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EDITORIAL

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ECONOMIC SANCTIONS AND HOW TO DEAL WITH THEM: THE ARBITRATOR'S PERSPECTIVE

Gordon Blanke[*]

Abstract

In the 21st century, economic sanctions have become an increasingly common feature in the realm of world politics. Albeit striving for political, trade-related, and humanitarian goals, the imposition of economic sanctions tends to produce far-reaching effects on dispute resolution processes, including, more specifically, arbitration. This note explores the procedural and substantive challenges that arbitrators face when confronted with disputes involving sanctions and/or sanctioned parties. As sanctions regimes spread across the world, arbitrators stand to enhance their own experience and likely develop a routine understanding of how to deal with such disputes without jeopardising the procedural efficiency of the proceedings.

I. Introduction

Economic sanctions are a powerful tool (as a welcome alternative to war) to achieve political, trade-related, and humanitarian goals, by placing recalcitrant states under coercive economic pressure. By way of example,

[*] Dr. Gordon Blanke is the Founding Principle of Blanke Arbitration. This article is based on a presentation delivered by him at the Linklaters 7th CARTAL Conference on International Commercial Arbitration, 2023 on Implications of Economic Sanctions on International Arbitration at the National Law University, Jodhpur, India, on Feb. 11, 2023. The author expresses his gratitude for the research assistance from Farhan Shafi, Associate, Blanke Arbitration, Dubai/London/Paris. For avoidance of doubt, this article does not aim to be exhaustive and seeks to outline only some of the main themes that the author considers of relevance to the subject.

the United Nations ["**UN**"],[1] the European Union ["**EU**"],[2] and the United States of America ["**US**"],[3] presently have in place some of the most comprehensive sanctions regimes worldwide. That said, apart from affecting the trading relationship and volume as well as quality of commercial transactions between the relevant parties, economic sanctions may also produce tangible effects on the provision of dispute resolution services, including arbitration.[4]

From the arbitrator's perspective, economic sanctions may produce effects at various stages of the arbitration process. These include:

- Effects on logistics and procedure, including the appointment of arbitrators or the formation of the arbitral tribunal;
- Jurisdictional effects with respect to the proper personal scope of a tribunal's jurisdiction;
- Substantive effects on the merits of the proceedings; and

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1 *U. N. Security-Council Consolidated List*, UNITED NATIONS SECURITY COUNCIL (June 29, 2023), *available at* https://www.un.org/securitycouncil/content/un-sc-consolidated-list.

2 European Commission Service for Foreign Policy Instruments, Restrictive measures (sanctions) in force, July 07. 2016, *available at* http://eeas.europa.eu/cfsp/sanctions/docs/measures_en.pdf.

3 US Office of Foreign Assets Control (OFAC), Sanctions Programs and Country Information, U.S. DEPARTMENT OF THE TREASURY, *available at* http://www.treasury.gov/resource-center/sanctions/Programs/Pages/Programs.aspx.

4 *See, e.g.,* Florian Kremslehner, Sophie Aulitzky & Philipp Stadtegger, *Chapter II: The Arbitrator and the Arbitration Procedure, Economic Sanctions in International Commercial Arbitration: A guide for practitioners, by practitioners, in* AUSTRIAN YEARBOOK ON INTERNATIONAL ARBITRATION 79–119 (Christian Klausegger, Peter Klein, Florian Kremslehner, Alexander Petsche, Nikolaus Pitkowitz, Irene Welser, Gerold Zeiler eds., 2022); Steve Ngo and Steven Walker, *Impact and Effects of International Economic Sanctions on International Arbitration*, 88(3) INT'L J. ARB., MED. & DISP. MGMT. 338, 338-403 (2022); Tamás Szabados, *EU Economic Sanctions in Arbitration*, 35(4) J. INTL'. ARB. 439, 439-462 (2018).

Effects post-award, including, in particular, the enforceability of a prospective award.

Each of these requires consideration early in the process, in order to ensure the responsible and efficient conduct of the arbitral proceedings. This, in turn, requires the arbitrator, *inter alia*, to heed —again, early on in the process —factors that might jeopardise the enforceability of a prospective award.

Against this background, this note seeks to explore the effects that economic sanctions may produce on the arbitration process, and to identify the powers that are readily available to arbitrators to deal with such effects responsibly – i.e., in a way that will minimise any disruption to the arbitration process. More specifically, following this Introduction, Section 2 of this note deals with the effect that sanctions may have on the logistical and procedural aspects of arbitral proceedings. Section 3 examines the jurisdictional challenges that may arise, such as arbitrability, public policy considerations, amongst others. Section 4 discusses the potential substantive effects of sanctions regimes on the merits of the proceedings. Finally, following an examination of the effects of sanctions regimes on post-award procedures in Section 5, Section 6 concludes.

II. Logistics and Procedure

Starting with logistics and procedure, these may be severely impacted by economic sanctions. More specifically, this section addresses the implications economic sanctions may have on arbitral appointments, arbitration costs, party representation, hearing witnesses and third-party funding.

A. Arbitral appointments

Economic sanctions can produce far-reaching consequences on the appointment of arbitrators. To start, an arbitrator nominated for appointment might be precluded from accepting appointment by a

sanctioned party, for example, to serve as that party's arbitrator on a three-member tribunal, or to serve as a sole arbitrator or chair. This will inevitably be the case in any one of the following circumstances:

- **The arbitrator's nationality** – Where the arbitrator shares the nationality of the sanctioned party and the sanction concerned bears on the country of that nationality, the arbitrator is likely to be directly affected by the scope of that sanction purely by dint of his or her nationality.

- **The arbitrator's country of residence** – Where the arbitrator is a resident of the sanctioned country, again, the arbitrator is likely to fall directly within the scope of the concerned sanction.

A variation of the theme are circumstances in which the arbitrator's law firm or chambers are either located in a sanctioned country or are sanctioned directly. A good example of the latter are the sanctions imposed on Essex Court Chambers by China in 2021 in response to a legal opinion produced by a number of Essex Court barristers with respect to the treatment of Uighur Muslims.[5]

Importantly, in any of the aforementioned circumstances, the arbitrator might be at risk of being challenged for reasons of personal disqualification or undue process (or unfitness to serve) under the governing arbitration law or the applicable institutional rules. By way of example, it has been reported that in an International Chamber of Commerce ["**ICC**"] reference, an arbitrator of Essex Court appointed by a Chinese party was successfully challenged.[6]

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5 Jack Ballantyne, *Arbitration in the era of sanctions*, GLOBAL ARBITRATION REVIEW (May 12, 2022), *available at* https://globalarbitrationreview.com/article/arbitration-in-the-era-of-sanctions [*hereinafter* "Ballantyne"].

6 *Id.*

For the avoidance of doubt, the arbitrator is under an obligation to disclose any potential conflict caused by a sanctioning legislation, whether at the outset of the arbitration process upon his or her nomination, or as the arbitral process unfolds in accordance with his or her standing disclosure obligation under the applicable arbitration rules and laws. As a word of caution, in the event that the question of an arbitrator's potential substitution arises after a hearing (whether jurisdictional or on merits) has been held, whether that hearing has to be re-run following the appointment of the substitute arbitrator must be considered. This might be a cause for significant procedural and financial concern.

B. Payment of registration fees, administrative costs and arbitrator fees

The payment of administrative fees and arbitration costs, generally, might equally pose a challenge. This includes payment of any registration fees to commence the arbitration and/or to introduce a counterclaim as well as the payment of arbitrator fees. To the extent that payment is made by a sanctioned party or from a sanctioned country, the relevant arbitral institution and/or the arbitrators will be precluded from accepting any such payment. In a worst-case scenario, a sanctioned party might even be precluded from registering a case/claims or counterclaims (in the event that the sanctioned party is a respondent).

Evidently, precluding a sanctioned party from bringing a claim in arbitration or filing a counterclaim in an ongoing arbitral process raises questions of access to justice and, more specifically, to the right to a legal remedy or the right to go to court. In order to mitigate the impact that any such preclusion might have on the sanctioned party, the stakeholders involved[7] may apply for a license to the relevant authorities in the sanctioning country for the limited release of the sanctioned party's frozen funds. This is particularly the case where the imposed sanctions regime provides for exemptions that

[7] Which will usually include the arbitrators, arbitral institutions and the sanctioned party itself.

cover the provision of legal services to the sanctioned party. Such exemptions, however, tend to be limited to contentious forms of dispute resolution, such as court proceedings, i.e., litigation, and arbitration, to the exclusion of general advisory work. That said, to obtain a license is usually time-consuming and will, as such, inevitably impact the duration of the arbitral procedure. Examples at hand are: (i) EU Council Reg. 2022/1269,[8] providing an exemption for transactions required to "*ensure access to judicial, administrative or arbitral proceedings in a member state, as well as for the recognition or enforcement of a judgment or an arbitration award rendered in a member state*;"[9] and (ii) the general license granted by the Office of Financial Sanctions Implementation of the United Kingdom ["**UK**"] to the London Court of International Arbitration, allowing it to process funds from sanctioned parties in the light of the UK's sanctions regime against Russia,[10] and Belarus,[11] following the invasion of Ukraine in 2022.[12]

It is also worth bearing in mind that some sanctions regimes (mostly those originating in the US) are of extraterritorial application. This means that they produce their effects beyond the US domestic market and apply to the operations of a sanctioned person even outside the US. In order to safeguard against the reach of sanctions regimes that apply extraterritorially

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8 Council Regulation (EU) 2022/1269 of July 21, 2022, amending Regulation 833/2014, concerning restrictive measure in view of Russia's actions destabilising the situation in Ukraine, 2022 O.J. (L 193) 1 (EU).

9 Council Regulation (EU) 2022/1269 of July 21, 2022, amending Regulation 833/2014, concerning restrictive measure in view of Russia's actions destabilising the situation in Ukraine, art. 10(g), 2022 O.J. (L 193) 1 (EU); *see also* the guidance provided by the EU in June, 2020 stating that Art. 5(aa) of Council Regulation 833/2014 of Jul. 31, 2014 concerning restrictive measure in view of Russia's actions destabilising the situation in Ukraine O.J. (L 2291 (EU) had to be read in the light of the fundamental right to an *"effective legal remedy"* within the meaning of Art. 6 of the European Convention of Human Rights and did not limit the provision of legal services required for an effective legal defence. For context, *see also* Ballantyne, *supra* note 5.

10 The Russia (Sanctions) (EU Exit) Regulations 2019, S.I. 2019/855 (Eng.).

11 The Republic of Belarus (Sanctions) (EU Exit) Regulations 2019, S.I. 2019/600 (Eng.).

12 Sebastian Perry, *LCIA gets exemption from Russia and Belarus sanctions*, GLOBAL ARBITRATION REVIEW (Oct. 17, 2022), *available at* https://globalarbitrationreview.com/article/lcia-gets-exemption-russia-and-belarus-sanctions.

in an arbitration context, it is advisable to use a currency other than that of the sanctioning country in the arbitration process. In arbitrations under the ICC Rules of Arbitration, for example, provision is made for the use of Euro rather than the US Dollar,[13] in order to mitigate any exposure to interventions by the US banking system in USD-denominated money transfers (whether for payment of the arbitration or compliance with the payment terms of a resultant award).

In the present context, it is also worth contemplating the application of a blocking statute and the extent to which such a statute might prohibit compliance with sanctions regimes that purport to apply extraterritorially.[14]

C. Party representation

Sanctions may also impose limitations on party representation and, as such, limit a party's otherwise free choice to appoint counsel and, hence, a party's right to legal representation. Thus, a sanctioned party may be precluded from appointing counsel from a sanctioned country. One way of dealing with this situation is for arbitrators to suspend the proceedings until the sanctions have been lifted. Albeit that this might be the safest way to preserve a sanctioned party's right to a counsel of its own free choice, depending on the duration of the sanctions, it might create severe procedural delays and inefficiencies.

An alternative solution would be for the sanctioned party to consider a change of counsel. This again might cause undesirable procedural delays in addition to jeopardising the sanctioned party's continuity of counsel, which, in turn, might provoke an unwanted change in case strategy and an undesirable increase in costs (with new counsel having to read up on and familiarise itself with the case in order to "*get up to speed*"). Depending on

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13 International Court of Arbitration, *Note to the Parties and Arbitral Tribunals on ICC Compliance* (Sept. 29, 2017), 2, 3.

14 Council Regulation (EC) 2271/96 of Nov. 22, 1996, protecting against the effects of the extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom, 1996 O.J. (L 309) 1 (EU).

the stage which the arbitral process has reached by the time the sanction hits, this might be more or less challenging.

Finally, a sanctioned party's first-choice or incumbent counsel might contemplate securing an exemption to the extent allowed under the applicable sanctions regime. This, however, might be time-consuming and require the interim suspension of the arbitral process pending the application for an exemption.

D. Hearing witnesses

Hearing oral testimony may pose a further challenge where a travel ban might be imposed on witnesses of a sanctioned nationality or from a sanctioned country. Where a party has relied on the concerned witness throughout the arbitral process and the sanctions were only adopted at an advanced stage of the proceedings, the affected party might be severely disadvantaged in the presentation of its evidence. By way of example, the sanctioned witness might not be able to travel cross-border to the venue of the evidentiary hearing and, thus, not be able to testify in person. This might limit a party's right to access to justice and its right to a fair hearing, preventing it from having a full or reasonable opportunity to present its case. To name but one example, in *JSC Tsargrad Media* v. *Google*,[15] the Moscow City Arbitrazh Court found that following the imposition of a travel ban upon the petitioner, there was overwhelming evidence to confirm that the petitioner was unable to obtain access to justice and protect its rights in the jurisdictions that had applied the sanctions, i.e., the EU and the US.[16]

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15 JSC Tsargrad Media v. Google, SOBRANIE ZAKONODATEL'STVA ROSSIISKOI FEDERATSII [SZ RF] [Russian Federation Collection of Legislation] Case No A40-155367/2020.

16 For further discussion, *see* Prerona Banerjee, *Arbitration or Sanctions: Who Survives the Battlefield?*, THE AMERICAN REVIEW OF INTERNATIONAL ARBITRATION BLOG (Apr. 28, 2023), *available at* https://aria.law.columbia.edu/arbitration-or-sanctions-who-survives-the-battlefield/.

In order to limit the risk of a witness being prohibited from travel and, thus, prevented from testifying in person, the affected party might be well-advised to contemplate applying for an exemption to the relevant sanctioning authorities. Given the time involved, any such application should be filed as soon as practically possible following the adoption of the sanction in order to ensure that the desired exemption will be obtained in good time before the commencement of the hearing. In the alternative, a sanctioned witness might testify remotely – for example, through video-conference. This process will arguably be facilitated by both the many soft law instruments and the amendments to arbitral legislation and rules adopted during the COVID-19 pandemic, which would allow for remote hearings in both domestic and international arbitration.[17]

E. Third-party funding

Third-party funding has gained increasing importance in arbitration in the 21st century. This is because it enhances disputing parties' access to justice in circumstances in which legal services become increasingly expensive and as such unaffordable for smaller, less well-resourced players in the market.

Concerns of unequal treatment might arise from the fact that third-party funding may not be available to sanctioned parties. Likewise, third-party funding may not be available from a funder located in a sanctioned country. To address these issues, the relevant stakeholders may, again, wish to explore the availability of licenses and exemptions granted by the sanctioning authority.

III. Jurisdiction

Sanctions may affect the proper personal or subject-matter jurisdiction of an arbitral tribunal. The main question that arises in this context is whether disputes involving a sanctioned party, or a sanctioned subject-matter are properly arbitrable under the relevant law, i.e., the law governing the

[17] *For e.g.,* ICC Arbitration Rules 2021, art. 26(1); LCIA Arbitration Rules 2020, art. 19.2. As regards arbitration laws, *see* UAE Federal Arbitration Law, art. 33(3) (2018).

arbitration agreement, the curial law (the law of the seat) or the governing law on the merits. This, in turn, is closely linked to the question of public policy, i.e., whether the involvement of a sanctioned party or a sanctioned subject-matter constitutes a violation of public policy under any of those laws.

It should be noted from the outset that *ratione personae*, to the extent that a sanctioned party is privy to the underlying arbitration agreement, economic sanctions will not necessarily prevent that party from participating in the arbitration process *per se*. The nature of such sanctions will usually be such that they weigh only on the *practicality* of a sanctioned party's participation in the process, with such party being subject to travel bans and exposed to economic restrictions (its assets usually being frozen accompanied by a prohibition to enter into economic transactions with parties from the sanctioning country). The core of the problem, therefore, remains the challenges faced by the sanctioned party to make payments to the arbitral institution and the arbitrators for their involvement in the process,[18] the sanctioned party's physical (in-person) attendance of hearings,[19] and compliance with the payment terms of a resultant award (requiring the cross-border transfer of monetary funds).[20]

A. Arbitrability

In order to ensure that the sanctions concerned do not affect the arbitrability of the underlying dispute under the law of the seat, the law governing the arbitration agreement, or the governing law of the merits, it is important for a tribunal to deal with the question of its proper jurisdiction over the sanctioned party or a sanctioned subject-matter, in the first instance. This may require the bifurcation of the arbitral proceedings to allow the tribunal to investigate the subjective and objective arbitrability of the underlying dispute during an initial phase on jurisdiction. In doing so,

18 On which see section II.B above.
19 On which see section II.D above.
20 On which see section V.B.i below.

the tribunal will be able to rely on the application of the principle of separability, which prevails under all leading arbitration laws. As a result, the potential invalidation of a contract in dispute does not extend to the arbitration agreement. In other words, the tribunal's *kompetenz-kompetenz* powers to determine its own jurisdiction remain unaffected by the application of a particular sanctions regime to the arbitral process.[21] However, while exercising such powers, the tribunal must, of course, take care not to become privy to a public policy infringement and, in turn, place itself in breach of the underlying sanctions (exposing itself to potential prosecution under the applicable sanctions regime).

Useful guidance on how to deal with the question of arbitrability in this context can be garnered from a brief review of how some of the world's leading courts have approached this question in the past. Generally speaking, the trend with the Swiss, US and Canadian courts would appear to be in favour of arbitrability, with only the Italian courts being an outlier. By way of example, in *Fincantieri-Cantieri Navali Italiani SpA (Italy)* v. *Ministry of Defense, Armament and Supply Directorate of Iraq, Republic of Iraq*,[22] the Genoa Court of Appeal ["**the Court**"] considered the effect produced by EU and US sanctions imposed on Iraqi parties on the ability to arbitrate a dispute relating to contracts for the supply of corvettes to the Iraqi Navy. The Court held that in the light of attendant public policy considerations, the dispute was not arbitrable and should instead be referred to the Italian courts. The Italian party then sought the recognition of the Genoa Court of Appeal decision under the Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters ["**Brussels**

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21 By analogy to the treatment, e.g., of antitrust issues in arbitration. *See, e.g.,* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985); and Case C-126/97, Eco Swiss China Ltd v. Benetton International NV, 1999, E.C.R. 1999 I-03055, which have affirmed the arbitrability of antitrust law despite its qualification as a matter of public policy in both the US and the EU.

22 Corte di Appello of Genoa, 7 May 1994, Fincantieri-Cantieri Navali Italiani SpA (Italy) v. Ministry of Defense, Armament and Supply Directorate of Iraq, Republic of Iraq, 21 Y.B. Comm. Arb. 594 (1996).

Convention"],[23] in order to obtain a stay of ICC arbitral proceedings pending in parallel in Paris. The Paris Court of Appeal found in favour of arbitrability, holding that matters of arbitration fell outside the scope of the Brussels Convention. By contrast, in *Air France* v. *Libyan Arab Airlines*,[24] the Court of Appeal of Quebec found that the UN sanctions regime against Libya did not affect the arbitrability of the underlying dispute and that, as a consequence, the Tribunal's affirmation of its own jurisdiction did not breach international public policy. Finally, *Belship Navigation, Inc.* v. *Sealift, Inc.*[25] is an example of a case where the US District Court for the Southern District of New York compelled to arbitrate a dispute that had arisen from a charterparty involving the Cuban Assets Control Regulation.[26]

B. Public policy

As stated above, for the tribunal to affirm its proper jurisdiction, it must ensure that it does not deal with sanctions in violation of prevailing public policy. The tribunal must, therefore, ascertain whether the sanctions concerned qualify as public policy under the governing law of the seat/the law governing the arbitration agreement; and, whether, public policy issues are arbitrable under that law. It is important to note in this context that, at the risk of becoming complicit in a public policy violation, arbitrators must not entertain parties that seek recourse to arbitration to avoid the application and/or effects of a sanctions regime that qualifies as public policy under the relevant law.

Some initial guidance may again be gained from instructive case law precedent from jurisdictions that have dealt with this issue. By way of

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23 EC Convention 41968A0927(01) of Dec. 31, 1972, on jurisdiction and the enforcement of foreign judgments in civil and commercial matters, 1968 O.J. (L. 299), 32–42 (1972). Council Regulation (EU) 1215/2012 of Dec. 12, 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), 2012 O.J. (L. 351), 1–32 (2012).

24 Air France v. Libyan Arab Airlines, [2000] R.J.Q. 717 (Can.).

25 United States District Court, Belship Navigation, Inc. v. Sealift, Inc, 1995 WL 447656 (U.S.).

26 Cuban Assets Control Regulations, 31 CFR 515 (July 09, 1963) (U.S.).

example, in *Société Française d'Etudes et de Réalisation d'Equipements Gaziers (Sofregaz)* v. *Natural Gas Storage Company (NGSC)*,[27] the Paris Court of Appeal refused to set aside an ICC award, which was found in favour of the Iranian Natural Gas Storage Company ["**INGSC**"]. This was in circumstances where INGSC had terminated a contract under Iranian law with Sofregas, a French company, which had refused to issue bank guarantees required under the contract owing to international sanctions imposed on Iran. According to the Paris Court, the sanctions concerned arose from the US sanctions regime, which, as opposed to the UN sanctions regime, did not qualify as French international public policy (*ordre public international*). By contrast, in *Ministry of Defense of Iran* v. *Cubic International Sales*,[28] the US Court of Appeal refused to set aside an ICC award on the basis that it violated the US sanctions regime imposed on Iran and, hence, the US public policy. The US Court of Appeal held that the US sanctions regime did not, as such, prohibit the payment that the award debtor had been ordered to make to the Iranian Ministry of Defence in the terms of the award; and stated that the award debtor was eligible for obtaining a license from the US Treasury Office of Foreign Asset Controls ["**OFAC**"], to pay the ICC award. As a result, there was no breach of the US sanctions regime, nor of US public policy.

Importantly, as is evident from this case law precedent, domestic courts tend to distinguish between domestic and international public policy in their application to international sanctions regimes, treating only sanctions of UN origin as falling within the ambit of international public policy. This allows leading arbitration jurisdictions to protect their own arbitral regimes from undue extraterritorial interference, and provides some comfort to arbitrators serving in arbitrations seated there.

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27 Cour d'appel [CA] [regional court of appeal] Paris, 50-16, June 03, 2020, No. 19-07261, Société Française d'Etudes et de Réalisation d'Equipements Gaziers v. Natural Gas Storage Company.

28 Ninth Circuit of Appeals, Ministry of Defense of Iran v. Cubic International Sales, 665 F.3d 1091 (Jan. 3, 2013) (U.S.) [*hereinafter* "Cubic International"].

C. Exclusive jurisdiction

In an attempt to restrain the effect of sanctions on their nationals, sanctioned countries have been seen to arrogate to their domestic courts' exclusive jurisdiction, over disputes involving their nationals. In this sense, sanctions might give rise to exclusive jurisdiction of the state courts in the sanctioned country, to the extent that an arbitration agreement has become ineffective by sanctions, or where a sanctioned party's representation is limited in the pending arbitration proceedings.

A good example of this approach are the 2020 amendments to the Russian Arbitrazh Procedure Code.[29] These empower the Russian Arbitrazh Court to adopt anti-arbitration injunctions against pending proceedings in which Russian nationals – both legal and natural persons – have been affected by the sanction's regime of a foreign state.[30]

IV. Merits

Sanctions might also impact the substantive determination of the underlying dispute. For the avoidance of doubt, issues arising with respect to the merits will evidently depend on the law governing the merits. Having affirmed their proper jurisdiction, tribunals may, therefore, have to determine any merits issues arising with respect to the sanctions under the law governing the substance of the dispute.

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29 Federal Law No. 171-FZ of June 8, 2020, "On Amending the Arbitrazh Procedure Code of the Russian Federation in Order to Protect the Rights of Individuals and Legal Entities in Connection with the Restrictive Measures Introduced by a Foreign State, State Association and (or) Union and (or) State (Inter-State) Institution of a Foreign State or State Association and (or) Union."

30 For comment in context, *see* E. Rubinina, *Russian Sanctions Law Bares Its Teeth: The Russian Supreme Court Allows Sanctioned Russian Parties To Walk Away From Arbitration Agreements*, KLUWER ARBITRATION BLOG (Jan. 22, 2022), *available at* https://arbitrationblog.kluwerarbitration.com/2022/01/22/russian-sanctions-law-bares-its-teeth-the-russian-supreme-court-allows-sanctioned-russian-parties-to-walk-away-from-arbitration-agreements/.

Common issues include the termination of the underlying contract due to impossibility of performance, illegality, or frustration as a result of the sanctions. To assist in the determination of these questions, it might be relevant to consider whether the relevant sanctions regime has been imposed after conclusion of the contract, to meet requirements of lack of foreseeability under the applicable law.

In the alternative, the tribunal may have to ascertain, by reference to the governing law on the merits and/or the terms of the contract, whether the imposition of the sanction may qualify as an event of *force majeure*, which prevents the performance of the contract. Depending on the terms of the contract, this, in turn, might invite the suspension of the contract pending the force majeure event, or the termination of the contract, should the performance of the contract become entirely impossible. For the avoidance of doubt, the successful invocation of a *force majeure* defence will depend on the language of the contract and/or statutory law provisions under the governing law on the merits.

In a further alternative, the law of a number of civil law jurisdictions may consider the doctrine of unforeseen circumstances,[31] which, albeit not impossible, make performance of the parties' obligations under the underlying contract excessively burdensome and allow the tribunal to adjust the terms of the contract accordingly. In doing so, at the risk of becoming complicit in the sanctioned conduct, a tribunal must beware not to change the contractual terms in a way that would allow the sanctioned party from escaping the effect of the sanctions.

V. Post-Award

[31] *See* Bashayer Al Majed and Abdulaziz Al Majed, *Frustration v Imprévision, Why Frustration is so 'Frustrating': The Lack of Flexibility in the English Doctrine's Legal Consequence*, LIVERPOOL L. REV. (2023), *available at* https://link.springer.com/article/10.1007/s10991-023-09327-9, who state "*the majority of civil law countries accept a similar but rather different principle, the theory of imprévision, or 'unforeseeable circumstances'*."

Issues that arise with respect to the enforcement of arbitral awards within the context of sanctions are two-fold:

- *Legal*, which includes the resistance to the enforcement of awards involving sanctions on the basis of: (i) non-arbitrability; (ii) public policy; or (iii) the irregular constitution of the tribunal; and

- *Practical*, which comprises questions of: (i) the enforcement of awards against a sanctioned award debtor whose assets are frozen; and (ii) the recoverability of pre- and post-award interest.

These will be discussed in some detail below.

A. Legal Issues

The legal issues that typically arise at the enforcement stage of an award involving sanctions coincide with some of the topics already discussed elsewhere in this note. In order to avoid repetition, cross-reference will be made as appropriate.

i. Non-arbitrability

The question of arbitrability has been discussed in relevant part at Section 3.1 above. Suffice to say that the potential non-arbitrability of a dispute qualifies as a ground for setting aside under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards[32] ["**New York Convention**"], as it does under other international and domestic enforcement regimes. More specifically, pursuant to Article V(2)(a) of the New York Convention, "*[r]ecognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that: (a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country.*"[33]

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32 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 330 U.N.T.S 38 [*hereinafter* "New York Convention"].

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

There is a tangible risk that domestic courts might hold disputes involving sanctions non-arbitral and, hence, proceed to the setting aside of the underlying award. Importantly, this is irrespective of the views taken by the tribunal on the subject-matter. That being said, judging by international court practices to date, most courts have taken a favourable approach to the arbitrability of disputes involving sanctions.[34] In addition, it might be relevant to contemplate the exclusive jurisdiction of some courts, e.g., Russian Arbitrazh Court under the Russian Arbitrazh (Commercial) Procedure Code as amended,[35] to the extent that this might hold relevance on a case-by-case basis.

ii. Public policy

The question of public policy has been addressed in relevant part at Section 3.2 above. Suffice it to say that the public policy exception qualifies as a ground for setting aside under Article V(2)(b) of the New York Convention, which provides that "*[r]ecognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that: (b) The recognition or enforcement of the award would be contrary to the public policy of that country.*"

It is important in this context to distinguish between domestic/international public policy of a domestic state v. transnational public policy given that different sanction regimes might attract different levels of protection – for example, UN sanctions regimes tend to qualify as transnational public policy and are, therefore, of universal application.[36]

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34 *Compare, e.g.,* the Italian courts (against) with the Swiss, Canadian and New York courts (in favour); *See, e.g., supra* note 24.; *See also*, *supra* note 25.

35 On which see section 3.3 above.

36 *See, e.g., supra* note 27, U.S. sanctions (as opposed to UN sanctions) not forming part of French ordre public international; *See also*, Cubic International, *supra* note 28, Enforcement of ICC award not contrary to US public policy – award debtor required to obtain OFAC license to pay award debt.

iii. Irregular constitution of the tribunal

Finally, an arbitral award resulting from a dispute involving sanctions might become subject to an application for setting aside on the ground that the constitution of the tribunal was irregular. This would arguably be the case where one (or more than one) of (the) arbitrator(s) originated from a sanctioned country if captured by the scope of the sanctions regime at the seat of the arbitration. This finds support in Article V(1)(d) of the New York Convention, which provides that "*[r]ecognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that: (d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place*."[37]

For completeness, it is arguable that the irregular constitution of a tribunal, comprising a sanctioned arbitrator, might, in addition or in the alternative, constitute a public policy violation within the meaning of Article V(2)(b) of the New York Convention in the country of enforcement.[38]

B. Practical Issues

Apart from the legal issues outlined at the preceding section, the enforcement of arbitral awards dealing with disputes involving sanctions may raise certain practical issues.

i. Award debtor's frozen assets

One of the main practical issues facing an award creditor arises when the assets of a sanctioned award debtor or of an award debtor having assets in a sanctioned country are frozen and as such not available for enforcement

37 New York Convention, art. V(1)(d).

38 Which provides verbatim as follows: *"Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that: (b) The recognition or enforcement of the award would be contrary to the public policy of that country."*

purposes. Where an award debtor's assets are frozen as a result of the sanctions, it might be possible for the award debtor to obtain a license from the sanctioning authority to permit them, to make the requisite payment to the award creditor. In addition, to ensure authorised receipt of payment by the award creditor, they may also have to obtain a license from the sanctioning authority for permission to accept payment from a sanctioned award debtor. Importantly, similar considerations apply while entering into a settlement with a sanctioned award debtor, or for securing an attachment over assets of a sanctioned award debtor.

Taking guidance from case law precedent on the subject, it is somewhat encouraging to see the constructive approach taken by leading courts to the matter. In *Crystallex Int'l Corp.* v. *PDV Holding Inc.*,[39] the US District Court for Delaware stayed enforcement proceedings in order to allow the Claimant to obtain a specific license from the OFAC, to enable enforcement against assets located in the US and owned by US-sanctioned Venezuelan state-owned entities. In *ConocoPhilips* v. *Venezuela*,[40] an International Centre for Settlement of Investment Disputes (ICSID) Ad Hoc Committee decided to lift the stay of enforcement of an USD nine billion award against Venezuela, in circumstances in which Conoco Philips, the award creditor, could obtain a specific license from the OFAC to enforce the award against sanctioned Venezuelan State assets. Finally, in *Mohamed Abdulmohsen Al-Kharafi & Sons Co.* v. *Libya and others* ,[41] the French Supreme Court did not grant enforcement by Al-Kharafi, a Kuwaiti company, against attached assets of a Libyan sovereign wealth fund subject

[39] Crystallex Int'l Corp. v. PDV Holding Inc., 2019 WL, 6785504 (Dec. 12, 2019) (U.S.).

[40] International Centre for Settlement of Investment Disputes, ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela, ICSID No. ARB/07/30, Order on the Applicant's Request for Reconsideration (Nov. 02, 2020).

[41] Cour de Cassation [Cass.] [supreme court for judicial matters], Sept. 07, 2022, No. 19-25.108 and 19-21.964, Mohamed Abdulmohsen Al-Kharafi & Sons Co. v. Libya and Others (Fr.).

to an EU sanctions regime, as, Al-Kharafi had not sought authorisation to do so from the French Treasury.

ii. Recoverability of pre- and post-award interest

An equally challenging issue is the recoverability of pre-award and post-award interest. These will usually be limited to the period over which the sanctioned award debtor has been found to be allowed to make payments under the award.

By way of example, in *Ministry of Defence and Support for Armed Forces of the Islamic Republic of Iran* v. *International Military Services*,[42] the English court held that the Iranian Ministry of Defense was precluded from enforcing the interest element of an award in respect of the period that the Ministry was subject to sanctions, on the basis that the EU sanctions regime in place prohibited the payment of such interest. Further, as regards pre-award interest, in *Ministry of Defense and Support for Armed Forces of Islamic Republic of Iran* v. *Cubic Defense Systems, Inc.*,[43] the US District Court for Southern California affirmed the availability of pre-judgment interest on amounts awarded in favour of the Iranian Ministry of Defense for the period between when the underlying ICC award was rendered and the commencement of the enforcement action before the courts. This is where there exists no exemption in the US sanctions regime in favour of the award debtor from paying the Ministry.

VI. Conclusion

Economic sanctions may produce unsettling effects throughout the arbitration process. This, however, does not mean that such effects cannot be managed responsibly by both the arbitrators and the parties. In doing

[42] Ministry of Defence and Support for Armed Forces of the Islamic Republic of Iran v. International Military Services, [2019] EWHC 1994 (Comm.) (appeal taken from Eng.).

[43] United States District Court, S.D. California, Ministry of Defense and Support for Armed Forces of Islamic Republic of Iran v. Cubic Defense Systems, Inc., Case No. 98-CV-1165-B (Jan. 03, 2013) (U.S.).

so, it is of paramount importance to safeguard a sanctioned party's right to a fair hearing, including its freedom to appoint counsel of its own choice. At the same time, arbitrators need to conduct the arbitration process efficiently without losing sight of the tenets of procedural economy to the extent necessary.

As sanctions regimes appear to become an increasingly common feature across the world, arbitrators will enhance their experience and likely develop a routine understanding of how to deal with disputes involving sanctions and/or sanctioned parties, without jeopardising the procedural efficiency of the proceedings.

ASYMMETRICAL CLAUSES, UNILATERAL APPOINTMENTS AND BILATERAL REFERENCES: RETHINKING THE STANDARD FOR COURT INTERVENTION

*Ajar Rab**

Abstract

There has been a lot of discussion and praise for the judgements of the Hon'ble Supreme Court of India in TRF Ltd. v. Energo Engineering Product ["TRF"] and Perkins Eastman Architects DPC v. HSCC ["Perkins"]. While their contribution towards ensuring the independence and impartiality of arbitrators is laudable, the cases have been subsequently misapplied to invalidate unilateral appointments. Unfortunately, the courts have mixed three entirely different concepts, i.e., asymmetrical clauses, unilateral appointments and bilateral references. This confusion has in turn led to excessive court intervention, akin to court confirmation and substitution of sole arbitrator appointments. The Courts have not paid adequate attention to Section 4 and 5 of the Arbitration and Conciliation Act, 1996 ["the Act"] and have interfered in sole arbitration appointments under the misguided notion of ensuring independence and impartiality by appointing judges from a limited pool of arbitrators.

This Article adopts the position, that concerns over independence and impartiality have already been addressed by an objective test under Schedule VII of the Act with the incorporation of the IBA Guidelines. After critically examining the judgements of various

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courts, it is argued that unilateral appointments are valid and have not been held to be void. An eligible arbitrator who is not barred under Schedule VII of the Act can be appointed unilaterally and the courts should not substitute their own mind in place of the will of the parties. It is ultimately argued that the power under Section 11 of the Act needs to be reconciled with Sections 4 and 5 of the Act in light of the intent behind The United Nations Commission on International Trade Law Model Law on International Commercial Arbitration ["Model Law"] provisions. This reconciliation can be achieved with the suggested objective standard which would respect party autonomy as well as ensure fair and equitable treatment of the parties.

I. Introduction

One of the key advantages of arbitration is expert adjudication of the dispute between parties.[1] A pre-requisite to achieve expert adjudication is to grant freedom to the parties to nominate and mutually agree upon a person with the necessary qualifications and experience to appreciate the nuances of the commercial realities and the contract between the parties.[2] This freedom to choose an arbitrator is akin to '*freedom of contract*' in the sense that the freedom is not absolute.[3] Public policy requires that the arbitrator chosen by mutual consent of the parties is fit for adjudication and that the appointment procedure is fair to both parties.[4] It should be clarified

1 Stephen K. Huber, *The Role of Arbitrator: Conflict of Interest*, 28 FORDHAM URB. L. J. 915, 917 (2001).

2 Gary Born, *Principle of Judicial Non-Interference in International Arbitral Proceedings,* 30 U. PA. J. INT'L L. 999 (2009); Thomas E. Carbonneau, *The Exercise of Contract Freedom in the Making of Arbitration Agreements*, 36 VAND. J. TRANSNAT'L L. 1189 (2003).

3 Ashutosh Ray & Ketul Hansraj, *The Legality of Unequal Arbitrator Appointment Powers in India: The Clarity, the Mist*, KLUWER ARBITRATION BLOG (Mar. 03, 2020), *available at* https://arbitrationblog.kluwerarbitration.com/2020/03/03/the-legality-of-unequal-arbitrator-appointment-powers-in-india-the-clarity-the-mist/.

4 Perkins Eastman Architects DPC v. HSCC (India) Ltd., (2020) 20 SCC 760, ¶ 23 [*hereinafter* "Perkins"]; Cour de Cassation [Cass.] [supreme court for judicial matters], Jan. 07, 1992, No. 89-18.708, Siemens AG and BKMI Industrienlagen GmbH v. Dutco Consortium Constr. Co. (Fr.); Lord Steyn, *England: The Independence and/or Impartiality of Arbitrators in*

that this '*fitness*' of the arbitrator is not a requirement under the Model Law, and the parties' consent is to be given utmost regard.[5] However, in all jurisdictions, the law will step in to protect a party (a) if the consent is either not free or gives an unfair advantage to one party, i.e., unilateral appointments, (b) the party did not know what it was consenting to, i.e., lack of disclosures or (c) if such consent has led to the appointment of a person who is unfit for adjudication, i.e., a person ineligible to be appointed as an arbitrator. In all other instances, the will of the parties is respected and given utmost priority.[6]

No arbitration statute prescribes a qualification requirement, as no requirement is contained under the Model Law.[7] India experimented with a qualification criterion by introducing the Eighth Schedule,[8] but had to repeal it,[9] since it led to a license requirement,[10] and effectively barred foreign arbitrators.[11] Most arbitration institutions, therefore, appoint

International Commercial Arbitration, *in* INTERNATIONAL CHAMBER OF COMMERCE, INDEPENDENCE OF ARBITRATORS: 2007 SPECIAL SUPPLEMENT 91, 95 (2008).

5 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. 11(5), as amended by G.A Res. 61/33, U.N. Doc. A/RES/61/33 (Dec. 18, 2006).

6 Rithu Krishna B R, *Indian Parties Choosing Foreign Seat of Arbitration – Party Autonomy and Public Policy,* 4(2) INT'L J. L. MGMT. HUM. 782, 786 (2021); Sunday A. Fagbemi, *The doctrine of party autonomy in international commercial arbitration: myth or reality?,* 6(1) J. SUSTAINABLE DEV. L. AND POL'Y 223, 245 (2015).

7 Commonwealth Secretanat, *Explanatory Document on the UNCITRAL Model Law on International Commercial Arbitration*, UNCITRAL (1991), *available at* https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/model-law-arbitration-commonwealth.pdf.

8 The Arbitration and Conciliation (Amendment) Act, 2019, No. 33, Acts of Parliament, 2019, § 43J (India).

9 The Arbitration and Conciliation (Amendment) Ordinance, 2020, No. 14, Acts of Parliament, 2020 (India).

10 Ajar Rab, *Accreditation of Arbitrators in India: A New License Requirement?,* KLUWER ARBITRATION BLOG (Oct. 11, 2019), *available at* https://arbitrationblog.kluwerarbitration.com/2018/10/11/accreditation-of-arbitrators-in-india-a-new-license-requirement/.

11 Ajar Rab & Ankit Singh, *2019 Amendment to Arbitration Law: Foreign Arbitrators in Indian Seated Arbitrations*, INDIACORPLAW (Sept. 5, 2020), *available at*

arbitrators who have acquired some accreditation,[12] and decide which arbitrator is most suitable for the nature of the dispute between the parties. In ad-hoc arbitration, the choice of the most suitable arbitrator is left to the parties to be determined in accordance with the procedure agreed upon by the parties and due regard is given to Section 11(1) of the Act. Only in the eventuality that "*a party fails to act as required under that procedure*" as contemplated in Section 11(6) of the Act, is the court expected to intervene. However, the term "*failure to act*" cannot trigger a court intervention in all circumstances. The courts ought to read this "*failure to act*" in light of Section 4(b), which provides for a waiver, and Section 5 of the Act, which mandates minimal court intervention. Moreover, this intervention does not, and should not, mean a substitution of the will of the parties by the supervising court. To prevent this uncalled-for court intervention, there ought to be an appropriate standard for court intervention.

As a first step, the court ought to respect the choice of the parties unless the arbitrator nominated suffers from a lack of (a) independence and impartiality or (b) disqualification. No response to the arbitration notice, or a simple objection to the proposed arbitrator without any reasons cannot be considered as a failure to achieve consensus. If a party knowingly waives its right to nominate an arbitrator or to oppose the candidature of an arbitrator, then the language of Section 4 to the effect that "*if a time-limit is provided for stating that objection, within that period of time, shall be deemed to have waived his right to so object ought to be binding*"[13] should be given effect. Otherwise, court intervention in such cases incentivises guerrilla tactics to deliberately delay the arbitral process.[14]

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https://indiacorplaw.in/2020/09/2019-amendment-to-arbitration-law-foreign-arbitrators-in-indian-seated-arbitrations.html.

12 Justice B.N. Srikrishna, Report of the High Level Committee to Review the Institutionalisation of Arbitration Mechanism in India (2017) [*hereinafter* "Justice Srikrishna"].

13 The Arbitration and Conciliation Act, 1996, No. 26, Acts of Parliament, 1996, § 4 (India).

14 JAN PAULSSON, THE IDEA OF ARBITRATION (2013).

At present, the standard for court intervention, inter alia, is occupied by a few judgments such as *Perkins*, *TRF* and *Bharat Broadband Network Limited* v. *United Telecom Limited*[15] ["**Bharat Broadband**"] ["**Ineligibility Cases**"]. While these judgements arrived at the correct conclusions in their peculiar facts, the willingness of courts to intervene at every instance on misplaced considerations of impartiality and fairness,[16] is killing party autonomy and expert adjudication in Indian arbitration.

It is argued that the current jurisprudence based on the *Ineligibility Cases* confuses three distinct concepts, i.e., (a) asymmetrical clauses, (b) unilateral appointments, and (c) a bilateral reference. The Ineligibility Cases addressed the limited issue of whether a person ineligible to be an arbitrator by virtue of his relationship can nominate another arbitrator.[17] However, these *Ineligibility Cases* have been given an expansive application. They have been praised for striking down "*unilateral appointments*" in India,[18] based on an isolated reading of a concluding line in *Perkins* that "*a person who has an interest in the outcome of the dispute cannot have the power to appoint a sole arbitrator*".[19] Such an interpretation goes against the express legislative intent to provide a system of checks and balances by statutorily incorporating the IBA Guidelines on Conflicts of Interest in International Arbitration ["**IBA Guidelines**"] by the Arbitration and Conciliation (Amendment) Act, 2015

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15 Perkins; TRF Ltd v. Energo Engineering Product, (2017) 8 SCC 377 [*hereinafter* "TRF"]; Bharat Broadband Network Limited v. United Telecom Limited (2019) 5 SCC 755 [*hereinafter* "Bharat Broadband"]; *See also*, Voestalpine Schienen GmBH v. Delhi Metro Rail Corporation (2017) 4 SCC 665 [*hereinafter* "Voestalpine"]; Central Organisation for Railway Electrification v. ECI-SPIC-SMO-MCML(JV), (2020) 14 SCC 712; Bhayana Builders Pvt Ltd v. Oriental Structural Engineers, 2018 SCC OnLine Del 7634 [*hereinafter* "Bhayana Builders"]; Poddatur Cable TV Digi Services v. SITI Cable Network Limited, 2020 SCC OnLine Del 350 [*hereinafter* "Poddatur"].

16 Proddatur, ¶ 31; Hong Lin-Yu et al., *Independence, Impartiality, and Immunity of Arbitrators: US and English Perspective,* 52(4) INT'L AND COMP. L. Q. 935, 935-967 (2013).

17 Perkins, ¶ 18; TRF, ¶ 7.1; Bharat Broadband, ¶¶ 13 & 18.

18 BORN, *supra* note 2; Bhumika Indulia, *To Appoint or Not to Appoint : A Critical Study of Unilateral Appointment of Arbitrators under the Arbitration Act, 1996*, SCC ONLINE BLOG (Mar. 14, 2022), *available at* https://www.scconline.com/blog/post/2022/03/14/a-critical-study-of-unilateral-appointment-of-arbitrators-under-the-arbitration-act-1996/.

19 Perkins, ¶ 21.

["**2015 Amendment**"]. If this line is read without context, it signals a death knell for party autonomy.[20] Applying this rationale, no party should ever have the right to nominate an arbitrator. Only the courts should appoint all arbitrators. Unfortunately, this is becoming increasingly true. Courts have started exercising jurisdiction in all cases of appointments without due regard to minimal intervention under Section 5 of the Act.

Invariably, "*arbitrators are usually nominated from a pool of person and include retired Supreme Court and High Court Judges who are known in the circuit*" ["**Limited Pool**"].[21] This Limited Pool rarely has subject matter specialists,[22] and completely subverts expert adjudication, which is one of the key strengths of arbitration as a dispute resolution mechanism.[23]

Therefore, Part II of this Article attempts to draw clear lines between asymmetrical clauses, unilateral appointments, and bilateral references. Part III of the Article critically examines the current jurisprudence based on the Ineligibility Cases and discusses the lack of clarity on the issue of unilateral appointments in India. Part IV addresses the problems that arise by misapplying the Ineligibility Cases to bilateral references and how courts subvert the goal of minimal court intervention. Part V attempts to find a standard for court intervention in arbitrator appointments. Part VI concludes with the urgent need to address and rethink the current jurisprudence on sole arbitrator appointment to bolster arbitration in India.

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20 Poddatur, ¶ 24.

21 McLeod Russel India Limited v. Aditya Birla Finance Limited, A.P. No. 106 of 2020, ¶ 45 [*hereinafter* "McLeod Russel"].

22 Legality of the Unilateral Appointment of an Arbitrator India, 3, 8 CT. UNCOURT 27 (2021).

23 Charles O'Neil, *Arbitration from a Commercial Client's Perspective*, 75(1) INT'L J. OF ARB., MED. & DISP. MGMT. 71, 71-75 (2009).

II. Distinguishing Asymmetrical Clauses, Unilateral Appointments and Bilateral References

There have been many views praising the Ineligibility Cases.[24] Unarguably, the Ineligibility Cases further independence and impartiality in arbitration proceedings.[25] However, the Ineligibility Cases and their subsequent application by courts do not adequately distinguish between an asymmetrical clause, a unilateral appointment of a sole arbitrator and a bilateral reference. In the absence of clarity between these concepts, there is bound to be confusion and misapplication of the Ineligibility Cases.

A. Asymmetrical Clauses

An asymmetrical clause is one where only one of the parties to the arbitration agreement has the right to invoke arbitration, while the other can only approach a court of law.[26] For example, only the employer may refer disputes to arbitration.[27] There is an asymmetry in the arbitration

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24 BORN, *supra* note 3; Shamik Sanjanwala, *Unilateral Appointment of Arbitrators: Unfairness and Unequal Treatment of the Parties*, (2022) 3 SCC J-32.

25 Jaffae Alkhayer & Ashlesha Dash, *Grounds of the Challenge of Arbitrators: The Difference between Independence and Impartiality*, 5 INT'L J.L. MGMT. & HUMAN. 1857, 1857-1864 (2022).

26 Raluca Papadima, *The Uncertain Fate of Asymmetrical Dispute Resolution Clauses in Arbitration around the Globe: To Be or Not to Be*, 90(3) MISS. L. J. 541, 542-543 (2021); Peter Ashford, *Is an Asymmetric Disputes Clause Valid and Enforceable?*, 86(3) INT'L J. OF ARB., MED. & DISPUTE MGMT. 347, 347-364 (2020).

27 D. Draguiev, *Unilateral Jurisdiction Clauses: The Case for Invalidity, Severability or Enforceability*, 31 J. OF INT. ARB. 19, 19-25 (2014); Lauren D. Miller, *Is the Unilateral Jurisdiction Clause No Longer an Option: Examining Courts' Justifications for Upholding or Invalidating Asymmetrical or Unilateral Jurisdiction Clauses*, 51 TEX. INT'L L. J. 321 (2016); *See* NB Three Shipping v. Harebell Shipping Ltd., 2004 EWHC 2001, ¶ 47.10; Debenture Trust Corp Plc v. Elektrim Finance BV, [2005] 1 All ER (Comm.) 476, ¶ 3; Wilson Taylor Asia Pacific Pte Ltd v. Dyna-Jet Pte Ltd., [2017] SGCA 32, ¶¶ 4 & 9.

agreement itself and the right to invoke arbitration.[28] Hence, the term '*asymmetrical clauses*'.[29]

B. Unilateral Appointments

On the other hand, in unilateral appointments, both parties can invoke arbitration under the arbitration agreement, but only one party has the right to nominate an arbitrator. For example, the arbitrator will be nominated by the investor.[30] This unilateral right of only one party to nominate and consequently appoint the sole arbitrator is called a '*unilateral appointment*'.[31] It is vital to note that neither the Model Law nor the Act bars unilateral appointments.[32]

The asymmetry in unilateral appointments is the lack of consent of both parties in the choice of arbitrator. In a certain sense, a unilateral appointment can be a subset of an asymmetrical clause only to the extent that it promotes an asymmetry between the parties resulting in the violation of

a cardinal principle of arbitration, i.e., equal treatment of parties.[33] Though equal treatment applies during the arbitration proceedings, it has been

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28 McLeod Russel, ¶¶ 43-45; *See,* Jane Willems, *The Arbitrator's Jurisdiction at Risk: The Case of Hybrid and Asymmetrical Arbitration Agreements, in* THE POWERS AND DUTIES OF AN ARBITRATOR: LIBER AMICORUM 410-416 (Patricia Louise Shaughnessy & Sherlin Tung eds., 2017).

29 *Supra* note 25; Ajar Rab, *Appointment of Sole Arbitrator: Can a Modified Asymmetrical Arbitration Clause Avoid Court Appointment?*, KLUWER ARBITRATION BLOG (Jan. 08, 2020), *available at* https://arbitrationblog.kluwerarbitration.com/2020/01/08/appointment-of-sole-arbitrator-can-a-modified-asymmetrical-arbitration-clause-avoid-court-appointment/.

30 McLeod Russel, ¶ 43.

31 Kanika Goel, *Appointment of a Sole Arbitrator: Analysis of Perkins Eastman*, 2(4) LEXFORTI L. J. 94 (2021).

32 Charles N. Brower & Charles B. Rosenberg, *The Death of the Two-Headed Nightingale: Why the Paulsson-van den Berg Presumption that Party-Appointed Arbitrators are Untrustworthy is Wrongheaded*, 29(1) ARB. INT'L 7, 7-44 (2013).

33 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. 18, as amended by G.A Res. 61/33, U.N. Doc. A/RES/61/33 (Dec. 18, 2006); The Arbitration and Conciliation Act, 1996, No. 26, Acts of Parliament, 1996, § 18 (India).

extended to procedural fairness during the constitution of the tribunal as well.[34] However, the extension of procedural fairness to issues before the first hearing of an arbitral tribunal ought to be governed by a regime similar to the *'freedom of contract'*, i.e., to respect the choice of parties unless there are compelling reasons otherwise.[35] For example, unequal bargaining power[36] or the contract is barred by law or opposed to public policy.[37] Thus, some common law jurisdictions such as England,[38] Singapore,[39] and the United States[40] continue to uphold unilateral appointments,[41] respecting the freedom of contract and the will of the parties.

On the other hand, in civil law countries, there is a clear distinction between an asymmetrical clause and unilateral appointments. For example, Section 1034 (2) of the German Code of Civil Procedure, 1877 states that "*If the arbitration agreement provides for one party to be more strongly represented in the composition of the arbitral tribunal, and this places the other party at a disadvantage, the latter may file a petition*….,"[42] and get an arbitrator appointed through the court. Similarly, Article 1028 (1) of the Dutch Code of Civil Procedure,

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34 Ilias Bantekas, *Equal Treatment of Parties in International Commercial Arbitration*, 69(4) INT'L & COMP. L. Q. 991, 991-1011 (2020).

35 ALAN REDFERN & MARTIN HUNTER, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 201 (4d. ed. 2004).

36 Pioneer Urban Land & Infrastructure Ltd. v. Geetu Gidwani Verma, (2019) 5 SCC 725, ¶ 6; Life Insurance Corporation. of India v. Consumer Educ. & Res. Ctr., (1995) 5 SCC 482, ¶ 47 (India); *See also,* Central Inland Transport Corporation Ltd. v. Brojo Nath, 1986 AIR 1571, ¶ 89.

37 Emmsons International Ltd. v. Metal Distributor (U.K.) & Ors., 2005 SCC OnLine Del 17, ¶ 15.

38 Pittalis v. Sherefettin, [1986] QB 868, at 889; Heyman v. Darwins Ltd., [1942] A.C. 356, at 370; NB Three Shipping v. Harebell Shipping Ltd., [2004] EWHC 2001 (Comm.), ¶ 11.

39 Wilson Taylor Asia Pacific Pte Ltd. v. Dyna-Jet Pte Ltd., [2017] SGCA 32, ¶¶ 23-24.

40 M.A. Mortenson Co. v. Saunders Concrete Co., Inc., 676 F.3d 1153, 1158 (8th Cir. 2012) (U.S.).

41 Udian Sharma, Independence and Impartiality of Arbitral Tribunals: Legality of Unilateral Appointments, 9(1) INDIAN J. ARB. L. 121 (2020).

42 ZIVILPROZESSORDNUNG [ZPO] [Code of Civil Procedure], § 1034(2) (Ger.).

2003 states, "*If by agreement or otherwise one party is given a privileged position with regard to appointment of the arbitrator or arbitrators*."[43]

In a similar vein, Article 15(2) of the Spanish Arbitration Act, 2003 provides a generic mandate that "*[T]the parties are able to freely agree on the procedure for the appointment of the arbitrators, provided there is no violation of the principle of equal treatment*."[44] Thus, what is contemplated by civil law jurisdictions is equal treatment or a privileged position resulting in one party controlling the entire arbitral process to the disadvantage of the other party. A unilateral right to appoint an arbitrator is, therefore, inherently unfair,[45] or fundamentally unequal,[46] as a person with interest in the outcome or decision of the dispute must not have the *sole* power to appoint the arbitrator.[47] This fairness requirement is the rationale for striking down unilateral appointments.

Thus, equality of the parties is part of transnational procedural public policy,[48] and to that extent, the Ineligibility Cases uphold the appropriate standard by disallowing unilateral appointments. Only one party having the right to nominate an arbitrator would invariably entitle one party to a certain advantage and also operate as a unilateral condition precedent,[49] making the clause unfair. For example, a department which had imposed liquidated damages on the contractor was to appoint the arbitrator unilaterally.[50] This advantage of one party is balanced in a three-member tribunal as both

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43 Art. 1028(1), RV [Code of Civil Procedure] (Neth.).

44 The Arbitration Act, 2003, No. 60/2003, art. 15(2) (Spain).

45 McLeod Russel, ¶ 3.

46 Cole Rabinowitz, *Fate of the UnilateralOption Clause Finally Dedded in Russia*, N.Y.U. J. INT'L L. POL. (Mar. 10, 2023), *available at* https://www.nyujilp.org/fate-of-the-unilateral-option-clause-finally-decided-in-russia/.

47 Shivani Khandekar & Divyansh Singh, *Independence and Impartiality of Arbitrators: Are We There Yet?*, KLUWER ARB. BLOG (Nov. 14, 2023), *available at* https://arbitrationblog.kluwerarbitration.com/2017/11/14/independence-impartiality-arbitrators-yet/.

48 *Supra* note 22, at 4.

49 Cour de cassation [Cass.] [supreme court for judicial matters] le civ., Sept. 26, 2012, Bull. civ. I, No. 983 (Fr.).

50 Bharat Sanchar Nigam Ltd. v. Motorola India Pvt. Ltd., (2009) 2 SCC 337 (India), ¶ 16.

parties have the right to nominate an arbitrator of their choice.[51] However, as is with most cases, the Ineligibility Cases have misapplied this rationale of equal treatment and extended it to a bilateral reference.

C. Bilateral Reference

A '*bilateral reference*' is where both parties have the right to mutually appoint a sole arbitrator.[52] The concerns over unequal treatment or the unilateral right of a party to appoint an arbitrator do not arise in the case of a bilateral reference. It must be clarified that the term '*bilateral reference*' is not used in international jurisprudence but is being used in this Article only to distinguish unilateral appointments. It is important to note that there is no asymmetry in a bilateral reference under the arbitration agreement or in the right to nominate an arbitrator. The asymmetry, if any, will arise in the procedure to be followed when mutually appointing the sole arbitrator.

D. Distinguishing Unilateral Appointments, Waiver and No Consensus

To appreciate the procedural asymmetry and to reconcile the Ineligibility Cases, it is necessary to take a hypothetical example. For instance, the claimant, Cars Co. wants to bring a claim against the respondent, a tyre manufacturing unit, Tyre Co. for providing defective tyres. Cars Co. sends a notice of arbitration to Tyre Co. and nominates Ms. Sharma as an arbitrator. The notice contains Ms. Sharma's (a) CV, (b) her consent, and (c) her declaration of independence and impartiality. Four different approaches are now available to the Tyre Co. (respondent) on the receipt of the arbitration notice:

(a) Give no reply to the arbitration notice within the contemplated 30 days provided under Section 11(4)(a) of the Act. ["**No Response**"]

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51 Wendy J. Miles, *Practical Issues for Appointment of Arbitrators Lawyer vs Non-Lawyer and Sole Arbitrator vs Panel of Three (or More)* 20(3) J. INT'L ARB. 219, 219-232 (2003).

52 Baron v. Sunderland Corporation [1965] 2 QB 56-66, at 64.

(b) Object to the nomination of Ms. Sharma without substantiating the reasons for the objection, i.e., an objection for objection's sake. ["**Objection Simpliciter**"]

(c) Nominate another arbitrator in place of Ms. Sharma.

(d) Raise objections to Ms. Sharma's candidature on qualifications, or lack of independence and impartiality.

*(c) and (d) are collectively referred to as ["**No Consensus**"].

From a consent perspective, there is no distinction between No Response, Objection Simpliciter, and No Consensus in each of the four scenarios as the fulcrum of arbitration, i.e., consent, is missing in all instances. Hence, the nomination of Ms. Sharma is unsustainable in law, and the court should step in to appoint a sole arbitrator as all these instances fall within the ambit of Section 11(6) of the Act. However, courts must distinguish instances of No Response and Objection Simpliciter from those of No Consensus based on the scheme of the Act and the Model Law.

E. The Power of Court Appointments

Section 11(1) of the Act gives the right to parties to appoint an arbitrator of their choice. Section 11(4)(a) of the Act provides that if there is an agreement between the parties as contemplated under Section 11(1) of the Act, and "*a party fails to appoint an arbitrator within thirty days from the receipt of a request to do so from the other party*," then the power of the court under Section 11(6) of the Act is triggered.

It is imperative to note that the language used in Section 11(4)(a) of the Act, casts a burden on the party in receipt of the arbitration notice to nominate an arbitrator. The burden is not on the claimant but on the respondent. Therefore, Section 11(4)(a) of the Act has to be read to mean "*if the respondent fails to appoint an arbitrator within 30 days from the receipt of a request to do so from the claimant*". However, in practice, the claimant usually proposes a name, i.e., Ms. Sharma, and the respondent can exercise one of the four

options mentioned above. Thus, the language of "*failure to act under that procedure*" in Section 11(6) of the Act refers to the procedure under Section 11(1). The respondent exploits the language of Section 11(4)(a), forcing the claimant to approach the court under Section 11(6) of the Act.

F. Incentivising Guerrilla Tactics

It is a given fact that once a dispute arises, parties seldom agree on anything, let alone the choice of arbitrator.[53] For this reason, an arbitration agreement is drafted in advance during commercial negotiations as parties are more likely to be agreeable with each other.[54] Moreover, there is a strategic advantage in delaying the appointment of an arbitrator if one party is the one being sued.[55] The claimant is forced to approach the court to appoint an arbitrator increasing the chances of a settlement since the court appointment would result in delay.[56] A court appointment may take six months to two years,[57] or sometimes even more. Therefore, the respondent in an arbitration hearing is tempted to derail the process of appointing the sole arbitrator,[58] to cause prejudice to the claimant.

In effect, despite having agreed to a procedure, the respondent who duly signed the arbitration agreement deliberately breaches the arbitration agreement to the detriment of the claimant, and the court approves of such conduct.[59] Not only does this approval violate fundamental notions of clean

53 Sarah Rudolph Cole, *Arbitrator Diversity: Can It Be Achieved?*, 98(3) WASH. UNIV. L. REV. 965 (2021).

54 AJAR RAB, DRAFTING OF CONTRACTS: BASIC PRINCIPLES ch. 9 (2022); Prashant S. Desai, *Arbitration Clause and International Contracts: An Analysis,* MANUPATRA (Mar. 03, 2022), *available at* https://articles.manupatra.com/article-details/Arbitration-Clause-and-International-Contracts-An-Analysis.

55 Lisa Bernstein, *Understanding the Limits of Court-Connected ADR: A Critique of Federal Court-Annexed Arbitration Programs*, 141(6) UNIV. PA. L. REV. 2169, 2169-2259 (1993).

56 *Supra* note 22, at 3

57 *Supra* note 22, at 3.

58 *Supra* note 55, at 2194.

59 Rent-A-Center, West, Inc. v. Jackson, 561 U.S. 63 (2010).

hands,[60] but it also runs afoul of the provisions for waiver and minimal court intervention provided under the Act.

On the contrary, there is a presumption that the arbitrator proposed by the claimant would be one whom the claimant could influence or likely to rule in favour of the claimant.[61] The *Ineligibility Cases* have further fueled this fear. However, parties and courts have lost sight of the system of checks and balances introduced by the 2015 Amendment.[62]

After the 2015 Amendment, the concerns of fairness, one party deriving advantage or independence and impartiality of a unilaterally appointed arbitrator have been duly addressed by an objective test of circumstances provided under the IBA Guidelines.[63] Therefore, to apply notions of unilateral appointments across the world in the Indian context is incorrect in view of the express legislative intent after the 2015 Amendment.

III. Current jurisprudence on Sole Arbitrator Appointments

Before the enactment of the 2015 Amendment, unilateral appointments were not only a norm but also sanctioned by courts.[64] The only exception was that a person controlling or dealing with the subject matter of the

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60 Caroline Le Moullec, *The Clean Hands Doctrine: A Tool for Accountability of Investor Conduct and Inadmissibility of Investment Claims*, 84(1) INT'L J. OF ARB., MEDIATION AND DISPUTE MGMT. 13, 13-37 (2018).

61 *Supra* note 25.

62 HRD Corporation (Marcus Oil and Chemical Division) v. GAIL (India) Ltd., (2018) 12 SCC 471, ¶ 14.

63 *Id.* at 63, ¶ 14; Voestalpine, ¶ 23.

64 Puneet Vyas, *Unilateral Appointment: Continued Dilemma Initiated by TRF* (June 18, 2019), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3486689; Executive Engineer, Irrigation Division, Puri v. Gangaram Chhapolia, [1984] 3 SCC 627, ¶ 9; Secretary to Government Transport Department, Madras v. Munusamy Mudaliar, [1988] (Supp) SCC 651; International Authority of India v. K.D. Bali and Anr, [1988] 2 SCC 360; S.Rajan v. State of Kerala, [1992] 3 SCC 608; M/s. Indian Drugs & Pharmaceuticals v. M/s. Indo-Swiss Synthetics Germ Manufacturing Co. Ltd., 1996 (1) SCC 54; Union of India v. M.P. Gupta, [2004] 10 SCC 504; Ace Pipeline Contract Pvt. Ltd. v. Bharat Petroleum Corporation Ltd., [2007] 5 SCC 304.

dispute could not be appointed as an arbitrator.[65] It was understood and accepted that the managing director of a public sector undertaking would have the unilateral right to nominate an arbitrator.[66]

Subsequently, the 246th Report of the Law Commission ["**Law Commission Report**"] addressed the delicate issue of party autonomy and the independence and impartiality of arbitrators.[67] The Law Commission Report observed that the right to natural justice could not be waived based on an arbitration agreement,[68] and the duty to appoint independent and impartial arbitrators was even more onerous on courts.[69] Thus, each party should have a right to (a) consent to the appointment of an arbitrator and (b) that the arbitrator should be independent and impartial ["**Twin Test**"].

To satisfy this Twin Test, India took the laudable step of statutorily incorporating the IBA Guidelines and introducing an exhaustive mechanism of checks and balances.[70] This led to the adoption of the Fifth, Sixth and Seventh Schedule. The Fifth Schedule adopted the Orange List of the IBA Guidelines mandating disclosures arising from the arbitrator's relationship with the parties, counsel, or subject matter of the dispute.[71] The Sixth Schedule specified the form for disclosure to be made by an arbitrator. The Seventh Schedule adopted the Red List of the IBA Guidelines incorporating a relationship-conflict provision,[72] which would lead to a de jure ineligibility of an arbitrator.[73]

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65 Indian Oil Corporation Ltd. v. Raja Transport (P) Ltd., [2009] 8 SCC 520, ¶ 34; *See* Denel Propreitory Ltd. v. Govt. of India, Ministry of Defence, AIR 2012 SC 817; Bipromasz Bipron Trading SA v. Bharat Electronics Ltd., [2012] 6 SCC 384.

66 TRF, ¶ 49.

67 Law Commission of India, Report on the Amendments to the Arbitration and Conciliation Act, 1996, No. 264/2014 (Aug. 2014).

68 *Supra* note 66, ¶ 57.

69 Voestalpine, at 681.

70 *Supra* note 41, at 125.

71 McLeod Russel, ¶ 32.

72 McLeod Russel, ¶ 32.

73 International Bar Association, *IBA Guidelines on Conflicts of Interest in International Arbitration* (October 23, 2014).

It is vital to note that, unlike the Red List of the IBA Guidelines, India adopted an approach similar to French Courts,[74] and provided the option to waive the ineligibility of an arbitrator in writing after the dispute has arisen.[75] The two requirements for such a waiver would be (a) an express consent in writing and (b) such consent is obtained after the dispute has arisen.[76] Thus, the 2015 Amendment gave a right to the parties to waive all relationship-based conflicts. Hence, any arbitrator appointment cannot be void ab initio since an agreement by the parties may cure it. However, the current jurisprudence based on the *Ineligibility Cases* considers such appointment void ab initio.[77] Therefore, it is necessary to first examine some of the landmark cases applicable to the issue of the appointment of a sole arbitrator.

A. The judgement in *TRF*

In brief, the arbitration agreement in *TRF* (which was entered into before the 2015 Amendment) provided that the sole arbitrator will be the managing director or his nominee. After the 2015 Amendment, the managing director or his nominee would fall in Entry 12 of the Seventh Schedule, which contemplates a situation where "*the arbitrator is a manager, director or part of the management or has a controlling influence in one of the parties*." Consequently, the Court rightly held the arbitrator to be ineligible as the independence and impartiality of such an arbitrator would be circumspect, and the arbitral proceedings would not be fair.

The Court duly noted the possibility of waiver and the priority to be accorded to the *'freedom of contract'* of the parties.[78] However, since the facts in *TRF* arose from a standard form contract of a public sector undertaking,

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74 Cour de cassation [Cass.] [supreme court for judicial matters] le. civ., Jan. 7, 1992, Bull. civ. I, No. 2 (Fr.)

75 The Arbitration and Conciliation Act, 1996, No. 26, Acts of Parliament, 1996, § 12(5) (India).

76 Bharat Broadband, ¶¶ 17 & 20.

77 McLeod Russel, ¶ 32.

78 TRF, ¶ 21.

and there was, in fact, no waiver by the parties, the Court terminated the arbitrator's mandate. It then addressed the second limb of the arbitration agreement, which permitted the managing director "*or his nominee*" to nominate an arbitrator. The Court did not permit the nominee of the managing director to be the arbitrator on the sound premise of the doctrine of agency, i.e., *qui facit per alium facit per se* (she who acts through another does the act herself).[79] Thus, permitting the nominee to be the arbitrator would indirectly compromise the independence and impartiality of the arbitrator.

At this point, it is critical to highlight that the judgement in *TRF* addressed the issue of appointment of an arbitrator being hit by the Seventh Schedule without an express waiver by parties. More importantly, it pertained to the question of the choice of arbitrator i.e., who can be the arbitrator as per eligibility requirement, not whether one can party unilaterally choose an arbitrator.

The three-judge bench in *TRF* clarified that:

> *"At the cost of repetition, we may state that when there are two parties, one may nominate an arbitrator and the other may appoint another. That is altogether a different situation. If there is a clause requiring the parties to nominate their respective arbitrator, their authority to nominate cannot be questioned. What really in that circumstance can be called in question is the procedural compliance and the eligibility of their arbitrator depending upon the norms provided under the Act and the Schedules appended thereto.*"[80]

Therefore, the Court in *TRF* was clear in making a distinction between the right of a party to nominate an arbitrator of choice and respecting the freedom of contract. The Court's role was limited to procedural compliance

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79 *See* Firm of Pratapchand Nopaji v. Firm of Kotrike Venkata Setty & Sons & Ors., (1975) 2 SCC 208, ¶¶ 8-9; *See also* Walter Ban AG, Legal Successor, of the Original Contractor, Dyckerhoff & Widmann A.G. v. Municipal Corp. of Greater Mumbai, (2015) 3 SCC 800, ¶¶ 9-10.

80 TRF, ¶ 50.

and checking the eligibility of the arbitrator under the Act. The caveat of the Court while pronouncing the judgement in *TRF* was clear, i.e., *"We are only concerned with the authority or power of the Managing Director."*[81] Thus, the Court was concerned with the "*twin capacity*" of the arbitrator.[82] The Court never contemplated striking down a unilateral appointment or appointing an arbitrator when there is No Response or an Objection Simpliciter.

B. The judgement in *Perkins*

Subsequently, a two-judge bench of the Supreme Court in *Perkins* affirmed the decision in *TRF*. In this case, the Chief Managing Director was to nominate an arbitrator.[83] Hence, the issue in *Perkins* was not whether an ineligible arbitrator or his nominee could be an arbitrator but whether a person ineligible to be appointed as an arbitrator could nominate another person. Therefore, in *Perkins*, the court distinguished two categories of cases.[84] One where the managing director is himself the arbitrator, along with additional power to appoint any other person. Second, where the Managing Director is not to act as the arbitrator but required to nominate an arbitrator. It is only the second category which may fall within the definition of a unilateral appointment. However, the entire discussion in *Perkins* revolves around the issue of nomination by an ineligible person and not the unilateral choice of one party while nominating the arbitrator.

The Court expressly cautions that it is only addressing "*all cases having clauses similar to that with which we are presently concerned*."[85] Therefore, while *TRF* applies to the first category of cases discussed in *Perkins*, the judgment in

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81 TRF, ¶ 54.

82 Worlds Window Infrastructure and Logistics Pvt. Ltd. v. Central Warehousing Corporation, [2018] SCC Online Del 1060; Kadimi International Pvt. Ltd. v. Emaar MGF Land Limited, [2019] (4) ArbLR 233 [*hereinafter* "Kadimi"]; Sriram Electrical Works v. Power Grid Corporation of India Ltd., [2019] SCC Online Del 977, ¶¶ 6-7 [*hereinafter* "Sriram Electrical"].

83 Perkins, ¶ 28.

84 Perkins, ¶ 20.

85 Perkins, ¶ 20.

Perkins applies to the second category. One may therefore argue that the judgement of *Perkins*, and not *TRF*, strikes down unilateral appointments.

C. The misapplication of *TRF* and *Perkins*

Both *TRF* and *Perkins* never directly addressed unilateral appointments of third parties[86] eligible under the Act. Yet, the judgements of *TRF* and *Perkins* are being applied to the effect that the Supreme Court took away the right to appoint sole arbitrators by one party to the arbitration agreement.[87]

The interpretation accorded to the *Ineligibility Cases* has been to render such appointments void ab initio, holding that an arbitrator was de jure unfit to exercise her functions as an arbitrator due to the ineligibility.[88] The courts have often not given due consideration to the express legislative intent permitting parties to waive the ineligibilities of arbitrators.[89]

More importantly, the *Ineligibility Cases* never directly addressed the issue of unilateral appointments. The focus of these cases was more on the ineligibility of the arbitrator, instead of the unilateral choice of one of the parties. Though one may argue that indirectly the effect is the same,[90] such reasoning goes beyond the express caveats given by the courts in *TRF* and *Perkins*.

It is also noteworthy that the courts unequivocally expressed that nomination by parties would only be scrutinised on procedure and eligibility under the Act.[91] Therefore, in principle, a party may unilaterally nominate an arbitrator as long as the arbitrator meets the requirements under the Act, i.e., the Seventh Schedule. Though the courts observed that a unilateral

86 *Supra* note 41, at 127.
87 Proddatur, ¶ 23; *Supra* note 22, at 4.
88 Bharat Broadband, ¶¶ 15-16.
89 McLeod Russel, ¶ 50.
90 *Supra* note 41, at 126.
91 TRF, ¶ 50.

right would be unfair,[92] it was not on the premise that a party would always have an interest in the dispute.[93] Instead, the courts specifically noted that a unilateral appointment would give the nominating party an advantage.[94] Unfortunately, the courts did not go beyond that observation and never examined the issue of a unilateral advantage post the introduction of the Seventh Schedule of the Act. Thus, the issue of an '*eligible arbitrator*' being appointed *unilaterally* by a party was left open for good reason.

D. No bar on Unilateral Appointments of an Eligible Arbitrator

The courts did not venture into unilateral appointments as courts did not need to strike down unilateral appointments after the 2015 Amendment. The advantage to a party, if any, is now subject to checks and balances under the Act. Thus, other courts have rightly distinguished the Ineligibility Cases and upheld unilateral appointments as long as the arbitrator appointed does not fall within the Seventh Schedule.[95] In DBM Geotechnics & Constructions Pvt. Ltd. v. Bharat Petroleum Corporation Ltd.,[96] the Bombay High Court not only upheld unilateral nomination by a party but also stated that an ineligible arbitrator "....is not stripped of all his nominating power. He must exercise that power in the manner that the law requires, i.e., by appointing an independent and neutral Arbitrator." Similarly referring to TRF, in Bhayana Builders Pvt. Ltd. v. Oriental Structural Engineers,[97] the court held that "The judgment of the Supreme Court, in my opinion, cannot be read to say that even if the parties agree that one of the parties to the Agreement shall appoint an Arbitrator, the

92 Zenith Fire Services (India) Private Limited v. Charmi Sales, 2013 SCC OnLine Bom 23, ¶ 16; Proddatur, ¶ 24.

93 As incorrectly interpreted in Proddatur, ¶ 23.

94 Perkins, ¶ 21; PSP Projects Limited v. Bhiwandi Nizampur City Municipal Corp., 2023 SCC OnLine Bom 230, ¶ 27.

95 Kadimi; Bhayana Builders, ¶ 32. D.K. Gupta v. Renu Munjal, 2017 SCC OnLine Del 12385, ¶ 8 [*hereinafter* "D.K. Gupta"]; Sriram Electrical, ¶ 9.

96 DBM Geotechnics & Constructions Pvt. Ltd. v. Bharat Petroleum Corporation Ltd, 2017 SCC OnLine Bom 2401, ¶ 21.

97 Bhayana Builders, ¶ 32.

said power has been taken away and such Agreement should be rendered void due to Section 12(5) of the Act."

Further, to create a balance between party autonomy and fairness, courts carved out exceptions to TRF and Perkins by supporting broad-based panel of arbitrators[98] offered by only one party.[99] In effect, courts have unequivocally given sanctity to unilateral appointments as long as an option to choose has been given to the other party. Thus, no bar under the Act exists that restrains a party from unilaterally appointing an arbitrator of its choice.[100] The only restriction is contained in the Seventh Schedule.[101] To say that the TRF and Perkins struck down unilateral appointments may be a misstatement, as such a power has not been ousted.[102] More importantly, whether a panel is permissible is also pending before a larger bench.[103] Therefore, TRF and Perkins cannot be interpreted to hold that unilateral appointments are invalid in India.

IV. Reconciling Party Autonomy, Waiver, and Court Intervention

Despite the express caution of the Supreme Court in *TRF* and *Perkins*, as per prevailing jurisprudence, the only option left to a party is to approach the court when there is a unilateral appointment,[104] or there is no consensus

98 Voestalpine, ¶ 30.

99 Central Organisation for Railways Electrification v. M/s. ECI-SPIC-SMO-MCML (JV), 2019 SCC OnLine SC 1635 (India), ¶ 27.

100 D.K. Gupta, ¶ 8; Kadimi, ¶ 20.

101 Bharat Broadband, ¶ 15; McLeod Russel India Limited v. Aditya Birla Finance Limited, A.P. No. 106 of 2020.

102 Amit George & Bharath Rayadurgam, *NPAC's Arbitration Review: Unilateral Appointment of a Sole Arbitrator: Exceptions to the Judgment in Perkins Eastman Architects DPC*, BAR AND BENCH (June 16, 2020), *available at* https://www.barandbench.com/columns/unilateral-appointment-of-a-sole-arbitrator-exceptions-to-the-judgment-in-perkins-eastman-architects-dpc.

103 Union of India v. Tantia Constructions Ltd., 2021 SCC OnLine SC 271.

104 Proddatur, ¶ 26; Bhartia Cutler Hammer Ltd. v. AVN Tubes Ltd., 1991 SCC OnLine Del 322, ¶ 5, *upheld by* the Division Bench in A.V.N. Tubes Ltd. v. Bhartia Cutler Hammer Ltd., 1992 SCC OnLine Del 81; SMS Ltd. v. Rail Vikas Nigam Ltd., 2020 SCC OnLine Del 77;

between the parties.[105] While one may accept the implication that a unilateral appointment would be unfair and contrary to public policy,[106] applying the *TRF* and *Perkins* ratio to instances of No Response or Objection Simpliciter goes against the express caveats of the Supreme Court.

The lines that "*a party to the agreement would be disentitled to make any appointment of an arbitrator on its own*",[107] must be read in the context of the initial scope of enquiry before the court and not in isolation. *TRF* and *Perkins* deal with the issue of nomination by a person who is ineligible to be an arbitrator herself.[108] The Court never even embarked on the enquiry, let alone hold that a party has no right to appoint an arbitrator when there is No Response or Objection Simpliciter. It must be emphasised here that such a nomination would not amount to a unilateral appointment but a bilateral reference. Both parties have the right to mutually decide the arbitrator, except that one party waives its right to reply or object to the nomination of the arbitrator without stating any reasons.

Such application of *TRF* and *Perkins* is not only ill-founded but also strikes at arbitration's core principles. A party will always have an interest in the dispute,[109] and one of the core foundations of party autonomy is to exercise the right to nominate an arbitrator of its choice, subject to the other side's consent.[110] Appointment of an arbitrator and illegality resulting from the lack of consent has no relation with the ineligibility of the arbitrator under

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BVSR-KVR (Joint Ventures) v. Rail Vikas Nigam Ltd., 2020 SCC OnLine Del 456; Assignia-VIL-JV v. Rail Vikas Nigam Ltd., 2016 SCC OnLine Del 2567.

105 *Supra* note 22, at 4.

106 Nishanth Vasanth & Rishabh Raheja, *Examining the Validiy of Unilateral Option Clauses in India: A Brief Overview*, KLUWER ARBITRATION BLOG (Oct. 20, 2017), *available at* http://arbitrationblog.luwerarbitration.com/2017/ 10/20/examining-validity-unilateral-option-clauses-ndia-briefoverview/?doing_wp_cron 1597326578.4179279804229736328125.

107 Perkins, ¶ 20.

108 Kadimi, ¶ 9.

109 Perkins, ¶ 20.

110 FAGBEMI, *supra* note 6.

law.[111] A distinction must be made between (a) a party cannot unilaterally appoint an arbitrator and (b) a party cannot appoint an arbitrator under any circumstances, i.e., the right of a party to nominate an arbitrator is extinguished after the 2015 Amendment.[112] To hold that a party cannot nominate an arbitrator[113] as per law is not only incorrect, but the effect is a default rule of court appointments in all cases ["**Default Rule**"]. The implementation of the *Default Rule* could never have been the intention of the legislature as the *Default Rule* will rob parties of the right to choose an arbitrator. Thus, courts ought to reconcile the *Ineligibility Cases* with Sections 4 and 5 of the Act.

A. Waiver

Section 4 of the Act is based on Article 4 of the Model Law and it states:

> "*4. Waiver of right to object.—A party who knows that—*
>
> *(a) any provision of this Part from which the parties may derogate, or*
>
> *(b) any requirement under the arbitration agreement,*
>
> *has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time-limit is provided for stating that objection, within that period of time, shall be deemed to have waived his right to so object.*"

Since the words of Article 4 of the Model Law have been adopted verbatim in Section 4 of the Act, the reference to Article 4 of the Model Law and Section 4 of the Act is made interchangeably in this part.

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111 Priknit Retails Ltd. v. Aneja Agencies 2013 SCC OnLine Del 534, ¶ 24(c) [*hereinafter* "Prinkit Retails"].

112 Kadimi, ¶ 10.

113 Proddatur, ¶ 28.

The Working Group's preliminary discussions do not contain any meaningful discussion on Article 4 of the Model Law.[114] Only at the Sixth Session was a draft article modelled on Article 30 of the United Nations Commission on International Trade Law Arbitration Rules, 1976 ["**UNCITRAL Arbitration Rules**"] introduced.[115] Unlike, Article 30 of the UNCITRAL Arbitration Rules, Article 4 introduces a time-limit test for an objection. Thus, two distinct tests are mentioned in Article 4 of the Model Law, i.e., (a) if a party proceeds without objection to non-compliance, or (b) if a party does not object within the time provided.

A brief look at the drafting history of Article 4 of the Model Law suggests that all nations were not in consonance with the interpretation and application of Article 4 to arbitration proceedings.[116] While Cyprus favoured a restricted application to non-mandatory provisions, India and Sweden believed that the waiver contemplated under Article 4 of the Model Law should not be restricted to only non-mandatory provisions.[117]

The broad consensus amongst working group members was that timelines should be left to party autonomy or the law applicable to the arbitral proceedings.[118]

However, the Working Group was adamant that non-compliance with provisions which a party knew should not be permitted to be a ground for

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114 Ilias Bantekas, *Waiver of Right to Object*, *in* UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION: A COMMENTARY 71 (Ilias Bantekas, Pietro Ortolani, Shahla Ali, Manuel A. Gomez & Michael Polkinghorne eds., 2020).

115 Redrafted Articles I–XII on Scope of Application, General Provisions, Arbitration Agreement and the Courts and Composition of Arbitral Tribunal, UN Doc. A/CN.9/WG.II/WP.45 (1983), reprinted in (1984) XV UNCITRAL YB 183, 185. Id., fn. 12, referring further to suggestions made in UN Doc. A/CN.9/233 (n. 5), ¶¶ 66, 188.

116 G.A. XVIII, U.N. Doc. A/5515, at 15.

117 Analytical Compilation of Comments by Governments and International Organizations on the Draft of a Model Law on International Commercial Arbitration, Report by the Secretary-General, UN Doc. A/CN.9/263 (19 March 1985), at 16.

118 *Supra* note 114, at 72.

setting aside the award or refusal at the stage of enforcement.[119] Therefore, fairness or equal treatment principles will not be violated if a party knowingly or negligently does not exercise a right within the time provided under the Act.

One can discern from the text of the Model Law and the Act as to which provisions were intended to be non-mandatory. For example, the mandate of Section 18 of the Act to treat parties equally and give an equal opportunity of hearing is non-derogable.[120] Such a derogation would be null and void.[121] On the other hand, requirements of time limits such as Section 13(2) of the Act would be non-mandatory provisions. If a party fails to challenge an arbitration within 15 days of becoming aware of a conflict, the party is precluded from challenging such an arbitrator.[122] A similar rationale should be applied to Section 11(4)(a) of the Act. Article 4 of the Model Law was also intended to cover requirements arising from the arbitration agreement,[123] and encompasses all those situations following the triggering of the arbitration clause.[124] This implies that a party is precluded from challenging the violation of a non-mandatory provision based on estoppel,[125] waiver (especially by conduct) and bad faith.[126]

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119 Composite Draft Text of a Model Law on International Commercial Arbitration: Some Comments and Suggestions for Consideration: Note by the Secretariat, UN Doc. A/CN.9/WG.II/WP.50 (1984), ¶ 11; *See also*, to the same effect, Rep. of the S.C., at 17, UN Doc. A/CN.9/264 (1985).

120 FAGBEMI, *supra* note 6.

121 FAGBEMI, *supra* note 6, at 223.

122 *Supra* note 114, at 72-73.

123 *Supra* note 114, at 72-73.

124 *Supra* note 114, at 73.

125 *See* LOUKAS A. MISTELIS, CONCISE INTERNATIONAL ARBITRATION 593 (2010).

126 *See* Rep. of the S.C., at 17, UN Doc. A/CN.9/264 (1985).

Waiver "*is the abandonment of a right, and thus is a defence against its subsequent enforcement*",[127] or conduct that extinguishes the claim.[128] Bad faith is based on equitable considerations of a party misleading the other party or deliberately breaching the arbitration agreement.[129] While the Model Law is silent on the precise nature of Article 4, it recognises that states may adopt Article 4 based on existing principles under domestic law or enact the waiver on an autonomous principle.[130] Like most other Model Law jurisdictions, the current text of Section 4 of the Act encompasses the autonomous version since it does not refer to domestic law principles. Under an autonomous interpretation, good faith, estoppel and knowledge are universally recognised.

i. Good Faith

Civil law jurisdictions recognise enforcement of contracts based on good faith i.e., *pacta sunt servanda.*[131] This good faith requirement has been extended to the arbitration agreement as well.[132] Even India has impliedly affirmed the good faith requirement after the amendment to the Specific

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127 JMC Projects (India) Ltd. v. Indure Private Limited, 2020 SCC OnLine Del 1950, ¶¶ 34-35; Kalparaj Dharamshri & Anr. v. Kotak Investment Advisor's Limited, (2021) 10 SCC 401; Mademsetty Satyanarayana v. G. Yelloji Rao, AIR 1965 SC 1405, ¶ 12; Dawson's Bank Ltd. v. Nippon Menkwa Kabushiki Kaisha, MANU/PR/0024/1935, ¶ 16. *See* CLOUT Case 1656, Assam Co. India Ltd v. Canoro Resources Ltd (2014) BCSC 370.

128 *See* International Standard Electric Corp. v. Bridas Sociedad Anonima Petrolera Industrial Y Comercial, 745 F. Supp. 172 (S.D.N.Y. 1990); Swiss Federal Supreme Court, Case Nos. 4A_348/2009 & 4A_69/2009; Spanish Supreme Court (TS) judgment in Union Générale de Cinéma SA v. XYZ Desarrollos SA, XXXII Y.B. COM. ARB. 525 (2007).

129 Amy J. Schmitz, *Confronting ADR Agreements' Contract/no-Contract Conundrum with Good Faith*, 56 DEPAUL L. REV. 55 (2006).

130 *Supra* note 114, at 76.

131 United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, 1489 U.N.T.S. 3, 19 I.L.M. 671, art. 7.

132 Simon Weber & Julie Martinez, *Good Faith in International Arbitration: Comparative Approaches in ICC Awards*, The ICC (2020) 2 ICC INT'L CT. ARB. BULL. 112, 112-122 (2020); Duarte G. Henriques, *The role of good faith in arbitration: are arbitrators and arbitral institutions bound to act in good faith?*, 33(3) ASA BULL. 514, 514-532, (2015).

Relief Act, 1963 in 2018.[133] Even other common law countries have recognised good faith as the '*organising principle'* of the common law.[134]

Universally, the principle of good faith is recognised by all procedural laws, general international law, soft law instruments, rules of arbitration institutes,[135] and the Vienna Convention on the Law of Treaties, 1969.[136] The International Court of Justice recognises good faith as a fundamental principle of legal obligations,[137] including procedural obligations.[138]

In this context, reference should be made to Article 11.1 of the ALI/UNIDROIT Principles of Transnational Civil Procedure, which provides that "*the parties and their lawyers must conduct themselves in good faith in dealing with the court and the other parties.*"[139] Similarly, Article 9(7) of the IBA Rules on the Taking of Evidence in International Arbitration grants the tribunal power to consider a party's failure to conduct itself in good faith.[140]

ii. Estoppel

The Supreme Court has repeatedly taken the view that a failure to object estops a party from objecting at the time of a setting aside application.[141] A

133 Ajar Rab, *Comparing Specific Performance Under The Specific Relief (Amendment) Act 2018 With The Cisg And The Unidroit Principles: The Problems Of The "Un-Common Law" In India*, 7 NLSIU Bus. L. Rev. 71, 71 - 98 (2021).

134 MSC Mediterranean Shipping Co. v. Cottonex Anstalt, [2015] EWHC 283, following the judgment of the Canadian Supreme Court in Bhasin v. Hrynew, 2014 SCC 71; *Supra* note 114, at 77.

135 *Supra* note 114, at 77.

136 Vienna Convention on the Law of Treaties, art. 31(1), May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 (1969

137 Nuclear Tests case (Australia v. France), (1974) ICJ REP. 253, 268

138 *Supra* note 114, at 77.

139 ALI/UNIDROIT Principles of Transnational Civil Procedure 2004, art. 11.1.

140 IBA Rules on the Taking of Evidence in International Arbitration, art. 9(7).

141 G. Engineers Pvt. Ltd v. Calcutta Improvement Trust, AIR 2002 SC 766, ¶ 9; *See also*, Narayan Prasad Lohia v. Nikunj Kumar Lohia, (2002) AIR 1139; BSNL v. Motorola India Pvt. Ltd., 2008 (7) SCC 431; SN Malhotra & Sons v. Airport Authority of India, 149 (2008) DLT 757 (DB).

failure to object is considered a tacit waiver,[142] or an unequivocal and conscious abandonment of rights of which it had full knowledge.[143] In *Bharat Broadband*, the Court made a distinction between waiver under Section 4 of the Act and waiver as contemplated under Section 12(5), stating that in the latter, the waiver has to be an "*express agreement in writing*".[144] The Court impliedly affirmed that the waiver in Section 4 of the Act could be implied based on conduct.

iii. Knowledge

To establish a waiver, some degree of knowledge is required. In the Seventh Session of the Working Group, the phrase "*ought to have known*" was proposed to be included but was eventually left out to uphold the standard of actual knowledge and not deemed knowledge.[145] However, negligence-based standards should not be ruled out.[146] For example, challenges to jurisdiction should be made at the first instance, i.e., without undue delay under Articles 8 or 16 of the Model Law.

Therefore, if the respondent fails to act in accordance with the arbitration agreement and there is No Response or an Objection Simpliciter, a party ought to be precluded from challenging the nomination of an arbitrator by the claimant. The ineligibility of an arbitrator under the Seventh Schedule ought to be raised in response to the nomination of an arbitrator unless the challenging party becomes aware of the conflict only after the arbitrator's

142 See CLOUT Case 1158, decided by the Zaragoza Provincial High Court (section 5), which discusses a tacit waiver.

143 Telestat Canada v. Juch-Tech, 2012 ONSC 2785 (Can.).

144 Bharat Broadband, ¶ 15; Ellora Paper Mills Ltd. v. State of Madhya Pradesh, (2022) 3 SCC 1, ¶ 19; *See* Jaipur Zila Dugdh Utpadak Sahkari Sangh Ltd. v. Ajay Sales & Supplies, (2021) 17 SCC 248; JMC Projects (India) Ltd. v. Indure Private Limited, (2020) SCC OnLine Del 1950; BW Businessworld Media Pvt. Ltd. v. Indian Railway Catering and Tourism Corporation Limited, 2022 SCC OnLine Del 226.

145 *Supra* note 114, at 80.

146 *Supra* note 114, at 80; *See*, Carpatsky Petroleum Corp. (Carpatsky II) case, decided by the Svea Court of Appeals, RH 2013:30.

appointment.[147] The court must evaluate the conduct of a party in a fair and appropriate manner.[148] Thus, the reference to 'time-limits' under Section 4 of the Act should be applied to Section 11(4)(a) to amount to a waiver.[149] Courts should refrain from intervening in cases of a waiver, unless contemplated under Section 5 of the Act.

B. Minimal Court Intervention

Jan Paulsson,[150] states that "the original concept that legitimates arbitration is that of an arbitrator in whom both parties have confidence". One way to ensure confidence in the arbitrator is to provide a transparent regime of checks and balances. As previously stated, these checks and balances were statutorily incorporated after the 2015 Amendment. A party is given several chances throughout the arbitral process to raise objections on any unfair advantage, relationship-based conflict, or violation of procedure. In brief, the respondent may:

1. Oppose the person nominated by a party in the arbitration notice and raise grounds of ineligibility under the Seventh Schedule.

2. Challenge the arbitrator under Section 13(2) of the Act during the proceedings at any time for ineligibility or subsequent knowledge of conflict post-disclosure by the arbitrator.[151]

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147 Atlantic Industries Ltd v. SNC-Lavalin Constructors (Pacific) Ltd., (2017) BCSC 1263, ¶ 23.

148 See Klaus Peter Berger and Thomas Arntz, *Good Faith as a General Organizing Principle of Common Law*, 32 ARB. INTL 167, 168 (2016).

149 Cour de Cassation [Cass.] [supreme court for judicial matters], Jan. 26, 2016, No. 15-12.363, Fibre Excellence v. Tembec SAS, the French Supreme Court dismissed an application to set aside an award rendered by a truncated tribunal because the claimant had failed to submit within the eight-day time frame imposed by the ICC Arbitration Rules its comments regarding the continuation of the proceedings without one of the arbitrators.

150 Jan Paulsson, *Moral Hazard in International Dispute Resolution*, 25(2) ICSID REV. – FOREIGN INV. L.J. 339, 339-355 (2010).

151 The Arbitration and Conciliation Act, 1996, No. 26, Acts of Parliament, 1996, § 12(3)(a) (India); *Supra* note 41, p. 124.

3. Seek termination of the mandate of the arbitrator under Section 14 of the Act for de jure or de facto ineligibility.[152]

4. Seek setting aside of the award for procedural violations under Section 34(2)(iii) or 34(2)(v) of the Act.[153]

5. Resist enforcement for violation of public policy, especially on the grounds of corruption or fraud.[154]

i. Fairness & Advantage

The first objection usually raised when considering unilateral appointments is fairness, and the second is an advantage. In No Objection or Objection Simpliciter cases, the fairness requirement cannot be complained of since a party chooses No Response or Objection Simpliciter after signing the arbitration agreement. Thus, a party ought to be estopped from claiming otherwise once it makes a deliberate or negligent choice after receipt of the arbitration notice.

Therefore, the first prong of the Twin Test contemplated by the Law Commission Report for adherence with natural justice ought to be read in light of Section 4 of the Act. A respondent cannot be permitted to deliberately derail the procedure agreed upon under Section 11(1) of the Act when by conduct, the respondent has chosen not to respond to the arbitration notice. Similarly, an objection only for objection's sake is a frivolous and unjust objection.[155] No Response or Objection Simpliciter cannot be held to be violative of the fairness test. If the respondent voluntarily or negligently permits the appointment of an arbitrator by the

152 *Supra* note 41, at 124.

153 The Arbitration and Conciliation Act, 1996, No. 26, Acts of Parliament, 1996, § 34 (India).

154 Vijay Karia vs Prysmian Cavi E Sistemi Srl, (2020) SCC Online SC 177, ¶ 59.

155 Urban Improvement Trust, Bikaner v. Mohan Lal, (2010) 1 SCC 512, ¶¶ 5- 6; Union of India v. Pushkar Paints, 2023 SCC OnLine Del 685, ¶ 30; Trimax IT Infrastructure and Services Ltd v. Delhi Transport Corporation, 2021 SCC OnLine Del 3830; TK Aggarwal v. Tara Chand, 2005 81 DRJ 567; Hindustan Construction Corporation. Ltd. v. Delhi Development Authority, 2006 (87) 191; Nav Nirman Engineering v. Vivekanand Mahila College, 2009 SCC OnLine Del 999.

claimant, the law cannot rescue such a recalcitrant party.[156] It is incumbent on the respondent to respond under the duty of good faith to perform under the arbitration agreement.[157]

The correct approach, in line with Section 5 of the Act, is that a court should terminate an arbitrator's appointment only when the arbitrator's appointment is hit by the Seventh Schedule and not otherwise.[158] Reading *TRF*, *Perkins*, *Central Organisation for Railway Electrification* v. *ECI-SPIC-SMO-MCML(JV)* ["**Central Organisation**"], and *Voestalpine Schienen GmBH* v. *Delhi Metro Rail Corporation* ["**Voestalpine**"] together leads to an inevitable conclusion that as long as the party has the option to counterbalance any advantage that a party derives from nominating an arbitrator, courts should not intervene.[159] Arbitrators derive their powers from private contract law, and freedom of contract should not be lightly interfered with as it is part of public policy.[160] Thus, if the clause is fair as per substantive contract law, the courts should not strike it down and substitute their own view.[161]

Most arbitration statutes do not contain a qualification requirement for arbitrators to promote party autonomy and give parties the flexibility to appoint an arbitrator who they believe is best suited to decide their dispute.

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156 D.K. Gupta, ¶ 12; Lite Bite Foods Pvt. Ltd. v. Airports Authority of India, 2019 SCC OnLine Bom 5163, ¶ 21.

157 Indranil Deshmukh & Samhita Mehra, *Good Faith Negotiations and Mediation: A Missed Opportunity So Far*, CYRIL AMARCHAND MANGALDAS (Nov. 28, 2019), *available at* https://corporate.cyrilamarchandblogs.com/2019/11/good-faith-negotiations-mediation-missed-opportunity-so-far/#_ftn11; Duarte G. Henriques, *The role of good faith in arbitration: are arbitrators and arbitral institutions bound to act in good faith?*, 33(3) ASA BULL. 514, 514-532 (2015).

158 Divyendu Bose v. South Eastern Railway, A.P. No. 1075 of 2017 [this case also mentions Fifth Schedule along with Seventh Schedule]; C P Rama Rao v. National Highways Authority of India, ARB. P. 345/2017, ¶ 11.

159 TRF, ¶ 50; Perkins, ¶ 20; Central Organisation for Railways, ¶ 19; Voestalpine, ¶ 26.

160 DAVID ST. JOHN SUTTON, JUDITH GILL QC & MATTHEW GEARING QC, RUSSELL ON ARBITRATION 104 (20d ed. 1982).

161 Union of India and Others v. Uttar Pradesh State Bridge Corporation Limited, (2015) 2 SCC 52, ¶ 13.

The only exception to party autonomy is the consideration of public policy, i.e., arbitrators' independence and impartiality and, consequently, eligibility.

ii. Independence and Impartiality

The second prong of the Twin Test requires that the arbitrator appointed be independent and impartial. The presumption that an arbitrator nominated by the claimant would favour the claimant,[162] or be biased has duly been addressed with the statutory incorporation of the IBA Guidelines. Any concerns about the presumed bias of an arbitrator nominated by the claimant will be tested by courts and parties against an objective standard of independence and impartiality provided under the Seventh Schedule. Thus, the respondent must raise any alleged ineligibility of a nominated arbitrator in response to the arbitration notice. When there is an opportunity to object, but a party does not object, the nomination ought to be confirmed. The party must be deemed to have waived all such objections,[163] except those arising in law, i.e. unless the arbitrator nominated is ineligible and the parties have not waived the ineligibility.

Even if there is No Response, nothing prevents the respondent from appearing before the arbitrator and raising a challenge as contemplated in Section 13(2) of the Act raising the ineligibility. Any reasonable arbitrator would withdraw for the sake of their reputation,[164] and the award would in all likelihood, be set aside under Section 34 of the Act.

If the arbitrator does not withdraw, the challenging party can seek termination of the arbitrator's mandate under Section 14 of the Act. Unfortunately, the courts have exercised power under Section 11(6) read

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162 *Supra* note 41, at 125.

163 Quippo Construction Equipment Limited v. Janardan Nirman Private Limited, (2020) 18 SCC 277, ¶ 24.

164 *Supra* note 33; Ajar Rab, *Immunity of Arbitrators: time for the Model Law to take a stand*, INT. ARB. L. R. 31.

with Section 14 of the Act even though the court's jurisdiction under Section 11 is very distinct from that provided under Section 14 of the Act.

iii. Termination of the Arbitrator's Mandate

Exercising power under Section 11(6) of the Act in instances of No Response or Objection Simpliciter amounts to, in a certain sense, the substitution of party autonomy with judicial discretion. Such substitution goes beyond the scope of minimum court intervention.[165] It effectively means that a nomination in a bilateral reference is always subject to court confirmation under Section 11(6) of the Act, which goes against the objective of introducing Article 5 of the Model Law. One of the circumstances that necessitated the introduction of Article 5 of the Model Law was restraining court confirmations of party-nominated arbitrators.[166] Therefore, the exercise of the power under Section 11(6) of the Act goes against the mandate of Section 5 of the Act.

The report of the 18th Session of the United Nations General Assembly specifically notes the objection of the Soviet Union that a court is not necessarily the most appropriate organ to appoint an arbitrator as compared to a chamber of commerce. Moreover, judicial procedure is not the most appropriate for appointing an arbitrator.[167]

Nonetheless, the courts have incorrectly exercised their power under Section 14 of the Act to terminate an arbitrator's mandate and substitute another arbitrator.[168] First and foremost, the court does not have the power under Section 11 of the Act to terminate the mandate of an arbitrator, even if it is a unilateral appointment. The appropriate remedy is to seek termination of the mandate under Section 14(1)(a) of the Act on the ground

165 *Supra* note 22, at 4.
166 Gerold Herrmann, The UNCITRAL Model Law -its background, salient features and purposes, at 15.
167 G.A. XVIII, U.N. Doc. A/5515, 3rd Committee: 1252nd meeting, Nov. 04, 1963.
168 Bharat Broadband, ¶ 17.

that the arbitrator is de jure or de facto unable to perform her functions.[169] More importantly, this application is to be made to the supervising court under Section 2(1)(e) of the Act, not the court under Section 11 of the Act.[170] The High Court and the Supreme Court have only been granted administrative jurisdiction under Section 11 of the Act,[171] limited to examining the prima facie validity of the arbitration agreement.[172] Granting the court under Section 2(1)(e) of the Act the power of termination or substitution, but reserving the power of appointment only to the High Court and Supreme Court is another bottleneck in arbitration proceedings in India but beyond the scope of this Article.

The other remedy is challenging the award under Section 34 of the Act.[173] Therefore, the court is bound by the express wordings of the Act, which prescribes the scheme for interference.[174] Section 14 of the Act contemplates termination of the mandate when an arbitrator is incapable of performing her work or the mandate assigned to the arbitrator cannot otherwise be completed, i.e., a de jure ineligibility.[175] Therefore, only in such cases can a substitute arbitrator be appointed when exercising the power under Sections 14 and 15 of the Act.[176] Once a tribunal has entered reference, constituting another tribunal would be without jurisdiction.[177]

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169 Swadesh Kumar Agarwal v. Dinesh Kumar Agarwal, (2022) 10 SCC 235, ¶ 21, [*hereinafter* "Swadesh Agarwal"].

170 *Id.* at 170.

171 The Arbitration and Conciliation Act, 1996, No. 26, Acts of Parliament, 1996, § 2(1)(e) (India); Konkan Railway Corporation Ltd. v. Rani Constr. Pvt. Ltd., (2002) 2 SCC 388, ¶¶ 22-23.

172 Vidya Drolia v. Durga Trading Corporation, AIR (2019) SC 3498.

173 State of Arunachal Pradesh v. Subhash Projects & Mktg. Ltd. & Anr., 2006 SCC OnLine Gan 57, ¶ 32.

174 Prinkit Retails, ¶ 24(c).

175 HRD Corporation (Marcus Oil and Chemical Division) v. GAIL (India) Ltd., (2018) 12 SCC 471, ¶ 12, [*hereinafter* "HRD Corporation"].

176 Prinkit Retails, ¶ 26.

177 Mrs. Subha Gopalakrishnan v. M/s. Karismaa Founds. Pvt. Ltd. & Ors., O.P. No. 711 of 2017 (India); *See* Antrix Corp. Ltd. v. Devas Multimedia Pvt. Ltd., (2014) 11 SCC 560 (India); *See* also Som Datt Builders Pvt. Ltd. v. State of Punjab & Ors., 2005 SCC OnLine P&H 891 (India).

Thus, the appropriate remedy to challenge the arbitrator is already contained in the statutory scheme[178] under Sections 12, 13, 14 and 15 of the Act and recourse to Section 11 is neither warranted nor contemplated under Section 5 of the Act.[179]

iv. Excessive Court Intervention

However, courts have exercised power under Section 11(6) of the Act to "*meet the ends of justice*" if the appointment procedure provided in the arbitration agreement is likely to result in a "*stalemate*" or the interests of justice require that courts should not follow the arbitration procedure provided in the arbitration agreement.[180] Unfortunately, the "*ends of justice*" have resulted in a substitution of the will of the parties. Considerations of expert adjudication or technical qualifications have also been ignored to favour the Limited Pool of arbitrators.[181]

Courts, in their zeal to appoint arbitrators from the Limited Pool, often create jurisdictional errors in complete subversion of the mandate of minimal court intervention enshrined in Section 5 of the Act. The High-Level Committee set up in 2017 to review the institutionalisation of arbitration categorically noted the excessive intervention by courts after the 2015 Amendment.[182] The Law Commission noted that courts must respect party autonomy, and even in cases of an arbitration falling within the

178 HRD Corporation, ¶ 10.

179 Swadesh Agarwal, *supra* note 169.

180 Siddhi Real Estate Developers v. Metro Cash & Carry India Pvt. Ltd. & Anr., 2014 SCC OnLine Bom 623 (India), ¶ 8.

181 Tramboo Joinery Mills Pvt. Ltd. v. Comm'r/Sec'y to Government & Ors., 2014 SCC OnLine J&K 55, ¶ 19; Panihati Rubber Ltd. v. Principal Chief Engineer Northeast Frontier Railway, 2016 SCC OnLine Gau 69, ¶¶ 9, 13.

182 *Supra note* 12, at 20; Mridul Godha & Kartikey M., *The New-Found Emphasis on Institutional Arbitration in India*, KLUWER ARBITRATION BLOG (Jan. 07, 2018), *available at* http://arbitrationblog.kluwerarbitration.com/2018/01/07/uncitral-technical-notes-online-disputeresolution-paper-tiger-game-changer/?doing-wp-cron-1597346999.8069019317626953125000.

Seventh Schedule, parties should be allowed to waive the ineligibility.[183] Therefore, the judicial overreach to usurp jurisdiction and appoint arbitrators is contrary to the goal of minimum intervention and completely disregards party autonomy,[184] especially in No Response and Objection Simpliciter cases. Even under the Arbitration Council of India proposed by the High-Level Committee, arbitrators will be appointed based on Section 11 read with the Fifth and Seventh Schedules of the Act. Therefore, as long as the nomination by one party meets these fundamental checks provided under the Act,[185] the court should not intervene.

V. A New Standard

In 'No Response' and 'Objection Simpliciter' cases, the courts must be guided by fairness and equitable treatment principles. A recalcitrant party should not be permitted to benefit from guerrilla tactics causing delay and prejudice to the claimant.

In this context, the power of default appointments is recognised under the English Arbitration Act, 1996 ["**EAA**"][186]. Section 17 of the EAA provides:

> *"17. Power in case of default to appoint sole arbitrator.*
>
> *(1) Unless the parties otherwise agree, where each of two parties to an arbitration agreement is to appoint an arbitrator and one party ("the party in default") refuses to do so, or fails to do so within the time specified, the other party, having duly appointed his arbitrator, may give notice in writing to the party in default that he proposes to appoint his arbitrator to act as sole arbitrator.*
>
> *(2) If the party in default does not within 7 clear days of that notice being given—*

183 Law Commission of India, Report on the Amendments to the Arbitration and Conciliation Act, 1996, No. 264/2014, at 60 (Aug. 2014).

184 *Supra* note 41, at 128.

185 Larson & Turbo Ltd. v. PWD, ARB. P. No. 529 of 2018 & I.A. Nos. 9704, 9723 of 2018, O.M.P. (T) (COMM.). No. 58 of 2018, ¶¶ 23, 25.

186 It should be noted that the English Arbitration Act is not based on the Model Law.

(a)make the required appointment, and

(b) notify the other party that he has done so,

the other party may appoint his arbitrator as sole arbitrator whose award shall be binding on both parties as if he had been so appointed by agreement.

(3) Where a sole arbitrator has been appointed under subsection (2), the party in default may (upon notice to the appointing party) apply to the court which may set aside the appointment."

Even though Section 17 of the EAA deals with appointments in a three-member tribunal, it lays down an express road map for court intervention which can serve as guiding criteria for court intervention in India. Firstly, Section 17 of the EAA distinguishes instances of No Consensus from those of No Objection and Objection Simpliciter. The phrase "*refuses to do so*" would clearly include instances of an Objection Simpliciter where the party objecting to the nomination of an arbitrator is simply refusing to appoint the arbitrator. Similarly, the phrase "*or fails to do so within the time specified*" recognised the waiver of a right by the party who gives No Response to nomination by the claimant. Section 17 of the EAA goes a step further to recognise the nomination as a duly appointed arbitrator after waiver.

Further, Section 17(3) of the EAA provides recourse to a party to have the appointment set aside by a court. Therefore, the logic of Section 17 of the EAA is clear. First, the parties should appoint an arbitrator as per the arbitration agreement. If one party refuses to appoint or does not do so within the prescribed time, the other party may appoint an arbitrator. The court will then determine if an arbitrator's appointment should be set aside if an application is made.

The priority of party autonomy is unequivocal in Section 17 of the EAA. Similarly, the delicate line between respecting party autonomy and court intervention on account of public policy concerns is also clearly provided. In India, the public policy requirement of independence and impartiality is

now statutorily provided under the Seventh Schedule. Hence, there is no requirement for a provision similar to Section 17(3) of the EAA. As mentioned above, there are various checks and balances under the Act, and a party has several remedies to challenge an appointment, including a request to terminate the arbitrator's mandate.

Thus, to give full effect to the mandate of *'minimal court intervention*', recognise the priority of jurisdiction of the arbitral tribunal, and at the same time maintain the public policy, the courts should adopt a similar standard for court intervention. A possible criterion may be:

The court must first resort to the procedure provided in the arbitration agreement.[187]

If the parties willingly conferred the right only on one party to appoint an arbitrator, the appointment should be upheld as long as the arbitrator nominated does not fall within the Seventh Schedule.[188]

1. If a party does not respond to the nomination of an arbitrator within 30 days or raises an objection without reason, the court should not interfere in the nomination by one party as long as the arbitrator nominated does not fall within the Seventh Schedule.

2. It is only in cases of a 'stalemate' or No Consensus between the parties that the court should exercise power under Section 11(6) of the Act.

3. If an ineligible arbitrator is appointed, remedies, as contained under Sections 13, 14 and 15 of the Act, should be resorted to by the challenging party.

Court appointments should be made when there is No Consensus. Even in such cases, the court must focus on the qualification of the arbitrator to be appointed[189] and their expertise in arbitration as well the subject matter of

[187] Union of India v. Parmar Construction, 2019 SCC OnLine SC 442, ¶ 41.
[188] Kadimi, ¶ 20.
[189] Northern Railway. Admin. v. Patel Engineering Co. Ltd., (2008) 10 SCC 240, ¶ 12.

the dispute. The presumption that the Limited Pool[190] is best suited for arbitration is misplaced and defeats the goal of expert adjudication in arbitration.[191]

VI. Conclusion

Arbitration in India has always been subject to criticism for excessive court intervention in arbitration.[192] While majority of the criticism has come on account of the slow enforcement and the aspect of courts re-examining merits at the stage of setting aside, not much attention has been paid to excessive court intervention in arbitrator appointments. Though it can be argued that the Model Law does not clarify the exact restraint to be exercised by courts when appointing arbitrators, a more careful look at the drafting history of Article 4 and 5 of the Model Law suggests otherwise.

Article 5 of the Model Law was inserted to ensure that the appointment by parties is not subject to confirmation by the court. The Model Law provided an entire mechanism for parties to challenge the arbitrator and have the arbitrator's mandate terminated if a challenged arbitrator refuses to withdraw. Therefore, court intervention was intended to be the last resort, not the first. However, the current jurisprudence in India indirectly leads to court confirmation of sole arbitrators.

Courts have often blurred the lines between asymmetrical clauses, unilateral appointments and the rights of parties to a bilateral reference. This has led to an incorrect interpretation that a party should not be allowed to nominate an arbitrator since it will always have an interest in the outcome of the dispute. Neither was such an interpretation intended by the Ineligibility

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190 Bhumika Indulia, *In India, the Arbitration movement has to grow, and people must have faith to participate in this movement, Former CJI NV Ramana*, LIVELAW (Feb. 16, 2023) *available at* https://www.scconline.com/blog/post/2023/02/16/arbitration-movement-has-to-grow-and-people-must-have-faith-to-participate-in-this-movement-former-cji-nv-ramana

191 Benoit Le Bars, *Recent Developments in International Energy Dispute Arbitration,* 32(5) J. INT'L ARB. 543, 543-549 (2015).

192 Gourab Banerji, *Judicial Intervention in Arbitral Awards: A Practitioner's Thoughts*, 21(2) NAT'L L. SCH. INDIA REV. 39, 39-53 (2009).

Cases, nor could the courts have intended for such an application as it would mean the death of party autonomy and expert adjudication in arbitration. The *Ineligibility Cases* were only concerned with ineligible arbitrators and their right of nomination. The courts never ventured into any analysis of unilateral appointments of eligible arbitrators. A critical look at the current jurisprudence, therefore, suggests that unilateral appointments are not invalid under Indian law after the 2015 Amendment.

Thus, courts need to distinguish between '*ineligible arbitrators*' and 'elgibile arbitrators'. As long as an arbitrator nominated by a party is eligible under the Seventh Schedule of the Act, the appointment (unilateral or otherwise) should be deemed to be confirmed, unless there is No Consensus. The unintended effect of the *Ineligibility Cases* has been to challenge every sole arbitrator appointment, even though the arbitrator is not per se ineligible under the Act. This unnecessary challenge has led to excessive court intervention and derailed the efficiency of the arbitral process. Courts have not paid enough attention to the objective test of conflict of interest based on the IBA guidelines and the statutory scheme for challenge of an ineligible arbitrator introduced by the 2015 Amendment.

Thus, courts should reconcile the mandate of minimal court intervention in Section 5 of the Act, with waiver under Section 4 of the Act and distinguish cases on No Objection and Objection Simplicter from those of No Consensus. A better standard to apply would be one similar to Section 17 of the EAA. Courts should refrain from substituting arbitrators from the Limited Pool based on an incorrect reading of Section 11(6) and 14 of the Act when there has been neglect or refusal to appoint a party, as long as the arbitrator appointed by the other party is not ineligible under the Seventh Schedule. Unless the courts reconcile Section 11, with Sections 4 and 5 of the Act, arbitrators from the *Limited Pool* will continue to make arbitration an 'exclusive club' at the cost of party autonomy and expert adjudication.

THE EFFICIENCY APEX: RETHINKING THE APPROACH TO PROCEDURE IN INTERNATIONAL COMMERCIAL ARBITRATION

Tim Robbins[*]

Abstract

Despite decades of debate addressing efficiency of arbitral proceedings and continuous efforts at procedural innovation, time and costs continue to be a major concern of users of international arbitration. In this paper, the author explores what are the objectives of an arbitration, with a view to formulating a procedural threshold to achieve those objectives in the most efficient way (the "Efficiency Apex"). The paper finishes by proposing a synthesised framework for the implementation of the Efficiency Apex, with a focus on bespoke case management and a reversal of standard procedural presumptions at the outset of an arbitration.

I. Introduction

Efficiency is a long-standing topic of both interest and concern in international arbitration. For decades, the arbitral community has debated the consequences of the increasing time, costs, complexity of arbitration, and of possible solutions. In the context of these discussions, efforts have been made to address efficiency through a variety of ways, whether by the introduction of various procedural tools, the wide-spread adoption of expedited procedures, or the publication of guidelines on procedural efficiency. Some changes have been used to greater effect than others; yet none have provided a sufficiently comprehensive solution so as to satisfy

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ongoing efficiency concerns. Efficiency of the proceedings, in particular, the costs involved, remain a top concern for users of arbitration.[1]

As lawyers, it is embedded in our education and training that the proceedings should be as fulsome and thorough as possible – with each issue explored to its fullest extent, all avenues of argument presented and supported by any and all available factual and legal authorities. The default approach adopted at the outset of most arbitration proceedings is a standard procedural order accompanied by a comprehensive procedural timetable, providing the parties with free range for several rounds of submissions, a discovery process, witness statements, expert reports (where relevant), and a full evidentiary hearing. While there may be some variations as between matters of different sizes and complexities, invariably, the vast majority of arbitrations adopt what has become a relatively standard set of procedures.

The aim of this article is to propose that, if true and meaningful progress is to be achieved with regard to efficiency, we need to fundamentally change our default approach to adopting standard procedures at the outset of the arbitration. The focus should be to adopt a procedure which includes only those steps that are necessary to achieve the objectives of the arbitration proceedings. Anything beyond that is, arguably, unnecessary and contributes to the inefficiency of the proceedings. The primary motivator underlying commercial arbitration is, after all, to pursue commercial interests and, while other interests may be at play, money is the ultimate motivating factor. Arbitration proceedings which expend time and costs

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1 *See* White & Case and Queen Mary University of London, *2018 International Arbitration Survey: The Evolution of International Arbitration*, at 8, chart 4, *available at* https://arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey---The-Evolution-of-International-Arbitration-(2).PDF. The cost of arbitration was listed as the "worst" characteristic of international arbitration, with 67% of respondents listing cost as one of their "three worst characteristics of international arbitration." *See also*, the discussion of the recent demand for efficiency in arbitration in Loukas Mistelis, *Efficiency. What Else? Efficiency as the emerging defining value of international: Between Systems Theories and Party Autonomy*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL ARBITRATION 349-376 (Thomas Schultz and Ortino Federico eds., 2020).

beyond what is necessary to achieve the objectives of the arbitration are therefore, to a certain extent, undermining the very purpose of the arbitration.

Unnecessary procedural elements – any elements for which the work undertaken is unnecessary to achieve the objectives of the arbitration – operate to siphon money from the parties and shift it to others involved in the dispute resolution process, including counsel, arbitrators, and experts. While it is clear that such costs cannot be avoided completely, as they are a necessary part of the procedure, it is often the case that the costs incurred go well beyond what is necessary.

In the 2021 Queen Mary – White & Case International Arbitration Survey, respondents were asked (from the position of party or counsel) which procedural steps they would be willing to do without, if it would make an arbitration faster or cheaper.[2] A majority of respondents were willing to place limits on the length of submissions, and large numbers were willing to forgo oral hearings, document production or having more than one round of submissions, amongst other procedural elements they were willing to sacrifice. This provides evidence of both an interest and willingness, on the part of counsel and parties, to place limits on the proceedings in the name of achieving greater efficiency.

Further, excessive information may instead be of detriment to a tribunal, leading to information overload and burial of the information most relevant to the issues necessary to determine the dispute. Unnecessary procedural elements also operate to delay the resolution of the dispute, which can have negative effects, as arbitrators' memory and understanding of important aspects of the matter fade with time.[3] Delays and increased costs undermine the legitimacy of the arbitral process, decreasing parties' willingness to use

2 *See, supra* note 1, at 13, chart 9.

3 Leah Elizabeth Thomas, *Consequences of undue delay in passing arbitral awards and imposition of timelines as a solution*, 6(2) NLIU L. REV. 220, 224 (2021).

it as a means of resolving disputes, and decreasing the pool of parties financially willing or able to pursue their claims.

It may be argued that costs orders and the awarding of interests are tools built into arbitral procedures, which are structured to address scenarios where parties fail to act efficiently, whether by filing unnecessary claims/defences, pursuing unmeritorious applications, or otherwise causing delay. However, while costs orders can provide a remedy to punish the offending party, the damage to the proceedings would have been done. The fees incurred unnecessarily would have to be diverted from the parties to the pockets of the various players in the dispute resolution process. Even for the winning party, the delay in obtaining remedies, uncertainty arising from the dispute, and wasted time, are all additional consequences that are not necessarily remedied by an award of costs and interest. Further, the very fact that the issues of efficiency, time, and costs continue to arise are evidence that the spectre of adverse costs and interest are insufficient as a deterrent.

The objective of this discussion is to encourage tribunals and parties to engage more deeply at the outset of the proceedings, in order to select a procedure that eliminates unnecessary procedural elements and focuses the parties on what is necessary to achieve the objectives of the arbitration. The objectives of an arbitration, as explored below, are to render an enforceable and correct award, as efficiently as possible. To achieve this, it is proposed that the procedural presumption at the outset of the proceedings be reversed – instead of starting from the assumption that the resolution of the dispute will require a full set of standard procedures, the starting point should instead be to evaluate the originating documents of the arbitration and determine what beyond those is necessary for the tribunal to resolve the disputes before it. The goal is to reach, but not exceed, the point where a tribunal has received sufficient information to resolve the parties' dispute, which the author refers to as the '*Efficiency Apex*.' It is also suggested that at this point, the parties' due process rights would also have been satisfied, subject to certain other protections discussed below in Part II.

To achieve this, the tribunal and parties should focus, from the outset of the arbitration, on adopting a more restrictive or limited procedure. Where parties are aware of the procedures and framework for the arbitration from the beginning of the arbitration, including appropriate limitations, they have the opportunity to adjust their submissions and evidence accordingly so that their case is fully presented. Where there are concerns about such limitations, the parties have protections built into the process. Further, in the event that a party is legitimately concerned about the procedure adopted, such concerns are to be raised at the appropriate time when such limitations become clear and should be appropriately reasoned. It will generally not be acceptable to complain, at the enforcement stage, that they were denied due process for reasons they were aware of during the arbitration.

The author is neither oblivious to the realities of international arbitration practice and the potentially conflicting motivations of those involved in the process, nor of the belief that these proposals will provide a panacea to all efficiency issues. However, given the pervasiveness of concerns relating to efficiency and the effects that it has on the legitimacy of an arbitration, there is an obligation to make a concerted effort to change our approach to arbitral procedure. Arbitrations are not judicial proceedings, the latter of which are subject to public scrutiny and multiple levels of review and appeal, and which may act as precedents for future cases. Arbitration is a process by which the parties carry out contractual obligations to resolve disputes privately. Enforceability, correctness, and efficiency are the prevailing objectives of arbitration. The more we focus on those objectives, the greater the chances are of achieving the benefits which attracted users to arbitration in the first place. The objectives are discussed below in detail in Part II, and a synthesised framework for their application is proposed in Part III.

II. The objectives of an arbitration

As a starting point, it is necessary to discuss the objectives of an arbitration. Like any dispute resolution process, the ultimate goal is for the parties to find a resolution to their dispute. In the case of arbitration, if this resolution does not occur by settlement between the parties, it will occur by way of one or more awards.

The rendering of an award – in and of itself – is not a sufficient objective however, and the method in which the award is rendered must, therefore, be considered. The prevailing party in the arbitration will want a method of recourse for the relief granted in the award, and so it follows as such that the award should be enforceable. This generally encapsulates, at a minimum, the protections provided in Article V of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ["**New York Convention**"],[4] which will be addressed in greater detail later in this part.

As discussed above, since it is primarily commercial interests which are at stake, any funds which are expended unnecessarily operate to shift money away from the parties and, therefore, undermine, at least to some extent, the objectives which the parties are trying to achieve. The author, therefore, proposes that another objective of the arbitration is to render the award as efficiently as possible. Efficiency obligations can be found enshrined in many of the rules of leading arbitral institutions, ranging from an obligation on the tribunal to adopt suitable procedures to avoid '*unnecessary delay and expense*,' to obligations on both the tribunal and the parties to '*make every effort to conduct the proceedings in an expeditious and cost-effective manner*.'[5]

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4 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art. V(1)(d), June 10, 1958, 330 U.N.T.S 38 [*hereinafter* "New York Convention"].

5 *See,* London Court of International Arbitration (LCIA) Arbitration Rules 2020, art. 14.1(ii); International Chambers of Commerce (ICC) Arbitration Rules 2021, art. 22(1); Stockholm Chamber of Commerce (SCC) Arbitration Rules 2023, art. 2(1); Hong Kong Internatonal Arbitration Centre (HKIAC) Administered Arbitration Rules 2018, art. 13.5; International Centre for Dispute Resolution (ICDR) Arbitration Rules 2017, art. 22(2); ICDR

There are concerns, however, that efficiency may come at a cost to the quality of the proceedings. Fabricio Fortese and Lotta Hemmi frame the issue in the following manner:

> *"Efficiency is often assimilated with only cost and time efficiency, but the other side of the same coin is to gain the efficient proceedings without risking either the correct outcome or the due process.*"[6]

The above passage suggests that two competing interests are efficiency on one side (of both time and costs), and the quality of the proceedings on the other (being the correct outcome and due process). A decrease in the time and money that is expended on the dispute should correlate with a *reduction* in the procedure, whether by reducing the length of the submissions, reducing or eliminating document exchange, limitations on hearings, or other choices implemented in the name of efficiency. Logically, these limitations may have an impact on the parties' ability to present their case, which may prevent sufficient information being relayed to the tribunal in order for it to reach the correct conclusion. Jennifer Kirby has described these competing interests in the following terms:

> *"To the extent people spend time and money on things that don't go towards producing awards that are correct and enforceable, many parties would probably agree that such time and expenses could be saved without reducing quality.*"[7]

The objective proposed by this passage appears to be the prevention of the wastage of time and money, without reducing the '*quality*' of the proceedings; the latter which would appear to encompass both the due process rights of the parties as well as the correctness of the result. While due process concerns find protection in the enforceability objective discussed above, the correctness of the result does not have similar

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Arbitration Rules 2017, art. 22(8); Singapore International Arbitration Centre (SIAC) Arbitration Rules 2016, art. 19.1.

6 Fabricio Fortese and Lotta Hemmi, *Procedural Fairness and Efficiency in International Arbitration*, 3(1) GRONINGEN J. INT'L L. 110, 116 (2015).

7 Jennifer Kirby, *Efficiency in International Arbitration: Whose Duty Is it?,* 32(6) J. INT. ARB. 689, 691 (2015) [*hereinafter* "Kirby"].

safeguards. As arbitral awards are, generally, not subject to appeal on the grounds that they are incorrect, it should be the aim of any tribunal to render decisions that are correct on the case before them. The integrity of the institution of arbitration as a whole would suffer if it were the prevailing view that tribunals do not aim to render correct decisions. As such, the author proposes that rendering an award that is correct, to the greatest extent possible, is an integral objective of an arbitration.

In light of the foregoing, the author proposes that the objectives of an arbitration are three-fold: (i) to produce an enforceable award; (ii) to produce a correct award; and (iii) to produce the award as efficiently as possible. Each of these objectives will be addressed in turn below.

A. Enforceability Objective

When discussing the objectives of an award, one inevitably gravitates towards enforcement, and the elements set out in Article V of the New York Convention. At the outset, it should be noted that the grounds for annulment or refusal of enforcement operate as a minimum standard for an award to achieve, and should not necessary (on their own) be relied upon as an aspirational objective at the outset of an arbitration. Further, the protections afforded by the New York Convention generally come into play following the conclusion of an arbitration, while this discussion is concerned with the determination of the procedure at the outset of the dispute.

Nonetheless, there are three important requirements to be gleaned from the New York Convention that can be used as guiding principles when determining the procedure to be adopted in an arbitration: (i) the tribunal shall not exceed the authority granted to it; (ii) the parties shall be treated with equality; and (iii) the parties shall have a full opportunity to present their case.

i. The Tribunal shall not exceed the authority granted to it

This requirement finds its source in Article V(1)(d) of the New York Convention, which provides, *inter alia*, that recognition or enforcement may be refused where the "*arbitral procedure was not in accordance with the agreement of the parties*."[8] One of the cornerstones of arbitration is that it is a consensual process based upon the agreement of the parties to resolve their disputes privately, and it should not be controversial that the parties' agreement as to the procedure should be complied with. As such, when the tribunal is determining the procedure for the arbitration, party agreement takes precedence.

Where this requirement becomes most interesting for the purposes of this discussion is where the parties do not agree on particular aspects of the procedure. In cases of such disagreements, which are common, prior agreements of the parties as to procedure will govern, the principal source of which will be the arbitration agreement which specifies the applicable rules for the arbitration. The rules of most, if not all, leading arbitral institutions grant significant authority to the tribunal to determine the specific procedures to be adopted. The 2021 ICC Rules of Arbitration ["**ICC Rules**"] provide the following at Article 22 with regard to the conduct of the proceedings:

> *"In order to ensure effective case management, after consulting the parties, the arbitral tribunal shall adopt such procedural measures as it considers appropriate, provided that they are not contrary to any agreement of the parties.*"[9]

This provision confirms the primacy of the parties' agreement on procedure, failing which, the tribunal is granted broad discretion to "*adopt such procedural measures as it considers appropriate*,"[10] following consultation with the parties. As such, by virtue of agreeing to the application of the ICC Rules, the parties come to the agreement that the tribunal shall have broad

8 New York Convention, art. V(1)(d).
9 ICC Rules of Arbitration 2021, art. 22(2) [*hereinafter*, "ICC Rules"].
10 ICC Rules art. 22(2).

discretion with regard to the determination of procedure on which the parties fail to reach agreement. Similarly, broad discretion can be found in the rules of other arbitral institutions.[11] The United Nations Commission on International Trade Law Model Law on International Commercial Arbitration ["**Model Law**"] also expressly states that where the parties fail to agree on the procedure to be followed, the tribunal shall conduct the arbitration in such manner as it considers appropriate.[12]

As such, so long as the tribunal respects the procedural agreements reached by the parties, it would satisfy this element of enforceability. This includes not only the arbitral procedure agreed to by the parties after the dispute has arisen, but also the procedure agreed to by the parties in their arbitration agreement, including any institutional rules incorporated therein. Those institutional rules generally, in turn, include a delegation of authority to the tribunal over procedural matters, who has discretion to adopt the procedures that it determines are best suited for the arbitration, which is most often subject to requirements of efficiency. This latter agreement – to be bound by the tribunal's discretion – should be no less binding than other contractual obligations of the parties *vis-á-vis* the arbitral process. Indeed, the tribunal's discretion to determine the arbitral procedure, in the absence of parties' agreement on such matters, is considered a foundation of the international arbitral process.[13]

ii. The parties shall be treated with equality

The requirement that the parties be treated with equality, while not explicitly set out in Article V of the New York Convention, is nonetheless a universally accepted principle in international arbitration. In many legal

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11 *See*, LCIA Arbitration Rules 2020, art. 14.5; SCC Arbitration Rules 2023, art. 23(1); HKIAC Administered Arbitration Rules 2018, art. 13.1; ICDR Arbitration Rules 2017, art. 22(1); SIAC Arbitration Rules 2016, art. 19.1.

12 United Nations Commission on International Trade Law (UNCITRAL), Model Law on International Commercial Arbitration, 1985 U.N.G.A. Res. 40/72 (Dec. 11, 1985), as amended by U.N.G.A. Res. 61/33 (Dec. 18, 2006) [*hereinafter*, [Model Law], art. 19.

13 GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION 182 (3d ed. 2022).

systems, the treatment of equality as between the parties is considered to be a principle of fundamental justice, a breach of which would be considered as grounds for refusal under Article V(2)(b) of the New York Convention (i.e., on the grounds that it is contrary to public policy). Some jurisdictions, such as Singapore, have expressly incorporated a breach of natural justice as a ground for refusing enforcement of an award.[14] The principle of equality of treatment is also found in Article 18 of the Model Law. Likewise, leading commentaries confirm that this is a fundamental requirement for the tribunal in exercising its discretion over the conduct of the proceedings.[15] This requirement should not, therefore, be a contentious one.

A distinction should be drawn, however, between equality of treatment between the parties and affording the parties' procedural demands equal weight. Not all procedural demands or proposals made by the parties are created equal. The tribunal's decisions on procedure should not automatically default to a middle ground between the positions of the parties, as one side's proposals may be clearly more appropriate for the efficient and effective conduct of the proceedings. Agreeing with one party more than the other on procedural matters is, therefore, not a matter of equality; it is the application of those procedural determinations where the requirement of equality comes into play.

In the context of fixing procedural directions at the outset of an arbitration, the principle of equality is a relatively simple concept and should generally encompass equal application of the procedural decisions (e.g., equal opportunities for submissions). While there may be the rare case where one party requires additional procedural concessions, this objective should be relatively easy to comply with when fixing procedural directions at the outset of the arbitration.

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14 See Singapore International Arbitration Act, Section 24(b).

15 *Supra* note 13, at 20-22; REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION 6.10-6.12 (Alan Redfern, Martin Hunter, Nigel Blackaby & Constantine Partasides eds., 2009).

iii. The parties shall have a full opportunity to present their case

The third requirement for enforcement, that the parties shall have a full opportunity to present their case, is the most complex in practice. There is a tendency for tribunals, at the outset of the arbitration, to impose minimal restrictions on the parties' procedural proposals, whether out of deference to parties due to an alleged lack of details known about the dispute at that time, or arising from the ever pervasive '*due process paranoia*.'

However, it is widely accepted that the right to '*full opportunity'* does not constitute a *carte blanche* for a party to demand and receive any and all procedural accommodations it seeks, and nor should it be considered to be such. As discussed above, the objective of an arbitration is to render an enforceable award, that is correct, as efficiently as possible. Procedural elements which either do not contribute to these objectives, or which exceed these objectives, operate to undermine the overarching commercial rationale for the dispute.

The right to present one's case is stated more generally in Article V(1)(b) of the New York Convention, where it provides the grounds for refusal of enforcement where a party was "*otherwise unable to present his case*."[16] In Article 18 of the Model Law, the right is framed as requiring that "*each party shall be given a full opportunity of presenting his case*,"[17] while in England & Wales, a non-Model Law country, it is framed as a "*reasonable opportunity*."[18]

Further still, the right to be heard is considered to be a fundamental principle of natural justice, and finds further protection in the *public policy* provision in Article V(2)(b) of the New York Convention, and in some national arbitration legislation.[19]

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16 New York Convention, art. V(1)(b).

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

18 The Arbitration Act 1996, c. 23, § 33 (Eng.).

19 *See e.g.*, the Singapore International Arbitration Act, § 24(b) (1994).

At their core, these provisions are all concerned with the due process rights of the parties, and many authors and courts have downplayed or dismissed any practical differences between them. What appears to be universally accepted is that parties' procedural rights are impliedly limited by considerations of fairness, and a *full* opportunity is not an open-ended one.[20]

Indeed, it has been observed that the drafters of Article 18 of the Model Law were primarily concerned with placing *limits* on the right to be heard so as to prevent its abuse by unscrupulous parties seeking to delay the proceedings. The Singapore Court of Appeal in *China Machine New Energy Corporation* v. *Jaguar Energy Guatemala LLC & AEI Guatemala Jaguar Ltd.*, referred to the *travaux préparatoires* of the Model Law and went on to conclude that "*the parties' right to be heard is impliedly limited by considerations of reasonableness and fairness*."[21]

The challenge for a tribunal, when determining the procedure to be adopted at the outset of the arbitration is, therefore, to evaluate the parties' respective proposals and determine the optimal procedure, which will not unduly restrict the parties' ability to present their case, while endeavoring to avoid unnecessary time and costs. It is here that tribunals often err on the side of caution, whether out of fear or prudence, which is summarised in the following passage:

> *"The arbitral tribunal may thus reason that avoiding the risk that the award be set aside or refused enforcement on the basis that a party's requests were rejected outweighs the disadvantages of indulging excessive procedural requests by one party. The consequence of this calculation is that a dissatisfaction may grow among the users of arbitration, who witness that insufficiently assertive case management by the arbitral tribunal renders the proceedings inefficient and unnecessarily*

[20] *Supra* note 13, at 2175; JEFFREY WAINCYMER, PROCEDURE AND EVIDENCE IN INTERNATIONAL ARBITRATION 751 (2012).

[21] China Machine New Energy Corporation v. Jaguar Energy Guatemala LLC & AEI Guatemala Jaguar Ltd, [2020] SGCA 12, ¶ 97.

> *expensive. In extreme cases, hypertrophic proceedings may affect the efficiency to an extent that due process is violated.*"[22]

This passage highlights the consequences of tribunals taking an unnecessarily expansive approach to procedure, which leads to wasted time and costs, and a resulting dissatisfaction amongst users. The key for tribunals is to focus on the objectives of an arbitration – a correct and enforceable award rendered as efficiently as possible – to take appropriate and reasonable steps from an early stage of the arbitration.

To this end, it is helpful to discuss the actual practical effects of early-stage procedural management by the tribunal: what are the consequences of a tribunal restricting procedural rights where one party has sought more expansive procedures? How and when does this result in a potential violation of a right to due process? In this light, the submissions of counsel necessary to plead their client's case can be compared to a gaseous substance, and the procedures adopted to a container in which the gas is contained. The greater the size of the container, the more the gas will expand to fit its contents; however, the amount of gas remains the same. Similarly, the more expansive a procedure adopted, the more likely that counsel are to expand their submissions to take advantage of the space permitted. It is not necessarily the quantity of submissions and evidence which are *required* to plead the case that expand, but it is merely the counsel taking advantage of the additional leeway granted to expand their submissions in potentially unnecessary ways.

The key to efficiency is finding the smallest size of the container in which the gas is able to fit – in terms of arbitration, this means finding the most efficient set of procedures which permit a counsel to plead their client's case. Once those parameters are set at the outset of an arbitration, the counsel would be able to adapt and plan appropriately, to ensure that their

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[22] Giuditta Cordero-Moss, *The Alleged Failure of Arbitration to Address Due Process Concerns: Is Arbitration under Attack?, in* STOCKHOLM ARBITRATION YEARBOOK 2021 259 (Axel Calissendorff and Patrik Schöldström eds., 2021).

client's case is adequately presented to the tribunal within the set procedures.

It should also be noted that in cases where a party seeks to resist enforcement of an award on the basis of a violation of its due process rights, that party will have to demonstrate that it was the procedural directions that were the cause of its inability to fully present its case, which should have been known by the party at the time it was pleading its case. A recent decision from the Singapore International Commercial Court, in assessing a claim for a breach of natural justice, highlighted this factor by stating "*the tribunal's decisions can only by assessed by reference to what was known to the tribunal at the time, and it follows that the alleged breach of natural justice must have been brought to the attention of the tribunal at the material time*."[23] (emphasis added)

Given that procedural directions are issued at the outset of a dispute, it would be challenging for a party to legitimately raise such concerns after the dispute has been terminated. This is since the parties were aware of the procedure and were provided the opportunity to present their case in accordance with such procedure. If a party was truly aggrieved or prejudiced by the procedures adopted, such concerns should have been properly raised at the relevant time of the proceedings and addressed then.

In consideration of the foregoing, the following principles can be drawn from the requirement that parties be given a *full opportunity* to present their case: (i) the right is impliedly limited by considerations of reasonableness and fairness; (ii) the procedure adopted should aim to accommodate what is necessary for the parties to plead their case, and not to exceed this; and (iii) any concerns that the procedure adopted is insufficient for a party to plead its case should be raised and addressed at the relevant time.

In summary, the enforceability objective will be satisfied when the foregoing three elements have been met: (i) the tribunal has not exceeded

23 GPE and Gaja v. Twaris Consultancy and SEPC, [2021] SGHC(I) 17, ¶ 104.

the agreement of the parties; (ii) the parties have been treated with equality; and (iii) the parties have had the opportunity to present their case.

B. Correctness objective

An objective which is notably missing from the requirements of the New York Convention, Model Law and other relevant sources is that an arbitral award, and the decisions rendered therein, should be "correct." This omission appears to be by design to avoid inconsistent and unwanted interference by national courts in arbitral awards, and to ensure the (relative) finality of awards.

However, this is not to say that correctness should not also be an objective of arbitral awards. Despite being excluded from the elements set out in the New York Convention, it should be the goal of any tribunal to aim to render a decision that is as *correct* as possible. Indeed, aside from partisan desires, it should be the objective goal of parties to arbitration that decisions in awards that are rendered be correct, to the extent that they can be described as such. Despite the scope for differences in interpretation and discretion, there are inevitably decisions which are objectively correct, those which are incorrect, and others that fall far more closely to one end of that spectrum than the other. Further, the integrity of the arbitral process depends on a level of trust and belief in the system that tribunals shall endeavour, and overwhelming succeed, to render decisions which are correct on the basis of the case before them.

As is seen in practice, however, the concept of *correctness* is not always a clear cut case, particularly where elements of interpretation, the assessment of evidence, and the exercise of discretion are involved. This is exacerbated by the more limited knowledge available to tribunals (and to parties) at the outset of the proceedings.

The focus for the correctness objective must necessarily rely on the information provided to the tribunal – which provides the tribunal with the ability to reach the correct conclusion (whether they actually do so or not).

When a tribunal has no knowledge of an arbitration, they have no chance of reaching the correct conclusion. As the tribunal receives more information on the dispute, its chances of reaching the correct conclusion increase exponentially. To this end, the author suggests that the objective of achieving *correctness* is fulfilled where the tribunal has received sufficient information to determine the issues before it.

However, at a certain point, further increases in the knowledge provided to the tribunal decrease in value, until it reaches a point where additional information is no longer necessary or beneficial to the tribunal. This fits the analogy of where the container is larger than is necessary to contain the gas: the same amount of gas could be contained in a smaller container, and the excess space of the container is unnecessary and inefficient. In arbitration terms, the objective should be to provide the tribunal with sufficient information to determine the dispute before it, with the least amount of time and money expended (i.e., as efficiently as possible).

The author proposes that at this stage – where the tribunal has been provided with the information necessary to decide the issues before it – the parties' due process rights have been satisfied. Additional submissions, evidence, and procedural steps beyond this are unnecessary to achieve the '*correctness*' objective, and, therefore, can be eliminated without affecting the parties' substantive rights with regard to the decisions of the tribunal. It is difficult to argue that a party's right to plead its case has been prejudiced by limiting or eliminating superfluous submissions or procedural steps that had no effect on the outcome of the arbitration.

C. Efficiency Objective

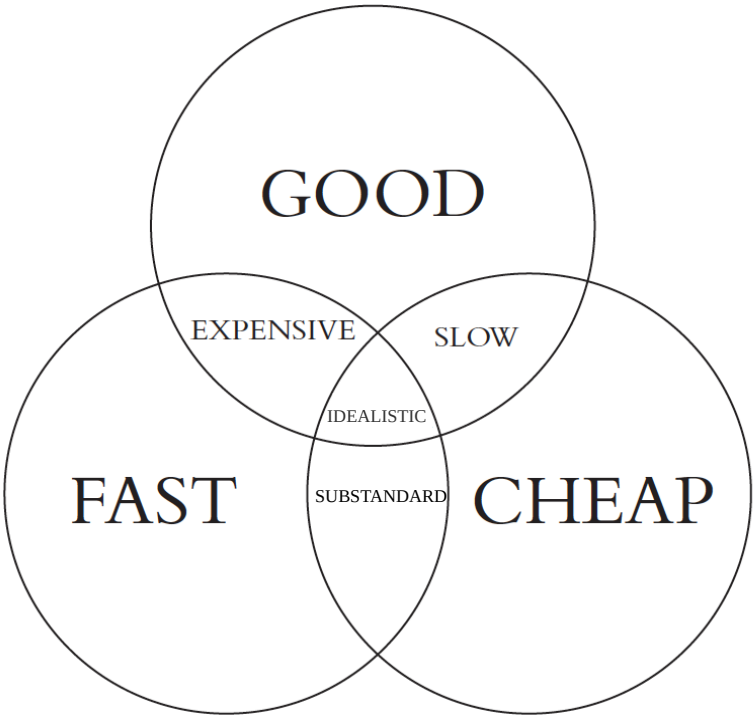
How does one then determine the point at which the two above objectives are achieved? The goal is to adopt as efficient a procedure as is required to satisfy the objectives of enforcement (the parties have a full opportunity to present their case) and correctness (the tribunal has received sufficient information to reach the correct conclusions). While there is no exact science as to how a tribunal achieves this, the more restrictive the procedure

adopted at the outset of an arbitration, the more likely counsel are to refine their cases and focus on the essential and most relevant aspects of their case.

The traditional instinct has been to err on the side of caution and adopt a standard set of procedures for the arbitration, with little consideration of what aspects of the procedure could be limited or removed without affecting the integrity of the results. Such caution leads to a situation in which it is too late to make choices that would lead to greater efficiency – on the realisation that they are unnecessarily lengthy, the length of submissions cannot be limited after they have been filed, nor can the document production exercise be done away with after it is realised that little to no material or relevant documents came to light through the process. The time and money spent on those aspects cannot be unspent after the fact. It is, therefore, incumbent on the tribunal and the parties to make concerted efforts at the outset of the arbitration to select the most efficient means of conducting the arbitration.

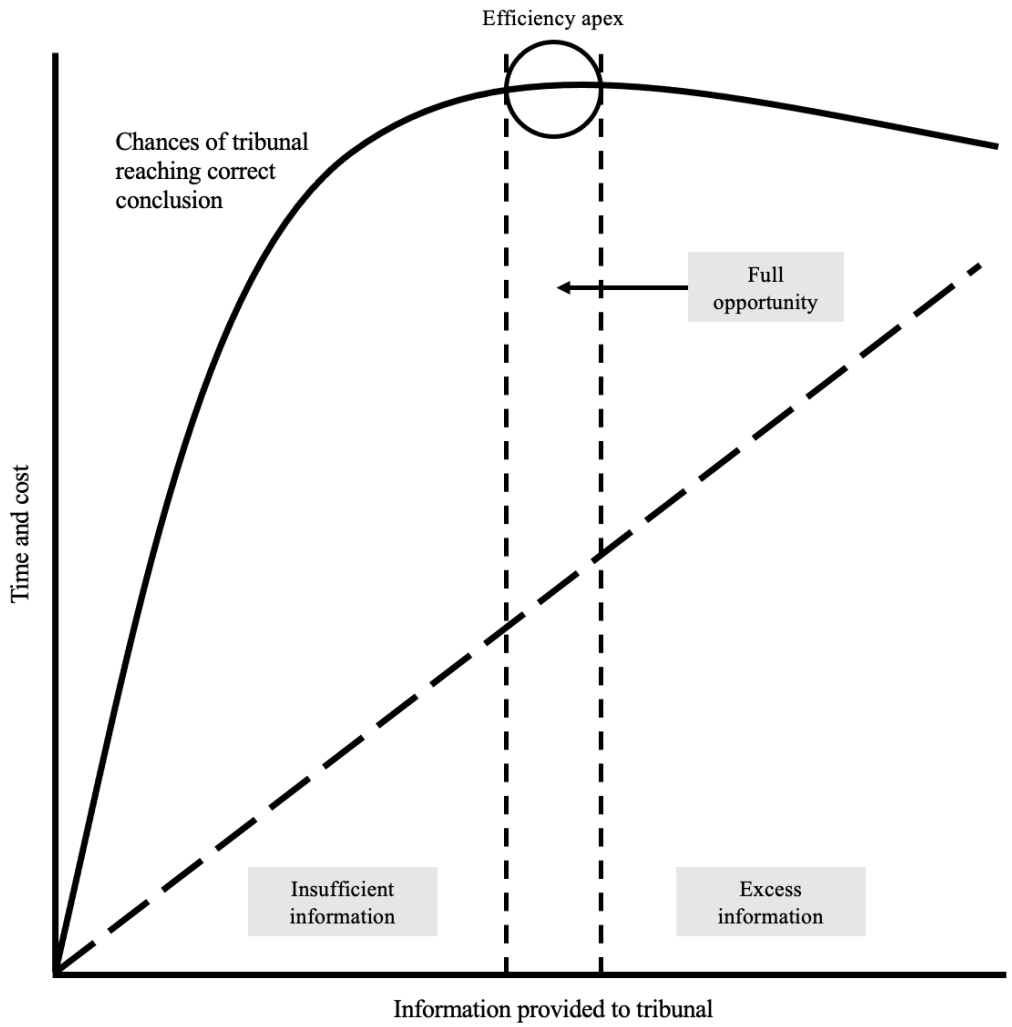
Some authors have referred to the '*Iron Triangle*' while discussing efficiency in arbitration. The Iron Triangle proposes the following – (i) you cannot have a good arbitration that is both fast and cheap; (ii) a fast arbitration that is good will be expensive; and (iii) a cheap arbitration that is good will be slow. The theory is that the pursuit of one of those three goals (good, fast and cheap), inevitably requires the sacrifice of another of those goals. It has been visually represented in the following way:[24]

[24] See Kirby, *supra* note 7. The language in the diagram has been altered slightly from the original, but the meaning is substantially similar.



However, the underlying assumption of this theory is that the quality of the proceedings (the *good* objective) increases in tandem with the more time and money that is expended in the arbitration. As has been explored by the author in the preceding sections, this is not necessarily the case: a *good* arbitration is one which results in an enforceable and correct award. Once these objectives have been met, more time and more money do not increase the objective quality of the arbitration. Instead, a 'good' arbitration is one which results in an enforceable and correct award with the least time and money expended. In this regard, the ultimate goal is not to achieve an arbitration that is simply faster or cheaper, it is trying to adopt a procedure which will involve the least time and costs which is necessary to resolve that particular dispute, resulting in an enforceable and correct award. The author

refers to this point at which optimal efficiency has been reached as the '*Efficiency Apex*,' as demonstrated in the following chart:



The left (y) axis indicates the increase in time and costs, while the bottom (x) axis represents information provided to the tribunal (by way of

submissions, evidence or otherwise). For simplicity, these two factors increase steadily in tandem (i.e., more information to the tribunal requires more time and costs spent).

The curved line represents the chances of the tribunal reaching the correct conclusion. The chances of this occurring begin at zero when no information has been provided to the tribunal and increase exponentially before levelling out at the dotted line, which represents the point when the tribunal has received sufficient information to render its decisions on the issues before it. It is where the proceedings reach the point where the tribunal has sufficient information that the *Efficiency Apex* is reached. The goal should, therefore, be to adopt a procedure which aims for the Efficiency Apex Zone, where the tribunal has received sufficient, but not excessive, information. As suggested earlier, this will also be the point at which the parties will have had a full opportunity to present their case, because, any additional information would not improve the tribunal's chances of deciding the issues before it in any different manner.

III. Applying the Objectives in Practice

How then do we apply these principles in practice? There is of course no single course of action which can be uniformly applied to all matters, as each matter will vary in the challenges the parties face in preparing and presenting their cases, and the nature of the disputes to be resolved. However, if there is one overriding concept that is to be applied in all matters — it is the increased engagement at initial states of the proceedings, on the part of the tribunal as well as the parties. Simply because determining the most efficient procedure at the outset of the proceedings is a challenging exercise, does not mean that we should capitulate and adopt the standard full set of procedural steps with minimal limitations by default.

To achieve this in practice, the author proposes that upon receiving the file, the tribunal should prepare a Preliminary Procedural Assessment ["**PPA**"].

The PPA would consist of a bespoke list of relevant procedural questions to be addressed to the parties, which the tribunal will have prepared based on its review of the case materials. Depending on the case, the PPA may include the following:

(a) **Early determination/preliminary assessment**: Whether there are any issues which are appropriate for early determination, or whether a preliminary assessment of the issues may be worthwhile;

(b) **Early-stage applications**: Whether the parties intend to file any -early-stage applications, such as for interim relief, security for costs, or challenges to jurisdiction;

(c) **Bifurcation**: Whether bifurcation of the proceedings may be appropriate for issues of jurisdiction, merits or quantum;

(d) **Submissions**: The style of submissions (memorial/pleading) any limits on the submissions – whether on the number of rounds or pages – and the minimum length of time required for preparation;

(e) **Document production**: The minimum time between steps required in document production, or whether the parties would be willing to forgo or limit document production;

(f) **Witnesses**: Whether the parties agree that statements of fact and documentary evidence are to form part of the parties' submissions, and limit witness statements to areas of disagreement;

(g) **Hearing**: Whether the parties may be willing to have the matter heard on the documents only, and whether the parties would be willing to hold evidentiary hearings by virtual means; and

(h) **Experts**: Whether any expert evidence is necessary, and whether the parties would be open to having joint expert reports or tribunal appointed expert(s).

The parties would be invited to complete the PPA and submit it to the tribunal, without the same being communicated to the other side. The questions in the PPA are not mandatory, as parties may not be in a position to have informed responses to all queries. It is also appreciated that parties may not want to '*show their hand*' on certain matters at an early stage, although the parties would be encouraged to be as open as possible, as strategy for pure gamesmanship purposes is discouraged and may result in adverse costs consequences.

Upon receiving the completed PPAs, the tribunal would then prepare proposed procedural directions, whether in the form of procedural order no. 1, a procedural timetable or otherwise. The tribunal would do so on the basis of the responses provided by the parties, as well as upon its review of the case materials. Where there are areas of agreement in the PPAs, the tribunal would adopt such agreement, and in areas of disagreement, the tribunal would be required to make an informed decision.

The draft procedural directions would then be circulated to the parties, along with copies of the PPAs for the parties' information. The parties should be given an opportunity to review and to agree on the draft, whether as proposed by the tribunal or amended by party agreement. Any areas of disagreement would be resolved at a case management conference. Parties may object to any of the proposed procedure, but such objections must be reasoned. In the absence of a reasonable basis for such objections, the tribunal should aim to adopt the more '*efficient*' procedure.

In certain cases, the tribunal may agree with the parties that there is insufficient information at an early stage to impose limitations, forgo certain procedural steps, or otherwise find ways to make the proceedings more efficient. In such cases, it may be appropriate to issue partial directions and revisit the remaining procedure at a later stage.

The rationale for the tribunal to be the one to prepare such directions is that efficiency may be required to be a tribunal-driven initiative. Parties may be reticent to agree to any limitations at early stages of the proceedings out

of caution or uncertainty, so as not to prejudice their rights at a later stage. Respondent parties may also feel that they have had inadequate time to prepare and do not yet have access to sufficient information in order to provide informed responses and agree to any limitations. However, as has been touched on throughout this discussion, tribunals should feel confident to place reasonable restrictions on the procedures adopted, given their wide discretion on matters of procedure in the absence of party agreement, as well as in light of their obligations to conduct the proceedings efficiently. Likewise, counsel should be well-equipped to adapt their submissions and case strategy to fit such procedures, and to raise appropriate and reasoned objections when such procedures may be limiting their due process rights.

The touchstone throughout this process should be the objectives of an arbitration as discussed above: to render an award that is enforceable and correct, as efficiently as possible. As suggested in the preceding sections, the parties' due process rights relating to their right to present their case may be considered to be satisfied where the tribunal has been provided with the information necessary to decide the issues before it, at which point the *correctness* objective is also met. Unless appropriate efforts are made at the outset of the arbitration to tailor the procedure to be as efficient as possible, it will be too late to do so at a later stage of the proceedings. If the arbitration community is serious about trying to address concerns relating to the time and costs of arbitration, then we need to be serious about changing the way that we approach procedure. We cannot simply continue to conduct arbitrations with the same approach, and expect different results. One might say that it would be the definition of insanity.

UN-MUDDLING JOINDER AND CONSOLIDATION IN INDIA: KEEPING PACE WITH INTERNATIONAL ARBITRAL PERSPECTIVES

*Arun Raghuram Mahapatra**

Abstract

In recent times, rising complex multi-party arbitrations have posed many administrative challenges for arbitral tribunals worldwide. To cut costs, save time in these proceedings, and mitigate the risk of inconsistent awards, the joinder of non-signatories and consolidation of arbitral proceedings have emerged as enticing options for parties engaged in commercial disputes. However, these alluring tools also go against ideas of party autonomy, privity, and equality, which form the basic tenet of arbitration, and their usage requires the careful exercise of thought and reason. This note aims to analyse the legal position of these procedural tools in the national and international landscape and ultimately come up with a holistic way forward for these tools.

I. Introduction

In the past few years, arbitral tribunals worldwide have been facing various difficulties due to elaborate and convoluted multi-party disputes. A rise in the multiplicity of proceedings has not only led to increased costs and time spent on arbitrations but has also brought forth the issue of conflicting awards.[1] To avoid these parallel proceedings and efficiently utilise resources, the tools of joinder and consolidation in arbitral proceedings have recently been gaining more popularity.

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1 Deepak Jain, Sanjolli K. Padhy & Muskaan Aggarwal, *Multiplicity of Arbitration Proceedings – A Study*, 2(1) IND. J. PROJECTS INFRASTRUCTURE ENERGY L. 37, 38 (2022).

Various renowned international arbitral institutions have recently revised rules regarding the joinder of third parties and consolidation.[2] These provisions have resulted in a more flexible arbitration environment by providing a fairly liberal rein to parties and arbitral tribunals to enjoin third parties and consolidate proceedings.

However, these alluring tools also go against the very tenet of arbitration. An arbitration exists only due to the arbitral clauses in a contract, and the concept of privity in a contract naturally implies that only signatories to the agreement should be permitted to be a part of the arbitral proceedings. Some jurisdictions have even enshrined the arbitral tribunals, whose existence emanates from the scope of the contract, with extra powers such as enjoining parties based on implicit consent. In some other cases, the joined or consolidated parties have even been devoid of choosing arbitrators while the other parties are allowed to exercise these rights. In short, these procedural tools have also encroached upon the ideas of party autonomy, privity, and equality, which form the foundation of the arbitration process.[3]

It begins by providing a brief on these tools, explaining their purpose, usage, advantages, and pitfalls in Part II. Part III then proceeds to elucidate upon the muddled legal position of these tools in Indian jurisprudence and brings to view the need for more clarity in the domain. The same is followed by a holistic analysis of the joinder and consolidation provisions of many renowned international arbitral institutions in a bid to identify the best-accepted international practices in Part IV. Lastly, Parts V and VI the essay, after a thorough look at the mounting criticism towards the Indian

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2 *See* International Chamber of Commerce (ICC) Arbitration Rules, 2021 [*hereinafter* "ICC Rules"]; *See* International Centre for Dispute Resolution (ICDR) Arbitration Rules, 2021 [*hereinafter* "ICDR Rules"]; *See* London Court of International Arbitration (LCIA) Arbitration Rules, 2020 [*hereinafter* "LCIA Rules"]; *See* Singapore International Arbitration Centre (SIAC) Rules, 2016 [*hereinafter* "SIAC Rules"].

3 SUNDRA RAJOO, LAW, PRACTICE AND PROCEDURE OF ARBITRATION IN INDIA 18 (2021).

approach of the 'Group of Companies' doctrine, attempts to provide alternate solutions in line with identified best practices.

II. Joinder and Consolidation: A Brief Explanation of the Tools

'Joinder' refers to involving or 'joining' a third party which is not a signatory of the arbitration agreement in the arbitral proceedings.[4] The idea of 'joinder' is a well-settled feature of litigation, and it is usually permitted for efficient administration and conservation of resources. Even in arbitration, the main aim behind a joinder is to reduce the time, costs, and other inefficiencies pertaining to multiplicity of proceedings,[5] including the risk of inconsistent awards.[6] Consolidation, on the other hand, refers to merging or amalgamating multiple arbitrations into one single procedure.[7] Similar to the tool of joinder, consolidation's main aim is to save time and resources, and it is usually employed in multi-party and/or multi-contract arbitrations. In recent times, due to a large rise in multi-party arbitration cases,[8] these

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4 *Arbitration: Joinder, Consolidation*, BODENHEIMER, *available at* https://www.changing-perspectives.legal/arbitration/frequently-arising-issues-in-international-arbitration/joinder-consolidation/; Kiran Gore, *Joinder*, JUS MUNDI (Sept. 27, 2022), *available at* https://jusmundi.com/en/document/publication/en-joinder#:~:text=Joinder%20(or%20%E2%80%9Cintervention%E2%80%9D),or%20by%20its%20own%20request

5 Giovanni Alemanni v. Argentine Republic, ICSID Case No. ARB/07/8, Concurring Opinion of Mr. J. Christopher Thomas, QC (Decision on Jurisdiction and Admissibility), ¶ 9.

6 R. F. Hansen, *Parallel Proceedings in Investor-State Treaty Arbitration: Responses for Treaty-Drafters, Arbitrators and Parties*, 73(4) MODERN L. REV. 540 (2010); GARY B. BORN, INTERNATIONAL ARBITRATION: LAW AND PRACTICE 282 (2009) [*hereinafter* "Born Law & Practice"].

7 *Core Issues in International Arbitration: Consolidation of Proceedings – Key Considerations to be Aware of*, HOLMAN FENWICK WILLAN, *available at* https://www.hfw.com/downloads/003468-Core-issues-in-international-arbitration.pdf; *Arbitration: Joinder, Consolidation*, BODENHEIMER, *available at* https://www.changing-perspectives.legal/arbitration/frequently-arising-issues-in-international-arbitration/joinder-consolidation/.

8 Marily Paralika & Alexander G. Fessas, *Joinder, Multiple Parties, Multiple Contracts, and Consolidation under the ICC Rules,* CYPRUS CHAMBER OF COMMERCE & INDUSTRY (Apr. 29, 2014), *available at* http://www.ccci.org.cy/wp-content/uploads/2014/05/Multi-Joinder-Consolidation.pdf.

tools have quickly gained popularity in international arbitral institutions and national forums.

However, unlike litigation, in arbitration, the threshold to allow for joinder or consolidation is higher and the instances where these tools can be employed are limited.[9] The arbitral tribunal's powers are born out of the volition of the parties and therefore the usage of these tools is normally only possible when all parties consent to the same.[10] The consent could be express, implied, or by the virtue of the arbitral rules adopted by the parties.[11]

Furthermore, viewing these tools from a different angle exposes us to their pitfalls, which at times outweigh their perceived benefits. These pitfalls are enumerated as follows:

- Consolidation and joinder can at times create issues pertaining to the appointment of arbitrators. In some cases, the joined or consolidated parties are devoid of choosing arbitrators while the other parties are allowed to exercise these rights. The same issue came up in the *Dutco Construction* v. *BKMI Industrienlagen GmbH et Siemens AG* ["**Dutco**"] case,[12] wherein the arbitral award was set aside on the premise that there was a violation of the principle of equality[13] during the appointment of arbitrators. Further, as stated by Prof. Gary Born, "*Many arbitrations involve three-person tribunals, with each party nominating one member of the*

9 REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION 91 (Nigel Blackaby, Constantine Partasides, Alan Redfern & Martin Hunter eds., 6th ed. 2015) [*hereinafter* "Redfern & Hunter"].

10 *See generally*, HANOTIAU, COMPLEX ARBITRATIONS: MULTI-PARTY, MULTI-CONTRACT, MULTI-ISSUE AND CLASS ACTIONS (2005).

11 *See,* Martin Platte, *When should an arbitrator join cases?*, 18 ARB. INT'L 67 (2002); R. Chandra Mohan & Lim Wee Teck, *Some contractual approaches to the problem of inconsistent awards in multi-party, multi-contract arbitration proceedings*, 1 ASIAN INT'L ARB. J. 161, 164 (2005).

12 Cour de Cassation [Cass.] [supreme court for judicial matters], Jan. 07, 1992, No. 89-18.708, Siemens AG and BKMI Industrienlagen GmbH v. Dutco Consortium Constr. Co. (Fr.).

13 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art. V, June 6, 1958, 330 U.N.T.S. 3 [*hereinafter* "New York Convention"].

tribunal, and the two party-nominated arbitrators agreeing upon a third arbitrator. If there are three (or more) parties to the arbitration, who have distinct interests, this model often does not work."[14]

- Confidentiality is considered one of the prime advantages of arbitration[15], and steps such as joining non-signatories into an ongoing dispute between parties come with an obvious, albeit limited, loss of confidentiality.[16]

- While in general consolidated/joined arbitrations are more efficient, the reduction in cost, time, and resources used are not necessarily distributed evenly among the parties.[17]

- At times, these tools are employed without the explicit consent of parties, or the ambit of implied consent is stretched extensively[18], and this is very dangerous as consent is considered to be one of the defining characteristics[19] of arbitration.

Ultimately, in the exercise of these procedural tools of joinder and consolidation, it is to be noted that although "lack of chronological coordination, potentially conflicting findings and the possibility of diverging judgments may cast disfavour upon arbitration," it must be ensured that "the remedy is not worse than the evil."[20]

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14 BORN LAW & PRACTICE, *supra* note 6, at 282-283.

15 MARGARET L. MOSES, THE PRINCIPLES AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 3 (2nd ed. 2012) [*hereinafter* "MOSES"].

16 BORN LAW & PRACTICE, *supra* note 6, at 283.

17 *Id.*

18 *See* BORN LAW & PRACTICE, *supra* note 6, at §5.01; REDFERN & HUNTER, *supra* note 9, at 85-91 (Principles of Alter Ego, Group of Companies, etc.).

19 MOSES, *supra* note 15 at 2.

20 BERNINI, OVERVIEW OF THE ISSUES, IN ICC, MULTIPARTY ARBITRATION 161, 163 (1991), *cited in* BORN LAW & PRACTICE, *supra* note 6, at 282.

III. The Muddled Legal Position of these Tools in India

Historically in our country, joining third parties in arbitrations has been held to be wrongful, impermissible, and antithetical to consent. The Supreme Court of India has held numerous times that non-signatories cannot be included as a party in the arbitration proceedings.21 However, this viewpoint is not static or inflexible in the sense that an additional party can be made a part of in arbitral proceedings by the exercise of the legal doctrine of "group of companies".

The "group of companies" doctrine first appeared in the Indian legal landscape in 2012 in the *Chloro Controls India (P) Ltd.* v. *Severn Trent Water Purification Inc.* ["**Chloro Controls**"] case.[22] In the said case, the Supreme Court liberally construed the wording "*person claiming through or under*" within Section 45 of the Arbitration and Conciliation Act, 1996 ["**Arbitration Act**"][23] to denote that even third parties to some of the agreements could be made a part of the arbitral proceedings. The said doctrine was defined as a situation wherein an agreement for arbitration entered into by a company could be binding on its parent bodies or non-signatory affiliates, provided that the facts show that there was a "mutual intention of the parties" to bind the same.[24] The Supreme Court, however, clarified that the act of subjecting a third party to arbitration without their prior consent was an exception, and the court would examine and subject such cases to deep jural scrutiny.

However, even though *Chloro Controls* was supposed to be an exception, it has led to a number of cases following the same approach.[25] Expanding this concept further, even cases having joint/similar causes of action and

21 S.N. Prasad v. Monnet Finance Ltd., (2011) 1 SCC 320; Sukanya Holdings (P) Ltd. v. Jayesh H. Pandya, (2003) 5 SCC 531.

22 Chloro Controls India (P) Ltd. v. Severn Trent Water Purification Inc., (2013) 1 SCC 641.

23 The Arbitration and Conciliation Act, 1996, No. 26, Acts of Parliament, 1996, § 45 (India).

24 Chloro Controls India (P) Ltd. v. Severn Trent Water Purification Inc., (2013) 1 SCC 641.

25 Ameet Lalchand Shah v. Rishabh Enterprises, (2018) 15 SCC 678, ¶¶ 21-25; Cheran Properties Ltd. v. Kasturi & Sons Ltd., (2018) 16 SCC 413, ¶¶ 21, 23-28; MTNL v. Canara Bank, (2020) 12 SCC 767, ¶¶ 10.1-10.12.

commonality of parties/interest have resulted in consolidations/joint arbitrations.[26]

It becomes even more clear from the matter of *Gammon India Ltd.* v. *NHAI*[27] that the judicial position in India seems to be accepting the practice of consolidation of certain inter-related disputes by a common arbitral tribunal, even if the parties have not explicitly agreed to the same.

However, the SC, in the recent *Cox & Kings Ltd.* v. *SAP India (P) Ltd.* ["**Cox & Kings**"] case,[28] doubted the legal basis of the "group of companies" doctrine and the correctness of the law evolved in *Chloro Controls*. After due deliberation, the Supreme Court came to the conclusion that there was a need to reconsider the said doctrine as it was based more on the aspects of convenience and economics instead of law and referred the matter to a larger bench in order to settle the question of law at hand.

Hence, we have a number of contradictory positions when we consider these procedural tools. On one end, some observances make these tools seem inexecutable and impermissible, whereas others make it seem permissible, that too without the explicit consent of parties. In such conflicting situations of laws, it becomes pertinent to expand our horizons and look at how various international arbitral institutions deal with such a situation so that we could take inspiration and harmonise the usage of the said tools.

IV. International Arbitral Institutions: Identifying the Best Practices

In this part of the note, the joinder and consolidation provisions of various international arbitral institutions have been analysed in order to identify the key trends, commonalities, and the widely accepted practices in these

26 P.R. Shah, Shares & Stock Brokers (P) Ltd. v. B.H.H. Securities (P) Ltd., (2012) 1 SCC 594.

27 Gammon India Ltd. v. National Highways Authority, 2020 SCC OnLine Del 659.

28 Cox & Kings Ltd. v. SAP India (P) Ltd., (2022) 8 SCC 1.

different rules. However, for the purpose of this note, the analysis has been specifically focused and limited to the rules of (i) International Chamber of Commerce ["ICC"], (ii) International Centre for Dispute Resolution ["ICDR"], (iii) London Court of International Arbitration ["LCIA"], and (iv) Singapore International Arbitration Centre ["SIAC"]. This part has been divided into two broad sub-divisions, one dealing with key trends in the joinder provisions and the other dealing with consolidation provisions.

A. Key Trends in Joinder Provisions Across International Arbitral Institutions

By holistically considering all the joinder provisions of the arbitral institutions as mentioned above, the following recurrent criteria that cut across all these institutions may be identified:

i. The third party, to be enjoined, must consent to the joinder

Among all the arbitral institution rules examined, for a joinder to take place, there is the minimum non-negotiable condition of the third party explicitly consenting to the joinder process.

This condition can be seen in the ICC Rules, wherein post the confirmation of any arbitrator, joining a third party becomes impermissible except if [a] all parties, along with the third party, consent to the same[29] or [b] the composition of the tribunal and the terms of reference are accepted by the third party and the tribunal permits the request, after taking into consideration all appropriate circumstances.[30] Likewise in the ICDR Rules, third parties can be made a part of the proceedings post the confirmation of any arbitrator, only if [a] all parties, along with the third party, consent to the same or [b] the tribunal once composed finds that the such joinder is appropriate, and the third party consents to same.[31] Similarly in the LCIA Rules, the tribunal can permit third person(s) to be enjoined into the

29 ICC Rules, art. 7(1).
30 ICC Rules, art. 7(5).
31 ICDR Rules, art. 8(1).

proceedings only when both the third person and the applicant party have agreed expressly to the joinder.[32] Lastly, even when coming to the SIAC Rules, which takes a bit of bespoke approach in comparison to the other institutions, this minimum condition is still present as a joinder can take place only if either [a] the arbitration agreement *prima facie* binds the third party; or [b] all involved parties, along with the third party, consent to the same.[33]

There are two main benefits to this non-negotiable condition of the third party consenting to the joinder process. The first benefit is that needless delays associated with determining implicit consent from circumstances, as can be experienced with the "group of companies" in the Indian jurisprudence, are completely avoided as the consent in this case must be express. The second benefit is that by consenting to the composition of the tribunal and other terms of reference, the equal and fair treatment of all parties concerned is ensured in line with the New York Convention[34] ,and thus the probability of setting aside/non-enforcement of the arbitral award is mitigated.[35] The same also solves the problems that came up in the *Dutco* case.[36]

Hence, the most important takeaway with regards to joinder provisions is that in all situations, the minimum and uncompromisable condition is explicit consent of the third party that is to be joined.

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32 LCIA Rules, art. 22.1(x).

33 SIAC Rules, r. 7.1; SIAC Rules, r. 7.8.

34 New York Convention, art. V.

35 Smitha Menon & Charles Tian, *Joinder and Consolidation Provisions under 2021 ICC Arbitration Rules: Enhancing Efficiency and Flexibility for Resolving Complex Disputes*, KLUWER ARBITRATION BLOG (Jan. 3, 2021), *available at* http://arbitrationblog.kluwerarbitration.com/2021/01/03/joinder-and-consolidation-provisions-under-2021-icc-arbitration-rules-enhancing-efficiency-and-flexibility-for-resolving-complex-disputes/.

36 Cour de Cassation [Cass.] [supreme court for judicial matters], Jan. 07, 1992, No. 89-18.708, Siemens AG and BKMI Industrienlagen GmbH v. Dutco Consortium Constr. Co. (Fr.).

ii. An extra condition, which is either the satisfaction of the tribunal or the consent of the remaining parties (either one or all)

As can be seen in the analysis of the rules of different international arbitral institutions in the preceding paragraphs, in addition to first condition of the consent of the third party, there is always an additional condition that must be satisfied for a joinder to take place. This additional condition is either [a] satisfaction of the tribunal/court of the circumstances of joinder, or [b] the consent of one or all the remaining parties.

The rationale behind this second condition is to make sure that there are no frivolous joinders, wherein there is no real merit or interest of the involved parties. In essence, the second condition is safeguard which prevents the procedure of joinder from being misused.

Overall, there are two primary key trends that are observed across the joinder provisions of various international institutional arbitration rules. These conditions are the non-negotiable consent of the third party and an additional safeguard provision in terms of satisfaction of the tribunal or consent of the remaining parties. Both these conditions are vital in resolving the inherent problems pertaining to the concept of arbitral joinder and will be of great use and guidance when we attempt to refine the scenario surrounding arbitral joinder in India.

B. Key Trends in Consolidation Provisions Across International Arbitral Institutions

By holistically considering all the consolidation provisions of the arbitral institutions as mentioned above, we can identify the following recurrent criteria that cut across all these institutions: -

i. The consent of all the parties is not necessarily mandatory

The process of consolidation differs from that of a joinder, as consent is not a non-negotiable condition during consolidation.

As per the ICC Rules, consolidation can take place if any one of the following disjunctive conditions of [a] all parties agreeing to consolidation; or [b] all arbitral claims falling under the same arbitration agreement(s); or [c] the Court deeming the arbitration agreements to be compatible in case of the claims falling under different agreement(s), but the same parties and dispute of same legal relationship being involved; are met.[37] Similarly, under LCIA Rules, consolidation can take place if the conditions outlined in Article 22A[38] of the said rules, which are to an extent *pari materia* to conditions outlined in the ICC Rules and also do not mandatorily require consent, are met. Likewise, the conditions for consolidation under the ICDR Rules also do not mandate consent and are almost similar to those of the ICC Rules and the LCIA Rules.[39] Finally, when we come to the conditions for consolidation enshrined under the SIAC Rules,[40] we witness the general pattern/combination of pre-requisite conditions as seen in other arbitral institutions and once again find that consent is a not mandatory requirement.

From the above, it can be surmised that the process of consolidation fundamentally differs from that of joinder as consent is not necessary for consolidated arbitrations. Although consent makes things easier and faster when granted, consolidations can still take place even if consent is not granted by all parties, given that certain other conditions are met. Evidently, procedural efficiency of the arbitration process is placed at a higher pedestal than party autonomy and consent during consolidation.

ii. *Consolidation without explicit consent is possible only when certain factors are satisfied*

When perusing the ICC, LCIA, ICDR, and SIAC Rules, we find that consolidation without explicit consent is possible when the same arbitration

37 ICC Rules, art. 10.
38 LCIA Rules, art. 22A.
39 ICDR Rules, art. 9(1).
40 SIAC Rules, art. 8.

agreements are involved or when compatible agreements involving the same stakeholders and the same legal dispute are involved.[41] Furthermore, relevant circumstances also must be given due regard in each case.[42]

Hence, during non-consensual consolidation, it is ultimately upon the wisdom of the court/tribunal/consolidation arbitrator to decide whether the proceedings need to be consolidated, keeping in mind the aforementioned factors. From this, we can also infer that judicial and legal theories play a more frequent and vital role during consolidation in comparison to joinder, as the wisdom of the court/tribunal is essentially guided by these principles.

iii. Either all the parties exercise the right to appoint arbitrators for the consolidated arbitration, or no party does

Apart from the 'basic' conditions, as outlined in the preceding paragraphs, arbitral institutions have also adopted additional conditions regarding the appointment of arbitrators.

In the LCIA Rules, consolidation without explicit consent of the parties can only take place if no tribunal has been constituted for such other arbitration(s) or, if already formed, such tribunal(s) has the same composition.[43]

Similarly, the ICDR Rules even specify the process of a consolidation arbitrator, who decides whether to consolidate proceedings based on the assessment of the basic conditions,[44] and they are to be chosen by the parties unless the parties fail to reach a common choice and the administrator chooses the same.[45] Furthermore when the consolidation takes places, all parties of such arbitrations are deemed to have renounced

41 *See,* ICC Rules, art. 10; LCIA Rules, art. 22A; ICDR Rules, art. 9(1); SIAC Rules, art. 8.
42 *See,* ICC Rules, art. 10; LCIA Rules, art. 22A; ICDR Rules, art. 9(1); SIAC Rules, art. 8.
43 LCIA Rules, art. 22A.
44 ICDR Rules, art. 9(3).
45 ICDR Rules, art. 9(2).

their rights to appoint an arbitrator and the consolidation arbitrator has the power to remove any of the appointed arbitrators and designate arbitrators from erstwhile-appointed tribunals to the consolidated arbitration.[46]

Likewise, in the SIAC Rules, the court retains the power to annul the designation of any arbitrator appointed prior to the consolidation.[47] Furthermore, a point to be noted here is that the revocation of any arbitrator is without prejudice to the validity of any act, order, or award passed by the arbitrator prior to being revoked.[48]

By perusing the above rules, we see that each party in a consolidated arbitration exercises the right to appoint an arbitrator, or in some institutional rules, each party waives the said right. By the virtue of this practice, a sort of uniformity is created in terms of appointment/non-appointment of arbitrators amongst the parties. The rationale behind practicing this uniformity is, once again, to maintain fairness and adhere to the principle of equality as mandated by the New York Convention and not fall prey to the situation that came up in the *Dutco* case.

Overall, three primary key trends are observed across the consolidation provisions of various international institutional arbitration rules. First, that consent is not mandatory in consolidation; second, that consolidation without explicit consent is possible only when certain 'basic' conditions are met; and third, that either all parties exercise or waive the right to appoint arbitrators. Once again, these trends and conditions are vital in the resolution of inherent problems pertaining to arbitral consolidation and will be of guidance and inspiration when we attempt to form holistic methods for arbitral consolidation in India.

46 ICDR Rules, art. 9(6).
47 SIAC Rules, art. 8(10).
48 SIAC Rules, art. 8(11).

V. Balancing the Interests in India: Arriving at a Harmonious Solution

A. Fixing the Problems Born of the Group of Companies Doctrine

From the above discussions held on joinder and consolidation, we can deduce that these tools, paired with a proper procedure, have become widely accepted by the international community. However, in India, as already discussed previously, the application of the 'group of companies' doctrine, rather than a delineated procedure, seems to have been the main driving force behind joinders and consolidation.

Ever since the beginning of its usage, the said doctrine has faced heavy criticism from the international community for its non-consensual approach. The most fundamental contention against the doctrine is delivered from Article 7 of the United Nations Commission on International Trade Law Model Law on International Arbitration[49] and Article II of the New York Convention,[50] which clearly state that the intention to arbitrate must be penned down. Prof. Gary Born has termed the said doctrine as 'controversial' and says that the same principle has been subject to prevalent criticism.[51] Furthermore, the said doctrine has only been recognised in India and France,[52] and most countries have usually rejected the same. An English commercial court had opined that "*the Group of Companies doctrine ... forms no part of English law*"[53] and similarly, Swiss Courts also generally bar the recognition of the same under their *Switzerland de lege lata*.[54] In other international cases, courts have also quashed arbitral awards

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49 United Nations Commission on International Trade Law (UNCITRAL), Model Law on International Commercial Arbitration, art. 7, G.A. Res. 40/72, U.N. Doc. A/RES/40/72 (Dec. 11, 1985), as amended by G.A Res. 61/33, U.N. Doc. A/RES/61/33 (Dec. 18, 2006).

50 New York Convention, art. II.

51 GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 1558-59 (3d. ed. 2009).

52 Dow Chemical France v. ISOVER Saint Gobain, ICC Case No. 4131, Interim Award, Sept. 23, 1982.

53 Peterson Farms Inc. v. C&M Farming Ltd., [2004] 2 Lloyd's Rep. 603 (Q.B.).

54 Award in Geneva Chamber of Commerce Case of 24-3-2000, 21 ASA BULL. 781 (2003).

that placed reliance on the said doctrine while binding non signatories to an arbitration agreement.[55] Finally, as if in a response to the mounting criticism, even the Supreme Court doubted the tenability of this doctrine in the recent *Cox & Kings* case.[56]

Hence, taking a cue from the international community and the rationale delivered by the bench in the *Cox & Kings* case, the author thinks that it is high time for our judiciary to either seriously reconsider, redefine, and clarify the ambit of this heavily criticized doctrine or discard it all together in the upcoming referred matter.

B. Adopting the International Standards, Both Judicially and Legislatively

In harmonising the usage of joinders and consolidation in our country, both the judiciary and the legislature have a vital role. Both the law-making and the law-interpreting organs need to have an approach that is comprehensive, rational, and balances the advantages and pitfalls of these procedural tools. In this regard, the following steps can be taken.

i. Legislative Steps

Despite the tools of joinder and consolidation gaining wide acceptance and their incorporation into institutional arbitral rules rapidly rising[57] most, if not all, national jurisdictions have failed to codify the same into specific legislative provisions. Most of the jurisprudence surrounding these tools arises from case laws and not from codified law, resulting in conflicting and varying positions of law. This problem is particularly aggravated by the fact that most debates regarding joinder and consolidation arise due to the existence of various methods and legal theories surrounding these tools and

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55 Judgment of January 20, 2006, C04/174HR (Netherlands Hoge Raad) (affirming annulment of arbitral award
binding non-signatory affiliates); BORN LAW & PRACTICE, *supra* note 6 at 140.

56 Cox & Kings Ltd. v. SAP India (P) Ltd., (2022) 8 SCC 1 (India).

57 Kirtan Prasad, *Joinder and Consolidation in Institutional Arbitration over the last 10 years: Evolution or Revolution*, 7(2) NAT'L L. SCH. BUS. L. REV. 25, 40 (2021).

the judicial interpretative process is perhaps not the best method when a multitude of interpretations exist. Thus, the codification of joinder and consolidation provisions has a massive unexplored advantage, as via legislative codification, these problems of conflicting interpretations and the overall lack of clarity in relation to these tools would be substantially reduced.

In light of this, the Indian legislature needs to come up with clear provisions for joinder and consolidation. The conditions drafted for these tools should conform with the key trends and commonalities of joinder and consolidation provisions as found in the analysis of various arbitral institutions, and the same should be implemented by the virtue of an amendment to the Arbitration Act.

In joinder cases, the conditions should either be the express consent of all the parties or the consent of the third party along with the satisfaction of the tribunal/court. Furthermore, there should be a balance between the rights of the signatories and the non-signatories, and none of them should be devoid of the right to select arbitrators. In the case of an already appointed tribunal prior to the joinder, if the third-party objects to the composition of the same, then the tribunal should be reconstituted post the joinder without prejudice to any decision/order delivered by the tribunal before the same. This reconstitution of the arbitral tribunal could either be undertaken with the mutual consent of all the parties, including the third-party, or, in case of lack of agreement, be undertaken by the High Court, wherein all the parties waive their right to appoint an arbitrator.

In cases relating to consolidation, the conditions should be either the express agreement of all the parties to the same or the satisfaction of the arbitral tribunal/High Court based on relevant circumstances and compatibility of agreements so involved. Similar to the joinder provisions, in case of disagreement on the composition of the arbitral tribunal, the tribunal should be reconstituted with each party's consent, or each party's

right to appoint an arbitrator should be waived, and the High Court should constitute an arbitral tribunal it deems fit.

Lastly, to not encroach upon the freedom and the autonomy of the parties in selecting a procedure of their choice, a "without prejudice" clause should be added before these provisions, which would state that these provisions would only come into play only when the institutional or ad-hoc procedure chosen by the parties does not provide for any specific method of joinder or consolidation. This step will not only maintain the autonomy-friendliness of the arbitration procedure, but it will also keep in check the persistent India-specific problem of excessive judicial intervention[58] and keep delays caused to such intervention to a minimum.

ii. Judicial Steps

Till the time the legislative codification and amendments come into place, the judiciary must devise an approach that can satisfactorily deal with situations of joinder and consolidations. The first order of business would be to either fix or get rid of the 'group of companies' doctrine so that no more arbitrations fall prey to non-consensual joinders and consolidations lacking in due process. The Courts should adopt a more rational approach in consonance with commonalities as depicted by various international arbitral institutions and develop a new doctrine or test whose conditions must be met for the process of joinder/consolidation to be applicable.

In cases of joinder, where the internationally accepted practice is for the mandatory demand of consent of the third party, the Courts should not force joinders without the explicit consent of the non-signatory. Only under very exceptional circumstances, as when the matters are concerned with the

[58] Justice B.N. Srikrishna, Report of the High Level Committee to Review the Institutionalisation of Arbitration Mechanism in India (2017).

principles of natural justice[59] or public policy,[60] should there be the application of non-consensual joinders. A 'disputes-based' method, wherein the joinder is based on a case-by-case consideration of inseparably entwined rights and obligations with respect to third parties,[61] rather than a test with fixed factors, is a possible approach to such exceptional circumstances. This flexibility is vital because a straight-jacket legal theory or solution would eventually run into problems wherein sometimes even minute involvement of third-party would lead them to be impleaded,[62] whereas during other times even inextricable rights of third-party would not be enough for it to be part of the proceedings, thus violating the general basic principles of fairness and natural justice.[63]

In the cases of consolidation, where the internationally accepted practice does not always mandate consent and the process at times pertains to the wisdom of the court/tribunal, non-consensual methods should still be evoked with great care and restraint and only in the cases where there exists an adequate legal/contractual relationship between the signatories and the non-signatories.[64] In the realm of consolidations, the Supreme Court could perhaps even try to use a refurbished version of the current 'group of companies' doctrine by coming up with a stricter test of intent for determining implied consent. This stricter test could be in line with the one used in the case of *Reckitt Benckiser* v. *Reynders Label Printing*[65], wherein the

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59 Ilias Bantekas, *Equal Treatment of Parties in International Commercial Arbitration*, 69(4) INT'L & COMP. L. Q. 991, 993 (2020).

60 FRANCO FERRARI, LIMITS TO PARTY AUTONOMY IN INTERNATIONAL COMMERCIAL ARBITRATION (2016).

61 Tejas Chhura, *The Need to Re-Think the Group of Companies Doctrine in International Commercial Arbitration*, 15 NAT'L UNIV. JURIDICAL SCI. L. REV. 1, 13-14 (2022) [*hereinafter* "Tejas Chhura"].

62 Dow Chemical France v. ISOVER Saint Gobain, ICC Case No. 4131, Interim Award, 23 September 1982, 136.

63 Tejas Chhura, *supra note* 61, at 13.

64 Punit Sanwal, *Dissecting the 'Group of Companies' Doctrine under Arbitration Law Vis-À-Vis the Cox & Kings Case*, RAJIV GANDHI NAT'L UNIV. L. FIN. & MERCANTILE L. REV. (Aug. 21, 2022), *available at* https://www.rfmlr.com/post/dissecting-the-group-of-companies-doctrine-under-arbitration-law-vis-%C3%A0-vis-the-cox-kings-case.

65 Reckitt Benckiser v. Reynders Label Printing, (2019) 7 SCC 62.

Supreme Court opined that the burden of proof to prove the implied consent of the non-signatory to arbitrate lied with the signatory. Rather than relying on minor connections,[66] like common letterheads, usage of intellectual property of third-party, etc.[67], the new test should stress more upon the reasoning which forms the basis of the transaction arrangement and any possible intention of the parties to divide the transaction and liability amongst group/subsidiary entities.[68] The test could even take inspiration from international jurisprudence, wherein more concrete factors like third-party's [a] active participation in the conclusion of the contract,[69] [b] interest in the outcome of dispute,[70] and [c] involvement in a contract that is inextricably intertwined with the disputed contract in question,[71] are considered.[72]

Overall, with the respect to both of these procedural tools, the main aim of these steps is to minimise the intervention of the courts wherever possible and focus more on the aspect of consent of the parties. However, whenever there is a need for the intervention of the courts in light of matters such as public policy, natural justice, etc., the courts should adopt a more over-arching case-by-case approach that considers a variety of factors and consider a more holistic view of the dispute. If the above steps are

66 Tejas Chhura, *supra note* 61, at 11.

67 Stavros Brekoulakis, *Rethinking Consent in International Commercial Arbitration: A General Theory for Non-Signatories*, 8 J. INT'L DISPUTE SETTLEMENT 610, 619 (2017).

68 Charlie Caher, Dharshini Prasad & Shanelle Irani, *The Group of Companies Doctrine – Assessing the Indian Approach*, 9(2) INDIAN J. ARB. L. 33, 50 (2021).

69 Sponsor AB v. Lestrade, Pau, Nov. 26, 1986 [1988] Rev. Arb. 153; ICC Case No. 5103/1988 [1988], J. DROIT INT'L 1206; Société Orthopaedic Hellas v. Société Amplitude, No 11-25.891 Cass. Civ. 1ere, Nov. 7, 2012.

70 Trelleborg do Brasil Ltda v. Anel Empreendimentos Participações e Agropecuária Ltda, Apelação Cível No.
267.450.4/6-00, 7th Private Chamber of São Paulo Court of Appeals, May 24, 2004.

71 Khatib Petroleum Services International Co. v. Care Construction Co. and Care Service Co., Case No. 4729 of the Judicial Year 72, Egypt's Court of Cassation, June 2004; Chaval v. Liebherr, Recurso Especial No 653.733, Brazilian Superior Court of Justice, 3 August 2006.

72 Eldiiar Raiymkulov, *Non-Signatory Parties in Arbitration: What can the Arbitration Institution of the Kyrgyz Republic Learn from International Practice?*, CENTRAL EUROPEAN UNIVERSITY (Apr. 01, 2016), *available at* https://www.etd.ceu.edu/2016/raiymkulov_eldiiar.pdf.

implemented by both the legislature and the judiciary, it would perhaps un-muddle the current ambiguous scenario and lead to a lot more clarity with regard to these tools.

VI. Conclusion

In light of the rising number of multi-party arbitrations and the rising popularity of the tools of joinder and consolidation, this note aimed to analyse the legal position of these procedural tools in the Indian and international landscape and ultimately arrive at a holistic way forward for these tools.

The note began by briefly explaining these tools, their purpose, usage, advantages, and pitfalls. Then it proceeded to elucidate upon the muddled legal position of these tools in Indian jurisprudence, going through many landmark judgments like *Chloro Controls*, *Cox & Kings*, among others. This part was followed by a bird's eye analysis of the joinder and consolidation provisions of many arbitral institutions in order to pinpoint key trends and commonalities between the same and arrive at the best-accepted international practices. Lastly, after a thorough look at the mounting criticism towards the Indian approach of the 'group of companies' doctrine, the note attempted to provide alternate solutions in line with the holistic analysis conducted in the preceding sections.

Conclusively, it can be said that the arbitration law pertaining to joinders and consolidation is at a crucial stage in India, hinging upon the matter referred to a larger bench by the *Cox & Kings* case. It is hoped that the conclusion ultimately reached by Supreme Court with regard to the question of law at hand is in line with the analysis of this essay, resulting in a better arbitration environment in our country. Similarly, it is hoped that the legislature comes out with clear and specific provisions for these procedural tools so as to make India stand on the same pedestal as other arbitration-friendly regime

THREE HEADS ARE BETTER THAN ONE? A DISCOURSE ON THE NUMBER OF ARBITRATORS AND THE NOTION OF SOLE ARBITRATOR VERSUS THREE-MEMBER TRIBUNAL

*Steve Ngo**

Abstract

*Although frequently used for international conduct, arbitration can be considered the "parallel world" of commercial dispute resolution, existing alongside litigation in national courts. In essence, arbitration is frequently chosen by parties because it offers extra benefits not found in court litigation, like the ability of the parties to agree on the number of arbitrators and choose the best arbitrators to hear their disputes. Parties do not, however, always get to choose their arbitrators because in cases where the parties are unable to agree on the number of arbitrators, a single arbitrator is appointed by default. The various facets of the debate between a single arbitrator and a three-person tribunal will be covered in this article, including the historical background, the United Nations Commission on International Trade Law Model Law's ["**Model Law**"] legislative deliberations, current practises, and future recommendations.*

I. Introduction

American mathematician Tobias Dantzig once said that "*mathematics is the supreme judge; from its decisions there is no appeal.*"[1] As a prologue, jurisprudence

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1 *Back Matter*, 118(8) AM. MATHEMATICAL MONTHLY (2011).

as science[2] would not be incompatible with or detached from the formal sciences of numbers. Arithmetic does, after all, play a crucial part in the law and in how legal proceedings are conducted, such as when determining the amount of money to be awarded, how to calculate interests and, from a jurisprudential perspective, the number of judges, jurors, and arbitrators. British jurist Lord Denning, formerly a Master of the Rolls, first studied mathematics before reading the law. He was renowned for his unique prose style of judgment and does not appear to have completely abandoned his numeral fascination where he had underlined numbers[3] in some of his decisions with quite a fascinating impression. This article deals with arbitration and the question of the number of arbitrators in arbitral proceedings. To a novice or arbitral theorist, this may appear to be an insignificant matter of the choice of number, but in fact, it is a material issue in international arbitral practice for practitioners.

Central to the concept of arbitration and its *raison d'être*, is the arbitrator. There is a well-known saying in French that "*Tant vaut l'arbitre, tant vaut l'arbitrage*" which translates to "*an arbitration is only as good as the arbitrator*".[4] Amidst the numerous discourse and publications on the purpose or concept of the appointment of arbitrators, at its core, the impulse of disputants is to prevail in the arbitration and to not be bested by the other. It would be rather jejune to think that friends can be made or existing relationships preserved when entering into the arbitration arena. This is in contrast though to other forms of Alternate Dispute Resolution ["**ADR**"] such as mediation, which invariably involves the will of the disputants themselves to come to a resolution *inter se* and not by an arbiter or

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2 *See* JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED xix (John Murray eds., 1832). Jurisprudence is said to be a science.

3 For interesting reading, Lord Denning wrote at the beginning of each of the judgements that "*This is the case of the three smugglers*" *in* Allgemeine Gold-und-Silberscheideanstalt v. Customs and Excise Commissioners, [1980] QB 390 and '*Many years ago Sir Edward Coke had a case about six carpenters. Now we have a case about six car-hire drivers*' *in* Cinnamond v. British Airports Authority, [1980] 1 WLR 582.

4 *See, e.g.*, Stephen R Bond, *The International Arbitrator: From the Perspective of the ICC International Court of Arbitration*, 12 NW. J. INT'L L. & BUS. 1 (1991).

adjudicator. The outcome of arbitration while heavily dependent on the good fight of each party, will ultimately be decided by the arbitral tribunal. Therefore, the cornerstone consideration while the parties prepare for arbitration is the appointment of the arbitrator also underpinned by the chief aims of winning and spending prudently for the arbitration to avoid a Pyrrhic victory.

In reality, disputants, while relying on the good counsel of their representatives, would want to appoint the "*right*" arbitrators for their dispute for the stake is high and there would be no appeal on the decision of the tribunals, whose decision is normally final. Here, the idea of choosing the "*right*" arbitrator can become elusive and at times, controversial. Parties are thought to be not inclined to appoint a random arbitrator but to at least consider someone with a known track record or based on recommendations from peers. On the other hand, well-known arbitrators might be overcommitted in terms of their time; given that not all disputes, parties and counsels are the same, there is no certainty that all arbitrators conduct all proceedings similarly, no matter how glowing the reports are from previous cases. In essence, then, the idea of party autonomy and choice of parties in the selection of arbitrators is a key reason for parties choosing arbitration. They can decide not only on the procedural aspects of the proceedings but also the arbitrator to whom they can entrust their disputes.

Arbitrators perform quasi-judicial roles not exactly effortlessly because, in contemporary times, they have been regularly called upon to adjudicate large and complex disputes, many of which have a significant impact on individuals, entities or even states. In substance, the roles and duties of arbitrators can be equated to those of judges in national courts though they operate in a different order, often enjoying more benefits such as a near "*free market*" approach to practice and acting as free agents. Unlike court judges with fixed remunerations, arbitrators tend to be better rewarded financially, typically on an *ad valorem* basis. However, these perks do not detract arbitrators from the heavy and often stressful responsibilities that

they have to shoulder– often, their specialised expertise is the *raison d'être* for their appointment and their best judicial acumen is expected. It is no wonder that in choosing arbitrators, the parties need to consider all relevant aspects very carefully. After all, arbitration can be a zero-sum game.

This article will not deal with the fundamental questions of the independence and impartiality of arbitrators but with the concept of and issues surrounding the number of arbitrators. It also emphasises the dichotomy of long-held beliefs or practices and the reality, juxtaposed, based on the culmination of inquiries, research and experience of an academic practitioner. This work also aims to invite further discussion on potential reforms for new or improved mechanisms in the procedural framework of contemporary international arbitration, which tends to be disregarded or relegated to the league of a non-issue.

II. Number of arbitrators

A. Purpose and brief historical context

International arbitration has been criticised in recent times for its high costs and complexity,[5] although this can be attributed to the parties themselves for their own choice of big-name arbitrators, counsels[6] or their own counsel's conduct in the arbitral proceedings, such as applications, discovery, and extension of time, which could all impact the timeframe for

[5] *See*, Queen Mary University of London, International arbitration: Corporate attitudes and practices 2006, at 19, *available at* https://arbitration.qmul.ac.uk/media/arbitration/docs/IAstudy_2006.pdf; Queen Mary University of London, International Arbitration: Corporate attitudes and practices 2008, at 5 *available at* https://arbitration.qmul.ac.uk/media/arbitration/docs/IAstudy_2008.pdf; Queen Mary University of London, 2015 International Arbitration Survey: Improvements and Innovations in International Arbitration, at 24 *available at* https://arbitration.qmul.ac.uk/media/arbitration/docs/2015_International_Arbitration_Survey.pdf.

[6] Sundaresh Menon, Opening Plenary Session, International Arbitration: The Coming of a New Age for Asia (and Elsewhere), ICCA Congress, ¶¶ 30, 35 (2012), *available at* https://cdn.arbitration-icca.org/s3fs-public/document/media_document/ags_opening_speech_icca_congress_2012.pdf.

the end of the proceedings.[7] In international commercial arbitration proceedings, the arbitral tribunal comprises of either a sole arbitrator or three arbitrators. In the case of a tribunal other than a sole arbitrator, the number is not even, as a matter of practicality, to avoid potential deadlock. Admittedly, it is trite law that arbitration is contractual and consensual between the parties, but there is also an economic consideration in the choice of the number of arbitrators; a sole arbitrator reduces costs, whereas three arbitrators increase the costs three-fold.

Given that the question of the number of arbitrators is conceived at the contract drafting stage of the arbitration or dispute resolution clause, it is also worthwhile considering what goes through the minds of the drafters. Contracts prepared by professionals often embody professional opinions or recommendations for the parties. This is to say that generally and empirically; parties may not enquire or inquire about the arbitration clause as their focus will be on the commercial terms they are about to enter into. There are, of course, exceptions, whereby the parties might be aware of the contentious nature of their contracts or have experience with disputes. When the parties choose or agree to arbitration, their choice of the number of arbitrators would be influenced by a variety of factors. They may only want the most economical set of the tribunal, which is the option of a sole arbitrator. This can be risky because proficient contract drafters would likely advise paying particular attention to the nature of the contract, value and profile of the parties so that informed choices can be made regarding the arbitration clause.

Nevertheless, legal contract drafters almost invariably are corporate law advisers and not dispute specialists and thus they may not have the insights into what there is to come when disputes arise. This is exacerbated by the fact that the parties may engage dispute lawyers from another set of firms

[7] Queen Mary University of London, 2015 International Arbitration Survey: Improvements and Innovations in International Arbitration, at 31, *available at* https://arbitration.qmul.ac.uk/media/arbitration/docs/2015_International_Arbitration_Survey.pdf.

different from the ones engaged to prepare the contracts. There is also the complication of self-drafted contracts and arbitration clauses by laypeople or legal professionals who do not fully comprehend arbitration. The prevalence of defective arbitration clauses in contracts these days is rife,[8] making the lack of awareness regarding the importance of considering the number of arbitrators inconsequential in comparison.

Briefly exploring the origin of the number of arbiters, there appears to be some historical context, which makes for an interesting academic observation. According to the ancient Jewish law or Talmud, in its key religious text of Mishnah Sanhedrin, composed in Talmudic Israel (circa 190 to 230 CE), it is said that:[9]

> *"Cases concerning property [are decided] by three [judges]. This [litigant] chooses one and this [litigant] chooses one and then the two of them choose another, according to Rabbi Meir. But the Sages say: "The two judges choose the other judge.""*

To this day, the Jewish Rabbinical court, or Beth Din, still maintains a "*bench*" of three adjudicators. The tradition as espoused above is compatible with the notion of natural justice, where each litigant chooses their own judge; no one can claim that he has been discriminated against, and also a collective decision-making process. Such a constitution will certainly avoid deadlock since, logically speaking, a majority of dissent becomes the majority decision.

It would be interesting to also observe other historical accounts, though they are ancient and may no longer make sense presently, which may or

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8 Laurence Shore, Vittoria De Benedetti & Mario de Nitto Personè, *A Pathology (Yet) to Be Cured?*, 39(3) J. INT'L ARB., 365 (2022).

9 Joshua Kulp, *English Explanation of Mishnah Sanhedrin, Chapter 3:1*, SEFARIA, *available at* https://www.sefaria.org/English_Explanation_of_Mishnah_Sanhedrin.3.1.1?lang=bi. It also went to discuss about challenging the judge on grounds of lack of impartiality "*This [litigant] can invalidate this one's judge, and this [litigant] can invalidate this one's judge, according to Rabbi Meir. But the Sages say: "When is this so? When they bring proof against them that they are relatives or otherwise invalid; but if they are valid and experts, he cannot invalidate them*."

may not have influenced contemporary context. Arbitration history scholars Roebuck and De Loynes de Fumichon, among others, published a work on the arbitration practice of ancient Rome and its empire based on the earliest evidence to 640AD.[10] Disputants were free to agree with any number of arbiters they liked, although the most usual way was to appoint a single arbiter but there have been more and the number was even, with usually two arbiters.[11] However, everything depended on the "*compromissum*,"[12] a sort of arbitration agreement between the parties. If two arbiters were named, the parties could ask either one of them to be the sole arbiter but if both named arbiters accepted the appointment, the award would have to be rendered by both or none.[13] The ancient Roman system also deals with the question of an even number of arbiters, which is thought of as "*likely to cause problem*" due to "*human nature's propensity to disagree*" and when the arbiters were equal in number and could not agree, the Roman praetor would compel the parties to add another arbiter to make it uneven.[14] Incidentally, if the parties in their compromise provided for two arbiters with the power to add but failed to name the third arbiter, it would be void.[15]

Meanwhile, the English Parliament passed the first arbitration act in 1697.[16] The ancient law stated that "…*Parties shall submit [disputes] to finally be concluded by the Arbitration or Umpirage which shall be made concerning them by the Arbitrators or Umpire pursuant to such Submission*…" There is nothing mentioned about the number of arbitrators, and neither is it conclusive, though "*arbitrators*" in the plural is stated. The subsequent English Arbitration Act of 1889 did not appear to specifically address the "*default*" number of arbitrators,

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10 DEREK ROEBUCK AND BRUNO DE LYONES DE FUMICHON, ROMAN ARBITRATION 38 (2004).

11 *Id.* at 118.

12 *Id.* at 19. Refers to a mutual promise undertaking between the parties to go to arbitration and to submit to the arbitrator's award.

13 *Id.* at 118.

14 *Id.*

15 *Id.* at 119.

16 *William III, 1697-8: An Act for determining Differences by Arbitration. [Chapter XV. Rot.Parl. 9 Gul. III.p.3. n.5], in* STATUTES OF THE REALM 1695-1701 369-370 (Vol. 7, John Raithby eds., 1820), *available at* http://www.british-history.ac.uk/statutes-realm/vol7/pp369-370.

whereas modern English legislations all eventually adopt the sole arbitrator position. For example, the Arbitration Act, 1950 states that unless a contrary intention is expressed by the parties, the reference shall be made to a single arbitrator.[17] Arguably, the default single arbitrator is instinctive since, in the beginning, arbitration can be traced back to the time of the English merchants when it was created to serve the needs of merchants and traders who needed their commercial disputes resolved expeditiously[18] and also likely to be uncomplicated. Incidentally, the single arbitrator system could be English by origin, as the development of arbitration laws and practice in its non-primitive form as well as in the last three centuries was primarily taking place in England, where its influence on the world during the time of the British Empire had, unsurprisingly, influenced the policies and laws of many countries today.

In a final historical review, the Institute of International Law at its 1875 session held at The Hague came up with draft regulations for the international arbitral procedure, intended to promote the use of arbitration.[19] The draft regulation provides for the parties to agree on designating the number of arbitrators (and names) according to the compromise, thus, in the absence of any provisions laid down in it, "*each of the contracting parties chooses on its own part an arbitrator, and the two arbitrators thus named choose a third arbitrator or designate a third person who shall select him.*"[20]

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17 Arbitration Act 1950, 14 Geo. 6 c. 27 § 6 (Eng.).

18 KYRIAKI NOUSSIA, CONFIDENTIALITY IN INTERNATIONAL COMMERCIAL ARBITRATION, A COMPARATIVE ANALYSIS OF THE POSITION UNDER ENGLISH, US, GERMAN AND FRENCH LAW 11 (2010).

19 Sessions of the Hague, Draft Regulations for International Arbitral Procedure (1875), *available at* https://www.idi-iil.org/app/uploads/2016/01/1875-Session-of-The-Hague-Arbitral-Procedure-translated-Scott.pdf.

20 *Id.* at art. 2.

B. Comparison and rationale

Turning to the modern history of arbitration legislation formation, it is imperative to examine the legislative history of the Model Law.[21] Modern arbitration enshrines the concept of party autonomy, which essentially grants the parties the right to decide on how the arbitration is to be conducted, including the number of arbitrators. In the first instance, the parties can and are usually expected to agree on the number of arbitrators at their contract formation stage. Often, parties have omitted or ignored this, resulting in the need to regulate how this is to be resolved when there is a deadlock. Where the parties cannot come to a consensus, there would be a default number that will apply; in the case of the Model Law, three arbitrators shall be appointed.[22] This is also consistent with the UNCITRAL Rules of Arbitration ["**Rules of Arbitration**"] which prescribes three arbitrators if the parties fail to agree on a sole arbitrator[23] wherein the number three "*appears to be the most common number in international arbitration*."[24]

The Model Law's provision on the number of arbitrators, though only framed in two short sentences,[25] belies the careful deliberations made by

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21 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), as amended by G.A Res. 61/33, U.N. Doc. A/RES/61/33 (Dec. 18, 2006) [*hereinafter* "Model Law"].

22 Model Law, art. 10(2).

23 Article 5, UNCITRAL Rules of Arbitration, adopted in 1976 by the UN General Assembly Resolution 31/98 and UNCITRAL Rules of Arbitration Article 7, revised in 2010, UN General Assembly Resolution 65/22. Perusing the legislative history or *travaux preparatoire* (See UNCITRAL Committee reports, A/CN.9/9/C.2/SR.3 (15 April 1976) and A/CN.9/9/C.2/SR.15 (23 April 1976)) of the Rules of Arbitration, some of the delegates had preferred a sole arbitrator over three arbitrator cited reasons of effectiveness and less expensive there were arguments for three arbitrators due to the preference for a 'college of arbitrators' and opportunity for the parties to each appoint an arbitrator (see A/CN.9/9/C.2/SR.3 (Apr. 15, 1976), ¶¶ 1, 5). Following the deliberation, it was held that the majority of countries advocated the appointment of three arbitrators thus this would be adopted (see A/CN.9/9/C.2/SR.3), ¶¶ 6 -7.

24 *See*, G.A. XVIII, U.N. Doc. A/CN.9/264, art. 10, at ¶ 3.

25 Model Law, art. 17.

the Model Law's Working Group ["**Working Group**"]. The Working Group considered various possibilities, which included:

(a) The number of arbitrators equal to the number of the parties but increased by one if the number is even. This was not thought to be practical since the claimant might be bringing a claim against multiple respondents and hence will result in an unsymmetrical tribunal.[26]

(b) The Working Group also considered the possibility of a sole arbitrator by default, and unless the circumstances of the case require a tribunal of three arbitrators,[27] a sole arbitrator would be appointed. However, there was widespread support for the choice of three arbitrators and the Working Group unanimously agreed without dissent.[28]

Indeed, the Working Group expectedly had to deal with the debate that a sole arbitrator would cost less in time and money.[29] However, it was eventually agreed that a panel of three arbitrators was more likely to "*guarantee equal understanding of the positions of the parties*" and "*three-person arbitral tribunals were the most common configuration in international commercial arbitration.*".[30]

The Model Law also did not require the number of arbitrators to be uneven,[31] for it is considered to be an "*overprotective legislative measure*" which

26 U.N. GA, Report of the Working Group on International Contract Practices on the Work of its Fourth Session, A/CN.9/232 (October, 1982), which illustrated that 'if a party were to commence arbitration proceedings against ten respondents in a single case, there would be one party-appointed arbitrator by the claimant and ten party-appointed arbitrators by the respondents.'

27 HOWARD M. HOLTZMANN & JOSEPH E. NEUHAUS, A GUIDE TO THE UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION, LEGISLATIVE HISTORY AND COMMENTARY, 349 (1989).

28 *Id.* at 349.

29 *Id.*

30 *Id.*

31 This is even when in some legal jurisdictions this is required and the existence of treaty, i.e. the "Strasbourg Uniform Law" or European Convention providing a Uniform Law on Arbitration, European Treaty No. 56, 1966. For instance, the French Decree No. 2011-48 of 13 January 2011 at Article 1451 requires the number of arbitrator to be uneven. Article

should be fully left to the parties' discretion and agreement.[32] Whilst an even number of arbitrators could lead to a deadlock, there are also sound reasons for this which cannot be dismissed completely. For example, the parties may want a two-arbitrator tribunal with the option to appoint an "*umpire*" should there be a deadlock between the two. There is no known evidence that a two-member tribunal will always fail and the umpire will only be called upon to act when necessary; also, the parties may want to appoint any number of arbitrators they prefer.[33] The system of two arbitrators with the option of an umpire was available in the past, largely based on English practice.[34]

Despite the Model Law providing for the default three-member tribunal, many countries that have adopted the Model Law and otherwise[35] have opted for a single arbitrator position. Apart from the possible influence of the English system, it is also quite natural to instinctively consider arbitration to be what it was first created – an alternative to court litigation, a less time as well as cost-consuming method.[36] For instance, Singapore,

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5 (1) and (2) states that "The arbitral tribunal shall be composed of an uneven number of arbitrators" and "If the arbitration agreement provides for an even number of arbitrators an additional arbitrator shall be appointed". Further, Article 5(3) provides that "If the parties have not settled the number of arbitrators in the arbitration agreement and do not agree on the number, the arbitral tribunal shall be composed of three arbitrators." It would appear that the Strasbourg Uniform Law have not gained significant traction considering the number of countries that have adopted it. *See*, Council of Europe, European Convention providing a Uniform Law on Arbiration, ETS No. 056, *available at* https://rm.coe.int/168006ff61.

32 Possible features of a model law on international commercial arbitration, Report by the Secretary-General, UN Doc. A/CN.9/207 (1981), ¶ 67.

33 HOLTZMANN, *supra* note 27 at 348.

34 *See, e.g.,* Arbitration Act 1950, 14 Geo. 6 c. 27, § 8 (Eng.).

35 *See, e.g.,* Arbitration Act 1996, c. 23, § 15(3) (Eng.); Federal Arbitration Act § 5, 9 U.S.C. § 5 (1947) (U.S.); Singapore International Arbitration Act 1994, § 9; The Arbitration and Conciliation Act, 1996, No. 26, Acts of Parliament, 1996, § 10(1) (India).

36 At least that was how arbitration was expected to be as one interesting historical record found in the British House of Commons Hansard attributed to Sir John Rigby, a member of the house who has also held offices as Solicitor-General (1892-1894) and Attorney-General (1894) that "*(H)his experience of arbitration was that it was more expensive and a more dilatory tribunal for simple cases than decision by a Court of Justice*." *See* 20 Parl Deb HC (1894) co. 900 (UK).

which adopted the Model Law,[37] prescribed a default single arbitrator whereas the Hong Kong Special Administrative Region's ["**Hong Kong SAR**"] previous arbitration law[38] was formulated based on the English Arbitration Act, 1950 for its domestic regime. Without the need to embark on an intricate historical inquiry, it would suffice to say that the rationale for choosing a sole arbitrator is largely about cost savings.

In an important exercise in the 1980s, the English and Wales Departmental Advisory Committee on Arbitration Law ["**DAC**"] was formed to conduct a review of the English arbitration law and also to consider the adoption of the Model Law. On the point of the number of arbitrators, the DAC reported the following rationale:[39]

> *"[T]he absence of agreement the default number shall be one. The employment of three arbitrators is likely to be three times the cost of employing one, and it seems right that this extra burden should be available if the parties so choose, but not imposed on them. The provision for a sole arbitrator also accords but with common practice in this country, and the balance of responses the DAC received." (emphasis added)*

The common observation that can be made from the above is that the provision for a sole arbitrator as default is wholly due to the issue of cost savings. The notion is that if the parties want a tribunal of three arbitrators, they can and are expected to do so, otherwise, a sole arbitrator would be appointed. Such an expectation is not irrational, given that there can be a presumption that contracts are drafted by trained professionals. However, given the number of "*pathological arbitration clauses*" out there, for the time being, it would appear to remain an aspiration that all contract and legal drafters are fully aware of arbitration today. Interestingly, this is contrasted with the Model Law of which the Working Group held the view that if the

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37 Singapore maintains a dual-regime arbitration law, for domestic and international arbitration.

38 Arbitration Ordinance, No. 22, Cap. 341, (1963) O.H.K (H.K.).

39 Departmental Advisory Committee on Arbitration Law Report on the Arbitration Bill, Feb. 1996, at 609-610.

parties desired the time and cost savings sometimes associated with a sole arbitrator, they would normally agree on this at the outset.[40]

The English Arbitration Act, 1996[41] even went on to include a mechanism for the statutory "*conversion*" of three arbitrators to a sole arbitrator (though not the other way around). Sections 17(1) and (2) provide that in the case of a three-member tribunal,[42] each of the parties shall appoint one arbitrator, but if a party fails to do so, the other party having appointed its arbitrator may treat its arbitrator as the sole arbitrator. This effectively means that despite the prior agreement of the parties for three arbitrators, the tribunal can be converted into a sole arbitrator configuration.[43]

For comparison purposes of other arbitral jurisdictions and notable provisions: France does not stipulate the default number of arbitrators. However, in the event, the parties could not agree on the procedures for appointing the arbitrator, the French Code of Civil Procedure provides the procedure that will be followed. The German arbitration law[44] provides for the freedom of the parties to determine the number of arbitrators failing

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40 *See* HOLTZMANN, *supra* note 27, at 349; *See also* Analytical commentary on draft text of a model law on international commercial arbitration, Report of the Secretary-General, UN Doc. A/CN.9/264, art. 10, ¶ 3.

41 Arbitration Act 1996, c. 23 (Eng.).

42 Arbitration Act 1996, c. 23, § 16(5) (Eng.).

43 Inevitably, there is concern of whether an arbitral award rendered under such 'reconfigured' tribunal may be refused enforcement under the United Nations Convention on the Enforcement and Recognition of Foreign Arbitral Awards, made in New York in 1958 [*hereinafter* "New York Convention"] abroad due to, among others, grounds that the composition of the tribunal is not in accordance with the agreement of the parties under art V(1)(d). The English case of Minermet SpA Milan v Luckyfield Shipping Corporation SA, [2004] 2 Lloyd's Rep 348, whilst *inter alia* dealt with the issue of notice requirement under section 17 of the English Arbitration Act, Cooke J also observed that ("…*no evidence has actually been adduced to show that there would be any additional difficulty in enforcing such an award against Luckyfield, a Panamian registered company… I cannot see therefore that there is any "substantial injustice" which will be done*…").

44 Under the Tenth Book of the Code of Civil Procedure Arbitration Procedure, the German arbitration law adopts the Model Law; ZIVILPROZESSORDNUNG [Code of Civil Procedure] §§1025-1066 (Ger.).

which the default number would be three arbitrators,[45] similar to the Swedish Arbitration Act.[46] Elsewhere, in Malaysia,[47] the default number of arbitrators would be a tribunal of three arbitrators for international arbitration[48] or a sole arbitrator in the case of domestic arbitration.[49] Hong Kong SAR being a key international arbitral jurisdiction has an interesting proposition to the number of arbitrators. Its Arbitration Ordinance[50] is novel, in that following the Model Law, it allows the parties to determine the number of arbitrators and the right to authorise a third party or institution to make that determination for them.[51] If the parties are unable to decide on the number of arbitrators (either one or three), the Hong Kong International Arbitration Centre ["**HKIAC**"] will decide for the parties.[52] Incidentally, Section 23(3) of the Arbitration Ordinance also fixes and caps the number of arbitrators that would be determined by HKIAC to three.[53]

Considering all the above, it can be concluded that the core reason for a single arbitration position, including the departure from the Model Law, is cost savings. In adopting this position, it is mostly a matter of policy, though there may also be influenced by time-honoured practices. As a general observation, the DAC report was made in 1996 and the policies were formulated more than two decades ago when the international commercial arbitration scene was much more different than it is today. Arbitration then was largely perceived as an ["**ADR**"] method alongside mediation and thus should be expeditious and economical, but today, arbitration is taking on

45 *Id.* at § 1034(1).
46 Swedish Arbitration Act (1999, 116), §§ 12-13. The Swedish arbitration law does not adopt but is influenced by the Model Law.
47 Malaysian Arbitration Act, 2005.
48 *Id.* at § 12(2)(a).
49 *Id.* at § 12(2)(b).
50 Arbitration Ordinance, (2011) Cap. 609.
51 *Id.* at § 23(2).
52 Provided also that the parties have opted out of section 1 of Schedule 2 of the Arbitration Ordinance.
53 Similarly, the ICC rules also fixed the number of arbitrator(s) as single or three only. *See* Hong Kong International Arbitration Centre (HKIAC) Administered Arbitration Rules 2018, art. 12(1).

an important position as a common and preferred method of dispute resolution alternative to courts.

Nevertheless, most arbitrations these days are institutional. As earlier argued that the question of the number of arbitrators is a matter of policy, then the question of whether national arbitration laws must undergo overhaul or review on a possible mechanism to "*upsize*" the constitution of the tribunal from single to three-member arbitrators remains a matter of policy choices that would be followed by each of the jurisdictions. At present, there is a remedy to this in the form of arbitral institution rules. Arbitration institutions are far more flexible than national arbitration laws or *leges arbitri* in that they promulgate procedural rules, and then participate in case administration as well as management; they also have far greater flexibility in introducing innovations as well as the ability to revise their rules within a much shorter period of time, unlike legislative process. Most commonly, arbitral institutions incorporate discretionary provisions allowing the appointment of three arbitrators if the circumstances of the dispute warrant the appointment of three arbitrators,[54] notwithstanding the default number of a single arbitrator. Nevertheless, this article is not a critique of any *leges arbitri* whereas the advantages and disadvantages of the number of arbitrators will be discussed.

C. Sole arbitrator

Shakespeare's famous line, "*and one man in his time plays many roles*," spoken by the character Jacques in "*As You Like It*," [55] is a fitting description of the sole arbitrator. The lone arbiter will be left to fend for herself or himself, all alone in the arbitral proceedings which can be a highly unpleasant "*battlefield*." Procedurally, he would need to deal with the parties, and if

[54] *See e.g.*, International Chambers of Commerce Rules of Arbitration 2021, art. 12(2); London Court of International Arbitration (LCIA) Arbitration Rules 2020, art. 5.8; Beihai Asia International Arbitration Centre (BAIAC) Arbitration Rules 2019, art. 8.1; Singapore International Arbitration Centre (SIAC) Arbitration Rules 2016, r. 9.1; Arbitration Act 1996, c. 23, § 15(3) (Eng.); International Arbitration Act 1994, § 9 (Sing.).

[55] WILLIAM SHAKESPEARE, AS YOU LIKE IT Act II, Scene VII (1623).

fortunate enough, the arbitrator would encounter cordial parties who are not exacting. However, if one is less than fortunate, in dispensing the duties, the arbitrator might come under pressure from one or both parties. Parties are not always cooperative and whilst respondents are thought to be likely to attempt in delaying the proceedings, claimants can similarly do so for various reasons[56] and hence the arbitrator would need to endure and handle it all. The sole arbitrator neither has nobody to fall back on, to deliberate and discuss, nor there can be any delegation of duties or tasks. As it is, the job of an arbitrator is already a pressuring one these days. If it is an ad hoc arbitration, the sole arbitrator has no one to turn to in enquiring about potential procedural issues, unlike in the case of institutional arbitration. Unlike judges, the commercialisation of arbitration also means that arbitrators would be concerned with what the parties, i.e., the "*customers*" think.[57] All eyes will be on the sole arbitrator, and he would have to need to deal with all the parties' objections and requests. The same respect that is shown to national court judges from the parties cannot be expected to be shown to an arbitrator. Parties will not be at the threat of contempt[58] for their treatment of the arbitrators, whereas, they may perceive that the arbitral tribunals are paid to do their job. In the Singapore High Court case

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56 It has been observed from the writer's own experience from the industry claimants may have commenced arbitration only to draw the respondent to negotiation, but this may not always be effective resulting in the tribunal being kept in abeyance indefinitely. Other examples can include the possibility of the claimant's counsel encountering issues over terms of engagement midway through the proceedings (such as non-payment of fees) resulting in the need to slow down the proceedings in order to resolve their internal impasse. *See*, Bremer Schiffbau und Maschinenfabrik v. South Indian Shipping Corp Ltd, [1981] AC 999.

57 Arbitral institutions have feedback forms that require parties to give their views about their satisfaction of the arbitral proceedings and rating the arbitrator. Institutions are keen to project a good image in order to remain the institution of the parties' choice. Whether or not this is a fair appraisal is subject to debate whereas the losing party is thought less likely not to be very pleased with the arbitrator.

58 In addition to being simply a guideline, the IBA produced Guidelines on Party Representation in International Arbitration, although in practice it will be difficult to enforce, such as by disciplining counsels or witnesses for their actions. *See* International Bar Association (IBA) Guidelines on Party Representation in International Arbitration, 2013.

of *Koh Bros* v. *Scotts Development*[59] involving the removal of the arbitrator, Prakash J. observed that when the arbitrator refused to discharge himself, the applicant should have taken out an application rather than haranguing him or sought to influence his decision by brandishing a Queen's Counsel's opinion in his face as this left a strong impression of bullying.[60] This subsequent part will discuss the common issues affecting both the parties and the sole arbitrator by looking at the advantages as well as disadvantages of the lone arbitrator.

i. The "Good"

The immediate advantage of a sole arbitrator as already enumerated above is costs, whereby the parties only need to pay for one arbitrator; put simply, it is one-third of the cost of the arbitral tribunal. Not only the arbitrator's fees but also lower expenses to pay; a tribunal of three arbitrators means three times more in terms of reimbursable personal and travelling expenses; the latter if they are all located in different geographical locations other than the place of the physical hearing.

Since there is no need for all members of the tribunal to speak with each other and just one person's schedule is taken into consideration when scheduling the hearings, it would seem natural that sole arbitral processes may, in theory, move along more quickly.[61] At the helm of a decisive and deft sole arbitrator, in theory, the parties can expect swifter conduct of the proceedings since the decision would be made by a single person. Quality of the conduct is less likely to be a concern since an arbitral tribunal can appoint experts to assist it and in the case of a sole arbitrator, he can enlist the services of a subject expert to assist if the dispute and its proceedings

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59 Koh Bros Building and Civil Engineering Contractor Pte. Ltd. v. Scotts Development (Saraca) Pte. Ltd., [2002] SGHC 223.

60 *Id.* at 49.

61 In practice, it is possible for the presiding arbitrator to be entrusted with the task of communicating with the parties on behalf of the tribunal for expeditiousness, or to make certain procedural rulings alone without the need to consult all the members of the tribunal; *See* SIAC Arbitration Rules 2016, r. 19.5.

prove to be challenging. Whilst there will be costs involved, fees may likely be lesser than that of another arbitrator, let alone two.

The tribunal secretary also comes in handy to assist the sole arbitrator in the administrative aspect of the proceedings. In the preparation of the arbitral award, as long as the arbitrator does not delegate intrinsic decision-making duties or roles expected of him by the parties as an arbitrator to discharge to avoid potential controversies,[62] the tribunal secretary can assist in a role akin to judicial clerks in assisting with legal research, proofreading or cite checking in the course of preparing the arbitral awards. This is also thought of to be beneficial in helping groom arbitral talents with tribunal secretaries, as the lack of opportunity to intern for arbitrators or to gain practical experience in actual arbitral proceedings is a constant debate.

From the practical standpoint, the appointment of a sole arbitrator is less likely to be mutually agreed upon by the parties and thus, is done by an arbitral institution or appointing authority, in the case of ad hoc arbitration. In this respect, the sole arbitrator can be completely "*unemotional*" towards the parties for he is likely to look to or feel accountable only to the arbitral institution or appointing authority as appointer.

Acting alone, the sole arbitrator does not need to confer or deliberate with anyone else. There is no need for internal tribunal deliberation, plagued with the burden of scheduling calls according to the availabilities of all the arbitrators and possibly also accounting for different time zones. Finally, with most arbitrators remunerated according to fees fixed according to published schedules, there will be no incentive for the arbitrators to procrastinate. However, with non-single arbitrator tribunals, availability and other professional commitments can get in the way, whereas this is less of an impediment for sole arbitrators who work alone.

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62 *See*, Omar Puertas & Borja Alvarez, *The Yukos Appeal Decision on the Role of Arbitral Tribunal's Secretaries*, INTERNATIONAL BAR ASSOCIATION, *available at* https://www.ibanet.org/article/B55CB7F1-01C6-4BDF-9383-90F567C17147.

ii. The Bad

As a flipside to the advantageous point raised above that sole arbitrators are likely to be an appointee of arbitral institutions or appointing authorities, the parties will end up not being able to exercise their rights under "*party autonomy*," said to be the predominant advantages and feature of arbitration, to nominate their arbitrators. Not that it is outright impossible for the parties to be able to agree on the choice of a sole arbitrator, but this process is almost certain to be plagued with scepticism and strategic non-comity. The choice of arbitrator candidate proposed by one party is likely to be received with doubts that the candidate might understand the position of the proposer, thus likely to be rejected by the other party. Counsels representing the parties will also not be prepared to accept any risk because if the sole arbitrator proposed by one party is accepted by the other and the latter eventually loses in the arbitration, it is expected that there would be a blame game. Further, it is commonplace that a party will reject proposals by the other because of the notion that "*if I can't have it my way, so can't you*." Put simply, it is elusive for two parties already in a dispute to come to a consensus over their arbiter. Contrasted with a multi-arbitrator tribunal, it is by convention that each party shall nominate their preferred arbitrator for appointment and typically the choice will not be opposed unless there are concerns of independence or impartiality. When the sole arbitrator is referred to the administering arbitral institution for his appointment, this can result in a delay in commencing the proceedings.

Then there is the question of the choice of the sole arbitrator appointed as the institution in the case of administered arbitration. It is difficult to please all as occasionally, a party or the parties may be sceptical of the choice of the appointee by the institution. A party may object to the choice of the sole arbitrator by the institution (even in the case of an institution—nominated co-arbitrator) but unless there are reasonable grounds, the institution will confirm the appointment. Apart from dilatory tactics employed by a party or both parties, there might be a reasonable objection to the institution's choice of arbitrator since they are not infallible.

Institutional repeat appointments of arbitrators, particularly popular ones, or arbitrators whose backgrounds, in the opinion of the parties, do not appear relevant to the case are some common industry complaints.[63]

In the early stage of the constitution of the arbitral tribunal, objections to the choice of a party's arbitrator is also common. If an objection is mounted against a party — nominated arbitrator, the party will normally be allowed to respond to it as well as the objected arbitrator responding to it. Depending on the applicable arbitration rules, the arbitral institution is unlikely to ignore the protests of a party or the parties regarding its choice of the single arbitrator. When this happens, the arbitrator may be given the option to respond to the unsuitability allegations or the institution might just withdraw the appointment. The arbitrator — candidate will not have the benefits of a counsel coming to their defence in that circumstance.

When an arbitrator is challenged midway through the proceeding, the arbitral tribunal shall first decide on the challenge[64] according to the Model Law[65] before escalating to the court or competent authority for its determination.[66] In the case of a tribunal of three arbitrators, when challenged, the entire tribunal will also be allowed to respond to and decide on the challenge. The remaining unchallenged arbitrators will confer

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63 Arbitral institutions are not always in an envious position since in promoting international arbitration, it takes into account diversity also in terms of geographical representation. At times, institutions may want to align their development objectives with the appointment of arbitrators from their targeted jurisdictions. However, this does not mean that the arbitrators are not qualified except that parties who are paying for the arbitration services expect nothing less than the best for their case for their plan is to win, thus they do not desire to be made part of the institutions' corporate plan. Common examples of such grievances include the appointment arbitrators from purely civil law jurisdiction to hear disputes and parties from common law jurisdiction or arbitrators who may be perceived to be disconnected from the parties and the disputes in terms of expertise, including sometimes language as well as custom.

64 In the case of administered arbitration, the challenge will be informed to the institution and depending of the rules and institutional procedure, the arbitral tribunal will also be informed and be given the opportunity to respond to it.

65 Model Law, art. 13(2).

66 Model Law, art. 13(3).

between them and the challenged arbitrator will likely be able to make an informed choice as regards the challenge thus potentially avoiding delay.

If a challenged sole arbitrator is removed, the entire arbitral proceedings will have to start all over again with the appointment of a new arbitrator. Different from a tribunal with three arbitrators, there is no need to reset the proceedings when the substitute arbitrator is appointed. The parties and the tribunal can jointly agree to what extent the previous proceedings would be followed. Hypothetically, this will be much more efficient compared to the appointment of a new sole arbitrator who will conduct the proceedings *de novo*.

iii. The Ugly

Suppose the sole arbitrator dies, is incapacitated, whether temporarily or permanently, vanishes, or perhaps is even kidnapped,[67] the parties would be in a quandary with much more difficulties if the proceedings are already at an advanced stage. Of course, most arbitration procedures provide for a substitute arbitrator in instances of the failure or impossibility of the arbitrator to act,[68] but the question is the practical consideration of doing so.[69] In such an unfortunate circumstance, the only practical approach is for the entire arbitral proceeding to restart *de novo*. However, unlike a tribunal of three arbitrators, there would be greater latitude for the parties, the substitute arbitrator and the remaining arbitrators to discuss at what stage the proceedings should proceed from (i.e., if there is any need for rehearing of certain parts of the case). The substitute arbitrator would confer with his arbitrator colleagues on the proceedings thus far and if need be, seek

67 Marc J. Goldstein, *International Commercial Arbitration*, 34(2) INT'L L. 519, 528 (2000).

68 Model Law, art. 14.

69 In the case of a deceased sole arbitrator and in the instance of an advanced stage proceedings, it is possible that the substitute arbitrator would rely on the transcript of the oral hearings, if any, but would likely seek further clarifications from the parties including hold a brief oral hearing. It is argued to be possible for the remaining members of a tribunal to render an award on the basis of the majority of the tribunal albeit remaining two of three-member tribunal, especially with the agreement of the parties which may take into consideration time factor and the unique circumstances. *See*, *supra* note 67.

clarifications from the parties or hold a short oral hearing to fill in any missing links in the case of conclusion of oral hearings. Arguably, having three arbitrators could hedge against calamities and "*not putting all the eggs in one basket*."

Next, what if the sole arbitrator is incompetent or inefficacious? Perhaps some arbitrators took on more cases than they could and ended up having to prioritise other large value disputes or own professional commitments since many arbitrators still retain their full-time occupations. Accounts of arbitrators who failed to respond to the parties timely after the conclusion of the oral hearing,[70] or took years before rendering the final awards are not unheard of. Worst, as time lapses, the arbitrator may have difficulties trying to recall what happened one or two years ago as memory fades. In a reported Singaporean case, an arbitrator took more than ten years after the conclusion of the hearing to render the arbitration award.[71] Putting aside the more extreme examples, a tardy arbitrator can be subject to a request for removal[72] for "*failing to act without undue delay*" as justice delayed is justice denied.[73] It is thought to be highly unlikely that in the case of a three-member tribunal, all the arbitrators would become unresponsive.

Already discussed earlier, some arbitral institutions' rules whilst prescribing default single arbitrators may also appoint a tribunal of three arbitrators if the dispute warrants it. Indeed, disputes which are likely to be demanding and complex will ideally be handled by a "*full bench*" of three arbitrators who can provide better support to each other. In the back of the mind of the

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70 E.g. PT Central Investindo *v.* Franciscus Wongso and others and another matter [2014] SGHC 190.

71 Hong Huat Development Co (Pte) Ltd v Hiap Hong & Co Pte. Ltd., [2000] SGCA 14.

72 UNCITRAL Model Law, art. 14(1).

73 However, this must be substantiated as a matter of as a matter of objective and subjective standard. It is objective if an arbitrator cannot respond to the parties' emails or correspondences despite repeated reminders but it is subjective if a party expects the arbitrator to reply its communication within twenty-four hours, or rendering the final award within weeks of the conclusion of the arbitral hearing. Arguably, delay cannot be a "*mere passage of time but passage of time that was more than was necessary and desirable*." *See* Regina v. R & Anor., [2016] EWCA Crim 1938.

parties, they are not free from the anxiousness of pleading before a sole arbitrator because it is essentially one person's view; if they form certain views or make up their mind, no one else can change their views and decision.

The sole arbitrator acts alone without the benefits of other arbitrators scrutinising each other. For instance, in a tribunal of three arbitrators, the presiding arbitrator is usually designated as the main contact person for the tribunal but even so, the co-arbitrators will always be required to approve draft communications and edit or prepare draft correspondences before being transmitted. The lack of peer-checking with a sole arbitrator does give rise to the concern of their personal conduct in addition to professional conduct,[74] after all, arbitrators perform a quasi-judicial function. There are many instances of controversial conduct of arbitrators that do not help in assuaging apprehensions. In *Catalina (Owners)* v. *Norma (Owners),* the sole arbitrator, an eminent lawyer, uttered a racist remark leading to his disqualification. One might wonder, what if he was never caught saying what he said, what was his mindset that would have influenced his decision making?

If the parties are faced with a strong-willed arbitrator, it can prove to be disconcerting. The Singapore High Court's case of *Turner (East Asia) Pte. Ltd.* v. *Builders Federal (Hong Kong) Ltd. and Another*,[75] concerns the removal

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[74] This is well established in medical law as regards a medical practitioner's in the distinguishment of personal conduct, professional conduct and professional competence. Skidmore v. Dartford & Gravesham NHS Trust, *per* Lord Steyn, [2003] UKHL 27, ¶¶ 18-19:

"…It seems right to treat the definitions of professional conduct ("behaviour of practitioners arising from the exercise of medical or dental skills") and professional competence ("adequacy of performance of practitioners related to the exercise of their medical or dental skills and professional judgment") as the primary categories. Personal conduct is the residual category consisting of "behaviour . . . due to factors other than those associated with the exercise of medical or dental skills" (Emphasis added).

For present purposes it is unnecessary to examine the distinction between professional conduct and professional competence...The line drawn between professional conduct and personal conduct is conduct "arising from the exercise of medical or dental skills" and "other" conduct."

[75] Turner (East Asia) Pte. Ltd. v. Builders Federal (Hong Kong) Ltd. and Another, [1988] SGHC 47.

of the arbitrator for not conducting himself impartially, but what might be interesting to note was the injudicious conduct of the sole arbitrator and rather controversially, the hostile treatment to one of the parties and offensive letters. Some of the arbitrator's remarks were also abrasive and the arbitrator defended himself by stating that those were merely "*jocular comments*."[76] In *Cofely Ltd.* v. *Bingham & Anor*,[77] a sole arbitrator was subject to an application for removal due to repeat appointments. When requested by a party's counsel to recuse himself, the arbitrator called for a hearing during which he aggressively questioned the party's counsel[78] and made known his displeasure, giving the impression of "*entering the arena*."

Indeed, the above examples and discussions are not passing any judgement on the single arbitrator system. However, might any of the situations in the cases above have been different if it was not arbitrated by a single arbitrator whereby there were other arbitrators involved? Whilst there is no guarantee that a three-member tribunal will always please the parties and produce a flawless outcome, the critiques of the sole arbitrator system as seen above have shown that in the realm of arbitration where arbitral awards cannot be "*appealed*" and the stake can be immensely high, it would be reasonable for the single person system be put under the microscope.

D. Three-member tribunal

i. Issue of costs

Considering all of the above discussion thus far, there appears to be no hostility towards an arbitral tribunal constitution of more than one arbitrator. The issue of cost stands out as the core issue, or perhaps, even the sole issue. As already enumerated above, arbitration is a "*one bullet, one shot*" attempt and thus, evidently, the risk is very high. Would the economic saving of two-thirds of the fees and expenses of the tribunal be worth it? If it is all about cost, a crucial question that must be asked would be how

[76] *Id.* at 103.
[77] Cofely Ltd. v. Bingham & Anor, [2016] EWHC 240 (Comm).
[78] *Id.* at 63, 64, 66.

burdensome are the fees and expenses of the arbitral tribunal vis-à-vis the whole cost of resolving a dispute through arbitration?

Among others, high cost, lengthy process and unnecessary complexity are the common grievances of arbitration users and these were also flagged as some of the major disadvantages of arbitration by the authoritative Queen Mary University of London's ["**QMUL**"] annual arbitration survey in 2006 and 2008[79] as well as the QMUL 2015 survey which still identified high costs as arbitration's worst feature.[80] According to a 2011 commentary, twenty-one arbitral institutions were polled on arbitration costs, and the results were similar to an earlier International Chamber of Commerce ["**ICC**"] survey, which found that 82 per cent was for counsel's fees and expenses, 16 per cent for the arbitrators' fees and 2 per cent for the institutions' fees.[81] Furthermore, according to the 2012 ICC Commission Report, "*costs incurred by the parties constitute the largest part of the total cost of international arbitration proceedings*."[82] The fees of arbitrators are *ad valorem*; it is transparent and can be accounted for. In a nutshell, arbitrators do not contribute to the high costs of arbitration nor constitute the substantial cost element in an arbitration.

It is also necessary to consider the preference of arbitration users and contract drafters as to the preferred number of arbitrators as decided at the outset of the contracts. A useful reference point is the data published by

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79 *See*, Queen Mary University of London, International arbitration: Corporate attitudes and practices 2006, *available at* https://arbitration.qmul.ac.uk/media/arbitration/docs/IAstudy_2006.pdf; Queen Mary University of London, International Arbitration: Corporate attitudes and practices 2008, *available at* https://arbitration.qmul.ac.uk/media/arbitration/docs/IAstudy_2008.pdf.

80 Queen Mary University of London, 2015 International Arbitration Survey: Improvements and Innovations in International Arbitration, *available at* https://arbitration.qmul.ac.uk/media/arbitration/docs/2015_International_Arbitration_Survey.pdf.

81 Matthias Scherer, *Arbitral Institutions under Scrutiny*, KLUWER ARBITRATION BLOG (Oct. 05, 2011), *available at* http://kluwerarbitrationblog.com/2011/10/05/arbitral-institutions-under-scrutiny/.

82 ICC Commission, Report on Controlling Time and Costs in Arbitration: Second Edition, at 6 (2012).

the ICC, arguably the world's leading international commercial arbitration service provider. According to its ICC 2020 statistics,[83] a vast majority of parties (87 per cent) have agreed on the number of arbitrators out of which, 62 per cent opted for a three-member tribunal and 38 per cent for a sole arbitrator.[84] When the parties have not agreed on the number of arbitrators, according to the ICC rules, the ICC Court would therefore determine for the parties and as a result, the overall statistics showed that 56 per cent of cases have been submitted to a three-member tribunal and 44 per cent to a sole arbitrator.[85]

ii. Does quantity equal quality?

As mentioned above that the Working Group observed that "*a panel of three arbitrators was more likely to guarantee equal understanding of the positions of the parties,*"[86] it is posited that there are also other dimensions to this. Hypothetically, based on logic and syllogistic arguments, the decision-making by three persons would be of a greater weight compared to one, granted that all of them are of equal intellect. It was also argued by a commentator in the case of the multi-judge decision-making process that "*reasonable assurance of sound decision and public confidence in that soundness support the multi-judge system.*"[87] In a note published by the *de Rechtspraak* of the

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83 *ICC Dispute Resolution Statistics: 2020*, INTERNATIONAL CHAMBER OF COMMERCE (Aug. 03, 2021), *available at* https://iccwbo.org/news-publications/arbitration-adr-rules-and-tools/icc-dispute-resolution-statistics-2020/. At the time of writing this article, the 2021 statistics are not available yet.

84 *Id.* at 13.

85 *Id.* at 13. In theory, a high value cases may warrant the appointment of three-member tribunal, however a highly experienced sole arbitrator with strong track record could also be appointed. On the other hand, complex cases may not necessarily equate to high value dispute thus may warrant three arbitrators but also a sole arbitrator depending on the case. As a whole, statistically this shows that there is a higher percentage of three-member tribunals being determined by the ICC Court than those of the sole arbitrator.

86 HOLTZMANN, *supra* note 27, at 349.

87 Robert A. Leflar, *The Multi-Judge Decisional Process,* 42 MD. L. REV. 722, 723 (1983).

Netherlands on best practices and recommendations for the Dutch civil divisions of the Court of Appeal, it is said that:[88]

> *"[I]t follows from research that in many cases a decision made by three judges is less likely to be at risk of errors than a decision made by a single judge. In addition, the involvement of three judges deepens the debate and sheds light on the case from various perspectives. A three-judge ruling is a synthesis of three opinions. For this reason, three-judge decisions have advantages from a qualitative point of view, or rather: they potentially have advantages."*

Having more than one arbitrator also essentially allows the constitution of a variety of experts, including a balance of expertise such as legal and non-legal experts. This is of particular relevance, especially when the dispute involves technical issues and is multi-jurisdictional where a multi-member tribunal can be constituted to reflect the circumstances of the disputes. For example, the Indus Water Treaty, 1960[89] provides for disputes[90] arising to be referred to arbitration by a Court of Arbitration established in accordance with Annexure G of the Treaty:[91]

> *"4. Unless otherwise agreed between the Parties, a Court of Arbitration shall consist of seven arbitrators appointed as follows:*
>
> *(a) Two arbitrators to be appointed by each Party in accordance with Paragraph 6; and*
>
> *(b) Three arbitrators (hereinafter sometimes called the umpires) to be appointed in accordance with Paragraph 7, one from each of the following categories:*

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88 The Judiciary, Professional standard: The three-judge decision-making process: Best practices and recommendations for the civil divisions of the courts of appeal., at 3, *available at* https://www.rechtspraak.nl/SiteCollectionDocuments/professional-standards.pdf.

89 The Indus Water Treaty, India-Pakistan, Sept. 19, 1960, 5 U.N.T.S. 603.

90 A dispute arose and held at the Permanent Court of Arbitration, also referred to as the Indus Waters Kishengaga Arbitration, 2013. *See* Indus Waters Kishengaga Arbitration (Pakistan v. India), Case No. 2011-01, Final Award (Perm. Ct. Arb. 2013).

91 *Id.* at ¶ 4.

(i) Persons qualified by status and reputation to be Chairman of the Court of Arbitration who may, but need not, be engineers or lawyers.

(ii) Highly qualified engineers,

(iii) Persons well versed in international law.

The Chairman of the Court shall be a person from category (b) (i) above." (emphasis added)

Although some commentators have described how an arbitrator can be multi-talented in various fields and proficient across different legal jurisdictions from all over the world, it is thought that a realistic, as well as prudent approach, should be taken in order to not over exaggerate the vocation of the arbitrator.[92] Thus, it is only likely through a three-member tribunal that a balanced and well-represented set of expertise can be constituted. For example, an engineering related dispute involving two different legal jurisdictions could be heard by a three-member tribunal comprised of legal and engineering experts. As opposed to the case of a sole arbitrator, such a collective body of knowledge, expertise and experience including quasi-judicial acumen embodied by one person can be a unicorn.

iii. Three is a crowd?

If a tribunal of three members is thought to embody a collective view of three able arbitrators and they collectively contribute to and produce a final arbitral award, what might the "*behavioural science*" behind this be? After all, the tribunal consists of three highly able and intellectually charged individuals coming together, many, at times, as strangers. According to the ICC 2020 statistics, of the 289 decided awards (both partial and final)

92 *See* RICHARD A. POSNER, HOW JUDGES THINK 7 (2008). The writer said about American judges, mutatis mutandis, is true also of the arbitrator: "*My analysis and the studies on which it builds find that judges are not moral or intellectual giants (alas), prophets, oracles, mouthpieces, or calculating machines. They are all-too-human workers, responding as other workers do to the conditions of the labor market in which they work.*"

rendered by three-member tribunals, only 16 per cent were rendered by the majority of the tribunal,[93] meaning 84 per cent of the awards were rendered by a unanimous three-member tribunal. This is a high statistical indicative that tribunals can work together and often in accord. Whilst it can be argued that the ICC situation does not represent the entire global perspective, empirically, from among global practitioners, it is also known that credible arbitrators can work alongside each other with a high level of professionalism. As professional arbitrators, they know their responsibilities towards the parties and are unlikely to jeopardise their reputation, provided that, *ceteris paribus*, the parties have put together a set of experienced and able arbitrators.

iv. Checks and balances

An arbitral tribunal of three arbitrators which involves the nomination of an arbitrator by each party wherein the two arbitrators would appoint the chair or presiding arbitrator has occasionally been criticised as a flawed system potentially bogged by the party-appointed arbitrators feeling "*obliged*" towards their nominators including subconsciously becoming an advocate of the party's case. This article will not be able to address the above points in detail and it is suggested that further research be conducted, perhaps also involving aspects of human psychology.

Notwithstanding that granted that we are in accord an arbitrator is "*in the category of an independent provider of services who is not in a relationship of subordination with the parties who receive his services*"[94] and all arbitrators appointed would have passed the tests of impartiality and independence, the subsequent discussion deals generally with the conduct and behaviour of the arbitrators. This is of relevance especially when users of arbitrations have doubts whether arbitration as a private dispute settlement method outside of national courts can be free from influence or interference. This discussion does not seek to posture arbitration as a state of utopia, but despite

93 *Supra* note 83, at 19.

94 *See* Jivraj v. Hashwani, [2011] UKSC 40, ¶ 40.

imperfections, arbitration, for many, and globally, is still the only choice of dispute resolution. Therefore, more is the need for checks and balances whenever and wherever possible. Each arbitrator is expected to be one's own person and not an advocate for a party. A three-member tribunal can ascertain the process to be followed when deliberating on the decision making, this way there would be transparency. The tribunal could also scrutinise each other's thoughts and views and therefore not only work towards a well-covered outcome or decision but also one which is accountable.

Finally, if there is a rogue arbitrator, it is more likely to be a sole arbitrator since no other peer is watching or present in the tribunal. Three arbitrators would need to consult each other and consider each of their arguments as well as opinions to render a majority award. No one person would be making the sole decision.

III. Evaluation and postulations

A. Reconciling policies and practices

To recapitulate, the discussion can be narrowed down into two main points– the *first* is the question of policy and procedural framework, and the *second* is the practical aspect including understanding the needs of users.

For the first point, in terms of the standpoint of legislative drafters and arbitral rule drafts, a sole arbitrator as the default option stemmed from cost savings and efficiency factors. The policy of a single arbitrator system appears to have inherited the historical tradition of arbitration as an alternative dispute resolution system to the courts but over the decades, arbitration has metamorphosed. No doubt, there are still means for the admission of the three-member tribunal despite the default sole arbitrator system but this is mostly only available in institutional arbitration. The question is, should the current *leges arbitri* be overhauled to reconsider adopting the Model Law's original default number of three arbitrators? Whilst it is reasonable to consider arbitral institutions to be best positioned

to administer procedural matters and make determinations on the number of arbitrators, there are still ad hoc arbitrations being opted by parties.

As for the second point, there exists some practical challenges in that most arbitrations are by way of an arbitration agreement in the contracts to submit future disputes to arbitration (unlike a "*compromise*"). The number of arbitrators would be decided there and then, whether consciously by the parties, or uninformed due to referring the disputes to arbitral institutions or their rules. Very often, only when a dispute has arisen would the parties be aware of the choice they have made or not made. In part, the situation is exacerbated by contract drafters replicating arbitration clauses from another source without fully grasping their applicability. There is also a possible disconnect between the contract drafters and the parties (also the eventual users of arbitration) as the choice and content of an arbitration clause are usually decided by the professional drafters who are mostly corporate lawyers.

Recent developments in arbitration may potentially render some previously held policies and practices obsolete. For example, third-party funding for arbitration whereby costs of doing arbitration will no longer be a hindering factor. With the focus on the best conduct of arbitral proceedings possible to obtain the most advantageous outcome where all financial burdens are being taken care of, the issue of costs of two additional arbitrators compared to a single arbitrator diminished. Also, in many jurisdictions, conditional and contingency fees agreements are now increasingly permitted,[95] bearing in mind that the fees and expenses of arbitrators do not contribute to the bulk of the entire costs of doing arbitration, in fact, the fees of the counsel are. Incidentally, all along, claimants are seldom required to pay for all of the tribunal and arbitral institutional fees at the commencement of the proceedings as it would be equally shared with the

[95] For instance, Singapore's recent regulatory changes allowing conditional fee agreements. *See*, *Framework for Conditional Fee Agreements in Singapore to Commence on 4 May 2022*, MINISTRY OF LAW SINGAPORE (Apr. 29, 2022), *available at* https://www.mlaw.gov.sg/news/press-releases/2022-04-29-framework-cfas-in-singapore-commence-4-may-2022/.

respondents as a matter of the contract, but in the event of the respondents' default, the claimants would usually be required to pay in instalments throughout the proceedings.

Finally, with the increase in competition in the arbitration industry, there are now more options for disputants to consider which include lower-cost solutions such as new arbitral institutions, online dispute resolution mechanisms, self-representation with the assistance of alternative professionals, widening legal talent pool and the broader use of mediation. These transform the way arbitrations are conducted.

B. Recommendations

The following recommendations and guidelines are proposed to ameliorate the present system of the default number of arbitrators:

(a) Arbitration clause drafting checklist – It is trite law that an arbitration clause is considered standalone and entirely separate from the underlying contract. Given the gravity of this, it is rife today with arbitration clauses being drafted without being given serious consideration. With pathological arbitration clauses commonly seen, it would not come as a surprise if no due regard is given to the determination of the number of arbitrators. The International Bar Association ["**IBA**"] already made a key contribution to global educational efforts by publishing guidelines for the drafting of arbitral clauses.[96] However, the industry stakeholders can do more to promote the use of the guidelines including academic institutions, chambers of commerce, professional bodies and local bar associations.

Awareness should be created that the drafting of arbitration clauses is not only a matter for corporate lawyers but also for in-house counsels and business owners. As a suggestion, a much more detailed checklist

[96] IBA Guidelines for Drafting International Arbitration Clauses International Bar Association (2010), *available at* https://www.ibanet.org/MediaHandler?id=D94438EB-2ED5-4CEA-9722-7A0C9281F2F2.

can be created to supplement the IBA's drafting guidelines such as one containing some guidelines on determining the rules and number of arbitrators according to the contract's value, risk profile, complexity, jurisdictions, etc. This can better help contract drafters make an informed choice and understand not only the importance of the number of arbitrators but also many other equally important aspects of an arbitration agreement such as the juridical seat of arbitration or specifying the substantive law. In addition, the parties should also be aware of the features of institutional arbitration, such as an expedited procedure that can impact the number of arbitrators.

For instance, in a noteworthy case involving the number of arbitrators according to expedited procedures in *Noble Resources International Pte Ltd* v. *Shanghai Good Credit International Trade Co., Ltd.*[97] the Shanghai court refused enforcement of a Singapore International Arbitration Centre ["**SIAC**"] award because it was arbitrated by a sole arbitrator under the expedited rules[98] when the arbitration clause provided for a three-member tribunal. The respondent objected to the choice of sole arbitrator but the SIAC confirmed the appointment of a sole arbitrator. At the enforcement stage, the award was refused enforcement on the grounds that the arbitral procedure was not as per the agreement of the parties and thus in breach of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ["**New York Convention**"].[99]

(b) Conversion of single to three-member tribunal – Already discussed above, the English Arbitration Act enables parties with a prior agreement to three arbitrators to convert to a sole arbitrator. This is a noble approach of promoting expeditiousness and cost-effectiveness

97 Noble Resources International Pte Ltd v. Shanghai Good Credit International Trade Co., Ltd., (2016) Hu 01 Xie Wai Ren No. 1, (Shanghai No. 1 Intermediate People's Court).

98 *See*, SIAC Arbitration Rules 2016, r. 5. The expedited rules apply when the dispute does not exceed the equivalent amount of S$ 6 million.

99 New York Convention, art. V(1)(d).

but consideration must also be given to the complexity and circumstances of the disputes. Other than reinstating the original Model Law provision, national arbitration reviewers could consider the approach in the Hong Kong Arbitration Ordinance, or a "*reverse conversion*" as per the English Arbitration Act which enables parties that have agreed to a single arbitrator to convert to a three-member tribunal subject to fulfilling certain conditions and according to its set procedure. It would also appear that institutional arbitrations have broader latitude and greater flexibility in initiating innovative approaches through their arbitral rules, however, appointing authorities designated under the Model Law or Rules of Arbitration can similarly be called upon to perform the required role.

(c) Objective standards in determining the number of arbitrators – Generally, in the case of administered arbitration and expedited procedure, the arbitral institution would have the discretion to determine whether the complexity of the case would necessitate a three-member tribunal or not. It is believed that the introduction of an objective approach will help to avoid the use of subjective standards, and thus uncertainty. Arbitral institutions can avoid being exposed to a myriad of challenges including potential legal action involving the parties over procedural decisions, it is thought that providing a general practice note can seek to assure parties that there is transparency or also seek to provide basic guidelines to the parties as to the parameters allowing an application or appeal to increase the number of arbitrators. Finally, the party requesting a three-member tribunal may also elect to advance the additional cost of the two arbitrators. As usual, the arbitral tribunal will then make its decision on costs in the final arbitral award.

IV. Conclusion

International commercial arbitration has come a long way to be where it is today. The ghosts of the past are likely to be confounded by the current state of the conduct of arbitration today. It was considered to be an

alternative dispute resolution method in the past and arbitration, according to the standard textbook definition decades ago, is often described as a quick and economical method of dispute resolution. One commentator observed that the role of the arbitrator is not necessarily a specifically juridical one, whereas credibility, personal integrity and an understanding of commercial and technical issues are more important than legal competence.[100] Eventually, there is a shift since about 1970 where the penetration of the United States of America ["**USA**"] practitioners into international arbitration resulted in its "*judicialization*" and the introduction of USA-style procedures, and the tendency toward a more adversarial process.[101] The expectation of arbitrators then evolved and, among others, it is no longer just a process parties choose if they want to avoid national courts for an economical and faster option. Inevitably, the massive growth of international trade also resulted in the use of arbitration due to the New York Convention.

Today, the role of arbitrators has exponentially increased. The stakes are high and parties go to arbitration to win. The arbitrators are central in this process of "*private judiciary*."[102] The arbitrators are needed by the parties, and yet they are not always put on the pedestal; parties expect a lot from them and may not hesitate to make known their demands. The parties' options, de facto, are a tribunal of a single arbitrator or three arbitrators. Arbitration involves arbitrators who are natural persons and is not a mechanical process. The decision on the number of arbitrators can also be said to be a matter of case strategy when it is very much in the hands of the drafters, not the arbitral institutions or the arbitrators. We must not lose sight of the fact that the parties ultimately have the autonomy to choose the dispute resolution method they deem most appropriate.

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100 Ralf Michaels, *Roles and Role Perceptions of International Arbitrators, in* INTERNATIONAL COMMERCIAL ARBITRATION AND GLOBAL GOVERNANCE: CONTENDING THEORIES AND EVIDENCE 59 (Thomas Dietz & Walter Mattli eds., 2014).

101 *Id.* at 60.

102 *Per* Lord Donaldson in Bremer Schiffbau und Maschinenfabrik v. South Indian Shipping Corp Ltd., [1981] AC 999.

The growth of international arbitration is still significantly influenced by arbitral institutions. Empirically, institutional arbitrations are now the norm; as a result of being at the forefront, arbitral institutions can continuously improve their procedures and processes, as well as contribute to the advancement of jurisprudence. In an academic debate,[103] the late Professor Emmanuel Gaillard expressed his opinions in favour of party-appointed arbitrators, which can be summed up as being great due to transparency and options. He continued by saying that in arbitration, parties can choose the institution, location, applicable law, and even the tribunal members. The chair is chosen with the participation of the parties, and arbitration requires all of these decisions. If institutions have the authority to appoint arbitrators in some circumstances, it is merely a power that the parties have delegated to them.

There have been discussions and debates about the necessity of party-appointed arbitrators in recent years, with some arguing that the idea of party autonomy in arbitration is outdated, thus arbitrators should be chosen on behalf of the parties, most likely by a third-party body like arbitral institutions. However, the parties' rights to select their arbitrators are not merely symbolic. In essence, it is not just a matter of the number of arbitrators because choosing three arbitrators rather than a single arbitrator can create a "*level playing field*" where the parties can decide how the arbitration would proceed since they were each given the chance to choose an arbitrator. Perhaps it is also time to re-establish the logic of arbitration.

[103] SIAC, *SIAC-CIArb Debate 8 June 2017*, YOUTUBE (June 20, 2017), *available at* https://www.youtube.com/watch?v=h19vcrp-RpY.

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