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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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EDITORIAL

Indian Review of International Arbitration (IRIArb) is dedicated to fostering meaningful dialogue on domestic and international arbitration. It aims to support the advancement of arbitration scholarship and practice by facilitating critical analysis and exploring contemporary developments.

IRIArb is pleased to bring its Volume 5 Issue 1 against these developments in the arbitration landscape around the world and in India. This issue contains contributions from around the world and features articles on issues relevant to arbitrations.

Apart from the landmark cases discussed in the articles below, there were certain relevant judgments in the field of international arbitration around the world, summarised as follows.

Gayatri Project Limited v. Madhya Pradesh Road Development Corporation Limited, 2025 INSC 698 (Supreme Court of India)

In 2005, Gayatri Project Limited and Madhya Pradesh Road Development Corporation (MPRDC) entered into a works contract for road rehabilitation in Madhya Pradesh. Disputes arose and were referred to arbitration, wherein the arbitral tribunal awarded Gayatri INR 1.03 crore for additional entry tax costs. MPRDC challenged the award under Section 34 of the Arbitration and Conciliation Act, 1996, claiming the tribunal lacked jurisdiction because the dispute should have been governed by the Madhya Pradesh Madhyastham Adhikaran Adhiniyam, 1983 (MP Act). This jurisdictional plea had not been raised before the arbitral tribunal.

The Commercial Court and the High Court accepted the objection and annulled the award, prompting Gayatri to appeal to the Supreme Court. The Supreme Court set aside the High Court's decision, holding that a jurisdictional objection cannot be raised for the first time in Section 34 proceedings unless the party shows strong and sufficient reasons for not raising it earlier. The Court reaffirmed that failing to raise jurisdictional objections at the appropriate stage amounts to waiver, as recognised in *Union of India v. Pam Developments* and *M.P. Road Development Authority v. L.G. Chaudhary Engineers & Contractors*. While the Court acknowledged that *Lion Engineering Consultants v. State of M.P.* permits raising jurisdictional issues as pure questions of law under Section 34, it clarified that such pleas are still subject to the principle of waiver. This judgment underscores the need of raising jurisdictional objections

at the earliest stage; to ensure that jurisdictional objections are not raised merely as a post-award strategy to stall the enforcement of valid decisions.

Rashtriya Ispat Nigam Limited v. Rescom Mineral Trading FZE, 2025: DHC:4269-DB (High Court of Delhi)

On 29 August 2023, Rashtriya Ispat Nigam Limited (RINL) entered into an agreement with Rescom Mineral Trading FZE (Rescom) for the supply of coking coal. Disputes arose when RINL alleged that the coal supplied did not comply with contractual specifications. Rescom filed a Section 9 Petition before the Delhi High Court, seeking interim protection of INR 139 crores. The Single Judge directed RINL to secure 50% of the claim by attaching TMT Steel Bars of equivalent book value, but failed to provide any reasoning for the attachment order.

RINL appealed under Section 37 of the Arbitration Act, contending that the impugned order lacked adequate reasoning and did not adhere to principles under Order XXXVIII Rule 5 of the Civil Procedure Code (CPC), which require careful judicial satisfaction before issuing attachment orders. The Division Bench of the Delhi High Court concurred, noting that the Single Judge focused primarily on the merits of the dispute while insufficiently addressing the need for financial security. The Bench held that an unreasoned order for substantial attachment is unsustainable, set aside the impugned order, and remanded the matter for fresh consideration, emphasizing that the decision should be uninfluenced by the earlier order. This ruling underscores the need for clear, reasoned judicial orders when granting attachment of assets under Section 9 of the Arbitration Act, especially where large sums are at stake, to ensure procedural fairness and judicial discipline. It also indicates that Indian courts continue to strictly enforce the principles of the CPC upon arbitral tribunals.

Renaissance Securities (Cyprus) Ltd v. ILLC Chlodwig Enterprises & Ors [2025] EWCA Civ 369

Renaissance Securities (Cyprus) Ltd ["**Renaissance**"] had Investment Service Agreements (ISAs) with six Russian companies, two of which contained English-law LCIA arbitration clauses with a London seat. Renaissance refused to return assets due to sanctions concerns. The defendants started proceedings in Russia against which the English Court granted anti-suit injunctions (ASIs) against them. Later, the defendants brought fresh Russian claims against certain Russian Renaissance-affiliated companies (RREs). Renaissance sought to vary the

earlier ASI order to cover those proceedings too. The Commercial Court refused, which Renaissance appealed.

The Court of Appeal agreed with the Commercial Court that the ISAs' arbitration clause did not extend to third-party claims, so there was no contractual basis for an ASI regarding proceedings against RREs. It held that the judge had erred in law in requiring a "forum threshold" for a vexatious/oppressive ASI in a single-forum case, but despite that, it declined relief. While an ASI could, in principle, protect arbitration integrity, court orders, and UK sanctions policy, the Court found unclear evidence of the relationship between Renaissance and the RREs, and possible lack of locus standi. Given this uncertainty, it refused the ASI and dismissed the appeal. The decision confirms that ASIs can, in suitable cases, restrain foreign proceedings against non-parties, but will depend on contractual scope, a clear evidential basis, and a legitimate interest in the relief sought. This decision has the potential to drastically broaden the scope of arbitration agreements however it may also be instrumental in ensuring that arbitration is not frustrated by actions of a third-party, the future application of ASIs will determine the same.

Saif Alrubie v. Chelsea Football Club Ltd & Anor [2025] EWHC 541 (Comm)

Football agent Saif Alrubie claimed a €2.1 million commission from Chelsea FC and its director, Mrs Granovskaia, alleging an agreement linked to a player transfer over €30 million. He later discontinued claims against Chelsea and pursued deceit and inducement claims against Mrs Granovskaia. Both had separately agreed with the FA to be bound by FA Rules, including Rule K, which requires arbitration between "Participants." They had no express arbitration agreement between themselves. Mrs Granovskaia applied under S.9 of the Arbitration Act 1996 to stay the claim, relying on Rule K.

The Commercial Court held that while participation in a sport does not automatically imply a horizontal contract between participants, here both parties had expressly agreed with the FA to be bound by its Rules as a condition of their roles (agent and club director). Rule K could only operate effectively if it had horizontal contractual effect, i.e., binding Participants inter se as well as vertically with the FA. On that basis, the arbitration clause applied between Mr Alrubie and Mrs Granovskaia. The Court rejected arguments that the clause ceased to apply when she left Chelsea, noting arbitration agreements survive termination of related contracts. Given Rule K's broad scope and the timing of the dispute (when she was still a Participant), the Court

found the claims fell within its ambit and stayed proceedings. The decision illustrates that where rules of a governing body are explicitly accepted as binding, courts may imply a direct arbitration agreement between members, even absent a bilateral contract, if necessary to give effect to the rules' purpose.

DMZ v. DNA [2025] SGHC 31

Under four sale contracts with arbitration clauses, the Defendant filed a Notice of Arbitration (NOA) at SIAC on 24 June 2024. SIAC asked for clarification of the number of arbitration agreements invoked and the clarification was received on 3 July 2024. On 9 July 2024, the SIAC Registrar fixed 3 July as the commencement date under SIAC Rule 3.3. The Claimant argued the claim was time-barred. At the Defendant's request, the Registrar revised the commencement date to 24 June in a 30 July 2024 decision. The Claimant sued in the Singapore High Court (SGHC) seeking to declare 3 July as the valid commencement date and to set aside the 30 July Decision.

The SGHC dismissed the claim, holding it had no jurisdiction to review the Registrar's decision. It reaffirmed the policy of minimal curial intervention (as in Sun Travels) and found that Rule 40.2 of the SIAC Rules expressly bars appeals or reviews of the Registrar's decisions to courts, unless permitted under the International Arbitration Act (IAA). No such provision applied, and recourse (if any) lies post-award under Article 34(2)(a)(iv) of the UNCITRAL Model Law. On the merits, the court held the Registrar was entitled to revise the commencement date as per Rule 40.1, and the SIAC Rules contain no clause barring internal reconsideration. The case is notable as the first Singapore decision on reviewing a SIAC Registrar's ruling, confirming that procedural objections must be raised promptly but court review can only occur, if at all, after an award is made. This ensures efficiency in arbitral proceedings and reinforces party consent regarding the arbitral institution and rules therein selected.

DLS v. DLT [2025] SGHC 61

A construction dispute under ICC Rules arose between contractor DLS and subcontractor DLT, seated in Singapore. The arbitral tribunal granted two decisions as part of a First Partial Award, a monthly payment order for operational costs and a lump sum payment order for VAT refunds.

The contractor applied to set aside these decisions. Later, the contractor sought to add an apparent bias ground based on an arbitrator's non-disclosure of a prior unrelated appointment.

The Court distinguished between interim measures and awards by substance over form. The monthly payment order was an interim measure, reviewable and thus not subject to setting aside, while the lump sum payment was final and could be set aside. It confirmed that new grounds for setting aside (like apparent bias) can be introduced after the three-month deadline with court permission, especially if the facts emerged late. On apparent bias, the Court applied the Singapore test focusing on whether a fair-minded observer would reasonably apprehend bias. It found no bias as the arbitrator acted reasonably and in good faith regarding non-disclosure, with the prior appointment distant in time and unrelated. The Court reaffirmed that non-disclosure alone is insufficient without a link to bias. This case clarifies the manner in which Singaporean Courts treat interim orders as opposed to partial awards, ensuring that interim orders which are typically granted for immediate relief are not subjected to excessive judicial interference.

ARBITRATION FUNDAMENTALS ASTRAY: A CRITICAL ANALYSIS OF INDIAN SUPREME COURT DECISION IN *DISORTHO S.A.S. v. MERIL LIFE SCIENCES*

Chirag Balyan[*] and *Yukta Tahiliani*[**]

ABSTRACT

This article, through a critical analysis of the Indian Supreme Court's decision in Disortho S.A.S. v. Meril Life Sciences Pvt. Ltd., identifies the flawed application of fundamental arbitration principles. The judgment—delivered by a three-judge bench led by then Chief Justice Sanjiv Khanna—assumed jurisdiction under Section 11 of the Arbitration and Conciliation Act, 1996, despite the arbitration agreement providing for institutional arbitration seated in Bogotá D.C., Colombia. This article observes the Court's conflation of key arbitration concepts such as lex arbitri, the law governing the arbitration agreement, and procedural rules, and reveals a doctrinal misunderstanding of well-settled international arbitration principles. The article critiques the Court's interpretation of conflicting clauses, failure to defer to the designated arbitral institution, failure to refer to previous relevant judgments and unnecessary application of the Enka judgment, which improperly lead it to extend Part I of the Indian Arbitration Act to cases involving foreign seats. It concludes that the judgment represents a significant setback to the evolution of a coherent arbitration regime in India and calls for greater doctrinal clarity in matters involving international arbitration, particularly as one judgment could have a watershed effect on future precedents.

I. INTRODUCTION

India is striving to shed its image as an arbitration-unfriendly jurisdiction,[1] a perception that has long drawn criticism from foreign investors and international arbitration lawyers.[2] Despite

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[1] Promod Nair, *A Sixty Month Makeover: Reinventing India as an "Arbitration-Friendly" Jurisdiction*, KLUWER ARB. BLOG (May 10, 2011), https://arbitrationblog.kluwerarbitration.com/2011/05/10/reinventing-india-as-an-arbitration-friendly-jurisdiction/; *India Will Soon Become the Hub of Arbitration, Says Law Minister*, THE HINDU (June 15, 2025), https://www.thehindu.com/news/national/india-will-soon-become-the-hub-of-arbitration-says-law-minister/article69695675.ece.

[2] Subhiksh Vasudev, *Has India Truly Delivered on Its Obligations Under Articles I and V of the New York Convention Over the Last 60 Years?*, KLUWER ARB. BLOG (Nov. 29, 2018), https://arbitrationblog.kluwerarbitration.com/2018/11/29/has-india-truly-delivered-on-its-obligations-under-articles-i-and-v-of-the-new-york-convention-over-the-last-60-years/.

having an arbitration act comparable to global best practices, based on the UNCITRAL Model Law, and arbitral institutions that have adopted international best practices in their rules, the nation faces an uphill battle. The primary culprit behind this negative perception is the inconsistent and unpredictable approach of the Indian judiciary. Gary Born classifies India as a "potentially problematic seat", acknowledging improved perceptions but highlighting persistent concerns. He observes:

> "*Although perceptions of the international arbitration regime in India have been materially improving, many international businesses remain skeptical about the risks of interference by lower courts in India-seated arbitrations and about the delays and unpredictability of litigation in Indian courts*."[3]

This scepticism stems from historical instances of judicial intervention and procedural delays, which continue to influence seat-selection decisions despite recent legislative reforms.[4] While there have been numerous pro-arbitration judgments in the past decade, an equal number of rulings have sent shockwaves through the arbitration community.[5]

However, the very framing of the debate as 'pro' or 'anti' arbitration is flawed. George Bermann pertinently argues:

> "*Plainly, the labels pro- and anti-arbitration do not do justice to the complexities associated with determining where international arbitration's best interests lie. [...] When a given policy or practice may be pro-arbitration in some respects, but anti-arbitration in others, a trade-off of some sort is required—a trade-off that the international arbitration community [...] actually have within their means to manage more or less well.*"[6]

Rather, the focus should be on whether Indian courts are correctly applying the fundamental principles of arbitration. Much of the judicial inconsistency stems from a lack of clear

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[3] GARY B. BORN, INTERNATIONAL ARBITRATION AND FORUM SELECTION AGREEMENTS: DRAFTING AND ENFORCING 286-289 (Wolters Kluwer 6th ed. 2021).
[4] Ajay Thomas, *India as a Hub for International Arbitration: Is It an Idea Whose Time Has Come?*, DIAC J. ARB. 145, 150–52 (2021).
[5] Vijayendra Pratap Singh, Abhijnan Jha, Urvashi Misra & Durga Priya Manda, *The Year India Almost Shed 'Judicial Parochialism' to Favour Arbitral Autonomy*, GLOB. ARB. REV. (Apr. 29, 2024), https://globalarbitrationreview.com/review/the-asia-pacific-arbitration-review/2025/article/the-year-india-almost-shed-judicial-parochialism-favour-arbitral-autonomy.
[6] George A. Bermann, *What Does It Mean to Be "Pro-Arbitration"?*, 34 ARB. INT'L 341, 352 (2018).

understanding of these basic tenets.[7] In this regard, a recent judgment by a three-judge bench of the Indian Supreme Court, authored by the then Chief Justice himself in the case of *Disortho S.A.S. v. Meril Life Sciences Private Limited*,[8] holds significant importance.

This ruling addresses several critical and fundamental issues in arbitration, including the law governing the arbitration agreement, the applicability of Part I of the Arbitration and Conciliation Act to international arbitration, and the determination of the seat of arbitration when it's not explicitly specified. Although the judgment ultimately resolved the specific dispute based on the lawyers' consent to arbitrate with India as the seat and under the Delhi International Arbitration Centre (DIAC) Rules, the observations made by the three-judge bench in the preceding paragraphs are highly significant. Notably, the Supreme Court assumed jurisdiction in this case even though the arbitration agreement provided for institutional arbitration at Bogota DC. As will be shown in the discussion that follows, this assumption of jurisdiction appears to be based on an erroneous understanding of *lex arbitri* and the governing law of the arbitration agreement. This paper will therefore critically engage with this judgment and its implications for the fundamental issues on which the Supreme Court has ruled. It is also clarified that the aim of this paper is not specifically to examine the governing law of the arbitration agreement, but rather to explore the theoretical assumptions underlying the Court's reasoning and to assess their soundness.

II. FACTS OF THE CASE

The present case originated from an International Exclusive Distributor Agreement ["**Distributor Agreement**"] executed on May 16, 2016, between Disortho S.A.S. ["**Disortho**"], a corporate entity established in Bogota, Colombia, and Meril Life Science Private Limited ["**Meril**"], a company registered in Gujarat, India. This agreement stipulated the terms for the distribution of medical products within Colombia. Following the emergence of disputes between the contracting parties, Disortho initiated proceedings by filing a petition under Section 11(6) of the Arbitration and Conciliation Act, 1996. The objective of this petition

[7] *Will the SC's Ruling Undermine India's Arbitration Framework? Legal Experts Weigh In*, ET LEGALWORLD (Feb. 28, 2025), https://legal.economictimes.indiatimes.com/news/litigation/will-the-scs-ruling-undermine-indias-arbitration-framework-legal-experts-weigh-in/118618220; *Arbitration Cases in Courts Should Be Heard by Specialised Division Benches: Retired Justice Rohinton Nariman*, BAR & BENCH (Mar. 9, 2024), https://www.barandbench.com/news/arbitration-cases-courts-should-heard-specialised-division-benches-retired-justice-rohinton-nariman.

[8] *Disortho S.A.S. v. Meril Life Sciences Private Limited*, 2025 SCC OnLine SC 570. [hereinafter *'Disortho'*].

was to secure the appointment of an arbitral panel, as provided for under Clauses 16.5 and 18 of the aforementioned Distributor Agreement. Meril subsequently challenged this petition, raising jurisdictional objections premised on the contention that the specified contractual clauses did not confer upon Indian Courts the requisite authority for the appointment of arbitrators.

The relevant clauses under the Distributor Agreement are as follows:

> "*16. Miscellaneous*
>
> *16.5. This Agreement shall be governed by and construed in accordance with the laws of lndia and all matter pertaining to this agreement or the matters arising as a consequence of this agreement with be subject to the jurisdiction of courts in Gujarat, India.*
>
> *18. Direct Settlement of Disputes*
>
> *The Parties mutually agree and pact that any dispute, controversy or claim arising during this Agreement …will be committed to Arbitration by either party for final settlement in accordance with the Arbitration and Conciliation Center of the Chamber of Bogota DC… The arbitration will take place in Bogota DC. On the premises of Center for Conciliation and Arbitration of the Chamber of Commerce of Bogota DC., or at the place where the Director of the Centre as determined in this city. The award shall be in law and standard will be applicable Colombian law governing the mailer…*"
> [Emphasis supplied].

III. LEGAL CONTROVERSY IN THE CASE

The three-judge bench judgment of the Supreme Court of India ["**SCI**"] is authored by the then Chief Justice Sanjiv Khanna. A detailed 26-page judgment analyses extensive foreign commentaries and case laws. However, it fails to mention contention of the parties which can only be guessed by the nature of the case.

Since the SCI was deciding a Section 11 application (for the appointment of arbitrator) under the Indian Arbitration Act, it seems like *Disortho's* central contention was why an Indian court was appointing the arbitrator when Clause 18 indicates Bogota DC as the place of arbitration. The reference to Bogota DC as the place would show that the courts in Bogota DC shall have

the supervisory jurisdiction over the arbitration, including the appointment of arbitrators and not an Indian court.

In para 26 of the judgment, SCI states that they will address the conflict between the Clause 16 and Clause 18 of the Distributor Agreement. The bench however didn't clarify why it thinks there is a conflict between two clauses.

A bare reading of Clause 16 indicates that the governing law of the agreement is Indian law and that the courts in Gujarat have jurisdiction. Clause 18 states that the place of arbitration is Bogotá D.C., the rules of the Arbitration and Conciliation Center of the Chamber of Bogotá D.C. shall apply, and the award shall be governed by Colombian law.

A preliminary perusal of these two clauses highlights two critical gaps resulting from ambiguous drafting. First, the clauses do not expressly specify the law applicable to the arbitration agreement. Second, the reference to the jurisdiction of Indian courts under Clause 16 raises the question of whether the seat of arbitration is intended to be in India, with Bogotá D.C. serving merely as the venue.

IV. SUPREME COURT RULING

Responding to these facts, the Supreme Court of India in Disortho issued the following rulings:

1. Since there was no express choice of law governing the arbitration agreement, the Court applied the Sulamérica three-stage test and held that Indian law, being the law of the underlying contract, also governs the arbitration agreement.
2. The Supreme Court of India observed that there was no express choice of seat, and treated Bogotá D.C. as the venue of arbitration.
3. The Indian Court (in this case, the courts in Gujarat) was held to have exclusive jurisdiction over the dispute.
4. The Court held that the Indian Arbitration and Conciliation Act, 1996, applies to this case, and that the Supreme Court of India has the power to appoint an arbitrator.

V. SUPREME COURT GOT THE FUNDAMENTALS WRONG

A. On Meaning of Lex Arbitri

SCI judgment notes in para 3 that *lex arbitri* is the "…the law governing the arbitration agreement and the performance of this agreement…" In footnote 5 of the judgment, the SCI notes that:

> "*Lex arbitri might be split into two components if the parties so desire – (i) law governing the agreement to arbitrate or the proper law of arbitration and (ii) the law governing the arbitration. While the former relates to validity, scope and interpretation of the arbitration agreement, the later refers to the supervisory jurisdiction exercised by the courts. We will refer to this split later in this judgment*."

The SCI in para 8 further adds that "these concepts are subsumed in each other. They are inherently intertwined as a part and parcel of the *lex arbitri*." But, cautions against such split.

It is submitted that this conception of *lex arbitri* is not entirely accurate. *Lex arbitri*, in simple terms, refers to the law governing the conduct of the arbitration itself, it does not extend to the law governing the arbitration agreement. The law applicable to the arbitration agreement constitutes a separate and distinct legal framework. This flows from the doctrine of separability. Where the parties have not made an express choice of law governing the arbitration agreement, courts across jurisdictions have adopted varying approaches to determine the applicable law. One approach is to apply the law governing the underlying contract; another is to apply the *lex arbitri*, i.e., the law of the seat of arbitration. A third approach, known as the validation principle, adopted in jurisdictions such as Switzerland seeks to uphold the arbitration agreement if it is valid under any potentially applicable law. France, however, applies a distinct substantive approach rooted in international arbitration law. French courts, unless there is a violation of a mandatory provision of French law or international public policy, assess the validity and effectiveness of international arbitration agreements based solely on the common intent of the parties, i.e., to apply the French substantive rules of international arbitration, without recourse to national conflict of law rules or the law governing the main

contract.[9] Additional methods, such as conflict of laws analysis, are also employed by certain countries to ascertain the proper law governing the arbitration agreement.

The law governing arbitration, also known as *lex arbitri* or *curial law*, refers to the legal system that dictates the procedural framework applicable to the arbitration.[10] In the context of international arbitration, this essentially determines which country's arbitration act will apply to the proceedings. Arbitration Acts, particularly those based on the UNCITRAL Model Law of 1985, typically contain comprehensive provisions concerning matters such as interim relief, form requirements for the arbitration agreement, rules governing the independence and impartiality of arbitrators, appointment and challenge to the appointment of arbitrator, the arbitration procedure itself, assistance in evidence gathering, the form of the award, grounds for setting aside an award, and appeals from certain arbitral tribunal orders, among others.[11]

In the absence of an express designation of the law governing arbitration, it is generally presumed to be that of the 'place' or 'seat' of the arbitration. The choice of seat, or more broadly, the law governing the arbitration, implies two key considerations: firstly, which law governs the arbitration proceedings, and secondly, which national court will exercise supervisory jurisdiction over the dispute. The choice of seat indicates the exclusive jurisdiction of the courts of the seat, unless contrary intention is indicated by the parties.[12]

It is however possible parties for to decide that while law of one country must govern the arbitration procedure, yet the courts of the other country shall have the supervisory jurisdiction. This can be done in two ways. First, parties may say that arbitration law of 'X' country should govern the arbitration, but 'Y' country will be the seat of arbitration. This would mean that courts of Y country will have supervisory jurisdiction over the arbitration and they will use the principles of arbitration from X country. Second, parties can choose 'X' country as a seat of arbitration and choose courts of 'Y' country as having exclusive or non-exclusive jurisdiction clause.

[9] Cour de Cassation, 1re civ., 20 Dec. 1993.
[10] Jennifer Haywood, *Law of the Arbitration Proceedings—Curial Law or Lex Arbitri (England and Wales)*, LEXISNEXIS (last visited July 10, 2024), https://www.lexisnexis.co.uk/legal/guidance/law-of-the-arbitration-proceedings-curial-law-or-lex-arbitri-england-wales.
[11] *Melford Capital Partners (Holdings) LLP and Others v. Frederick John Wingfield Digby*, [2021] EWHC 872 (Ch).
[12] Michael J. Mustill & Stewart C. Boyd, *Commercial Arbitration* 60–62, 64–68 (2d ed. 1989).

Whereas, the law governing the arbitration agreement refers to a legal system which determines its formal and substantive validity, formation, termination, interpretation, scope, subject-matter arbitrability at the pre-award stage[13], assignment, and waiver.[14] Where this governing law differs from the *lex arbitri* (the law governing the arbitration), the law governing the arbitration agreement can typically be bifurcated into two distinct aspects: the law governing the formal validity of the arbitration agreement (e.g., the writing requirement), and the law governing its substantive validity. The former often aligns with the *lex arbitri*, while the latter is determined by the law specifically chosen to govern the substantive validity of the arbitration agreement.

The past few years have witnessed significant and evolving judicial discourse across leading arbitral jurisdictions, such as the United Kingdom and Singapore, concerning the crucial issue of determining the law governing the arbitration agreement. In the United Kingdom, noteworthy cases including *Sulamerica*[15], *Kabab-Ji*[16], *Enka v. Chubb*[17], and more recently, *Unicredit*[18], have meticulously addressed and shaped the principles governing this complex area of law. Parallel to this, Singaporean jurisprudence has similarly developed through pivotal decisions such as *BCY v. BCZ*[19], *BNA v. BNB*[20], and *Anupam Mittal*[21]. The Indian Supreme Court has joined this critical legal fray with its pronouncement in *Disortho.* The SCI in *Disortho* have adopted the English approach in *Sulamérica* and *Enka. It used the precedents interchangeably.* The SCI even didn't pause to reflect that there are deviations in the *Sulamérica* and *Enka* approaches. The UK SC in Enka endorsed the three-stage test in *Sulamérica*, but differed from *Sulamérica* on the weight to be given to the law of the substantive contract versus the seat in the implication of the proper law of the arbitration agreement.[22] Moreover, Indian courts have given no justification on why they shall borrow

[13] [2022] SGCA 1.
[14] Kapil Arora & Aditi Tambi, *Law Governing Arbitration Agreement: Which Way Are Indian Courts Headed?*, CAM DISPUTES RESOLUTION BLOG (Aug. 20, 2024), https://disputeresolution.cyrilamarchandblogs.com/2024/08/law-governing-arbitration-agreement-which-way-are-indian-courts-headed/; Amanda Nunes Sampaio, *The Law Governing the Arbitration Agreement: Why We Need It and How to Deal With It*, INT'L BAR ASS'N (last visited June 10, 2024]), https://www.ibanet.org/article/699fd751-0bd4-4a15-bf84-e2542a8219c9.
[15] *Sulamérica Cia Nacional de Seguros SA and others v. Enesa Engelharia SA and others* [2013] 1 WLR 102 [hereinafter '*Sulamérica'*].
[16] *Kabab-Ji SAL v. Kout Food Group*, UKSC/2020/0036 [hereinafter '*Kabab-Ji'*].
[17] *Enka Insaat Ve Sanayi AS v. OOO Insurance Company Chubb* [2020] 1 WLR 4117 [hereinafter '*Enka'*].
[18] *UniCredit Bank GmbH v. RusChemAlliance* LLC [2024] UKSC 30 [hereinafter 'UniCredit'].
[19] *BCY v. BCZ,* [2017] 3 SLR 357 (SGHC) [hereinafter '*BCY'*].
[20] *BNA v. BNB* [2020] 1 SLR 456 (SGCA) [hereinafter '*BNA'*].
[21] *Anupam Mittal v. Westbridge,* [2023] SGCA 1 (SGCA) [hereinafter '*Anupam Mittal'*].
[22] *Revisiting the Proper Law of the Arbitration Agreement*, 39 ESSEX CHAMBERS (May 11, 2020), https://www.39essex.com/information-hub/blog/revisiting-proper-law-arbitration-agreement.

from the English approach which is based in a distinct statutory framework and case-law evolution which prioritize the conflict approach of determining governing law. It is beyond the scope of this paper to further comment on this evolving jurisprudence of applicable law of the arbitration agreement.

1. Supervisory Jurisdiction Without Lex Arbitri: A Permissible Innovation?

While parties theoretically may agree to subject an arbitration seated in one country to the procedural laws of another, such arrangements are rare in practice due to their inherent complexities and potential for legal uncertainty. Courts, including the English Court of Appeal,[23] and the U.S. Fifth Circuit,[24] have acknowledged the conceptual validity of this approach but caution against it, emphasising that absent clear intent, the law of the seat typically governs arbitral procedure.[25] English law explicitly permits such derogation under Section 4(5) of the Arbitration Act 1996 for non-mandatory provisions,[26] though judicial and academic scepticism persists, with commentators describing the scenario as:

> *"…'exceptional'; 'almost unknown'; a 'purely academic invention'; 'almost never used in practice'; a possibility 'more theoretical than real'; and a 'once-in-a-blue-moon set of circumstances'. Commentators note that such an agreement would be complex, inconvenient, and inconsistent with the selection of a neutral forum as the arbitral forum."*[27]

Yet Indian lawyers practising International Commercial Arbitration advise their clients to do this bifurcation so as to exclude the jurisdiction of Indian courts. This approach is motivated by concerns over inconsistent judicial interpretations and protracted litigation timelines. Consequently, a practice emerged wherein parties would designate Indian law as the substantive law governing the contract, while simultaneously selecting the Indian Arbitration and Conciliation Act, 1996, as the governing law. To enhance procedural efficiency, such

[23] *Naviera Amazonica Peruana S.A. v. Compania Internacional de Seguros del Peru* [1988] 1 Lloyd's Rep. 116, 120 (C.A.) (Eng.).
[24] *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F.3d 291 (5th Cir. 2004).
[25] *Channel Tunnel Grp. Ltd. v. Balfour Beatty Constr. Ltd.* [1993] 1 A.C. 334, 357-58 (H.L.) (Eng.).
[26] Arbitration Act 1996, c. 23, § 4(5) (Eng.).
[27] *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F.3d 274, 291 (5th Cir. 2004) at 32.

agreements frequently specified London as the arbitral seat, thereby vesting supervisory jurisdiction in English courts.[28]

This hybrid framework was judicially examined in *Arsanovia case*[29], where the underlying contract was governed by Indian law, the arbitration was administered by the LCIA, and London was designated as the seat. The English High Court, in assessing a challenge under Section 67 of the English Arbitration Act 1996, applied the Indian Arbitration Act to determine the tribunal's substantive jurisdiction.

Thus, it is possible to have supervisory jurisdiction of courts of one country and applicable law of arbitration of some other country. While in practice this should be avoided for confusion, theoretically, it is permissible.

2. De-Linking Seat and Court Supervision

While parties may, at times, stipulate for a court in a different country to hold jurisdiction, it is crucial to note that unless such a choice of jurisdiction clause is *exclusive*, the courts of the seat will ordinarily retain exclusive jurisdiction.

But, it may happen where an arbitration agreement designates a seat of arbitration and, at the same time, stipulates that the court of another jurisdiction shall have exclusive supervisory jurisdiction. In *Sulamérica*[30], Clause 7 of the General Conditions titled as 'Law and Jurisdiction' provides Brazil law as the substantive law and vested Brazilian courts with exclusive jurisdiction. Clause 12 titled as 'Arbitration' designated London as the seat of the arbitration.

In these facts, the court while upholding the arbitration clause noted that practical effect of exclusive jurisdiction clause ["**EJC**"] is limited. The clause does not displace the arbitration agreement but coexists with it in a narrowly defined capacity. It allows recourse to Brazilian courts for limited purposes: to affirm the arbitrability of a dispute, to compel arbitration, to confirm the validity or enforceability of an award, or to assume jurisdiction on the merits where the parties mutually agree to forgo arbitration. The EJC functions to preclude proceedings on

[28] Abhinav Bhushan & Niyati Gandhi, *The Ghost of the Governing Law Returns: Lex Arbitri v. Curial Law in India*, KLUWER ARBITRATION BLOG (Feb. 26, 2014), https://arbitrationblog.kluwerarbitration.com/2014/02/26/the-ghost-of-the-governing-law-returns-lex-arbitri-v-curial-law-in-india/.
[29] *Arsanovia Ltd. v. Cruz City 1 Mauritius Holdings* (2012) EWHC 3702 (Comm).
[30] [2012] EWCA Civ 638.

the merits before courts other than those in Brazil. Rather than conflicting with the arbitration clause, the EJC supports the procedural framework by directing any necessary judicial intervention to a specific forum.[31]

In scenarios involving two potential *fora* namely, the courts of the seat and those with non-exclusive jurisdiction from another country, the parties retain a choice, and the principle of *forum non-conveniens* may be invoked in such circumstances.[32]

3. Procedural Rules v. Lex Arbitri

The observation of the SCI in para 11 conflates the distinction between procedural rules governing the arbitration and lex arbitri. The SCI observes:

> "*We are of the view that matters such as filling vacancies on arbitral tribunals and the removal of an arbitrator through the exercise of supervisory jurisdiction, in the absence of a clear mechanism within the arbitration agreement, should be normally governed by the law applicable to the arbitration agreement itself, rather than by the procedural rules that govern the arbitration process. It is, after all, the lex arbitri that governs the arbitration and its associated processes*."

Understood holistically, the Supreme Court of India's stance appears to be that arbitral appointments are governed by the law of the arbitration agreement. This position should be read alongside the Court's earlier observation in paragraph 8, where it noted that the law governing the arbitration agreement and the *lex arbitri* (i.e., the law governing the arbitration proceedings) are, in essence, subsumed within one another. This interpretation is further reinforced in the concluding line of paragraph 16, where the Court states that *lex arbitri* ultimately governs the arbitration. In effect, the Court suggests that procedural rules including those relating to the appointment of arbitrators are not governed by institutional rules, but by the law of the arbitration agreement, which it equates with *lex arbitri*, unless the two are clearly severed. As already discussed in the preceding paragraph, this conflation reflects a misunderstanding of the relevant legal principles. In what follows, we now examine the role

[31] *Id*, ¶ 44.
[32] *McDonald's India Private Limited v. Vikram Bakshi & Ors*, FAO (OS) 9/2015 (HC, Delhi).

and scope of procedural rules in arbitration and assess whether and to what extent they govern the process of arbitral appointments.

In simple terms, procedural rules in arbitration refer to the framework governing the conduct of arbitral proceedings and are distinct from both the *lex arbitri* (the law of the seat) and the law governing the arbitration agreement.[33] These rules typically address matters such as the filing and service of the request for arbitration, submission of replies and counterclaims, constitution and challenge of the tribunal, determination of the arbitral seat and language, jurisdictional objections (including competence-competence and separability), written submissions, taking of evidence, conduct of hearings, provisional measures, choice of substantive law, time limits for awards, formalities of rendering awards, and costs.

While many of these aspects are addressed in institutional arbitration rules (such as those of ICC, LCIA, SIAC, or UNCITRAL), these rules generally provide only a broad procedural framework. They identify key procedural stages but leave substantial discretion to the arbitral tribunal and the parties to tailor procedures in a case-specific manner much like in *ad-hoc* arbitration.

As Gary Born notes, institutional rules offer predictability and structure but do not comprehensively prescribe the sequence, timing, or detail of proceedings. Consequently, most aspects of the arbitral process remain subject to party agreement or, in its absence, to the tribunal's discretion, exercised within the bounds of the *lex arbitri*.[34]

Furthermore, parties often include procedural provisions in their arbitration or successive agreement concerning the appointment and qualification of arbitrators, timelines, rate of interest, cost-sharing mechanisms, and the types of remedies the tribunal may award. However, such determinations, while contractually valid, do not fall within the law applicable to the arbitration agreement. Instead, they constitute a separate procedural contract between the parties, subordinate to the mandatory provisions of the *lex arbitri*. In institutional arbitration, these party choices may also be subject to the institutional rules.

In international arbitration, party autonomy is paramount in procedural matters, and arbitrators must fill any procedural gaps in the absence of agreement. Nonetheless, procedural autonomy

[33] *Paul Smith Ltd. v. H&S International Holdings Inc.,* [1991] 2 Lloyd's Rep 127.
[34] GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 2120–2318 (Wolters Kluwer 2d ed. 2014).

is not absolute.[35] Arbitrators retain a duty to ensure the fundamental fairness of the proceedings, and must reject or modify party agreements that would compromise due process or violate mandatory norms under the *lex arbitri*.[36] In practice, parties usually agree only on broad procedural outlines such as incorporation of institutional rules or selective procedural issues like disclosure or witness presentation leaving much of the process to be shaped by the tribunal.

National courts generally accord significant deference to procedural decisions taken under institutional rules, including institutional authority over arbitrator appointment, seat designation, and tribunal fees.[37] In this respect, institutional rules often operate as a quasi-autonomous legal regime, displacing default national rules unless overridden by mandatory law. This principle is affirmed in the oft-quoted judgment of the Paris *Cour d'appel* in *Raffineries de pétrole d'Homs et de Banias v. Chambre de commerce internationale*, where the court held that in international arbitration, the rules of domestic law play only a subsidiary role, applicable only in the absence of party agreement. The ICC Rules, as agreed upon by the parties, constituted the "law of the parties" and were to be applied to the exclusion of other laws.[38]

Thus, the modern procedural architecture of international arbitration is a layered construct. It is grounded in party autonomy, guided by institutional rules, but always constrained by the fundamental principles and mandatory provisions of the *lex arbitri*.

What emerges from the above discussion is that the appointments in institutional arbitration are usually governed by their specific procedural rules. Conversely, for *ad-hoc* arbitrations or when an institution is unable to make an appointment, the courts of the seat may intervene in accordance with the *lex arbitri*.

The proposition that Indian courts may intervene in matters concerning the appointment of arbitrators in international arbitration based on the law governing the arbitration agreement

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[35] Andreas Respondek, Carolin Nemec & Mihaela Dumbrava, *Limits to Party Autonomy in International Commercial Arbitration*, SING. L. GAZ., Sept. 2019, https://lawgazette.com.sg/feature/limits-to-party-autonomy-in-international-commercial-arbitration/.

[36] Giuditta Cordero-Moss, *Limits on Party Autonomy in International Commercial Arbitration*, 4 PENN. ST. J.L. & INT'L AFF. 186, 187 (2015).

[37] See, Franco Ferrari & Friedrich Rosenfeld eds., *Deference in International Commercial Arbitration* (Wolters Kluwer 2023). González & Rioseco Abogados, *Deference to Parties' Procedural Autonomy and Due Process*, LEXOLOGY (Apr. 20, 2017), https://www.lexology.com/library/detail.aspx?g=a0cb799f-67fa-4f85-8a15-787fedfa9060.

[38] *Raffineries de pétrole d'Homs et de Banias* v. *Chambre de commerce internationale*, 1985 Rev. Arb. 141, 149 (Paris Cour d'appel).

apart from the place (or seat) of arbitration originates from *Bhatia-BALCO* fiasco. The Supreme Court's decision in *Union of India v. Reliance Industries Ltd.*[39] critically reflects this shift. The Court in *Reliance* relying on past precedents held that where it is determined that the juridical seat lies outside India, or where the law governing the arbitration agreement is not Indian law, Part I of the Arbitration and Conciliation Act, 1996 stands excluded by necessary implication. Consequently, the doctrine of concurrent jurisdiction (i.e., allowing Indian courts to intervene even when the seat is outside India) would not apply irrespective of whether the arbitration agreement predates *BALCO*. This effectively introduced a negative proposition: if Indian law does not govern the arbitration agreement, Part I cannot apply.

The decision in *Arif Azim* further entrenched and reversed this logic by converting the negative inference into a positive rule, namely, that if the law governing the arbitration agreement is Indian law, then Part I would apply even if the seat is undetermined. In paragraph 39 (page 55) of *Arif*, the Court observed:

> "*Part I of the Act, 1996 will be applicable only to those arbitration agreements where the seat or place of arbitration is in India or, in the absence of any categorical finding as to the place or seat of arbitration, where such agreement stipulates or can be read to stipulate that the law governing the arbitration agreement would be Indian law."*[40] *[emphasis supplied]*

By paragraph 71 of the judgment, however, this formulation undergoes a subtle but significant change. The Court states:

> *"Part I of the Act, 1996 and the provisions thereunder only applies where the arbitration takes place in India, i.e., where either (i) the seat of arbitration is in India or (ii) the law governing the arbitration agreement are the laws of India."*[41]

In doing so, the Court omits the earlier qualifier— "in the absence of any categorical finding as to the place or seat of arbitration"—thus potentially expanding the jurisdictional reach of Indian courts in ways not supported by prior precedent.

[39] (2015) 10 SCC 213.
[40] *M/s. Arif Azim Co. Ltd. v. M/s. Micromax Informatics Fze,* (2024) INSC 850, ¶ 55.
[41] *Id*, ¶ 71.

It is worth noting that why Justice Nariman in *Reliance* upheld the negative formulation can be understood in light of its effort to limit the retrospective application of *Bhatia*. Paragraphs 20 and 21 of *Reliance* clarify that:

> *"The last paragraph of Bharat Aluminium's judgment has now to be read with two caveats, both emanating from paragraph 32 of Bhatia International itself—that where the Court comes to a determination that the juridical seat is outside India or where law other than Indian law governs the arbitration agreement, [Part I] would be excluded by necessary implication... It is only those agreements which stipulate or can be read to stipulate that the law governing the arbitration agreement is Indian law which would continue to be governed by the Bhatia rule."*

The Court then concluded in paragraph 21 that, because the arbitration in that case had its seat in London and the arbitration agreement was governed by English law, Indian courts had no jurisdiction.

Thus, the jurisprudential drift from *Reliance* to *Arif* reveals a misapplication of the scope of Part I, whereby the law governing the arbitration agreement is erroneously treated as an independent jurisdictional basis. It appears that in *Disortho*, the Supreme Court of India relied on paragraph 71 of *Arif* to conclude that if the law governing the arbitration agreement is Indian law then applying the *Sulamérica* and *Enka* principle, part I of the Arbitration and Conciliation Act, 1996 would apply. However, for the reasons discussed above, this reasoning is flawed and reflects a misreading of actual legal position.

4. *Should Supreme Court have shown the deference?*

In institutional arbitration, the appointment of arbitrators is governed by the prescribed rules of the relevant arbitral institution. Since the Centre for Conciliation and Arbitration of the Chamber of Commerce of Bogotá D.C. was the designated arbitral institution in this case, it was incumbent upon the Centre to appoint an arbitrator upon the request of the claimant. Even if there was a dispute between the parties regarding the juridical seat of arbitration or the law governing the arbitration agreement, this would not preclude the arbitral tribunal from determining those issues. Accordingly, there was no necessity for the petitioner to approach the Court, as the tribunal was fully competent to decide such preliminary matters.

Nevertheless, since the petitioner moved the SCI, the Court could have exercised judicial restraint and directed the parties to approach the designated arbitral institution in accordance with the agreed rules. Moreover, under Section 11(6)(c) of the Arbitration and Conciliation Act, 1996, the Supreme Court may intervene only when the designated arbitral institution has failed to perform its function. The judgment does not record any pleading or observation to that effect. However, given that the petitioner *Disortho*, a company incorporated in Bogotá D.C. chose to invoke the jurisdiction of the SCI under Section 11 for appointment of an arbitrator, the Court proceeded to exercise its appointment power.

It appears that the SCI relied on the *BALCO–Arif Azim* line of reasoning, wherein in the absence of a designated seat, the governing law of the arbitration agreement could serve as a basis to invoke Part I of the Arbitration and Conciliation Act, 1996. This likely formed the basis for the SCI's assumption of jurisdiction in the present matter. However, this assumption merely validates jurisdiction, it does not confer it automatically particularly because the governing law of the arbitration agreement was not expressly stipulated in the contract and had to be determined during the course of the hearing. The court didn't frame any jurisdictional issue in the judgment signalling the lofty drafting.

Notably, had the 2019 Amendment to Section 11 been in force at the relevant time, the appointment could have been made by one of the arbitral institutions designated by the Supreme Court. Under Section 11(6A) and 11(6B) of the amended Act, such institutions are deemed not to be exercising judicial power, thereby reflecting the legislature's intent to minimise judicial intervention in arbitral appointments.

Had the appointment request been made to a designated institution instead; what outcome might have followed? While one cannot predict the specific decision, we can be certain that it would not have created the analytical disarray that this judicial intervention has generated.

Moreover, when the Court asserts jurisdiction by relying on the law of the arbitration agreement, instead of permitting the arbitral institution to perform its intended function, it risks diminishing the autonomy typically afforded to such institutions and the fundamental party-driven character of international arbitration. This action could obscure the distinction between the procedural independence of arbitral institutions and the legitimate supervisory functions of courts under the *lex arbitri*. This approach of the SCI leads to issues of coherence, perceptions

of judicial overreach, and questions about India's alignment with established international arbitral norms

5. Determining Seat

In this case arbitration agreement mentioned place of arbitration as Bogota DC. The SCI held that in this case Bogota SC is rather a venue. While the SCI has cited *Roger Shashoua*[42], it is not clear from the judgment how they have applied *Shashoua* principles to come to this conclusion.

The principles for identifying an arbitral seat when not expressly designated have been clearly developed in Indian jurisprudence. The foundational *BALCO*[43] judgment established that the term "place" may signify either the juridical seat or mere physical venue depending on context. This principle was operationalized through the *Shashoua* presumption, which holds that when parties designate a venue under supranational rules (like ICC or UNCITRAL) without specifying a seat, the venue is presumed to be the juridical seat absent contrary indications. The Supreme Court's Constitution Bench in *BALCO* expressly endorsed this approach, noting the frequent convergence between the law governing arbitration agreements and the curial law. Subsequent refinement came in *BGS SGS SOMA JV*[44], which established a three-pronged test: (1) singular designation of a place, (2) fixed proceedings without relocation possibilities, and (3) absence of *contrary indicia*. This framework was applied in *Arif Azim*[45], where Dubai's designation as venue under UAE procedural rules was held to constitute the seat given no rebutting evidence.

Coming to the present case, the arbitration clause designates Bogota D.C. as the *place* of arbitration. It further states that the arbitration shall take place "on the premises of the Center for Conciliation and Arbitration of the Chamber of Commerce of Bogota D.C., or at the place determined by the Director of the Centre in this city." This phrasing distinguishes between the "place" and the "venue" of arbitration. While Bogota D.C. is specifically named as the juridical place, the reference to different physical venues within the city underscores the logistical, rather than legal, flexibility of location. Importantly, the clause also provides that the award

[42] *Roger Shashoua (1) v. Sharma*, [2009] EWHC 957 (Comm).
[43] *BALCO v. Kaiser Aluminium Technical Services Inc*, (2012) 9 SCC 552.
[44] *BGS SGS SOMA JV v. NHPC Ltd.,* (2020) 4 SCC 234.
[45] *M/s. Arif Azim Co. Ltd. v. M/s. Micromax Informatics Fze,* (2024) INSC 850.

shall be rendered in accordance with Colombian law. In the absence of any significant contrary indicia, the proper inference is that Colombia is the juridical seat of arbitration.

The mere reference to Indian substantive law or to the jurisdiction of courts in Gujarat does not displace the designation of Colombia as the seat. As repeatedly held by the Supreme Court, the seat determines the curial law and the exclusive jurisdiction of supervisory courts. A tribunal seated in Bogota may well apply Indian substantive law if so chosen by the parties. As a matter of principle, courts in Gujarat would only exercise jurisdiction over disputes not referable to arbitration, or in exceptional situations—such as interim relief or enforcement—without undermining the primacy of the seat. Further, the clause here does not amount to an exclusive jurisdiction clause in favour of Indian courts.

In *Arif Azim Co. Ltd. v. Micromax Informatics FZE*, the Supreme Court reaffirmed that it is the seat of arbitration, not the jurisdiction clause, that confers exclusive supervisory jurisdiction. There, the agreement designated Dubai as the venue and subjected the proceedings to UAE Arbitration and Conciliation Rules. Even though a separate clause granted non-exclusive jurisdiction to Dubai courts, the Court held that in the absence of significant contrary indicia, the designation of Dubai as the venue, coupled with the chosen curial law, was sufficient to treat Dubai as the juridical seat.

This reasoning was echoed in *Mankastu Impex Pvt. Ltd. v. Airvisual Ltd.*, where the arbitration clause provided that disputes would be resolved by arbitration "administered in Hong Kong," while the governing law was Indian law and Delhi courts had jurisdiction. The Court held that the designation of Hong Kong as the place of arbitration implied that the supervisory jurisdiction vested with Hong Kong courts, and not Indian courts. Thus, despite Indian substantive law applying to the contract (*lex contractus*), the law governing the arbitration agreement (*lex arbitri*) was held to be Hong Kong law, and the Indian court declined jurisdiction to appoint an arbitrator.

It is also significant that the Supreme Court of India in *Disortho* did not distinguish its reasoning from earlier binding precedents such as *Arif Azim* and *Mankastu Impex.*, among others. In those cases, the Court had categorically held that jurisdiction clauses do not determine the juridical seat of arbitration, especially where a specific place has been designated as the venue and curial law has been clearly stipulated.

Yet, in *Disortho*, the Court appeared to rely on the existence of a jurisdiction clause and the reference to Indian substantive law without engaging with why similar *indicia* had been expressly rejected as determinative of seat in the earlier authorities. This omission is doctrinally significant. In *Arif Azim*, for instance, the venue was Dubai and the curial law was UAE Rules, while Dubai courts were given non-exclusive jurisdiction. Still, the Court concluded that the juridical seat was Dubai. Similarly, in *Mankastu*, even though the contract was governed by Indian law and Delhi courts were named, the designation of Hong Kong as the place of arbitration prevailed. The failure of *Disortho* to even refer to let alone reconcile, these judgments raises concerns about internal coherence in Indian arbitration jurisprudence.

VI. CONCLUSION

If India aims to become a global hub for arbitration, its courts will need to continue deepening their understanding of arbitration law and its guiding principles. This involves more than resolving inconsistencies in past rulings. At times, key concepts in arbitration may not be fully appreciated in judicial reasoning. As a result, certain interpretations tend to persist until revisited by benches with greater exposure to arbitration practice. Ongoing engagement with international developments and doctrinal clarity can help strengthen the Indian arbitration framework.

By then, however, the damage to jurisprudence is often significant. The lingering effects of the *Bhatia International* judgment continue to haunt Indian arbitration law, both in doctrine and in practice. The recent *Disortho* decision unfortunately reproduces many of these foundational errors and demonstrates lack of clear understanding of arbitration principles.

From a drafting perspective, the judgment is deficient on several fronts. It omits a clear account of the parties' pleadings and fails to substantiate its basis for assuming jurisdiction, particularly in the face of an institutional arbitration clause. Although the Court asserts that the seat of arbitration is India, rather than Bogotá D.C., it offers no explanation as to why established principles from *Roger Shashoua* or *BGS SGS Soma* were not followed or considered inapplicable. The Court casually cites *Sulamérica* to determine the law governing the arbitration agreement, without critically engaging with either *Sulamérica* or *Enka*. Notably, the English Arbitration Act is itself now moving away from the *Enka* approach.[46] Moreover, the

[46] Arbitration Act 2025, § 6A (UK).

Court does not interrogate why Indian courts should adopt English jurisprudence at all, given that the English legal framework is materially distinct from the Indian Arbitration and Conciliation Act, 1996. The continued reliance on the fragmented and often ambiguous English case law has done little to aid the development of a coherent Indian arbitration regime.

At a more conceptual level, the judgment mischaracterises the meaning of *lex arbitri*, erroneously suggesting that the arbitration agreement governs the procedural aspects of arbitration. It also exhibits a lack of clarity about what constitutes procedural rules in arbitration, and fails to distinguish these from the institutional rules or mandatory provisions of the law of the seat. These fundamental errors threaten to derail India's progress toward a consistent, arbitration-friendly jurisprudence.

INTERIM MEASURES FOR DEPOSIT(S) IN ARBITRATION: FROM THE LENS OF TENANCY CASES

Nishant Datta[*]

ABSTRACT

This article critically examines the application of interim measures for deposits in arbitration within the context of tenancy disputes in India. Against the backdrop of prolonged court delays and an increasing shift from traditional litigation to arbitration, the article outlines the imperative for expeditious relief in landlord-tenant conflicts. First, it underscores how judicial interventions under Sections 9 and 17 of the Arbitration and Conciliation Act, 1996 provide vital powers to secure interim reliefs aimed at preserving property rights and mitigating financial losses, particularly when landlords face protracted litigation and challenges in recovering arrears. Second, the discussion navigates the benefits of tenancy arbitration, highlighting its cost-effectiveness, speed, and procedural flexibility, attributes that are especially significant in a scenario where traditional court processes can extend over decades. In doing so, several landmark judgments are examined to illustrate how the arbitrator's autonomy and statutory timelines enhance dispute resolution efficiency, thereby reducing the economic burden on parties. Third, the article provides a detailed comparison between the powers of civil courts under the Code of Civil Procedure and those vested in arbitral tribunals by the Arbitration Act. Last, the article establishes that the judiciary's pro-arbitration stance effectively widens the scope for interim reliefs, thereby safeguarding lessors' rights against defaulting tenants and preventing the dissipation of assets. Lastly, the article touches upon areas for improvement in this domain and discusses scope for evolution in the current arbitration regime in the Indian context.

I. INTRODUCTION

Indian courts have been marred with long delays and with millions of cases pending. Especially worse has been the case of tenancy disputes under rent control laws, where eviction cases have been known to last for decades.[1] Tenancy laws have evolved with time, and delays have been brought down to a large extent, both by judicial precedents as well as amendments in prevailing laws. However, by and large, lessors are forced to await for long periods for final disposal of their cases to get their properties back in their custody and control, and this is often accompanied with forsaking recovery of arrears of

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[1] Souvik Bhadra and Nupur Jalan, *Alternative Dispute Resolution in Tenancy Disputes – Walking the Tightrope*, 1 NUJS JODR 1 (2021), 97-116; Gurinder Pal Singh, *Judicial Delays: A Time for Reflection*, BAR AND BENCH (5 February 2025), https://www.barandbench.com/law-firms/view-point/judicial-delays-a-time-for-reflection.

lease rentals. In this context, arbitration has assumed more importance especially in terms of speed of disposal of cases and with growing awareness, more and more lessors are opting for arbitration clauses in their lease agreements. Yet there is widespread lack of awareness of the rights of lessors in terms of seeking interim reliefs in arbitration and commercial cases, such that their rights (especially financial entitlements) are secured while without awaiting final disposal of the cases.

In the above context, this article critically examines the application of interim measures for deposits in arbitration within the context of tenancy disputes in India. Against the backdrop of prolonged court delays and an increasing shift from traditional litigation to arbitration, the article outlines the imperative for expeditious relief in landlord-tenant conflicts. *First*, it underscores how judicial interventions under Sections 9 and 17 of the Arbitration and Conciliation Act, 1996 provide vital powers to secure interim reliefs aimed at preserving property rights and mitigating financial losses, particularly when landlords face protracted litigation and challenges in recovering arrears. *Second*, the discussion navigates the benefits of tenancy arbitration, highlighting its cost-effectiveness, speed, and procedural flexibility, attributes that are especially significant in a scenario where traditional court processes can extend over decades. In doing so, several landmark judgments are examined to illustrate how the arbitrator's autonomy and statutory timelines enhance dispute resolution efficiency, thereby reducing the economic burden on parties. *Third*, the article provides a detailed comparison between the powers of civil courts under the Code of Civil Procedure and those vested in arbitral tribunals by the Arbitration Act. *Last*, the article establishes that the judiciary's pro-arbitration stance effectively widens the scope for interim reliefs, thereby safeguarding lessors' rights against defaulting tenants and preventing the dissipation of assets.

II. UNDERSTANDING INTERIM RELIEFS IN ARBITRATION

In civil disputes, Indian courts and arbitral tribunals are often times required to pass interim orders to safeguard the interests of parties and to balance equities. This applies equally to tenancy disputes. Sections 9 and 17 of the Arbitration and Conciliation Act, 1996 ["**Arbitration Act**"] empower courts and arbitral tribunals respectively, with jurisdiction to pass interim measures. Following the 2015 amendment, Sections 9(1) and 17(1) are now substantially *pari materia*, thereby equating the powers of arbitral tribunals with those of courts in granting interim measures. Consequently, any analysis of interim relief in tenancy disputes under Section 9 is now equally applicable to Section 17.[2] This parity

[2] Vasanth Rajasekaran and Harshvardhan Korada, *Interim Reliefs in Arbitration: Emerging Judicial Trends in India,* 2024 SCC ONLINE BLOG EXP 24, https://www.scconline.com/blog/post/2024/03/27/interim-reliefs-arbitration-emerging-judicial-trends-india/, last accessed on 6 April 2025.

ensures that the rationale and framework for granting interim relief, whether by a court or a tribunal, must be viewed through the same legal lens.

The underlying object of the power to grant of interim orders and measures, which is often overlooked, is preservation of ownership and continued existence of the concerned property itself and to prevent abuse of process by the tenants by weaponizing delay in legal proceedings. This is particularly applicable in the commercial real estate sector, inasmuch as these powers can and must be exercised to provide adequate safeguards against prolonged delays in adjudicating disputes concerning default in contractual payments against third party obligations, such as monthly maintenance charges, utility bills and statutory taxes. The defaults can effectively snowball quantitatively into such amounts as would jeopardize the lessor's ownership and solvency alike, with possibility of the third parties seeking payment by way of exercising attachment or lien on the property itself. Another object of such powers is to balance the equities and protect the income/livelihood of lessors from defaulting tenants without awaiting final determination of their *inter-se* disputes.

III. BENEFITS AND CHALLENGES OF TENANCY ARBITRATIONS IN INDIA

The floodgates for tenancy arbitration in India were opened by the Supreme Court in its landmark decisions in Judgements in *Suresh Shah v. Hipad Technology India Private Limited*,[3] and *Vidya Drolia v. Durga Trading Corporation*.[4] Now more than ever, landlord-tenant disputes are increasingly shifting from their traditional arenas of civil courts to the hands of arbitrators, highlighting the demand for quicker and expert-driven dispute resolution mechanisms. This shift highlights the tangible utility that arbitration provides to parties, particularly those unwilling to allow conflicts to remain in procedural paralysis.

Section 29A of the Arbitration Act caps the timeline for completion of the arbitral process at 12 months. This provides immense comfort to the parties that decide to submit their tenancy disputes to arbitration, and projects arbitration as a viable alternative to protracted court disputes. In *Narinder Singh & Sons v. Union of India*,[5] the Supreme Court underscored that arbitration must strike a balance between speedy disposal and ensuring equal opportunity for both parties. It was further emphasised that neither expedience nor fairness should be sacrificed. Should the process be unnecessarily

[3] *Suresh Shah v. Hipad Technology India Private Limited*, (2021) 1 SCC 529.
[4] *Vidya Drolia v. Durga Trading Corporation*, (2021) 2 SCC 1.
[5] *Narinder Singh & Sons v. Union of India*, (2022) 18 SCC 690.

prolonged, it would be to the detriment of a just and equitable resolution. In comparison to traditional litigation, arbitration therefore ensures that tenancy disputes are expediently resolved, while ensuring that the procedural safeguards accorded to the landlord and tenancy is not compromised. Due to the shortened timeline, arbitration also presents itself as an economical option in contrast to protracted litigation.

In *BSDC Pvt. Ltd. v. Samir Narain Bhojwani*,[6] the Supreme Court emphasised the cost-effective nature of arbitration. It was stated that ensuring arbitration remains affordable could save parties significant time and expenses, while bolstering its role as the preferred avenue for dispute resolution. By way of arbitration, landlords (especially institutional and corporate landlords) and tenants, especially small-scale property owners and renters with low means, can resolve disputes without having to pay exorbitant legal fees that accompany delays and complications of traditional litigation.

The procedural flexibility offered by arbitration is another significant benefit of arbitration for tenancy disputes. Section 19 of the Arbitration Act enforces the concept of '*party autonomy*', which makes arbitration a flexible procedure compared to the procedural rigours of civil litigation. Party autonomy has been held by the Supreme Court to be the *grundnorm* of arbitration in *Centrotrade Minerals and Metal v. Hindustan Copper*.[7] The Supreme Court acknowledged the crucial role that party autonomy plays in forming arbitral procedures when it concluded that, as the fundamental tenet and guiding principle of arbitration, it permits parties to choose and adopt its procedural rules. Tenancy disputes often brew hostility, which can be avoided by arbitration since it creates a less hostile and flexible atmosphere that promotes amicable resolutions. In addition, arbitration being a private affair, it also protects both parties from reputational damage that litigation may bring with it. Moreover, prioritising effective dispute resolution procedures provides resolution while preserving the pragmatic stability of landlord-tenant relationships. Protracted legal fights can often strain relationships and disturb living or leasing arrangements. On the contrary, swift arbitration may allow parties to protect their relationship and continuing the tenancy, while resolving isolated disputes arising out of the tenancy agreement in parallel.

That said, arbitration of tenancy disputes carries its own share of disadvantages, most of which are disadvantages that tag along with most dispute resolution mechanisms. If the landlord is involved in

[6] *BSDC Pvt. Ltd. v. Samir Narain Bhojwani,* (2024) 7 SCC 218.
[7] *Centrotrade Minerals and Metal v. Hindustan Copper*, (2017) 2 SCC 228.

a lengthy court battle, they may haemorrhage money and be on the hook for all financial burdens arising out of the property in dispute.

First, while tenancy arbitrations do offer a faster and efficient method to resolve disputes, the challenges they face are rooted in procedural complexities. Although it is understood that arbitration is a 'cost effective' and 'faster' procedure, the recurring appeals and challenges to arbitral proceedings and awards seek to muddy the waters. While the process for enforcement of an award is identical to the process for enforcement of a decree under the Code of Civil Procedure, 1908 ["**CPC**"]. However, enforcement of an arbitral award involves an additional step of judicial recognition. The award only becomes enforceable after the statutory period for challenging the same, under Section 34 of the Arbitration Act, expires. This step serves as the ground for several routine challenges by parties against whom the award is passed. This prevents the successful party from realising the benefits of the award if any challenges are taken up by courts. At this point, I would like to share about two recent tenancy arbitration cases handled by my office for the same client/landlord with different legal strategy adopted in both. In Scenario One, the client insisted on initiation of arbitration proceedings at the earliest and did not opt for filing of a petition under Section 9 of the Act, contrary to advise given. This led to an arbitration case being initiated after filing of application under Section 11 (Case No. Arb. P. No. 757/2023 before High Court of Delhi, disposed vide order dated 17.08.2023) and even though the tenant got his defence struck off during arbitral proceedings, the Award was passed only on 14.08.2024, i.e., after almost one year since the commencement of proceedings. In contrast, Scenario Two presented an entirely different outcome in terms of timeline and costs for the client since in this scenario the client agreed to file an application under Section 9 before the High Court of Delhi (Case No. OMP(I) COMM 401 / 2024) wherein the tenant appeared through counsel on the second date of hearing and surrendered possession, while also offering to amicably negotiate and settle the arrears of financial dues. The possession was taken immediately by the landlord and the remaining dispute was referred to the mediation centre, where an amicable settlement was arrived at, culminating in a settlement agreement being signed on 22.01.2025, within eight weeks from date of initiating proceedings and without having to go for proceedings for arbitral tribunal and avoiding costs altogether. This potential in Section 9 to encourage an errant tenant in default to settle with the landlord and promptly handover possession is something which must be resorted to in all cases where

there is an arbitration clause, at least till such time that the Model Tenancy Act [8]is formally passed by the Legislature.

Second, *a large majority of the Indian arbitration landscape continues to remain reliant on ad hoc arbitrations.*[9] Ad hoc arbitrations, which suffer from lack of functional consistency, lend themselves open to contests and challenges to their arbitrability, appointments, seat of arbitration and procedure. It is therefore advisable that for parties to enjoy the full benefits of arbitrating their tenancy disputes, they should prefer institutional arbitration. Not only does institutional arbitration reduce procedural lags and delays, awards issued by tribunals constituted through institutional appointment are also more likely to withstand judicial scrutiny. The reason being that such tribunals are presumed to have been formed in accordance with recognized procedures and established standards. The credibility and procedural rigor associated with institutional arbitration, ensures impartiality, expertise, and adherence to due process.

Third, vexatious and recalcitrant claims in arbitrations also prolong the arbitral procedure, thereby forcing parties to reach a settlement in order to avoid getting tangled in procedural delays. Often to wriggle out of their obligation to arbitrate tenancy disputes, parties file a case before a civil court. The party wanting to refer the dispute to arbitration then has to file an application under Section 8 of the Arbitration Act for the court's consideration. This adds an unnecessary additional step, delaying the effective resolution of the dispute. While dealing with an application under Section 8 of the Arbitration Act, courts are expected to adopt a very pro-arbitration outlook. In *SBI General Insurance Co. Ltd. v. Krish Spg*,[10] the Supreme Court sought to curtail judicial interference in the referral of disputes to arbitration, reaffirming that an arbitrator should be appointed, and the matter referred to arbitration, even if the claim appears frivolous on its face. It held that tests such as the "*eye of the needle*" and "*ex facie meritless*," which require courts to scrutinize contested facts and assess *prima facie* evidence, run counter to the fundamental principles of autonomy of tribunal and limited judicial intervention. The Supreme Court emphasised that allowing courts to conduct such assessments at the referral stage would encroach upon the jurisdiction of the arbitral tribunal and undermine the efficiency of arbitration as a dispute resolution mechanism. The pro-arbitration approach acknowledges the benefits that arbitration offers in unburdening the court system, ensuring that

[8] The Model Tenancy Act, 2021: Will it Stand the Test? (A Legislative Comment), 8.1 RSLJ 1 (2021).
[9] Anvita Sharma, *PWD's Recent Notification : A Setback for Arbitration Reform in India?*, INDIACORPLAW (July 1, 2025, 7.01 PM), https://indiacorplaw.in/2025/04/30/pwds-recent-notification-a-setback-for-arbitration-reform-in-india/.
[10] *SBI General Insurance Co. Ltd. v. Krish Spg*, 2024 SCC OnLine SC 1754.

disputes are resolved in accordance with the arbitration agreement, without undue interference from courts in the early stages of the process.

Overtime, tenancy arbitration in India has come a long way and now offers procedural flexibility, cost-effectiveness, and efficiency, making it a strong substitute for traditional litigation. Parties willing to arbitrate their disputes would benefit from the current judicial pro-arbitration outlook, which is continuously making efforts to strengthen arbitration in India. Nonetheless, difficulties still exist, especially with regard to the enforcement of arbitral rulings and the vulnerability of ad hoc arbitrations to protracted conflicts and procedural ambiguities.

IV. COMPARISON BETWEEN THE POSITION IN CPC VIS-À-VIS ARBITRATION ACT WITH SPECIAL FOCUS ON '*ESSAR HOUSE V. ARCELLOR MITTAL*'

Before proceeding with examination of extent of jurisdiction and limits of intervention available under Section 9 and 17 of the Arbitration Act in tenancy matters, it would be apposite to draw a brief comparison of these powers with those available to a civil court under Order XV-A (Delhi amendment), Order XXXIX Rule 10 and Order XXXVIII Rule 5 of the CPC. Order XXXVIII Rule 5 CPC provides for 'attachment before judgment' and the underlying principle on which this provision is based is essentially the preservation of subject matter of the civil case in case of the defendant likely absconding outside the jurisdiction of the Court after dissipating the aforementioned subject matter. The conditions under this provision have traditionally been strict and applicability thereof has been kept restricted by Courts as opposed to the grant of interim injunctions under Order XXXIX Rules 1 and 2 CPC, which provision has traditionally been applied to a greater extent. Now, this is where Sections 9 and 17 of the Act are more liberal and provide reliefs of wider amplitude, especially when it comes to financial reliefs and interim orders for preservation of the subject matter of arbitration cases without requiring the party to meet strict conditions similar to those contained in Order XXXVIII Rule 5 CPC.[11] Similarly, under Order XXXIX Rule 10 CPC, Courts have traditionally been granting interim relief of deposit of 'admitted' amounts during the pendency of the proceedings. However, the biggest drawback of this provision has always been '**deposit'** of such 'admitted' rentals and other amounts before the Court itself instead of the same being directed to be paid directly to the Plaintiff/ lessor.

[11] *OYO Hotels & Homes (P) Ltd. v. Pearl Hospitality & Events (P) Ltd.,* 2020 SCC OnLine Del 1889.

Perhaps the aforementioned inadequacies and shortcomings in the existing provisions in CPC are what led to a new interim protection being introduced to the CPC by way of Order XV-A CPC, which was inserted by way of amendment introduced by the High Court of Delhi *vide* notification dated 12.11.2008[12] and provides for striking off defence in a suit by a lessor in case of default by lessee in depositing arrears of rent and/or in case of failure to continue to deposit rent during the suit. Since the amendment to CPC which introduces Order XV-A has been promulgated as a measure of delegated legislation, this issue is more or less localised to the State of Delhi and consequently a significant number of judgments referred are from the High Court of Delhi.

A. Interim measures before Essar House judgment

The position prevailing prior to Supreme Court's judgment in case of *Essar House Pvt. Ltd. v. Arcellor Mittal Nippon Steel India Limited* ["**Essar House**"],[13] dealt with grant of interim measures under Section 9 of the Act in a different and slightly curtailed manner and an instance thereof is the case decided by the High Court of Delhi in *Value Source Mercantile Limited Vs. Span Mechnotronix***,** wherein the High Court held that Section 9 "*shall have the same power for making orders as it has for the purpose of, and in relation to, any proceedings before it*".[14] While dealing with the scope of powers available under Order XV-A CPC, the Division Bench of the High Court of Delhi in the case of Supertrack Hotels Vs. Friends Motels[15] followed Value Source (Supra) and held that said provision (Order XV-A as well as Order XXXIX Rule 10 CPC), empowering Courts to direct defendants to deposit such amounts on account of arrears and even though Section 9 did not expressly provide for such deposits, the 'principles thereof would certainly apply to such proceedings' Another case relevant for this article is that of *Sona Corporation v. Ingram Micro*[16] decided by High Court of Delhi, which also follows Value Source and Supertrack Hotels (supra) and exercised power under Section 9 to direct the tenant to pay to landlord the arrears of rent. Therefore, the scope of powers upto this point of time while deciding a Section 9 petition was somewhat restricted to the conditions applicable to reliefs available under CPC to civil courts such as those discussed hereinabove under Order XXXVIII Rule 5, Order XXXIX Rules 1 and 2 and under Order XXXIX Rule 10 CPC.

[12] Delhi High Court, *Notification No. 324/Rules/DHC*, inserting Order XV-A (Striking Off Defence in a Suit by a Lessor) into Code of Civil Procedure, 1908 (as applicable in Delhi), dated Nov. 12, 2008.
[13] *Essar House Pvt. Ltd. v. Arcellor Mittal Nippon Steel India Limited*, 2022 SCC OnLine SC 1219.
[14] *Value Source Mercantile Limited Vs. Span Mechnotronix***,** FAO OS 141 of 2014, decided on 28th May, 2014.
[15] *Supertrack Hotels Pvt. Ltd. v. Friends Motels Pvt. Ltd.,* FAO (OS) 307/2016, decided on 22nd September, 2017.
[16] *Sona Corporation India Pvt Ltd v. Ingram Micro India Pvt Ltd*, OMP (I) COMM 249/2018, decided on 25th July, 2018.

B. Essar House judgment and its impact on interim measures

One of the most important and recent judgments on this issue in *Essar House*, where the Supreme Court extensively dealt with comparison between powers under CPC and the Arbitration Act. The conclusion arrived at in this judgment is well founded and in consonance with settled principles of statutory interpretation. The observations at paragraphs 39 and 40 of the judgement are of utmost importance, where the Supreme Court notes that while deciding a petition under Section 9 of the Arbitration Act, the power of the Court to grant relief "*is not curtailed by the rigours of every procedural provision in the CPC*" and that "*the technicalities of CPC cannot prevent the Court from securing the ends of justice*". This has been so observed after taking note of the rigorous conditions and pre-requisites for exercise of power under Order XXXVIII Rule 5 CPC and the Court has paved the way for Courts and arbitral tribunals while exercising their powers under Sections 9 and 17 Arbitration Act to proceed and grant reliefs akin to those sought under Order XXXVIII Rule 5 CPC but without meeting all conditions demanded by the said provisions.

Interim protection and preservation of subject matter of the case have been given utmost importance. The Supreme Court, in paragraph 43, proceeds to note that the powers of a Court under Section 9 of the Arbitration Act are wider than the powers under the provisions of the CPC and subsequently concurs with various High Courts judgments, which have proceeded on the same principle.

The Supreme Court has made a significant departure from settled position in *Essar House* while noting in paragraph 50 thereof that " *Proof of actual attempts to deal with, remove or dispose of the property with a view to defeat or delay the realisation of an impending Arbitral Award is not imperative for grant of relief under Section 9 of the Arbitration Act. A strong possibility of diminution of assets would suffice. … …*". Thereby substantially diluting the rigours of Order XXXVIII Rule 5 CPC and widening the scope of powers under Section 9 Arbitration Act.

In essence, the judgment of the Supreme Court in *Essar House* recognizes the powers under Section 9 of the Arbitration Act to be free of any strict fetters as provided under CPC. This judgment has since been followed and applied by numerous High Courts and has not been overruled by any larger bench of the Supreme Court till date of publication of this article.

V. THE WAY FORWARD

It would not be an unreasonable or baseless charge on Legislature to state that it has taken far too long to pass the Model Tenancy Act, 2021, which ultimately has only been passed by the Union

Cabinet on 02.06.2021. the draft bill was finalised first in 2019. However, this also suffers from an obstacle in its path being adoption by State Assemblies, and only a handful have implemented this law being Assam, Uttar Pradesh, Tamil Nadu and Andhra Pradesh. This change is already underway and is likely to provide a better scenario than prevailing today wherein the landlords get speedy disposal of tenancy disputes. This will, of course, take time to commence as this Act provides for setting up of Rent Tribunals in all States. In the meantime, the powers under Section 9 are more than adequate for protecting landlords and providing speedy disposal of disputes as well as recoveries of amounts. The issue regarding rent control laws being still in operational in many States and the same being a populist measure makes it rather unlikely that the same will be scrapped altogether in any haste. Another manner in which arbitration can help fill in the gap while we await implementation of Model Tenancy Act and establishment of Rent Tribunals thereunder is in a manner analogous to the mandatory, statutory arbitration mechanism provided under Section 19 of the Micro, Small and Medium Enterprises Development Act, 2006 (MSME Act), wherein parties with disputes are referred to arbitration even though there may not be any arbitration clause or agreement between them.

VI. CONCLUSION

While the provisions for grant of interim measures contained in the Arbitration and Conciliation Act, 1996, have received a wider interpretation, there is still scope for further evolution. Greater autonomy and power must be conferred on arbitral tribunals especially in situations requiring grant of interim measures before and/or at the time of commencement of arbitral proceedings as well as in situations demanding emergency arbitration.

While understandably the role of Courts cannot all altogether be removed, yet a preference and leaning towards arbitral tribunals dealing with interim measures is the way forward, perhaps in conjunction with institutional arbitration. Rather, a few years down the road, instead of having any direct intervention, Courts can eventually assume a purely supervisory role such as in case of appeals under Section 37 of the Act. In view of the above, the Courts are empowered under Section 9 of the Arbitration Act to pass interim orders, which includes directing deposit of arrears of admitted lease rent and to further direct payment of monthly lease rent till vacation of the tenanted premises. The jurisdiction to pass such orders takes guidance from principles contained in Order XXXIX Rule 10 CPC and Order XV-A CPC (Delhi amendment) and has also been held to be free of any fetters and strict conditions as those under Order XXXVIII Rule 5 CPC.

SUPREME COURT'S INTERPRETATION ON MODIFYING ARBITRAL AWARDS: A DRIFT FROM DEFERENCE TO INTERVENTION?

Shalaka Patil[*] and Harsh Khanchandani[**]

ABSTRACT

This article examines the recent ruling of the Supreme Court addressing whether courts have the power to modify arbitral awards under Section 34 (setting aside proceedings) and Section 37 (appeals from Section 34 orders) of the Arbitration and Conciliation Act, 1996. The issue had long been unsettled, with conflicting judicial precedents, some permitting modification in limited cases and others confining courts' powers strictly to setting aside awards. In Gayatri Balasamy v. ISG Novasoft Technologies Ltd., the Court clarified that while Section 34 does not expressly confer a power to modify, a limited power exists to correct clear and severable errors, particularly concerning post-award interest or clerical mistakes, provided the court does not reassess the merits.

The article analyzes the judgment's legal reasoning, its implications for arbitral finality, and its interface with Article 142 of the Constitution. It presents contrasting perspectives: one author supports a restrained judicial power to modify, while the other advocates strict adherence to statutory boundaries. The article concludes that while the ruling brings some clarity, it also leaves unresolved issues particularly regarding operational limits, highlighting the need for legislative intervention to definitively settle the scope of judicial interference in arbitral awards.

I. INTRODUCTION

The issue of Indian courts' jurisdiction to amend arbitral awards under the Arbitration and Conciliation Act, 1996 ["**Arbitration Act**"] has been a longstanding topic of judicial debate. The controversy stems from the absence of an explicit provision in the Arbitration Act granting powers to courts to modify or amend an arbitral award. This omission gives rise to a fundamental legal question: when a court is seized with a challenge to an arbitral award under the Arbitration Act, is its jurisdiction confined solely to setting aside the award, either wholly or in part? Or does it extend to modifying or partially altering the award in circumstances where such intervention is deemed necessary? Further, if such power to modify exists, to what extent can the court substitute its own findings for that of the arbitral tribunal?

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In contrast, under the ordinary appellate jurisdiction over judgments and orders rendered by civil courts, appellate courts frequently exercise the power to mould reliefs including modifying interest rates, altering substantive findings, or adjusting the scope of final relief granted. This prompts a critical inquiry: is the distinction between appellate review and arbitral challenge purely procedural, given that the grounds under Section 34 are narrower than those available in an appeal? Or is there a principled bar against judicial modification of arbitral awards, even in cases where parts of the award are legally unsustainable?

This has long been a contentious issue in Indian arbitration law. Several judgments of various High Courts and some of the Supreme Court have held that courts do have the power to modify arbitral awards in certain situations.[1] *Per contra*, there is a line of authority which takes the opposite view, holding that courts can only set aside an award, while not amending or rewriting it in any form.[2]

These and other topical, critical questions regarding the extent of judicial intervention in arbitration were recently addressed by the Supreme Court in *Gayatri Balasamy v. ISG Novasoft Technologies Ltd*.[3] In this case, a three-judge bench of the Court, by its order dated February 20, 2024, referred the issue to the Chief Justice of India for the constitution of a larger bench. As a consequence, a five-judge Constitution Bench of the Supreme Court was constituted. The final judgment, delivered in May 2024, now provides authoritative clarity on the question.

In this article, we discuss the Supreme Court's recent ruling and share our views on the scope of judicial powers to modify arbitral awards in India.

II. JUDICIAL PRECEDENTS: HOW HAVE INDIAN COURTS APPROACHED THE QUESTION OF MODIFYING ARBITRAL AWARDS?

Before addressing the recent Constitution Bench judgment, it is necessary to consider how Indian courts have historically approached the question of modifying arbitral awards under the Arbitration Act. While Section 34 of the Arbitration Act [4] does not expressly confer any power of modification, the Supreme Court, in a series of decisions, has intervened in arbitral awards to varying extents. These

[1] *McDermott International Inc. v. Burn Standard Co. Ltd.* [(2006) 11 SCC 181]; *Vedanta Ltd. v. Shenzhen Shandong Nuclear Power Construction Co. Ltd.* [(2019) 11 SCC 465]; *ONGC v. Western GECO International Ltd.* [(2014) 9 SCC 263]; *Numaligarh Refinery Ltd. v. Daelim Industrial Co. Ltd.* [(2007) 8 SCC 466]; *Ssangyong Engineering & Construction Co. Ltd. v. NHAI* [(2019) 15 SCC 131]; *Oriental Structural Engineers Pvt. Ltd. v. State of Kerala* [(2021) 6 SCC 150]; *Tata Hydro-Electric Power Supply Co. Ltd. v. Union of India* [(1992) 1 SCC 508].
[2] *Project Director, NHAI v. M. Hakeem* [(2021) 9 SCC 1]; *Larsen Air Conditioning and Refrigeration Company v. Union of India* [(2023) 15 SCC 472] and *SV Samudram v. State of Karnataka* [(2024) 3 SCC 623].
[3] 2025 SCC OnLine SC 986.
[4] Arbitration and Conciliation Act, No. 26 of 1996, §34, India Code (1996).

interventions raise critical questions about doctrinal consistency and the permissible scope of judicial interference in arbitral proceedings.

In *McDermott International Inc. v. Burn Standard Co. Ltd.*,[5] the Supreme Court held that errors of fact or law made by the arbitrator cannot be corrected under Section 34 of the Arbitration Act, and that the only available remedy is to set aside the award. Notwithstanding this, the Court deemed it fit to modify the award to the extent of reducing both the pre-award and post award interest rate from 10% to 7.5% per annum by invoking its powers under Article 142 of the Constitution of India.[6] This provision authorizes the Supreme Court to pass such orders as may be necessary to do complete justice in any cause or matter pending before it. However, this approach raises a foundational question: can courts deny the power to correct legal errors while simultaneously altering substantive aspects of the award, such as interest rates? This inconsistency has made the regime uneven in its application and introduced a measure of subjectivity into what was intended to be a narrowly tailored power of review. This approach adopted in McDermott (*supra*) was also reiterated in *Numaligarh Refinery Ltd. v. Daelim Industrial Co. Ltd.*,[7] where the Court held that modification was permissible where the arbitrator acted without jurisdiction or adopted an interpretation that was contrary to settled legal principles.

In *ONGC v. Western GECO International Ltd.*,[8] the Court determined that an arbitral award may either be set aside or modified, contingent upon the severability of the contentious segment from the rest of the award. The principle of severability was used to justify partial interference: if the impugned part of the award could be hived off without impacting the remaining portions, courts could intervene to that limited extent. Specifically, in this case the Court found that the arbitral tribunal had erroneously clubbed the entire period between October 2001 and March 2002 as delay attributable to ONGC, without appreciating the factual nuances or drawing logical inferences from the record. This, the Court held, amounted to a miscarriage of justice. Consequently, the Court deducted 56 days from the delay period wrongly attributed to ONGC and ordering a proportionate reduction in the compensation awarded to Western Geco. This targeted correction of a specific factual and legal error while preserving the remainder of the award was facilitated by the doctrine of severability.

[5] (2006) 11 SCC 181.
[6] INDIA CONST. art. 142.
[7] (2007) 8 SCC 466.
[8] (2014) 9 SCC 263.

Although this does not constitute a legal power of modification, it was indicative of a judicial stance in which the partial setting-aside of an award was regarded as a subset of modification. Consequently, an award may be selectively modified, provided the separable segment is sufficiently distinct and its removal does not render the remainder of the award impracticable/unworkable.

In *Vedanta Ltd. v. Shenzhen Shandong Nuclear Power Construction Co. Ltd.*,[9] the question before the Court pertained to the modification of the interest rate awarded on INR and Euro components. The parties contended that the interest rate fixed by the arbitrator was unreasonable in light of prevailing economic conditions and sought its correction. The Supreme Court allowed such modification and revised the interest rates accordingly. Interestingly, in this decision, there was no discussion on the basis of the Court's power to make such modifications. Notably, there was no reference to Article 142 or any other enabling constitutional or statutory provision. The only plausible corollary is that the Court implicitly read the power of modification into the challenge framework under Section 34 itself.

An evolution of this approach was seen in *Ssangyong Engineering & Construction Co. Ltd. v. NHAI*,[10] where the majority award was set aside for violating the public policy of India, and the minority award was upheld, including its interest component. Although framed as a setting aside, the effect of this decision was to substitute one part of the award with another, thereby indirectly amounting to a modification of the arbitral outcome. In *Oriental Structural Engineers Pvt. Ltd. v. State of Kerala*[11] and *Tata Hydro-Electric Power Supply Co. Ltd. v. Union of India*,[12] the Supreme Court modified the commencement dates or rates of interest, guided by equitable considerations and previous precedents.

Taken together, these decisions suggest that certain forms of modification particularly with respect to interest are viewed as more acceptable, even though the statutory framework makes no such distinction. This raises an important normative and legal question: should courts adopt a blanket approach—either treating arbitral awards as completely immune from modification, or recognising the permissibility of modification in principle? The selective modification of certain elements while professing to uphold the limited scope of Section 34 introduces doctrinal ambiguity and undermines the predictability that arbitration is meant to offer.

[9] (2019) 11 SCC 465.
[10] (2019) 15 SCC 131.
[11] (2021) 6 SCC 150.
[12] (1992) 1 SCC 508.

In *Project Director, NHAI v. M. Hakeem*,[13] the Supreme Court addressed this inconsistency directly. It was held that Section 34 does not contemplate the modification of arbitral awards. The judgment underscored that the Arbitration Act is aligned with the UNCITRAL Model Law, which permits only setting aside or remission of an arbitral award, and does not authorise courts to alter the award's content. The Court further clarified that the broader remedial powers available under the now-repealed Arbitration Act, 1940 do not carry forward into the present Arbitration Act. Accordingly, any attempt to expand the scope of judicial powers under the current framework would require a legislative amendment, not judicial interference.

Comparative international practice reinforces the aforesaid conclusion. Some arbitral jurisdictions, such as Singapore and Hong Kong, provide for a limited power of modification or remission, but this authority is expressly codified in statute.[14] As co-authors of this article, we acknowledge divergent perspectives on this issue. The first author takes the view that the power to modify should be read into Section 34 and be exercised in appropriate circumstances. According to this view, an arbitral award should not be treated differently from a judgment rendered by a civil court, and where higher courts are seized with a challenge, substitution of the arbitral tribunal's view may be permissible so long as it remains within the bounds of Section 34. Ultimately, any judicial interference, be it by way of setting aside, partial remittal, or alteration of an award – all amount to some degree of modification.

The second author, by contrast, emphasizes on the need to preserve the finality and autonomy of the arbitral process.[15] In this view, any interference with the award, beyond the narrow confines of Section 34, would undermine party autonomy and dilute the efficiency of arbitration. The dissenting opinion of Justice K. V. Viswanathan in the recent Constitution Bench judgment is, in the second author's view, a more consistent and coherent approach.

III. SCHEME OF THE ARBITRATION ACT AND COURT'S ANALYSIS IN ITS MAJORITY DECISION

In light of the judicial precedents and the scheme of the Arbitration Act, particularly the *proviso* to Section 34(2)(a)(iv),[16] the Court found it pertinent to examine the scope of its powers under Section 34 of the Arbitration Act. The Court noted that the *proviso* to Section 34 of the Arbitration Act allows

[13] (2021) 9 SCC 1.
[14] Arbitration Act 2001, § 49 (2020 Rev. Ed.) (Sing.); Arbitration Ordinance, (Cap. 609), §§ 67, 68, 69, Schedule 2, § 4(5) (H.K.).
[15] Justice R.S. Bachawat, Law of Arbitration and Conciliation, 6th edn (New York: LexisNexis, 2017).
[16] Arbitration and Conciliation Act, No. 26 of 1996, § 34(2)(a)(iv) & proviso, INDIA CODE (1996).

for the severance of parts of an award which fall foul of Section 34, thereby preserving the valid or good parts. In light of the same, the Hon'ble Court proceeded to analyse the permissibility and limits of modifying an arbitral award distinguishing such power from the traditional setting aside of an award, the arbitrator's powers under Section 33,[17] and the court's power to remand under Section 34(4)[18] and made the following observations:

i. The Court, in analysing the statutory scheme and underlying objectives of the Arbitration Act held that a strict interpretation of Section 34, which confines the courts to merely setting aside arbitral awards without permitting any modifications, would undermine the fundamental purpose of arbitration. The Court observed that such a restrictive interpretation could lead to significant procedural inefficiencies, including unnecessary costs, extended delays, and redundant proceedings. The Court further noted that when the defects in an arbitral award are limited and clearly identifiable, and the valid portions are legally and practically severable, remitting the matter to the arbitral tribunal for further consideration would be an excessive and unjust remedy.[19]

ii. The Hon'ble Court elucidated on the distinction between its powers under Section 34 and the provisions of Sections 33 and 34(4) of the Arbitration Act respectively. It held that while inadvertent errors, such as typographical or clerical mistakes, may be corrected by the court during proceedings under Section 34, these powers are distinct from those available under the appellate or review jurisdiction. The court's authority to modify is limited to clear and self-evident errors apparent on the face of the record and does not extend to reappreciating evidence or reinterpreting the merits of the award. If the correction sought is debatable or raises interpretational uncertainty, the court cannot modify the award. In such instances, the appropriate course of action would be to invoke the tribunal's powers under Section 33 or seek remand under Section 34(4) of the Arbitration Act.[20]

iii. The Court further examined its authority to declare or modify post-award interest under the Arbitration Act by specifically referring to Section 31(7). The Court held that it can modify post-award interest under Section 31(7)(b) when warranted by the facts and equities of the case. This would ensure fairness, especially if the delays are justified or the award creditor is

[17] *Id at* § 33, INDIA CODE (1996).
[18] *Id at* § 34(4), INDIA CODE (1996).
[19] *Gayatri Balasamy v. ISG Novasoft Techs. Ltd.,* 2025 INSC 605, ¶¶ 40–46.
[20] *Id at* ¶¶ 55-69.

at fault. Additionally, it was held that courts can grant post-award interest if the award is silent on that aspect, preventing the beneficiary from being left without remedy.[21]

iv. Lastly the Court, while considering the scope of its powers under Article 142 of the Constitution, stated that power under Article 142 may be exercised to do complete justice between the parties, however, that such power should not be used to revisit or substitute the reasoning or conclusions of the arbitral tribunal. Accordingly, the Court held that modification under Article 142 is permissible only under exceptional circumstances such as for correcting manifest errors or addressing equitable considerations without venturing into a reappreciation of the merits of the matter.[22]

IV. THE DISSENTING OPINION OF JUSTICE K.V. VISHWANATHA

In his dissenting opinion, Justice K.V. Vishwanathan firmly rejected the majority view, holding that Section 34 of the Arbitration Act neither confers any power on courts to modify arbitral awards, nor can such a power be read into the statute contrary to legislative intent. He emphasized that the authority to set aside an award is distinct and qualitatively different from the power to modify, which is not a 'lesser' power but an entirely separate function not contemplated by the Act. It was also clarified that even the Supreme Court, while exercising its extraordinary powers under Article 142, cannot override the statutory limits of Section 34 to modify an award. However, he recognized that courts may correct purely clerical, typographical, or computational errors, provided such corrections do not affect the substance of the award, in line with the principle that judicial acts should not cause prejudice due to inadvertent mistakes. He endorsed the ruling in *Project Director, NHAI v. M. Hakeem* [23] as correctly laying down the law that modification of an award would be outside the scope of Section 34 and is distinguishable from the permissible act of severing invalid portions of an award.

V. ANALYSIS

The authors of this piece hold differing views on the issue of whether courts are vested with the power to modify arbitral awards under Section 34 of the Arbitration Act. Nonetheless, both authors concur that it was imperative for the Supreme Court to address and clarify this question, given its recurring relevance in virtually every challenge to an arbitral award. In practice, when such challenges are

[21] *Id at* ¶¶ 72-79.
[22] *Id at* ¶¶ 82-84.
[23] (2021) 9 SCC 1.

mounted, it is often the case that the entire award is not sought to be set aside. More commonly, parties take exception to only certain discrete portions of the award. In such circumstances, any partial setting aside will, almost unavoidably, entail a corresponding modification of the award. Section 34(2)(a)(iv) following UNCITRAL Model Law, along with the explanation to Section 34(2)(b), explicitly contemplates the setting aside of parts of an award.[24] Therefore, the statutory scheme itself provides a foundation for limited judicial engagement with select components of an award – an engagement that may inevitably result in some degree of modification.

The first author is of the view that the majority's recognition of a power to modify, as embedded within Section 34, is the correct interpretative approach. The modification of an arbitral award should not be equated with an appeal; rather, courts ought to have the authority to vary an award where such modification necessarily follows from the tribunal's determination of a question of law, thereby promoting justice and procedural efficiency.[25] According to this view, the statute should not be read restrictively in this regard.[26] The only permissible limitations on such a power must arise from the internal constraints of Section 34 itself namely, the well-established boundaries precluding a reassessment of factual findings or a reappreciation of evidence. It is true that the judgment has been critiqued for not laying down precise contours or limiting principles governing modification. However, it may be that the Court, acknowledging the diversity of factual matrices that arise in arbitral disputes, consciously refrained from issuing a comprehensive list of scenarios. Crucially, the court's decision has at least clarified a few examples where change would not be suitable, such as when there is a legitimate dispute about interpretation or a contentious interpretation of the provisions of the contract.

Therefore, the first author argues that, as long as the court strictly adheres to its limitations, award modification is permissible under Section 34. This view aligns with the recommendations of the Dr. T.K. Viswanathan Committee, which proposed legislative amendments to expressly permit such modifications signaling a broader policy shift toward empowering courts in India to modify arbitral awards.[27] In these situations, the prohibition against reexamining the merits, reevaluating the evidence, or substituting the tribunal's opinion with its own is equally applicable. The exercise of a

[24] HOWARD M. HOLTZMANN AND JOSEPH NEUHAUS, A GUIDE TO THE UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION: LEGISLATIVE HISTORY AND COMMENTARY (Alphen aan den Rijn: Kluwer Law International, 1989), pp.954–956.
[25] MICHAEL J MUSTILL AND STEWART C BOYD, THE LAW AND PRACTICE OF COMMERCIAL ARBITRATION IN ENGLAND (2nd edn, Butterworths 1989).
[26] NAKUL DEWAN, ENFORCING ARBITRAL AWARDS IN INDIA (LexisNexis 1st edn 2017).
[27] Expert Committee to Examine Specific Issues and Review the Institutionalisation of Arbitration Mechanisms in India, Report (Ministry of Law and Justice, Government of India, 2017) (Chair: Dr. T.K. Viswanathan).

limited power to modify should not be viewed as being in conflict with the statutory scheme as long as those boundaries are upheld.

The second author adopts a contrary stance. In his view, the power to modify has not been conferred under the existing provisions of the Arbitration Act. He emphasizes that, unlike the Arbitration Act of 1940, which specifically allowed courts the authority to modify awards under Section 15, the 1996 Act intentionally omits such a provision, indicating a clear legislative desire to limit judicial interference. By comparing the two acts, he suggests that Parliament's omission of the modification power represents a deliberate trend toward finality in arbitral proceedings and a more limited role for the judiciary.[28] He argues that the more appropriate course would be for Parliament to introduce an express statutory provision dealing with this issue.[29] Jurisdictions such as the United Kingdom, New Zealand, Kenya and Singapore allow courts to modify awards, but only through clearly defined statutory mechanisms Section 67 of the English Arbitration Act, 1996,[30] Section 5(7) of Schedule 2 of the New Zealand Arbitration Act, 1996,[31] Section 34-A of the (Australian) Commercial Arbitration Act, 2010,[32] Section 11 of the Federal Arbitration Act 1925 (USA),[33] Section 39(5) of the Kenyan Arbitration Act, 1995,[34] and Section 47 of the Singapore Arbitration Act, 2001[35] respectively. According to the second author, Justice K.V. Vishwanathan's dissent effectively emphasizes how crucial it is to uphold the fundamental idea of arbitral finality and ensure minimum judicial interference.[36] Even with the best of intentions, the use of a modification power runs the risk of weakening party autonomy and eroding trust in the arbitration process.

It is pertinent to note that the Draft Amendment of 2024[37] to the Arbitration Act appears to provide legislative support for the concept of partial setting aside and, by extension, modification of arbitral awards. The proposed substitution for Section 34(2A) expressly allows courts or appellate arbitral

[28] Law Commission of India, *76th Report on the Arbitration Act*, 1940 (1978); UNCITRAL Model Law on International Commercial Arbitration (1985), Art 34.
[29] NIGEL BLACKABY, REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION (Oxford: Oxford University Press 6th edn 2015), pp.569–604.
[30] Arbitration Act 1996, c. 23, § 67 (Eng.).
[31] Arbitration Act 1996 (NZ), sch 2, § 5(7).
[32] Commercial Arbitration Act 2010 (NSW), § 34A.
[33] Federal Arbitration Act 1925 (USA), § 11.
[34] Arbitration Act 1995 (Kenya), § 39(5).
[35] Arbitration Act 2001, § 49 (2020 Rev. Ed.) (Sing.).
[36] Justice R.S. Bachawat, Law of Arbitration and Conciliation, 6th edn (New York: LexisNexis, 2017); Arbitration and Conciliation Act 1996 (India), Statement of Objects and Reasons; Arbitration and Conciliation Act 1996 (India), s 5; UNCITRAL Model Law on International Commercial Arbitration (1985), Art 34.
[37] The Arbitration and Conciliation (Amendment) Bill, 2024, Draft Bill, Ministry of Law & Justice, Dep't of Legal Affairs, India (2024), available at https://www.scobserver.in/wp-content/uploads/2025/02/2024-Draft-Arbitration-Amendment-Bill.pdf.

tribunals to set aside an award "in whole or in part" on a limited set of grounds, such as ultra vires jurisdiction, conflict with Indian public policy, or patent illegality. While the text does not use the term "modification", the recognition of partial setting aside implies the ability to modify an award. Severing a specific component of an award, would inevitably lead to the recalibration of the award resulting in a modification.

This inherent consequence aligns the Draft Amendment with the majority view emerging in Indian jurisprudence, which has cautiously acknowledged limited scope for modification. In this respect, the Indian position, as revised, approaches the broader remedial powers found in other jurisdictions. For instance, Section 67 of the English Arbitration Act, 1996 expressly empowers courts to "vary" an award when ruling on challenges to substantive jurisdiction.[38] Similarly, Section 49 of the Singapore Arbitration Act, 2001 allows courts, on appeal, to confirm, vary, remit, or set aside an award in whole or in part.[39] While the Indian provision does not adopt the same terminology, its effect post-amendment places it within the same normative framework by implicitly recognizing modification as a logical corollary to partial setting aside in line with the decision

Significantly, the draft includes a new sub-section (7) that allows the court or appellate arbitral tribunal to remit only the severed portion of the award for redetermination within a specified timeframe while binding the tribunal to the unchallenged findings.[40] By enabling courts to remit only the defective portion of an award for reconsideration, the amendment seeks to promote procedural efficiency. It avoids the need to set aside an entire award where only a distinct segment suffers from certain grounds for setting aside. The ambit of this provision is both corrective and preservative. It permits judicial intervention to excise the offending portion of the award and remit it to the arbitral tribunal for redetermination within a prescribed timeframe, without disturbing the finality of the unchallenged findings. In doing so, it reinforces the principle of minimal judicial interference while upholding the integrity and enforceability of arbitral awards to the extent they remain unaffected by legal infirmities. This approach aligns with the reasoning adopted by the Supreme Court, which held that when the defects in an arbitral award are limited in scope and clearly identifiable, it would be just to remit only the defective portion to the arbitral tribunal for reconsideration, thereby preserving the sanctity of the untainted findings. Despite this difference of opinion, both authors concur that the ruling is a positive step because it clarifies a matter that was previously the subject of contradictory

[38] Arbitration Act 1996, c. 23, § 67 (Eng.).
[39] Arbitration Act 2001, § 49 (2020 Rev. Ed.) (Sing.).
[40] The Arbitration and Conciliation (Amendment) Bill, 2024, Draft Bill, Ministry of Law & Justice, Dep't of Legal Affairs, India (2024), available at https://www.scobserver.in/wp-content/uploads/2025/02/2024-Draft-Arbitration-Amendment-Bill.pdf.

rulings. Although opinions on the extent and validity of this authority vary, courts are now recognized for their ability to deal with separate and severable portions of an award, whether through modification or partial set aside.

That said, a number of questions remain unresolved. Most significantly, the judgment does not specify whether its ratio is to operate prospectively or whether it would also govern pending matters. While Indian courts have consistently held that, unless explicitly stated otherwise, judicial decisions are presumed to apply retrospectively and would, therefore, govern pending proceedings as well.[41] However, in the context of arbitral awards, this presumption has significant practical consequences. A retrospective application of the judgment would mean that courts seized of pending Section 34 proceedings would be empowered to permit modification of awards, even where such remedies were previously viewed as impermissible. This could enhance consistency and correct previously rigid interpretations, but it also raises concerns regarding legal certainty, especially for parties who structured their challenges based on the earlier understanding of limited judicial intervention. However, in the absence of explicit mention in the judgment, the balance of principles particularly the default presumption of retrospectivity and the need to promote uniformity in arbitral jurisprudence would favor retrospective application.

Further, it is unclear how trial courts will operationalise this newly recognised power in the absence of clear doctrinal guardrails. There is a foreseeable risk that litigants may now attempt to frame most challenges as requests for modification rather than set-aside, thereby creating conceptual uncertainty particularly in determining whether an alleged error is manifest and self-evident thus amenable to limited judicial correction or whether it involves debatable / contested findings, which would fall outside the permissible scope of intervention. Courts will be required to carefully delineate the boundary between lawful severance of an award and impermissible substantive revision and also specify / outline the instances for a potential invocation of Article 142 of the Constitution to achieve complete justice. This would require significant judicial time and interpretive rigor.

VI. CONCLUSION

Thus, there are, broadly speaking, two lenses through which the judgment may be viewed. From a practical standpoint, acknowledging a modification power might, in some circumstances, shorten the duration of the process. A limited modification could eliminate the need for a full remand or a *de*

[41] *Asstt. Commissioner v. Saurashtra Kutch Stock Exchange*, (2008) 14 SCC 171; *Sree Sankaracharya University of Sanskrit v. Manu*, 2023 SCC OnLine SC 640; *CIT v. Saurashtra Cement and Chemical Industries Ltd* (1976) 105 ITR 196 (SC).

novo arbitration in cases where the award is essentially unassailable but suffers from inadvertent errors or clear and self-evident errors apparent on the face of the record. On the other hand, extending Section 34's reach to cover changes, even in a restricted way, might encourage attempts at covert appellate review. Although the Arbitration Act bars courts from reassessing factual findings, there remains a concern that litigants may seek to revisit substantive aspects of the award under the guise of seeking modifications.

One sustainable path forward lies in legislative reform. If the power to modify awards is to be part of the Indian arbitral regime, it must be codified in a way that clearly defines its scope and limitations. This would bring India closer to other mature arbitration jurisdictions while also protecting against the risks associated with broad judicial discretion. Until Parliament decides to intervene, courts must exercise this power with caution and restraint, so as not to disrupt the delicate balance between judicial oversight and arbitral autonomy.

RECOURSE DELAYED, RECOURSE DENIED? PROCEDURAL ASYMMETRY AGAINST JOINDER OF NON-SIGNATORIES UNDER THE ARBITRATION AND CONCILIATION ACT, 1996

Amogh Srivastava,[*] Arnav Mathur[**] and Sparsh Gautam[***]

Abstract

The increasing complexity of modern arbitrations, particularly those involving multiple parties, has exposed significant limitations in the Indian Arbitration and Conciliation Act, 1996, especially regarding the joinder of non-signatory third parties. Recent judicial pronouncements have crystallised a procedural asymmetry in the remedies available to parties aggrieved by arbitral tribunal decisions on joinder. Specifically, if a tribunal rejects a joinder application, the aggrieved party may immediately appeal under Section 37 of the Act. Conversely, if the tribunal allows the joinder and adds a third party to the proceedings, the newly joined party must endure the entire arbitration process and can only challenge the decision after the final award under Section 34 read with Section 16(6). This bifurcated regime creates an imbalance, potentially subjecting non-consenting parties to protracted and costly proceedings without timely judicial recourse. This article critically examines the practical ramifications of this split mechanism, exploring whether the current statutory framework permits a more equitable approach, such as treating certain joinder decisions as "interim awards" to enable immediate challenge. The discussion is further enriched by a comparative analysis of how other jurisdictions address similar issues, highlighting the need for reform in Indian arbitration law to ensure fairness, efficiency, and parity of treatment in multi-party disputes.

I. INTRODUCTION

Multi-party disputes involve complex corporate groups and contracts.[1] International arbitration adapts with the Group of Companies doctrine ["**GoCD**"], which binds affiliates who did not sign the contract when they intend to arbitrate.[2] This doctrine looks at factors like a non-signatory's participation in contractual negotiations or performance to infer intent to be bound by the arbitration

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[1] Vedaant Agarwal & Shivankar Sukul, *Analyzing the Feasibility & Legitimacy of Third-Party Extension of Arbitration Agreement in the Indian Arbitration Regime*, 3 INDIAN REV. INT. ARBITR., 6 (2023).
[2] Disha Surpuriya, *Group of Companies Doctrine: Caveats to Consider before Its Application*, 2 INDIAN REV. INT. ARBITR. 1 (2022).

agreement.[3] In India, the Arbitration and Conciliation Act, 1996[4] ["**Arbitration Act**"] does not explicitly provide for multi-party joinder or non-signatory participation.[5] Nevertheless, to fill this gap, Indian courts and tribunals have increasingly relied on the GoCD to rope in affiliates and third parties.[6]

Recently, the Supreme Court of India ["**SC**"] in *ASF Buildtech Pvt. Ltd. v. Shapoorji Pallonji & Co. Pvt. Ltd.* ["**ASF Buildtech**"],[7] settled a long-standing conflict by holding that arbitral tribunals can implead non-signatories under the Arbitration Act. The SC held that questions of "who are the proper parties" fall within the tribunal's jurisdictional competence under Section 16 of the Arbitration Act once a tribunal is constituted.

However, when an arbitral tribunal decides a request to implead a non-signatory party to an ongoing arbitration, the avenues for immediate judicial recourse against that decision are sharply asymmetrical.[8] Suppose the tribunal refuses to join a party, holding that it lacks jurisdiction over the non-signatory. In that case, the aggrieved party who sought the joinder can appeal immediately under Section 37 of the Arbitration Act. However, if the tribunal allows the joinder, asserting jurisdiction over the non-signatory new party, the newly impleaded party has no immediate right of appeal and must await the final award to challenge that decision under Section 34 of the Arbitration Act.

This procedural asymmetry, whereby an order denying joinder is instantly appealable, but an order allowing joinder is not, forms the core focus of this paper. The one-sided appeal mechanism was a conscious legislative choice.[9] Positive jurisdiction rulings travel only to a post-award review, minimising mid-stream court intervention.[10] Even so, this paper argues that applying that same logic to third-party joinder decisions, which is an eventuality that the drafters never squarely addressed, warrants a fresh examination of the position of law. The paper argues that this asymmetry *qua* third-party joinder decisions is doctrinally unstable and practically unfair. It can force non-signatories to undergo lengthy arbitrations with no early recourse from the Court, even as signatories who are

[3] Vijayendra Pratap Singh, Abhijnan Jha & Abhisar Vidyarthi, *India's Tryst with the Group of Companies Doctrine: The End or the Beginning of a New Dawn?*, 39 ARBITR. INT. 109, 111 (2023).
[4] The Arbitration and Conciliation Act, (1996).
[5] Arjun Gupta, Sahil Kanuga, & Vypak Desai, *Blessed Unions in Arbitration - An Introduction to Joinder and Consolidation in Institutional Arbitration*, 4 INDIAN J. ARBITR. LAW 128, 132 (2016).
[6] Robert Walters, *The Group of Companies Doctrine in International Arbitration: India, Australia, the United States and the United Kingdom*, 52 AUST. BUS. LAW REV. 177, 182 (2024).
[7] 2025 SCC OnLine SC 1016.
[8] *Infra*, Part III.
[9] Arbitration and Conciliation Bill, Statement of Objects and Reasons cl. 4 (1995); Law Comm'n of India, 129th Report on Arbitration ¶¶ 4.22–4.27 (1988).
[10] *SBP & Co. v. Patel Eng'g Ltd.,* (2005) 8 SCC 618, ¶¶ 33–34; *McDermott Int'l Inc. v. Burn Standard Co. Ltd*., (2006) 11 SCC 181, ¶ 50; *Indian Farmers Fertiliser Co-operative Ltd. v. Bhadra Prods*., (2018) 2 SCC 534, ¶¶ 10–12.

denied a joinder get prompt access to courts. Such lopsided remedies arguably violate parity of treatment and create uncertainty if an eventual award is later nullified for lack of jurisdiction.[11]

This paper begins by tracing the evolution of the arbitral power to implead non-signatories in Indian law *[Part II]*. It then analyses the bifurcated appeal regime under Sections 16, 34, and 37 of the Arbitration Act to illustrate the incongruity in how different outcomes of a jurisdictional plea yield different appeal rights *[Part III]*.

The discussion then turns to policy: the practical consequences of the current scheme *[Part IV]*. Next, a doctrinal question is posed: could an order joining a non-signatory be treated as an *"interim award,"* thus allowing immediate challenge under Section 34? *[Part V]*. A brief comparative overview considers how other jurisdictions handle jurisdictional rulings and appeals to understand India's approach in an international context *[Part VI]*. Finally, the conclusion calls for reform – either legislative amendment to clarify and correct the asymmetry, or a recalibration through judicial interpretation to ensure a more balanced regime *[Part VII]*. This article shows that the current imbalance in appealing third-party joinder decisions cannot stand under the Arbitration Act's commitment to a fair and consistent process.

II. IMPLEADING NON-SIGNATORIES: EVOLUTION OF THE DOCTRINE AND POWER OF THE ARBITRAL TRIBUNAL

The SC first endorsed the concept of joinder of non-signatories in an arbitration over a decade ago. In *Chloro Controls v. Severn Trent Water Purification*,[12] the SC observed that a non-signatory affiliate could be subjected to arbitration if a mutual intention of all parties to bind the non-signatory is discernible. This laid the foundation for the GoCD in India, which was drawn from French arbitral jurisprudence,[13] and aimed at dealing with integrated corporate transactions.[14] The doctrine applies when a non-signatory helps negotiate or perform the contract or otherwise acts as if bound by its arbitration clause/agreement. Indian courts have used it to prevent fragmented disputes, but their application is inconsistent, and its role in domestic arbitration remains uncertain.[15]

[11] *Infra*, Part IV.
[12] *Chloro Controls India (P) Ltd. v. Severn Trent Water Purification Inc*., (2013) 1 SCC 641, ¶¶ 70-72, 105.
[13] *Infra*, Part VI (i).
[14] *Dow Chemical v. Isover Saint Gobain*, Interim Award, Case No. 4131 of 1982, 9 Y.B. Comm. Arb. 131 (ICC Int'l Ct. Arb.); Gouvernement du Pakistan, M*inistere des Affaires Religieuses v. Société Dallah Real Estate & Tourism Holding Company*, Cour d'appel [CA] [regional court of appeal] Paris, Feb. 17, 2011, 09/28533 (Fr.); *Kabab-Ji SAL (Lebanon) v. Kout Food Group (Kuwait)*, Cour d'appel [CA] [regional court of appeal] Paris, Jun. 23, 2020, 17/22943 (Fr.).
[15] Singh, Jha, and Vidyarthi, *supra* note 6 at 116.

Initially, decisions on whether a non-signatory could be bound were typically made by courts at the referral stage. For instance, when one party applied under Section 8 or Section 11 of the Arbitration Act to refer disputes to arbitration, courts would sometimes extend the arbitration agreement to a third party at that threshold stage, or refuse to do so, based on the GoCD.[16] It raised the question: once arbitration had commenced, could the arbitrator decide to join a new party who had not been part of the reference?

In *Arupri Logistics v. Vilas Gupta*,[17] the Delhi High Court ["**DHC**"] held that tribunals lack any statutory or inherent power under the Arbitration Act to implead parties—only courts can do that. Likewise, in *V.G. Santhosam v. Shanthi Gnanasekaran* ["**VG Santhosam**"],[18] the Madras High Court ["**MHC**"] ruled that arbitrators, as creatures of contract, may only decide disputes between signatories and cannot join additional parties.

However, certain High Courts,[19] have advanced a different view that once an arbitration is validly commenced, the tribunal should be able to effectively and conclusively resolve all disputes, bringing in necessary parties, lest the award be rendered incomplete

For example, in *Cardinal Energy & Infrastructure Pvt. Ltd. v. Subramanya Construction & Development Co. Ltd.*, the Bombay High Court held that the tribunal must decide whether to implead a non-signatory at the referral stage. The tribunal alone can determine whether a non-signatory is bound by the arbitration agreement. If it is, the tribunal may implead them.[20]

These conflicting positions set the stage for the SC's intervention. *While Cox and Kings Ltd. v. SAP India Pvt. Ltd.*, ["**Cox & Kings**"][21] dealt with the context of referring parties to arbitration, its reasoning paved the way for extending the principle to joinder during arbitral proceedings.[22] This judgment harmonised the doctrine of *Kompetenz-Kompetenz* with the GoCD by clarifying that a tribunal's jurisdiction under Section 16 of the Arbitration Act extends to deciding who is bound by the arbitration agreement.

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[16] Vikash Kumar Jha & Namrata Sadhnani, *Reaffirming the Group of Companies Doctrine in Indian Arbitration: A Comprehensive Analysis of the Cox and Kings Judgment*, 7 INDIAN ARBITR. LAW REV. 17, 21.
[17] 2023 SCC OnLine Del 4297, ¶ 93
[18] 2020 SCC OnLine Mad 560, ¶¶ 42, 105.
[19] *IVRCL Ltd. v. Gujarat State Petroleum Corporation* Ltd., 2015:GUJHC:31651-DB, ¶ 13; *IMC Ltd. v. Board of Trustees of Denndayal Port Trust*, 2018 SCC OnLine Guj 4972, ¶¶ 23, 45-47; *NOD Bearing Pvt. Ltd. v. Bhairav Bearing Corporation*, 2019 SCC OnLine Bom 366, ¶¶ 4-6; *Vistrat Real Estates Pvt. Ltd. v. Asian Hotels North Ltd*., 2022 SCC OnLine Del 1139, ¶¶ 11-14; *Indraprastha Power Generation Co. Ltd. v. Hero Solar Energy Pvt. Ltd*., (2024) SCC OnLine Del 6080, ¶¶ 20-26; *KKH Finvest Private Ltd. v. Jonas Haggard & Ors.,* (2024) SCC OnLine Del 7254, ¶¶ 78-81.
[20] 2024 SCC OnLine Bom 964, ¶ 41.
[21] 2023 SCC OnLine SC 1634, ¶¶ 162-169.
[22] Vikash Kumar Jha and Namrata Sadhnani, *supra* note 13 at 27.

In September 2024, the SC in *Ajay Madhusudan Patel v. Jyotrindra S. Patel* ["**Madhusudan**"],[23] dealt with a split in family-held companies. One faction tried to drag a non-signatory group into arbitration under a family arrangement. The SC allowed arbitration but left the group's binding status to the arbitrator. It noted that the group had partly participated in the transaction, making full resolution impossible without them. Under Section 11(6) of the Arbitration Act, it refused a *"mini-trial"* on those facts. Instead, it appointed an arbitrator and directed them to weigh the evidence and apply *Cox & Kings*. This shows the post-*Cox & Kings* approach, where courts may refer non-signatories when there is a clear intent to arbitrate, but final arbitrability is decided by the tribunal under Section 16 of the Arbitration Act.[24]

ASF Buildtech Pvt. Ltd. cemented the tribunal-centric approach. In that arbitration, the contractor impleaded two non-signatory affiliates based on comfort letters and integrated group dealings. The sole arbitrator, invoking Section 16 of the Arbitration Act, kept them in the proceeding. The DHC affirmed. The SC declined to interfere. It held that tribunals have the implied power to join non-signatories under the Act's scheme, so long as parties expressly or impliedly consented.[25] It also held that *Kompetenz-Kompetenz* in Section 16 covers all jurisdictional questions – existence, validity, party status, and scope of disputes.[26] *ASF Buildtech* thus affirmed arbitral power and deferred judicial review.[27] However, it also created an asymmetry: Tribunal joinder decisions are treated as "jurisdictional rulings" under Section 16, permitting only limited appeals.

III. THE BIFURCATED APPEAL REGIME: SECTIONS 16, 34 AND 37 OF ARBITRATION ACT

In *ASF Buildtech*, the SC made the following remarks on the nature of appeal of third-party joinder decisions passed by an arbitral tribunal:

> *"**95**. […] On the other hand, the apprehensions of prejudice can be properly mitigated by leaving such question for the arbitral tribunal to decide, as such party can always take recourse to Section 16 of the Act, 1996 and thereafter in appeal under Section 37, and where*

[23] *Ajay Madhusudan Patel v. Jyotrindra S. Patel*, (2025) 2 SCC 147.
[24] *Supreme Court Lays Down Factors for Determination of 'Veritable' Party for Purposes of Reference to Arbitration*, AZB (Oct. 30, 2024), https://www.azbpartners.com/bank/supreme-court-lays-down-factors-for-determination-of-veritable-party-for-purposes-of-reference-to-arbitration/.
[25] *Supra* note 20 at 127.
[26] Shailendra Singh, *Arbitral Tribunals Empowered to Implead Non-Signatories: Analyzing ASF Buildtech v. Shapoorji Pallonji*, AUGUST ATTORNEYS LLP (May 6, 2025), https://www.augustattorneys.in/arbitral-tribunals-empowered-to-implead-non-signatories-analyzing-asf-buildtech-v-shapoorji-pallonji/.
[27] *Supra* note 20 at 137.

> *it is found that such party was put through the rigmarole of arbitration proceedings vexatiously, both the tribunal and the courts, as the case may be, should not only require that all costs of arbitration insofar as such non-signatory is concerned be borne by the party who vexatiously impleaded it, but the arbitral tribunal would be well within its powers to also impose costs.*
>
> ***102.*** *[…] In contrast, determinations made by the arbitral tribunal — including on issues of jurisdiction and* ***impleadment — are amenable to challenge under Section 16 of the Act, 1996 and, thereafter, under Section 37****. Accordingly, the better course of action is for referral courts to refrain altogether from delving into the issue of whether a non-signatory is a veritable party to the arbitration agreement, and to leave such matters for the arbitral tribunal to decide in the first instance."*
>
> *(emphasis added)*

However, unlike the SC's formulation in *ASF Buildtech*, under the Arbitration Act, not every decision rendered under Section 16 of the Arbitration Act gives rise to an interlocutory appeal. Challenges to an arbitral tribunal's jurisdictional rulings follow a "split" appellate mechanism:

(1) If the tribunal accepts an objection, that order is appealable with immediate effect under Section 37(2)(a)[28];

(2) If the tribunal rejects the objection and proceeds, no such interim remedy exists, and any challenge must await the final award under Section 34.[29]

To see how this would operate in practice, consider two contrasting scenarios:

First, suppose a claimant moves to implead *X*, a non-signatory affiliate, and *X* pleads that the tribunal lacks jurisdiction because it never consented to arbitrate. If the tribunal upholds *X's* plea and refuses to join *X*, it has in effect *"accepted a plea referred to in Section 16(2) or (3),"* terminating arbitration against *X* on jurisdictional grounds. Section 37(2)(a)[30] entitles the disappointed party (the claimant in this case) to appeal with immediate effect, amidst the ongoing arbitration, to the High Court. The court's review is limited to the tribunal's jurisdictional ruling. It may either order *X* to be joined or uphold the tribunal's decision and let the arbitration proceed without it. By providing this prompt judicial check, the Arbitration Act prevents a tribunal from permanently excluding a *bona fide* party without risk of reversal.

[28] S*upra* note 7 at 37(2)(a).
[29] *Id* at 34.
[30] *Id* at 37(2)(a).

In contrast, if the tribunal rejects X's jurisdictional objection and permits joinder in identical circumstances, the decision is beyond the scope of Section 37.[31] *X* cannot seek an interlocutory appeal and is compelled to participate in the arbitration (or refrain at its peril) until the final award is rendered. Only then may *X* invoke Section 34(2)(a)(i)[32] to set aside the award on the ground that no valid arbitration agreement bound it. That deferred remedy, however, carries significant burdens: interlocutory measures, the full costs of defending the merits, and the risk that an adverse award may be enforced in the event the application for grant of stay made by the party instituting a Section 34 petition remains unsuccessful (Section 36 (2)[33] requires a separate stay application.) Moreover, the Section 34 review is strictly limited to statutorily enumerated grounds, precluding any broad re-examination of evidence.[34] The result is a stark procedural asymmetry: Wrongful *exclusion* invites immediate redress, whereas wrongful *inclusion* forces a non-signatory to endure the arbitration and face post-award litigation to vindicate its jurisdictional objection.

The differentiation is deliberate. It dichotomy originates from the UNCITRAL Model Law on International Commercial Arbitration, 1985 ["**Model Law**"] framework, but India adopted it in the reverse manner. Article 16(3) of the Model Law gives a party the right to court review if a tribunal affirmatively rules that it has jurisdiction as a preliminary matter. The Arbitration Act, by contrast, flipped appealability where it allows immediate court intervention only when the arbitrator rules no jurisdiction, not when the arbitrator asserts jurisdiction. The rationale was to minimise disruptions to the arbitral process.[35] If every decision made by an arbitrator in which he has jurisdiction were subject to instant appeal, arbitrations could be stalled by dilatory challenges. By limiting interim appeals to the scenario of a tribunal wrongly truncating the arbitration (and otherwise requiring parties to wait until the final award), the Arbitration Act sought to strike a balance in favour of arbitral continuity. The asymmetry, therefore, reflects a policy judgment that the repercussions of exclusion are systemically graver than those of inclusion.

However, when these legislations were drafted, the drafters could not have anticipated today's commercial reality and the proliferation of multi-party disputes. Hence, the bifurcated appeal regime was created and adopted. Because the Arbitration Act contains no express power for the tribunal to

[31] *Id* at 37.
[32] *Id* at 34(2)(a)(i).
[33] *Id* at 36(2).
[34] *Gayatri Balasamy v. M/s ISG Novasoft Technologies Ltd*., 2025 INSC 605, ¶ 12; *Punjab State Civil Supplies Corporation Ltd. & Anr. v. M/s Sanman Rice Mills & Ors*., 2024 INSC 742, ¶¶ 10, 20; *Bombay Slum Redevelopment Corporation Private Limited v. Samir Narain Bhojwani*, 2024 SCC OnLine SC 1656, ¶ 16.
[35] Vaishnavi Chillakuru, *The Rule of Competence-Competence: A Comparative Analysis of Indian and English Law*, 6 CONTEMP. ASIA ARBITR. J. 133, 139 (2013).

join non-signatories and the SC has had to source that power from Section 16, we now face the practical difficulties described below.

In *V.G. Santhosam*,[36] the MHC treated third-party joinder decisions as an interim application under Section 17(1)(ii)(e) and thus appealable under Section 37(2)(b) regardless of its outcome. Post-*ASF Buildtech*, however, the tribunal's joinder power is sourced directly from Section 16, so *V.G. Santhosam's* ratio no longer holds.

To summarise, the current statutory scheme creates a procedural vulnerability: a non-signatory has to either (a) participate in an arbitration it contends is illegitimate, incurring costs and risking an adverse award, or (b) refuse to participate and then later argue nullity – a gamble that could lead to an *ex parte* award and complications in enforcement or set-aside. Conversely, a party legitimately entitled to have a necessary third party in the arbitration can swiftly correct a tribunal's refusal *via* appeal, meaning the prejudice of exclusion is short-lived if they are right. While two scenarios are not doctrinally equivalent, we juxtapose them only to highlight the markedly different cost–risk profiles that flow from the legislature's choice. The playing field is thus tilted. The consequences are next, examining how the asymmetry can play out in practice, sometimes to the detriment of arbitral fairness and efficiency.

IV. PRACTICAL CONSEQUENCES OF THE BIFURCATED APPEAL REGIME

The one-sided appellate regime for third-party joinder decisions is not just a theoretical issue, it has real-world impacts on arbitration conduct and fairness.

First, arbitration rests on consent.[37] Non-signatories often challenge third-party joinder decisions on the lack of consent.[38] Denying these non-consensually added parties prompt court review deepens the harm initially caused. They may endure years of arbitration and later litigation to defend a joinder that should never have been allowed. When a party denies any intent but is still forced into arbitration, it cannot obtain a swift judicial check. This imbalance burdens non-signatories.[39] They may settle just to avoid the ordeal, even if the tribunal lacks authority, which undermines the role of the tribunal in determining its own jurisdiction. The asymmetry could be seen as impinging on arbitration's *"equal*

[36] *V.G. Santhosam v. Shanthi Gnanasekaran*, (2020) 5 MAD LJ 198, ¶ 42.
[37] Nigel Blackaby et al., *Chapter 1: Overview of International Commercial Arbitration*, *in* REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION (7th edition ed. 2022).
[38] Kingshuk Banerjee & Nidhi Kulkarni, *The Group of Companies Doctrine in India – Antithetical to Free Consent?*, SCC TIMES (Mar. 23, 2023), https://www.scconline.com/blog/post/2023/03/23/the-group-of-companies-doctrine-in-india-antithetical-to-free-consent/.
[39] Tejas Chhura, *The Need to Re-Think the Group of Companies Doctrine in International Commercial Arbitration*, 15 NUJS LAW REV. 28, 38 (2022).

treatment" principle. One set of parties (the original signatories) can leverage the system to their advantage (by adding parties and locking them in until the final award), whereas the other set (the non-signatories) has no equivalent leverage to escape early. While one might argue that the non-signatory can still present its case on jurisdiction before the arbitrator, the arbitrator's ruling remains final for the duration of the case. To be sure, a newly joined respondent can raise a jurisdictional objection by filing an interlocutory application under Section 16. Yet that step does not restore parity: if the tribunal dismisses the objection, the respondent has no interim recourse, whereas a claimant whose joinder request is refused can pursue an immediate Section 37 appeal. The imbalance, therefore, endures despite the formal availability of Section 16. Nor is it enough to rely on arbitral self-restraint; even careful tribunals can err, and it is precisely those exceptional, but not unimaginable, instances of mistaken joinder that this paper seeks to address.

Second, the present scheme lets arbitration run to an award, only for a court to later possibly find no tribunal jurisdiction against a party. This risk springs from procedural asymmetry. If the tribunal wrongly joins a non-signatory, a court can set aside any award against that party under Section 34(2)(a)(i) for incapacity or invalid agreement, under Section 34(2)(a)(v) for procedural defects or additionally, it can be challenged under Section 34(2)(a)(iv) on the ground of jurisdictional errors. The result is wasted resources and no lasting outcome. While *ASF Buildtech* does acknowledge this risk and empowers tribunals or courts to shift costs onto the party that pressed a vexatious joinder, and even if the same observation is applicable under Section 34 petitions, that remedy is discretionary and arrives only after the resources and time have already been consumed; costs alone cannot recoup the strategic disruption or restore the wasted arbitral effort.

Lastly, Sections 16 and 37 of the Arbitration Act sought to limit court's interference. Yet parties facing joinder may still resort to other methods to appeal. Writ petitions are maintainable, even when an alternative remedy is available, when the order in question is perverse, lacks inherent jurisdiction, is illegal and contravenes the vires of a statute, where a party is left remediless, etc.[40] The SC has held that High Courts must refrain from such petitions if the Arbitration Act offers any remedy, however, post-award. Still, asymmetry breeds exceptions. In *ASF Buildtech*, the petitioner asked the SC to rule

[40] *Serosoft Solutions Pvt. Ltd. v. Dexter Capital Advisors Limited*, 2025 SCC OnLine SC 22, ¶¶ 14-15; *Bhaven Constructions v. Executive Engineer Sardar Sarovar Narmada Nigam Limited*, (2022) 1 SCC 75, ¶¶ 18-19; *T.N. Cements Corpn. Ltd. v. Micro & Small Enterprises Facilitation Council*, 2025 SCC OnLine SC 127, ¶¶ 13-18; ˆ, (2020) 15 SCC 706, ¶ 17; *Godrej Sara Lee Ltd. v. E&TOCA*A, 2023 SCC OnLine SC 95, ¶¶ 4, 6; *Kharghar Co-Op. Housing Societies Federation Ltd. & Anr. v. Municipal Commissioner, Panvel Municipal Commissioner & Ors.*, 2023 SCC OnLine Bom 775, ¶ 3; *Hari Vishnu Kamath v. Syed Ahmad Ishaque*, (1954) 2 SCC 881, ¶ 24; *Maharashtra Chess Assn. v. Union of India*, (2020) 13 SCC 285, ¶¶ 10-12, 14-22; S*hri Guru Gobind Singhji Institute of Engineering & Technology v. Kay Vee Enterpris*es, 2024 SCC OnLine Bom 3808, ¶¶ 26-27.

on its pre-award bindingness.[41] The SC affirmed the legal test but did not address the petitioner's factual non-involvement. The SC refrained from doing so, because of the limitations inherent in its role from engaging in an intricate evidentiary inquiry. However, relying solely on post-award relief creates multiple stages of proceedings, namely award, set-aside, appeals, and execution, effectively turning arbitration into protracted litigation. This hurts arbitration's one-stop ethos. A limited pre-award appeal on jurisdiction could resolve disputes early and curb unnecessary follow-on suits.

In summary the current scheme, while rooted in the correct intent of streamlining arbitrations, creates incentive mismatches. It gives one side the temptation to overreach (knowing the other side's remedies are delayed), and the other side the temptation to obstruct (knowing it cannot get relief until the end). The next Part examines whether Indian law provides any doctrinal escape hatch from this asymmetry, by re-characterising specific tribunal orders as "awards" to permit immediate challenges.

V. JOINDER DECISIONS AS "INTERIM AWARDS"? – TESTING THE BOUNDARIES OF SECTION 16

The asymmetrical appellate mechanism not only causes practical problems[42] but is also not well supported by legal principles, especially in the form as adopted by the Arbitration Act. Courts seeking to rely on this split mechanism have used inconsistent reasoning. This Part analyses whether an alternative view can be taken within the framework of the Arbitration Act to remedy the practical ramifications of the asymmetrical appellate procedure.

A. Decision on third-party joinder decisions as "Interim Awards"

One approach to mitigate the serious consequences of the split mechanism involves reconsidering the legal effects of the bifurcation.[43] The statutory framework clearly establishes that decisions of joinder are to be challenged under Section 34, while decisions of non-joinder must be challenged under Section 37, as discussed in Part III. However, a question arises whether the recourse under Section 34 becomes available the instant the tribunal impleads a party (as it does for Section 37) or whether parties must wait until the final award.

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[41] Mahendra Bhavsar & Co, *Impleading Non-Signatories in Arbitration: Key Legal Ruling*, MAHENDRA BHAVSAR & CO (Jun. 1, 2025), https://mahendrabhavsar.com/impleading-non-signatories-in-arbitration-legal-insight-from-the-2025-asf-buildtech-case/.

[42] *Infra* Part IV; *cf.* Anthony Crockett & Daniel Mills, *A Tale of Two Cities: An Analysis of Divergent Approaches to Negative Jurisdictional Rulings*, KLUWER ARBITRATION BLOG (Nov. 8, 2016), https://arbitrationblog.kluwerarbitration.com/2016/11/08/a-tale-of-two-cities-an-analysis-of-divergent-approaches-to-negative-jurisdictional-rulings/.

[43] SINGAPORE ACADEMY OF LAW, LAW REFORM COMMITTEE, *Report on the Right to Judicial Review of Negative Jurisdictional Rulings* 6 (Jan. 2011), https://sal.org.sg/wp-content/uploads/2025/03/2011-01-Judicial-Review-of-Negative-Jurisdictional-Rulings.pdf.

The '*sit-through-the-arbitration*' approach was affirmed by the SC in *S.B.P. and Co. v. Patel Engineering Ltd. and Ors.*[44] The SC considering the jurisdiction of the High Court under Articles 226 and 227 of the Indian Constitution ["**Constitution**"] to entertain challenges to arbitral tribunal orders, examined the Arbitration Act and the available recourse against tribunal decisions. It held that unless the tribunal's order is appealable under Section 37, the party must "wait until the award is passed by the tribunal" to seek recourse under Section 34.[45] This approach is reinforced by Section 5 of the Arbitration Act, which prohibits judicial intervention unless specifically provided for in the Act. These provisions form the foundation for denying immediate challenges against ordinary tribunal decisions.

However, section 34 provides for setting aside arbitral awards, which includes interim awards.[46] The Arbitration Act provides limited guidance on which tribunal decisions constitute interim awards, except for Section 31(6), which states that "*The arbitral tribunal may, at any time during the arbitral proceedings, make an interim arbitral award on any matter with respect to which it may make a final arbitral award.*" If a specific decision of the tribunal on third-party joinder can be considered an "interim award," immediate recourse would be available under Section 34, and parties would not need to wait until the final award.[47] This approach would remedy the onerous consequences of the split mechanism. However, on a careful review of judicial decisions addressing this precise issue reveals inconsistencies and inadequate reasoning.

The DHC has, on different occasions, refused to consider third-party joinder decisions as "interim awards". In *Goyal MG Gases Pvt. Ltd. v. Panama Infrastructure Developers Pvt. Ltd*,[48] ["**Goyal MG Gases**"] the Appellant sought to implead the subsequent buyers of windmills, which had been sold to them by the Respondent in breach of the agreement between the Appellant and the Respondent. The arbitral tribunal rejected the plea to implead, and this decision was challenged under Section 34 as an interim award. The application was rejected on grounds of both maintainability and jurisdiction and was subsequently challenged under Section 37(1)(c) of the 1996 Act. The DHC, in deciding the appeal held that for an order to be an interim award, it must conclusively decide a substantive dispute between the parties. Since a decision to implead, in DHC's view, does not touch upon the merits of the case, it was held to not be an interim award.

[44] *S.B.P. and Co. v. Patel Engineering Ltd. and Ors*, 2005 INSC 526.
[45] *Id,* ¶ 44.
[46] The Arbitration and Conciliation Act, 1996, §2(1)(c).
[47] NIGEL BLACKBY ET AL., *supra* note 34, ¶¶ 5.113-5.114, 7.20.
[48] *Goyal MG Gases Pvt. Ltd. v. Panama Infrastructure Developers Pvt. Ltd*, 2023:DHC:2276-DB.

In *Coslight Infra Company Pvt. Ltd. v. Concept Engineers & Ors.*,[49] ["**Coslight Infra**"] the Petitioner sought to implead the director of one of the Respondents on grounds that he is a necessary and proper party for adjudication. The tribunal rejected the plea, which the petitioner challenged before the DHC under section 34 positing the determination by the tribunal as an 'interim award'. Rejecting the petition, the DHC held that the decision of the tribunal did not record "a finding which touches upon the heart of the dispute or that it decides an issue which impacts the substantive rights of the parties".

Both these decisions rely on the DHC's decision in *Rhiti Sports v. Powerplay Sports*[50] ["**Rhiti Sports**"] to conclude that third-party joinder decisions are not interim awards. A closer look at the ratio of *Rhiti Sports*, however, does not affirm a general position that third-party joinder decisions are foreclosed from being considered as interim awards.

The DHC, in *Rhiti Sports*, was considering a challenge under Section 34 against the decision of the arbitral tribunal rejecting the Petitioner's application under Order VIII Rule 1A(3) of Code for Civil Procedure, 1908 ['***CPC***"] to place additional documents on record. The DHC, in deciding the petition, laid down the requirements for a decision of an arbitral tribunal to be an 'interim award'. It takes note of Section 31(6) which states that an Arbitral Tribunal "may make an interim arbitral award in any matter in respect of which it may make a final award". Since a final award would embody the final settlement of disputes and would result in culmination of proceedings,[51] an interim award would have the same effect on the issues it finally decides.[52]

To understand the *ratio* of *Rhiti Sports* and assess whether *Goyal MG Gases* and *Coslight Infra* interpreted it correctly, it is useful to examine how similar issues have been treated in other cases. The SC has held decisions on limitation constitute interim awards.[53] The DHC, relying on *Rhiti Sports*, has similarly treated decisions rejecting application to amend the claim amount[54] or seeking discovery of additional documents[55] as amounting to interim awards. In particular, in *APTEC Advanced Protective Technologies*,[56] the DHC held that the arbitral tribunal, while rejecting the discovery applications, made a conclusive finding on a factual issue. This curtailed one of the defence of the appellant with regards to a substantive dispute in the arbitration.[57] Even though the arbitral

[49] *Coslight Infra Company Pvt. Ltd. v. Concept Engineers & Ors.,* 2024:DHC:8755.
[50] *Rhiti Sports v. Powerplay Sports*, 2018 SCC OnLine Del 8678.
[51] The Arbitration and Conciliation Act, 1996, §32(1).
[52] *Rhiti Sports*, 2018 SCC OnLine Del 8678, ¶ 17.
[53] *Indian Farmers Fertilizer Co-Operative Limited v. Bhadra Products*, 2018 INSC 53.
[54] M/*S Cinevistaas Ltd. v. M/S Prasar Bharti*, AIROnline 2019 Del 347.
[55] *APTEC Advanced Protective Technologies AG v. Union of India*, 2025:DHC:111-DB.
[56] *Id.*
[57] *Id,* ¶¶ 26, 29

tribunal's decision was rejecting a discovery application, the DHC considered it to be an interim award because of the determinations the tribunal had to make in rejecting those applications.[58]

Moving to the issue of impleading a third-party. The arbitral tribunal can implead a non-signatory based on the GoCD, if it can infer that the non-signatory intended to be bound by the arbitration agreement by virtue of its participation in negotiations or performance of the contract. In deciding this, the tribunal may make certain determinations on questions of fact. If it makes such determinations conclusively, then it may directly affect the substantive rights and obligations of the parties (including the non-signatory), at dispute in the arbitration. In such situations, it is difficult to see why such decisions must be excluded from the category of interim award, especially in light of the DHC's decision in *APTEC Advanced Protective Technologies*.

It is for this reason the observation regarding interim awards in *Coslight Infra Company* is of little significance as the decision of the tribunal was not final regarding non-joinder of the director. Evidence was yet to be led, and tribunal was to decide the issue definitively.[59] Thus, any general observations by the DHC in *Coslight Infra Company* regarding the capacity of joinder decisions to be interim award must be treated as *obiter*.

Even considering *Rhiti Sports* without these subsequent developments, one of the authorities considered by the DHC therein was Russel on Arbitration (Twenty-Third Edition).[60] The author considered an award to be a 'final determination of a particular issue or claim in the arbitration' in contrast with 'orders and directions which address the procedural mechanisms to be adopted'. It considered 'questions concerning the jurisdiction of the tribunal or the choice of the applicable substantive law' as suitable for determination by the issue of an award.[61] This clarifies that third-party joinder decisions are not routine procedural decisions and can be decided by virtue of an interim award, as laid down the DHC.

B. Section 16 decisions as "Interim Award"

Both *Goyal MG Gases* and *Coslight Infra Company* rejected an early challenge under Section 34 by finding that the tribunal's third-party joinder decisions fail to meet the requirements of an "interim award". Jurisprudence has evolved substantially on this question particularly through *APTEC*

[58] *Adjudication Of Issue(s) in Dispute under the Guise of Discovery Application – Recourse Under Indian Law*, AZB (Feb. 4, 2025), https://www.azbpartners.com/bank/adjudication-of-issues-in-dispute-under-the-guise-of-discovery-application-recourse-under-indian-law/.
[59] *Coslight Infra*, 2024:DHC:8755, ¶¶ 9, 14.
[60] DAVID JOHN SUTTON ET AL., RUSSEL ON ARBITRATION, (24th ed., 2015).
[61] *Id*, at 290, ¶ 6-002.

Advanced Protective Technologies liberalising the standard further.[62] However, considering the recent decision in *Cox & Kings* and *ASF Buildtech,* the same evolving jurisprudence is not directly transferrable to third-party joinder decisions. This is because in establishing the power to implead parties as an exercise of a tribunal's power under Section 16, one must consider whether the courts have considered Section 16 decisions open to immediate and separate challenge under Section 34 by virtue of being interim awards.

A near-consistent position has been maintained by the courts that decisions upholding jurisdiction under Section 16 must wait till the final award to be challenged under Section 34.[63] However, unlike *Goyal MG Gases* and *Coslight Infra Company*, these decisions very rarely turn upon the innate capacity of the decision as an interim award. The decisions that reject an early challenge to jurisdictional decisions under Section 34 rely primarily on Section 16(5) and 16(6) to suggest that the challenges against decisions of jurisdiction have to wait until the final award is rendered.[64]

With *Cox & Kings* and *ASF Buildtech*, establishing the power to implead parties as an exercise of a tribunal's power under Section 16, the entire prohibition of Section 16(5) and Section 16(6) now applies squarely to third-party joinder decisions. Whether this was an intended consequence of the SC in *Cox & Kings* and *ASF Buildtech* is a separate question. The effect remains, that there is now an absolute prohibition against immediate review of positive jurisdictional decisions even when tribunals can bifurcate jurisdictional issues from merits and decide on its competence through issuance of an interim award.

This blanket prohibition of Section 16(5) and 16(6) to third-party joinder decisions is bound to severely restrict party autonomy and their case management freedom.[65] There may be instances, particularly in large multi-party arbitrations, where the parties and the tribunal prefer to consider the proceedings in stages.[66] The parties may prefer to resolve all jurisdictional questions first, to prevent tying third-parties to such arbitral proceedings, which are prone to be slow and arduous. [67] To defer

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[62] *Adjudication Of Issue(s) in Dispute under the Guise of Discovery Application*, *supra* note 54.
[63] *Practical Properties Pvt. Ltd. Vs. Comet Overseas Pvt. Ltd. and Ors*., 2016:DHC:1515; *Deep Industries Limited vs. Oil and Natural Gas Corporation Limited and Ors*. , 2019 INSC 1299, ¶ 16; *Rajnigandha Cooperative Group Housing Society Ltd. v. Chand Construction Co. & Another*, 2001 (60) DRJ 293; *Anto Augustine and Ors. v. Girish Koshy George and Ors*., 2022 KLJ 3 400, ¶ 18.
[64] *Mukhtar Alam v. Yasmin Khalique*, 2024 SCC OnLine Cal 7307, ¶¶ 24-28; *Anto Augustine and Ors. v. Girish Koshy George and Ors*., 2022 KLJ 3 400, ¶ 18.
[65] NIGEL BLACKBY ET AL., *supra* note 34, ¶¶ 5.116, 5.119, 5.121
[66] *Departmental Advisory Committee on Arbitration Law: 1996 Report on Arbitration Bill*, 13(3) ARBITRATION INTERNATIONAL 275, ¶ 226; Hse Yu Chiu, *Final, Interim, Interlocutory or Partial Award: Misnomer apt to Mislead*, 13 SAC LJ 467, 477.
[67] John Yukio Gotunda, *An Efficient Method for Determining Jurisdiction in International Arbitrations*, 40 COLUM. J. TRANSNAT'L L. 11, 13-14.

all recourses against such decisions to the end of the arbitration would unnecessarily burden the parties and may be counterproductive.[68]

VI. COMPARATIVE PERSPECTIVES: JURISDICTIONAL RULINGS AND TIMING OF APPEALS'

A. France

The 'Group of Companies' doctrine historically originates from various arbitral awards rendered in France, seminal of which is the decision by an ICC tribunal in *Dow Chemical v. Isover Saint Gobain*,[69] where it was held that common intention of the parties may be ascertained from the active role played by the non-signatories in the performance of the contract containing the arbitration agreement. The tribunal held that when a group of companies possess a single economic reality, the tribunal must take the same into account when deciding upon its own jurisdiction.

Article 1465 of the French Code of Civil Procedure (as amended by Decree No. 2011-48 of January 13, 2011) confers upon the tribunal sole jurisdiction to rule upon objections relating to its jurisdiction. Article 1491 (for domestic arbitration) and Article 1518 (for international arbitrations whose awards are rendered in France) allow for an appeal for annulment (*recours en annulation*). The French Courts routinely consider partial award on jurisdiction for an action of annulment,[70] including third-party joinder decisions,[71] before the tribunal makes a final award.[72] It is important to note that the grounds for seeking an action of annulment is available in both instances of the tribunal wrongly declaring itself competent or incompetent.[73] Therefore, unlike India, the recourse against a jurisdictional decision is independent of its result and available instantly for annulment.

B. United Kingdom

Under English law, the arbitral tribunal first decides whether a third party can be joined. Section 30(1)(a) of the Arbitration Act 1996 ["**UK Arbitration Act**"] incorporates *Kompetenz-Kompetenz*,

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[68] UNCITRAL, *Official Records of the General Assembly*, Fortieth Session, Supplement No. 17 (A/40/17), 1985, ¶¶ 157-163; Kriti Srivastava, *The Challenge to Arbitral Award on Jurisdiction: Different Seat, Different Story*, 5 ITA REV. 1, 6 (2023).

[69] *Dow Chemical v. Isover Saint Gobain*, Interim Award, Case No. 4131 of 1982, 9 Y.B. Comm. Arb. 131 (ICC Int'l Ct. Arb.).

[70] Cour de cassation [Cass.] [supreme Court for judicial matters] 1e civ., Feb. 12, 2025, 22-11.436 (Fr.); Cour d'appel [CA] [regional court of appeal] Paris, Apr. 4, 2023, 22/00408 (Fr.).

[71] *Malakoff Corporation Berhad v. Tlemcen Desalination Investment Company*, Cour d'appel [CA] [regional court of appeal] Paris, Jun. 13, 2023, 21/07296 (Fr.).

[72] *SA Ess Food v. Société Caviartrade*, Cour d'appel [CA] [regional court of appeal] Paris, May 22, 2003, 2001/20561 (Fr.).

[73] Code civil [C. civ.] [Civil Code] art. 1492 (Fr.).

so that a UK-seated tribunal may find a non-signatory bound by the arbitration agreement. However, it cannot compel joinder without express or implied consent. In *Peterson Farms Inc. v. C & M Farming Ltd..*,[74] Langley J annulled an ICC interim award for relying on the French Group of Companies doctrine, holding it is not part of English law.[75] By contrast, when a tribunal finds an implied promise to arbitrate, it normally issues a standalone *"Partial Award on Jurisdiction."*[76]

After the award, both sides enjoy a symmetrical right of challenge. Either party may challenge the partial award under Section 67 of the UK Arbitration Act within 28 days. The Commercial Court can set it aside, annul it, or vary it, regardless of whether jurisdiction was affirmed or denied, thus avoiding asymmetry. Section 72 of the UK Arbitration Act offers a second safety valve where anyone who "takes no part" may ask the court to declare the tribunal lacks jurisdiction at any time. In *ABC v. DEF*, [77] HHJ Pelling KC applied this, ruling that a parent company named in two LCIA arbitrations was not party to any valid arbitration agreement.[78]

C. Netherlands

The Dutch Code of Civil Procedure represents a different framework from France and UK. Article 1052(1) confers upon the tribunal competence to decide on its jurisdiction. All challenges to jurisdiction must be raised at the first instance before the tribunal, or the party would have deemed to have waived it.

The Code provides for a bifurcated appellate procedure. If the tribunal upholds its jurisdiction, that decision may only be challenged alongside the final award or a partial final award.[79] However, if the tribunal declines jurisdiction, the ordinary courts assume jurisdiction over the dispute.[80]

In *Manuel Garcia Armas et al. v. Venezuela*,[81] the Dutch Supreme Court recently held that negative jurisdictional decisions are not susceptible to setting-aside proceedings. This is despite the fact that the Dutch Code treats negative jurisdictional decisions as arbitral awards,[82] and stipulates that certain

[74] *Peterson Farms Inc. v. C & M Farming Ltd.,* [2002] EWHC 121 (Comm).
[75] *Id*, ¶ 62.
[76] *C v. D*, [2007] EWHC 1541 (Comm).
[77] *ABC v. DEF*, [2025] EWHC 711 (Comm).
[78] *Id*, ¶ 20.
[79] Art. 4:1052 ¶ 4 RV (Neth.); PIETER SANDERS AND ALBERT JAN VAN DEN BERG, THE NETHERLANDS ARBITRATION ACT 1986 (Kluwer International Law 1987) *as cited in* NIGEL BLACKBY ET AL., *supra* note 34, ¶ 9.02.
[80] Art. 4:1052 ¶ 5 RV (Neth.).
[81] HR 21 april 2023, JBPr 2023, 57 m.nt. Bas van Zelst en Bas Keizers ([Eiser]/De Bolivariaanse Republiek Venezuela) (Neth.).
[82] Art. 4:1052 ¶ 6 RV (Neth.).

provisions of the Code continue to apply to them.[83] The Court clarified that setting-aside proceedings under Article 1065(1)(a) are only available where no valid arbitration agreement exists.[84]

As a result, while positive jurisdictional decisions are subject to full review (together with the final award), no recourse is available against negative jurisdictional decisions..[85] This has become subject to challenge before the European Court of Human Rights.[86] The case is pending as of writing this article.[87]

D. Singapore

Until 2012, Singaporean Law provided no recourse against negative jurisdictional decisions.[88] A tribunal's decision rejecting jurisdiction was therefore final and not subject to judicial review.[89] However, in 2012, Section 10 of the International Arbitration Act, 1994 was amended to allows appeals against both positive and negative jurisdictional decisions.[90] Such appeals must be filed within 30 days of having received the notice of the tribunal's ruling[91] and need not be challenged in conjunction with the final award.[92] This amendment has brought parity in the procedural remedies available to the parties against unfavourable jurisdictional decisions and protects them from incurring unnecessary costs in protracted arbitrations by avoiding the need to wait until the conclusion of the proceedings.

[83] *Id.*
[84] Art. 4:1065, ¶ 1(a) RV (Neth.).
[85] Jeroen van Hezewijk & Eleonora Di Pangrazio, *Dutch courts diverge over review of jurisdiction decisions*, GLOBAL ARBITRATION REVIEW (Sep. 20, 2022), https://globalarbitrationreview.com/article/dutch-courts-diverge-over-review-of-jurisdiction-decisions (last visited Jul. 14, 2025).
[86] Johannes Hendrik Fahner & Darius Eckenhausen, *Asymmetrical Avenues for Annulment - The Continuing Controversy over the Setting Aside of Negative Jurisdictional Decisions*, KLUWER ARBITRATION BLOG (Jan. 16, 2024), https://arbitrationblog.kluwerarbitration.com/2024/01/16/asymmetrical-avenues-for-annulment-the-continuing-controversy-over-the-setting-aside-of-negative-jurisdictional-decisions/ (last visited Jul. 14, 2025); Toby Fisher, *Failed BIT claim leads to human rights complaint*, GLOBAL ARBITRATION REVIEW, https://globalarbitrationreview.com/article/failed-bit-claim-leads-human-rights-complaint (last visited Jul. 14, 2025).
[87] Mr García Armas V. Venezuela – *Certain Negative Jurisdictional Findings Cannot Be Challenged under the Dutch Arbitration Act*, HOUTHHOFF https://www.houthoff.com/en/expertise/Practice/Arbitration/Arbitration-Blogs/Certain-negative-jurisdictional-findings-cannot-be-challenged-under-the-Dutch-Arbitration-Act (last visited Jul. 14, 2025).
[88] *PT Asuransi Jasa Indonesia (Persero) v. Dexia Bank SA*, [2007] 1 SLR(R) 597.
[89] Antony Crockett & Daniel Mills, *A Tale Of Two Cities: An Analysis of Divergent Approaches to Negative Jurisdictional Rulings*, KLUWER ARBITRATION BLOG (Nov. 7, 2016), https://arbitrationblog.kluwerarbitration.com/2016/11/08/a-tale-of-two-cities-an-analysis-of-divergent-approaches-to-negative-jurisdictional-rulings/.
[90] International Arbitration (Amendment) Act 2012 (Singapore).
[91] International Arbitration Act 1994, § 10(3) (Singapore); *See also* Arbitration Act 2001, § 21, 21A (Singapore) for domestic arbitration.
[92] *Frontier Holdings Limited v. Petroleum Exploration (Private) Limited*, [2024] SGHC(I) 34.

VII. CONCLUSION

India's predominance of *ad hoc* arbitrations, as opposed to institutional ones, makes it imperative for the Arbitration Act to recognise and address the procedural asymmetry inherent in the current regime for the joinder of third parties. While the objective is not to encourage unnecessary litigation or disrupt the arbitral process through excessive court intervention, the law must provide a prompt and effective remedy for third parties who are compelled to participate in arbitrations. Forcing such parties to wait until the final award to challenge their joinder is manifestly unjust, exposing them to unnecessary costs and uncertainty, only for a court to potentially set aside the tribunal's decision at a much later stage. Comparative experience from other jurisdictions demonstrates that more balanced mechanisms are both possible and desirable. Ultimately, while it is essential to prevent third parties from evading legitimate liability, it is equally important to afford them timely and meaningful recourse against improper joinder, thereby upholding the integrity and fairness of the arbitral process.

HYBRID SOLUTIONS FOR MODERN CONFLICTS: EVALUATING THE PROMISE AND PITFALLS OF THE ARB-MED-ARB PROTOCOL

Garima Dhankar[*]

Abstract

The Arb-Med-Arb (AMA) Protocol, 2014 jointly developed by the Singapore International Arbitration Centre (SIAC) and the Singapore International Mediation Centre (SIMC), integrates the consensual strengths of mediation with the enforceability of arbitration. This paper offers a critical evaluation of the AMA Protocol, contextualizing its emergence within Singapore's broader effort to redefine access to justice and diversify cross-border dispute resolution. While the protocol is lauded for addressing the enforceability dilemma in mediation and preserving party autonomy, its practical application reveals nuanced limitations.

The paper begins by outlining the AMA Protocol's structural framework—its three-tiered process, institutional underpinnings, and dual reliance on SIAC and SIMC rules. It then highlights the protocol's key strengths, including procedural flexibility, relationship preservation, speedy disposal and enforceability under the New York Convention. However, the analysis also identifies systemic vulnerabilities, including ambiguities surrounding jurisdictional objections, gaps in interim relief mechanisms, the risks posed by "double-hatting" of mediator-arbitrators, and challenges in formalizing complex mediated settlements as arbitral awards.

To address these concerns, the paper proposes practical refinements to enhance procedural clarity and institutional robustness. It also critically assesses the AMA Protocol's continued relevance in light of the Singapore Convention on Mediation (SCM), arguing that the two frameworks are complementary rather than competing. While the SCM enhances the enforceability of mediated settlements, it lacks the fallback adjudicative strength that the AMA Protocol provides.

Ultimately, this paper contends that hybrid mechanisms like AMA are not merely transitional innovations, but integral to the evolving architecture of international dispute resolution. With

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thoughtful reform, the AMA Protocol can serve as a sustainable model that balances efficiency, enforceability, and procedural integrity in complex commercial disputes.

I. INTRODUCTION

In recent years, Singapore has actively redefined "access to justice" by broadening and diversifying its dispute resolution landscape. With a focus on creating robust alternatives to traditional litigation, Singapore introduced several pioneering initiatives to accommodate the evolving needs of cross-border commercial disputes. This approach is evident in the establishment of the Singapore International Commercial Court ["**SICC**"] in 2015, the integration of mediation within its legislative framework, and the creation of the Singapore International Mediation Centre ["**SIMC**"] to name a few. Among these innovations, one of the most notable is the collaboration between the Singapore International Arbitration Centre ["**SIAC**"] and SIMC that introduced the AMA Protocol, " a unique hybrid mechanism that integrates arbitration and mediation in a seamless and structured process.[1] The protocol aims to offer disputants the best of both worlds: flexibility and cost-effectiveness of mediation within the protective framework of enforceable arbitral awards.

Despite its widespread acclaim and conceptual allure, the AMA Protocol is not without its share of critiques. Heralded as a groundbreaking fusion of arbitration and mediation, the Protocol shines in theory, yet reveals some 'chinks in the armour' upon closer inspection. While it aims to offer a dynamic alternative to conventional dispute resolution mechanism, questions linger about the practicalities and limitations woven into its structure.[2] Beneath its polished exterior, subtle yet significant vulnerabilities emerge, which may disrupt its intended seamless application. To fully realize the protocol's ambitious potential, these structural gaps call for careful scrutiny and thoughtful refinement.

This paper will begin with examining the structural framework of the AMA Protocol, providing a foundation for exploring its strengths and a critical assessment of its limitations. Based on these analyses, it proposes refinements aimed at enhancing the Protocol's efficacy. Finally, it assesses the Protocol's continued relevance following the introduction of the United Nations Convention on International Settlement Agreements Resulting from Mediation ["**SCM**"]. Through this layered analysis, the paper aims to illuminate the evolving role of hybrid dispute resolution frameworks in the global legal landscape.

[1] Singapore International Mediation Centre, *'Arb-Med-Arb Protocol'*, https://simc.com.sg/arb-med-arb.
[2] N.G. Cheryl, *'The Arb-Med-Arb Protocol: Promising in Concept, Problematic in Design'*, (2020) 32 SAcLJ, Pp. 120.

II. THE AMA PROTOCOL- NATURE AND FRAMEWORK

As a unique blend of both arbitration and mediation, the AMA Protocol seamlessly combines the strengths of these two distinct mechanisms. On one hand, the Protocol leverages mediation's non-adversarial nature, enabling parties to seek amicable solutions that preserve commercial relationships. On the other, if mediation fails, the Protocol ensures a seamless transition back to arbitration for a binding, enforceable outcome. For the Protocol to be invoked, parties may either include a specific AMA clause in their contract or mutually agree to submit to AMA Protocol for a resolution under it[3] This clause acts as a procedural anchor, enabling the seamless transfer between arbitration and mediation within the SIAC-SIMC framework. The AMA Protocol's structure unfolds in three distinct yet interconnected stages, facilitating a seamless transition from arbitration to mediation and back, if necessary. First, parties initiate arbitration proceedings under SIAC Rules[4] by filing a notice of arbitration ["**NOA**"], anchoring the dispute firmly within a structured arbitration framework. Following initial steps, such as filing a Notice of Arbitration, exchanging preliminary statements and constitution of the Arbitral Tribunal ["**AT**"] by SIAC, the arbitration process is placed in "suspended animation." / stayed by the AT.[5] At this point, the dispute is referred to mediation under the SIMC, which must be completed within an eight-week timeframe from the commencement of mediation, unless extended by the SIAC Registrar, allowing the parties with a "cooling-off" period to resolve their differences amicably within a specified window.[6] Thereafter, if mediation yields a full or partial settlement, the agreement is returned to the AT to be formalized as a consent award, thus securing enforceability under the New York Convention ["**NYC**"]. Should mediation fail to yield a satisfactory outcome, the arbitration resumes[7], enabling the AT to render a binding resolution on the merits. The AT shall resume the proceedings on the date of Registrar's notification to the Tribunal to resume it.[8]

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[3] *SIMC-SIAC AMA Protocol: A Seamless Multi-Tiered Dispute Resolution Process Tailored for Users*, SINGAPORE INT'L MEDIATION CTR., https://simc.com.sg/insights/new-siacsimc-ama-protocol-seamless-multi-tiered-dispute-resolution-process-tailored-users.

[4] *Ibid*, ¶ 2.

[5] Emmanuel Chua, *A new Dawn For Mediation? The Launch of the Singapore International Mediation Centre (SIMC) and Introduction of the SIAC-SIMC Arb-Med-Arb Protocol'*, KLUWER ARBITRATION BLOG (29th December 2014). https://arbitrationblog.kluwerarbitration.com/2014/12/29/a-new-dawn-for-mediation-the-launch-of-the-singapore-international-mediation-centre-simc-and-introduction-of-the-siac-simc-arb-med-arb-protocol/.

[6] Edward Foyle, *'New SIMC-SIAC to Offer 'Arbitration-Mediation-Arbitration' Procedure'*, HOGAN LOVELL ARBLOG (27th November 2014).

[7] *Supra* note 3, ¶ 8.

[8] *SIMC-SIAC AMA Protocol*, at ¶ 8, https://simc.com.sg/sites/default/files/content-files/SIAC-SIMC%20arb-med-arb%20Clause.pdf.

The AMA Protocol defies strict categorization as either a dispute resolution clause or a set of procedural rules, embodying elements of both.[9] While it is often triggered through a pre-dispute clause—such as the standard SIAC-SIMC AMA Clause—it is not limited to such situations. The Protocol may also apply where parties agree, after a dispute has arisen, to resolve their dispute in accordance with its terms. However, the Protocol itself does not constitute a standalone dispute resolution clause. Instead, it incorporates aspects of a procedural framework, particularly in how it integrates mediation within the scope of arbitration.[10] The Protocol is not self-contained; core procedural elements, such as the constitution of the AT and the initiation of mediation, are governed by the respective rules of SIAC and SIMC. In this way, the AMA Protocol stands as a *sui generis* innovation[11], merging contractual commitments with procedural flexibility to offer a distinctive and adaptable framework for effective dispute resolution.

III. STRENGTHS OF AMA

With hybrid dispute resolution mechanisms gaining recognition as the future of cross-border conflict management[12], the AMA Protocol emerges as a trailblazer. By offering the confidentiality, flexibility, and relationship-preserving benefits of mediation, alongside the enforceability of arbitration, the AMA Protocol effectively addresses the "mediation dilemma"—the challenges of achieving binding and enforceable settlements through mediation alone.[13] This unique blend not only safeguards commercial relationships but also ensures that settlements hold weight under the NYC, offering parties the dual promise of amicable resolution and enforceable finality. The structured integration of arbitration and mediation within the AMA Protocol offers unique advantages, especially in the early stages of a dispute. Starting with arbitration, the AMA Protocol allows parties to establish their positions through an early exchange of briefs and statements, enabling a clear-eyed assessment of strengths, weaknesses, and potential outcomes.[14] This early phase not only supports a cost-benefit analysis but also provides procedural clarity, a crucial advantage often missing in less structured hybrid models.

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[9] *Supra* note 2.
[10] *Supra* note 2, Pp 129.
[11] *Supra* note 2, Pp 129.
[12] SIDRA, *'Trending in International Dispute Resolution' 2021.*
https://www.pwc.com/sg/en/publications/assets/page/hybrid-dispute-resolution-delivers-the-best-of-both-worlds.pdf
[13] Christopher Boog, 'The New SIAC/SIMC Protocol: A seamless Multitiered Dispute Resolution Process Tailored to the User's Needs', (Asian Dispute Review 2015), Vol. 17(2), Pp 91. (Oct. 23, 2024)
https://kluwerlawonline.com/journalarticle/Asian+Dispute+Review/17.2/ADR2015018.
[14] MAN YIP, *Combinations of mediation and arbitration: The Singapore perspective, in* MULTI-TIER APPROACHES TO THE RESOLUTION OF INTERNATIONAL DISPUTES: A GLOBAL AND COMPARATIVE STUDY, 186 (2021).

One of the AMA Protocol's distinguishing features is its deliberate sequencing. Unlike other frameworks, such as those offered by the Hong Kong International Arbitration Centre or the International Chamber of Commerce, which start with mediation, the AMA Protocol initiates with arbitration and subsequently pauses to prioritize mediation.[15] This sequencing is significant: by anchoring the dispute in arbitration from the outset, the Protocol ensures the presence of a "live" dispute throughout the process, preserving the tribunal's jurisdiction.[16] When mediation is successful, the Protocol seamlessly transitions the mediated settlement back to arbitration to be formalized as a consent award, sidestepping common enforceability challenges. The Protocol's design also facilitates procedural efficiency. The early exchange of pleadings and evidentiary material defines the scope of the dispute, allowing parties to trim unnecessary complexities and focus on key issues. This approach not only streamlines the process but also fosters a collaborative environment, as parties have clarity on each other's claims and can work toward practical solutions.

Further enhancing the Protocol's appeal is the institutional support provided by the SIAC and the SIMC. Together, these institutions offer parties access to expert panels, rigorous case management, and quality assurance.[17] To uphold neutrality and prevent conflicts of interest, SIAC and SIMC will typically appoint separate arbitrators and mediators respectively under the applicable arbitration and medication rules, although parties may mutually agree to appointthe same individual to fulfil both roles.[18] Additionally, the SIMC mediators are certified by the Singapore International Mediation Institute (SIMI), ensuring that the professionals involved meet high standards suitable for handling complex, cross-border disputes.[19] Finally, the AMA Protocol minimizes risks associated with mediation conducted in bad faith. Since unresolved issues automatically return to arbitration, parties have little incentive to obstruct or delay during mediation.[20] This layered approach prevents stonewalling, ensuring that the mediation phase remains productive and that any tactics aimed at delaying the resolution process prove ineffective.[21]

[15] *Supra* note 5.
[16] *Ibid*.
[17] Aziah Hussain, et al., *SIAC-SIMC's Arb-Med-Arb Protocol*, N.Y. DISP. RESOL. LAW 2018, Vol. 11(2), Pp. 85.
[18] Royston Tan and Aloysius Liu, *Enhancing the Med-Arb Process in Singapore: Lessons from the Commonwealth and Beyond*, SINGAPORE LAW GAZETTE (Oct. 22,2024) (2016), https://v1.lawgazette.com.sg/2016-06/1579.html.
[19] *Supra* note 16.
[20] *Ibid*.
[21] *Ibid*.

IV. WEAKNESSES OF AMA

While the AMA Protocol introduces a promising framework for hybrid dispute resolution, it is not without its limitations. The following points highlight some of these critical weaknesses.

A. Jurisdictional Objections

The Protocol's silence on jurisdictional objections introduces a notable ambiguity, particularly concerning the timing and procedural context in which such challenges may be raised. While the Protocol mandates a suspension of arbitration proceedings following the exchange of the NOA and the Response to NOA—after which the case is referred to mediation—it does not clarify how jurisdictional objections are to be addressed within this framework..[22] Under the SIAC Rules, Rule 8.2 allows the Registrar to refer a jurisdictional objection—raised before the constitution of the Arbitral Tribunal—to the SIAC Court for determination. [23] As the AMA Protocol mandates that mediation must commence only after the tribunal has been constituted, any jurisdictional challenge at the outset effectively halts the AMA process before it begins. This creates a structural rigidity that undermines the Protocol's intended efficiency and front-loading of amicable resolution. While such objections are legitimate procedural rights, their interaction with the AMA sequence may lead to delays in mediation, frustrate party expectations, and provide room for strategic misuse. Parties may hesitate to engage meaningfully with mediation if the question of jurisdiction is unresolved, and the absence of tailored guidance within the Protocol amplifies this uncertainty.

Moreover, the lack of explicit reference to Rule 8.2 or guidance on sequencing raises the risk of procedural missteps. Parties may initiate mediation while a jurisdictional objection remains unresolved, inadvertently violating procedural safeguards. This opens the door for potential challenges to the enforceability of any resulting award under Article V(1)(d) of the New York Convention, which permits refusal of enforcement where the arbitral procedure was not in accordance with the agreement of the parties. Although the SIAC Rules can technically resolve such objections before mediation, the Protocol's omission creates legal uncertainty, especially for users unfamiliar with institutional procedures. As such, this procedural silence represents not only a logistical challenge but a substantive risk to the integrity of the AMA mechanism itself.

[22] *Supra* note 3, ¶ 5.
[23] SIAC Rules 2025, Rule 8.1 and Rule 8.2.

B. Interim Reliefs

Another notable operational gap within the AMA Protocol is its ambiguity around interim relief during mediation. As the Protocol stands, it remains unclear whether parties can seek such reliefs within the framework potentially compelling them to resort to Rule 45 and prematurely terminate mediation to resume arbitration for urgent relief—a drastic and counterproductive measure.[24] Alternatively, parties may seek recourse through Singapore's High Court under section 12A of the International Arbitration Act.[25] However, this route imposes a high threshold for court intervention, particularly concerning urgency and the tribunal's jurisdictional scope.[26] While brief mediation timelines may appear to reduce the need for interim reliefs, this oversight grows critical in complex cases that may require prompt intervention. Without a defined process for urgent relief and given the limitations in SIAC's emergency arbitrator provisions, the AMA Protocol faces a notable vulnerability in situations when immediate measures are necessary.[27]

Additionally, the SIAC Rules 2025 introduced a potential corrective via Protective Preliminary Orders (PPOs), allowing ex parte relief even prior to tribunal constitution.[28] On the surface, this appears to address the interim relief vacuum during the AMA's mediation stage. However, the PPO regime operates procedurally outside the AMA's current sequencing, raising questions about its structural compatibility. Moreover, its ex parte, adversarial character risks undermining the collaborative ethos of mediation—a foundational pillar of the AMA model. The uncertainty is further compounded by the non-binding nature of PPOs and their unclear enforceability under the New York Convention.[29] Therefore, unless the AMA Protocol is revised to explicitly integrate PPOs—perhaps through procedural safeguards such as disclosure obligations and temporal limits—their use may be viewed as both procedurally ambiguous and strategically disruptive. The Protocol's future iterations would benefit from tailored provisions that harmonize urgency with procedural coherence, safeguarding both effectiveness and legitimacy.

[24] *Supra*. (n 15).
[25] IAA, Section 12.(Oct. 29,2024) https://sso.agc.gov.sg/act/iaa1994.
[26] *Ibid*.
[27] *Supra*. (n 15).
[28] *Supra*. (n 25), Schedule 1, Rule 25 onwards.
[29] Steptoe & Johnson LLP, *SIAC Rules 2025: Innovation in International Arbitration – Ex Parte Applications,* STEPTOE (7 March 2024) https://www.steptoe.com/en/news-publications/siac-rules-2025-innovation-in-international-arbitration-ex-parte-applications.html.

C. Double Hatting

While SIMC typically favours distinct appointments for the roles of mediator and arbitrator to preserve impartiality and confidentiality, the AMA Protocol offers parties the flexibility to appoint the same individual for both roles.[30] This "double-hatting" option, though efficient and cost-effective[31], raises significant concerns around procedural integrity. In a dual role, a mediator-arbitrator privy to confidential information during private mediation sessions may inadvertently be influenced when returning to an adjudicative role, thus compromising perceived impartiality as it becomes challenging for even the most disciplined adjudicator to entirely disregard prior knowledge.[32] Furthermore, parties may exploit private caucus sessions to present skewed or even false information, free from the constraints of perjury, potentially shaping the mediator-arbitrator's perception in a way that the opposing party cannot counteract.[33] Even if the mediator-arbitrator conscientiously attempts to separate the two roles, parties may question their impartiality, especially if an arbitration decision is unfavourable. Whether perceived or real, bias in double-hatting can erode confidence in the AMA Protocol, casting doubt on the fairness of the entire process.[34] Though efficient, this practice risks compromising the Protocol's core principles of neutrality and confidentiality. This lack of confidence, whether from perceived or actual bias, can undermine the AMA Protocol's legitimacy by casting doubt on the fairness and neutrality of the entire process.

D. Limitations in Formalizing Mediation Settlements as Arbitral Awards

One of the AMA Protocol's primary objectives is to formalize mediated settlements as enforceable consent awards. However, in practice, this transformation is not without legal and procedural limitations. A core tension lies in reconciling the flexibility of mediation—which encourages bespoke, business-oriented solutions that may involve future contingencies, third-party obligations, or non-monetary commitments[35]—with the jurisdictional and procedural constraints of arbitration, which is bound by the terms of reference and the original arbitration agreement.[36] Although Rule 9 of the AMA Protocol permits the arbitral tribunal to render a consent award embodying the parties'

[30] *Supra* note 20.
[31] *Supra* note 1, ¶ 11.
[32] *Supra* note 16.
[33] Avagene Skervin, 'To Caucus or not to Caucus, that is the Question', 2023 (27 October 2024) https://www.riverdalemediation.com/news-resources/blog/to-caucus-or-not-to-caucus-that-is-the-question/.
[34] *Supra*. (n 16).
[35] Edmund Wan, 'Singapore Arb-Med-Arb Clause - A Viable Alternative?', King & Wood Mallesons. https://www.chinalawinsight.com/2017/12/articles/global-network/singapore-arb-med-arb-clause-a-viable-alternative/ .
[36] United Nations Commission on International Trade Law (UNCITRAL), *UNCITRAL Model Law on International Commercial Arbitration 1985, with amendments as adopted in 2006*, Art. 34(2)(a)(iii), U.N. Doc. A/40/17, Annex I, 24 ILM 1302 (1985), as amended by U.N. Doc. A/61/17, Annex I (2006).

settlement, the award must remain within the scope of the tribunal's jurisdiction. This is not an express limitation in the rule itself but a functional constraint embedded in the broader architecture of arbitration law. Settlement terms that fall outside the defined arbitral reference—such as obligations involving third parties or unrelated contractual frameworks—may risk jurisdictional overreach, rendering the resulting consent award susceptible to challenge. This issue has been recognized in jurisdictions such as Russia, where in *Latvijas Titli v. Vozrojdenie*, the Supreme Court of Arbitration refused to enforce a consent award that only partially mirrored the parties' global settlement, reasoning that such fragmentation undermines the principle of mutual concession fundamental to settlement agreements.[37]

The Indian position, as clarified in *Nuovopignone International SRL v. Cargo Motors Pvt Ltd*[38] by the Delhi High Court, offers a strongly pro-enforcement reading. The court upheld the enforceability of a foreign consent award even in the absence of adjudication on merits, drawing from international precedents and reasoning that the New York Convention does not exclude such awards from its ambit. However, the judgment also highlighted unresolved questions. For example, when settlements arise before the tribunal is constituted, or when settlement terms exceed the reference scope, enforcement may become legally vulnerable. As arbitral tribunals are creatures of consent and limited mandate, the kompetenz-kompetenz principle demands that tribunals confirm their jurisdiction before issuing such awards. Moreover, while consent awards are generally equated with standard awards under both institutional rules and domestic legislation (e.g., Section 30(4) and 74 of the Indian Arbitration Act), they raise distinct concerns. There have been documented instances, such as *Société Viva Chemical v. APTD* (Paris Court of Appeal), where consent awards were used to perpetrate fraud or simulate disputes for ulterior purposes like tax evasion.[39] These risks call for an elevated degree of scrutiny by tribunals when issuing consent awards, especially in international settings where public policy considerations differ across jurisdictions. Comparative perspectives from England and Singapore also caution against equating the formal status of a consent award with its substantive scrutiny. For instance, in *Halpern v. Halpern*, the English court acknowledged that challenges to a consent award may arise not only under the grounds typical to arbitral awards, but also under contractual doctrines such as duress, fraud, or mistake.[40] Hence, while enforcement mechanisms may treat consent awards

[37] *Latvijas Titli v. Vozrojdenie*, Russian Supreme Court of Arbitration, Resolution No. 50 (2014).
[38] *Nuovopignone International SRL v. Cargo Motors Pvt Ltd*, Delhi High Court, O.M.P. (EFA) (COMM.) 11/2021 (2023).
[39] *Société Viva Chemical (Europe) NV v. APTD*, Court of Appeal of Paris, No. 07/17769 (2008).
[40] *Halpern v. Halpern*, [2006] EWHC 603 (Comm).

as equivalent to adjudicated awards, their hybrid character—straddling arbitration and contract—necessitates a nuanced doctrinal treatment.

Therefore, while the AMA Protocol provides a procedural vehicle for enforcement, its substantive effectiveness depends on whether the mediated outcome aligns with arbitral jurisdiction and public policy constraints. The solution may lie in encouraging tribunals to exercise soft scrutiny over the legality and coherence of settlement terms prior to issuing a consent award—thereby enhancing the Protocol's legitimacy without undermining party autonomy. Furthermore, revisiting the scope of referral clauses to allow for broader settlements, or incorporating a procedural safety valve (e.g., tribunal certification of legal compliance), may help fortify enforceability across jurisdictions.

Where parties have the freedom to craft bespoke solutions, the AMA Protocol restricts the enforceability of settlement terms to those that fall strictly within the arbitration scope.

V. SUGGESTIONS FOR REFINEMENT OF THE PROTOCOL

In lieu of the identified challenges, the following refinements are proposed to strengthen the operational effectiveness and procedural integrity of the Protocol:

A) To address the jurisdictional ambiguities within the AMA Protocol, a multi-tiered refinement is proposed. First, the Protocol should expressly empower the arbitral tribunal to determine jurisdictional objections at the earliest possible stage, ideally prior to the commencement of mediation. This would align with established judicial reasoning that jurisdictional issues must be resolved upfront to preserve procedural economy and prevent unnecessary expenditure of resources. In this context, the tribunal's power should be limited to early-stage adjudication of jurisdictional matters and should not extend to the final hearing. Additionally, it would be prudent to bar jurisdictional objections during the arbitration's suspended phase—except where they relate to the grant of urgent interim relief—to discourage strategic abuse of the process. Alternatively, the SIAC Registrar or the SIAC Court could undertake a prima facie review of jurisdictional objections, akin to Rule 8.2 of the SIAC Rules. This procedural checkpoint would help filter out weak or dilatory objections before tribunal constitution, signalling early to the parties the likely merits of their position and ensuring the AMA process moves forward with greater certainty.

B) To address the existing ambiguity concerning interim relief, it is proposed that the Protocol be refined to explicitly allow parties to seek emergency interim measures at any stage of the

proceedings, leveraging provisions in Rule 45 and Schedule 1 of the SIAC Rules[41], as well as Article 26 of the UNCITRAL Rules[42] These provisions preserves a party's right to apply for interim or emergency relief from judicial or other authorities at any time, notwithstanding the arbitration agreement. Additionally, Schedule 1 of the SIAC Rules allows a party to apply for the appointment of an Emergency Arbitrator even before the constitution of the arbitral tribunal, empowering such arbitrator to grant urgent interim measures within 14 days of appointment. Similarly, Article 26 of the UNCITRAL Arbitration Rules enables parties to request interim measures from the arbitral tribunal to preserve assets, maintain or restore the status quo, or prevent harm to the arbitral process itself. Furthermore, SIAC and SIMC should consider issuing clear, expedited guidelines for interim relief applications within the AMA framework. Such guidelines would enable the swift processing of urgent requests, preserving the efficiency of the mediation process and minimizing the need for parties to prematurely terminate mediation in pursuit of relief.

C) To address double-hatting concerns, it is proposed that the AMA Protocol be refined to prioritize distinct appointments for the roles of mediator and arbitrator. Alternatively, the protocol could draw on practices from Hong Kong and Australia. In Hong Kong, arbitrator-mediators are required to disclose any confidential information acquired during mediation before arbitration on the merits begins[43], ensuring a level playing field. The Australian approach offers flexibility by requiring party consent for a mediator to proceed as arbitrator, allowing either party to object if they question the individual's neutrality.[44] Additionally, adopting a consent-based or resignation model in the AMA protocol, as seen in the IBA Guidelines[45], could reinforce impartiality and bolster user confidence.

D) Finally, it is suggested that to enhance the AMA Protocol's flexibility in formalizing innovative settlement agreements, a refined approach could incorporate "Supplemental Consent Awards," allowing tribunals to enforce terms that extend beyond the original arbitration agreement if parties explicitly consent.[46] Additionally, introducing an optional "Extended Arbitration

[41] *Supra* note 25, Schedule 1, Rule 45.
[42] UNCITRAL Arbitration Rules, Article 26. https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/21-07996_expedited-arbitration-e-ebook.pdf .
[43] Hong Kong Arbitration Ordinance (Cap. 609), Article 33(4). (Oct.23,2024) https://www.elegislation.gov.hk/hk/cap609.
[44] Commercial Arbitration Act 2010, Section 27D (Oct.26,2024) https://legislation.nsw.gov.au/view/whole/html/inforce/current/act-2010-061.
[45] International Bar Association, IBA Guidelines on Conflicts of Interest in International Arbitration (Oct. 28,2024) https://www.ibanet.org/document?id=Guidelines-on-Conflicts-of-Interest-in-International-Arbitration-2024.
[46] Strong, S. I, '*Beyond International Commercial Arbitration? The Promise of International Commercial Mediation*.' WASHINGTON UNIVERSITY LAW REVIEW, 9(4), Pp 542-593,

Agreement" clause would enable parties to outline broader enforceable terms, such as third-party obligations etc.[47] Such a clause would acknowledge the unique demands of commercial disputes, empowering tribunals to uphold dynamic, forward-looking agreements beyond conventional arbitration boundaries.

VI. AMA PROTOCOL'S RELEVANCE IN THE SCM ERA

The SCM is lauded as a ground-breaking development in international dispute resolution, aimed specifically at elevating the enforceability of International Mediated Settlement Agreements (IMSAs) across borders.[48] Much like the NYC did for arbitration, the SCM aims to provide mediation with the enforceability needed to elevate it as a trusted method for resolving international commercial disputes. By providing a standardized framework for the recognition and enforcement of IMSAs, the SCM addresses a longstanding gap in the legal landscape, allowing parties to seek enforcement of mediated settlements in contracting states without having to re-litigate the issues or establish a separate legal basis for enforcement.[49] This provides mediation a newfound legal gravitas, enhancing its appeal as a dispute resolution tool in cross-border commercial matters.

Given this new framework, a critical question arises: does the AMA Protocol retain its value and relevance in this evolving landscape, or has the SCM effectively supplanted its utility? It is argued that although the SCM significantly advances mediation's role in international dispute resolution, it does not render the AMA Protocol obsolete, rather, the two frameworks fulfil distinct roles. Therefore, the AMA Protocol remains relevant for several key reasons.

Firstly, The SCM primarily serves as a "gap-filler" in cross-border enforcement, excluding settlements already enforceable as court judgments or arbitral awards.[50] By carving out such agreements, it avoids overlap with conventions like the NYC, thus complementing rather than replacing existing frameworks. In this context, the AMA Protocol's hybrid structure remains relevant, especially for cases where parties seek the dual assurance of both mediation and arbitration. While the SCM enhances mediation's enforceability, it does not offer the procedural flexibility that

https://openscholarship.wustl.edu/cgi/viewcontent.cgi?article=1813&context=law_journal_law_policy&httpsredir=1&referer=.

[47] Karyna Loban, '*Extension of Arbitration Agreement to third parties'*, INTERNATIONAL ARBITRATION ATTORNEY (2009), https://www.international-arbitration-attorney.com/wp-content/uploads/arbitrationlawloban_karyna.pdf.

[48] Singapore Convention on Mediation, https://www.singaporeconvention.org/convention/about.

[49] David Tan, '*The Singapore Convention on Mediation to Reinforce the Status of international Mediated Settlement Agreement: Breakthrough or Redundancy?*', CONFLICT RESOLUTION QUARTERLY 2023, Vol. 40(4), Pp. 468-470.

[50] Alexander, Nadja and Chong, Shou Yu*, 'An introduction to the Singapore convention on mediation: Perspectives from Singapore'* NEDERLANDS-VLAAMS TIJDSCHRIFT VOOR MEDIATION EN CONFLICTMANAGEMENT, 4, 37-56 (2018)

allows parties to fall back on arbitration if mediation fails. The AMA Protocol fills this niche by permitting mediated settlements to transition seamlessly into enforceable arbitral awards, safeguarding enforceability under the NYC. Additionally, the Protocol's incorporation of the Kompetenz-Kompetenz principle empowers tribunals to independently assess jurisdictional challenges, reinforcing procedural integrity.[51] In contrast, the SCM focuses solely on enforcing IMAs without provisions to enforce the underlying agreement to mediate, potentially undermining its efficacy.[52]

Secondly, with only 58 signatories and 18 parties[53], the SCM's current reach is limited, raising concerns about its enforceability across jurisdictions. The second reservation compounds this uncertainty by allowing signatory states to require an explicit "opt-in" for enforcement, weakening the SCM's automatic applicability.[54] Furthermore, the ambiguous reference to "competent authority" in Article 4.1[55] leaves room for varied interpretations, which could lead to inconsistent enforcement practices. In contrast, the AMA Protocol, secured by the NYC, offers a more reliable and globally recognized framework for the enforcement of mediated settlements, providing the procedural certainty the SCM currently lacks.

The contemporary relevance of the AMA Protocol is further underscored by the evolving domestic legal frameworks in jurisdictions such as India and Singapore. India's Mediation Act, 2023 institutionalizes mediation by establishing a comprehensive legislative framework that includes provisions for mandatory pre-litigation mediation, accreditation of mediators, and the recognition of domestically mediated settlement agreements (IMSAs) as decrees of the court. However, the Act explicitly excludes international mediated settlement agreements[56]—defined in line with the SCM—from being enforced as decrees of court under its provisions. While India signed the SCM in 2019,[57] it has not yet ratified the Convention, and the Act does not establish a separate framework for the enforcement of such international mediated outcomes. This gap accentuates the relevance of the AMA Protocol. By transforming a failed mediation into an arbitration and permitting mediated terms to be embodied in a consent award, the AMA Protocol secures enforceability under the New York

[51] *Supra* note 59, Pp 473.
[52] *Supra* note 60.
[53] *Supra* note 58.
[54] *Supra* note 58, Article 8.
[55] *Supra* note 58, Article 4.1.
[56] The Mediation Act 2023, s 2(2).
[57] United Nations, 'Singapore Convention on Mediation' (adopted 20 December 2018, opened for signature 7 August 2019, entered into force 12 September 2020) UN Doc A/RES/73/198, https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements.

Convention—an enforceability route currently unavailable under Indian law for IMSAs due to the absence of SCM ratification and lack of an implementing mechanism.

Similarly, Singapore's mediation landscape, shaped by the Singapore Mediation Act, 2017 and the Singapore Convention on Mediation Act, 2020, offers a robust legal basis for enforcing international mediated settlements under the SCM. However, these enactments focus primarily on the end-product of mediation—the mediated agreement itself—without addressing situations where mediation fails or where parties seek an integrated mechanism that transitions fluidly from mediation to arbitration. The AMA Protocol fills this critical procedural gap by preserving party autonomy while ensuring finality through arbitration in the event of mediation breakdown, thereby supporting a more versatile dispute resolution pathway.

Moreover, while the Mediation Act in India represents a progressive step by embedding international principles into domestic law, it does not contain structural features akin to the AMA Protocol's fallback mechanism, nor does it offer automatic international enforceability in the absence of SCM ratification. This underscores that national legislation, while complementary, does not substitute the procedural adaptability and transnational enforceability guaranteed by the AMA Protocol. Rather, these developments reinforce the Protocol's continued relevance in multi-jurisdictional disputes, especially where parties seek both procedural flexibility and enforceability across borders.

Therefore, it is suggested that, rather than viewing the SCM as a threat to the AMA Protocol, it is more accurate to see the two frameworks as symbiotic. The SCM elevates mediation by creating a standalone mechanism for enforcing IMSAs, thus promoting mediation's broader acceptance in international dispute resolution. However, for disputes that require a more rigorous procedural backbone—such as those involving multi-tiered commercial obligations or complex enforcement needs—the AMA Protocol provides a complementary pathway.

VII. CONCLUSION

The future of international dispute resolution increasingly points toward hybrid models that blend the strengths of both consensual and adjudicative approaches. The AMA Protocol stands at a critical juncture in its evolution, offering an innovative yet imperfect bridge between arbitration and mediation. Despite certain limitations identified in this paper, these gaps present opportunities for refinement of the protocol rather than impediments. Addressing jurisdictional uncertainties is essential—not merely as a matter of procedural order, but as a prerequisite for ensuring that parties enter mediation with clarity and confidence. Jurisdictional objections should be resolved through a

structured process either before or at the threshold of proceedings, avoiding disruptive challenges during the mediation phase and preserving institutional efficiency. Equally crucial is the articulation of interim relief mechanisms within the Protocol. By expressly integrating emergency relief options, such as protective preliminary orders, the AMA framework can better serve parties seeking urgent protection without having to abandon mediation altogether. Clear procedural guidance on how such relief interacts with suspended arbitral proceedings would safeguard against abuse and contribute to the predictability of the process.

Furthermore, while the rendering of consent awards is a key strength of the Protocol, it raises substantive concerns that cannot be overlooked. The ability of the arbitral tribunal to adopt mediated settlements into enforceable awards must be coupled with a measure of scrutiny—particularly where terms deviate from the original scope of reference or involve multi-contract disputes. Without safeguards, there is a risk of undermining the legitimacy of the award or frustrating the settlement's commercial balance. Finally, the role of the mediator within the AMA process warrants careful recalibration. Preserving confidentiality should not come at the expense of fairness or accountability. Introducing narrowly tailored exceptions—especially in cases of misconduct or conflict of interest—would reinforce the integrity of the mechanism without eroding the protected space that mediation is meant to offer.

In the years ahead, with the SCM now also in effect, it will be intriguing to observe how the protocol performs in practice as more cases test its structure and adaptability. Overall, the future of the AMA Protocol lies not in rigid formalism, but in its capacity to evolve through calibrated reforms. Strengthening its architecture across these dimensions will ensure it remains a reliable and effective hybrid dispute resolution mechanism in an increasingly complex international legal landscape. With continued enhancements and practical adaptations, the AMA Protocol is poised to influence the evolution of hybrid mechanisms in international dispute resolution, offering a model of adaptable, enforceable, and procedurally effective conflict management.

THE DIALECTIC OF TREATY OBLIGATIONS AND DOMESTIC IMMUNITY: REVISITING THE ENFORCEMENT PARADOX UNDER ENGLISH LAW IN THE APPLICATION OF THE NEW YORK CONVENTION TO STATE DEFENDANTS IN *CC/DEVAS v. REPUBLIC OF INDIA*

Josep Galvez[*]

Abstract

This article undertakes a detailed analysis of CC/Devas (Mauritius) Ltd & Ors v. Republic of India [2025] EWHC 964 (Comm), a significant judgment rendered by the High Court of Justice (Commercial Court) on 17 April 2025. The matter before Sir William Blair concerned the adjudicative jurisdiction of English courts in the enforcement of arbitral awards against a foreign sovereign, namely the Republic of India, and the extent to which ratification of the New York Convention (1958) constitutes a submission to jurisdiction within the meaning of section 2(2) of the State Immunity Act 1978. The claimants, investors under a bilateral investment treaty, sought recognition and enforcement of two arbitral awards seated in The Hague, alleging that India had given its prior written consent to such enforcement under Article III of the Convention. The court was asked to determine whether such ratification alone constitutes a waiver of sovereign immunity under English law. The judgment is notable for its precise delineation of adjudicative versus enforcement jurisdiction, its interpretation of international treaty obligations as domestic waivers of immunity, and its broader implications for investor-State arbitration. This article explores the judgment's legal reasoning, contextual background, and anticipated impact on future enforcement proceedings involving foreign sovereigns in England and beyond.

I. INTRODUCTION

In *CC/Devas (Mauritius) Ltd & Ors v. Republic of India* [2025] EWHC 964 (Comm)1, the Commercial Court was required to grapple with a novel and finely balanced question of public international law, treaty interpretation, and domestic sovereign immunity. At issue was whether a sovereign State, by ratifying the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 ["**New York Convention**"], can be deemed to have submitted to the adjudicative jurisdiction of the courts of the United Kingdom under section 2(2) of the State Immunity Act 1978 ["**SIA**"]. The claimants, a consortium of Mauritius- and US-based entities, sought enforcement of two investment treaty arbitration awards rendered under the auspices of the Permanent Court of Arbitration seated at The Hague, claiming in excess of €195 million against the

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[1] *CC/Devas (Mauritius) Ltd v. Republic of India* [2025] EWHC 964 (Comm) [1].

Republic of India. Their central contention was that India's ratification of the Convention constituted "prior written agreement" to the jurisdiction of the English courts within the meaning of the SIA.

The case sits at the confluence of complex transnational legal trends, where domestic enforcement proceedings increasingly intersect with global arbitration norms and the evolving doctrine of State immunity. Unlike the more conventional route under section 9 of the SIA, where a foreign State's agreement to arbitrate in writing waives immunity, the claimants sought to bypass the need for such an agreement entirely. They instead relied on the overarching obligations of recognition and enforcement embedded in Article III of the New York Convention[2]. India, for its part, resisted this contention, asserting that mere ratification of the Convention could not, without more, constitute a waiver of its sovereign immunity from suit. The resulting dispute turned on an exacting construction of English statutory language and public international law instruments.

The litigation before Sir William Blair was characterised by procedural complexity and international entanglements. Parallel proceedings were ongoing in the Netherlands, the arbitral seat, where issues of validity and enforceability of the underlying awards remained the subject of scrutiny. The present application arose from an earlier without-notice enforcement order granted under section 101 of the Arbitration Act 1996. That order, which concerned the enforcement of the BIT awards as judgments of the High Court, was later challenged by India on jurisdictional grounds, thus prompting the current proceedings.[3]. The hearing focused exclusively on a narrow yet highly consequential point of law, referred to as the "section 2 question", namely whether India's ratification of the New York Convention, standing alone and irrespective of its consent to arbitration, constituted submission to the jurisdiction of the English courts for the purposes of enforcement.

Sir William Blair's judgment, delivered on 17 April 2025, reflects a meticulous approach to statutory interpretation, buttressed by comparative jurisprudence and public policy considerations. The court examined the nature of adjudicative jurisdiction under English law and distinguished it from enforcement jurisdiction, which is separately addressed under section 13 of the SIA. In refusing to conflate the obligation to "recognise and enforce" arbitral awards under Article III of the New York Convention with a blanket waiver of immunity, the court upheld a strict construction of sovereign immunity doctrine. The ruling rejected the proposition that ratification of the Convention, absent more specific language, could constitute a "prior written agreement" under section 2(2).

[2] *Id* at ¶ 2.
[3] *Id* at ¶ 6.

This judgment assumes considerable significance within the broader matrix of investment treaty arbitration and the enforcement of foreign awards against sovereign States. It offers an authoritative pronouncement on the limits of treaty-based jurisdictional consent and reaffirms the primacy of domestic legislation in determining the extent of State immunity. For States, investors, and arbitral tribunals alike, the decision sets a clear benchmark for what constitutes valid submission to jurisdiction under English law. It also reflects the courts' continued adherence to a cautious and restrained doctrine of sovereign immunity, one rooted in legislative text rather than inferred from multilateral treaty obligations. The implications for global enforcement strategies are profound, and this article now turns to examine the factual and legal backdrop in greater detail.

II. BACKGROUND TO THE DISPUTE

The origins of the dispute lie in a high-stakes commercial venture initiated in 2005 between Devas Multimedia Private Limited ["**Devas**"], an Indian company, and Antrix Corporation Limited ["**Antrix**"][4], the commercial arm of the Indian Space Research Organisation. Under the so-called Devas Contract[5], Antrix agreed to lease S-Band satellite spectrum to Devas for the deployment of a hybrid satellite-terrestrial communication service. Although the agreement nominally involved two Indian corporate entities, Devas was, according to the claimants, substantially financed and controlled by foreign investors, including the claimants in these proceedings[6]. These investments were made according to the protections afforded under the bilateral investment treaty between Mauritius and India ["**Mauritius–India BIT**"], signed in 1998 and in force from 2000 until its termination in 2017.

In February 2011, the Indian government abruptly annulled the Devas Contract, citing a reorientation of national priorities regarding use of the electromagnetic spectrum. The decision, taken by the Indian Cabinet Committee on Security, was predicated on the assertion that the S-Band frequencies were needed for vital governmental purposes, and hence, commercial leasing was no longer tenable. Following this decision, Antrix terminated the Devas Contract. Devas had initiated arbitration against Antrix under the ICC Rules, resulting in an award of USD 562.5 million, which was later set aside by the Indian courts[7]. The claimants, as foreign shareholders in Devas, commenced a separate investor–State arbitration proceedings against India under the Mauritius–India BIT. This was

[4] *Id* at ¶ 13.
[5] *Id* at ¶ 15.
[6] *CC/Devas (Mauritius) Ltd, PCA Case No. 2013-09*, Award on Jurisdiction and Merits, 25 July 2016, ¶103.
[7] *Id* at ¶ 16.

governed by the UNCITRAL Rules, 1976 and administered by the Permanent Court of Arbitration in The Hague.

The arbitration proceedings resulted in two awards: one on jurisdiction and merits, dated July 25, 2016, and another on quantum, dated October 13, 2020 [collectively, the "**BIT Awards**"]. The tribunal found, *inter alia*, that India had expropriated the claimants' investments without due process or fair and equitable treatment. Although the tribunal accepted that part of the annulment decision was motivated by essential security interests, and therefore not a breach of India's obligations under the BIT, it nonetheless concluded that India was liable for the remainder. The tribunal awarded damages exceeding €195 million, quantifying the loss attributable to the 40% of the annulment decision it found unlawful. This assessment was rooted in the tribunal's conclusion that India's actions, while partly justified on essential security grounds, nonetheless amounted to a breach of the fair and equitable treatment standard under the BIT for the remaining portion[8]. The damages award was confirmed in the final award on quantum, dated 13 October 2020[9]. .

India raised a jurisdictional objection before the arbitral tribunal and in subsequent enforcement proceedings, contending that the claimants had not complied with the legality requirements stipulated in Article 2 of the Mauritius–India BIT. It further asserted that the claimants' indirect interests in Devas did not constitute a qualifying 'investment' within the meaning of Article 1(b) of the treaty. Interestingly, these arguments were also reiterated before the English Commercial Court as part of India's broader immunity defence[10].

Following prolonged efforts to enforce the BIT Awards in various jurisdictions, including the Netherlands, Canada, and Singapore, each with varying degrees of success, the claimants turned to the English courts. On 29 June 2021, they obtained a without-notice enforcement order under section 101 of the Arbitration Act 1996, which allows New York Convention awards to be enforced as if they were judgments of the High Court. In response, India applied on 5 May 2022 to set aside the order[11], asserting that it enjoyed sovereign immunity from the adjudicative jurisdiction of the English courts under Section 1 of the SIA, and that the exceptions in Sections 2 and 9 did not apply.

[8] *CC/Devas (Mauritius) Ltd, PCA Case No. 2013-09*, Award on Jurisdiction and Merits, 25 July 2016, ¶¶ 446–448.
[9] *CC/Devas (Mauritius) Ltd, PCA Case No. 2013-09*, Award on Quantum, 13 October 2020, ¶ 263.
[10] *CC/Devas (Mauritius) Ltd v. Republic of India* [2025] EWHC 964 (Comm), [20]–[21]; *CC/Devas (Mauritius) Ltd, PCA Case No. 2013-09*, Award on Jurisdiction and Merits, 25 July 2016, ¶¶ 196–220.
[11] *Id* at ¶¶ 6, 7.

The claimants advanced two main arguments in reply. First, they contended that India had agreed to arbitration within the meaning of section 9 of the SIA, through its consent embedded in Article 8 of the Mauritius–India BIT. Secondly, and more unusually, they asserted that India's ratification of the New York Convention amounted to "prior written agreement" to the adjudicative jurisdiction of the English courts under section 2(2) of the SIA. To this end, the claimants placed heavy reliance on section 17 of the SIA, which deems references to "agreements" to include "*treaties, conventions, or other international agreements*." Accordingly, they argued that Article III of the Convention, which obliges Contracting States to recognise and enforce arbitral awards, amounted to a submission to jurisdiction sufficient to displace immunity.

The hearing before Sir William Blair was confined solely to this latter issue, commonly referred to as the "section 2 question." In light of the overlapping yet analytically distinct issues under sections 2 and 9 of the State Immunity Act 1978, it was agreed between the parties that the section 9 issue, namely whether India had agreed in writing to submit the dispute to arbitration under the Mauritius–India BIT, and a related application for a case management stay, pending the outcome of proceedings before the Dutch courts, would be determined separately and at a later stage. This procedural bifurcation was formally endorsed by Sir Nigel Teare in a directions order dated 18 October 2024, thereby isolating the 'section 2 question' for preliminary determination[12]. The section 2 issue thus became a freestanding question of law: whether India's ratification of the New York Convention constitutes, without more, a submission by prior written agreement to the adjudicative jurisdiction of the English courts in proceedings for the recognition and enforcement of arbitral awards. This question was procedurally significant because, if answered in the affirmative, it would allow the claimants to bypass the factually contested issues surrounding the alleged arbitration agreement under the BIT.

In seeking to persuade the court that the section 2 question should be answered affirmatively, the claimants pointed to the express language of Article III of the New York Convention, which mandates that Contracting States "shall recognise arbitral awards as binding and enforce them" by domestic procedural rules. They contended that this obligation necessarily implied[13] a waiver of jurisdictional immunity, given that recognition and enforcement could not proceed without the forum court assuming adjudicative jurisdiction over the foreign State. By contrast, India maintained that ratification of a multilateral treaty does not, absent express language, constitute an unequivocal

[12] *Id* at ¶ 7.
[13] *Id* at ¶¶ 2-5.

waiver of immunity. The mere obligation to enforce arbitral awards, it was argued, does not amount to submission to the jurisdiction of any particular court.

III. DECISION OF THE COURT

Sir William Blair commenced his analysis by isolating the interpretive task posed by section 2(2) of the State Immunity Act 1978, particularly the phrase "prior written agreement." He accepted the premise that, under Section 17 of the Act, such agreement may include an international convention, such as the New York Convention. However, he underscored that the threshold for construing a treaty obligation as a waiver of sovereign immunity must be set high. The judge affirmed that a waiver must be "clear and unequivocal" if it is to displace the fundamental presumption of immunity codified in section 1 of the Act. Thus, the key question became whether Article III of the Convention satisfied that standard by way of an express or necessarily implied submission to the adjudicative jurisdiction of the English courts.

Article III of the New York Convention provides that each Contracting State "shall recognise arbitral awards as binding and enforce them under the rules of procedure of the territory where the award is relied upon." The claimants argued that this provision must necessarily carry with it the corollary that the courts of the enforcing State are thereby vested with jurisdiction, since enforcement could not be affected absent such jurisdiction. Sir William Blair rejected this contention. In his judgment, Article III did not on its face address the question of jurisdiction. It imposed an obligation of result, namely, that States must provide for a mechanism of enforcement consistent with the Convention. Still, it did not dictate how such enforcement would be achieved within domestic legal systems.

The judge then turned to the broader international legal context, including the jurisprudence surrounding treaty interpretation under the Vienna Convention on the Law of Treaties 1969. Applying Articles 31 and 32 of that Convention, Sir William Blair reiterated that treaty provisions must be interpreted in good faith in accordance with the ordinary meaning of their terms, in context, and in light of their object and purpose. In this regard, he acknowledged the pro-enforcement bias of the New York Convention, which has been described as a "liberalising instrument" in favour of arbitral finality. Nonetheless, he concluded that such bias cannot override the principle that waiver of State immunity must be express and not inferred from general obligations.

In addressing the persuasive authorities, the court was invited to consider *Infrastructure Services Luxembourg SARL v. Kingdom of Spain* [2023] 1 Lloyd's Rep 66, a case concerning the ICSID

Convention[14]. There, the High Court held that Article 54(1) of the ICSID Convention, which contains language analogous to Article III of the New York Convention, amounted to a submission to jurisdiction within the meaning of section 2(2) of the SIA. However, Sir William Blair distinguished that case on the basis that the ICSID Convention comprises a self-contained enforcement regime to which State parties expressly agree, including by allowing direct enforcement of awards as final judgments, without further review. The New York Convention, by contrast, operates through the procedural rules of domestic courts, thereby leaving a greater role for national law to determine questions of immunity. Notably, the Vienna Convention on the Law of Treaties does not authorise the interpretation of one treaty's effect through the lens of another distinct treaty addressing a separate subject matter.

Sir William Blair also found significant support in the recent decision of the Court of Appeal in *General Dynamics United Kingdom Ltd v. State of Libya* [2025] EWCA Civ 134, which held that a State's agreement to an arbitration clause rendering an award "binding and enforceable" amounted to a waiver of both adjudicative and enforcement immunity[15]. However, that case was premised upon the language of the arbitration clause itself and did not concern the effect of treaty ratification. Accordingly, it did not bear directly upon the issue before the court. The judge observed that neither General Dynamics nor any prior English decision had held that the mere act of ratifying the New York Convention, without more, constituted a submission to jurisdiction under section 2(2).

Further, Sir William Blair gave careful consideration to the textual contrast between section 2(2) and section 13(3) of the SIA. While the former permits a finding of submission by "prior written agreement," including treaties, the latter provides that "a provision merely submitting to the jurisdiction of the courts is not to be regarded as a consent" for the purposes of enforcement. This disjunction, he held, militated against any assumption that a general treaty obligation such as that in Article III could be read as a waiver of immunity in respect of adjudicative jurisdiction. Such an approach would collapse the distinction between adjudicative and enforcement immunity, which Parliament had preserved by separate statutory treatment.

In conclusion, the High Court answered the section 2 question in the negative. It held that India's ratification of the New York Convention did not, by itself, constitute a "prior written agreement" sufficient to engage the exception to immunity under section 2(2) of the SIA. The court therefore declined to determine the claimants' application for summary enforcement of the BIT Awards on this

[14] *Infrastructure Services Luxembourg SARL v. Kingdom of Spain* [2023] 1 Lloyd's Rep 66.
[15] *General Dynamics United Kingdom Ltd v. State of Libya* [2025] EWCA Civ 134.

ground. The matter remains pending regarding the Section 9 question, concerning whether India has agreed to arbitrate disputes under the Mauritius–India BIT. Until that issue is resolved, the question of sovereign immunity under English law in this case remains unsettled, albeit narrowed by this preliminary ruling.

IV. TAKEAWAYS

The decision of Sir William Blair in *CC/Devas (Mauritius) Ltd v. Republic of India* [2025] EWHC 964 (Comm) is likely to resonate across international arbitration circles as a reaffirmation of the English courts' cautious and principled approach to the doctrine of sovereign immunity. By refusing to extrapolate jurisdictional submission from the Republic of India's ratification of the New York Convention, the judgment fortifies the long-standing presumption that any waiver of State immunity must be express and specific. The ruling thus reinstates the centrality of statutory interpretation within the English legal framework, declining to subordinate Parliament's intention in the SIA to generalised policy commitments under multilateral instruments.

For practitioners involved in enforcing arbitral awards against foreign States, the ruling serves as a potent reminder that the procedural advantages of the New York Convention do not extend to modifying the fundamental jurisdictional thresholds imposed by domestic law. While the Convention undoubtedly compels Contracting States to furnish an effective mechanism for enforcement, it does not preordain the outcome of any given enforcement proceeding. In England and Wales, the dual requirements of adjudicative jurisdiction and execution immunity, distinct yet related, must each be met on their own legal footing, with apparent statutory authority for derogation from immunity in every case[16]. This bifurcated structure is firmly established in English law, as confirmed by the Supreme Court in *Argentum Exploration Ltd v. The Silver*[17] and the Court of Appeal in *Hulley Enterprises Ltd v. Russian Federation*[18], both of which affirm that the State Immunity Act 1978 treats jurisdictional and enforcement immunity as separate and independently governed doctrines

Moreover, the High Court's delineation of adjudicative versus enforcement immunity reinforces the structural coherence of the SIA. By refusing to treat Article III of the New York Convention as a proxy for consent to enforcement under section 13(3), the court avoided the doctrinal slippage that might otherwise arise from conflating different species of jurisdiction. This precision ensures that

[16] State Immunity Act 1978, § 2, 9, 13.
[17] *Argentum Exploration Ltd v. The Silver and Another* [2024] UKSC 32, ¶¶ 15-17 (Lord Lloyd-Jones and Lord Hamblen).
[18] *Hulley Enterprises Ltd v. Russian Federation* [2025] EWCA Civ 108, ¶ 26-28 (Males LJ).

States retain protection in the enforcement phase unless they have clearly waived such immunity, either in the underlying contract, the BIT, or in post-dispute conduct. For claimants, this necessitates careful drafting and strategic foresight at the investment structuring stage.

The ruling also carries significant implications for the interpretation of international conventions within domestic systems. In adopting a textually grounded approach to Article III, the court resisted the temptation to advance a teleological interpretation driven by the object and purpose of the Convention. Although pro-enforcement jurisprudence may have considerable rhetorical and practical appeal, the judgment affirms that such objectives cannot override the clear statutory scheme enacted by Parliament. In this way, the decision acts as a bulwark against judicial overreach in matters implicating State sovereignty and international comity.

Notably, the judgment does not foreclose enforcement altogether. The claimants may still prevail if they can establish jurisdiction under Section 9 of the SIA by showing that India agreed in writing to arbitrate the disputes at issue. That question, which remains sub judice, will require a fact-sensitive inquiry into the legality of the investment, the effect of the Mauritius–India BIT, and the extent of India's consent to investor–State arbitration. Nonetheless, the decision on section 2 clarifies that the existence of a treaty obligation to enforce awards cannot by itself supplant the need for such an inquiry under English law.

Finally, the decision is of broader jurisprudential significance in the ongoing global discourse surrounding the limits of State immunity in the context of international arbitration. It sits in quiet contrast to recent decisions in jurisdictions such as Canada, the Netherlands, and France, which have embraced a more liberal approach to the enforcement of arbitral awards against recalcitrant States. In *The Republic of India v CCDM Holdings*[19], the Quebec Court of Appeal enforced the Devas award notwithstanding India's immunity defence. Likewise, the Dutch Supreme Court in *Yukos Capital v. Russia*[20] and multiple lower courts refused to countenance Russia's allegations of fraud, focusing instead on the award's finality and procedural integrity. France, too, in *Commisimpex v. Republic of Congo*[21], upheld execution against sovereign assets used for commercial purposes, confirming a pragmatic approach to immunity from execution. These examples illustrate a comparative trend toward limiting State immunity where obstruction or bad faith threatens the enforceability of awards,

[19] *The Republic of India v. CCDM Holdings, LLC & Ors*, 2024 QCCA 1620 (Quebec Court of Appeal).
[20] *Yukos Capital Sàrl v. Russian Federation*, Supreme Court of the Netherlands (Hoge Raad), Judgment of 5 April 2019, ECLI:NL:HR:2019:504.
[21] *Société Commisimpex v. République du Congo*, Cour de cassation (1ère civ.), Judgment of 13 January 2021, No. 19-18.821, ECLI:FR:CCASS:2021:C100021.

an inclination the English courts, in *Devas*, consciously resisted in favour of textual orthodoxy and legislative restraint. By adhering to a restrained and rule-bound model, the English courts reaffirm their role as guardians of a dualist legal tradition in which treaty obligations do not attain domestic effect save through statutory transposition. This distinction, so often overlooked in discussions of investor–state dispute resolution, is rendered with analytical precision in this critical and enduring judgment.

TRIBUNAL'S RELIANCE ON EXTRANEOUS MATERIAL AND ITS EFFECT ON NATURAL JUSTICE: A COMMENT ON *DJP & ORS. v. DJO*, [2025] SGCA (I) 2

Rajarshi Singh[*]

I. INTRODUCTION

The mechanism of international arbitration presupposes the existence of procedural fairness, and a guaranteed adherence to the principles of natural justice.[1] These elements, often embedded under the overarching notion of *due process*,[2] are essential and non-derogable for safeguarding the legitimacy of the resulting arbitral award.[3] These principles posit that an arbitral tribunal must approach a dispute with an open mind, bereft of prejudgment, and adjudicate the same by considering *only* the arguments and material submitted before it by the parties. However, in modern arbitral practice, with the increasing frequency of arbitral appointments, it is not uncommon for an arbitrator to concurrently serve on multiple tribunals addressing analogous factual or legal issues. This gives rise to a critical question: In such cases, does the adoption or incorporation of reasoning and content from another award, arising from a separate proceeding in which the arbitrator also participated, constitute a violation of natural justice?

The Singapore Court of Appeal ["**SGCA**"] was recently seized with this question in the case of *DJP & Ors. v. DJO*[4] wherein a challenge to an arbitral award was mounted on the basis that the tribunal has copy-pasted a substantial portion of the award, including legal analysis and reasoning, from another arbitral award, thereby compromising the integrity of the arbitration process by impeding parties' right to a fair hearing and independent adjudication. The nature of challenge is rather unique, and its careful analysis by the SGCA affirms the imperative of independent factual and legal assessment by arbitral tribunals in each proceeding.

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[1] MATTI S. KURKELA & SANTTU TURUNEN, DUE PROCESS IN INTERNATIONAL COMMERCIAL ARBITRATION (Oxford Univ. Press 2nd ed. 2010).

[2] Gabrielle Kaufmann-Kohler, *Globalization of Arbitral Procedure*, 36 VAND. J. TRANSNAT'L L. 1313, 1321 (2003).

[3] Bernardo M. Cremades Sanz-Pastor, *The Use and Abuse of "Due Process" in International Arbitration*, 9 ARBITRAJE: REV. ARB. COM. INV. 661 (2016).

[4] *DJP & Ors. v. DJO* [2025] SGCA (I) 2.

II. FACTS LEADING TO THE CHALLENGE BEFORE THE SGCA

A. Background

The appellants in this case (claimants in the arbitration proceeding) is a consortium comprising of two Indian companies and one Japanese company (lead member of the consortium) which bid for, and were awarded, the tender for contract relating to managing respondent's Western Freight Corridor ["**CPT-13 Contract**"]. The respondent in this case (respondent in the arbitration proceeding) is a special purpose vehicle, operating a network of railway lines in India including the Western Freight Corridor for which the bids were invited. The CPT-13 Contract provided for arbitration to be conducted under the Rules of Arbitration of the International Chamber of Commerce ["**ICC**"] and was seated in Singapore.

In 2017, the Indian Ministry of Labour and Employment issued a notification enhancing the daily rate of minimum wages payable to workmen in India with immediate effect. The appellants, in 2020, sought a contractual adjustment due to increased labour costs following the notification on the ground that the same constituted 'change in legislation' as per the CPT-13 Contract. This request was rejected by the respondent, which led the appellants to initiate ICC arbitration proceedings in Singapore on 16 December 2021 ["**the Arbitration**"].

B. The three arbitrations

The appellants (claimants in the Arbitration) and the respondent respectively nominated Hon'ble Justice K.K. Lahoti and Hon'ble Justice Gita Mittal as arbitrators, who nominated Hon'ble Justice Dipak Misra as the president ["**Presiding Arbitrator**"]. Interestingly, the Presiding Arbitrator was also parallelly chairing two other arbitration proceedings, namely CP-301 and CP-302 arbitration (both domestic arbitrations seated in New Delhi), which were similar in terms of issues raised and reliefs sought, and were against the same party which was the respondent in the present case, i.e., DJO ["**Parallel Arbitrations**"]. The CP-301 and CP-302 arbitration proceedings had concluded and arbitral awards were rendered before the award was issued in the Arbitration ["**Impugned Award**"].

C. Determination of the set aside challenge

The issue arose from the fact that the contents of the Impugned Award were substantially '*copied*' from the earlier awards issued in CP-301 (and/or CP-302) proceedings. Therefore it was alleged that the arbitral tribunal failed to discharge its duty of fairness, the obligation of exercising independent

judgment, and to impartially review the evidence and submissions raised before it. This, as per the respondent, constituted a violation of the principles of natural justice and the Impugned Award was challenged before the Singapore International Commercial Court ["**SICC**"] on three grounds:

(i) The tribunal's failure to independently assess and apply its mind to the issues and to give proper reasoning in support of its award was a breach of the agreed arbitral procedure under Article 34(2)(*a*)(iv) of the UNCITRAL Model Law on International Commercial Arbitration ["**Model Law**"].

(ii) The tribunal in substantially reproducing the contents of the awards rendered in the Parallel Arbitrations in the Impugned Award violated Singaporean Public Policy and thus the Impugned Award was liable to be set aside under Article 34(2)(*b*)(ii) of the Model Law.

(iii) The tribunal had acted in breach of the principles of natural justice under Section 24(b) of the International Arbitration Act, 1994 ["**IAA**"].

The SICC set aside the Impugned Award vide judgment dated 15.08.2024,[5] holding that it was issued in breach of natural justice and found it unnecessary to address the remaining two grounds. This decision was assailed by the appellants before the SGCA resulting in the present ruling. The considerations that led to the decision of the SGCA are dealt with in the following paragraphs.

III. DETERMINATION OF THE CHALLENGE *VIS-À-VIS* VIOLATION OF NATURAL JUSTICE

The principles of natural justice are integral to any adjudicatory process, and apply with equal force in the context of arbitration.[6] Every legal system strives to uphold this minimum standard of procedural fairness, which is variously articulated as, "due process"[7], "reasonable opportunity to present its case"[8], "*principe du contradictoire*"[9], or "natural justice," as is the case in Singapore.[10]

[5] *DJO v. DJP & Ors*. [2024] SGHC (I) 24.
[6] *Anwar Siraj & Anr. v. Ting Kang Chung & Anr*. [2003] 2 SLR(R) 287; *Soh Beng Tee & Co Pte Ltd v. Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86.
[7] UNCITRAL Model Law on International Commercial Arbitration art. 34(2)(a)(ii), U.N. GAOR, 40th Sess., Supp. No. 17, U.N. Doc. A/40/17, at 280 (Dec. 11, 1985); GARY B BORN, Recognition and Enforcement of International Arbitral Award, in INTERNATIONAL COMMERCIAL ARBITRATION (Kluwer Law International 3rd edn 2021).
[8] Arbitration Act 1996, c. 23, § 33 (UK).
[9] Art 1464, *Code de Procédure Civile* (France); Catherine Kessedjian, *Principe de la contradiction et arbitrage* (1995) 3 REV ARB 381.
[10] International Arbitration Act 1994, § 24(b) (Sing.).

Article 24(b) of the IAA explicitly recognizes that Singaporean courts may set aside an award if it has been passed in breach of principles of natural justice. These principles are broadly formulated under two tenets, namely; (i) the adjudicator must be unbiased (*nemo judex in causa sua)*, and (ii) the parties must be given an opportunity to be heard (*audi alteram partem*).[11] These two traditional limbs are also recognized under English arbitration law,[12] and a failure to observe them may result in the award being set aside under Section 68 of the English Arbitration Act, 1996.[13]

The test for a successful challenge to an arbitral award on the ground of violation of the principles of natural justice has been propounded by the Singapore High Court in *John Holland Pty Ltd v. Toyo Engineering Corp (Japan).*[14] It held that the party alleging the breach must establish *firstly*, which rule of natural justice has been breached; *secondly*, how the rule of natural justice has been breached; *thirdly*, in what way was the breach connected to the making of the award; and *fourthly*, how the breach has prejudiced its rights.

The SICC, in setting aside the Impugned Award, applied the abovementioned test and was of the view that the arbitral tribunal has rendered the Impugned Award in violation of principles of natural justice. That is, by substantially relying on the awards rendered in the Parallel Arbitrations the arbitral tribunal had prejudged the disputes, and its reliance on extraneous considerations led to a decision which was not rooted in the arguments and submissions of the parties constituting a violation of the fair hearing rule.

A. Prejudgment and apparent bias: The fair-minded observer test

An arbitral tribunal is vested with the duty to independently assess the arguments, submissions and material presented before it in an arbitration proceeding, without being influenced by, or being predisposed towards, the issues in the dispute. That is, an arbitral tribunal, in exercising its adjudicatory functions, must be bereft of any prejudgment and should approach each issue impartially. Impartiality, in essence, is a trait related to the mind of the arbitrator which ensures 'complete receptivity' towards arguments raised by the parties.[15]

[11] DJO, *supra* note 4, at 36.
[12] Arbitration Act, *supra* note 8, § 33.; *Minmetals Germany GmbH v. Ferco Steel Ltd.,* [1999] CLC 647*; See also* DAVID ST. JOHN SUTTON ET AL., RUSSELL ON ARBITRATION ¶ 5-038 (Sweet & Maxwell 24th edn 2015).
[13] *Norbrook Laboratories Lid v. Tank* [2006] EWHC 1055.
[14] *John Holland Pty Ltd v. Toyo Engineering Corp* 2001 2 SLR 262; *Soh Beng Tee & Co Pte Ltd v. Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86.
[15] Sam Luttrell, *Bias Challenges in International Commercial Arbitration- The Need for a "Real Danger" Test,* KLUWER L. INT'L, p. 15 (2009).

Axiomatically, any prejudgment in relation to the subject-matter of the dispute constitutes a lack of impartiality,[16] and may give rise to a finding of apparent bias. In the present case, the arbitral tribunal extensively used the substantive contents from the award rendered in the Parallel Arbitrations, and used those awards as template for drafting the Impugned Award with slight adjustments to accommodate for the specific differences of the Arbitration. The question before the SGCA, therefore, was whether this gives rise to a justifiable doubt of apparent bias?

To this end, the SGCA posited that the relevant standard for assessing the presence of apparent bias is the "fair-minded observer" test. That is, whether a fair-minded and informed observer, after considering the facts and circumstances of the case would reasonably apprehend that the arbitral tribunal had either formed a conclusive stance, or demonstrates a predisposition towards a given view, before perusing the evidence and considering the arguments raised by the parties.[17] This is a widely-recognized standard, and has also been adopted in other jurisdictions, such as the UK, in adjudicating allegations of apparent bias.[18]

The SGCA, applying the "fair-minded observer" test conclusively determined that in the present case, a fair-minded and informed observer would reasonably apprehend apparent bias on the end of the tribunal, on the basis of the following facts:

(i) The tribunal used the awards rendered in the Parallel Arbitrations as the starting point for drafting the Impugned Award which suggests that the tribunal remained '*anchored*' to its earlier decision, compromising its ability and openness to consider matters afresh. This, as per the SGCA, also hinted towards the Impugned Award being plagued by *confirmation bias*.[19]

(ii) Some of the arguments raised in the Arbitration were novel, nuanced and/or distinct from the arguments raised in the Parallel Arbitrations, however, the same did not find express reference in the Impugned Award demonstrating the tribunal failed to address the fresh contentions of the respondent.[20]

(iii) The new arguments raised by the respondent, which were eventually considered by the tribunal, were mostly interposed between paragraphs that were extracted from the awards

[16] IBA Rules of Ethics for International Arbitrators, Art 3.1 (1987).
[17] DJP, *supra* note 4, at 38.
[18] *Halliburton v. Chubb*, [2020] UKSC 48; *ASM Shipping Ltd of India v. TTMI Ltd of England* [2005] EWHC 2238 (Comm).
[19] DJP, *supra* note 4, at 74.
[20] DJP, *supra* note 4, at 76.

of the Parallel Arbitration. Moreover, a large part of the analysis appeared in similar terms across all three awards, even though the respondent had raised slightly different arguments in the Arbitration.[21]

(iv) The Impugned Award referred to incorrect provisions and applied the version of Clause 13.8 (providing the formula for price adjustment) from CP-301 and CP-302 contracts, which differed from the formula provided in CPT-13 contract. The Tribunal also incorrectly applied Indian law as *lex arbitri* (which was the *lex arbitri* for the Parallel Arbitrations) instead of Singaporean law. Furthermore, the tribunal cited the title of CP-301 contract instead of CPT-13 contract in the Impugned Award.[22]

The SGCA, highlighting the abovementioned circumstances, held that a fair-minded observer would have concluded that the integrity of the arbitral process was compromised and upheld the finding of apparent bias.

B. The fair hearing rule

The second head under which the SGCA tested the compliance of the Impugned Award with natural justice principles is the *fair hearing rule*. This rule, enshrined in Article 18 of the Model Law, mandates the arbitral tribunal to treat the parties with equality and give them a full opportunity to present their case.[23] These non-derogable guarantees[24] represent the basic notions of fairness that underpin the legitimacy of the arbitral mechanism,[25] and have been characterized by the UN Commission on International Trade Law as "fundamental principles" applicable throughout the arbitral proceedings.[26]

The contours of the fair hearing rule has been explained by the SGCA observing that an arbitral tribunal is required to apply their independent mind to the issues which are in the dispute, and the said dispute must not be adjudicated on a basis that was neither submitted before it nor contemplated

[21] *DJP*, *supra* note 4, at 77.
[22] *DJP*, *supra* note 4, at 78.
[23] PETER BINDER, INTERNATIONAL COMMERCIAL ARBITRATION AND MEDIATION IN UNCITRAL MODEL LAW JURISDICTIONS 330–36 (Kluwer Law Int'l 2019).
[24] *Triulzi Cesare SRL v. Xinyi Group (Glass) Co Ltd* [2015] 1 SLR 114.
[25] Analytical Commentary on Draft Text of a Model Law on Int'l Comm. Arb., U.N. Doc. A/CN.9/264, ¶ 7 (Mar. 25, 1985).
[26] U.N. Comm'n on Int'l Trade Law, Report on the Work of Its Eighteenth Session, U.N. GAOR, 40th Sess., Supp. No. 17, U.N. Doc. A/40/17, at 176 (June 3–21, 1985).

by the parties.[27] This requirement of exercising independent mind is a fundamental component of arbitral procedural safeguards with its significance recognised across jurisdictions, and has been held to be "*indispensable*" by the French courts.[28] It follows, when a tribunal arrives at a decision by considering extraneous material to which parties did not have access, it would constitute a violation of the fair hearing rule.

In the instant case, the arbitral tribunal's reliance on extraneous material formed a pervasive part of the Impugned Award. It remained undisputed that about 212 paragraphs out of 451 paragraphs of the Impugned Award, including aspects of legal reasoning, were copied and pasted from the awards rendered in the Parallel Arbitrations.[29] Though the appellant argued that it was merely a "short cut" for preparing the Impugned Award and did not affect the outcome of the arbitration proceeding, the SGCA took a contrary position and held that it constituted a breach of the tribunal's duty to confine itself to the submissions made in the Arbitration. Moreover, by drawing its factual and/or legal reasoning from other decisions, without giving the parties an opportunity to respond, the tribunal violated the principle of fair hearing.

Furthermore, as the tribunal drew heavily from the facts and submissions of the Parallel Arbitrations, and failed to deliberate upon and address the new arguments raised by the respondent. Thus, the SGCA conclusively determined that the tribunal violated the respondent's right to a fair, independent and impartial decision implicit in the principle of fair hearing.

IV. RECOGNITION OF THE 'EXPECTATION OF EQUALITY' PRINCIPLE

A particularly notable aspect of this decision of the SGCA, arguably novel in international arbitration practice, is recognition of the principle of 'expectation of equality' in arbitral proceedings.[30] The SGCA, tracing the origin of this principle under the duty of '*equal treatment*' enshrined in Article 18 of the Model Law,[31] held that this duty binds both the parties and the tribunal.[32] While it is doctrinally well-established that the duty to exercise independent and impartial judgment extends equally to all the members of an arbitral tribunal;[33] the SGCA by recognizing the 'expectation of equality' principle

[27] DJP, *supra* note 4, at 39; *CJA v. CIZ,* [2022] SGCA 41*; JVL Agro Industries Ltd v. Agritrade International Pte Ltd* [2016] 4 SLR 768.
[28] *Ury V Galeries Lafayette*, Decision of Court of Cassation 13 April 1972 (1975) Rev Arb 235.
[29] DJP, *supra* note 4, at 73.
[30] DJP, *supra* note 4, at 63.
[31] DJP, *supra* note 4, at 56.
[32] *Singapore International Arbitration: Law & Practice* (David Joseph & David Foxton eds., LexisNexis, 2014); *See also Triulzi Cesare SRL v. Xinyi Group (Glass) Co Ltd* [2015] 1 SLR 114 [112].
[33] Sundaresh Menon, *Adjudicator, Advocate, or Something in Between? Coming to Terms with the Role of the Party-Appointed Arbitrator*, 34 J. INT'L ARB. 347, 357 (2017).

has extended this principle by holding that each arbitrator must also have equal access to the materials relevant to the dispute.

SGCA clarified that where only one arbitrator has access to extraneous material that reasonably appears to have influenced the outcome of the arbitration, such a circumstance may, *in itself*, constitute grounds for challenging the integrity of the arbitral process.[34] The underlying objective is that all arbitrators are afforded the same opportunity to consider the relevant information, thereby upholding the principles of fairness and equality in arbitral proceedings.

The expectation of equality is compromised when there is material asymmetry of information among tribunal members. Applying this principle in the present case, the SGCA found that unlike the co-arbitrators, the Presiding Arbitrator was privy to the Parallel Arbitrations which significantly influenced the outcome of the Arbitration. This unequal access to relevant information compromised the expectation of equality between the Presiding Arbitrator and the co-arbitrators, which resultantly undermined the integrity of the Arbitration. Notably, contentions on this ground were not raised by the respondent before either the SICC or the SGCA.

V. CONCLUSION

This judgment is a nuanced contribution to the international arbitration jurisprudence pertaining to determination of a set aside challenge mounted on the basis of natural justice violations. The SGCA has underscored the significance of fair procedure in arbitration and its intricate relationship with the integrity of the arbitral process. Although it acknowledged that the mere act of copying materials into an award is not infractionary, it clarified that inclusion of such extraneous material must not come at the cost of tribunal's duty to render independent and impartial judgment.

Having said that, the judgment fails to conclusively delineate the threshold at which reliance on prior award(s) or other extraneous material may constitute procedural impropriety. Therefore, there is a need for clearer normative guidelines to determine when such reliance may compromise procedural fairness. To this end, a practical safeguard could be the disclosure by arbitrators of their involvement in related proceedings, and requiring the arbitrators to pre-emptively inform the parties of any extraneous material that may inform their reasoning, thereby affording them an opportunity to object.

[34] DJP, *supra* note 4, at 61.

Furthermore, though the SGCA endorsed the application of the principle of 'expectation of equality' in arbitration, it offered limited guidance on its practical application, thereby leaving scope for future challenges on this ground. In this light, it is important to systematically address the informational asymmetry between the tribunal members as arbitrators, especially presiding arbitrators, are often appointed due to their specialized knowledge, subject-matter expertise, and because of their familiarity with the dispute which naturally places them in a position of informational advantage. The resulting imbalance could inadvertently invite challenges on this ground. In this regard, institutional arbitral rules might benefit from incorporating procedural protocols to ensure that all tribunal members have access to the same evidentiary material and communications. This would operationalise the principle of 'expectation of equality' and minimise the risk of post-award challenges based on informational asymmetry.

"TAMING THE GUERRILLA IN INTERNATIONAL COMMERCIAL ARBITRATION" BY NAVIN G. AHUJA: BOOK REVIEW

*Jayati Karia**

I. INTRODUCTION

International arbitration is often praised for being a flexible, private, and efficient way to solve commercial disputes across borders. But in recent years, this process has faced a growing challenge, especially parties using "guerrilla tactics". These are deliberate, bad-faith procedural strategies that frustrate the arbitral process, delay resolution, inflate costs, and undermine the legitimacy of the system itself.[1] Navin G. Ahuja's, "Taming the Guerrilla in International Commercial Arbitration" extensively identifies and offers an analytical examination of the rising threat posed by such abuses.

II. OVERVIEW AND SUMMARY

The opening chapter lays down a conceptual foundation, it combines doctrinal analysis, practical examples, and empirical insight to problematise an increasingly prevalent phenomenon. Common yet often undefined, these include delaying arbitrator appointments, filing frivolous objections, overloading the other side with paperwork, or using parallel litigation to disrupt proceedings. Such tactics exploit arbitration's flexibility and lead to weak enforcement, exposing systemic flaws in the arbitration ecosystem. Chapter two outlines arbitration's fundamentals i.e. neutrality, confidentiality, flexibility, enforceability, and finality. At the same time putting forth the vulnerabilities of the same such as delays, cost inflation, and procedural abuse. It contrasts judges' accountability with arbitrators' expertise, flags rising costs and underused expedited procedures, and notes the uneven impact of emergency relief. The author critically essentially warns that without stronger procedural discipline and innovation, arbitration risks losing legitimacy, urging reforms to balance autonomy with efficiency, predictability, and resilience against abuse.

The third and the fourth chapter deals with the main aspects and workings of guerilla tactics in international arbitration. The book traces their evolution from jurisdictional objections to witness coaching, ex-parte communications, anti-arbitration injunctions, and even arbitrator misconduct, showing how each tactic derails fairness and efficiency. The author relied on Surveys (2010 to 2021) to confirm their rise despite ethical codes. He links their persistence to cultural clashes, due process

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[1] NAVIN G. AHUJA, TAMING THE GUERRILLA IN INTERNATIONAL COMMERCIAL ARBITRATION (Springer 2022).

fears, weak sanctions, opaque procedures, and pressures from third-party funding, overworked arbitrators, and absent appeals. By exposing these systemic enablers, the author argues that taming guerrilla tactics requires stronger regulation, cultural sensitivity, and procedural clarity without sacrificing arbitration's ideals. The most important chapter of the book, fifth chapter, provides us with solutions to control guerilla tactics in international arbitration. This section discusses the the role of tribunals, arbitral institutions, courts, and bar associations in deterring and penalising such tactics. The potential solutions will be analysed further.

Later chapters examine Hong Kong's judicial sanctions against guerrilla tactics. The discussion then broadens to advocacy for model arbitration clauses embedding conduct standards and sanction mechanisms, ethical guidelines for counsel and arbitrators, and enhanced early case management. The author also discusses challenges such as "virtual guerrilla tactics" witnessed during the COVID-19 pandemic.

III. ANALYSIS

A. Controlling Guerrilla Tactics Through Cost Sanctions

The book's core contribution is its discussion of controlling guerilla tactics. One of the most compelling mechanism is the role of the tribunal itself, the arbitrators can deploy pragmatic tool of applying cost sanctions towards the parties engaging in such behaviour. Cost sanctions refer to a tribunal's authority to order one party to bear the arbitration-related costs. Traditionally, international arbitration adheres to the principle of "costs follow the event", or what is often called the "loser pays" rule.[2]

The author reframes this principle beyond a mere accounting exercise. He highlights that costs can serve as more than compensation and act as a behavioural correction mechanism. In other words, cost sanctions are not just about who wins or loses, they are about how parties behave during the proceedings. Some of the instances could be making excessive document requests, filing frivolous interim applications or abusing cross-examinations. If the parties have engaged "excessively" then they may end up paying more than just their own legal bills.[3] Arbitral rules are catching up with this view. For instance, the ICC Rules 2021 (Article 38(5)) explicitly allow tribunals to consider the

[2] JEAN KALICKI & MOHAMED ABDEL RAOUF, EVOLUTION AND ADAPTATION: THE FUTURE OF INTERNATIONAL ARBITRATION 465-503 (Kluwer Law International 2019).
[3] LORD HACKING & SOPHIA BERRY HACKING, DEFINING ISSUES IN INTERNATIONAL ARBITRATION: CELEBRATING 100 YEARS OF THE CHARTERED INSTITUTE OF ARBITRATORS (Oxford University Press 2016).

conduct of parties particularly, whether they conducted themselves in a "cost-effective and expeditious manner".[4] Similarly, the LCIA Rules 2020 (Article 28.4) and the IBA Guidelines on Party Representation recognize that parties and their counsel can be held financially accountable for wasting the tribunal's time or sabotaging the process.[5]

The imposition of cost sanctions can be advantageous because they are procedurally flexible. Tribunals can issue cost orders not only at the conclusion of the proceedings but also during the process through interim cost orders, a feature that deserves much more attention. More importantly, cost sanctions are less intrusive than other punitive measures. Unlike dismissing a party's claims or refusing to admit evidence which may raise due process concerns, ordering a party to pay costs, especially when done with fairness and adequate notice is far less controversial. It carries moral authority without threatening the finality or enforceability of the award.[6]

The author briefly but strongly suggests that if tribunals could require a misbehaving party to pay certain costs promptly, mid-proceedings, it could drastically alter the power dynamics in the room. This is done as the party repeatedly delays the proceedings through baseless procedural challenges or floods the case with irrelevant document requests.[7] Rather than waiting until the final award to apportion costs, the tribunal could warn the party early on and issue an interim cost order, directing them to cover the other side's expenses incurred due to those specific disruptive actions. This has to effects firstly, it sends a clear warning that misconduct has immediate repercussions and secondly, it neutralises delay tactics, since the financial burden is no longer postponed to the end.[8]

The 2015 ICC Commission Report explicitly advises tribunals not to wait for a final award before addressing costs. It talks about English litigation practices, where adverse cost decisions frequently stem from individual procedural tussle. Arbitrators educated under such comparative frameworks have become more proactive, increasingly issuing cost orders tied to discrete misbehaviours.[9]

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[4] International Chamber of Commerce, Rules of Arbitration, 2021, art. 38(5).
[5] IBA Guidelines on Party Representation, 2013, guideline 26.
[6] GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 2601 – 2758 (Kluwer Law International 2021) https://icsid.worldbank.org/sites/default/files/parties_publications/C9734/B%20-%20Request%20for%20Interim%20Measures%20%E2%80%93%2012.14.2021/Claimants'%20Legal%20Authorities/CL-0001-ENG%2C%20Born%20-%20Provisional%20Relief%20in%20International%20Arbitration.pdf.
[7] The School of International Arbitration, Queen Mary University of London, *'2025 International Arbitration Survey The path forward: Realities and opportunities in arbitration',* QMUL https://www.qmul.ac.uk/arbitration/media/arbitration/docs/White-Case-QMUL-2025-International-Arbitration-Survey-report.pdf.
[8] *Supra* note 6.
[9] Neil Newing, Ryan Cable & Johnny Shearman*, Costs in International Arbitration – Are Changes Needed?*, KLUWER ARBITRATION BLOG (Jan. 1, 2019) https://legalblogs.wolterskluwer.com/arbitration-blog/costs-in-international-arbitration-are-changes-needed/.

Moreover, tribunals can use cost sanctions to indirectly discipline legal counsels. Although arbitrators cannot formally sanction party representatives, they can express disapproval of counsel's misconduct through detailed cost orders. If a representative's conduct causes a cost burden for their own client, it may damage the client-counsel relationship or even lead to internal disputes about fee reimbursement. This strategy as the author discussed is a powerful deterrent especially for repeat players in the arbitration world. The psychological and financial impact of such a move can be significant. Knowing that each disruptive step may lead to an immediate and tangible cost, guerrilla parties may think twice before engaging in such conducts.[10] The author rightly highlights that interim cost sanctions, if embraced by tribunals and supported by institutional rules, it can help restore balance where one party wants to weaponise delay. Tribunals must ensure that such orders are proportionate, justified, and do not infringe on due process. Parties must be given a chance to respond before such an order is issued.[11] But if those procedural safeguards are met, interim costs could evolve from a theoretical tool to a real-time check against guerrilla behaviour.

Despite their appeal limitations do exist, the reality is that many parties engaging in guerrilla tactics do so knowing full well they might lose the case and pay costs. But for them, the goal is not to win on the merits. Rather, it is to delay enforcement, exhaust the opposing party's resources, or force a settlement out of frustration.[12] In such scenarios, even a significant cost award at the end of proceedings may not deter misconduct, particularly if the guerrilla party is financially strong. Some parties may consider a cost sanction a valid price for dragging the process out and apply pressure.[13] Additionally, tribunals often show reluctance in penalising parties too harshly, especially in grey areas where it is difficult to draw the line between aggressive advocacy and bad faith, the classification of "excessiveness" in such scenarios becomes difficult. Moreover, lack of consistency across tribunals and institutions in applying conduct-based cost sanctions means that guerrilla actors can't always predict the consequences of their actions and thus, reducing the sanctions' preventive impact.[14] The author indicates that cost sanctions are not a silver bullet, but they are a necessary part

[10] Stephan Wilske, *Sanctions Against Counsel in International Arbitration – Possible, Desirable Or Conceptual Confusion?*, 8, CONTEMP. ASIA ARB. J., 141-184 (2015).
[11] GEORGE A. BERMANN, *Costs Allocation in International Arbitration: What Normative Source, If Any?*, in FINANCES IN INTERNATIONAL ARBITRATION: LIBER AMICORUM PATRICIA SHAUGHNESSY (KLUWER LAW INTERNATIONAL 2020).
[12] Günther J. Horvath & Amanda Neil, *Guerrilla Tactics in International Arbitration*, 19, ASIAN DISP. REV., 131-137 (2017).
[13] Vladimir Khvalei, *Guerilla Tactics in International Arbitration: The Russian View*, AUSTRIAN YEARBOOK ON INTERNATIONAL ARBITRATION 2011, 335 (2011).
[14] Vladimir Plavic, *Disciplinary Powers of the Tribunal*, AUSTRIAN YEARBOOK ON INTERNATIONAL ARBITRATION 2014, 167-179 (2014).

of the solution. When used wisely especially through interim cost awards, they can avoid procedural abuse and help tribunals regain control over disrupted proceedings.

But to make this mechanism more effective, several things need to happen there is a need for the arbitral institutions to give tribunals clearer authority to issue interim cost orders. Tribunals must be trained and encouraged to use these powers confidently and fairly.[15] Additionally, parties should be informed from the outset that procedural misconduct will have financial consequences. Cost sanctions, particularly when applied early and proportionately, can deter guerrilla tactics not by threatening the adversarial process, but by making procedural unnecessary tactics immediately counterproductive.[16] Hence, a strong case for improving cost sanctions especially interim costs, from a theoretical form to an active tool of procedural justice can be observed . While establishing clear frameworks for imposing interim costs it still remains a work in progress.

B. Strategic Use of Interim Measures Against Guerrilla Tactics

The second major weapon proposed is the strategic use of interim measures designed to protect parties' rights and the integrity of the arbitral process itself. These measures, whether termed "provisional" or "conservatory," aim to preserve the status quo, prevent harm, secure assets for eventual awards, or preserve evidence, all "pending final determination of the issues on the merits."[17] The author discusses several manners in which interim measures can counteract guerrilla tactics. For instance, preservation order can prevent the destruction of crucial evidence, which is a common tactic to undermine a case. Similarly, an order for security for costs acts as a deterrent against frivolous claims intended solely to burden the opposing party with legal expenses. By empowering tribunals to issue such orders, arbitration aims to maintain fairness and efficiency.[18]

The author sheds light on the limitations that continue to undermine their practical effectiveness especially in the face of guerrilla tactics. While tribunals may grant urgent relief, their jurisdiction is inherently limited to the parties bound by the arbitration agreement. This becomes problematic when tactics involve third parties, such as moving assets or hiding evidence through unrelated entities,

[15] Mariel Dimsey & Richard Kreindler, *Conduct and Costs: How Should the Tribunal Sanction the Parties in Costs?*, INTL. J. OF ARB., MED. AND DISP. MANAGEMENT, 80, 4, 387-398 (2014).
[16] *Id.*
[17] UNCITRAL Model Law on International Commercial Arbitration, art. 17 (2006).
[18] Jennifer Bryant Dr & Johannes Hagmann, *Interim Measures in International Arbitration: Towards International Consistency*, 10, 2, NLS BUS. L. REV., 46-74 (2024) https://repository.nls.ac.in/nlsblr/vol10/iss2/9.

leaving tribunals powerless to intervene.[19] Jurisdictional disparities further weaken the reliability of interim relief.[20] Adding to this is the delay in constituting the arbitral tribunal itself, the gap between the initiation of proceedings and the formation of the tribunal offers an open window for obstructive tactics to occur unchecked.[21] More importantly, arbitral tribunals simply lack the coercive powers which the national courts have. They cannot fine or imprison parties for non-compliance, leaving enforcement of their orders contingent on often slow-moving domestic courts. The enforceability of interim measures under the New York Convention remains ambiguous, especially for orders not reaching to the level of a final award. This grey area creates inconsistencies and weakens the certainty arbitration offers.[22] Thus, while interim measures are theoretically robust, their effectiveness is hindered by procedural, jurisdictional, and enforcement-related constraints which can be exploited through guerrilla tactics.

IV. INSTITUTIONAL REFORMS: THE 2025 SIAC RULES

It is against this backdrop that the SIAC Rules 2025 represent a significant evolution in this context and addresses the very issues the author identifies. The most noteworthy development is Rule 25 of Schedule 1, which introduces a major procedural shift, allowing a party to seek emergency interim relief even before filing a Notice of Arbitration, and potentially without notifying the opposing party. These Protective Preliminary Orders ["**PPOs**"] are granted ex-parte by an Emergency Arbitrator, who is required to act within 24 hours of appointment.[23] This is a direct response to a recurring problem which is that the time lag between the initiation of arbitration and the formation of the tribunal. Guerrilla tactics are prevalent in this time gap where one party can destroy evidence, move assets offshore, or take unilateral steps to damage the process.[24] The main benefit of this is the speed in which the Emergency Arbitrator is empowered to act with exceptional urgency. There is secrecy involved in which the ex-parte mechanism allows applicants to seek relief before the opposing party can react destructively. While a system of checks and balances is maintained as the PPOs must be served within 12 hours of issuance, and they expire within 3 days unless properly notified hence,

[19] LAWRENCE W NEWMAN & COLIN ONG, INTERIM MEASURES IN INTERNATIONAL ARBITRATION INTRODUCTION, (JurisNet, LLC 2014).
[20] GUO YU, THE UNCITRAL MODEL LAW AND ASIAN ARBITRATION LAWS: IMPLEMENTATION AND COMPARISONS, 285 (Cambridge University Press 2018).
[21] PATRICIA SHAUGHNESSY, INTERIM MEASURES, INTERNATIONAL ARBITRATION IN SWEDEN: A PRACTITIONER'S GUIDE, 95 (Kluwer Law International 2013).
[22] B.A. Bukar, *Enforcement of Interim Measures / Awards in Domestic and International Commercial Arbitration Under the New York Convention and the Arbitration and Conciliation Act*, TDM 1 (2010) www.transnational-dispute-management.com.
[23] Singapore International Arbitration Centre (SIAC) Rules, 2025, Rule 25, Schedule 1.
[24] *Supra* note 21.

safeguarding due process.[25] By balancing speed with procedural fairness, SIAC's approach sets a new benchmark for functional and enforceable interim relief in arbitration.

To deal with third parties who are not signatories to the arbitration agreement but are often used to carry out guerrilla tactics like hiding assets or obstructing evidence.[26] Under the new rules, particularly the broadened joinder provisions, SIAC allows third parties to be joined to the arbitration even before the tribunal is formally constituted.[27] Previously, such procedural delays gave the guilty party a window to exploit these outsiders without any consequence. Now, if a party is suspected of using a third party to interfere with the process, there's a quicker route to bring that third party into the proceedings and hold them accountable.[28] While arbitrators still can't force third parties to comply the way courts can, these reforms strengthen the tribunal's ability to act swiftly and strategically.

While not interim measures per se, the expanded Expedited Procedure and the newly introduced Streamlined Procedure (for disputes under SGD 1 million) have a critical as well as a supportive role. By reducing timelines and procedural complexity, these rules minimise the window during which interim relief may be urgently needed. this matters because the longer the proceedings, the greater the incentive and opportunity for guerrilla tactics to flourish. SIAC's structural changes reduces the need for interim measures by simply ensuring that final resolution comes quickly. In a sense, it acts as a preventative mechanism, discouraging the types of delay-based misconduct that interim measures are often called upon when needed.[29]

By comparing the author's proposals with the features of the SIAC Rules 2025, it becomes clear that his recommendations are both valid and practically realisable. His advocacy for empowering tribunals to act early and decisively against misconduct comes through in SIAC's proactive granting of powers to Emergency Arbitrators and the institution's willingness to intervene pre-tribunal. His call for measures to address third-party manipulation is reflected in expanded joinder rules. And his emphasis on disciplined, time-conscious procedures aligns with the structural changes designed to streamline lower-value disputes and reduce incentives for delay.

V. CONCLUSION

[25] SIAC Rules 2025, Schedule 1, at ¶29.
[26] *Supra* note 19.
[27] SIAC Rules 2025, Rule 38.
[28] Jonathan Lim & Zeslene Mao, *Revised SIAC Rules Come Into Effect On 1 January 2025*, WILMERHALE, (Jan. 8, 2025) https://www.wilmerhale.com/en/insights/client-alerts/20250108-siac-rules-come-into-effect-on-1-january-2025.
[29] *Id.*

Overall, what stands out are the arguments by the author which are firmly grounded in the contemporary realities of arbitration practice, and his proposed solutions are neither utopian nor purely doctrinal, they are rooted in mechanisms already visible in the rules and practices of leading arbitral institutions. This book is directly helpful to practitioners, arbitrators, institutional policymakers, and even legislators tasked with supporting the arbitral framework.

The book's strengths lie in its comprehensive scope, the clarity with which it categorises guerrilla tactics, and the practicality of its suggested counter-measures. Its integration of cost sanctions into procedural discipline, combined with a realistic appraisal of their limits, demonstrates sophisticated thinking. The exploration of interim measures is quite balanced, crediting their potential while being candid about enforcement shortcomings. By connecting these critiques onto real institutional reforms like those of SIAC, the author's analysis feels both validated and forward-looking.
However, certain limitations inherent in the topic that the book cannot fully overcome. As the author himself concedes, some guerrilla actors are undeterrable by present-day measures, cost sanctions may be escaped by wealthy parties, and interim measures may fail in jurisdictions with limited enforcement cooperation. While the proposals are solid, their global efficacy remains contingent on unifying of standards across institutions and jurisdictions, which is something beyond the control of any one tribunal or set of rules. Moreover, the complex line between aggressive advocacy and abusive conduct remains a challenge for arbitrators, potentially causing hesitation in deploying sanctions even if warranted.

In conclusion, the book is a relevant, rigorous and practical contribution to the studies on arbitration reform. It captures the dual reality of arbitration's promise and its procedural deficiencies, and it proposes tools when deployed effectively, can shift the balance of power away from guerilla actors. While it is realistic about the limitations of these tools, the book is optimistic about their potential being actualised by institutional will and practical rule changes, as seen in the SIAC 2025 reforms. Navin G. Ahuja's work functions as both a warning and a guide that without vigilance, flexibility can be weaponised, but with carefully crafted measures, arbitration can remain resilient, disciplined, and fair in the face of evolving procedural threats.