impleaded as "*parties*" in

58 Arbitration Act, § 34(2)(b)(ii).
59 K. Dhanasekar v. Union of India, 2019 SCC OnLine Mad 38989, ¶ 10.
60 Arbitration & Conciliation (Amendment) Act, No. 33 of 2019, § 9 (India).
61 Centre for Arbitration & Research, *supra* note 57 at 36–37.
62 Arbitration Act, § 2(1)(h) (Indian law defines party to mean a party to an arbitration agreement).
63 Tariq Khan, *The Who, Why & When of Confidentiality in Arbitration Proceedings*, SCC ONLINE BLOG (Jan. 21, 2021), *available at* https://www.scconline.com/blog/?p=242532.

arbitration.[64] There is no reason to speculate that the courts would adopt a strict definition of parties under Section 42A – when the court has adopted a liberal definition of the term "*parties*" – while ordering the impleadment of a non-signatory. In other words, though it is admitted that impleadment of non-signatories is possible only in exceptional circumstances, whenever such an impleadment is allowed, the courts would adopt the same liberal definition of "*parties*" in extending the scope of Section 42A to non-signatories.

It is noteworthy to mention here that the interpretation of this provision has not come up before courts and, hence, it is difficult to predict its impact on the enforceability of an award. Nevertheless, breach of confidentiality can have practical consequences such as deterring some parties from using third-party software and technologies in their arbitrations.

iv. Issues pertaining to Blockchain Arbitration

By its very nature, an award rendered through blockchain arbitration may be unenforceable in India.[65] Since a blockchain award is distributed on a blockchain ledger, it raises questions about the place of rendering of the award, stamping of the award, and original copy of the award, etc. Even assuming that such awards are self-executing and the need for instituting formal recognition and enforcement proceedings does not arise, the losing party may use these ambiguities to delay enforcement of such awards by securing interim orders in its favour.

B. Practical Concerns

As important as the legal concerns appear to be, they tend to disappear when more and more technology is being used. This is because use of more and more technology would lead to an increase in the chances of any legal issues arising out of use of technology in arbitration reaching the Indian courts and hence, being interpreted conclusively. Therefore, it becomes imperative to identify the ground realities that have hindered the adoption of technology in the contemporary Indian arbitration landscape.

i. Reluctance from Arbitral Community

During consultations with various practitioners, law firm partners, senior advocates and top management of various Indian arbitral institutions who have vast experience in handling both domestic and international commercial arbitration as both arbitrator and counsel, it was found that a lack of awareness regarding the use of technology amongst the Indian arbitral community is the primary hindrance to the use of technology in India. This is because most senior practitioners, judges and arbitrators have spent their careers in a physical arbitration environment and, hence, there is a passive and involuntary reluctance from the arbitral community to employ technology in arbitration. Moreover, such arbitrators also insist on submission of physical copies of all records and having

---

64 Soorjya Ganguly & Somdutta Bhattacharyya, *Binding Non-Signatories to an Arbitration- Charting the Shifting Paradigms*, ARGUS PARTNERS (Nov. 22, 2019), *available at* https://www.argus-p.com/papers-publications/thought-paper/binding-non-signatories-to-an-arbitration-charting-the-shifting-paradigms/ (summarizing the Indian law on the subject).

65 Ritika Bansal, *Enforceability of Awards from Blockchain Arbitrations in India*, KLUWER ARB. BLOG (Aug. 21, 2019), *available at* http://arbitrationblog.kluwerarbitration.com/2019/08/21/enforceability-of-awards-from-blockchain-arbitrations-in-india/.

physical hearings as far as possible. Per one practitioner who is currently the registrar of a leading Indian arbitral institution and former partner of a leading dispute resolution law firm in India, the general environment and the history of the conduct of arbitration proceedings also poses a hindrance to the adoption of the use of technology. For instance, live transcription of arbitration hearings is not a routine practice in Indian arbitration. Therefore, it is difficult to imagine the employment of technology-oriented transcription services in Indian arbitration, even if they are available at cheaper rates. In other words, a technology-oriented transcription service would not be seen as a cheaper alternative to human based transcription service. Rather, it would be viewed as an additional cost burden.

ii. Untrained Arbitrators

As a corollary to the previous challenge, one reason that may explain the reluctance of Indian arbitrators is unfamiliarity with prevailing technologies. In the earlier part of this article, various technological tools and their uses in arbitration were identified. It is only natural to assume that many readers would be coming across these tools for the first time and even those who are familiar with such technologies would testify to the fact that the use of such technologies requires a certain degree of training. As already noted, the parties themselves arrange for virtual hearing support. This sometimes leads to logistical problems. For instance, it was pointed out by a practitioner who is a partner in a boutique dispute resolution law firm in India and founder of an online dispute resolution service provider, that due to the *ad hoc* nature of technological arrangements, there is no testing of equipment and software prior to the actual hearing to ensure its functionality. This sometimes leads to interruptions and problems during actual hearings, and can lead to more time-consuming proceedings, rather than time-saving proceedings. A further instance disclosed by another independent practitioner and former senior associate at a leading Indian law firm is the lack of awareness regarding features like break-out rooms. Therefore, the unfamiliar arbitrators usually deliberate their findings on the same platform or at a physical venue. This may lead to ego clashes, disruptions, health risks (due to COVID-19), etc.

In the ordinary court system, the Supreme Court has taken it upon itself to champion the Indian dispute resolution system into a tech-savvy era. In these COVID-19 times, the Supreme Court has been proactive in training judges, advocates and staff, in familiarising them with technological tools.[66] On the other hand, the Indian arbitration regime is a decentralised regime largely working on *ad hoc* arbitrations. This exacerbates the conundrum of where to attribute the responsibility for taking the the initiative to train Indian arbitrators in the use of technology.

iii. High Costs

The costs associated with the use of technology is a problem which has continuously plagued arbitration. Even the most sophisticated and repeat players are consistently worried about the costs incurred due to the use of technological tools in arbitration. Therefore, it is only natural that Indian

[66] Sparsh Upadhyay, *Over 1.6 Lakh Lawyers, Judges, & Court Staffers Trained Online by Supreme Court E-Committee during Pandemic Period*, LIVELAW (Mar. 21, 2021), *available at* https://www.livelaw.in/news-updates/1.6-lakh-lawyers-judges-and-court-staffers-trained-online-by-supreme-court-e-committee-during-pandemic-171502.

parties belonging to a developing country would be more worried about the costs. Consultations with practitioners revealed that costs are not an issue with respect to most India-seated arbitrations. This is because Indian arbitrations only use video conferencing software, which are either reasonably priced, or are free to use, like Google Meet.

Although with increased usage, the pricing of video conferencing platforms has come down, the costs of sophisticated AI tools continue to deter parties from using AI software.[67] Many practitioners noted that they use tools like transcription services only when they have enough budget for the same. Another practitioner who is currently the registrar of a leading Indian arbitral institution and former partner of a leading dispute resolution law firm in India and who frequently uses such technologies in international arbitration disclosed that in domestic arbitration, his proposal to use a particular tool was opposed by the Respondent, a Public Sector Undertaking, because of the high costs involved. Similarly, a leading law firm practitioner and partner having experience in dispute resolution and arbitration had also disclosed that his firm had taken an initiative to introduce more technology in Indian arbitration. However, this initiative could not take flight as parties viewed the costs associated with such technologies as an additional and unnecessary burden.

iv. Preference for Ad Hoc Arbitration over Institutional Arbitration

India continues to prefer *ad hoc* arbitration over institutional arbitration. While popular Indian arbitral institutions like Mumbai Centre for International Arbitration have encouraged the use of technology,[68] such benefits have not reached down to most domestic arbitrations as the same are oblivious of institutional arbitration. Of course, an *ad hoc* arbitration may get converted into an institutional arbitration when it is referred to a court-annexed arbitration centre, nevertheless, some practitioners and law firm partners routinely handling arbitrations in India have opined that there could be more use of technology if such an initiative is taken by arbitral institutions.

v. Lack of E-Stamping Facilities

Under Indian law, an award is to be sufficiently stamped before it can be enforced as a decree of the court. At the outset, it is clarified here that stamping is important for the enforcement of an award and not for the making of an award. This is because Section 31 of the Act provides conditions for making an award. These conditions do not enumerate the stamping of the award. The Delhi High Court has explained this distinction in the following words:

> "… *[T]he Arbitration Act does not… create a legal obligation on the parties in arbitration to pay stamp duty on an award. It is only when they begin taking steps to enforce the award that the parties are obligated to ensure that the instrument has been duly stamped…. Thus, the Arbitration Act envisages that the payment of requisite stamp duty on an award shall only be required when a party is seeking to get the same enforced under Section 36*."[69]

---

67 WHITE & CASE, *supra* note 2.

68 *Annual Report 2021*, MUMBAI CENT. INT'L ARB. 1 (2021), *available at* https://mcia.org.in/wp-content/uploads/2016/05/mcia-report.pdf.

69 Mohini Elec. Ltd. v. Delhi Jal Board, 2021 SCC Online Del. 3506.

In this respect, it has been noticed that India is still at the nascent stages of introducing the concept of e-stamping.[70] However, until such time, the parties are compelled to get their awards physically stamped. A caveat that needs to be mentioned here is that the concept of stamping is not strictly related to an arbitration proceeding. Moreover, practitioners do not recognise physical stamping as a major hindrance to the use of technology in Indian arbitration as they view it as an everyday affair. Thus, in all fairness, it may be noted that the concept of e-stamping can lead to the complete virtualisation of the arbitration process, but it is not a hindrance per se.

C. Technological Concerns

It has been said that "*You know what I like about pen and paper? Nobody can hack into … [it].*"[71] A shift from a pen-and-paper arbitration regime to a tech-savvy regime is bound to bring its own unique set of challenges which need to be identified before technological tools are adopted.

i. Concerns Regarding Witness Coaching

A common issue that emerged during consultations with practitioners is that of witness coaching. To elaborate, in a virtual cross-examination, a witness is cross-examined in a two-dimensional virtual environment instead of a three-dimensional physical environment. Thus, there is a real possibility that a witness may open a chat service or a document on his screen during the cross-examination, or there may be another person present in the room providing answers to the witness.

Another common issue is that a witness may fake internet disruption and re-join after some time after being coached by their lawyer. In fact, it was found that this is such a prominent and pressing concern that even the most tech-savvy arbitrators prefer to conduct witness examinations in a physical setup. Although there is no empirical evidence suggesting this finding but nonetheless the consultations with various practitioners, law firm partners, senior advocates and top management of arbitral institutions seemed to meet at a consensus regarding this fact. Moreover, the arbitrators may sometime propose a hybrid model of cross-examination, where one person representing the cross-examining party would be present in the room to ensure that witness testimony is not coached. The obvious disadvantage of these solutions is that in a lockdown-like situation, the arbitration proceedings are bound to be adjourned resulting in delay.

Some practitioners including a partner in the dispute resolution and arbitration wing of a leading full-service law firm in India also disclosed that a few arbitrators order for makeshift technological solutions to counter this problem. For instance, one practitioner pointed out that during cross-examination, the witness would be ordered to log in from one additional device which would be placed behind the head of the witness providing additional vision. This mitigates the risk of witness coaching to some extent. On the other hand, other practitioners noted that they had used a 360 camera to counter this problem.

ii. Cybersecurity Concerns

---

70 Martin Hunter, Simon Weber & Sadyant Sasiprabhu, *Arbitral Awards in Indian Arbitration, in* ARBITRATION IN INDIA 188 (Dushyant Dave, Martin Hunter, Fali Nariman & Marike Paulsson eds., 2021).

71 KINGSMAN: THE SECRET SERVICE (20th Century Fox 2014).

With arbitration being a highly confidential affair, the need to ensure the integrity of data on third party platforms assume high significance. In the past, websites of notable arbitral institutions like the Permanent Court of Arbitration have been hacked, which led to the leakage of highly sensitive data.[72] More use of technology would naturally lead to a higher risk of hacking and other cybersecurity concerns. In this respect, India has a poor reputation in relation to cybersecurity, with data hacks being a common news affair. For instance, in 2018, the Supreme Court's website was reportedly hacked.[73] Thus, such concerns hinder the adoption of technology in Indian arbitration.

iii. Data Protection Concerns

With the emergence of the global information economy, personal data is the new gold. Behavioural tagging, data profiling, among other, are some of the reasons which have led to the development of data protection law. While most of the literature concerning data protection and arbitration is aimed at ensuring compliance with existing laws, failure to establish a data protection protocol can have adverse consequences. Since arbitration involves disclosure of highly sensitive and confidential information, an unrestricted transfer of the same without the consent of the parties can be disastrous. For instance, counsel and arbitrators may share personal data pertaining to a particular entity with a funder.[74] Such a funder may use the data to determine the probability of that entity at succeeding in arbitration. Thus, such data processing can make or break a deal for the entity to secure a funding for its claim. A party that often loses may want to secure its data transfer so that its funding prospects are not diminished.

On the date of writing this article, India still does not have a data protection law. The previously proposed Personal Data Protection Bill, 2019,[75] aimed to form comprehensive law on the same, however, an updated form of the same is yet to be published and the same was withdrawn from the Lok Sabha in August 2022. Moreover, there have been some concerns as to whether the said Bill would effectively cover or even be applicable to arbitration in India.[76] Further, very recently a draft

---

72 Luke Eric Peterson, *Permanent Court of Arbitration Website Goes Offline, with Cyber-security Firm Contending that Security Flaw was Exploited in Concert with China-Philippines Arbitration*, INV. ARB. REPORTER (July 23, 2015), *available at* https://www.iareporter.com/articles/permanent-court-of-arbitration-goes-offline-with-cyber-security-firm-contending-that-security-flaw-was-exploited-in-lead-up-to-china-philippines-arbitration/.

73 Ashok Bagriya & Bhadra Sinha, *Supreme Court Website Down, Reportedly Hacked, after Loya Case Verdict,* HINDUSTAN TIMES (Apr. 19, 2018), *available at* https://www.hindustantimes.com/india-news/supreme-court-website-inaccessible-reportedly-hacked/story-dFJFx9r34UKDKyNj9JAeLK.html.

74 Third Party funder refers to financing of a claim by an unrelated third party in exchange for a share from the proceeds of the award. For further discussion *see also*, Meenal Garg, *Introducing Third-Party Funding in Indian Arbitration: A Tussle between Conflicting Public Policies*, 6(2) NLUJ L. REV. 71 (2020).

75 *The Personal Data Protection Bill, 2019*, PRS INDIA (Dec. 11, 2019), *available at* https://prsindia.org/files/bills_acts/bills_parliament/2019/Personal%20Data%20Protection%20Bill,%202019.pdf.

76 Ananya Bajpai & Shambhavi Kala, *Data Protection, Cybersecurity & International Arbitration: Can they Reconcile?*, 8(2) INDIAN J. ARB. L. 1, 15 (2019); Tarun Krishnakumar, *Data Protection in India & Arbitration: Key Questions Ahead*, KLUWER ARB. BLOG (Apr. 16, 2019), *available at* http://arbitrationblog.kluwerarbitration.com/2019/04/16/data-protection-in-india-and-arbitration-key-questions-ahead/.

Digital Personal Data Protection Bill, 2022[77] has been released inviting public comments and the same has not been introduced in the Parliament as on date.[78]

Domestically, increasing attention is being paid to data protection, especially since the Supreme Court recognised the right to privacy as a fundamental right.[79] Now, in a scenario where arbitration players in India are already oblivious and sceptical of technological tools, a shabby data protection framework is undoubtedly a huge hindrance to the adoption of technology in Indian arbitration.

There are major challenges to the use of technology in Indian arbitration. Some of these challenges are in consonance with the challenges faced by the international arbitral community when it commenced the adoption of technological tools. Similarly, some of these hindrances, like high costs are also being faced by other jurisdictions. However, a majority of these challenges are unique to the Indian arbitration regime because of its arbitration landscape and history. These include lack of familiarity with use of technology in arbitration, reluctance to adopt technological tools in arbitration, lack of proper training etc.

The legal concerns appear to be ambiguous provisions requiring more interpretation. Barring witness coaching, these technological concerns also do not seem to be very pressing concerns. Rather, practical concerns like reluctance from the arbitral community and untrained users, appear to be the most prominent concerns hindering the adoption of technology in Indian arbitration. Although parties, counsels, and arbitrators may have devised temporary solutions to overcome these challenges, in the long run, these challenges are sure to become a bigger problem than they seem to be today. Practitioners and law firm partners routinely handling arbitrations in India have opined that a positive change is possible provided such challenges are properly addressed.

V. Suggestions and Conclusions

A. Suggestions

The research has revealed that there is a long road ahead, before India can match up to the best international practices regarding the use of technology. To cover this distance, this part offers suggestions which have been classified into three categories, namely- immediate, short-term, and long-term suggestions.

Broadly, an immediate suggestion implies an *ad hoc* solution which needs to be implemented as soon as possible. A short-term suggestion implies a suggestion which needs to be implemented within a span of one year. Finally, a long-term solution is continuous practice which needs to be adopted by various stakeholders to promote and sustain the use of technology in Indian arbitration.

---

77 *The Digital Personal Data Protection Bill, 2022*, MINISTRY OF ELEC. AND INFO. TECH. (Dec. 7, 2022), *available at* https://www.meity.gov.in/writereaddata/files/The%20Digital%20Personal%20Data%20Protection%20Bill%2C%202022.pdf.

78 *The Digital Personal Data Protection Bill 2022*, PRESS INFO. BUREAU (Dec. 7, 2022), *available at* https://pib.gov.in/PressReleasePage.aspx?PRID=1881402#:~:text=The%20Ministry%20of%20Electronics%20and,of%20its%20public%20consultation%20exercise.

79 Justice K.S. Puttaswamy v. Union of India, (2017) 10 SCC 1.

A caveat that needs to be mentioned here is that some of the suggestions may be prior to the time period classification mentioned here. However, the purpose of the present classification is to suggest an ideal time period for the achievement of such solutions.

i. Immediate Suggestions

1. Procedural Guidelines by the Supreme Court

In the past, the Supreme Court has issued guidelines for the examination of witnesses through video conferencing.[80] During the pandemic, the Supreme Court also issued guidelines for the functioning of courts through video conferencing.[81] Therefore, due to a lack of any other central body, it is necessary that such guidelines are issued by the Supreme Court for the functioning of arbitral tribunals through video conferencing. These guidelines should account for witness tampering, cyber security, data privacy, etc. Moreover, these guidelines should duly consider the prerogative of the arbitrator to formulate their own procedure for the conduct of arbitration proceedings.

Although there are some guidance notes available in the public domain, any guidelines issued by the Supreme Court would obviously come with a sense of legitimacy, and there is a higher probability that these guidelines would be accepted by *ad hoc* arbitral tribunals. Moreover, such guidelines would also give implied ex-ante clarity on the interpretation of certain provisions which are still in the grey area. In fact, this is the reason why this article has not proposed any model guidelines as the same would be another fish in the sea of non-binding guidelines, which may or may not be followed by the arbitral tribunals.

2. Addressing due process concerns

It is necessary that the arbitrators consider various factors while allowing or rejecting a request for virtual hearing. These factors may include the stage of proceedings, reason for objection to virtual hearing, past conduct of parties in delaying the proceedings, etc. Such a reasoned order would help in avoiding a challenge to the award under Section 34 of the Act or a procedural order.

3. Amendment of Arbitration Clauses

It has been proposed to include virtual arbitration in arbitration clauses to overcome some of the potential legislative ambiguities.[82] In conjunction with the same, the author opines that even the pre-pandemic drafted arbitration clauses should be amended to incorporate the experiences learnt from virtual arbitration.

4. Incentives from arbitral institutions

Globally, some arbitral institutions have announced a reduction in administration fees if the parties agree to use technology in their arbitrations.[83] Similarly, another incentive is the use of an in-house case management portal of the arbitral institution on a trial basis for no extra charge. Some Indian

---

80 State of Maharashtra v. Praful B. Desai, (2003) 4 SCC 601.

81 Re: Guidelines for Court Functioning through Video Conferencing during COVID-19 Pandemic, (2020) 6 SCC 686.

82 Tariq Khan & Pradhnya Deshmukh, *Scope of Online Arbitration & its Future in India*, USLLS ADR BLOG (May 1, 2021), *available at* https://usllsadrblog.com/scope-of-online-arbitration/.

83 Allison Goh, *Digital Readiness Index for Arbitration Institutions: Challenges & Implications for Dispute Resolution under the Belt & Road Initiative*, 38 J. INT'L ARB. 253, 258 (2021) [*hereinafter* "Goh"].

service providers disclosed that they had entered into agreements with some arbitral institutions for the use of technology, however, the details of such arrangements were not shared with the author. Therefore, in light of the same, the burden to popularise such arrangements falls on the Indian arbitral institutions who can offer incentives to promote the use of such technologies.

5. Incorporating non-disclosure agreements and data protection clauses with service providers

The previous part of the article has shown that there is some uncertainty regarding confidentiality and data privacy obligations of technological service providers. Therefore, until requisite clarity is achieved, it would be advisable if parties include non-disclosure agreements and confidentiality clauses in their agreements with the technological service providers. Similarly, they may also prefer to put clauses regarding data privacy and data storage.

ii. Short Term Solutions

1. More Indian service providers of technology and funders

It would take a long time for technology in arbitration to become an industry standard and, therefore, the high costs associated with it would be a problem for some time. Thus, to ensure that India capitalises on the benefit of technological advancements, a quicker solution is required. Consultations with various practitioners and service providers have shown that Indian service providers of technological tools are cheaper than the global service providers.[84] Hence, the entry of more and more Indian service providers into the market could address the cost problem to some extent. Similarly, the entry of funders who understand the benefits of technology and the Indian arbitration landscape can help nullify the apprehension of high costs by funding genuine claims.

2. Enactment of ACI as a training agency

Many practitioners noted that the lack of use of technology can be partly attributed to the lack of any nodal agency which could take initiative in this respect. Hence, it is noteworthy to mention here that the 2019 Amendment Act had proposed the introduction of Part IA into the Act, which provided for the creation of the Arbitration Council of India ["**ACI**"]. One of the functions of ACI was to train arbitrators and grade arbitral institutions to maintain appropriate standards.[85] Interestingly, the provisions pertaining to ACI have not been enacted till date. Therefore, it is imperative that ACI is established, as, only it can function as a nodal agency to promote technology in Indian arbitration. In other words, what the Supreme Court has done for the courts, ACI can do for arbitration. ACI can formulate a roadmap for training of arbitrators in the use of technology. Furthermore, during the grading of arbitral institutions, the ACI may also consider the recently proposed Digital Readiness Index to motivate arbitral institutions to inculcate more and more technological tools in their proceedings.[86]

---

84 Vikas Mahendra, *Technology & Transcription in Arbitration*, BAR & BENCH (Apr. 20, 2021), *available at* https://www.barandbench.com/columns/technology-and-transcription-in-arbitration.

85 Arbitration & Conciliation (Amendment) Act, No. 33 of 2019, §10 (India).

86 *See generally* Goh, *supra* note 83.

In the past, commentators have also argued for entrusting this function to some nodal agency.[87] However, the problem with such solutions is that the proposed nodal agencies lack statutory backing. Thus, any solution proposed on the bedrock of such institutions is flimsy and voluntary. Even if for the sake of argument such a solution is accepted, it would still involve a long legislative process in converting such agencies into statutory bodies. On the other hand, the ACI can be established more quickly, which could evolve hybrid policies having a flavour of mandatory statutory compliances and incentive based voluntary initiatives.

3. Legislative Amendments to recognise technological tools in arbitration

The research has shown that there is nothing in the Act prohibiting the use of technology in arbitral proceedings. However, it can also be seen that due to a lack of precedent and legislative guidance, much of the contemporary discussion is centred on predicting the positive and negative consequences of the use of technology in Indian arbitration. It is noteworthy to mention here that with the exception of Section 7 of the Act, there is no other mention of technology in the Act. In contrast to this, many recently enacted foreign legislations expressly provide for the use of technology at various stages of arbitration, like witness examination, virtual hearing, award, etc. Surprisingly, the Act has been amended three times, in 2015, 2019, and 2021; but no endeavour has been made to inculcate express provisions with respect to the use of technology in Indian arbitration. Further, in case *ad hoc* arbitration continues to remain the norm, institutional guidance notes and ACI will not be able to make a major impact in the use of technology in *ad hoc* arbitration. Therefore, it would be advisable if the legislature amends the Act to bring it in line with international technology practices.

4. Enactment of Online Dispute Resolution Specific Provisions/Policies

Hong Kong has introduced an online dispute resolution scheme for certain types of disputes, provided that certain pre-conditions are satisfied.[88] Although various sectors and ministries may choose to adopt this route depending upon the nature of the sector, it would be beneficial if a specific provision is introduced in the Act. The Act already provides for a summary fast-track arbitration procedure, which may be opted by the parties.[89] Along similar lines, the legislature may enact a similar provision for online arbitration, which the parties may choose. Niti Aayog, in its recent report, had also noted that the Act should incorporate online dispute resolution specific provisions and supplementary rules.[90] The legislature may experiment with this suggestion through small-scale disputes. In India, the Micro, Small and Medium Enterprises Development Act, 2006,[91] ["**MSMED Act**"] was enacted that

87 *See, e.g.,* Nihal Raj, *New Technologies in Arbitration: Ensuring Independence & Impartiality*, ACADEMIKE (Dec. 10, 2020), *available at* https://www.lawctopus.com/academike/new-technologies-in-arbitration-ensuring-independence-and-impartiality/.

88 *COVID-19 Online Dispute Resolution Scheme Launched Today*, GOVERNMENT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION (June 29, 2020), *available at* https://www.info.gov.hk/gia/general/202006/29/P2020062900651.htm?fontSize=1.

89 Arbitration Act, § 29B.

90 Niti Aayog Expert Committee on ODR, *Designing the Future of Dispute Resolution: The ODR Policy Plan for India*, NITI AAYOG 82 (Oct. 2020), *available at* https://www.niti.gov.in/sites/default/files/2021-11/odr-report-29-11-2021.pdf [*hereinafter* "Niti Aayog Expert Committee on ODR"].

91 Micro, Small & Medium Enterprises Development Act, No. 27 of 2006 (India).

introduced the concept of statutory arbitration for the resolution of small-scale disputes.[92] The legislature can amend the MSMED Act to create a concept of mandatory statutory virtual arbitration. This suggestion is also in consonance with the fact that presently, there is comparatively a greater proliferation of technology in low value arbitrations. This amendment will not only provide legitimacy to online arbitration but also promote the use of technology in arbitration.

5. Reimagining the role of Court-annexed arbitral institutions

Court-annexed arbitral institutions cannot thrive by holding on to a brick-and-mortar model of arbitration. Sooner or later, technology is bound to revamp the Indian arbitration landscape. Private arbitral institutions have already started gearing up for this revolution. It is imperative that the infrastructure of court-annexed arbitral institutions is ramped up to provide technological services. Also, the administrative staff of such institutions needs to be trained adequately to bring these institutions at par with private arbitral institutions. The relevance of this solution assumes importance as one independent practitioner who was a former senior associate at a leading Indian law firm had noted that if such lethargic attitude continues to persist, government authorities may consider shutting down such institutions. Therefore, it is suggested that court-annexed arbitral institutions embrace this inevitable change before it becomes a pre-requisite for their survival.

6. Enacting the Data Protection Law

It is necessary that India enacts its own data protection law. Many foreign arbitral institutions may be already adhering to global data privacy standards because of mandatory compliance with foreign data protection laws. However, enacting this law would also mandate the indigenous service providers to pay attention to data privacy concerns.

iii. Long Term Solutions

1. Increased use of technology

A simple solution to the high costs problem would be to let the market forces take on its full play. In other words, increased usage of technology would lead to more competition and consequent reduction in cost as and when such technology becomes the industry standard.

2. Co-ordination between Courts and Arbitral Tribunals

Co-ordination between arbitration and the judiciary can be done in two ways. *First*, ACI can co-ordinate with Supreme Court and gain from the judicial experience in the introduction of technology in court proceedings. The Supreme Court has revolutionised the Indian court system by adopting e-filing and virtual courts. Furthermore, courts have also started adopting AI to assist judges in decision-making.[93] ACI can use these lessons to formulate better and more suitable guidelines for Indian arbitration. *Second*, if use of technology increases, courts need to ensure that their rulings are pro-arbitration and pro-technology. In this respect, Section 5 of the Act provides for minimal judicial

---

92 *Id.* § 18(3).

93 Amit Anand Choudhary*, Use of Artificial Intelligence will Transform the Judiciary but Technology will not be Allowed to Decide Cases: CJI*, TIMES OF INDIA (Apr. 21, 2021), *available at* https://timesofindia.indiatimes.com/india/use-of-artificial-intelligence-will-transform-judiciary-but-technology-will-not-be-allowed-to-decide-cases-cji/articleshow/82183403.cms.

intervention. Moreover, the courts have circumscribed their powers to set aside an award under Section 34 of the Act to a great extent.[94]

3. Continued innovation by arbitral institutions

The research has shown that India-based private arbitral institutions are in a better position to embrace technology in its functioning when compared to court-annexed arbitral institutions. However, this development is limited to the establishment of the bare minimum video conferencing structure. On the other hand, global arbitral institutions have established their own technological platforms for the conduct of arbitral proceedings like NetCase created by the ICC,[95] SCC Platform by the Stockholm Chamber of Commerce,[96] etc.

Innovation is important as parties will move to those platforms where innovative digital tools are available.[97] Thus, it is not enough that arbitral institutions stay one step behind global arbitral institutions. To increase the use of technology in Indian arbitration, it is imperative that arbitral institutions and other service providers keep innovating new digital tools. In this respect, Niti Aayog has identified a set of principles which such service providers may take into account while innovating.[98]

It is noteworthy to mention here that one practitioner who is an AOR at the Supreme Court of India and a former partner in the dispute resolution wing of a leading full service law firm in India, had opined that the burden of popularising the use of technology cannot be solely shifted to arbitral institutions as in any case, the parties always have the residual option to themselves agree on a service provider of their choice. In this respect, this article does not view arbitral institutions as the sole bearer of the responsibility of popularising the use of technology. No doubt this change can be brought only by the collective efforts of all stakeholders. Nevertheless, this article views arbitral institutions as a key stakeholder and expects the same standards of functioning that have been set by global arbitral institutions.

4. Developing Infrastructure

The use of technology essentially depends upon access to high speed and uninterrupted internet connection, computers, laptops, smartphones etc. The government should ensure that these necessities are available to everyone and there is no unwarranted disruption.

iv. Conclusion

This article has illustrated the existing use of technology in the Indian arbitration landscape, affirming that the contemporary Indian arbitral community utilised technology as a response to the pandemic and does not compare with international arbitration in terms of technological proliferation and

94 Ssangyong Eng'g & Constr. v. Nat'l Highways Auth. of India, 2019 SCC Online SC 677.

95 *ICC NetCase: A Secure Environment for ICC Arbitration*, INT'L CHAMBER COM., *available at* https://iccwbo.org/content/uploads/sites/3/2016/11/NetCase-Pamphlet-English.pdf.

96 *SCC Platform – Simplifying Secure Communication from Request to Award*, STOCKHOLM CHAMBER OF COMMERCE (Sept. 2019), *available at* https://sccinstitute.com/case-management/.

97 Colin Hutton, Rob Wilson & Laura West, *Innovation & Technology in International Arbitration: What lies ahead?*, LEXOLOGY (Nov. 26, 2019), *available at* https://www.lexology.com/library/detail.aspx?g=7d3d0aa5-dcbf-407c-8190-9ad68e06f9b3.

98 Niti Aayog Expert Committee on ODR, *supra* note 90 at 8–93.

comfort while using technology. The article then enumerated hindrances in the use of such technology and finally, proposed a comprehensive plan involving all stakeholders to promote the use of technology in Indian arbitration.

On one hand, the international arbitral community has been rapidly adopting technology on all fronts. Current innovations and technological best practices are the result of international discussion and initiative. On the other hand, India has been playing catch-up and has barely scratched the surface of the potential benefits that can be derived from the use of technology in arbitration. The lack of use of technology in arbitration is the reason why the legal jurisprudence pertaining to the same is almost non-existent in India.

The Law Commission of India in 2014 had suggested the use of tele-conferencing and videoconferencing in arbitration.[99] After six years, Indian arbitrators had to resort to this alternative, albeit because of COVID-19. Practitioners have noted that although the use of technology was due to COVID-19, parties have recognised the advantages of the same, especially in terms of cost and time saving. With respect to other technologies, India should not wait for another pandemic. It is amply clear that if used properly and rationally, technology can change the face of Indian arbitration. Moreover, reluctance to adopt further technological advancements would only pose as a hindrance in achieving the dream of making India a global arbitration hub.

Furthermore, COVID-19 cannot be seen as an end but only as of the beginning of the use of technology in India-seated arbitrations. In other words, the end of the pandemic (whenever the day comes) should not be viewed as *au revoir* to technology in Indian arbitration. This is because the Indian arbitration community, in any case, would have to match its standards to international arbitration. This does not mean that technology should be incorporated in a similar fashion as the international community. This article has advocated for a methodology to incorporate technology in arbitration considering the unique arbitral landscape of India. However, continued hostility towards the use of technology in arbitration would only lower the chances of India being selected as a seat of arbitration.

[99] LAW COMM'N INDIA, *supra* note 44 at 13.

INDIAN JOURNAL OF ARBITRATION LAW

EXTRA-TERRITORIAL ARBITRATION: INDIAN PARTIES ARBITRATING ABROAD

Gracious Timothy Dunna[*]

Abstract

Supreme Court's judgment in PASL Wind Solutions v. GE Power Conversion India discusses the implications of "extra-territorial" arbitration, i.e., Indian parties arbitrating abroad. Beyond just a case analysis, the real implication of this judgment is far-reaching, and parties will want to consider this seemingly fancy option with some care and consideration. Accordingly, the article begins with legal implications in the governance of extra-territorial arbitration. It then narrows down to the potential legal concerns, followed by the practicalities that are likely to pass unnoticed in all the excitement of choosing extra-territorial arbitration. Hence, the article helps parties take a thoughtful approach and make an informed choice. Finally, it is worth considering if extra-territorial arbitration reflects the condition of domestic arbitration and the need among users to look beyond borders for a better seat to arbitrate.

I. Introduction To Extra-Territorial Arbitration

Domestic parties choosing a seat of arbitration abroad, on the sheer force of 'party autonomy,'[1] to exclude the applicability of the domestic arbitration law is a startling choice because a seat outside their home jurisdiction is an agreement that the foreign law (*lex arbitri*)[2] relating to the conduct and supervision of arbitrations will apply to the proceedings. For ease of reference, the author refers to it as 'extra-territorial arbitration.'

Freedom to contract is one of the pillars of arbitration,[3] and stretching it to such limits to go beyond borders was finally inquired and settled by the Supreme Court in *PASL Wind Solutions Pvt. Ltd.* v. *GE Power Conversion India Pvt. Ltd.* ["**PASL**"].[4] It is widely accepted that the term "International Commercial Arbitration" in Part I of the Arbitration & Conciliation Act 1996 ["**Arbitration**

---

[*] Arbitration Counsel; LL.B. Hons. (2015), V. M Salgaocar College of Law, Goa University; LL.M. International Commercial Arbitration (2018), Straus Institute for Dispute Resolution, Pepperdine University Caruso School of Law; Certificate (2018), Indian Society of International Law; Certificate (2020), The Hague Academy of International Law; Secretary, Society of Construction Law – India; Member, International Task Force on Mixed Mode Dispute Resolution. The author is grateful to Ms. Deeksha Pokhriyal, a student at the NALSAR University of Law, Hyderabad, for her excellent research, editing assistance, and inputs in completing this article.

1 JULIAN D. M. LEW, APPLICABLE LAW IN INTERNATIONAL COMMERCIAL ARBITRATION 75 (1978) ("There is the movement towards the rule allowing the parties to choose the law to govern their contractual relations. This development has come independently in every country and without any concerted efforted by the nations of the world; it is the result of separate, contemporaneous and pragmatic evolutions within the various national systems of conflict of laws.").

2 Smith Ltd. v. H. International, [1991] 2 Lloyd's Rep. 127, 130 (U.K.) ("It is … a body of rules which sets a standard … for the conduct of the arbitration. The law governing the arbitration comprises the rules governing interim measures … the rules empowering the exercise by the Court of supportive measures to assist an arbitration which has run into difficulties … and the rules providing for the exercise by the Court of its supervisory jurisdiction over arbitration.").

3 ALAN REDFERN & MARTIN HUNTER, INTERNATIONAL ARBITRATION 71 (2015) [*hereinafter* "REDFERN & HUNTER"] ("The agreement to arbitrate is the foundation stone of international arbitration. It records the consent … that is indispensable to any process of dispute resolution outside national courts.").

4 PASL Wind Solutions v. GE Power Conversion India, (2021) SCC OnLine SC 331 [*hereinafte*r "PASL"].

Act"] refers to parties, whilst in Part II, it relates to geography. Therefore, under Part II of the Arbitration Act, "extra-territorial arbitration" between two Indian parties would be considered international commercial arbitration (i.e., the resulting award would be a foreign arbitral award under Part II).

But before PASL, courts in India were split about the validity of an 'extra-territorial arbitration.' The opposing school of thought suggested that parties could not be allowed to derogate from Indian law. The essence is that parties could not override the mandatory rules of their home country—an interpretation derived from Section 2(6) read with Section 28 of the Arbitration Act.[5] The nerve of the issue before PASL was if the public policy of India would allow domestic parties to choose a seat abroad and then enforce the award made abroad in India. To which their answer was negative, given the reluctance to afford such freedom to parties for reasons of law and policy (and perhaps the unconventional outlook of such practice).

Indeed, the question of whether a state's public policy would allow its nationals to contract a foreign seat of arbitration would depend on what its public policy states in this regard. But PASL cleared the way for parties to select a foreign seat rightfully, based on the considerations that suit them. The concept is truly fascinating; that parties can designate a foreign seat of arbitration, even in the complete absence of any nexus to that foreign state where the seat lies. The topic assumes importance because if domestic parties can enjoy arbitration abroad, an entire paradigm shift in the world of arbitration is waiting around the corner—one that will indeed have a significant impact on domestic arbitration in India (i.e., arbitrations other than international commercial under Part I of the Arbitration Act). It is the dawn of an age that embraces a greater degree of party autonomy and globalizing arbitrations between domestic/Indian parties at a whole new level. We are now in the era of 'extra-territorial arbitrations.

This paper delves into the intricacies of extra-territorial arbitrations by tracking the development in views taken by the Indian courts. The author tries to explain the following concepts in this paper. Section [II] discusses the PASL Case, including the issues in the case, factual matrix, application of the concepts, TDM case, and lastly, a recapitulation of the whole case. Section [III] discusses the legal effects of arbitration governance, including rules governing court assistance, rules governing court supervision, and rules governing procedure and due process. Section [IV] discusses potential legal concerns, including arbitrability issues in light of competition law, reception by foreign courts, and lex arbitri issues. Section [V] discusses the practicality of arbitrating extraterritorially, including access to specialist courts or advanced court systems, taking advantage of international public policy, and other practical considerations.

[5] Arbitration and Conciliation Act, No. 26 of 1996, § 28 (India) [*hereinafter* "Arbitration Act"].

II. The PASL Case: Settling the Law

A. Issue

In PASL, the Supreme Court addressed whether two Indian companies (incorporated in India) can choose a seat outside India and whether that award would be subject to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ["**New York Convention**"], can be considered a 'foreign award' under Part II of the Arbitration Act and, accordingly, enforced. In other words, it was considered whether two Indian parties could exclude the application of the Arbitration Act and go abroad to a different forum to arbitrate their dispute (an extra-territorial arbitration).[6]

B. Factual Matrix and Procedural Posture

In this case, the parties entered into a settlement agreement in 2014 after some disputes arose regarding some purchase orders for certain converters. The arbitration clause in the settlement provided the following:

> "*6. Governing Law and Settlement of Dispute*
>
> *6.1 Any dispute or difference arising out of or relating to this agreement shall be resolved by the Parties in an amicable way. (A minimum of 60 days shall be used for resolving the dispute in amicable way before same can be referred to arbitration).*
>
> *6.2 In case no settlement can be reached through negotiations, all disputes, controversies or differences shall be referred to and finally resolved by Arbitration in Zurich in the English language, in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce, which Rules are deemed to be incorporated by reference into this clause. The Arbitration Award shall be final and binding on both the parties.*
>
> *6.3 The Agreement (together with any documents referred to herein) constitutes the whole agreement between the Parties and it is hereby expressly declared that no variation and/or amendments hereof be effective unless mutually agreed upon and made in writing.*"
>
> (emphasis supplied)

Eventually, disputes arose between the parties regarding the settlement. The Appellant claimed that the warranties were not provided for the converters as promised under the settlement, whereas the Respondent argued that the warranties covered only certain delta modules and not the converters.[7]

The Appellant issued a request for arbitration to the International Chamber of Commerce ["**ICC**"]. In 2017, a sole arbitrator was appointed by the ICC. Parties agreed that the substantive law applicable to the dispute would be Indian law.[8] But a preliminary objection was filed by the Respondent challenging the arbitrator's jurisdiction on the ground that two Indian parties could not have chosen a foreign seat of arbitration. The Appellant opposed the said application and asserted that there was

6 PASL, (2021) SCC OnLine SC 331, ¶ 2.
7 PASL, (2021) SCC OnLine SC 331, ¶ 3.2.
8 PASL, (2021) SCC OnLine SC 331, ¶ 3.3.

no such bar under the law. However, the sole arbitrator dismissed the objection after relying on Indian case laws[9]. Hence, the sole arbitrator found that the arbitration clause in the settlement agreement is valid and proceeded to apply the Swiss Act because the seat of the arbitration was Zurich, Switzerland. Though, for cost-saving purposes, the venue of the arbitration was Mumbai.[10]

The final award was rendered, and the Respondent called upon the Appellant to pay the awarded amount. However, the Appellant failed to oblige, and the Respondent initiated enforcement proceedings under Sections 47 and 49 of the Arbitration Act[11] before the Gujarat High Court, within whose jurisdiction the assets of the Appellant were located. In a complete *volte-face*, the Appellant asserted that the seat of arbitration was Mumbai, where all the hearings of the arbitral proceedings took place. Accordingly, the Appellant applied Section 34 of the Arbitration Act[12] before the Small Causes Court in Ahmedabad, later transferred to the Commercial Court in Ahmedabad. In response to the Section 34 application, the Respondent moved under Order 7 Rule 11 of the Code of Civil Procedure, 1908 ["**CPC**"][13], which got rejected by the Commercial Court.

After various other procedural maneuvers, the proceedings under Section 34 of the Arbitration Act for challenging the award and the Respondent's application under Order 21 of the CPC for the execution of the final award was stayed, while the Supreme Court heard the appeal.

C. Discussion and Application

The Supreme Court took a step-by-step approach to deal with the issue. It first determined that the seat of arbitration was indeed Zurich (and not Mumbai).[14]

i. Exclusivity of Parts I and II

Next, it considered the exclusivity of Parts I and II of the Arbitration Act and observed no permeation between the two Parts[15] based on the principle of territoriality.[16] This needed to be investigated because the Respondent submitted that the expression "unless the context requires otherwise" used in Section 44 necessarily imported the definition of 'international commercial arbitration' contained in Part I when the context requires,[17] namely, that Indian parties have agreed to a seat outside India.

The Court first iterated that Section 2(2) of the Arbitration Act[18] (the only permissible application interface between the two Parts) uses the expression 'international commercial arbitration' in the context of the 'place of arbitration' being outside India. In contrast, 'international commercial

9 Reliance Industries Limited v Union of India, (2014) 7 SCC 603; Sasan Power Ltd. v North American Coal Corporation (India) (P) Ltd (2016) 10 SCC 813; Atlas Export Industries v Kotak & Co. (1999) 7 SCC 61; GMR Energy Ltd. v Doosan Power Systems (India) (P) Ltd. (2017) SCC OnLine Del 11625.

10 PASL, (2021) SCC OnLine SC 331, ¶ 3.4.

11 Arbitration Act, No. 26 of 1996, §§ 47, 49 (India).

12 Arbitration Act, No. 26 of 1996, § 34 (India).

13 Order VII Rule XI, Civil Procedure, No. 5 of 1908 (India).

14 PASL, (2021) SCC OnLine SC 331, ¶¶ 30-33.

15 PASL, (2021) SCC OnLine SC 331, ¶¶ 34-37.

16 Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc., (2012) 9 SCC 552, ¶ 124.

17 PASL, (2021) SCC OnLine SC 331, ¶ 24.

18 Arbitration Act, No. 26 of 1996 (India).

arbitration' contained in Section 2(1)(f) of the Arbitration Act[19] is in the context of such arbitrations seated in India, and the definition there is party-centric. It boiled down to this: 'international commercial arbitration' is primarily a place-centric idea under Part II of the Arbitration Act (as provided under Section 44 of the Arbitration Act), which means an arbitration between any two parties seated outside India, to which the New York Convention applies.

ii. Party-oriented v. seat-oriented ideas

Further, the Court ventured to set out the ingredients of a foreign arbitral award sought to be enforced under Part II of the Arbitration Act. Section 44 of the Arbitration Act[20] (ratifying Article I of the New York Convention) defines a foreign arbitral award using four ingredients:[21]

> "*(i) the dispute must be considered to be a commercial dispute under the law in force in India,*
>
> *(ii) it must be made in pursuance of an agreement in writing for arbitration,*
>
> *(iii) it must be disputes that arise between 'persons' (without regard to their nationality, residence, or domicile), and*
>
> *(iv) the arbitration must be conducted in a country which is a signatory to the New York Convention*."

The Court found that ingredients (i) and (ii) were effortlessly satisfied. It also found that ingredients (iii) and (iv) were sufficiently satisfied, given that the dispute was indeed between two persons, i.e., two India-incorporated companies, and that the arbitration is conducted at a juridical seat in Switzerland, which is a signatory to the New York Convention. This framework of analysing an arbitration drew an essential distinction between a 'foreign arbitration' and 'international arbitration – that they are not the same creature.'[22]

> "*1.4.1 Foreign arbitration and international arbitration are not the same. An arbitration that takes place in State A is a foreign arbitration in State B. It does not matter whether the arbitration is commercial or non-commercial or whether the parties are from the same country, from different countries or that one or all are from State A. Since even a domestic arbitration in State A is a foreign arbitration in State B, the courts of State B would be called upon to apply the New York Convention to enforcement of a Clause calling for arbitration in State A and to the enforcement of any award that would result*."
>
> (emphasis supplied)

Hence, any award made in a State other than the State of the recognition or enforcement court would fall within the scope of the New York Convention, i.e., it would be a foreign award.[23] In that, the parties' nationality, domicile, or residence would not be relevant because the determinative factor

19 Arbitration Act, No. 26 of 1996 (India).
20 Arbitration Act, No. 26 of 1996, § 44 (India).
21 PASL, (2021) SCC OnLine SC 331, ¶ 45.
22 UNCTAD Commentary, Dispute Settlement, 5.1, International Commercial Arbitration, ¶ 1.4.1.
23 ICCA's Guide to the Interpretation of the 1958 New York Convention: A Handbook for Judges, III. 1.1.

under the New York Convention is only the place of arbitration, nothing else. Accordingly, the Court rendered:

> "*25. We have already seen that the context of Section 44 is party-neutral, having reference to the place at which the award is made. For this reason, it is not possible to accede to the argument that the very basis of Section 44 should be altered when two Indian nationals have their disputes resolved in a country outside India*."[24]
>
> (emphasis supplied)

The Court opined that the expression "*unless the context otherwise requires*" could not be considered to undo the very basis of Section 44 by transforming it from its seat-oriented provision to a party-oriented provision as under Part I of the Arbitration Act. More so because the opening words of Section 44 itself say "*[i]n this Chapter*," which is Chapter I of Part II of the Arbitration Act. No canon of interpretation would allow such transboundary application of definition when expressly limited to apply in circumscription.[25]

iii. Reliance on the 'Atlas' case

To further its conclusions above,[26] the Court in PASL referred to *Atlas Exports Industries Ltd.* v. *Kotak & Co.* ["**Atlas**"],[27] which had considered the following arbitration clause:

> "*27. Arbitration.--(a) Any dispute arising out of or under this contract shall be settled by arbitration in London in accordance with the arbitration Rules of Grain and Food Trade Association Limited, No. 125 such Rules forming part of this contract and of which both parties hereto shall be deemed to be cognisant.*
>
> *(b) Neither party hereto, nor any persons claiming under either of them, shall bring any such dispute until such dispute shall first have been heard and determined by the arbitrators, umpire or Board of Appeal, as the case may be, in accordance with the arbitration Rules and it is expressly agreed and declared that the obtaining of the award from the arbitration, umpire or Board of Appeal, as the case may be, shall be a condition precedent to the right of either party hereto or of any person claiming under either of them to bring any action or other legal proceedings against the other of them in respect of any such dispute*."

In that case, the final award was delivered in 1987 under the Rules of GAFTA, London. As the award was not complied with, the award creditor moved an application under Sections 5 and 6 of the erstwhile Foreign Award Act, 1961 ["**FAA**"][28] before the Bombay High Court. The award was made a Rule of the Court, followed by a decree. The award debtor preferred a Letters Patent Appeal on the grounds that since both the parties were Indian, the award could not be enforced as contrary to

---

24 PASL, (2021) SCC OnLine SC 331, ¶ 49.
25 PASL, (2021) SCC OnLine SC 331, ¶ 26.
26 PASL, (2021) SCC OnLine SC 331, ¶¶ 53-55.
27 Atlas Exports Industries Ltd. v. Kotak & Co., (1999) 7 SCC 61.
28 The Foreign Awards (Recognition and Enforcement) Act, No. 45 of 1961, §§ 5, 6 (India).

Sections 23 and 28 of the Indian Contract Act ["**ICA**"][29]. However, the Court rejected this argument by holding that:[30]

> "*10. […] It was submitted that Atlas and Kotak, the parties between whom the dispute arose, are both Indian parties and the contract which had the effect of compelling them to resort to arbitration by foreign arbitrators and thereby impliedly excluding the remedy available to them under the ordinary law of India should be held to be opposed to public policy….*
>
> *11. The case at hand is clearly covered by Exception 1 to Section 28. Right of the parties to have recourse to legal action is not excluded by the agreement. The parties are only required to have their dispute/s adjudicated by having the same referred to arbitration. Merely because the arbitrators are situated in a foreign country cannot by itself be enough to nullify the arbitration agreement when the parties have with their eyes open willingly entered into the agreement….*"
>
> (emphasis supplied)

It was categorically held that a foreign award could not be refused enforcement merely because two Indian parties were involved, and the arbitration was extra-territorial. Although, the analysis by the Atlas Court was in the context of Sections 23 and 28 of the ICA and the existence of remedies. In this regard, the Court simply pointed to the mutuality of the agreement to arbitrate extraterritorially. Besides, the Court also observed that the award debtor never took this plea before and could not be allowed to wipe the board clean in hindsight.[31]

iv. Reliance on the 'Sasan (I)' case

To further its conclusions above,[32] the Pasl Court also referred to *Sasan Power Ltd.* v. *North American Coal Corp. Ltd.*, ["**Sasan (I)**"][33] which had considered the following arbitration clause:

> "*Section 12.2 - Dispute Resolution*
>
> *Arbitration*
>
> *(a) Any and all claims, disputes, questions or controversies involving Reliance on the one hand and NAC on the other hand arising out of or in connection with this Agreement (collectively, 'Disputes') which cannot be finally resolved by such parties within 60(sixty) days of arising by amicable negotiation shall be resolved by final and binding arbitration to be administered by the International Chamber of Commerce (the 'ICC') in accordance*

---

29 Indian Contract Act, No. 9 of 1872, §§ 23, 28 (India).

30 *Ibid. See also*, PASL, (2021) SCC OnLine SC 331, ¶ 50 (It can be seen that exception 1 to Section 28 of the Contract Act specifically saves the arbitration of disputes between two persons without reference to the nationality of persons who may resort to arbitration. It is for this reason that this Court in Atlas (supra) referred to the said exception to Section 28 and found that there is nothing in either Section 23 or Section 28 which interdicts two Indian parties from getting their disputes arbitrated at a neutral forum outside India).

31 PASL, (2021) SCC OnLine SC 331, ¶ 30 ("We are, therefore, unable to accede to the contention of Mr. Himani that this case cannot be regarded as an authority for the proposition that Sections 23 and 28 of the Contract Act are out of harm's way when it comes to enforcing a foreign award under the Foreign Awards Act, 1961, where both parties are Indian companies.").

32 *Id.* ¶ 33.

33 Sasan Power Ltd. v. North American Coal Corp. Ltd., (2015) SCC Online MP 7417 [*hereinafter* "Sasan (I)"].

with its commercial arbitration Rules then in effect (the 'Rules'). The place of arbitration shall be London, England."

(emphasis supplied)

The Sasan (I) Court held that it was permissible for two Indian parties to arbitrate extraterritorially.[34] Sasan (I) in turn also relied on Atlas and rightly appreciated the core issue: which among the two Parts (I or II) would apply to an extra-territorial arbitration. Like the PASL Court, it too considered that Section 44 of the Arbitration Act concerned an award to which the New York Convention applied.[35] And, like the Atlas Court, it also observed the mutuality of the agreement to arbitrate extraterritorially.[36] After all, the choice was made at their own risk, and they could not be allowed to later complain about it. Part I would simply not apply if their agreement to arbitrate conformed with the ingredients under Section 44 of the Arbitration Act.

D. Deconstructing the *TDM* Case

The decision of the Supreme Court in *TDM Infrastructure Pvt. Ltd.* v. *UE Development India Pvt. Ltd.* ["**TDM**"][37] was disregarded as a binding precedent, having been rendered by a single judge under Section 11 of the Arbitration Act. For the longest time, the ratio of the TDM case had a contagious impact on the decisions of various High Courts. TDM made far-reaching conclusions. It interpreted Section 2(6) of the Arbitration Act to mean that Section 28 was imperative/mandatory and that Indian parties, therefore, could not be allowed to derogate from Indian law.[38] The TDM court committed the error of blurring the fine line between the substantive law (dealt under Section 28) and the law of the juridical seat and wrongly held that Indian parties could not choose a foreign juridical seat.

Section 28 (Sub Provisions, Clauses)	**Remarks on the Implications**
Rules applicable to the substance of the dispute. — **(1) Where the place of arbitration is situated in India, —** **(*a*) in an arbitration other than an international commercial arbitration, the arbitral tribunal shall decide the dispute submitted to arbitration in accordance with**	– Where the 'place of arbitration' is in India – Concerns domestic arbitrations only – Indian law will mandatorily apply to the substance of the dispute (substantive law) – No choice of law available in case of substantive law

[34] Sasan I, (2015) SCC Online MP 7417, ¶ 57.
[35] *Ibid.*
[36] *Id.*, ¶ 72.
[37] TDM Infrastructure Pvt. Ltd. v. UE Development India Pvt. Ltd., (2008) 14 SCC 271.
[38] Arbitration Act, No. 26 of 1996, § 2(6) (India) ("(6) Where this Part, except section 28, leaves the parties free to determine a certain issue, that freedom shall include the right of the parties to authorise any person including an institution, to determine that issue.").

the substantive law for the time being in force in India;	
(*b*) in international commercial arbitration,— **(*i*) the arbitral tribunal shall decide the dispute in accordance with the rules of law designated by the parties as applicable to the substance of the dispute;**	– Where the 'place of arbitration' is in India – Concerns 'international commercial arbitration' as per Section 2(1)(f) – Choice of law (for substantive law) available to the parties
(*b*) in international commercial arbitration,— **(*ii*) any designation by the parties of the law or legal system of a given country shall be construed, unless otherwise expressed, as directly referring to the substantive law of that country and not to its conflict of laws rules;**	– Where the 'place of arbitration' is in India – Concerns 'international commercial arbitration' as per Section 2(1)(f) – Any designation of choice of law (for substantive law) would exclude the conflict of law rules
(*b*) in international commercial arbitration,— **(*iii*) failing any designation of the law under clause (*a*) by the parties, the arbitral tribunal shall apply the rules of law it considers to be appropriate given all the circumstances surrounding the dispute.**	– Where the 'place of arbitration' is in India – Concerns 'international commercial arbitration' as per Section 2(1)(f) – If parties have not made a choice of law (for substantive law), the tribunal will determine the applicable substantive law

For the sake of clarity about Section 28 of the Arbitration Act, it provides and means the following:

Unfortunately, the Court in TDM sent the wrong signal, picked up by the High Courts, for instance, in *Seven Islands Shipping Ltd.* v. *Sah Petroleums Ltd.* ["**Seven Islands**"].[39] There, the Bombay High Court relied on TDM to hold that there could not be an 'international arbitration agreement' between two Indian parties.[40] Another Single Judge of the Bombay High Court, in *M/s Addhar Mercantile Pvt. Ltd.* v. *Shree Jagadamba Agrico Exports Pvt. Ltd.* ["**Addhar**"],[41] referred to TDM and held that Indian nationals

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

40 *Id.* ¶ 13.

41 M/s Addhar Mercantile Pvt. Ltd. v. Shree Jagadamba Agrico Exports Pvt. Ltd., Arbitration Application No. 197 of 2014 along with Arbitration Petition No. 910 of 2013.

could not be permitted to derogate from Indian law and that this was part of the public policy.[42] TDM and the decisions that followed it did not appreciate the law in the correct perspective and, therefore, stood overruled in PASL.

In contrast, a decision of the Delhi High Court, in *GMR Energy Limited* v. *Doosan Power Systems India* ["**GMR**"],[43] also considered the same question and instead followed Sasan (I) and Atlas.[44] It correctly distinguished TDM stating that the TDM Court had clarified that any findings/observations made were only to determine the Court's jurisdiction under Section 11 of the Arbitration Act and not for any other purpose. Hence, the Court in GMR did not rely on TDM or have the need to follow it. Likewise, the Delhi High Court followed the trend in *Dholi Spintex* v. *Louis Dreyfus*, ["**Dholi**"][45] which also relied on Sasan (I) to consider the same point of law and held that an arbitration agreement between the parties is independent of the substantive contract and parties can choose a different law governing the arbitration (i.e., juridical seat). Though the validity of the arbitration agreement would not turn on it, Dholi also justified the parties' choice of a foreign seat by noting the existence of some foreign element to the agreement between the parties.[46]

E. A Recapitulation

Indeed, legislatures and courts have the authority to create reasonable exceptions to restrict the exercise of freedom of contract where it is conceived that public policy requires it.[47] Besides the statutory leeway confirmed by the Court in Pasl, it was hard to see why there should be a need to limit the freedom to contract a seat of arbitration outside domestic borders; or why it is difficult to perceive the ramifications of substituting a local seat with a foreign seat.

Minimal State intervention is better suited in respect of contracts between parties on how to resolve their disputes. Indeed, any pro-arbitration jurisdiction fixates some limit to party autonomy,[48] but these limits are generally prescribed when procedural autonomy results in the abridgment of substantive rights. In the tug-of-war between procedural and substantive rights, substantive rights often prevail. And the selection of a foreign seat of arbitration—which is predominantly procedural[49]— does not

---

42 *Id.* ¶ 8.

43 GMR Energy Ltd. v. Doosan Power Systems India, CS (Comm) 447/2017.

44 *Id.* ¶¶ 29-31, 41. *See also*, ¶ 43 (where the court relied on Fuerst Day Lawson v. Jindal Exports Ltd., (2001) 6 SCC 356, wherein comparing the pre amendment and post amendment Arbitration Act it was observed that the new Act is more favourable to international arbitration than its previous incarnation.).

45 Dholi Spintex v. Louis Dreyfus, CS (Comm) 286/2020.

46 *Id.* ¶ 47. See also, PASL, (2015) SCC Online MP 7417, ¶¶ 31-32 ("It is important to note that no such caveat is entered when India acceded to the New York Convention and enacted the Foreign Awards Act and the Arbitration Act, 1996. On the contrary, we have seen as to how "persons" mentioned in Section 44 has no reference to nationality, residence or domicile. This is another important pointer to the fact that, unlike the U.S. Code, Section 44 of the Arbitration Act does not enter any such caveat.").

47 *See* Carolyn Edwards, *Freedom of Contract and Fundamental Fairness for Individual Parties: The Tug of War Continues*, 77 UMKC L. REV. 647, 657 (prohibitions against lotteries, Sunday laws, and usury statutes, or other regulations that are intended to protect the health, safety, and economic welfare of citizens).

48 *See* In re Wal-Mart Waze & Hours Emp't Practices Litig., 737 F.3d 1262, 1267-68 (9th Cir. 2013) (parties cannot waive their right to judicial review).

49 REDFERN & HUNTER, *supra* note 3, at 175.

conflict with public policy.[50] Notably, under the Arbitration Act, an award is not subject to annulment for violating 'Indian law' applicable to the substance of the dispute; instead, the ground is narrower —'public policy.'

Hence, an award contrary to the public policy, or the mandatory rules, would be unenforceable (to the extent it offends it).[51] And these 'mandatory rules' may be defined as rules that cannot be derogated;[52] thus, providing the necessary safety net. This safety net, as it were, performs the function of not allowing domestic parties to derogate mandatory rules (that they are subject to) by arbitrating extraterritorially.[53] Another effect of choosing a particular place of arbitration abroad is that it also brings its own mandatory rules and public policy, the entire package, and those must be obeyed as well.[54]

In the end, an extra-territorial award's recognition or enforcement will depend on the law and the will of the enforcing State. And when enforcing, which would be under the New York Convention, the enforcement would depend on where the award was made — at the seat.

III. Legal effects in arbitration governance

The selection of a juridical seat is like ordering the whole enchilada — it is the whole package. Meaning that the choice includes the corresponding *lex loci arbitri* or *lex arbitri*. Inversely, therefore an express choice of *lex arbitri* may be regarded as an implied choice of the corresponding seat.[55] And because there are important procedural consequences (sometimes substantive), the choice of seat is critical because the arbitrator (and the parties) must bow down to the mandatory norms of the country in which he sits. For example, many legal systems prohibit the arbitration of disputes involving sensitive public interests, such as the protection of investors in corporate securities or contracts with state agencies. Furthermore, some legal systems require arbitrators to state the reasons for their awards; some provide for the removal of inept or unfair arbitrators. A few legal systems provide for an appeal from errors in matters of law.

In this regard, Gary Born ["**Born"**] tenders a succinct understanding:[56]

---

50 PASL, (2015) SCC Online MP 7417, ¶ 55-58 (discussing the example of the Benami Transaction Act and its potential violation).

51 REDFERN & HUNTER, *supra* note 3, at 357.

52 Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations, Article 3(3).

53 Under Article 17(1) of the UNCITRAL Model Law, for instance, parties must be treated with equality and each party must be given a reasonable opportunity of presenting a case; Article 17(3) states that the tribunal must hold a hearing if either party requests; under Articles 20 and 21, there must be a consecutive exchange of written submissions; under Article 29(5), if the tribunal appoints an expert, parties must be given an opportunity to present their own expert witnesses on the points at issue.

54 REDFERN & HUNTER, *supra* note 3, at 176.

55 *See, e.g.,* Braes of Doune Wind Farm (Scotland) Ltd v. Alfred McAlpine Business Services Ltd, [2008] EWHC 426 (TCC) (That while the choice of seat will usually dictate the corresponding procedural law, the converse can also be true. The parties' choice of procedural law of a country (England) was held to indicate that England was also the chosen country as the seat of the arbitration.).

56 GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 2214 (3d ed., 2021) [*hereinafter* "GARY B. BORN"].

"*The local law of the arbitral seat may have a material influence on the law applicable to the substantive or procedural issues that arise during the course of the arbitration. Again, that is true both because some national arbitration laws directly impose both mandatory procedural requirements and substantive rules in locally-seated arbitrations, and because, in practice, a variety of considerations give the arbitral seat an indirect influence on the procedures and substantive rules applicable in the arbitration.*

… [N]ational arbitration legislation in the arbitral seat often imposes rules regarding choice of law, 'internal' procedural issues, statutes of limitations, confidentiality, disclosure, provisional relief and consolidation or joinder in locally-seated arbitrations."

But what does *lex arbitri* mean? It is, of course, not the law governing the dispute. Rather *lex arbitri* is also the *lex loci arbitri*, as in the law of the place of the proceedings; thus, an arbitrator must bend to the mandatory norms of the state in which he legally sits. Its components have unique coverage, but ultimately *lex arbitri* essentially governs the validity of the arbitral process itself.[57] Though the context of *lex arbitri* varies from jurisdiction to jurisdiction,[58] the package would most likely comprise the following segments — the broad contents of *lex arbitri*. But before we consider these segments, it is worthwhile to read what the English case law[59] rhetorically questioned and answered:

"*What then is the law governing the arbitration? It is, as the present authors trenchantly explain, a body of rules which sets a standard external to the arbitration agreement, and the wishes of the parties, for the conduct of the arbitration. The law governing the arbitration comprises the rules governing interim measures (e.g. Court orders for the preservation or storage of goods), the rules empowering the exercise by the Court of supportive measures to assist an arbitration which has run into difficulties (e.g. filling a vacancy in the composition of the arbitral tribunal if there is no other mechanism) and the rules providing for the exercise by the Court of its supervisory jurisdiction over arbitrations (e.g. removing an arbitrator for misconduct*."

A. Rules governing court assistance

An important consideration about the choice of seat is the auxiliary support from the courts, such as interim measures, the appointment of arbitrators, the taking of evidence, and so on. These are rules entitling the local courts to intervene to support the arbitration.

Particularly about interim measures, *lex arbitri* is generally also considered to supply the standards applicable to a request for interim measures (which is distinguishable from the tribunal's power or authority to grant measures).[60] This standard is often based on three elements: (i) whether the claimant

57 William W. Park, *The Lex Loci Arbitri and International Commercial Arbitration*, INT'L COMP. L. Q. 32 (1983), 21, 23.

58 REDFERN & HUNTER, *supra* note 3. (Each state will decide for itself what laws it wishes to lay down to govern the conduct of arbitrations within its own territory.).

59 REDFERN & HUNTER, *supra* note 3, at 79; Smith v. H International, [1991] 2 Lloyd's Rep 127, ¶ 130.

60 For awards adopting this approach, *see* Procedural Order of July 2008 in ICC Case No. 15218, in ICC, PROCEDURAL DECISIONS IN ICC ARBITRATION 79 (2015) (tribunal applied Swiss lex arbitri); Procedural Order of December 2007 in ICC Case No. 14993, in REDFERN & HUNTER, *supra* note 3 at 77 (tribunal seated in Vienna referred to Austrian procedural rules when granting security for costs); Procedural Order of June 2007 in ICC Case No. 14581, in *id.* at 86 (tribunal seated in Geneva applied Swiss law in denying anti-suit order); Procedural Order of December 2006 in ICC Case No. 14020, in *id.* at 67 (tribunal seated in London relied on 1996 English Arbitration Act); Procedural Order of May 2006 in ICC Case No. 13620, in REDFERN & HUNTER, *supra* note 3 at 65 (tribunal seated in London relied on 1996 English Arbitration Act); Interim Award in ICC Case No. 8879, 11(1) ICC CT. BULL. 84 (2000) (relying on lex contractus and lex fori); Interim

has a prima facie case on the merits; (ii) whether there is an urgent need for interim relief; and (iii) whether the claimant will suffer serious or irreparable harm if the emergency relief is not granted. While there is an alternative view that *lex arbitri* has no business in providing such standards (which have led some tribunals to apply "international standards"),[61] the author(s) find(s) that following the standards under the law of the seat is more objectively available to a tribunal to apply.

As with standards, local nuances may also arise in matters like the maintainability or admissibility of an application before a court for urgent provisional relief. E.g., in *Gerald Metals SA* v. *Timis*,[62] an English Court considered urgent provisional relief under Section 44(3) of the English Arbitration Act 1996 [63]["**EAA**"] in circumstances where timely and effective relief could have instead been granted by an expedited tribunal or emergency arbitrator under the institutional rules. It held:

> "*[The] test of exceptional urgency must be whether effective relief could not otherwise be granted within the relevant timescale – the relevant timescale for this purpose being the time which it would otherwise take to form an arbitral tribunal. Likewise, under Article 9B [of the LCIA Rules] the test of what counts as an emergency must be whether the relief is needed more urgently than the time that it would take for the expedited formation of an arbitral tribunal. That, in my view, is the rational interpretation of these rules. Accordingly, it is only in cases where those powers, as well as the powers of a tribunal constituted in the ordinary way, are inadequate, or where the practical ability is lacking to exercise those powers, that the Court may act under section 44*."[64]

This is a significant aspect highlighting the distinctiveness of English *lex arbitri*. And in contrast, no such standard exists under Indian *lex arbitri,* which considers the maintainability of an application for interim relief (prior to the tribunal's constitution) vis-à-vis any emergency remedies available under the agreed arbitration rules. Hence, the decision of a seat can be significant, as in the case of the English *lex arbitri*, which suggests that the availability of timely and effective relief under institutional rules (such as emergency arbitrators) may, in certain circumstances, erode the Court's power to grant urgent interim relief in support of the arbitral proceedings.

Where parties disagree on the appointment of a sole arbitrator or where there is a breakdown of the appointment procedure, Indian parties will not have access to Indian courts for assistance. This is simply because Section 11 of the Arbitration Act[65] is only available to arbitrations seated in India (in other words, governed by Part I of the Arbitration Act). Hence, Indian parties are likely to confront

---

Award in ICC Case No. 8786, 11(1) ICC CT. BULL. 81, 82 (2000) (referring to Article 183 of Swiss Law on Private International Law as basis for provisional and protective measures); Interim Award in ICC Case No. 7544, 11(1) ICC CT. BULL. 56 (2000) (considering French domestic standards as "helpful as a pointer"); Award in Summary Arbitral Proceedings in NAI Case No. 2212 of 28 July 1999, XXVI Y.B. COMM. ARB. 198 (2001) (considering Dutch domestic standards); Interim Award in NAI Case No. 1694 of 12 December 1996, XXIII Y.B. COMM. ARB. 97 (1998) (considering Dutch domestic standards). *See also* R. SCHÜTZE, SCHIEDSGERICHT UND SCHIEDSVERFAHREN ¶ 257 (4TH ED. 2007) (under German version of UNCITRAL Model Law, domestic standards for provisional measures applicable to tribunal's consideration of such measures). *See also*, GARY B. BORN, *supra* note 56, at 4034.

61 GARY B. BORN, *supra* note 56, at 2645-47.

62 Gerald Metals SA v. Timis, [2016] EWHC 2327 (Ch), ¶ 7.

63 Arbitration Act 1996, ch. 23, § 44(3) (Eng.) [*hereinafter* "EAA"].

64 GARY B. BORN, *supra* note 56, at 2645-47.

65 Arbitration Act, No. 26 of 1996, § 11 (India).

some unfamiliar laws around the appointment of arbitrators. For example, English *lex arbitri* features odd and even numbers of arbitrators in the tribunal. Further, unequal appointment rights are permitted in certain circumstances; e.g., by operation of Section 17 of the EAA[66], one party may appoint his arbitrator as sole arbitrator in circumstances where the arbitration agreement provides that each party is to appoint an arbitrator and one party fails to do so. Moreover, where the agreement is commercial and provides that a tribunal is to be constituted from a panel wholly appointed by one side, the other party cannot seek to attack the award on the basis that the procedure would result in an impartial tribunal.[67]

This is a potential concern if an enforcing jurisdiction, like India, treats unequal and unilateral appointments with scrutiny under its public policy.[68] It is, therefore, reasonable to consider that an award resulting from extra-territorial arbitrations (i.e., a foreign award under Part II of the Arbitration Act) may be vulnerable based on local jurisprudence/public policy,[69] which could potentially give rise to a lack of substantive jurisdiction of the tribunal leading to the annulment of the arbitral award under Section 34 of the Arbitration Act.

B. Rules governing court supervision

A juridical seat comes with strings attached, and particularly important are the rules governing court supervision, i.e., rules entitling the local courts to intervene to, *e.g.*, set-aside/annul an arbitral award, or terminate the mandate of an arbitrator and substitute him, or determine jurisdictional claims (if possible, under the *lex arbitri*).

Thus, when challenging an award, the *lex arbitri* will provide the grounds on which an award may be set aside (the permissible challenges to an award[70]) and, notably, the standard of review applicable in such proceedings.[71] The New York Convention also echoes this in that a party may seek to vacate or set aside an award in the State in which, or under the law of which, the award is rendered.[72]

This is a serious matter when considering the practicality of arbitrating extraterritorially. Unlike the Indian setting under the Arbitration Act, which only has the one infamous provision (Section 34) for setting aside arbitral awards, the EAA has a sort of platter of possibilities. Concerning an arbitration seated in England, a party may challenge the award on the grounds of serious irregularity affecting the

---

66 EAA, § 17 (Eng.).

67 RUSSEL ON ARBITRATION 4-036 (David St. John Sutton et al. eds. 2015).

68 *See* Perkins Eastman Architects DPC & Anr. v. HSCC India Ltd., 2019 SCC Online SC 1517, ¶¶ 20-21; Proddatur Cable TV Digi Services v. SITI Cable Network Ltd., 2020 SCC Online Del 350, ¶¶ 11, 22-23, 27-28. *See also*, Ellora Paper Mills Ltd. v. State of MP, 2022 SCC Online SC 8 (mandate of the arbitrator terminated concerning a contract and arbitration that was pre-2015 amendment).

69 *See, e.g.*, Societe Siemens & BKMI v. Societe Dutco (1992) 119 JDI 707 (on the principle of equality of parties, where one claimant appoints an arbitrator and multiple defendants with potentially separate interest are only able to appoint one arbitrator jointly).

70 *See, e.g.*, C v. D, [2007] EWCA Civ 1282 (English court held that the law of the seat governed the scope of permissible challenges to an arbitration award, and the attempted challenge to the award in the courts of New York was restrained by injunction.).

71 *See generally*, Gracious Timothy Dunna, *Standard of Review in Set-Aside and Enforcement Proceedings Relating to Arbitral Awards in India*, 14 NATIONAL L. SCHOOL J. 252 (2019).

72 *See* Yusuf Ahmed Alghanim & Sons, W.L.L. v. Toys "R" Us, Inc., 126 F.3d 15, 23 (2d Cir. 1997).

tribunal, the proceedings, or the award,[73] or that the tribunal had no substantive jurisdiction.[74] Further, it is also possible to appeal against the award on a question of law, but unlike the previous two grounds of challenge, this requires the Court's leeway (unless the parties have agreed to it).[75]

Thus, Indian parties are cautioned that because the effect of the choice of seat is to treat the courts of the seat as having exclusive supervisory jurisdiction, when the seat is, *e.g.*, London, it will be inappropriate to commence proceedings in India with the object to set aside the award (which is christened English by virtue of the seat).

Likewise, challenges to the appointment may also work differently in a foreign jurisdiction. For example, Section 24 of the EAA[76] provides that parties will need to seek the Court's intervention through an application where arbitration rules do not apply. While this remedy before a court is not available at the first instance, it is placed differently in comparison to Sections 12 and 13 of the Arbitration Act[77], wherein the tribunal itself determines the challenge, and the machinery does not allow a court's intervention in this issue except in an application for setting aside such an arbitral award (that comes post-arbitration proceedings). Under Section 24(1)(d)(ii) of the EAA, an applicant must meet the threshold and establish that he has suffered or will be caused substantial injustice if the arbitrator is not removed.[78]

The point is that these differences matter, and Indian parties must not find it surprising when confronted by such legal standards in seeking the Court's intervention.

C. Rules governing procedure and due process

Any *lex arbitri* generally sets out the principle that party autonomy prevails concerning the procedure of the arbitration.[79] This often exists in the arbitration agreement itself or under the institutional rules selected by the parties. But when that is not the case, *the arbitrator is the master of his own procedure*.[80]

Bequeathed with the power to regulate the procedure as it deems fit, the tribunal, for instance, must consider the application of the rules of evidence. The Arbitration Act makes it abundantly clear that arbitrations are free from the proverbial chains of CPC and the Indian Evidence Act 1872.[81] Though, where the parties have not expressly agreed, the tribunal bears the mantle in deciding whether to apply strict rules of evidence (or any other rules) as to the admissibility, relevance, or weight of any material (oral, written, or other) sought to be relied upon on matters of fact or opinion.

---

73 EAA, § 68 (Eng.).
74 EAA, § 67 (Eng.).
75 EAA, § 69 (Eng.).
76 EAA, § 24 (Eng.).
77 Arbitration Act, No. 26 of 1996, §§ 12, 13 (India).
78 The expression "substantial injustice" is not defined in the English Arbitration Act 1996.
79 This principle is enshrined in the UNCITRAL Model Law, Article 19(1) ("Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the tribunal in conducting the proceedings.") *See also*, EAA, §§ 34(1), 38(1).
80 Bremer Vulkan Schiffbau und Maschinenfabrik v. South India Shipping Corp, [1981] AC 909, 972 & 985. *See also*, Arbitration Act, No. 26 of 1996, § 19 (India).
81 Arbitration Act, No. 26 of 1996, § 19 (India).

The only rider is the overriding mandatory rules. Meaning, that where the law governing the procedure is, for example, English law, the parties' freedom will be restricted by the EAA[82] and the public interest[83] (including, of course, principles of natural justice and fairness[84]). A departure from this has the potential to constitute a serious irregularity and result in the award being set aside or unenforceable.

IV. Potential legal concerns

When two Indian parties are arbitrating extraterritorially, they do not escape the shadow of various legal hurdles and impediments, both at home and abroad. Those that are particularly foreseeable are commented upon in the following segments. However, it is necessary to keep in mind that we are still in the nascent stages of such extra-territorial adoption among parties and that it is still an evolving front in law and practice.

A. Arbitrability issues

Extra-territorial arbitrations raise questions about India's reservations in enforcing foreign awards. Arbitrability of issues is one such hurdle under Section 48(2)(a) of the Arbitration Act[85].

Take, for instance, the dichotomy that can arise in the arbitrability of issues under competition/anti-trust law. The United States of America"["U.S."] allows for arbitration of such issues where it is of an international character: in *Mitsubishi Motor Corporation* v. *Soler Chrysler-Plymouth* ["**Mitsubishi**"],[86] anti-trust issues arising out of international contracts were held to be arbitrable under the Federal Arbitration Act 1925, despite the public importance of anti-trust laws in the domestic realm. On the contrary, India's policy on arbitrability of issues under competition/anti-trust law is practically non-existent, so it is fair to suggest that the subject matter is likely not capable of settlement by arbitration under Indian laws[87]. Hence, while a foreign award resulting from an extra-territorial arbitration in the U.S. may be valid under its *lex arbitri*, a potential challenge brews in India if that award is sought to be enforced in the Indian courts.

That apart, there is, of course, the issue of public policy of the state—a theme that will remain evergreen in India. And to that, the New York Convention reserves to each signatory country the right to refuse enforcement of an award[88] where the recognition or enforcement of the award would be contrary to a public policy of that country.

B. Reception by Foreign Courts

That parties from a State may contract to arbitrate extraterritorially is one thing, but whether foreign courts will be ready to receive alien parties to take their assistance and intervention is another. In one sense, it should make no difference to a foreign court whether the parties are from different States or

82 EAA, § 4(1), sched. 1 (Eng.).
83 EAA, § 1(b) (Eng.).
84 EAA, § 33(1) (Eng.).
85 Arbitration Act, No. 26 of 1996, § 48(2)(a) (India).
86 Mitsubishi Motor Corporation v. Soler Chrysler-Plymouth, 473 U.S. 614 (1985).
87 *See* Abhisar Vidyarthi, *Applying Vidya Drolia's "Four-Fold Arbitrability Test" to Antitrust Disputes in India*, KLUWER ARB. BLOG (Feb. 10, 2021).
88 Article V(2)(b), New York Convention, 1959.

the same (the former situation being more familiar to us). Parties are, therefore, cautioned not to be too excited to go 'seat shopping' abroad, lest the local courts find no regard for it and the parties lose all court assistance and supervision.

Candidly, instances of this nature are a rare breed. But England, for instance, for many years, has been a premier location for international disputes, with foreign parties often trying to litigate in London. And generally, there are many ways in which the English courts assume jurisdiction over international disputes between foreign parties. In particular, to claim jurisdiction, an English Court will rely on the parties' contract (besides the Court's expectation to be satisfied with the reasonable prospects of success and if England would be an appropriate forum).[89] Albeit, the foregoing is in the context of litigation, it is safe to say that English courts may well be open to welcoming two Indian parties, selecting London as the seat of arbitration. And so, if Indian parties prefer a foreign seat of arbitration, the jurisdiction of that forum would go to bind the parties.

C. Lex Arbitri Issues

Lex arbitri, as discussed above, provides the default rules, which (in most cases) can be modified by the parties' agreement. But often, there will be matters of mandatory law that apply and cannot be derogated. Either way, the *lex arbitri* will significantly influence the law applicable to several issues (particularly procedural) that arise pre, during, and post-arbitration proceedings. Thus, Indian parties are cautioned that, as a practical matter, things may be the *same, but different,* like one of those occasions when you get exactly what you are not looking for.

i. Conflict of laws

The *lex arbitri* (depending on the foreign seat selected) may mandatorily require the arbitral tribunal to apply the local conflict law rules (as applied by national courts) whenever there is a need to find/ identify the applicable law in the absence of the parties' agreement. E.g., where parties have not agreed to the substantive law that would govern the dispute. The idea is that every system of conflict of laws rules is a subset of the national law of the arbitral seat, and every arbitration is anchored and subject to some national law. Accordingly, the national law also ends up governing the rules of conflict of laws to be followed by the arbitral tribunal seated there.[90]

Although, the more contemporary legislations like those following the UNCITRAL Model Law on International Commercial Arbitration ["**Model Law**"] may take a different approach by giving substantial discretion/freedom to the arbitral tribunal, like Section 28(1)(b)(iii)[91] of the Arbitration Act, which states:

> "*failing any designation of the law under clause (a) by the parties, the arbitral tribunal shall apply the rules of law it considers to be appropriate given all the circumstances surrounding the dispute*."

---

89 *See, e.g.,* Cherney v. Deripaska, [2008] EWHC 1530 (Comm)(Cherney relied upon a contract which he claimed had been entered into in London in 2001). *See also*, OJSC Oil Co. Yugraneft (in liquidation) v. Abramovich & Ors., [2008] EWHC 2613 (Comm).

90 *See* F.A. Mann, *Lex Facit Arbitrum*, 2 ARB. INT'L (1986), 241, 244-45, 248.

91 Arbitration Act, No. 26 of 1996, § 28(1)(b)(iii) (India).

The EAA is similar, stating in Section 46(3)[92] that: "*If or to the extent that there is no … choice or agreement [on the substantive law applicable to the dispute,] the tribunal shall apply the law determined by the conflict of laws rules which it considers applicable*."

However, it is unlikely that there is absolute discretion and, hence, the arbitrator would feel more comfortable or convinced to simply apply the local rules of conflict of laws.

There are also more unfamiliar national arbitration laws where arbitrators are bestowed with the power to directly apply whatever substantive law they consider appropriate, without the medium of conflict of laws. *E.g.*, Article 1511 of the French Code of Civil Procedure[93] provides that the arbitrator may resolve the dispute "*in accordance with the rules of law [he] considers appropriate*." Some other civil law countries in Europe and elsewhere take a similar approach, which apparently requires no conflict of laws analysis and permits the direct application of substantive law. This parallels with some leading arbitration rules, like Article 21 of the ICC Rules of Arbitration (2012)[94], Article 35 of the UNCITRAL Arbitration Rules (2010)[95], Article 59 of the WIPO Arbitration Rules (2002)[96], Article 22.3 of the London Court of International Arbitration Rules ["**LCIA**"] (1998)[97] amongst others. In essence, all these rules suggest that if the parties fail to designate rules of law, "*the arbitral tribunal shall apply the rules of law which it determines to be appropriate*."[98]

ii. *Burden of proof and evidence*

The burden of proof (the burden of proving a particular issue) may also give rise to a conflict of laws questions: whether it assimilates with the substantive law governing the dispute or with the *lex arbitri*. On one side, it concerts with the substantive law dealing with parties' rights and liabilities, but on the other side, certain procedural matters (such as disclosures) can also directly or indirectly concern the burden of proof.

Where neither of these options is suitable, arbitrators may end up developing their own rules in light of the substantive law and *lex arbitri* relevant to the particular issue before them. The same thought process can apply to evidentiary matters (such as admissibility, the weight of evidence, and the like).

iii. *Limitation/ prescription periods*

A limitation or prescription period will virtually always apply to extra-territorial arbitrations, as normally applicable in the case of national court proceedings. But there are significant choice of law questions here for such extra-territorial arbitrations — it is the age-old debate of whether statutes of limitation are to be regarded as "procedural" or "substantive."

92 English Arbitration Act, 1996, § 46(3) (Eng.).
93 Civ. Pro. C. art. 1511 (Fr.).
94 International Chamber of Commerce (ICC) Rules of Arbitration, 2012, art. 21 [*hereinafter* "ICC Rules"].
95 United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules, 2010, art. 35.
96 World Intellectual Property Organisation (WIPO) Arbitration Rules, 2002, art. 59.
97 London Court of International Arbitration (LCIA) Arbitration Rules, 1998, art. 22.3.
98 ICC Rules, art. 17.

In the US, for instance, statutes of limitations have been regarded as procedural in nature and, therefore, governed by the law of the forum. In contrast, some civil law jurisdictions generally regard them to be substantive in nature, thus, holding these to be issues governed by the substantive law applicable to the merits. Thus, as a practical matter, there is a lot of potential for confusion in extra-territorial arbitrations. The Canadian Supreme Court aptly describes it:

> "*[N]ot all legal systems treat limitation periods – or extinctive prescription, as it is known in civil law jurisdictions – alike. Those built on the common law tradition have tended to conceive of them as a procedural matter, while those following the civil law tradition generally consider them to be a question of substantive law*."[99]

In this regard, Born notes a trend in common law jurisdictions to assimilate limitation issues with substantive law governing the dispute. In part, it is because the jurisdiction whose substantive law applies is generally more likely to have been within the parties' expectations.[100] Hence, as a practical matter, it would be safer for Indian parties to consider the shortest potentially-applicable limitation/prescription period when in dispute.

iv. Joinder of parties

Arbitration laws generally do not deal with consolidation, joinder, or intervention of parties. Hence, there is potential for variations from jurisdiction to jurisdiction and surprises for Indian parties, though there is not much authority (or clarity) on what law governs these issues in international arbitration.

There are at least three legal systems that can plausibly apply to issues of consolidation, joinder, and intervention, and each of these alternatives can be quite compelling: (a) the law governing the arbitration agreement; (b) the law of the arbitral seat; and (c) the national law of the party concerned. The applicability of any of these alternatives will obviously depend on the jurisdiction where extraterritorial arbitration is taking place and the rules of conflict of laws of that place. Hence, Indian parties are advised to make an express choice of the law governing these issues or the criteria applicable when at the crossroads of conflict of laws.

III. Practicality of Arbitrating Extra-Territorially

There may be a number of reasons why going extra-territorial may seem lucrative to Indian parties. Much like the quirks among Indians to go and settle abroad, the choice of a foreign seat has its fancies. These may include the court systems, pool of qualified lawyers, specialists/experts, and so on. And in a way, much of it is *per se* unrelated to the law of that place but equally important in many ways.

In the context of London, for instance, Justice Carr has said that the "*coexistence of London's reputation as an international business with its reputation as a global legal centre is no coincidence. Business requires expert legal advice and a predictable and stable legal system in which to operate. The English Courts are a safe and neutral forum*

99 Tolofson v. Jensen, [1994] 3 S.C.R. 1022, at 1068-70.
100 GARY B. BORN, *supra* note 56, at 2874.

for the resolution of disputes, overseen by a strong and famously independent judiciary."[101] With that, it is quite understandable why extra-territorial arbitration can be appealing (and validly so) to Indian parties.

A. Access to Specialist Courts or Advanced Court Systems

Court systems are usually the markers of high-quality jurisprudence and legal environments. And so, a good reason for Indian parties to choose a seat beyond home-state territory may actually be within the home-state territory itself, like the incongruities in domestic courts, which can be pretty demotivating, notably in set aside proceedings. Hence, all the positives of going extra-territorial that one can consider hereinbelow have an equal and opposite negative in the home-state jurisdiction.

A foreign seat mainly opens access to specialist commercial courts staffed by highly competent and experienced judges in dealing with the most complex commercial cases. In addition, there may be an array of powerful interim remedies available to Indian parties. All this comes with a wealth of reported case law, supplying certainty to the greatest extent and ensuring that procedural law and arbitration-related litigation are principled and predictable. The list does not stop there. Other beneficial/ attractive features include the recoverability of legal costs if the arbitration (and the related litigation) is successful. This provides good value when assessed against the comparable costs parties incur in India, which often do not result in any recovery of costs.

B. Taking Advantage of International Public Policy

It is well acknowledged that there is always a firm public policy behind the judicial enforcement of arbitration agreements and arbitral awards, and the New York Convention is the foundation of this idea.

India is one such jurisdiction that uses a different standard of public policy (call it "international public policy") when considering the enforcement of a foreign arbitral award. It arises out of the clear statutory difference between the definitions of public policy in Part I of the Arbitration Act for arbitrations seated in India (under Section 34(2)(b)(ii)) and Part II of the Arbitration Act for arbitration seated outside India (under section 48(2)(b)).

Accordingly, in the case of extra-territorial arbitrations, which yield a foreign award governed by Part II of the Arbitration Act, Indian parties can potentially take advantage of the difference in public policy standards (Section 48 being narrow; hence, referrable as "international public policy"). In other words, since an arbitral award may only be set aside by Indian courts if the arbitral seat is in India, public policy standards (under Section 34) normally applicable between two Indian parties would not apply to an incoming foreign award for enforcement proceedings, which applies the international public policy.[102] As unusual as it may seem, it is hard to think this disturbs the delicate balance between the tenet of party autonomy and the public policy of India.

---

[101] Justice Carr, Closing Address for British Turkish Lawyers Association Seminar, *available at* https://www.judiciary.uk/announcements/speech-carr-j-btla-190913/.

[102] Arbitration Act, No. 26 of 1996, §§ 46 (When foreign award binding), 48 (Conditions for enforcement of foreign awards).

C. Other Practical Considerations

Not everything in the garden is rosy. Much like the anxieties Indians face when traveling abroad (with food, culture, cost, etc.), the choice of a foreign seat has a few snags. Cost is an important factor, and representation in arbitrations in pre- and post-arbitral stages will not be cheap (especially if local lawyers from foreign jurisdictions are involved). Cost may be coupled with the addition of burdens like the location of evidence and witnesses, which are likely to be based in India itself.

The huge differences in legal culture can emerge (and sometimes even ambush), revealing their significant (or nuanced) impact on legal issues. Practically speaking, local procedural laws and customs may have an impact on the procedural decisions made by an arbitral tribunal, especially if one or more of the arbitrators is a local practitioner.[103] Thus, where Indian parties were to arbitrate in London or New York, with English/ American arbitrators, it should not be a surprise if the procedures entail relatively fulsome common law document disclosures and cross-examinations (than an arbitration seated in a civil law country like Switzerland with domestically-oriented Swiss arbitrators). Similarly, local arbitrators may instinctively incline to apply the local conflict of laws rules of the arbitral seat (or sometimes with some hybrid combination of other choice-of-law rules to relate with the extra-territorial nature of the arbitration at hand). Likewise, local standards of provisional reliefs are likely to be relied upon when considering an application for provisional measures of protection.

IV. Concluding Remarks

This landscape shift in arbitration has many faces — some positive, others not so much. And while it may seem pessimistic, it is worth pondering whether extra-territorial arbitration indicates the condition of domestic arbitration in India and the need felt by users to go abroad in search of a better seat to arbitrate. With this new dimension, India might come under pressure to further its pro-arbitration policy, especially domestic arbitration. Else why would Indian parties feel the need to arbitrate extraterritorially? There is clearly a drastic need to pace up with the more advanced jurisdictions or, at least meet the users' expectations.

[103] GARY B. BORN, *supra* note 56, at 3213.

ANTI-ARBITRATION INJUNCTIONS ON FOREIGN ARBITRATIONS AND THE NEW YORK CONVENTION: AN ANATHEMA?

Abhi Udai Singh Gautam & Tanmay Gupta[*]

Abstract

*This article explores the contours of the validity of anti-arbitration injunctions, so far as they conflict with kompetenz-kompetenz and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1961 ["**New York Convention**"]. For this purpose, the article, first, establishes that the obligation to compel parties to arbitrate is not absolute. Rather, it is contingent on certain qualifications that must be met by the arbitration agreement, for it to be recognised. Second, it explores how national courts have interpreted the sources of their authority to enjoin foreign arbitrations. Then, the article will engage with the argument that issuing anti-arbitration injunctions would be against the principle of kompetenz-kompetenz. Lastly, the article will establish that enjoining foreign arbitrations violates the structure of the New York Convention and the principle of international comity. In this light, National Courts should not grant injunctions that seek to interfere with the functioning of foreign courts, especially of the Member States of the New York Convention.*

I. Introduction

An arbitral tribunal has the authority (and the duty) to resolve disputes which the parties have agreed to submit to arbitration.[1] This authority flows from the arbitration agreement, which is born out of the parties' consent. The New York Convention creates an obligation on States to respect and enforce arbitration agreements.[2] The United Nations Commission on International Trade Law Model Law on International Commercial Arbitration ["**Model Law**"] obligates any judicial authority to refer a dispute to arbitration unless it finds that the arbitration agreement is "*null and void, inoperative or incapable of being performed.*"[3] This position is fairly settled across non-UNCITRAL jurisdictions as well, such as the English Arbitration Act ["**EAA**"][4] and the US Federal Arbitration Act ["**FAA**"].[5]

Despite this, arbitration proceedings may be resisted. According to Redfern and Hunter, a respondent may choose to boycott the proceedings, challenge the jurisdiction of the tribunal, or challenge the

---

[*] Students at NALSAR University of Law, Hyderabad. The authors would like to thank Lakshaya Grover (penultimate year student at NALSAR University of Law) for his help during the research and drafting of the article.

1 Nigel Blackaby and Constantine Partasides (eds.), REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION, 23-24 (6th ed., 2015) [*hereinafter* "REDFERN & HUNTER"].

2 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 330 U.N.T.S. 3, art. II [*hereinafter* "New York Convention"].

3 United Nations Comm'n on Int'l Trade Law, Model Law on International Commercial Arbitration, G.A. Res. 40/72, U.N. Doc. A/RES/40/72 (Dec. 11, 1985), art. 8, as amended by G.A Res. 61/33, U.N. Doc. A/RES/61/33 (Dec. 18, 2006) [*hereinafter* "UNCITRAL Model Law"].

4 English Arbitration Act, 1996, cl. 23, § 9.

5 United States Arbitration Act, 9 U.S.C. § 3 (1925).

award once it has been made.[6] The tribunal typically has the power to go ahead with the proceedings *ex parte* in case a party refuses to attend.[7] Provisions are also provided in, *inter alia*, the Singapore International Arbitration Centre ["**SIAC**"], United Nations Commission on International Trade Law ["**UNCITRAL**"], and the London Court of International Arbitration ["**LCIA**"] Rules.[8] Provided the tribunal gives appropriate notice of the proceedings, the hearing is not affected by a party's non-attendance.[9]

Arbitration laws further seek to minimise the need to go to court. *Kompetenz-kompetenz* provides tribunals with wide powers to rule on their jurisdiction, which extends to determining the validity of the underlying contract, or the arbitration agreement.[10]

Despite the rule of *kompetenz-kompetenz*, parties may approach a national court for an anti-arbitration injunction. National courts have continuously accepted that they have the authority to issue an injunction enjoining arbitration proceedings.[11] Some national courts have enjoined arbitrations seated in other jurisdictions.[12] Tribunals have not always acceded to anti-arbitration injunctions and have continued the proceedings despite the proscriptions issued by national courts.[13]

The article will explore the contours of the validity of such injunctions, especially ones that seek to proscribe foreign-seated arbitrations.

II. Article II of The New York Convention

The New York Convention places an obligation to recognise and enforce arbitration agreements in writing under Article II, which is mirrored in the Model Law, and numerous national laws.[14] The provision reads as follows:

> *"1) Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.*

---

6 REDFERN AND HUNTER, *supra* note 1, 345-347.

7 *See* Singapore International Arbitration Centre (SIAC) Rules 2016, rule 24 ("If any party fails to appear at a meeting or hearing without showing sufficient cause for such failure, the Tribunal may proceed with the arbitration and may make the Award based on the submissions and evidence before it in case a party refuses to attend a meeting without cause.").

8 *Ibid*.; United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules, as revised in 2010 (with addendum added in 2013), rule 30; London Court of International Arbitration (LCIA) Arbitration Rules 2020, rule 15.8; ICC Arbitration Rules 2021, art. 26(2).

9 *Ibid*.; English Arbitration Act 1996, cl. 23, § 41; Arbitration & Conciliation Act, No. 26 of 1996, § 25 (India); *see* Sohan Lal Gupta v. Asha Devi Gupta, (2003) 7 SCC 492.

10 *See* discussion on *kompetenz-kompetenz*, infra; *See also* Fiona Trust v Yuri Privalov, [2007] EWCA Civ 20.

11 GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION, 1410-1415 (3d ed., 2021) [*hereinafter* "BORN"].

12 Société Nationale Industrielle Aerospatiale v. Lee Kui Jak, 1978 AC 871 (U.K.).

13 *See* Himpurna Cal. Energy Ltd v. Indonesia, Interim Award & Final Award in Ad Hoc Case of 26 September 1999 & 16 October 1999, XXV Y.B. COMM. ARB. 109, 110 (2000).

14 *See* Arbitration & Conciliation Act, No. 26 of 1996, §§ 8, 45 (India); United States Arbitration Act, 9 U.S.C. § 3 (1925); English Arbitration Act 1996, cl. 23, § 9; Federal Act on Private International Law 1987, art. 7 (Switz.); UNCITRAL Model Law, art. 7.

> *[…]*
>
> *2) The court of a Contracting State […] [shall] refer the parties to arbitration unless it finds that the said agreement is null and void, inoperative or incapable of being performed."*[15]

Therefore, from a plain reading of the provision, it is clear that courts need not recognise arbitration agreements in certain situations. First, arbitration agreements must be in writing. The Model Law also recognises any agreement which is recorded in a permanent form to be an agreement in writing.[16] Illustratively, the Indian Supreme Court in *Great Offshore* v. *Iranian Offshore* held that agreements made over an exchange of faxed documents would be considered written arbitration agreements.[17]

Second, the agreement must provide for arbitration between parties that have a defined legal relationship. In this respect, the phrase has not been subject to much legal scrutiny.[18] Still, the New Zealand Court of Appeal in *Methanex* v. *Spellman* held that a defined legal relationship, by itself, would give rise to certain legal claims and obligations.[19] Therefore, the arbitration clause can be extremely wide, but it needs to relate to a predetermined relationship between the parties.[20]

Third, the requirement of arbitrability. Arbitrability generally depends on the relevant national law. Differences may arise between them, however, so far as disputes deal with the rights and obligations amongst the partis, they are generally deemed arbitrable. For instance, Common law jurisdictions allow disputes which do not impact the rights of third parties to be arbitrable.[21] Similarly, Swiss law allows "*Any claim involving an economic interest*" to be arbitrated.[22] On the other hand, certain jurisdictions like France limit arbitrability if the State is involved in the dispute.[23]

Lastly, an arbitration agreement must be in existence. It must not be void, inoperative, or incapable of being performed. Notably, this ground, along with arbitrability, is often invoked to grant anti-arbitration injunctions. However, the standard for invalidity is very high. In this regard, the French Cour de Cassation in *Weissberg* v. *Subway* held that the standard of invalidity is a manifest standard. As long as the determination of invalidity would be open to a legitimate dispute between the parties, the Court could not invalidate the arbitration agreement.[24] The party resisting the agreement must meet the manifest standard and establish the impossibility of the agreement.[25] Similarly, the Indian Supreme Court in *World Sport* v. *MSM Singapore* ["**World Sport**"] held that a mere allegation of invalidity because

---

15 New York Convention, art. II.

16 UNCITRAL Model Law, art. 7, option 1; *see* Arbitration & Conciliation Act, No. 26 of 1996, § 7 (India).

17 Great Offshore Ltd v. Iranian Offshore Engineering and Construction Co, (2008) 14 SCC 240 (India).

18 BORN, *supra* note 11, at 320-323.

19 Methanex Motonui Ltd. v. Joseph Spellman, [2004] 1 NZLR 95 (N.Z.).

20 BORN, *supra* note 11.

21 *See* Fulham Football Club (1987) Ltd v. Sir David Richards, [2011] EWCA Civ 855; *see also* Booz Allen & Hamilton Inc v. SBI Home Finance Ltd, (2011) 5 SCC 532 (India) [*hereinafter* "Booz Allen v. SBI Home Finance"].

22 Federal Act on Private International Law 1987, art. 177(1) (Switz.).

23 French Code of Civil Procedure, art. 2060; Conseil D'état, Code of Administrative Justice, art. 311.

24 Weissberg SRL v. Subway International BV (Cour de Cassation), Y.B. COMM. ARB. 2016 - Volume XLI [*hereinafter* "Weissberg SRL v. Subway International"].

25 *Ibid.*

of fraud would not invalidate the arbitration clause.[26] The Court in *Claxton Engineering* v. *TAX Olaj-es* ["**Claxton Engineering**"] injuncted a foreign arbitration based on this ground where it determined that the alleged arbitration agreement did not exist *de jure*.[27]

While the New York Convention places conditions on an arbitration agreement, it does not explicitly establish a court's power to issue an anti-arbitration injunction. There is no provision that empowers a court to enjoin arbitration. However, national courts have often relied on Article II as the source of the authority to issue anti-arbitration injunctions.[28] It has been argued that this is incompatible with *kompetenz-kompetenz*[29] and international law obligations flowing from the New York Convention.[30]

III. National Courts' Interpretations of Their Source of Authority

National courts have affirmed their powers to enjoin international arbitration proceedings so consistently that it has become a settled question for some jurisdictions.[31] However, different courts have sought to rely on different principles to justify their powers to issue anti-arbitration injunctions even against foreign arbitrations.

A. Inherent Powers of Court: England and India

The EAA's applicability is limited to arbitrations seated in England, Wales, and Northern Ireland.[32] Therefore, an English court cannot rely on it to injunct foreign arbitrations. Still, English courts have affirmed their authority to issue such injunctions. As affirmed by the English Courts, on multiple occasions,[33] they are empowered under section 37 of the Senior Courts Act, 1981 ["**SCA**"] to grant injunctions "*in all cases in which it appears to the court to be just and convenient to do so.*"[34]

The Court of Appeal in *Weissfisch* v. *Julius* has held that this power is inherent to the court and can exist despite the jurisdictional restriction in the EAA.[35] However, the Court held that this must be viewed alongside the principle that courts of the seat must have supervisory jurisdiction over the

---

26 World Sport Group (Mauritius) v. MSM Satellite (Singapore), (2014) 11 SCC 639 (India) [*hereinafter* "World Sport v. MSM Satellite"].

27 Claxton Engineering Services Limited v. TAX Olaj-es Gazkutato Ktf, [2011] EWHC 345 (Comm) [*hereinafter* "Claxton Engineering v. TAX"].

28 *See* Jennifer L. Gorskie, *US Courts and the Anti-Arbitration Injunction*, 28(2) ARB. INT'L 295 (2012) (for US Courts) [*hereinafter* "Jennifer L. Gorskie"].

29 Sairam Subramanian, *Anti-arbitration injunctions and their compatibility with the New York convention and the Indian law of arbitration: future directions for Indian law and policy*, 34(2) ARB. INT'L 185 (2018) [*hereinafter* "Sairam Subramanian"].

30 Martin Schwebel, Anti-Suit Injunctions in International Arbitration: An Overview, *in* E. Gaillard (ed.), ANTI-SUIT INJUNCTIONS IN INTERNATIONAL ARBITRATION 5 (2005) [*hereinafter* "Martin Schwebel"].

31 *See* Sabbagh v. Khoury, [2019] EWCA Civ 1219 [*hereinafter* "Sabbagh v. Khoury"].

32 English Arbitration Act 1996, cl. 23, § 2(1).

33 Elektrim SA v. Vivendi Universal SA [2007] 2 Lloyd's Rep 8; Intermet FCZO v Ansol Ltd [2007] EWHC 226 (Comm); J Jarvis & Sons Ltd v. Blue Circle Dartford Estates Ltd [2007] BLR 439.

34 Senior Courts Act 1981, cl. 9, § 37 (U.K.).

35 Weissfisch v. Julius, [2006] EWCA Civ 218 [*hereinafter* "Weissfisch v. Julius"].

proceedings,[36] and the obligations imposed by the New York Convention. So, the court held that such injunctions should be very carefully considered.[37]

Mere questions on the invalidity of the arbitration agreement would not invite such an injunction. The invalidity of the agreement (or other such circumstances) must be so egregious that compelling the parties to arbitration would be oppressive for one party.[38]

The High Court has, in the past, imposed injunctions on arbitrations abroad using these inherent powers. As already discussed, the High Court in *Claxton Engineering*[39] granted an anti-arbitration injunction, holding that the alleged arbitration agreement itself did not exist. In *Excalibur* v. *Texas Keystone* ["**Excalibur**"], the same party had commenced Court proceedings in England and sought commencement of arbitral proceedings in New York. The High Court granted the anti-arbitration injunction. It reasoned that one of the parties was not a party to the arbitration agreement, and had no connection with the contract through which the arbitration agreement was being claimed. Further, all parties had already accepted the jurisdiction of the Commercial Court. In light of this, the Court ruled that the Court would be the proper forum for the resolution of the parties' dispute.[40]

The Court of Appeal in *Sabbagh* v. *Khoury* has affirmed this position. The Court ruled that if arbitration was oppressive or prime facie vexatious, an English Court could issue an anti-arbitration injunction even if England was not the natural forum for the dispute.[41] The Court reasoned that issuing anti-arbitration injunctions where England was not the natural forum was permissible because this would not involve any question over the jurisdiction of foreign courts, but rather over the jurisdiction of the tribunal.[42]

The Hong Kong Court of First Instance in *Lin Min* v. *Chen Shu Quan* has specifically referred to Section 37(1) of the English SCA.[43] In this case, the Court was confronted by a conflict between Section 12 of the Arbitration Ordinance,[44] and Section 21(L) of the High Court Ordinance, which is analogous to Section 37(1) of the SCA.[45] It decided that Section 12 of the Arbitration Ordinance did not impinge on its general jurisdiction to grant injunctions to arbitrations. In holding so, it relied on the English position which maintains that the power bestowed upon the courts under Section 37(1) does not capitulate to the provisions of the EAA.

Indian Courts have also partly relied on English jurisprudence on the matter of enjoining foreign arbitrations. For instance, the Division bench in *McDonald's India Private Limited* v. *Vikram Bakshi* relied

---

36 *See* Naviera Amazonica Peruana SA v. Compania Internacional de Seguros del Peru [1988] 1 Lloyd's Rep 116 (principle that Seat of arbitration provides exclusive jurisdiction).

37 Weissfisch v. Julius, [2006] EWCA Civ 218.

38 *See* Albon (t/a NA Carriage Co) v. Naza Motor Trading SDN BHD [2007] EWCA Civ 1124.

39 Claxton Engineering v. TAX, [2011] EWHC 345 (Comm).

40 Excalibur Ventures LLC v. Texas Keystone Inc & Ors [2011] EWHC 1624 (Comm).

41 Sabbagh v, Khoury & Ors [2019] EWCA Civ 1219.

42 *Id.* ¶¶ 110-114.

43 Lin Min v. Chen Shu Quan [2012] HKCFI 328.

44 Arbitration Ordinance, Cap 609 (H.K.); the ordinance is similar to Article 5 of the Model Law that prohibits intervention by courts, except where provided by the statutory instrument.

45 High Court Ordinance (Cap 4), § 21L(1) (H.K.).

on Excalibur to suggest that none of the conditions which would make an arbitration "oppressive" were present.[46]

A key example is the Delhi High Court decision in *Union of India* v. *Dabhol Power Company* ["**Dabhol Power Company**"]. The Court held that being a court of equity, it had the inherent power to injunct a party from pursuing oppressive proceedings.[47] The Court held that the Indian Arbitration and Conciliation Act, 1996 ["**ACA**"] could not stand in its way and restrict its inherent power found in equity. Here, the parties sought to invoke a London seated arbitration clause. The Court reasoned that conducting the proceedings while a question that formed the root of the dispute was sub-judice would be oppressive to parties.[48] Here, the Court provided an injunction not because of section 45 of the ACA, but despite it. It held that it could not be bound by the narrow grounds in the ACA where the balance of convenience favoured an injunction. This reasoning is very similar to the one used by English courts.

Further, *Dabhol Power Company* has attracted considerable criticism on the grounds that it is indicative of the growing tendency of courts in developing countries like India, Bangladesh,[49] Pakistan,[50] and Indonesia,[51] to grant anti-arbitration injunctions that further the endeavour of protecting domestic entities and state-run companies. This trend posits a major policy-based issue with granting anti-arbitration injunctions owing to its potential consequence of frustrating the global arbitration system.[52]

B. Derivation From the Obligation to Compel Arbitration: US and India

As seen above, Article II of the New York Convention places certain conditions on the enforcement and recognition of arbitration agreements. US Courts have consistently held that their authority to enjoin arbitral proceedings arises from the power concomitant with their power to compel arbitration under FAA Sections 3 and 4.[53] This is despite the fact that the FAA, like the New York Convention, does not provide the court the power to injunct an arbitration.[54] For instance, the US Supreme Court in *First Options* affirmed the principle that US Courts would only assume negative *kompetenz-kompetenz* where parties have bestowed such power to the tribunal.[55] The US Appeals Court in *SGS* v.

46 McDonald's India Private Limited v. Vikram Bakshi, 2016 SCC OnLine Del 3949 (India).

47 Union of India v. Dabhol Power Company, IA 6663/2003 in Suit 1268/2003 (India), unreported, DELHI HIGH COURT, *available at* delhihighcourt.nic.in/dhcqrydisp_j.asp?pn=104242&yr=2004) ("This Court being a Court of equity has inherent powers to injunct a party from proceeding further with oppressive proceedings in a foreign country especially when temporary deferment thereof is not going to make much difference").

48 *Ibid.*

49 *See* Saipem SpA v. The People's Republic of Bangladesh, ICSID Case No ARB/05/7 (June 30, 2009).

50 *See* SGS v. Pakistan (2003) 19 Arbitration International 182 (Pakistan Supreme Court 2002); The Hub Power Co v. Pakistan WAPDA (2000) 16 Arbitration International 439 (Pakistan Supreme Court 2000).

51 *See* Persusahaan Pertambangan Minyak Dan Gas Bumi Negara v Karaha Bodas Co (District Court of Central Jakarta), Unpublished Judgment of 1 April 2002, *as cited in* BORN, *supra* note 11.

52 Sharad Bansal & Divyanshu Agrawal, *Are anti-arbitration injunctions a malaise? An analysis in the context of Indian law*, 31(4) ARB. INT'L (2015) [*hereinafter* "Bansal & Agarwal"].

53 Jennifer L. Gorskie, *supra* note 27.

54 *Ibid.*

55 First Options of Chicago Inc v. Kaplan, 514 U.S. 938 (1995).

REMSCO,[56] injuncted a Boston seated International Chambers of Commerce ["**ICC**"] arbitration, observing that the Boston proceedings were not envisioned in the agreement.

However, the US courts have consistently held that they enjoy the power to enjoin arbitral proceedings in case of international arbitrations seated in the US. This power does not extend to tribunals seated beyond the jurisdiction of the FAA.[57] A US federal court even declared that granting injunctions on foreign seated arbitrations would be against the New York Convention.[58]

Therefore, it is observed that even as the US courts enjoin arbitral proceedings, they maintain a strict observance of the Seat Theory. This is not true in the case of other jurisdictions. For instance, Indian courts have repeatedly affirmed their power to foreign arbitrations through the obligation to enforce arbitration agreements.[59]

Indian courts typically exercise the power to enjoin India seated arbitrations through Section 8, and foreign arbitrations through Section 45.[60] However, the grounds provided in both provisions mirror Article II(3) of the New York Convention. It is now settled from the decisions in *Vidya Drolia* v. *Durga Trading* and *Shin-Etsu Chemical Co. Ltd.* v. *Aksh Opti-fibre Ltd.* that the court at the referral stage can only undertake a prima facie analysis in case of both foreign and India seated arbitrations.[61]

It has been argued that the question of enjoining foreign arbitrations has not been definitively settled by the Supreme Court. The Courts have focussed more on the parties' case than their powers to issue the relevant injunction.[62] For instance, in *World Sport*, the Supreme Court did not undertake a detailed discussion of whether section 45 gave it the authority to enjoin a Singapore arbitration. Rather, it simply moved on to analyse the case of the parties as to the validity of the arbitration agreement, which it upheld. The Supreme Court was also beset with the question of enjoining a foreign arbitration in *Chatterjee Petrochem* v. *Haldia Petrochemicals Limited*,[63] wherein again the court did not consider the validity of enjoining foreign arbitrations under the New York Convention. It simply went into the parties' agreement and determined that the arbitration agreement calling for an ICC arbitration was

---

56 Societe Generale De Surveillance SA v. Raytheon European Management and Systems Company, 643 F.2d 863 (1st Cir. 1981).

57 Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 364 F.3d 274, 287 (5th Cir. 2004); 10 Civ. 04541 (CM), 2011 WL 666174 (S.D.N.Y. Feb. 8, 2011); *See also* Dedon GmbH v. Janus et Cie, 411 F. App'x 361 (2d Cir. 2011) (appeal in US Appeals Courts).

58 URS Corp. v. Lebanese Co. for the Development & Reconstruction of Beirut Central District SAL, 512 F. Supp. 2d 199 (D. Del. 2007) [*hereinafter* "URS Corp. v. Lebanese Co."].

59 World Sport v. MSM Satellite, (2014) 11 SCC 639 (India).

60 *See* Bharat Aluminium Company v. Kaiser Aluminium Technical Services Inc, (2012) 9 SCC 552 (India); this section will focus on foreign arbitrations. However, please refer to the following cases where the Courts have utilised section 8 to enjoin arbitrations: Booz Allen v. SBI Home Finance, (2011) 5 SCC 532 (India), Sukanya Holdings (P) Ltd v. Jayesh H Pandya, (2003) 5 SCC 531 (India), Vimal Kishor Shah v. Jayesh Dinesh Shah, (2016) 8 SCC 788 (India). The following illustrations are where the same Section 8 petitions have failed: Vidya Drolia v. Durga Trading Corporation, (2021) 2 SCC 1 (India) [*hereinafter* "Vidya Drolia v. Durga Trading"], Deccan Paper Mills Co Ltd v. Regency Mahavir Properties, (2021) 4 SCC 786 (India).

61 Shin-Etsu Chemical Co. Ltd. v. Aksh Opti-fibre Ltd, (2005) 7 SCC 234 (India); Vidya Drolia v. Durga Trading, (2021) 2 SCC 1 (India).

62 Sairam Subramanian, *supra* note 29.

63 Chatterjee Petrochem Co v. Haldia Petrochemicals Ltd, (2014) 14 SCC 574 (India).

valid, and hence enforceable. It is unclear (or rather, unsaid) on what legal principles the Supreme Court could have stayed the arbitration had the agreement been manifestly void.

High Courts have been more decisive (more often in error) when issuing anti-arbitration injunctions under Section 45. The Calcutta High Court issued an anti-arbitration injunction in *Kolkata Port Trust* v. *Louis Dreyfus*,[64] which involved an incorrectly advanced investment treaty claim. Louis Dreyfus had attempted to compel arbitration against the Port Trust under the France-India Bilateral Investment Treaty. The High Court determined that the Kolkata Port Trust was not a party to the arbitration agreement under the Bilateral Investment Treaty ["**BIT**"], and therefore could not be made a party to an arbitration. Therefore, there was no valid arbitration agreement between the parties, and Louis Dreyfus was enjoined from pursuing the arbitration proceedings. This decision again does not answer the question as to the power of Section 45 to stop foreign proceedings, and simply proceeds on facts. It also seems to ignore that Indian courts have considered that the ACA is not applicable in case of investment treaty claims.[65]

The Delhi High Court, in the first instance, cited inarbitrability of minority oppression claims in *Vikram Bakshi* v. *McDonald's* to stay a London seated arbitration under the LCIA.[66] However, the Division Bench, relying on English decisions, reversed the decision on the ground that it did meet the "*exceptional conditions*" required to injunct foreign proceedings.[67]

Even recently, the Calcutta High Court's decision in *Balasore* v. *Medima*[68] attempted to clear the air regarding the power of an Indian court to issue anti-arbitration injunctions towards foreign arbitrations. The Court firmly reasoned that the Indian courts could provide anti-arbitration injunctions for foreign seated arbitrations in case certain conditions were met.

This decision is defective because it depends on *Modi Entertainment Network* v. *W.S.G. Cricket ["**Modi Entertainment**"]* to establish the conditions to be met for issuing an anti-arbitration injunction.[69] Modi Entertainment had dealt with grounds for granting anti-suit injunctions, which is fundamentally distinct from an anti-arbitration injunction on multiple levels.[70] Although it is true that both of them essentially restrict the rights of parties to approach dispute resolution forums,[71] while anti-suit injunctions only bind the parties, anti-arbitration injunctions may be issued against both parties and arbitrators.[72] The necessity for granting an anti-suit injunction may arise when proceedings are initiated

64 Board of Trustees of the Port of Kolkata v. Louis Dreyfus Armatures SAS, 2014 SCC OnLine Cal 17695 (India).

65 Union of India v. Vodafone Group Plc 2018 SCC OnLine Del 8842 (India), Union of India v. Khaitan Holdings 2019 SCC OnLine Del 6755 (India); Pratyush Miglani, Nikhil Varma and Prakhar Srivastava, *BIT Arbitral Awards Virtually Non-Enforceable in India: Does the Delhi High Court Need Course Correction*, SCC ONLINE (Apr. 10, 2021), *available at* https://www.scconline.com/blog/post/2021/04/10/arbitral-awards-2/#_ftnref42.

66 Vikram Bakshi v. McDonalds India Pvt Ltd, 2014 SCC OnLine Del 7249 (India).

67 McDonald's India Private Limited v. Vikram Bakshi, 2016 SCC OnLine Del 3949 (India).

68 Balasore Alloys Limited v. Medima LLC, 2020 SCC Online Cal 1699 (India).

69 Modi Entertainment Network v. W.S.G. Cricket Pte. Ltd., (2003) 4 SCC 341 (India).

70 Romesh Weeramantry, *Anti-Arbitration Injunctions: The Core Concepts*, NAT'L UNIV. SING., *available at* https://cil.nus.edu.sg/wp-content/uploads/2014/06/Note-on-anti-arbitration-injunctions.pdf.

71 BORN, *supra* note 11, at 1410.

72 *Id.; see also* Weissfisch v. Julius, [2006] EWCA Civ 218.

by one of the parties in a foreign court to its advantage. However, the absence of an arbitration agreement, violation of the arbitration agreement's condition precedents, and claims of vexatious or oppressive proceedings, all constitute valid grounds that may warrant granting an anti-arbitration injunction, where such authority exists. Furthermore, anti-suit injunctions pose a threat to the principle of state sovereignty and the parties' access to courts,[73] whereas anti-arbitration injunctions additionally jeopardize party autonomy and infringe upon the fundamental principles of *kompetenz-kompetenz* and separability.[74]

Additionally, the Delhi High Court's ruling in *Dabhol Power Company* supports the view that the arbitrations can be enjoined if they are oppressive or *prima facie* vexatious in the exercise of equity. These grounds are not mentioned in section 45, or the New York Convention. This view, much like most other Indian decisions on this point, has omitted considering the New York Convention. The courts do not appear to have demonstrated cognisance of the fact that they act as an extension of the State for the activities for which the State is held accountable internationally. An order by a domestic court preventing the contract's agreed-upon international arbitration reflects a failure on the court's part to "*refer the parties to arbitration*", as mandated by Article II(3) of the New York Convention. Moreover, it has been argued that this approach fails to anticipatorily "*recognize arbitral awards as binding and enforce them*", as required by Article III of the New York Convention. Thus, it pre-emptively rejects recognition and enforcement on the basis of reasons that may be beyond the scope of Article V of the New York Convention.[75]

Further, this seems to be in dissonance with the law laid down in *Bharat Aluminium Company* v. *Kaiser Aluminium Technical Services Inc.* ["**BALCO**"] regarding the sole supervisory jurisdiction of the seat. Even if the decision in BALCO dealt with whether Part I of the ACA could be applied to foreign seated arbitrations, it is argued that the interpretation that Section 45 can be used to enjoin foreign arbitrations stands in the dissonance of the general principle of the seat expounded by the Court.[76]

It is visible that the Indian judicial position seems to mix Section 45 with the court's inherent powers. This, it is argued, cannot be permitted since the ACA is a code in itself.[77] As such, it is argued that the High Court seems to have affirmed its power to enjoin foreign proceedings in ignorance of its source. The same may be said of other decisions discussed in this section.

---

73 Marseilles Fret SA v. Seatrano Shipping Co Ltd [2002] ECR I-3383 (Tribunal de Commerce, Marseille); Re the Enforcement of an English Anti-Suit Injunction [1997] ILPr 320 (Oberlandesgericht Dusseldorf) C-24/02; *see* Nicolas Poon, *The Use and Abuse of Anti-Arbitration Injunctions*, 25 SING. ACAD. L. J. 247 (2013).

74 Martin Schwebel, *supra* note 29.

75 *Id.*

76 *Cf* Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc., (2012) 9 SCC 552 (India) [*hereinafter* "BALCO v. Kaiser Aluminium"] ("The legal position that emerges from a conspectus of all the decisions, seems to be, that the choice of another country as the seat of arbitration inevitably imports an acceptance that the law of that country relating to the conduct and supervision of arbitrations will apply to the proceedings.").

77 Bina Modi v. Lalit Modi, 2020 SCC OnLine Del 901 (India).

In sum, while Section 45 may be applicable to foreign arbitrations, imposing an additional, non-statutory requirement of "*oppressive or vexatious*" claims on such injunctions confuses the jurisprudence around the subject even further.

IV. Negative *Kompetenz-Kompetenz* Obligations on National Courts: Enough to Stop Anti-arbitration Injunctions?

Kompetenz-kompetenz is envisaged in Article 16 of the Model Law. Like Article II, it is mirrored almost universally. The relevant extract of the provision is as follows:

> "*(1) The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement*…."[78]

Additionally, it has been argued that the principle of *kompetenz-kompetenz* imposes a negative obligation on national courts to refer questions of jurisdiction and validity to arbitral tribunals.[79] This ensures that the authority of arbitrators cannot be impeded by parties trying to avoid arbitration.[80]

However, this is not reflected uniformly in national courts. For instance, the US FAA does not seem to adopt the principle.[81] FAA Section 3 requires a US court to satisfy itself with the validity and enforceability of the arbitration agreement before referring the parties to arbitration.[82] Further, Section 4 requires the courts to determine the validity of the agreement as a precondition to compel arbitration.[83] Therefore, unsurprisingly, US courts have had a greater tendency to enjoin arbitration proceedings.[84] However, US Federal courts have progressively read *kompetenz-kompetenz* into the FAA.[85] The US Supreme Court in *Preston* v. *Ferrer* involved a question of arbitrability in proceedings governed by the American Arbitration Association Rules ["**AAA**"]. The court affirmed that the authority of the tribunal to determine the validity of the agreement would first go to the tribunal, and then the relevant judicial authority.[86] However, the Court reached this conclusion because the parties, through the AAA rules, had agreed that the tribunal had the authority to determine the validity of the contract. This view was strengthened in *Schein* v. *Archer*, where the court held that it was within the parties' competence to authorise the tribunal to rule on arbitrability. In such a case, the tribunal would

---

78 UNCITRAL Model Law, art. 16.

79 Pratyush Panjwani and Harshad Pathak, *Assimilating the Negative Effect of Kompetenz-Kompetenz in India: Need to Revisit the Question of Judicial Intervention?*, 2(2) INDIAN J. ARB. L. 1 (2013).

80 Phillip Landolt, *The Inconvenience of Principle: Separability and Kompetenz-Kompetenz*, 30(5) J. INT'L ARB. 511 (2013).

81 Stavros Brekoulakis, *Chapter II: The Arbitrator and the Arbitration Procedure - The Negative Effect of Compétence-Compétence: The Verdict has to be Negative*, in Christian Klausegger, Peter Klein, Christian Klausegger, Peter Klein, Florian Kremslehner, Alexander Petsche, Nikolaus Pitkowitz, Jenny Power, Irene Weiser & Gerold Zeiler eds., AUSTRIAN YEARBOOK ON INTERNATIONAL ARBITRATION 237 (2009) [*hereinafter* "Stavros Brekoulakis"].

82 United States Arbitration Act, 9 U.S.C. §3 (1925).

83 United States Arbitration Act, 9 U.S.C. §4 (1925).

84 Jennifer L Gorskie, *supra* note 28.

85 *See* Stavros Brekoulakis, *supra* note 81.

86 Preston v. Ferrer, 552 U.S. 346 (2008) ("[The] contract […] provides for arbitration in accordance with the AAA rules. [The] rules states that "[t]he arbitrator shall have the power to determine the existence or validity of a contract of which an arbitration clause forms a part." The incorporation of the AAA rules, and in particular Rule 7(b), weighs against inferring from the choice-of-law clause an understanding shared by Ferrer and Preston that their disputes would be heard, in the first instance, by the Labor Commissioner.").

have the primacy to rule on that issue.[87] Therefore, while the FAA does not recognise the principle, the negative obligation of *kompetenz-kompetenz* will bind the court where parties bestow such a power to the tribunal.[88]

Contrary to the United States, French law seems to favour *kompetenz-kompetenz* to a much greater extent. Once the tribunal has been constituted, Article 1458 of the French Code of Civil Procedure dictates that a state court "*shall declare itself incompetent*" to rule on any dispute already before the tribunal.[89] Further, if the tribunal has not been constituted, the court would still compel parties to arbitration unless the arbitration agreement is manifestly null and void.[90] The Cour De Cassation in *Weissberg* v. *Subway* added that the court could only enjoin proceedings if it is impossible to set the arbitration in motion.[91] Therefore, French courts are almost completely subservient to the arbitral tribunal. The Swiss position in this regard is also quite similar. In a case regarding the grant of anti-arbitration injunctions, a Swiss Court has pronounced that judicial tutelage to the effect of issuing such injunctions is not permissible under Swiss law since both the positive and negative effects of the principle of *kompetenz-kompetenz* are duly recognised by it.[92]

Jurisprudence in the EAA is more ambivalent. The EAA affirms a tribunal's power to rule on its jurisdiction.[93] The tribunal is the natural forum for the determination of substantive jurisdiction.[94] EAA empowers a court to determine the invalidity of the arbitration agreement, and mirrors Article II of the New York Convention.[95] Further, a person who is not a party to the proceedings can question the validity and existence of the agreement before the court.[96] Much like the US FAA, the text of the EAA does not seem to explicitly provide a negative *kompetenz-kompetenz* obligation. Again, much like US Federal courts, English courts have also read this negative obligation into the act to a limited extent.

The Queen's Bench in *Harbour Insurance* v. *Kansa* held that it was within the powers of the arbitral tribunal to determine the validity of the contract, even when it was alleged to have been struck by *ab-initio* invalidity due to illegality. However, the court opined that the power of the arbitrator was merely

---

87 Henry Schein Inc v. Archer & White Sales Inc, 586 U.S. (2019) ("When the parties' contract delegates the arbitrability question to an arbitrator, the courts must respect the parties' decision as embodied in the contract. […] [However,] courts "should not assume that the parties agreed to arbitrate arbitrability unless there is clear and unmistakable evidence that they did so.'").

88 *See ibid.*; *also see* First Options of Chicago Inc v. Kaplan, 514 U.S. 938 (1995).

89 French Code of Civil Procedure, art. 1458.

90 Gefu Kuchenboss Gmbh und Co KG v. Corema, Cour de Cassation 08-17548 (2009).

91 Weissberg SRL v. Subway International, Y.B. COMM. ARB. 2016 - Volume XLI ("Nothing shows that setting such arbitration in motion would be impossible. By correctly finding that the alleged non-applicability was not manifestly apparent, the Court of Appeal decided, according to the law, to refer the parties [to arbitration].").

92 Air (PTY) Ltd v. International Air Transport Association (IATA) and CSA in Liquidation, Case No C/1043/2005-15SP, Republic and Canton of Geneva Judiciary, Court of First Instance, 2 May 2005; *see* Matthias Scherer and Werner Jahnel, *Anti-Suit and Anti-Arbitration Injunctions in International Arbitration: A Swiss Perspective*, 4 INT'L ARB. L. REV. (2009).

93 English Arbitration Act, 1996, cl. 23, § 31.

94 *See* English Arbitration Act, 1996, cl. 23, § 31; Stavros Brekoulakis, *supra* note 81.

95 English Arbitration Act, 1996, cl. 23, § 9.

96 English Arbitration Act, 1996, cl. 23, § 72.

one of convenience. It could not affect the legal rights of the parties, who could then approach the Commercial Court.

Therefore, while the question of jurisdiction could be answered by the arbitral tribunal, only a court could settle it definitively.[97] Although this position was pronounced under older legislation, it is reflected in the possibility of bringing jurisdictional questions to court in a 'second look' jurisdiction.[98]

In *Owens Corning* v. *XL Insurance*, the court upheld the principle that while the arbitral tribunal's determination of validity must come first, the court could undertake a *prima facie* analysis of the validity of the agreement.[99] The Court of Appeal in *Fiona Trust* v. *Privalov* has also affirmed that the tribunal should be the one to rule on its jurisdiction. However, the Court clarified that the court could exercise some discretion when the question involved the validity or the existence of the arbitration agreement itself.[100] However, it is a settled position that a "*first-look*" analysis by an English Court only involves a *prima facie* analysis.[101]

The Indian ACA is a Model Law compliant statute.[102] Still, the stance of the Indian courts towards the negative effect of *kompetenz-kompetenz* is quite nebulous. In *Kvaerner Cementation* v. *Bajranglal Agarwal ["**Kvaerner**"],*[103] the Supreme Court emphasized the substance of Section 16 that reflects the principle of *kompetenz-kompetenz* to hold that regardless of claims that the arbitration agreement was illegal, it is beyond the jurisdiction of national courts to scrutinize the maintainability of arbitral proceedings. In holding so, it adopted the negative aspect of *kompetenz-kompetenz* into Indian law. It did so by attributing precedence to the arbitral tribunal over its jurisdiction. However, subsequent judgments by the Supreme Court in 2005[104] and 2014,[105] had appeared to have overruled *Kvaerner*. These pronouncements recognized the competence of national courts to prevent arbitration under Sections 8 or 45 of the ACA, respectively. Nevertheless, the dust had not yet settled. *Kvaerner* was later cited

97 Harbour Assurance Co Ltd v. Kansa General International Insurance Co Ltd, [1992] 1 Lloyd's L Rep 81 ("The approach in English law is simple, straightforward and practical. As a matter of convenience arbitrators may consider, and decide, whether, they have jurisdiction or not: they may decide to assume or decline jurisdiction. But it is well settled in English law that the. result of such a preliminary decision has no effect whatsoever on the legal rights of the parties. Only the Court can definitively rule on issues relating to the jurisdiction of arbitrators.").

98 English Arbitration Act, 1996, cl. 23, § 30; Karyl Nairn, *National Report for England and Wales (2019 through 2020)*, *in* Lise Bosman (ed), ICCA INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION, (2020, Supplement No. 110, April 2020) 1–97, 71; *see* Dallah Real Estate and Tourism Holding Company v. The Ministry of Religious Affairs, Government of Pakistan [2010] UKSC 46 [*hereinafter* "Dallah v. Pakistan"].

99 XL Insurance Limited v. Owens Corning, [2000] 2 Lloyd's Rep 500.

100 Fiona Trust v. Yuri Privalov, [2007] EWCA Civ 20.

101 *Ibid.*

102 United Nations Commission on International Trade Law, *Status: UNCITRAL Model Law on International Commercial Arbitration 1985: with amendments as adopted in 2006*, *available at* https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status.

103 Kvaerner Cementation Ltd. v. Bajranglal Agarwal, (2012) 5 SCC 214 (India) ("3. There cannot be any dispute that in the absence of any arbitration clause in the agreement, no dispute could be referred for arbitration to an Arbitral Tribunal. But, bearing in mind the very object with which the Arbitration and Conciliation Act, 1996 has been enacted and the provisions thereof contained in Section 16 conferring the power on the Arbitral Tribunal to rule on its own jurisdiction, including ruling on any objection with respect to existence or validity of the arbitration agreement, we have no doubt in our mind that the civil court cannot have jurisdiction to go into that question.").

104 SBP & Co. v. Patel Eng'g. Ltd., (2005) 8 SCC 618 (India).

105 World Sport v. MSM Satellite, (2014) 11 SCC 639 (India).

with approval by the Supreme Court in *Ayyasamy* v. *Paramsivam*.[106] Furthermore, in 2019, reliance on *Kvaerner* was again placed by the Supreme Court to rule that any issue, whether over jurisdiction or the legality of the arbitration agreement, should be resolved by the arbitrator alone and that Civil Courts had no authority over the subject.[107] The variety of conflicting authorities on this subject is reflective of the cloud of ambiguity that looms over the grant of anti-arbitration injunctions in India. Be that as it may, it is safe to conclude that the negative effect of *kompetenz-kompetenz* goes unrecognized in cases that involve arbitrability.[108]

The contours of the negative obligations were defined recently in *Vidya Drolia* v. *Durga Trading*. The Supreme Court held that the arbitrator must have the first opportunity to rule on its jurisdiction. The Court can only pre-empt the question of jurisdiction at the stage of compelling arbitration when the arbitration agreement is *ex facie* unenforceable. The court reasoned that parties cannot be compelled to arbitrate a dispute which is demonstrably non-arbitrable.

In this light, Indian Courts do not firmly recognise the negative obligation of *kompetenz-kompetenz*. At best, the Indian position is ambivalent. Given the recent resurgence of *Kvaerner*, the principle of negative *kompetenz-kompetenz* seems to be taking hold. However, the repeated specific affirmations of the power to enjoin arbitrations[109] to lead to the conclusion that Judicial bodies do not, largely, recognise negative *kompetenz-kompetenz*.

A key takeaway from this discussion is that there is no internationally consistent position taken by national courts regarding the negative obligation arising from *kompetenz-kompetenz*. While French courts have accepted the authority of the tribunal to rule on its jurisdiction in the first instance, common law courts in England and India have affirmed the discretion of the court to adjudge infirmities in the arbitration agreement which appear apparent to them. In a middle path, US courts have recently affirmed the complete authority of the tribunal to rule on matters relating to the arbitration agreement and arbitrability. However, this is subject to the parties' agreement. Absent such an agreement, US Courts have the full power to determine the validity of the agreement.

This shows that while the positive obligation of *kompetenz-kompetenz* is almost universally settled, the negative obligation arising from it is far from it.

Given this, and the contours drawn out by national courts while deciding issues of *kompetenz*, this principle by itself seems insufficient to stand in the way of anti-arbitration injunctions. This is because, following the opinion in *Dallah* v. *Pakistan*, the power of the arbitrator is one of convenience and not one which weighs on a reviewing court.[110] Further, Prof. Gary Born has opined that it would be

[106] A. Ayyasamy v. A. Paramasivam, (2016) 10 SCC 386 (India) (the court has specifically affirmed the passage pointed out in note 99).
[107] NALCO Ltd. v. Subhash Infra Engineers (P) Ltd., (2020) 15 SCC 557 (India).
[108] Booz Allen v. SBI Home Finance Ltd., (2011) 5 SCC 532 (India).
[109] *See* discussion in the previous part.
[110] Dallah v. Pakistan, [2010] UKSC 46.

difficult to consider a situation where it would be illegitimate for a court to enjoin an arbitration over which it has jurisdiction, where it can see apparent legal deficiencies.[111]

It must also be considered that neither the Model Law nor the New York Convention, actually mention any negative *kompetenz-kompetenz* principle. Lastly, Brekoulakis has argued, which the author considers an appropriate view in light of the present jurisprudence, that the negative obligation itself should be controlled. This is because consent is the bedrock of commercial arbitration, and compelling the parties to move to arbitration for the determination of jurisdiction (which is again reviewable) where it does not exist undermines that requirement.[112] Therefore, where the arbitration agreement itself is improper, void, impossible, or not in existence, negative *kompetenz-kompetenz* cannot be used to restrict the courts' power.

V. Obligations of Comity: The Structure of the New York Convention

It has been previously argued that anti-arbitration injunctions to foreign arbitrations should be allowed since the law governing the arbitration agreement may differ from the law of the seat.[113] Further, Article II of the New York Convention does not place a seat requirement on the recognition of arbitration agreements, which would prevent the unnecessary exercise of this authority.[114]

As regards the first argument, the law of the arbitration agreement may be different from that of the seat.[115] However, this does not take away the jurisdiction of the seat of arbitration. Merely because an international arbitration involves different laws, does not mean that different courts would exercise jurisdiction of the same proceedings.[116]

The second argument, on the other hand, requires further analysis. Contrary to what the argument claims, where the power to enjoin arbitrations has been derived from the inherent powers of a court, such a power may not be restricted by the determination of whether the court is the natural forum for the resolution of the dispute.[117] Further, the general structure of the New York Convention would prevent a national court from interfering with other courts from fulfilling their obligations under the Convention.

Prof. Born argues that the New York Convention places an implicit obligation on States to not interfere with other States' fulfilment of their own obligations under the Convention.[118] This also finds

111 BORN, *supra* note 11.
112 Stavros Brekoulakis, *supra* note 81.
113 Bansal & Agarwal, *supra* note 52.
114 *Ibid.* ("the safeguard against such a situation is present in Article II(3) itself. Article II(3) refers to a Court 'seized of an action' which may be the subject matter of an arbitration agreement. A determination on whether a court is 'seized of an action' would be made under the domestic law of the concerned court, which would preclude such court from exercising jurisdiction over mattes wholly unconnected with the country of such court.").
115 *See* Kabab-Ji SAL v. Kout Food Group, [2021] UKSC 48.
116 *See* Union of India v. McDonnel Douglas Corporation, [1993] 2 Lloyd's Rep. 48; *see also* Shashoua & Ors. v. Sharma, [2009] EWHC 957 (Comm), [2009] 1 C.L.C. 716 (An English Court was held to have sole supervisory jurisdiction where contract was governed by Indian law. This was because the seat of arbitration was London).
117 *See* Sabbagh v. Khoury, [2019] EWCA Civ 1219.
118 BORN, *supra* note 11, at 1415-1419.

support in Swanson's arguments against extra-territorial anti-suit injunctions. According to him, considerations of comity obligate the national court to pay deference to other states' laws, and the international legal system.[119] The New York Convention does not provide for the extra-territorial application of any state laws. The opinion of the United States District Court for the Southern District of New York in *URS* v. *Development & Reconstruction of Beirut* illustrates that comity can serve as a tool to restrict anti-arbitration injunctions that arise from a foreign seat. The Court observed that the only time a "court of secondary jurisdiction" could interfere with the arbitral process was at the stage of enforcement.[120]

This is also in line with the general proposition of the Seat Theory. Certain national courts, including those of England[121] and India,[122] have affirmed that the seat is the juridical centre of the arbitration. A seat provides exclusive supervisory jurisdiction over the arbitration to the courts situated therein. While the seat is a reference to a geographical place, it is a term that denotes a legal meaning that is unconnected with the physical place where the proceedings are held.[123] It is treated as an exclusive jurisdiction clause.[124] Therefore, when an English Court enjoins an arbitration (suppose it is seated in New Delhi), it violates the basic principle that only the court at the seat must decide.

Even the non-existence of an arbitration agreement would not be a ground to enjoin a foreign arbitration. This, again, must be left to the courts at the seat. International comity demands deference to the legal system of other states. By stepping over its own jurisdictional limit, an enjoining court is likely to step over the authority of other national courts. Further, the laws relating to the existence and enforceability of arbitration agreements may differ across jurisdictions. A subject matter considered arbitrable in England may not be so considered in India, and vice versa.

As an illustration, English Courts[125] have refused to apply the 'group of companies' doctrine, laid out initially in *Dow Chemicals* v. *Sant Gobain*.[126] However, Indian Courts have wholeheartedly accepted it.[127] Therefore, if three entities, X, A, and B (who is a subsidiary of B) enter into a composite transaction within the meaning of the group of companies doctrine.[128] However, X only has a Mumbai-seated arbitration agreement with A. An English Court would understand that no arbitration agreement exists between A and C, while an Indian Court may reach a different conclusion.

---

119 Steven R Swanson, *Antisuit Injunctions in Support of International Arbitration*, 81 TUL L. REV. 395 (2006).

120 URS Corp. v. Lebanese Co., 512 F. Supp. 2d 199 (D. Del. 2007); *see also* Richard Garnett, *Anti-arbitration injunctions: walking the tightrope*, 36 ARB. INT'L 349 (2020).

121 *See* Star Shipping AS v. China National Foreign Trade Transp. Corp [1993] 2 Lloyd's Rep. 445.

122 *See* BALCO v Kaiser Aluminium, (2012) 9 SCC 552 (India).

123 PT Garuda Indonesia v Birgen Air [2002] SGCA 12; Union of India v. McDonnell Douglas Corporation [1993] 2 Lloyd's Rep 48.

124 *Ibid.*

125 Peterson Farms Inc v. C & M Farming Ltd [2004] EWHC 121 (Comm); Sarita Patil Woolhouse, *Group of Companies Doctrine and English Arbitration Law*, 20(4) ARB. INT'L 435 (2004).

126 Dow Chemical and others v. Isover Saint Gobain, ICC Award No. 4131, YCA 1984, 131.

127 Chloro Controls India (P) Ltd v. Severn Trent Water Purification Inc, (2013) 1 SCC 641 (India); Ameet Lalchand Shah v. Rishabh Enterprises, (2018) 15 SCC 678 (India); MTNL v. Canara Bank, (2020) 12 SCC 767 (India).

128 Please assume, for the purpose of this example, that whatever the exact characteristics of the transaction, it qualifies under the Group of Companies Doctrine such that an arbitration agreement between A and B can also compel C to arbitrate.

In the case above, one of two situations can take place where B approaches the English courts seeking an anti-arbitration injunction against X. First, the Court grants it, ruling that compelling arbitration where no valid agreement exists would be vexatious. Second, the Court refuses to grant it, reasoning either that the law at the seat recognises such arbitration agreements, or that the agreement passes an *ex facie* analysis considering the Indian position.

Both these conclusions are contrary to international comity and the seat theory. At the First, the Court would simply ignore the purported choice of the parties to arbitrate in India, and ignore the Indian courts' jurisdiction over the dispute. Enjoining the proceedings, would hinder Indian courts' ability to meet their obligation to enforce arbitration agreements. The second conclusion would also be undesirable because then the English Court would effectively rule over principles of Indian law, effectively acting like a court for that duration.

Therefore, especially considering the Seat theory, the authority to enjoin foreign arbitrations should not exist, since even the exercise of denying such injunctions would amount to overstepping the boundaries of the seat.

Certain jurisdictions have been reticent to adopt the Seat theory. However, even "delocalisation" does not provide authority to enjoin foreign proceedings. On the contrary, this principle restricts curial authority to interfere before the stage of enforcement. For instance, the Paris Cour D'appel in *Gotaverken Arendal AB* v. *Libyan General National Maritime Transport Co,* held that international arbitration is not integrated into the legal system of any state, and should be controlled by the jurisdiction through which enforcement is sought.[129] Similarly, the Cour de Cassation affirmed that an arbitral award would remain in existence even if it has been set aside, and should be reviewed independently by the enforcing court.[130]

Therefore, it is argued that the restriction on curial authority in a delocalised system is so high that a question of enjoining arbitrations, even those at the "seat" of arbitration, would not arise. The same is reflected in French Courts' subservience to negative *kompetenz-kompetenz* (discussed above). It is argued this stems from the understanding that curial intervention should not even be considered, except by an enforcing court.

VI. Resisting Anti-Arbitration Injunctions

Thus far, the article has discussed the validity of anti-arbitration injunctions issued on foreign seated arbitration. Despite the case made out against the validity of anti-arbitration injunctions, both in this article and by earlier works, national courts have attempted to injunct arbitral proceedings. A natural consequence of such injunctions is that they create tension between arbitral tribunals and national

[129] Gotaverken Arendal AB v. Libyan General National Maritime Transport Co, Cour d'Appel de Paris, F 9224 of 1980, Revue critique de droit international privé 1980, 763.

[130] Hilmarton Ltd v, Omnium de Traitement et de Valorisation, Cour de Cassation 1997; Putrabali v. Rena, Cour de Cassation, June 29, 2007; *See* Masood Ahmed, *The Influence of the Delocalisation and Seat Theories upon Judicial Attitudes Towards International Commercial Arbitration*, 77(4) INT'L J. ARB. MED. DISP. MGMT. 406 (2011).

courts.[131] Arbitral tribunals, on their part, have resisted such injunctions and have continued proceedings regardless.[132]

A key argument raised by an ICC tribunal, which sought to resist an anti-arbitration injunction issued by the Supreme Court at the seat of arbitration was that an international arbitration tribunal is not akin to a state organ.[133] Rather, the tribunal's authority comes from the agreement of the parties, which it is bound to enforce. Further, accepting a court injunction would have, according to the tribunal, amounted to dereliction of its contractual duty to resolve the dispute before it.[134] This is also shown in the International Convention on the Settlement of Disputes Between States and Nationals of Other States ["**ICSID**"] Award in *Saipem* v. *Bangladesh*, ["**Saipen**"] where the Tribunal approved an earlier ICC tribunal's decision in refusing to accede to an anti-arbitration injunction issued by the High Court of Dhaka on the same grounds.[135] The Saipem tribunal took matters one step further. It declared that if Saipem, who was aggrieved by the injunction, could establish that the anti-arbitration injunction had caused damages, the injunction would be considered expropriation under the ICSID.[136]

Another strand of resistance is visible in *Himpurna* v. *Indonesia*, where the tribunal resisted an anti-arbitration injunction issued by Seat Courts. The Supreme Court of Indonesia, which was the court at the seat, attempted to enjoin the arbitral proceedings. The tribunal simply responded by shifting the arbitral seat from Kuala Lumpur to London and continued proceedings.[137] It should be noted that this approach, is in line with the arguments made in the article against enjoining foreign arbitrations. This is because the move from Indonesia to England could only have been considered effective by the tribunal if it thought that a London seated arbitration did not have to obey Indonesian courts.

From this section, it is clear that arbitral tribunals have not always acceded to injunctions. However, such resistance may ultimately prove futile. The reneging party, as discussed earlier, also has the option to resist the enforcement of the arbitral award.

Per the New York Convention, an arbitral award can be refused enforced if it conflicts with the public policy of the enforcing state.[138] The same, of course, is mirrored in a number of national arbitration laws.[139]

---

131 Tying- Wei Chiang, *Anti-Arbitration Injunctions in Investment Arbitration: Lessons Learnt from the India v. Vodafone Case*, 11 CONTEMP. ASIA ARB. J. 251 (2018).

132 BORN, *supra* note 11, at 1420-1421.

133 S v. State X, Award (Dec. 7, 2001), ICC Case No. 10623.

134 *Ibid.*

135 Saipem S. Pa v. People's Republic of Bangladesh, Award on Jurisdiction and Recommendation on Provisional Measures, ICSID Case No. ARB/05/07.

136 *Id.*, ¶¶ 132-134.

137 Himpurna Cal. Energy Ltd v. Indonesia, Interim Award & Final Award in Ad Hoc Case of Sept. 26, 1999 & Oct. 16, 1999, XXV Y.B. COMM. ARB. 109, 110 (2000).

138 New York Convention, art. V(2)(b).

139 *See* Arbitration & Conciliation Act, No. 26 of 1996 (India), §§ 34(2)(b)(ii), 48(2)(b); English Arbitration Act, 1996, cl. 23, § 68(2)(g); French Code of Civil Procedure, art. 1514; *see* Admart AG v. Stephen & Mary Birch Found., Inc., 457 F.3d 302, 307 (3d Cir. 2006); interestingly, even while the US FAA does not contain an explicit public policy exception, the US has acceded to the New York Convention and US Courts have interpreted and "strictly enforced" Article V.

In the Indian context, the Supreme Court in *Renusagar Power* v. *General Electric*[140] ["**Renusagar**"] affirmed the public policy ground for the enforcement of foreign awards. The Court gave a restrictive definition to public policy, which must be interpreted as "*fundamental policy of Indian law*"[141] This is retained in current jurisprudence and is reflected in the current form of section 48(2)(b) of the ACA.[142] According to the Court in Renusagar, any award rendered in violation of court orders would violate the fundamental policy of Indian law.

Therefore, if an arbitral tribunal continues with the proceedings despite the imposition of an anti-arbitration injunction, it would face the risk of being rendered unenforceable at the post-award stage. However, this dictum has not been universally followed in practice. Notably, the Calcutta High Court in *Devi Resources* v. *Ambo International* ["**Devi Resources**"] enforced an arbitral award made in violation of an interim arbitration injunction.[143] In furtherance of its jurisdiction the Court had restrained the Indian party from pursuing a foreign seated arbitration.[144] However, the Tribunal continued the arbitration nonetheless. Further, the award was issued while the injunction was still operating. However, the Calcutta High Court did not stop the enforcement of the award because it reasoned that the order for injunction was not against the Tribunal, but against the Indian party personally. This case, it is argued, reveals the unnecessarily adverse impact of anti-arbitration injunctions against foreign seated tribunals. First, the court, as in Devi Resources, would not be able to restrain the tribunal, but only the party from proceeding with the arbitration. Second, it shows that the effect of anti-arbitration injunctions is hollow – so much so that arbitrations tribunals can effectively resist an interim injunction, carry out proceedings to the prejudice of one party, and still get the award enforced.[145]

VII. Conclusion

The article has, thus far, analysed the validity of anti-arbitration injunctions issued to enjoin a foreign international commercial arbitration. It stands to reason that courts are within their powers to injunct arbitrations taking place in their jurisdictions, provided the purported arbitration agreement does not meet the standards of Article II of the Convention. While a tribunal has the power to judge its validity, the consensus is absent as to whether this authority prevents a court from doing the same. On the other hand, a limited curial power of "first-look" has emerged as the standard.

Therefore, while anti-arbitration injunctions are not themselves invalid, they certainly cannot carry an extra-national application. Attempting to enjoin foreign-seated tribunals interferes with the

---

140 Renusagar Power Co Ltd v. General Electric Co, 1994 Supp (1) SCC 644 (India).

141 *Id.* ¶ 85.

142 Vijay Karia v. Prysmian Cavi E Sistemi SRL, (2020) 11 SCC 1 (India); *see also* Arbitration & Conciliation Act, No. 26 of 1996 (India), § 48(2)(b) (Proviso).

143 Devi Resources Limited v. Ambo Exports Limited, 2019 SCC Online Cal 7774 (India).

144 *See* Modi Entertainment Network v. WSG Cricket Pte Ltd, (2003) 4 SCC 341 (India); here, the court had utilised principles which arise from anti-suit injunctions, which empower an Indian Court restrain only persons over which the court has personal jurisdiction from pursuing litigation before foreign courts.

145 See Saarthak Jain and Kashish Makkar, *The dilution of interim anti-arbitration injunctions in Devi Resources: pro-enforcement approach gone too far?*, 36(2) ARB. INT'L 297 (2020).

jurisdiction of national courts and prevents other states from fulfilling their obligations under the New York Convention.

Lastly, this article has also briefly discussed how anti-arbitration injunctions against foreign/international arbitrations may not be effective. Such injunctions may be resisted successfully, may qualify as expropriation under international law (ICSID), and may also prove to be extremely difficult to enforce.

Therefore, such injunctions, it has been argued, are needlessly disruptive and *sans* jurisdiction to the parties' intent and the basic principles of international arbitration. This makes it incompatible with the modern system of international commercial arbitration.

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