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Contents

Good Faith or Bad Faith – Analysing the Enforceability of Pre-Arbitral Negotiation Clauses

Aditya Mehta[*] *and Swagata Ghosh*[**]

Court proceedings have always been considered an expensive and time-consuming system of dispute resolution. Whilst arbitral proceedings have been a respite for those inclined to keep their disputes away from Courts, even such adversarial proceedings come with their own set of challenges. This has created a need for other alternatives/supplements. One such supplement, increasingly found tiered in dispute resolution clauses in commercial contracts, is the obligation to amicably negotiate on the disputes in good faith, prior to instituting adversarial proceedings. But how far can one ensure the element of 'good faith' in such negotiations and how far are such clauses enforceable? This article seeks to provide (i) a holistic view of the nature of pre-arbitral negotiation clauses; (ii) a comparative analysis of the judicial approach adopted in various jurisdictions and the role of Courts in enforcing such clauses; and (iii) practical guidelines for drafting enforceable tiered dispute resolution clauses.

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The authors were ably assisted by Darsan Guruvayurappan [Class of 2023, B.A., LL.B. (Hons.) at the National Law School of India University (NLSIU), Bengaluru]. The views expressed are not legal advice and are not necessarily the views of Cyril Amarchand Mangaldas or its clients. This paper reflects the position of law and developments in law as of 14 February 2021.

I. Introduction

Arbitration, as an alternative dispute resolution mechanism, has emerged as a popular choice for parties who desire to settle their disputes outside court. However, *inter alia* its expensive and adversarial nature, which may ultimately drag parties to courts, has created a need for other alternatives/supplements, especially in commercial contracts. Tiered dispute resolution mechanisms have therefore gained much traction, as they offer parties a final opportunity to resolve their disputes, but without having to resort to adversarial proceedings in the first instance. Negotiations, in good faith, with the aim of reaching an amicable settlement is one such pre-arbitral steps that may help parties avoid legal proceedings and provide the parties an opportunity to discuss and settle their disputes and/or claims with a commercial mind. Such pre-arbitral negotiation clauses require the parties to meet and undertake friendly/good faith discussions in order to reach a compromise/settlement. However, the terms 'good faith' or 'friendly' discussions are highly subjective in nature. Despite the informal and inexpensive nature of such a mechanism, the hurdles faced by the parties in enforcing such negotiation clauses, the difficulties faced by the arbitrators or the courts in determining the nature of the parties' obligations thereunder, and the parameters of sufficient compliance; have made parties mindful of inclusion of such clauses in their agreements.

This paper seeks to examine the evolving judicial attitude across several common law jurisdictions towards the enforceability of good-faith negotiation clauses and offers practical guidelines for drafting enforceable tiered dispute resolution clauses. The discussion is divided into seven parts. The first part analyses the concept of tiered dispute resolution clauses, the second and third parts discuss negotiation as a means of settlement of disputes and the element of "good" faith in such negotiations. The fourth part discusses the enforceability of such good faith negotiation clauses. The fifth and the sixth parts of this paper compares the jurisprudence surrounding such clauses across the United Kingdom, Australia, and Singapore and further analyses the position adopted by the Indian courts. Finally, this is followed up with some guidelines that practitioners may consider whilst drafting such clauses.

II. Tiered Dispute Resolution Clauses

Tiered dispute resolution clauses, also known as 'escalation clauses' or 'filter clauses', comprise of one or more steps involving amicable alternative

dispute resolution procedures, before such disputes become the subject matter of adversarial proceedings.[1] Such steps are left to the parties' choice and may include negotiations, mediation, conciliation, and expert determination. These are increasingly popular in commercial contracts as most parties are inclined to amicably settle, in an attempt to safeguard their commercial relationship[2] and prevent legal proceedings, which are both expensive and time-consuming. Such clauses are a preferred choice as they allow resolution of disputes, without the commencement of any formal proceedings which may otherwise irreparably strain their business relationships and commercial trust. In the event such disputes are not resolved, the parties are then referred to adversarial proceedings. Tiered dispute resolution clauses can be drafted in diverse ways depending upon the requirements of the parties. It will be relevant to point out that dispute resolution clauses are not boiler plate clauses. An effective dispute resolution clause must be tailor made based on the nature of the agreement and the intention of the parties. There is no straitjacket formula for drafting these clauses and are best drafted on a case-to-case basis.

The advantages of amicable settlement of disputes are well known and widely accepted, and such procedures are now even mandated by legislation. For example, the Commercial Courts Act, 2015 has made mediation prior to the institution of commercial suits mandatory. Section 12A of the Act states that a suit, which does not contemplate any urgent interim relief, shall not be instituted unless the party instituting the suit exhausts the remedy of pre-institution mediation and such a process shall be completed within a period of three months, which can be extended for a further period of two months with the consent of parties. Thus, parties involved in commercial transactions could be said to be subjected to a tiered dispute resolution process even without having incorporated such a clause in their underlying agreements.

In tiered dispute resolution clauses, each step usually escalates the disputes to higher levels of authority, and different degrees of determination. The number of steps involved prior to resorting to arbitration depends on the requirement of the parties keeping in mind their commercial transaction. The simple clauses often require the parties to negotiate or mediate their disputes in good faith or engage in friendly discussions for a particular period, failing

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[1] Oliver Krauss, 'The Enforceability of Escalation Clauses Providing for Negotiations in Good Faith under English Law' (2015-2016) 2 McGill Journal of Dispute Resolution 142.

[2] Vasilis F L Pappas and Artem N Barsukov, 'Multi-Tier Dispute Resolution Clauses as Jurisdictional Conditions Precedent to Arbitration' (*Global Arbitration Review*) <https://globalarbitrationreview.com/guide/the-guide-energy-arbitrations/fifth-edition/article/five-years-later-update-multi-tier-dispute-resolution-clauses-jurisdictional-conditions-precedent-arbitration> accessed 5 August 2020.

which the disputes are referred to arbitration.[3] The more complex ones often include negotiations in good faith as the first step followed by negotiations between senior representatives of the parties and such other steps, with arbitration as only the last resort for the parties.[4] Essentially, these clauses are pre-conditions or conditions-precedent to arbitration/adversarial action.

The mandatory nature of tiered dispute resolution clauses bars the initiation of arbitral (or other adversarial) proceedings until the initial step of negotiation or mediation (or any other mechanism stipulated in the contract) is satisfied. The step providing for reference of disputes to arbitration is not triggered, unless either of the parties initiates and completes the pre-arbitral step.[5] If parties fail to comply with such pre-arbitral steps, the disputes cannot be referred to arbitration.[6] However, such clauses may be misused by the defaulting party who may refuse to take part in such pre-arbitral steps for the sole purpose of avoiding or delaying submission of disputes to arbitration.[7]

III. Good Faith Negotiations as a pre-arbitral step

Negotiations have always played an important role in the formation of business relationships. Parties entering into commercial transactions *ad nauseum* negotiate the terms that will govern their relationship. Not only at the inception, but even at times when there are disagreements arising out of such transactions, parties seek to engage in negotiations in order to amicably settle such conflicts and to continue with their individual business commitments. Along with alternative dispute resolution mechanisms like mediation and conciliation, negotiation as a form of dispute resolution process has gained much significance. The reasons *inter alia* include long drawn and/or expensive adversarial proceedings, which do not guarantee a favourable outcome, but will, in most cases, sour business relationships and put a halt on commercial transactions. Therefore, there is an obvious commercial sense in such dispute resolution clauses as arbitration can be avoided by friendly discussions to resolve a claim.[8]

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3 *Emirates Trading Agency LLC* v *Prime Mineral Exports (P) Ltd* [2014] EWHC 2104 (Comm) : (2015) 1 WLR 1145.

4 *Conway Exports (P) Ltd* v *Rudra Pharma Distributors (P) Ltd* 2006 SCC OnLine Del 825.

5 Didem Kayali, 'Enforceability of Multi-Tiered Dispute Resolution Clauses', (2010) 27(6) Journal of International Arbitration 551.

6 *HIM Portland LLC v DeVito Builders Inc.,* 317 F 3d 41, 42 (1st Cir, 2003).

7 Katarina Tomic, 'Multi-Tiered Dispute Resolution Clauses: Benefits and Drawbacks' (2017) Journal for Legal and Social Studies in South East Europe 360.

8 *Emirates* (n 3).

Negotiations are an informal process whereby parties attempt to settle their claims without having to commence any legal or institutional proceedings. The approach and intent of the parties in conducting such negotiations should be to reach an agreement that will put an end to their respective *inter se* claims. The aim of the parties should be to resolve a dispute about the existing bargain and its performance. The parties to a negotiation are required to have an honest approach and discuss their claims keeping in mind their commercial transaction. The entire purpose of such clauses providing for negotiation as a pre-arbitral step is to encourage business-like resolution of differences and disputes with a view to avoid the time and expense involved in a legal process.[9]

It cannot be gainsaid that the parties are in the best position to determine their commercial bargain. Negotiations are designed to exclude the role of any third party (including lawyers), so that perspectives are limited to the commercial bargain (as opposed to the purported strength of one's legal case), and the parties are in the best position to reach a settlement. Their familiarity with their commercial goals and the consequences of an untimely break in the business relationship, normally motivates parties to reach a compromise that is best suited for them.

Additionally, the informal nature of such negotiations and the lack of any rigid procedural structure nurtures innovative and practical solutions, and moves parties to amicably resolve their disputes, in the true spirit of such clauses. Parties are guided by commercial considerations and not legal principles (or technicalities) which should enable them to settle their disputes commercially and quickly. Further, during the course of such negotiations, which may be made contractually confidential, the reputation of the parties is not affected (and consequently egos aren't irreparably hurt) and such negotiations (which are inherently and contractually without prejudice) do not prejudice the parties' legal rights. At the same time, unlike adversarial proceedings (which are, at times, initiated with an injunctive order), business remains unhindered while parties negotiate their claims. If parties genuinely comply (in letter and in spirit) with their obligation to negotiate in good faith with a view to amicably reach a settlement, disputes get filtered at an early stage and parties are not constrained to resort to adversarial proceedings.

Having said this, such clauses do have their own tribulations, and parties must be mindful before including negotiations as a pre-arbitral step to their tiered dispute resolution clause. The concept of 'good faith' in negotiations or 'friendly' discussions is often considered too open ended, and fails to provide

[9] *Emirates Trading Agency LLC v Sociedade De Fomento Industrial (P) Ltd* [2015] EWHC 1452 (Comm) : (2016) 1 All ER (Comm) 517.

sufficient meaning or measure as to what such agreements (at the minimum) involve or when can such negotiations be objectively determined to have concluded.[10] The difficulty in ensuring 'good faith' in any negotiations between the parties, accompanied by the difficulty in determining whether the parties have discharged their obligations in 'good faith', usually cause apprehensions of unenforce ability of such clauses. Further, the lack of specificity and clarity in the process to be followed in certain tiered dispute resolution clauses involving negotiation, makes such pre-arbitral steps unenforceable in court. Additionally, if strict time lines are not expressly stated in such clauses, such negotiations can be prolonged by the defaulting party which in turn may make such claims time barred. In well drafted pre-arbitration negotiation clauses, a particular time period is stipulated for completing such negotiations, and other checks and balances are put in place to prevent misuse.[11]

The substance of such negotiations, i.e., what is discussed between the parties, has been the topic of much debate and has resulted in contrasting views. Whilst Australian Courts are of the view that such negotiations should be anchored in the parties' assessment of their rights and obligations under their existing bargain,[12] English Courts find such a view to be unrealistically narrow. According to the English Courts, good faith negotiations or friendly and amicable discussions should proceed on the premise that both parties' interests would be served by a compromise which involves future business dealings in light of the changes in the commercial environment irrespective of the party's existing legal rights.[13] This means that amicable resolution of commercial disputes typically involves consideration, not only of the existing contractual rights and obligations which the parties have assumed, but also parties' wider commercial interests which might enable the parties to settle those disputes which otherwise would have been difficult to settle.[14]

IV. The Element of 'Good' Faith in Negotiations

The concept of "negotiations in good faith" has remained a topic of hot debate. The uncertainty that comes with the necessity to negotiate in 'good faith' is what often makes such clauses unenforceable and unworkable.[15] The

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[10] Gary B Born, *International Commercial Arbitration* (2nd edn, Kluwer Law International 2014) 636-942.

[11] Krauss (n 1).

[12] *United Group Rail Services Ltd v Rail Corporation, New South Wales* (2009) NSWCA 177.

[13] *Emirates* (n 9).

[14] *Emirates* (n 3).

[15] Leon Trakman and Kunal Sharma, 'The Binding Force of Agreements to Negotiate in Good Faith' (2014) 73 Cambridge Law Journal 598.

question then is, what does the requirement of negotiating in good faith actually entail? What is the measure for determining whether the parties have negotiated in good faith or have engaged in 'friendly' discussions? Can the parties be expected to negotiate in good faith or have friendly discussions, in the midst of burgeoning disputes? Unless terms such as 'good-faith' and 'friendly-discussions' are given clear, objective, and substantive meaning, clauses requiring the same may end up being an insignificant and empty formality.

The challenge, often faced while interpreting such clauses (those requiring the parties to negotiate in good faith), is the uncertainty and ambiguity arising from bad or inappropriate drafting. Such clauses often require parties to simply negotiate in good faith or engage in friendly discussions to resolve their disputes before such disputes are referred to arbitration, and do not provide any additional constraints or requirements defining what should actually be done, and how it should be done. Such clauses have been held to be nebulous and amorphous, implicating factors that are so indefinite and uncertain that the intent of the parties can only be fathomed by conjecture and surmise.[16] The reason being the difficulty in proving compliance with an agreement to negotiate in 'good faith' with certainty. However, such difficulty does not, *ipso facto* necessarily mean that the pre-arbitral step is vague, illusory, or uncertain. The test of enforceability of such clauses is not whether such agreements to negotiate are validly recognized processes of alternative dispute resolution, but whether the obligations and the negative injunctions that such agreements impose on the parties are sufficiently certain and clear which can be given legal effect to.[17] The phrase 'good faith' or 'friendly' or 'amicable' implies honesty and the observance of reasonable commercial standards of fair dealing.[18] Parties engaging in good faith negotiations must have an honest, genuine and realistic assessment of their rights and obligations. An agreement to negotiate in good faith is a promise to negotiate genuinely with a view to resolve claims to entitlement by reference to a known body of rights and obligations, in a manner that respects each party's contractual rights and gives due allowance for honest and genuinely held views about those pre-existing rights.[19] It requires a bona fide effort and an honest and genuine attempt to resolve differences through discussions. If such discussions are thought to be reasonable and appropriate, the parties should be ready to make a compromise in order show faithfulness and

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[16] *Candid Productions v International Skating Union*, 530 F Supp 1330 (SDNY 1982).
[17] *Tang v Grant Thornton International Ltd* [2012] EWHC 3198 (Ch) : (2013) 1 All ER (Comm) 1226.
[18] *Emirates* (n 3).
[19] *United Group Rail* (n 12).

fidelity to existing and future bargains.[20] There is an obligation on the parties to cooperate in order to achieve contractual objects. The yardstick of such negotiations is, therefore, honest, and genuine negotiation within the framework of fidelity to the bargain.[21]

In order to determine whether there has been sufficient compliance with an agreement to negotiate in good faith, it must be seen whether the parties were willing to comply with honest standards of conduct having regard to the interest of the parties. The parties are expected to conduct themselves in a manner that will yield consensus. There must be a willingness to consider options for resolution of disputes that maybe put forth by the counter party. Each party is expected to reveal true and accurate information, put forward their best proposal having regard to the commercial interests of both parties and make concessions to the extent possible. If such conduct is deviated from by the parties, arbitrators or courts would not have any difficulty in identifying such conduct. For example, if the defaulting party refuses to discuss their claims, courts will have sufficient grounds to hold such parties in breach of their obligations. Thus, where the parties fail to honour standards of conduct that is expected from parties who have entered into an agreement to negotiate, courts and arbitrators will have no difficulty in recognizing and identifying these failures.[22]

Whilst this hassle-free and informal process of settling disputes by way of good faith negotiations and friendly discussions may be viewed as the simplest and commercially viable method, parties must be mindful of such inclusion in their tiered dispute resolution clauses. It is important to carefully analyse the advantages and drawbacks that accompanies such negotiations and its enforceability in various jurisdictions (discussed later).

V. Enforceability of Good Faith Negotiation Clauses

Courts have generally been averse to enforce clauses which require the parties to negotiate in good faith or engage in friendly and amicable discussions. Such pre-arbitral steps are often considered too vague to be given legal effect as an enforceable condition precedent to arbitration.[23] Courts consider it difficult to determine the rights and obligations of the parties that arise from such broadly formulated clauses, and whether such obligations have

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[20] ibid. Also *see*, *Emirates* (n 3).
[21] *United Group Rail* (n 2).
[22] *Emirates* (n 3).
[23] *Tang* (n 17).

been sufficiently complied with by the parties.[24] Such clauses have also been equated with 'agreements to agree', which are considered unenforceable in common law.[25] However, recent developments have shown that the courts are willing to look beyond the exact phrases used in such clauses in order to ascertain the real intention of the parties while incorporating such clauses. and the conduct of the parties in negotiations under such clauses.[26]

In the recent past, courts have been found to enforce negotiation clauses. However, they have not generalized the enforceability of such clauses and have dealt with them on a case-to-case basis. For instance, the England and Wales High Court has held the pre-arbitral step of friendly discussions for a specified period of time as enforceable.[27] Similarly, agreement to enter into mediation following a prescribed procedure as a pre-arbitral step has been held to be capable of giving rise to binding obligations.[28] In order to determine if such clauses are enforceable, it needs to be ascertained whether such clauses are sufficiently certain. If the rights and obligations of the parties are clear and certain,[29] and if what is required of the parties is a genuine and honest approach while negotiating their disputes with the aim of reaching an amicable settlement, there is nothing that is inherently inconsistent with such clauses.[30] However, the omission of any guidance as to the quality or nature of the attempts to be made to resolve disputes or differences have rendered courts unable to determine compliance with pre-arbitral steps.[31]

Along with the nature and phrasing of the clause, the conduct of the parties must also be considered when deciding upon its validity. Where discussions have continued for several months prior to the commencement of arbitration,[32] or where a series of contentious correspondence has been exchanged between the parties prior to invocation of arbitration,[33] it cannot

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[24] *Courtney & Fairbairn Ltd v Tolaini Brothers (Hotels) Ltd* [1975] 1 WLR 297. Also *see*, *Sun Security Services v Babasaheb Bhimrao Ambedkar University* 2014 SCC OnLine All 16608 : (2015) 1 ADJ 319; *Sulamérica Cia Nacional de Seguros SA* v *Enesa Engelharia SA* [2012] EWCA Civ 638 : (2013) 1 WLR 102 : (2012) 2 All ER 795 (Comm); *Cable & Wireless plc v IBM United Kingdom Ltd* [2002] EWHC 2059 (Comm) : (2002) 2 All ER (Comm) 1041.

[25] *Walford* v *Miles* (1992) 2 AC 128 : (1992) 2 WLR 174 : (1992) 1 All ER 453.

[26] Simon Chapman, 'Multi-Tiered Dispute Resolution Clauses: Enforcing Obligations to Negotiate in Good Faith' (2010) 27 Journal of International Arbitration 89.

[27] *Emirates* (n 3).

[28] *Neil Holloway, Samantha Holloway v Chancery Mead Ltd* [2007] EWHC 2495 (TCC) : (2008) 1 All ER 653 (Comm).

[29] *Sulamérica* (n 24).

[30] *United Group Rail* (n 12).

[31] *Tang* (n 17).

[32] *Emirates* (n 9).

[33] *Visa International Ltd v Continental Resources (USA) Ltd* (2009) 2 SCC 55 : AIR 2009 SC 1366. Also *see*, *Demerara Distilleries (P) Ltd v Demerara Distilleries Ltd* (2015) 13 SCC 610 : (2014) 4 Arb LR 343 (SC).

be held that the pre-condition to arbitration has not been sufficiently complied with. If parties have been involved in frequent discussions involving sufficient effort, it cannot be held that the parties demonstrated lack of good faith or that there was absence of a genuine desire or attempt to reach an amicable solution.[34] However, it may not be sufficient for the parties to take part in discussions merely for the purpose of complying with the pre-arbitral step. Courts would normally ascertain whether such discussions or negotiations were entered into between the parties with the objective to settle such disputes. If the correspondence or record of discussions show that there was no scope for amicable settlement due to the rigid and hard stands taken by the defaulting parties, arbitration may be invoked without complying with the pre-condition of amicable settlement of the dispute.[35]

The general global principle that is discernible from various judgements is that while determining the enforceability of such clauses, the intention of the parties while entering into such an agreement is an important factor. When the parties have themselves agreed to a dispute resolution clause which purports to prevent them from launching into an expensive arbitration without first seeking to resolve their disputes through negotiations, courts should normally be inclined towards giving effect to the parties' bargain. The primary reason, being the importance of party autonomy in alternative dispute resolution procedures. In fact, enforcement of such an agreement to negotiate as part of a dispute resolution clause is considered to be in public interest. This is because parties to a commercial transaction expect the courts to enforce obligations which they have freely undertaken and because the object of the agreement is to avoid what might otherwise be an expensive and time-consuming arbitration.[36]

VI. Approach in Foreign Jurisdictions

A. United Kingdom

The concept of agreements to negotiate/discuss prior to reference of disputes to arbitration, has been discussed *ad nauseum* by English Courts. Initially, English Courts were reluctant to enforce such clauses.[37] However, recent judgments have shown that the courts are willing to enforce such clauses if the same are sufficiently certain and have been complied with by the parties.

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[34] *Emirates* (n 9).
[35] *Visa* (n 33). Also *see*, *Demerara* (n 33).
[36] *Emirates* v *Prime Mineral* (n 3).
[37] Chapman (n 26).

One of the earliest cases where the courts in United Kingdom dealt with an agreement which had a requirement to negotiate was in the case of *Courtney & Fairbairn Ltd.* v *Tolaini Brothers (Hotels) Ltd.*[38] In this case, a contract required the defendants to instruct a third party to "negotiate fair and reasonable contract sums". Interpreting the said requirement, the Court of Appeal held that a contract to negotiate, like a contract to enter into a contract, is not known to the law. According to Lord Denning, when there is a fundamental matter undecided and to be a subject of negotiation, there is no contract. This view of the Court of Appeal was relied upon by the Queen's Bench while deciding a case wherein the agreement had a clause which required the parties to settle their disputes amicably before resorting to arbitration. Although *Courtney & Fairbairn* dealt with an agreement to negotiate the terms of a contract as opposed to negotiating a dispute as a condition precedent to arbitration, the Queen's Bench held that such a clause was not a condition precedent.[39]

Another significant ruling by the English Courts in relation to enforceability of agreements to negotiate was in the case of *Walford* v *Miles*.[40] In this decision, the House of Lords was dealing with a case wherein the owners of a business undertook to terminate negotiations with a third party for the sale of their business if the other party promised to continue negotiations to buy the business. While holding such clauses to be unenforceable, the House of Lords was of the view that such a duty to negotiate in good faith was unworkable in practice and lacked certainty as it did not provide for a duration of the obligation to negotiate and made no provision for termination of the such negotiations. Therefore, it can be safely assumed that the House of Lords found the agreement in this case to be unenforceable mainly because of a lack of clear process for conducting such negotiations. This judgment can be construed to be a positive step forward insofar as it did not declare agreements to negotiate as being inherently unenforceable.

The aforesaid judgments were relied upon by the Queen's Benchin *Halifax Financial Services Ltd.* v *Intuitive Systems Ltd.*[41] while dealing with a tiered dispute resolution clause that required senior representatives of the parties to meet in good faith and attempt to resolve disputes without resorting to legal proceedings. If the disputes remained unresolved, the parties were required

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[38] *Courtney* (n 24).

[39] *Itex Shipping Pte Ltd v China Ocean Shipping* (1989) 4 WLUK 218 : (1989) 2 Lloyd's Rep 522. Also *see*, *Paul Smith Ltd v H&S International Holding Co Inc* (1991) 2 WLUK 211 : (1991) 2 Lloyd's Rep 127, wherein the Queen's Bench once again relied on *Courtney & Fairbairn* and *inter alia* held that provisions wherein the parties are required to settle their matters amicably before resorting to arbitration are not enforceable legal obligations.

[40] *Walford* (n 25).

[41] (2000) 2 TCLR 35 : (1999) 1 All ER (Comm) 303.

to enter into negotiations with a mediator, and if the parties failed to reach an agreement within forty-five days, the parties could move the court unless the parties agreed to resort to arbitration. Such a dispute resolution clause is slightly unique as there is no definite agreement to arbitrate. But the question was whether the first stage contemplated in the clause i.e., to meet in good faith and settle disputes, was enforceable. Answering in the negative, the Queen's Bench held that such a clause was not a condition precedent to legal proceedings and accepted the submission that courts had consistently declined to compel parties to engage in co-operative processes, particularly in good faith negotiations, because of the practical and legal impossibility of monitoring and enforcing such processes. The most interesting part of this judgment is the distinction made by the Court between determinative and non-determinative procedures. According to the Queen's Bench, the former includes arbitration, binding expert valuations and third-party certifications wherein the parties have agreed to conclusively resolve their disputes by third parties and the latter involved mediation and negotiation wherein there is no obligation on the parties to mandatorily resolve their disputes through such procedures.

A positive approach from the English Courts towards agreements to negotiate in good faith was first seen in the decision of the Queen's Bench in *Cable & Wireless plc* v *IBM United Kingdom Ltd*.[42] In this case, the dispute resolution clause required the parties to engage in negotiations in good faith through their senior representatives to settle their disputes. In the event their disputes were not resolved, the parties were required to attempt in good faith to resolve their disputes through an alternative dispute resolution procedure as recommended by the Centre For Dispute Resolution. This second stage of the dispute resolution clause was challenged for not being enforceable due to uncertainty. The Queen's Bench, whilst acknowledging that a mere undertaking to negotiate a contract in good faith or an agreement to settle dispute amicably would be unenforceable due to lack of certainty, held that the dispute resolution clause in the case at hand had, instead of simply agreeing to attempt in good faith to negotiate a settlement, gone a step forward and identified a particular procedure to be followed for settlement of their disputes. This judgment suggested that courts would not reject enforcement of such clauses if they provided for a definite procedure which includes timelines, positive and negative covenants, and the like. However, it must also be noted that there was no specific time line provided in said clause to make it certain. Despite that the Court found the said clause to be enforceable since it was reasonably certain.

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[42] *Cable* (n 24).

The aforesaid authorities were again reviewed by the Court of Appeal in *Neil Holloway, Samantha Holloway* v *Chancery Mead Ltd*.[43] wherein the court dealt with a dispute resolution clause that required the parties to resolve their disputes by way of conciliation before the commencement of arbitration. In this case, the Court identified three requirements for such agreements to be enforceable: (a) the process must be sufficiently certain in that there should not be the need for any further agreement, (b) the administrative processes for selecting a party to resolve such disputes and to pay that person should also be defined, and (c) the process, or at least the model of the process, should be set out so that the detail of the process is sufficiently certain. As the dispute resolution clause in this case had satisfied each of the aforesaid requirements, the Court held that such a clause was a condition precedent to arbitration.[44]

The test laid down by the England and Wales High Court in *Tang* v *Grant Thornton International Ltd*.,[45] may also serve as a guiding principle for determining enforceability of such clauses. In the said case, the Chancery Division of the England and Wales High Court had to determine the enforceability of a tiered dispute resolution clause which required the parties to refer their disputes and differences to the Chief Executive, who shall attempt to resolve the same in an amicable fashion, before referring such disputes to a panel of board members and finally have the unresolved disputes submitted to arbitration. The said clause even provided for definite time lines within which each of the step had to be completed. However, the Court held that such a dispute resolution clause was too nebulous in terms of the content of the parties' respective obligations to be given legal effect as an enforceable condition precedent to arbitration.[46] In a similar case, wherein the parties were required to have their disputes resolved amicably by mediation, the Court held that such a clause was not enforceable as such a clause did not define the rights and obligations of the parties with sufficient certainty to enable it to be enforced.[47] The test in these cases, therefore, is whether the provision prescribes, without the need for further agreement: (a) a sufficiently certain and unequivocal commitment to commence a process; (b) from which may be discerned what steps each party is required to take to put the process in place; and which is (c) sufficiently and clearly defined to enable the court to determine objectively (i) what under that process is the minimum required of

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43 *Neil Holloway* v *Chancery Mead* (n 28).
44 *Holloway* (n 28).
45 *Tang* (n 17).
46 *Tang* (n 17).
47 *Sulamerica* (n 24).

the parties to the dispute in terms of their participation in it, and (ii) when or how the process will be exhausted or properly terminable without breach.[48]

One of the most recent judgments on this issue is the decision of the English High Court in *Emirates Trading Agency LLC* v *Prime Mineral Exports (P) Ltd*.[49] The dispute resolution clause in this case required the parties to first seek to resolve the dispute or claim by friendly discussions and, if no solution was arrived at by the parties within a period of four weeks, then the non-defaulting party could invoke arbitration. All the aforesaid authorities were discussed in detail in this decision. Whilst acknowledging the principle laid down in the case of *Walford* v *Miles*, the Court held that an agreement to seek to resolve disputes by friendly discussions within a specified period of time is not equivalent to a bare agreement to agree and that such a clause in the agreement is enforceable. In arriving at this conclusion, the Court took note of the discussions held between the parties and held that there had been sufficient compliance with the pre-arbitral step of negotiation. This decision was thereafter followed in the case of *Emirates Trading Agency LLC* v *Sociedade De Fomento Industrial (P) Ltd*.[50] It is interesting to note that the clauses in *Tang* and *Sulamerica Cia Nacional de Seguros SA* v *Enesa Engelharia SA*[51] which appear to be far more detailed in terms of process as compared to a clause requiring friendly discussions, were held to be unenforceable and the clause in this case was held to be enforceable. This is probably because the Court found sufficient compliance with such a pre-condition.

The aforesaid decision was thereafter followed by England and Wales High Court in *Ohpen Operations UK Ltd.* v *Invesco Fund Managers Ltd.*[52] where in the Court stayed the proceedings in order to enable the parties to comply with the pre-condition of mediation. In this case, the Court was dealing with a dispute resolution clause which required that the parties to first use their respective reasonable efforts to resolve disputes and thereafter refer the unresolved disputes to mediation before approaching the courts. The Court observed that there is a clear and strong policy in favour of enforcing alternative dispute resolution provisions in encouraging the parties to resolve disputes prior to litigation. It held that where a contract contains a valid machinery for resolving potential disputes between the parties, it will usually be necessary for the parties to follow that machinery and the court will not permit an action to be brought in breach of such agreements. In view

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48 *Tang* (n 17).
49 *Emirates* (n 3).
50 *Emirates* (n 9).
51 *Sulamerica* (n 24).
52 2019 EWHC 2246 (TCC) : (2020) 1 All ER (Comm) 786.

of the decision in *Tang*, the England and Wales High Court laid down the following principles as guiding factors to ensure the enforceability of such clauses:

1. The agreement must create an enforceable obligation requiring the parties to engage in alternative dispute resolution.
2. Such an obligation must be clearly expressed to be a condition precedent to arbitration or court proceedings.
3. The dispute resolution process to be followed does not have to be formal but must be sufficiently clear and certain by reference to objective criteria, including machinery to appoint a mediator or determine any other necessary step in the procedure without the requirement of any further agreement by the parties.
4. The court has a discretion to stay proceedings commenced in breach of an enforceable dispute resolution agreement. In exercising its discretion, the court will have regard to the public policy interest in upholding the parties' commercial agreement and furthering the overriding objective in assisting the parties to resolve their disputes.

B. Australia

The issue of enforceability of 'good' faith negotiations as a condition precedent to arbitration has been discussed in detail by the Supreme Court of New South Wales in the case of *United Group Rail Services Ltd.* v *Rail Corpn. New South Wales*[53] which has been referred to and relied upon in several cases across jurisdictions.[54] In this case, the Court was dealing with a contract for design and build of rolling stock which had a dispute resolution clause wherein the parties were required to meet and undertake genuine and good faith negotiations with a view to resolve such disputes failing which the same would be referred to mediation and thereafter arbitration. Carrying out an extensive examination of the English and Australian authorities, the Court held such clauses to be enforceable. The Court held that the phrase 'genuine and good faith' is a composite phrase concerning an obligation to behave in a particular way in the conduct of an essentially self-interested commercial activity *viz.* the negotiation for resolution of a commercial dispute and therefore is enforceable.

[53] *United Group Rail* (n 12).
[54] *United Group Rail* (n 12).

C. Singapore

In 2012, the Singapore Court of Appeal, in the case of *HSBC Institutional Trust Services (Singapore) Ltd.* v *Toshin Development Singapore Pte. Ltd.*[55] dealt with a tenancy agreement which required the parties to "*in good faith endeavour to agree*" in respect of a rent review mechanism provided in the said agreement. The Court discussed the findings of *Walford* v *Miles*[56] and held that there is no good reason as to why an express agreement between contractual parties should not be upheld as such agreements are not contrary to public policy. The Court also distinguished between pre-contractual negotiations and negotiations as required under a concluded contract and held that parties bound to negotiate under a concluded contract are not free to simply walk away from the negotiating table without any rhyme or reason.

Similarly,in the case of *International Research Corp PLC* v *Lufthansa Systems Asia Pacific Pte. Ltd.*,[57] the Singapore Court of Appeal had the opportunity to deal with tiered dispute resolution clauses wherein it held that such clauses require strict compliance.[58] In this case, disputes arose out of an agreement entered into between the parties which provided that the parties were required to resolve their disputes first by a specified mediation procedure, failing which such disputes would be referred to arbitration. The arbitral tribunal had held that such clauses are unenforceable for uncertainty and are not meant to be obstacles in the way of commencement of arbitration. Upon challenge, the High Court held that all parties were bound by the dispute resolution mechanism specified in the contract entered into between the parties. Upholding the view of the High Court, the Court of Appeal held that where parties had clearly contracted for a specific set of dispute resolution procedures as pre-conditions for arbitration, then in the absence of any waiver, such pre-conditions have to be complied with.[59] Whilst this is a welcome change, one must understand that the disputes resolution clause in this case was well-defined and certain, and did not contemplate mere negotiations between parties in good faith.

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[55] 2012 SGCA 48.
[56] *Walford* (n 25).
[57] 2013 SGCA 55.
[58] 2013 SGCA 55 : (2014) 1 SLR 130.
[59] Amanda Lees, 'The Enforceability of Negotiation and Mediation Clauses in Hong Kong and Singapore' (2015) 17 Asian Dispute Review 16.

VII. The Indian Approach

Whilst Indian Courts have often been faced with pre-arbitral negotiation clauses, there isn't much judicial literature on their enforceability and validity. Courts have not explicitly ruled on the enforceability of such clauses, but rulings suggest that such clauses may be valid, and that the conduct of the parties may be used to determine whether such clauses have been sufficiently complied with.

A. Supreme Court

The Supreme Court in *Visa International Ltd. v. Continental Resources (USA) Ltd.*,[60] while hearing an application under Section 11 of the Arbitration and Conciliation Act, 1996 ("**Arbitration Act**") had occasion to deal with an arbitration clause which required the parties to settle such disputes through arbitration which could not have been settled amicably by the parties. The argument before the Court was that the application (under Section 11 of the Arbitration Act) was premature given the fact that pre-condition for amicable settlement of the dispute between the parties had not been complied with. Without delving into the enforceability of such pre-arbitral steps, the Supreme Court, upon a viewing of the conduct of the parties, held that the fact that parties exchanged letters undoubtedly showed that attempts were made for an amicable settlement and since there was not much scope left for such a settlement due to the rigid stands taken by the parties, as was evident from the correspondence between the parties, the parties had no option but to invoke arbitration.[61]

In *Swiss Timing Ltd.* v *Commonwealth Games 2010 Organising Committee,* the Supreme Court once again analysed the conduct of the parties to observe that considerable efforts were made to resolve the issue without having to take recourse to formal arbitration and it is only when all these efforts failed, that the petitioner communicated to the respondent its intention to commence arbitration.[62] A similar approach was once again taken by the Supreme Court in the case of *Demerara Distilleries (P) Ltd.* v *Demerara Distilleries Ltd.* In this case, the parties raised a contention that the application under Section 11 of the Arbitration Act was pre-mature as the pre-arbitral steps of engaging in mutual discussions and thereafter, mediation, had not been followed. The Court held that elaborate and acrimonious correspondence exchanged by and between the parties indicated that any

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[60] *Visa* (n 33).
[61] *Visa* (n 33).
[62] (2014) 6 SCC 677.

attempt to resolve disputes through mutual discussions and mediation would be an 'empty formality'.[63]

B. Delhi High Court

The Delhi High Court has had the opportunity to deal with a detailed set of pre-arbitral steps. In the case of *Conway Exports (P) Ltd.* v *Rudra Pharma Distributors (P) Ltd.*, the Delhi High Court, in an application under Section 11 of the Arbitration Act examined a tiered dispute resolution clause which required the parties to attempt in good faith to settle their disputes.[64] It further provided that if the parties were unable to settle their disputes through good faith negotiations within a period of sixty days, the same was to be attempted to be resolved through senior representatives of the parties within a further period of sixty days, failing which the disputes would be referred to arbitration. The Court held that although there were no formal negotiations that took place under the said clause, the fact that two senior representatives of the parties had met was sufficient to discharge the obligation under the agreement.

This apparent view of the Delhi High Court (that pre-arbitral steps should be followed in their essence and spirit as opposed to a formal and rigid compliance), has changed over the years. In another case, the Delhi High Court held that a dispute resolution clause comprising a prior requirement to be complied with before invoking arbitration was only directory in nature and not mandatory as such an interpretation would protect the parties' rights.[65] In this case, the Court was dealing with an arbitration clause which required the parties to first settle their disputes amicably by mutual discussions. The Court was of the view that if such pre-arbitral steps are held to be mandatory, it can prejudice the parties seeking to invoke arbitration as by the time the parties comply with such pre-arbitral steps, invocation of arbitration might be barred by limitation. However, the Supreme Court has, in *Geo Miller & Co. (P) Ltd.* v *Rajasthan Vidyut Utpadan Nigam Ltd., inter alia* held that the period during which the parties were *bona* fide negotiating towards an amicable settlement may be excluded for the purpose of computing the period of limitation for reference to arbitration.[66]

In one of the most recent cases on this issue, the Delhi High Court was dealing with a clause whereby the parties had to endeavour to amicably resolve their disputes within thirty days, failing which the parties would refer

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[63] *Demerara* (n 33).
[64] *Conway* (n 4).
[65] *Ravindra Kumar Verma v BPTP Ltd* 2014 SCC Online Del 6602.
[66] (2020) 14 SCC 643 : 2019 SCC Online SC 1137.

the disputes to arbitration. The question before the Court was whether such a procedure was followed. Whilst the Court relied on *Visa International* to hold that the correspondence between the parties evidenced that attempts had been made to resolve the dispute prior to invocation of the arbitration clause, it took a step forward to hold that such a clause cannot be held to be mandatory as no specific procedure was prescribed as to how the parties would try and resolve their disputes. Relying upon *Ravindra Kumar*, the Court held that such a clause was directory and no fault could be found in the act of the parties for invoking arbitration.[67]

C. Bombay High Court

The Bombay High Court has been more proactive in enforcing pre-arbitral steps. In *Tulip Hotels (P) Ltd. v Trade Wings Ltd.*,[68] the Bombay High Court dismissed an application for appointment of arbitrators and held that where the parties had agreed to a specific procedure for settling their disputes through arbitration and had prescribed certain conditions precedent to arbitration, the parties cannot avoid compliance with such pre-conditions. However, if such pre-conditions are avoided by an unwilling party, the other party is not rendered a helpless spectator and can commence arbitration. In this case, the Court was dealing with a clause whereby the parties had agreed to settle their disputes through conciliation under Section 62 of the Arbitration Act.

D. Karnataka High Court

The Karnataka High Court has also, in its recent decision in *Mphasis Ltd.* v *Strategic Outsourcing Services (P) Ltd.*, followed the reasoning laid down by the Delhi High Court in *Ravindra Kumar* for holding the requirement to engage in negotiations prior to arbitration as directory and not mandatory. In this case, the Court dealt with a dispute resolution clause which required all disputes under the concerned agreement to be settled mutually between the parties through negotiations, and only if the such disputes remained unresolved for a period of sixty days, could the parties refer the disputes to arbitration. The Court held that attempts had been made to initiate negotiations, but no action was taken by the other party. It further held that even if the pre-requirement for invoking arbitration is not complied with, the same cannot prevent reference to arbitration.[69]

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[67] *Siemens Ltd v Jindal India Thermal Power Ltd* 2018 SCC Online Del 7158.
[68] 2009 SCC Online Bom 1222.
[69] MANU/KA/1267/2019.

From the aforesaid, it appears that whilst Courts in India (i) give primacy to contractual stipulations; (ii) enforce pre-arbitral procedures; (iii) determine compliance of pre-arbitral procedures on the basis of the conduct of the parties and the facts of each case; such clauses are not considered to be a bar to commencement of arbitration. Pertinently, the enforceability of clauses requiring good faith negotiations prior to initiation of arbitration, still needs to be determined on a case-to-case basis due to the subjective nature (and varied wordings) of such clauses.

E. Rajasthan High Court

In the case of *Simpark Infrastructure (P) Ltd.* v *Jaipur Municipal Corpn.*,[70] the Rajasthan High Court held that where parties have agreed to an arbitral procedure for dispute resolution, the condition precedent for invoking the arbitration clause is required to be followed before filing an application under Section 11 of the Arbitration Act.

VIII. A PRACTICAL GUIDE

The aforesaid discussion is aimed at giving an insight into the manner in which courts have interpreted such clauses, and the key considerations that need to be kept in mind whilst drafting such clauses. It is imperative for parties to understand the importance of pre-arbitral steps, as failure to comply therewith may entail consequences, including delay in or derailment of proceedings. What is fundamental, is that parties must not choose to ignore agreed contractual procedures. The tendency of the courts is to normally enforce a commercial bargain and the terms of the relationship between the parties.

In the circumstances, the following aspects may be kept in mind while drafting pre-arbitral negotiation clauses:

1. The language of such clauses should be clear, crisp, and unambiguous.[71] They should be drafted with utmost care and caution to avoid the possibility of such a clause being subjected to two possible interpretations. For instance, an agreement may provide for pre-conditions to arbitration which was intended to be mandatory at the time of entering into the contract. However, due to the vague language of the clause, courts may view such a clause to be directory and not

[70] 2012 SCC Online Raj 3833.

[71] Julian David Mathew Lew, Loukas A Mistelis, and Stefan Kroll, *Comparative International Commercial Arbitration* (Kluwer Law International 2003) 165–85.

mandatory. Thus, the intention of the parties may be defeated if the clauses are open ended and capable of multiple interpretations.

2. Such clauses must explicitly and unequivocally state what pre-conditions need to be complied with by the parties, prior to invocation of arbitration. The alternative dispute resolution procedure adopted by the parties must be clearly stated in order to leave no room for any ambiguity.[72]

3. The language of such clauses must be drafted in a manner, so as to create enforceable obligations on the parties. Participation in these pre-arbitral steps must not read as a mere formality, but an enforceable obligation.

4. The process to be followed by the parties, for compliance with such pre-arbitral steps, must be clearly determined and incorporated in the agreement.[73] For instance, parties must specify (i) which officials are required to take part in the friendly discussions and good faith negotiations; (ii) whether such negotiations are to take place by way of correspondence or whether the parties need to physically meet and undertake such negotiations; (iii) the place of such meetings and the number of meetings that need to be held; (iv) how the process is to be initiated and how it is to be conducted (including whether by presentation/exchange of claims and counter claims, etc.).

5. Parties should avoid using phrases such as "good-faith", "friendly", "amicable" or "best endeavours". These phrases are subjective in nature and are capable of multiple interpretations which ultimately may lead to its unenforce ability. The courts may find it difficult to gauge whether there was any "good faith" involved in such negotiations, or whether the parties were capable of being "friendly" in their discussions once the disputes had already arisen. Instead, such clauses should use alternative phraseology that clearly specifies that the parties must engage in negotiations with the aim of resolving the disputes arising out of or in connection with the agreement for a particular period.

6. Such clauses should clearly specify each step, and also state that the same is mandatory in nature and accordingly parties cannot move to the second step without complying with the first. The entire objective behind incorporating such clauses is to have a stepwise mechanism to resolve disputes amicably between parties to a commercial

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[72] Klaus Peter Berger, *Private Dispute Resolution in International Business: Negotiation, Mediation, Arbitration*, (3rd edn, Kluwer Law International 2015) 15-56.

[73] Tomic (n 7).

transaction. Such an objective is defeated if parties avoid (or can avoid) complying with such pre-arbitral steps.[74]

7. The timeline for each of these pre-arbitral steps is of utmost importance. Such clauses must specify the exact period within which each step needs to be complied with and what is to happen upon expiry of that time period. If the timelines for each of these pre-arbitral steps are not specified, it may be disadvantageous for the party seeking to invoke arbitration, as the opposing party may delay negotiations. Reasonable timelines must be provided for each step so as to enable the parties to achieve the objective behind incorporating such steps in the dispute resolution process.[75]

8. The consequences of non-compliance with such pre-conditions must also be clearly spelt out in such tiered dispute resolution clauses. This is to ensure that the parties mandatorily comply with such pre-conditions. Courts tend to interpret provisions/clauses without negative stipulations/consequences to be directory in nature and not mandatory.[76] Therefore, parties must provide for the consequences for non-compliance at each step.

9. Additionally, tiered dispute resolution clauses should also specify the other conditions when each pre-arbitral step gets triggered, and when each step is said to be sufficiently complied with. This is to enable the parties to understand at what stage each step should be resorted to, thereby, making the dispute resolution mechanism comprehensive. This also helps the courts to better understand the nature of such clauses and whether there have been sufficient compliances.

10. It is preferable not to make pre-arbitral steps dispute specific. For instance, there are some clauses, where parties seek to resolve a particular kind of dispute arising out of the agreement by way of negotiations and another kind of dispute through expert determination. This unnecessarily complicates such clauses and may make them unworkable. Therefore, normally parties should formulate a dispute resolution procedure that will be all encompassing and applicable to all disputes arising out of their agreement.

11. The tiered dispute resolution clause should be drafted in such a manner so as to clearly and unequivocally specify that only claims which cannot be resolved by the first step may be referred to the second step. For instance, if the parties have chosen negotiations as their

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[74] ibid.
[75] Born (n 10).
[76] *State of Bihar v Bihar Rajya Bhumi Vikas Bank Samiti* (2018) 9 SCC 472.

pre-arbitral step, the language must specify that neither of the parties can escalate their claims to the arbitrator, unless they have undergone the pre-arbitral step of negotiation. Each and every dispute/claim shall be subjected to negotiations and if they remain unresolved, only then can the same be referred to arbitration.

IX. CONCLUSION

The evolution of the law on this issue, i.e., enforceability of pre-arbitral steps, has evolved from Courts holding pre-arbitral steps to be unenforceable, then directory, and now, to some extent, mandatory. The law, in this regard, will continue to evolve. Whilst we may find solace in the fact that the bargain between the parties has consistently been (and remains likely to be) upheld by courts, the discussion in relation to enforcement of good faith negotiation clauses has not yet been settled. The subjective nature of the phrases 'good faith' and 'friendly discussions' makes a unanimous and universal view on the issue, difficult. However, the recent trend appears to be that parties are required to comply with such steps, whether or not such steps are mandatory or directory, thereby upholding the contractual arrangement/bargain between them. Having said that, a detailed examination of existing authorities (which gives an insight into the courts' disposition), will surely assist in understanding the key considerations that play on the court's mind while dealing with such clauses, which in turn will enable informed parties to draft meaningful and enforceable multi-stage dispute resolution provisions.

Joinder and Consolidation in Institutional Arbitration over the last 10 years: Evolution or Revolution?

*Kirtan Prasad**

Joinder and consolidation have acquired greater practical significance in recent times given the increased complexity of commercial transactions, which now involve multiple suites of documents and multiple parties. Arbitral rules relating to joinder and consolidation have consequentially evolved to keep pace with user feedback in this regard. There has been a palpable shift in the last ten years from a conservative approach to a more permissive and innovative one. This article attempts to trace that evolution with reference to certain Indian and international arbitral rules. It concludes with a few comments on how parties may wish to deal with this evolving trend in their contracts, and cautions that any forthcoming changes and innovations will be need to be rigorously assessed against the touchstone of party consent.

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I. PREFACE

This article endeavours to describe the evolution of arbitral rules relating to joinder and consolidation over the past ten years. In doing so, it analyses three international institutional rules frequently used by Indian parties, namely: the London Court of International Arbitration ('**LCIA**'), the International Court of Arbitration ('**ICC**') and the Singapore International Arbitration Centre ('**SIAC**'),[1] and two Indian institutional rules:[2] the Indian Council of Arbitration ('**ICA**') and the Mumbai Centre for International Arbitration ('**MCIA**'). It also provides a brief comment on the general trend in this area.

II. INTRODUCTION

Although they are often referred to in the same breath, joinder and consolidation are conceptually different.

Joinder refers to the inclusion of third parties (often *prima facie* non-parties to the arbitration agreement) in proceedings. Unlike applications for joinder in court proceedings, however, arbitral tribunals do not have coercive powers over third parties since the Tribunal derives its power from consent. It is therefore important to analyse if the third party has consented to the tribunal's jurisdiction and, equally, whether the original parties to the contract have consented to such a joinder. Joinder may be affected through reliance on traditional contractual doctrines such as agency or equitable assignment, but also corporation-related concepts such as piercing the corporate veil, alter ego, or the "group of companies" doctrine.[3]

Consolidation, on the other hand, is where two or more separate arbitral proceedings are merged into a single arbitration. The consolidated arbitration can be presided over by one of the existing arbitral tribunals, or a new arbitral tribunal can be appointed for the merged arbitration. The two

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1 This is based on experience and anecdotal evidence.

2 Although over thirty arbitral institutions are said to exist in India. It has been observed that ad-hoc arbitration remains the overwhelming arbitral case load in India. *See*, 'Working Paper on Institutional Arbitration Reforms in India' <https://www.icaindia.co.in/HLC-Working-Paper-on-Institutional-Arbitration-Reforms.pdf> accessed 20 October 2020.

3 See, for instance, the joinder discussed in the decision of the Indian Supreme Court in *Chloro Control India (P) Ltd v Severn Trent Water Purification Inc* (2013) 1 SCC 641 (Supreme Court of India), which considered whether a third-party could be bound by an arbitration clause under Section 45 of the Arbitration and Conciliation Act, 1996 ('**the 1996 Act**'), and more particularly, pursuant to the group of companies doctrine.

separate arbitral proceedings can be in relation to disputes under the same contract, or under different contracts, but arising from similar facts.

Both joinder and consolidation do, however, rest on a common juridical foundation, that is, the scope of party consent. This may be provided for in the underlying contracts between the parties or reflected in the legislation of the applicable laws chosen by the parties.

Issues relating to joinder and consolidation have acquired greater practical significance in recent times given the increased complexity of commercial transactions, which now involve multiple suites of documents and multiple parties. This is so across several sectors, most notably, oil and gas, energy, resources, projects, and construction.

There is some benefit to having disputes relating to the same transaction or related contracts, between related parties being determined by the same tribunal. Doing so is more efficient and mitigates the risk of inconsistent decisions by tribunals who may need to consider overlapping issues. It also diminishes the risk of tribunals deciding cases in a silo (i.e., with reference to one contract or one contractual relationship alone), without the benefit of all the facts relating to the overall transaction.

Ideally, parties ought to provide for a complete code to deal with multi-contract or multi-party disputes by consent, at the outset, in their relevant contracts. However, this is often not the case. Dispute resolution provisions are notoriously named "midnight clauses" reflecting the fact that they tend to be negotiated at the very end of a transaction and therefore receive little, if any, attention. This has changed in recent times, with commercial parties (if not their transactional lawyers) being very alive to the benefits of drafting effective and enforceable dispute resolution provisions. Parties are also increasingly aware of the issues arising out of multi-contract and multi-party disputes. Indeed, large suites of documents in the project finance sector, for instance, now regularly explicitly address joinder and consolidation. Parties sometimes use umbrella dispute resolution agreements[4] as well, in a bid to

[4] Complex transactions typically involve multiple documents between different sets of parties. For instance, there may be finance agreements between banks and the borrowers (who may be one or more of the underlying obligors), security documents between a guarantor and the finance parties, and contracts relating to the performance of the obligation in question (whether the project or a share purchase agreement) between the underlying obligors. Rather than providing for dispute resolution clauses in relation to each of these agreements, parties sometimes use an umbrella dispute resolution agreement or master dispute resolution agreement to govern all of the agreements in this transactional suite. This agreement is typically signed by each of the parties, or alternatively, incorporated by reference into the individual documents. This is not to be confused with the term "umbrella arbitration agreements" or "umbrella clauses" as used in the context of investment treaty disputes.

ensure that the entire suite of documents is subject to a single dispute resolution clause. Such umbrella agreements also contain provisions for joinder of parties and consolidation of disputes across the entire suite of documents. Although, this level of awareness and engagement of dispute resolution clauses is not uniform. The need to engage with such complex drafting is often dispensed with in lower value transactions which tend to adopt historic dispute resolution clauses, without reflection.

Even if the parties did direct their minds to the question of joinder and consolidation, it is not always possible to fully and accurately predict the nature of disputes which may arise at the point of negotiation.

Parties, tribunals, and institutions have sometimes resorted to pragmatic techniques to overcome the absence of adequate joinder and consolidation provisions. For example, in lieu of formal consolidation, parties have been known to agree to appoint the same tribunal across all of the related disputes in question and thereafter agree to conduct all of the related arbitrations concurrently, resulting in *de-facto* consolidation.[5] However, such measures often require party agreement after the dispute has arisen, when there is less scope for consensus. An obstructive respondent, for instance, could inflict considerable cost inefficiency by insisting on separate proceedings, raising objections to joinder, and appointing a different tribunal to hear each dispute. As such, despite best intentions, the end result is often unsatisfactory and inefficient.

In a bid to address this, most leading international institutional arbitral rules now provide for rules relating to joinder and consolidation. As these rules are deemed incorporated by reference into the parties' contract, there is no need for the contract itself to provide for a full chapter and verse code on joinder and consolidation. However, it may nevertheless be prudent for parties to further define the scope of such joinder and consolidation provisions in their contracts (for instance, by expressly stipulating which third parties may be joined to an arbitration and/or defining the scope of "related contracts" in respect of which disputes may be consolidated). In such a case, the parties will have, by agreement, modified the institutional joinder and consolidation rules which are to apply as between themselves.

[5] Concurrent conducted arbitrations, however, remain formally separate. For instance, the Tribunal typically issues a separate award in relation to each of the arbitrations.

III. Evolution of Joinder and Consolidation Rules

Over the past ten years, most arbitral institutions have either introduced rules relating to joinder and consolidation or refined pre-existing ones. Such amendments have typically been in response to user feedback and complications that have arisen in the practical implementation of the rules. This section of the article seeks to describe this evolution.

A. The LCIA Rules

1. 1998-2014

The LCIA Rules provided for the joinder of third parties as early as in the 1998 edition of the rules. Article 22.1(h) of those rules provided for the tribunal:

> "*To allow,* ***only upon the application of a party****, one or more third persons to be joined in the arbitration as a party* ***provided any such third person and the applicant party have consented thereto in writing****, and thereafter to make a single final award, or separate awards, in respect of all parties so implicated in the arbitration.*" (emphasis added).

This was considered a "potentially far reaching power" at the time.[6] Indeed it was acknowledged that the idea that a third party could be joined without the consent of all parties "could be seen as a departure from normal practice".[7] However, this approach was justified on the basis that the non-consenting party could be deemed to have consented to the joinder on account of agreeing to arbitrate under the LCIA Rules.[8] This provision was amended in 2014 to delete the words "only upon the application of a party," such that the third party could apply for joinder as well.

However, there was no provision on consolidation until the 2014 LCIA Rules. The 2014 edition of the LCIA Rules provided for the tribunal's power to order consolidation in Articles 22.1 (ix) and (x) as follows:

> "*(ix) to order, with the approval of the LCIA Court, the consolidation of the arbitration with one or more other arbitrations into a*

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6 Peter J. Turner and Reza Mohtashami, *A Guide to the LCIA Arbitration Rules* (OUP 2009) 137-78.

7 ibid.

8 Turner and Mohtashamin (n 6).

single arbitration subject to the LCIA Rules where all the parties to the arbitrations to be consolidated so agree in writing; and

(x) to order, with the approval of the LCIA Court, the consolidation of the arbitration with one or more other arbitrations subject to the LCIA Rules commenced under the same arbitration agreement or any compatible arbitration agreement(s) between the same disputing parties, provided that no arbitral tribunal has yet been formed by the LCIA Court for such other arbitration(s) or, if already formed, that such tribunal(s) is (are) composed of the same arbitrators."

It also provided for the LCIA Court's power to order consolidation in Article 22.6, which stated that:

"*Without prejudice to the generality of Articles 22.1(ix) and (x), the LCIA Court may determine, after giving the parties a reasonable opportunity to state their views, that two or more arbitrations, subject to the LCIA Rules and commenced under the same arbitration agreement between the same disputing parties, shall be consolidated to form one single arbitration subject to the LCIA Rules, provided that no arbitral tribunal has yet been formed by the LCIA Court for any of the arbitrations to be consolidated.*"

As such, the LCIA Court could consolidate proceedings before the formation of the tribunal. Thereafter, the tribunal could order consolidation (with the approval of the LCIA Court) if either: (a) all the parties to the consolidated arbitration agreed in writing; or (b), absent consent, if the arbitrations to be consolidated arose out of (i) the same or "compatible arbitration agreements" (ii) between the same disputing parties, and (iii) provided that no arbitral tribunal had been formed for the other arbitrations or, if they were, they were composed of the same arbitrators.

Also, unlike joinder, which was to be determined by the tribunal, *"ultimate consolidation authority rested with the institution (the LCIA Court) rather than solely the tribunal, although consolidation ordered by the tribunal was permissible after appointment and with approval of the Court.*"[9]

2. 2020

The most recent edition of the LCIA Rules was released in October 2020. The provision on joinder remains substantially the same, save that it clarifies

[9] Maxi Scherer and Lisa Richman, *Arbitrating under the 2014 LCIA Rules: A User's Guide* (first published 2015, Kluwer Law International 2015) 239-256 paras 32-33.

when and how consent to joinder may be provided. The new Article 22.1 (x) states that the tribunal may:

> "*Allow one or more third persons to be joined in the arbitration as a party provided any such third person and the applicant party have consented* ***expressly*** *to such joinder* ***in writing following the Commencement Date*** *or* ***(if earlier) in the Arbitration Agreement;*** *and thereafter to make a single final award, or separate awards, in respect of all parties so implicated in the arbitration*." (emphasis added).

Provisions relating to consolidation and concurrent proceedings have been moved into a new Article 22A (also numbered Article 22.7). This article is largely a re-arrangement of the previous Articles 22.1 (ix), (x), and 22.6 on consolidation, but it also broadens the power of the LCIA Court and the tribunal in two important respects:

1. First, tribunals (or the LCIA Court, if the tribunal has not yet been appointed) now have the power to order the consolidation of arbitrations commenced under the same arbitration agreement or any compatible arbitration agreement(s) and arising out of the same transaction or series of related transactions – even if the disputing parties are not the same (Article 22.7(ii)). This is a notable expansion, effected by deleting the phrase "[between]the same disputing parties" found in Articles 22.1(x) and 22.6 of the 2014 Rules.
2. Second, Article 22.7(iii) now explicitly provides for the power of the tribunal to order concurrent conduct of proceedings (with the approval of the LCIA Court) "*either between the same disputing parties or arising out of the same transaction or series of related transactions* [i.e., even if the disputing parties are not the same]", "*where the same arbitral tribunal is constituted in respect of each arbitration*." As discussed briefly above, parties have been known to agree to conduct proceedings concurrently as a form of de-facto consolidation (in the absence of explicit consolidation provisions). However, this new rule helpfully clarifies that the tribunal (and LCIA Court) may order concurrent proceedings, even if one of the parties objects and even if the disputing parties are not the same. Critically, concurrent proceedings may only be ordered if the same tribunal has been appointed across all the proceedings. The situations in which parties or a tribunal may opt to order concurrent proceedings (under Article 22.7(iii),) as opposed to consolidation (under Article 22.7(ii)), are likely to be limited. However, concurrent proceedings under Article 22.7(iii) may prove to be an effective alternative, in case there are any concerns

under the relevant applicable laws arising out of the enforcement of an award rendered in consolidated proceedings.

B. The ICC Rules

1. 1998-2012

Unlike the LCIA Rules, the 1998 edition of the ICC Rules did not contain a provision on joinder but did allow for a limited form of consolidation in relation to disputes between the same parties. Article 4(6) of the 1998 ICC Rules stated that:

> "4(6) *When a party submits a Request in connection with a legal relationship in respect of which arbitration proceedings* ***between the same parties*** *are already pending under these Rules,* ***the Court may****, at the request of a party, decide to include the claims contained in the Request in the pending proceedings provided that the Terms of Reference have not been signed or approved by the Court. Once the Terms of Reference have been signed or approved by the Court, claims may only be included in the pending proceedings subject to the provisions of Article 19.*"

The 2012 version of the ICC Rules contained extensive provisions on both joinder and consolidation (primarily in Articles 7-10).

Article 7 of the 2012 ICC Rules allowed for any party (the Claimant, Respondent, or indeed the third-party seeking to be joined) to apply to the Secretariat for joinder. Article 7(1) stipulates that a request for joinder can only be filed before any arbitrator has been confirmed or appointed, unless all parties, including the additional party, agree otherwise. Articles 7(2) – (3) set out the information that must be contained in a Request for Joinder, whilst Article 7(4) explicitly provided for the other party/parties to file an Answer to such a Request.

In light of the ruling in the *Dutco* case,[10] Article 12(7) of the 2012 ICC Rules also explicitly dealt with the constitution of the tribunal in the case of

[10] *Sociétés BKMI et Siemens* v *Société Dutco Construction* (7 January 1992) Court of Cassation, First Civil Chamber. That case related to the ICC's practice of asking co-respondents to jointly nominate a co-arbitrator, as the arbitration agreement in that case provided for the appointment of a three-member panel. The French Court of Cassation in the ruled that the Tribunal had not been properly constituted in that case, and in doing so held (i) that each party had a right to equal treatment when it came to constituting the arbitral tribunal and (ii) that it was not possible to waive this right in an arbitration agreement made before the dispute arose.

joinder. Article 12(7) provides that the additional party has the choice, when a three-member arbitral tribunal must be constituted, to jointly select and nominate a co-arbitrator with the claimant(s) or to jointly select and nominate a co-arbitrator with the respondents. If the parties are unable to agree, then Article 12(8) provides that ICC Court may appoint each member of the tribunal and designate one of them to act as president.[11]

Consolidation was dealt with in Article 10. Article 10 provided that the ICC Court may order consolidation in three circumstances, where:

> "*a) the parties have agreed to consolidation; or*
>
> *b) all of the claims in the arbitrations are made under the same arbitration agreement; or*
>
> *c) where the claims in the arbitrations are made under more than one arbitration agreement, the arbitrations are between the same parties, the disputes in the arbitrations arise in connection with the same legal relationship, and the Court finds the arbitration agreements to be compatible.*"

Article 10 also sets out the basis on which consolidation is to be ordered. It states that the "*Court may take into account any circumstances it considers to be relevant, including whether one or more arbitrators have been confirmed or appointed in more than one of the arbitrations and, if so, whether the same or different persons have been confirmed or appointed.*" In addition, it states that "*when arbitrations are consolidated, they shall be consolidated into the arbitration that commenced first, unless otherwise agreed by all parties.*" In this regard, the ICC Court has exclusive jurisdiction to order consolidation under the ICC Rules.[12] The tribunal has no authority to do so.

Notably, rather than confine itself simply to provisions on joinder and consolidation, Articles 8 and 9 of the ICC 2012 Rules clarified certain additional points relating to the conduct of proceedings between multiple parties and under multiple contracts:

1. Article 8 clarified that in a claim involving multiple parties, a claim may be made by any party against any other party. Although it was

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[11] This overcomes the issue in the Dutco case by effectively providing that, in the absence of agreement, none of the parties shall have the right to appoint an arbitrator. As all appointments are made by the Court, all parties will have deemed to be treated equally.

[12] T Webster and M Buhler, *Handbook of ICC Arbitration: Commentary, Precedents and Materials* (3rd edn, Sweet & Maxwell 2014).

largely reflected in practice, this provision clarified, for instance, that co-Respondents could make cross-claims against each other.[13]

2. Article 9 allowed for "*claims arising out of or in connection with more than one contract may be made in a single arbitration, irrespective of whether such claims are made under one or more than one arbitration agreement under the Rules.*"

However, Articles 7-10 are subject to the limits in Article 6(3)-(7) of the 2012 ICC Rules. These Rules provided for the mechanism to deal with situations in which a party raised an objection concerning "*the existence, validity or scope of the arbitration agreement or concerning whether all of the claims made in the arbitration may be determined together in a single arbitration.*"Broadly, in such cases, the arbitral tribunal would determine the objection or plea, unless the Secretary-General referred the matter to the ICC Court, for its decision.[14]

As such, the 2012 ICC Rules took a fairly expansive approach to joinder and consolidation, as well as the conduct of proceedings under multiple contracts and between multiple parties more generally, whilst bearing in mind the rulings of national courts on previous editions of its Rules (e.g., the French Court de Cassation's decision in the *Dutco* case).

This approach to joinder and consolidation was maintained in the 2017 edition of the ICC Rules.[15] However, the ICC has recently issued a 2021 version of its Rules, which came into effect on 1 January 2021.

2. 2021

The 2021 Rules do contain notable refinements to the joinder and consolidation provisions. In particular:

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[13] Herman Verbist and Erik Schaefer, *ICC Arbitration in Practice* (2nd edn, Kluwer Law International 2015) 23-230, 57- 58.

[14] If the matter was referred to the Court, then the arbitration could only proceed "*if and to the extent that the Court* [was] *prima facie satisfied that an arbitration agreement under the Rules existed*" (Article 6(4)). As such, the Court could either order that the arbitration proceed (in which case the arbitral tribunal would be at liberty to consider the question of its jurisdiction afresh – (Article 6(5)), or the Court could order that all or part of the arbitration(s) not proceed. However, a negative decision by the Court did not prevent a party from asking any competent national court to determine if there was a binding arbitration agreement (Article 6(6)) or a party from making the same claim at a later date in other proceedings (Article 6(7)), i.e., the decision of the Court, was without prejudice to the merits of the parties' plea.

[15] There were no revisions to arts 7, 8, 9 and 10 of the Rules.

1. The new Article 7(5) provides for requests for joinder after the constitution of the tribunal. In such circumstances, the rules state that, "*the arbitral tribunal shall take into account all relevant circumstances, which may include whether the arbitral tribunal has prima facie jurisdiction over the additional party, the timing of the Request for Joinder, possible conflicts of interests and the impact of the joinder on the arbitral procedure*." Notably, this new Article 7(5) along with an amendment to Article 7(1), removes the requirement that joinder, after the appointment of any arbitrator, may only take place with the consent of all parties. It is understood that this change was in response to inefficiencies arising out of the requirement for all parties to consent in the previous versions of Article 7.[16] This has been described as the most important change in the 2021 Rules.[17]
2. The previous version of Article 10(b) provided that the Court may allow consolidation of pending arbitrations (between non-identical parties) where "all the claims are made under the same arbitration agreement." This raised questions as to whether "same arbitration agreement" encompassed identical arbitration agreements contained in different contracts. The 2021 Rules now clarify that the Court may order the consolidation where "all of the claims in the arbitrations are made under the same arbitration agreement or agreements."
3. In a similar vein, Article 10(c) has been amended to clarify that consolidation may be ordered "where the arbitrations are not made under the same arbitration agreement or agreements" (i.e., where the arbitrations have been commenced under different arbitration agreements), but where the arbitrations are between the same parties, the disputes arise in connection with the same legal relationship and the Court finds the arbitration agreements to be compatible.

As such, the 2021 ICC Rules now permit the tribunal to order joinder, even without the consent of all parties. Further, disputes between non-identical parties may be consolidated if they arise from the "same arbitration agreement or agreements". If the arbitration agreements are different, however, consolidation may only be ordered if the arbitrations are between the

[16] Martha E Vega-Gonzalez and Katie Gonzalez, 'New York Arbitration Week Revisited: The Challenges of Multi-Party and Multi-Contract Issues in International Arbitration and the Anticipated ICC Rules Changes' (*Kluwer Arbitration Blog*, 5 December 2020) <http://arbitrationblog.kluwerarbitration.com/2020/12/05/new-york-arbitration-week-revisited-the-challenges-of-multi-party-and-multi-contract-issues-in-international-arbitration-and-the-anticipated-icc-rules-changes/> accessed 15 January 2021.

[17] ibid.

same parties, arise in connection with the same legal relationship and the arbitration agreements are compatible.

C. The SIAC Rules

The SIAC has published three editions of its Rules between 2010 and 2020: 2010, 2013, and 2016. Further, at the time of writing of this article, the SIAC has announced the formal commencement of the process of reviewing the 2016 SIAC Arbitration Rules.

1. 2010-2013

As of 2010, the SIAC Rules contained a limited provision on joinder, with no provision for consolidation of proceedings. Article 24 of the SIAC Rules provided that a tribunal may "***upon the application of a party**, allow one or more third parties to be joined in the arbitration, **provided that such person is a party to the arbitration agreement**, with the written consent of such third party, and thereafter make a single final award or separate awards in respect of all parties*."[18] In limiting joinder to "parties to the arbitration agreement" and requiring an application from one of the existing parties to the arbitration, the SIAC Rules were much more conservative than the 1998 LCIA Rules (for instance).

This remained unchanged in the 2013 version of the SIAC Rules as well.

2. 2016-2017

However, there were significant changes to joinder and consolidation in the 2016 edition.[19] In this regard:

1. Rule 6 of the SIAC Rules deals with the commencement of arbitration disputes arising out of multiple contracts;
2. Rule 7 contains a considerably expanded regime for joinder; and
3. Rule 8 deals with consolidation.

On joinder, an application for joinder may be made either to the SIAC Court, before the constitution of the tribunal (Rules 7.1 to 7.7), or to the

[18] This was the case even in previous 2007 version of the Rules.

[19] Some of these changes responded to the guidance provided by the Singapore Court of Appeal in *PT First Media TBK v Astro Nusantara International BV* [2013] SCGA 57 (Singapore Court of Appeal), which related to the Tribunal's power to order joinder under Rule 24(b) of the previous version of the Rules.

tribunal, after it has been formed, and even if the SIAC Court has rejected joinder in the first instance (Rules 7.8 to 7.11). To this end, the fact that the SIAC Court has ordered a joinder does not preclude the tribunal from subsequently ruling on its own jurisdiction and finding that it has no jurisdiction over the third party. Instead, as recognised by Rules 7.4 and 7.10, the tribunal retains its power under Rule 28.2 to rule on its own jurisdiction.[20]

The application can be made either by the existing parties to the arbitration or by the non-parties seeking to be joined (Rules 7.1 and 7.10). Rules 7.1 and 7.10 also set out two grounds on which joinder may be ordered by the SIAC Court and the tribunal, respectively: (i) if the non-party is *prima facie* bound by the arbitration agreement; or (ii) all parties, including the non-party, have consented to joinder.

As with joinder, consolidation may also be ordered by the SIAC Court (before the tribunal has been constituted) (Rule 8.1) or by the tribunal (after it has been constituted and even if the SIAC Court refused to order consolidation under Rule 8.1, in the first instance) (Rule 8.4).

The grounds for SIAC Court ordered consolidation are as follows (Rule 8.1):

1. all parties have agreed to the consolidation;
2. all the claims in the arbitrations are made under the same arbitration agreement; or
3. the arbitration agreements are compatible, and: (i) the disputes arise out of the same legal relationship(s); (ii) the disputes arise out of contracts consisting of a principal contract and its ancillary contract(s); or (iii) the disputes arise out of the same transaction or series of transactions.

The grounds for tribunal ordered consolidation (under Rule 8.7) are similar to those in the case of consolidation applications to the SIAC Registrar, save that, "*the consolidation application can be made only if the same tribunal has been constituted in each of the arbitrations sought to be consolidated, or only one tribunal has been constituted in all the pending arbitrations. If different tribunals have been constituted, then neither Rule (b) nor (c) can apply.*"[21]

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[20] SIAC Rules 2016, rr 6-8; John Choong, *A Guide to the SIAC Arbitration Rules* (2nd edn, OUP 2018) ch 7, 37.

[21] ibid.

Although the LCIA and ICC were quicker off the mark in terms of joinder and consolidation provisions, the SIAC has caught up, if not led the way in some respects. For instance, the 2016 version of the SIAC Rules reflected the ability to order consolidation even if there was no identity of parties across the various proceedings.

It remains to be seen if the upcoming seventh edition of the SIAC Rules will contain any further innovations in this realm.

Quite apart from changes to the Rules themselves, SIAC has proposed a cross-institutional consolidation protocol in December, 2017 because:[22]

> "*The consolidation provisions of existing institutional rules of leading arbitral institutions do not permit the consolidation of arbitrations that are subject to different sets of institutional arbitration rules (for example, SIAC and ICC arbitrations), even if they satisfy the other criteria for consolidation…In turn, this prevents related disputes, which otherwise meet the criteria for consolidation, from being heard together and thus limits the ability of arbitration to reach its full potential as a dispute resolution mechanism to serve the needs of users.*"

The proposal puts forward two options:[23]

1. First, it proposes that arbitral institutions could adopt a consolidation protocol that sets out a new, standalone mechanism; or
2. Second, and alternatively, it proposes that arbitral institutions could adopt a consolidation protocol providing that one institution would be authorized to determine any cross-institution consolidation application based on its own consolidation rules. The institution whose rules are to apply will be based on objective criteria agreed in the protocol.

Whilst cross-institutional co-operation would facilitate non-fragmented resolution of disputes, it could, however, test the limits of party autonomy. On the one hand, it may be argued that the fact of disparate institutional rules being applied to related contracts is simply a result of parties not having directed their minds to the issue. Had they done so, they would likely choose

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[22] SIAC, 'Proposal on Cross-Institution Consolidation Protocol' (19 December 2017) <https://siac.org.sg/69-siac-news/551-proposal-on-cross-institution-consolidation-protocol> accessed 15 January 2021.

[23] The Memorandum may be found at this link <https://siac.org.sg/images/stories/press_release/2017/Memorandum%20on%20Cross-Institutional%20Consolidation%20(with%20%20annexes).pdf> accessed 15 January 2021.

just one institution in the interests of consistency (to this end, it could be argued that the cross-institutional protocol is simply a mechanism for giving effect to party autonomy). On the other, it is equally arguable that disparate institutional rules selected reflect the parties comfort with a particular institution (e.g., a lender may prefer LCIA arbitration whilst the owner and contractor may choose to have their arbitration administered by the ICC or ad-hoc arbitration), and to that end, the fragmentation, though messy, reflects party autonomy.

However, the efficacy of this protocol depends on consensus amongst the institutions.[24] Wherever the chips land on this protocol, it certainly wins high praise for innovation and its attempt to rationalise an unruly terrain.

D. The ICA Rules

The 2012 version of the ICA Rules contained the following provision on consolidation at Rule 39:

> "*Where there are two or more applications for arbitration by the Council and the issue involved in the dispute arises out of same transactions, the Registrar may, if he thinks proper to do so and with the consent of the Parties, fix the hearings of the disputes to be heard jointly or refer the applications to the same Tribunal. The awards, however, shall be given separately in each case.*"

The power to consolidate was expanded further in Rule 17(6) of the ICA Rules which states:

> "*The Tribunal may, with the consent of the parties, direct consolidation of two or more arbitral proceedings before it, if the disputes or differences therein are identical and between the same parties or between the parties having commonality of interest or where such disputes arise out of separate contract but relate to the same transactions.*"

Further, under the 2014 ICA Rules, it is the tribunal, rather than the Registrar, who has the power to consolidate. This rule was not changed in

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[24] The protocol has also been criticised from a practical implementation perspective. See, for instance, Matthew Knowles, 'UK: SIAC's Proposal for a Protocol on Cross-Institutional Consolidation of Arbitrations: Too Much Complexity to be Beneficial?' (*Mondaq*, 16 January 2018) <www.mondaq.com/uk/arbitration-dispute-resolution/663930/siac39s-proposal-for-a-protocol-on-cross-institutional-consolidation-of-arbitrations-too-much-complexity-to-be-beneficial> accessed 15 January 2021.

the amended ICA Rules on International Commercial Arbitration published in 2016.[25]

The ICA Rules, however, do not contain any provisions on joinder.

E. The MCIA Rules

The MCIA is a relatively new institution (having only been launched in 2016). It was borne out of a joint initiative between the domestic and international business and legal communities. However, what it lacks for in age, it has certainly made up for with its state-of-the-art rules (which include emergency arbitrator provisions, expedited proceedings, scrutiny of awards, etc).

It also contains provisions for the consolidation of arbitrations, but not joinder. In this regard, Rule 5.1 provides that: (a) at the request of a party; and (b) after consultation with parties and appointed arbitrators, (c) the MCIA Council has the power (but not obligation) to consolidate two or more arbitration proceedings, provided that:

i. all the parties agree to the consolidation; and

ii. all claims in the arbitration are made under the same arbitration agreement.

The fact that the power to consolidate has been conferred on the Council, but not the tribunal, is interesting, but not unusual. It is similar, for instance, to the ICC approach. However, unlike the ICC Rules, consolidation may only be granted if the claims are made under the same arbitration agreement, and if all the parties agree to consolidation.

The approach to consolidation and absence of joinder provisions may reflect jurisdiction-specific considerations,[26] or a preference to take a more conservative approach in the first edition of the arbitral rules for a new institution. In any event, it adds to the diversity of institutional approaches to joinder and consolidation, in what is already proving to be a colourful terrain.

IV. KEY TRENDS

There is not, as yet, consensus on international best practice in so far as joinder and consolidation is concerned. Each of the institutions described

[25] Rules of International Commercial Arbitration 2016.
[26] As discussed further in the Key Trends Part below.

above has taken a slightly bespoke approach. However, there is a palpable trend towards facilitating the resolution of multi-party and multi-contract disputes before a single body, by way of increasing the grounds and avenues for joinder and consolidation. This recognises the practical problems that have arisen by the absence of these rules such as time and cost inefficiencies, the risk of conflicting decisions by arbitral tribunals, and indeed applications to national courts to resolve such issues.

Of the institutions discussed above, the LCIA and ICC were off the mark early, given that they provided for some form of joinder and/or consolidation, as early as in their 1998 Rules, and that they both provided for fairly extensive joinder and consolidation provisions by 2012-2014.

Notwithstanding this, a 2018 article which undertook a comparative analysis of joinder and consolidation rules (albeit, comparing a different set of arbitral rules to the ones discussed in this article), commented as follows:

> "*As a general observation, the various arbitral rules can be categorized as those which take a more conservative approach on joinder and consolidation, and those which take a more aggressive approach. The ICC, LCIA, and UNCITRAL Rules fall into the former category, whilst the Swiss, SCC, HKIAC, and ACICA Rules fall into the latter category, reflecting a divergence among the arbitral institutions in their willingness to interfere with party autonomy.*"[27]

It would appear that with the recently announced revisions to their rules, the ICC and LCIA are also moving towards a more permissive approach. As described above, the SIAC is in the same vein as these institutions – if not leading the charge in some respects. Indeed, in proposing the cross-institutional protocol, the SIAC has also demonstrated its willingness to push the frontier of the debate further.[28]

The approach of the Indian institutions is currently more conservative. This may reflect the nascency of institutions such as the MCIA (who may choose to take a more permissive approach in future iterations of their rules) or, alternatively, this approach may reflect jurisdiction-specific concerns. For instance, there may be hesitance to adopt a more permissive approach on account of historic "excessive judicial intervention in arbitration" coupled

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[27] Gordon Smith, 'Comparative Analysis of Joinder and Consolidation Provisions Under Leading Arbitral Rules' (2018) 35(2) Journal of International Arbitration 173.

[28] At the time of writing this article the SIAC has announced the formal commencement of the process of reviewing the 2016 SIAC Arbitration Rules. It remains to be seen if the seventh edition of these rules will contain any further innovations in this realm.

with delays in the Indian courts,[29] both of which may be counterproductive to the cause of efficiency. There is much to be said for a conservative approach that minimises the risk of obstructive parties making ill-founded applications to the courts, either during the arbitration or at the enforcement stage. Similarly, provisions on joinder may have been eschewed on account of Section 45 of the Indian Arbitration and Conciliation Act of 1996, which allows the courts to refer certain non-signatories to arbitration.[30]

V. CONCLUSION

Whilst the emphasis on innovation and a more permissive approach is encouraging from an efficiency perspective, it is imperative that parties, counsel, arbitrators, and institutions remain vigilant to ensure that the joinder and consolidation provisions (i) respect the bounds of party consent; and (ii) also take into account national laws which may give rise to enforcement concerns.

Enforcement of an award arising out of an allegedly inappropriate joinder or consolidation may be challenged under Article V of the *New York Convention*,[31] in particular, on the basis of Article VI(c) that:

> "*The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced.*"

There may also be additional requirements under the laws of the place where enforcement is anticipated, which ought to be taken into account. It may be argued that it is not legitimate for tribunals (or institutions) to have regard to such enforcement concerns in the underlying arbitration (which ought to be determined in accordance with the laws chosen by the parties).

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[29] The Working Paper on Institutional Arbitration identified "*problems with delays and excessive judicial involvement in arbitration proceedings*" as one of the reasons why institutional arbitration is not the preferred mode of arbitration in India.

[30] See, for instance, the decision of the Supreme Court of India in *Chloro Control India (P) Ltd v Severn Trent Water Purification Inc* (2013) 1 SCC 641 (Supreme Court of India), which considered whether a third-party could be bound by an arbitration clause under Section 45 of the 1996 Act, and more particularly, pursuant to the group of companies doctrine.

[31] The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958.

Regardless, as a practical matter, parties will no doubt wish to ensure that any award obtained is ultimately enforceable. Tribunals may also wish to have regard to such enforcement concerns in order to preserve the efficacy of any award that they may render.[32]

Enforcement concerns may be more complicated in cases where the underlying suite of documents provides for more than one governing law. For instance, in a project finance deal, the governing law of the project documents may well be the law of the place where the project is to be implemented. However, the security documents may well provide for another governing law, because of the lender's preference or in view of the jurisdiction in which enforcement is envisaged (e.g., the jurisdiction where the guarantor is incorporated or has assets). Similarly, is not unusual to see the documents providing for disparate seats of arbitration as well.

Quite apart from enforcement concerns, there may well be circumstances in which it is neither objectively desirablenor the intention of parties to facilitate joinder or consolidation. This is particularly so in areas such as shipping or commodities, where there is a premium on the swift resolution of a large volume of claims of relatively modest value. An unduly permissive approach to joinder and consolidation in such cases would unnecessarily complicate relatively straightforward disputes.

Joinder and consolidation are not always appropriate for large high-value disputes either. For instance, there may be a desire to prevent sub-contractors further down the chain from interfering in disputes between the owner and original contractor. Also, finance parties frequently wish to keep the underlying obligor out of disputes with the guarantor under the security documents.

If the parties wish to keep such ostensibly related disputes separate and/or prevent related third parties from intervening in proceedings, then they ought to, ideally, make their preference clear in their contracts. Tribunals and institutions also ought to be vigilant to ensure that the bounds of consent are not overstepped. This will, in turn, turn on the individual facts of each case.

Indeed, an interesting area to watch out for in the future will be to ascertain how institutions, tribunals, and parties alike deal with the ever-expansive but differing approaches to joinder and consolidation, particularly in

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[32] Article 42 of the ICC Rules, for instance, provides that "*in all matters not expressly provided for in the Rules, the Court and the arbitral tribunal shall act in the spirit of the Rules and shall make every effort to make sure that the award is enforceable at law.*"

the case of overlapping jurisdiction. Query whether there will be more court applications on this account.

In all, there have been significant changes in the area of joinder and consolidation over the past ten years. Perhaps, not a revolution, but certainly a considerable evolution. Given the ongoing innovation in this realm, it would be premature to pass a final verdict. The author may wish to take stock again, perhaps in ten years' time. Until then, it is hoped that any forthcoming changes and innovations will be rigorously assessed against the touchstone of party consent (and national legislation, where appropriate).

The Ban on Double Hatting in Investment Arbitration: A Double-Edged Sword?

*Dr. Vanina Sucharitkul, FCIArb**

International arbitration has, in recent times, made efforts to address the growing concerns surrounding the practice of double hatting – the practice of counsels representing parties and also accepting appointments as arbitrators in different proceedings. While the search for the optimal tool to regulate the practice has ranged from options such as a ban on concurrent appointments to the adoption of a code of conduct for arbitrators, some scholars have questioned the rationale for regulating the practice in the first place. This paper will challenge the axiomatic criticism of the practice of double hatting and argue that instituting a ban on double hatting will severely prejudice the diversity and quality of arbitrators in international arbitration. In making these claims, the paper will analyse the principles of conflict of interest and issue conflicts which underpin the ban on double hatting. Using these parameters, it will argue that multiple roles donned by an arbitrator does not a priori warrant regulation and disqualification, but an assessment on a case-to-case basis and highlight the flaws in the assumptions on which the ban on double hatting is premised. The paper will then engage with the proposed reforms surrounding double hatting in the recent ISDS-UNCITRAL Code of Conduct and bring forth the systemic barriers created for women and second-generation lawyers in securing arbitrator appointments, severely impacting the diversity and quality of the pool of arbitrators, and reinforcing the "male, pale and stale" stereotype of arbitrators in international arbitration.

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I. Introduction

The independence and impartiality of arbitrators are of vital importance both to disputing parties and the legitimacy of investment arbitration as a whole.[1] Independence relates to a decision maker's relationships with the parties, which affect his or her views or attitudes on the merits of the dispute.[2] The requirement of independence is set forth in the International Centre for the Settlement of Investment Disputes ('**ICSID**') Convention, which states that arbitrators shall be "*persons … who may be relied upon to exercise independent judgment.*"[3] On the other hand, impartiality means "*com-*

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[1] Audley Sheppard, 'Arbitrator Independence in ICSID Arbitration' in Christina Binder and others (eds), *International Investment Law for the 21st Century. Essays in Honour of Christoph Schreuer* (OUP 2009); August Reinisch and Christina Knahr, 'Conflict of Interest in International Investment Arbitration' in Anne Peters and Lukas Handschin (eds), *Conflict of Interest in Global, Public and Corporate Governance*, (CUP 2012); David Gaukrodger and Kathryn Gordon, OECD, 'A Scoping Paper for the Investment Policy Community' (2012) OECD Working Papers on International Investment 49 <http://dx.doi.org/10.1787/5k46b1r85j6f-en> accessed 18 August 2021.

[2] *See*, International Bar Association Rules of Ethics for International Association 1987, art 3.1; Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (2nd edn, OUP 2013) 280. *See also*, Michael Hwang andKevin Lim, 'Issue Conflict in ICSID Arbitrations' (2011) 8 Transnational Dispute Management478.

[3] Article 14(1) of the ICSID Convention states the qualities required of members of the Panels of Conciliators and Arbitrators. Articles 12-16 of Conciliators of and Arbitrators. Article 40 of the ICSID Convention extends these requirements to arbitrators appointed from outside the panels.

plete receptivity to the parties' arguments."[4] An impartial arbitrator is "*one who is not biased in favour of, or prejudiced against, a particular party or its case*."[5] The common assumption is that an arbitrator in international disputes must be *both* impartial and independent.[6] Indeed, the Investor-State Dispute Settlement ('**ISDS**') system was designed to be a depoliticised process meant to fill deficiencies and gaps in the relatively weak domestic legal institutions of certain countries.[7] Some observers argue that investment arbitration offers a neutral and impartial forum to resolve investor-State disputes as a basis for ensuring the rule of law.[8]

In recent years, criticisms that ISDS is in a state of crisis in many parts of the world have been surrounding the decision makers.[9] Due to the nature of the party-appointment system in *ad hoc* arbitration, critics have raised concerns on whether the outcomes of arbitral awards are being influenced by arbitrators' financial or strategic career interests.[10] This sentiment was captured by Professor Joost Pauwelyn:

> "*ISDS is in a state of crisis in many parts of the world, and much of the criticism is focused precisely on who is deciding ISDS cases.*

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4 Sam Luttrell, *Bias Challenges in International Commercial Arbitration – The Need for a "Real Danger"* (Kluwer Law International 2009) 23.

5 Bishop Doak and Lucy Reed, 'Practical Guidelines for Interviewing, Selecting and Challenging Party-Appointed Arbitrators in International Commercial Arbitration'(1998) 14 Arbitration International 399.

6 Impartiality, which is usually paired with the obligation of independence, is not explicitly called for in either the English or the French version of the Convention. The Spanish version of Article 14 para. One does however stipulate that arbitrators must be impartial. Since all language versions of the ICSID Convention are equally authentic, the general consensus among scholars and ICSID arbitration users that both requirements are mandatory. *See*, Christoph Schreuer, *The ICSID Convention: A Commentary* (CUP 2001); Noah Rubins and Bernhard Lauterburg, 'Independence, Impartiality and Duty of Disclosure in Investment Arbitration' in Christina Knahrand others (eds), *Investment and Commercial Arbitration – Similarities and Divergences*, (Eleven International2010).

7 Susan Franck, 'The Nature and Enforcement of Investor Rights Under Investment Treaties: Do Investment Treaties have a Bright Future?' (2005) 12 UC Davis Journal of International Law & Policy 70; William Dodge, 'Investor-State Dispute Settlement Between Developed Countries: Reflections on the Australia-United States Free Trade Agreement' (2006)39 Vanderbilt Journal of Transnational Law14.

8 Jan Paulsson, *Denial of Justice in International Law* (CUP 2005) 265; Charles N Browner and Stephan Schill, 'Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law'(2008) 9 Chicago Journal of International Law 497; Sergio Puig, 'Blinding International Justice' (2016) 56 Virginia Journal of International Law 663.

9 Pia Eberhardt and Cecilia Olivet, *Profiting from Injustice, how Law Firms, Arbitrators and Financiers are Fuelling an Investment Arbitration Boom* (Corporate Europe Observatory and the Transnational Institute 2012) 30; Antoni Eliason, 'Evidence Partiality and the Judicial Review of Investor-State Dispute Settlement Awards: An Argument for ISDS Reform' (2018)50 Georgetown Journal of International Law 3.

10 Muthucumaraswamy Sornarajah, 'Power and Justice: Third World Resistance in International Law' (2006) 10 Singapore Year Book of International Law 33.

> *The investment regime is said to be governed by arbitrators, rather than states. Arbitrators are labelled as "private judges" operating in secrecy, biased in favor of large multinationals, without regard to conflicts of interest and issuing inconsistent decisions.…the world investment regime seems, at present, to have too much rule of lawyers and not enough rule of law.*"[11]

Investment arbitrators have been called "private judges" who operate in secrecy, are biased in favour of big multinational companies with no regard for conflicts of interest.[12] The alleged presence of a pro-investor bias has also fuelled a growing backlash against investment arbitration.[13]

There are suggestions that it is unethical to act both as arbitrator and counsel, even in unrelated investment disputes. The damning anti-trade and anti-ISDS non-governmental organisations ('**NGOs**') report "*Profiting from Injustice*" launched an attack on the investment arbitration community, particularly targeting the arbitrators who continued to function as counsels in concurrent cases. The report stated that "*the fact that some arbitrators also act as counsel which, in some situations, can raise doubts about the arbitrator's independence and impartiality.*"[14] Following this report, the United Nations Conference on Trade and Development ('**UNCTAD**') issued a Report on Recent Developments in Investor-State Dispute Settlement in 2013 with broad stroke critique of "*contradictory decisions issued by tribunals, an increasing number of dissenting opinions, concerns about arbitrators' potential conflicts of interest all illustrate the problems inherent in the system [of international arbitration].*"[15] However, it should be underscored that this UNCTAD report failed to cite any independent research or studies but instead based it on the agenda-based and unreliable 2012 anti-ISDS report *Profiting from Injustice.*

The anti-ISDS rhetoric has reached the political arena in Europe and the United States. The European Union ('**EU**') Trade Commissioner Cecilia

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[11] Joost Paulwelyen, 'The Rule of Law without the Rule of Lawyers: Why Investment Arbitrators are from Mars, Trade Adjudicators from Venus' (2015) 109 American Journal of International Law 763; Eberhardt and Olivet (n 9); Gus Van Harten, 'Arbitrator Behaviour in Asymmetrical Adjudication: An Empirical Study of Investment Treaty Arbitration' (2011) 50(1) Osgoode Hall Law Journal 211.

[12] Gus Van Harten (n 11); Paulwelyen (n 11) 221, 763; *See also*, Nathalie Bernasconi-Osterwalderand others, 'Who Wins and Who Loses in Investment Arbitration - Are Investors and Host States on a Level Playing Field: The Lauder/Czech Republic Legacy' (2005) 6 Journal of World Investment & Trade 69.

[13] Asha Kaushal, 'Revisiting History: How the Past Matters for the Present Backlash against the Foreign Investment Regime' (2009) 50 Harvard International Law Journal1-2.

[14] Eberhardtand Olivet (n 9) 43.

[15] UNCTAD, 'Recent Developments in Investor-State Dispute Settlement (ISDS)' (IIA Issues Note No. 1, May 2013) UNCTAD Doc. No. UNCTAD/WEB/DIAE/PCB/2013/4,26.

Malmström, declared: "*We want the rule of law, not the rule of lawyers.*"[16] United States Senator and former Presidential Candidate Elizabeth Warren wrote in her op-ed, that ISDS:

> "*Wouldn't employ independent judges. Instead, highly paid corporate lawyers would go back and forth between representing corporations one day and sitting in judgments the next. Maybe that makes sense in an arbitration between two corporations, but not in cases between corporations and governments. If you're a lawyer looking to maintain or attracting high-paying corporate clients, how likely are you to rule against those corporations when it's your turn in the judge's seat?*"[17]

It has been said that concerns about possible conflicts of interests of arbitrators pose a challenge to the independence of decision makers and thereby to the rule of law.[18] Indeed, criticisms of the current system of ISDS relating to the independence and impartiality of arbitrators are by now well-known, having been both acknowledged at the multilateral level[19] and also a subject of significant scholarly attention.

This article will examine the topical issue of the "double hatting" phenomenon, where individuals act as counsel and arbitrators in ISDS proceedings either involving similar issues, sometimes known as "issue conflict" or unrelated issues. When does double hatting become a legitimate concern? Are the criticisms valid or exaggerated? Then the article will analyse the proposed Draft Code of Conduct for Adjudicators in International Investment Disputes ('**Draft Code of Conduct**' or '**Draft Code**'), released by the United Nations Commission on International Trade Law ('**UNCITRAL**') and the ICSID as well as prohibitions on the practice of double hatting in some of the recent treaties. The crucial question is whether the Draft Code will indeed address the purported criticism of arbitrator bias or instead produce negative

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[16] European Commission, 'Commissioner Malmström Consulted the European Parliament on Reforms of Investment Dispute Resolution in TTIP and Beyond' *News Archive*s (Brussels, 6 May 2015).

[17] Elizabeth Warren, 'The Trans-Pacific Partnership Clause Everyone Should Oppose', *The Washington Post* (25 February 2015) <www.washingtonpost.com/opinions/kill-the-dispute-settlement-language-in-the-trans-pacific-partnership/2015/02/25/ec7705a2-bd1e-11e4-b274-e5209a3bc9a9_story.html> accessed 17 August 2021.

[18] Stephan Schill, 'Reforming Investor–State Dispute Settlement: A (Comparative and International) Constitutional Law Framework' (2017) 20(3) Journal of International Economic Law 656; *See also*, Stephan Schill, 'Developing a Framework for the Legitimacy of International Arbitration' in Albert Jan van den Berg (ed), *Legitimacy: Myths Realities, Challenges* (Wolters Kluwer, 2015).

[19] Secretariat, 'Arbitrators and Decision-Makers: Appointment Mechanisms and Related Issues' (30 August 2018) A/CN.9/WG.III/WP.152, 5.

impacts and cause unnecessarily hurdles, hence impeding arbitrators from accepting appointments.

Before delving into the intricacies of double hatting, and the specific risks that it poses to arbitrator independence and impartiality, it is first useful to distinguish between actual bias and apparent bias. Bias is a generic term which describes a decision maker who is not impartial or independent with respect to one of the parties to the dispute or its subject matter.[20] This paper is concerned with *apparent* rather than *actual* bias, since actual bias will entitle the aggrieved party to challenge the arbitrator, as well as the award rendered by them,[21] and accordingly, is uncontroversial.

II. Double Hatting in Investment Arbitration: A Question of Two Hats Too Many?

The most controversial issue that has sparked a lot of debates when it comes to the question of independence and impartiality of arbitrators is the switching of roles between arbitrators and counsels in different cases. This situation has also been called "*role confusion*" or "*double hatting*".[22] The risks developing from the possibility that practitioners take part in different arbitrations in diverse capacities have been labelled as "*issue conflict*". An "*issue conflict*" – also described as "*inappropriate predisposition*"[23] – is a conflict of interest stemming from an arbitrator's relationship to the subject matter of the dispute, rather than their relationship with the disputing parties. It becomes relevant in the context of double hatting, as the emergence of an issue conflict is heightened when arbitrators are allowed to continue their operations as counsel as well. Legal commentators note: "*The issue is not whether a counsel or an arbitrator think it is proper, in a specific case, to*

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[20] Hwang and Lim (n 2) 475.

[21] Arts 53 and 54 of the ICSID Convention provides that ICSID awards are not subject to review by national courts. However, an award may be annulled by an *ad hoc* committee of three persons (appointed by the Chairman of the Administrative Council from ICSID's Panel of Arbitrators) on a number of grounds, including the ground that there has been a serious departure from a fundamental rule of procedure (*see*, art 52 of the ICSID Convention). See *Klockner v Cameroon* (1985), ICSID Case No. ARB/81/2, Decision on Annulment, [119].

[22] Stefanie Schacherer, 'Independence and Impartiality of Arbitrators - A Rule of Law Analysis' (2018) Working Paper, University of Geneva 19<https://archive-ouverte.unige.ch/unige:107171> accessed 18 August 2021.

[23] Laurence Boisson De Chazournes and John Cook, 'Report of the ASIL-ICCA Joint Task Force on Issue Conflicts in Investor-State Arbitration' (2016) International Council for Commercial Arbitration, ICC Reports No. 3, 34.

wear both hats, but whether an observer would so conclude".[24] This section will explore the criticism of double-hatting and arguments for the ban of such a practice (A) and the counter-arguments that serving as counsel and arbitrator does not necessarily create a conflict of interest *per se*(B).

A. Arbitrators Acting as Counsel Purportedly Create an Issue Conflict and an Appearance of Bias

Role confusion is "*a situation where the appearance of an individual as an arbitrator in one ICSID case who acts as a counsel ... in another ICSID case may give rise to a perception of bias, in the sense that his or her role might be perceived to inform actions in the other*".[25] The concept refers to the mere appearance or actual bias on the part of the arbitrator arising from his/her relationship with the substance of the dispute.[26] Critics of double hatting advocate for a "*separate bar*", that is, for the prohibition of arbitrators serving as counsel.[27]

1. Do Multiple Roles in ISDS Create Apparent Bias?

Critics argue that counsel acting as arbitrators in ISDS proceedings creates an appearance of bias because the person wearing both hats may be perceived as using one of his roles to inform or influence actions in the other.[28] Further, a counsel may benefit from his or her role as an arbitrator through access to information and contacts that are useful for his or her practice as counsel.[29] Philippe Sands, a staunch critic of multiple roles,[30] highlighted the double-hatting dilemma:

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[24] Günther Horvath and Roberta Berzero, 'Arbitrator and Counsel: The Double-Hat Dilemma' (2013) 10 Transnational Dispute Management 2.

[25] Philippe Sands, 'Conflict of Interests for Arbitrator and/or Counsel,' in Meg Kinnear and others (eds), *Building International Investment Law: The First 50 Years of ICSID* (Kluwer Law International 2015) 655.

[26] Joseph Brubaker, 'The Judge Who Knew Too Much: Issue Conflicts in International Adjudication' (2008) 26 Berkeley Journal of International Law111.

[27] Dennis Hranitzky and Eduaro Silva Romero, 'The 'Double Hat' Debate in International Arbitration' (2010) New York Law Journal.

[28] Sands (n 25) 655.

[29] Philippe Sands, 'Conflict and Conflicts in Investment Treaty Arbitration: Ethical Standards for Counsel,' in Arthur Rovine (ed), *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers*, vol 6 (Brill Nijhof 2013) 45; Michael Waibel and Yanhui Wu, 'Are Arbitrators Political?' (2011) 5 ASIL Research Forum 8-9.

[30] Malcolm Langford, Daniel Behn and Runar Hilleren Lie, 'The Revolving Door in International Investment Arbitration (June 2017) 20 Journal of International Economic Law 301.

> "*It is possible to recognise the difficulty that may arise if a lawyer spends a morning drafting an arbitral award that addresses a contentious legal issue, and then in the afternoon as counsel in a different case drafts a pleading making arguments on the same legal issue. Can that lawyer, while acting as arbitrator, cut herself off entirely from her simultaneous role as counsel? The issue is not whether she thinks it can be done, but whether a reasonable observer would so conclude. Speaking for myself, I find it difficult to imagine that I could do so without, in some way, potentially being seen to run the risk of allowing myself to be influenced, however subconsciously.*"[31]

The concern is that an arbitrator might be tempted, even subconsciously, to add a portion that could later be cited in another case. In other words, arbitrators may have the possibility of deciding on or appearing to decide on, an issue in one manner as to benefit a party that they represent in another dispute. Such an *arrière pensée* ('ulterior motive') might result in the creation of legal authority on a similar or identical point, that may be of persuasive value in another case where this arbitrator is acting as a counsel.[32] On the other hand, an arbitrator might be influenced by his or her position while acting as a counsel in another case. As a result, the switching of roles is said to affect an arbitrator's impartiality and independence and create a conflict of interest.[33] It is further argued that the dual roles performed by arbitrators give rise to a risk of self-serving behavior.[34] Critics have cited the fact that some institutions have limited such practice. For example, the International Court of Justice ('**ICJ**') took a leadership role in eradicating this kind of practice nearly 20 years ago in its practice directions, which precluded individuals who acted as counsel from simultaneously sitting as *ad hoc* judges. The Court of Arbitration for Sport ('**CAS**') has now also prohibited double hatting.[35] However, it should be noted that the ICJ is a permanent international court with judicial functions which is very different from arbitration and the CAS is a very specific type of arbitration.

Critics of the international investment arbitration regime have continually argued that concerns of legitimacy arise when a system of adjudication permits adjudicators to act as arbitrators in one case and as legal counsel in

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[31] Sands (n 29) 31-32.

[32] William Park, 'Arbitrator Integrity: The Transient and the Permanent' (2009) 46 San Diego Law Review 648.

[33] Caline Mouawad), 'Issue Conflicts in Investment Treaty Arbitration,'(2008) 5 Transnational Dispute Management 2.

[34] Sands (n 25) 667.

[35] Philippe Sands, 'Reflections on International Judicialization' (2017) 27 European Journal of International Law 894.

another.[36] Phillippe Sands comments "*One aspect that touches on the legitimacy and effectiveness of the ICSID system concerns the question of the propriety of lawyers acting simultaneously as counsel and arbitrator—in different cases of course—in cases that largely raise the same or similar legal issues.*"[37] Critics find double-hatting particularly concerning in the field of investment treaty arbitration as it involves issues of public policy and interest. Professor Stephan Schill explains that investment arbitration has a public function which should be understood as "*going beyond the resolution of the individual dispute, and as having a public effect on third-party actors.*"[38] Critics such as Horvath Gunther and Berzero Roberta have suggested that the practice of double hatting causes States to "*lose confidence in the system*" and this "*might be the reason at the basis of the recent withdrawal of some States from the ICSID system and poses threats to the legitimacy of the system itself.*"[39] Therefore, it is crucial to ensure the independence and impartiality of the arbitrators, not only with respect to the parties to a specific proceeding but also with respect to the entire system.

While issue conflicts can arise in any type of arbitration, it is argued that the problem is particularly acute in the field of international investment arbitration due to its nature and characteristics.[40] ISDS cases often involve the interpretation of bilateral BITs containing similar, if not identical, provisions and therefore call for greater caution.[41] Unlike private arbitration proceedings, ISDS requires the application of an evolving body of international law, therefore, arbitrators in investment arbitration perform more of a "*law-making*" role.[42] In other words, in investment treaty arbitration, where decisions serve as persuasive precedents in future arbitrations, so-called 'issue conflicts' can raise system-level concerns.[43] Furthermore, awards in investor-State arbitrations are usually published and therefore exposed to careful public scrutiny. All these factors have cumulatively placed the issue of conflict of interest in this particular field of international investment arbitration and the resulting ethical obligations into the spotlight. Given the public function of ISDS, critics claim that the way arbitrators operate must be taken into account to avoid the appearance of bias.

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[36] Langford, Behn, and Hilleren Lie (n 30) 321.
[37] Sands (n 29).
[38] Stephan Schill, 'Crafting the International Economic Order: The Public Function of Investment Treaty Arbitration and Its Significance for the Role of the Arbitrator' (2011) 23 Leiden Journal of International Law411. ibid 405.
[39] Horvath and Berzero (n 24) 13.
[40] Hwang and Lim (n 2) 523.
[41] Horvath and Berzero (n 24) 16; Sands (n 25) 655.
[42] Judith Levine, 'Dealing with Arbitrator 'Issue Conflicts' in International Arbitration' (2006) 4 Dispute Resolution Journal 62.
[43] Schill (n 38) 420.

B. Serving Multiple Roles Does Not, by Itself, Create a Conflict of Interest

Critics of the "separate bar" proposition argue that barring counsels from serving as arbitrators may deprive international arbitration of some of the best talents as individuals may opt for more lucrative roles as counsels. This would severely limit the pool of arbitrators and hence limit the parties' freedom to select the arbitrator of their choice. In ISDS, it is far from evident that issue conflict, as opposed to other facts, contributed to decisions of States to withdraw from the system.[44]

1. Conflict of Interest Should be Evaluated on a Case-by-Case Basis

Some legal scholars argue that it has not been demonstrated that issue conflicts have such a weighty impact on the investment arbitration system that existing rules and institutions are unable to address them.[45] From this perspective, the general ethical rules are sufficient for arbitrators to manage challenges on a case-by-case basis.[46] In this vein, Meg Kinnear, Secretary-General of ICSID, has stated: "*the real key is not, 'what are the roles you've played,' it's not about the roles you played yesterday. The key is, 'in this particular situation, is there conflict?'*".[47] Similarly, Anna Joubin-Bret, Director of UNCITRAL shared her personal view: "*I believe there is no inconsistency in representing a party in arbitral proceedings and sitting as an arbitrator in other arbitral proceedings, as long as fundamental rules on conflict of interest are abided by.*"[48] According to this position, published decisions on challenges to arbitrators suggest that existing rules and institutions are managing the 'issue conflicts' problem by rejecting unmeritorious challenges, but also by sustaining challenges where the facts support justifiable doubts regarding the arbitrator's impartiality.[49] Indeed, conflict of interest should be evaluated on a case-by-case basis through disclosure, rather than viewing the entire practice as a whole as creating an appearance of bias. Just because an arbitrator serves as a counsel in an unrelated case does not, in itself, mean

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[44] Hranitzky and Romero (n 27).

[45] Hwang and Lim (n 2) 520; Hranitzky and Eduaro Romero (n 27) 2.

[46] Maria Nicole Cleis, *The Independence and Impartiality of ICSID Arbitrators. Current Case Law, Alternative Approaches, and Improvement Suggestions* (2017) 8 Nijhoff International Investment Law Series 202-03.

[47] David Caron, 'An Interview with Meg Kinnear' (2010)104 Proceedings of the ASIL Annual Meeting 432.

[48] 'Interview with Anna Joubin-Bret' (Arbitral Women, April 2019) <https://www.arbitralwomen.org/newsletters/> accessed 17 August 2021.

[49] *Telekom Malaysia Berhad v Govt of Ghana* PCA Case No. 2003-03; *Vito G. Gallo v Govt of Canada*, UNCITRAL, PCA Case No. 55798.

that the two cases would overlap in issues or that the arbitrator would not be able to uphold the duty of independence and impartiality. As the functions of arbitrator and counsel do not always conflict, the rare cases in which they do can better be managed with clear and targeted rules on conflicts of interest. Such rules would require the recusal, or (*ultima ratio*) the removal of an arbitrator in a conflicting situation.

Adrian Winstanley, former Director General of the London Court of International Arbitration (**'LCIA'**) is also of the view that there is nothing problematic about acting as counsel and arbitrator because "*Problems only arise when there are connections that throw up conflicts between the cases in which an individual is appearing in one capacity in one or more of the cases, and in another capacity in others*".[50] Thus, a case-by-case approach with respect to conflict of interest appears as the more appropriate one. The accurate question to raise in cases where an issue of an overlapping role of counsel and arbitrator occurs is whether a reasonable observer, knowing the facts and circumstances of a particular case, would consider such overlapping as characterizing the inability to approach the case with an open mind and independent judgment.[51] Indeed, Todd Weiler has argued that "*individuals acting as arbitrators are professionals offering a private service - not officials performing a public service – and that there should be no bright-line prohibition against individuals practicing as arbitrators and counsel contemporaneously.*"[52] Moreover, there has been no allegation, that the existing rules and institutions are unable to manage conflict issues.[53]

2. Counsel Who Serve as Arbitrators Benefit the Parties and the Tribunal

Restricting double hatting would consequently reduce the pool of potential arbitrators that parties can select from. Therefore, this would deprive the parties of their ability to choose the arbitrator of their choice.[54] Indeed, sur-

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[50] 'Survey: Arbitral Institutions Can Do More to Foster Legitimacy. True or False?' in Albert Van Den Berg (ed), *Legitimacy: Myths, Realities, Challenges* (Kluwer Law International, 2015) 727.

[51] ibid 726.

[52] Luke Peterson, 'Analysis: Arbitrator Challenges Raising Tough Questions as to who Resolves BIT Cases,' (2007) Investment Treaty News.

[53] *See*, *Republic of Ghana v Telekom Malaysia Berhad* (2004) District Court of The Hague, Challenge No. 13/2004; *Vito G. Gallo v Govt of Canada* (2009) NAFTA/UNCITRAL, Decision on the Challenge to Mr. J. Christopher Thomas QC.

[54] Horvath and Berzero (n 24) 13.

veys show that in 47% of ISDS cases, at least one arbitrator also serves as counsel.[55]

Service as counsel can allow for the would-be arbitrators to gain the experience and reputation necessary for arbitral appointments to follow. As ICSID Secretary-General Meg Kinnear stated:

> "*For ICSID arbitrators, in addition to law, competence in commerce, industry, or finance is also very relevant. Investment disputes often require an understanding of business transactions, commercial agreements, transnational legal frameworks, and investment decisions … In addition, globalization and the Centre's strategic promotion have resulted in the combination of different groups of arbitrators. Since the 1980s, ICSID has partnered with international arbitration institutions such as the AAA/ICDR, LCIA, and ICC to develop, enlarge, and share their experts*."[56]

Today, there is substantial overlap between arbitrators and counsel involved in commercial arbitration and investor-State arbitration.[57] That said, experience as counsel is beneficial if not necessary for their appointments as arbitrators. To serve as an arbitrator, it is crucial to have adequate professional competence and the main way to gain competence is through working as a counsel.[58] Acquiring experience as counsel remains the normal path leading to appointments as an arbitrator.[59] It is equally important for a tribunal to consist of a counsel as counsels often bring technical knowledge and beneficial viewpoints that can bring counterbalance to a tribunal. A tribunal member with experience as counsel can deliver practical perspective particularly when it comes to procedural matters and tactics. Arbitrators generally find it useful to have one member of the tribunal with practical counsel experience.

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[55] Malcolm Langford, Daniel Behn and Runar Hilleren Lie, 'The Ethics and Empirics of Double Hatting' (2017) 6(7) ESIL Reflection 3.

[56] For an elaboration of this evolution, *see*, Sergio Puig, 'Emergence and Dynamism in International Organization: ICSID, Investor-State Arbitration and International Investment Law' (2013) 44 Georgetown Journal of International Law 531–605.

[57] Sergio Puig, 'Social Capital in the Arbitration Market' (2014) 25 European Journal of International Law 402.

[58] John Crook, 'Dual Hats and Arbitrator Diversity: Goals in Tension' (2019) 113 American Journal of International Law 288.

[59] International Council for Commercial Arbitration (n 50) 726.

3. Counsels Advocate Views That are Not Necessarily Their Own Beliefs

The concern over the lack of independence and impartiality of investment arbitrators who serve as counsel runs contrary to the main characteristic of an advocate who is required to put forward arguments to win the client's case. Those arguments do not necessarily reflect a personal belief but rather frame the client's case in the best way possible.[60] Senior Counsel Dr. Michael Hwang is also of the view that the mere fact that "*an arbitrator is concurrently advocating a position on an issue before him in another case as counsel does not, on the sole basis of the simultaneity of the advocacy, mean that such advocacy represents the arbitrator's personal belief*".[61] Indeed, to argue a point does not necessarily mean that one believes in its soundness[62] and that one will take the same stance in a different case. As a Dutch Court stated in a case concerning the challenge of a well-known Professor and arbitrator:

> "*It could easily happen in arbitrations that an arbitrator has to decide on a question pertaining to which he has previously, in another case, defended a point of view. Save in exceptional circumstances, there is no reason to assume however that such an arbitrator would decide such a question less open-minded than if he had not defended such a point of view before. Therefore, in such a situation, there is, in our opinion, no automatic appearance of partiality vis-a-vis the party that argues the opposite in the arbitration.*"[63]

An Arbitrator's reputation rests on his or her independence and impartiality which critically affects future selection as arbitrators and professional career as private counsels.[64] Therefore, it is not a tenable argument that a counsel or arbitrator would jeopardise his or her professional credibility and career through the influence of multiple roles.

Indeed, Professors Michael Waibel and Yanhui Wu conducted a study on the bias which included arbitrators who act as counsels and found that "*arbitrators who also wear the hat of counsel to private investors are more likely*

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[60] Natasha Peter and Clotilde Lemarie, 'Is there a Different Yardstick for Arbitrator Bias in Investment Treaty Arbitrations?' (2008) 5 Transnational Dispute Management 6.

[61] Hwang and Lim (n 2) 510.

[62] Nassib Ziade, 'How Many Hats Can a Player Wear: Arbitrator, Counsel and Expert?' (2009) 24 ICSID Review 51.

[63] *Ghana v Telekom Malaysia* (2004) District Court of the Hague, Challenge No. 17/2004, [11].

[64] Daphna Kapeliuk, 'The Repeat Appointment Factor: Exploring Decision Patterns of Elite Investment Arbitrators' (2010) 96 Cornell Law Review 90.

to affirm jurisdiction, though there is no significant effect on their decision on liability."[65] On the other hand, critics have not been able to come up with concrete arguments for any drastic departure from the long-held tradition other than trying to equate *ad hoc* arbitrators with judges who hold permanent public office.

4. Proposed Alternative to Banning Double Hatting

In the course of their analysis of the topic of arbitrator bias, several scholars have concluded that certain characteristics of arbitration in general, or investment arbitration more particularly, are diametrically opposed to independence and impartiality. These irreconcilable conflicts, they argue, require a comprehensive reform of the investment arbitration system, instead of a piecemeal approach. Several grounds for challenges would thereby be eliminated all at once.

Professor Paulsson, for example, argues that party appointments inherently contradict the obligation to be independent and impartial, and therefore proposes that party appointments should be abolished, or at least be restricted to closed arbitrator panels.[66] Horvath and Berzero, as well as Bernasconi-Osterwalder, find investment arbitrators' dual functions as arbitrators and counsels to be incompatible with their obligation of independence and impartiality.[67] Thus, they propose a prohibition of such dual functions, in order to eliminate an entire range of potential conflicts.[68] The consolidation of the pool of arbitrators that such a prohibition would entail, however, raises a number of issues which will be detailed below. Most recently, the UNCITRAL Working Group III ('**WGIII**') has convened to discuss reform proposals on arbitrator appointment and ethical rules.[69]

C. ICSID and UNCITRAL Draft Universal Code of Conduct

On 1 May 2020, the Secretariats of ICSID and UNCITRAL released the first version of the Draft Code. The proposed Code had 12 articles, and included

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[65] Waibel and Yanhui Wu (n 29) 34.

[66] Jan Paulsson, 'Moral Hazard in International Dispute Resolution'(2010) 25 ICSID Review 348-52.

[67] Horvath and Berzero (n 24) 13; Nathalie Bernasconi-Osterwalder, Lise Johnson and Fiona Marshal, 'Arbitrator Independence and Impartiality: Examining the Dual Role of Arbitrator and Counsel' (2010) IV Annual Forum for Developing Country Investment Negotiators 51.

[68] Bernasconi-Osterwalder, Johnson, and Marshal (n 67) 51.

[69] 'Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fifth session' (New York, 23–27 April 2018) A/CN.9/935 [45].

commentaries for each article, explaining the rationale for each provision as well as the tensions and concerns that each provision addressed. After receiving a number of constructive comments from multiple stakeholders, the second version of the Draft Code ('**Second Draft**') on 19 April 2021 was released, which incorporated the suggestions and comments provided into the redrafted provisions. While the first version of the Draft Code initiated the conversation in the ISDS community about the need for reform in the appointment of arbitrators, it left a number of poignant questions unanswered, which were subsequently addressed in the Second Draft. This section will analyse the suggested reforms under the Draft Code and critique the way in which the Second Draft has taken the mantle established by the first version forward, but still leaves significant room for further deliberation.

1. Definition of "Adjudicator"

While the first version of the Draft Code applied to all adjudicators,[70] the broad scope of the term left much to be desired in terms of specificity. The term "*adjudicators*" purposefully encompasses a broad category of existing and possible future participants in ISDS adjudicatory processes, including "*arbitrators,* ad hoc *committee members, candidates to become adjudicators, appeal judges, and judges in permanent bodies*".[71] The Draft Code also required adjudicators to ensure that their assistants are aware of and comply with the Code.[72] In this way, the Code sought to ensure that it could be applied across the board regardless of the type of reform that the WG III intended to achieve.

It should be noted that the use of the inclusive term "*adjudicators*" in the first version of the Draft Code failed to recognise the different roles performed by arbitrators and judges in a dispute settlement framework.[73] The position of a judge in an established court of law is one which is permanent in nature, where they hold a tenured office, and cases are earmarked for their decision based on a randomised roster not affected by the parties who are to appear before them. As a result of such permanence in their appointment, judges are provided with a fixed salary for such tenured employment. In contrast, arbitrators, by the very nature of their role, are *ad hoc* appointees.

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[70] First Draft Code 2020, art 2.

[71] First Draft Code 2020, art 1.1.

[72] First Draft Code 2020, art 1.2.

[73] Vanina Sucharitkul, 'ICSID and UNCITRAL Draft Code of Conduct: Potential Ban on Multiple Roles Could Negatively Impact Gender and Regional Diversity, as well as Generational Renewal' (*Kluwer Arbitration Blog*, 20 June 2020) <http://arbitrationblog.kluwerarbitration.com/2020/06/20/icsid-and-uncitral-draft-code-of-conduct-potential-ban-on-multiple-roles-could-negatively-impact-gender-and-regional-diversity-as-well-as-generational-renewal/> accessed 18 August 2021.

Their appointments are dictated by the will of the parties, and every arbitrator appointment is subjected to a separate assessment of any conflict of interest which the arbitrator might have with the subject matter, parties to the dispute etc.[74] Thus, while permanent courts establish strict rules with respect to the prohibition on judges performing multiple roles, such prohibitions follow as a consequence of the public function performed by judges and are therefore imperative so as to uphold the public trust in such institutions. However, the same metric cannot be extended to arbitrators, who perform a strictly private function of adjudicating the dispute brought before them by the parties and have to undergo an evaluation of their independence and impartiality against pre-existing conflict of interest guidelines. As a result, instead of establishing differential standards, which would treat arbitrators and judges on separate thresholds based on the roles they perform, the Code hampered the effectiveness of the provisions framed under it by including them under the broader umbrella of "*adjudicators*".[75]

The Second Draft recognised the issue pertaining to the inclusive definition of "*adjudicators*", and amended the definition in Article 1 to include separate provisions for 'arbitrator' and 'judge' respectively. An 'arbitrator' is defined as "*a member of an ad hoc tribunal or panel, or member of an ICSID ad hoc Committee who is appointed to resolve an 'International Investment Dispute*", thus restricting the scope of application of the Code to those disputes which arise out of International Investment Disputes.[76]

2. Duty to Disclose

In Article 3, the first version of the Draft Code included a series of general duties, such as fairness, competence, and the duty to comply with any confidentiality and non-disclosure obligations. The provision reinforced the salient duty of adjudicators to be independent and impartial at all times, to avoid direct or indirect conflicts of interests and any appearance of bias.[77]

Article 5 of the first version contained an expansive disclosure requirement relating to the widespread concern of repeat appointments in ISDS. Accordingly, disclosure is required for:

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[74] ibid.

[75] Sucharitkul (n 73).

[76] Chiara Giorgetti, 'The Second Draft of the Code of Conduct for Adjudicators in International Investment Disputes: Towards a Likely Agreement?' (*Kluwer Arbitration Blog*, 29 May 2021) <http://arbitrationblog.kluwerarbitration.com/2021/05/29/the-second-draft-of-the-code-of-conduct-for-adjudicators-in-international-investment-disputes-towards-a-likely-agreement/> accessed 18 August 2021.

[77] Draft Code 2020, art 3(a).

> "*(…)any professional, business and other significant relationships, within the past [five] years with: (i)The parties [and any subsidiaries, parent companies or agencies related to the parties; (ii)The parties' counsel; (iii)Any present or past adjudicators or experts in the proceeding; (iv) Any third party with a direct or indirect financial interest in the outcome of the proceeding.*"

If candidates and adjudicators have any direct or indirect financial interest in: (i) the proceeding or in its outcome; and (ii) an administrative proceeding, a domestic court proceeding or another panel or committee proceeding that involves questions that may be decided in the ISDS proceeding, again they shall disclose them. The first version also called for disclosure of "*all ISDS [and other [international] arbitration] cases in which the candidate or adjudicator has been or is currently involved as counsel, arbitrator, annulment committee member, expert, [conciliator and mediator]*" and "*a list of all publications by the adjudicator or candidate [and their relevant public speeches].*"[78] It is crucial to remember that, as per the Draft Code, such disclosure obligations are recurring, and not merely a one-time only disclosure requirement.

Such disclosure obligations under Article 5, of prior publications and public speeches *inter alia*, become a deterring factor for arbitrators accepting appointments, especially for senior arbitrators, who may not have recorded every speaking event or publication in their disclosure. What the provision fails to acknowledge is that the burden of showing how such a publication or speaking engagement hampers an arbitrator's independence or impartiality of an arbitrator falls on the party. As a result, it should be the prerogative of the party, and not of the arbitrator, to demonstrate through appropriate due diligence, how a particular publication or speaking engagement may impact the arbitrator's independence or impartiality. Furthermore, the effect of such an obligation was compounded by the lack of any discernible sanctions, thus making it extremely difficult for arbitrators to comply with the same or understand the ramifications of non-compliance.

The Second Draft, while placing the regulation of repeat appointments in Article 10, continues to adopt the same approach, by allowing repeat appointments unless there is a challenge made by a party on the grounds of independence and impartiality. The robust and comprehensive disclosure requirement is maintained to assess the tenability of any challenge based on repeat appointments of an arbitrator.[79] The Second Draft also removes the disclosure obligation of publications, inserted to deal with issue conflicts, as

[78] Draft Code 2020, art 5.
[79] Giorgetti (n 76).

it is believed that addressing the same can be adequately undertaken using the existing challenge mechanisms in ISDS without the need for an express provision.

3. Double-Hatting

One of the most prominent changes that the first version of the Draft Code proposed was with respect to double-hatting. Article 6 of the Code stipulated that

> "*Adjudicators shall [refrain from acting]/[disclose that they act] as counsel, expert witness, judge, agent or in any other relevant role at the same time as they are [within X years of] acting on matters that involve the same parties, [the same facts] [and/ or] [the same treaty].*"

Not only was a prohibition on double hatting considered imperative to implement, but the potential for a conflict of interest to arise from any concurrent representations made by the arbitrator was seen as sufficient justification to institute an "*outright ban*" on the practice. Comment 67 to the Code stated that such a ban would be suitable as it could be applied and implemented easily and would prohibit any participation in an additional role of an adjudicator which could lead to a potential conflict of interest.

a) Draft Code Version 1

A complete prohibition on double hatting, however, would lead to a situation where the overall pool of arbitrators in the ISDS regime will be reduced substantially.[80] A pertinent example in this respect is the interpretation of the phrase "*same facts*" in Article 6. The phrase "*same facts*" could be interpreted broadly to include events impacting multiple countries at once, such as a worldwide financial breakdown, or a healthcare crisis such as the COVID-19 pandemic. Furthermore, it increases the scope for uncertainty and discretion by failing to lay down the stipulated number of years within the undertaking of such additional roles are permissible, and the requirement for disclosure as well. Indeed, it would be extremely difficult to ascertain *ex-ante*, whether two matters involve the "*same facts*". The factual information could only be properly ascertained after the appointment or when pleadings are filed. The second version of the code employs the term "*same*

[80] Vanina Sucharitkul, 'ICSID and UNCITRAL Draft Code of Conduct's Potential Ban on Multiple Roles Could have a Severe Impact on Gender Diversity' (*Arbitral Women*, 11 May 2020) <https://www.arbitralwomen.org/icsid-and-uncitral-draft-code-of-conducts-potential-ban-on-multiple-roles-could-have-a-severe-impact-on-gender-diversity/> accessed 15 August 2021.

factual background", which could add weight to the prospective arbitrator in exploring this scenario.

b) Draft Code Version 2

On the issue of double hatting, the second version of the Draft Code takes a leap forward from its predecessor. Now regulated in Article 4,[81] it gives an option to the parties to explicitly approve of multiple roles undertaken by an arbitrator without a restriction on the time limit. The provision states:

> "*Unless the disputing parties agree otherwise, an Adjudicator in an IID proceeding shall not act concurrently as counsel or expert witness in another IID case [involving the same factual background and at least one of the same parties or their subsidiary, affiliate or parent entity]*"[82]

Furthermore, it reduces the scope of the prohibition on multiple roles, by restricting it to counsels and experts and to merely concurrent roles. Comment 26 explains the change: "*Article 4 reflects the suggestion that double-hatting could be acceptable with informed consent of the disputing parties. Disclosure pursuant to Article 10 aims to ensure that such consent is given on an informed basis.*" Therefore, the rationale is that disclosure would be the basis for the parties to assess conflict of interest, which now shifts the focus on party autonomy and the parties' right to appoint the arbitrator of their choice. Article 4 is also limited to situations of concurrent multiple roles and does not include a prohibition or limitation for a period before or after being an Adjudicator (as in the former version).The Second Draft recognises the fallibilities of instituting a total restriction on double hatting, and seeks to regulate it bearing in mind the underlying rationale behind the same, while simultaneously ensuring that it does not curtail arbitrator appointments unfairly, thus striking a "*measured balance*".[83] While the concerns pertaining to the broad ambit of the phrase "*same facts*" continues to exist, the Second Draft still provides the discretion to the parties to decide whether multiple roles performed by an arbitrator would adversely affect his or her independence or impartiality, rather than instituting an automatic ban on double hatting.

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[81] Second Draft Code 2021, art 4.

[82] ibid.

[83] 'ICSID Publishes Revised Draft Code of Conduct for Adjudicators,' (*Pinsent Masons*, 28 April 2021) <https://www.pinsentmasons.com/out-law/news/icsid-publishes-revised-draft-code-of-conduct-for-adjudicators> accessed 15 August 2021.

Thus, the Draft Code makes it evident that tackling issues of bias and conflict of interest require a nuanced approach, and a full prohibition as urged in Comment 30 simply does not work. In his article, Chan Leng Sun contends that a code of conduct will not be efficient if it is too exhaustive. It could work only if it provides very general guidelines.[84] This is because detailed guidelines run the risk of "*creating confusion and even inconsistencies with court decisions*" and other competing codes.[85]

4. Prohibition Against Double-Hatting under Treaties

Critics of double hatting argue that the practice of allowing arbitrators to serve as counsel raises issues regarding "*due process of law*".[86] Therefore, the practice should be prohibited and individuals should choose whether to serve as an arbitrator or counsel.[87] Those advocating for the prohibition of double hatting argue that disclosures alone are not enough and an outright prohibition of double hatting would be easier to implement.[88] Proponents of the ban adopt the broad approach that counsels acting as arbitrators would lean towards the interpretation of what is considered favourable to their client's case on similar issues in a case before them. Other arguments put forward include the availability of a sufficient pool of arbitrators and those economic reasons of individuals, such as the unavailability of arbitrator appointments, especially for young professionals, that should not prevail over ethical standards.[89] Such arguments have found significant traction within the ISDS community, with many seeing it as a sign of the larger legitimacy crisis which the system is suffering from.

In the list of ISDS reforms, the UNCTAD proposed the outright prohibition of "double hatting" of arbitrators/adjudicators simultaneously acting as counsels or experts in other ISDS proceedings irrespective of whether the cases involved the same issues in dispute.[90] The European Commission has been paying particular attention to this phenomenon. The Comprehensive Economic and Trade Agreement (**'CETA'**)which replaces investment arbitration with the two-tiered investment court system (**'ICS'**) consisting of tenured judges and an appellate mechanism includes a clear prohibition of

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[84] Chan Leng Sun, "Arbitrators' Conflicts of Interest Bias by Any Name' (2008) 5(4) Transnational Dispute Management 64.

[85] ibid 65, 69.

[86] Thomas Buergenthal, 'The Proliferation of Disputes, Dispute Settlement Procedures and Respect for the Rule of Law' (2006) 22 (4) Arbitration International 498.

[87] ibid; Sands (n 29) 47.

[88] *See*, Comment 67 of art 6 of the Draft Code 2020.

[89] Sands (n 29) 48.

[90] UNCTAD, *Reforming Investment Dispute Settlement*(IIA Issues Note 1, March 2019) UNCTAD/DIAE/PCB/INF/2019/3, 7.

double hatting. Specifically, Article8.30 provides that "*upon appointment, [members of the tribunal] shall refrain from acting as counsel or as party-appointed expert or witness in any pending or new investment dispute under this or any other international agreement*".[91] The other EU Free Trade Agreements and Investment Protection Agreements ('**IPAs**') containing the ICS provide for a similar prohibition.[92] The prohibition in the EU trade agreements is much broader since it encompasses "witnesses".

In March 2018, in the context of their ongoing review and implementation of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership ('**CPTPP**'), New Zealand, Canada and Chile issued a Joint Declaration on Investor-State Dispute Settlement. The Joint Declaration provides in the relevant part:

> "*Intend to promote transparent conduct rules on the ethical responsibilities of arbitrators in ISDS procedures, including conflict of interest rules that prevent arbitrators from acting, for the duration of their appointment, as counsel or party-appointed expert or witness in other proceedings…*"[93]

In May 2018, the Netherlands published a new draft model bilateral investment treaty ('**BIT**'), the final version of which was approved on 22 March 2019.[94] The Dutch Model BIT is considered revolutionary in that it replaced party-appointment of arbitrators with an institutional appointment, by providing for an appointment authority under Article 20, and mandating all arbitrator appointments to take place through the same.[95] Moreover, the Model BIT's stringent ban on double hatting has also raised controversy. Specifically, Article 20(5) states:

> "*Members of the Tribunal shall not act as legal counsel or shall not have acted as legal counsel for the last five years in investment disputes under this or any other international agreement.*"[96]

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[91] CETA, art 8.30 (1).

[92] EU-Vietnam Investment Protection Agreement 2019, art 3.40; EU-Singapore IPA, art 3.11.

[93] New Zealand Ministry of Foreign Affairs and Trade, 'Joint Declaration on Investor State Dispute Settlement' (8 March 2018).

[94] 'Netherlands Model Bilateral Investment Agreement' (*UNCTAD*, 22 March 2019) <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5832/download> accessed 16 August 2021.

[95] Marike Paulsson 'The 2019 Dutch Model BIT: Its Remarkable Traits and the impact on FDI' (*Kluwer Arbitration Blog*, 18 May 2020) <http://arbitrationblog.kluwerarbitration.com/2020/05/18/the-2019-dutch-model-bit-its-remarkable-traits-and-the-impact-on-fdi/> accessed 16 August 2021.

[96] Netherlands BIT (n 94).

The prohibition of arbitrators who have acted as counsel for the last five years appears unnecessarily excessive. A recent treaty between Iran and Slovakia also prohibited arbitrators from working simultaneously as counsel, as well as party-appointed experts or witnesses as well.[97] However, that treaty did not bar arbitrators who had worked in previous years as counsel or experts.

The stringent bar on double-hatting which extends to previous roles in the past five years is unduly severe and would have negative consequences on the pool of arbitrators available to sit on cases brought under the new Dutch BIT. This means that all experienced arbitrators with their up-to-date and in-depth knowledge of investment law and expertise in investment treaty arbitration proceedings are automatically barred –irrespective of the absence of any justifiable conflict of interest. Consequently, only former judges, a limited pool of senior arbitrators and academics (who have not acted as legal counsel in the past 5 years), as well as counsels outside the investment treaty arbitration field can be selected. This makes the pool of potential arbitrators very restrictive and rather unattractive for both investors and States. This excessive exclusion of active experienced legal counsels inevitably means that potentially less experienced arbitrators, who may lack arbitration experience and procedural expertise will be selected, which arguably will not necessarily yield better quality awards.[98]

III. The Negative Impact of Banning Counsels from Serving as Arbitrators

The complete ban on double-hatting is disproportionate as it would also cover situations where there is no conflict of interest or circumstances that pose no danger of any conflict. In these situations, the ban would eliminate the positive implications of dual roles without improving arbitrators' independence and impartiality.[99] The ban would also be counterproductive as it would reduce the already small pool of arbitrators, severely impact diversity (A), and pose as an entry barrier for the second-generation arbitrators (B). The cost of a complete ban prevails over the benefits when less burdensome measures such as targeted disclosures on conflict of interest can serve as a more suitable alternative.

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[97] Agreement between the Slovak Republic and the Islamic Republic of Iran for the Promotion and Reciprocal Protection of Investments (Slovakia-Iran) (2016), art 18(5).

[98] Nicos Lavranos, 'The New Arbitration Rules under the 2018 Dutch Model BIT Text' Lavranos (Nicos), "The New Arbitration Rules under the 2018 Dutch Model BIT Text", in SNIDJERS (Hank) (eds.), *Tijdschrift voor Arbitrage*, (*KluwerArbitration*,2020)61.

[99] ibid 202.

A. Barring Dual Roles will Reduce the Pool of Arbitrators and Severely Impact Diversity

It has often been observed that appointments to ISDS are often taken up by a select club of elite "*Grand Old Men*". Indeed, at the 2014 International Council for Commercial Arbitration ('**ICCA**') Miami Conference, the international-arbitration community gathered to address the question: "Who are the arbitrators?"[100] The prevalence of the "*male, pale, and stale*" phenomenon – that is, a large majority of the individuals chosen to serve as international arbitrators are male, from North America or Western Europe, and generally quite senior, continues to be the norm in arbitrator appointments in the ISDS regime, as was agreed upon by the panellists at the conference as well.[101]

Diversity is critical to the idea of moving towards better adjudication, as varied world views, know-how, background and experiences of different individuals, male as well as female, from all corners of the world is a boon to every stakeholder concerned.[102] The importance of such diversity becomes even more pronounced in the ISDS paradigm, as investor-State disputes often involve issues of key public policy and interest. The constitution of decision makers, with respect to gender and demography, should thus reflect those who will be affected by the decision-makers. Therefore, imposing a blanket restriction on double-hatting would have the unwelcome consequence of fostering the prevailing dominance of a select few established male arbitrators, mainly belonging to Western European and North American countries, in the ISDS framework.

In a recent study conducted, wherein 249 investment treaty cases decided until May 2010 were analysed, it was found that only 6.5% of the arbitrators in those cases were women.[103] Furthermore, a survey of 353 ICSID cases

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[100] Joseph Mamounas, 'ICCA 2014. Does 'Male, Pale, and Stale' Threaten the Legitimacy of International Arbitration? Perhaps, but There's No Clear Path to Change' (*Kluwer Arbitration Blog*, 10 April 2014) <http://arbitrationblog.kluwerarbitration.com/2014/04/10/icca-2014-does-male-pale-and-stale-threaten-the-legitimacy-of-international-arbitration-perhaps-but-theres-no-clear-path-to-change/> accessed 16 August 2021.

[101] ibid; *see also*, Crook (n 58) 284.

[102] Ingrid Muller, 'Diversity and Lack Thereof Amongst International Arbitrators – Between Discrimination, Political Correctness and Representativeness' (2015) 12(4) Transnational Dispute Management 6; Caley Turner, ''Old, White, and Male': Increasing Gender Diversity in Arbitration Panels' (*International Institute for Conflict Prevention and Resolution*, 2014) 11<https://www.cpradr.org/news-publications/articles/2015-03-03--old-white-and-male-increasing-gender-diversity-in-arbitration-> accessed 16 August 2021.

[103] Gus Van Harten, 'The (Lack of) Women Arbitrators in Investment Treaty Arbitration' (*FDI Perspectives*, 2012) 1<https://ccsi.columbia.edu/sites/default/files/content/docs/publications/FDI_59.pdf> accessed 16 August 2021.

conducted by the author from 2012-2019 demonstrated that of the 1,055 appointments made in those cases, only 152 women were appointed, which is only 14.4% of the total appointments. The distribution of the appointment of female arbitrators reveals an even more problematic trend. Across all the cases, only a meagre 35 individual female arbitrators were chosen and two of them, namely Professor Brigitte Stern and Professor Gabrielle Kauffman-Kohler, were appointed in 45.3% of the cumulative appointments of women arbitrators appointed in such cases. The lack of female representation in arbitrator appointments in the ISDS paradigm remains a dire problem.[104]

This concern has prompted efforts to increase the pool of female and minority arbitrators through the launch of the Equal Representation in Arbitration Pledge (the '**ERAPledge**')[105] in 2016. Various arbitral institutions, law firms, and corporations have signed the Pledge and committed to increase and nominate, on an equal opportunity basis, the number of women appointed as arbitrators in order to achieve a fair representation as soon as practically possible, with the ultimate goal of full parity.[106] Currently, with over 4,000 signatories, the international arbitration community has recognised the under representation of women in international arbitration tribunals.[107] Arbitral institutions worldwide have placed diversity, including gender diversity, generational diversity, and regional diversity at the forefront of their agenda and have released statistical data on the improvement of diversity in the appointment of arbitrators annually.[108] For example, in 2014, the International Chamber of Commerce ('**ICC**') achieved gender parity in the composition of the Vice Presidents of the International Court of Arbitration.[109] In addition, in 2018, the Court Members of the ICC International Court of Arbitration comprised equal numbers of men

[104] Puig (n 57) 401.

[105] Mirèze Philippe, 'Equal Representation in Arbitration (ERA) Pledge: A Turning Point in the Arbitration History for Gender Equality' (*Kluwer Arbitration Blog,* 2 June 2016) <http://arbitrationblog.kluwerarbitration.com/2016/06/02/equal-representation-in-arbitration-era-pledge-a-turning-point-in-the-arbitration-history-for-gender-equality/> accessed 16 August 2021.

[106] ibid.

[107] Ashley Jones and Stephanie Mbonu, 'The ERA Pledge Surpasses 4,000 Signatories' (*Practical Law Arbitration Blog*, 28 May 2020) <http://arbitrationblog.practicallaw.com/the-era-pledge-surpasses-4000-signatories/> accessed 16 August 2021.

[108] In 2013, the ICC statistics revealed that out 9% of arbitrator nominations and appointments were women whereas in 2018 the numbers rose to 18.4% in 2018. See ICC, 'ICC Dispute Resolution 2018 Statistics', *ICC Publication*, no. 898E, 2019,11; ICC, "ICC Arbitration Figures Reveal New Record for Awards in 2018, (*ICC News*, 11 June 2019); Philippe (Mirèze), 'How Has Female Participation at ICC Evolved? ICC Arbitrators, Court Members and Court's Secretariat' (2017) 3ICC Dispute Resolution Bulletin 39.

[109] Mirèze (n 108) 17.

and women.[110] These examples illustrate the significance of diversity in the international arbitration community. The increase in the gender diversity of arbitral tribunals was also brought forth by the Queen Mary University-White and Case 2021 International Arbitration Survey, which stated how 61% of the survey participants had observed a positive trend in gender-diverse arbitrator appointments.[111] The survey further mentioned how the prevailing issues in addressing the issue of lack of gender-diverse appointments have to be addressed at the first threshold of the nomination of arbitrators by parties. It states that the two most chosen suggested reforms for bringing more diversity in arbitrator appointments were: appointing authorities and arbitral institutions coming up with a specific policy of suggesting and appointing diverse arbitrators, and counsels suggesting a diverse set of arbitrators to their clients for potential appointments.[112]

In investment arbitration, it is quite often the case that individual arbitrators are chosen from the ranks of counsel, who have to maintain their regular practice until they receive an adequate number of arbitrator appointments to ensure that they can transition into a permanent arbitrator role in the future. For women arbitrators, it places a doubly onerous burden. Amongst the women who are appointed as arbitrators (and the statistics above show how disproportionately low those appointments are), a number of them are practicing counsels or work at law firms. Of the 46 women appointees, 32 have their curricula vitae publicly available on the ICSID website.[113] It is observed that of these 32 appointees, 21 were working in important positions at reputed law firms, or as counsels. As a result, a blanket ban on double hatting would inevitably result in excluding those women, and others from the system.

On the aspect of regional diversity, it is noteworthy that while the total arbitrator appointments made represent eighty-eight different nationalities, almost half of such appointments are from the following seven countries: New Zealand, Australia, Canada, Switzerland, France, the United Kingdom, and the United States.[114] For appointments made in 2018, the percentage of ICSID arbitrators from Western Europe and North America totalled 75.4% while the percentage reached 79% when including Australia and

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[110] 'ICC Renews Alexis Mourre as President and Nominates Court with Full Gender Parity and Unprecedented Diversity' (*ICC News*, 21 June 2018) <https://iccwbo.org/media-wall/news-speeches/icc-renews-alexis-mourre-president-nominates-court-full-gender-parity-unprecedented-diversity/> accessed 16 August 2021.

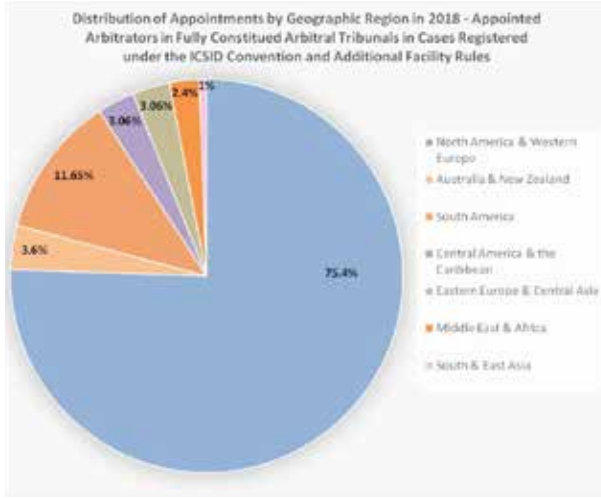
[111] White and Case-Queen Mary University of London, School of International Arbitration 'International Arbitration Survey: Adapting Arbitration to a Changing World' (2018)15.

[112] ibid 18.

[113] 'ICSID Secretary-General' (2019) ICSID Annual Report 25.

[114] Data gathered from a survey of the ICSID database.

New Zealand. In 2018, the arbitrators appointed from countries in Western Europe and North America accounted for 75.4% of the total, whereas it increased to an astonishing 79% after including Australia and New Zealand, thus further buttressing the claim that the "*pale, male and stale*" phenomenon continues to persist.[115]



As a result of this lack of regional diversity, and the predominance of arbitrators from a select few countries, parties in the ISDS system are restricted in their choice of arbitrators who can best relate to the specific claims made as a result of having a familiar background as the appointing party. The proposed ban on double hatting, therefore, unwittingly, ends up placing an enormous restriction on the principle of party autonomy in so far as arbitrator appointments are concerned, as they are curtailed in appointing arbitrators who can understand the parties' legal, cultural, and socio-political background, with the objective of arriving at outcomes which are cognisant of that context and background.

Given the under representation, it has been suggested that parties should take advantage of the unique and practical benefits of composing an arbitral tribunal of more diverse individuals and backgrounds than have traditionally been considered for these roles.[116] Barring individuals who serve as counsel in ISDS proceedings from serving as arbitrators in investment disputes would reduce the overall pool of potential arbitrators, notably women and

[115] Statistics gathered from a review of appointments on a case-by-case basis of arbitration cases filed in 2018 from the ICSID database.
[116] ibid 122.

those from other regions, and deprive the parties of the ability to select the arbitrator of their choice. Alternatives to an outright ban include a '*time phased*' method of regulating multiple appointments, where lawyers may continue to function as counsels for a certain amount of time until they manage to secure a sufficient number of arbitrator appointments.[117] This approach is however difficult to implement in practice. A more sustainable approach to an automatic disqualification might be for the parties to bear the burden to challenge arbitrators upon arbitrators making complete and reliable disclosures.

B. The Ban on Double Hatting would Reduce the Pool of Arbitrators and Create a Barrier for Second Generation of Arbitrators

One of the challenges of investment arbitration is the limited pool of qualified arbitrators with the skills and experience necessary to be able to handle such complex disputes. Indeed, ICSID Secretary General, Meg Kinnear emphasised "*we're very conscious that there's a need for more arbitrators*."[118] In an interview with the renowned Professor David Caron, he further elaborated:

> "*One of the issues that I think many people have heard and that I heard when I talked to ICSID users, was the whole question of the rosters. Frankly, with the explosion of cases, it's awfully difficult to find enough qualified arbitrators who are available, who are not conflicted, and are all of the things you would need in an arbitrator … There are also numerous vacancies on the roster or expired nominations, those kinds of issues*."[119]

Preventing lawyers in arbitral proceedings from acting as arbitrators would reduce the overall size of the pool of potential arbitrators and deprive the parties of their freedom to select arbitrators of their choice, including senior counsel with in-depth expertise who could bring valuable practical experience. This would run contrary to the fundamental principle of party autonomy, notably the freedom to select the arbitrator of their choice. With the ban, only the most seasoned arbitrators would economically be able to pursue an exclusive career as arbitrators creating a lack of diversity and increased interdependence and reappointments.[120] Barring counsels from serving as arbitrators could also deprive the arbitration community of some

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[117] Crook (n 58) 284.
[118] Meg Kinnear, 'ICSID in the Twenty-First Century: An Interview with Meg Kinnear' (2010) 104 Proceedings of the ASIL Annual Meeting 431.
[119] ibid 421.
[120] Cleis (n 46) 203.

of the best talents as certain individuals may opt for the more lucrative role of counsel. Consequently, the prohibition of double hatting would unduly limit the number and undermine the rigour and quality of arbitrators in ISDS.[121]

Generation renewal in arbitration is significant to the arbitration community given that senior arbitrators will inevitably retire. The next generation of arbitrators, tend to be practicing as counsel for economic reasons and to hone their expertise, Hence, they would unlikely be able to give up their role as counsel until they receive enough appointments to serve as full-time arbitrators due to the scarcity of appointments.[122] The ban would exclude a greater number of candidates than necessary and pose a barrier to entry by preventing the renewal of the arbitrator pool. This is echoed by Comment 68 to the Draft Code, which states: "*A ban on double-hatting also constrains new entrants to the field, as few counsels are financially able to leave their counsel work upon receiving their first adjudicator nomination*." Allowing newcomers to sit alongside more senior arbitrators would enable them to gain more experience and benefit from the transition of the second generation of arbitrators. Some commentators view that the argument against double hatting by the most powerful and influential arbitrators (referred to as the "core") is very strong. However, this should not apply to transitioning practitioners *i.e.*, younger counsel, where a more nuanced approach is required.[123] Too stringent a restriction on the practice of double hatting would limit the already small pool of arbitrators and have negative effects on the development of a new generation of arbitrators.

IV. CONCLUSION

An overarching ban on double hatting, which places an absolute restriction on individuals serving as counsels in investment arbitration proceedings from being appointed as arbitrators, is seen by many as the most pressing reform to rejuvenate the ISDS regime. However, such a measure would not only fail to achieve its intended aim but also harm the progress achieved in increasing diversity in arbitrator appointments in ISDS and impede the growth of the second generation of arbitrators. A broad-based ban on double-hatting,

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[121] Langford and Behn (n 30) 322-23.

[122] Crook (n 58) 288; *See also*, Schill (n 38) 420; Horvath and Berzero (n 24) 13.

[123] Anthea Roberts 'A Possible Approach to Transitional Double Hatting in Investor-State Arbitration' (*EJIL: TALK!*, July 2017) <www.ejiltalk.org/a-possible-approach-to-transitional-double-hatting-in-investor-state-arbitration/> accessed 16 August 2021;William Park and Catherine Rogers 'A conversation with Professor William W. (Rusty) Park—as interviewed by Professor Catherine A Rogers: Institute for Transnational Arbitration Houston' (2018) 34(4) Arbitration International 495.

such as the ones proposed in the Netherlands Model BIT and the first Draft Code, fails to recognise that multiple roles performed by an arbitrator do not, in and of themselves, pose a risk to their independence and impartiality. Caution should be exercised when considering measures that impede party autonomy, reduce the pool of arbitrators, and negatively impact diversity. Any prohibition would significantly curtail the progress made in the ISDS regime to improve gender and regional diversity in the pool of arbitrators. Instead of imposing the onerous cost of a complete ban of double hatting on potential arbitrators and parties. This article proposes a system of tailored disclosures made by arbitrators. Through full disclosure, the parties can assess if the particular appointment would raise a conflict of interest and whether the parties would accept the appointment with knowledge of the potential multiple roles.

Interim Measures of Protection in Aid of Foreign-Seated Arbitrations: Judicial Misadventures and Legal Uncertainty

Muskan Agarwal and Amitanshu Saxena***

Interim measures of protection are important in an arbitral procedure to preserve the rights of the parties to a dispute. These become of particular relevance when the parties seek them in a country that is beyond the place of arbitration. The Arbitration & Conciliation Act, 1996,by virtue of proviso to Section 2(2),empowers parties to a foreign seated arbitration to seek interim reliefs from Indian Courts. However, the law provides that parties can contract out of such provision. To determine parties' intention, when there is no express clause or an agreement to that effect, a principle of implied exclusion is used, which usually works to the disadvantage of parties to foreign-seated arbitration. The authors undertake an examination of Indian case laws to show that the judicial task of deciphering such implied intent through an arbitration clause, particularly in cases relating to interim relief, is anchored in a mistaken understanding of the objective of the Arbitration& Conciliation Act. Legal practice concerning the grant of interim reliefs in foreign arbitrations in common law jurisdictions of England and Singapore is also examined. Further, the authors deal with the underlying issues regarding enforcement of emergency arbitrators' orders in India and then conclude with suggestions.

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The views of the authors in this article are personal and do not constitute legal/professional advice from Shardul Amarchand Mangaldas & Co.

I. Introduction

Like any traditional litigation process, a private dispute resolution process such as arbitration seeks to safeguard parties' rights during the course of the arbitral process,[1] to make the final award meaningful and effective. This objective is achieved through the mechanism of interim measures of protection that are granted to parties to a dispute. These interim measures are temporary and have the positive effect of not only compelling parties to behave in a way that is conducive to the success of the proceedings but also ensuring that an eventual, final award can be implemented.[2] The need for such measures is supported by the argument that a final award might be of little or no value if a recalcitrant party removes assets from the jurisdiction, destroys the subject matter of dispute or, in other cases, transfers funds out of the jurisdiction before the judgement. It is, therefore, not surprising that interim measures are noted to be 'at least as important as or even more important than an award'.[3]

Implementation of interim measures depends not only upon the mere grant of such interim orders by the arbitral tribunal or Court, but also on their enforceability, especially in jurisdictions other than the place of arbitration.[4] An interim measure ordered by a foreign Court or foreign-seated arbitral tribunal is generally not enforceable in the jurisdiction outside the seat. Moreover, there is no effective recourse that can be pursued if a party declines to be bound by such an order.[5] Thus, domestic Courts of the said

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1 Gary Born, *International Commercial Arbitration* (2nd edn, Kluwer Law International 2014) 2427.

2 Stephen M Ferguson, 'Interim Measures of Protection in International Commercial Arbitration: Problems, Proposed Solutions, and Anticipated Results', (2003) 12 Int'l Trade L J 55 <https://core.ac.uk/download/pdf/232783391.pdf> last accessed 12 September 2021.

3 VV Veeder, 'Provisional and Conservatory Measures', *Enforcing Arbitration Awards under the New York Convention: Experience and Prospects,* vol 2 (United Nations Publication) 21.

4 When assets or evidence are located in foreign jurisdictions and not in the country of the seat of arbitration.

5 Julian DM Lew, Loukas A Mistelis and Stefan M Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International 2003) 356.

jurisdiction must intervene and assist in implementing such interim measures and rescue the arbitration process itself.[6]

Apart from Article 17 of the revised edition of the UNCITRAL Model Law on International Commercial Arbitration[7] (‘**UNCITRAL Model Law**’), there are no other uniform standards that govern municipal Courts of a country when they are faced with the issue of enforcement of interim orders issued in support of foreign-seated arbitrations. Article 17 of the UNCITRAL Model Law is specifically designed to support the enforcement of interim arbitral measures in relevant national jurisdictions. It states that an interim arbitral measure, no matter how styled ‘shall be recognized as binding and…. enforced upon application to the competent Court, irrespective of the country in which it was issued.’[8] The UNCITRAL Working Group on Arbitration, in its thirty-second session at Vienna, highlighted the ‘practical importance’ of having an effective regime for enforcement of interim measures and that these measures were not ‘dealt with in many legal systems in a satisfactory way’.[9] The commission recognized that it was equally important to enforce such measures not only at places where arbitration was actually conducted but also outside them.[10] This development was necessary as the number of cases in which the parties sought interim measures before the tribunals had been on the rise.[11]

Part II of the Arbitration and Conciliation Act, 1996 (‘**ACA**’)[12] regulates the enforcement of foreign arbitral awards in India. India is a signatory to the New York[13] and the Geneva[14] Conventions. Therefore, Courts in India are obligated to enforce foreign awards provided that all conditions are

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6 See Nigel Blackaby, Constantine Partasides, et al., *Redfern and Hunter on International Arbitration* (OUP 2009) [7.01].

7 United Nations Commission on International Trade Law, *UNCITRAL Model Law on International Commercial Arbitration 1985*, *with Amendments as Adopted in 2006* (2006) <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-09955_e_ebook.pdf> accessed 23 July 2020.

8 James E Castello and Rami Chahine, ‘Enforcement of Interim Measures’, (Global Arbitration Review) <https://globalarbitrationreview.com/chapter/1178692/enforcement-of%E2%80%89-interim-measures> accessed 5 July 2020.

9 Report of the Secretary General in United Nations General Assembly ‘Settlement of Commercial Disputes: Possible Uniform Rules on Certain Issues Concerning Settlement of Commercial Disputes: Conciliation, Interim Measures of Protection, Written Forms for Arbitration Agreement’ (14 January 2000) A/CN.9/WG.II/WP.108 <https://undocs.org/en/A/CN.9/WG.II/WP.108> accessed 20 July 2020.

10 ibid [82].

11 ibid [104].

12 Arbitration and Conciliation Act, 1996 (hereafter ‘ACA’).

13 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (10 June 1958). 330 UNTS 38.

14 Convention on the Execution of Foreign Arbitral Awards, Geneva (26 September 1927).

met.[15] However, before 2015, there was no express provision in the ACA that facilitated the enforcement of an interim measure in India issued by a Court or an arbitrator in case of a foreign-seated arbitration..

In order to make interim reliefs available to the parties to a foreign-seated arbitration, the Indian legislature, through the Arbitration and Conciliation (Amendment) Act, 2015 ('**2015 Amendment**'), added a proviso to Section 2(2)[16] that allowed Section 9 (provision relating to interim measures, etc. by Court) to be applicable in support of foreign-seated arbitrations. The 246th Report of the Law Commission of India, which suggested the amendment to Section 2(2),also provided the objective of the amendment. It stated that a party may strip away its assets when the seat of the arbitration is abroad, and its assets are located in India. In such scenarios, there would be an absence of an 'efficacious remedy', as the other party, which obtains an interim order from a foreign Court,would not be able to get it enforced directly by filing an execution petition.[17] The only way,then, in which the other party can seek an interim relief is if a 'judgment' of a foreign Court holding the other party for contempt of the Court is enforced under the Code of Civil Procedure ('**CPC**'). This remedy is not entirely effective as it will only be available after the other party defaults on the foreign order.[18] Hence, the changes made to Section 2(2) are in line with the objective of the 2015 Amendment and assist parties to a foreign-seated arbitration interim reliefs in India.

In order to ensure party autonomy, the proviso to Section 2(2) states that parties can contract out of such provision. To this effect, the Law Commission in the 246th Report intended the parties to have an 'express agreement' to exclude the applicability of Section 9. However, the legislature, while drafting the provision, dropped the word 'express' from its language. This omission has led to the proviso to Section 2(2) falling prey to the regressive theory of implied exclusion, where the Courts decide whether the parties have expressly or *impliedly* excluded the applicability of Section 9

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[15] The award must be from a country which is a signatory to either the New York or the Geneva Conventions and it should be made in a territory that has been notified as a convention country by the Central Government based on the presence of reciprocal provisions; See ACA (n 12), s 44.

[16] ACA (n 12), s 2(2) proviso: 'Provided that subject to an agreement to the contrary, the provisions of ss 9, 27 and cl (a) of sub-s (1) and sub-s (3) of s 37 shall also apply to international commercial arbitration, even if the place of arbitration is outside India, and an arbitral award made or to be made in such place is enforceable and recognised under the provisions of part II of this Act'.

[17] An execution petition would not qualify as a 'judgment' or 'decree' for the purposes of ss 13 and 44A of the Code of Civil Procedure ('CPC') that provides a mechanism for enforcing foreign judgments. See Law Commission of India, *Amendments to the Arbitration and Conciliation Act* (Law Com No 246, 2014) , [41] (hereafter 'Report No 246').

[18] ibid.

through an arbitration clause. The authors, in this article, seek to prove that the judicial task of deciphering this implied intent through an arbitration clause is anchored in a mistaken understanding of the objectives of the ACA and the 2015 Amendment. The principle of implied exclusion is a relic of the pre-*BALCO*[19] period, and Indian Courts should desist from its application. Instead, they should purposively interpret the 2015 amendment, and thereby ensure that interim awards granted in a foreign-seated arbitration are conveniently enforced in India.

In this connection, Part II of the article will deal with the principle of implied exclusion, or the ghost of implied exclusion that looms over parties who choose to seek interim relief from Indian Courts in assistance of foreign-seated arbitrations. For this purpose, besides looking into the circumstances that led to the genesis of the rule of implied exclusion, the article will also analyse recent Indian cases on this issue to critically evaluate the legal position in Part III. The next section, Part IV, will consider the legal practice employed in common law jurisdictions including England and Singapore in the above context. Further, Part V will explain the underlying issues regarding the enforcement of orders of emergency arbitrators *(*'**EA**'). Finally, the paper will conclude with suggestions for the future of Indian law and policy governing the grant of interim reliefs in aid of foreign-seated arbitrations.

II. The Genesis of Implied exclusion and its problems

The theory of implied exclusion finds its genesis in the (in) famous case of *Bhatia International v Bulk Trading SA*[20] ('***Bhatia***'). It has been employed to decide the applicability of Part-I of the ACA to pre-*BALCO* foreign-seated arbitrations. Post the 2015 Amendment, it has been used to decide on the applicability of provisions of sections 9 and certain others[21] to foreign-seated arbitral proceedings.

At this stage, it is necessary to understand the circumstances under which the Supreme Court of India propounded the principle of implied exclusion in the Bhatia judgment in 2002. The relief sought in *Bhatia* was the issuance of an interim injunction for restraining the transfer/alienation of assets located in India. The governing agreement, in the case, had stipulated that

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[19] The infamous case of *Bhatia International v Bulk Trading SA* (2002) 4 SCC 105 got overruled by the Supreme Court in *Bharat Aluminium Co v Kaiser Aluminium Technical Services Inc* (2012) 9 SCC 552 [hereafter, '*BALCO*'] wherein it was held that s 2(2) was effectively a declaration of doctrine of territoriality, and thereby made Part-I applicable only to arbitrations seated in India.

[20] *Bhatia International v Bulk Trading SA* (2002) 4 SCC 105 (Supreme Court).

[21] ACA (n 12), ss 27 (1)(a), 37(3).

the arbitration was to be held in Paris and the International Chamber of Commerce ('**ICC**') rules. Before the 2015 Amendment, Section 9 confined issuance of Court-ordered reliefs only to arbitrations where the place of arbitration was in India. The Court recognised that such a provision in the present case will leave the party remediless. It, thus, retained the freedom of the parties to approach the Indian Courts under Section9 unless parties, expressly or impliedly, excluded it by agreement.[22]

However, this well-intentioned decision of the Court came with the theory of implied exclusion. The Court reasoned that since the legislature had not 'specifically' provided that the provisions of Part I of ACA applied to international commercial arbitrations held out of India, the intention of the legislature was to allow parties to exclude Part-I or any provision by an 'express or implied' agreement. Not only did the Supreme Court go against the basic scheme of the ACA in reaching this erroneous conclusion,[23] but it also read an apparent conflict in a place where none had existed.[24]

Moreover, there was no strait-jacket formula to conclude either the implied or express exclusion of Part-I. Thus even afterwards, for pre-*BALCO* arbitrations, there was a steady trend where most cases held Part-I to be excluded by implication. Such a conclusion was reached on the basis of facts and circumstances particular to each case, with emphasis upon the juridical seat of arbitration, institutional rules, and governing law of the arbitration agreement.[25]

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[22] KS Harisankar, 'Supervisory Jurisdiction of Indian Courts in Foreign Seated Arbitration: The Beginning of a New Era or the End of Bhatia Doctrine? (2013) 3 The Arb Brief 56 <https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1034&context=ab> accessed 12 September 2020.

[23] See *BALCO* (n 19).

[24] Vidhu Gupta, 'Stretching The Limits Of Statutory Interpretation: Critical Review Bhatia International v Bulk Trading, (2010) 5 Nalsar Stud. L. Rev140 <http://www.commonlii.org/in/journals/NALSARStuLawRw/2011/6.html > accesed 12 September 2021.

[25] The arbitral agreement in *Dozco India (P) Ltd v Doosan Infracore Co Ltd* (2011) 6 SCC 179 stipulated place of arbitration in Seoul and rules applicable as per ICC rules of arbitration. The Court found this sufficient to hold that parties intended to have Seoul only as the seat of their arbitration, thereby impliedly excluding application of Part-I; In *Reliance Industries Ltd v Union of India* (2014) 7 SCC 603 where London was chosen as the seat of the arbitration and the arbitration agreement was to be governed by the laws of England, the Court held that a combination these factors meant that parties had expressly excluded Part-I; In *Videocon Industries Ltd v Union of India* (2011) 6 SCC 161 the fact that arbitration agreement was to be governed by the laws of England led to the conclusion by the Court that Part-I was excluded; In *Harmony Innovation Shipping Ltd v Gupta Coal India Ltd* (2015) 9 SCC 172 London was decided as the seat of arbitration after analysing the terms in its agreement and on that basis Part-I was excluded.

Furthermore, the Supreme Court, in a pre-*BALCO* arbitration, held that the principle of implied exclusion of Part-I is 'too well-settled' and 'with good reasons' to allow the Court to take any other view.[26]

The case laws in Part III of the article show how the theory of exclusion by necessary implication, which is anchored in an illogical understanding of the objective of the ACA, has been relied on by the Indian Courts for interpreting the terms 'subject to an agreement to the contrary' mentioned under the proviso to Section 2(2). As mentioned above, under the theory, the Courts look for a presence of a foreign seat of arbitration to read an implied agreement between the parties to exclude Part-I of the ACA or any of its provisions. Such an act results in a logical inconsistency where the proviso to Section 2(2) mandates providing interim relief in aid of foreign-seated arbitrations, but the theory provides that a foreign seat law would be one of the determinative factors in reading exclusion by necessary implication. The theory of implied exclusion, propounded in *Bhatia,* is hence restored to the extent of deciding the applicability of Section 9 in foreign-seated arbitrations. Although there have not been a plethora of judgments on this issue, a distinction can still be sketched out in the rationale applied by the Courts. Hence, a grey area exists and it requires immediate intervention so to ensure the ambitious pro-arbitration regime that India is committed to develop.

In *Raffles Design International India (P) Ltd v Educomp Professional Education Ltd,*[27] the aggrieved petitioner approached a Singapore-seated SIAC tribunal as per the agreement between the parties.[28] However, pending the constitution of the tribunal, the petitioner obtained an interim relief from an emergency arbitrator. The respondent acted in contravention of the emergency award and, consequently, the petitioner sought interim relief before the Delhi High Court.

On the issue of whether the parties had impliedly excluded the application of any provisions of Part-I, the Court took into consideration the objective behind the addition of proviso to Section 2(2) by the 2015 Amendment and questioned 'whether an agreement between the parties that a foreign law would be applicable to the arbitration, implicitly excludes the applicability of Section 9 of the Act'.[29] The Court came to the conclusion that it does not, and, by a conjoint reading of the proviso to Section 2(2) and the SIAC

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[26] *Eitzen Bulk A/S v Ashapura Minechem Ltd* (2016) 11 SCC 508 : 2016 SCC OnLine SC 523 (Supreme Court).

[27] *Raffles Design International India (P) Ltd v Educomp Professional Education Ltd* 2016 SCC OnLine Del 5521 (Delhi HC) ('***Raffles***').

[28] ibid [64]-[65].

[29] ibid [85].

Rules,[30] inferred that it was open for the parties to approach national Courts (including Courts other than Singapore) to seek provisional relief before the constitution of an arbitral tribunal.[31] However, the Court held that it could not enforce interim measures that were ordered by an arbitral tribunal seated outside its jurisdiction, as no provision in the ACA provided for the same. But the Court held that it can still award a similar relief on merits under a separate Section 9 application.[32]

Another case here is *Ashwani Minda v U-Shin Ltd.*[33] *The applicant, in this case, sought interim relief under a Section 9 petition before the Delhi High Court. Like Raffles*, the applicant, in this case, approached an EA. However, unlike *Raffles*, the relief sought was not granted by the EA. On the issue of whether there was an exclusion of applicability of Section 9 by the parties, the Court first threw light on the arbitration clauses and decided it was so. The arbitration clause is as follows:

> *"[…] 9.5. In case of failure to reach a settlement, such disputes, controversies or differences shall be submitted to the arbitration under the Commercial Rules of the India Commercial Arbitration Association to be held in India if initiated by YUSHIN, or under the Rules of the Japan Commercial Arbitration Association (JCAA) to be held in Japan if initiated by JAY."*[34]

The Court stated since the arbitration was initiated by JAY, the above clause shows the parties' intention to exclude Part-I by choosing Japan and JCAA as the seat and the institutional rules respectively. Further, the Court reasoned that since the JCCA rules entailed a 'detailed mechanism for seeking interim and emergency measures', including deeming an emergency relief to be an interim relief once the arbitral tribunal was duly instituted, the parties were bound by any such emergency relief if they had opted for the same.[35] Hence, the Section 9 petition was not held maintainable.

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[30] Singapore International Arbitration Centre Rules 2016, r 26.3. R 26.3 of SIAC: A request for interim relief made by a party to a judicial authority prior to the constitution of the Tribunal, or in exceptional circumstances thereafter, is not incompatible with these rules [r 30.3 of SIAC rules, 2016 is similarly worded to r 26.3.].

[31] In a similar case, *Aitreya Limited v Dans Energy Pvt Ltd & Ors.* 2011 SCC OnLine Del 5585 the Delhi High Court had allowed a petition for s 9 as the agreement between the parties allowed them to approach any Court of competent jurisdiction for a suitable interim relief.

[32] ibid [100]-[101].

[33] *Ashwani Minda v U-Shin Ltd* 2020 SCC OnLine Del 1648 (Delhi HC) (hereafter, '*Ashwani Minda*').

[34] ibid [46].

[35] Commercial Arbitration Rules (Japan Commercial Arbitration Association), art 77.5

The decision in *Ashwani Minda* case was appealed before a division bench of the Delhi High Court.[36] The division bench, however, did not go into the question of implied exclusion and left the question to be answered in future proceedings.

In *Ashwani Minda*, the learned Single Judge adopted a regressive approach. The judgment distinguished the case from *Raffles* on the basis of two factors: i) The applicable rules in *Raffles* (SIAC) allowed the parties to approach Indian Courts, and ii) in *Raffles,* there was no clause in the agreement that excluded the applicability of Section 9.[37] In the view of the authors, this reasoning does not hold water. The first reason provided-that SIAC rules allow approaching Indian Courts and JCAA rules do not as it provides an elaborate mechanism for seeking interim reliefs – hinges on the choice of institutional rules. This does not indicate the parties' intention to impliedly exclude the application of proviso of 2(2) in any way. The authors say so as the very purpose of amending 2(2) was to provide parties to a foreign-seated arbitration (governed or not governed by a type of institutional rule) the option of interim relief(s) if the assets or properties were to be situated in India.[38]

The second reason- there being no clause in Raffles that excluded the applicability of Section 9-logically means that there was a clause in the relevant agreement in the *Ashwani Minda* Case, which expressly or impliedly barred the application of Section 9. However, there can be no conclusive determination from the arbitration clause in *Ashwani Minda* case (mentioned above) that the proviso to Section 2(2) was implicitly sought to be barred by the parties.

In *Archer Power Systems (P) Ltd v Kohli Ventures Ltd Co*[39] the relevant clause in the agreement expressly conveyed the intention to exclude the applicability of the *complete* ACA.[40] The arbitration was to be governed by the ICC rules and was seated in London.[41] By virtue of such an agreement, the interim relief under Section 9 was not granted since the proviso to Section 2(2) was deemed to be impliedly excluded. However, a later statement in the same clause depicted that parties had allowed the operation of provisions

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[36] *Ashwani Minda v U-Shin Ltd* 2020 SCC OnLine Del 721 (Delhi HC).

[37] *Ashwani Minda* (n 34) [61].

[38] Report No 246 (n 17).

[39] *Archer Power Systems (P) Ltd v Kohli Ventures Ltd Co* 2017 SCC OnLine Mad 36458 (Madras HC) [hereafter, '*Archer*'].

[40] ibid [8(d)(ii)]. ('The Indian Arbitration Act will not apply to the Arbitration Proceedings as the law applicable to such Arbitration shall be British law. To enforce the decision of Arbitrator the parties shall be free to take support of Indian Courts and Judicial system in terms of international law.')

[41] ibid [11(r)].

of Part-II of the ACA, for supporting the enforcement of the final award in India. The Court made an interesting observation that '[…] if a section 9 application is filed in the instant case, post award, the dynamics and dimensions of applicable law may change'.[42] This meant that if the final foreign award was sought to be executed in India, any deliberation concerning the grant of an interim measure could have concluded differently. This aggravates complexity and introduces an unnecessary distinction with respect to pre-award and post-award interim measures. The ramifications of not granting an interim award at both the contemplated stages are similar when it comes to the risk of the rights of claimant being prejudiced or the subject matter getting dissipated.

The Editorial Board recommends that you extend the second section (implied exclusion) till here and start a fresh section here onwards (purposive interpretation of the proviso to S. 2(2) so the reader has greater clarity

III. Advocating for a Purposive Interpretation of proviso to Section 2(2) of ACA

As discussed by cases in the previous section of this paper, the approach of mechanically inferring implied exclusion of Section 9 when the seat was located in a foreign nation and the choice of curial law was not Indian law, was finally not followed by the Bombay High Court.[43] The Court held that as there was 'an absence of a specific agreement to the contrary', the operation of provisions of Section 9 wasn't excluded, notwithstanding the fact that it was a foreign-seated arbitration.[44] The only significant asset of the counterparty to the claim in the present case was a helicopter located within the jurisdiction of the Court. The Court allowed the petition and highlighted that such a stand was important 'to prevent dissipation and diversion of assets'. [45] Thus, the Court did not analyse the arbitration agreement between the parties to decide whether there was any implied exclusion of Section 9 at all.

A similar approach was seen in the case of *Actis Consumer Grooming Products Ltd v Tigaksha Metallics (P) Ltd*.[46] In the case, the Himachal

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[42] ibid [48].

[43] *Aircon Beibars FZE v Heligo Charters (P) Ltd* (2018) SCC OnLine Bom 1388[hereafter, '*Heligo*'].

[44] ibid [15].

[45] ibid [16].

[46] *Actis Consumer Grooming Products Ltd v Tigaksha Metallics (P) Ltd* 2020 SCC OnLine HP 2234, (Himachal Pradesh HC) [hereafter, '*Actis*'].

Pradesh High Court, while deciding upon its jurisdiction to grant an interim relief for assisting an arbitration being conducted in Geneva (and chosen institutional rules being LCIA), stressed on the fact that as subject matter of the dispute was located within its territory, it was well within its power to entertain the application.[47] Thus, the Court did not take upon the task of deciphering any contrary intention, having the effect of impliedly excluding the proviso to Section 2(2), from the terms in the agreement. The reasoning of the Court was:

> "*Part-I of the Arbitration Act shall have no applicability in present case, but in aforesaid facts and circumstances, for insertion of proviso to Section 2(2), w.e.f. 23.10.2015, Sections 9, 27, 31(1)(a) and 37(3) of the Arbitration Act are applicable in present case. The property, subject matter of the arbitral proceedings is situated within jurisdiction of this High Court. Therefore, this Court has jurisdiction to entertain the present petition, filed under Section 9 of the Arbitration Act.*"[48]

From a perusal of these two cases (*Heligo* and *Actis*), it is seen that an approach complementary to the objective of the amendment was employed. The Courts pro-actively lent their support to protect assets and subject matter falling within their realms, thereby eliminating any chance of detriment being caused to them.

Interestingly, the Delhi High Court in *Goodwill Non-Woven (P) Ltd v X coal Energy & Resources LLC*[49] went one step ahead. In the instant case, the petitioner's (Indian Entity) claim was for the refund of a certain amount remitted under a contract towards the respondent (Foreign Entity). As there were chances that the respondent would obstruct satisfaction of any decree which may be passed in favour of the petitioner, the petitioner moved the Court under Section 9 of the ACA to secure the amount in dispute through a bank guarantee which would be issued by a nationalised bank in India. The respondent contended that the proviso to Section 2(2) was merely an asset-based jurisdiction and Courts in India did not possess the power to grant interim reliefs when there were no assets of the counterparty located within its territory. The Court rejected the contention of the respondents. It held that the nature of reliefs enlisted under Section 9 'do not presuppose existence of asset(s) in India'[50] and that Section 9 petition was held

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[47] ibid [31]-[32].

[48] ibid [32].

[49] *Goodwill Non-Woven (P) Ltd v Xcoal Energy & Resources LLC* 2020 SCC OnLine Del 631 (Delhi HC).

[50] ibid [48, 49]. Few instances highlighted by the Court were availability of an asset in case of appointment of a guardian for a minor or securing the amount in dispute by directing the foreign party to deposit the same in Court, securing the amount in dispute in arbitration

maintainable.[51] It further explained that if the Indian party succeeded in this arbitration, it could conveniently invoke such a bank guarantee in satisfaction of the arbitral award.[52] Hence, the interpretation extends the scope of proviso to even those cases where there are no assets of a counterparty to the claim located in India. There was no contention by the respondents that any agreement between the parties impliedly excluded the operation of proviso to Section 2(2).

It can be seen that there are divergent opinions of the Indian Courts on the grant of interim reliefs in aid of foreign-seated international commercial arbitration.

In the opinion of the authors, the approach of the Courts in *Heligo* and *Actis* puts forward the correct reasoning as it advances the objective of the 2015 Amendment. The Courts in these two cases avoided a remediless situation for the parties and took into consideration the fact that preservation of the subject matter (located in India) was essential. Even in *Raffles,* the Court awarded an alternative by allowing the parties to apply for the relief separately. Hence, real justice was sought to be done instead of a 'cut-and-dried' approach as taken by Courts in other instances.

In cases like *Ashwani Minda* and *Archer*, as noted above, the Court clearly did not consider the purpose for which the amendment to Section 2(2) was brought, which was to not leave parties remediless when properties or assets may be in India. It embraced the theory of implied exclusion, similar to what was employed by Courts in the *Bhatia* regime. While the principle favouring the implied exclusion of Part I helps parties in pre-*BALCO* arbitrations to exclude the applicability of Part I, the same rule does not work in their favour when Courts gather an implied intention to exclude the applicability of Section 9 as well. The objective of the 2015 Amendment, as iterated above, was to make Section 9 available in foreign seated arbitration which logically requires the Court to take an assumption in favour of including the applicability of Section 9 in such arbitrations. It is thus incumbent upon the Supreme Court to address this situation cohesively by laying down a clear and uniform position regarding grant of interim reliefs in foreign-seated arbitrations.

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like directing the foreign party to furnish a bank guarantee in favour of the Indian party etc.

[51] ibid[50].

[52] ibid [49].

IV. Cross-Jurisdictional issues and the way forward

The explanatory note to the 2006 revisions to the UNCITRAL Model Law states that 'the existence of an arbitration agreement does not infringe on the powers of the competent Court to issue interim measures and that the party to such an arbitration agreement is free to approach the Court with a request to order interim measures'.[53] This has given rise to a 'free-choice model' where parties are free to choose either the Courts or arbitral tribunals for interim reliefs. However, in order to curb judicial intervention when an arbitral tribunal has been constituted and to protect party autonomy, the 'Court-subsidiarity model', which reflects a pro-arbitration attitude, has come to the fore. It allows national Courts to provide reliefs only when the arbitral tribunal has neither been fully constituted nor has it been able to entertain such requests.[54] Further deviating from the aforementioned model, many jurisdictions have embraced a 'flexible Court-subsidiarity model' where the national Courts are empowered to provide reliefs even after the arbitral tribunal is in place; though, in narrow circumstances.[55]

After the 2015 Amendment introduced Section 9(3) in the ACA, India has gone from adopting a free-choice model to following a flexible Court-subsidiarity approach. Under Section 9(3) of the ACA, Indian Courts are proscribed to entertain an interim relief application unless the remedy sought by an arbitral tribunal proves to be inefficacious. In the following part, the authors will take the examples of two other jurisdictions- England and Singapore- that follow a similar flexible model of Court subsidiarity,[56] and throw light on the method(s) adopted by these jurisdictions to tackle the issue of providing interim reliefs in foreign-seated arbitrations, without giving rise to problems in the conflict of jurisdictions.

A. England

Under Section 44 of the (English) Arbitration Act, 1996, Courts in England are, subject to strict limitations, authorized to issue provisional remedies

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[53] United Nations Commission on International Trade Law, *UNCITRAL Model Law on International Commercial Arbitration 1985, With amendments as adopted in 2006* (2006) 23 <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-09955_e_ebook.pdf> accessed 23 July 2020.

[54] France and Brazil follow this model. See William Wang, *International Arbitration: The Need for Uniform Interim Measures of Relief* (2003) 28 Brook J Int'l L 1059, 1085.

[55] Rachael Kent and Amanda Hollis, 'Concurrent Jurisdiction of Arbitral Tribunals and National Courts to Issue Interim Measures in International Arbitration' in Diora Ziyaeva (ed), *Interim and Emergency Relief in International Arbitration* (Juris Publishing 2015).

[56] Jan K Schaefer, 'New Solutions for Interim Measures of Protection in International Commercial Arbitration: English, German and Hong Kong Law Compared'[1998] EJCL.

with respect to arbitral proceedings.[57] A party is to approach the Court directly only in cases of urgency[58] and the Court may act only to the extent that the tribunal has no power or is unable for the time being to act effectively.[59] Section 44 could be exercised even where the seat of the arbitration is outside England & Wales[60], with the rider that when arbitration with a foreign seat makes it inappropriate[61] to grant relief, the Courts can refuse to grant such relief. Accordingly, local Courts have developed a test to determine appropriateness – the primary requirement of which is to demonstrate a link with the English jurisdiction for parties in a foreign seated arbitration to get interim relief.

In *Econet Wireless Ltd v VEE Networks Ltd*,[62] the respondents filed an application to set aside a freezing injunction ordered in favour of the claimant. While the forum of the arbitration in the above case was Nigeria, the dispute was to be resolved in accordance with the UNCITRAL Rules. The Court noted that the respondents had no connection with the English jurisdiction and their assets weren't located within the jurisdiction either.[63] Thus, it ordered the injunction to be lifted. The Court went on to say that power of an English Court is a 'long-arm' jurisdiction and the parties seeking relief have to justify any application that is made to an English Court rather than the Court at the seat of arbitration.[64]

The above principle is recognized in a catena of cases.[65] In *Mobil Cerro Negro v Petroleos de Venezuela*, the claimant made an application for a

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[57] Guy Pendell, 'England and Wales' in Lawrence W. Newman and Colin Ong (eds), *Interim Measures in International Arbitration* (Juris Publishing 2014).

[58] Arbitration Act 1996 (United Kingdom), s 44(3) [hereafter 'English Arbitration Act'].

[59] ibid, s 44 (5).

[60] ibid, s 2(3). Also See Departmental Advisory Committee on Arbitration Law, *Report on the Arbitration Bill* (1996) 280-281.

[61] Robert Merkin states that 'inappropriateness depends on two factors: (a) whether English law has been chosen as the procedural law; and whether the only hope of assistance is provided by English Courts; or (b) where although the arbitration has no connection with England, there is evidence in England which needs to be preserved, or one of the parties has assets within the jurisdiction which can be frozen by means of Mareva Injunction'. See Robert Merkin, *Arbitration Act 1996* (Lloyds Commercial Law Library 2000) 102.

[62] *Econet Wireless Ltd v Vee Networks Ltd* [2006] EWHC 1568 (Comm).

[63] ibid [16].

[64] ibid [19]. See, generally, Milo Molfa, Adam Grant et al., 'Challenges in the Taking of Evidence in Arbitrations Seated in Mainland China' (2019) 36 J Intl Arb 315 <https://www.clearygottlieb.com/-/media/files/joia_challenges-in-the-taking-of-evidence-in-arbitrations-seated-in-mainland-china-pdf.pdf> accessed 18 July 2020.

[65] *Company 1 v Company 2* [2017] EWHC 2319 (QB); *Petrochemical Logistics Ltd v PSB Alpha AG* [2020] EWHC 975 (Comm); *Taurus Petroleum Ltd v State Oil Mktg Co* (2017) 3 WLR 1170 : [2017] UKSC [54]; *Commerce & Industry Co of Canada v Certain Underwriters at Lloyds of London*, (2002) 1 WLR 1323 : [2002] 2 All ER (Comm) 204. It is noted that where there is little or no contact with the forum in which a provisional measure is sought, state Courts are generally reluctant to grant such measure.

freezing order in order to assist the New-York seated arbitration. Rules of Conciliation and Arbitration of the ICC were chosen by the parties to resolve the dispute. The High Court observed:

> "*[…] this Court will only be prepared to exercise discretion to grant an application in aid of foreign litigation for a freezing order affecting assets not located here if the respondent or the dispute has* a sufficiently strong link here or...there is some other factor of sufficient strength to justify proceeding in the absence of such a link."[66]

The Court declined to grant a freezing order and suggested that the appropriate place for the plaintiff to seek a freezing order was Venezuela, where most of its assets were situated. Moreover, the observation shows that the English Court stepped in to provide interim relief only when there was a sufficient link with the English jurisdiction.

Satisfying the test for sufficient connection depends on the facts of any given case[67] and various factors are weighed in to provide relief in foreign-seated arbitrations. Some of these factors are:

a) Defendant/Respondent has assets within the English jurisdiction.[68]

b) Defendant/Respondent is a resident or domiciled in England. Proving nationality alone has not been held to be a sufficient connection[69]; instead, a long-term connection with the jurisdiction has been sought by the Courts.

c) Governing law of arbitration is English law.[70]

d) The Court of the seat of arbitration is seized of the matter and could more appropriately grant the relief being sought than the English Court.[71]

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66 *Mobil Cerro Negro Ltd v Petroleos de Venezuela* [2008] 1 Lloyd's Rep 684 [119] (emphasis added).

67 James Carter and others 'A Jurisdiction Too Far: The English Commercial Court Declines to Continue Freezing Injunctions in Support of Foreign and English Seated Arbitrations' (DLA Piper, 26 June 2020) <https://www.dlapiper.com/en/chile/insights/publications/2020/06/the-english-commercial-Court-declines-to-continue-freezing-injunctions/> accessed 18 July 2020.

68 The English Courts have issued relief in cases when there were no assets located within the jurisdiction when the seat of the arbitration was London. See *Cetelem SA v Roust Holdings Ltd* [2005] EWHC 300 (QB) ; *Belair LLC v Basel LLC* [2009] EWHC 725 (Comm); *U&M Mining Zambia Ltd v Konkola Copper Mines Plc* [2014] EWHC 3250 (Comm).

69 *Petrochemical Logistics Ltd* (n 65) [58].

70 *Company 1* (n 65) [90].

71 ibid [89]-[92]. Also See Tom Yates and Daniel Relton, 'English Court Considers When it is Appropriate to Grant Injunctive Relief in Aid of a Foreign Seated Arbitration' (Global Arbitration News, 17 January 2018) <https://globalarbitrationnews.com/

e) Risk of dissipation of the subject matter of the dispute.[72]

While the first three factors are relevant indeciding the appropriateness of issuing relief in a foreign-seated arbitration, the last two factors relate to satisfying the tests mentioned under Sections 44(3) and 44(5) of the Act, i.e., of urgency, power of the arbitrator and effectiveness of the arbitrator's order.

A conspectus of the decisions and factors laid above reflects that the English Court gives regard to all the circumstances of the case and particularly focuses on whether there are any links between the dispute and England.[73] In contrast, Indian Courts, as seen in Part 2, anchor their decisions of granting or not granting interim relief in the parties' choice of a foreign seat of arbitration and arbitral rules.

The scope of an English Court in granting interim orders is limited to matters of urgency and which are necessary to preserve the assets or evidence. Nonetheless, the principles employed in deciding the issuance of an interim measure can guide the Indian Courts to tackle issues of granting interim reliefs in foreign-seated arbitration.

Interestingly, the 176th Law Commission of India's Report of 2001,[74] which was issued an year before the *Bhatia* case (and thus before the test of implied exclusion),recommended Section 2(2) of the ACA to be suitably amended so that provisions of Sections 9 and 27 are applicable to international arbitrations where the place of arbitration is either outside India or is not specified in the agreement.[75] The suggestion was along the lines of Section 2(3) of the (English) Arbitration Act,[76] and one could only imagine how this amendment would have shaped the arbitration landscape in India had it seen the light of the day.

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english-Court-considers-when-it-is-appropriate-to-grant-injunctive-relief-in-aid-of-a-foreign-seated-arbitration/> accessed 19 July 2020.

[72] *Petrochemical Logistics Ltd* (n 65) [42], [49]; See *MacLeish Littlestone Cowan v Hajibassi* [2006] All ER (D).

[73] Yates (n 71).

[74] Law Commission of India, *The Arbitration and Conciliation (Amendment) Bill, 2001* (Law Com No 176, 2001).

[75] ibid, 28 [2.1.7].

[76] English Arbitration Act (n 58), s 2(3). Section 2(3) is as follows: 'The powers conferred by the following sections apply even if the seat of the arbitration is outside England and Wales or Northern Ireland or no seat has been designated or determined—

(a) section 43 (securing the attendance of witnesses), and

(b) section 44 (Court powers exercisable in support of arbitral proceedings);

but the Court may refuse to exercise any such power if, in the opinion of the Court, the fact that the seat of the arbitration is outside England and Wales or Northern Ireland, or that when designated or determined the seat is likely to be outside England and Wales or Northern Ireland, makes it inappropriate to do so.'

B. Singapore

In Singapore, the International Arbitration Act ('IAA') governs international arbitrations. Section 12A, inspired by Article 17J of the 2006 amendments to the UNCITRAL Model Law,[77] was introduced to the IAA through the International Arbitration (Amendment) Act, 2009. It empowered Singapore Courts to lend curial assistance in support of arbitration as it has for *in relation to an action* or *a matter in the Court*. In line with Section 44 of the (English) Arbitration Act 1996,[78] Courts' powers under 12A are also limited. A Court intervenes in cases of urgency and acts to the extent where the arbitral tribunal has no power or is unable for the time being to act effectively.[79] Courts have the discretion to refuse interim orders in support of a foreign arbitration if they consider it to be 'inappropriate'.[80]

The 'inappropriate' test has been criticized for its uncertainty and ambiguity.[81] In this regard, the Ministry of law, in its 'Consultation Paper on the International Arbitration (Amendment) Act, 2009 Bill', claimed Section 12A standard as an 'added safeguard to give the Court sufficient flexibility to deal with complicated international disputes'.[82] It further clarified in a response that the discretion of Courts to determine appropriateness will be guided by the principle of comity.[83] The Ministry of Law has avoided enunciating the principle of comity in the legislation. However, the said principle, which requires that a jurisdiction recognizes and respects the jurisdiction of foreign and transnational legal orders, would mean that the Singapore Courts exercise caution in granting interim relief orders in aid of those foreign arbitrations that would involve concerns of comity with Courts of foreign nations.

Before the incorporation of Section 12A, the position of Singapore Courts on this issue was laid down in *Swift-Fortune Ltd v Magnifica Marine SA*. The Singapore Court of Appeal had held that Singapore Courts do not have

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77 UNCITRAL Model Law (n 7), art 17J.

78 Ministry of Law (Singapore)'Consultation Paper on the Draft International Arbitration (Amendment) Bill 2009' (2009) <https://www.mlaw.gov.sg/files/news/press-releases/2009/07/linkclick17e0.pdf> accessed 20 July 2020 [3(a)].

79 International Arbitration Act, 1994, s 12A (4)-(6) ['hereafter IAA'].

80 ibid, s 12A(3).

81 Mahdev Mohan, 'The New International Arbitration (Amendment) Bill – A Broader Framework for Interim Relief or Just a Tune-Up?' (2010) 22 Sing Ac LJ 299, 303; See Ronald Wong, 'Interim Relief in Aid of International Commercial Arbitration – A Critique on the International Arbitration Act' (2012) 24 Sing Ac LJ501,523.

82 Consultation Paper (n 78) para 4.

83 Ministry of Law (Singapore) 'Responses to Public Feedback Received on International Arbitration (Amendment) Bill' (2009) <https://www.mlaw.gov.sg/files/news/announcements/2009/09/linkclick1e3a.pdf> accessed 21 August 2020.

the power 'to grant interim measures, including Mareva interlocutory relief, to assist foreign arbitrations.'[84]

This position was statutorily reversed when Section 12A was introduced in the IAA. The Ministry of Law explained that a justiciable right before a Singapore Court is not a prerequisite[85] for a plaintiff to claim an interim relief.[86] It is worth noting here that departure from the requirement of a 'justiciable/recognizable cause of action under Singapore law'[87] reflects Singapore's commitment towards providing curial support in aid of foreign arbitrations as it is very much possible that the jurisdictions-where the cause of action arises, where the arbitration takes place and where the location of assets or evidence is – are three different countries.

In the case of *Five Ocean Corpn v Cingler Ship Pte Ltd*,[88] the Singapore High Court considered an application for an order of sale of cargo on board a vessel in aid of a Singapore-seated arbitration. The Court determined the presence of dual requirements of urgency and necessity[89] pursuant to Section 12A (4) of IAA and stated that such situations existed[90] and granted the application. Though in this particular arbitration, the seat was located in Singapore itself, the judgment went on to explain the scope and reasons behind the incorporation of Section 12A. Section 12A can be employed by Singapore Courts in assisting foreign seated arbitrations was clearly stated: :

> "*The main legislative intention behind the enactment of s 12A* was to give the Court powers over assets and evidence situated in Singapore and to make orders in aid of arbitrations that were seated in Singapore and overseas."[91]

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[84] ibid [59].

[85] Responses (n 83) 4. See Explanatory statement to the International Arbitration (Amendment) Bill 2009 <https://www.mlaw.gov.sg/files/news/announcements/2009/09/linkclick83db.pdf> accessed 21 August 2020, 8.

[86] *Swift Fortune* (n 86) [96]: '[...] Section 4(10) of the Civil Law Act of Singapore (which provides for injunctive orders by Courts) does not confer any power on the Court to grant a Mareva injunction against the assets of a defendant in Singapore unless the plaintiff has an accrued cause of action against the defendant that is justiciable in a Singapore Court'. Also See *Front Carriers Ltd v Atlantic & Orient Shipping Corpn (2007) 2 Lloyd's Rep 131 :* [2006] 3 SLR 854.

[87] Responses (n 83) 4.

[88] *Five Ocean Corpn v Cingler Ship Pte Ltd* [2015] SGHC 311.

[89] IAA (n 79) s 12A (4) : 'If the case is one of urgency, the High Court or a Judge thereof may, on the application of a party or proposed party to the arbitral proceedings, make such orders under sub-section (2) as the High Court or Judge thinks necessary for the purpose of preserving evidence or assets'.

[90] *Five Ocean Corporation* (n 88) [56]. Deteriorating health of the crew members on board the vessel, lack of fresh supplies, overheating of the cargo, etc. were taken into consideration.

[91] ibid [39] (emphasis added).

While the above case of 2015 portrays the intention behind the enactment of Section 12A, the then Law Minister of Singapore in 2009 had addressed one of the important reasons behind allowing interim orders to be passed by Singaporean Courts in aid of foreign arbitration. He remarked that non-enforcement of foreign arbitral tribunal's orders in Singapore make a case for allowing limited Court intervention by making an application under section 12A.[92]

Similarly, the lack of enforceability of orders passed by a foreign-seated tribunal was one of the main reasons behind justifying grant of interim order(s) by an Indian Court in cases where the seat of the arbitration is outside India.[93] An Indian Court should, therefore, heed the purpose behind the 2015 Amendment and rule accordingly in cases involving grant of interim reliefs.

In the context laid down above, it can be safely concluded that the two most popular destinations for international commercial arbitration – England and Singapore – have made interim measures of protection available to parties in a foreign seated arbitration, subject to necessary juridical requirements of the respective jurisdictions. India, a common law country, with its arbitration law dating back to more than two decades, has made substantial progress to aid international commercial arbitration by introducing the 2015 Amendment to the ACA. However, the repercussions of the theory of implied exclusion, propounded in *Bhatia* case, are still being felt by the Indian Judiciary.

V. The Case of Emergency Arbitrators

The orders of not only a foreign Court or a foreign tribunal, but even those of emergency arbitrators face uncertainty of enforcement in India. An emergency arbitrator is a person, usually appointed by the arbitral institution involved, who awards or orders interim measures that have effect until the

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[92] K Shanmugam, Law Minister, 'Second Reading Speech on the International Arbitration (Amendment) Bill' (19 October 2009) <https://www.mlaw.gov.sg/news/parliamentary-speeches/second-reading-speech-by-law-minister-k-shanmugam-on-the-international-arbitration-amendment-bill> accessed 21 August 2020 [8]. It may be noted that other cases where the Court can exercise such power 'include a party applying to Court for relief before the arbitral tribunal has been fully or properly constituted; a party applying to Court for relief against a non-party to the arbitration, which an arbitral tribunal has no power over; and where the arbitral tribunal is unable to hear an urgent application for interim relief sufficiently quickly'.

[93] Report No. 246 (n 17).

formation of a tribunal.[94] These emergency arbitrators have become an increasingly popular alternative[95] for parties to seek interim relief and are chosen over Court proceedings which may, in some cases, be excessively lengthy.[96] Moreover, provision for emergency arbitrators limits the intervention of Courts. It resolves the inconvenience a party may face with the laws of the country where the interim measures are to be sought and enforced.[97]

While UNCITRAL Model Law contains provision 17H for recognition and enforcement of interim measures, it does not include emergency arbitrators within the definition of the arbitral tribunal. This non-inclusion not only leaves open the question of whether an emergency arbitrator falls within the ambit of the definition,[98] but also makes it unclear whether the UNCITRAL Model Law allows for an order of an emergency arbitrator to be enforced. In India, the 246th Report recommended including an emergency arbitrator within the definition of an arbitral tribunal[99] when the arbitration is conducted under the rules of an institution providing for the appointment of an emergency arbitrator. However, this recommendation was not given effect in the 2015 Amendment to the ACA.

Thus, orders passed by a foreign arbitral tribunal, a foreign Court in aid of international commercial arbitration, and reliefs ordered by Emergency Arbitrators are not enforceable under the current legislative framework of India. But, we have seen how in *Raffles* case, the Court observed that it can award a similar interim relief (granted by the foreign tribunal) under a separate petition under Section 9. In *Plus Holdings Ltd v Xeitgeist Entertainment Group Ltd*[100] the Bombay High Court noted that the petitioner's rights *in regard to the film in question* were *sufficiently recognized in the Emergency Award,* and thereby proceeded to grant an *adinterim*

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[94] Nikhil J Variyar, 'Tribunal Ordered Interim Measures and Emergency Arbitrators: Recent Developments Across the World and in India' (2015) 4 Ind J Arb L 34, 36.

[95] The International Chamber of Commerce, art 29; Hong Kong International Arbitration Centre, sch 4; Singapore International Arbitration Centre, sch 1; Stockholm Chamber of Commerce, app II; Swiss Chambers of Arbitration Institution, art 15 (7), and London Court of International Arbitration, art 9B. These contain provisions regulating appointment and decision making of the emergency arbitrator.

[96] Rania Alnaber, 'Emergency Arbitration: Mere Innovation or Vast Improvement'(2019) 35 Arb Intl 441.

[97] Variyar (n 94); See Patricia Louise Shaughnessy, 'Chapter 32: The Emergency Arbitrator' in Patricia Louise Shaughnessy and Sherlin Tung (eds), *The Powers and Duties of an Arbitrator* (Kluwer Law International 2017) 339-348.

[98] UNCITRAL Model Law (n 7) art 17H: 'An interim measure issued by an arbitral tribunal shall be recognized as binding and, unless otherwise provided by the arbitral tribunal, enforced upon application to the competent Court irrespective of the country in which it was issued, subject to the provisions of article 17I'.

[99] ACA (n 12) s. 2(1)(d).

[100] *Plus Holdings Ltd v Xeitgeist Entertainment Group Ltd* 2019 SCC OnLine Bom 13069 (Bombay HC).

injunction in the petitioner's favour. Though the Section 9 petition was considered *de novo,* the Court reasoned that the emergency award still held a persuasive value. However, such instances don't reduce the importance of an effective enforcement regime, which is required to address the lacuna once and for all.

VI. Conclusion

In normal circumstances, the apt forum for seeking interim reliefs would be Courts of the seat of arbitration. However, when assets are located in a different jurisdiction, a party often has no remedy but to approach the Courts of that country.[101] The current legal framework in India is not well-equipped to deal with such situations. There is no set of uniform and established principles that guide the Indian Courts while dealing with questions of enforcement of foreign interim orders. Moreover, when a relevant law of the country where a party seeks to enforce an interim order does not recognise such orders, a party may have to directly apply before the municipal Court of that country as per the applicable arbitration law.

In India, the 2015 Amendment provided a remedy and allowed parties to approach the Indian Courts to seek interim reliefs in aid of foreign-seated arbitrations, provided that the arbitral award from such arbitrations is enforceable and recognised under the provisions of Part II of the ACA. However, due to the omission of the word 'express' in the phrase 'subject to an agreement to the contrary' of the proviso to Section 2(2) of the ACA by the legislature, the Courts in India came to rely on the theory of implied exclusion to decide whether an implied exclusion of Section 9 of the ACA can be read into the arbitration agreement. This adjudication was done by analysing the law of the country in which the arbitration is seated, institutional rules applicable to the arbitration, and the law governing the arbitration agreement.

The application of the theory of implied exclusion in cases related to the grant of interim reliefs under the proviso to section 2(2) has, thus, breathed new life into an uncertainty in a similar way as the rulings in the *Bhatia* judgment- regarding the implied exclusion of Part-I of the ACA in foreign-seated arbitrations- did.

This uncertainty could be avoided if the Courts in India desist from going back to the pre-*BALCO* period and consider the scheme of the ACA, the

[101] Chris Parker, 'Court-ordered Interim Relief in Support of 'Foreign' Arbitrations in Hong Kong, Singapore and England' (2007)9 Asian Disp. Rev.82.

objective behind the 2015 Amendment, and the purpose of granting interim reliefs in a foreign-seated arbitration. Certain principles, which guide other jurisdictions, can help the Indian Judiciary lay down a more structured policy to govern the grant of interim reliefs in aid of foreign-seated arbitrations. These are as follows:

a) English Courts are inclined to grant interim relief when assets are situated in their jurisdiction and there is an adequate risk of dissipation of assets. When the assets are not located, they focus on establishing a sufficient link between the parties, the contract or the arbitration agreement with the English jurisdiction. This approach is holistic and considers all the circumstances when dealing with an application concerning a request for grant of interim relief. India should consider adopting this approach. This could be done by the Judiciary which reads the same approach into the existing provisions. Alternatively, it could be done by the Legislature by introducing specific explanations via amendments under relevant Sections of the ACA.

b) Singapore recognises that the arbitrator would not be able to act effectively when faced with cases of enforcement of foreign arbitral tribunal's order. It allows interim orders to be passed by its Courts in aid of foreign arbitration. Section 9(3) of the ACA allows for limited intervention of Indian Courts after an arbitral tribunal has been constituted, in circumstances where the remedy rendered by the arbitral tribunal would be inefficacious. As noted above, a foreign tribunal's order providing interim relief would not be enforceable in India, thereby rendering it ineffective. Thus, the principle underlying the requirements under Section 9(3) of the ACA should be made applicable in cases when relief is sought in aid of a foreign-seated arbitration. This can be done by allowing the parties to move an application under Section 9(3), thereby providing teeth to the foreign arbitrator-ordered interim measures.

The issue could be effectively resolved if the legislature considers rectifying its mistake by adding the word 'express' in the proviso to Section 2(2) of the ACA. Such an approach would run concurrently with the scheme and objective of the current Indian arbitration regime.

An efficient and final resolution of this issue can also be achieved by the international community at large. Akin to the New York Convention, a convention can be drafted that will harmonise and streamline the treatment and enforcement of interim measures by different nations. The authors believe that such a move will bring more stability and predictability to the practice of international commercial arbitration worldwide.

The 2021 Amendment to Arbitral Legislation in India: Is it a Step in the Right Direction?

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I. Introduction

The Arbitration and Conciliation (Amendment) Act, 2021 ('**2021 Amendment**') was enacted in March, 2021. It repealed the Arbitration and Conciliation (Amendment) Ordinance, 2020 which was promulgated by the President in November, 2020. The 2021 Amendment introduced *two* significant changes to the Arbitration and Conciliation Act, 1996 ('**the Act**').

First, it amended Section 36 of the Act, which empowered the court to grant an unconditional stay of the enforcement of an award when a *prima facie* case of fraud or corruption is made out in the contract or the arbitration agreement or the making of the award.

Second, it amended Section 43J to vest the Arbitration Council of India with the power to decide the qualifications of arbitrators and repealed Schedule VIII of the Act, which hitherto provided a list of qualification and experience required to be an arbitrator in India. Section43J is included in

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Part I-A of the Act, which provides for the establishment of the Arbitration Council of India (Part I-A of the Act is yet to be notified).

These changes directly result from *two* previous amendments – the Arbitration and Conciliation (Amendment) Act, 2015 ('**2015 Amendment**') and the Arbitration and Conciliation (Amendment) Act, 2019 ('**2019 Amendment**'). In a two-step analysis, we closely examine the 2021 Amendment. First, we will delve into the background of the 2021 Amendment in context of the 2015 and 2019 Amendments. Second, we will explore what the 2021 Amendment means for the arbitration landscape in India and its possible lacunae in furthering a pro-arbitration framework.

II. Background and Controversies Leading up to the 2021 Amendment

A. Amendment to Section36

By virtue of Section34 of the Act, an arbitral award can be set aside by the court subject to any of the grounds provided in the said Section being satisfied.[1] Consequently, the award is rendered unenforceable. Mirroring the UNCITRAL Model Law,[2] these criteria are broadly based on the principles of party autonomy, procedural fairness and public policy.[3] In this regard, a question that arises often is whether the award rendered is enforceable *during* the pendency of the set aside proceedings before the court.[4] It is difficult to strike a balance between one party's right to procedural propriety and the other party's urgency to enforce the award. Moreover, there needs to be a mechanism to prevent a losing party to employ dilatory tactics to render the award infructuous. Given that a successful party in an arbitration might on an average spend about six years in defending challenges made to the

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1 At present, an award is set aside if a party proves that it was either under some incapacity, the arbitration agreement was invalid, it was not given proper notice or was unable to fully present its case, the award is beyond the tribunal's subject matter jurisdiction, or the procedure followed was not in line with the parties' agreement (s 34(2)(a) of the Act). An award may be set aside if a Court finds that if the subject matter of the dispute is not arbitrable or the award is in conflict with public policy of India (s 34(2)(b) of the Act).

2 UNCITRAL Model Law on International Commercial Arbitration 1985 (With Amendments as Adopted in 2006).

3 For a detailed discussion on the contours of public policy in India, *see*, Dushyant Dave, 'Recognition and Enforcement of Foreign and Domestic Arbitral Awards: Role of National Courts' in Dushyant Dave, Martin Hunter, and Fali Nariman (eds), *Arbitration in India* (Kluwer Law International 2021).

4 Gary Born, *International Commercial Arbitration* (3rd edn, Kluwer Law International 2020) 4083-84. Professor Born infers that national courts in both common and civil law jurisdiction are vested with considerable discretion to grant suspension of a recognition action under Article VI of the New York Convention.

arbitral award,[5] it becomes even more significant whether the award should be enforced in the meantime Section36 of the Act empowers the court to grant stay against enforcement of arbitral awards during the pendency of set aside proceedings. Often, the central point becomes under what circumstances a stay is justified.[6]

On this contentious issue, the 2021 Amendment was preceded by the 2015 and 2019 Amendments to the Act.[7] Prior to the 2015 Amendment, the enforcement of an award was *automatically* stayed upon a Section 34 application being filed.[8] Almost always, the award-debtor would file a Section 34 challenge to delay enforcement. The 2015 Amendment demarcated a paradigm shift in the approach. It did away with automatic stay of enforcement of an award when an application to set aside is filed, and the court could grant a stay only in cases where it deems fit.[9] A separate application for grant of stay is to be filed and the court while granting a stay can direct the award debtor to provide a security.

While this was a forward-looking change, it gave rise to a debate as to its applicability and centred on whether the amendment would apply to Section 34 and Section 36 applications arising out of the arbitrations before 23rd October, 2015 (the date when the 2015 Amendment was implemented).[10] Section 26 of the 2015 Amendment provided that none of the changes brought about by the 2015 Amendment would apply to arbitral proceedings commenced before the Amendment came into effect.[11] However, in *BCCI*

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5 *Hindustan Construction Co Ltd v Union of India* (2020) 17 SCC 324 : 2019 SCC OnLine SC 1520 [3] (Supreme Court of India).

6 Ashish Dholakia, Ketan Gour, and Kaustub Narendran, 'India's Arbitration and Conciliation (Amendment) Act, 2021: A Wolf in Sheep's Clothing?' (*Kluwer Arbitration Blog*, 23 May 2021) <http://arbitrationblog.kluwerarbitration.com/2021/05/23/indias-arbitration-and-conciliation-amendment-act-2021-a-wolf-in-sheeps-clothing/> accessed 5 July 2021.

7 *See*, Lord Peter Goldsmith, 'International Commercial Arbitration in India: Some Reflections on Practice and Policy in Gourab Banerji and others (eds), *International Arbitration and the Rule of Law: Essays in Honour of Fali Nariman* (Permanent Court of Arbitration 2021) 379, 381; Subiksh Vasudev, 'The 2019 Amendment to the Indian Arbitration and Conciliation Act: A Classic Case of One Step Forward and Two Steps Backward' (*Kluwer Arbitration Blog*, 25 August 2019) <http://arbitrationblog.kluwerarbitration.com/2019/08/25/the-2019-amendment-to-the-indian-arbitration-act-a-classic-case-of-one-step-forward-two-steps-backward/> accessed 5 July 2021.

8 *Fiza Developers and Inter-Trade (P) Ltd v AMCI (India) (P) Ltd* (2009) 17 SCC 796 [20] (Supreme Court of India); *National Aluminum Co Ltd v Pressteel & Fabrications (P) Ltd* (2004) 1 SCC 540 [11] (Supreme Court of India).

9 The Arbitration and Conciliation (Amendment) Act 2015, s 19.

10 Subiksh Vasudev, 'The 2020 Amendment to the Indian Arbitration Act: Learning from the Past Lessons?' (*Kluwer Arbitration Blog*, 10 December 2020) <http://arbitrationblog.kluwerarbitration.com/2020/12/10/the-2020-amendment-to-the-indian-arbitration-act-learning-from-the-past-lessons/?print=print> accessed 5 July 2021.

11 The Arbitration and Conciliation (Amendment) Act 2015, s 26.

v Kochi Cricket (P) Ltd ('***BCCI Case***'),[12] the Supreme Court held that the new Section 36 was an exception to the rule set in Section26 of the 2015 Amendment. Consequently, Section 34 applications filed before the cut-off date and those applications filed in relation to arbitrations commenced prior to 23rd October, 2015 would now attract the new Section 36.

The Parliament, through the 2019 Amendment, introduced Section87.[13] Accordingly, the 2015 Amendment (including the amended Section36) would neither apply to the arbitral proceedings commenced before 23rd October, 2015 nor to the court proceedings arising out of such arbitrations. Effectively, the ruling in the *BCCI Case* was watered down. In November 2019, the Supreme Court in *Hindustan Construction Co Ltd v Union of India*,[14] struck down Section 87 holding it to be "*manifestly arbitrary*, *unreasonable*, *and contrary to public interest*".

Now, the 2021 Amendment has introduced new grounds for an 'unconditional stay' of the enforcement of the award. When the courts are satisfied that a *prima facie* case of either the arbitration agreement/contract or the award being induced by *fraud* or *corruption* is made out, an unconditional stay will be granted. The Section is accompanied with an explanation providing that this amendment shall also apply to all court cases arising out of or in relation to arbitration proceedings before the commencement of the 2015 Amendment.

B. Amendment to Section 43J and Abrogation of Schedule VIII

While India has witnessed a trend of its policy becoming pro-arbitration, many stakeholders expressed their dissatisfaction with the arbitral process. It was perceived that Indian arbitrators adopted the procedural and evidentiary provisions from the domestic civil procedure into the arbitral process.[15] To adequately deal with this, a High-Level Committee chaired by Justice B.N. Srikrishna was constituted in 2016 to review the institutionalisation of arbitration mechanisms in India. The Committee found that India could improve its pool of arbitrators by providing accreditation to arbitrators. Since accreditation would be provided by an independent professional institute

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[12] (2018) 6 SCC 287 (Supreme Court of India).

[13] The Arbitration and Conciliation (Amendment) Act 2019, s 13.

[14] (2020) 17 SCC 324 : 2019 SCC OnLine SC 1520 [7] (Supreme Court of India).

[15] 'Modi Makes Institutional Arbitration a Priority' (*Global Arbitration Review*, 2016) <https://globalarbitrationreview.com/modi-makes-institutional-arbitration-priority> accessed 30 June 2021.

whose grading would be based on a combination of stringent criteria, there would be a reliable standard of assessment for arbitrators.

In light of the recommendations of the Committee, the Parliament amended the Act in 2019. It established the Arbitration Council of India ('**ACI**') by introducing Part I-A to the Act and stipulated recognition of professional institutes providing accreditation of arbitrators as one of the essential duties and functions of the ACI. It also introduced the Eighth Schedule to the Act, prescribing an exhaustive list of requisite qualifications and experience for being appointed as arbitrators.

Since its introduction, the Eighth Schedule was widely criticised for being over-broad, its most common criticism stemmed from a common perception that the Eighth Schedule debarred a foreign national from being appointed as an arbitrator in an Indian seated arbitration.[16] For example, Entry (i) to the Eighth Schedule permitted the appointment of an advocate within the meaning of the Advocates Act, 1961 having ten years of experience. Only a person of Indian nationality could be an advocate under the Advocates Act (reciprocity being an exception).[17] If that were the case, this would not only militate against the widely accepted doctrine of party autonomy in arbitration but also the Act itself. Section11(1) and Section11(9) of the Act permit appointment of an arbitrator of any nationality in an international commercial arbitration. Even the Supreme Court recognised that there is no absolute bar in foreign lawyers conducting international commercial arbitrations in India on a fly-in and fly-out basis.[18] Therefore, the requirements of the Eighth Schedule were only meant to apply to arbitrators of Indian nationality.

However, in light of the widespread criticism, even before the provisions of the 2019 Amendment (Part I-A and Eighth Schedule) were notified, the President promulgated an Ordinance in November, 2020, which, among other things, provided that the qualifications, experience, and norms for accreditation of arbitrators be specified by regulations made by the ACI in

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[16] Ravi Shankar Sathiyamoorthy, 'Government of India Deletes Schedule VIII that Banned Foreign Legal Professionals from Sitting as Arbitrators in India Seated Arbitrations' (*Matin Dale,* 2020) <https://www.martindale.com/legal-news/article_law-senate_2534676.htm> accessed 30 June 2021; Ajar Rab, '2019 Amendment to Arbitration Law: Foreign Arbitrators in Indian Seated Arbitrations' (*IndiaCorpLaw,* 2020) <https://indiacorplaw.in/2020/09/2019-amendment-to-arbitration-law-foreign-arbitrators-in-indian-seated-arbitrations.html> accessed 30 June 2021.

[17] The Advocates Act 1961, s 24.

[18] *Bar Council of India v A.K. Balaji* (2018) 5 SCC 379 : AIR 2018 SC 1382 (Supreme Court of India).

consultation with the Central Government. This Ordinance provided for the omission of the Eighth Schedule to the Act vide Section 4 of the Ordinance.[19]

III. What the Amendment Means for the Arbitral Landscape in India

In this Section, we analyse the potential implications of the amendment. We look at the three facets: *first*, the introduction of new ground for a stay application—*prima facie* fraud and corruption; *second*, the applicability of the new ground—in terms of the standard of proof and retrospective application; and *third*, the replacement of Eighth Schedule with regulations to be made by the ACI.

A. Prima Facie Fraud and Corruption

The 2021 Amendment introduced a new ground for an unconditional stay of the enforcement of arbitral awards. This part of the paper will analyse whether it is wise to allow an unconditional stay on the enforcement of an arbitral award if the underlying contract (including an arbitration clause) or the arbitration agreement is tainted by fraud/corruption. This would be tested on primarily three grounds:

First, the amendment is not consistent with the doctrine of separability in arbitration. According to the principle of separability, the arbitration clause in a contract is considered separate from the main contract. Thus, if the underlying contract is invalid due to breach or termination, the arbitration clause will still survive. According to the Amendment, if the contract appears *prima facie* to have been tainted by fraud/corruption, then the award (that is based on the arbitration clause in the contract or an arbitration agreement) would be stayed unconditionally. However, the principle of separability mandates that despite the main contract being tainted by fraud or corruption, the arbitration clause would survive and the dispute must be referred to arbitration.[20] An exception to this principle was carved out by the Supreme Court in *A. Ayyasamy v A. Paramasivam*[21] and *Avitel Post Studioz*

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[19] 'Government Issues Ordinance to Amend Arbitration Law' *The Economic Times* (4 November 2020) <https://economictimes.indiatimes.com/news/economy/policy/government-issues-ordinance-to-amend-arbitration-law/articleshow/79045017.cms?from=mdr> accessed 30 June 2021.

[20] This has also found precedence with the Supreme Court in the case of *Swiss Timing Ltd. v. Commonwealth Games*. It can also be derived from a conjoint reading of Sections 15 and 16 of the 1996 Act.

[21] (2016) 10 SCC 386 (Supreme Court of India).

Ltd v HSBC PI Holdings (Mauritius) Ltd.[22] Here, a distinction was drawn between "fraud simpliciter" and "serious allegations of fraud," in that a serious allegation of fraud would permeate the entire contract *causing damage in the public domain* and the dispute would fall outside the competence of an arbitral tribunal. Where a party alleged fraud simpliciter, the appropriate forum is the Arbitral Tribunal and not the court at the stage of enforcement of the arbitral award.

Second, the 2021 Amendment can cause conceptual confusion by disturbing the existing jurisprudence on the intersection between Sections 34 and 36.[23] As per Section 36(2), for an application of unconditional stay, there must be a pending challenge under Section34 of the Act seeking an annulment. Interestingly, an arbitral award may be annulled when the "*making of the award* was induced or affected by fraud or corruption" as opposed to "*the arbitration agreement or contract which is the basis of the award*" was induced or effected by fraud or corruption. This gives rise to an incongruous situation. While the ground is not available for setting aside an award, it is available for an unconditional stay on enforcement.

Third, the courts of enforcement have a legitimate basis to scrutinise arbitral awards in certain cases, including fraud or corruption. Courts enjoy jurisdiction when an application to set aside an award is filed, as to whether proper procedure was followed and opportunity to present the case was given to the parties before the award was made. Since arbitral proceedings do not enjoy the same amount of state support as ordinary court proceedings, the proceedings or the award obtained may sometimes be prone to be tainted by fraud or corruption. Recognising this, the English High Court in *Federal Republic of Nigeria v Process and Industrial Developments Ltd* granted an unprecedented extension for filing an annulment application based on prima facie case of fraud.[24] These concerns are only further exacerbated in India because of the sheer diversity of sectors in which disputes are referred to arbitration and as the range of stakes involved vary from small matters to big ticket cases. Further, most arbitrations in India are *ad hoc*, with little institutional supervision. Therefore, allowing a strong case of prima facie fraud as a ground for unconditional stay may be legitimately required. That said, the amendment, in effect, allows the court wider discretion while considering an application for stay of enforcement of an award than the power

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[22] (2021) 4 SCC 713.

[23] Anahad Miglani and Gaganjyot Singh, 'Fraud in the Underlying Contract: A New Hurdle for Enforcement of India-Seated Arbitral Awards' (*Oxford Business Law Blog,* 2020) <https://www.law.ox.ac.uk/business-law-blog/blog/2020/12/fraud-underlying-contract-new-hurdle-enforcement-india-seated> last accessed 30 June 2020.

[24] [2020] EWHC 2379 (Comm).

the court has while considering an application for stay of enforcement of a decree under the CPC.[25]

B. Unconditional Stay and Retrospectivity

This Section of the paper analyses the application of the new ground for a stay application. *First*, it analyses the appropriate standard of proof required to make a case for *prima facie* fraud or corruption; s*econd,* it analyses the Explanation to Section 36 which provides for the application of the Amendment retrospectively.

Efficiency is the cornerstone of Arbitration and an unconditional stay may *prima facie* be antithetical to efficiency. An unconditional stay encourages the losing party to falsely allege fraud or corruption to stay the enforcement of the award. In doing this, it defeats the very purpose of the alternate dispute mechanism by drawing parties to courts and making it prone to litigation. This would not only overburden the courts but might also result in a further slip in ease of doing business reports. Further, an unconditional stay is tantamount to a pre-emptive decision that places the award-holder in a prejudiced position before the proceedings are completed. For these reasons, it may hurdle India's efforts towards a pro-arbitration regime.

One of the most crucial critiques of the automatic stay regime was that such a legislation takes away the court's discretion in the determination of whether a stay is justified. This led to mandatory judicial interference with the arbitral award in Section 34 challenges, and a similar system under the 2021 Amendment has certainly raised eyebrows. India's position is contrary to most Model Law countries[26] throughout the world who have vested their courts with a broad discretion in granting stays/suspensions to awards.[27]

On the one hand, it is imperative to provide relief to parties when the procedure is tainted with fraud and corruption; on the other, the judicial intervention should be minimal. Accordingly, the standard of *prima facie* case has to be balanced to account for the efficient enforcement of the award. A low *prima facie* standard would be antagonistic to the purpose of efficiency as it incentivizes losing parties to falsely allege fraud or corruption. What the

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[25] *See*, Dholakia, Gour, and Narendran (n 6).

[26] Model Law countries refer to countries that have adopted the UNCITRAL Model Law on International Commercial Arbitration 1985 (With Amendments as Adopted in 2006) as their national arbitration legislation. At present, the Model Law has been adopted in 118 jurisdictions. *See* <https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status> last accessed 15 August 2021.

[27] Born (n 4) 4083.

prima facie enquiry is will have to be interpreted by the courts since there is little legislative guidance on this.

It has also been pointed out that Section34 and the new Section36 will lead to a conundrum.[28] The Supreme Court, in *Ssangyong Engg & Construction Co Ltd v NHAI*,[29] held that Section 34 is a summary procedure and it is not within the court's ambit to reappreciate evidence or meticulously examine the award. However, the inquiry of whether there is a *prima facie* case of fraud will require some level of examination of the award or evidence.[30] Thus, the two Sections do not seem to be in consonance with each other. These doubts pertaining to the *prima facie* inquiry would have to be resolved by the judiciary in an appropriate case.

The controversy of retrospectivity of Section36 amendments seems to have been put to rest with the 2021 Amendment since unlike previous instances, the Legislature itself has clarified that the amendment will apply retrospectively. Notably, the Justice Srikrishna High Level Committee had endorsed the view against retrospective application of Section26 of the 2015 Amendment. The Committee opined that retrospective application would lead to uncertainty and inconsistency. When we look at the 2021 Amendment, parties are likely to file fresh applications on the new grounds. They may also possibly file applications for the variation of orders granting an unconditional stay on the new ground.

This might lead to a flurry of new applications and revival of already settled cases. This might burden the courts and increase the average time for disposal of Section36 requests for stay on enforcement.

Therefore, the introduction of unconditional stay that can be retrospectively applied requires careful consideration by the judiciary. It becomes extremely crucial to devise a correct touchstone against which all requests are tested, and frivolous requests should not prejudice the parties.

C. Eighth Schedule

After the Eighth Schedule was abrogated by the President's ordinance, the 2021 Amendment removed the Eighth Schedule altogether from the Act. The Schedule will be replaced by regulations made by the ACI. When the Amendment Bill was debated before the Lok Sabha, this move was widely

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[28] Dholakia, Gour, and Narendran (n 6).
[29] (2019) 15 SCC 131 (Supreme Court of India).
[30] *Svenska Handelsbanken v Indian Charge Chrome* (1994) 1 SCC 502 [88] (Supreme Court of India).

appreciated as it would attract eminent international arbitrators to the country, give greater flexibility to the ACI thereby promoting institutional arbitration, and reinstate the principle of party autonomy as parties may choose arbitrators of their choice.[31] It would be a step towards furthering the pro-arbitration stance adopted by India recently. However, as mentioned earlier, this acclaim received by the Amendment is premised on a misconception that the former Eighth Schedule prohibited foreign arbitrators from being appointed in India seated arbitrations.[32]

After the Amendment, the ACI is tasked to make a fresh set of regulations which will govern the accreditation of arbitrators. As of now, there is no clarity on what these regulations might be. The provisions relating to the ACI in Part I-A are yet to be notified.

As the Committee Report recognised, the regulations would benefit from adopting the best practices of arbitral accreditation institutions around the world. Accordingly, the regulations may, *inter alia*, include criterion such as experience in conducting arbitral proceedings, specialized knowledge in the arbitration and evidence of published writings in ADR journals or legal periodicals.[33] Finally, it is hoped that practitioners, experts and key stakeholders are consulted before making these regulations. Such consultation will prevent any further controversy on this issue and ensure that the regulations do not fall prey to the same criticisms as the Eighth Schedule. Anyway, all these would be of relevance only if the ACI is launched. It is hoped that when the ACI is launched and the regulations are released, it will increase the efficiency of the arbitral process in India.

IV. Conclusion

This paper examines the 2021 Amendment and highlights not only its attempt at a cleaner and more professional arbitration process but also possible lacunae that might need to be addressed by the Parliament or the courts.

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[31] Akshita Saxena, 'Centre Notifies Arbitration & Conciliation (Amendment) Act 2021' (*Live Law* 2021) <https://www.livelaw.in/news-updates/centre-notifies-arbitration-conciliation-amendment-act-2021-171079> accessed 7 July 2021.

[32] 'Government Issues Ordinance to Amend Arbitration Law' *The Economic Times* (2020) <https://economictimes.indiatimes.com/news/economy/policy/government-issues-ordinance-to-amend-arbitration-law/articleshow/79045017.cms?from=mdr> accessed 30 June 2020.

[33] Pooja Chakrobarty and Kunal Dey, 'The Glass Half Empty-Analyzing the Arbitration and Conciliation (Amendment) Act, 2021' (*Argus-p.com*, 2021) <https://www.argus-p.com/papers-publications/thought-paper/the-glass-half-empty-analyzing-the-arbitration-and-conciliation-amendment-act-2021/> accessed 7 July 2021.

While the 2021 Amendment is well-intentioned to effectively deal with the evil of fraud and corruption, it leaves a lot of potential for the judiciary and legislature to shape the law. This paper has attempted to highlight few areas of concern and suggests avenues for improvement.

A Chronological Analysis of Vodafone and Cairn –A BIT-terSaga

Aayushi Singh[*]

In 2012, India's retrospective taxation amendment culminated in an unfortunate torpedo of investment arbitrations against it, nestling India's journey with bilateral investment treaties in unrest. India's subsequent termination of BITs with multiple countries and conclusion of a protectionist model bilateral investment treaty also garnered critique. Retrospective taxation may be supported by State sovereignty, State practice and discretion however it becomes imperative to understand the nuances of individual investment arbitrations to appreciate the concerns of the investors and the state's unfettered and almost unchecked power to frame and amend taxation laws. The paper chronologically appreciates the findings in Vodafone International Holdings v. Government of India and Cairn Energy Plc v. Republic of India – two landmark disputes, while trying to draw the common thread of retrospective taxation vis-à-vis violations of fair and equitable treatment/most-favoured nation clauses and other similar themes. The paper attempts to critically analyse the Tribunal's approaches in the disputes, while also balancing the concerns of the stakeholders involved and cementing a more reformed investment treaty regime in India.

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I. INTRODUCTION

Crossing out the usage of retrospective taxation by the present administration, Arun Jaitley, the Finance Minister of India from 26th May, 2014 to 30th May, 2019, had stated that a permanent law in this regard would not be possible and that the cost would be 'too heavy' if any future government indulged in such a 'misadventure.'[1] The comment was almost clairvoyant considering the Indian Government's fate. Still coming back to its feet from the aftermath of *White Industries*,[2] India's subsequent journey with bilateral investment treaties (**'BITs'**) has been nestled in chaos –culminating in a torpedo of investment arbitrations against it in the last few years. The legal and factual disputes in these arbitrations may be multifaceted but the underlying theme is not entirely disjunct: the misadventure of *retrospective taxation*.

In December, 2015, India terminated its existing BITs with fifty-seven countries with which investment agreements had already expired or were soon to expire[3] and further concluded to approve a draft Model BIT.[4] In a treaty, the definition of investment is pivotal since it determines whether investors may force host states into binding arbitration. Ideally, two such definitions may exist,'enterprise-based' (i.e., where investments may be considered establishments of an enterprise in the host state) or 'asset-based' (i.e., including resources or capital which may have crossed borders) – the latter naturally being broader in its context. While also providing a very narrow definition of '*investment*', seemingly tilted towards enterprise-based investment rather than asset-based one,[5] the Model BIT also utilised vague terminology as the requirement of enterprises to satisfy '*certain duration*' of existence[6] without specifying how much and made a blanket exclusion of meting out the most-favoured nation treatment. Naturally, such restrictions limit the scope of subsequent challenges. A rather protectionist Model BIT also represents a change in the tectonics of India's foreign investment policy

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1 '"Misadventure" of Retrospective Taxation will be Costly: FM' *Hindustan Times* (New Delhi, 18 April 2015) <www.hindustantimes.com/business/misadventure-of-retrospective-taxation-will-be-costly-fm/story-SQDjYNdui14KduR97onn3I.html> accessed 18 October 2021.

2 *White Industries Australia Ltd. v Republic of India* (2010) UNCITRAL, Final Award.

3 'India Takes Steps to Reform its Investment Policy Framework After Approving New Model BIT' (*Investment Treaty News*, 10 August 2016) <https://www.iisd.org/itn/en/2016/08/10/india-takes-steps-to-reform-its-investment-policy-framework-after-approving-new-model-bit/m> accessed 18 October 2021.

4 'Model Text for the Indian Bilateral Investment Treaty' (*Department of Economic Affairs, Government of India*) <https://dea.gov.in/sites/default/files/ModelBIT_Annex_0.pdf> accessed 18 October 2021 ('Model Indian BIT 2016').

5 Model Indian BIT 2016, arts 1(4)(c), 1(4)(h).

6 Model Indian BIT 2016, art 1.4.

in the aftermath of the numerous investor-state arbitrations initiated against India.

The Model BIT specifically excluded regulatory measures relating to taxation from the purview of the treaty. Article 2 of the Model BIT[7] provided that the host state's regulatory measures relating to taxation cannot be adjudicated by an investment tribunal. The host state's decision as to whether a particular regulatory measure is related to taxation (whether made before or after the commencement of arbitral proceedings) shall be non-justiciable. No arbitral tribunal shall be able to review such a decision, hence also limiting challenges under Double Taxation Avoidance Agreements.[8] DTAAs enjoy a two-fold utility: *first*, avoidance of double taxation by taxpayers in their source and residence country; and *second*, opting for the Mutually Agreed Procedure under such DTAAs to resolve cross-border disputes. Even without the exclusion of taxation measures, the Model BIT was seen as an inward-looking and protectionist treaty.

The heavily debated decision to preclude taxation from future BITs is presumably in response to the multitude of claims against India regarding the retrospective application of taxation law. While arguments regarding state sovereignty and discretion may be meted out - it becomes imperative to understand the nuances of these arbitrations individually to appreciate the concerns of the investors and the state's unfettered and almost unchecked power to frame and amend taxation laws.

The paper shall chronologically appreciate the findings in (Part II) *Vodafone International Holdings v Republic of India,* (Part III) *Cairn Energy Plc v Republic of India*. Lastly, the paper attempts to critically analyse the approaches in the disputes while balancing the concerns of the stakeholders involved(Part IV).

II. Unearthing India's tax 'misadventure': Vodafone International Holdings v. Government of India

Vodafone's journey in India has been entrenched in heavy litigation, be it due to the infamous retrospective tax amendment or Vodafone's contentious revenue-sharing model.[9] The Vodafone Saga arose when Vodafone International

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[7] Model Indian BIT 2016, art 2.4(ii).

[8] ibid.

[9] Himanshi Lohchab, 'Telcos, ILDOs Spar Over International Termination Rate Revenue Share' *Economic Times* (New Delhi, 4 February 2020) <https://economictimes.indiatimes.com/industry/telecom/telecom-news/telcos-

Holdings BV ('**Vodafone**') acquired CGP Investments from Hutchison Telecommunications International Ltd. ('**HTIL**'). CGP controlled 67% of Hutchison Essar Limited ('**HEL**') based in India. Subsequently, Vodafone also acquired all subsidiaries of CGP including 67% stake of HEL based in India.This acquisition enabled Vodafone to indirectly control a prominent Indian telecom company, HEL.

In 2007, a show-cause notice under Section 201 of the Income Tax Act ('Consequences of failure to deduct or pay') was issued to Vodafone and HEL, now Vodafone Essar Ltd ('**VEL**') to treat Vodafone as an "*assessee indefault*" for its failure to deduct taxes as required under Section 195 of the Income Tax Act. The legal issues in the case revolved around whether the transfer of shares between two foreign companies resulting in a transfer of the interest held by a foreign company to another foreign company amounted to a transfer of capital assets in India (since this transfer had the effect of essentially *transferring* Indian assets). Vodafone challenged the validity of these notices by filing a writ petition before the Bombay High Court questioning the jurisdiction of the Income Tax Department. The Bombay HC deemed the writ to be non-maintainable as Vodafone had an effective alternate remedy under the Income Tax Act which Vodafone failed to exhaust.

Subsequently, Vodafone moved to file a special leave petition before the Supreme Court. The Supreme Court held that Hutchison-Vodafone was not chargeable under Section 9(1)(i) of the Income Tax Act as a reading of the provision did not include taxation of indirect transfers.[10] Chief Justice S.H. Kapadia, Justice Swatanter Kumar and Justice K.S. Radhakrishnan declared that the taxpayer, Vodafone International Holdings BV, a company resident in the Netherlands, was not liable to be taxed in India. Justice Radhakrishnan went ahead to note that the Income Tax authorities' demand for capital gains tax would "*amount to imposing capital punishment for capital investment since it lacks the authority of law.*"[11]

Considering CGP Investments being based in the Cayman Islands, the Supreme Court observed how interposing investment in Indian companies through a foreign holding company based in Cayman Islands or Mauritius was common for tax and business purposes - primarily for avoidance of

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ildos-spar-over-international-termination-rate-revenue-share/articleshow/73913901.cms?from=mdr> accessed 18 October 2021.

[10] The Income Tax Act 1995, s 9(1)(i):

> *"Any income accruing or arising outside India due to a business connection in India is deemed to accrue or arise in India and shall be taxable in case of all assessees irrespective of their residential status."*

[11] *Vodafone International Holdings BV v Republic of India (I) (India-Netherlands BIT)* (2020), UNCITRAL, PCA Case No. 2016-35, Final Award [188].

approval and registration processes required for direct transfers. It must be understood that this may inevitably lead to hydra-headed evils such as double tax avoidance issues, evasion or avoidance of tax.Thus, the taxation and nature of the holding structure needs to be astutely examined by courts.[12] The Supreme Court further distinguished between the concepts of tax evasion and tax planning and observed this was a case of genuine strategic planning.[13] Instead of this, HTIL's CGP shares to VEL amounted to the transfer of capital assets under Section 2(14) of the Income Tax Act and were thereby not chargeable as capital gains for the purposes of the Act.

Looking at older cases, in *Azadi Bachao*,[14] the Apex Court upheld Circular 789[15] which stated that a Certificate of Residence issued by Mauritian authorities would suffice to establish tax residence and beneficial status under the Mauritius-India Double Tax Avoidance Agreement. The Vodafone ruling was iconic more so because it settled the lurking questions regarding the correctness of the Supreme Court's decision in *Azadi Bachao* and its departure from *McDowell*.[16] While relying on a 1972 ruling,[17] the Supreme Court in *McDowell* had stated that "*colourable devices cannot be part of tax planning and it is wrong to encourage or entertain the belief that it is honourable to avoid the payment of tax by resorting to dubious methods*."[18]

The Income Tax Department's understanding was that *McDowell* hinted at a departure from the Westminster Doctrine/Principle which states that a person is entitled to make any lawful arrangement of his affairs that he sees fit to reduce liability to tax.[19] The Supreme Court in *Vodafone International Holding* clarified that it is incorrect to assume from McDowell that all tax planning is illegal, illegitimate, or impermissible,[20] thus ruling out the insinuation that the Income Tax Department had made regarding legitimate tax planning which was well within the realm of law. *Vodafone* reconciled *McDowell* and *Azadi Bachao* and clarified that in the context of forum, treaty shopping or tax, evasion/avoidance, the two cases are not at loggerheads.

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12 ibid [68].
13 ibid [63].
14 *Union of India v Azadi Bachao Andolan* (2004) 10 SCC 1 (Supreme Court of India)
15 Circular No. 789, dated 13-4-2000.
16 *McDowell and Co Ltd v CTO* (1985) 3 SCC 230 (Supreme Court of India).
17 *CIT v Vadilal Lallubhai* (1973) 3 SCC 17 (Supreme Court of India).
18 ibid [15].
19 *IRC v His Grace the Duke of Westminster* 1936 AC 1, 19 (UK House of Lords).
20 Vodafone (n 11) [64]

In 2012, Section 9(1)(i) of the Income Tax Act was amended[21] and retrospective tax was imposed on earlier transactions. The amendment provided for the insertion of two explanations of the contents of Section 9(1)(i). The meaning of '*through*' in the section was to be construed as 'by means of', 'in accordance with' or 'by reason of.' The Income Tax Department shrewdly utilising the amended law, imposed Vodafone with a tax demand of INR 14,200 crore including taxes worth INR 7,990 crore with interest but held back on imposing any additional penalties. In 2016, the Tax Department updated the demand to INR 22,100 crore plus interest.

The legality of the same was challenged by VGP's subsidiary Vodafone BV who invoked Article 4(1) of the India-Netherlands BIT (National Treatment and Most-Favoured National Treatment) claiming a breach of the Fair and Equitable Treatment ('**FET**') standard. India's natural defence was of course a challenge to the jurisdiction of the investment tribunal primarily on the ground that the BIT expressly excluded domestic tax legislation from the ambit of the FET protection. However, more than Article 4(1) of the BIT, the heavily debated portion of the BIT was Article 4(4) which stated that the:

> "*Provisions of paragraphs 1 and 2* in respect of the grant of national treatment and most favoured nation treatments*hall also not apply in respect of any international agreement or arrangement relating wholly or mainly to taxation or any domestic legislation or arrangements consequent to such legislation relating wholly or mainly to taxation.*" (emphasis supplied).[22]

Such drafting was ambiguous and questionable on multiple counts.

If, as was argued, the domestic tax legislation is only excluded from review in respect of claims founded on the national treatment and MFN treatment standard in paragraph 2, the reference to paragraph 1 (which deals with the FET standard) in Article 4(4) would essentially be redundant. To draw in principles of interpretation enshrined in Article 31(1) of the Vienna Convention on Law of Treaties, "good faith" principles can be extended to give full meaning to the effect of the treaty (*effet utile*). This automatically should also extend to paragraph 1 –thus, excluding domestic tax legislations from the net of fair and equitable treatment and full protection and security standards.

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[21] "(i) *all income accruing or arising, whether directly or indirectly, through or from any business connection in India, or through or from any property in India, or through or from any asset or source of income in India 4 or through the transfer of a capital asset situate in India*."

[22] Agreement between the Republic of India and the Kingdom of the Netherlands (India-Netherlands) (adopted 6 November 1995), art 4(4).

If India had to deliberate the exclusion of taxation measures from investment treaty jurisdiction, then it needs to contemplate the dire need of incorporating much broader treaty provisions which further the same objective as well – something which Article 4(4) of the BIT failed to do.

The substantive question is whether a retrospective amendment to the tax legislation would lead to a violation of the legitimate expectation of an investor. If we were to adopt the approach established by *Occidental*[23] and *Enron*,[24] there ideally should not be such significant changes in the legislation as to affect the very core of legitimate expectation. In *Enron*, by 'dismantling' the regulatory framework, Argentina had failed to provide a stable framework as required by the BIT, thereby acting unfairly and inequitably.[25] Consequently, an interesting line of argument can be developed if the tribunal's reasoning in *Enron* is applied to Vodafone. Imposing a retrospective tax amendment needs to be weighed against a state's sovereign exercise of power and that legislative power shall and must not cease at the whims of investors. Thus, *Enron* can be distinguished from *El Paso*[26] and *Continental* which stated that "*it would be unconscionable for a country to promise not to change its legislation as time and needs change, or even more to tie its hands by such a kind of stipulation in case a crisis of any type or origin arose*."[27]

The retrospective tax amendment was also not specifically targeted at Vodafone since it was a generic amendment; however, the thoughtfully calibrated timing of the legislation made the underlying legal intention seem extremely dubious. An investor may often make an investment in reasonable reliance on the stability of the regulatory framework of the host state,[28] so that in certain circumstances a reform of the framework can breach the investor's legitimate expectation. Legitimate expectations may also be created when the state provides specific representations, assurances, or commitments

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[23] *Occidental Exploration and Production Company v Ecuador* (2004), UNCITRAL, LCIA Case No. UN 3467, Final Award [185].

[24] *Enron Corpn and Ponderosa Assets v Argentine Republic* (2007), ICSID Case No. ARB/01/3, Award.

[25] ibid [251]-[268].

[26] *El Paso Energy International Co v Argentine Republic* (2011), ICSID Case No. ARB/03/15, Award.

[27] *Continental Casualty Company v Argentine Republic* (2008), ICSID Case No. ARB/03/9, Award [258].

[28] *Hydro Energy 1 Sàrl and Hydroxana Sweden AB v Kingdom of Spain* (2020), ICSID Case No. ARB/15/42, Decision on Jurisdiction, Liability and Directions on Quantum [596].

directly to the investor,[29] at the time of making the investment upon which the investor places reliance for making the investment.[30]

According to the award, the government needed to reimburse Vodafone 60 per cent of its legal costs and half the cost borne by it for appointing an arbitrator on the panel. Hence, the government's liability in the case would have come to around INR 75 crores.[31] In parallel of the same, Cairn Energy Plc and Vedanta Resources Plc filed separate arbitrations challenging the retrospective amendment of taxation laws, aggravating the chaos.

III. Cairn Energy PLC and Cairn UK Holdings Limited (CUHL) v. Government of India

The underlying dispute that erupted in the Cairn PCA arbitration[32] dates to 2006. The two parties involved were Cairn Energy Plc ('*CEP*') and its British subsidiary, Cairn UK Holdings Limited ('**CUHL**'). The line of transactions arose from the reorganization of CEP's shares in its Indian subsidiaries, which were subsequently transferred to CUHL, making CUHL the direct owner of all twenty-seven of CEP's Indian subsidiaries. Subsequently, CUHL transferred these shares to its subsidiary incorporated in Jersey, Cairn India Holdings Limited ('**CIHL**'). Cairn India Limited ('**CIL**') was subsequently incorporated as a CUHL subsidiary in India and CUHL's shares in CIHL were transferred to CIL, i.e., (CUHL->CIHL->CIL). Cairn India Limited divested 30% of its shares in an initial public offering, managing to raise $931 million in December 2006. Vedanta UK purchased 59% of the remaining shares and transferred them to their Indian wholly-owned subsidiary Vedanta Limited. ('**VL**') CIL later merged with Vedanta Limited in 2017, making Cairn Energy receive a 5% shareholding in VL.

After an investigation of CIL's office regarding capital gains incurred in the above transactions, in 2015, the Income Tax Department imposed a tax liability of $1.6 billion on CIL for failure to deduct withholding tax on the transactions. Subsequently, CUHL (the parent body) initiated arbitration

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[29] *Glencore International AG v Republic of Colombia* (2019), ICSID Case No. ARB/16/6, Award [1368].

[30] *Mobil Cerro Negro Holding Ltd v Bolivarian Republic of Venezuela* (2014), ICSID Case No. ARB/07/27, Award [256].

[31] Dilasha Seth, 'India Challenges Vodafone Arbitration Award, Plans the Same in Cairn Case' *Business Standard* (New Delhi, 25 December, 2020) <https://www.business-standard.com/article/companies/india-challenges-vodafone-arbitration-award-plans-the-same-in-cairn-case-120122401064_1.html> accessed 20 April 2022.

[32] *Cairn Energy Plc v Republic of India* (2020), UNCITRAL, PCA Case No. 2016-07, Final Award.

under Article 9 (3)(c) of the UK-India BIT, while proceedings before tax authorities were ongoing. Without prejudice to the arbitration proceedings, an appeal against the proceedings was also initiated before the Income Tax Appellate Tribunal which upheld the tax demand against CUHL in 2017 but dismissed the imposition of interest thereupon. In the subsequent months of 2017, the Tax Department engaged in the forced sale of CUHL's shares in CIL, selling 98.72 percent of CUHL's shareholding in CIL/VL and other preference shares and seized dividends due to CUHL.

Before the Permanent Court of Arbitration, India's primary argument hinged on its sovereign power to amend taxation laws and their non-arbitrability under a BIT or otherwise. India relied on an implied exclusion of taxation disputes from the BIT based on state practice.[33] In the alternative, India relied on both transnational public policy and Indian and Dutch (Netherlands being the seat of the arbitration) public policy to argue that even if both parties were consenting to the present arbitration, taxation matters are not arbitrable under law. Transnational public policy transcends state boundaries and may arise from an international consensus regarding universal standards in "civilised nations" (an extended reference to Article 38 of the International Court of Justice[34] may be drawn) such as corruption, bribery, slavery, terrorism, etc.[35] To draw such a high-handed argument over a theme where international consensus[36] is as divided as taxation was a tricky move indeed.

The Tribunal also drew adistinction between a tax-related investment dispute and a tax dispute, where the former must relate to a BIT violation by a host state's measures related to taxation, the latter relates to the taxability of specific transactions and the amount thereunder.[37] The former would squarely fall within the ambit of "*any dispute between an investor of one Contracting Party and the other Contracting party*" as stipulated under Article 9 of the UK-India BIT. A tax dispute would concern the domestic laws of a country and possibly the laws of several countries as far as international transactions were concerned, falling under the ambit of a country's

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[33] ibid [765].

[34] Statute of the International Court of Justice, art 38: "*The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: international custom, as evidence of a general practice accepted as law; the general principles of law recognized by civilized nations.*"

[35] RB Schlesinger, 'Research on the General Principles of Law Recognized by Civilized Nations' (1957) 51(4) American Journal of International Law734–53.

[36] 'Transnational (or Truly International) Public Policy and International Arbitration' in Pieter Sanders (ed), *Comparative Arbitration Practice and Public Policy in Arbitration, ICCA Congress Series*, vol 3 (Kluwer Law International 1987) 258 – 318.

[37] *Cairn Energy* (n 32) [793].

domestic laws and double taxation avoidance treaties with other countries.[38] The Tribunal adjudicated the present dispute to be a tax-related investment dispute where the issue was whether the measure taken by the host state, (regardless of whether it was valid or invalid under its municipal tax laws) violated international law obligations under the BIT.[39]

India also made a rather unique argument of interpreting the UK-India BIT along with the UK-India Double Taxation Avoidance Agreement (DTAA),[40] in light of Article 31(3) of the Vienna Convention on Law of Treaties.[41] It must be impressed that a DTAA cannot be construed as a "*subsequent agreement*" between the parties to be used as a tool for interpreting the BIT under Article 31(3)(a) or Article 31(3)(b) of Vienna Convention. The DTAA was enforced in 1993, chronologically before the BIT and did not establish an agreement between the parties with respect to the BIT's subsequent interpretation.

The Tribunal also had to consider whether disputes relating to returns from an investment constituted a dispute related to the investment, since the dispute was essentially concerning the capital gains earned by the Claimants through disinvestment of their shares. *Achmea* v. *Slovak Republic*[42] established returns to be an integral part of an investment, however unlike the UK-India BIT, the investment treaty in *Achmea*[43] did not make a distinction between the terms 'investment' and 'returns'. While Article 4(2) and Article 7 of the BIT accorded protection to 'returns' from the investment, the investor's claims were made under Articles 3 and 5 of the BIT, which

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[38] Reuven S Avi-Yonah and Brett Wells, 'The BEAT and Treaty Overrides: A Brief Response to Rosenbloom and Shaheen' (2018) 92(4) Tax Notes International 383.

[39] ibid.

[40] Convention Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of India for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital Gains (United Kingdom-India) (adopted 25 January 1993) ('**UK-India Double Taxation Convention**').

[41] Vienna Convention on Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 ('**VCLT**'), art 31(3):

> "(3) *There shall be taken into account, together with the context:*
> *(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;*
> *(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;*
> *(c) any relevant rules of international law applicable in the relations between the parties.*"

[42] *Achmea BV v Slovak Republic* (2012), UNCITRAL, PCA Case No. 2008-13 (formerly *Eureko BV v Slovak Republic*).

[43] Agreement on Encourageent and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic (Netherlands-Slovakia) (29 April 1991).

applied only to 'investments.' Thus, India argued that unless allegations related directly to the breach of provisions of the treaty providing substantive obligations regarding an investment, the dispute would fall outside the Tribunal's jurisdiction. Article 9 of the BIT contained broad language for resolution of "*any dispute in relation*" to an investment and was overseen in the Respondent's perspective. *Siemens* v. *Argentina*[44] previously pointed out that the lack of a specific mention in the treaty provisions does not indicate an exclusion of the matter – thus, insinuating that a lack of the term 'returns' in Article 9 did not imply its exclusion.

As mentioned earlier, relying on *effet utile*, a restricted interpretation of the term 'investment' to exclude returns from the investment would be inconsistent with Article 31(1) of VCLT as well as we would be deviating from the ordinary meaning of the treaty's terms and not interpreting it in good faith. Further, it could not be established that the parties had an intention to juxtapose the two terms against each other in order for a special meaning to be assigned to 'investment', if Article 31(4) of the Vienna Convention were to be applied.

Article 3 (Fair and Equitable Treatment) and Article 5 (unlawful expropriation) of the BIT were invoked due to the retrospective application of the 2012 tax amendments and forced sale of CUHL's shares. The investors also alleged violation of Article 7 of the BIT due to restrictions on CUHL's right to transfer remaining shares in CIL. Like Vodafone, the deprivation of FET hinged on the fundamental change in taxation law which breached predictability,[45] legal stability[46] and legitimate expectations[47] of the investors – all of them being inherent components of FET. It has been acknowledged by previous tribunals and model BITs[48] that when host states make certain administrative decisions, they are obliged to offer transparent procedures and give notice to investors concerned with the decisions.[49] The arbitrariness of the tax regime did not hint at intelligible procedures being followed by the state.

The way the Income Tax Department targeted Cairn was also brought under the radar as it hinted towards a premeditated effort to prevent CUHL from selling its investment. Prejudice, preference or bias substitutes the rule

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[44] *Siemens AG v The Argentine Republic* (2007), ICSID Case No. ARB/02/8, Final Award.
[45] *Técnicas Medioambientales Tecmed SA v The United Mexican States* (2003), ICSID Case No. ARB (AF)/00/2, Final Award.
[46] *Occidental Exploration and Production Company v Ecuador* (2004), UNCITRAL, LCIA Case No. UN 3467, Final Award.
[47] *Multipack SRL v Romania [I]* (2013), ICSID Case No. ARB/05/20, Final Award.
[48] US Model Bilateral Investment Treaty 2012, art 20.6.
[49] *Metalclad Corporation v United Mexican States* (2000), ICSID Case No. ARB(AF)/97/1, Award [9].

of law.[50] It may either be a measure damaging the investor without serving any apparent legitimate purpose, or based not on legal standards but on discretion, prejudice or personal preference.[51] Commencing action against Cairn after the enforcement of the 2012 amendments, when compared to non-enforcement of tax liability imposed on Vodafone was also brought forth by the Claimant. This differential treatment naturally strengthened the violation of fair and equitable treatment. Thus, referring to the ICJ's decision in *ELSI,*[52] the Tribunal held that the retroactive taxation of the 2006 transactions was grossly unfair and breached the FET standard under Article 3 of the BIT.

IV. The Aftermath of Multiple Investment Arbitrations - Where does India Stand?

On a more reassuring note, subject to certain conditions, the Taxation Amendment Act, 2021[53] was passed, seeking to nullify the tax assessments levied against Cairn in January 2016 and ordering the refund of INR 7,900 crore collected from Cairn. Cairn would be filing necessary documentation under Rule 11UF(3) of the Indian Income Tax Rules, 1962 intimating the withdrawal, termination and/or discontinuance of various enforcement actions. This may seem promising however there are more deep-rooted issues warranting attention.

To look at the treaty in *Vodafone* (the India-Netherlands BIT), Article 4(4) of the BIT showed a minor improvement from the carve-out in Article 4(3) of the India-UK BIT invoked in *Cairn* and *Vedanta*, the latter being immensely constrained. Article 4(3) of the India-UK BIT does not make any reference to exclusion of claims involving treaty obligations other than MFN or National Treatment (for example, expropriation or fair and equitable treatment could still be alleged in respect of taxation). The taxation carve-out in the India-Japan CEPA[54] can be drawn as an example, Article 10(1) of which was used for India's objection in *Nissan*.[55] Article 10(1) provides that "*the provisions of this Agreement shall not apply to* ***any taxation measures***." The latter three words are succinct and clear enough to have only one unequivocal

[50] *Joseph Charles Lemire v Ukraine* (2011), ICSID Case No. ARB/06/18,Award [262]-[263].
[51] *EDF (Services) Ltd v Romania* (2009), ICSID Case No. ARB/05/13, Award [303].
[52] *Case Concerning Elettronica Sicula SpA (ELSI)* (*United States of America v Italy*) (1989) ICJ Rep 15.
[53] Taxation Laws (Amendment) Act 2021.
[54] Comprehensive Economic Partnership Agreement between Japan and the Republic of India (Japan-India) (adopted 16 February 2011).
[55] *Nissan Motor Co Ltd v Republic of India* (2019), UNCITRAL, PCA Case No. 2017-37, Decision on Jurisdiction.

implication. Unlike the UK-India or Netherlands-India BIT, Article 10(1) does not seek to exclude only specific types of treaty claims.

To analyse the aforementioned awards, it becomes critical to analyse the Indian Model BIT's framework. Article 2.4(ii) of India's Model BIT stipulated that the host state's regulatory measures related to taxation could not be adjudicated by an investment tribunal - making taxation measures completely outside the purview of the BIT. Further, investors would not be able to challenge any change in the country's taxation laws in any circumstances, hence also limiting challenges under Double Taxation Avoidance Agreements or Free Trade Agreements. From an investor's perspective, the exclusion is potentially problematic since it gives the state unfettered power. The exclusion ensures that if a dispute similar to Cairn arises in the future for investments pursued under the BIT, an arbitral tribunal will be deprived of the power to adjudicate. More unfortunately, the distinction between taxation disputes and tax-related investment disputes that the Cairn tribunal considered will hold no relevance in such circumstances. There exists, from an investor's point of view, a dire need to incorporate this demarcation in upcoming BITs/FTAs.

Even though India has made a peace offering through the Taxation Laws (Amendment) Bill, 2021 regarding its ill-deliberated taxation measures, much needs to be reconciled from our learnings from the adverse awards to cement a stronger investment treaty regime.

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