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ABOUT THE JOURNAL

Indian Review of International Arbitration ["**IRIArb**"] is a bi-annual publication of Maharashtra National Law University, Mumbai's Centre for Arbitration and Research. IRIArb accepts submissions on a rolling basis, and follows a double-blind peer review process. IRIArb is edited by professionals, is an open access journal, and is available for free of cost at www.iriarb.com. For any queries or feedback, you may write to the editors at iriarb@mnlumumbai.edu.in.

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AIMS AND SCOPE OF THE JOURNAL

IRIArb focuses on research in both academic and practical aspects of international commercial and investment arbitration and other connected areas of law. With the aim to provide for a balance between research on contemporary developments, and analysis of long-standing issues in international arbitration, IRIArb is dedicated to being a catalyst towards the progress of international arbitration through the publication of reliable and useful literature in arbitration. Creating a platform to facilitate dialogues among stakeholders, ranging from contributors from the highest legal foras to current law students from different legal, linguistic and cultural backgrounds, IRIArb encourages previously unpublished papers that caters to developing an educated colloquy – that is contemporary, recent or novel.

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EDITORIAL

IRIArb remains steadfastly dedicated to influencing contemporary discussions in the field of international arbitration. This issue of IRIArb is dedicated to Mr. Fali Nariman.

ARBITRATION IN INDIA

As India solidifies its position as a significant participant in the global arbitration discourse, arbitration law and practice in India has seen its fair share of activities leading up to this issue. In June 2023, the Ministry of Law and Justice constituted an Expert Committee to Examine the Working of the Arbitration Law and Recommend Reforms in the Arbitration and Conciliation Act 1996, headed by Dr. T.K. Vishwanathan, Former Secretary, Department of Legal Affairs. The long-awaited report was released in March 2024, and it has suggested numerous changes to the act, to make arbitration more efficient, flexible and commercially viable.[1]

First, one of the most prominent recommendations, intentioned to restore the expediency of the arbitration process, is to introduce a mandatory timeline of 60 days for reference by the referral court under Section 8 of the Arbitration and Conciliation Act, 1996 ("Act"). Similar deadlines have been suggested for commencement of arbitration after application for interim relief under Section 9 (30 days), appointment of the arbitral tribunal by the court if parties do not appoint a tribunal (15 days), completion of pleadings (6 months) and time provided to make an appeal on an award (60 days). These deadlines, if implemented, would ensure the completion of the arbitration process within a reasonable period.

To compare these with other prominent arbitration regimes, the UK arbitration Act, 1996 ('UK Act')[2] and the Singapore Arbitration Act, 2001 ('Singapore Act')[3] provides clear time limits for the time provided to make an appeal on an award (28 days)[4]. The Federal Arbitration Act. 1947 ('US Act')[5] mandates that the award be made within 30 days of the final hearing,[6] and challenge to be made within 3 months.[7] Thus, the impact of this recommendation will be vital in bringing arbitration in India to the level of efficiency of arbitration worldwide. Further, it is particularly important in the Indian context, where excessive court interference has led to significant delay.

[1] Report of the Expert Committee to Examine the Working of the Arbitration Law and Recommend Reforms in the Arbitration and Conciliation Act 1996 to make it alternative in the letter and spirit. (March, 2024).
[2] Arbitration Act 1996 (c. 23), United Kingdom.
[3] Arbitration Act, 2001, Ed. 2020, Republic of Singapore.
[4] Arbitration Act, 2001, § 50.
[5] Federal Arbitration Act, 1947, ch.392, §1, 61 Stat. 669, United States of America.
[6] Federal Arbitration Act, 1947, 5 U.S. Code § 579.
[7] Federal Arbitration Act, 1947, 9 U.S. Code § 12.

Second, an amendment has been suggested to Section 11 of the Act to make any clause prescribing unilateral appointment of an arbitrator *void ab initio*. This suggestion aims to ensure greater equality in the arbitration process by restoring the equal power of appointment to each party and militate against attempts by parties with greater bargaining power to dilute on the neutrality of the tribunal. This furthers the stance taken by the Supreme Court in the *Perkins Eastman*[8] and other more recent judgments.[9] The suggestion recognises that this provision may be waived if both parties consent to it in a written agreement after the dispute has arisen. The legality of unilateral appointment brings up a complex struggle between unconscionability and party autonomy.[10] Party autonomy is a cornerstone of arbitration; however, no justice system can abide by unconscionable agreements where one party is oppressed by another. By disallowing unilateral appointment clauses, the recommendation will protect parties with lesser bargaining power from being strong-armed into unjust contracts, yet the waiver will uphold party autonomy and allow parties to enforce unilateral appointment clauses. Thus, the recommendation will be instrumental in making India pro-arbitration in an equitable manner.

Third, the report has suggested the introduction of a new section– 12A, with the aim of imposing the duty of impartiality and neutrality on arbitral institutions as well. This would require arbitral institutions to maintain transparency in ownership and management, ensure fair arbitrator appointments, monitor arbitration timelines, and publish a code of ethics for arbitrators to strictly adhere to. Currently, no domestic arbitration legislation or arbitral institutional rules deal with the neutrality of the arbitral institution and its employees. Even the IBA Guidelines on Conflict of Interest in International Arbitration do not deal with conflict arising within arbitral institutions. However, there is one notable exception: the Russian Arbitration Center (RAC).[11] It deals with employees acting as tribunal assistants, employees involved with case management activities and employees involved in other administrative functions and any conflict of interest that may arise in such instances.[12] It lays down a clear requirement for disclosing and resolving any potential conflict of interest. With the increasing popularity of institutional arbitration, this recommendation will be vital in bridging the legislative gap in conflict of interest by ensuring institutional neutrality and safeguarding arbitration proceedings from bias. However, it can be improved by specifically

[8] Perkins Eastman Architects DPC & Anr. v HSCC (India) Ltd 2019 SCC Online SC 1517
[9] Haryana Space Application Centre v. Pan India Consultants (P) Ltd., (2021) 3 SCC 103; Jaipur Zila Dugdh Utpadak Sahkari Sangh Ltd. v. Ajay Sales & Suppliers, 2021 SCC OnLine SC 730; and Ellora Paper Mills Ltd. v. State of M.P., (2022) 3 SCC 1.
[10] Himanshu Raghuwanshi and Krishnanunni, *Unilateral Arbitrator Appointments in the US – A tussle between 'Unconscionability' & 'Party Autonomy*, AMERICAN REVIEW OF INTERNATIONAL ARBITRATION *(Feb 21, 2021).*
[11] Arbitration Rules 2021, Russian Arbitration Center, Russian Institute of Modern Arbitration.
[12] Arbitration Rules 2021, Internal Rules of the RAC, Article 7.

mentioning the independence and impartiality of the administration or employees in arbitral institutions, as the RAC does.

Fourth, the report has sought to codify the concept of emergency arbitration in India, first recognised in Amazon.com NV Investment Holdings LLC v. Future Retail Limited and Ors.,[13] in the form of Section 12B. In emergency arbitration, a party can apply for urgent interim relief before an arbitral tribunal is formally constituted. For this purpose, a separate emergency arbitrator will be promptly appointed. This concept is not too new to the international arbitration arena and is codified in the rules of various institutions such as SIAC,[14] LCIA,[15] SCC,[16] HKIAC,[17] ICDR/AAA,[18] etc. An oft debated question with regards to an emergency awards is whether it qualifies as an award. Some courts have accepted the argument that it is not a final determination of issues and, hence, cannot be called an award.[19] Others have accepted the argument that it is final and binding for the purpose of maintaining status quo and that it pre-empts any law that limits its enforceability, so it does count as an award.[20] The recommendation resolves this conflict by concluding that the emergency award will be enforceable as if it were an interim order under Section 17(2) of the Arbitration and Conciliation Act, 1996.

Another issue is regarding the enforceability of emergency awards from foreign-seated arbitrations. Currently, in India, emergency awards from foreign-seated arbitrations would not be enforceable, and Amazon v. Future Retail did not comment on this. This gap is left empty by the recommendation as it does not deal with the validity or enforceability of emergency awards from foreign-seated arbitrations.

Fifth, it attempts to codify a concept that is yet uncodified but broadly accepted by Indian courts, i.e., third-party funding in the form of Section 18A. A third-party funder provides financial support to assist individuals or commercial entities in pursuing or defending themselves in arbitration proceedings. This practice is growing increasingly popular in India. In Bar Council of India v. A.K. Balaji,[21] the Supreme Court confirmed that there is no bar on third-party funding in India. This

[13] 2021 SCC OnLine SC 557.
[14] Arbitration Rules of the Singapore International Arbitration Centre SIAC Rules (6th Edition, 1 August 2016), Schedule 1.
[15] London Court of International Arbitration, Arbitration Rules, 2020, art 9B.
[16] Stockholm Chamber of Commerce Rules, 2010, Expedited Rules and Appendix II.
[17] Hong Kong International Arbitration Centre Administered Arbitration Rules, 2008, art. 38.
[18] International Centre for Dispute Resolution of the American Arbitration Association Rules (2006), art. 37.1.
[19] Yahoo! Inc. v. Microsoft Corporation, United States District Court, Southern District of New York, 13 CV 7237, October 21, 2013.
[20] Chinmax Medical Systems Inc., v. Alere San Diego, Inc., Southern District of California, Case No. 10cv2467 WQH (NLS), May 27, 2011.
[21] (2018) 5 SCC 379.

recommendation attempts to codify this concept and add safeguards to prevent misuse by stating that the identity of the third-party funder must be disclosed to the tribunal. However, regarding third-party funding, there is another issue regarding whether the third-party funder would have to bear the costs if an adverse award is received. In Tomorrow Sales Agency Private Limited v. SBS Holdings, Inc. and Ors.,[22] the court held that the funder would not have to bear costs, distinguishing itself from the position in English law. However, this issue has not been dealt with at all in the recommendation. A related and further question of law as to whether a third-party funder is to be treated as a non-signatory party to the proceeding has also not been settled. Thus, the recommendation needs to be more elaborate to deal with all the issues of third-party funding.

Sixth, it suggests various amendments to make virtual mediation and arbitration compatible with the current regime. It suggests conducting small and medium-value claims arbitration virtually unless otherwise agreed by the parties. This recommendation has a twofold benefit, firstly it recognises the need for a simpler procedure for lower value claims and mandates the tribunal to follow a fast-track procedure for the same. Secondly, it makes the arbitration regime more accessible to individuals and smaller companies as they would be less inconvenienced by virtual proceedings.

These are welcome changes to the Arbitration Act and, if accepted by the legislature, would be able to significantly increase the efficiency of the Indian arbitration regime. However, it is not without its faults and gaps, which must be remedied.

ARBITRATION IN THE UNITED KINGDOM

There appears to be an increasing trend towards modifying the domestic arbitration regime in India and the United Kingdom. A bill amending the UK Arbitration Act, 1996, has been amended in March 2024.[23] The bill first clarifies its stance on the law governing the arbitration agreement, which is the law of the seat, if not agreed upon by the parties. This is a necessary clarification as there was extreme confusion on this matter around the world, where some courts decided on the law of the seat,[24] and other courts preferred the law of the matrix contract.[25] It also upholds an important principle of arbitration, i.e., the Doctrine of Separability, as the law of the matrix contract would not be considered in deciding the law of the arbitration agreement.

[22] 2023 SCC OnLine Del 3191.
[23] Arbitration Bill, HL Bill 59, 58-4 (2024).
[24] FirstLink Investments Corp Ltd. v. GT Payment Pte Ltd., 5 WLUK 446 (2014); Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc., (2012) 9 SCC 648*; Kabab-Ji (Lebanon) v. Kout Food Group (Kuwait),* Court of Appeal Paris, Case No. 17/22943 (2020).
[25] BCY v. BCZ SGHC 249 (2016); Enka Insaat Ve Sanayi A.S. v. OOO Insurance Company Chubb, UKHC 38 (2020); Sulamerica CIA Nacional De Seguros SA and Ors. v. Enesa Engenharia SA and Ors., EWCA Civ 638 (Comm) (2012).

The Act also addresses the issue of immunity of arbitrators. It limits the circumstances under which an arbitrator can be ordered to pay costs in the proceedings for their removal. Additionally, it specifies that an arbitrator's resignation does not automatically incur liability unless shown to be unreasonable. These provisions provide safeguards for arbitrators while still ensuring accountability. This provision adds specificity to the issue of immunity that has yet to be incorporated in other arbitration regimes around the world.

In terms of jurisdiction, the Act specifies that once a tribunal has ruled on a preliminary jurisdictional point, a court application on the same question should not be considered further. This is of particular importance for two reasons. Firstly, it ensures that the arbitral tribunal's competence in deciding jurisdiction is upheld. Secondly, it ensures that arbitration is not hindered at an initial stage and is allowed to proceed efficiently. This streamlines the process and avoids duplication of efforts between the tribunal and the court. It upholds one of the cornerstones of arbitration, i.e., minimal court intervention.

INDIAN ARBITRATION JUDGMENTS

The initial six months of 2024 have witnessed notable judgements in the realm of international arbitration.

NBCC (India) Limited v. Zillion Infraprojects Pvt. Ltd.

In the case NBCC (India) Limited v. Zillion Infraprojects Pvt. Ltd.,[26] the NBC appealed the judgment of the High Court of Delhi, contesting the appointment of an arbitrator under Section 11(6) of the Arbitration & Conciliation Act 1996. The dispute arose from a construction contract with Zillion Infraprojects Pvt. Ltd. NBCC argued that the incorporation of an arbitration clause from a prior contract, i.e., a tender letter between the parties, is invalid as the parties have explicitly decided the dispute resolution method for this contract in the Letter of Intent. The Supreme Court ruled that general references do not automatically incorporate arbitration clauses from prior contracts despite being between the same two parties, particularly when specific clauses in the contract prescribe a different dispute resolution mechanism.

Gujarat Composite Ltd. v. A. Infrastructure Ltd. & Ors.

[26] NBCC (India) Ltd. v. Zillion Infraprojects (P) Ltd., 2024 SCC OnLine SC 323.

In Gujarat Composite Ltd. v. A. Infrastructure Ltd. & Ors.,[27] Gujarat Composite Ltd entered into license agreements with A. Infrastructure Ltd, allowing the latter to operate manufacturing plants. Later, a supplemental agreement outlined financial advancements and allowed A. Infrastructure Ltd. to mortgage the production units. A tripartite agreement involving the Bank of Baroda was also signed. Disputes arose when A. Infrastructure Ltd requested an extension of the license agreement, which Gujarat Composite Ltd rejected due to financial constraints. A legal battle ensued, with Gujarat Composite Ltd seeking arbitration, while A. Infrastructure Ltd contested the arbitrability of the dispute, leading to conflicting decisions by the Gujarat High Court and the Ahmedabad Commercial Court.

The Supreme Court dismissed Gujarat Composite Ltd.'s appeal, affirming the lower courts' decisions. It clarified that arbitration can only be compelled if the dispute falls within the scope of the arbitration agreement. Since the dispute involved parties and transactions beyond those covered by the original license agreement, the Court ruled against mandating arbitration. Additionally, it emphasized that an arbitration clause in agreements related to the dispute, such as the original license agreement, doesn't automatically extend arbitration to the subject matter. Therefore, the Commercial Court's denial of Gujarat Composite Ltd.'s application under Section 8 of the Arbitration Act was upheld.

S.V. Samudram v. The State of Karnataka

In the case of S.V. Samudram v. The State of Karnataka,[28] the Supreme Court was presented with the issue of whether the High Court was justified in confirming an order that modified an arbitral award by reducing the awarded amount. This stemmed from a contractual agreement of 1990 between S.V. Samudram, a civil engineering contractor, and the Karnataka State Public Works Department for constructing an office and residence for the Chief Conservator of Forests at Sirsi. Delays and disputes led to arbitration, where an award favoured the applicant. However, subsequent legal challenges sought to modify this award, questioning the High Court's confirmation under Sections 34 & 37 of the Arbitration & Conciliation Act, 1996.

The Supreme Court reaffirmed that courts lack jurisdiction to modify arbitral awards under Section 34 and that any such modification exceeds legal bounds. It underscored the necessity of arbitration awards being final and binding, thus emphasizing the limited supervisory role of courts in arbitration.

[27] Gujarat Composite Ltd v. A infrastructure Ltd & Ors., 2023 SC 384.
[28] S.V. Samudram v. State of Karnataka, (2024) 3 SCC 623.

This case highlights the principle of minimal judicial intervention in arbitration and reiterates the sanctity of arbitral awards.

Delhi Metro Rail Corporation Ltd. v. Delhi Airport Metro Express Pvt. Ltd.

In Delhi Metro Rail Corporation Ltd. v. Delhi Airport Metro Express Pvt. Ltd.,[29] a three-judge bench of the Supreme Court allowed a curative petition against the judgement by a two-judge bench of the same court. The court set aside the judgement in question by applying the standard of 'grave miscarriage of justice' and affirmed the Divisional Bench judgment of the High Court, which partly set aside the arbitral award due to patent illegality under §34(2A). This judgement by the Supreme Court may appear against the goal of an arbitration-friendly environment as the SC, while allowing the curative petition, opens a possibility of a fifth stage of intervention by courts in an arbitral award and also partly sets aside the arbitral award. However, the SC sounded significant caution to the exercise of curative petitions and the narrow scope of judicial review of arbitral awards and held that such petitions can only be allowed in exceptional cases.

This edition of IRIArb starts with the memory and legacy of Mr. Fali S. Nariman in the field of Arbitration and then moves on to discuss a wide range of topics from the field of International Arbitration.

Sarosh Zaiwalla in his piece, *"A Life Dedicated to Justice: Remembering Fali Nariman"* highlights his long-standing association with Fali Nariman, dating back to their childhood in Bombay. Zaiwalla recounts working with Nariman on various cases, emphasizing their shared belief that the law should serve justice. One notable case involved reclaiming a company from a dishonest employee using a clever interpretation of the Indian Benami Act. Rooted in his Zoroastrian faith, Nariman's integrity and commitment to fairness were unwavering. His dedication extended to international arbitration, where he served as Vice-Chairman of the ICC Court. Nariman's legacy continues to inspire the pursuit of justice.

In "*Mastering the Art of Arbitration: Exploring the Legacy of Mr. Fali S. Nariman,"* Sudhir Mishra, Petal Chandhok, and Rupali Gupta celebrate the distinguished career of Fali S. Nariman, highlighting his profound impact on arbitration. Nariman's exceptional advocacy skills transcended national boundaries, significantly promoting arbitration as a reliable and efficient dispute resolution method. The article discusses his roles in prominent international arbitration bodies, such as Vice-Chairman of the ICC International Court of Arbitration and President of the ICCA, and his advocacy for India

[29] DMRC v. Delhi Airport Metro Express (P) Ltd., 2024 SCC OnLine SC 522.

as a hub for international arbitration. It also reviews five notable arbitration cases handled by Nariman, illustrating his impact on arbitration policies at both national and international levels.

Manohar Samal in his article titled *"Addressing Challenges in the Enforcement of International Arbitral Awards rendered in Smart Contract Disputes on the Blockchain"* discusses the enforceability issues of smart contracts under arbitration law. The article examines the requirement of the New York Convention for arbitration agreements to be in writing and the challenges posed by purely coded smart contracts, which may not qualify as such. It also highlights the difficulties in meeting stamping & registration requirements and furnishing authenticated copies for enforcement. The article delves into the inadequacies of the juror voting system in blockchain arbitration. Samal proposes several recommendations to tackle these issues and emphasizes the need for collaborative efforts from all stakeholders to bridge existing gaps until substantial legal advancements are made, ensuring better enforceability of awards rendered in smart contract disputes on the blockchain.

Badrinath Srinivasan in his article titled *"Dealing with LIBOR Cessation in International Arbitration: Some Suggestions"* discusses the challenges posed by the discontinuation of the London Inter-Bank Offered Rate (LIBOR), a widely used interest rate benchmark, for ongoing and future arbitration proceedings. This article also explores how international arbitral tribunals and courts have dealt with the cessation of LIBOR, as several long-term agreements and investment treaties refer to LIBOR as the applicable rate. It suggests ways for parties and tribunals to address this issue, as an award on interest can contribute substantially to the overall damages award. The author, in the end, gives an overview of how LIBOR cessation has been handled by adjudicatory forums, to assist courts, arbitral tribunals, counsel, and parties in India and elsewhere in dealing with the discontinuation of LIBOR where the underlying contracts or treaties index the interest rate to LIBOR.

Rajesh Kapoor's article titled *"The Idea of A-National Arbitral Award and an Autonomous Arbitral Order - A Critical Analysis"* explores the concept of international arbitration's independence through case reviews. The Norsolor Case involved a dispute between a Turkish company, Pabalk, and a French company, Norsolor, over an agency agreement termination. Arbitration in Vienna under ICC rules applied lex mercatoria, with Norsolor seeking annulment and Pabalk seeking enforcement in Paris. The Vienna Court of Appeal partially annulled the award, and the Paris Court of Appeal refused enforcement of the annulled part. However, the French Supreme Court stressed that French courts should consider enforcement under other laws, highlighting international arbitration's autonomy from the seat's legal order. The Hilmarton Case reinforced this stance. A dispute between Hilmarton, an English company, and OTV, a French company, over a consultancy agreement led to arbitration in

Geneva, resulting in an award against Hilmarton. The French court upheld the award despite its annulment in Switzerland, reiterating the autonomous nature of international arbitration.

Vanya Chhabra and Intisar Aslam in their article titled *"Judicial Guardian to the Rescue! Preventing the Abuse of Termination Proceedings in Arbitration"* examine the intricacies of arbitration proceedings under the Indian Arbitration and Conciliation Act, 1996, focusing on the termination of proceedings through final awards and arbitral tribunal orders. It argues for the inclusion of partial awards within the scope of final awards to prevent the abuse of arbitration termination processes. The article also discusses the implications of unilateral claim withdrawal, referencing the Fortminster award under UNCITRAL Arbitration Rules, which emphasizes preventing claimants from unilaterally ending arbitration without considering respondent's costs. It highlights the necessity of judicial intervention under Article 227 of the Indian Constitution to address the lack of remedies for challenging termination orders, advocating for a balance between minimal judicial interference and safeguarding constitutional rights in arbitration.

Darren Low Jun Jie's article titled *"Issue Estoppel in International Commercial Arbitration and the Effect of Foreign Judgments on Enforcement Courts: Republic of India v Deutsche Telekom"* discusses the Singapore Court of Appeal's decision in *Republic of India v Deutsche Telekom*, focusing on whether a foreign judgment on the validity of an arbitral award can create an issue estoppel. This principle prevents re-litigation of the same issues. The article explores the court's endorsement of the "Primacy Principle," which gives precedence to decisions by the courts at the seat of arbitration. The decision affirms that Singapore law recognizes issue estoppel from foreign judgments, detailing the conditions for its application. The court's ruling addresses the ongoing debate between the territorialist and delocalization theories in international arbitration. Ultimately, the decision supports the use of issue estoppel in enforcement proceedings to ensure finality in litigation and limit cross-border disputes, influencing the recognition and enforcement of foreign judgments in international commercial arbitration.

Adhiraj Lath's article titled *"Red Eagle Vies for Gold: The Tribunal in Red Eagle v. Colombia Finds Colombia not Liable for Treaty Breach While Diverging From the Tribunal in Eco Oro v. Colombia"* examines the ICSID Tribunal's decision in *Red Eagle v. Colombia,* where the Tribunal dismissed all claims by Red Eagle Exploration under the Canada-Colombia FTA, finding no breach by Colombia. The Tribunal determined that environmental exceptions could only be invoked as a defence on merits rather than as a jurisdictional objection. Lath contrasts this with *Eco Oro v. Colombia* highlighting the substantial divergence in how similar claims under the same FTA were adjudicated. In *Red Eagle*,

the Tribunal concluded that legitimate expectations do not fall within the Minimum Standard of Treatment (MST), whereas *Eco Oro* recognized them, introducing a novel two-pronged approach to MST. Lath critically analyses these inconsistencies, emphasizing the potential for fragmented treaty interpretations and their significant implications for international investment law.

A LIFE DEDICATED TO JUSTICE:
REMEMBERING FALI NARIMAN BY SAROSH ZAIWALLA

My association with Fali Nariman began long before our paths crossed professionally and I had known Fali since our childhood days in Bombay. Years later, when I qualified as a solicitor in the UK, I had several opportunities to work alongside Fali in the pursuit of justice. Fali and I had both shared the same principle of "law is for justice, and not justice for law." In simpler terms, legal interpretations should serve a higher purpose – achieving a fair outcome for all parties involved.

One such case I recall involved Oceanics UK, a British company operating in India through its subsidiary, Oceanics India. Legal restrictions at the time prevented foreigners from being a shareholder and/or directing Indian companies. An employee working with the Indian subsidiary was shown as the legal owner and director of the company on paper. This individual, however, was dishonest, claiming ownership of the company with assets valued at £4 million. The Indian Benami Act seemingly barred Oceanics UK from taking legal action in Indian courts, so I consulted Fali who recognised that the Benami Act did not allow ownership of the company to be changed. Thereafter, Fali drafted a legal opinion with which I, along with my client, went along and took physical possession of the company. Presented with a united front and the undeniable truth, the dishonest employee relented and moved out of the company.

This is just one example which illustrates Fali's unwavering commitment to honesty. Deeply rooted in his Zoroastrian faith, Fali belonged to the Priest Sect of the Parsi community, which emphasises good thoughts, words, and deeds. Fali would never advocate for dishonesty, especially before the courts. His legal strategies were crafted not just within the confines of the law, but with the ultimate goal of achieving a fair resolution.

Our paths crossed again on the international stage. I had been serving as a member of the International Court of Arbitration of ICC Paris for eight years, representing India, when the ICC Court of Arbitration appointed Fali as Vice-Chairman. Despite his busy legal practice in India, Fali diligently travelled to Paris for court sessions, demonstrating his dedication to international arbitration. I always found Fali to be well prepared, ensuring well-drafted awards before they went to the ICC Court for approval. Experiencing judges from diverse legal backgrounds come together with their difference jurisprudence to revise awards before publication with the paramount objective of justice, was a truly unique experience.

Fali Nariman was more than a legal luminary; he was a true believer of justice. His legacy will continue to inspire generations of lawyers to uphold the true spirit of the law – a tool to achieve fairness and justice.

MASTERING THE ART OF ARBITRATION: EXPLORING THE LEGACY OF MR. FALI S. NARIMAN

Sudhir Mishra, Petal Chandhok and Rupali Gupta*

INTRODUCTION

Mr. Fali S. Nariman, an internationally acclaimed jurist, held a prestigious and prominent place in the Indian legal history. His exceptional advocacy skills extended beyond the boundary of the nations as evidenced by the illustrious list of matters within the Indian legal system and international arena. His contribution especially in the sphere of Arbitration has been significant, from promoting it as an efficient and efficacious mode of dispute resolution in India and internationally as well as in the development of the law governing arbitration.

The presence of Mr. Nariman in the International Court of Arbitration as Vice-Chairman, of the International Chamber of Commerce (ICC) Paris,[30] his long-standing association with International Council for Commercial Arbitration (ICCA) as the President and Honorary President[31], and the Chartered Institute of Arbitrators (CIArb) amongst many other has not only made the world identify the proficiency of an Indian jurist but has also brought India in the forefront of discussion as a prospective destination for international arbitration. He had vigorously advocated the case of India as a potential destination for international arbitration across the spectrum and also the reliability of the Indian arbitration mechanism when dealing with India.[32]

He had actively advocated for the use of international arbitration in resolving cross border disputes, which stems from his recognition of its potential to provide parties with a neutral, efficient, and enforceable mechanism. He has through his writings, speeches, and public engagements, emphasized the advantages of arbitration over traditional litigation, particularly in the context of cross-border disputes.

He has been involved in several landmark arbitration cases in India and internationally. He has served as an arbitrator in numerous disputes and has also represented parties in arbitration proceedings. His deep understanding of arbitration law and practice has made him a sought-after figure in the field, in

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[30] Bar & Bench, https://barindia.in/patron-members/fali-s-nariman.pdf

[31] International Council for Commercial Arbitration, https://www.arbitration-icca.org/fali-nariman-1929-2024

[32] 41 Geo. Wash. Int'l L. Rev. 381 (2009-2010) India and International Arbitration: The Dabhol Experience, https://heinonline.org/HOL/LandingPage?handle=hein.journals/gwilr41&div=16&id=&page= ; https://digitalcommons.pepperdine.edu/cgi/viewcontent.cgi?article=1270&context=drlj

India and internationally. By way of this article, we shall review five notable international arbitration cases and national cases of international significance handled by him, serving in various roles and capacities. It illuminates his contribution in shaping arbitration policies both at national and international levels and forging connections between the two realms of arbitration, which has fascinated and captivated legal practitioners.

REVIEW OF THE CASES WHERE MR. FALI S. NARIMAN WAS A COUNSEL OR AN ARBITRATOR

A. Chloro Controls (India) P. Ltd. V. Severn Trent Water Purification Inc. and others[33]

The present case is an ideal example of invocation of arbitral reference in multiple, multi-party agreements with intrinsically interlinked cause of action, more so, where the performance of ancillary agreements is substantially dependent upon the effective execution of the principal agreement.

The Hon'ble Supreme Court of India in the instant case answers the following questions:

(i) Ambit and scope of Section 45 of the Arbitration and Conciliation Act, 1996 ("**Arbitration Act**").

(ii) In a case where multiple agreements are signed between different parties and where some contain an arbitration clause and others do not, and further the parties are not identically common in proceedings before the Court (in a suit) and the arbitration agreement, a reference of disputes as a whole or in part can be made to the arbitral tribunal, more particularly, where the parties to an action are claiming under or through a party to the arbitration agreement?

Section 45 of the Arbitration and Conciliation Act, 1996 deals with the power of judicial authority to refer parties to arbitration, which forms part of Chapter I, Part II dealing with enforcement of certain foreign awards in accordance with the New York Convention, annexed as Schedule I to the Arbitration Act

Mr. Fali S Nariman, Ld. Senior Advocate, arguing on behalf of the Appellant in the matter, highlighted the following legal averment and arguments:

[33] Cholor Controls (India) P. Ltd. v. Severn Trent Water Purification Inc. and others (2013) 1 SCC 641 : 2012 SCC OnLine SC 809.

(i) Similarities between Section 45 of the Arbitration Act and Article V(II) of the New York Convention.

(ii) The Arbitration Act is an amending and consolidating Act being an enactment setting out in one statute the law relating to arbitration, international commercial arbitration and enforcement of foreign arbitral awards.

(iii) On legal position and merits of the case, all parties involved in court proceedings must also be parties to the arbitration agreement or should be any person claiming through or under such party.

(iv) If the expression 'parties' is not construed to mean all parties to the action and the agreement, it will result in multiplicity of proceedings, and frustration of the intended one-stop remedy and may cause further mischief.

(v) After coming into force of the Arbitration Act, it is no longer possible to contend that some parties and/or some matters in a suit can be referred to arbitration leaving the rest to be decided by another forum.

(vi) Bifurcation of matters/cause of action and parties is not permissible under the provisions of the Arbitration Act. Such procedure is unknown to the law of arbitration in India.

(vii) The party in order to solve dispute from arbitration should have a clear intention at the time of the contract, to submit any dispute or differences as that may arise, to arbitration and then alone the reference contemplated under section 45 can be enforced.

The Hon'ble Supreme Court in the instant case held that :

(i) Section 45 is a provision falling under Chapter I of Part II of the Arbitration Act which is a self-contained Code. Section 45 of the Arbitration Act suggests that unless the Court finds that an agreement is null and void, inoperative and incapable of being performed, it shall refer the parties to arbitration.

(ii) The determination of fundamental issues as contemplated under Section 45 of the Arbitration Act, should be done by the judicial forum at the beginning of the proceedings itself such that the said issue attains finality, which is not only appropriate but is also the legislative intent.

(iii) Distinguished the provisions of Section 8 of the Arbitration Act with Section 45 of the Arbitration Act, and held that the ambit of Section 45 of the Arbitration Act is wider in its impact and application.

(iv) The expression 'person claiming through or under' would mean and take within its ambit multiple and multi-party agreements, though in exceptional case. Even non-signatory parties to some of the agreements can pray and be referred to arbitration provided they satisfy the pre-requisites under Sections 44 and 45 read with Schedule I.

(v) Reference of non-signatory parties is neither unknown to arbitration jurisprudence nor is it impermissible.

(vi) Upheld the doctrine of Group of Companies Doctrine and held that in the cases of group companies or where various agreements constitute a composite transaction like Mother agreement and all other agreements being ancillary to and for effective and complete implementation of the Mother Agreement, the court may have to make reference to arbitration even of the disputes existing between signatory or even non-signatory parties. However, the discretion of the Court has to be exercised in exceptional, limiting, befitting and cases of necessity and very cautiously.

(vii) Where different agreements between the parties provide for alternative remedies, it does not necessarily mean that the other remedy or jurisdiction stands ousted.

(viii) Where the parties to such composite transaction provide for different alternative forums, including arbitration, it has to be taken that the real intention of the parties was to give effect to the purpose of agreement and refer the entire subject matter to arbitration and not to frustrate the remedy in law.

The case underscored the pro-arbitration stance of Indian law. The Hon'ble Supreme Court emphasized the importance of upholding arbitration agreements and adopting a liberal approach to their interpretation and enforcement. By doing so, the Hon'ble Supreme Court reinforced the role of arbitration as an effective alternative dispute resolution mechanism and signalled a favourable environment for arbitration in India.

By providing clarity on arbitration procedures and the enforceability of international arbitration agreements, the Chloro Controls case enhances certainty and predictability in Indian arbitration law. Parties involved in arbitration can rely on the principles established in this case to navigate the arbitration process with confidence, knowing that the courts are inclined to uphold arbitration agreements and respect the autonomy of arbitral tribunals.

B. Thysen Stahlunion GMBH versus The Steel Authority of India[34]

The instant case arises out of the enforcement of the award dated 24.09.1997, as per the Arbitration and Conciliation Act, 1996 stemming from the agreement containing an arbitration clause for settlement of disputes in accordance with the rules of Conciliation and Arbitration of the International Chambers of Commerce (ICC) Paris by a sole Arbitrator appointment by the Chairman of the Arbitral Tribunal of the Court of Arbitration of ICC at New Delhi. The agreement also provided that the contract shall be "*governed and construed in accordance with the laws of India for the time being in force."*

The main controversy in the present case arose because of the timeline of the commencement of the arbitration proceedings and the enforcement of the Arbitration and Conciliation Act, 1996. The moot contention for determination by the Hon'ble Court was whether the award dated 24.08.1997 and execution relating thereto would be governed by the Arbitration Act, 1940 or under the Arbitration and Conciliation Act, 1996. The Hon'ble Court also went to decide if the execution proceedings are proceedings in relation to arbitration proceedings or are totally independent of the arbitral proceedings.

While determining the dispute, it was considered imperative to firstly determine when did the arbitration proceeding commence in the instant case. The Hon'ble Court after due deliberation and consideration, determined that since the Arbitration is conducted as per the International Chamber of Commerce (ICC) rules, the date of commencement of dispute would be considered to be the date on which the request is received by the Secretariat of the Court as per the ICC rules.

Further, to answer the second question, if the execution proceedings are proceedings in relation to arbitration proceedings or are totally independent of the arbitral proceedings, the Hon'ble Court determined that execution proceedings are just the follow up stage of the arbitration proceedings and thus shall be governed by the law which governed the arbitration proceeding. Thus in the present case, since the arbitration proceedings commenced under the Arbitration Act, 1940, therefore all the proceedings relating to the enforcement of the award shall also be governed by the 1940 Act.

[34] Thysen Stahlunion GMBH v. The Steel Authority of India 1998 SCC OnLine Del 617 : (1999) 48 DRJ 210.

Mr. Fali S. Nariman, the Ld. Senior Advocate arguing on behalf of the Petitioner in the case, argued and observed the following while commending the Arbitration and Conciliation Act of 1996, and emphasizing its intricacies and nuances.

(i) In reference to the Arbitration and Conciliation Act, 1996 he mentioned that the purpose of the Arbitration and Conciliation Act, 1996 ("**1996 Act**") is to consolidate and amend the law relating to:

a. the domestic arbitration,
b. international commercial arbitration,
c. enforcement of foreign arbitral awards, and
d. the conciliation, and
e. for matters connected therewith or incidental thereto.

As such approach should first be found in the 1996 Act itself.

(ii) He further indicated that the United Nation Commission on International Trade Law ("**UNCITRAL**") has adopted a model law on international commercial arbitration in 1985 and the General Assembly of the United Nations has recommended to give due consideration to the said model law, recognising the specific needs of international commercial arbitration practice.

(iii) It was deemed *"to be expedient to make law respecting arbitration and conciliation taking into account the Model Law and Rules".*

(iv) The legislative intend to facilitate the commercial international arbitration and also to expedite the resolution of disputes arising from the international commercial transactions.

(v) The 1996 Act is a code complete in itself and exhaustive.

(vi) The 1996 Act incorporates certain improvements and innovations over the Arbitration Act, 1940 ("**1940 Act**") such as the award in 1940 Act by itself was never taken to be a decree and did not have statutory force, whereas by virtue of Section 35 and 36 of the 1996 Act, the arbitral award becomes final and binding on the parties.

C. Sasan Power Limited Vs. North American Coal Corporation India Private Limited[35]

[35] Sasan Power Limited v. North American Coal Corporation India Private Limited (2016) 10 SCC 813

In this case, the Appellant company and a foreign company entered into an agreement ("**AGREEMENT-I**") for mining and development operations. Under AGREEMENT-I, the foreign company agreed to provide certain consultancy and other onsite services for a mine to be operated by the Appellant in the country. The Appellant, the foreign company and the Respondent/Indian Company and a fully owned subsidiary of the foreign company entered into an agreement ("**AGREEMENT-II**"). By the said agreement, the foreign company purported to assign all its rights and obligations with the consent of the Appellant to the Indian Company. All the three signatories to the AGREEMENT-II agreed that the foreign company was not relieved of its obligations and liabilities. Disputes arose, leading to the termination of AGREEMENT-I by the Respondent and initiation of arbitration. The Appellant however instituted a suit seeking relief against the Respondent, but did not include reference to the AGREEMENT-II in its claims.

Shri Fali Nariman, who represented the appellant in the case, had raised three questions of general importance for the consideration and decision of the Hon'ble Court, which are:

(i) Whether it is permissible under the consolidated Indian law of arbitration (now contained in the Arbitration and Conciliation Act 1996) for two Indian Companies (each incorporated and registered in India) to agree to refer their commercial disputes (that might arise between them) to a binding arbitration, (ad hoc or institutional), with place of arbitration outside India, and with governing law being English law?

(ii) Whether two Indian companies, each of whom have been incorporated and registered in India could in law be said to have "*made an agreement referred to in Section 44*" of the 1996 Act, so as to confer jurisdiction and authority on the competent Court to refer the parties to ICC arbitration in London under Section 45 of the Arbitration and Conciliation Act 1996?

(iii) Whether the arbitration agreement in Clause XII was invalid and void for being in breach of Clause (a) of Section 28 of the Indian Contract Act 1872 (not being saved by the Exception Clause), and also void because of the provisions of Section 23 of the Indian Contract Act, 1872, and hence not referable to arbitration Under Section 45 of the Arbitration and Conciliation Act, 1996?"

The abovesaid questions raised by Mr. Nariman, although remained unanswered in the present case, they laid down the foundation for further development of the Arbitration law in India.

The Hon'ble Supreme Court while examining the dispute held that:

(i) The basis of the Appellant's lawsuit rested on a mistaken belief that through Agreement II, the American Company effectively transferred its rights and duties to the Respondent, and that the Respondent assumed the position of the American Company.

(ii) However, since the obligations of the American Company under Agreement I remain unfulfilled and it has not been relieved of these obligations by Agreement II, it is concluded that neither an assignment nor a novation of Agreement I occurred in relation to the Respondent through Agreement II.

(iii) Therefore, on the facts of the case it cannot be asserted that both parties involved in the dispute are Indian, rendering it ineligible for arbitration in a foreign jurisdiction.

(iv) Once the requirement of Section 45 of the 1996 Act, of the agreement being legal, valid, and capable of being performed by the suit, are fulfilled the Court is therefore obliged to refer the parties to arbitration.

D. Dresser Rand S.A Vs. Bindal Agro Chem Ltd and Ors.[36]

The case revolves around whether an arbitration agreement existed between Dresser Rand ("**DR**") and BINDAL, stemming from a series of communications and documents including the General Conditions of Purchase, Revision No.4 dated June 10, 1991, and letters of intent issued by KGK on June 12, 1991.

DR argued that an arbitration agreement existed based on two premises:
1. Clause 27.4.2 of the General Conditions of Purchase constituted an arbitration agreement.
2. The letters of intent, issued by KGK on BINDAL's behalf, implied an arbitration agreement.

However, the Hon'ble Court disagreed with DR's contentions:
1. The General Conditions of Purchase and Revision No.4 were seen as setting the terms for potential future contracts, not constituting agreements themselves.
2. The letters of intent, while indicating BINDAL's intent to purchase machinery from DR, did not contain an arbitration clause nor did they explicitly bind the parties to arbitration.

The Hon'ble Court meticulously analyzed the contractual documents involved, including the General Conditions of Purchase, Revision No.4, and the letters of intent. It rightly emphasized

[36] Dresser Rand S.A. v. Bindal Agro Chem. Ltd. and Ors. (2006) 1 SCC 751: 2006 SCC OnLine SC 74.

that these documents should be interpreted within the context of their purpose and language used.

The Hon'ble Court correctly determined that neither Clause 27.4.2 of the General Conditions of Purchase nor the letters of intent contained explicit arbitration clauses. It highlighted that the General Conditions of Purchase and Revision No.4 were preparatory documents outlining terms for potential future contracts, rather than binding agreements.

The Hon'ble Court appropriately considered the possibility of an agency relationship between KGK and BINDAL. However, it rightly concluded that even if KGK acted as BINDAL's agent, it didn't automatically imply the existence of an arbitration agreement.

The Hon'ble Court astutely analyzed the intent of the parties based on their conduct and correspondence. It correctly observed that the letters of intent were precursors to purchase orders, and their language did not suggest an immediate binding agreement or arbitration clause.

The Hon'ble Court effectively addressed DR's argument regarding BINDAL and KGK's conduct implying acceptance of an arbitration agreement. It aptly emphasized that mere actions or statements indicating a willingness to nominate an arbitrator did not equate to acceptance of an arbitration agreement. Throughout its review, the court consistently applied established legal principles governing contract interpretation, agency relationships, and arbitration agreements. It relied on precedents and legal standards to arrive at its decision.

In conclusion, the Hon'ble Court's decision appears well-founded and legally sound. It appropriately considered all relevant factors, documents, and arguments presented by the parties, ultimately concluding that no arbitration agreement existed between DR and BINDAL/KGK. The dismissal of DR's appeals seems justified based on the court's thorough legal analysis and application of principles.

In this case, Mr. Nariman represented the appellant and in his submission, he mentioned that an agreement, even if not signed by the parties, can be spelt out from correspondence exchanged between the parties which admits of no doubt. He further pointed out that by

agreeing to refer the dispute, the appellant had consented to the arbitrator's jurisdiction, thus forfeiting the right under Section 33 of the Act.

E. Indus Waters Kishenganga Arbitration[37]

The Indus Waters Kishenganga Arbitration was a significant event that contributed to the revival of the Indus Waters Treaty and the arbitration of interstate water disputes. The arbitration arose from a dispute between India and Pakistan regarding the construction of the Kishenganga Hydroelectric Project ("**KHEP**") by India, which Pakistan argued violated the treaty. Mr Fali S. Nariman represented India in this Arbitration proceedings.

The KHEP involved diverting the waters of the Kishenganga River, a tributary of the Indus, for power generation. Pakistan contended that this diversion would affect its own Neelum-Jhelum Hydroelectric Project downstream. India maintained that the project was permissible under the treaty's provisions.

The Indus Waters Kishenganga Arbitration centered on the interpretation and application of the Indus Waters Treaty of 1960, which governs water sharing between India and Pakistan. The dispute arose when India initiated the construction of the Kishenganga Hydroelectric Project in the Indian-administered region of Jammu and Kashmir, intending to divert the waters of the Kishenganga River for power generation.

Pakistan objected to the project, arguing that it violated the treaty by impacting the flow of water downstream, particularly affecting Pakistan's Neelum-Jhelum Hydroelectric Project. India countered that the project fell within the treaty's provisions, allowing India to use the western rivers for non-consumptive purposes such as hydropower generation.

The arbitration proceedings commenced in 2010, following the treaty's dispute resolution mechanism, which involved the appointment of a neutral expert and later a seven-member court of arbitration. The court's task was to interpret the treaty's provisions and determine whether India's actions complied with its obligations under the treaty.

[37] In the matter of the Indus Waters Kishenganga Arbitration before the Court of arbitration constituted in accordance with the Indus Waters Treaty 1960, between the Government of India and the Government of Pakistan signed on 19 September, 1960 between the Islamic Republic of Pakistan and the Republic of India, ON the Interim Measures Application of Pakistan dated June 6, 2011

In its decision issued in 2013, the court upheld India's right to divert water for power generation but imposed restrictions to mitigate the adverse effects on Pakistan's project. These restrictions included ensuring a minimum flow of water into the Neelum River during crucial periods to safeguard Pakistan's hydroelectric facilities.

The arbitration outcome reaffirmed the treaty's role as a legally binding instrument for water management between the two countries. It underscored the significance of international law in resolving interstate water disputes and highlighted the importance of adhering to treaty obligations and engaging in diplomatic dialogue to address shared water challenges.

In conclusion, the Kishenganga Arbitration set a significant legal precedent for addressing intricate water conflicts through arbitration. It played a pivotal role in upholding stability and fostering collaboration in the administration of the Indus River Basin. In essence, this arbitration highlighted the importance of the Indus Waters Treaty in regulating water distribution between India and Pakistan, while showcasing the efficacy of arbitration in resolving inter-state water disputes.

CONCLUSION

Mr. Fali S. Nariman was a great admirer of our constitution and more importantly, he was passionate about civil liberties. His advocacy skills were laced with wit, presence of mind, humour and grace. He knew his craft; he was the one who could modulate his entire arguments as per the bench and the court where was standing. Mr. Nariman practiced law for 74 years and was offered judgeship at High Court at a young age and later at the Supreme Court too. Both the times he had refused. He was one of the finest jurist, who had the duel opportunity of serving our parliament too as a Member of Parliament under Prime Minister Atal Bihari Vajpayee.

He has made profound contributions to both Indian and international arbitration. His expertise and advocacy have significantly shaped the landscape of arbitration in India, as well as globally. Through his extensive legal career, Mr. Nariman has played a key role in advancing arbitration as a preferred method for dispute resolution in India, contributing to the development of arbitration law and jurisprudence in the country.

Internationally, Mr. Nariman's influence extends to his participation in high-profile arbitration cases and his leadership in various arbitration organizations. His nuanced understanding of legal principles and his commitment to upholding the integrity of arbitration have earned him respect and recognition on the international stage.

He never retired and was working till his last day and wrote a landmark book on our constitution which was just released a year back. Ask all the advocates who worked with him either as a junior advocate or briefing counsel, they would affirm that he would be meticulous and expected highest degree of hard work from juniors. He has left this world but as it is said legends never die and his arguments teaching and judgements which benefited from his intellect are still here to guide us.

ADDRESSING CHALLENGES IN THE ENFORCEMENT OF INTERNATIONAL ARBITRAL AWARDS RENDERED IN SMART CONTRACT DISPUTES ON THE BLOCKCHAIN

Manohar Samal*

I. INTRODUCTION

Blockchain technology has been deployed in a multitude of industries and sectors. As a result of such sector-wide applications, several forms of disputes have arisen out of smart contracts in the blockchain. These not only include disputes about errors in the automated execution of the pre-coded standards but also pertain to disputes on the underlying transactions. Arbitration of smart contract disputes in the blockchain has so far, comprised of pure blockchain arbitrations as well as hybrid blockchain arbitrations.[38] In pure blockchain arbitrations, decisions are taken by 'jurors' using the voting system. The Award-holder is awarded with the escrow amount maintained on the blockchain by the parties during the initiation of the dispute.[39] Due to the lack of sufficient opportunity for the parties to present their submissions, the lack of proper discovery of evidence processes and the lack of legal expertise by the jurors rendering a decision based on voting in blockchain arbitrations, preference has been given to hybrid blockchain arbitrations.[40] In hybrid blockchain arbitrations participation of international arbitration institutions, Arbitrators, as well as Courts of the legal seat, has been made possible with the use of 'blockchain oracles'[41] which permit parties to effectively present their submissions, enable Arbitrators to undertake proper discovery of evidence and allows parties to seek interim relief in the Court of the legal seat. However, the Awards passed in both forms of blockchain arbitrations have faced tremendous issues about enforcement due to the lack of recognition of smart contracts in most jurisdictions and the lack of recognition of Awards rendered in the blockchain under the New York Convention creating a multitude of enforceability issues for parties.[42] Using doctrinal research, this paper aims to highlight as well as address the issues faced while enforcing international arbitral awards rendered in smart contract disputes on the blockchain

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[38] Zoe Can Koray, *Blockchain, Smart Contracts and Alternative Dispute Resolution,* GIDE LOYRETTE NOUEL (Apr. 18, 2024, 2:58 PM), https://www.gide.com/en/news/blockchain-smart-contracts-and-alternative-dispute-resolution.

[39] Michael Buchwald, *Smart Contract Dispute Resolution: The Inescapable Flaws of Blockchain- Based Arbitration,* 168 UNIVERSITY OF PENNSYLVANIA LAW REVIEW 1369 (2020).

[40] *Id*.

[41] Chainlink, *Hybrid Smart Contracts,* CHAINLINK (Apr. 18, 2024, 3:05 PM), https://chain.link/education-hub/hybrid-smart-contracts.

[42] Sharath Mulia and Romi Kumari, *Blockchain Arbitration: The Future of Dispute Resolution,* FOX MANDAL SOLICITORS & ADVOCATES (Apr. 18, 2024, 3:08 PM), https://www.foxmandal.in/blockchain-arbitration-the-future-of-dispute-resolution/.

with an intent to formulate best practices that may be opted by parties and counsels that may ensure a more efficacious manner of enforcement of such Arbitration Awards.

II. UNDERSTANDING BLOCKCHAIN ARBITRATION

Smart Contract Disputes on the Blockchain

Considering the fact that transactions on the blockchain are executed with the help of smart contracts, it is necessary to understand how smart contracts function. Smart contracts are contracts between two or more parties which are generally in the form of computer codes that execute in an automated fashion, either one or more portions or the entire contract between such parties.[43] Such automated execution is based upon the fulfilment of pre-determined parameters that have been programmed to such computer codes.[44] The execution of smart contracts takes place on a blockchain network for which gas fees (also referred to as transaction fees) are paid by the parties.[45] Numerous forms of smart contract disputes can arise. These include disputes about the underlying technology such as technical errors resulting in non- execution or ineffective execution,[46] disputes about the underlying transaction such as defective goods or deficient services[47] and disputes about external factors such as a change in law or *force majeure* events that either render the contract impossible to perform, frustrated or render such contract to be illegal in its entirety.[48]

Looking at the fact that smart contracts may, almost always be in coded form and not in natural language form, a new form of arbitration known as 'blockchain arbitration' was introduced by companies that host blockchain platforms and blockchain networks to resolve disputes arising out of smart contracts and this is discussed in the next part of this paper.

Structure of Blockchain Arbitration

Unlike the traditional arbitration process, there are some inherently distinctive elements of blockchain arbitration. The blockchain arbitration process starts with the deposit of cryptocurrencies in an on-

[43] Manohar Samal, *Arbitrability of Smart Contract Disputes in India,* VISUAL LEGAL ANALYTICA (Apr. 18, 2024, 3:32 PM), https://www.indicpacific.com/post/arbitrability-of-smart-contract-disputes-in-india.
[44] *Id*.
[45] LCX Team, *A Short Guide to Smart Contracts and Gas Fees,* LCX (Apr. 18, 2024, 3:44 PM), https://www.lcx.com/a-short-guide-to-smart-contracts-and-gas-fees/.
[46] Harriet Fenleigh and Adam Sanitt, *Arbitrating Smart Contract Disputes,* NORTON ROSE FULLBRIGHT (Apr. 18, 2024, 3:45 PM), https://www.nortonrosefulbright.com/en-gb/knowledge/publications/ea958758/arbitrating-smart-contract-disputes.
[47] Asli Budak and Seher Kose, *Arbitration in the Era of Smart Contracts,* MONDAQ (Apr. 18, 2024, 3:46 PM), https://www.mondaq.com/turkey/fin-tech/841140/arbitration-in-the-era-of-smart-contracts.
[48] Eric Tjong Tjin Tai, *Force Majeure and Excuses in Smart Contracts,* 26 EUROPEAN REVIEW OF PRIVATE LAW (2018).

chain escrow account which will be automatically paid to the Award-holder (winner of the arbitration proceedings).[49] The adjudication in an on-chain arbitration process is conducted by 'jurors'. These jurors volunteer by depositing cryptocurrencies or crypto tokens and are chosen to adjudicate based on a lottery system hosted by the blockchain network.[50] A decision is rendered based on juror voting, post- which the arbitration fees which is deposited by the parties at the beginning of the process itself are distributed amongst the jurors. During the process of blockchain arbitration, the parties do not have the opportunity to present evidence and make arguments unlike the traditional arbitration process but only are permitted to present their arguments in a text box in the initial stages during which they can upload documents, images and other forms of media to substantiate their claims.[51] There is no mechanism for seeking further evidence either by the other party of the dispute or by the jurors.[52] During the entire process of blockchain arbitration, anonymity is maintained since neither the identities of the parties nor of the jurors are disclosed to each other. Some blockchain platforms provide an appeal mechanism whereas some treat the decision rendered by the jurors in the first instance as final and do not permit an appeal mechanism.[53] Once the decision is rendered, the cryptocurrency amount in the escrow account is automatically transferred to the Award-holder's account resulting in automated enforcement. Blockchain arbitrations have so far proved to be useful in disputes having small claims and have proved to be quite challenging for complex disputes, out of which enforcement remains one of the most pressing challenges, intricacies of which are discussed in the next part.

III. ISSUES IN ENFORCEMENT OF ARBITRAL AWARDS RENDERED ON THE BLOCKCHAIN

Challenges in Off-Chain Enforcement

In several instances, a requirement may arise where either absolute enforcement or partial enforcement might be required off-chain (in the real world). This need may arise due to several reasons such as the need for attaching movable as well as immovable property including bank accounts or to enforce the restriction, continuation or specific relief of a particular act.[54] In such instances, there are significant qualms created by blockchain arbitration since on-chain enforcement

[49] *Id.* 2.
[50] Yannick Gabuthy, *Blockchain- Based Dispute Resolution: Insights and Challenges,* 14(3) GAMES 34 (2023).
[51] Wulf Kaal and Craig Calcaterra, *Crypto Transaction Dispute Resolution,* 73(1) THE BUSINESS LAWYER 109 (2017).
[52] *Id*.
[53] *Id.* 2.
[54] Pietro Ortolani, *Chapter 21: Recognition and Enforcement of the Outcome of Blockchain- Based Dispute Resolution,* BLOCKCHAIN AND PRIVATE INTERNATIONAL LAW (2023), https://brill.com/edcollchap-oa/book/9789004514850/BP000030.xml?language=en.

is completely based upon the transfer of cryptocurrencies or crypto assets that are transferred to an escrow account during the initiation of the respective smart contract dispute. This prevents the parties from effectively realizing off-chain enforcement.

Another significant issue with the blockchain arbitration process is that the recognition of blockchain arbitration is remote and arguably, even absent from the international law framework. This has resulted in the lack of an effective off-chain enforcement mechanism for Awards rendered in blockchain arbitrations as neither the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (New York Convention) nor the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration, 1985 has any mechanism for enforcements of Arbitral Awards rendered on blockchain platforms through national Courts.

The absence of mechanisms for enabling national Courts to integrate blockchain oracles for off-chain enforcement is another impediment which arises out of the non-recognition of enforcement of blockchain Arbitral Awards. Undoubtedly, there have been isolated incidents of national Courts enforcing blockchain Arbitral Awards. One of the most prominent examples of the same is the Judgment of the Fourth Civil Judge of the First Judicial District in the State of Jalisco which had enforced a blockchain Arbitral Award rendered on the blockchain platform Kleros.[55] The Arbitral Award rendered on the blockchain platform had arisen out of a real estate leasing agreement wherein a Sole Arbitrator was appointed. However, as per the agreement between the parties, the Sole Arbitrator had to refer the dispute to the Kleros Protocol blockchain platform where the jurors would vote and render a decision.[56] After the procedural order was issued, the Sole Arbitrator referred the dispute to the Kleros Protocol and three jurors rendered their decision. The Sole Arbitrator then followed the decision of the jurors of the Kleros Protocol and passed the Arbitral Award. Upon an application of enforcement, the Fourth Civil Judge of the First Judicial District in the State of Jalisco enforced the said Arbitral Award.[57]

[55] Mauricio Virues Carrera, *Accommodating Kleros as a Decentralised Dispute Resolution Tool for Civil Justice Systems; Theoretical Model and Case of Application,* KLEROS (2020), https://ipfs.kleros.io/ipfs/QmfNrgSVE9bb17KzEVFoGf4KKA1Ekaht7ioLjYzheZ6prE/Accommodating%20Kleros%20as%20a%20Decentralized%20Dispute%20Resolution%20Tool%20for%20Civil%20Justice%20Systems%20-%20Theoretical%20Model%20and%20Case%20of%20Application%20-%20Mauricio%20Virues%20-%20Kleros%20Fellowship%20of%20Justice.pdf.
[56] *Id.*
[57] *Id.*

It is noteworthy that, even though the decision rendered on the Kleros Protocol was enforced, the Award in which enforcement was sought before the Fourth Civil Judge of the First Judicial District in the State of Jalisco was the Sole Arbitrator's Award who had *ad verbatim* followed the decision rendered by the jurors on the Kleros Protocol. Therefore, there was a traditional Arbitral Award presented before the Mexican Court which satisfied the requirements of an Award under the New York Convention. In pursuance of the same, it can be argued that an Arbitral Award purely rendered on the blockchain is yet to be enforced by a national Court under the New York Convention as there is little or no evidence of Blockchain Awards directly being brought for enforcement before a national Court. Hence, the impediment caused by the lack of integration of the blockchain with the real world through blockchain oracles continues to prevail.

Challenges Relating to Seat of Arbitration

It has proven to be quite difficult to ascertain the seat of arbitration in a smart contract dispute where the smart contract has been executed purely in a coded form. Undoubtedly, some parties certainly convert smart contract obligations into a natural language contract where clauses about the seat of arbitration may be present. But otherwise, it is quite difficult to ascertain the same. The reason for this is that due to the automated nature of smart contracts, the need for off-chain enforcement was seen as otiose by blockchain developers and therefore, only the execution parameters are included in smart contracts and all elements that may be required to initiate a dispute are not coded into the smart contract, the seat of arbitration being one of the many elements. Over the years, the ground reality that smart contracts are not foolproof has been explicated[58] creating a significant hurdle in the mechanism which albeit blockchain arbitrations have attempted to address but have failed to achieve due to their suitability for smaller-sized claims.

The absence of a seat of arbitration can cause significant difficulties, especially when the smart contract dispute is being resolved through hybrid arbitrations. This is because the seat of arbitration is inextricably linked to the national Court that will exercise supervisory jurisdiction for interim relief, an extension of the mandate, enforcement, the challenge of the award and like circumstances.[59] Even in purely on-chain arbitrations (blockchain arbitrations), in case partial off-chain enforcement is required, there continues to remain an impending risk of the national Court refusing such partial off-

[58] Stuart D. Levi and Alex B. Lipton, *An Introduction to Smart Contracts and their Potential and Inherent Limitations,* HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE (May 03, 2024, 3:42 PM), https://corpgov.law.harvard.edu/2018/05/26/an-introduction-to-smart-contracts-and-their-potential-and-inherent-limitations/.

[59] RASHDA RANA, INTERNATIONAL ARBITRATION- WORKBOOK, MODULE- I, LAW, PRACTICE AND PROCEDURE (Chartered Institute of Arbitrators, 2021).

chain enforcement on the ground of, *inter alia,* the seat of the Arbitration not being definitive and ascertained. It is undeniable that the seat of arbitration is a mandate. Article 20 of the UNCITRAL Model Law asserts the need for a place (in the context of Article 20 can be treated as the 'seat') of arbitration, which if not determined by the parties, has to be determined by the Arbitral Tribunal.[60] Even in domestic legislation, the requirement of a seat of arbitration (occasionally referred to as a place of arbitration) is indispensable. This is evident from Section 3 of the Arbitration Act, 1996,[61] Section 20 of the Arbitration and Conciliation Act, 1996,[62] Section 46 of the Arbitration Act, 2001,[63] Article 1068 of the Netherlands Arbitration Act, 2014[64] and Article 28 of the Federal Law of Arbitration, 2018[65].

In the multi-faceted possibilities of hybrid arbitrations, rare instances may showcase that parties can opt for smart contract execution on-chain and dispute resolution off-chain through a natural language contract for dispute resolution. Under such circumstances, the seat of arbitration may be determined. In all other forms of hybrid arbitrations and purely blockchain arbitrations, the seat of arbitration is often a dilemma not foreseen by parties in the execution stages which may result in the aggrieved party losing out on other available remedies apart from the standard receipt of escrow cryptocurrency amount through on-chain enforcement. The limited powers of jurors in blockchain arbitrations also make it an impossibility for the on-chain Arbitral Tribunal to determine the seat of arbitration in the absence of explicit mention of the seat in the arbitration agreement. Although the international arbitration framework provides for the respective national Courts to determine the seat based on underlying facts and circumstances, the threat of the parties being relegated to different national Courts for determination of seat and enforcement continues to exist currently.

Lack of Recognition of Smart Contracts as an Enforceable Contract

There has been lengthy discussion and debate amongst the international arbitration community concerning the validity of smart contracts under the respective contract laws of various domestic legal systems. Some jurisdictions have taken proactive steps to confer legal recognition to smart contracts. To illustrate, the United States of America which has been at the forefront of assigning legal status to smart contracts has reportedly several of its States such as Wyoming, Arizona, Nevada, Delaware and Tennessee that have enacted legislation that legally recognizes smart contracts and its underlying

[60] UNCITRAL Model Law on International Commercial Arbitration, 1985.
[61] Arbitration Act, 1996 (United Kingdom).
[62] Arbitration and Conciliation Act, 1996 (India).
[63] Arbitration Act, 2001 (Singapore).
[64] Netherlands Arbitration Act, 2014 (Netherlands)
[65] Federal Law of Arbitration, 2018 (United Arab Emirates).

transactions related to crypto assets.[66] The United Kingdom is another jurisdiction, which although may not have created separate legislation, confers legal status to smart contracts. The United Kingdom Law Commission conducted an in-depth study and concluded that the United Kingdom's legal framework certainly does recognize smart contracts as a valid contract.[67] Italy is another jurisdiction which through Law Decree No. 135/2018 has conferred legal recognition to smart contracts.[68] Beyond domestic law, the United Nations Convention on Contracts for the International Sale of Goods (CISG) (as a governing law of a smart contract) contains provisions that are capable of resolving smart contract disputes as a smart contract satisfies the essential ingredients of contract under the Convention.[69]

Albeit the fact that smart contracts may be treated as valid contracts, the question which continues to remain is whether such contracts are enforceable contracts for arbitration law. For enforceability, the New York Convention requires the agreements to be in writing. In case parties have entered into a natural language version of the smart contract or have specifically included a few natural language clauses by way of a separate agreement, then such a natural language agreement can certainly be treated as an enforceable agreement under the New York Convention. However, the risk of a national Court declining the enforcement of a purely coded smart contract is quite possible on the ground that the smart contract is not tantamount to an 'agreement in writing'.[70] Furthermore, the New York Convention and consequently, domestic laws of several jurisdictions also require that the arbitration agreement must be sufficiently stamped/ registered or an original or authenticated true copy must be furnished before the national Court where enforcement is sought. This can be quite challenging in the context of smart contracts as it is not possible to stamp such agreements or furnish original or authenticated true copies before the enforcing Court resulting in the enforcing Court refusing enforcement.

[66] Sibilla Grenon, *Codifying Code? Evaluating US Smart Contract Legislation,* INTERNATIONAL BAR ASSOCIATION (2019), https://www.ibanet.org/MediaHandler?id=C8D2EBA4-57D1-4F01-8AA5-24C9CFF2B447.
[67] United Kingdom Law Commission, *Smart Legal Contracts: Advice to Government,* HH ASSOCIATES (2021), https://cloud-platform-e218f50a4812967ba1215eaecede923f.s3.amazonaws.com/uploads/sites/30/2021/11/Smart-legal-contracts-accessible.pdf.
[68] Mateja Durovic and Franciszek Lech, *The Enforceability of Smart Contracts,* 5(2) THE ITALIAN LAW JOURNAL 493 (2019), https://theitalianlawjournal.it/data/uploads/5-italj-2-2019/493-durovic-lech.pdf.
[69] Anna Duke, *What Does the CISG Have to Say About Smart Contracts? A Legal Analysis,* 20 CHICAGO JOURNAL OF INTERNATIONAL LAW (2020), https://cjil.uchicago.edu/print-archive/what-does-cisg-have-say-about-smart-contracts-legal-analysis.
[70] *Id.* 17.

Challenges in the Juror Voting System

The juror voting system which forms the substratum of blockchain arbitrations is incapable of addressing even the most basic forms of party autonomy principles, procedural fairness and principles of natural justice tenets. This is because, as discussed earlier, unless hybrid arbitration is opted for through a blockchain oracle in the real world, a pure blockchain arbitration permits parties to only make one round of submissions through a text box and image/ video/ audio upload box and permits the other side to respond once.[71] There is no opportunity for either the jurors to seek further evidence or for the parties to present any form of additional evidence.[72] The parties are unable to determine the qualifications of jurors or appoint the preferred juror for blockchain arbitration, resulting in the paramount undermining of the party autonomy principle.[73]

Over the years, concerns have been raised over the authenticity and genuineness of the juror voting system which is the substratum of the pure blockchain arbitration process. Some blockchain platforms have introduced safeguards. To illustrate, the platform Kleros has attempted to de-incentivize lazy and careless voting by jurors by providing additional economic benefits to jurors that provide majority opinion as opposed to the minority opinion.[74] On the contrary, the Aragon Network does not provide any economic incentives for jurors to preserve the authenticity of the decision taken by them.[75] Similarly, blockchain platforms use the hash commit reveal scheme to preserve unanimity and protect the data security of claims and evidence presented before the jurors during blockchain arbitration.[76] What is quite clear is that there is a lack of standard practices amongst blockchain platforms in pure blockchain arbitrations. Irrespective of the safeguards undertaken by the blockchain platforms, the fact that jurors are selected by a random pool in all the blockchain arbitrations itself impedes the expertise of the jurors in the subject matter is questionable. Therefore, the fact that the juror voting system undermines party autonomy and procedural fairness, are sufficient reasons for national Courts to refuse enforcement.

IV.

[71] *Id. 2.*
[72] *Id.*
[73] Pedro Lacasa, *Can Blockchain Arbitration Become A Proper 'International Arbitration?' Jurors v. Arbitrators,* CONFLICT OF LAWS (May 04, 2024, 8:01 PM), https://conflictoflaws.net/2022/can-blockchain-arbitration-become-a-proper-international-arbitration-jurors-vs-arbitrators/#:~:text=Blockchain%20arbitration%20models%20do%20not,%2C%20the%20applicable%20law%2C%20etc.
[74] Clement Lesaege, Federico Ast and William George, *Kleros Short Paper v. 1.0.7,* KLEROS (2019), https://kleros.io/whitepaper.pdf.
[75] Facus Pagnuolo, *Aragon White Paper,* GITHUB (May 04, 2024, 8:19 PM), https://github.com/aragon/whitepaper.
[76] Patrick McCorry, Surya Bakshi, Iddo Bentov, Sarah Meiklejohn and Andrew Miller, *Pisa: Arbitration Outsourcing for State Channels,* CORNELL UNIVERSITY (May 04, 2024, 8:23 PM), https://www.cs.cornell.edu/~iddo/pisa.pdf.

V. POTENTIAL RECOMMENDATIONS TO TACKLE THE ISSUES OF ENFORCEMENT

There is a significant revamp that will be required to ensure ease of enforcement in pure blockchain arbitrations. As the number of arbitral institutions with specific rules in place for blockchain arbitrations is quite low, the fact that several jurisdictions are yet to make a switch to institutional arbitration from *ad-hoc* arbitrations and that amending a multilateral Convention like the New York Convention may be a distant dream due to the close nexus of geopolitics with international law, potential best practices can be adopted by the international arbitration community to ensure better enforceability of awards rendered out of smart contract disputes on the blockchain. The natural question which would arise at this stage is why should parties even go through the trouble of entering into smart contracts if the blockchain arbitration mechanism is not on par with traditional methods in terms of procedural fairness, party autonomy and enforceability. The reason for this is that few industries and sectors such as insurance, airline, shipping, logistics, healthcare, banking and finance have reaped significant benefits from the automated execution capabilities of smart contracts and the immutability provided by blockchain networks.

One of the most apparent reforms that could be adopted is at the stage of the deal negotiation itself where parties can agree to the execution of the transaction by a smart contract with the exception that the arbitration agreement is entered in natural language form. Due to the inherent severability of the substantive portion of the agreement with the arbitration agreement,[77] parties can alleviate difficulties in the event of a dispute arising out of the said smart contract. Naturally, the legal seat (in some jurisdictions referred to as "place of arbitration"), procedural rules, governing law, language and pre-initiation steps are also paramount determinative factors which can be chosen as per the substance and nature of the arrangements between the parties. Having a natural language arbitration agreement in place can also help parties sufficiently comply with the stamping/authenticating requirements and furnish an original copy of the arbitration agreement before the respective national Court of enforcement.

Another solution that could be adopted is the choice of procedural rules and forums. This is because procedural rules which recognize smart contracts and are capable of stipulating specific procedures in its respect would be better suited for parties to smart contracts. The Digital Dispute Resolution Rules of the United Kingdom Jurisdiction Taskforce[78] and the draft JAMS Smart Contract Clause and

[77] *Id.* 22.
[78] Digital Dispute Resolution Rules, 2021 (United Kingdom).

Rules[79] are two of the most prominent procedural rules of arbitration available for parties executing transactions through a smart contract. Similarly, in terms of international arbitration institutions, although all major institutions such as the International Chamber of Commerce Court of Arbitration, London Court of International Arbitration, Singapore International Arbitration Centre, Hong Kong International Arbitration Centre and the Mumbai Centre for International Arbitration are capable of administering disputes arising out of smart contracts, specific international arbitration institutions such as the Blockchain Arbitration and Commerce Society International Tribunal have also begun to operate in the realm of providing administration of smart contracts dispute resolution services.

The other reform that could be adopted if parties wish to refer the dispute to a pure blockchain arbitration mechanism with jurors is to permit the involvement of an international arbitration institution through a blockchain oracle to enable the presentation of additional submissions, additional evidence, examination of witnesses and experts so that the Award- sufferer does not challenge and succeed in setting aside the Award rendered by the jurors to be non-compliant with procedural fairness and principles of natural justice requirements.

Another solution that parties can opt for is the inclusion of the qualifications of jurors in the coded version of the smart contract itself. This will in turn result in jurors with a particular set of qualifications being chosen instead of a randomized pool of jurors. Naturally, this would also mean that parties will have to choose the execution of their smart contract in a blockchain network that has a more diverse pool of jurors. However, what is to be kept in mind is that the arrangements made by the parties in the case before the Fourth Civil Judge of the First Judicial District in the State of Jalisco must not be imitated since the Sole Arbitrator therein had delegated the essential function of adjudication to the Kleros jurors. Albeit the fact that such an Award was granted enforcement in Mexico, there is a huge chance that a similar Award would be set- aside by national Courts of most jurisdictions on the grounds of excessive delegation of the essential functions of an Arbitrator.

Additionally, parties can also include a juxtaposed enforcement clause in their Arbitration Agreement where in case of a requirement of partial off-chain enforcement in an Award rendered by blockchain network jurors, a national Court must be able to assist in such off-chain enforcement through a blockchain oracle and in the need of a national Court Order for enforcement to be effectuated on-chain, such national Court Order for enforcement must be enforced on-chain through a blockchain

[79] JAMS Rules Governing Disputes Arising out of Smart Contracts, 2024 (United States of America).

oracle. This would as a pre-requisite, require the parties to enter into a separate agreement with a company providing services as a blockchain oracle.

VI. CONCLUSION

As arbitration in the international sphere continues to be driven by stakeholders at the forefront which not only include the parties, counsels, tribunal secretaries, secretariats and arbitral institutions but also include arbitrators, the reform in this sphere is not dependent on a straitjacket formula or an isolated instance of unilateral effort but is an outcome which can only be achieved by pivotal participative process from all the stakeholders involved in traditional and smart contracts arbitrations alike.

Under the detailed discussions undertaken on the subject matter, it is safe to conclude that even though blockchain arbitration shows immense promise, the traditional legal system has not provided an effective mechanism for smooth transitioning from on-chain to off-chain execution and enforcement resulting in the parties and arbitral institutions have to adopt best practices to fill the gap, up till a significant revamp to the international arbitration legal system in this respect is witnessed.

DEALING WITH LIBOR CESSATION IN INTERNATIONAL ARBITRATION: SOME SUGGESTIONS

Badrinath Srinivasan*

I. INTRODUCTION

The London Inter-Bank Offered Rate ('**LIBOR**') was one of the most important and widely used interest rate indices in the world. At one point in time, about US$ 300 trillion worth of contracts worldwide were indexed to LIBOR, and it was commonly used in high-value commercial transactions.[80]

In 2012, an article in The Financial Times exposed the manipulation of LIBOR rates by bankers for personal gain. This revelation sparked investigations and led to the transfer of LIBOR administration to the Intercontinental Exchange ('**ICE**') Benchmark Administration ('**IBA**') in 2014. The UK Financial Conduct Authority ('**UKFCA**' or '**FCA**'), which was responsible for regulating the LIBOR, imposed fines on several banks involved in the manipulation and implemented enhanced technology and surveillance measures to safeguard LIBOR's integrity.[81]

Notwithstanding the investigations and the reforms undertaken, the credibility of the LIBOR was severely hit. In July 2017, nearly five years after the Financial Times op-ed, the UKFCA stated that it was not sustainable to prolong the LIBOR beyond 2021 since the banks were not lending to each other as much as they had previously and that there were not enough transactions in certain currencies to make a good estimate of the rates.

With this announcement, the commercial world began looking to learn how to deal with the cessation of LIBOR. The important question was how to address the retirement of LIBOR insofar as agreements indexed to LIBOR were concerned. The problem was exacerbated since national legal systems did not prescribe an interest rate alternative to LIBOR for a particular currency, such as British Pounds or US dollars.

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[80] See, Part II of this paper.

[81] See, Part III of this paper.

A national legal system may announce the interest rate equivalent to LIBOR for its currency. A typical example is the USA, which announced the alternative to LIBOR for US dollars.[82] However, where the law applicable to the agreement is Indian law, the default interest rate as prescribed in Indian law is applicable, which is the Interest Act, 1978, and not the equivalent of LIBOR for US dollars when the currency of the agreement is US dollars.

One solution to this problem is for the parties to renegotiate their agreements and choose a mutually agreeable index. Another solution is for countries to provide legislative solutions. For instance, many states in the US came up with legislation that sought to replace US LIBOR-indexed contracts and securities with an alternative reference rate.[83] Likewise, UK's Critical Benchmarks (References and Administrators' Liability) Act, 2021 contains a detailed framework for LIBOR cessation.[84] The other is to let arbitral tribunals/ courts decide the issue, which could be followed in subsequent cases.

This paper addresses how international arbitral tribunals and courts the world over have dealt with the issue of LIBOR retirement. The issue as to cessation of LIBOR is at times left unaddressed by counsels/ parties and leads to uncertainties on how arbitral tribunals deal with this issue. Hence, this paper suggests the way pleadings could be structured to address this issue. The larger purpose of this endeavour is to present an overview of how LIBOR cessation has been dealt with by adjudicatory forums so that this may be of use to courts/ arbitral tribunals and parties in India and elsewhere on the matter.

For this purpose, this paper is structured in the following manner: Part II discusses the LIBOR and the use of LIBOR in commercial agreements and international investment treaties. Part III traces the history of LIBOR and its retirement. Part IV deals with how international tribunals and domestic courts have dealt with contracts and treaties linking the applicable interest rate with LIBOR since its retirement. Awards and decisions where different approaches to LIBOR cessation have been adopted are illustratively discussed in Part IV. Part V concludes by recommending the pleadings/ submissions to be adopted by parties and how courts/ arbitral tribunals can decide on alternatives to LIBOR in the wake of LIBOR retirement.

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[82] Federal Reserve Bank of New York, Press Release: ARRC Formally Recommends Term SOFR (29 July 2021), https://www.newyorkfed.org/medialibrary/Microsites/arrc/files/2021/ARRC_Press_Release_Term_SOFR.pdf (accessed 5 March 2024).

[83] Osler, Legislative Solutions to U.S. Dollar LIBOR Cessation (19 March 2021), https://www.osler.com/en/insights/updates/legislative-solutions-to-u-s-dollar-libor-cessation/ (accessed 25 June 2024).

[84] Herbert Smith Freehills, Final Part of UK LIBOR Legislative Solution Receives Royal Assent (17 December 2021), https://www.herbertsmithfreehills.com/notes/bankinglitigation/2021-12/final-part-of-uk-libor-legislative-solution-receives-royal-assent (accessed 25 June 2024).

II. LIBOR IN COMMERCIAL AGREEMENTS AND INTERNATIONAL INVESTMENT TREATIES

The LIBOR used to be administered by the British Bankers' Association ('**BBA'**) and was calculated across ten currencies for different periods, ranging from overnight to one year.[85] As the name suggests, LIBOR refers to the interest rate of unsecured borrowing by banks from one another.[86]

LIBOR has been used as the applicable interest rate in various financial loan agreements such as swaps and futures[87], at least since 1970.[88] It has also been used in commercial mortgages, loan agreements, and student loans.[89] At its peak, agreements worth US$ 300 trillion used LIBOR as the applicable interest rate index.[90]

LIBOR rates in agreements are typically stated as: "LIBOR + x%, where x refers to the percentage points above the LIBOR rate of a particular currency with the relevant maturity term stated in the agreement. For instance, Article 11.4 of the Model Production Sharing Contract of Timor Leste states:

"*Any amount not paid in full when due shall bear interest, compounded on a monthly basis, at an annual rate equal to one (1) month term LIBOR (London Interbank Offer Rate) for United States Dollar deposits as published by the Intercontinental Exchange for Benchmark Administration (IBA), plus two (2) percentual points, on and from the due date until the date the principal and interest accrued thereon are paid in full.*"[91]

Thus, the above interest rate clause has the following components:

- Interest rate index used being LIBOR.

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[85] ICE Benchmark Administration, Roadmap for ICE LIBOR (18 March 2016), p. 4, https://www.ice.com/publicdocs/ICE_LIBOR_Roadmap0316.pdf (accessed 6 March 2024).
[86] For a detailed account of how LIBOR was calculated, see, Thomas Heidorn & Rebecca Meier, US Dollar Swaps after LIBOR, Frankfurt School - Working Paper Series, No. 235, Frankfurt School of Finance & Management (2024), https://www.econstor.eu/bitstream/10419/283009/1/1880608936.pdf (accessed 27 March 2024), p. 8- 10.
[87] David Ho & David R. Skeie, LIBOR: Origins, Economics, Crisis, Scandal, and Reform (1 March 2014), FRB of New York Staff Report No. 667, https://ssrn.com/abstract=2423387 (accessed 4 March 2024), p. 2.
[88] ICE Benchmark Administration, Roadmap for ICE LIBOR (18 March 2016), p. 4, https://www.ice.com/publicdocs/ICE_LIBOR_Roadmap0316.pdf (accessed 6 March 2024).
[89] *Ibid*, p. 2-3.
[90] The Wheatley Review of LIBOR: Final Report (September 2012), p. 7, https://assets.publishing.service.gov.uk/media/5a7b3fe2e5274a319e77e076/wheatley_review_libor_finalreport_280912.pdf (accessed 4 March 2024)('***Wheatley Review Report***').
[91] Model Production Sharing Contract for the Onshore of Timor-Leste (2021), https://resourcecontracts.org/contract/ocds-591adf-6678047627/download/pdf (accessed 1 March 2024).

- LIBOR rates being published by the Intercontinental Exchange for Benchmark Administration (the part about usage is already covered in the previous point).
- Currency being US Dollars.
- Interest being compounded monthly.
- The term of the LIBOR, i.e., the term of the borrowing being on a monthly basis.
- Premium being two percentage points above the LIBOR rate.

These components form a typical clause providing for the applicable interest rate index, which is usually reckoned by parties.

It is not that the LIBOR rates are used only in commercial/ financing agreements. From 1985 to 2022, at least 354 investment treaties between States explicitly used LIBOR as the applicable interest rate index.[92] The first investment treaty to refer to LIBOR explicitly was the China Kuwait Bilateral Investment Treaty ('**BIT**'), 1985.[93]

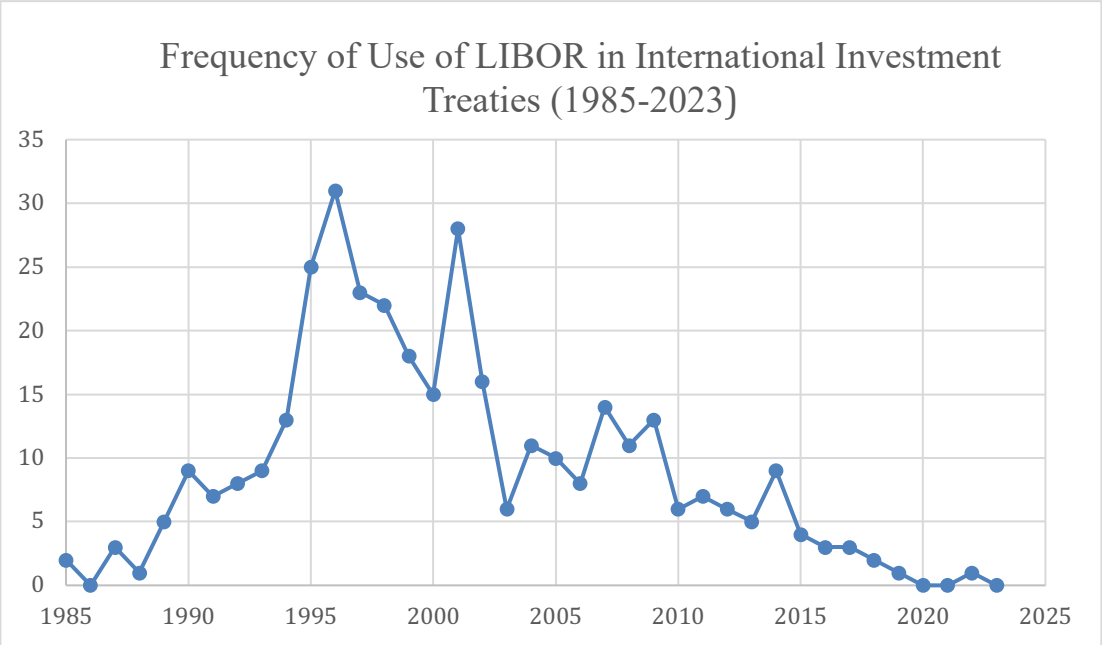
The use of LIBOR was the highest between 1995 and 2003, and then it radically decreased. At its peak, thirty-one investment treaties referred explicitly to LIBOR in 1996 and this number was reduced to zero in 2020.[94] In 2020, the use of LIBOR in investment treaties virtually became NIL. The below graphic depicts this.[95]

[92] The list of treaties referencing LIBOR between 1985 to 2022 is available at https://docs.google.com/spreadsheets/d/1AFp0lpocQR6WaxaDhfHHE4juCaeLPfnG/edit?usp=sharing&ouid=102151753336716892926&rtpof=true&sd=true

[93] Available at https://edit.wti.org/document/show/68ada9a9-a0b2-4e36-843d-05ad91b84df9?textBlockId=955c8ee5-7437-421f-8cf9-c24d2595e6fe&page=1 (accessed 26 March 2024).

[94] Available at https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/6443/download (accessed 25 June 2024)

[95] The graphic is derived from data obtained from treaties available at https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/6443/download (accessed 25 June 2024). Treaties referencing LIBOR between 1985 to 2022 which is the basis of the graph is available at https://docs.google.com/spreadsheets/d/1AFp0lpocQR6WaxaDhfHHE4juCaeLPfnG/edit?usp=sharing&ouid=102151753336716892926&rtpof=true&sd=true



Surprisingly, LIBOR finds explicit mention in the Hungary Oman BIT, 2022[96], despite widespread news about the cessation of LIBOR.[97] Article 6 thereof deals with expropriation. Article 6(3), which concerns interest rates, reads:

"*The compensation shall include interest calculated on 6 (six) months LIBOR basis from the date of expropriation to the date of actual payment and shall be effectively realisable and freely transferable in a Freely Convertible Currency at the market exchange rate prevailing on the time of transfer*."

The BIT was signed in February 2022 and employs LIBOR despite clear indications right from 2019 that LIBOR would cease to be published.[98] At least two treaties used the LIBOR in 2018[99] and one treaty used it in 2019.[100]

Insofar as the Indian practice in investment treaties is concerned, seven BITs explicitly refer to LIBOR as the interest rate, as the below table shows:

[96] Available at https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/6443/download (accessed 26 March 2024).
[97] See, Part III of this paper.
[98] Available at https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/6443/download (accessed 25 June 2024).
[99] Belarus Turkey BIT, 2018, Article 6(4) and Qatar Togo BIT, 2018, Article 5(2).
[100] Belarus Hungary BIT, 2019, Articles 2 and 6(1).

S. No.	BIT	Date of signature	Date of Entry into Force	Current Status
1	India Italy BIT, 1995	23.11.1995	26.03.1998	Terminated
2	India Qatar BIT, 1999	07.04.1999	15.12.1999	Terminated
3	India Kuwait BIT, 2001	27.11.2001	28.06.2003	Terminated
4	Belarus India BIT, 2002	27.11.2002	23.11.2003	Terminated
5	India North Macedonia BIT, 2008	17.03.2008	17.10.2008	Terminated
6	India Lithuania BIT, 2011	31.03.2011	01.12.2011	In force
7	India United Arab Emirates BIT, 2013	12.12.2013	21.08.2014	In force

Indian treaty practice suggests that India has favoured either a six-month LIBOR[101] or has merely chosen LIBOR without elaborating on the applicable loan tenor (i.e., one month, three months, six months, or other tenor).[102] Lack of specific choice of loan tenor may lead to uncertainties regarding the specific rate applicable. This would entail that the parties lead evidence on the appropriate loan tenor and for the tribunal to decide on the same.

Arbitral tribunals under investment treaties have commonly used LIBOR + 2% while awarding interest.[103] Even in the absence of explicit mention in the investment treaties, arbitral tribunals in investor-state arbitrations have awarded interest on damages indexed at LIBOR rates.[104]

III. LIBOR & ITS RETIREMENT

Since 2009, regulators across the world, including the UK Financial Services Authority, and regulators in the USA, Canada, Japan, Switzerland, and the European Union, began investigating possible manipulation of LIBOR rates.[105]

[101] India Italy BIT, 1995, Article 5(5); India Qatar BIT, 1999, Article 5(2); India Kuwait BIT, 2001, Article 7(1)(b); India UAE BIT, 2013, Article 7(1)(b).
[102] Belarus India BIT, 2002, Article 5(1); India North Macedonia BIT, 2008, Article 5(1); India Lithuania BIT, 2011, Article 5(1).
[103] See, for instance, Award in Bacilio Amorrortu v. Republic of Peru, PCA Case No. 2020-11 (5 July 2022), Para 695, https://www.italaw.com/sites/default/files/case-documents/italaw170969.pdf (accessed 8 March 2024).
[104] See, for instance, Award in Rusoro Mining Limited v. The Bolivarian Republic of Venezuela, ICSID Case No. ARB(AF)/12/5 (22 August 2016), Para 837, holding: "*LIBOR is an international commercial benchmark: the interest rate at which banks can borrow funds from other banks in the London interbank market. LIBOR is published daily for different maturities and currencies and is universally accepted as a valid reference for the calculation of variable interest rates*".
[105] *Wheatley Review Report*, p. 5.

On 27 July 2012, The Financial Times published an op-ed piece by Douglas Keenan about LIBOR manipulation since 1991.[106] According to the op-ed, the bankers were understating or overstating the rates and profiting from trades. The op-ed stated that the LIBOR rates were not determined by the three-month actual market rates but were determined artificially by asking the banks about the rates through a poll eliminating the highest and the lowest rates and thereafter averaging out the rates. Keenan argued that although the difference between the actual and the reported rate was minuscule, given that LIBOR affected contracts linked to trillions of dollars, the total amount impacted was huge. The op-ed piece also disclosed that an investigation was being carried out in parallel by the House of Commons Treasury committee. This revelation sparked investigations and eventually led to the transfer of the LIBOR administration to the IBA in 2014.[107]

This was not the first time the credibility of the LIBOR was questioned.[108] For instance, in a seminal paper titled "Does the LIBOR Reflect Banks' Borrowing Costs", Connan Snider and Thomas Youle argued that there was evidence that banks had large portfolio exposures to the LIBOR and had earned profits owing to LIBOR's quick decrease in rate and conjectured that the portfolio exposures could have been the source of misreporting incentives.[109] The manipulation, it was alleged, was done to the tune of billions of dollars.

In 2012, the UK Financial Services Authority imposed a penalty of about GBP 59 million on Barclays Bank Plc. for misconduct relating to LIBOR and the Euro Interbank Offered Rate (EURIBOR).[110] The House of Commons constituted a Treasury Committee to inquire into LIBOR manipulation. A Report was submitted in 2012 by the Committee. The Report noted that LIBOR and EURIBOR were manipulated between 2005 and 2008 by Barclays Bank Plc. It noted that the bank made US Dollar LIBOR and EURIBOR submissions after considering the requests made by its interest rates derivative traders.

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[106] Douglas Keenan, My Thwarted Attempt to Tell of Libor Shenanigans, Financial Times (27 July 2012), https://www.ft.com/content/dc5f49c2-d67b-11e1-ba60-00144feabdc0 (accessed 21 May 2024).
[107] David Hou & David Skeie, LIBOR: Origins, Economics, Crisis, Scandal, and Reform, Federal Reserve Bank of New York Staff Reports, no. 667 (March 2014), https://www.newyorkfed.org/medialibrary/media/research/staff_reports/sr667.pdf (accessed 25 June 2024).
[108] See, for instance, Rosa M. Abrantes-Metz & Sumanth Addanki, Is the Market Being Fooled? An Error-Based Screen for Manipulation (August 2007), https://ssrn.com/abstract=1007348; Rosa M. Abrantes-Metz *et al*, Libor Manipulation? 36 Journal of Banking & Finance 136- 150 (2012).
[109] Snider, Connan Andrew and Youle, Thomas, Does the LIBOR Reflect Banks' Borrowing Costs? (April 2, 2010), https://ssrn.com/abstract=1569603 (accessed 27 February 2024)
[110] Report of the House of Commons Treasury Committee: Fixing LIBOR: Some Preliminary Findings (9 August 2012), https://publications.parliament.uk/pa/cm201213/cmselect/cmtreasy/481/48102.htm (accessed 29 February 2024).

The impact of the manipulation was so much that the Report concurred with the observations of the UK Financial Services Authority that the manipulation "*created the risk that the integrity of LIBOR and EURIBOR would be called into question and that confidence in or the stability of the UK financial system would be threatened*". The Report concluded by noting that these manipulations reduced trust and confidence in the markets.

Subsequent news reports and investigations led to the transfer of administration from the British Bankers' Association to the Intercontinental Exchange (ICE) Benchmark Administration (IBA) in 2014. Fines were imposed on several banks which were involved in the manipulation. LIBOR was upgraded with new technology and surveillance tools to ensure credibility.[111]

Notwithstanding the investigations and the reforms undertaken, the credibility of the LIBOR took a severe hit. In June 2017, the UKFCA published a consultation paper titled "Powers in relation to LIBOR contributions"[112] wherein it stated:

"*A key consideration in whether and for how long the continuation of LIBOR is essential for market integrity will be the availability of credible alternative interest rate benchmarks, particularly the risk-free rates on which work is underway in relation to many currencies in response to the recommendations in the Financial Stability Board's report*".[113]

On 27 July 2017, nearly five years after the Financial Times op-ed, the UKFCA stated that it was not sustainable to prolong the LIBOR beyond 2021 for the reason that the banks were not lending to each other as much as they had previously and that there were not enough transactions in certain currencies to make a good estimate of the rates.[114] Thus began the steps to retire the LIBOR.

At that time, there were concerns as to the availability of alternative interest rates.[115] In April 2017, a working group, known as the Risk-Free Rate Working Group in the UK selected SONIA (Sterling

[111] ICE Benchmark Administration, Roadmap for ICE LIBOR (18 March 2016), https://www.theice.com/publicdocs/ICE_LIBOR_Roadmap0316.pdf (accessed 6 March 2024).
[112] Financial Conduct Authority, Consultation Paper CP17/15: Powers in Relation to LIBOR Contributions (June 2017), https://www.fca.org.uk/publication/consultation/cp17-15.pdf (accessed 6 March 2024).
[113] *Ibid*, p. 6.
[114] Andrew Bailey, The Future of LIBOR (27 July 2017), https://www.fca.org.uk/news/speeches/the-future-of-libor (accessed 6 March 2024).
[115] Andrew Bailey, The Future of LIBOR (27 July 2017), https://www.fca.org.uk/news/speeches/the-future-of-libor (accessed 6 March 2024); Bank of England, Record of the Financial Policy Committee Meeting on 20 September 2017 (3 October 2017), Para 91, https://www.bankofengland.co.uk/-/media/boe/files/record/2017/financial-policy-committee-meeting-september-2017 (accessed 6 March 2024).

Over Night Index Average) as the replacement for the LIBOR.[116] In the US, SOFR (Secured Overnight Financial Rate) is being used. There have been many alternatives proposed but all these options, including SONIA, are specific currency based. Further, the SONIA is an "overnight rate" while LIBOR used to publish a three-month rate as well. Both were not comparable. The banks agreed to continue to contribute to LIBOR till the end of 2021 for the market to transition from LIBOR to alternative rates.[117]

On 5 March 2021, the FCA announced the cessation of the thirty-five LIBOR settings, which were then published by the IBA.[118] About twenty six LIBOR settings were to be ceased by the end of 2021 and certain US dollars LIBOR settings were to cease by 30 June 2023.[119] The FCA stated that LIBOR rates which were to be continued till the specified periods were "synthetic" in that they did not represent the underlying market and were continued to be published "to assist legacy contract holders".[120]

The publication of "synthetic" LIBOR rates was pursuant to the exercise of the power to require continued publication of those rates in accordance with Article 21(3) of the Benchmarks Regulation and as per the decision of the FCA dated 10 September 2021.[121] In April 2023, the UKFCA decided to continue the publication of "synthetic" US LIBOR rates till 30 September 2024.[122]

In India, in July 2021, the Reserve Bank of India issued an advisory to banks, financial institutions and Non Banking Financial Companies (NBFCs) to transition from LIBOR by ceasing to refer LIBOR in contracts, except for managing risks arising out of LIBOR contracts, to cease adoption of the Mumbai Interbank Forward Outright Rate (MIFOR), which references the LIBOR, and to refer

[116] Bank of England, SONIA Recommended as the Sterling near Risk-Free Interest Rate Benchmark (28 April 2017), https://www.bankofengland.co.uk/news/2017/april/sonia-recommended-as-the-sterling-near-risk-free-interest-rate-benchmark
[117] Financial Conduct Authority, About LIBOR Transition (2 September 2019), https://www.fca.org.uk/markets/libor-transition (accessed 6 March 2024).
[118] Financial Conduct Authority, FCA Announcement on Future Cessation and Loss of Representativeness of The LIBOR Benchmarks (5 March 2021), https://www.fca.org.uk/publication/documents/future-cessation-loss-representativeness-libor-benchmarks.pdf (accessed 6 March 2024).
[119] *Ibid*.
[120] *Ibid*, Para 13.
[121] Article 21(3), Benchmarks Regulation – Notice Of First Decision (10 September 2021), https://www.fca.org.uk/publication/libor-notices/article-21-3-benchmarks-regulation-first-decision-notice.pdf (accessed 6 March 2024).
[122] Financial Conduct Authority, FCA Announces Decision on Synthetic US dollar LIBOR (3 April 2023), https://www.fca.org.uk/news/news-stories/fca-announces-decision-synthetic-us-dollar-libor (accessed 6 March 2024).

to fallback clauses adopted by various institutions such as the International Swaps and Derivatives Association, Indian Banks' Association, etc.[123]

The Reserve Bank of India issued another circular on 12 May 2023 advising banks and financial institutions "*to ensure that no new transaction undertaken by them or their customers rely on or are priced using the US$ LIBOR or the MIFOR*" and to develop systems and processes to transition away from LIBOR by 1 July 2023.[124]

Associations/ organisations that publish standard form contracts linking the interest to LIBOR and related LIBOR rates have also published amendments or revisions to such forms, incorporating suitable alternatives.[125]

Thus, given the scandals and the loss of confidence of the business community and the financial regulators on LIBOR and its related publications, the commercial world has moved away from LIBOR.

IV. COMMERCIAL & INVESTMENT DISPUTES IN THE WAKE OF LIBOR RETIREMENT

Unfortunately, parties to agreements, especially the long-term ones which referred to LIBOR, have been unable to modify them by mutual agreement to provide alternatives to LIBOR. Consequently, the issue relating to applicable interest rate remains a contested issue in disputes emanating out of LIBOR indexed agreements. This part analyses various decisions of courts/ arbitral tribunals deciding on the claim for interest rate based on LIBOR in international disputes.

Arbitral tribunals in investor-state arbitrations commonly award interest based on LIBOR rates.[126] Interest adds to a significant portion of monetary awards. Since 2000, interest has added around 50%

[123] Reserve Bank of India, Roadmap for LIBOR Transition (8 July 2021), https://www.rbi.org.in/Scripts/NotificationUser.aspx?Id=12128&Mode=0 (accessed 6 March 2024).
[124] Reserve Bank of India, LIBOR Transition (12 May 2023), https://m.rbi.org.in/Scripts/BS_CircularIndexDisplay.aspx?Id=12503 (accessed 6 March 2024).
[125] See, for instance, the ISDA 2020 IBOR Fallbacks Protocol of the International Swaps and Derivatives Association, Inc., https://assets.isda.org/media/3062e7b4/08268161-pdf/ (accessed 3 April 2024); the Model Joint Operating Agreement (2023) of the Association of International Energy Negotiators uses SOFR instead of the LIBOR. See, Bracewell, The 2023 AIEN Model Form JOA Placing ESG Issues at the Heart of Oil and Gas Operations (3 March 2023), https://www.jdsupra.com/legalnews/the-2023-aien-model-form-joa-placing-7785304/ (accessed 4 April 2024).
[126] PriceWaterCoopers, International Arbitration Damages Study (2023), p. 10, https://www.pwc.co.uk/forensic-services/assets/international-arbitration-damages-study.pdf (accessed 4 March 2024); Tiago Duarte-Silva and Swati Kanoria, The Importance of Interest in Arbitral Awards (February 2022), p. 1, https://media.crai.com/wp-content/uploads/2022/02/09124409/CRA_IA_Insights-the-importance-of-interest-in-arbitral-awards.pdf (accessed 4 March 2024)

of the money to damages awarded in non-ICSID arbitral awards.[127] As Chapter II noted, given the prevalence of investment treaties using LIBOR, this is not surprising.

Interest has been regarded as an "under-pleaded" area of law.[128] Except for a mention or a claim on interest rate in the pleadings, parties do not specifically devote attention in their pleadings to the claim on interest or the interest rate. Owing to the retirement of LIBOR and the general impact of an interest claim on damages, it would be good for the parties to devote specific attention to interest claims.

Prominent Awards in Investor-State Arbitrations regarding LIBOR Cessation

This portion of the paper analyses prominent arbitral awards in investor-state arbitration that determine the applicable interest rate in the wake of LIBOR cessation.

Deutsche Telekom v. India

In *Deutsche Telekom v. India (PCA Case No. 2014-10*), arbitration was invoked by Deutsche Telekom against the Republic of India under the Germany India BIT, 1995. The Claimant, in its pleadings in 2018, sought damages and claimed interest at LIBOR + 4% compounded annually. However, the Claimant revised the claim for interest in its post-hearing brief submitted in June 2019. It is worth replicating the relief prayed for regarding interest in the post-hearing brief:

"*The Claimant relies on its Request for Relief as set out in its Reply on Quantum, subject to amending paragraph (b) such that interest is calculated at the rate of LIBOR (or any other comparable rate in case LIBOR should be discontinued in the future) plus 4% in line with the suggestion in paragraph 228 above*."

Thus, the Claimant, at the end of the arbitral proceeding, sought to revise the claim for interest by seeking a calculation of interest at a "comparable rate" in case LIBOR discontinued.

The tribunal passed the award in May 2020 and awarded damages in favour of the Claimant. It also allowed the claim for interest at "*6-month USD LIBOR (or any other comparable rate in case LIBOR were to be discontinued in the future) plus 2% p.a., compounded semi-annually, starting to run 30*

[127] Tiago Duarte-Silva and Swati Kanoria, The Importance of Interest in Arbitral Awards (February 2022), p. 1, https://media.crai.com/wp-content/uploads/2022/02/09124409/CRA_IA_Insights-the-importance-of-interest-in-arbitral-awards.pdf (accessed 4 March 2024)

[128] Global Arbitration Review, An Unexpected Interest in Interest (12 May 2015), https://globalarbitrationreview.com/article/unexpected-interest-in-interest (accessed 7 December 2023).

days after the date of this award until payment in full".[129] Thus, while the tribunal allowed the claim for interest at LIBOR, it reduced the premium over LIBOR from 4% to 2%.

The tribunal contemplated that EURIBOR was a comparable rate.[130] The Award clearly recognised the possibility of LIBOR being discontinued and awarded a rate comparable to the applicable LIBOR rate in case it was discontinued. However, in the operative portion of the Award, it did not specify the comparable rate.[131]

Makae Europe v. Saudi Arabia

In *Makae Europe SARL v. Kingdom of Saudi Arabia (ICSID Case No. ARB/17/42)*[132], both parties sought interest at six-month LIBOR + 2% interest compounded semi-annually.[133] The Claimant also proposed that the tribunal apply a fixed interest rate of 2.19%, which was the LIBOR rate on the notional date - 11 May 2021, plus 2%.[134]

The Tribunal partially accepted the suggestion of the Claimant and awarded a fixed interest of 2.16% compounded on a semi-annual basis instead of fixing an alternative reference rate.[135]

Venezuela US S.R.L. v. Venezuela

In the Quantum Award in *Venezuela US S.R.L. v. The Bolivarian Republic of Venezuela (PCA Case No. 2013-34)*[136], the Tribunal noted that the Claimant claimed USD LIBOR + 10% as the applicable interest rate but awarded twelve-month USD LIBOR + 4% compounded annually.[137]

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[129] Final Award in Deutsche Telekom AG v. The Republic of India (27 May 2020), Paras 357(a) and (c), https://www.italaw.com/sites/default/files/case-documents/italaw16518.pdf (accessed 27 February 2024)('**Deutsche Telecom v. India**')".
[130] Deutsche Telecom v. India, Para 316.
[131] Deutsche Telecom v. India, Para 357.
[132] Award in Makae Europe SARL v. Kingdom of Saudi Arabia, ICSID Case No. ARB/17/42 (30 August 2021), https://www.italaw.com/sites/default/files/case-documents/italaw170019.pdf (accessed 5 March 2024)('**Makae Europe v. Saudi Arabia**').
[133] Makae Europe v. Saudi Arabia, Para 201.
[134] *Ibid*.
[135] *Ibid*, Paras 202 and 203(d).
[136] Final Award (Quantum) in Venezuela US S.R.L. v. The Bolivarian Republic of Venezuela, PCA Case No. 2013-34 (4 November 2022), https://www.italaw.com/sites/default/files/case-documents/180629.pdf (accessed 5 March 2024)('**Venezuela US v. Venezuela**').
[137] Venezuela US v. Venezuela, 107, Para 3.

The Tribunal also held that if the twelve-month USD LIBOR became inoperative for any reason, interest was to be calculated on any amount outstanding at a rate "*generally considered equivalent to twelve-month USD LIBOR plus a margin of four per cent (4%) with annual compounding*".[138]

JSC Tashkent Mechanical Plant v. Kyrgyz Republic

In *JSC Tashkent Mechanical Plant & Others v. Kyrgyz Republic (ICSID Case No. ARB(AF)/16/4)*[139], the BIT provided for LIBOR[140] and the Claimant recognised that the normal practice was to award LIBOR plus an appropriate margin but specifically requested the Tribunal to award the 10-year US Treasury rate as the applicable interest rate index since LIBOR was to be phased out.[141]

The Tribunal found that LIBOR + 4% compounded annually was the normally used interest rate index for awarding interest by other investment tribunals, and since the BIT explicitly mentioned LIBOR, it considered interest at LIBOR + 4% compounded annually as reasonable.[142]

The tribunal also noted that LIBOR was to cease and therefore considered it "prudent" to provide clarity on the award of interest if LIBOR ceased. Instead of replacing LIBOR as the applicable interest rate, as the Claimant had desired, the Tribunal went on to hold that when LIBOR ceased, the applicable interest rate was to be a 10-year US Treasury rate + 4% compounded annually.[143] The Tribunal partially accepted the Claimant's submission as regards the interest rate being a 10-year US Treasury rate on the ground that the Respondent did not object to the Claimant's submission in this regard.

It is important that in case one of the parties proposes an interest rate that is alternative to LIBOR, the other party ought to address that argument, failing which, it is possible that the tribunal/ court could decide in favour of the former owing to default of the latter in addressing the proposed interest rate.

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[138] *Ibid*, Para 107.4.
[139] Award in JSC Tashkent Mechanical Plant & Others v. Kyrgyz Republic, ICSID Case No. ARB(AF)/16/4 (17 May 2023), https://www.italaw.com/sites/default/files/case-documents/180245.pdf (accessed 5 March 2024) ('**JSC Tashkent v. Kyrgyz Republic**').
[140] JSC Tashkent v. Kyrgyz Republic, Para 785.
[141] *Ibid*, Para 668.
[142] *Ibid*, Para 785.
[143] *Ibid*, Para 786.

JSC DTEK Krymenergo v. Russian Federation

The Arbitral Award dated 1 November 2023 in the investor-State dispute between *JSC DTEK Krymenergo v Russian Federation (PCA Case No. 2018-41)*[144] under the Russia Ukraine BIT, 1998 is a recent attempt at comprehensively addressing the issue of LIBOR retirement. This is a case where the BIT specifically provided for LIBOR as the applicable interest rate for compensation owing to expropriation. Article 5(2) of the Treaty stated:

"*2. The amount of such compensation shall correspond to the market value of the expropriated investments immediately before the date of expropriation or before the fact of expropriation became officially known, while compensation shall be paid without delay, including interest accruable from the date of expropriation until the date of payment,* ***at the interest rate for three-month deposits in US dollars on the London Interbank Market (LIBOR) plus 1%****, and shall be effectively disposable and freely transferable*". (emphasis added).

The Claimant in the arbitration contended that it should be awarded interest at the rate related to yield to maturity on US dollars denominated sovereign bonds of Russia.[145] On the other hand, the Respondent (Russian Federation) argued for LIBOR + 1%, as provided in Article 5(2).[146]

The arbitral award noted the lack of assistance from counsel for both parties on the issue of cessation of LIBOR rates.[147] Despite the disagreement, neither party to the dispute assisted the arbitral tribunal in dealing with the cessation of publication of LIBOR rates, and the tribunal noted:

"*972. The Tribunal notes that, on 30 June 2023, the LIBOR rate for three-month deposits ceased to exist. Despite being aware of this situation and having ample opportunity to submit arguments on this point, the Parties did not do so*."[148]

Nevertheless, the Tribunal decided that the applicable interest rate was the LIBOR rate as specified in Article 5(2) of the Agreement.[149] The tribunal also noted that until then, LIBOR was considered as

[144] Award dated 1 November 2023 in JSC DTEK Krymenergo v Russia, PCA Case No. 2018-41, https://www.italaw.com/sites/default/files/case-documents/180426.pdf (accessed November 22, 2023)('**JSC DTEK v. Russia**').
[145] JSC DTEK v. Russia, ¶ 953
[146] *Ibid.*
[147] *Ibid.*
[148] *Ibid*, ¶ 972.
[149] *Ibid*, ¶ 967.

the universally accepted reference rate for calculating the applicable interest[150] and that the LIBOR ceased to exist.[151]

Despite the lack of assistance, the tribunal directed the parties to reach an agreement on the alternative interest rate within forty-five days from the date of the award and held that in case parties were unable to reach an agreement, the applicable interest rate index was to be the Secured Overnight Financing Rate ('**SOFR**').[152] The Tribunal chose SOFR in view of the recommendations of the Federal Reserve Bank of New York that SOFR was the alternative to LIBOR.[153] Since there were multiple SOFR rates published, the tribunal also offered clarity on which of the SOFR rates was to be taken in the following words: "*Since the applicable LIBOR rate is the three-month rate, the SOFR replacement, if applicable, should be the 90-day SOFR average rate published by the Federal Reserve Bank of New York.*"[154]

Accordingly, the tribunal decided that the LIBOR rate for three-month deposits in US$ or the equivalent SOFR was the applicable interest rate index.[155]

Thus, many arbitral awards have moved away from LIBOR to alternatives such as EURIBOR[156], fixed interest rate[157], SOFR[158], USD Prime rate[159], 10-year US treasury rates[160], Wall Street Journal

[150] *Ibid*, ¶ 969.
[151] *Ibid*, ¶ 972.
[152] *Ibid*.
[153] *Ibid*, citing Federal Reserve Bank of New York, Press Release: ARRC Formally Recommends Term SOFR (29 July 2021), https://www.newyorkfed.org/medialibrary/Microsites/arrc/files/2021/ARRC_Press_Release_Term_SOFR.pdf (accessed 5 March 2024).
[154] JSC v. Russia, ¶ 973.
[155] For a detailed account of calculation of the SOFR, see, Thomas Heidorn & Rebecca Meier, US Dollar Swaps after LIBOR, Frankfurt School - Working Paper Series, No. 235, Frankfurt School of Finance & Management (2024), https://www.econstor.eu/bitstream/10419/283009/1/1880608936.pdf (accessed 27 March 2024), p. 12-15.
[156] See, for instance, Final Award in Antonio del Valle Ruiz v. Spain, PCA Case No. 2019-17 (13 March 2023), Paras 800(f) and (g), https://www.italaw.com/sites/default/files/case-documents/italaw171384.pdf (accessed 6 March 2024); Award in Sevilla Beheer B.V. and others v. Kingdom of Spain, ICSID Case No. ARB/16/27 (22 May 2023), Para 222(ii), https://www.italaw.com/sites/default/files/case-documents/18020.pdf (accessed 5 March 2024)
[157] See, for instance, Makae Europe v. Saudi Arabia, Para 201; Award in Infracapital F1 v. Spain, ICSID Case No. ARB/16/18 (2 May 2023), Paras 219 (2) and (5), https://www.italaw.com/sites/default/files/case-documents/italaw171392.pdf (accessed 5 March 2024).
[158] See, for instance, Award in CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited and Telcom Devas Mauritius Limited v. Republic of India, PCA Case No. 2013-09 (13 October 2020), Paras 663(d) and (h) https://www.italaw.com/sites/default/files/case-documents/italaw170005.pdf (accessed 5 March 2024); Award in Niko Resources (Bangladesh) Ltd. v. Bangladesh Petroleum Exploration & Production Company Limited and Bangladesh Oil Gas and Mineral Corporation, ICSID Case No, ARB/10/18 (24 September 2021), Para 375(8), https://www.italaw.com/sites/default/files/case-documents/180447.pdf (accessed 5 March 2024); Award in Marko Mihaljevic v. Republic of Croatia, ICSID Case No. ARB/19/35 (19 May 2023), Para 152(c), https://www.italaw.com/sites/default/files/case-documents/18029.pdf (accessed 5 March 2024)
[159] See, for instance, Award in Nachingwea U.K. Limited (UK) v. Tanzania, ICSID Case No. ARB/20/38 (14 July 2023), Para 413(4), https://www.italaw.com/sites/default/files/case-documents/180253.pdf (accessed 5 March 2024).
[160] See, for instance, JSC Tashkent v. Kyrgyz Republic, Para 786.

Prime Rate[161], equivalent bank rates of specific jurisdictions such as the Federal Reserve Bank of New York[162], Central Bank of Ecuador[163], Emirates Inter-Bank Offer Rate[164], etc.[165]

In those arbitral awards, tribunals do not merely state in general terms that an equivalent of LIBOR would apply[166] but specify the index that would be applicable in place of LIBOR. There have been examples of a few cases where synthetic LIBOR rates have been applied, with or without premium added.[167] But such decisions are rare.

Position under English Law

The English Commercial Court laid down a set of default rules in dealing with the cessation of US LIBOR rates. In *Lonestar Communications Corporation LLC v. Daniel Kaye*[168] *("Lone Star"),* the Commercial Court put to rest the debate about whether LIBOR or US Prime Rate was the appropriate interest rate for US awards.

Prior to the aforesaid Commercial Court's decision in March 2023, there was divergence in the views of the English Court as to whether LIBOR or US Prime Rate was to be used for interest on US$. While some decisions concluded that US Prime Rate was the appropriate rate[169], some ruled in favour of LIBOR.[170] This issue was finally settled in *Lone Star*, where the English Commercial Court laid down default rules to deal with the situation:

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[161] See, for instance, Award in Bridgestone Licensing v. Panama, ICSID Case No. ARB/16/34 (14 August 2020), Para 590, https://www.italaw.com/sites/default/files/case-documents/italaw11771b .pdf (accessed 6 March 2024).
[162] See, for instance, Award in Garcia Armas v. Bolivarian Republic of Venezuela, PCA Case No. 2013-03 (26 April 2019), Para 572, https://www.italaw.com/sites/default/files/case-documents/italaw11124.pdf (accessed 5 March 2024);
[163] See, for instance, Award in Inter Rao V. CELEC (ECUADOR), CAM Caso No. 3568-18 (29 May 2023), https://www.italaw.com/sites/default/files/case-documents/180303.pdf (accessed 5 March 2024).
[164] Partial Award on Remedies in Crescent Petroleum v. Nigeria (27 September 2021), Para 887.D, https://www.italaw.com/sites/default/files/case-documents/italaw170264.pdf (accessed 7 March 2024).
[165] For an overview of key interest rate indices in various jurisdictions, see, Thomas Heidorn & Rebecca Meier, US Dollar Swaps after LIBOR, Frankfurt School - Working Paper Series, No. 235, Frankfurt School of Finance & Management (2024), https://www.econstor.eu/bitstream/10419/283009/1/1880608936.pdf (accessed 27 March 2024), p. 16.
[166] Final Award in Zhongshan Fucheng v. Nigeria (26 March 2021), Para 198(c)(vi), https://www.italaw.com/sites/default/files/case-documents/italaw170108.pdf (accessed 7 March 2024); Venezuela US v. Venezuela, Para 107.4.
[167] See, for instance, Award in PACC Offshore Services v. United Mexican States, ICSID Case No. UNCT/18/5 (9 May 2022), Paras 54- 57 and 60(c), https://www.italaw.com/sites/default/files/case-documents/italaw170564.pdf (accessed 8 March 2024); Final Award on Costs in Bacilio Amorrortu v. Republic of Peru, PCA Case No. 2020-11 (25 October 2022), Para 46(ii), https://www.italaw.com/sites/default/files/case-documents/italaw170804.pdf (accessed 8 March 2024).
[168] [2023] EWHC 732 (Comm) (30 March 2023).
[169] See, for instance, Kuwait Airways Corp v Kuwait Insurance Co (No. 3), [2000] 1 All ER (Comm) 973, 992; Mamidoil-Jetoil v. Okta Crude Oil Refinery, [2002] EWHC 2462 (Comm), Para 16; Certain Underwriters at Lloyd's London v. Syria, [2018] EWHC 385 (Comm), Para 82; Pisante v. Logothetis, [2022] EWHC 2575 (Comm), Para 74; Phones 4U Ltd v EE Ltd & Ors (Re Interest and Permission to Appeal) [2023] EWHC 3378 (Ch) (12 January 2024), Para 5.
[170] See, for instance, Fiona Trust v. Privalov, [2011] EWHC 664 (Comm), Para 15; Vis Trading Co Ltd v. Nazarov, [2013] EWHC 491 (QB), Paras 10- 14; Orexim Trading Ltd v. Mahavir Port and Terminal Private Limited, [2019] EWHC 2338; Trafigura Maritime Logistics Pte Ltd v. Clearlake Shipping Pte Ltd, [2022] EWHC 2625 (Comm), Para 2.

- **Default Rule 1**: The default interest rate for awards in US Dollars by the English Commercial Court was to be based on US Prime, irrespective of:
    - the place of operations of the Claimant; or
    - the nature of the claim, maritime or otherwise.
- **Default Rule 2**: No uplift over US Prime would be the default rule. However, even in the absence of evidence, in some cases, it would be obvious that the claimant would have to pay a higher rate to borrow US dollars as compared to a bank's most creditworthy customers. In such cases, courts could order US Prime with the uplift of 1% or 2% for certain types of claimants.
- **Default Rule 3**: Uplifts higher than 1% or 2% would require evidence to justify interest awards.

Default Rule 1 noted above (default interest rate to be based on US Prime) is subject to evidence on the use of another rate.

The default rules determined in *Lone Star* have been followed in various other decisions in the UK.[171]

Pleadings relating to Interest Rate indexed to LIBOR

Many litigating parties whose contracts were based on LIBOR have sought alternative reliefs in their pleadings. For instance, in *Zhongshan Fucheng v. Nigeria*[172], while seeking interest with reference to LIBOR, the petition for enforcement also added in parenthesis that if the USD LIBOR and the GBP LIBOR ceased to exist, the applicable interest rate would be equivalent to USD LIBOR and GBP LIBOR, respectively, plus 2% compounded on a monthly basis, including the date of payment.[173]

The formulation of the relief sought on interest is quoted below:

"*vii. interest on the sums specified on all the amounts specified in subparagraphs (iv) and (v) above from the day after the Award until payment at the one month GBP LIBOR rate plus 2 per cent for each year, or proportion thereof, such interest to be compounded monthly, until and including the*

[171] Rolls-Royce Holdings Plc v Goodrich Corporation [2023] EWHC 2002 (Comm); Delivery Hero SE v Mastercard Asia/Pacific Pte Ltd [2023] EWHC 1827 (Comm); Celestial Aviation Services LTD v UniCredit Bank AG, London Branch [2023] EWHC 1071 (Comm), Paras 20-21. Some decisions of English Courts have provided for US Prime as the appropriate rate without reference to *Lone Star*. See, for instance, Suppipat & Ors v Narongdej & Ors [2023] EWHC 1988 (Comm) (31 July 2023).

[172] Petition to Enforce Arbitral Award (2022), in Zhongshan Fucheng v. Nigeria, US District Court, https://www.italaw.com/sites/default/files/case-documents/180228.pdf (accessed November 22, 2023).

[173] *Ibid*, Para 5(a)(vii).

date of payment (and should, for any reason, GBP LIBOR cease to be operative while any amount remains outstanding, the interest due shall from that date onward be calculated on the basis of whatever rate is generally considered equivalent to GBP LIBOR plus 2%, compounded monthly, until and including the date of payment)".

Some petitions for enforcement of arbitral awards do not contain specific pleadings to that effect, although the award may note that the applicable interest rate after the cessation of LIBOR would be the interest rate considered equivalent to LIBOR. For instance, in *MOL Hungarian Oil and Gas Company Plc v. Republic of Croatia*[174], one of the prayers was for an interest rate linked to LIBOR, but the petition also footnoted the relevant portion of the arbitral award sought to be enforced, which provided for an interest rate equivalent to LIBOR without mentioning such an alternative explicitly.[175]

On the other hand, some petitions for enforcing arbitral awards do not pray for an equivalent of LIBOR. Take the case of *Oschadbank v. Russian Federation*[176], where the petition contained no prayer seeking interest at a rate equivalent to LIBOR. This may not be good practice, although it may be difficult for enforcement petitions to go beyond the arbitral award. This will depend on each jurisdiction and the important issue would be whether a court at enforcement stage would be willing to apply an equivalent of LIBOR even if the arbitral award does not so provide. Absent such indications in that jurisdiction, it is prudent to specifically pray for the applicability of an equivalent or comparable rate to LIBOR in petitions for enforcing arbitral awards.

V. CONCLUSION

In the last few years, many parties to international arbitration whose contracts were linked to LIBOR have sought alternative reliefs in their pleadings or have amended/ revised the reliefs sought to address the issue of LIBOR cessation. It would be beneficial for parties in pending arbitrations/ litigations to plead or amend their pleadings to address LIBOR cessation and propose alternatives to LIBOR. Respondents who face such a situation would do well to examine if the proposed alternatives align with the agreed rate or applicable rate and if not, object to, or propose other alternatives. If respondents are silent, tribunals/ courts may deem such silence to be acquiescence and decide in favour of claimants.

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[174] Petition to Enforce Arbitral Award (2023), in MOL Hungarian Oil and Gas Company Plc v. Republic of Croatia, US District Court, https://www.italaw.com/sites/default/files/case-documents/italaw171244.pdf (accessed November 22, 2023).
[175] *Ibid*, Footnote 9.
[176] Petition to Confirm Foreign Arbitral Award (2023), in Oschadbank v. Russian Federation, https://www.italaw.com/sites/default/files/case-documents/italaw171277.pdf (accessed 22 November 2023).

Where parties are silent on the question, it would be beneficial for arbitral tribunals/ trial courts to invite submissions from parties on the same.[177] An uncertain arbitral award is not in the interest of any stakeholder of arbitration, including parties, arbitrators, arbitral institutions, supervising courts, etc. Wherever permissible, arbitral tribunals could issue advisories or adopt guidelines while dealing with LIBOR cessation. Even where arbitral awards providing for LIBOR are sought to be enforced, it would do well for parties to plead for applying an interest rate index equivalent to LIBOR, at least from the date of LIBOR's cessation.

SOFR seems to have been suggested as the possible replacement to US LIBOR, but it has also been criticised as not representing commercial rates since SOFR is based on loans which are backed by US treasury bonds which are risk free and thus does not reflect credit risk and does not respond to the market as LIBOR did.[178] The English Commercial Court has sought to apply the US Prime Rate as the default interest rate for US Dollar awards. However, US Prime Rate has been viewed as increasing borrowing loan costs if adopted as a replacement for LIBOR.[179]

Irrespective of the relative merits of various alternative reference rates, it is the duty of Counsel to best represent their clients and to assist the tribunal in reaching a fair award. Hence, it is not proper for Counsel to be silent on the issue of the applicable interest rate index. While many tribunals took the initiative to invite submissions from parties on LIBOR cessation,[180] Counsel should take proactive steps to bring this issue to the attention of the tribunals. Failure to do so might reflect negatively on the performance of Counsel.

Depending on the subject matter, parties could structure their pleadings on interest in such a way as to apply LIBOR until its cessation and seek the alternative rate (such as US Prime or SOFR, if in Dollars, or other equivalents) after the date of cessation. They could also pray for fixation of any

[177] See, for instance, Award in PACC Offshore Services v. United Mexican States, ICSID Case No. UNCT/18/5 (9 May 2022), Para 54, https://www.italaw.com/sites/default/files/case-documents/italaw170564.pdf (accessed 8 March 2024)
[178] Award in PACC Offshore Services v. United Mexican States, ICSID Case No. UNCT/18/5 (9 May 2022), Para 55, https://www.italaw.com/sites/default/files/case-documents/italaw170564.pdf (accessed 8 March 2024). See also, The Board of the International Organisation of Security Commissions, Statement on Alternatives to USD Libor (3 July 2023), https://www.iosco.org/library/pubdocs/pdf/IOSCOPD738.pdf (accessed 3 April 2024)(expressing that caution should be employed in adopting the alternative rates, including SOFR), and Urban J. Jermann, Is SOFR better than LIBOR? (18 April 2019), https://ssrn.com/abstract=3361942 (accessed 22 May 2024), p. 1-2.
[179] Nathan J Moore & Dana Bradley, LIBOR Fallback to Prime May Increase Corporate Loan Costs (26 October 2023), https://www.wilmerhale.com/insights/client-alerts/20231026-libor-fallback-to-prime-may-increase-corporate-loan-costs (accessed 22 May 2024)/
[180] See, for instance, Award in PACC Offshore Services v. United Mexican States, ICSID Case No. UNCT/18/5 (9 May 2022), Para 54, https://www.italaw.com/sites/default/files/case-documents/italaw170564.pdf (accessed 8 March 2024)

other rate as an alternative, in addition to the alternative suggested by the party. Suitable justification for claiming an increase beyond the relevant rates is also required to be pleaded. Hence, pleadings may be drafted or amended accordingly for addressing the issue.

Contract law of each jurisdiction usually provides for default interest rates where an agreement is silent or where the term in the agreement providing for a default interest rate is unenforceable. In the Indian context, for instance, Section 3(1) of the Interest Act, 1978 provides for the applicable interest rate, which is the "*highest of the maximum rates at which interest may be paid on different classes of deposits (other than those maintained in savings account or those maintained by charitable or religious institutions) by different classes of scheduled banks in accordance with the directions given or issued to banking companies generally by the Reserve Bank of India*".[181] This is subject to a contract providing otherwise.[182] Section 31(7)(b) of the Arbitration and Conciliation Act, 1996 provides for interest at the rate specified in the Interest Act, 1978. These rules are default rules.

Section 3(1) of the (Indian) Interest Act, 1978 allows parties to contract around the default rule and provides for an agreed interest rate. The default rate provided in the Interest Act of 1978 is reflective of the market interest rate for Indian Rupees and not for US Dollars or other currency. If parties had agreed to LIBOR, making applicable the default interest rate provided in the Interest Act, 1978 or in the Arbitration and Conciliation Act, 1996, might lead to unjust results.[183]

Therefore, if the currency of the contract is other than the Indian Rupee, the Interest Act, 1978 or the Arbitration and Conciliation Act, 1996 may not reflect the equivalent market rate. In such cases, it would do well for arbitral tribunals and courts to apply alternatives and that too from the date when LIBOR ceased.

[181] Section 3(1) read with Section 2(b) of the Interest Act, 1978.
[182] Section 3(3)(a)(i) of the Interest At, 1978.
[183] Section 31(7)(b) speaks of interest rate at 2% above the current rate of interest as defined in Section 2(b) of the Interest Act, 1978. "Current rate of interest" as per the Interest Act, 1978 refers to "*the highest of the maximum rates at which interest may be paid on different classes of deposits (other than those maintained in savings account or those maintained by charitable or religious institutions) by different classes of scheduled banks in accordance with the directions given or issued to banking companies generally by the Reserve Bank of India under the Banking Regulation Act, 1949 (10 of 1949)*."

SOFR reflects the "*cost of borrowing cash overnight collateralized by Treasury securities*".[184] On the other hand, US Prime Rate is the interest rate that the largest twenty five commercial banks[185] in the United States charge their "*most creditworthy customers for loans*".[186] Based on the arbitral awards and decisions discussed above, it appears that arbitral tribunals and courts in India would have to decide to adopt either the SOFR or the US Prime Rate in place of LIBOR.

[184] Federal Reserve Bank of New York, Secured Overnight Financing Rate Data, https://www.newyorkfed.org/markets/reference-rates/sofr (accessed 22 May 2024). For a detailed account of calculation of SOFR, see, Federal Reserve Bank of New York, Calculation Methodology for the TGCR, BGCR, and SOFR, https://www.newyorkfed.org/markets/reference-rates/additional-information-about-reference-rates#tgcr_bgcr_sofr_calculation_methodology (accessed 22 May 2024).

[185] Federal Reserve, What is the prime rate, and does the Federal Reserve set the prime rate? https://www.federalreserve.gov/faqs/credit_12846.htm (accessed 22 May 2024).

[186] James Chen, Prime Rate: Definition and How It Works (16 April 2024), https://www.investopedia.com/terms/p/primerate.asp (accessed 22 May 2024).

THE IDEA OF A-NATIONAL ARBITRAL AWARD AND AN AUTONOMOUS ARBITRAL ORDER – A CRITICAL ANALYSIS

Rajesh Kapoor*

I. INTRODUCTION

It is highly desirable that the fate of an award passed in international arbitration is governed by internationally accepted norms, not parochial laws. The New York Convention of 1958 ("**the Convention**") was framed with this object as it created a regime under which enforcement of foreign awards could be refused only on internationally accepted grounds as enumerated in the Convention. The limitation of the Convention is that it applies at the stage of enforcement only and hence cannot protect arbitral awards from the idiosyncrasies of the laws of the seat of arbitration.

Consequently, there has been an attempt to make the seat completely inconsequential. This has happened in two ways. One of them delinks an arbitral award from the seat and grounds it in the legal order of the place of enforcement. This approach is fraught with the problem of retrospective validity i.e., the award remains in a legal vacuum until it is enforced. Furthermore, like the Seat Theory, it regards a municipal system of law – a legal order of some State, as the source of validity of an award passed in international arbitration. Consequently, it also ends up subjecting an international phenomenon to a national legal order. The argument here is that the foundation of an international phenomenon ought to be international.

This has given birth to the idea of grounding international arbitration in a non-national legal order, consequently rendering the arbitral award passed in such an arbitration 'a-national', i.e. an award whose legal validity does not stem from any national legal order. Two questions of fundamental importance arise here. Firstly, whether such an award is enforceable under the New York Convention, which governs the enforcement of foreign awards globally and secondly, whether such an idea would make international arbitration a more preferable option to decide cross-border disputes. This paper endeavours to answer these questions.

The paper is divided into 5 parts. Part I is the introduction. Part II deals with the idea of delinking arbitration from the legal order of the seat, and Part III deals with the theory of transnational arbitral legal order. Part IV discusses the possibility of enforcing 'a-national arbitral awards' under the Convention. The paper ends with Part V i.e., the conclusion.

II. DELINKING INTERNATIONAL ARBITRATION FROM THE SEAT OF ARBITRATION

France has been at the forefront of detaching international arbitration from the legal order of the seat of arbitration. Accordingly, this paper analyses the progression of this approach in France.

The French saga of delinking arbitration from the legal order of the seat begins with the *Norsolor*[187] case. This case had "created a great stir",[188] however, for the reason that the arbitrators decided the dispute on the basis of *lex mercatoria*.[189] The dispute concerned the termination of an agency agreement between a Turkish company called Pabalk and a French company, Ugilor, which later became Norsolor. The agency agreement provided for ICC arbitration, and Vienna was fixed as the seat of arbitration. As the parties had not selected the substantive law of the contract, according to Rule 13 of the erstwhile ICC Rules, it was incumbent upon the arbitrators to make the selection by applying the conflict of law rules they would deem fit.

In view of the international nature of the contract, the tribunal selected *lex mercatoria* as the governing law of the contract, without applying the conflict of law rules. The tribunal held that Norsolor had misused its superior position and did not act in good faith, which is one of the core principles of *lex mercatoria*. Consequently, it passed an award against the French company, ordering it to pay compensation to Pabalk.

Norsolor applied for setting aside the award in Vienna, which was dismissed by the Commercial Court of First Instance there.[190] At the same time, the Court of First Instance in Paris allowed Pabalk's application for enforcement of the award.[191] Norsolor applied to the Court of Appeal in Vienna for setting aside the award and also approached the Court of Appeal in Paris for setting aside the order of enforcement granted by the Court of First Instance. The Court of Appeal in Paris postponed the matter in view of the proceedings before the Court of Appeal in Vienna, which indicates acknowledgement of a link between the legal order of the seat and an arbitral award passed there.

Accordingly, when the Court of Appeal in Vienna vacated the award partially, its French counterpart refused to enforce that part. The word on which the Paris Court of Appeal relied upon to do so was "*cassee*" which it said is a synonym of "*annullee*".[192] Accordingly, it stated that the annulled part of

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[187] *Pabalk Ticaret Ltd Sirketi v Norsolor SA* decided 19 Nov. 1982 Paris Court of Appeal (1983) Rev Arb 472, Y B Comm Arb XI (ICCA and Kluwer 1986) 484.

[188]Emmanuel Gaillard, 'Enforcement of Awards Set Aside in the Country of Origin: The French Experience' in Albert Jan van den Berg (ed), *Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of the Application of the New York Convention* (ICCA and Kluwer Law International 1999) 505, 508.

[189]ibid.

[190] Y B Comm Arb XI (ICCA and Kluwer Law International 1986) 486.

[191]ibid 484.

[192]ibid 488.

the award becomes unenforceable from the very moment it is annulled "in accordance with Art. V (1) (e) of the New York Convention".[193] Thereafter, it retracted the order of enforcement granted by the Court of First Instance to the extent the latter had allowed enforcement of the annulled part and refused to stall enforcement of the part which had not been annulled.[194] However, the French Supreme Court rejected this approach and held that the French courts have an obligation to explore the possibility of enforcement under some other law in view of Article VII (1) of the Convention.[195] Thus the French Apex Court acknowledged that international arbitration is free from the legal order of the seat of arbitration.

This position is clearly and firmly established by the French courts i.e. the Cour de cassation (The Supreme Court) and the Cour d'appeal de Paris through the famous *Hilmarton*[196] case wherein they upheld the idea of an international award not anchored to the legal order of the seat of arbitration.[197] *Hilmarton* carries a lot more weight than *Norsolor* because in *Norsolor* the award was upheld by the Apex Court at the seat before the Cour de Cassation ruled in favour of enforcing the same in France. On the other hand, in *Hilmarton* the award had been squarely annulled by all the relevant courts at the seat, including the Apex Court. Despite that, in France, all courts right from the lowest rung to the top agreed to enforce it.

The case involved a consultancy agreement between an English company Hilmarton and a French company Omnium de Traitement et de Valoristaion S.A. ("**OTV**"). As per the contract, the English company was to help OTV in procuring a construction contract in Algeria. A dispute arose about the commission, and the matter was referred to arbitration under the ICC Rules in Geneva.

The sole arbitrator rendered an award against Hilmarton on the basis that the agreement involved "traffic in influence",[198] which in his opinion was against the Algerian law as well as the public policy of Switzerland, the seat of arbitration. Hilmarton applied for setting aside of the award in Switzerland and OTV applied for its enforcement in France. The award was set aside by the Geneva Court of Appeal[199] and the decision was also affirmed by the Swiss Supreme Court.[200] Nevertheless,

[193] ibid.
[194] ibid 487.
[195] ibid 489. Also see Emmanuel Gaillard (n 2) 509.
[196] *Omnium de Traitement et de Valorisation-OTV v Hilmarton* Y B Comm Arb XXI (ICCA and Kluwer Law International 1996) 524.
[197] Emmanuel Gaillard (n 2) 510.
[198] Y B Comm Arb XXI (ICCA and Kluwer Law International 1996) 525.
[199] ibid.
[200] ibid.

permission to enforce the award was granted in France by the Court of First Instance as well as the Court of Appeal.

The decision to enforce the award was affirmed by the Cour de Cassation, stating that the relevant award was "an international award which was not integrated into the Swiss legal order, such that its existence continued in spite of it being set aside and that its recognition in France was not contrary to international public policy".[201]

Hilmarton clearly detached arbitration from the legal order of the seat and thus made Article V (1) (e) of the New York Convention superfluous. This position was further strengthened by the Paris Court of Appeal's decision in *Chromalloy*,[202] wherein an award passed in favour of an American company and against the Egyptian government was enforced despite its annulment by a competent court at the seat in Egypt. After *Hilmarton*, van den Berg had said that "if an award is set aside in the country of origin, a party can still try its luck in France".[203] *Chromalloy* made it clear that it is not anymore a matter of luck but a firmly established rule. It is remarkable here that *Chromalloy* had sought enforcement in the US as well and the US joined France in enforcing awards set aside at the seat[204] and thus recognizing that an arbitral award is not bound to the legal order of the seat of arbitration.

The problem with this approach is that it delinks arbitration from the legal order of the seat but grounds it in the legal order of the place of enforcement. The shortcoming is that, till the time the award is enforced, it exists in a legal vacuum. From the perspective of legal theory, this is not tenable. Furthermore, this does not make international arbitration international, because ultimately it draws its validity from a national legal order. Moreover, this approach is arbitrary in the selection of the law governing arbitration, since the seat is at least selected by the parties but the place of enforcement could be any place where the award creditor has assets. Thus, this approach goes against party autonomy, which is cardinal to arbitration.

III. THE THEORY OF ARBITRAL LEGAL ORDER

The theory of arbitral legal order postulates that international arbitration does not have any connection not just with the legal order of the seat of arbitration but with any national legal order. It rather belongs

[201] Emmanuel Gaillard (n 2) 510.
[202] 'France No. 26, The Arab Republic of Egypt v. Chromalloy Aeroservices, Inc., Cour d'Appel [Court of Appeal], Paris, Not Indicated, 14 January 1997' Y B Comm Arb XIX (ICCA and Kluwer Law International 1997) 691.
[203] Y B Comm Arb XIX (ICCA and Kluwer Law International 1994) 592.
[204] Eric Schwartz, 'A Comment on Chromalloy, Hilmarton, à l'américaine' (1997) 14 JOIA 126.

to an "international legal order, called sometimes *lex mercatoria*, sometimes transnational law, more recently arbitral legal order".[205] It was the French jurist Berthold Goldman who had famously stated that an arbitrator in international arbitration does not have any forum and if he has any it is the whole world.[206] Gaillard developed this idea further,[207] and it has been endorsed of late by the French courts including the *Cour de Cassation*.[208]

This idea has gained much traction with the passage of time. Thus, the Supreme Court of Canada has held that "arbitration is an institution without a forum and without a geographic basis".[209] Stephen Schill describes international arbitration as a stable institution of transnational governance".[210] According to Lew, international arbitration in modern times exists in a "non–national or transnational"[211] space. The proposition here is that international arbitration exists in a legal order which is distinct from national legal orders and is transnational in nature.[212]

There are scholars who have turned to natural law to evince the existence of a transnational arbitral order. Gaillard thus observes:

> The existence of an arbitral legal order can readily be acknowledged if one accepts to reason from a natural law perspective. Higher values that supposedly result from the nature of things or of society-which at times consolidate solutions found in positive law by justifying them and, at other times, question those solutions to induce their evolution-can easily be perceived as a justification for the existence of a legal order that is superior to legal systems whose only merit is to have been generated by sovereign States.[213]

Natural law consists of those transcendental values which are intrinsic to "the nature of man or of society".[214] The argument is that international arbitration is a natural option for the settlement of certain types of disputes and it is very reasonable to have a distinct legal order to deal with this distinct

[205] Pierre Mayer, 'The French Approach as a Starting Point for General Reflections on the Recognition of Foreign Award Judgments' in Andrea Menaker (ed), *International Arbitration and the Rule of Law: Contribution and Conformity* (ICCA and Kluwer Law International 2017) 706.
[206] See Emmanuel Gaillard, *Legal Theory of International Arbitration* (Martin Nijhoff 2010) para 1.
[207] See ibid .
[208] '*Société PT Putrabali Adyamulia v Société Rena Holding et Société Moguntia Est Epices*, Cour de cassation (1ère Ch. civile), Not Indicated, 29 June 2007' (2007) Rev Arb 507; Philippe Pinsolle, 'The Status of Vacated Awards in France: the Cour de Cassation Decision in Putrabali' (2008) 24 Arbitration International 277, 282.
[209] *Dell Computer Corporation v Union des Consommateurs and Olivier Dumoulin* [2007] 2 RCS 801,803.
[210] Stephen W Schill, 'Developing a Framework for the Legitimacy of International Arbitration' in Albert Jan Van den Berg (ed), Legitimacy: Myths, Realities, Challenges, ICCA Congress Series, Vol 18 (ICCA & Kluwer Law International 2015) 789, 794.
[211] D M Lew, 'Achieving the Dream: Autonomous Arbitration' (2006) 22 Arbitration International179, 181.
[212] See Emmanuel Gaillard, *Legal Theory of International Arbitration* (Martinus Nijhoff 2010).
[213] Emmanuel Gaillard, (n 26) para 46.
[214] ibid para 47.

phenomenon. Thus, Thomas Clay says that it seems that natural law "has found a new expression in the idea of an arbitral legal order".[215] Natural law is instinctively universal and so is international economic law. It is in the very nature of international economic law to desire a unifying transnational legal order. The fragmented municipal legal orders are against its very nature. According to Bruno Oppetit, international commercial law:

> for its part, clearly manifests a desire for unity and universality, based on the common needs and interests of the international economic community. As such it does not accord with a fragmentation of the international legal framework and encourages the use of unifying legal notions, such as *lex mercatoria*, general principles of law, or truly international public policy.[216]

In the naturalist vision of international arbitration, certain norms like autonomy of the parties, general principles of law and international public policy are the higher norms to which the other laws dealing with arbitration must conform. If the latter are not in consonance with these higher norms, then the arbitrator shall disregard them.[217] On the other hand, according to Gaillard, the source of transnational arbitral legal order lies in the "normative activity of States".[218] He opines that in the field of arbitration, certain principles are now accepted by most of the States. It is these universally accepted principles which constitute the transnational arbitral legal order and an award passed in international arbitration is grounded in this order.

ENDORSEMENT OF THE VIEW BY THE FRENCH COURTS

In the year 2007, in *Putrabali v Rena Holding,* the French Supreme Court once again allowed the enforcement of an award annulled at the seat.[219] *Putrabali* is hugely important because this time the Court developed a completely new theory to justify the enforcement of annulled awards. Although *Hilmarton* and *Chromalloy* had firmly established the French approach of enforcing awards annulled at the seat, the premise on which they rested was problematic as the arbitral award remained in a legal vacuum until its enforcement. The *Putrabli* decision addressed that issue by proposing the existence of an autonomous arbitral legal order and rooting an award passed in international arbitration in the said legal order right from the moment it is delivered by the arbitral tribunal.

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[215] Thomas Clay, *L'arbitri* (Dalloz 2001) 222 translated into English in Emmanuel Gaillard, *Legal Theory of International Arbitration* (Martinus Nijhoff 2010) para 48.
[216] Bruno Oppetit, *Philosophie du Droit* (Dalloz 1999*)* 119*,* translated into English in Emmanuel Gaillard, *Legal Theory of International Arbitration* (Martinus Nijhoff 2010) para 48.
[217] Emmanuel Gaillard,(n 26) para 49.
[218] ibid para 50.
[219] *PT Putrabali* (n 22) 507.

Putrabali involved a contract for supply of white pepper by an Indonesian company named Putrabali, to a French company Société Est Epices, which later became Rena Holding. The goods sank during the voyage and the French buyer refused to make the payment. Importantly, the shipping documents had been transmitted to the buyer before the goods sank.

The matter was referred to arbitration with the seat as London which culminated in an award passed in favour of the seller. Since the parties had agreed to two-tier arbitration, an award was passed in favour of the French buyer in the second round. The Indonesian company made an appeal to the English High Court against the second award. The High Court found the award faulty and remitted the matter to arbitration. This time, an award was passed in favour of the Indonesian company, requiring the French buyer to make the payment.

In the meantime, the French company applied in France for enforcement of the award passed in the second round. The Court of First Instance granted the permission to enforce the same and the decision was affirmed by the Court of Appeal in Paris, stating that there is no reason not to enforce the award in France as none of the grounds enumerated under Article 1502 were applicable in this case. It reiterated the French position that annulment of an award at the seat is no ground for refusing enforcement in France.

Putrabali made an appeal to the Cour de Cassation. It is remarkable here that Putrabali did not dispute the possibility of enforcement of an award annulled at the seat, in France. The crux of its challenge was that Rena Holding should not have tried to enforce the first award in view of the agreed procedure between them. In doing so, it breached that trust. As Pinsolle points out, the Cour de Cassation could have simply rejected the challenge of Putrabali on the basis that the enforcement is valid as per French law by relying upon Article VII of the Convention, which it did, but it also went further and discussed the theoretical basis for allowing the enforcement of annulled awards.[220]

The Cour de Cassation held that "an international arbitral award, which is not anchored in any national legal order, is a decision of international justice whose validity must be ascertained with regard to the rules applicable in the country where its recognition and enforcement are sought".[221] Decisions of international justice emanate from a transnational legal order, and not from any national legal order.[222] The task of the legal order of the place of enforcement is merely to see whether to incorporate the

[220] Philippe Pinsolle, (n 22) 280.
[221] Y B Comm Arb XXXII (ICCA and Kluwer Law International 2007) 299, 302.
[222]Pinsolle (n 22) 285.

decision in its legal order.[223] According to the *Putrabali* decision, there exists a distinct arbitral legal order and the validity of an award passed in international arbitration stems from this order. Since this award is not rooted in any national legal order, the award becomes an 'a-national award'.

IV. THE NEW YORK CONVENTION AND THE IDEA OF A-NATIONAL AWARDS

An 'a-national award' does not draw its legal force from any particular national legal order. This makes it truly international. Furthermore, no national court has the power to set it aside, and thus it is immune from the idiosyncrasies of the laws of the seat. Of course it can be refused enforcement but only if the enforcement would be against the global standards provided in the Convention. The important question which arises is, does the Convention recognise such an award? The Convention applies to foreign arbitral awards and defines the same as an award passed in a country other than the place where enforcement is sought. This does not accommodate the idea of 'a-national awards', because in the case of an 'a-national award', the place where it is passed is irrelevant.

The said territoriality principle was objected by some delegates particularly from France and Germany during the making of the Convention.[224] Their argument was that in some conditions, an award passed within their territory could be considered as a foreign award and the Convention should apply to such awards as well. On their insistence, another criterion was added which provided that the Convention would also apply to awards not considered domestic by the State where enforcement is sought.[225] This was in view of the autonomy of the parties to choose the law governing their arbitration. The problem with this view is that even though *autonomy is cardinal to arbitration but the legal force of an award cannot stem from the autonomy of the parties alone because the very idea of autonomy can exist only if provided by some legal system.*[226]

The Convention permits the parties to select a governing law other than that of the seat. According to Article V(1)(e), a foreign award can be refused enforcement if "the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made". The words "under the law of which" imply that the law governing arbitration could be of a place other than the seat of arbitration. Could that law also be 'a-national'?

[223] ibid 289.
[224] Albert Jan ven den Berg, *The New York Convention of 1958*, (T.M.C. Asser 1981) 23.
[225] ibid.
[226] Francis Mann, 'Lex Facit Arbitrum' (1986) 2 Arbitration International 241, 245.

It can be argued that there is no point in allowing the parties to subject arbitration to the municipal law of a place other than the State where arbitration is conducted. If that choice is so attractive, the parties will choose that place as the seat, instead of complicating things without any rhyme or reason. Therefore, permitting them to select a law other than that of the seat as the governing law, should be interpreted to allow parties to subject arbitration to a non-national system of law. But the provision contemplates a competent authority to suspend or set aside an award which is not possible in the case of an 'a-national legal order'. Hence the above mentioned reference under Article V(1)(e) of the Convention cannot be to a non-national legal order. Moreover, the idea of 'a-national awards' is not in consonance with the intention of the makers of the Convention. This is clear from the travaux préparatoires of the Convention.

The Convention came into existence on 10 June 1958. Its genesis cannot be said to be confined to merely the time when it was being drafted and deliberated upon. On the other hand, its "roots can be traced back to the very beginning of the 20th century".[227] The seeds of the Convention were sown then. This was the time when arbitration was seen with suspicion or unfavorably by national courts generally.[228] Nevertheless, the international business community pitched for developing a legal framework for international arbitration. The ICC which was established in 1919 took the lead in this respect and submitted a proposal to the League of Nations, which finally took the form of the Geneva Protocol on Arbitration Clauses (1923)[229] ("the Protocol").

The Protocol is considered a landmark in the field of international arbitration.[230] There also exists a view that "the Protocol was not a major contribution to the development of the law of arbitration".[231] According to Gary Born, such "suggestions are inaccurate".[232] In his opinion, some aspects of the Protocol "had a profound and decisive effect on the future of international arbitration law and on the language of the New York Convention, the UNCITRAL Model Law and other leading legislation and international instruments in the field".[233]

[227]Christoph Liebscher, 'Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958 Preliminary Remarks' in Reinmar Wolff (ed), *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards-Commentary* (CH Beck 2012) 9.
[228] ibid.
[229] ibid.
[230] Nigel Blackaby and others, *Redfern and Hunter on International Arbitration* (6th edn, OUP 2015) para 1.18.
[231]Hamid G. Gharavi, *The International Effectiveness of the Annulment of An Arbitral Award* (Kluwer Law International 2002) para 117. Though in the same paragraph he acknowledges that "It would, however, be unfair to minimize the achievements of the Protocol as it constituted the first step towards an international arbitration legislation".
[232]Gary Born, *International Commercial Arbitration* (3rd edn, Wolters Kluwer 2021) 63 see at foot note 461.
[233]ibid.

The Protocol though a milestone in the journey of international commercial arbitration was not equipped to enforce foreign arbitral awards.[234] The States party to it were obliged to enforce awards passed in their territory only and that too in accordance with the local laws.[235] This meant that a substantive review of an award was also possible at the stage of enforcement if the laws of the place of enforcement permitted the same. These limitations paved the way for the creation of the Geneva Convention of 1927.

The most significant aspect of the Geneva Convention was that it introduced for the first time the concept of a foreign award in a multilateral treaty.[236] The obligation of the contracting States was to enforce awards passed in any other contracting State. However, it suffered from the problem of double execution, i.e., the award was required first to be approved by a court in its country of origin before it could be enforced in any other contracting State. Thus, it was required to be approved twice.[237] This proved practically quite cumbersome.[238] Moreover, the procedure for the conduct of the arbitration proceedings used to be the law of the place of arbitration, and it was required that the award conforms to that law.[239]

The international business community, forced by the above-mentioned shortcomings, geared its efforts towards the creation of a truly international legal framework to regulate international commercial arbitration.[240] Once again the ICC was at the forefront and worked towards the creation of uniform standards to govern international arbitration.[241] The main problem which it found with the Geneva Convention was its overdependence on the laws of the place of arbitration. In 1953, the ICC submitted a draft proposal to the United Nations Economic and Social Council (ECOSOC), in which it proposed the radical idea of autonomous arbitration, i.e., detaching it from national laws.[242] This did not find favour with most of the States.[243]

Consequently, the ECOSOC formed an ad hoc committee and forwarded the ICC Draft Convention to it.[244] The ad hoc committee created a draft considerably different from the one sent to it. The

[234]Christoph Liebscher (n 41) 9.
[235]According to Article III of the Protocol, "Each Contracting State undertakes to ensure the execution by its authorities and in accordance with the provisions of its national laws of arbitral awards made in its own territory".
[236]Christoph Liebscher (n 41) 11.
[237] Nigel Blackaby (n 44) para 11.87.
[238] Albert van den Berg (n 38) 7.
[239] Christoph Liebscher (n 32) 11.
[240]Albert van den Berg (n 38) 7; Christoph Liebscher (n 41) 12; Gary Born (n 46) 99.
[241] Albert van den Berg,(n 38) 8.
[242] Gary Born (n 46) 99.
[243] Christoph Liebscher (n 41) 12.
[244]ibid.

ECOSOC forwarded this draft to many stakeholders.[245] In order to deliberate further, it conducted a conference at the United Nations headquarters in New York between 20 May and 10 June 1958.[246] It is these deliberations which finally brought into existence the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958, popularly known as the New York Convention of 1958.

The Convention removed the requirement of seeking "a declaration"[247] from a competent court at the seat of arbitration that the award is enforceable in their jurisdiction. It also provided for the presumptive validity of an arbitral award, which shifted the onus on the party resisting enforcement to prove the existence of any of the conditions for refusing enforcement.[248] However, it did not accept the idea of an international award i.e., an award detached from the national laws as proposed by the ICC, and replaced that with the idea of a foreign award as proposed by the ad hoc committee formed by the ECOSOC.[249] Thus, it rejected the notion of a-national awards. Van den Berg believes that the Convention does not apply to a-national awards but he admits that there is some confusion in this respect.[250]

V. CONCLUSION

The quest to free arbitration from the peculiarities of national laws is understandable, but the endeavor to achieve that goal by detaching arbitration from the national legal order and making awards a-national is fraught with problems. First, the Convention does not accept the idea of a-national awards as it was rejected during its making. Second, arbitration needs assistance of national courts not only at the time of enforcement of an award but even before it commences and also during the conduct of the proceedings. This support may be required even to bring an arbitration tribunal into existence and at times for "the 'freezing' of a bank account or for the detention of goods".[251] A national court would not be ready to provide the said support, if arbitration is not rooted in its legal order.

Thirdly, an 'a-national award' cannot be annulled by any national courts, which will make it a fearsome instrument. Even an apparently flawed award will have to be opposed at every place where enforcement is sought. Consequently, making potential parties disinterested in opting for

[245] Albert van den Berg (n 38) 8.
[246] ibid.
[247] Nigel Blackaby (n 44) para 1.210.
[248] See Article V of the New York Convention; Albert van den Berg (n 38) 9.
[249] Albert van den Berg (n 38) 35.
[250] ibid 34, "Although the extensive debates at the New York Convention are not entirely clear on this point, it can be assumed that the idea was also rejected by the majority of the delegates."
[251] Nigel Blackaby (n 44) para 3.77.

international arbitration as a mechanism to resolve their cross-border disputes. Thus, the idea of 'a-national awards', which at first glance appears to facilitate the growth of international arbitration, actually makes it a less preferable option.

JUDICIAL GUARDIAN TO THE RESCUE! PREVENTING THE ABUSE OF TERMINATION PROCEEDINGS IN ARBITRATION

Vanya Chhabra* and Intisar Aslam**

I. INTRODUCTION

Basing its foundation upon the UNCITRAL Model Law[252] the Indian Arbitration and Conciliation Act, 1996 ("**Indian Arbitration Act**") provides for the termination of arbitration proceedings broadly through two procedural ways: *(i)* a final arbitral award and *(ii)* an order of the arbitral tribunal.[253] This section of the article aims to argue that the scope of the final award expands to include partial awards within its ambit. For this purpose, it is necessary to delve into the discussion of the Working Group II while drafting the provision within the 1985 Model Law.

From the different drafts of the second Working Group, a base definition was attributed to the final award as an award that decides all the claims presented or submitted before the arbitral tribunal.[254] It was further discussed that termination of arbitration proceedings or the arbitrator's mandate would not be attracted in case of non-finality. Given the foregoing, examples of non-final awards were said to include partial awards, interlocutory awards, and interim awards.[255] It is noteworthy that a similar stance for this definition has also been adopted by the Supreme Court of India.[256]

In the First Draft (1982), the Working Group took a weaker stance by stating that the proceedings shall not terminate unless the award either "*is apparently*" or "*indicates that it is*" or "*not intended to settle the dispute in full*".[257] In the subsequent draft (1982), the provision was comparatively strongly worded, stating that termination would happen unless the award either "*is not intended to*" or "*does not*" "*constitute a final disposition of the substance of the dispute*".[258] During the final discussions, however, the Working Group omitted this expansive definition and replaced it with the term final award, which is present in Article 32(1) of the Model Law.[259] While this discussion provides a clear

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[252] UNCITRAL Model Law on International Commercial Arbitration, 1985.
[253] Arbitration and Conciliation Act, 1996, §32, No. 26, Acts of Parliament (India).
[254] ILIAS BANTEKAS, *Termination of Proceedings- Article 32* in UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION: A COMMENTARY 836 (Cambridge University Press 2020).
[255] HOWARD HOLTZMANN & JOSEPH NEUHAUS, A GUIDE TO THE UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION: LEGISLATIVE HISTORY AND COMMENTARY 867 (Kluwer Law International 1989).
[256] IFFCO Ltd. v. Bhadra Products, (2018) 2 SCC 534.
[257] First Draft, A/CN.9/WG-II/WP.38, ¶¶118-119.
[258] Second Draft, A/CN.9/WG-II/WP.40.
[259] UNCITRAL Model Law on International Commercial Arbitration, 1985, art. 32, cl. 1.

idea of the intent of the drafters of what would constitute a final award, the Indian Courts have taken a divergent view, perhaps unintentionally, which reflects one essential point the drafters missed while deliberating on the incorporation of this model provision i.e., if partial awards are final.

The historical background of the provision, therefore, unfolds one amongst several instances that possess the potential for the abuse of termination of arbitration proceedings: the scope of a 'final' award under Section 32(1) of the Indian Arbitration Act. It is necessary to define the contours of this term since a part of an arbitral award supporting the favored party is not only enforceable under the New York Convention[260], but can also be set aside under Section 34 of the Indian Arbitration Act if the party is aggrieved, making the arbitration proceedings time-efficient.[261]

II. SCOPE OF FINAL AWARD IN TERMINATION OF PROCEEDINGS: CAN A PARTIAL AWARD BE INCLUDED?

The main argument of this section is that partial awards may also be final, and therefore, they cannot be treated separately from final awards. Such an observation entails that termination of arbitration proceedings will also happen in case of pronouncement of partial awards, as opposed to the intent of the Working Group, and, in the narrower sense, the same would happen with respect to that particular claim for which the partial award has been issued.

The Indian Arbitration Act defines an "arbitral award" under Section 2 (1) (c) to mean that it includes an interim award. It does not use the expression "*partial award*". However, this category of partial award also falls within the ambit of 'award' under Section 2(1)(c) of the Indian Arbitration Act.[262] The Supreme Court in the McDermott Case had noted:

> "On the other hand, we are of the opinion that it is final in all respects with regard to disputes referred to the arbitrator, which are subject matter of such award. We may add that some arbitrators instead and in place of using the expression "interim award" use the expression partial award…"[263]

[260] Martin King and Ian Meredith, *Partial Enforcement of International Arbitration Awards*, 26(3) ARBITRATION INTERNATIONAL, 381-390 (2010).
[261] Larsen Air Conditioning & Refrigration Co. v. Union of India, (2023) SCC OnLine SC 982.
[262] Sanjeev Kapoor and Saman Ahsan, *Challenging and Enforcing Arbitral Awards: India*, GLOBAL ARBITRATION REVIEW (Nov. 11, 2023, 02:45 AM), https://globalarbitrationreview.com/insight/know-how/challenging-and-enforcing-arbitration-awards/report/india.
[263] McDermott International Inc. v. Burn Standard Co. Ltd., (2006) 11 SCC 181, ¶70.

Furthermore, the Court had also observed that an interim award may be a final award on those claims that have been settled at the interim stage.[264] This finality of partial award is evident from cases in different jurisdictions including the UK, the USA, India, etc.

In the case of *EGF v. HVF*[265], the England High Court categorically held that if an award is passed at any stage, it has to be final and conclusive. It observed that arbitral tribunals must avoid providing interim relief through partial or interim awards. The reasoning behind this is that interim relief is meant to be temporary. In contrast, an award- whether interim or final- resolves the dispute conclusively between parties and cannot be reconsidered. One scenario observed by the New York State High Court has been that if the parties mutually agree that the decision shall be treated as final on the decided issue, a partial award can be considered final; however, in the case before it, no mutual agreement existed.[266]

In *Emirates Trading Agency LLC v. Sociedade de Fomento Industrial Private Limited*[267], the court recognized the finality of a partial award since both awards are binding in nature and, subject to a few exceptions, the tribunal loses its power to review or reconsider the subject matter of the award in both cases.

Similarly, in *NHAI v. Trichy Thanjavur Expressway Ltd*., the Court observed that each independent claim has its distinct award, and the final award is composed of several decisions or awards. Thus, it is well-settled that partial awards determine or settle some of all the claims submitted to arbitration and impose res judicata.[268] Additionally, it has been ruled that "*if the partial award answers the definition of the award, as envisaged under Section 2(c) of the 1996 Act, for all intent and purport, it would be a final award*".[269]

Lastly, both the partial award and the final award are the subject matter of challenge under Section 34 of the Indian Arbitration Act.[270] Given that the partial award is determinative of the rights of the parties, the finality of a partial award is strengthened by the fact that it will have an effect even after the final award is issued. Conclusively, any inclusion of a partial award within the final award will, thus, prevent the deliberate prolonging of arbitration proceedings, i.e., guerilla tactics on a res judicata

[264] *Id*. at ¶68.
[265] (2022) EWHC 2470 (Comm).
[266] American Intl. Specialty Lines Ins. Co. v. Corporation, (2020) NY Slip Op 02529.
[267] (2015) EWHC 1452 (Comm).
[268] ILIAS BANTEKAS, *Termination of Proceedings- Article 32* in UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION: A COMMENTARY 836 (Cambridge University Press 2020); McDermott International Inc. v. Burn Standard Co. Ltd., (2006) 11 SCC 181.
[269] McDermott International Inc. v. Burn Standard Co. Ltd., (2006) 11 SCC 181, ¶69.
[270] *Id*. at ¶70.

issue, and prevent wasting of resources and time, ensuring a streamlined, prompt, and efficient resolution of the dispute.[271]

III. WITHDRAWAL OF CLAIM: CAN STRICT INTERPRETATION ABUSE THE ARBITRAL PROCESS?

To answer this question, the arbitration dispute between *Fortminster* v. *Czech Republic* ["**Fortminster award**"] must be referred to.[272] The award holds importance for India as the same was decided under the UNCITRAL Arbitration Rules.[273] The point of law to be decided by the tribunal was whether withdrawal of notice invoking arbitration would unilaterally terminate the arbitral proceedings under Article 32(2) of the UNCITRAL Arbitration Rules. The tribunal observed:

> *"...that the Claimant could bring arbitration proceedings to an end unilaterally by withdrawing its Notice of Arbitration and without the constitution of an arbitral tribunal, that would also mean that the Claimant would be given the right to get rid of the Respondent's claim for costs to all intents and purposes. In the Arbitral Tribunal's view, such a consequence would be unacceptable by any standards*."[274]

In this case, the Claimant had set out its prayer for relief with an indication of the amounts sought as well as a statement of the facts supporting its claim within the Notice of Arbitration.[275] The tribunal 'determination' of costs was left to be decided by the arbitral tribunal; it constituted a legitimate interest in the non-termination of proceedings and also concluded that by virtue of such an interest, the continuance of proceedings had not become unnecessary to attract Article 32. While the tribunal impliedly differentiated between the notice of arbitration and statement of claim through the 'determination' of costs, it incidentally brought the notice of arbitration within the ambit of 'claim' by referring to it in the context of a legitimate interest of the respondent under Paragraph 2(a) of the Arbitration Rules. It is worth noting that the difference lies in the quantification of claims.[276] While the former includes an initial quantification, the latter incorporates the amount of all quantifiable claims.

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[271] ILIAS BANTEKAS, *Termination of Proceedings- Article 32* in UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION: A COMMENTARY 836 (Cambridge University Press 2020).
[272] Fortminster v. Czech Republic.
[273] UNCITRAL Arbitration Rules, GA Resolution 31/98.
[274] Fortminster v. Czech Republic, ¶70.
[275] *Id*. at ¶62.
[276] Team Farallon, *Notice of Arbitration*, FARALLON LAW CORPORATION (Nov. 28, 2023, 02:47 AM), https://fl.sg/resource/notice-of-arbitration/.

In international arbitration, it is well-settled that unilateral termination of proceedings cannot occur. This is also evident from investment arbitration, for instance, through cases like *Ambiente Ufficio* v. *Argentina* and *Abaclat* v. *Argentina*.[277] In these, the tribunal had observed that the claimant cannot unilaterally withdraw its request for arbitration without the consent of the other party once the request for arbitration has been registered. In fact, the Czech Republic tribunal has set a sound precedent for national courts and arbitration tribunals to adopt while adjudicating disputes of similar subject matter.

Through the lens of the Indian arbitration landscape, Section 23 of the Indian Arbitration Act provides that the statement of claim consists of the facts supporting his claim, the points at issue, and the relief or remedy sought.[278] The same is outlined in Article 18 of the UNCITRAL Arbitration Rules.[279] On the other hand, Article 3 provides for the contents of the notice of arbitration to include, inter alia, the names and addresses of the parties, the general nature of the claim, and an indication of the amount involved, if any, and the relief or remedy sought.[280] A similar form of the arbitration notice has been observed by the court in *Veena* v. *Seth Industries Ltd.*[281], stating that there is no statutory requirement to state the claims proposed to be made in the reference to include within the notice invoking arbitration. Crystallisation of claims is not necessary, and a notice merely indicating the emergence of a dispute and invoking the arbitration clause is sufficient. The rule of liberal interpretation adopted by the tribunal would also prevent misuse of this provision, where the parties could seek guerilla tactics to unilaterally terminate arbitration proceedings post-invocation of notice of arbitration.

IV. SAFEGUARDS FROM ABUSE AND REMEDY TO THE REMEDILESS: A CIRCUMSPECT INTERVENTION BY COURTS

The Indian courts, while emphasizing the need for minimal judicial intervention in arbitration, have been wary of expanding the exercise of the High Court's supervisory jurisdiction under Article 227 of the Constitution of India, 1950 ("**Constitution**") over orders of arbitral tribunals. Statutorily judicial intervention is made permissible for exceptional circumstances or where a party has acted in bad faith i.e. appeals allowed under Section 37 of the Indian Arbitration Act. A 7-judge bench in the case of *SBP and Co. v. Patel Engineering and Anr.* held that High Court's exercise of jurisdiction over arbitral tribunals is not permissible as an arbitral tribunal is a creature of a contract i.e. the arbitration agreement. The underlying reasoning provided by the court was that if such an exercise of

[277] Ambiente Ufficio v. Argentina (Decision on Jurisdiction & Admissibility), ¶337; Abaclat v. Argentina (Decision on Jurisdiction & Admissibility), ¶615.
[278] Arbitration and Conciliation Act, 1996, §23, No. 26, Acts of Parliament (India).
[279] UNCITRAL Arbitration Rules, GA Resolution 31/98.
[280] UNCITRAL Arbitration Rules, GA Resolution 31/98.
[281] (2010) SCC OnLine Bom 1684, ¶24.

supervisory jurisdiction was permitted, it would render the purpose and objective of "minimum judicial interference" nugatory.

Indian courts have permitted writ challenges under Article 227 against orders of arbitral tribunals, including orders for termination passed under Section 32(2) of the Indian Arbitration Act.[282] The underlying principle that forms the basis for this approach is that a legislative enactment cannot curtail a right granted under the Constitution.[283] The High Courts can thus continue to exercise their writ powers of supervisory jurisdiction conferred on them by the Constitution of India. But to what extent? The Indian Arbitration Act does not contemplate direct interference with orders passed by arbitral tribunals except under 34 and 37 of the Indian Arbitration Act. Courts have "*almost a nil scope of interference*" unless there is some adversity, perversity, or the award is contrary to law, or it actually shocks the court's conscience.[284] Hence, as a consequence, it is only under exceptional circumstances that a writ petition under Article 227 ought to be entertained.[285] One such exceptional circumstance is where an application for termination of the arbitration proceedings is allowed by the arbitral tribunal under Section 32(2).[286] Notably, the Indian Arbitration Act does not envisage any provision to challenge such a termination order thus, rendering the party remediless. This aspect is further substantiated by the fact that an order under Section 32(2) is not appealable under Section 37.[287] Even if the affected party wishes to challenge such a rejection of the request to termination order, it would have to hold in abeyance and wait for the final award to be passed to exercise its right to challenge the final award under Section 34 of the Indian Arbitration Act.

Once a termination application is permitted, the arbitral proceedings come to an end and the mandate of the arbitral tribunal stands terminated.[288] An arbitral tribunal becomes *functus officio* when it passes an order for termination of the arbitration proceedings.[289] Post-termination, the tribunal has no jurisdiction to entertain any applications or pass any orders in the proceedings.

A. Striking a Balance between Writ Jurisdiction and Non-Judicial Interference

[282] Deep Industries Ltd. v. ONGC Ltd. (2020) 15 SCC 706.
[283] Chandra Kumar v. Union of India, (1997) 3 SCC 261; Tagus Engineering Private Limited & Ors. v. Reserve Bank of India and Ors., W.P. 3957/2021, ¶5.
[284] Municipal Corporation of Delhi v. Mr. Narinder Kumar, 2023/DHC/000598.
[285] IDFC First Bank Limited v. Hitachi MGRM Net Limited, W.P. (C) 8573/2021.
[286] Arbitration & Conciliation Act, 1996, §32(2), No. 26, Acts of Parliament (India).
[287] Arbitration & Conciliation Act, 1996, §37, No. 26, Acts of Parliament (India).
[288] *Id*. at §32(3).
[289] M/s Vag Educational Services v. Aakash Educational Services Ltd., (2022) SCC OnLine Del 3401.

The courts are entrusted with the duty to maintain the delicate balance between the constitutional rights available under Article 227 and the statutory policy objective of minimum judicial interference under Section 5 of the Indian Arbitration Act.[290]

Article 227 delineates the High Court's authority to exercise "*superintendence over all courts and tribunals throughout the territories in relation to which it exercises jurisdiction*". Arbitrations are considered a special mechanism of dispute resolution. Accordingly, arbitral tribunals are held to be no different from statutory tribunals.[291] Extraordinary situations can arise which may require course correction using judicial interference. Indian Arbitration Act does not prohibit judicial interference but calls for minimum judicial interference to ensure smooth and speedier resolution of the dispute in the best interest of a developing economy.

The supervisory jurisdiction of High Courts under Article 227 is to be applied judiciously, particularly in scenarios where either the court/tribunal has *(i)* assumed jurisdiction that it does not have; *(ii)* failed to exercise jurisdiction that it does have; and *(iii)* overstepped the limits of its jurisdiction. A challenge to an order rejecting the termination of arbitration proceedings cannot be permitted. This is primarily because, in such a scenario, the arbitral tribunal would continue to hold the mandate for arbitration, and any interference by the court would be unwarranted and unqualified.

On the other hand, party autonomy and minimum judicial interference form the foundation for arbitration law. The doctrine of minimum judicial interference restricts the role of courts to that of watchdogs. Section 5 is akin to Article 5 of the UNCITRAL Model Law.[292] Section 5 of the Indian Arbitration Act is a non-obstante clause to give an overriding effect to the provisions of the Indian Arbitration Act over other statutes[293], ensuring a smooth and quick resolution to a dispute. The intervention of courts is expressly barred, except in situations specifically provided for in the Indian Arbitration Act itself.[294] But, no act can curtail the power bestowed upon the High Court under Article 227 which forms part of the basic structure of the constitution.

Article 227, being a constitutional provision, triumphs the applicability of the non-obstante clause under Section 5. The Supreme Court stamped this understanding in the Deep Industries Ltd. v. ONGC

[290] Videocon Industries Ltd. v. Union of India, (2011) 6 SCC 161.
[291] SREI Infrastructure Finance Ltd. v. Tuff Drilling Pvt. Ltd., (2018) 11 SCC 470.
[292] UNCITRAL Model Law on International Commercial Arbitration, 1985, art. 5.
[293] Arbitration & Conciliation Act, 1996, §5, No. 26, Acts of Parliament (India).
[294] Videocon Industries ltd. v Union of India, (2011) 3 SCC 161.

Ltd. case and held that "*Article 227 is a constitutional provision which remains untouched by the non-obstante Clause of Section 5 of the Act.*"[295]

Article 227 cannot be invoked routinely for matters falling under the Indian Arbitration Act. The threshold for interference under Article 227 against an order of the tribunal ought to be high to prevent any abuse of process and derailment of the statutory scheme of the Indian Arbitration Act. Any such challenge can only be entertained in 'exceptional cases'.[296] The courts must be "*extremely circumspec*t" and may interfere in case of an order being perverse.[297] Further, they must discourage any litigation that interferes with the arbitral process unnecessarily. The courts should only exercise their discretionary powers in cases of exceptional rarity where bad faith is demonstrable.[298]

B. Saga of Termination of Arbitration between Amazon and Future Group: A Setback to the Pro-Arbitration Approach

In the infamous case of *Future Group-Amazon*, the Competition Commission of India passed an order keeping its approval for the acquisition of equity shareholding of FCPL by Amazon in abeyance.[299] The Future Group asserted that the main agreement between the parties became unenforceable, and the arbitration - was 'impossible', calling for termination. The Future Group sought adjournment of the hearing of expert witnesses approximately three months after they had been pre-scheduled with the consent of all the parties and arbitrators. The arbitral tribunal declined to adjourn the hearings. The Arbitral Tribunal accommodated the request of Future Group by utilizing the allocated dates for a hearing on applications for termination of arbitration proceedings. Future Group challenged the procedural orders issued by the arbitral tribunal under Article 227 seeking a direction that continuation of arbitration proceedings was contrary to law.

The Single Judge of the Delhi High Court, following the law laid down in the Surender Kumar Singhal Case,[300] held that the petition under Article 227 was not maintainable[301]. Even in the Surender Kumar Singhal Case, the court had held a petition filed under Article 227, against an order rejecting an application filed under Section 16 deciding upon the jurisdiction of the arbitral tribunal, to be non-maintainable. He noted that there cannot be a complete bar to the petitions being filed under Article

[295] (2020) 15 SCC 706.
[296] Bhaven Construction versus Executive Engineer, Sardar Sarovar Narmada Nigam Ltd. & Anr., (2022) 1 SCC 75.
[297] Deep Industries Ltd. v. Oil and Natural Gas Corporation Ltd. & Anr., (2019) SCC Online SC 1602.
[298] Surendra Kumar Singhal & Ors. v. Arun Kumar Bhalotia & Ors., (2021) SCC OnLine 3708.
[299] Proceedings against Amazon.com NV Investment Holdings LLC under Sections 43A, 44 and 45 of the Competition Act, 2002, Competition Commission of India, Order dated December 17, 2021.
[300] *Id*. 42 at ¶24.
[301] Future Retail Ltd. v. Amazon. Com NV Investment Holdings LLC, (2022) SCC OnLine Del 13.

227. There is "*only a very small window*" for interference with orders passed by the arbitral tribunal while exercising jurisdiction under Article 227.[302] Court in exercise of jurisdiction under Article 227, cannot dictate to a duly constituted arbitral tribunal, the manner and the procedure of carrying out the arbitration proceedings.[303]

The Single Judge dismissed the writ petitions following a pro-arbitration approach. He balanced the scope of judicial supervision and the doctrine of minimum judicial intervention. The intent of the Indian Arbitration Act was to ensure expeditious disposal of disputes between the parties and there should be minimum judicial interference by courts in arbitration proceedings. The Single Judge added that "*if the parties are encouraged to approach the Court at every stage of the arbitration proceedings, the whole purpose of the arbitration would stand frustrated*."[304]

The Future Group, however, filed Letters Patent Appeals ("**LPAs**") before the Delhi High Court against the Single Judge's order. The Division Bench stayed the arbitral proceedings.[305] Interestingly, the Division Bench made note of the objections to the very maintainability of the appeals but did not decide the issue. The Division Bench placed heavy reliance on the order of the CCI. The Division Bench followed the three basic principles for granting an interim injunction i.e. there exists a prima facie case, balance of convenience, and irreparable harm.[306]

We argue that the order to stay arbitration proceedings was passed in non-maintainable appeals. No intra-court appeals or Letters Patent Appeals are maintainable against orders passed by a court exercising jurisdiction under Article 227.[307] Moreover, the Division Bench's order fell foul of the need to discourage unnecessary judicial interference in the arbitral process. It merely looked at the LPAs for grant of interim relief. It failed to provide any reasonable explanation for granting of a stay on arbitral proceedings. Accordingly, it was not prudent to exercise the jurisdiction under Article 227 to preserve the efficiency of the arbitral process in this case.

The stay order delayed and derailed an international commercial arbitration in non-maintainable appeals due to excessive judicial intervention. The stay order was in direct contradiction to the principles of Kompetenz-Kompetenz. The stay order was passed while completely ignoring the

[302] S.B.P. & Company v. Patel Engineering Ltd. and Anr., (2005) 8 SCC 618; Fuerst Day Lawson Limited v. Jindal Exports Limited, (2011) 8 SCC 333, ¶¶15-17; Bhaven Construction versus Executive Engineer, Sardar Sarovar Narmada Nigam Ltd. & Anr., (2022) 1 SCC 75, ¶¶10-19.
[303] Future Retail Ltd. v. Amazon. Com NV Investment Holdings LLC, (2022) SCC OnLine Del 13, ¶24.
[304] *Id*. at ¶25.
[305] (2022) SCC OnLine Del 67.
[306] *Id*. at ¶9.
[307] Section 10 of the Delhi High Court Act, 1966 read with Clause 10 of the Letters Patent (Lahore); Jogendrasinhgji Vikaysinhji v. State Of Gujarat & Ors., (2015) 9 SCC 1.

directions in the *Surender Kumar Singhal Case,* where the court categorically pointed out that interference was permissible only if the order was completely perverse.[308] It held that the efficiency of the arbitral process should not be diminished and interdicting the arbitral process should be completely avoided. Amazon approached the Supreme Court against the stay order. The Supreme Court finally removed the stay on arbitration proceedings after approximately three months.[309]

The applicability of the narrow scope for interference and the high threshold to entertain any challenge would help ensure that arbitration processes in India are respected. Only in exceptional circumstances where perversity is demonstrable should courts allow such challenges. Eventually, the burden falls on High Courts to enforce it strictly and curtail any abuse of process that may delay or derail arbitration proceedings.

V. CONCLUSION

In conclusion, the scope of final awards in the termination of arbitration proceedings must encompass partial awards due to their potential finality concerning specific claims. This understanding will prevent the prolongation of arbitration proceedings by treating partial awards as final for the claims they resolve, thus ensuring a streamlined, prompt, and efficient resolution of disputes. Further, the issue of unilateral withdrawal of claims in arbitration highlights the potential for abuse if interpreted strictly. In this regard, *Fortminster* award has served as a critical reminder, underscoring the need for a liberal interpretation of 'claim' vis-à-vis termination proceedings, which would protect the respondent's legitimate interest in the determination of costs and prevent wastage of time of the tribunal.

Given the foregoing, it must also be put to the fore that termination of arbitration proceedings under Section 32(2) of the Indian Arbitration Act leaves a party without a remedy. Since the Act does not provide a direct mechanism to challenge a termination order and such orders are not appealable under Section 37, parties are effectively left without immediate recourse. This creates a unique scenario where judicial intervention under Article 227 becomes necessary to prevent a miscarriage of justice and ensure constitutional rights are upheld. While the scope for intervention under Section 34 is extremely limited, confined to instances of patent illegality, perversity, or awards that shock the conscience of the court, the need to address non-appealable termination orders warrants a cautious yet decisive judicial approach.

[308] *Id*. 42 and 44 at ¶24.
[309] Amazon. Com NV Investment Holdings LLC v. Future Retail Ltd. & Ors., Civil Appeal No. 2845-2846 of 2022 [Order dated April 6, 2022].

Given the potential for prolongation of termination proceedings by the parties and subsequently no recourse in cases of termination, such a landscape shows India in a bad light and impacts India's image as a pro-arbitration hub. Thus, the courts must tread carefully, ensuring that they do not overstep their boundaries and dilute the principle of minimal interference while also providing necessary remedies in cases where parties are otherwise rendered remediless.

ISSUE ESTOPPEL IN INTERNATIONAL COMMERCIAL ARBITRATION AND THE EFFECT OF FOREIGN JUDGMENTS ON ENFORCEMENT COURTS: REPUBLIC OF INDIA V DEUTSCHE TELEKOM[310]

Darren Low Jun Jie*

I. INTRODUCTION

The Singapore Courts continue to be a rich source of international arbitration jurisprudence, and its decisions continue to generate much commentary. For instance, the Singapore International Commercial Court's judgment on the confidentiality of arbitral deliberations did not go unnoticed in the world of international commercial arbitration.[311] Another decision worth mentioning is that of the Court of Appeal when it declined to grant a sealing order for arbitration-related proceedings because the confidentiality of the underlying arbitration had already been lost.[312]

Recently added to the mix is *Republic of India v Deutsche Telekom AG* [2023] SGCA(I) 10, which addressed the applicability and effect of issue estoppel in the context of international commercial arbitration.[313] Specifically, the Court of Appeal, in this case, addressed the question of whether a foreign judgment on the validity of an arbitral award raised an issue of estoppel. The question assumes a level of significance for both practical and conceptual reasons. The practical reason is obvious: if issue estoppel does not apply, a whole host of endless cross-border and transnational litigation may follow.

The conceptual reason remains highly debated. While Article V of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("**New York Convention**") sets out the limited and exhaustive grounds upon which recognition and enforcement of an award may be refused, there is no guidance on the obverse issue, i.e., the circumstances under which an enforcement court should allow the recognition and enforcement of an award.

Against this backdrop, there exists in international arbitration two schools of thought – the "territorialist" and the "delocalization" school. As put by Singapore's Chief Justice Sundaresh

[310] The author appreciates the comments provided and revisions proposed by the anonymous reviewer as well as his colleague, Mr Mohammed Reza. Any errors and omissions are the author's own.
* LLB (Lond), LLM (Cambridge); Advocate and Solicitor (Singapore).
[311] CZT v CZU [2023] SGHC(I) 11.
[312] *The Republic of India v Deutsche Telekom AG* [2023] SGCA(I) 4.
[313] This article shall refer to the appellant as "**India**" and respondent as "**DT**".

Menon, "*[o]n the "territorialist" view, the legal validity of an arbitral award derives from the legal order of the seat of the arbitration. Hence, if the award is set aside, it becomes a legal nullity and cannot be enforced in any jurisdiction because there is nothing left to enforce. By contrast, on the "delocalisation" theory, the legal force of an arbitral award stems from an international legal order that transcends national legal systems. This entails that the effect of a seat court's decision to set aside an award is confined to the jurisdiction of the seat alone – the award remains enforceable in other jurisdictions*".[314]

The Court of Appeal of the Republic of Singapore, sitting as the appellate Court hearing the appeal against the decision of the (lower) Singapore International Commercial Court,[315] agreed with the lower Court on the point that India was estopped from raising a number of grounds for resisting DT's enforcement of an arbitral award following India's unsuccessful attempt at raising these same grounds before the Federal Supreme Court of Switzerland in proceedings brought by India to set aside the very same award. These grounds culminated in a single overarching submission that DT's investment fell outside the scope of the offer to arbitrate in the bilateral investment treaty between India and Germany such that the Tribunal which made the award sought to be enforced did not in fact have jurisdiction to determine the dispute between India and DT.[316]

The Court of Appeal's judgment is notable for several reasons.

The Court of Appeal reaffirmed that Singapore law indeed recognizes that foreign judgments are capable of giving rise to issue estoppels.[317] It also observed a Singapore enforcement court may and perhaps should invoke such issue estoppels in the international commercial arbitration context where it is confronted by the prior decision of a foreign seat court that has dealt with the same issues.[318] Finally, the judgment consisted of a majority opinion from 4 of the 5 sitting justices with a concurring opinion from the remaining justice, both of which addressed the existence and applicability of a separate rule of international arbitration law and practice – the Primacy Principle – requiring an enforcement court to accord primacy to a prior determination of the seat court on certain types of issues.

[314] Sundaresh Menon CJ, *Transnational Relitigation And The Doctrine Of Transnational Issue Estoppel* (8th Judicial Seminar on Commercial Litigation, 14 March 2024).
[315] *Deutsche Telekom AG v The Republic of India* [2023] SGHC(I) 7 (S Mohan J, Roger Giles IJ, Anselmo Reyes IJ) at [153].
[316] [2023] SGCA(I) 10 at [38].
[317] [2023] SGCA(I) 10 at [73].
[318] [2023] SGCA(I) 10 at [79].

Each of these aspects of the decision raises other easily overlooked considerations of practical importance, which the rest of this article will address in turn.

II. RECOGNITION OF FOREIGN JUDGMENTS

Under Singapore law, it is well established that in order for a foreign judgment to give rise to issue estoppel, it must first be recognized under that jurisdiction's conflict of laws rules.[319] However, it is still an open question under Singapore law whether reciprocity (whether the jurisdiction from which the foreign judgment in question originates similarly recognizes judgments from the court in which the foreign judgment is sought to be enforced) should be a precondition to the recognition of foreign judgments at common law.[320] This should not have been an issue in the instant case (indeed, the Court of Appeal did not even consider it) because both parties in the Singapore Court had submitted to the jurisdiction of the foreign court. Because they have done so, that party comes under an obligation to obey that foreign court's judgment and it is said that the foreign court has "*international jurisdiction*".[321]

Assuming for a moment that this was an issue in the present case, then it would appear on a cursory review of the Swiss Courts' approach shows that such a requirement (if applied) would likely be met.[322] This would also be true as regards the laws of various other jurisdictions. In this connection, the Singapore Court of Appeal has observed that the absence of reciprocity would, in practice, rarely be an obstacle to the recognition of a foreign judgment.[323] This is because there are few jurisdictions that subscribe to a general bar against recognition of foreign judgments.[324]

III. THE PRECISE CONSIDERATION OF WHEN AN ISSUE ESTOPPEL ARISES

As held by the Court of Appeal, for a foreign judgment to give rise to issue estoppel under Singapore law, the decision on the specific issue in question must be final and conclusive under the law of the jurisdiction in which that foreign judgment originated. This is because it would be illogical for a court to treat a judgment of a foreign court as final and binding if that court would not regard its own decision as final and binding.[325]

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[319] *Merck Sharp & Dohme Corp v Merck KGaA* [2021] SGCA 14 at [35].
[320] *Merck Sharp & Dohme Corp v Merck KGaA* [2021] SGCA 14 at [39].
[321] Yeo Tiong Min, *The Changing Global Landscape for Foreign Judgments*, Yong Pung How Professorship of Law Lecture 2021 (6 May 2021) at [7].
[322] Swiss Code on Private International Law, Articles 25 to 27.
[323] *Merck Sharp & Dohme Corp v Merck KGaA* [2021] SGCA 14 at [39].
[324] *Merck Sharp & Dohme Corp v Merck KGaA* [2021] SGCA 14 at [39].
[325] [2023] SGCA(I) 10 at [156].

In addition to this requirement, the foreign judgment must also originate from a court of competent jurisdiction that has transnational jurisdiction over the party sought to be bound, and not be subject to any defenses to recognition.[326] Further, there must be commonality of the parties to the prior proceedings and to the proceedings in which the estoppel is raised and the subject matter of the estoppel must be the same as what has been decided in the prior judgment.[327]

The key feature of the decision focuses on the first limb, i.e., whether the judgment was final and conclusive. The Court of Appeal's decision shows that issue preclusion does not arise simply because of the fact that the Federal Supreme Court of Switzerland rejected India's jurisdictional arguments in the setting-aside application. Rather, the question was much more nuanced once: given the Federal Supreme Court's decision to reject these arguments, would India be prevented from re-litigating these same issues were enforcement proceedings brought in Switzerland? Put another way, since there is a distinction between enforcement proceedings being brought, on the one hand, in the jurisdiction where the seat court is located and, on the other, any other jurisdiction where assets are located, there would arguably not have been any relevant issue estoppel in Singapore if India itself was not so prevented from subsequently re-litigating these same issues before a Swiss enforcement court. After all, the Singapore Court's concern is to ensure that the Singapore enforcement court is not giving greater preclusive effect to the Federal Supreme Court's decision not to set aside the award than would be accorded under Swiss law itself.[328]

The majority in the Court of Appeal was at pains to emphasise this point. In doing so, it relied on two judgments of the Federal Supreme Court in another unrelated case, which were highlighted by the expert appointed by DT.[329] It concluded that "*a subsequent Swiss court would not reconsider India's [grounds for resisting enforcement], these having already been considered and rejected*…".[330]

Another aspect of the Court of Appeal's decision is the affirmation of the trite principle that for an issue estoppel to arise from a foreign court judgment, the foreign court's determination of that issue must be a necessary part of that decision.[331] Considering briefly the grounds relied on by India before the Federal Supreme Court, it would appear that its decision on all of these grounds was necessary in ultimately deciding not to set aside the Tribunal's award. This is because, had India succeeded in establishing any of them, the outcome of the setting aside application before the Federal Supreme

[326] [2023] SGCA(I) 10 at [64].
[327] [2023] SGCA(I) 10 at [64].
[328] [2023] SGCA(I) 10 at [173].
[329] [2023] SGCA(I) 10 at [171].
[330] [2023] SGCA(I) 10 at [174].
[331] [2023] SGCA(I) 10 at [69(c)].

Court may have been different. This was not a "*two ratio*" type of case giving rise to an exception to issue estoppel, where a Court finds on alternative grounds in favour of a successful party. In such a case, these findings would not create issue estoppels because none of these alternative grounds could be said to be "*legally indispensable to the conclusion*".[332] It was necessary for the Federal Supreme Court to engage with and reject all of India's arguments.

IV. THE PRIMACY PRINCIPLE (OR LACK THEREOF)

While both the majority and the minority opinions agreed that issue estoppel operated so as to preclude India from re-litigating its jurisdictional arguments, and while both majority and minority held that it was unnecessary to consider the Primacy Principle as it did not arise in the present case, they were divided on the hypothetical applicability of the Primacy Principle. As mentioned above, the Primacy Principle operates so as to require an enforcement court to accord primacy to a prior determination of the seat court on certain types of issues. As observed by Singapore's Chief Justice, the Primacy Principle is largely followed by the Australian and US Courts.[333]

The majority leaned in favour of the Primacy Principle, observing that the "*main trend appears to favour according primacy to the decision of a seat court without necessarily applying transnational issue estoppel*".[334] The provisional position, according to the majority, was that the principle "*may be understood as building upon the comity principle in the specific context of international arbitration by requiring an enforcement court in Singapore to treat a prior judgment of a seat court as presumptively determinative of matters dealt with in that judgment to the extent these pertain to the validity of the award*".[335]

On the other hand, the minority disagreed with the majority. The penultimate passage is worth quoting in full:

> "*A principle according to which an enforcement court must treat a prior decision of the seat court as determinative or presumptively determinative, short of some public policy consideration, or evident procedural failing, or evident error, appears to me to bypass the first necessary enquiry, namely whether the prior court's decision is preclusive, and, if it is not, why it is not. It would also draw a sharp, and not necessarily realistic, distinction between*

[332] See *Eli Lilly v Genentech* [2020] EWHC 261 (Pat) at [58] to [60].
[333] Sundaresh Menon CJ, *Transnational Relitigation And The Doctrine Of Transnational Issue Estoppel* (8th Judicial Seminar on Commercial Litigation, 14 March 2024).
[334] [2023] SGCA(I) 10 at [119].
[335] [2023] SGCA(I) 10 at [121].

> *prior decisions of courts of the seat and prior decisions of other enforcement courts. If there is no issue estoppel, and an objection raised to say jurisdiction is complex and difficult to determine, it leaves unclear at what point a party is to be precluded from raising or an enforcement court from accepting the objection. Finally, once recognised as a presumptive rule (rather than, for example, a power to restrain abuse), it requires qualification by a series of further rules*".[336]

Both the majority and minority judgments, however, appear to recognise that the Primacy Principle is not one which applies in an all-or-nothing fashion. But because of this it is difficult to predict whether, in substance, the Primacy Principle would develop into a doctrine that would be of practical importance over and above that of issue estoppel.

The development of the principle may also be counterproductive: the more uncertain the limits of the Primacy Principle, the less conducive it would be to the ideal served by issue estoppel, namely, that of finality in litigation. Things would change, for example, if parties hotly dispute the determination of the seat of the arbitration. In this author's view, the jury is still out on whether the Primacy Principle would ensure finality (the majority appear to assert that it does)[337] as the principle might, depending on the development of the principle, carry with it the risk of generating even more unmeritorious applications to reopen what could potentially be concluded matters.

V. CONCLUSION

Ultimately, the result in *India v DT* is a welcome one. First, consistent with the development of the law in England, it reached a defensible conclusion and has clarified that issue estoppel may and perhaps should be invoked by a Singapore enforcement court when faced with a prior seat court decision on the validity of an arbitral award. Second, the minority judgment in *India v DT* is perhaps the first significant and eminently well-reasoned opinion from a highly respected common law judge that swims against the tide of the Australian and US decisions which favour the application of the Primacy Principle. Third, the decision leaves open the question of whether, as a matter of Singapore law, an issue estoppel would arise from decisions of other foreign enforcement courts (as opposed to seat courts).

[336] [2023] SGCA(I) 10 at [220] (per Mance IJ).
[337] [2023] SGCA(I) 10 at [121].

RED EAGLE VIES FOR GOLD: THE TRIBUNAL IN *RED EAGLE V. COLOMBIA* FINDS COLOMBIA NOT LIABLE FOR TREATY BREACH WHILE DIVERGING FROM THE TRIBUNAL IN *ECO ORO V. COLOMBIA*

Adhiraj Lath*

I. INTRODUCTION

The majority ICSID[338] Tribunal in *Red Eagle Exploration Limited v. Republic of Colombia*[339] dismissed all the claims of Red Eagle Exploration [**"Claimant"**] brought under the Canada-Colombia FTA.[340] A three-member Tribunal comprising Dr. Andrés Rigo Sureda (President, appointed by agreement of the parties), Mr. José A. Martínez de Hoz (Arbitrator, appointed by the Claimant), and Prof. Philippe Sands (Arbitrator, appointed by the Respondent), rendered an award dated February 28, 2024, with Dr. Rigo Sureda and Prof. Sands forming the majority, and Mr. Martínez de Hoz penning the dissent.

This piece attempts to explore the decision of the Tribunal and the reasoning it used to arrive at the outcome that Colombia had not breached its treaty obligations. The article further delineates Colombia's objection to the Tribunal's jurisdiction by invoking the environmental exception provision of the FTA. Finally, the case comment concludes by critically comparing the majority's decision in *Red Eagle,* to the majority's decision in *Eco Oro v. Republic of Colombia* ("*Eco Oro*")[341], a case arising out of similar circumstances under the same FTA.

II. BACKGROUND

In brief, the dispute concerned the prohibition of gold mining in the Colombian *páramos.*[342] Between the period of June 2010 and October 2013, the Claimant, a Canadian gold mining company, acquired

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[338] International Centre for Settlement of Investment Disputes ("ICSID") established in 1966 under the auspices of *the Convention on the Settlement of Investment Disputes between States and Nationals of Other States.*

[339] ICSID Case No. ARB/18/12.

[340] *Free Trade Agreement between Canada and the Republic of Colombia,* dated November 21, 2008, which entered into force on August 15, 2011.

[341] *Eco Oro Minerals Corp. v. Republic of Colombia*, ICSID Case No. ARB/16/41, Decision on Jurisdiction, Liability and Directions on *quantum*, September 9, 2021.

[342] *Páramos* are described in Resolution 769, August 5, 2002, Article 2 of the Ministry of the Environment as a "*High mountain ecosystem, located between the upper limit of the Andean forest and, if applicable, with the lower limit of glaciers or perpetual snow, in which a herbaceous and grassland vegetation dominates, frequently frailejones and may*

mining titles and exploration permits [**"mining titles"**] in the Santurbán *páramo*, in Vetas, located in the northeastern region of Colombia. Meanwhile, in 2010, the Colombian Government banned mining in the *páramos.*[343] This initial ban was found to be unconstitutional by the Constitutional Court of Colombia, as the Court found that the ban was contended to have been enforced without consulting the indigenous and Afro-descendant people of the region.[344]

Thereafter, the mining ban in the *páramos* was reinstated in 2011.[345] This ban was subsequently ratified in 2015.[346] In 2014, the Santurbán *páramo* was delimited,[347] and the delimitation substantially overlapped with the Claimant's mining titles. The ban, however, was protected by a grandfathering provision for titles with pre-acquired environmental licenses before February 9, 2010. The 2015 ratification was then challenged before the Colombian Constitutional Court, and the Court ruled that the said grandfathering provision was unconstitutional. The Court additionally directed that a more expansive delimitation is required to be carried out in the Santurbán *páramo,* where the majority of the Claimant's project was situated.[348] This meant that there could be no exception to the mining ban imposed in the *páramos,* leading to a reduction of the areas sanctioned to the Claimant. This blanket ban on mining, coupled with the impending threat of further delimitation of the Santurbán *páramo,* ultimately led to RE abandoning the project as it was no longer viable.

III. CONTENTIONS OF THE PARTIES

A. Claimant's Contentions

The Claimant filed its claims under the FTA in 2018, seeking compensation of USD 87 million plus interest.[349] On merits, the Claimant, *inter alia,* contended that Colombia had overarchingly breached the minimum standard of treatment [**"MST"**] under customary international law, including fair and equitable treatment standard [**"FET"**] contained in Article 805 of the FTA, and the most favored nation treatment [**"MFN"**] under Article 804 of the FTA. Through this breach, the Claimant argued, Colombia had adopted measures that breached the FET standard and specifically frustrated the Claimant's legitimate expectations by failing to provide a stable and predictable legal framework for its investments. The Claimant also contended that Colombia acted in a discriminatory, non-

have low and shrubby forest formations and present wetlands such as rivers, ravines, streams, peat bogs, swamps, lakes and lagoons."
[343] Law 1382, February 9, 2010.
[344] Constitutional Court, Judgment C-367, May 11, 2011.
[345] Law 1450, June 16, 2011.
[346] Law 1753, June 9, 2015.
[347] Ministry of Environment and Sustainable Development, Resolution No. 2090, December 19, 2014.
[348] Constitutional Court, Judgment C-035, February 8, 2016.
[349] Notice of Intent dated 14 September 2017.

transparent, unreasonable, and arbitrary manner, and its conduct amounted to expropriation of its investment under Article 811 of the FTA. The Claimant opposed the jurisdictional objections of Colombia that measures taken under the pretext of environmental protection could not be adjudicated.

B. Colombia's Defense

Colombia filed its jurisdictional objections and, in its defense, *inter alia,* argued that the measures implementing the ban, fall squarely within the ambit of Article 2201(3),[350] i.e., the general exception clause under the FTA, which permitted that those measures could be taken for environmental purposes. This position was taken by Colombia as a jurisdictional objection, by which it argued that it had not consented to arbitrate under the FTA for measures having an environmental purpose. Colombia also argued that it had exercised its police powers legitimately under Article 811 of the FTA, and, therefore, its conduct could not amount to expropriation.

IV. ANALYSIS OF THE TRIBUNAL (MAJORITY)

A. On Jurisdiction

The majority of the Tribunal upheld its jurisdiction by finding that the Claimant had brought its claims within the *ratione temporis* jurisdiction of the Tribunal, and that Colombia had not adduced enough evidence to demonstrate that the Claimant could be denied benefits under Chapter 8 (Investment) of the FTA. It further found that Colombia's *ratione materiae* objection under Article 2201(3) of the FTA, which provides that the Contracting Parties to the FTA can adopt measures that are necessary to protect the environment ("environmental exception"), was not an objection to the jurisdiction of the Tribunal, but rather a defense on the merits.

To arrive at this conclusion, it followed the reasoning of another Tribunal in *Eco Oro v. Colombia,*[351] which was in *seisin* of substantially similar disputes under the same FTA, to rule that all forms of environmental measures *per se* were not excluded from Chapter Eight, and rather that these

[350] Article 2201(3) of the FTA (which is not included in the investment chapter but in a separate chapter on "Exceptions") provides:
"*For the purposes of Chapter Eight (Investment), subject to the requirement that such measures are not applied in a manner that constitute arbitrary or unjustifiable discrimination between investment or between investors, or a disguised restriction on international trade or investment, nothing in this Agreement shall be construed to prevent a Party from adopting or enforcing measures necessary:*

1. *To protect human, animal or plant life or health, which the Parties understand to include environmental measures necessary to protect human, animal or plant life and health;*
2. *To ensure compliance with laws and regulations that are not inconsistent with this Agreement; or*
3. *For the conservation of living or non-living exhaustible natural resources.*"

[351] Supra (note 4), ¶¶ 379-380.

exceptions only apply once there has been a determination of a breach of a primary obligation, such as MST or FET in Chapter Eight.[352] The Tribunal, therefore, upheld its jurisdiction over the claims.

B. On merits

i. On whether Colombia violated MST, including FET?

The Tribunal considered the construction of Article 805 of the FTA[353] and held that there was a certain degree of "*ambivalence*"[354] in the FTA, as the wording of the FET provision did not go beyond MST to create "*additional substantive rights*". The Tribunal referred to the award in *Waste Management, Inc. v. United Mexican States,*[355] to examine the contours of the linkage between MST and FET as conduct which is *"arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory […], or involves a lack of due process leading to an outcome which offends judicial propriety".*[356] The Tribunal then moved on to hold that MST cannot be extended or broadened by the operation of the MFN clause in Article 804 of the FTA in view of the binding interpretation of the Canada-Colombia Joint Commission on the construction of the MFN standard.[357]

On the issue of whether the Claimant's legitimate expectations had been breached, the Tribunal concluded that under customary international law, there was insufficient evidence either through general and consistent state practice or subjective acceptance of such practice as law through *opinio juris* to support the argument that legitimate expectations form a part of MST. The Tribunal also arrived at the finding that the Claimant could not prove that it had placed reliance on any representation by Colombia under a "*quasi-contractual relationship*"[358] between the parties to induce

[352] *Red Eagle Exploration Limited v. Republic of Colombia,* ICSID Case No. ARB/18/12, ¶174-175.
[353] Article 805 of the Treaty is reproduced below:
"1. Each Party shall accord to covered investments treatment in accordance with the customary international law minimum standard of treatment of aliens, including fair and equitable treatment and full protection and security.The concepts of 'fair and equitable treatment' and 'full protection and security' do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.
2. The obligation in paragraph 1 to provide 'fair and equitable treatment' includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process.
3. A determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article.
Footnote 2 of Article 805 states that "it is understood that the term 'customary international law' refers to international custom, as evidence of a general practice accepted as law, in accordance with subparagraph 1(b) of Article 38 of the Statute of the International Court of Justice."
[354] Supra (note 14), ¶ 286.
[355] *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/03, Award, April 30, 2004, ¶ 98.
[356] Supra (note 14), ¶287.
[357] *Decision of the Canada-Colombia Joint Commission - Interpretation of Certain Chapter Eight Provisions,* October 24, 2017 (available at: https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/colombia-colombie/fta-ale/decision-interpretation-notes.aspx?lang=eng).
[358] Supra (note 14), ¶ 294.

breach of MST, as held by the Tribunal in *Glamis Gold v. United States*.[359] Accordingly, the Tribunal concluded that Colombia's conduct did not fulfill the threshold required to breach MST.

ii. On whether Colombia indirectly expropriated the Claimant's investment

The Claimant argued that Colombia had indirectly expropriated its mining titles under Article 811 of the FTA. The Tribunal noted that any claim for expropriation, needs to be underpinned by the "*existence of a vested right of which it has been deprived*".[360] The Tribunal was not satisfied that the Claimant had ever acquired a "*vested right*", as the mining titles were always "*conditional on being granted an environmental license*".[361] The Claimant had also failed to establish the "*rare circumstances*"[362] under which public policy measures may fall outside the scope of a State's police powers as there was no vested right founded on Colombia's representations to begin with, which amounted to expropriation.[363] Consequently, the Tribunal ruled that the claim failed at the first hurdle of establishing a "*vested right*" to demonstrate an expropriatory breach, and accordingly dismissed the claim.[364]

iii. On whether the environmental exception under Article 2201 of the FTA was applicable?

Colombia contended that measures were taken to protect *páramo* ecosystems as per the environmental exception enumerated in Article 2201(3).[365] On the other hand, the Claimant contended that treaty exceptions must be restrictively interpreted to preclude "*an escape route*"[366] to host States from performing their treaty obligations.

In its finding, however, the Tribunal reiterated that exceptions under Article 2201(3) would only apply if there had been a breach of a "*primary obligation*"[367] under Chapter 8 (Investment), i.e., breach of MST or an expropriatory breach, which the Claimant failed to prove. Thus, the need to engage in a discussion on the environmental exception did not arise.

V. DISSENTING AWARD

[359] *Glamis Gold Ltd v. United States of America,* UNCITRAL, Award, June 8, 2009, ¶766.
[360] Supra (note 14), ¶399.
[361] Supra (note 14), ¶ 399.
[362] Supra (note 14), ¶ 401.
[363] Supra (note 14), ¶ 401.
[364] Supra (note 14), ¶400.
[365] Supra (note 12).
[366] Supra (note 14), ¶407.
[367] Supra (note 14), ¶428.

In his dissenting award, Mr. Martínez de Hoz opined that Colombia displayed "*mixed and unclear*"[368] signals concerning its regulatory framework and observed that Colombia had repeatedly changed its policies and rules, giving rise to a breach of legitimate expectations. The dissenting award referred to the Tribunal's decision in *Eco Oro*[369] to find that Colombia had not exercised due diligence in granting mining titles over environmentally sensitive areas.[370] The dissenting arbitrator also found that the Claimant had legitimate expectations which were negated by Colombia's constant modifications to its regulatory framework, in addition to it not carrying out a delimitation within time, in terms of the Constitutional Court Judgment dated February 8, 2016.[371] This conduct, as a result, made mining activities unviable for the Claimant.

On the point of invocation of the environmental exception under Article 2201(3), the dissenting arbitrator opined that measures protected under the right to invoke environmental exception did not exclude Colombia's right to compensate the Claimant under international law. The dissenting award, however, did not find that Colombia had indirectly expropriated the Claimant's investment, given the requirement that an "*aggravating factor*", set out under Article 811 of the FTA, was missing.

VI. DIVERGENCE BETWEEN THE DECISIONS IN RED EAGLE AND ECO ORO: A CRITICAL ANALYSIS

The majority award in *Red Eagle* is in stark contrast with the findings of the majority in *Eco Oro*,[372] where substantially similar claims arising under the same FTA, found Colombia liable under the FTA for breach of MST, as Colombia's inconsistent conduct in delimiting the Santurbán *páramo* had breached the *Eco Oro's* legitimate expectations of a conducive regulatory framework, including an expectation for a stable and predictable legal environment. The majority also found that the environmental exception under Article 2201(3) of the FTA, could not relieve Colombia from its obligation to pay compensation under international law (similar to Mr. Martínez de Hoz's dissent in *Red Eagle*).

The majority in *Eco Oro,*[373] however, found that the mining ban in the *paramos* qualified as a legitimate exercise of Colombia's police powers under Annex 811(2) of the FTA, resulting in no expropriatory breach. Notably, Prof. Sands (Colombia's appointee in both cases) penned a dissenting

[368] Supra (note 14), ¶ 58 of Dissenting Opinion dated February 23, 2024.
[369] Supra (note 4).
[370] Supra (note 14), ¶76 of Dissenting Opinion dated February 23, 2024.
[371] Supra (note 11).
[372] Supra (note 14).
[373] Supra (note 14).

award in *Eco Oro,*[374] finding that the threshold for finding a breach of MST is much higher than that of FET (including legitimate expectations) and found no evidence that spawned legitimate expectations.

Of particular interest, in relation to *Red Eagle's*[375] treaty interpretation on MST excluding legitimate expectations, is the majority's decision in *Eco Oro*, by which it propounded an unprecedented two-pronged analysis to discern a breach of MST.[376] *Firstly,* the Tribunal noted that the conduct under consideration must be a breach of legitimate expectations, i.e., that the host state failed to provide a stable and transparent investment environment or acted in bad faith. *Secondly,* the Tribunal should examine whether these circumstances were unacceptable from an international law perspective. The upshot of this unique, novel interpretation in *Eco Oro* is that the standard of legitimate expectations under FET falls under the scope of MST, which diametrically contrasts the finding in *Red Eagle*. In *Red Eagle,* the majority found that the legitimate expectations standard could not form a part of MST, which required a higher threshold to establish a breach.

VII. CONCLUSION: A NOVEL ARENA FOR TREATY INTERPRETATIONS?

Both *Red Eagle* and *Eco Oro* drastically diverge in the finding of legitimate expectations under the scope of MST and Colombia's conduct under the same factual matrix. The high threshold of MST and the exclusion of legitimate expectations from MST under customary international law, set out by the majority in *Red Eagle*, is subverted by the finding in *Eco Oro,* that legitimate expectations fall under the realm of MST. Strikingly, *Red Eagle* underscored that it could not find any state practice or *opinio juris* to include legitimate expectations under customary international law MST. *Eco Oro*, therefore, stretches treaty practice to create a novel, unprecedented, two-pronged approach to determining a breach of MST.

In sum, the diverging views of the ICSID Tribunals in *Red Eagle* and *Eco Oro* show a dichotomy of treaty interpretations of the same treaty which could engender novel interpretations of MST and legitimate expectations under international law. The exact ramifications of these decisions remain to be seen.

[374] Supra (note 14).
[375] Supra (note 2).
[376] Supra (note 14), ¶762.