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ABOUT THE JOURNAL

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AIMS AND SCOPE OF THE JOURNAL

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fora, to current law students from different legal, linguistic and cultural backgrounds, IRIArb encourages previously unpublished papers that caters to developing an educated colloquy – that is contemporary, recent or novel.

Note: The views expressed in the articles published in this Volume of Indian Review of International Arbitration are those of the authors and in no way do they reflect the opinion of IRIArb, its editorial board, the Centre for Arbitration and Research or Maharashtra National Law University, Mumbai.

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FOREWORD

Dr. Abhishek M. Singhvi*

The birth of a new journal, dedicated to arbitration, is undoubtedly an occasion to celebrate. While congratulating the editors of this enterprise heartily in this inaugural issue, I must remind them of the wag's naughty comment that a publication, like some other forms of human endeavour, may be a joy to conceive, but are invariably a pain to deliver. This salutary warning will remind them to constantly strive that extra bit and suffer that extra pain to maintain the quality and integrity of this journal.

Having recounted my own 'Memoirs of a Personal Journey Through Indian Arbitration Law'[1] in 2016 in another arbitration journal and having had the privilege of having appeared in a large number of the major arbitration judgements of the apex court, I am saddened by the degradation of this principal bypass to litigation, even after the enactment of the glittering United Nations Commission on International Trade Law ["**UNCITRAL**"] as far back as 1985.[2] The ABCD bedevilling litigation— **A**ccess, **B**acklog, **C**ost and **D**elay— has engulfed Indian arbitration despite seminars, sermons, legislative amendments and numerous Supreme Court judgements. Hence, non-arbitral ADRs— mediation, conciliation, lok adalats, ad hoc settlement procedures and so on—have developed and grown as further bypasses to the original bypass. That is good for ADRs, much needed in India, but it equally underlines the manifold failures of the Indian arbitral process, despite the fanfare surrounding the Arbitration & Conciliation Act, 1996 [*"***A&C Act***"*].

The 'Good, Bad and the Ugly' of Indian arbitration includes the absence of any uniform arbitration ethic and culture in a hugely diverse federal Indian constitutional and judicial structure. How an arbitration roster judge looks at an award—Part I or Part II– in Bombay High Court or the Supreme Court of India ["**SCI**"]is in practice very different from the district judge in Tuticorin or the trial judge in Gangtok or, for that matter in Hyderabad and Cuttack, where such awards first land up in their original jurisdiction. Some treat it as appeals against awards, some treat it as justifying middling

*Senior Advocate, Supreme Court of India; BA (Hons), St Stephen's College, Delhi University; MA (Cantab); PhD (Cantab). Abhishek Singhvi is a sitting third-term Member of Parliament; eminent jurist; former Chairman, Parliamentary Standing Committee on Law & Justice; former Additional Solicitor General of India; author of many books; frequent columnist; visible media personality; Senior National Spokesperson, Indian National Congress.

[1] Abhishek M. Singhvi, *Memoirs of a Personal Journey through Indian Arbitration Law*, 4(2) IJAL 14-27 (2016)
http://ww.ijal.in/sites/default/files/IJAL%20Volume%204_Issue%202_Abhishek%20Manu%20Singhvi.pdf.

[2] UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW, UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION 1985: AMENDED IN 2006 (Vienna: United Nations, 2008), https://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf.

interference and a few others adopt hands off approach. Sensitisation of all judicial officers, especially at the lower echelons, at judicial academies and at academic interactions, is the need of the hour before we dream of India as an arbitral destination, in (false) comparisons to highly compact, uniform and consistent jurisdictions like Singapore, Hong Kong and many European fora.

Secondly, the zigzags of the judiciary, even at the higher levels, have contributed no less to the chaos and confusion. That unruly horse, public policy, which needs dexterous judicial riders, has had torturous U-turns, sometimes expansionist qua judicial interference, sometimes non-interventionist. Even a quick, cursory look at the judgments in the cases of *Renusagar*[3], *Saw Pipes*[4], *ONGC Geco*[5], and *Associated Builders*[6] will illustrate this. Limiting only to these four out of many more, it is clear that the first adopted the limited review approach [under the old law[7]], while the second opened the doors virtually fully to the error apparent doctrine, de facto synonymous with an appeal against an award, despite the stated object of the A&C Act to bury error apparent deep and strong! Again, as recently as 2014, *ONGC Geco* opened the doors wider than conceived, which necessitated the valiant and nuanced pullback by Justice Nariman in *Associated Builder*, since the latter was a smaller bench than the former.

Thirdly, the tragic and humongous waste of time before the *Bhatia*[8] doctrine was corrected by *BALCO*[9], after four long years, in between spawning a large quantum of progeny authored by hapless High Court judges who had to follow *Bhatia* or strain to distinguish it, illustrates the fundamental structural problem of Indian arbitration jurisprudence. Correction may inevitably happen, but since Keynes reminds us that in the long run, we are all dead, the time it takes for that corrective finality is enough to create legal destruction and mayhem at lower judicial levels in the interregnum. Fourthly, even when absolutely ridiculous and unacceptable consequences, arising from clumsy drafting, are corrected after passage of many years, we tend to turn full circle to the original sin.[10] The best example is the October 2015 legislative amendment to section 36 of the A&C Act [11], which resulted in "auto stay" of an arbitral award by the *mere fact of filing* a section 34 challenge without even a judicial stay. Despite correction by Justice Nariman in *BCCI case*[12], there was clear legal and judicial *deja vu* and

[3] Renusagar Power Co. Ltd. v. General Electronic Co., 1994 Supp (1) SCC 644 ["**Renusagar**"].
[4] ONGC v. Saw Pipes, 2003 (5) SCC 705 ["**Saw Pipes**"].
[5] ONGC Ltd. v. Western Geco International Ltd., 2014 (9) SCC 263 ["**ONGC Geco**"].
[6] Associate Builders v. DDA, (2015) 3 SCC 49 ["**Associate Builders**"].
[7] The Foreign Award (Recognition and Enforcement) Act, 1961.
[8] Bhatia International v. Bulk Trading, (2002) 4 SCC 105 ["**Bhatia**"].
[9] Bharat Aluminium Co. & Ors. v. Kaiser Aluminium Technical Service Inc., (2012) 9 SCC 552 ["**BALCO**"].
[10] The partial resurrection of *Bhatia* by 2015 amendment is a classic example of this.
[11] Arbitration and Conciliation (Amendment) Act, 2015.
[12] BCCI v. Kochi Cricket Pvt. Ltd. (2018) 6 SCC 287 ["**BCCI**"].

turning full circle by the 2019 amendment, which was again struck down by Nariman J. in the *HCC*[13] case. This is now followed by 2021 amendment to the A&C Act, which mandates the court to unconditionally stay the award if *prima facie* case allegation of fraud or corruption is made out in either the arbitration agreement or in the making of the award itself.[14] Honestly, I could go on, but will now turn to the recent seminal judgement of the apex court by a three-judge combination, authored yet again by Nariman J, in the so called *PASL Wind Solutions* case decided on 20 April 2021.[15] I tried hard to critique it and find faults within it, but to be honest I find it unexceptionable and flawless. Firstly, anything coming from the pen of an outstanding jurist and thinker like Nariman J., especially with his expertise in arbitration law, gives it huge presumptive validity. Secondly, it rightly decided something simple and elementary: two Indian nationals or two Indian registered corporate entities can nevertheless choose a foreign arbitral seat and apply the *lex loci* of that seat. The heart of the decision rightly holds, thirdly, that such a consensual and contractual decision does not fall foul of any general principle that two Indian parties choosing foreign arbitrators are violating public policy under sections 23 or 28 of the Contract Act.

Fourthly, in the *PASL* case, the court relied on Exception 1 to section 28 of the Indian Contract Act, which specifically excluded consensual references to arbitration from such public policy.

Fifthly, the court also relied heavily on the earlier Supreme Court judgement of *Atlas*[16] in 1999, which had clearly excluded arbitration references from section 28, but went further, and *dehors Atlas*, independently concluded, after Justice Nariman's typically comprehensive survey of the entire law on public policy, that such references to a foreign seated arbitration would not violate any letter or spirit of public policy arising from sections 23 or 28. On many other issues also, the *PASL* court has been clear and unequivocal.

Sixthly, it rightly holds that there is no basis of searching for or applying the "closest connection" test to ascertain seat, since that approach is apposite only for cases where there is lack of clarity regarding seat. The *PASL* case was clearly a case of crystal clarity, where a foreign seat was categorically contractually designated in writing and then further found as an arbitral finding by the sole arbitrator in a detailed ~~a~~ reasoned order. Incidentally, though the closest connection test could not possibly have arisen on the facts of the *PASL* case, I would have liked a definitive judgement by a three-judge bench

[13] Hindustan Construction Company v. Union of India, 2019 SCC Online SC 1520 ["**HCC**"].
[14] Arbitration and Conciliation (Amendment) Act, 2021, §. 2.
[15] PASL Wind Solutions Pvt. Ltd. v. GE Power Conversion India Pvt. Ltd., 2021 SCC Online SC 331 ["**PASL**"].
[16] Atlas Export Industries v. Kotak & Company (1999) 7 SCC 61 ["**Atlas**"].

on the seat issue, after the confusion created by the clearly erroneous Supreme Court judgement in *Hardy Exploration* case[17]. However, that is another story altogether.

Seventhly, an equally significant finding, again correct and unexceptionable is that section 2(2) proviso added to the A&C Act by amendment with effect from 23rd October 2015, does not in ae way become a bridge between Part I and 2 of the Act and the latter two Parts, as already held earlier in *BALCO*, remain mutually exclusive. Eighthly, it holds that Section 2(2) was merely an amendment, as rightly held by the *PASL* court, to facilitate emergent interim relief by Indian courts to preserve the subject matter even of foreign seated arbitrations, where such subject matter is in India. It does not mean that Part 1 and 2, generally govern or affect or cross-fertilize each other. Valuable *travaux preparatoires* from diverse jurisdictions have been cited in the *PASL* judgement relating to the discussions on the New York Convention[18], to underline the contrast between other countries and India, with the former wanting to have some parts of the old Geneva Convention regime inserted into the New York Convention, especially qua national rooted arbitrations, which was not accepted by the New York Convention framers. Hence, ninthly, the *PASL* court holds that section 44 was born in the Indian Act as an implementation of Article 1 of the New York Convention, consciously making international awards "a national" or "non-national" with no territorial or nationality restrictions.

Tenthly, the *PASL* court also rightly rejects the argument that the words "unless the context otherwise requires" in section 44 would bring Part 1 arbitration principles [domestic or foreign] into Part 2 foreign seated arbitrations. It reiterates that the mutual exclusivity of Parts 1 and 2 cannot be breached, directly or indirectly, either by section 2(2) or the above words of section 44. For the same reason, eleventhly, the court held that section 44 does not change the focus from a seat focused provision to a person, domicile or nationality focused one. The absence of any caveat or reservation by India to the New York Convention is also noted in this regard.

Last but not the least and in my opinion, the most significant part of the judgement in its concluding paragraphs, in terms of long-term judicial policy and perspective, is the emphasis in the judgement on the vital necessity to revive, reinvent, reiterate and reinstall party autonomy into arbitration jurisprudence. It rightly calls party autonomy the 'backbone of arbitrations.' The five judges in *BALCO* are quoted in this regard. If these concluding paragraphs [101 to 104] are observed not only in letter but also in spirit, the bane of Indian arbitration— excessive interference, an appellate approach to awards, the subjective sense of justice of the hearing judge— should hopefully be a thing

[17] Union of India v. Hardy Exploration and Production (India) Inc., (2019) 13 SCC 472 ["**Hardy Exploration**"].
[18] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 10 June 1958, 21 UST. 2517, 330 UNTS 39 ["**New York Convention**"].

of the past. Whether the *PASL* spirit is in fact judicially followed is, however, a moot question qua which, given past Indian experience, I would still say that the jury is out.

In conclusion, I would again congratulate the editors for taking this laudatory initiative, and also all the expert contributors. But above all, I take this opportunity to invoke and commemorate the memory of Professor Gaillard, a preeminent persona in this field, who put his intellectual giant footprints on this entire subject faultlessly and flawlessly. The year 2021 has seen a big loss to the arbitration world by the demise of this great contributor to this subject. May his soul find eternal peace. Om Shanti.

MESSAGE FROM PATRON

It is a great honor for the entire team of Indian Review of International Arbitration (IRIArb), including me, to dedicate the inaugural issue of our journal to Professor Emmanuel Gaillard. Professor Gaillard's influence on and contribution to international arbitration is undeniable and his demise has been a huge loss to this entire community. Along with being an undisputed leader in the world of international arbitration, he was also an inspiration for arbitration enthusiasts across the globe. His demise comes as a personal loss for IRIArb as we lost not only our advisor but also a great supporter of our initiatives. He will forever remain our inspiration, and his works shall continue to guide us. We aspire to follow in his footsteps and add positively to the field of international arbitration.

At IRIArb, our objective is to integrate the Indian perspective into the increasing discourse on international arbitration and facilitate a channel for both the industry and academia to engage in critical discussions on the subject. We believe that India is slowly but surely gaining importance in the arbitration community and is ready to take on a more active role in shaping the contemporary developments currently taking place in the field. We aim to act as a catalyst for the progress of international arbitration in India through publication of reliable research, opinions and insights from practitioners, academics and other stakeholders in the field of international arbitration.

Amongst the many recent developments in international arbitration, one which is highly relevant is the combined attempt of ICSID and UNCITRAL to devise the Code of Conduct for Adjudicators in International Investment Disputes. Independence and impartiality, and concerns related to integrity, fairness and efficiency have been long standing issues in investor state dispute settlement. While it is commendable that such an attempt to devise a uniform code of conduct for adjudicators is being made, it is important to ensure efficient execution of the Code so that it does not remain a mere academic document. In this regard, our managing editor Abhisar Vidyarthi, and assistant editor Sikander Hyaat have taken the opportunity to write a comment on the Draft Code of Conduct for Adjudicator in the editorial of our inaugural issue.

India's lacklustre attitude towards international investment at large, and specifically investor state dispute settlement, has been a topic of great deliberation in the arbitration community. While India is not a member of ICSID, it remains a key player in foreign direct investment, and has a sizeable number of both inbound and outbound investments. Additionally, in recent times, India has also registered an increasing presence in investor state disputes. Therefore, IRIArb intends to focus equally on developments in international investment arbitration, and our editorial is one such attempt.

On behalf of the entire team of IRIArb, I thank all the contributors for their wonderful and informative contributions to the inaugural issue of the journal. I am particularly thankful to Dr. Abhishek Manu Singhvi, who has graced our journal by writing the Foreword. I am also grateful to Professor George Bermann for his tribute to Professor Gaillard. Lastly, I want to thank all the editors, our stellar peer reviewers, and our Editor-in-Chief Mr. Chirag Balyan, without whom the completion of this issue would not have been possible.

~ Prof. (Dr.) Dilip Ukey,

Vice Chancellor, MNLU Mumbai

IN MEMORIAM: EMMANUEL GAILLARD

George A. Bermann*

It is difficult to add meaningfully to all that has been said and written about the extraordinary Emmanuel Gaillard who left us far too soon. But I shall try.

Emmanuel has been described lately as a "titan" and a "giant." Though he was those things, they fail to capture the humility and humanity that marked Emmanuel for the length of his career. Notwithstanding the monumental achievements he made, and the recognition he so richly deserved, Emmanuel remained throughout a modest, loyal and supportive member of the international arbitration community.

Emmanuel was the "complete" actor in the international arbitration arena. He was outstanding as counsel, arbitrator, teacher, scholar, mentor, as well as a most civic-minded member of the community. He was a model, not only because of the wide range of ways in which he contributed to the international arbitration enterprise, but also because he served that enterprise in all those capacities with the highest level of professionalism. There appeared to be no avenue of activity within the field for which he lacked the requisite talent and skills and to which he was unwilling or unable to direct his devotion.

As counsel, Emmanuel argued among the most prominent cases in the modern history of international arbitration, commercial and investment alike, including of course the case in which he won for his client the staggering sum of USD 50 million, but so very many others. As arbitrator, he exhibited all the qualities one wants of someone serving in that capacity, including seriousness of purpose, attention to detail, managerial skill, courtesy, and of course impartiality and independence. While acting in both of these capacities – counsel and arbitrator – Emmanuel was a mentor to countless young people entering, or hoping to enter, into arbitration practice.

As a life-long teacher, Emmanuel brought his dedication and capacity to inspire to classrooms at the University of Paris XII, Sciences Po Law School, the Geneva Master in International Dispute Settlement (MIDS) of the University of Geneva and the Graduate Institute of International and Development Studies and, along with his longtime colleague and

*Professor of Law and Director of the Center for International Commercial and Investment Arbitration, Columbia Law School. He has served as an arbitrator in scores of international commercial and investor-State arbitrations starting in 1980 and is a member of the roster of most leading international arbitral institutions. He was founding member of the Governing Board of the ICC International Court of Arbitration. He is a frequent expert witness on issues of international arbitration and transnational litigations before arbitral tribunals and national courts.

collaborator, Yas Banifatemi, more recently at U.S. law schools no less prestigious than Harvard and Yale. He spoke widely in academic fora world-wide, so that those who were not formally his students could benefit from him and all his insights. The school where I teach – Columbia Law School – was among those beneficiary institutions. I myself first met Emmanuel some 40 years ago when we were both fairly young academics, near the start of our careers. I knew even then that, whatever might transpire thereafter, he would remain a constant friend and colleague.

Emmanuel's scholarship was exceptional both in quantity and quality, beginning most prominently with the Fouchard, Gaillard & Goldman treatise on International Arbitration, and culminating in his unique contribution to the international arbitration literature, the "Legal theory of International Arbitration." In between and since there have appeared countless publications, both broad- and narrow-gauged works of profound appeal to practitioners and academics alike. Emblematic is his 2004 Commentary on ICSID Convention Case law, the first of its kind. But he could also be light-heartedly serious as when he delivered the 2020 Annual International Commercial Arbitration Lecture at American University Washington College of Law, Center on International Commercial Arbitration, entitled "Seven Dirty Tricks to Disrupt Arbitral Proceedings." Thus, although Emmanuel had his fingers on all aspects of international arbitral practice – be it the use of arbitral anti-suit injunctions, the Energy Charter Treaty, or enforcement of awards annulled at the seat – he managed at the same time to elevate the level of inquiry and, in so doing, push the intellectual boundaries. Particularly salient has been his contribution to the emergence of an "a-national," de-localized vision of the international arbitration phenomenon, untethering international arbitration to the extent feasible from the intrusions of national law. I had the personal honor and pleasure of co-authoring with Emmanuel the UNCITRAL Guide to the New York Convention. Relatedly, he along with Yas Banifatemi, created a New York Convention website that puts the websites of any and every other international convention to shame.

Ample mention has been made of Emmanuel's role as mentor. In none of his many capacities of endeavor did Emmanuel fail to perform that role and to perform it masterfully.

Not to be overlooked is Emmanuel's character best described as civic. Above and beyond all that has been mentioned, Emmanuel built institutions, all of which have endured and prospered. One can start of course with Shearman & Sterling, an international law firm that – as Global Head of Disputes and Global International Arbitration Practice Group Leader for 33 years – he personally put at the center of the international arbitration map. At his death, Emmanuel had just established a new professional entity, Gaillard Banifatemi Shelbaya Disputes, a global law firm with offices in London, Paris and New York. While building the Shearman & Sterling empire, Emmanuel formed the International

Arbitration Institute, a Paris-based institution that began with the relativity modest task of creating a roster of international arbitrators but moved on to produce an impressive series of studies in the field. Exactly ten years ago, Emmanuel conceived of and constructed the Paris Academy of International Arbitration, inspired in large part in its format by the Hague Academy of International Law, offering students classroom and extra-classroom exposure to learn about all aspects of international arbitration from leading figures in the field of international arbitration, as well as the possibility of building collegial relations with highly talented fellow students from around the world. I had the pleasure and honor of teaching a special course in the program's inaugural year, 2011, and will give the General Course in International Commercial Arbitration in the 2021 tenth-anniversary edition. Emmanuel truly built institutions. He was plainly "constructive" in all senses of the term.

I return to where I began. Emmanuel accomplished and contributed all that I have described, not only with apparent effortlessness, but without any need for credit or acclaim, deserving of that though he may have been. We all miss him and all his attributes, not least his generosity of spirit and his capacity to inspire

EDITORIAL

SECOND VERSION OF DRAFT CODE OF CONDUCT: HITS AND MISSES

Abhisar Vidyarthi & Sikander Hyaat*

Abstract

*On April 19, 2021, the Second Version of the Draft Code of Conduct for Adjudicators in International Investment Disputes ["**Second Version**"] was released by the United Nations Commission on International Trade Law ["**UNCITRAL**"] Working Group III ["**WG III**"]. The Second Version reflects the comments received on the First Version of the Draft Code of Conduct ["**First Version**"], which was released by the WG III on May 1, 2020. The authors, as a part of the Centre for Arbitration & Research ["**CAR**"] at MNLU Mumbai, had earlier submitted comments/recommendations on the First Version to the ICSID Secretariat. In this paper, the authors add to their earlier work and conduct an analysis of the changes that have been incorporated in the Second Version, pursuant to discussions on the comments received on the First Version. Additionally, the authors provide their comments/recommendations on the Second Version.*

I. INTRODUCTION

On April 19, 2021, the Second Version of the Draft Code of Conduct for Adjudicators in International Investment Disputes ["**Second Version**"] was released by the United Nations Commission on International Trade Law ["**UNCITRAL**"] Working Group III ["**WG III**"]. The Second Version reflects the suggestions and recommendations submitted by various stakeholders including States and the academia, on the First Version of the Draft Code of Conduct ["**First Version**"], which was released by the WG III on May 1, 2020. The authors, as a part of the Centre for Arbitration & Research ["**CAR**"] at MNLU Mumbai, had earlier submitted comments/recommendations on the First Version to the ICSID Secretariat.[1] In this paper, the authors add to their earlier work and conduct an analysis of the changes that have been incorporated in the Second Version, pursuant to discussions on the comments received on the First Version. Additionally, the authors provide their comments/recommendations on the Second Version.

Before delving into the contents of the Second Version, the authors deem fit to discuss the backdrop under which the WG III has endeavored to release a Code of Conduct for Adjudicators in Investor-

*Abhisar Vidyarthi is the Managing Editor & Sikander Hyaat Khan is an Assistant Editor of Indian Review of International Arbitration.

[1] Centre for Arbitration and Research – MNLU Mumbai, Comments on the Draft Code of Conduct for Adjudicators in Investor-State Disputes Settlement [2020].

State Dispute Settlement ["**Code**"]. Investor State Dispute Settlement ["**ISDS**"], in its present form, has been under constant criticism due to concerns with respect to the system's transparency, independence and impartiality, due process, third party participation, and consistency and predictability.[2] While broader concerns persist, the scope of this enquiry is restricted to concerns giving birth to the Code. Serious reservations exist surrounding the independence and impartiality of arbitrators, which focus on conflict of interests and the lack of diversity in their appointments, as reports show numerous repeated appointments and a concentration of arbitrators from a certain region, age, gender and ethnicity.[3] Moreover, there are increasing concerns with regard to the ISDS community being a closed group, wherein the same group of individuals perform multiple roles, giving rise to the problem of double hatting, which further fuels the apprehensions regarding lack of independence and impartiality in the adjudication process. In the wake of such criticisms, international bodies have initiated public debates and discussions in furtherance of developing solutions for possible reform.

The UNCITRAL, at its Fiftieth Session in July 2017, gave the mandate to the WG III to contemplate and discuss possible reforms of the ISDS system.[4] Similarly, earlier in October 2016, ICSID had also advised its 153 member States that it was beginning the Rule Amendement Project, wherein the ICSID rules and regulations would be updated.[5] An aspect where a collaborative and concerted effort towards reform has been made by both UNCITRAL and ICSID is that of devising the Code for the adjudicators of ISDS.[6] The Code seeks to address criticisms of ISDS pertaining to concerns related to processes for the appointment of arbitrators, including issues associated with their conflict of interests, independence and impartiality, disclosure mandates, diversity, qualifications, and problems raised by third-party funding arrangements.[7]

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[2] Karl P. Sauvant & Federico Ortino, *Improving The International Investment Law and Policy Regime: Options for the Future* 75-85 (2013), http://ccsi.columbia.edu/files/2014/03/Improving-The-International-Investment-Law-and-Policy-Regime-Options-for-the-Future-Sept-2013.pdf.

[3] Justine Touzet & Marine Vienot de Vaublanc, *The Investor-State Dispute Settlement System: The Road To Overcoming Criticism*, KLUWER ARBITRATION BLOG (Aug. 6, 2018), http://arbitrationblog.kluwerarbitration.com/2018/08/06/the-investor-state-dispute-settlement-system-the-road-to-overcoming-criticism.

[4] UNCITRAL, Rep. on the Work of its Fiftieth Session, U.N. Doc A/72/17 (2017).

[5] The ICSID Rule Amendment Project is premised upon a three-fold end. First, is the modernization of rules based on case law jurisprudence of the ICSID. Second, is to make the ISDS model time and cost effective while balancing due process considerations and making ISDS more equitable for investors and States. Third, is to make ISDS an environmentally friendly process.

[6] Draft Code of Conduct for Adjudicators in Investor-State Dispute Settlement 2 (May 1, 2020), https://icsid.worldbank.org/sites/default/files/amendments/Draft_Code_Conduct_Adjudicators_ISDS.pdf.

[7] *Id.*

Discussions on the Code were initiated by the WG III on the basis of a note prepared by the WG III along with ICSID, and has subsequently been supported by various stakeholders.[8] States have submitted proposals with their views on the various aspects being deliberated in the WG III, particularly on the desirability of the code and its intricacies and features.[9] Based on the inputs received and subsequent deliberations, the UNCITRAL and ICSID, on April 19, 2021, have now released the Second Version, inviting further comments and suggestions from States, the academia and other interested stakeholders. The WG III has sought to base the Code on a comparative review of standards found in codes of conduct in investment treaties, arbitration rules applicable to ISDS, and of international courts. The Code is intended to provide applicable principles and provisions addressing matters such as independence and impartiality, and the duty to conduct proceedings with integrity, fairness, efficiency, and civility.[10] Moreover, in addition to codifying the essential ethical duties of integrity, fairness, competence, diligence, civility and efficiency, the Code also seeks to address some long-standing and sensitive issues in ISDS such as repeat appointments, issue conflict and double hatting.[11] The Code, as conceived by the WG III, intentionally uses the word 'adjudicators' and not 'arbitrators.' The Code, therefore, applies to all kinds of adjudicators, including arbitrators, ad hoc committee members and potential candidates to become adjudicators. Moreover, the usage of the word 'adjudicator' allows the Code to be applied even to judges, in the event that systemic reforms are made to ISDS to include permanent bodies or appeal mechanisms where sitting 'judges' may be appointed. The Code also applies to adjudicators' assistants.[12]

The authors have narrowed the scope of their analysis and recommendations in this paper to four Articles of the Second Version, i.e., Articles 4, 5, 7 and 10, since the same Articles were part of the author's earlier analysis and comments, which they had conducted along with other researchers, and submitted their comments to the ICSID and UNCITRAL on behalf of the CAR. The paper has been divided into two parts. *Firstly*, the authors undertake a comparative analysis of the two Versions; and *secondly* the authors analyze the Articles of the Second Version and provide their comments and recommendations on the same.

[8] UNCITRAL WGIII, Possible reform of investor-State dispute settlement (ISDS) Background information on a code of conduct, UN Doc A/CN.9/WG.III/WP.167 (2019).
[9] UNCITRAL WGIII, Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of its resumed Thirty-Eighth Session, at ¶¶51, 68, UN Doc A/CN.9/1004/Add.1 (2020).
[10] Chiara Giorgetti, *The Draft Code of Conduct for Adjudicators in Investor-State Dispute Settlement: An Important Step Forward in the Reform Process*, EJIL: TALK (Aug. 13, 2020), https://www.ejiltalk.org/the-draft-code-of-conduct-for-adjudicators-in-investor-state-dispute-settlement-an-important-step-forward-in-the-reform-process/.
[11] *Supra* note 6, at 3.
[12] *Supra* note 6, art. 1(2).

II. COMPARATIVE ANALYSIS OF THE FIRST AND SECOND VERSION

The table below reproduces the text of the provisions (which were the subject matter of the authors' scrutiny in their Comments) in both, the First and the Second versions of the Code. As can be inferred, *prima facie*, changes have been made in the order and arrangement of the provisions. The introduction to the Second Version mentions that the re-ordering of the Code has been made to allow Article 10, i.e., the Article on disclosure (earlier Article 5) to follow the substantive requirements of the Code (Articles 3-9).[13] This section entails a comparative analysis of the First Version vis-à-vis the Second Version, while discussing the comments that the authors had submitted on the First Version of the Code.

First Version	Second Version
Article 5 [see Article 5(2)(a)(iv) and Article 5(2)(d)] **Conflicts of Interest: Disclosure Obligations** 1. Candidates and adjudicators shall avoid any direct or indirect conflict of interest. They shall disclose any interest, relationship or matter that could reasonably be considered to affect their independence or impartiality. To this end, candidates and adjudicators shall make all reasonable efforts to become aware of such interests, relationships and matters. 2. Disclosures made pursuant to paragraph (1) shall include the following: (a) Any professional, business, and other significant relationships, within the past [five] years with: (i) The parties [and any subsidiaries, parent-companies or agencies related to the parties]; (ii) The parties' counsel; (iii) Any present or past adjudicators or experts in the proceeding;	**Article 10 [see Article 10(2)(a)(iv)** **Disclosure Obligations** 1. Adjudicators shall disclose any interest, relationship or matter that may, in the eyes of the parties, give rise to doubts as to their independence or impartiality, or demonstrate bias, conflict of interest, impropriety or an appearance of bias. To this end, they shall make reasonable efforts to become aware of such interest, relationship, or matter. 2. Adjudicators shall make disclosures in accordance with paragraph (1) and shall include the following information: (a) Any financial, business, professional, or personal relationship within [the past five years] with: (i) the parties, and any subsidiary, affiliate or parent entity identified by the parties; (ii) the parties' legal representatives, including all appointments as Arbitrator, [Judge], counsel, or expert witness made by the parties' legal representative in any IID [and non-IID] proceedings;

[13] Draft Code of Conduct for Adjudicators in Investor-State Dispute Settlement, Version 2, ¶ 2 (April 19, 2021), https://icsid.worldbank.org/sites/default/files/draft_code_of_conduct_v2_en_final.pdf.

(iv) [Any third party with a direct or indirect financial interest in the outcome of the proceeding]; (b) Any direct or indirect financial interest in: (i) The proceeding or in its outcome; and an administrative proceeding, a domestic court proceeding or another panel or committee proceeding that involves questions that may be decided in the ISDS proceeding; (c) All ISDS [and other [international] arbitration] cases in which the candidate or adjudicator has been or is currently involved as counsel, arbitrator, annulment committee member, expert, [conciliator and mediator]; and (d) **A list of all publications by the adjudicator or candidate [and their relevant public speeches]** 3. Adjudicators shall have a continuing duty to promptly make disclosures pursuant to this article. (ii) 4. Candidates and adjudicators should err in favour of disclosure if they have any doubt as to whether a disclosure should be made. Candidates and adjudicators are not required to disclose interests, relationships or matters whose bearing on their role in the proceedings would be trivial.	(iii) the other Arbitrators, Judges or expert witnesses in the proceeding; and **(iv) any third-party funder with a financial interest in the outcome of the proceeding and identified by a party;** (b) Any financial or personal interest in: (i) the proceeding or its outcome; and (ii) any administrative, domestic court or other international proceeding involving substantially the same factual background and involving at least one of the same parties or their subsidiary, affiliate, or parent entity as are involved in the IID proceeding; and (c) All IID [and non IID] proceedings in which the Adjudicator has been involved in the past [5/10] years or is currently involved in as counsel, expert witness, or Adjudicator. 3. Adjudicators shall make any disclosures in the form of Annex 1 prior to or upon accepting appointment, and shall provide it to the parties, the other Adjudicators in the proceeding, the administering institution and any other person prescribed by the applicable rules or treaty. 4. Adjudicators shall have a continuing duty to make further disclosures based on newly discovered information as soon as they become aware of such information. 5. Adjudicators should err in favor of disclosure if they have any doubt as to whether a disclosure should be made. The fact of disclosure by an Adjudicator does not establish a breach of this Code.
Article 6 **Limit on Multiple Roles** Adjudicators shall [refrain from acting]/[disclose that they act] as counsel, expert witness, judge, agent or in any other relevant role at the same time as they are [within X years of] acting on matters that	**Article 4** **Limit on Multiple Roles** Unless the disputing parties agree otherwise, an Adjudicator in an IID proceeding shall not act concurrently as counsel or expert witness in another IID case [involving the same factual

involve the same parties, [the same facts] [and/ or] [the same treaty].	background and at least one of the same parties or their subsidiary, affiliate or parent entity].
Article 8(2) **Availability, Diligence, Civility and Efficiency** 2. [Adjudicators shall refrain from serving in more than [X] pending ISDS proceedings at the same time so as to issue timely decisions.]	**Article 5** **Duty of Diligence** 1. Adjudicators shall perform their duties diligently throughout the proceeding and shall refuse competing obligations. They shall be reasonably available to the parties and the administering institution, shall dedicate the necessary time and effort the proceeding, and shall render all decisions in a timely manner. 2. Adjudicators shall not delegate their decision-making function to an Assistant or to any other person.
Article 10 **Pre-appointment Interviews** 1. Any pre-appointment interview shall be limited to discussion concerning availability of the adjudicator and absence of conflict. Candidates shall not discuss any issues pertaining to jurisdictional, procedural or substantive matters potentially arising in the proceedings. 2. [If any pre-appointment interview occurs, it shall be fully disclosed to all parties upon appointment of the Candidate.]	**Article 7** **Communications with a Party** 1. Any pre-appointment communication with a Candidate concerning a potential appointment shall be limited to discussion concerning the expertise, experience and availability of the Candidate and the absence of any conflict of interest. Candidates shall not discuss any issues pertaining to jurisdictional, procedural, or substantive matters that they reasonably can anticipate will arise in the proceeding. 2. [The contents of any pre-appointment communication concerning the proceeding between the Candidate and a party shall be fully disclosed to all parties upon appointment of the Candidate.] 3. An Adjudicator shall not have any ex parte contacts with a party concerning the proceeding other than communications contemplated by the applicable rules or treaty or consented to by the parties.

One of the principal reservations that the authors had with the First Version was that certain obligations and restrictions imposed on the adjudicators were impractical and cumbersome in nature. In order to construct a meaningful and effective code of conduct, it is essential that the Code does not render it impractical for individuals in the legal or business community to serve as arbitrators. For example, the First Version required that adjudicators to disclose all relevant publications as a part of their disclosure obligations, a provision which has now been away with in light of imposing onerous obligations. While theoretically expansive and elaborate disclosures ensure utmost transparency and eradicate the chances of actual or apparent conflicts of interest, practically, it is essential that the WG III acquires an equilibrium and balance between transparency and effectiveness. The same is essential to ensure that the Code does not act as an impediment to the freedom of the parties to choose the best qualified arbitrators. Through the changes incorporated in the Second Version, as can be seen from the above table, the WG III has attempted to make the Code a more practical document, which finds a balance between the interests of all stakeholders in ISDS. In doing so, the WG III has deleted certain portions and terms that left the scope of the Code ascertainably broad and uncertain. The authors delve deeper into the changes that have been brought to the specific Articles below.

A. Article 10(2)(a)(iv), earlier Article 5(2)(a)(iv)

Article 5 of the First Version had a very broad ambit and could possibly have led to unnecessary arbitrator challenges, which in turn would result in higher costs and delays. Moreover, there was a lack of clarity and definiteness in the provision that would act as a major impediment to the practical and strict interpretation of the Code.[14] This concern of the authors' was shared by most states and commentators in their comments to the First Version. Therefore, most of the changes that have been brought to this provision in the Second Version have been with the intention to streamline the provision and accord more practicality, precision and clarity to the disclosure mandate.

The most important change in this Article is the removal of the phrases '*direct or indirect conflict of interest*' and '*direct and indirect financial interest*'. The authors, as part of the CAR team, had voiced their concerns that bifurcation of interests into '*direct and indirect interests*' may lead to confusion on the disclosures that ought to be made by the adjudicators. The reason being that the Code did not define the term '*direct or indirect,*' and as such the scope of '*indirect interests*' in the outcome of the dispute would be ambiguous and unascertainable. The authors specifically suggested the need for a change to Article 5(2)(a)(iv) in the First Version [now Article 10(2)(a)(iv)], which governs the

[14] *Supra* note 1. The team at CAR suggested that *"The suggestions in this report are aimed towards the end of eradicating vagueness from these provisions to prevent any loopholes in the framework governing arbitrator/adjudicator conduct."*

adjudicator's relationship with interested third parties, such as third party funders, which may affect their ability to decide the dispute with an open mind. In this regard, Article 5(2)(1)(iv) in the First Version was guilty of imprecision and abstruseness. The First Version required adjudicators to disclose any professional, business and other significant relationships, within the past five years, with any third party with a '*direct or indirect financial interest*' in the outcome of the proceedings. Apart from being a very broad mandate, there was no clarity, explanation or precision as to the definition of the term '*direct or indirect conflict of interest*'. In this regard, the authors had recommended that instead of using the term '*direct or indirect financial interest,*' the Code could use the term 'significant interest' and had also recommended a definition of 'significant interest'.[15] The underlying rationale behind our suggestion was the possibility that a third party having a relationship with the adjudicators might have a far-stretched, distant, inconsequential or interlinked indirect financial interest in the outcome of the dispute. Therefore, using the phrase '*direct or indirect financial interest*' would cause uncertainty and make the disclosure mandate under this provision unnecessarily broad.

The aforementioned recommendation was acknowledged by the Inter-Pacific Bar Association in its comments on Article 5 of the First Version, wherein it opined:

> "one comment suggests that, instead of "direct or indirect interest", the Draft Code should use "significant interest" defined as "interest resulting in doubts about independence, sense of fairness and impartiality of the adjudicators." We do not necessarily support requiring disclosure only of "significant" conflicts of interest, but would here rather propose specifying the meaning of "indirect interest". Alternatively, the wording could refer instead simply to "conflict of interest" and dispense with "direct or indirect" (noting that the second sentence of the existing article covers all types of interest that "could reasonably be considered" to be a conflict – whether direct or indirect)."[16]

Article 10 of the Second Version brings much needed clarity in this regard as the term '*direct or indirect financial interest*' has now been replaced by '*financial interest*,' which is more definite and straightforward in nature. This is a welcome change as it does away with the uncertainty that came with the unascertainable ambit of the term '*indirect financial interest*'. The other changes that have been brought about in this provision are that (a) the disclosure mandate has been restricted to third party funders, as against any third party; and (b) disclosure must be made in respect of the third-party funders identified by a party. The erstwhile provision provided a broader mandate and extended to any third party having a financial interest in the outcome of the proceeding. The WG III has now narrowed down the provision to only require disclosures with respect to a particular kind of third

[15] *Supra* note 1, at 8-9.
[16] UNCITRAL and ICSID, Draft Code of Conduct, Comments by State/Commenter 118 (Jan 14, 2021).

party, i.e., third party funders. Moreover, the erstwhile provision did not specify the manner in which the adjudicators would become aware of the third-party funders involved in the matters and make disclosures to that extent. It certainly could not be the case that the adjudicator would have the reasonable means to independently assess the third parties involved and ascertain facts that would warrant a disclosure. Therefore, in accordance with the change brought, the disclosure mandate of the adjudicators will be limited to only those third-party funders which have been identified by the parties themselves. The authors have some reservations and recommendations on Article 10(2)(a)(iv) of the Second Version, which has been elaborated upon in the next part of the paper.

B. Article 5(2)(d) of the First Version has not been included in the Second Version

Article 5(2)(d) of the First Version addressed the widely debated question of 'issue conflict.' Issue conflicts, in international arbitration, are argued to arise owing to past expression of views by the adjudicators that may show certain bias or prejudgment of certain issues. It should be noted that the existence of conflict of interest due to a possible issue conflict continues to be widely debated topic in ISDS and there is no consensus on its application or effectiveness. Sub-para (d) of Article 5 of the First Version required the disclosure of relevant publications that may give rise to such issue conflicts and sought comments from states and commentators on whether the disclosure mandate should extend to 'relevant public speeches' as well. While the authors, having submitted their comments from a purely academic perspective, had supported the disclosure of relevant publications and public speeches on the ground that the same might be "*manifestations of the pre-existing and core views of the adjudicators*"[17] it is understandable as to why the requirement of such disclosure has been done away with. In fact, the authors, in their comments, had highlighted that the importance of ensuring that this provision does not discourage experienced professionals from talking and sharing their experience and ideas with the community to help develop arbitration law.[18] Most states and commentators raised similar concerns, that requiring the disclosure of 'all' related publications and public speeches would put a very onerous burden on adjudicators and would impede their academic freedom.

The practical difficulties that adjudicators, who have been in practice for numerous years, may face due to the requirement to disclose all related publications and public speeches has been very aptly explained by Mr. Mark Kantor in his comment on Article 5(2)(d) of the First Version, wherein he has

[17] *Supra* note 1, at 10.

[18] *Id*. The team at CAR suggested *"It is also important to ensure that this provision does not discourage adjudicators from talking and sharing ideas with the community to help develop arbitration law. Therefore, 'relevant public speeches' must be defined as only those speeches that raise doubts over standard of fairness or impartiality of the adjudicators, and are 'publicly available.'"*

succinctly put forth that considering the magnitude of publications and speeches made by arbitrators, and the possible connotations that the terms publications and public speeches have, it becomes practically impossible to make disclosure of all publications and relevant public speeches.[19] The non-inclusion of Article 5(2)(d) in the Second Version manifests that the WG III has sought to find a balance between the interests of all stakeholders. It is essential that the Code which is formulated is in the best interests of both, the parties and the adjudicators. The requirement of disclosing all publications and speeches, which adjudicators have undertaken over a very long period of time, would be extremely burdensome and may open the doors for unnecessary or frivolous challenges. In this regard, it would be very helpful if the WG III releases an assessment on relevance and effectiveness of viewing issue conflicts as conflict of interests in ISDS.[20]

Finding a practical solution for issue conflicts in ISDS is a very difficult task. The reason being that issue conflicts, in its truest sense, would deal with inherent views and perspectives of adjudicators, whether or not they have been expressed in publications or speeches by the adjudicators. Adjudicators, being human beings, are susceptible to beliefs and presuppositions, and they naturally bring these with them to the arbitration. The WG III must assess the practical solutions that may prevent issue conflicts from compromising the credibility of ISDS, as a whole, and awards rendered by arbitrators. In this regard, it will be appropriate to refer to the decision in the disqualification challenge against Professor Campbell McLachlan in the case of *Urbaser SA v. Argentine Republic*. The two remaining arbitrators, while considering the question of issue conflicts, had opined that the ability to change one's mind based on new evidence or arguments is one of the main qualities of an

[19] *Supra* note 16, at 139. Mr. Mark Kantor states that "*Art. 5.2(d) requires adjudicators to disclose a list of all publications and, in brackets, their relevant public speeches. Using myself as an example (and believing that many others are similarly situated), I cannot comply with these requirements. I have been publishing for at least 42 years. I have not maintained a comprehensive list of publications for that period. Many of those publications have little to do with international investment law, investments, or indeed even law – it is hard to see how that is relevant to an assessment of my possible conflicts. Moreover, I have made many posts over the decades on listservs, social networks or similar platforms – are those publications? I do not keep a record of those posts either. As for "public speeches," I again have been giving presentations for decades. I do not keep a comprehensive record – indeed, I normally speak from handwritten notes that I discard promptly after the event. Further, what is covered – is my participation on a panel of discussants at a conference covered? As a moderator of such a panel? As a "speaker" at a program sponsored by a student group?*"

[20] The WG III may consider to undertake an assessment similar to ICCA Reports No. 3: ASIL-ICCA Task Force Report on Issue Conflicts in Investor-State Arbitration, https://cdn.arbitration-icca.org/s3fs-public/document/media_document/asil-icca_report_final_5_april_final_for_ridderprint.pdf. The ASIL-ICCA Task Force was composed of a diverse group of leading experts from a wide range of professional backgrounds, including arbitrators, counsel, members of arbitral institutions, and academics. The Report was intentioned to provide evaluation and practical resolution of potential challenges arising out of issue conflicts and reflecting on the fundamentals of ISDS.

academic.[21] Therefore, merely because an adjudicator has expressed a certain position in his past academic works on legal issues relevant to the arbitration should not automatically lead to the conclusion that the adjudicator has prejudged the issues and cannot decide the matter with a sense of fairness or an open mind.[22] It is unlikely that a hard and fast rule of disclosure will ably tackle the conflict of issue conflicts because the same are highly fact-dependent and need to be assessed through specific thorough enquiries. The authors have some recommendation in this regard and the same has been elaborated in the next part of the paper.

C. Article 4, earlier Article 6

As can be seen from the above table, the scope of Article 4 in the Second Version, which was Article 6 in the First Version has been streamlined. This provision is arguably the most contentious provision inserted in the Code for the reason that it seeks to regulate the practice 'double hatting', which as suggested by many scholars is a major cause of apprehension of real or apparent bias in an ISDS proceeding.[23] In the context of ISDS, double-hatting may be referred to as the practice by which one individual acts in two different roles in ISDS cases simultaneously or within a short time period.[24] It usually refers to being an arbitrator and a counsel simultaneously, but it may extend to various other roles such as an expert witness or mediator in separate ISDS proceedings.[25] Several parts of this provision had been left open for further deliberation and comments from stakeholders in the First Version. The WG III, in Article 6 in the First Version, had sought comments from all stakeholders on the appropriate way to regulate double hatting in ISDS. For the same, the WG III had provided for an alternative between (a) a blanket ban on adjudicator performing multiple roles simultaneously [within X years of] on matters that involve the same parties, [the same facts] [and/or] [the same treaty] and (b) a disclosure of the matters where adjudicators acted as counsel, expert witness, judge, agent or in any other relevant role at the same time as they are [within X years of] acting on matters that involve the same parties, [the same facts] [and/ or] [the same treaty].

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[21] Urbaser S.A. v. Argentina Republic, ICSID Case No. ARB/07/26, Decision on Claimants' Proposal to Disqualify Professor Campbell McLachlan, Arbitrator, ¶ 51 (Aug. 12, 2010).

[22] *Id*. at ¶45. The disqualification challenge was rejected by the remaining two arbitrators on the ground that the mere showing of an opinion, academic or otherwise, even if relevant in a particular arbitration, is not sufficient to sustain a challenge for lack of independence or impartiality of an arbitrator.

[23] Sergio Puig, *The Death of ISDS?,* KLUWER ARBITRATION BLOG (March 16, 2018), http://arbitrationblog.kluwerarbitration.com/2018/03/16/the-death-of-isds/. The Author states that *"While serving as arbitrators, the professionals also represent clients, thus wearing "double hats," raising challenges to their legitimacy and impartiality."*

[24] ICSID, Code of Conduct – Background Papers: Double Hatting 1, https://icsid.worldbank.org/sites/default/files/Background_Papers_Double-Hatting_(final)_2021.02.25.pdf.

[25] *Id.*

Article 4 in the Second Version now provides that adjudicators are required not to act as expert witness or counsel in another IID case, unless otherwise agreed between the parties. It is important to note that the WG III has limited the restriction on multiple roles only to counsel or expert witness, as opposed to an array of other roles stipulated in the First Version. The Second Version also qualifies this prohibition by the consent of parties. Therefore, if the parties give consent to other concurrent roles played by adjudicator (which he/she shall duly disclose), then the adjudicator can continue to act in these concurrent roles. The reason behind narrowing down on adjudicator on one hand and counsel/expert witness on the other hand is that "*this appears to be the overlap that most likely creates conflict, and which is of greatest concern in terms of the legitimacy of IID settlement.*"[26] It is still undecided whether this prohibition is sought to be applied absolutely or qualified by yet another criterion, i.e., the factual background or one of the parties (including its subsidiary or affiliate) being same.

The authors, along with other researchers, as part of the CAR team, had suggested that the Code should impose a mandatory disclosure regime as against a complete bar on the adjudicators to perform multiple roles.[27] The change made to this provision seems to be partially in line with the earlier recommendation of the authors when read with Article 10(2)(c) of the Second Version. Article 10(2)(c) provides that the adjudicator must disclose all IID [and non IID] proceedings in which the Adjudicator has been involved in the past [5/10] years or is currently involved in as counsel, expert witness, or adjudicator.[28] Therefore, adjudicators will be required to disclosure such information and in the event that the parties do not have any reservation in that regard, the adjudicator will be permitted to continue as an adjudicator in the concerned matter. Therefore, the mandatory bar on double hatting is now qualified by party consent. The qualification introduced in the provision in the form '*unless the disputing parties agree otherwise*' is a valid introduction as it allows the disputing parties to assess the circumstances and decide if they want to continue with or challenge the concerned adjudicator.

An outright ban on multiple roles would lead to the exclusion of a greater number of professionals than necessary to avoid conflict of interest, and would impede the elementary right of the parties to choose the best suited adjudicators and counsels for their arbitrations. Moreover, an outright ban would be detrimental to young professionals, as in the early stages of their careers it would be unlikely for them to sustain themselves by exclusively performing a single role. This would be antithesis to the efforts being made by the international arbitration community to foster diversity in the system.

[26] *Supra* note 13, at ¶ 29.
[27] *Supra* note 1, at 14-15.
[28] *Supra* note 13, art. 10(2)(c).

The authors have a further recommendation in this regard and the same can found in the next part of the paper.

D. Article 5, earlier Article 8(2)

Article 8 of the First Version required adjudicators covered by the Code to meet the broader requirements of availability, diligence, civility, and efficiency at each stage of the arbitral proceedings. The general scheme of Article 8 of the First Version was to impose a positive obligation on adjudicators to maintain the highest standards of professionalism and punctuality throughout proceedings. Article 8(2) of the First Version more specifically sought to achieve the envisaged ends of availability, diligence, civility, and efficiency by seeking to cap the number of IID cases which an adjudicator adjudicated at once, leaving it open to suggestions as to what would be an objectively suitable number for setting such a cap.

Article 8, which is now Article 5 in the Second Version, has altogether done away with the requirement of capping the number of proceedings an adjudicator could adjudicate. The explanation to the Second Version states such requirement has been deleted in light of comments noting that the number of cases an adjudicator can reasonably address depends on many variable factors, including the stage of the case, its complexity, and the role of the adjudicator.[29] A salient addition to this article is the obligation upon an adjudicator to not delegate their decision-making function to an assistant or a third person. This provision was previously found in the erstwhile Article 7 but has now been assimilated into Article 5. The decision to remove the cap on the number of IID cases which an adjudicator can adjudicate at once is good. The reason being that merely because adjudicators are involved in multiple IID cases does not in itself confirm that they shall not be available to fulfil their roles in a punctual and efficient manner. It is very important to ensure that the Code does not impose unnecessary limitations on the appointment of an adjudicator as the same (a) intrudes into the freedom of parties to appoint their desired adjudicator and (b) impedes on the right of adjudicators to be appointed, particularly newer, less experienced arbitrators who may need multiple cases to make arbitration a full-time role.[30] In this regard, the authors, along with other researchers at CAR, in their comments to the ICSID Secretariat, had suggested that greater efficiency, transparency and accountability can be achieved through a disclosure mandate.[31] The disclosure mandate would require adjudicators to disclose and update the parties of their availability/available dates, such that parties could assess if the schedule of the adjudicator permits them to ensure efficient timelines for the

[29] *Supra* note 13, at ¶ 33.
[30] *Supra* note 16.
[31] *Supra* note 1, at 27-28.

arbitration. The same could enable the parties to make reasonable assumptions about the workload and ability of the adjudicator to deliver timely judgments. The title of Article 8 in the First Version was Availability, Diligence, Civility and Efficiency, and it provided additional requirements of civility, punctuality, respect, collegiality, consideration of best interests of parties. The same has been done away with by the WG III in Article 5 of the Second Version, which now has the title 'Duty of Diligence'. Instead, a separate article, i.e., Article 6 of the Second Version deals with other duties of the adjudicators, which include the duties of remaining available and treating parties with civility. The comments of the authors on Article 5 of the Second Version can be found in the next part of the paper.

E. Article 7, earlier Article 10

Article 10 of the First Version sought to regulate the manner in which pre-appointment interviews of potential candidates are taken in the ISDS regime. It provided that pre-appointment interviews be only restricted to inquiring about the availability of a candidate and not any jurisdictional, substantive or procedural questions arising out of the proceedings. Towards such an end, an option was provided for disclosure of pre-appointment interviews to disputing parties in case a formal appointment was made in furtherance of any such interviews.

The CAR, in its comments, submitted that such interviews must not touch upon substantive matters at stake and ought to be restricted to well-defined contours which include names of the parties in dispute and any third parties, general nature of the case to allow assessment whether candidate feels competent to hear the case, i.e., whether the candidate is withheld due to the existence of a conflict.[32] It was also suggested that a provision must be made for video recording of such interviews as a check and balance mechanism to see that propriety is observed in the way these interviews are conducted.[33] Additionally, keeping in line with the principle of independence, a provision should be added to the effect that such interviews should not be compensated except for any travel or transportation costs incurred by the candidate.[34]

Article 10 in the First Version, now dealt with by Article 7 in the Second Version, has not seen a substantial change. Restriction on ex-parte communication between an adjudicator and parties concerning the proceedings, which was earlier provided for under Article 7(2) of the First Version has now been reproduced in Article 7(3) of the Second Version with a modification. Article 7(3) in the Second Version provides that "*An Adjudicator shall not have any ex parte contacts with a party*

[32] *Supra* note 1, at 32.
[33] *Supra* note 1, at 33.
[34] *Id.*

concerning the proceeding other than communications contemplated by the applicable rules or treaty or consented to by the parties."[35]

III. RECOMMENDATIONS ON THE SECOND VERSION

At the outset, the authors believe that the Second Version is a more practical and clearer version of its predecessor. The WG III has effectively incorporated the comments received from all stakeholders and also ensured that the Code is more balanced and reasonable in the obligations it imposes on the adjudicators. With respect to the five articles which form the subject of the present analysis, the authors have certain recommendations, for further clarity, and to ensure that the underlying objectives of these provisions are met. The specific suggestions for each article are discussed below.

A. Article 10(2)(a)(iv)

As commended by the authors, Article 10(2)(a)(iv) is a much more practical and streamlined version of its predecessor. The WG III has removed the phrase '*direct and indirect interest*,' and thereby has made the disclosure mandate more definite and clearer. However, there are certain aspects of the provision which could benefit from greater clarity. The recommendations are being made to address (a) the scope and (b) explanation of key terms of Article 10(2)(a)(iv).[36]

Firstly, Article 5(2)(a)(iv) in the First Version required the adjudicators to disclose if they had a professional, business and other significant relationships with **any third party**, who has a financial interest in the outcome of the proceedings. However, as evident from the text of Article 10(2)(a)(iv) reproduced above, the disclosure mandate in the Second Version has been limited to only **third-party funders**. Therefore, the adjudicators will not be required to disclose their relationship with any other type of third parties that may have a financial interest in the outcome of the proceedings. The authors are unable to agree that relationship of adjudicators only with third party funders warrant disclosure.

The probable reason why the scope this provision has been limited to only third-party funders, as against any third party, is because third party funders are most likely to be the third parties that are involved in ISDS and give rise to concerns related to conflict of interest. The authors are in consensus with the WG III that conflict of interests arising out of third-party funding is a major concern owing to the widespread and growing use of third-party funders in ISDS. However, it will be in the interest of efficiency to require disclosure of relationship with any third party that has a financial interest in

[35] *Supra* note 13, art. 7(3).

[36] *Supra* note 13, art. 10. Article 10(2)(a)(iv) states, "*2. Adjudicators shall make disclosures in accordance with paragraph (1) and shall include the following information:*
(a) Any financial, business, professional, or personal relationship within [the past five years] with:
(iv) any third-party funder with a financial interest in the outcome of the proceeding and identified by a party".

the outcome of the proceedings. This will ensure that if adjudicators have any relationship with third parties, other than third party funders (and those mentioned in Article 10(2)(a)(i)), the same is also disclosed by them. Other financially interested parties can include insurers, insurance companies, ultimate beneficial owners, investment banks, hedge funds, persons entitled to receive proceeds of an award under a third-party funding or other agreement, persons obligated to pay an award under an indemnification or other agreement, among others. Additionally, the WG III may consider providing an indicative list as to the types of relationships that may be covered under the term 'third party.' Requiring disclosure of relationships with other financially interested parties will not be onerous as the Second Version now requires the parties to themselves name or identity the interested third parties. Therefore, the authors propose that Article 10(2)(a)(iv) may be amended to include third parties other than third party funders. Moreover, a particular emphasis may be made on third party funders to highlight their increasing relevance in ISDS. The amended Article 10(2)(a)(iv) may take the following form: "*Any third party with a financial interest in the outcome of the proceeding, including, in particular third-party funders, that have been identified by the parties*."

Secondly, in order to accord more clarity to Article 10(2)(a)(iv), the WG III can consider providing a definition for the term 'third party funders.' Given that the WG III has rightly sought to address third party funders more narrowly and precisely, it would be appropriate to explain as to how the Code understands the term 'third party funders.' Providing a definition will allow both parties and adjudicators to adequately identify and disclose any relevant material. In order to provide the definition of 'third party funders,' the WG III may consider incorporating the language used in the draft ICSID Arbitration Rules amendments. It defines a 'third party funder' as "*any non-party from which the party, directly or indirectly, has received funds for the pursuit or defense of the proceeding through a donation or grant or in return for remuneration dependent on the outcome of the proceeding," excluding "a representative of a party.*"[37] The authors propose that incorporating similar text in the Code will further streamline Article 10(2)(a)(iv) and avoid the possibility of any confusions with respect to the disclosure mandate.

Thirdly, Article 10(2)(a)(iv), and Article 10 as a whole, has now dispersed with the phrase '*direct and indirect financial interest*' and has replaced the same with '*financial interest*'. As previously highlighted by the authors, this is a welcome change as it does away with the uncertainty that came with the same. To give further clarity to this article, the WG III may consider providing an indicative list (non-exhaustive) as to what would be considered as financial interest under this article. The same

[37] 1 ICSID, *Working Paper 4: Proposals for Amendment of the ICSID Arbitration Rules*, Rule 14 37 (2020), https://icsid.worldbank.org/sites/default/files/amendments/WP_4_Vol_1_En.pdf.

need not be included in the main article and rather can be explained in the Commentary to the article. For instance, the Commentary to Article 10 in the Second Version notes, for avoidance of doubt, that the adjudicator's remuneration for work performed and reimbursement of expenses incurred in connection with the IID proceeding is not considered a financial interest for the purposes of Article 10. Similarly, a little more guidance as to what constitutes financial interest with respect to third party funders or other third parties in sub-para (iv) of Article 10(2) would be useful. The idea is to make the disclosure mandate easier by providing direction to the parties and the adjudicators, such that the same can be complied with without any hassle or confusion. It may be noted that as per Article 10(5) "*adjudicators should err in favour of disclosure if they have any doubt as to whether a disclosure should be made*." However, a little more clarity will not harm the Code and will only make the task easier and efficient.

Fourthly, as can be seen in Article 10, 'candidates' have been excluded from the disclosure mandate under this provision. In the First Version, both candidates and adjudicators were covered by the disclosure mandate of the Code. However, the revised form of the Article in the Second Version has limited the requirement only to adjudicators. The commentary on Article 10 does not explain this change. The term 'Candidates' has been defined under Article 1(4) of the Second Version and it refers to a person who has been contacted regarding potential appointment as an adjudicator. It is unclear as to why candidates have been removed from the scope of Article 10. The timeline when the disclosure under Article 10 must be made has not been made explicit by the WG III. However, by reason of candidates being excluded from the Ambit of Article 10, it can be inferred that the disclosure under Article 10 must be made only after the adjudicator has been appointed. Importantly, Article 7 of the Second Version, which deals with pre-appointment communication between parties and the candidate, requires that discussion must include ascertaining the absence of any conflict of interest. Therefore, during the pre-appointment communications, the potential candidates must be required to make disclosures, and the same must take the form of disclosure made under Article 10. This would be in line with the IBA Guidelines on Conflicts of Interest in International Arbitration ["**IBA Guidelines**"], which require a candidate to make any disclosures "*prior to accepting his or her appointment or, if thereafter, as soon as he or she learns of them*."[38] The authors propose that the ambit Article 10 must, therefore, extend to both candidates and adjudicators, as was the position in the First Version.

Fifthly, the WG III must consider providing the timeline of making disclosures under Article 10. It is unclear when an adjudicator is required to make his/her initial disclosures under Article 10. While

[38] IBA Guidelines on Conflicts of Interest in International Arbitration, art. 3 (2014).

the same may be governed by the respective applicable arbitration rules, the Code must provide some clarity in that regard. Article 10(4) only provides that the adductors have a continuing duty but does not indicate as when does that duty begin. A reference can again be drawn to the IBA Guidelines, which provide that the disclosures made be made prior to accepting appointment or, if thereafter, as soon as he or she learns of them. Similarly, Para 4 (b) and (c) of the CPTPP Code of Conduct reads as follows:

> "(b) The disputing parties or the Secretary-General, as the appointing authority for an arbitration referred to in Article 9.22.2 (Selection of Arbitrators), will provide a candidate a copy of this Code of Conduct and the Initial Disclosure Statement set out in the Appendix to this Code of Conduct.
>
> (c) A candidate shall submit the Initial Disclosure Statement set out in the Appendix to this Code of Conduct to the disputing parties or the Secretary-General, as the appointing authority, no later than seven days after receipt of that Statement."[39]

Comments received on the First Version also pointed out this requirement, but the same was not considered by the WG III. However, to accord utmost clarity to the Code, and in line with the aforementioned, the authors propose that the WG III must consider to include a timeline for disclosures to be made under Article 10. If not a specific timeline, as seen in the CPTPP Code of Conduct, the following text may be considered: *"Disclosures must be made as soon as possible in view of the information available to the adjudicator at the time or in accordance with the applicable rules."*

Lastly, the authors propose that the WG III should consider mentioning the consequences of non-disclosure in accordance with Article 10. While the Code explicitly states that non-disclosure by an adjudicator does not in itself establish a breach of this Code, it might also be prudent to highlight (at least in the commentary) the consequences of failure to disclose a material fact in accordance with Article 10. Would the non-disclosure of a certain fact under Article 10 amount to a breach of the Code? The Commentary to Article 11 answers this question in the negative. This is in consonance with the general practice in international arbitration, which suggests that a mere non-disclosure of a certain fact would not in itself warrant the disqualification of arbitrators, unless the non-disclosure is of a fact which rises to the level of a lack of independence or impartiality under Article 3 of the Code.[40] Article 11(2) of the Second Version provides that the disqualification and removal procedures

[39] The Code of Conduct for Investor-State Dispute Settlement Under Chapter 9 Section B (Investor-State Dispute Settlement) of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership.

[40] *See* IBA Rules of Ethics for International Arbitrators, art. 4.1 (1987); Alpha Projektholding GmbH v. Ukraine, ICSID Case No. ARB/07/16, Decision on Respondent's Proposal to Disqualify Arbitrator Dr. Yoram Turbowicz (2010.; Azurix Corp. v. Argentine Republic, ICSID Case No. ARB/01/12, Award (2006); Tidewater Inc. and others

in the applicable arbitration rules shall apply to breaches of Articles 3-8 the Code. As evident, a breach of Article 10 is not covered under the ambit of Article 11(2). However, since the Code seeks to provide for effective implementation of the Code, the WG III might want to include a certain direction in this regard to give teeth to the disclosure mandate prescribed under Article 10 of the Second Version. The same can be done by mentioning in the Commentary to Article 11 that non-disclosure of a **material fact** under Article 10 might be a ground for a successful challenge under Article 11(2). Material fact can be defined as a fact which rises to the level of a lack of independence or impartiality under Article 3 of the Code.

B. Non-inclusion of Article 5 (2)(d) of the First Version

The authors highlighted that requiring the disclosure of all publications and relevant public speeches was an extremely onerous requirement, and was therefore not included in the Second Version. However, having said that, it is also important to understand that the concerns surrounding issue conflicts are not hypothetical in nature. Particularly, issue conflicts are at the heart of the debates regarding the increasing criticisms of ISDS that there is lack of objectivity in decision making. Though challenges based on the ground of issue conflicts are rarely successful, there is evidence to show that several challenges alleging 'issue conflict' have recently succeeded. One of the prime examples of the same is when the then-President of the International Court of Justice upheld a challenge on the basis of an arbitrator's "*strongly held and articulated positions*" regarding a legal issue that was significant to the concerned matter.[41] Another example where issue conflict was the ground for a successful challenge was when the President of the ICSID Administrative Council upheld a challenge against Mr. José Maria Alonso. In this case, the challenge was upheld based on the Mr. Alonso's partnership in the law firm which was representing a different claimant in a case against the same Respondent State.[42] Lastly, in a decision that was rendered by two unchallenged arbitrators, the challenge was upheld on the ground that the arbitrator had been involved in another case involving the same respondent and similar facts involving, inter alia, the same witness.[43]

There is no doubt that regulating issue conflicts is one of the most difficult tasks that is posed before the WG III. The practical problems that arise with over regulation of issue conflicts has already been

v. the Bolivarian Republic of Venezuela, ICSID Case No. ARB 10/5, Decision on Claimants' Proposal to Disqualify Professor Brigitte Stern, Arbitrator (2010).

[41] CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited, and Telcom Devas Mauritius Limited v. Republic of India, UNCITRAL, Decision on the Respondent's Challenge to the Hon. Mark Lalonde as Presiding Arbitrator and Prof. Francisco Orrego Vicuña as Co-Arbitrator, ¶ 53 (Sept. 30, 2013).

[42] Blue Bank International & Trust (Barbados) v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/12/20, Decision on the Challenge to José Maria Alonso (Nov. 12, 2013).

[43] Caratube International Oil Company LLP and Devincci Salah Hourani v. Republic of Kazakhstan, ICSID Case No. ARB/13/13, Decision on the Proposal for Disqualification of Mr. Bruno Boesch (Mar. 20, 2014).

explained by the authors in the previous part of this paper. However, in light of the fact that issue conflicts are central to the concerns of lack of objectivity in ISDS, the complete absence of any mention of the same in the Second Version may be seen as questionable by several stakeholders. It is certain that Article 5(2)(d) was very broad and imposed unreasonable obligations on the adjudicators, and thus was rightly not included by the WG III in the Second Version. However, while a broad disclosure mandate is unjustified, an attempt must be made to find a balance between the best interests of both, the parties and the adjudicators. The underlying objective or purpose of disclosures under Article 10 is not to facilitate challenges but rather to anticipate and avoid them. The disputing parties have a right to assess the information disclosed and decide the course of action they want to choose. In the opinion of the authors, regulating issue conflicts is important for the perceived objectivity, legitimacy, and credibility of ISDS, even if issue conflicts can rarely be practically ascertained in reality. Therefore, we propose, that instead of a complete removal of a provision requiring disclosure of issue conflicts (manifested in form of publications and speeches), a very limited disclosure obligation can be imposed on the adjudicators, which would come into play only in extraordinary circumstances.[44] The same must require the adjudicators to disclose if they have been "***actively*** *involved in the* ***public advocacy*** *of the specific case, legal questions or facts of the matter in a manner that suggests bias or prejudgment of the case.*"

While isolated publications or speeches do not warrant disclosures (and it is not practical for adjudicators to keep a record of them), in cases where an adjudicator has been constantly and rigorously involved in public advocacy (whether through speeches or publications), the same must be made known to the parties. The word 'actively' must be given due notice as it would mean that the adjudicators have, over time, taken a certain public position on the specific case, legal questions or facts of the matter in a manner that suggests bias or prejudgment of the case. By way of example, if a certain adjudicator has constantly, through his words and works, questioned the manner in which a certain Respondent State treats its investors, the same must definitely be disclosed as it would be a *prima facie* case of issue conflict. Such a disclosure obligation would not be cumbersome, but will ensure the perceived objectivity, credibility, and legitimacy of ISDS proceedings.

[44] For instance, the Code of Conduct for arbitrators under the EU-Canada Comprehensive Economic and Trade Agreement (CETA) specifically provides that candidate arbitrators shall disclose "*public advocacy or legal or other representation concerning an issue in dispute in the proceeding or involving the same matters*." The arbitrator Codes of Conduct in CETA, the EU-Singapore Free Trade Agreement, and the EU-Vietnam Free Trade Agreement all further provide that an arbitrator "*shall not be influenced by self-interest" or use his or her position "to advance any personal or private interests*."

C. Article 4

In the authors' opinion, Article 4 of the Second Version has found a right balance between the interests of all stakeholders. An aspect that the WG III has still not conclusively decided is whether there should be a full prohibition on multiple roles or the same should apply only when the cases have the same factual background and at least one of the same parties or their subsidiary, affiliate or parent entity. The authors believe that there should not be a full prohibition under Article 4 and instead the WG III must adopt a tailored approach, imposing a restriction only where the cases involve 'the same factual background' and 'at least one of the same parties or their subsidiary, affiliate or parent entity.' There are two reasons for this recommendation:

Firstly, the authors strongly believe that a full prohibition will be detrimental to diversity in ISDS. As has been recognized by the WG III in the commentary to this article, a full prohibition will be particularly detrimental to the new entrants in the field, as they need to take up multiple roles in order to establish themselves in the field.[45] Adopting a tailored approach will not only allow new entrants the freedom to take up multiple roles in unrelated matters, but will also effectively take care of conflicts that arise when the matters are similar (either factually or by way of the parties involved).

Secondly, the tailored approach is compatible with party autonomy in appointment of arbitrators. There is no need for the Code to impose more restrictions on appointment than necessary. The only reason why there could be a full prohibition on multiple roles in unrelated matters is to ensure availability of adjudicators and the same has already been taken care of by Article 5(1) of the Code.[46] Therefore, when there is no real possibility of a conflict of interest, there is no need to unnecessarily complicate the code by providing excessive restrictions. The authors propose that the WG III should adopt the tailored approach and accordingly give examples of when concurrent cases would be considered to address the same factual context or the same party (as proposed in the Commentary). Another suggestion would be to use this opportunity (i.e., the Code) to highlight the importance of fostering diversity in ISDS. By opting for a tailored approach over a full prohibition over multiple roles, the Code would be doing the diversity discourse a favour by allowing new diverse entrants to find their feet in the field without blanket restrictions on multiple roles. Diversity has been a pressing issue in international arbitration for a long time now. While the Code does not directly seek to promote diversity in ISDS, it will naturally impact the same. Therefore, the WG III should consider mentioning

[45] *Supra* note 6, at ¶ 68.

[46] *Supra* note 13, art. 5(1). Article 5(1) states that *"Adjudicators shall perform their duties diligently throughout the proceeding and shall refuse competing obligations. They shall be reasonably available to the parties and the 8 administering institution, shall dedicate the necessary time and effort the proceeding, and shall render all decisions in a timely manner."*

(in the Commentary to Article 4) that one of the reasons for opting for a tailored approach as against full prohibition is to foster diversity in ISDS.

D. Article 5

With respect to Article 5, the authors reiterate the recommendation made earlier by the CAR team to the ICSID Secretariat. Greater efficiency, transparency and accountability can be achieved by introducing a disclosure mandate for Article 5. The disclosure mandate would require adjudicators to disclose and update the parties of their availability/available dates, such that parties can assess if the schedule of the adjudicator permits them to ensure efficient timelines for the arbitration.[47] The same would enable the parties to make reasonable assumptions about the workload and ability of the adjudicator to deliver timely judgments, thereby making the arbitral process consistent with its goals of time and cost efficiency.

E. Article 7

Insofar Article 7 is concerned, the authors recommend that the Commentary to the Code should provide an exhaustive set of criteria based on which pre-appointment interviews ought to be conducted. In this regard, the Code may draw guidance from Article 2 of the Chartered Institute of Arbitrators (CIArb) Practice Guidelines[48] or Para 49 of the International Chamber of Commerce's (ICC) Note to Parties and Arbitration Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration,[49] both of which impose positive obligations upon parties and adjudicators to only delve into certain defined aspects for the purposes of interviewing the prospective adjudicator. The Code can also accommodate a negative obligation upon parties and adjudicators to not delve into certain aspects for the purposes of interviewing the prospective adjudicator. In this regard, the Code may draw inspiration from Article 3 of CIArb's Practice Guidelines.[50] Furthermore, Article 7(2) of

[47] *Supra* note 31.

[48] International Arbitration Practice Guideline: Interviews for Prospective Arbitrators, art. 2 (Aug. 30, 2016). Article 2 limits scope of pre-appointment discussions to "*past experience in international arbitration and attitudes to the general conduct of arbitral proceedings; expertise in the subject matter of the dispute; availability, including the expected timetable of the proceedings and estimated timings and length of a hearing; and/or in ad hoc arbitrations, the prospective arbitrator's reasonable fees and other terms of appointment, to the extent permissible under the applicable rules and/or law(s).*"

[49] Note to Parties and Arbitration Tribunals on the Conduct of the Arbitration Under the ICC Rules of Arbitration ¶ 49 (Jan. 1, 2019). ¶ 49 states that *"prospective arbitrator may communicate with a party or party representative on an ex parte basis to determine his or her expertise, experience, skills, availability, acceptance and the existence of potential conflicts of interest"*. As per clause (c), *"in all such ex parte communications, an arbitrator or prospective arbitrator shall refrain from expressing any views on the substance of the dispute"*.

[50] *Supra* note 48, art. 3. Article 3 refrains parties and arbitrator from *"discussing the specific facts or circumstances giving rise to the dispute; the positions or arguments of the parties; the merits of the case; and/or the prospective arbitrator's views on the merits, parties' arguments and/or claims"*.

the Second Version has been left bracketed, as it was in the First Version (then, Article 10(2)). Explanation to Article 7(2) states that while some comments on the First Version that "*Article 7(2) was unnecessary and could be onerous if there were multiple contacts*", others were of the opinion "*that a provision such as Article 7(2) could easily be complied with by a recording or transcript and was a useful guarantee of compliance with Article 7(1).*" [51] Authors reiterate their previous suggestions that a recorded pre-appointment interviews [**"PAI"**] with the chosen candidate must be disclosed to the other party, such recording being present in, preferably, video or otherwise audio.[52] While there may exist apprehensions that such recordings could be onerous, the opportunity cost of not having such recordings can cast serious aspersions over the integrity and fairness of the arbitral process. It is also suggested that the article must also incorporate a clause to the effect that such pre-appointment interviews must not be remunerated or compensated in any manner except travel expenses of the candidate (if the venue of the meeting is outside an office), which ought to be reimbursed. [53]

IV. CONCLUSION

The need for a uniform and well-defined mechanism such as the Code is amplified in light of the recent annulment decision in *Eiser* v. *Spain,*[54] wherein the ad hoc Committee annulled the impugned award in its entirety on the ground that claimant-appointed arbitrator had omitted to disclose a professional relationship with the claimants' damages expert. The successful annulment in this case exhibits the far-reaching consequences of non-disclosure by adjudicators. It is therefore imperative that the WG II provides a workable mechanism to regulate conflict of interests, disclosures, double hatting and other factors impacting the constitution of the tribunal. In the absence of such a mechanism, awards rendered in ISDS will be susceptible to annulment, which would not only lead to increase in time and costs, but will also hamper the credibility of ISDS in general.

Having said that, the Code should not be viewed in isolation of the policy objectives that it seeks to achieve. Discussions and deliberations on the adoption of the Code should focus on attaining an equilibrium between the interlinked policy and ethical considerations. Moreover, the Code should also not be constructed in isolation of practical considerations, of which the First Version was sadly

[51] *Supra* note 13, at ¶ 37.
[52] *Supra* note 33.
[53] *See Supra* note 48, art. 1(5). Commentary to the article elaborates "*If the interview takes place in a business location other than the prospective arbitrator's office and they have to travel to the meeting, they may be reimbursed for their reasonable travel expenses or, if it takes place by telephone and/or videoconference, they may be reimbursed for any reasonable communication expenses."*
[54] Eiser Infrastructure Limited and Energia Solar Luxemburg S.À.R.L. v Kingdom of Spain, ICSID Case No. ARB/13/36, Decision on Annulment (June 11, 2020).

guilty. It is essential to understand that the Code is not a mere academic or theoretical document. It is a document which is intended to be strictly implemented. Therefore, to ensure such implementation, the Code should find the right balance between factors such as (a) ethical concerns, (b) regulating conflict of interest, (c) ensuring effective disclosures, (d) fostering diversity, (e) ensuring credibility and objectivity, (f) party's autonomy to make appointments and (g) practical considerations of the adjudicators. The Second Version is much closer to achieving this balance and provides a more practical and implementable document than its predecessor. Perhaps, the most tedious task will be ensuring the smooth enforcement of the Code. The WG III is working on a separate paper that will discuss the possible methods of implementing the Code, and the same will be published separately.

REFLECTIONS ON THE JUDICIAL APPROACH IN ARBITRATION MATTERS CONCERNING GOVERNMENT AND PUBLIC SECTOR ENTERPRISES

Dr. Kaushal J. Thaker[*]

Abstract

This article delves into the disputes involving the government, emanating from arbitration proceedings. The focus of the article involves the Arbitration Act of 1940 and the Arbitration and Conciliation Act of 1996. Various Supreme Court and High Court judgments covering both these Acts and the modalities of the judgments have been discussed and analysed, with a focus on the evolution of the law to its present footing. The article also has a key focus on the types of challenges available under the Act of 1940 and the development of the law via judicial decisions and their incorporation in the Act of 1996 and its further amendments. The key facets under this area are the interpretation of arbitral agreements, challenges and the jurisdiction of the Court via different mechanisms.

I. INTRODUCTION

"Peace in lis is essence of arbitration"

- Justice M.S. Parikh[**]

When parties agree to settle their dispute through arbitration, and choose their arbitrator "*they seek to sway away from the procedural niceties and delays inherent in litigation, and aim to undergo a comparatively party-centric, efficacious, confidential, and fairly flexible process.*"[1] The Arbitration and Conciliation Act, 1996, ["**A & C Act**"] based on the United Nations Commission on International Trade Law ["**UNCITRAL**"] Model Law lays down the legal framework to help parties achieve the aforementioned objectives by laying down the principles of party autonomy and minimum judicial intervention amongst others. However, in my opinion, the doctrine of minimum judicial intervention is merely lip service as litigations in this sphere of law have increased manifold primarily because of the expanding functions of the government and its instrumentalities.

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[1] Kaushal J. Thaker, *Glimpses and Gleaning of Alternative Disputes Redressal Mechanism in India: An Overview* in CHIRAG BALYAN AND YASHRAJ SAMANT, COMMERCIAL ARBITRATION: INTERNATIONAL TRENDS AND PRACTICES (2021) at 9.

The A & C Act has repealed the Arbitration Act of 1940,[2] along with the Acts of 1937[3] and 1961,[4] and aims to consolidate and define laws relating to domestic and international arbitration.

Interestingly, there are still pending claims or litigations under the 1940 Act and the 1961 Act. The erstwhile 1940 Arbitration Act mainly had provisions concerning post-arbitral challenges and very few pre-arbitral or during-the-proceedings challenges. In the aftermath of the A&C Act, the courts are approached at all stages, even for the appointment of arbitrators. Justice D.A. Desai in *Ramji Dayawala and Sons (P) Ltd.* v. *Invest Import*[5] expressed the anguish of the court and lamented:

> "Arbitration being a mode of resolution of disputes by a judge of the choice of the parties was considered preferable to adjudication of disputes by court. If expeditious, less expensive resolution of disputes by a judge of choice of the parties was the consummation devoutly to be wished through arbitration, experience shows and this case illustrates that the hope is wholly belied because in words of Edmond Davis J in Prince V Miller[6] these may be disastrous proceedings."

Again, within one year, the Apex Court in *Guru Nanak Foundation* v. *Rattan Singh & Sons*[7] expressed the anguish of the Court over the 1940 Act in the following words: "*the way in which the proceedings under the Act are conducted and without an exception challenged in Courts has made lawyers laugh and legal philosophers weep*."[8]

This paper, based on a survey of judicial decisions, would demonstrate that Justice Desai's remarks which were made in the context of the 1940 Act are still relevant.

In this paper, an effort is made to draw an analysis of decisions under both, the 1940 Act and the A & C Act, as the courts still decide matters under both the legislations. This paper is an explorative reconnaissance of this branch of the justice delivery system. It examines the judgments of Indian Courts primarily involving the government and the public sector enterprises.

[2] The Arbitration and Conciliation Act, 1940, now repealed.
[3] The Arbitration [Protocol and Convention] Act, 1937.
[4] The Foreign Awards [Recognition and Enforcement] Act, 1961.
[5] Ramji Dayawala and Sons (P) Ltd. v. Invest Import, (1981) 1 SCC 80.
[6] Prince v. Miller (1066)1 WLR 1235.
[7] Guru Nanak Foundation v. Rattan Singh & Sons, (1981) 4 SCC 634.
[8] *Id*, ¶1.

II. ROLE OF INDIAN COURTS IN ARBITRATION MATTERS CONCERNING GOVERNMENT OR PUBLIC SECTOR ENTERPRISE

A. No Preferential Treatment to Government under the A&C Act

The Apex Court in *Pam Developments (P) Ltd.* v. *State of West Bengal*[9] held that the A & C Act is a special Act that provides for quick resolution of disputes between the parties and Section 18 of the A & C Act makes it clear that the parties shall be treated equally.[10] The Court held that "*there cannot be any special treatment given to the Government as a party.*"[11] The court noted that while it is true that the Code of Civil Procedure, 1908 ["**CPC**"] provides for a differential treatment to the Government in certain cases [like under Section 80 of CPC], the same is not applicable while considering a case against the Government under the A&C Act.[12] In this light, the Apex Court held that the money decree can't automatically stay only because it was passed against the government.

B. Computation of Period of Limitation in Arbitral Matters

This part discusses various judgments of the Indian courts where principles pertaining to the limitation period in the context of India arbitration law are laid down.

The Apex Court in *State of Goa* v. *Western Builders,*[13] held that commercial disputes should be disposed of quickly so that the country's economic progress can be expedited. In *Union of India* v. *Tecco Trichy Engineers & Contractors,*[14] a three-judge bench of the Supreme Court of India ["**SCI**"] held that the period of limitation for filing an application under section 34 would commence only after a valid delivery of the award takes place under section 31(5) of the Act. On the issue of the limitation period for challenging the award, the Apex Court while relying on Section 14 of the Limitation Act held that time to challenge the award starts running from the date on which signed copy of the award is delivered to the party making application for setting it aside.[15] The Court further held that Section 14 of the Limitation Act, 1963 applies to an application made under the A&C Act.

In *Union of* India v. *Popular Construction,*[16] the Court held that Section 5 of the Limitation Act, 1963 would not apply to applications filed under Section 34 of the Act and therefore, the issue of sufficiency of the cause for the delay can't be considered. In *Dakshin Haryana Bijli Vitran Nigam*

[9] Pam Developments (P) Ltd. v. State of West Bengal, (2019) 8 SCC 112.
[10] *Id*, ¶24.
[11] *Id*.
[12] *Id*, ¶¶24, 25.
[13] State of Goa v. Western Builders, (2006) 6 SCC 239.
[14] Union of India v. Tecco Trichy Engineers & Contractors, (2005) 4 SCC 239.
[15] State of Maharashtra v. M/s. Ark Builders Pvt. Ltd, (2011) 4 SCC 616.
[16] Union of India v. Popular Construction, (2001) 8 SCC 470.

Ltd. v. *M/S Navigant Technologies Pvt. Ltd,*[17] the issue before the SCI was whether the limitation period to challenge the award shall be computed from the date of draft award or the date of the signed award. The Court after relying on various authorities held that it shall be calculated from the date of the signed award. The Court also noted that a dissenting opinion is not an award for the purpose of computing the limitation period. The dissenting opinion must be pronounced contemporaneously with the majority award.

The Apex Court in *Bharat Sanchar Nigam Ltd. & Anr.* v. *M/s Nortel Networks India Pvt. Ltd*.[18] while dealing with the two issues raised in the appeal namely, (i) regarding the period of limitation for filing an application under Section 11 of the Act; and (ii) whether the Court may refuse to make the reference under Section 11 where the claims are *ex facie* time-barred,[19] held that the period of limitation for filing an application under Section 11 of the Act would be governed by Article 137 of the First Schedule of the Limitation Act, 1963. Here, reference can also be made to the decision in *Secunderabad Cantonment Board* v. *B. Ramachandraiah & Sons*[20]*,* wherein the Court held that the challenge was time-barred and referred to Article 137 of the Limitation Act, the Court held that the application filed on 6.11.2013 was *ex facie* time-barred. Going into the merits of the case, the Court noted that the demand for arbitration was made by a letter dated 7 November 2006 and reiterated in another letter dated 13 January 2007 [mentioning that the appointment of arbitrator had to be made within 30 days]. Thus, the Court held that the limitation began to run on and from 12/02/2007. Therefore, the applications under Section 11 of the A & C Act were held to be hopelessly time-barred.[21]

In *Government of Maharashtra (Water Resources Department)* v. *M/s Borse Brothers Engineers & Contractors Pvt. Ltd*.[22], the Apex Court held that a delay beyond 90 days, 30 days, or 60 days can be condoned by way of exception and not by way of rule[23] and it was in the peculiar facts and circumstances of the case where the Apex Court reviewed its earlier judgment in *N.V. International*

[17] Dakshin Haryana Bijli Vitran Nigam Ltd. v. M/S Navigant Technologies Pvt. Ltd, 2021 SCC Online SC 157.
[18] Bharat Sanchar Nigam Ltd. & Anr. v. M/s Nortel Networks India Pvt. Ltd., 2021 SCC OnLine SC 207.
[19] Livelaw News Network, Limitation Period for Filing 'Section 11' Application Seeking Appointment of Arbitrator Governed by Article 137 Limitation Act: Supreme Court, LiveLaw.in (March 10, 2021, 12:52 PM), https://www.livelaw.in/top-stories/limitation-appointment-arbitrator-article-137-supreme-court-170978.
[20] Secunderabad Cantonment Board v. B. Ramachandraiah & Sons, 2021 SCC OnLine SC 219.
[21] Vasanth Rajasekaran and Saurabh Babulkar, *Indian Arbitration Quarterly Roundup 2021* (January 2021 To March 2021), Phoenix Legal (April 14, 20221), https://www.mondaq.com/india/arbitration-dispute-resolution/1057982/indian-arbitration-quarterly-roundup-2021-january-2021-to-march-2021.
[22] Government of Maharashtra (Water Resources Department) v. M/s Borse Brothers Engineers & Contractors Pvt. Ltd, Decision Dated 19 March 2021 in Civil Appeal No. 995 Of 2021 (India).
[23] Manu Sebastian, SC Overrules 'NV International' Verdict Which Held Delay Beyond 120 Days for Arbitration Appeal Under Section 37 Can't Be Condoned, LiveLaw.in (March 19, 2021, 6:48 PM).

v. *State of Assam*[24] and *Union of India* v. *Varindera Constructions Ltd*[25] and dismissed the appeals filed by the government of Maharashtra. Thus, in *Borse Brothers,* the Apex Court overturned its earlier decision in *NV International, c*larifying that an aggrieved party must file an appeal under Section 37 of the A & C Act within 60 days from the date of order. The Court further held that a delay in such filing appeals can be condoned by the appellate court, however, such condonation must be granted only by way of exception and is permissible if the delay is "short".[26]

C. Power of Appellate Courts to Interfere in Arbitral Awards

The Apex Court while interpreting the 1940 Act, held that the correctness of the award on merit cannot be examined by courts. In a five-decade-old decision in the case of *Uttar Pradesh Co-Operative Federation Ltd.* v. *Sunder Bros, Delhi*[27], which is followed even today and which the author considers to be laying a very sound foundation to obliterate delays and flimsy objections, the SCI held as under:

> "It is well established that where the discretion vested in the Court under Sec. 34 of the Indian Arbitration Act has been exercised by the lower court, the appellant court should be slow to interfere with the exercise of that discretion. In dealing with the matter raised before it at the appellant stage, the appellate court would normally not be justified in interfering with the exercise of the discretion under appeal solely on the ground that if it had considered the matter at the trial stage it may have come to a contrary conclusion. If the discretion has been exercised by the trial court reasonably and in a judicial manner the fact that the appellate court would have taken a different view may not justify interference with the trial court's exercise of discretion. As is often said, it is ordinarily not open to the appellate court to substitute its own exercise of discretion for that of the trial judge; but if it appears to the appellate court that in exercising its discretion, the trial court has acted unreasonably or capriciously or has ignored relevant facts then it would certainly be open to the appellate court to interfere with the trial court's exercise of discretion."

The Apex Court in *FCI* v. *Joginderpal Mohinderpal*[28] has held that the objection against an arbitral award can be raised only if it falls within the parameters fixed by the provisions of Section 14, and 33 of the Act, 1940. It was held that if the award is based on equity, fair play, principles of natural justice, and established practice and procedure then the award should not be interfered with. In proceedings of arbitration, there must be adherence to justice, equity, law, and fair play in action.

[24] N.V. International v. State of Assam, (2020) 2 SCC 109 (India).
[25] Union of India v. Varindera Constructions Ltd., (2020) 2 SCC 111 (India).
[26] Nishith Desai Associates, Dispute Resolution Hotline, NDA INFORMATION (April 14, 2021), https://www.nishithdesai.com/information/news-storage/news-details/newsid/6541/html/1.html.
[27] Uttar Pradesh Co-Operative Federation Ltd. v. Sunder Bros, Delhi, 1966 Supp SCR 215.
[28] FCI v. Joginderpal Mohinderpal, (1989) 2 SCC 347.

In *Puri Construction Pvt. Ltd* v. *Union of India,*[29] the Apex court held that the Court cannot decide and deny certain claims by reassessing terms of dispute and cannot hold that profit accrued shall be limited to a certain percentage only by rejecting other claims. The view in *Puri* was reiterated after a decade of the A & C Act coming into force in the case of *Rajasthan State Road Transport Corporation* v. *Indag Rubber Ltd*.[30] This shows that although the issue was well settled, the appellant took a chance and litigated the matter as far as the Apex Court, but unsuccessfully.

In *Gujarat Water Supply and Sewerage Board* v. *Unique Electors (Gujarat) Private Limited, Ahmedabad,*[31] the Court, while considering a challenge to an arbitral award considered the ambit of Sections 28, 29, 30 under the Arbitration Act, 1940, and held that:

> "[T]he arbitrator by virtue of the terms mentioned in the order of this Court had to decide which of the disputes were arbitrable and which were not. It is true that the arbitrator has not specifically stated in the award that he had to decide the question of arbitrability. The arbitrator has rested by stating that he had heard the parties on the point of arbitrability of the claim and the counter-claim. He has further stated that after 'considering all the above aspects' and 'the question of arbitrability or non-arbitrability' he had made the award on certain aspects. Reading the award along with the preamble, it appears clear that the arbitrator had decided the arbitrability and the amount he has awarded was on the points which were arbitrable. The contention that the arbitrator had not decided the question of arbitrability as a preliminary issue cannot also be sustained. A reference to the arbitrator's proceedings which were discussed in detail by the High Court in the judgment under appeal reveal that the procedure adopted by the arbitrator, i.e., that he will finally decide the matters, indicated that the parties had agreed to and the arbitrator had proceeded with the consent of the parties in deciding the issues before him and in not deciding the question of arbitrability as a separate, distinct and preliminary issue. The arbitrator has made his award beating all the aspects including the question of arbitrability in mind."

In *Hindustan Construction Co. Ltd.* v. *Governor of Orissa,*[32] the Court held that the State Government could not be permitted to challenge the jurisdiction of the Special Arbitration Tribunal after it had submitted to its jurisdiction merely because the award went against it. The Court held:

> "It hardly behooves the State Government to question the jurisdiction of the Special Tribunal at such a belated stage merely because the award was not to its liking. The State Government cannot be permitted to behave like an ordinary dishonest litigant who takes an off chance hoping to succeed and if the outcome is not to his liking to turn back and question the Special Tribunal's jurisdiction."[33]

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[29] Puri Construction Pvt. Ltd v. Union of India, (1989) 1 SCC 411.
[30] Rajasthan State Road Transport Corporation v. Indag Rubber Ltd, (2006) 7 SCC 700.
[31] Gujarat Water Supply and Sewerage Board v. Unique Electors (Gujarat) Private Limited, (1989) 1 SCC 532.
[32] Hindustan Construction Co. Ltd. v. Governor of Orissa, (1995) 3 SCC 8.
[33] *Id*, ¶7.

The SCI noted that the High Court should not have permitted such a somersault by the Government. As per the A&C Act, the challenge to the arbitral award is stricter and there are specific grounds for setting aside the awards which are enumerated under Section 34 of the A&C Act. The A&C Act has been further amended in 2015, 2019, and 2021. The 2015 Amendment to Section 34 has defined 'public policy'.

The SCI in *ONGC* v. *Saw Pipes* [34] laid down the principles for interfering in arbitral awards and emphasized the object of section 34(3) of the A&C Act. It was held by the Court that the remedy by way of a regular suit is intended to be excluded. In *Mc Dermott International Inc*. v. *Burn Standards Co. Ltd,* the Court held that courts cannot correct errors of the Arbitrators.[35] In *Steel Authority of India Ltd* v. *Gupta Brothers Steel Tubes Ltd.,*[36] it has been held that when Courts have concurrently held that the arbitrator has gone into the issues of facts thoroughly, applied their mind to the pleadings and evidence before them and the terms of the contract and then passed duly considered award and no ground for setting aside the award within the four corners of Section 30 of the 1940 Act has been made out, the Courts shall not interfere in arbitral awards.[37] In *Sumitomo Heavy Industries Ltd* v. *Oil & Natural Gas Commission of India,*[38] a similar view as hereinabove was reiterated holding that when the award was not only a plausible one but a well-reasoned award, the interference by the High Court was unnecessary and the Court restored the award of the Tribunal.

Recently in *Ssangyong Engineering & Construction* v. *N.H. Authority of India*[39], the Court held that it cannot substitute its view over that of the arbitrators. Apex Court has held that the provision aims at keeping the supervisory role of the Court at the minimum level. The decision in *Government of India* v. *Vedanta Limited [Formerly Cairn India Ltd.] and others*[40] and in *K. Marappan [Dead]* v. *Superintending Engineer T.B.P.H.L.C. Circle Anantapur*[41] [the facts are discussed separately] would show that the powers of the Court to modify the award are limited as discussed above and has opined that delay in arbitration proceedings is counterproductive to the efficiency of arbitration. The aforementioned instances show that the government was not justified in litigating where the right or the challenge was not maintainable.

[34] ONGC v. Saw Pipes, 2003 (5) SCC 705.
[35] Mc Dermott International Inc. v. Burn Standards Co. Ltd, (2006) 11 SCC 181.
[36] Steel Authority of India Ltd v. Gupta Brothers Steel Tubes Ltd, (2009) 10 SCC 631.
[37] *Id*, ¶38.
[38] Sumitomo Heavy Industries Ltd v. Oil & Natural Gas Commission of India, (2010) 11 SCC 296.
[39] Ssangyong Engineering & Construction v. N H Authority of India, (2019) 15 SCC 131.
[40] Government of India v. Vedanta Limited [Formerly Cairn India Ltd.] and others, (2020) 10 SCC 1.
[41] K. Marappan (Dead) v. Superintending Engineer T.B.P.H.L.C. Circle Anantapur, (2020) 15 SCC 401.

A classic example of this is the recent decision of the Apex Court in *Atlanta Infrastructure Ltd.* v. *Municipal Corporation of Greater Mumbai*[42] which dealt with Section 15 of the 1940 Act wherein the arbitration petition filed by Municipal Corporation, the Single Judge found the award to be in order and thus dismissed the challenge. In appeal, the Division Bench interfered with the award of the arbitrator. The Apex Court held that the arbitrator had given good reasons and there was no reason to interfere by High Court. The judgment of the High Court was set aside. The Apex Court further held that the Division Bench exceeded its bounds in interfering with the well-reasoned award of the arbitrator. The arbitrator had given good reasons stating that what had been awarded was by way of direct expenses, loss of productivity of machinery and equipment, and by way of loss of overheads and profits. The Court lowered the rate of interest by opining that interest rates have been continuously dropping and that in the interest of justice, it was of the view that both the *pendente lite* interest as well as future interest should be at a median rate of interest of 12%.

The Apex Court in *M/s Oriental Structural Engineers Private Limited* v. *State of Kerala*[43] allowed the appeal and granted a rate of interest on delayed payment. The only question to be decided was at what rate the interest should be paid. The award was sustained and the orders of both the Courts below were set aside. The decision demonstrates that the Government litigated till the High Court level and delayed the payment of interest. Here, reference can be made to the decision in *K. Marappan [Dead]* v. *Superintending Engineer T.B.P.H.L.C. Circle Anantapur*.[44] In this case, the arbitral proceedings under the 1940 Act had culminated in the year 2019. The subordinate Court had set aside the award of interest for the period from 2 April 1988 till the date of the award namely 19 August 1988, which can be said to be *pendente lite* interest. This finding was on the basis that the arbitrator had no power to award interest on amounts found due. The subordinate court was not justified in setting aside the portion awarding interest and the interest as awarded by the arbitrator was restored by the Apex Court.

The Allahabad High Court in *M/s R.N. Tandon and Sons* v. *Betwa River Board,*[45] *which* was decided on 1 August 2019 but the arbitral award was passed in 1986, held that a well-reasoned arbitral award was interfered with by the court on the ground that the finding is bad. Though the judge referred to several judgments, the judicial officer himself embarked on a fact-finding mission and appreciated facts on the basis that the arbitrator had committed an error in not assigning reasons, and relying on the decision in *Thawer Das* v. *Union of India*[46], misread the award as if there were an error apparent

[42] Atlanta Infrastructure Ltd. v. Municipal Corporation of Greater Mumbai, (2018) 15 SCC 230.
[43] M/s Oriental Structural Engineers Private Limited v. State of Kerala, 2021 SCC OnLine SC 337.
[44] *Supra* note 42.
[45] M/S R.N. Tandon And Sons v. Betwa River Board, 2019 SCC OnLine All 4966.
[46] Thawer Das v. Union of India, (1955) 2 SCR 48.

on the face of the record. The arbitral award was also based on the decision of the Apex Court in *Raipur Development Authority* v. *Chokhamal.*[47] The reasons were well assigned by the arbitrator, and thus, the judgment of the District Court reversing the arbitral award was held to be bad in the eyes of law.[48]

In *Kamrup Industrial Gases Ltd.* v. *Union of India,*[49] the case was governed by the 1940 Act and the matter was decided in 2017. In this matter, related to Sections 29, 30, 33, and 39 of the Arbitration Act, 1940, the Apex Court set aside the order of the division bench of the High court as the High Court had allowed the appeal on the ground that vital documents were not before the arbitrator. The Apex court on perusal of the documents and the award held that documents in form of evidence were produced by the appellant and were also dealt with by the arbitrator. The arbitral award was upheld and the post decretal interest at the rate of 9% was awarded to the appellant.

On 03 October 2017, the SCI in the matter of *Chittaranjan Maity* v. *Union of India*[50] reaffirmed the position that under the provisions contained in Section 31(7)(a) of the A & C Act when parties had agreed under the terms of the agreement that *pendente lite* interest shall not be payable, the Arbitrator cannot award interest between the date on which the cause of action arose till the date of the award. *In Hindustan Construction Company Limited & Anr.* v. *Union of India*[51], SCI handed down its highly-anticipated judgment in settling the issue of automatic stays on the enforcement of arbitral awards. The court struck down Section 87 of the A & C Act as being *"manifestly arbitrary"*. This was a welcome decision appearing to resolve years of uncertainty surrounding stays and enforcement of awards and the applicability of amendments for the enforcement of contracts. This decision would curb the latitude the government was taking by the automatic stay and their approach to challenge awards would be minimised as they would have to deposit the award amount. The SCI in *BGS SGS SOMA JV* v. *NHPC Ltd,*[52] where the dispute was regarding the seat of challenge post arbitral award – that whether juridical or legal seat of arbitration in an International Commercial Arbitration would be the place of arbitration as determined according to Section 20 of A&C Act, held that part I of A & C Act would have no application to international commercial arbitration held outside India, and enforcement of an award can be in accordance with provisions contained in Part II only.

In *MMTC* v. *Vedanta Ltd.,*[53] the Court under a Section 34 challenge held:

[47] Raipur Development Authority v. Chokhamal, 1989 (2) SCC 721.
[48] *Id.* ¶20.
[49] Kamrup Industrial Gases Ltd. v. Union of India, 2017 (6) SCC 707.
[50] Chittaranjan Maity v. Union of India, (2017) 9 SCC 611.
[51] Hindustan Construction Company Limited & anr. v. Union of India, 2019 SCC OnLine SC 1520.
[52] BGS SGS SOMA JV v. NHPC Ltd, (2020) 4 SCC 234.
[53] MMTC v. Vedanta Ltd, (2019) 4 SCC 163.

> "Court does not sit in appeal over the arbitral award and may interfere on merits on the limited ground provided u/s. 34(2)(b)(ii), i.e. if the award is against the public policy of India and prior to the amendments to the 1996 Act in 2015, a violation of Indian public policy, which in turn, includes a violation of the fundamental policy of Indian law, a violation of the interest of India, conflict with justice or morality, and the existence of patent illegality in the arbitral award."

The Apex court also held that award would be bad if the concept of "*fundamental policy of Indian law*" which would cover compliance with statutes, and judicial precedents, adopting a judicial approach and compliance with the principles of natural justice was contravened. The Apex Court held that the court may interfere with an arbitral award in terms of section 34(2)(b)(ii), if the findings are "*arbitrary, capricious or perverse, or when the conscience of the Court is shocked, or when the illegality is not trivial but goes to the root of the matter*".[54] The Apex Court, after considering all the facts and the decisions of arbitrators who had passed the majority award as accepted by the division bench of the High Court in the exercise of its powers under Sections 34 and 37 of the A&C Act, upheld the award holding that the dispute was covered under the agreement between the Appellant and the Respondent, and as such the dispute was governed by the arbitration clause under the said agreement. Thus, Court did not find any reason to disturb the majority award on the ground that the subject matter of the dispute was not arbitrable. *Thus, the challenge that spanned over years was in fact was not tenable.*

The disputes now raised by the parties are as to the seat of arbitration and forum of arbitration through companies incorporated in India. A recent decision, though in the realm of private companies, would be relevant for the, future and reference to *PASL Wind Solutions Private Limited* v. *GE Power Conversion India Private Limited*,[55] would be necessary.

D. Invoking Writ Jurisdiction

The SCI in *Navayuga Engineering Company* v. *Bangalore Metro Rail Corporation Limited*[56] reiterated that a High Court while exercising jurisdiction under Articles 226 and 227 should be extremely circumspect in interfering with the orders passed under the Arbitration and Conciliation Act. It further held that such inference can be made only in cases of exceptional rarity or cases which are stated to be patently lacking in inherent jurisdiction. The Court observed that despite of making this clear through the decision in *Deep Industries Ltd.* v. *ONGC*[57], High Courts are still interfering in

[54] *Id*, ¶11.
[55] PASL Wind Solutions Private Limited v. Ge Power Conversion India Private Limited, 2021 SCC OnLine SC 331.
[56] Navayuga Engineering Company v. Bangalore Metro Rail Corporation Limited, 2021 SCC OnLine SC 469.
[57] Deep Industries Ltd. v. ONGC, (2020) 15 SCC 706.

matters where writ jurisdiction need not be exercised. In *Bhaven Construction* v. *Executive Engineer Sardar Sarovar Narmada Nigam Ltd and Anr*[58] the Court has laid down the parameters when writs can be issued. The single judge refrained from exercising jurisdiction under Article 226 but the Division Bench exercised jurisdiction. This order was passed in 2015 and the decision of the Apex Court allowing appeal was decided in 2021. The litigation of 1998 has yet not attained finality as, to date, the challenge under section 34 of the A & C Act by the authority is pending.

In *State of Gujarat and Ors.* v. *Amber Builders,*[59] while allowing the appeal, the Apex Court held that writ was not the proper remedy for challenging a notice issued by the state and held that (i) the appropriate remedy was to

> "approach the arbitral tribunal constituted under the Gujarat Act since that would have jurisdiction to decide whether the notice issued by the Government was a legal notice and whether the Government was, in fact, entitled to recover any amount from the contractor. It would also be within the jurisdiction of the Tribunal to decide whether the contractor had made out a *prima facie* case for grant of interim relief."[60]

Further,

> "insofar as the powers vested in the Arbitral Tribunal in terms of the Section 17 of the A & C Act were concerned, such powers could be exercised by the Tribunal constituted under the Gujarat Act because there was no inconsistency in these two Acts as far as the grant of interim relief was concerned. This power was already vested in the tribunal under the Gujarat Act and Section 17 of the A & C Act compliments these powers and therefore it could not be said that the provisions of Section 17 of the A & C Act were inconsistent with the Gujarat Act."[61]

In *Unitech Limited & Ors.* v. *Telangana State Industrial Infrastructure Corporation (TSIIC) & Ors.,*[62] the Apex Court held that the presence of an arbitration clause does oust the jurisdiction under Article 226 of the Constitution in all cases.

E. Litigations under Sections 9 and 11 of the A&C Act

The fact that arbitral proceedings partake appointment of a person of their choice to decide their dispute is now governed by the provisions of Section 11 which has been time and again invoked. In

[58] Bhaven Construction v. Executive Engineer Sardar Sarovar Narmada Nigam Ltd and Anr, 2021 SCC OnLine SC 8.
[59] State of Gujarat and Ors. v. Amber Builders, (2020) 2 SCC 540.
[60] *Id*, ¶ 18.
[61] *Infra* note 65, ¶21.
[62] Unitech Limited & Ors. v. Telangana State Industrial Infrastructure Corporation [TSIIC] & Ors., 2021 SCC OnLine SC 99.

RSPL Limited Through Shri Harish Ramchandni Assistant President v. *Simplex Infrastructure Ltd*.,[63] the Court held that the application under Section 11 was not maintainable as the court could not appoint an arbitrator and acceptance of appointment is *fait accompli* to debar the jurisdiction under Section 11(6). The appointment of a retired Judge to act as an Arbitrator being objected to by the respondent shows that Section 11 is now acting as counterproductive to the provisions of the Act. View taken by the Apex Court in *Uttarakhand Purv Sainik Kalyan Nigam Limited* v. *Northern Coal Field Limited,*[64] and *Walter Bau Arbitration Agreement, Legal Successor of the Original Contractor, Dyckerhoff and Widmann, A.G.* v. *Municipal Corporation of Greater Mumbai and another*[65] goes to show that litigation, now under Section 9 and 11 have also increased the burden of the Courts which requires legislative re-thinking.

The question of appointment of arbitrator and existence of arbitral dispute was decided by the Apex Court in *ONGC Mangalore Petrochemicals Ltd.* v. *Ans Construction Ltd. and Another*[66] which requires to be looked into as Apex Court refused to appoint an arbitrator. The Apex Court under the 1940 Act decided that after accepting all the bills, the arbitrator could not have been appointed, referring to the decision decided in 1993 in the case titled *P.K. Ramaiah and Company v. Chairman and Managing Director, National Thermal Power Corporation*[67]. The decision in *Ramaiah* has been followed in *Union of India* v. *Hari Singh.*[68] In *Oriental Insurance Company Ltd.* v. *Dicitex Furnishing Limited*[69], the Court decided on the scope of arbitration application. Disputes between private parties for appointment of sole arbitrator to resolve the dispute often reached up to the Apex Court. The Apex Court time and again has gone into the disputes whether they are arbitrable or not.

Recently, an issue arose before the High Court of Gujarat in the case of *SMS Infrastructure Limited* v. *Gujarat State Road Development Corporation*[70] where the petitioner requested the appointment of an arbitrator. The matter was highly contested and it was contended by the petitioner that as the respondent corporation was not notified under the Gujarat Public Works Contracts Disputes Arbitration Tribunal Act, 1992, the Arbitration Tribunal constituted under the Arbitration Tribunal

[63] RSPL Limited Through Shri Harish Ramchandni Assistant Ive President v. Simplex Infrastructure Ltd., 2021 SCC OnLine Guj 848.
[64] Uttarakhand Purv Sainik Kalyan Nigam Limited v. Northern Coal Field Limited, (2020) 2 SCC 455.
[65] Walter Bau Arbitration Agreement, Legal Successor of the Original Contractor, Dyckerhoff and Widmann, A.G. v. Municipal Corporation of Greater Mumbai and another, (2015) 3 SCC 800.
[66] ONGC Mangalore Petrochemicals Ltd. v. Ans Construction Ltd. and Another, 2018 (3) SCC 373.
[67] P.K. Ramaiah and Company v. Chairman and Managing Director, National Thermal Power Corporation, 1994 Supp (3) SCC 126.
[68] Union of India v. Hari Singh, 2010 (15) SCC 201.
[69] Oriental Insurance Company Ltd. v. Dicitex Furnishing Limited, 2020 4 SCC 621.
[70] Infrastructure Limited v. Gujarat State Road Development Corporation, 2021(0) AIJEL HC 242780.

Act would not have jurisdiction to adjudicate the disputes between the parties. The High Court held that the Gujarat State Road Development Corporation ["**GSRDC**"] was an instrumentality of state and private arbitrator could not be appointed and the dispute was to be decided as per the 1992 Act. However, the Ahmedabad Municipal Corporation, which is a local body was held by Apex Court to not be governed by the Gujarat Public Works Contracts Disputes Arbitration Tribunal Act, 1992. The A & C Act read with the State Acts of different states has made the procedure even more cumbersome. This is clear from the aforesaid decision where organisations litigate even before the arbitration starts.

A similar situation, as was observed in the year 1981 by His Lordship Justice D.A. Desai, arose in the case of *Amway India Enterprises Limited* v. *Ravindra Nath Rao Sindhia*[71] where even before appointing an arbitrator, Amway took recourse to dispute relating to International Commercial Arbitration and contended that the Delhi High Court had no jurisdiction to appoint an arbitrator.

F. Appointment of Retired Employees of PSU's as Arbitrators

In the case of *Central Organisation for Railway Electrification* v. *ECI-SPIC-SMO-MCML*[72], the issue before the SCI was whether retired employees who have worked in the Railways are ineligible to act as arbitrators. The Court held that merely because the panel of the arbitrators are the retired employees who have worked in the Railways, does not make them ineligible to act as the arbitrators. *In M/s. Voestalpine Schienen GmbH* v. *Delhi Metro Rail Corporation Ltd*.,[73] the dispute between Delhi Metro Rail Corporation Ltd. ["**DMRC**"**]** and a German entity was related to a contract for procurement of rails for the Delhi-Metro project. The arbitration clause provided for the selection of a three-member tribunal from a DMRC maintained panel of engineers consisting of *serving or retired engineers of the 'Government Departments or of PSUs'*. Nevertheless, the Court laid down two important requirements for the appointment of arbitrators from a panel maintained by a PSU/Government entity.

First, the panel must be 'broad based'. For example, it could contain names from other government undertakings and PSUs unconnected with the disputing parties, as well as individuals of high repute from the private sectors and the legal community; and *second*, the other party should be able to choose from the 'broad based' panel, rather than a small short-list as envisaged in the DMRC contract. Indeed, the Court struck down that portion of the arbitration clause which required DMRC to prepare a shortlist of five arbitrators. This is to dispense any apprehension of the Government picking its favourites.

[71] Amway India Enterprises Limited v. Ravindra Nath Rao Sindhia, 2021 SCC OnLine SC 171.
[72] Central Organisation for Railway Electrification v. ECI-SPIC-SMO-MCML, (2020) 14 SCC 712.
[73] M/s. Voestalpine Schienen GmbH v. Delhi Metro Rail Corporation Ltd, (2017) 4 SCC 665.

In conclusion, while there is still some uncertainty in this field, Government entities and PSUs must at least take a fresh look at the appointment process in their contracts to ensure that they comply with the Arbitration Act. Equally, parties (both, domestic and foreign) who are entering into contracts with Indian Government entities and PSUs must also be aware of the amended conflict of interest norms, to ensure that the arbitrator appointment process in their contract is enforceable.

In *Indian Oil Corp. Ltd.& Ors* v. *M/s Raja Transport (P) Ltd.*[74] the SCI found that the appointment of an 'employee' of one of the parties as an arbitrator would not on its own, raise the presumption of bias. However, the Court noted that it had the discretion to refuse the appointment of an employee of a party as arbitrator if there exists a reasonable apprehension about his impartiality or independence. In *ONGC* v. *ANS Constructions Limited and Another,*[75] the only issue which arose for the SC's consideration was whether a case had been made out by ANS Construction for referring the dispute to arbitration. ONGC primarily contended that ANS Construction failed to demonstrate that there existed a dispute regarding its claim and that the 'No Dues Certificate' was issued under duress. In this case, the respondent could not establish that there was any arbitral issue left, hence, the court refused to appoint an arbitrator.

In *United India Insurance Co. Ltd and Anr*. v. *Hyundai Engineering and Construction Co. Ltd and Ors.,*[76] the Apex Court refused to appoint an arbitrator after reading the restricted or conditional arbitration clause, whereby the liability had to be accepted before and repudiation of claim which falls in the definition of excepted category which would render arbitration agreement not capable of enforcement and, therefore, application for appointment of arbitration was rejected holding that the dispute was non-arbitrable and the suit should have been filed. In *Haryana Space Application Centre* v. *Pan India Consultants (P) Ltd.* ["**HARSAC**"], the SCI set aside the appointment of nominee arbitrator of HARSAC on the ground that the appointment was hit by section 12(5) read with the seventh schedule of the A&C Act. It is noteworthy that the *lis* between the parties was in the final stage and the award was ready to be pronounced. The issue raised before the apex court was that the tribunal couldn't pass the award despite an elapse of four years since the constitution of tribunal and therefore, the order of the District Judge and the High Court extending the mandate of the tribunal shall be set aside. The issue of ineligibility was not pleaded by the parties. The Apex Court substituted the arbitrator upon the consent of the parties.

[74] Indian Oil Corp. Ltd.& Ors v. M/S Raja Transport (P) Ltd, (2009) 8 SCC 520.
[75] ONGC v. ANS Constructions Limited and another, (2018) 3 SCC 37.
[76] United India Insurance Co. Ltd v. Hyundai Engineering and Construction Co. Ltd, (2018) 17 SCC 607.

G. Mediation in Arbitral Proceedings

The mediator only facilitates the structured interactive process. Backlogs and delays are the major reasons to take the mediation route post arbitral awards as it is seen that matters remain pending at all stages for decades. An order to refer parties for mediation can be passed even at the stage of Section 37 of the A&C Act, if the Court feels there is an element of the settlement. This reference order of mediation can go ahead only if both parties agree to mediation. Further, if there is an agreement to this effect i.e., Mediation-Arbitration-Mediation, then as per the terms and conditions of the agreement, parties may be relegated for mediation even at the stage of Section 37 of the Act. In a case titled *Harindra Singh* v. *Union of India and another,*[77] the Allahabad High court set aside the rejection of award as it was found that respondent officers tried to play fraud by not producing the reasons assigned by the arbitrator which were summoned by the High Court and produced by the Union of India before the High Court at the appellate stage and raised an objection. It was contended in the appeal that the award was set aside on the sole ground namely that the arbitrator had not assigned reasons while passing the award. The fact was, however, that the arbitrator had assigned reasons and kept it in a sealed cover which was kept by the officers and not submitted to the Court. The appellant was aggrieved because of the deliberate mistake of the respondent and, therefore, the alternative dispute resolution method under section 89 of the Code of Civil Procedure was suggested. Here, the Court had felt that it would be better that instead of passing any stricture, the matter should be sorted out.

It would be better if, in arbitrations involving government or even involving private parties, at the stage of challenge under 34 or 37 of the Act, parties are requested to go for mediation by invoking section 89 of the CPC, of course by consent, otherwise there will be a new challenge, like that in *Afcons.*[78] It is suggested that a hybrid model can be adopted in arbitration involving private parties and the government or Public Sector Enterprises, namely mediation-arbitration-mediation which would lessen the burden to a great extent. This hybrid is a combination of two dispute redressal methods which may be developed as one, where an arbitrator is allowed to act as a mediator after he has heard the parties, try to narrow down the dispute, and facilitate in resolving it.

H. No Litigation Amongst Limbs of Government

The Apex Court in the year 1992 decided that different limbs of Government machinery must not bring their litigation before the Court. More particularly, in *ONGC* v. *Collector of Central Excise,*[79]

[77]Harindra Singh v. Union of India and another, 2019 SCC OnLine All 4594.
[78]Afcons Infrastructure Ltd. and Anr. v. Cherian Varkey Construction Co. (P) Ltd. and Others, (2010) 8 SCC 24.
[79]O.N.G.C. v. Collector of Central Excise, (1992) Supp (2) SCC 432.

the Apex Court even went to the extent of holding that disputes between public sector undertakings and the Union of India would waste public time and money, and should not be brought before the Court. The Apex Court suggested that the dispute should be examined at the highest governmental level and be resolved there. The principle which emerged was that there should be an examination at the governmental level. A decade later, a similar view was reiterated by the Apex Court in *Chief Conservator of Forest, Govt. of A.P.* v. *Collector & Others*[80] and it went further in holding that the framers of the Constitution and Code of Civil Procedure never contemplated that two departments of a State or the Union of India would litigate in the Court of law. They must resolve their disputes to set at rest all inter-departmental controversies at the level of the Government and such matters should not be carried to a Court of law for the resolution of the controversy. The Government came out with guidelines in such matters which resulted in the creation of Permanent Machinery of Arbitrators ["**PMA**"] in the Department of Public Enterprises.[81] As per the directive, an arbitration clause was to be included in all the commercial contracts entered into by the Public Enterprises/Government Departments, etc.[82]

Recently, to make the mechanism of resolving disputes more effective and binding on the disputing parties, the government substituted PMA with a new mechanism called Administrative Mechanism for Resolution of CPSEs Disputes ["**AMRCD**"] having a two-tier structure. The A & C Act would not apply as per guidelines, and the arbitrator's award can be challenged.

i. *Tier 1:* The claimant will approach the Financial Advisor (FA) of its administrative Ministry/Department for representing the dispute before the Secretary of its administrative Ministry/Department. The Secretary of administrative Ministry/Department of claiming party will intimate the same to the Secretary of administrative Ministry/Department of the Respondent and Secretary-Dy Legal Affairs and thereafter meetings will take place in the administrative Ministry/Department of the claiming party to examine the facts and resolve the dispute on merit. The FAs of the concerned administrative Ministries/Departments will represent the issues related to the dispute in question before the above Committee. After arriving at a decision by the Committee, the Secretary of the administrative Ministry/Department of the claiming party will write down the decision and it will be signed jointly by both the Secretaries and Secretary- d/o

[80] Chief Conservator of Forest, Govt. of A.P. v. Collector & Others, (2003) 3 SCC 472.
[81] *See* Department of Public Enterprises, Government of India, *Settlement of Commercial Disputes between Public Sector Enterprises inter se and Public Sector Enterprise(s) and Government Department(s) through Permanent Machinery of Arbitrators (PMA) in the Department of Public Enterprises (*DPE O.M. No. DPE/4(10)/2001-PMA-GL-I dated 22nd January, 2004*)*, https://dpe.gov.in/sites/default/files/Guideline-260.pdf
[82] *Id*.

Legal Affairs. A copy of the decision will be communicated by the Secretary of the administrative Ministry/Department of the claiming party to each party to the dispute for implementation. The decision must be rendered within three months from the date of reference from the aggrieved party.

ii. *Tier 2:* Any party aggrieved with the decision of the Committee at the First tier may prefer an appeal before the Cabinet Secretary at the Second tier within 15 days from the date of receipt of the decision of the Committee at the First tier, through its administrative Ministry/Department, whose decision will be final and binding on all concerned.

AMRCD will apply in the "*event of any dispute or difference relating to the interpretation and application of the provisions of commercial contract(s) between Central Public Sector Enterprises (CPSEs)/ Port Trusts inter se and also between CPSEs and Government Departments/Organizations (excluding disputes concerning Railways, Income Tax, Customs & Excise Departments).*"[83] The Apex court again in *MTNL* v. *Canara Bank*[84] directed that when AMRCD has been set up, the disputes should be settled through AMRCD and if AMRCD cannot settle the dispute then such disputes should be resolved through arbitration proceedings. The pendency of such matters of Govt./ PSUs *inter se* should first be resolved by such methods.

III. CONCLUSION

It would not be out of place to mention what the Malimath Committee Report of 2003[85] has stated. The report begins with Andre Gide's maxim "*everything has been said already, but as no one listens, we must always begin again*".[86] This applies to arbitration jurisprudence also.

From the above discussion of the 1940 Act, the A&C Act, the subsequent amendments, and other alternative dispute redressal methods, it can be asserted that the technique of dispute resolution is not static. The crises of judicial delay, judicial arrears, high litigation costs, and the complicated nature of lawsuits evolved the need for arbitration. But, despite the doctrine of minimum judicial intervention, the analysis of the above cases would show that the disputes covered by arbitration agreements are coming to the court at every stage. The wide economic activities in which the State has been involved means that State or its instrumentalities are one of the parties to such dispute. The

[83] F. No. 4(1)/2013-DPE(GM)/FTS-1835, Government of India Ministry of Heavy Industries & Public Enterprises, Department of Public Enterprises. https://dpe.gov.in/sites/default/files/PMA_Guideline_1835-22-05-2018.pdf

[84] MTNL v. Canara Bank, (2019) 10 SCC 32.

[85] Committee on Reforms of Criminal Justice System, Government of India, Ministry of Home Affairs, March 2003, https://www.mha.gov.in/sites/default/files/criminal_justice_system.pdf

[86] *Id*.

recalcitrant attitude of the State in litigating with the citizens was condemned by Justice Krishna Iyer in *State of Punjab* v. *M/s Geeta Iron and Brass Works Ltd.*[87] The State, in order to avoid litigation amongst its limbs, has rightly implemented the AMRCD scheme. Similarly, in its dispute with citizens, it shall encourage the use of alternative methods such as mediation. Indeed, *"State should act as a model litigant"*.[88] The author would add that the State should also act as a model 'problem solver'. By incurring wasteful litigative expenditure, State instead acts as a harbinger of problems for the justice delivery mechanism. The author has carried the reconnaissance of all the above judicial decisions in the hope that the repeated cries of the justice system stumbling underneath arrears of cases are heard for once.

[87] State of Punjab v. M/s Geeta Iron and Brass Works Ltd (1978) 1 SCC 68.
[88] Popatrao V Patil v. The State of Maharashtra, 2020 SCC OnLine SC 291, ¶ 9.

CONNECTIVITY AND DECOUPLING: BELT AND ROAD DISPUTE RESOLUTION IN A FRACTURED TRADE ENVIRONMENT

Mark Feldman*

Abstract

*A core theme of China's Belt and Road Initiative ["**BRI**"] is connectivity, which extends to BRI-related dispute resolution. But BRI-related advances in dispute resolution connectivity will be occurring in an international trade environment that is becoming increasingly fractured; the extent to which a fractured trade environment might impede BRI-related opportunities for dispute resolution connectivity merits close consideration. A range of initiatives in Asia lower the risk of states "detaching" themselves from China. Particularly with respect to dispute resolution, China has participated in the conclusion of a Regional Comprehensive Economic Partnership agreement, the launch of the China International Commercial Court ["**CICC**"] and the International Commercial Dispute Prevention and Settlement Organization, as well as the development of a number of instruments that improve the enforceability of dispute resolution outcomes in a range of settings, including a few dozen bilateral treaties on judicial assistance as well as a set of multilateral instruments covering mediated settlement agreements ["**the Singapore Convention on Mediation"**], choice of court agreements ["**the Hague Choice of Court Convention**"], and court judgments ["**the Hague Judgments Convention**"]. But a low risk of separation from China does not entail a low risk of criticism of China. Malaysia's recent suspension, and subsequent resumption, of a few major BRI projects provides one clear example. In the particular context of dispute resolution, many responses to the launch of the CICC by China's Supreme People's Court have been critical or, at a minimum, skeptical. Rather than leading to separation, criticism instead can be a form of engagement. International engagement with the BRI and the Asian Infrastructure Investment Bank has been strong notwithstanding significant criticism of both initiatives. An increasingly fractured trade environment likely will not impede China's advancement of dispute resolution connectivity, particularly given the active rulemaking and institution building occurring on China's side of the divide.*

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I. INTRODUCTION

China's Belt and Road Initiative ["**BRI**"][1] will continue to give rise to a large number of international commercial disputes[2] across many jurisdictions,[3] which creates the opportunity to develop a Belt and Road dispute resolution regime.[4] Indeed, three key components of such a regime are now in place: the launch of the China International Commercial Court ["**CICC**"] in 2018,[5] the launch of the International Commercial Dispute Prevention and Settlement Organization ["**ICDPASO**"] in 2020,[6] and the entry into force of the Singapore Convention on Mediation in 2020.[7]

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[1] "China proposed [BRI] in 2013 to improve connectivity and cooperation on a transcontinental scale. The scope of the initiative is still being deliberated, but it involves two main components, each underpinned by significant infrastructure investments: the Silk Road Economic Belt ["**the Belt**"] and the New Maritime Silk Road ["**the Road**"]." WORLD BANK GRP., BELT AND ROAD ECONOMICS: OPPORTUNITIES AND RISKS OF TRANSPORT CORRIDORS, p. 3. For discussion of the BRI as "China's most significant strategic move for engagement in an extra-regional arrangement" since its accession to the World Trade Organization, *see* Heng Wang, *China's Approach to the Belt and Road Initiative: Scope, Character and Sustainability*, 22 J. INT'L ECON. L. 29, 30 (2019).

[2] *See e.g.*, Cao Yin, *China's Top Court Vows Better Legal Service for BRI-Related Cases*, CHINA DAILY (Feb. 25, 2019) ("Statistics previously released by the top court showed Chinese courts at all levels concluded about 200,000 foreign-related disputes between 2013-2017, with the BRI-related cases a main component"); *Building the Judicial Guarantee of International Commercial Court Belt and Road Construction An Exclusive Interview with Gao Xiaoli, Vice President of the Fourth Civil Division, The Supreme People's Court, PRC,* CHINA INT'L COMM. CT. (Mar. 19, 2018), http://cicc.court.gov.cn/html/1/219/208/209/774.html, p 6 ["The construction of 'Belt and Road' is mainly about economic cooperation, which inevitably leads to disputes in the field of trade and investment"].

[3] *See* Justice Steven Chong, *Dispute Settlement in the Belt and Road Initiative: Lessons from the Singapore Experience*, 8 CHINESE J. OF COMP. L. 30, 31 (2020) ["One of the core realities of dispute resolution along the Belt and Road is the sheer diversity of the jurisdictions lying along it"].

[4] *See e.g.*, *Opinion Concerning the Establishment of the Belt and Road International Commercial Dispute Resolution Mechanism and Institutions*, CHINA INT'L COMM. CT. (June 27, 2018) [referring to the "establishment of the Belt and Road international commercial dispute resolution mechanism and institutions"], http://cicc.court.gov.cn/html/1/219/208/210/819.html; Judge Gao, *supra* note 2, at 7 [the development of "a fair, efficient, and convenient 'One Belt and One Road' dispute resolution mechanism" would require "all countries along the route to work together to discuss cooperation, build and share, and advance international rule of law"]. For discussion of "China's officially coordinated effort to develop dispute settlement mechanisms for the BRI," see Jiangyu Wang, *Dispute Settlement in the Belt and Road Initiative: Progress, Issues, and Future Research Agenda*, 8 CHINESE J. OF COMP. L. 4, 11 (2020).

[5] *See* Provisions of the Supreme People's Court on Several Issues Regarding the Establishment of the International Commercial Court, CHINA INT'L COMM. CT. (June 25, 2018), http://cicc.court.gov.cn/html/1/219/199/201/817.html.

[6] *See* Guiguo Wang & Rajesh Sharma, *The International Commercial Dispute Prevention and Settlement Organization: A Global Laboratory of Dispute Resolution with an Asian Flavor*, 115 AJIL UNBOUND 22 (2021) ["The ICDPASO was coordinated by the China Council for the Promotion of International Trade and the China Chamber of International Commerce, together with industrial and commercial organizations and legal service agencies from over thirty countries and regions including the European Union, Italy, Singapore, Russia, Belgium, Mexico, Malaysia, Poland, Bulgaria, and Myanmar"].

[7] Singapore Convention on Mediation, *Singapore Convention on Mediation Enters into Force* (Sept. 20, 2020), https://www.singaporeconvention.org/media/media-release/2020-09-12-singapore-convention-on-mediation-enters-into-force.

A core BRI goal is connectivity. A 2015 statement jointly issued by China's National Development and Reform Commission, Ministry of Foreign Affairs and Ministry of Commerce provides:

> The Belt and Road Initiative aims to promote the connectivity of Asian, European and African continents and their adjacent seas, establish and strengthen partnerships among the countries along the Belt and Road, set up all-dimensional, multi-tiered and composite connectivity networks, and realize diversified, independent, balanced and sustainable development in these countries.[8]

The BRI includes both "*physical* infrastructure" and "*legal* infrastructure."[9] Stated in terms of connectivity, infrastructure connectivity includes not only "'hard' infrastructure such as roads, railways, ports, oil pipelines and telecommunication networks" but also "soft infrastructure," such as "cooperation mechanisms, operation systems and management models," as well as, more broadly, "a shared understanding and recognition of essential legal principles and rules."[10] The BRI promotes "soft connectivity" by attaching "great importance to connectivity-related standards and regulations" and contributing to "strengthening the global governance system."[11] The soft connectivity advanced by BRI legal infrastructure extends to dispute resolution.[12]

A Belt and Road dispute resolution regime could be expected to advance BRI soft connectivity in many ways. The CICC, for example, can have opportunities to interact with a number of recently developed international commercial courts in Asia, the Middle East, and Europe.[13] Chinese arbitral

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[8] National Development Reform Commission, Ministry of Foreign Affairs, and Ministry of Commerce of the People's Republic of China, with State Council Authorization, *Vision and Actions on Jointly Building Silk Road Economic Belt and 21st Century Maritime Silk Road* (March 2015), http://en.drc.gov.cn/2015-10/13/content_22174539.htm. *See also* Joint Communique of the Leaders' Roundtable of the 2nd Belt and Road Forum for International Cooperation (Apr. 27, 2019), http://www.xinhuanet.com/english/2019-04/27/c_138016073.htm, ¶ 7 ["We start from the conviction that connectivity contributes to boosting growth, economic and social development, trade in goods and services, as well as investment and creating employment opportunities and better communication and exchanges among peoples"].

[9] Chief Justice Sundaresh Menon, *The Settlement of International Commercial Disputes: Alternative Dispute Resolution, Commercial Courts, and the Convergence of Commercial Laws*, NATIONAL JUDGES COLLEGE (BEIJING) (Aug. 29, 2019), p. 10 (emphasis in original).

[10] Liao Fan, *Understanding the BRI through "Five Connectivities"*, CGTN (Apr. 20, 2019). *See also* Heng Wang, *supra* note 1, at 36 [characterizing the BRI as including "software" (mechanisms and agreements) and "hardware" (economic corridors with BRI states)].

[11] Ning Jizhe, Vice Chairman, National Development and Reform Commission (Oct. 2019), *in* HARMONIZING INVESTMENT AND FINANCING STANDARDS TOWARDS SUSTAINABLE DEVELOPMENT ALONG THE BELT AND ROAD, CHINA DEVELOPMENT BANK AND UNITED NATIONS DEVELOPMENT PROGRAMME (2019), http://www.un.org.cn/uploads/20191108/bbb5cee285b9e35d7de574f4e9e4f6df.pdf, p. 2.

[12] *See* Chief Justice Menon National Judges College, *supra* note 9 [with respect to legal infrastructure supporting BRI physical infrastructure, "the economic networks of the BRI must rest upon an effective transnational system for commercial dispute resolution"].

[13] *See e.g.*, Chief Justice Sundaresh Menon, *International Commercial Courts: Towards a Transnational System of Dispute Resolution*, OPENING LECTURE FOR THE DIFC COURTS LECTURE SERIES (2015), p. 32 ["A network of international commercial courts helmed by a community of renowned international commercial judges can emerge as a very significant platform for the development of a body of consistent jurisprudence"].

institutions can begin to administer investment treaty cases.[14] Chinese arbitral institutions can coordinate with foreign arbitral institutions.[15] Foreign arbitral institutions can operate in mainland China.[16] Foreign nationals can participate as mediators, arbitrators, and advisors in mainland China.[17] Foreign and Chinese institutions can coordinate on dispute prevention and dispute resolution as members of ICDPASO.[18] China can advance the international enforceability of a range of dispute resolution outcomes through bilateral[19] and multilateral[20] rulemaking and implementation.

Notably, however, such BRI-related advances in dispute resolution connectivity will be occurring in an international trade environment that is becoming increasingly fractured. There has been much

[14] As discussed below, the Shenzhen Court of International Arbitration ["**SCIA**"], the China International Economic and Trade Arbitration Commission ["**CIETAC**"], and the Beijing Arbitration Commission ["**BAC**"] each have developed rules on administering investment treaty cases.

[15]The SCIA, for example, has entered into a cooperation agreement with the International Centre for Settlement of Investment Disputes ["**ICSID**"]. *See SCIA Concludes Cooperation Agreement with ICSID in Washington, D.C.*, SHENZHEN CT. INT'L ARB. (June 27, 2018), http://www.sccietac.org/web/news/detail/1745.html.

[16] *See Beijing to Open Foreign Arbitral Institutions*, HERBERT SMITH FREEHILLS (Sept. 14, 2020) ["On 7 September 2020, the State Council of China published a policy paper on opening up the services sector in Beijing . . . The paper announces that foreign arbitral institutions will be allowed to set up 'business organisations in designated area(s) in Beijing', to 'provide arbitration services in relation to civil and commercial disputes arising in the areas of international commerce and investments'"], https://hsfnotes.com/arbitration/2020/09/14/beijing-to-open-to-foreign-arbitral-institutions/; *China's Lin-gang Free Trade Zone in Shanghai Opens to Foreign Arbitration Institutions from 2020*, HERBERT SMITH FREEHILLS (November 12, 2019) ["a foreign arbitration institution can administer in areas including international commerce, maritime, and investment"], https://hsfnotes.com/arbitration/2019/11/12/chinas-lin-gang-free-trade-zone-in-shanghai-opens-to-foreign-arbitration-institutions-from-2020/.

[17] Foreign nationals can provide mediation and advisory services as members of the CICC's International Commercial Expert Committee, as discussed below. Foreign nationals also can serve as arbitrators in international disputes administered not only by foreign, but also Chinese, arbitral institutions. *See* Arthur Ma *et al.*, Commercial Arbitration, China, GLOBAL ARB. REV., (May 20, 2021) ["Article 67 of the PRC Arbitration Law provides that an arbitration institution may appoint non-nationals with special knowledge in the fields of law, economy, and trade, science and technology and other relevant professions to act as arbitrator. Major arbitration institutions, such as CIETAC, BAC and SHIAC, all have foreigners on their panel of arbitrators"], https://globalarbitrationreview.com/insight/know-how/commercial-arbitration/report/china.

[18] *See* Wang & Sharma, *supra* note 6, at 23 [ICDPASO "provides procedures that cater to the needs of different disputants with diverse dispute resolution preferences including good offices, mediation, and arbitration with an option for appeal"].

[19] *See* Song Jianli, *Recognition and Enforcement of Foreign Judgments in China: Challenges and Developments*, CHINA INT'L COMM. CT., http://cicc.court.gov.cn/html/1/219/199/203/1048.html ["A number of bilateral treaties on judicial assistance between China and other countries have been signed involving recognition and enforcement of foreign judgments in civil and commercial matters. As of October, 2017, China has signed about 39 treaties with other countries involving such civil and commercial matters, and 36 of these treaties provide for recognition and enforcement of judgments and arbitral awards"].

[20] As discussed below, China has participated in multilateral initiatives aimed at advancing the enforceability of foreign arbitral awards [becoming a Party to the New York Convention in 1987], mediated settlement agreements [signing the Singapore Convention on Mediation in 2019], choice of court agreements [signing the Hague Choice of Court Convention in 2005], and domestic judgments [actively participating in the development of the Hague Judgments Convention].

discussion about the risk of the world's two largest economies "decoupling," in the sense of a sharp reduction in economic interdependence.[21] Support within the U.S. government for at least some degree of U.S.-China decoupling has remained consistently strong across the Trump and Biden administrations.[22] China, for its part, has emphasized the importance of self-sufficiency as part of its "dual circulation" strategy.[23] The extent to which such a fractured trade environment might impede BRI-related opportunities for dispute resolution connectivity merits close consideration. The United States can be expected to continue raising concerns regarding China's rulemaking and institution

[21] *See e.g.*, Jonathan D. Pollack & Jeffrey A. Bader, *Looking Before We Leap: Weighing the Risks of US-China Disengagement*, Policy Brief, BROOKINGS (July 2019), p 5 ["Pessimists believe China's advances will result in the weakening of American power, and that China could ultimately supplant America's post-war dominance of global politics, economics, and military power. They contend that this threat must be stifled by detaching China from the major developed economies and by greatly heightening a looming military rivalry with China"]; Edward Luce, *The New Era of US-China Decoupling*, FINANCIAL TIMES (Dec. 20, 2018) ["China's technology strategy is . . . shifting from foreign acquisition to import substitution. Global supply chains are starting to fragment. China is accelerating the 'indigenisation' of microchips, aviation technology and robotics"].

[22] The Trump administration applied a range of decoupling measures, including national security reviews, export controls, tariffs, sanctions and forced sales. *See* Chad P. Bown & Melina Kolb, *Trump's Trade War Timeline: An Up-to-Date Guide*, PETERSON INSTITUTE FOR INT'L ECONOMICS (Feb. 8, 2021), https://www.piie.com/blogs/trade-investment-policy-watch/trump-trade-war-china-date-guide. To a significant extent, those decoupling measures have remained in place under the Biden administration. *See e.g.*, Saleha Mohsin & Jennifer Jacobs, *Biden Team Likely to Proceed with Trump China Investment Ban*, BLOOMBERG (May 7, 2021) ["The Biden administration is likely to maintain pressure on China by preserving limits on U.S. investments in certain Chinese companies imposed under former President Donald Trump"]; Demetri Sevastopulo, *Biden's 100 Days: Hawkish Approach to China Stokes Beijing Frictions*, FINANCIAL TIMES (Apr. 30, 2021) ["Biden has shown no sign of lifting tariffs that Trump levied on Chinese exports. His team is reviewing Trump-era moves on technology but most measures have not been reversed. He has also placed Chinese firms on an export blacklist, a tool often used by Trump"]; Matt Spetalnick & Michael Martina, *Many Key China Issues Still "Under Review" at Biden's First 100 Days*, REUTERS (Apr. 30, 2021) ["U.S. Trade Representative Katherine Tai said in a recent interview that the United States was not ready to lift [duties on Chinese goods], in part because of the leverage it gives American negotiators"); Eric Martin, *Biden Pick Sees "No Reason" to Lift Huawei Curbs*, BLOOMBERG (Feb. 4, 2021) ("President Joe Biden's nominee for Commerce Secretary, Gina Raimondo, said she knows of 'no reason' why Huawei Technologies Co. and other Chinese companies shouldn't remain on a restricted trade list"].

[23] *See e.g.*, Jude Blanchette, *Dual Circulation and China's New Hedged Integration Strategy*, CENTER FOR STRATEGIC AND INT'L STUDIES (Aug. 24, 2020) [the dual circulation strategy "envisions a new balance away from global integration (the first circulation) and toward increased domestic reliance [the second circulation] . . . [t]his new worldview sees the continued decoupling of global supply chains as an enduring trend, and so Beijing now seeks [to balance] internationalization and self-sufficiency (自力更生) that marks China's own version of 'hedged integration'."].

building generally,[24] and in a BRI context specifically.[25] But as observed by Robert Zoellick, who previously served as Deputy Secretary of State and as president of the World Bank: "The U.S. can complain about China, but should also offer its own attractive ideas."[26] Similarly, the Foreign Minister of Singapore, Dr. Vivian Balakrishnan, on a 2019 visit to Washington DC, emphasized that it was in the interest of the United States to "actively contribute" to the shaping of global norms.[27]

As discussed below, in recent years the United States has provided some leadership in rulemaking and institution building, and the Biden administration has reversed some of the Trump administration's retreat from global engagement. The Biden administration also has started to explore the development of potential alternatives to BRI.[28] But U.S. leadership in developing attractive alternatives to China's initiatives remains at an early stage. To the extent the United States fails to develop such alternatives, the likelihood of states detaching themselves from China is reduced.

Detaching from China becomes even less likely when a range of recent Asia-based regional and multilateral initiatives are considered. Those initiatives include, in addition to BRI, the establishment of multilateral development banks in Beijing ["**the AIIB**"] and Shanghai the New Development Bank ["**NDB**"], the conclusion of the Regional Comprehensive Economic Partnership ["**RCEP**"] agreement, and the conclusion of the Singapore Convention on Mediation. But a low risk of

[24] During the Obama administration, for example, attempts by U.S. officials to discourage allies from joining – or, at a minimum, raise doubts concerning – the Asian Infrastructure Investment Bank ("AIIB") were widely reported. *See e.g.*, Matthias Sobolewski & Jason Lange, *U.S. Urges Allies to Think Twice Before Joining China-led Bank*, REUTERS (March 17, 2015) ("Washington insists it has not actively discouraged countries from joining the new bank, but it has questioned whether the [AIIB] will have sufficient standards of governance and environmental and social safeguards"); Jane Perlez, *U.S. Opposing China's Answer to the World Bank*, N.Y. TIMES (October 9, 2014) ["in quiet conversations with China's potential partners, American officials have lobbied against the development bank with unexpected determination and engaged in a vigorous campaign to persuade important allies to shun the project"].

[25] *See e.g.*, David Brunnstrom, *U.S. Says Will not Send High-level Officials to China's Silk Road Summit*, REUTERS (Apr. 3, 2019) ['"We will not send high-level officials from the United States," U.S. State Department spokesman Robert Palladino said . . . We will continue to raise concerns about opaque financing practices, poor governance, and disregard for internationally accepted norms and standards, which undermine many of the standards and principles that we rely upon to promote sustainable, inclusive development, and to maintain stability and a rules-based order']. As discussed below, the United States continues to raise BRI-related concerns under the Biden administration.

[26] Robert Zoellick, *A Better Way to Deal with Beijing*, WALL ST. J. (May 14, 2019).

[27] Edited Transcript of Minister for Foreign Affairs Dr. Vivian Balakrishnan's Remarks on "Seeking Opportunities Amidst Disruption – A View from Singapore" at the Center for Strategic and International Studies ["**CSIS**"], 15 May 2019, MINISTRY OF FOREIGN AFFAIRS SINGAPORE (May 16, 2019), https://www.mfa.gov.sg/Newsroom/Press-Statements-Transcripts-and-Photos/2019/05/20190516_FMV-Washington---CSIS-Speech.

[28] *See* The Editorial Board, *Creating Alternatives to China's Belt and Road*, FINANCIAL TIMES (Apr. 24, 2021) ["As part of his plan to create an alliance of democracies to counter China's growing power, US president Joe Biden has proposed to the UK's Boris Johnson setting up an infrastructure effort to rival the Belt and Road plan"].

separation from China does not entail a low risk of criticism of China. Malaysia's recent suspension,[29] and subsequent resumption,[30] of a few major BRI projects provides one clear example of such criticism. In the particular context of international dispute resolution, many responses to the launch of the CICC have been critical[31] or, at a minimum, skeptical.[32] Rather than leading to separation, criticism instead can be a form of engagement. As discussed below, a fractured trade environment does not pose a significant threat to China's ability to advance dispute resolution connectivity given, in particular, the active rulemaking and institution building occurring on China's side of the divide.

Analyzing China's opportunities for advancing BRI dispute resolution connectivity first requires an understanding of the core elements of a Belt and Road dispute settlement regime, which are discussed below.

II. A BELT AND ROAD DISPUTE SETTLEMENT REGIME

Much of what might ultimately comprise a Belt and Road dispute settlement regime has been in place for some time, particularly with respect to commercial arbitration and investment treaty arbitration. But with respect to litigation, mediation and "one-stop" commercial dispute resolution services, BRI already has played a significant role in beginning to shape a new landscape. Each category of dispute resolution is discussed below.

A. Commercial Arbitration

Arbitral institutions in Hong Kong, Singapore, Seoul, Kuala Lumpur, Beijing, Shanghai and Shenzhen are well-positioned to administer claims submitted to international commercial arbitration pursuant to dispute settlement provisions in BRI-related contracts. Indeed, those institutions welcome

[29] *See* Stefania Palma, *Malaysia Suspends $22bn China-backed Projects*, FINANCIAL TIMES (July 5, 2018) ["The suspension of the three projects is the starkest manifestation yet of Prime Minister Mahathir Mohamad's call to diminish Chinese influence in Malaysia"].

[30] *See e.g.*, Joseph Sipalan, *China, Malaysia Restart Massive 'Belt and Road' Project after Hiccups*, REUTERS (July 25, 2019) ["China and Malaysia resumed construction on a massive 'Belt and Road' train project in northern Malaysia on Thursday, after a year-long suspension and following a rare agreement to cut its cost by nearly a third to about $11 billion"].

[31] *See e.g.*, Jonathan E. Hillman & Matthew P. Goodman, *China's Belt and Road Court to Challenge Current US-led Order*, FINANCIAL TIMES (July 25, 2018) ["Beijing casts itself as lender and builder to all along the Belt and Road. But if its courts succeed, it could also become judge and jury"]; Jacob Mardell, *Dispute Settlement on China's Terms: Beijing's New Belt and Road Courts*, MERICS BLOG (Feb. 14, 2018) ["Belt and Road detractors will view the establishment of the new dispute settlement mechanism as further proof that the initiative's primary purpose is to increase Beijing's oversight and to further the Communist Party's ownership of the BRI narrative"].

[32] *See e.g.*, Julien Chaisse & Xu Qian, *Conservative Innovation: The Ambiguities of the China International Commercial Court*, 115 AJIL UNBOUND 17, 21 (2021) ("the extent to which [the CICC] will be able to meet the specific demands stemming from the BRI remains doubtful"); Chaguan, *A Belt-and-Road Court Dreams of Rivalling the West's Tribunals*, THE ECONOMIST (June 6, 2019) ["the new court has an uncertain future, clouded by doubts about how many firms will agree to use it"].

the opportunity to play a key role in resolving BRI-related disputes. Some leading arbitration institutions have established particular bodies that focus on BRI-related disputes;[33] more generally, Asia-based arbitration institutions often highlight the significance of BRI-related disputes.[34]

With respect to international commercial arbitration, the BRI can rely on the existing, and mature, set of rules and institutions that are in place to resolve international commercial disputes arising from contracts; indeed, as noted above, those institutions will enthusiastically provide such support. Notably, however, and as discussed below, both the CICC and the ICDPASO are developing "one-stop" dispute resolution mechanisms, which will create new opportunities for interactions between foreign arbitral institutions and China-based institutions. In addition, and as discussed below, the combination of the BRI and the entry into force of the Singapore Convention on Mediation will significantly elevate the profile of mediation among the suite of services offered by arbitral institutions.

B. Investment Treaty Arbitration

For investment treaty claims, the BRI similarly can rely on the existing, and mature, set of rules and institutions that are in place, specifically as provided in investor-State dispute settlement mechanisms available under China's extensive investment treaty network.[35] Much of that network, however, needs updating; many of China's investment treaties with BRI states were concluded in the 1990's.[36] As a BRI dispute settlement regime develops, the issue of how to update China's existing investment treaty network will be a key question to consider; on that issue, a number of different strategies would be available.[37]

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[33] *See* HKIAC Belt and Road Advisory Committee, HONG KONG INT'L ARB. CTR., https://www.hkiac.org/Belt-and-Road/belt-and-road-advisory-committee; Belt and Road Commission, INT'L CHAMBER OF COMMERCE, https://iccwbo.org/dispute-resolution-services/belt-road-dispute-resolution/belt-and-road-commission/.

[34] *See e.g.*, *Driving Forces Behind Belt and Road Initiative*, ASIAN INT'L ARB. CENTRE (Aug. 13, 2019) ["this industry dialogue . . . considers the role of arbitration to resolve disputes arising in the BRI"], https://www.aiac.world/events/365/Driving-Forces-Behind-Belt-&-Road-Initiative; *Running Belt and Road Arbitrations: Behind the Scenes with SIAC*, SINGAPORE INT'L ARB. CENTRE (Sept. 16, 2018) ["This session will provide a 'behind the scenes' look at how the SCIA Rules assist parties with the resolution of Belt & Road disputes"], https://www.siac.org.sg/component/registrationpro/event/281/Running-Belt-and-Road-Arbitrations--Behind-the-Scenes-with-SIAC?Itemid=552.

[35] *See* Investment Policy Hub, International Investment Agreements Navigator, China, UNCTAD, https://investmentpolicy.unctad.org/international-investment-agreements/countries/42/china.

[36] *See* Matthew Hodgson and Adam Bryan, *Bumps in the Road: Identifying Gaps in China's Belt and Road Treaty Network*, TRANSNAT'L DISPUTE MANAGEMENT 3 (2017).

[37] *See e.g.*, Jie Huang, *Procedural Models to Upgrade BITs: China's Experience*, 31 LEIDEN J. INT'L L. 93 (2018) [discussing "Coexistence," "Replacement," "Amendment," and "Joint Interpretation" models for upgrading investment treaties].

The BRI also could encourage another development with respect to China's investment treaty practice: the potential availability of Chinese arbitral institutions to administer, and apply their own arbitration rules, to investment treaty cases. The SCIA, CIETAC and the BAC have each issued a set of investment arbitration rules.[38] As China updates its investment treaty network with BRI states, there will be opportunities to include flexible language allowing disputing parties to agree to the applicability of arbitration rules developed by Chinese arbitral institutions.[39] Updated investment treaties also could place particular emphasis on mediation,[40] consistent with, as discussed below, the central importance of mediation within an overall BRI dispute settlement regime.

C. Litigation

In connection with the litigation of BRI-related disputes, China's Supreme People's Court ["**SPC**"] established the CICC in 2018.[41] The SPC identified a number of motivations driving the establishment of the CICC, including not only the need to "provide services and protection for the 'Belt and Road' construction," but also, more broadly, the need to "try international commercial cases fairly and timely in accordance with the law, protect the lawful rights and interest of the Chinese and foreign parties equally, [and] create a stable, fair, transparent, and convenient rule of law international business environment."[42]

The CICC has at times been referred to as "China's Belt and Road Court,"[43] and there is some support for that characterization. As noted above, the SPC identified the need to support "'Belt and Road' construction" when establishing the CICC; in addition, the BRI is expressly mentioned in the "Opinion Concerning the Establishment of the Belt and Road International Commercial Dispute

[38] *See* Beijing Arbitration Commission/Beijing International Arbitration Center Rules for International Investment Arbitration, BEIJING ARB. COMMISSION (Oct. 1, 2019), https://www.bjac.org.cn/page/data_dl/touzi_en.pdf; *Facilitating the Belt and Road: CIETAC Launches Investment Arbitration Rules*, HERBERT SMITH FREEHILLS (Dec. 4, 2017), https://www.herbertsmithfreehills.com/latest-thinking/facilitating-the-belt-and-road-cietac-launches-investment-arbitration-rules; *SCIA Updates its Rules to hear Investor-State Arbitrations*, HERBERT SMITH FREEHILLS (Nov. 4, 2016), https://hsfnotes.com/arbitration/2016/11/04/scia-updates-its-rules-to-hear-investor-state-arbitrations/.

[39] *See e.g.*, Comprehensive and Progressive Agreement for Trans-Pacific Partnership ["**CPTPP**"] art 9.19(4) ("The claimant may submit a claim referred to in ¶ 1 under one of the following alternatives . . . if the claimant and respondent agree, [the claim may be submitted under] any other arbitral institution or any other arbitration rules").

[40] *See e.g.*, CPTPP art. 9.18(1) ["In the event of an investment dispute, the claimant and the respondent should initially seek to resolve the dispute through consultation and negotiation, which may include the use of non-binding, third-party procedures, such as good offices, conciliation, or mediation"].

[41] *See* Provisions of the Supreme People's Court on Several Issues Regarding the Establishment of the International Commercial Court, CHINA INT'L COMM. CT. (June 25, 2018), http://cicc.court.gov.cn/html/1/219/199/201/1574.html.

[42] *Id*.

[43] Hillman & Goodman, *supra* note 31.

Resolution Mechanisms and Institutions."[44] Indeed, the CICC is composed of tribunals located in Shenzhen and Xi'an, which reflects the geography of the Belt and Road Initiative: the Xi'an tribunal faces west, toward the Silk Road Economic "Belt", while the Shenzhen tribunal faces south, toward the 21st Century Maritime Silk "Road".[45] But the CICC's jurisdiction is not tied to the Belt and Road Initiative. Rather, the CICC's jurisdiction is tied to several categories of "international commercial cases,"[46] which might, or might not, relate to BRI projects. Thus, over time, it is possible that the CICC will become less associated with the BRI and more associated with a set of international commercial courts that recently have begun operations in Asia, the Middle East, and Europe, including courts in Singapore, Dubai, and the Netherlands.[47]

The potential for interaction between international commercial courts has been noted by Judge Gao Xiaoli, Deputy Chief Judge of the SPC's Fourth Civil Division, which oversees the operations of the CICC's Shenzhen and Xi'an tribunals.[48] Judge Gao highlighted, in the context of the CICC, the importance of "internationality" and "influence" for international commercial courts.[49] Consistent with those remarks, Chief Justice Sundaresh Menon of the Supreme Court of Singapore has highlighted, with respect to the Singapore International Commercial Court ["**SICC**"], that the SICC will be a forum that allows "the jurisprudence and best practices of the Singapore courts" to be "shared with the world."[50] Justice Steven Chong of the Supreme Court of Singapore similarly has observed that the SICC can serve as an "ambassador for the Singapore Judiciary."[51]

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[44] Opinion Establishing BRI Dispute Resolution Mechanism and Institutions, *supra* note 4.

[45] *See* Freshfields Bruckhaus Deringer, *China Establishes International Commercial Courts to Handle Belt and Road Initiative Disputes*, OXFORD BUSINESS LAW BLOG (Aug. 17, 2018) ["It is envisioned that the CICC in Xian, Shaanxi Province will focus on disputes arising from projects on land as Xian is the starting point of the ancient Silk Road. The CICC in Shenzhen, which is in the Guangdong-Hong Kong-Macau Greater Bay Area, will focus on disputes arising from infrastructural developments along the coastline of the maritime routes"], https://www.law.ox.ac.uk/business-law-blog/blog/2018/08/china-establishes-international-commercial-courts-handle-belt-and.

[46] *See* SPC Provisions on Establishment of the CICC, *supra* note 41, art. 2.

[47] For discussion on the global rise of international commercial courts, *see* Pamela K. Bookman, *The Adjudication Business*, 45 YALE J. INT'L L. 227 (2020); Janet Walker, *Specialised International Courts: Keeping Arbitration on Top of its Game*, 85 ARBITRATION 2 (2019); Chief Justice Menon, DIFC Courts Lecture, *supra* note 13.

[48] *See* Opinion Establishing BRI Dispute Resolution Mechanism and Institutions, *supra* note 4.

[49] Judge Gao, *supra* note 2, p. 8.

[50] Chief Justice Menon, DIFC Courts Lecture, *supra* note 13, at 19.

[51] Justice Chong, *supra* note 3 at 36.

With respect to the CICC, the potential for international influence currently is limited by Chinese nationality requirements applicable to CICC judges[52] and the counsel[53] appearing before them, as well as Chinese language requirements applicable to CICC proceedings.[54] The CICC's International Commercial Expert Committee – which currently is composed of both Chinese and foreign nationals – can provide some degree of internationality, although Expert Committee members have limited authority under current rules.[55] The SPC made appointments to the International Commercial Expert Committee in 2018 [32 appointments][56] and 2020 [24 appointments].[57]

China-based scholars and judges have highlighted the need for the CICC to develop a more international orientation.[58] Notably, Judge Long Fei, who serves as Deputy Director in the CICC's Coordination and Guidance Office,[59] has observed that "the SPC will set up a think-tank of legal experts from BRI countries."[60] Consistent with such a development, the SPC's second set of International Commercial Expert Committee appointments reflects significant participation by

[52] *See* Wei Sun, *International Commercial Court in China: Innovations, Misunderstandings and Clarifications*, KLUWER ARB. BLOG (July 4, 2018) ["According to Article 9 of the PRC Law on Judges, judges of Chinese courts must be Chinese nationals, so it is impossible for foreign nationals to be judges of the Courts"].

[53] *See* Li Huanzhi, *China's International Commercial Court: A Strong Competitor to Arbitration?,* KLUWER ARB. BLOG (Sept. 30, 2018) ["only Chinese-admitted lawyers can act as legal representatives according to the Chinese Civil Procedure Law, even when the applicable law is foreign law"].

[54] *See* Sun, *supra* note 52 ["Article 262 of the Civil Procedure Law in China provides that trials of cases involving foreign elements must be in 'language commonly used in the PRC', meaning Chinese, including languages native to the 55 recognized ethnic minorities in China. Article 6 of the Law on the Organization of Courts also includes a similar requirement"].

[55] *See* Working Rules of the International Commercial Expert Committee of the Supreme People's Court, CHINA INT'L COMM. CT. (Nov. 21, 2018), Art. 3 http://cicc.court.gov.cn/html/1/219/208/210/1146.html [authorizing Expert Committee members to preside over mediations, provide advisory opinions on issues of international or foreign law, advise on the development of the CICC, advise on the formulation of SPC "judicial interpretations and judicial policies," and work on other matters "entrusted by" the CICC].

[56] *See The Supreme People's Court Established the International Commercial Expert Committee,* CHINA INT'L COMM. CT. (Aug. 26, 2018), http://cicc.court.gov.cn/html/1/219/208/209/981.html.

[57] *See The Decision on the Appointment of the Second Group of Members for the International Commercial Expert Committee of the Supreme People's Court*, CHINA INT'L COMM. CT. (Dec. 8, 2020), http://cicc.court.gov.cn/html/1/219/208/210/1876.html.

[58] *See e.g.*, Sheng Zhang, *China's International Commercial Court: Background, Obstacles and the Road Ahead*, 11 J. INT'L DISPUTE SETTLEMENT 150, 164 (2020) [internationalization of the CICC "insufficient"]; Judge Xiangzhuang Sun, *A Chinese Approach to International Commercial Dispute Resolution: The China International Commercial Court*, 8 CHINESE J. COMPARATIVE L. 45, 50 (2020) [proposing an expansion of the International Commercial Expert Committee in terms of both membership and authority]; Judge Long Fei, *Innovation and Development of the China International Commercial Court*, 8 CHINESE J. COMPARATIVE L. 40, 44 (2020) [recommending an expansion of the "scale" of the International Commercial Expert Committee and a strengthening of "international judicial exchange and cooperation"]; Chaisse & Qian, *supra* note 32, at 21 ["the CICC faces the challenge of not being able to attract leading international experts and not using sufficiently flexible rules of representation for foreign lawyers"].

[59] *See* Judge Long Fei, *supra* note 58, at 40.

[60] *Id*. at 44.

nationals of BRI states, with representation from Algeria, Egypt, Kazakhstan, Nigeria, Pakistan and Uganda.[61] In terms of potential for internationality and influence, the CICC's '"one-stop" international commercial dispute resolution mechanism'[62] is noteworthy. That "one-stop" model, as characterized in the Working Rules of the CICC's International Commercial Expert Committee, is a "diversified dispute resolution mechanism that efficiently links mediation, arbitration, and litigation."[63]

Such integrated dispute resolution services reflect one version of the "multi-door courthouse" originally conceived by Harvard Professor Frank Sander, in which disputing parties are presented with a set of dispute resolution options, normally including some form of litigation, arbitration, and mediation services.[64] Matthew Erie has characterized the CICC's "one-stop" model as "perhaps" the "fullest expression" of Professor Sanders' multi-door courthouse.[65] The CICC's form of multi-door courthouse could influence the development of integrated dispute resolution services in other jurisdictions. The enhanced status of mediation under the CICC's one-stop mechanism[66] increases the mechanism's potential for international influence. The respective roles of mediation and one-stop dispute resolution services within a Belt and Road dispute settlement regime are discussed below.

D. Mediation

Mediation has been a key element in China's overall BRI dispute resolution strategy. In 2019, the China Council for the Promotion of International Trade and the Singapore International Mediation Centre signed a Memorandum of Understanding "to set up an international panel of mediators, to better handle disputes that may arise" from BRI projects; the panel "will comprise skilled and experienced dispute resolution professionals from China, Singapore and other countries involved in the BRI."[67] China – together with many other BRI states – signed the Singapore Convention on

[61] *See* Decision on Second Group of Expert Committee Appointments, *supra* note 57.
[62] SPC Provisions on Establishment of the CICC, *supra* note 41, art 11.
[63] Expert Committee Working Rules, *supra* note 55, art 1. The SPC has characterized such linkage of mediation, arbitration, and litigation services as a "'one-stop' international commercial dispute resolution mechanism." SPC Provisions on Establishment of the CICC, *supra* note 41, art. 11.
[64] *See* Matthew Erie, *The China International Commercial Court: Prospects for Dispute Resolution for the "Belt and Road Initiative*, 22 ASIL INSIGHTS 11 (Aug. 31, 2018).
[65] *Id*.
[66] *See e.g.*, SPC Provisions on Establishment of the CICC, *supra* note 41, art. 12 ["The International Commercial Court may, within seven days after accepting a case and with the consent of the parties, entrust the member of the International Commercial Expert Committee or the international commercial mediation institution to mediate the dispute"].
[67] *Singapore, China to set up International Panel of Mediators for Belt and Road Projects*, MAXWELL CHAMBERS (Jan. 25, 2019), https://www.maxwellchambers.com/2019/01/25/singapore-china-to-set-up-international-panel-of-mediators-for-belt-and-road-projects/.

Mediation on the day the instrument opened for signature.[68] As noted above, members of the CICC's Expert Committee are authorized to serve as mediators in CICC cases.[69] The International Chamber of Commerce has issued the following guidance regarding mediation of BRI disputes: "As Belt and Road disputes typically have at least one Chinese party, we recommend that mediation always be considered for Belt and Road disputes."[70] Peter Corne and Matthew Erie predict that mediation ultimately will be "at the very center of BRI dispute resolution strategy."[71]

The Singapore Convention on Mediation can support the role of mediation in resolving BRI-related disputes by advancing not only the enforceability, but also the stature, of mediation among dispute resolution options.[72] Regarding enforceability, Parties to the Singapore Convention will have an international obligation to enforce agreements resulting from mediations that resolve international commercial disputes.[73] The combination of BRI and the entry into force of the Singapore Convention on Mediation almost certainly will elevate the profile of mediation among the suite of services offered by arbitral institutions.[74] The central role of mediation in the respective one-stop dispute resolution mechanisms of the CICC and the ICDPASO – which are discussed below – likely will further elevate the status of mediation as a form of commercial dispute resolution.

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[68] *See* United Nations Treaty Collection, United Nations Convention on International Settlement Agreements Resulting from Mediation, Status, https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-4&chapter=22&clang=_en

[69] *Supra* note 55

[70] International Chamber of Commerce Guidance Notes on Resolving Belt and Road Disputes using Mediation and Arbitration, p. 2 https://iccwbo.org/content/uploads/sites/3/2019/02/icc-guidance-notes-belt-and-road-disputes-pdf.pdf.

[71] Peter H. Corne & Matthew Erie, *China's Mediation Revolution? Opportunities and Challenges of the Singapore Mediation Convention*, OPINIO JURIS (Aug. 28, 2019).

[72] *See e.g.*, Bruce Love, *New UN Singapore Convention Drives Shift to Mediation of Trade Disputes*, FINANCIAL TIMES (Aug. 5, 2019) ["regardless of how many mediated settlements actually need to be enforced under the new convention, its real value will probably lie in reinforcing the credibility of mediation"] [quoting Jan O'Neill].

[73] *See* Mediation, *46 Countries Sign the New Singapore Convention on Mediated Settlements*, HERBERT SMITH FREEHILLS (Aug. 7, 2019) https://hsfnotes.com/adr/2019/08/07/46-countries-sign-the-new-singapore-convention-on-mediated-settlements/ [analyzing criteria that a settlement agreement must meet to give rise to an international enforcement obligation under the Singapore Convention on Mediation: a settlement agreement that is (i) "international", (ii) results from mediation, (iii) does not fall within an excluded category of settlement agreement, and (iv) cannot be refused enforcement on one of the listed grounds in the Convention].

[74] *See e.g.*, Mediation, SHENZHEN CT. INT'L ARB. [SCIA's Mediation Center "aims to encourage the parties to conduct mediation before or outside the arbitration proceedings and help them resolve various domestic and foreign commercial disputes in combination with arbitration in a harmonious, efficient, cost-effective and fast way"], http://scia.com.cn/index.php/En/index/serviceinfo2/sid/50.html; ICC Guidance Notes on Resolving Belt and Road Disputes Using Mediation and Arbitration, INT'L CHAMBER OF COMMERCE ["Although a stand-alone procedure, mediation can be combined with other dispute resolution procedures as part of a tiered dispute resolution process"[, https://iccwbo.org/content/uploads/sites/3/2019/02/icc-guidance-notes-belt-and-road-disputes-pdf.pdf; Mediation, ASIAN INT'L ARB. CENTRE ["A fusion of mediation and arbitration called Mediation-Arbitration ("Med-Arb") is also available with Med-Arb allowing parties to initiate mediation before resorting to arbitration"], https://www.aiac.world/Mediation-Mediation.

E. One-Stop Commercial Dispute Resolution Services

Both the CICC and the ICDPASO are in the process of developing "one-stop" commercial dispute resolution mechanisms.[75] The two dispute resolution mechanisms are discussed below.

i. CICC

In 2018, the SPC selected the first group of arbitration institutions and mediation institutions to be included in the CICC's one-stop mechanism.[76] In its notice, the SPC provided some details regarding the operation of the one-stop mechanism. For cases brought before the CICC, the disputing parties may pursue mediation by selecting a mediation institution that has been included in the one-stop mechanism to "conduct mediation by agreement."[77] If the disputing parties reach an agreement through mediation, the CICC "may issue a conciliation statement in accordance with the law" or, if the parties request a judgment, the CICC "may make a judgment based on the mediation agreement and serve it to the parties."[78] With respect to arbitration, disputing parties may apply to the CICC "for preservation of evidence, assets or acts" and may, after an award is issued, apply to the CICC "for setting aside or enforcing the arbitral award." Notably, however, CICC support for arbitration extends only to cases administered by arbitral institutions that have been included in the one-stop mechanism.[79]

For the first set of arbitration and mediation institutions chosen for inclusion in the CICC's one-stop mechanism, the SPC selected only Chinese institutions.[80] To gain international recognition and influence, the CICC's one-stop mechanism would eventually need to include participation by foreign institutions. As a first step, the three foreign commercial arbitration institutions that currently operate

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[75] *See* SPC Provisions on Establishment of the CICC, *supra* note 41, art. 11 [characterizing the CICC's linkage of mediation, arbitration and litigation services as a "'one-stop' international commercial dispute resolution mechanism"); Wang & Sharma, *supra* note 6, at 22 ("The ICDPASO aims to be a global legal hub providing "one-stop" dispute resolution services"].

[76] *See Notice of the General Office of the Supreme People's Court on Inclusion of the First Group of International Commercial Arbitration and Mediation Institutions in the "One-stop" Diversified International Commercial Dispute Resolution Mechanism*, CHINA INT'L COMM. CT. (Dec. 5, 2018), http://cicc.court.gov.cn/html/1/219/208/210/1144.html, [selecting CIETAC, the Shanghai International Economic and Trade Arbitration Commission, the SCIA, the BAC, the China Maritime Arbitration Commission, the Mediation Center of China Council for the Promotion of International Trade and the Shanghai Commercial Mediation Center].

[77] *Id*.

[78] *Id*.

[79] *Id*. [outlining CICC support "[i]n respect of international commercial cases accepted by an arbitration institution that is included in the [one-stop] Mechanism"].

[80] *Supra* note 76.

in the Shanghai FTZ – the HKIAC, ICC, and SIAC[81] – could be actively considered for inclusion in the one-stop mechanism. Notably, with respect to the potential inclusion of foreign institutions in the CICC's one-stop mechanism, the President of Shanghai University of Political Science and Law, Liu Xiaohong, recently observed that the CICC is "working on the inclusion of well-known commercial arbitration and mediation institutions from China and abroad" in the one-stop dispute resolution platform.[82] Consistent with President Liu's remarks, Judge Xiangzhuang Sun, who currently serves on the CICC, has supported the inclusion of the "world's major arbitration and mediation institutions" in the CICC's one-stop dispute resolution platform.[83] The inclusion of such institutions in the CICC's one-stop mechanism would, again, be of central importance for the CICC's international profile.

ii. ICDPASO

Although the ICDPASO and CICC are both China-based institutions that are developing one-stop dispute resolution mechanisms, the organizations differ in many important respects. The CICC is a "permanent adjudication organ"[84] of the SPC, while the ICDPASO is a non-governmental organization[85] that has been jointly established by the China Council for the Promotion of International Trade, the China Chamber of International Commerce, and "industrial and commercial organizations and legal service agencies from over 30 countries and regions[.]"[86] In addition,

[81] *See* Arbitration Notes, *Beijing to Open Foreign Arbitral Institutions*, HERBERT SMITH FREEHILLS (Sept. 14, 2020) ["HKIAC, SIAC and ICC have opened representative offices in Shanghai . . . In August 2019, a further State Council policy paper [extended permitted business activities to include conducting] 'arbitration business in relation to civil and commercial disputes arising in the areas of international commerce, maritime affairs, investment, etc.' . . . It has been reported that several foreign arbitral institutions are in the process of setting up branches in the extended free trade zone under the August 2019 policy paper, although it remains to be seen which types of 'arbitration businesses' those branches will be permitted to conduct"], https://hsfnotes.com/arbitration/2020/09/14/beijing-to-open-to-foreign-arbitral-institutions/.

[82] President Liu Xiaohong, *China's Practice of Developing an International Commercial Dispute Resolution Mechanism*, CHINA INT'L COMM. CT. (Dec. 23, 2020), http://cicc.court.gov.cn/html/1/219/199/203/2043.html.

[83] Judge Sun, *supra* note 58, at 51-52.

[84] SPC Provisions on Establishment of the CICC, *supra* note 41, art. 1.

[85] *See* Bernard Dewit, *International Commercial Dispute Prevention and Settlement Organization (ICDPASO)*, QUEEN MARY UNIVERSITY OF LONDON (November 12, 2020), https://www.qmul.ac.uk/euplant/blog/items/international-commercial-dispute-prevention-and-settlement-organization-icdpaso.html.

[86] List of Deliverables of the Second Belt and Road Forum for International Cooperation (April 27, 2019), ¶ 11, http://www.beltandroadforum.org/english/n100/2019/0427/c36-1312.html. For a list of participating organizations, *see The First General Assembly of International Commercial Dispute Prevention and Settlement Organization (ICDPASO) Was Successfully Held*, INT'L COMM. DISP. PREVENTION AND SETTLEMENT ORG. (Sept. 29, 2020), http://en.icdpaso.org/content/2162.

ICDPASO intends to provide not only commercial arbitration and mediation services but also dispute prevention[87] and investor-State dispute resolution[88] services, which are not offered by the CICC.

Like the CICC, the ICDPASO reflects the BRI-related development of "diversified dispute resolution" mechanisms, which aim to "integrate litigation, arbitration, and mediation proceedings to meet parties' need from both China and abroad."[89] The Charter of the ICDPASO sets out several areas of work that can advance dispute resolution connectivity, including participation in "international events related to the deliberation, adoption and modification of international rules under the auspices of relevant international institutions and organizations" as well as establishing "a mechanism for regular communication, promote experience sharing and business cooperation among commercial organizations, dispute settlement institutes, academic institutions and think tanks around the world[.]"[90] Both the CICC and the ICDPASO will seek to advance the internationality and influence of international dispute resolution services in China. The sharply different design of the two institutions reflects a larger trend, occurring globally, of experimentation with "institutional design in an effort to become world-recognized forums for international commercial dispute resolution."[91] The particular BRI emphasis on connectivity adds a distinctive element to the international dispute resolution experimentation underway in China.

III. OPPORTUNITIES FOR BRI DISPUTE RESOLUTION CONNECTIVITY

As discussed above, the central BRI goal of connectivity extends not only to the "hard" connectivity of physical infrastructure but also to the "soft" connectivity of legal infrastructure. As stated by Chief Justice Menon, "an effective transnational system for commercial dispute resolution" must form part of the legal infrastructure that is required to support "the economic networks of the BRI."[92] Liao Fan's observation that soft connectivity can be advanced through the development of a "shared

[87] *See* Service, Dispute Prevention, INT'L COMM. DISP. PREVENTION AND SETTLEMENT ORG., http://en.icdpaso.org/category/54.

[88] *See* Wang & Sharma, *supra* note 6, at 23 (the CICC "has no jurisdiction over a dispute between a private investor (Chinese or foreign) and a foreign state or a foreign investor and the Chinese government because such disputes are not between equal parties . . . In contrast, the ICDPASO is intended to be an effective forum for commercial and investment disputes").

[89] Opinion Establishing BRI Dispute Resolution Mechanism and Institutions, *supra* note 4. *See also* Jian Zhang, *International Commercial Dispute Prevention and Settlement Organization: A Quick Overview*, CHINA JUSTICE OBSERVER (Oct. 15, 2020) (ICDPASO's "diversified dispute settlement mechanism" features "a synergistic use of litigation, mediation, and arbitration"), https://www.chinajusticeobserver.com/a/thing-about-international-commercial-dispute-prevention-and-settlement-organization.

[90] The Charter of the International Commercial Dispute Prevention and Settlement Organization, art.6(3) and art. 6(7), INT'L COMM. DISP. PREVENTION AND SETTLEMENT ORG, http://en.icdpaso.org/category/76.

[91] Pamela K. Bookman & Matthew S. Erie, *Experimenting with International Commercial Dispute Resolution*, Symposium on Global Labs of International Commercial Dispute Resolution, 115 AJIL UNBOUND 5, 7 (2021).

[92] Chief Justice Menon National Judges College, *supra* note 9, at 10.

understanding and recognition of essential legal principles and rules"[93] applies to legal infrastructure generally and to international dispute resolution in particular.

For China-based institutions, BRI-related international dispute resolution will create many opportunities to advance soft connectivity. As discussed above, such opportunities will include: for the CICC, potential interactions with international commercial courts in Asia, the Middle East and Europe; the expansion of rulemaking and services by Chinese arbitration institutions to include investor-State arbitration; the expansion of services by foreign arbitration institutions and foreign nationals in mainland China; coordination between Chinese and foreign arbitration institutions; coordination between Chinese and foreign institutions on dispute prevention and resolution through the work of the ICDPASO; and bilateral and multilateral rulemaking on the international enforceability of a variety of dispute resolution outcomes.[94]

Regarding potential CICC interactions with other international commercial courts, the launch of the Standing International Forum of Commercial Courts ["**SIFoCC**"] is noteworthy. As stated by Chief Justice Menon in a recent address in Beijing: "The SIFoCC draws together courts from almost 30 different countries to share best practices in the belief that courts working together can make a stronger contribution to the rule of law than they can working alone."[95] Consistent with such an emphasis on "cross-court dialogue and collaboration,"[96] a recent SPC Opinion addressing the CICC mentions opportunities for cooperation with international commercial courts outside of China.[97] The SIFoCC held its second meeting in New York in 2018;[98] the meeting included representation from 35 jurisdictions, "with 13 jurisdictions represented by their Chief Justice."[99] Representatives from the SPC as well as the Hong Kong judiciary attended the meeting.[100]

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[93] Liao Fan, *Understanding the BRI through "Five Connectivities"*, CGTN (Apr. 20, 2019). *See also* Heng Wang, *supra* note 1 at 36 [characterizing the BRI as including "software" (mechanisms and agreements) and "hardware" (economic corridors with BRI states)].

[94] *See* Introduction, *supra*.

[95] Chief Justice Menon National Judges College, *supra* note 9, at 20-21.

[96] *Id*. at 20.

[97] *See* Susan Finder, *Supreme People's Court Updates its Belt & Road Policies*, SUPREME PEOPLE'S COURT MONITOR (January 28, 2020) (discussing SPC Opinion on Providing Services and Guarantees for the Belt & Road, **关于人民法院**进一步为"一带一路"建设提供司法服务和保障的意见, http://www.court.gov.cn/fabu-xiangqing-212931.html)

[98] The SIFoCC held a third meeting virtually in 2021. *See The 3rd SIFoCC Meeting – Now Available to Watch Online*, STANDING INT'L FORUM OF COMM. CTS. (Mar. 24, 2021), https://sifocc.org/2021/03/24/the-3rd-sifocc-meeting-now-available-to-watch-online/.

[99] *Report of the Second SIFoCC Meeting – New York 2018 (Feb. 5, 2019)*, STANDING INT'L FORUM OF COMM. CTS, p. 3, https://sifocc.org/2019/02/05/report-of-the-second-sifocc-meeting-new-york-2018/.

[100] *Id*. at 6-7.

Chief Justice Menon's remarks on international collaboration also included discussion of the Asian Business Law Institute ["**ABLI**"], which was founded in Singapore in 2016.[101] As stated by Chief Justice Menon, "the goal of the ABLI is to provide 'practical guidance in the field of Asian legal development' and 'the convergence of Asian business laws.'"[102] Three SPC judges serve on the ABLI's Board of Governors,[103] two of whom also serve on the CICC: Judge Gao Xiaoli and Judge Shen Hongyu.[104] The ABLI can provide additional opportunities for the SPC – and, in particular, the CICC – to develop greater levels of internationality and influence.

Notwithstanding the above opportunities for advancing BRI dispute resolution connectivity, those opportunities will be arising in an increasingly fractured international trade environment. The extent to which that fractured trade environment might impede opportunities for BRI dispute resolution connectivity is discussed below

IV. CONNECTIVITY IN A FRACTURED TRADE ENVIRONMENT

Over the past few years, the potential decoupling of the world's two largest economies has received considerable attention.[105] As observed by Edward Luce:

> [T]he normal rules of globalisation are breaking down . . . This is creating two effects. The first is economic disengagement. After years of rapid growth, China's investment in the US is dropping rapidly . . . US barriers to Chinese entry are getting higher by the day. China's technology strategy is thus shifting from foreign acquisition to import substitution . . . The second is that other countries are being forced into an unwelcome choice. In a win-lose world, you are either with America or you are with China.[106]

If countries ultimately do face such an "unwelcome choice," one central factor to be considered would be the level of international engagement demonstrated, respectively, by the United States and China. On a recent visit to Washington D.C., the Foreign Minister of Singapore, Dr. Vivian Balakrishnan, stated the following:

> As the centre of gravity, of economic balance, shifts, I would argue that the best way for the United States to safeguard its own enlightened long-term self-interest is to keep its seat at the table, and to actively contribute to the shaping of norms that govern the global commons.[107]

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[101] Chief Justice Menon National Judges College, *supra* note 9, at 23.
[102] *Id*. (quoting Introduction, ASIAN BUS. L. INSTITUTE https://abli.asia/Introduction).
[103] *See* Board of Governors, ASIAN BUS. L. INSTITUTE https://abli.asia/ABOUT-US/BoardofGovernors.
[104] *See* Judges, CHINA INT'L COMM. CT. http://cicc.court.gov.cn/html/1/219/193/196/index.html.
[105] *Supra* note 21.
[106] Luce, *supra* note 21.
[107] Balakrishnan, *supra* note 27.

The United States recently has demonstrated some leadership in the shaping of global norms when creating the U.S. International Development Finance Corporation ["**DFC**"],[108] concluding the United States-Mexico-Canada Agreement ["**USMCA**"],[109] developing a "Vision and Principles for a Free and Open Indo-Pacific,"[110] and announcing, with Australia and Japan, a Trilateral Partnership for Infrastructure Investment in the Indo-Pacific.[111] The Biden administration also has reversed some of the Trump administration's retreat from global engagement. Such actions have included rejoining the Paris Climate Agreement,[112] rejoining the World Health Organization,[113] and, following the blocking of several World Trade Organization ["**WTO**"] appointments by the Trump administration,[114] ultimately supporting the appointment of a new WTO Director General.[115] With respect to BRI in particular, the Biden administration has started to explore the development of potential alternatives.[116]

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[108] In 2018, the United States created the DFC to update and expand the operations of the Overseas Private Investment Corporation. *See* Mercy A. Kuo, *The US International Development Finance Corporation and China*, THE DIPLOMAT (Oct. 25, 2018).

[109] *See* Free Trade Agreements, United States-Mexico-Canada Agreement, OFFICE OF THE U.S. TRADE REP., https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement.

[110] *See* The Department of Defense Indo-Pacific Strategy Report, Preparedness, Partnerships, and Promoting a Networked Region (June 1, 2019), https://media.defense.gov/2019/Jul/01/2002152311/-1/-1/1/DEPARTMENT-OF-DEFENSE-INDO-PACIFIC-STRATEGY-REPORT-2019.PDF, p 3 ["In 2017, President Trump announced our nation's vision for a free and open Indo-Pacific at the APEC Summit in Vietnam"].

[111] *See* Joint Statement of the Governments of the United States of America, Australia, and Japan (Nov. 17, 2018), PRIME MINISTER OF AUSTRALIA (Nov. 17, 2018), https://au.usembassy.gov/joint-statement-of-the-governments-of-the-united-states-of-america-australia-and-japan/.

[112] *See* Press Statement, Antony J. Blinken, Secretary of State, *The United States Officially Rejoins the Paris Agreement*, U.S. DEPT. OF STATE (Feb. 19, 2021), https://www.state.gov/the-united-states-officially-rejoins-the-paris-agreement/.

[113] *See* Lindsay Maizland, *Biden's First Foreign Policy Move: Reentering International Agreements*, COUNCIL ON FOREIGN RELATIONS, (Jan. 21, 2021) ("Biden rejoined the World Health Organization (WHO) . . . the United States will also join COVAX, a WHO-led initiative to distribute two billion COVID-19 vaccine doses around the world by the end of the year"), https://www.cfr.org/in-brief/bidens-first-foreign-policy-move-reentering-international-agreements.

[114] *See* Larry Elliott, *US Blocking Selection of Ngozi Okonjo-Iweala to be Next Head of WTO*, THE GUARDIAN (Oct. 28, 2020) ["The US is blocking the appointment of Ngozi Okonjo-Iweala as the next head of the World Trade Organization despite the former finance minister of Nigeria winning the overwhelming backing of the WTO's 164 members"); Tetyana Payosova, Gary Clyde Hufbauer & Jeffrey J. Schott, *The Dispute Settlement Crisis in the World Trade Organization: Causes and Cures*, PETERSON INSTITUTE FOR INT'L ECONOMICS POLICY BRIEF 18-5 (March 2018) ("For the past few years, US officials have blocked appointments of Appellate Body members to force WTO members to negotiate new rules that address US concerns and limit the scope for judicial overreach"].

[115] *See Office of the United States Trade Representative Statement on the Director General of the World Trade Organization*, OFFICE OF THE U.S. TRADE REP. (Feb. 5, 2021), ["The Biden-Harris Administration is pleased to express its strong support for the candidacy of Dr. Ngozi Okonjo-Iweala as the next Director General of the WTO"], https://ustr.gov/about-us/policy-offices/press-office/press-releases/2021/february/office-united-states-trade-representative-statement-director-general-world-trade-organization.

[116] *See* The Editorial Board, *Creating Alternatives to China's Belt and Road*, FINANCIAL TIMES (Apr. 24, 2021) ["As part of his plan to create an alliance of democracies to counter China's growing power, US president Joe Biden has proposed to the UK's Boris Johnson setting up an infrastructure effort to rival the Belt and Road plan"].

But the development of attractive BRI alternatives by the United States remains at an early stage, and during the Trump administration China engaged in – and, today, continues to engage in – exceptionally active rulemaking and institution building in Asia. Examples of such rulemaking and institution building include: (i) the advancement of multilateral development banks in Beijing ["**the AIIB**"[117]] and Shanghai ["**the NDB**"[118]], (ii) the conclusion of BRI cooperation agreements with more than 135 countries;[119] (iii) the establishment of CICC tribunals in Shenzhen and Xi'an;[120] (iv) the establishment of the ICDPASO in Beijing;[121] (v) the conclusion of the RCEP agreement, which establishes "the world's largest trading bloc"[122] as well as a Secretariat;[123] (vi) participation in many bilateral and multilateral initiatives aimed at advancing the enforceability of outcomes in a variety of dispute resolution settings, including the New York Convention [arbitral awards],[124] Singapore

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The Council on Foreign Relations recently developed a set of recommendations on "alternatives to BRI," including the finding that "the World Bank and its related institutions remain the best alternative to BRI." Jennifer Hillman & David Sacks, China's Belt and Road: Implications for the United States, COUNCIL ON FOREIGN RELATIONS (March 2021), https://www.cfr.org/report/chinas-belt-and-road-implications-for-the-united-states/recommendations.

[117] As of May 2021, the AIIB has 103 approved members. *See* Introduction, ASIAN INFRASTRUCTURE INVESTMENT BANK, https://www.aiib.org/en/about-aiib/index.html. Notably, the AIIB could be well-positioned to significantly advance BRI-related dispute resolution connectivity. In its 2019 Yearbook, the AIIB examined "the role of international organizations in promoting effective dispute resolution, both as dispute participants and by providing dispute resolution platforms and expertise." Peter Quayle and Xuan Gao, Introduction, *in* INT'L ORGANIZATIONS AND THE PROMOTION OF EFFECTIVE DISPUTE RESOLUTION, AIIB YEARBOOK OF INT'L L. 2019 1 (Peter Quayle & Xuan Gao, eds., 2019). In particular, the AIIB Yearbook considered whether the AIIB was "well placed" to serve as a "modern ICSID for the Belt and Road."

[118] The New Development Bank was jointly founded by the BRICS countries (Brazil, Russia, India, China, and South Africa). *See* New Development Bank, Organization, Members, https://www.ndb.int/about-us/organisation/members/.

[119] Jack Nolan & Wendy Leutert, *Signing Up or Standing Aside: Disaggregating Participation in China's Belt and Road Initiative*, BROOKINGS (Nov. 5, 2020) ["As of January 2020, 138 countries have signed on to the BRI, ranging from Italy to Saudi Arabia to Cambodia"], https://www.brookings.edu/articles/signing-up-or-standing-aside-disaggregating-participation-in-chinas-belt-and-road-initiative/. A recent Council on Foreign Relations report includes 139 countries within BRI. *See* Hillman & Sacks, *supra* note 116, Introduction.

[120] *Supra* note 45.

[121] *Supra* note 45.

[122] *RCEP: Asia-Pacific Countries Form World's Largest Trading Bloc*, BBC NEWS (Nov. 16, 2020) [RCEP "is made up of 10 Southeast Asian countries, as well as South Korea, China, Japan, Australia and New Zealand . . . Members of RCEP make up nearly a third of the world's population and account for 29% of global gross domestic product"].

[123] *See RCEP: A First Look at the Texts*, ASIAN TRADE CENTRE (Nov. 16, 2020), http://asiantradecentre.org/talkingtrade/rcep-a-first-look-at-the-texts.

[124] China became a Party to the New York Convention in 1987. *See* New York Arbitration Convention, Contracting States, http://www.newyorkconvention.org/countries. In 2018, UNCITRAL and the SCIA hosted in Shenzhen the "world's first commemorative event for the 60th anniversary of the New York Convention." *Shenzhen Sent Out "China's Voice in International Rules,"* SHENZHEN CT. INT'L ARB. (May 21, 2018), http://www.sccietac.org/web/news/detail/1740.html. Also in 2018, the SPC, UNCITRAL, CIETAC and the China Council for the Promotion of International Trade co-hosted the 2018 China Arbitration Summit, held in

Convention on Mediation [mediated settlement agreements],[125] the Hague Choice of Court Convention ["**choice of court agreements**"],[126] the Hague Judgments Convention ["**court judgments**"],[127] and a number of bilateral judicial assistance treaties.[128]

Such rulemaking and institution building, however, has not escaped criticism, particularly from the United States. U.S. criticism of the BRI has been frequent and consistent.[129] The Biden administration has continued raising such criticisms, as reflected in recent remarks by U.S. Secretary of State Antony J. Blinken.[130] During the Obama administration, similar governance concerns raised by U.S. officials in response to the launch of the AIIB were widely reported.[131]

Such criticism has not, however, led to countries "detaching" themselves from China. China has entered into BRI cooperation agreements with more than 135 countries.[132] Regarding BRI investment in the 2020's, the law firm Baker McKenzie and BRI consultancy firm Silk Road Associates recently

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Beijing, to "celebrate the 60th Anniversary of the New York Convention." 2018 China Arbitration Summit, http://cietacen.chinaarbitrationweek.org/arbitration-summit2018/Summit_en.html.

[125]China signed the Singapore Convention on Mediation in 2019. *See Singapore Convention Enters into Force, Annex A, List of Countries that Signed and Ratified the Singapore Convention on Mediation*, SINGAPORE CONVENTION ON MEDIATION (Sept. 12, 2020), https://www.singaporeconvention.org/media/AnnexACountriesSCM.pdf.

[126] *See China Signs the 2005 Choice of Court Convention*, HAGUE CONF. ON PRIVATE INT'L LAW (Sept. 12, 2017), https://www.hcch.net/en/news-archive/details/?varevent=569.

[127] *See The 2019 HCCH Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters has been Adopted*, CHINA INT'L COMM. CT. (July 3, 2019), http://cicc.court.gov.cn/html/1/219/208/209/1303.html ["During the conference, the Chinese delegation constructively participated in negotiations, firmly supported multilateralism, actively played the role as a bridge and built consensus among all the parties, and took the initiative to lead the rule-making"].

[128] *See* Song, *supra* note 19.

[129] *See e.g.*, Brunnstrom, *supra* note 25 (United States declines to send high-level officials to Silk Road Summit); U.S. National Security Council, Twitter (Mar. 9, 2019) ["Italy is a major global economy and a great investment destination. Endorsing BRI lends legitimacy to China's predatory approach to investment and will bring no benefits to the Italian people"], https://twitter.com/WHNSC/status/1104402719568203776; Nectar Gan and Robert Delaney, *United States under Donald Trump is Veering Away from China's Belt and Road*, SOUTH CHINA MORNING POST (Apr. 25, 2019) ["In a globalized world, there are many belts and many roads . . . And no one nation should put itself into a position of dictating 'one belt, one road"] (quoting then-U.S. Defense Secretary James Mattis].

[130] *See* Press Releases, *Secretary Antony J. Blinken Virtual Roundtable with Kenyan and Nigerian Journalists*, U.S. DEPT. OF STATE (Apr. 27, 2021) ["In some instances, other countries that make investments in fact load a lot of debt on the countries getting the so-called investment, and that debt becomes a trap and a huge burden, and the country either has to pay it back by taking resources away from other parts of its budget that benefit people or it can't pay it back and then the country that's made the debt, issued the debt, suddenly owns whatever it was investing in . . . we've seen other countries come in with big projects but they bring in their own workers instead of relying on local workers who should get the benefits of working on these projects. Sometimes the standards when it comes to protecting the rights of workers working on these projects are insufficient or the environmental standards are not respected"], https://www.state.gov/secretary-antony-j-blinken-virtual-roundtable-with-kenyan-and-nigerian-journalists/;

[131] *Supra* note 24.

[132] *Supra* note 119.

modelled five scenarios, which ranged from US$560 billion to US$1.32 trillion.[133] In 2019, the AIIB "welcomed nine new proposed members," increasing AIIB membership to 102 shareholders representing "79 percent of the global population."[134] RCEP "will create a free trade zone covering about 30% of the world's gross domestic product, trade and population."[135]

Rather than leading to separation, criticism instead can be a form of engagement. A fractured trade environment does not pose a significant threat to China's ability to advance dispute resolution connectivity given, in particular, the active rulemaking and institution building occurring on China's side of the divide.

V. CONCLUSION

The central BRI goal of connectivity extends not only to the "hard" connectivity of physical infrastructure but also to the "soft" connectivity of legal infrastructure. The advancement of soft connectivity through development of shared understandings on core principles and rules applies to legal infrastructure generally and to international dispute resolution in particular.

For China-based institutions, BRI-related international dispute resolution can create many opportunities to advance soft connectivity. Such opportunities include: for the CICC, potential interactions with international commercial courts in Asia, the Middle East and Europe; the expansion of rulemaking and services by Chinese arbitration institutions to include investor-State arbitration; the expansion of services by foreign arbitral institutions and foreign nationals in mainland China; coordination between Chinese and foreign arbitral institutions; coordination between Chinese and foreign institutions on dispute prevention and resolution through the work of the ICDPASO; and bilateral and multilateral rulemaking on the international enforceability of a variety of dispute resolution outcomes. But such BRI-related advances in dispute resolution connectivity will be occurring in an increasingly fractured international trade environment, with attention focused on a potential U.S.-China decoupling. That fractured trade environment follows years of U.S. practice toward China, across three administrations, in which U.S. officials consistently have raised governance concerns in connection with China-led initiatives.

[133] Jiangyu Wang, *supra* note 4, at 6-7.
[134] *From Our President*, 2019 AIIB Annual Report and Financials, ASIAN INFRASTRUCTURE INVESTMENT BANK (2020), https://www.aiib.org/en/news-events/annual-report/2019/_common/pdf/2019-aiib-annual-report-and-financials.pdf.
[135] Kate Whiting, *An Expert Explains: What is RCEP, the World's Biggest Trade Deal?*, WORLD ECONOMIC FORUM (May 18, 2021), https://www.weforum.org/agenda/2021/05/rcep-world-biggest-trade-deal/.

The increasingly fractured trade environment has not, however, led to countries "detaching" themselves from China. China has entered into BRI cooperation agreements with more than 135 countries; AIIB membership represents nearly 80% of the global population; the RCEP free trade area will cover about 30% of the world's trade and population. The risk of separation from China may be low, but the risk of criticism of China is not. Malaysia's recent suspension, and subsequent resumption, of a few major BRI projects provides one clear example of such criticism. In the particular context of international dispute resolution, many responses to the launch of the CICC have been critical or, at a minimum, skeptical. Rather than leading to separation, such criticism instead can operate as a form of engagement. International engagement with the BRI and the AIIB has been strong notwithstanding significant criticism of both initiatives. An increasingly fractured trade environment likely will not impede China's advancement of dispute resolution connectivity, particularly given the active rulemaking and institution building occurring on China's side of the divide.

DEMYSTIFYING PUBLIC POLICY TO ENABLE ENFORCEMENT OF FOREIGN AWARDS – INDIAN PERSPECTIVE

Bhavana Sunder & Kshama A. Loya*

Abstract

This article attempts to demystify the uncertainty and unpredictability around public policy, and deduces situations in which the scope and ambit of public policy can be assertively ascertained. It further examines 'public policy' as a ground for grant or refusal of enforcement of a foreign award in India, that has one of the largest judicial caseload of international commercial disputes and international arbitration. While arriving at their deductions, the authors analyse the context in which public policy is placed under the New York Convention; Indian law and its adoption of the New York Convention; the meaning of public policy and its realm of operation in law for purposes of enforcement of foreign awards; and judicial interpretation of public policy by Indian courts. Based on the aforesaid analysis, they also identify practical situations in which public policy can be raised as a ground to resist or defend resistance to enforcement of foreign awards.

I. INTRODUCTION

"*Public policy is never argued at all but when other points fail*."

-Burrough J.

The aforesaid statement[1] depicts the elusive nature of 'public policy' in legal proceedings that draw upon its presence in statute, conventions and legal systems. The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 ["**New York Convention**"] is a critical international convention that gives room for public policy considerations while assessing enforcement of a foreign arbitral award (foreign award). Article V(2)(b) of the New York Convention states:

> "(V)(2) Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:
>
> (a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

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[1] Burrough J. in Richardson v. Mellish, (1824-34) All ER 258.

(b) The recognition or enforcement of the award would be contrary to the public policy of that country."[2]

The present article examines 'public policy' as a ground for grant or refusal of enforcement of a foreign award in India. Its open-textured and variable nature has created much divergence in the international arbitration community on its meaning, applicability and limits. For some, public policy has played a savior of foreign awards; for others, it has set the arbitration proceedings and the outcome at naught. Most award creditors may have realized the fruits of their arbitration only after long arduous legal proceedings to establish non-contravention of public policy. This has created a cloud of uncertainty and unpredictability around public policy.

This paper attempts to demystify this uncertainty, and deduce situations in which the scope and ambit of public policy can be assertively ascertained. While arriving at these deductions, we will analyze the context in which public policy is placed under the New York Convention (II); Indian law and its adoption of the New York Convention (III); the meaning of public policy and its realm of operation in law for purposes of enforcement of foreign awards (IV); and judicial interpretation of public policy by Indian courts (V). In the end, based on the aforesaid analysis, we identify practical situations in which public policy can be raised as a ground to resist or defend resistance to enforcement of foreign awards (VI).

II. THE NEW YORK CONVENTION

The New York Convention was adopted by the United Nations and entered into force on 7 June 1959. At the date of this article, the Convention has 163 Contracting States.[3] The New York Convention is considered to be the cornerstone of the international arbitration system.[4]

Prior to the New York Convention, the Geneva Protocol of 1923 was signed between countries to enable recognition and enforcement of an award by the State in which it was made. Subsequently, the Geneva Convention of 1927 widened the scope of the Geneva Protocol of 1923 by providing recognition and enforcement of protocol awards within the territory of contracting States, and not merely the State in which the award was made.[5]

[2] Convention on the Recognition & Enforcement of Foreign Arbitral Awards, Article V (2), June 10, 1958, 330 UNTS 3.

[3] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 330 U.N.T.S. 3. https://www.newyorkconvention.org/countries.

[4] Renaud Sorieul, *Message from the Secretary of UNCITRAL*, New York Convention 1985 (2013) https://newyorkconvention1958.org/index.php?lvl=cmspage&pageid=10&menu=729&opac_view=-1.

[5] ALAN REDFERN & MARTIN HUNTER, LAW & PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 61-62 (2nd ed. 1991).

Under the Geneva Convention of 1927, a party seeking enforcement had to prove the conditions necessary for enforcement and was often obliged to seek a declaration in the countries where the arbitration took place to the effect that the award was enforceable in that country, before it could enforce the award in the courts at the place of enforcement,[6] which commonly referred to as the doctrine of double-exequatur. Article 1(e) of the Geneva Convention of 1927 required that, in order for recognition and enforcement to be granted, it had to be positively demonstrated that such "*recognition or enforcement of the award is not contrary to the public policy or to the principles of law of the country in which it is sought to be relied upon*".[7] Owing to its broad language and burden of proof on the party *seeking* enforcement, the Geneva Convention of 1927 hindered speedy settlement of disputes through arbitration.

The New York Convention replaced the Geneva Convention of 1927. Among other provisions, Article V (2)(b) provided that recognition of an award may be refused on the basis of public policy. It omitted the reference to "*principles of law of the country in which it is sought to be relied upon*". This omission was acknowledged as highlighting the pro-enforcement bias of the New York Convention. Further, the New York Convention places the burden of proof on the party attempting to resist enforcement. Thus, the New York Convention seeks to provide a simpler and effective method for recognition and enforcement of foreign awards. Since its inception, the New York Convention's regime for recognition and enforcement has become deeply rooted in the legal systems of its Contracting States and has contributed to the status of international arbitration as common means of resolving commercial disputes today.[8]

III. ADOPTION OF THE NEW YORK CONVENTION BY INDIA

India was a signatory to the Geneva Protocol of 1923 and the Geneva Convention of 1927. With a view to implement the obligations under the said Protocol and Convention, the Arbitration (Protocol & Convention) Act, 1937 was enacted. India became a signatory to the New York Convention in 1958 and ratified it in 1960. The Foreign Awards (Recognition and Enforcement) Act, 1961 ["**Foreign Awards Act**"] was enacted to give effect to the New York Convention. The Foreign Awards Act was repealed to give way to the Arbitration & Conciliation Act, 1996 ["**A&C Act**"].

[6] Renusagar Power Co. Ltd v. General Electric Co., 1994 Supp (1) SCC 644.
[7] UNCITRAL SECRETARIAT GUIDE ON THE CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS 239 (2016) https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/2016_guide_on_the_convention.pdf
[8] *Id.* at 1.

Part II (Chapter I) of the A&C Act deals with the enforcement of New York Convention awards. Section 48(2) of the Act provides statutory expression to Article V(2) of the New York Convention which enables a signatory country to refuse enforcement of a foreign award, if it is in contravention of its public policy. The existing equivalent portions of Section 48 of the A&C Act (as it stands today) and Article V of the New York Convention envisaging the ground of public policy are set out in the table below:

New York Convention (Article V)	**A&C Act (Section 48)**
Article V(2) Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that: **(b)** The recognition or enforcement of the award would be contrary to the public policy of that country.[9]	**Section 48(2)** Enforcement of an arbitral award may also be refused if the Court finds that— **(b)** The enforcement of the award would be contrary to the public policy of India. [Explanation 1. —For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if, — (i) the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81; or (ii) it is in contravention with the fundamental policy of Indian law; or (iii) it is in conflict with the most basic notions of morality or justice. Explanation 2. —For the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute.][10]

Signatories to the New York Convention do not automatically become reciprocating countries in India – there is a requirement for the Central Government to notify reciprocating countries. An award passed in a notified reciprocating territory may be enforced in India as a 'foreign arbitral award' under

[9] *Supra* note 2, Article V.
[10] Arbitration and Conciliation Act, §48(2) (1996).

the A&C Act. So far, the Central Government has notified 48 countries as reciprocating territories for the purposes of the New York Convention.

IV. MEANING OF PUBLIC POLICY

Article V(2)(b) does not define public policy. It provides that a court may refuse to recognize or enforce an award if the award "*would be contrary to the public policy of that country"*.[11] The words 'that country' are indicative of public policy of the country where enforcement is sought. Thus, the public policy of that country must be applied by courts in assessing objections to enforcement. However, before delving into the public policy of India, it is important to understand the basic tenets of public policy.

A. Meaning and Possible Views

Public policy forms part of a wider range of tools, such as the mandatory rules of the forum that override private autonomy that allow a court to protect the integrity of the legal order to which it belongs. Although different jurisdictions define public policy differently, case law tends to refer to a public policy basis for refusing recognition and enforcement of an award under Article V(2)(b) of the New York Convention when the core values of a legal system have been deviated from. Invoking the public policy exception is a safety valve to be used in those exceptional circumstances when it would be impossible for a legal system to recognize an award and enforce it without abandoning the very fundaments on which it is based.[12]

Defining public policy, Sir William Holdsworth stated,

> "A body of law like the common law, which has grown up gradually with the growth of the nation, necessarily acquires some fixed principles, and if it is to maintain these principles it must be able, on the ground of public policy or some other like ground, to suppress practices which, under ever new disguises, seek to weaken or negative them."[13]

In *Gherulal Parakh* v. *Mahadeodas Maiya*, the Supreme Court of India favoured a narrow, non-evolving view of public policy and stated, "*though the heads are not closed and though theoretically it may be permissible to evolve a new head under exceptional circumstances of a changing world, it is admissible in the interest of stability of society not to make any attempt to discover new heads in these days*."[14]

[11] *Supra* note 2, Article V(2)(b).
[12] *Supra* note 7, at 240.
[13] WILLIAM SEARLE HOLDSWORTH, HISTORY OF ENGLISH LAW 55 (Vol. III, 2013).
[14] Gherulal Parakh v. Mahadeodas Maiya, 1959 AIR 781.

However, with time, the meaning of 'public policy' has evolved significantly over the years and across different jurisdictions. In *Central Inland Water Transport Corpn. Ltd.* v. *Brojo Nath Ganguly*, the Court held, "*public policy connotes some matter which concerns the public good and the public interest. The concept of what is for the public good or in the public interest or what would be injurious or harmful to the public good or the public interest has varied from time to time*."[15]

Thus, public policy is either subject to a narrow view *i.e.*, fixed principles where courts cannot create new heads of public policy, or a broad view where courts can play a role in judicial law making. As evident below, a narrow view is adopted for the purposes of enforcement of foreign awards.

B. Applicable Public Policy for Purposes of Foreign Awards

Foreign awards operate at the level of private international law involving conflict of laws, as opposed to domestic awards. Thus, a distinction needs to be drawn while applying the rule of public policy between a matter governed by domestic law and a matter involving conflict of laws. The application of the doctrine of public policy in the field of conflict of laws is more limited than that in the domestic law and the courts are slower to invoke public policy in cases involving a foreign element than when a purely municipal legal issue is involved.[16] Although the concept of public policy is the same in nature in these two spheres of law, its application differs in degree and occasion, corresponding to the fact that transactions containing a foreign element may constitute a less serious threat to municipal institutions than a purely local transactions.[17]

The particular rule of public policy may be of an overriding nature and therefore be a ground to resist enforcement, or it may be local in the sense that it represents some feature of internal policy. If it is the latter, it must be confined to cases governed by the domestic law and ought not be extended to a case governed by foreign law. In order to ascertain whether the rule is all-pervading or merely local, it must be examined in the light of its history, the purpose of its adoption, the object to be accomplished by it and the local conditions.[18]

The above also justified minimal judicial intervention in enforcement of foreign awards as distinguished from domestic awards. In the Supplementary Report to the 246th Law Commission Report, the Law Commission stated that the legitimacy of judicial intervention in the case of a purely

[15] Central Inland Water Transport Corpn. Ltd. v. Brojo Nath Ganguly, (1986) 3 SCC 156.
[16] DICEY & MORRIS, THE CONFLICT OF LAWS 92 (Vol. I, 11th ed. 1987).
[17] R.H. GRAVESON, CONFLICT OF LAWS 165 (7th ed. 1974).
[18] CHESHIRE AND NORTH, PRIVATE INTERNATIONAL LAW 129 (12th ed. 1992).

domestic award is far more than in cases where a court is examining the correctness of a foreign award or a domestic award in an international commercial arbitration.[19]

The above also finds international judicial support. In the United Kingdom, the Court of Appeal has held that "*public policy will only be engaged where the illegality reflects considerations of international public policy rather than purely domestic public policy*."[20] In France, an international arbitral award may be refused enforcement if it is contrary to 'international public policy'.[21] International public policy in France refers to "*the French conception of international public policy, that is the rules and values which cannot be violated within the French legal order, even in the framework of situations of an international nature*".[22] In Italy, public policy is construed as international public policy, and not purely domestic public policy. Public policy may include the core fundamental values of the Italian Constitution and bar the recognition of conflicting foreign judgments.[23]

The fact that minimum judicial intervention is warranted in enforcement of foreign awards and domestic public policy is not applied supports a narrow view of public policy. In the United States, in the landmark case of *Parsons & Whittemore Overseas Co.* v. *Societe Generale De L'industrie Du Papier,*[24] the Court of Appeal discussed that the pro-enforcement bias implicit in the New York Convention is indicative of the narrow manner in which the public policy defense is to be construed. Courts in India have supported a narrow view of public policy as will be evident in Section V below.

C. Judicial Interpretation of Public Policy in India

Under the A&C Act, public policy stands as a ground both for setting aside awards made by India-seated arbitral tribunals under Section 34, and for resisting enforcement to foreign awards under Section 48. Despite the internationally recognized view that public policy vis-à-vis foreign awards must be applied narrowly at a private international law level, Indian case law witnessed an intermingling of the operative realms of public policy for domestic and foreign awards. Whilst this

[19] Law Commission of India, *Report No. 246 on Amendments to the Arbitration and Conciliation Act 1996* (Aug. 2014).
[20] RBRG Trading (UK) Limited v. Sinocore International Co. Ltd., [2018] EWCA Civ 838.
[21] French Code of Civil Procedure, Article 1520 (1981).
[22] Pierre Pic & Asha Ranjan, *The Public Policy Exception in International Arbitration: A Snapshot From France*, 6 IJAL 197 (2017), *citing* Cour d'appel [CA] [regional court of appeal] Paris, June 14, 2001, SA Compagnie commercial André v. SA Tradigrain France, REV. ARB. 773 (2001).
[23] Massimo Benedettelli and Marco Torsello, *Challenging and Enforcing Arbitration Awards 2019, Italy*, Global Arbitration Review (May, 2021) https://globalarbitrationreview.com/jurisdiction/1005944/italy.
[24] Parsons & Whittemore Overseas Co. v. Societe Generale De L'industrie Du Papier, 508 F.2d 969.

was largely undesirable, judicial interpretation has enriched the content of public policy both in the realm of domestic and foreign awards. The trajectory of judicial interpretation is briefly traced below.

i. Renusagar: Public Policy for Foreign Awards

In 1993, the Supreme Court of India ["**SCI**"] had an opportunity to determine the contours of public policy in the landmark case of *Renusagar Power Co. Ltd* v. *General Electric Co.*[25] ["**Renusagar**"], involving enforcement of a foreign award under the Foreign Awards Act.[26] Applying a narrow view of public policy, the Court held that since the Foreign Awards Act is concerned with recognition and enforcement of foreign awards which are governed by the principles of private international law, the expression "public policy" in Section 7(1)(b)(ii) of the Foreign Awards Act, 1961 must necessarily be construed in the sense the doctrine of public policy as applied in the field of private international law. Applying the said criteria, it was held that the enforcement of a foreign award would be refused on the ground that it is contrary to public policy if such enforcement would be contrary to "(i) fundamental policy of Indian law; or (ii) the interests of India; or (iii) justice or morality".[27]

In relation to the 'fundamental policy of Indian law', the Court held that "(i) the award must invoke something more than merely a violation of Indian law to be refused enforcement; (ii) a violation of economic interests of India is contrary to public policy; (iii) it is the fundamental principle of law that orders of courts must be complied with and a disregard for such orders would be contrary to public policy".[28]

ii. Saw Pipes: Patent Illegality for Domestic Awards

Subsequent to the judgment in *Renusagar,* the SCI interpreted the meaning of 'public policy' In in the case of *ONGC Ltd.* v. *Saw Pipes Ltd.*[29] (now overruled) ["**Saw Pipes**"]. This case involved challenge to domestic arbitral awards rendered in India on the ground of public policy under Section 34 of the A&C Act. In addition to the meaning of public policy provided in *Renusagar* (which was in relation to foreign awards), the SCI introduced the concept of 'patent illegality' for setting aside domestic awards under the head of public policy. Patent illegality, to some extent, involved a review of the *merits* of the underlying dispute. Defining patent illegality, it held that

> "Illegality must go to the root of the matter and if the illegality is of trivial nature it cannot be held that award is against the public policy. Award could also be set aside if it is so

[25] *Supra* note 6
[26] Foreign Awards (Recognition and Enforcement) Act, §7(1)(b)(ii) (1961).
[27] *Supra* note 6, at 66.
[28] *Supra* note 6, at 76, 85.
[29] ONGC v. Saw Pipes (2003) 5 SCC 705.

> unfair and unreasonable that it shocks the conscience of the Court. Such award is opposed to public policy and is required to be adjudged void."[30]

The SCI followed the dicta of *Saw Pipes* in the case of *Venture Global Engineering* v. *Satyam Computer Services Ltd. & Anr.* (now overruled).[31]

iii. Phulchand: Patent illegality extended to Foreign Awards

In the case of *Phulchand Exports Ltd.* v. *O.O.O Patriot* (now overruled) ["**Phulchand**"], the SCI extended the ground of 'patent illegality' devised in *Saw Pipes* for setting aside domestic awards in India, to resistance of enforcement of foreign awards in India.[32] The judgment of the SCI in *Phulchand* set a disturbing precedent as it widened the ambit of public policy *vis-a-vis* foreign awards - no longer keeping it narrow and minimal as in *Renusagar*.

iv. Lal Mahal: Revert to Renusagar for Foreign Awards

In *Shri Lal Mahal Ltd.* v. *Progetto Grano SPA*, ["**Lal Mahal**"] the SCI overruled its decision in *Phulchand* and held that a foreign award may be refused enforcement under Section 48(2)(b) *only* if such enforcement would be contrary to: (i) the fundamental policy of Indian law; or (ii) the interests of India; or (iii) justice or morality,[33] thereby returning to the position laid down by *Renusagar*. It refused to apply the ground of patent illegality while assessing foreign awards.

v. 246th Law Commission Report: Patent Illegality Restricted

In August 2014, the 246th Law Commission Report ["**246th LCR**"] provided significant inputs in relation to the definition of public policy. It acknowledged that *Saw Pipes* had unintended consequences on international commercial arbitrations and the enforcement of foreign arbitral awards, which was corrected by the SCI in *Lal Mahal.* Additionally, it recommended "(i) addition of Section 34(2A) to the A&C Act, in order to limit the ground of 'patent illegality' to purely domestic arbitral awards; and (ii) a suggestion to add that "an award shall not be set aside merely on the ground of erroneous application of the law or by re-appreciating evidence".[34]

The 246th LCR also proposed to statutorily include a definition to public policy based on the SCI's dicta in *Renusagar.* Going a step forward, the 246th LCR suggested that the definition of public policy should not include within it 'the interests of India' since the same was capable of interpretational

[30] *Id.*, at 31.
[31] Venture Global v. Engineering v. Satyam Computer Services Ltd. & Anr., (2008) 4 SCC 190.
[32] Phulchand Exports Ltd. v. O.O.O Patriot, (2011) 10 SCC 300.
[33] Shri Lal Mahal Ltd. v. Progetto Grano Spa, (2014) 2 SCC 433.
[34] *Supra* note 19.

misuse. Thus, it was proposed that the ambit of public policy for enforcement of foreign awards should be limited to fundamental policy of Indian law; or basic notions of justice or morality.[35]

vi."Western Geco": Wednesbury Principle of Reasonableness included for Domestic Awards

Before the recommendations of the 246th LCR were incorporated into the A&C Act, the SCI expanded the scope of public policy in *ONGC* v. *Western Geco International Ltd.* in a case involving challenge to domestic awards. The Court held that 'fundamental policy of law' included three fundamental juristic principles, namely, (i) duty to adopt judicial approach, i.e., to not act in an arbitrary, capricious or whimsical manner. Judicial approach requires courts to act in a fair, reasonable and objective manner and its decision should not be actuated by any extraneous consideration; (ii) compliance with principles of natural justice, including *audi alterum partem* and application of mind to the facts and circumstances; and (iii) 'Wednesbury principle' *i.e.,* an award may be set aside if it is perverse and so irrational that no reasonable person would have arrived at the same. The SCI held that a court could set aside a domestic award under the umbrella of fundamental policy of Indian law if the award is perverse or irrationality such as to fall foul of the touchstone of the aforesaid principles.[36]

vii. Associate Builders: Public Policy Consolidated

Public policy was further consolidated in *Associate Builders* v. *Delhi Development Authority,* while assessing a challenge to domestic award. It set out the following elements of 'public policy' which are set out and summarized below:[37]

a) *Fundamental Policy of Indian Law:* This includes (a) contravention of the provisions of the Foreign Exchange Regulation Act, 1973 as it is a statute enacted for the national economic interest; (b) disregarding orders of superior courts in India; (c) disregarding the binding effect of the judgment of a superior court; and (d) the principle of adopting a judicial approach, which demands that a decision be fair, reasonable and objective. An arbitrary or whimsical decision would not be a determination that is fair, reasonable or objective; contravention of the principle of *audi alteram partem* principle also contained in Sections 18 and 34(2)(a)(iii) of the A&C Act; a decision which is so perverse or so irrational that no reasonable person would have arrived at the same. A decision could be deemed perverse if: (i) the finding is based on no evidence, or (ii) an arbitral tribunal takes into account something irrelevant to the decision which it arrives at; or (iii) ignores vital evidence in arriving at its decision.

[35] *Id.*
[36] ONGC v. Western Geco International Ltd. (2014) 9 SCC 263.
[37] Associate Builders v. Delhi Development Authority (2015) 3 SCC 49.

b) *Contrary to the interest of India:* This ground relates to India as a member of the world community in its relations with foreign powers.

c) *Against justice:* An award is against justice when it shocks the conscience of the court. For example, an arbitral award which awards a relief without any reason or justification.

d) *Against morality:* Morality includes within it 'sexual morality' so far as Section 23 of the Indian Contract Act, 1872 is concerned. If it is to go beyond sexual morality, it would cover agreements which are not illegal per se but would not be enforced given the prevailing morals of the day. Interference on this ground would also be only if it is something which shocks the court's conscience.

e) *Patent illegality:* This includes contravention of the substantive law of India, which would result in an illegality which goes to the root of the matter and cannot be of a trivial nature; contravention of the A&C Act itself; contravention of Section 28(3) of the A&C Act, which is the 'Rules applicable to the substance of the dispute'. If two views are possible, court can't substitute its view for the view of arbitrator. [38]

viii. Supplementary Report of the 246th Law Commission

In light of decision in *Western Geco*, the Law Commission issued a Supplementary Report to the 246th Law Commission Report specifically on the topic of "Public Policy" in February 2015. It recorded the 'chief reason' for its issuance as the inclusion of the Wednesbury principle of reasonableness within the phrase of "fundamental policy of Indian law" by the SCI in *Western Geco.* The Wednesbury principle of reasonableness permitted courts to look at an award to understand whether the conclusion would be one which "no reasonable person would have arrived at". This test permitted a review of an arbitral award on its merits. The Law Commission suggested that such a power to review an award on merits is contrary to the objectives of the A&C Act and international practice, and would increase judicial interference in awards. It proposed that another explanation be added to Section 34 of the A&C Act, *viz.,* "*For the avoidance of doubt the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute."*[39]

ix. Arbitration and Conciliation [Amendment] Act, 2015

In light of the proposed amendments, the A&C Act was amended through the Arbitration and Conciliation [Amendment] Act, 2015. As prescribed by the Law Commission Report, the ground of

[38] *Id.*

[39] Law Commission of India, Supplementary to Report No. 246 on Amendments to Arbitration and Conciliation Act, 1996, *"Public Policy", Developments post-Report No. 246* (Feb 2015).

'patent illegality' is now restricted only to domestic arbitrations by way of insertion of Section 34(2A). Patent illegality is not available as a ground for international commercial arbitrations. Additionally, Section 48 of the A&C Act was amended to include the following explanations:

> "Explanation 1. —For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if, — (i) the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81; or (ii) it is in contravention with the fundamental policy of Indian law; or (iii) it is in conflict with the most basic notions of morality or justice. Explanation 2. —For the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute."[40]

x. Ssangyong Engineering: S.34 and S.48 of A&C Act

In *Ssangyong Engineering and Construction Company Ltd.* v. *NHAI* [*"***Ssangyong Engineering***"*], the SCI set aside a majority domestic award. The specific factual circumstance involved a Circular being issued by the Respondent and unilaterally applied as binding on the other party. This was upheld by the majority arbitral tribunal. Thus, the SCI held that:

> "This being the case, it is clear that the majority award has created a new contract for the parties by applying the said unilateral Circular and by substituting a workable formula under the agreement by another formula de hors the agreement. This being the case, a fundamental principle of justice has been breached, namely, that a unilateral addition or alteration of a contract can never be foisted upon an unwilling party, nor can a party to the agreement be liable to perform a bargain not entered into with the other party. Clearly, such a course of conduct would be contrary to fundamental principles of justice as followed in this country, and shocks the conscience of this Court.". [41]

Thus, the majority award was set aside on the ground that the award had unilaterally altered the terms of the underlying contract, thereby being contrary to the principles of justice and shocking the conscience of the court. However, the minority award was upheld, by invoking the Court's inherent powers under Article 142 of the Constitution of India.

The Court held that this was contrary to the public policy of India. Additionally, relying upon *Associate Builders*, and carefully considering the changes in the law, particularly the Arbitration and Conciliation [Amendment] Act, 2015, the SCI in *Ssangyong Engineering* demarcated the grounds for setting aside domestic awards and setting aside international commercial arbitrations seated in India and resisting the enforcement of foreign arbitral awards.[42]

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[40] Arbitration and Conciliation Act, §48 (1996).
[41] Ssangyong Engineering and Construction Company Ltd. v. NHAI, 2019 (15) SCC 131.
[42] *Id.*

V. KEY DEDUCTIONS ON PUBLIC POLICY UNDER INDIAN LAW

India is one of the few jurisdictions to statutorily define public policy through the Arbitration and Conciliation (Amendment) Act, 2015. While some countries consider public policy to mean international public policy, Indian courts have held that there is no workable definition of international public policy, thus, it should be construed to be the doctrine of public policy as applied by courts in India.[43] Within the definition of public policy, India has statutorily included the grounds of fraud, corruption, fundamental policy of Indian law and basic notions of justice and morality.

While public policy has no definition and its elements have been identified statutorily in Section 48(2)(b)(ii), additional elements have been sufficiently postulated by judicial interpretation. In light of the above analysis, the following practical deductions can be made about public policy. These will be helpful while assessing an application resisting enforcement of a foreign award.

A. Court's Discretion in Refusing Enforcement

S.48(2) provides that the Court "*may*" refuse enforcement of a foreign award. This provides discretion to the Court to, in certain circumstances, allow enforcement of a foreign award even if grounds of refusal are made out.

In the case of *Cruz City 1 Mauritius Holdings* v. *Unitech Limited,* [*"***Cruz City***"*] the Delhi High Court proposed a balancing test to determine when a foreign arbitral award may be refused enforcement on the ground of public policy. The Court in *Cruz City* considered whether refusing to enforce a foreign award which is contrary to public policy may be further opposed to '*public policy*'. However, the Court further held that while the width of discretion to refuse the enforcement of an arbitral award is narrow and limited, if sufficient grounds are established, courts can accept the contentions to refuse the enforcement of an arbitral award.[44]

Additionally, in the case of *Vijay Karia & Ors.* v. *Prysmian Cavi E Sistemi SRL* [*"***Vijay Karia"***], the SCI held that while discretion of courts may be employed in some of the grounds for refusing the enforcement of a foreign award, courts do not have any discretion regarding the grounds of fraud, corruption, fundamental policy of Indian law, basic notions of justice and morality. [45]

In the United Kingdom, in the case of *Minmetals Germany Gmbh* v. *Ferco Steel Ltd.,* it has been held that

[43] *Supra* note 6.
[44] Cruz City 1 Mauritius Holdings v. Unitech Limited, (2017) 239 DLT 649.
[45] Vijay Karia & Ors. v. Prysmian Cavi E Sistemi SRL, 2020 SCC OnLine SC 177.

> "considerations of public policy involve investigation not only of the core procedural defect relied upon by way of objection to enforcement but of all surrounding circumstances which are material to the English Court's decision whether, as a matter of policy, enforcement should be refused. Such circumstances may give rise to policy considerations which so strongly favour enforcement as to outweigh policy considerations to the contrary"[46]

In *Dallah Real Estate and Tourism Holding Company* v. *Ministry of Religious Affairs, Government of Pakistan,* the Supreme Court of the U.K., held that while there may be a discretion to enforce an arbitral award even if grounds for refusal of enforcement are made out in some circumstances, the absence of a valid arbitration agreement is not a ground wherein the court can exercise such discretion. [47]

In *Yukos Oil Co* v. *Dardana Ltd.*, the Court of Appeal in has held that the word 'may' in Article V of the New York Convention suggests that even if one or more grounds are made out, "*the right to rely on them had been lost, by for example another agreement or estoppel*." The High Court of Hong Kong, in the case of *Hebei Import,*[48] held that courts to not have the discretion to enforce an arbitral award if the award is against public policy and the basic notions of morality and justice. [49]

B. Beyond Mere Statutory Violation

The expression 'fundamental policy of Indian law' calls for a violation that is beyond mere statutory violation. In *Renusagar,* the Court held that Article V(2)(b) of the New York Convention had omitted the reference to "*principles of law of the country in which it is sought to be relied upon*" while replacing the Geneva Convention of 1927. Since the expression "public policy" covers the field not covered by the words "and the law of India" which follow the said expression, it was held that contravention of law alone will not attract the bar of public policy and something more than contravention of law is required.[50]

It is important to assess the nature, object and scheme of a statute to determine if the violation of such statute would constitute a violation of the fundamental policy of Indian law. In *Vijay Karia,* the SCI held that any rectifiable breach under the FEMA cannot be said to be a violation of the fundamental policy of Indian law. It held that the Reserve Bank of India could step in and direct the parties to comply with the provisions of the FEMA or even condone the breach. However, the arbitral award

[46] Minmetals Germany Gmbh v. Ferco Steel Ltd., [1999] 1 All ER (Comm) 315.
[47] Dallah Real Estate and Tourism Holding Company v. Ministry of Religious Affairs, Government of Pakistan [2010] UKSC 46.
[48] Hebei Import & Export Corporation v. Polytek Engineering Company Ltd., [1999] 2 HKC 205.
[49] Yukos Oil Co v. Dardana Ltd., [2002] EWCA Civ 543.
[50] *Supra* note 6.

would not be non-enforceable as the award would not become void on this count.[51] Citing its judgment in *Renusagar,* the SCI held that the fundamental policy of Indian law must pertain to "*a breach of some legal principles or legislation which is so basic to Indian law that it is not susceptible of being compromised. "Fundamental Policy" refers to the core values of India's public policy as a nation, which may find expression not only in statutes but also time-honoured, hallowed principles which are followed by the Courts*."[52]

C. Basic Notions of Justice & Morality

A recent instance wherein a majority arbitral award was set aside as being opposed to 'justice' is that of the case of *Ssangyong Engineering,* wherein it was held that the award unilaterally altered the contract which is opposed to the fundamental principles of justice and shocks the conscience of the court. Thus, when it comes to the public policy of India argument based upon most basic notions of justice, it is clear that this ground can be attracted only in very exceptional circumstances when an award shocks the conscience of the Court. [53]

D. Mistake of Fact or Law

The SCI has repeatedly held that the scope of enquiry under Section 48 does not permit review of a foreign arbitral award on its merits. Courts do not have the ability to take a 'second look' at the foreign arbitral award at the enforcement stage.[54] This is now incorporated as a statutory rule under Section 48(2)(b), Explanation 2. Further, the Delhi High Court, in the case of *Cairn India & Ors.* v. *Government of India* recently held that once an arbitral tribunal has been vested with jurisdiction by parties, it has the right to make both right and wrong decisions as these are errors which fall within their jurisdiction. [55]

In *Vijay Karia*, the SCI, while citing Albert Jan van den Berg in his treatise The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation, has noted that,

> "it is a generally accepted that the court before which the enforcement of the foreign award is sought may not review the merits of the award. The main reason is that the exhaustive list of grounds for refusal of enforcement enumerated in Article V does not include a mistake in fact or law by the arbitrator. Furthermore, under the New York Convention, the task of the enforcement judge is a limited one. The control exercised by him is limited to verifying whether an objection of a respondent on the basis of the

[51] Vijay Karia & Ors. v. Prysmian Cavi E Sistemi SRL, 2020 SCC OnLine SC 177.
[52] *Id.*
[53] Ssangyong Engineering and Construction Company Ltd. v. NHAI, 2019 (15) SCC 131.
[54] Shri Lal Mahal Ltd. v. Progetto Grano Spa, (2014) 2 SCC 433.
[55] Cairn India & Ors. v. Government of India, O.M.P.(EFA)(COMM.) 15/2016 & I.A. Nos. 20459/2014 & 3558/2015, Judgment Dated February 19, 2020.

> grounds for refusal of Article V is justified and whether the enforcement of the award would violate the public policy of the law of his country. This limitation must be seen in the light of the principle of international commercial arbitration that a national court should not interfere with the substance of the arbitration".[56]

E. Natural Justice

Section 48(1)(b) permits a party to resist enforcement on grounds relating to violation of natural justice if a party is unable to present its case during the arbitration proceedings. However, a party may also resist the enforcement of an arbitral award on the ground of natural justice as being against public policy under Section 48(2)(b)(ii) (as natural justice forms a part of the fundamental policy of Indian law). A foreign award can possibly be challenged if the arbitral tribunal had ignored the submissions of the party in totality and the resulting award was contrary to the principles of natural justice, thereby violating public policy. This was the finding of the Delhi High Court in the case of *Campos Brothers Farms* v. *Matru Bhumi Supply Claim Pvt. Ltd*.[57] An appeal against the Single Judge's order in this case is currently pending before the Division Bench of the Delhi High Court.[58]

F. Construction of Contract

Under Section 48(2), a court is not permitted to delve into merits of the award and evaluate the manner in which the arbitral tribunal has construed the terms of the underlying contract. However, recently, in a rare decision, the SCI has declined the enforcement of a foreign arbitral award in the case of *National Agricultural Cooperative Marketing Federation of India* v. *Alimenta S.A.*[59] [*"***National Agricultural**"] under the Foreign Awards Act as the enforcement application in the present case was filed in 1993. In this case, the Appellant was allegedly unable to comply with the contractual terms wherein the Appellant was to export groundnuts. The SCI noted that the export required government approval, however, the government did not grant the Appellant the necessary approvals to carry out its contractual obligations. Further, the agreement itself contained a clause wherein it was provided that the contract between the parties would be cancelled if the shipment was prohibited by an executive or legislative act by the government which would make the shipment impossible [*"***Contingency Clause***"*]. In its award, the arbitral tribunal awarded damages upon the Appellant for a breach of contract.

[56] Vijay Karia & Ors. v. Prysmian Cavi E Sistemi SRL, 2020 SCC OnLine SC 177.
[57] Campos Brothers Farms v. Matru Bhumi Supply Claim Pvt. Ltd., (2019) 261 DLT 201.
[58] Campos Brothers Farms v. Matru Bhumi Supply Claim Pvt. Ltd., EFA(OS) (COMM) 10/2019.
[59] National Agricultural Cooperative Marketing Federation of India v. Alimenta S.A, Civil Appeal No. 667 of 2012.

The SCI held that the export could not have taken place without the approval of the Government. Export without the government's permission would have violated the law, thus, enforcement of the award would be violative of the public policy of India. Considering that the Contingency Clause would have become applicable, the contract itself would have been cancelled. The contract was thereby rendered void under Section 32 of the Indian Contract Act, 1872.[60] Thus, enforcing an award which seeks the payment of damages for breach of a contract (which was rendered void) is contrary to the fundamental policy of Indian law. The SCI, relying upon several judgments, including that of *Associate Builders* and *Ssangyong Engineering*, held the foreign arbitral award to be unenforceable as being opposed to the fundamental policy of Indian law and the basic notions of justice, and thereby public policy. This judgment could be problematic for many reasons, foremost being appreciation of the merits of the dispute and re-assessment of the tribunal's construction of the contract.

G. Fraud or Corruption

While Indian courts have had an opportunity on expand upon what may constitute the fundamental policy of Indian law and basic notions of justice and morality, there is minimal jurisprudence on what constitutes fraud or corruption in the context of refusing the enforcement of a foreign arbitral award.

H. Other Potential Grounds

Further, courts in other jurisdictions have held that award without reasons is contrary to public policy,[61] however, such objections may now be classified into the bucket of "patent illegality" in India and be unavailable as an objection to the enforcement of foreign arbitral awards. There are certain other grounds that courts have held to be contrary to public policy such as acting in bad faith, duress, impartial hearing, surprise decisions, etc.[62] However, Indian courts have not had the opportunity to evaluate such grounds yet – and it is likely that many of these grounds would be considered 'patent illegality' and not be available as a ground to resist the enforcement of a foreign award.

I. Applicability of Public Policy under A&C Act

The ground of public policy is available in India both for challenge to an India-seated award and to resist enforcement of a foreign award. However, in an international commercial arbitration conducted

[60] Indian Contract Act, §32 (1872), provides that, "*Contingent contracts to do or not to do anything if an uncertain future event happens cannot be enforced by law unless and until that event has happened. If the event becomes impossible, such contracts become void*."

[61] Smart Systems Technologies Inc. v. Domotique Secant Inc., 2008 QCCA 444.

[62] DIRK OTTO & OMAIA ELWAN, ARTICLE V(2), IN RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS: A GLOBAL COMMENTARY ON THE NEW YORK CONVENTION (Kronke, Nacimiento, Otto, et al. eds. 2010).

in India, the ground of challenge relating to public policy of India would be the same as the ground of resisting enforcement of a foreign award in India. This is because Section 34 of the A&C Act, which deals with challenge to awards made by India-seated arbitral tribunals, differentiates between international commercial arbitrations held in India and other arbitrations held in India. Thus, after the Arbitration and Conciliation (Amendment) Act, 2015, grounds relating to patent illegality appearing on the face of the award do not apply to (i) international commercial arbitration awards made in India; and (ii) foreign awards being resisted in India.

VI. CONCLUSION

Resistance to enforcement of foreign awards in a country must be approached with circumspection. The question whether enforcement of a foreign award violates the public policy of India must be considered in the context that India is a signatory to the New York Convention.[63] It is the sovereign commitment of India to honour foreign awards, except on the exhaustive grounds provided under Article V of the New York Convention.

While it may be tough to construe public policy without a workable definition, judicial interpretation offers sufficient guidance, whilst maintaining that judicial interference remain minimal. It is essential to recognize the need for restraint in examining the correctness of a foreign award or a domestic award tendered in an international commercial arbitration, as opposed to a domestic award. As stated in *Fritz* v. *Scherk*, we cannot have trade and commerce in world markets and international seas exclusively on our terms, governed by our laws and resolved in our courts.[64] Concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties' agreement, even assuming that a contrary result would be forthcoming in a domestic context.[65]

As the Court in *Cruz City* has aptly stated, a policy to enforce foreign awards itself forms a part of the *public policy of India* – and courts should strive to find the right balance between the policy of enforcing foreign awards and considering the grounds for resisting the enforcement of foreign awards.[66] In light of judicial guidance and international circumspection over public policy as a ground for refusal of enforcement of foreign awards – hopefully, public policy will not be argued readily only when all other points fail!

[63] Cruz City 1 Mauritius Holdings v. Unitech Limited, (2017) 239 DLT 649.
[64] Fritz Scherk v. Alberto Cuvler, 417 US 506 (1974).
[65] Mitsubishi Motors Corpn. v. Soler Chrysler-Plymouth Inc., 87 L Ed 2d 444.
[66] *Supra* note 63.

EXCLUSIVE JURISDICTION & SEAT OF ARBITRATION:

EXAMINING THE INDIAN ARBITRATION LANDSCAPE

Sagar Gupta*

Abstract

*Erroneous interpretation of statutory provisions and misapplication of dicta laid down by the Supreme Court of India ["**SCI**"] in the Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc.* [*"**BALCO**"*] *has caused some uncertainty in determining which courts exercise jurisdiction over arbitrations in India. This error is largely owed to the courts having imported the concept of arbitral seat into domestic arbitrations without any legislative basis. Such misapplication of a concept from international arbitrations has caused an inconsistency within the Arbitration & Conciliation Act, 1996 and has led to an incoherent and disjointed understanding of the scope of party autonomy in drafting arbitration agreements in light of mandatory statutory language. The 246th Report of the Law Commission of India on Amendments to the Arbitration & Conciliation Act, 1996 sought to remedy this situation; however, the resulting amendments in 2015 did not reflect the change. This article examines the legal framework surrounding exclusive jurisdiction clauses in arbitration in India and the relationship between arbitral seat and exclusive jurisdiction. In the light of the text of the legislation, the position taken by courts is seemingly practical, yet arguably without statutory basis. Therefore, relevant amendments to the legislation have been suggested to clarify the scope of arbitral seat in Indian arbitrations.*

I. INTRODUCTION

International arbitration, as a method of dispute resolution, has been preferred by people of commerce over centuries in some form or the other. In a world with increasing cross-border trade and investment, it has become clear that predictability and security in providing flexible dispute resolution processes is imperative to attract foreign investment. For a country like India, this is important as it positions itself as an attractive investment destination.

India has had a mixed history with arbitration – both domestic and international. In recent years, international commercial arbitration has taken off in India, both in terms of increased use by Indian corporations, and structurally by legislative and judicial backing needed for its effective functioning.

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It has been half a decade since the major amendments to the Arbitration and Conciliation Act, 1996 [*"***the A&C Act***"*] were enacted to bring Indian arbitration law in line with global best practices in 2015 (with minor amendments made in 2019 and 2021)[1] and the response from practitioners and academics has been mixed.[2] The pro-arbitration stance of the judiciary has been evident from the reduced judicial intervention in international commercial arbitration.[3]

However, at the heart of international commercial arbitration lies a real conflict between the jurisdictions of national courts and private dispute settlement tribunals. The legitimacy of the system of international commercial arbitration has itself been judged in various jurisdictions through examination of awards as violative of the public policy of their national laws – on questions such as arbitrability, enforcement of awards, and ouster of jurisdiction of courts. This is all the more difficult to understand in the light of the web of complexities woven around the system, for instance, in the interaction between the arbitral tribunal and national courts, and conflict of laws principles.

[1] The Arbitration and Conciliation (Amendment) Act, (2015); The Arbitration and Conciliation (Amendment) Act, (2019); The Arbitration and Conciliation (Amendment) Act, (2021).

[2] Tejas Karia et al., *Post Amendments: What Plagues Arbitration in India,* 5 INDIAN J. ARB L. 230 (2016); Vaishnavi Chillakuru & Naresh Thacker, *Country Chapter on India* in the Asia-Pacific Arbitration Review 2017, GLOBAL ARB. REV. (May. 23, 2017), https://globalarbitrationreview.com/review/the-asia-pacific-arbitration-review/2018/article/india; Prakash Pillai & Mark Shan, *Persisting Problems: Amendments to the Indian Arbitration and Conciliation Act*, KLUWER ARB. BLOG (Mar. 10, 2016), http://kluwerarbitrationblog.com/2016/03/10/persisting-problems-amendments-to-the-indian-arbitration-and-conciliation-act/; Aakanksha Kumar, *The Arbitration Ordinance, 2015 – Less isn't always more. [Part-I]*, ARBITER DICTUM BLOG (Nov. 5, 2015), https://arbiterdictum.wordpress.com/2015/11/05/the-arbitration-ordinance-2015-less-isnt-always-more-part-i/.

[3] Bharat Aluminium Co. v. Kaiser Aluminium Technical Service, Inc., (2012) 9 SCC 552 ["**BALCO**"]*;* Manu Thadikkaran, *Judicial Intervention in International Commercial Arbitration: Implications and Recent Developments from the Indian Perspective* 29 J. INT'L ARB. 681 (2012); Vivekananda N, *Lessons from the BALCO dicta of the Supreme Court*, SINGAPORE INT'L ARB. CENTRE, http://www.siac.org.sg/2013-09-18-01-57-20/2013-09-22-00-27-02/articles/196-lessons-from-the-balco-dicta-of-the-indian-supreme-court; Ashish Chugh, *The Bharat Aluminium Case: The Indian Supreme Court Ushers In a New Era,* KLUWER ARB. BLOG (Sept. 26, 2012), http://kluwerarbitrationblog.com/2012/09/26/the-bharat-aluminium-case-the-indian-supreme-court-ushers-in-a-new-era.

India's case is no different. An overburdened judiciary,[4] coupled with other problems such as a lack of specialised benches on arbitration law in courts[5] or a special arbitration bar,[6] leads to lack of coherence in the development of the law of international commercial arbitration as applied by the courts. This leads to the incorrect application of the law laid down by the Supreme Court of India ["**SCI**"] and other judicial fora.

Courts at the seat of arbitration retain supervisory jurisdiction over arbitral proceedings in diverse matters such as the appointment of arbitrators, grant and enforcement of interim measures and post-award remedies such as setting aside.[7] Therefore, it is important to determine the principles of jurisdiction that apply and which court should the parties approach.

In May 2017, the SCI *sought to clarify* the position on exclusive jurisdiction of courts in exercise of its supervisory jurisdiction on an arbitration proceeding in *Indus Mobile Distribution Pvt. Ltd.* v. *Datawind Innovations Pvt. Ltd. & Ors*[8]. The dictum of the SCI – relying on erroneous precedent – dealt with the conflict between party autonomy and the statutory principles of jurisdiction in the Act. The SCI disregarded the statutory provisions and vested jurisdiction exclusively in the "seat court". This ratio of *Indus Mobile* has been applied incorrectly and inconsistently by various High Courts across the country. While the SCI has attempted to settle the interpretation of the *Indus Mobile* decision in *BGS SGS SOMA JV* v. *NHPC Limited*[9] ["**BGS**"], there remain several unanswered questions.

[4] For an interesting analysis on the workload of the Supreme Court see Nick Robinson, *A Quantitative Analysis of the Indian Supreme Court's Workload* 10, J. EMPIRICAL LEGAL STUD. 570 (2013); Alok Prasanna Kumar et al., *The Supreme Court of India's burgeoning backlog problem and regional disparities in access to the Supreme Court*, Consultation Paper, VIDHI CENTRE FOR LEGAL POLICY, (2015).

[5] This position has been sought to be remedied partially by the enactment of the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015, https://www.indiacode.nic.in/bitstream/123456789/2156/1/AAA2016___04.pdf. *See* Sulabh Rewari & Poorvi Satija, *Are Commercial Courts the answer to India's arbitration woes?,* KLUWER ARB. BLOG (Dec. 25, 2015), http://arbitrationblog.kluwerarbitration.com/2015/12/25/are-commercial-courts-the-answer-to-indias-arbitration-woes/.

[6] The Indian Arbitration Forum is an association of lawyers that aims at reducing the control of the judiciary in arbitration and hopes to encourage best practices in arbitration, *see* Prachi Shrivastava, *Hiroo Advani founds arbitration body with other law firm litigators to bar costly judges from arbitration*, LEGALLY INDIA (Sept. 4, 2013), http://www.legallyindia.com/201309043954/Law-firms/hiroo-advani-founds-iaf-leads-law-firm-movement-to-bar-costly-judges-from-arbitration.

[7] GARY B. BORN, INTERNATIONAL ARBITRATION: LAW AND PRACTICE 111-126, (2d ed. 2015); NAKUL DEWAN, THE LAWS APPLICABLE TO AN ARBITRATION IN ARBITRATION IN INDIA (Dushyant Dave et al. eds., 2021).

[8] Indus Mobile Distribution Pvt. Ltd. v. Datawind Innovations Pvt. Ltd. & Ors., AIR 2017 SC 2105. [*"***Indus Mobile***"*].

[9] BGS SGS SOMA JV v. NHPC Limited, (2020) 4 SCC 234.

This article attempts to deal with the ambiguity that arises from the import of the concept of arbitral seat into domestic arbitrations in the light of the *Indus Mobile* decision. Section II of the article deals with the concepts of arbitral seat and jurisdiction under Indian arbitration law as well as the march of law post- ***BALCO***. In section III, the article traces the use of exclusive jurisdiction clauses and its interpretation by courts in India. In section IV, the article examines the current state of play in relation to the jurisdiction of Indian courts post-*Indus Mobile.* Finally, the article is concluded by suggesting relevant statutory changes and a plea for coherent judicial interpretation.

II. DECODING THE JURISDICTIONAL LABYRINTH

The jurisdictional test under the Act with respect to supervisory jurisdiction of Indian courts in relation to a domestic arbitration is independent of the consent and intention of the parties. It is based on statutory principles such as cause of action. Section II of this article seeks to trace the development of the rules of jurisdiction under international commercial arbitration, examine the jurisdictional test under the Act and consequently explore the march of law through judicial precedent.

A. Arbitral Seat: Implications, Contours & Limitations

As arbitration developed and expanded, it became important to define its interaction and relationship with national legal systems. This led to the introduction of the concept of arbitral seat, which has gained central importance in international commercial arbitration today.[10] Contrary to the theory of delocalisation, the seat theory finds its basis in the territorial thesis.[11] The theory presupposes the need to root arbitration in a national legal system to derive its legitimacy.[12]

The arbitral seat is the juridical home of the arbitration and is a matter of legal fiction created by the arbitration agreement. The concept of arbitral seat is significant as it supplies an arbitration proceeding with the legal framework that governs the arbitration. This includes the national legislation applicable to the arbitration, the law presumptively applicable to the arbitration agreement and post-award remedies. The national law applies both to internal procedures of arbitration [procedural fairness] as well as the external relationship of the arbitration with national courts

[10] Star Shipping AS v. China Nat'l Foreign Trade Trans. Corp., [1993] 2 Lloyd's Rep. 445; Michael Hwang, SC and Fog Lee Cheng, *Relevant Considerations in Choosing the Place of Arbitration,* 2 ASIAN INT'L ARB J. 195 (2008); GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION, (3d ed. 2021).

[11] For an early conception of the territorial principle, *see* FRANCIS A. MANN, LEX FACIT ARBITRUM IN INTERNATIONAL ARBITRATION: LIBER AMICORUM FOR MARTIN DOMKE 159 (Pieter Sanders ed., 1967).

[12] For other conceptualisations by arbitration theorists such as delocalisation and autonomous legal order, *see* Jan Paulsson, *Arbitration in Three Dimensions* (LSE Legal Studies Working Paper No. 2,2010); Emmanuel Gaillard, *Aspects Philosophiques du Droit de l'Arbitrage International* (2008).

[supervisory jurisdiction].[13] In addition, the seat presumptively lends the applicable procedural law to the arbitration.

The territorial thesis finds basis in the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 [*"***New York Convention***"*] where the post-award remedy of refusal of enforcement is available only before the courts at the arbitral seat [place where award is "made"].[14] One of the best known examples of the territorial thesis is the UNCITRAL Model Law on International Commercial Arbitration ["**UNCITRAL Model Law**"] which provides for its application on the basis of "place of arbitration" under Article 1(2).[15] The drafting history as well as the language of Article 1(2) indicates that supervisory jurisdiction under the UNCITRAL Model Law can be exercised *only* by the courts at the arbitral seat. Such supervisory jurisdiction of national courts at the arbitral seat extends to appointment of arbitrators, assisting in evidence taking, and annulment of awards.

The UNCITRAL Model Law also makes clear, by implication, that there exists a difference between the "seat" and "venue" of arbitration.[16] Under Article 20, the parties by agreement may choose any place of arbitration. However, notwithstanding such choice, the tribunal may meet at any place it considers appropriate.[17] Therefore, the geographic location of hearings or meetings i.e., venue, has to be understood as distinct from arbitral seat.[18] Under Indian law, the territorial principle is contained in Section 2(2).[19] For the purpose of this article, it is important to bear in mind that an arbitral seat in

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[13] GARY B. BORN, INTERNATIONAL ARBITRATION: LAW AND PRACTICE 111 (2d ed. 2015).

[14] Convention on the Recognition & Enforcement of Foreign Arbitral Awards, Article V, June 10, 1958, 330 U.N.T.S. 3.

[15] UNCITRAL Model Law on International Commercial Arbitration 1985 [*"***UNCITRAL Model Law***"*]. Article I(2) provides: *"(2) The provisions of this Law, except articles 8, 9, 17 H, 17 I, 17 J, 35 and 36, apply only if the place of arbitration is in the territory of this State".*

[16] Naviera Amazonica Peruana SA v. Cia Internacional de Seguros del Peru, [1988] 1 Lloyd's Rep 116; NIGEL BLACKABY ET AL., REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION ¶ 3.39, at .For an Indian law perspective on the seat and venue distinction, *see* Enercon (India) Ltd. v. Enercon Gmbh, (2014) 5 SCC 1, ¶¶ 103, 107, 113 [*"***Enercon***"*] and Eitzen Bulk A/S v. Ashapura Minechem Limited., (2016) 11 SCC 508 [*"***Eitzen**"].

[17] UNCITRAL Model Law, art. 20(2).

[18] This would be clear from the semantic distinction between the words 'seat' and 'venue'. *See e.g.,* Judgment of 3 February 2010, [2010] SchiedsVZ 336, 336 (Oberlandesgericht München). However note that Gary Born cites several cases where courts have interpreted references to "venue", "forum" and "situs" to mean arbitral seat on the basis that "*these interpretations rest on the (correct) theory that parties do not ordinarily specify in advance, in their arbitration agreement, the logistical matter of hearing location, which often depends on matters such as the domiciles of the arbitrators, counsel and witnesses, which are not likely to be known when the arbitration agreement is drafted. Instead, references to "venue," "forum" or "situs" are more likely to be intended to address the more important subject of the arbitral seat.*" These cases include Shagang South-Asia (H.K.) Trading Co. Ltd v. Daewoo Logistics [2015] EWHC 194, ¶¶35-38 (Comm); Enercon GmbH v. Enercon (India) Ltd [2012] EWHC 689, ¶¶ 56-59 (Comm) and Shashoua v. Sharma [2009] EWHC 957 (Comm) ¶34, [*"**Shashoua**"*]. *See generally, Supra* note 13 at 2226-2227. This position has also been advocated by the Supreme Court in BGS.

[19] The Act, §2(2) provides: *"(2) This Part shall apply where the place of arbitration is in India.*

international arbitration may be determined by the parties by agreement (either explicitly or by default through choice of institutional arbitration rules)[20] and such choice solely determines the jurisdiction of courts under territorial national arbitration legislations.

B. Jurisdiction under the Act

In the backdrop of the drive to reduce judicial intervention in arbitration, the jurisdiction of Indian courts over arbitrations has been a subject of intense scrutiny by practitioners and academics alike.[21] The structure of the Act is unique and is a major reason for the debate surrounding jurisdiction. The Act is divided into four parts, two of which deal with arbitration; Part I provides the legal framework for domestic arbitrations and international commercial arbitrations seated in India [*"***Part I arbitrations***"*], Part II provides for enforcement of foreign awards i.e., awards made in foreign seated arbitrations. For the purposes of this article, the focus is jurisdiction under Part I of the Act. There are three critical provisions that form the basis of the controversy and are analysed below:

i. Section 2(1)(e)

> Under Part I of the Act, the extent of judicial intervention is limited by the provisions therein.[22] There are two types of authorities that may exercise jurisdiction, namely, judicial authority (not defined; includes tribunals such as the National Company Law Tribunal) and "Court" as defined under Section 2(1)(e).[23] The definition of "Court" has been held to be exhaustive due to the use of the word "means" immediately succeeding it as well as the absence of "includes".[24] The rule for determining the court of competent jurisdiction therefore is one which *has the jurisdiction to decide the questions forming the subject-matter of arbitration if the same had been the subject matter of a suit* (i.e.,

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Provided that subject to an agreement to the contrary, the provisions of sections 9, 27 and clause (a) of sub-section (1) and sub-section (3) of section 37 shall also apply to international commercial arbitration, even if the place of arbitration is outside India, and an arbitral award made or to be made in such place is enforceable and recognised under the provisions of Part II of this Act."

[20] *See* e.g., Rule 23, MCIA Rules 2016, https://mcia.org.in/mcia-rules/english-pdf/.

[21] Pratyush Panjwani & Harshad Pathak, *Assimilating the Negative Effect of Kompetenz-Kompetenz in India: Need to Revisit the Question of Judicial Intervention,* 2 INDIAN J. ARB. L. 24 (2013); Ajay Kumar Sharma, *Judicial Intervention in International Commercial Arbitration: Critiquing the Indian Supreme Court's Interpretation of the Arbitration and Conciliation Act, 1996*, 3 INDIAN J. ARB L. 6 (2014)

[22] The Act, § 5.

[23] *Id*., § 2(1)(e) provides: *"(1)In this Part, unless the context otherwise requires, –*
"Court" means— (i) in the case of an arbitration other than international commercial arbitration, the principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, but does not include any Civil Court of a grade inferior to such principal Civil Court, or any Court of Small Causes;
(ii) in the case of international commercial arbitration, the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, and in other cases, a High Court having jurisdiction to hear appeals from decrees of courts subordinate to that High Court;" (emphasis supplied).

[24] State of West Bengal v. Associated Contractors, (2015) 1 SCC 32. [*"***Associated Contractors**"].

court having jurisdiction because of the situs of the cause of action). The provision uses the rules of jurisdiction for suits under the Code of Civil Procedure, 1908 [*"**the CPC**"*], as an analogy of fixing jurisdiction under the Act. Therefore, the jurisdiction of the "Court" is determined by statute *on the basis of where the cause of action arises* and not the choice of parties under the arbitration agreement.

ii. Section 20

Parties may by agreement choose the place of arbitration under Section 20 of the Act. Although the distinction between "seat" and "venue" is clear by implication, Indian courts have struggled with these concepts. Recently, the Supreme Court has laid down law to distinguish between these terms in the context of arbitration agreements.[25] It has also applied the *Shashoua* principle to domestic arbitrations where "venue" should be interpreted to mean "seat" of arbitration, provided there is no indication to the contrary.[26] It is pertinent to note that although the parties may designate the place of arbitration, this does not affect the jurisdiction of courts under Section 2(1)(e) under the scheme of the Act.

iii. Section 42

In order to limit multiple proceedings before different courts, Section 42 provides that where any application has been made under Part I in a Court, that Court *alone* would have jurisdiction over the arbitral proceedings. It must be noted that such application should have been validly made before a court of competent jurisdiction. Section 42 does not apply to petitions for appointment of arbitrators.[27]

It is, therefore, clear that jurisdiction under the Act is not contingent on consent and is dependent on the statutory determination under Section 2(1)(e). The parties' choice of place of arbitration has no implication on jurisdiction.

C. Historical Error in BALCO

In the landmark case of *BALCO,*[28] the SCI overruled the much-criticised judgment of *Bhatia International* v. *Bulk Trading SA*[29]. The SCI ruled on the inapplicability of Part I of the Act to foreign seated arbitrations. However, in the course of its judgment, the SCI erroneously interpreted Section 2(1)(e) and altered the meaning of "Court" for Part I arbitrations.[30] The root of this error goes to

[25] Enercon; Reliance Industries Ltd. v. Union of India, (2014) 7 SCC 603 ["**Reliance**"].

[26] BGS ¶ 63: "*It will thus be seen that wherever there is an express designation of a "venue", and no designation of any alternative place as the "seat", combined with a supranational body of rules governing the arbitration, and no other significant contrary indicia, the inexorable conclusion is that the stated venue is actually the juridical seat of the arbitral proceeding*."

[27] Associated Contractors; Pandey and Co. Builders (P) Ltd. v. State of Bihar, (2007) 1 SCC 467.

[28] *Supra* note 3.

[29] Bhatia International v. Bulk Trading SA, (2002) 4 SCC 105.

[30] For an excellent debate on this issue, *see* V. Niranjan & Shantanu Naravane, *Bhatia International Rightly Overruled: The Consequences of Three Errors in BALCO,* 9 SCC J-26 (2012) ["**Niranjan & Naravane***"*]*;* S.K.

superimposing the concept of seat, reserved until then for international commercial arbitrations to domestic arbitrations. The SCI held (incorrectly) that Section 2(1)(e) refers to two distinct courts: "court of the subject matter of the arbitration" (seat court) and the "court of the subject matter of the suit" (cause of action court).[31] It further held that both courts will have jurisdiction concurrently, contrary to the jurisdictional test under Section 2(1)(e) (examined in section II.B of this article above and is pegged to cause of action).

The conferment of jurisdiction under Indian law is a legislative act, and not a judicial one.[32] The alteration of the jurisdictional test in *BALCO* is a result of the erroneous import of the concept of arbitral seat into domestic arbitration. The legal framework for a domestic arbitration is solely the national law. In importing the concept of arbitral seat on the pretext of neutrality, the SCI did not take into consideration either the language of the statute, nor its well settled principle that parties may not confer jurisdiction on courts where none exists.

In practice, this historical error in *BALCO* has wide ramifications. In a domestic arbitration agreement, parties may confer jurisdiction on a court outside the scope of "Court" under Section 2(1)(e). Therefore, contracting parties in Chennai and Bangalore (or indeed elsewhere) may confer jurisdiction on the courts of Mumbai or Delhi even if no part of the performance of the contract or cause of action of a dispute may arise there. This is not support by the legislative scheme and is arguably a result of judicial conflation of arbitral concepts.

Post-*BALCO*, the SCI had the opportunity to examine Section 42 of the Act in *Associated Contractors*. The SCI held that, "*The context of Section 42 does not in any manner lead to a conclusion that the word "court" in Section 42 should be construed otherwise than as defined.*"[33] In the case, the SCI failed to take into consideration the notion of "seat court" invented by *BALCO*. As examined later, the SCI in *Indus Mobile* alters the already ambiguous *BALCO* dictum from concurrent jurisdiction to exclusive jurisdiction of "seat court".

III. SURVEYING EXCLUSIVE JURISDICTION CLAUSES

Exclusive jurisdiction clauses have always been somewhat of an enigma in Indian law – fraught with conflicting precedent and incoherence. Traditionally, an exclusive jurisdiction clause is the clearest exposition of the intention of the parties to oust the jurisdiction of any particular court. Such ouster

Dholakia & Aarthi Ranjan, *Not Three But Half An Error In BALCO: Bhatia International Rightly Overruled,* 1 SCC J-81 (2013); V. Niranjan & Shantanu Naravane, *Three Errors in BALCO Revisited,* 4 SCC J-1 (2013).

[31] BALCO, ¶ 96.

[32] Natraj Studios (P) Ltd v. Navrang Studios & Anr., (1981) 1 SCC 523; Kondiba Dagadu Kadam v. Savitribai Sopan Gujar, (1999) 3 SCC 722; Jagmittar Sain Bhagat v. Health Services, Haryana, (2013) 10 SCC 136.

[33] Associated Contractors, ¶ 20.

of jurisdiction of a court is permissible by agreement of the parties and is not hit by public policy considerations in the Indian Contract Act, 1872.[34]

Equally important is the consideration that under Indian law, parties by agreement cannot confer jurisdiction on a court which it does not possess under the CPC, but only designate one among the multiple courts that possess jurisdiction.[35] The dictum of the SCI in *A.B.C. Laminart (P) Ltd.* v. *A.P. Agencies* [*"***A.B.C. Laminart***"*], proved to be ambiguous where it held that exclusive jurisdiction can be conferred to any court which has "proper jurisdiction". The "proper jurisdiction" of the court in a matter relating to a contract depends on the cause of action arising through connecting factors such as place of execution, and place of performance, place of payment and place where defendant resides.[36]

In the seminal case of *Swastik Gases,* a 3-judge bench of the SCI clarified the position on exclusive jurisdiction clauses in India.[37] The SCI, while deciding the territorial jurisdiction in a petition for appointment of an arbitrator, held that the use of words like "alone", "only", "exclusive" or "exclusive jurisdiction" is not decisive and does not make any material difference in determining the question of ouster of jurisdiction.[38] The intention of the parties was said to be clear and unambiguous by the mere existence of a jurisdiction clause.[39]

A. Exclusive Jurisdiction Clauses & the Act

The concept of jurisdiction under the Act is complex. As mentioned earlier, the conferment of jurisdiction to a court is a legislative act. Under the Act, the jurisdiction is determined by the exhaustive definition of "Court" in Section 2(1)(e). Section 2(1)(e) determines jurisdiction of courts

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[34] Hakam Singh v. Gammon (India) Ltd., (1971) 1 SCC 286, ¶ 4 […*But where two courts or more have under the Code of Civil Procedure jurisdiction to try a suit or proceeding an agreement between the parties that the dispute between them shall be tried in one of such Courts is not contrary to public policy. Such an agreement does not contravene Section 28 of the Contract Act.*]

[35] *Id.* at ¶ 4; Globe Transport Corpn. v. Triveni Engg. Works, (1983) 4 SCC 707; A.B.C. Laminart (P) Ltd. v. A.P. Agencies, (1989) 2 SCC 163; Patel Roadways Ltd. v. Prasad Trading Co., (1991) 4 SCC 270; R.S.D.V. Finance Co. (P) Ltd. v. Shree Vallabh Glass Works Ltd., (1993) 2 SCC 130; Angile Insulations v. Davy Ashmore India Ltd., (1995) 4 SCC 153; Shriram City Union Finance Corpn. Ltd. v. Rama Mishra, (2002) 9 SCC 613; New Moga Transport Co. v. United India Insurance Co. Ltd., (2004) 4 SCC 677.

[36] A.B.C. Laminart, ¶¶ 10-11.

[37] Swastik Gases (P) Ltd. v. Indian Oil Corpn. Ltd., (2013) 9 SCC 32 [*"***Swastik Gases***"*], (where the exclusive jurisdiction was in favour of Kolkata and no place of arbitration specified by the parties).

[38] Swastik Gases, ¶ 32 ("…*Where the contract specifies the jurisdiction of the courts at a particular place and such courts have jurisdiction to deal with the matter, we think that an inference may be drawn that parties intended to exclude all other courts. A clause like this is not hit by Section 23 of the Contract Act at all. Such clause is neither forbidden by law nor it is against the public policy. It does not offend Section 28 of the Contract Act in any manner."*)

[39] Swastik Gases, ¶¶ 32, 57.

independent of the intention of the parties. The test for exclusive jurisdiction under the Act is limited to Section 42, i.e., if any application has been made in a particular Court, that Court alone shall have jurisdiction to entertain subsequent applications.

In *Associated Contractors*, the SCI relying on cases decided on the 1940 Act[40] and the Act[41], held that Section 42 shall not bar an exclusive jurisdiction clause in a contract merely due to the absence of a non obstante clause wiping out a contrary agreement between the parties.[42] Therefore, any applications made to a court, not being the court mentioned in the exclusive jurisdiction clause, were rendered to be without jurisdiction. In a contrary vein, it also held that in order to attract exclusivity of jurisdiction under Section 42 of the Act, the application should have been made[43] validly to a court of competent jurisdiction within the meaning of Section 2(1)(e).[44] Therefore, in order for an exclusive jurisdiction clause to be valid in an arbitration agreement, the parties need to confer jurisdiction to a "cause of action court" [being the "Court" under Section 2(1)(e)]. Prior to *BALCO,* various High Courts including Andhra Pradesh[45] & Delhi[46] and the SCI[47] held in a catena of cases that the "seat court" shall have exclusive jurisdiction in domestic arbitrations. It is important to note that a part of the cause of action arose within the jurisdiction of the "seat court" in these judgments. It seems that these cases were impliedly overruled by *BALCO.*[48]

[40] Jatinder Nath v. Chopra Land Developers (P) Ltd., (2007) 11 SCC 453, ¶ 9; Rajasthan SEB v. Universal Petro Chemicals Ltd., (2009) 3 SCC 107, ¶¶ 33-36.

[41] Swastik Gases, ¶ 32.

[42] Associated Contractors, ¶ 22. For a misapplication of Associated Contractors, *see* Bhandari Udyog Ltd. v. Industrial Facilitation Council, (2015) 14 SCC 515 (where arbitration was conducted in Raichur jurisdiction, "cause of action court" was denied jurisdiction).

[43] For an interesting discussion on the phrase 'has been made' in §42 of the Act, *see* Priya Hiranandani Vandervala v. Niranjan Hiranandani, 2016 SCC OnLine Del 3435 (DB) ["**Priya Hiranandani Vandervala***"*]; Surya Pharmaceuticals v. First Leasing Company of India, 2013 SCC OnLine Mad 3384, ¶ 7; ONGC v. Jagson Intl. Ltd., 2005 SCC OnLine Bom 814 (the first application "must be a competent application and not just any application"); H.K.A. Agencies v. Actia India Pvt. Ltd., 2011 (1) ILR Ker 378, ¶ 15.

[44] Sasken Communications Technologies Ltd. v. Prime Telesystems Ltd., 2002 SCC OnLine Del 823; Engineering Project (India) Ltd. v. Indiana Engineering Works, 2004 SCC OnLine Del 517; Sarovar Park Plaza Hotels & Resorts Pvt. Ltd. v. World Park Hotels India Ltd., 2005 SCC OnLine Del 1040.

[45] Paramita Constructions Pvt. Ltd. v. UE Development (P) Ltd., 2008 SCC OnLine AP 822 (Bangalore was place of arbitration and cause of action arose in Bangalore); Salarjung Museum v. Design Team Consultants Pvt. Ltd., 2009 SCC OnLine AP 804 (Delhi was seat of arbitration); Jyothi Turbopower Services Pvt. Ltd. v. Shenzhen Shandong Nuclear Power Construction Company Ltd., 2011 SCC OnLine AP 163 (where jurisdiction was denied in favour of Odisha courts).

[46] Geo Miller & Co Ltd. v. United Bank of India, 1997 SCC OnLine Del 345.

[47] Balaji Coke Industry Pvt. Ltd. v. Maa Bhagwati Coke Pvt. Ltd., (2009) 9 SCC 403.

[48] Niranjan & Naravane at 32.

Following *BALCO,* the jurisdiction was assumed as the "seat court"[49] by the Delhi High Court in petitions for grant of interim measures,[50] and appointment of arbitrators[51] irrespective of that fact that it may not possess jurisdiction otherwise under Section 2(1)(e) i.e. through cause of action. The Delhi High Court has maintained that both the "seat court" and "cause of action court" have concurrent jurisdiction.[52] The Delhi High Court has also applied Section 42 to exclude its jurisdiction applying the principle of concurrent jurisdiction.[53] The presence of an exclusive jurisdiction clause was imperative to curtail the jurisdiction of either the "seat court" or the "cause of action court" and mere stipulation of seat was not enough to exclude jurisdiction.[54] Interestingly, in *PCP International Ltd.* v. *Lanco Infratech Ltd.*[55] [*"***PCP International***"*], the Delhi High Court declined jurisdiction even when it was designated the "venue" of arbitration relying on the difference between "seat" and "venue" of arbitration.

In *M/s R.B. Saxena & Sons* v. *Mahindra Logistics Ltd.*, the Delhi High Court denied jurisdiction in a petition for appointment of arbitrator where the venue was Mumbai and an exclusive jurisdiction clause in favour of courts in Mumbai.[56] The Delhi Court rightly pointed out that *BALCO* states that both the "seat court" and the "cause of action court" will have concurrent jurisdiction and does not

[49] The "seat court" refers to the courts at the place/seat/venue of arbitration as opposed to "cause of action court" or courts stipulated through an exclusive jurisdiction clause. The terms 'seat' and 'venue' have been distinguished where necessary.

[50] Ion Exchange (India) Ltd. v. Panasonic Electric Works Co. Ltd., 2014 SCC OnLine Del 9731, ¶¶ 12-14 ["**Ion Exchange**"]; NHPC Ltd. v. Hindustan Construction Co. Ltd., 2015 SCC OnLine Del 9804 (appeal from §9) ["**NHPC**"]; SRS Private Investment Powai Ltd. v. Supreme Housing and Hospitality Pvt. Ltd., 2016 SCC OnLine Del 5446 ["**SRS Private Investment**"]; Jyoti Structure Ltd. v. Dakshinanchal Vidyut Vitran Nigam Ltd., 2016 SCC OnLine Del 5035 ["**Jyoti Structure**"]; Adesh Enterprises LLP v. Vinod Kumar Goswami, 2017 SCC OnLine Del 7508 ["**Adesh Enterprises**"].

[51] Rohit Bhasin v. Nandini Hotels, 2013 SCC OnLine Del 2300; Newtech Cinemas Pvt. Ltd. v. OSR Cinemas & Entertainment Pvt. Ltd., 2016 SCC OnLine Del 6155; AIR Liquide North India Pvt. Ltd. v. Shree Shyam Pulp & Board Mils Ltd., 2016 SCC OnLine Del 5254; Overseas Mobile Pvt. Ltd. v. Zte Telecom India Pvt. Ltd., 2016 SCC OnLine Del 1522 (part of cause of action arose in Delhi); Orient Bell Ltd. v. Kaneria Granito Ltd., 2017 SCC OnLine Del 7060 ["**Orient Bell**"].

[52] Devas Multimedia Pvt. Ltd. v. Antrix Corporation Ltd., 2018 SCC OnLine Del 9338 ["**Devas Multimedia**"]; Ion Exchange; NHPC; Priya Hiranandani Vandervala. Note that Devas Multimedia was discussed by the Supreme Court in BGS and held to be erroneous.

[53] Priya Hiranandani Vandervala; Devas Multimedia.

[54] Sravanthi Infratech Pvt. Ltd. v. Tricolite Electrical Industries Ltd., 2016 SCC OnLine Del 6313; ABB Ltd. v. Isolux Corsan India Engineering & Construction, 2016 SCC OnLine Del 3454, ¶¶19-20; Priya Hiranandani Vandervala, ¶ 22-23. Cf. Jyoti Structure (where part of cause of action did not arise in favour of Allahabad, did not enforce exclusive jurisdiction clause) and Orient Bell (where part of cause of action arose in Delhi, did not enforce exclusive jurisdiction clause in favour of Ahmedabad); Jyoti Structure (where an exclusive jurisdiction clause in favour of Mumbai was not enforced).

[55] PCP International Ltd. v. Lanco Infratech Ltd, 2015 SCC Online DEL 10428.

[56] M/s. R.B. Saxena & Sons v. Mahindra Logistics Ltd., 2016 SCC OnLine Del 5462.

address the question of exclusive jurisdiction.[57] In a similar petition, the Delhi High Court relied on *Ion Exchange*[58]and accepted jurisdiction where the agreement in question mentioned Delhi as the venue of arbitration and Delhi courts were given sole and exclusive jurisdiction over all disputes.[59] In addition to the exclusive jurisdiction clause, the Delhi High Court held that the place of arbitration under Section 20 is the place where the arbitration agreement is performed (in this case, Delhi) and hence, it sought to assume jurisdiction under the cause of action route prescribed by *A.B.C. Laminart.*[60]

The Bombay High Court, on the other hand, has consistently held that the "seat court" shall have exclusive jurisdiction, and not the "cause of action court".[61] In *Bhagwandas Auto Finance* v. *Tata Motors Finance Ltd.,* it assumed jurisdiction (place of arbitration and exclusive jurisdiction in Mumbai) even when no part of cause of action arose in Mumbai and application for setting aside the arbitral award was pending before courts in Kolkata.[62] As part of the cause of action of the underlying dispute arose in Kolkata, the application for setting aside the award was made before courts there. Note that this is permissible by the scheme of the Act and is a classic example of the *BALCO* error. Due to the introduction of the concurrent jurisdiction in *BALCO,* the parties to a domestic arbitration are likely to indulge in forum shopping and delay the arbitral proceedings or enforcement of arbitral awards. This forum shopping does not emanate from the Act, but from the importation of the concept of arbitral seat into domestic arbitration.

The Hyderabad High Court recently held in a revision petition from a case concerning the grant of interim measures [where the venue of arbitration was Hyderabad and the exclusive jurisdiction was granted to courts in Ranga Reddy District] that the courts in Ranga Reddy District did not have exclusive jurisdiction as they were devoid of jurisdiction inherently.[63] The *BALCO* dictum was distinguished by the Hyderabad High Court on facts and it opined that Section 20 of the Act adds a facet to the well-settled principles of jurisdiction.

In conclusion, there seemed to be no coherent trend emerging from the various High Courts about the exclusive or concurrent nature of jurisdiction as a result of designation of a seat or venue of

[57] *Id*. at ¶ 8.
[58] Ion Exchange.
[59] Bygging India Ltd. v. Lanco Infratech Ltd., 2016 SCC OnLine Del 5486.
[60] *Id*.
[61] Ansaldo Caldaie Boilers India Pvt. Ltd. v. NAGAI Power Pvt. Ltd., 2015 SCC OnLine Bom 7244 (where the place of arbitration was mentioned as Hyderabad, jurisdiction denied); Reliance Infrastructure Ltd. v. Roadway Solution (I) Pvt. Ltd., 2016 SCC OnLine Bom 16 (where place of arbitration and jurisdiction was Mumbai, assumed jurisdiction even when courts in Pune were seized of applications viz. §42).
[62] Bhagwandas Auto Finance v. Tata Motors Finance Ltd., 2015 SCC OnLine Bom 369.
[63] M/s Sushee Ventures Pvt. Ltd. v. Rahul Agarwal & Ors., 2016 SCC OnLine Hyd 401

arbitration. The enforcement of exclusive jurisdiction clauses is also unclear as courts have tried to reconcile the principle of party autonomy and the jurisdictional tests for "Court" in the Act. The conceptual uncertainty has been settled erroneously in the *Indus Mobile* decision of the SCI and is discussed in the next part.

IV. STATE OF PLAY

The SCI in *Indus Mobile* significantly altered the various decisions of High Courts interpreting the *BALCO* dictum on jurisdiction of courts and exacerbated the internal inconsistency of "seat" and "exclusive jurisdiction" in Part-I arbitrations. The SCI was concerned with an agreement between Indus Mobile [Appellant] and Datawind Innovations [Respondent No.1], based in Amritsar, for the supply of mobile phones, tablets and their accessories. The supply of goods was to take place from New Delhi to Chennai. The agreement contained an arbitration clause that provided as follows:

> **"Dispute Resolution Mechanism**:
>
> Such arbitration shall be conducted at Mumbai, in English language.
>
> …
>
> 19. All disputes & differences of any kind whatever arising out of or in connection with this Agreement shall be subject to the exclusive jurisdiction of courts of Mumbai only."

The petition before the SCI arose from a judgment of the Delhi High Court[64] disposing off an application for interim measures and appointment of an arbitrator. The Delhi High Court denied courts of Mumbai jurisdiction on the basis that no part of the cause of action arose in Mumbai. However, it was held that the arbitration would be conducted in Mumbai.

The SCI appreciated the observations in *BALCO* and *Enercon*[65] to hold that "*the moment seat is designated, it is akin to an exclusive jurisdiction clause*". In addition, the SCI held that reference to "seat" is a concept whereby a neutral venue may be vested with jurisdiction by the parties. As discussed above, the view taken by the SCI lending jurisdiction to the "seat court" does not find basis in either legislatively in the Act [where the "cause of action court" should assume jurisdiction in line with Section 2(1)(e)] or in the jurisprudence of the SCI [where the "seat court" and "cause of action court" have concurrent jurisdiction].

In the subsequent sections, the article acknowledges that the *Indus Mobile* decision endeavours to provides some clarity on the jurisdictional principles applicable to domestic arbitrations within the current legislative wording. However, the central thesis of this article is that the reasoning in *Indus*

[64] Datawind Innovations Pvt. Ltd. v. Indus Mobile Distribution Pvt. Ltd., 2016 SCC OnLine Del 3744.
[65] Enercon, ¶ 38.

Mobile and subsequent judgements of the SCI[66] lack sufficient legislative basis and leaves the question of jurisdiction of courts under the Act open to conflicting interpretation by parties and courts.

A. High Court Decisions post-*Indus Mobile*

Before analysing the current state of play, it is necessary to trace the emerging jurisprudence in courts that are applying the exclusive jurisdiction of "seat court" dictum of *Indus Mobile.* A perfunctory glance on the cases shows the lack of coherence in the development of the body of case law on this question. Broadly, the concepts of "place", "seat" and "venue" of arbitration have been interpreted inconsistently and the effect of exclusive jurisdiction clauses remains undecided.

There are some incongruous and varied trends that appear from the High Court judgments post-*Indus Mobile:*

(1) Generally, courts seem to be giving the "seat court" the exclusive jurisdiction,[67] irrespective of an exclusive jurisdiction clause to the contrary.[68] Where an exclusive jurisdiction clause was present simpliciter without a corresponding arbitration clause, it was enforced.[69]

(2) Courts have also determined courts at the *venue* of arbitration to have exclusive jurisdiction, even when there is an exclusive jurisdiction clause conferring jurisdiction to another court.[70]

(3) In a contradictory vein, courts have also determined jurisdiction in favour of courts mentioned in exclusive jurisdiction clause, as opposed to the "seat court".[71]

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[66] Brahmani River Pellets Ltd. v. Kamachi Industries Ltd. (2020) 5 SCC 462 [where the "venue" of arbitration was specified as Bhubaneswar, the Supreme Court held that jurisdiction for arbitral appointments could be assumed by the Orissa High Court only]; BGS [where the Supreme Court imported the Shashoua principle to domestic arbitrations in India misapplying the BALCO dictum].

[67] Noida Toll Bridge Company Limited v. New Okhla Industrial Development Authority, 2017 SCC OnLine Del 11487; Dipendra Kumar v. The Strategic Outsourcing Services Pvt. Ltd., 2017 SCC OnLine Del 10361; Aseva Limited Liability Corporation v. Superficial Health and Spa Private Limited and Ors., 2017 SCC OnLine Del 11083; Mechon Services v. Predominant Engineers & Contractors (P) Limited, 2017 SCC OnLine Cal 19196; Raheja Developers Ltd. v. Proto Developers and Technologies Ltd., 2018 SCC OnLine Del 6966; NJ Construction v. Ayursundra Health Care Pvt. Ltd., 2018 SCC OnLine Del 7009.

[68] Devyani International Ltd v. Siddhivinayak Builders and Developers, 2017 SCC OnLine Del 11156.

[69] General Instruments Consortium v. Lanco Infratech Limited, 2017 SCC OnLine Bom 7697. *Cf.* Reckon Enterprise v. Nazrul CMDA Employees' Co-operative Housing Society Ltd., 2017 SCC OnLine Cal 16345 where the court refused to accept jurisdiction where no cause of action arose within its jurisdiction.

[70] Green Builders and Promoters Pvt. Ltd. v. Ramesh and Ors., MANU/PH/1243/2017; Raman Deep Singh Taneja v. Crown Realtech Pvt. Ltd., 2017 SCC OnLine Del 11966; PCR Warehousing Limited v. Central Railside Warehouse Company Ltd., MANU/DE/2682/2017 (only venue mentioned in arbitration clause). *Cf.* CVS Insurance and Investments v. Vipul IT Infrasoft Pvt. Ltd., 2017 SCC OnLine Del 12149 (where venue of arbitration was Delhi and exclusive jurisdiction was in favour of Noida courts, the Delhi High Court denied jurisdiction).

[71] Asha Tiwari v. BPTP Limited, 2017 SCC OnLine Del 10179.

(4) The jurisdiction of the "seat court" has been ousted in favour of the "cause of action court", relying on Section 42 of the Act.[72]

(5) The dictum in *Indus Mobile* was also applied to a foreign seated international commercial arbitration.[73] This raises questions of precedent as the facts of *Indus Mobile* are concerned with a purely domestic arbitration.

B. Precedent in Arbitration Cases

The SCI in *Indus Mobile* relied on the cases of *BALCO*[74] [5-judge bench], *Enercon*[75], *Reliance,*[76] and *Eitzen*[77] [all 2-judge benches] among others, in holding that the selection of seat of arbitration is analogous to an exclusive jurisdiction clause. The SCI also emphasized on the importance of arbitral seat by highlighting the difference between "seat" and "venue" of arbitration.

This raises pertinent questions about the application of the doctrine of precedent in arbitration cases and the development of the body of arbitration law in general. *First,* in *BALCO,* the observations of the SCI with respect to jurisdiction of a court for Part I arbitrations are mere *obiter dicta* as it was concerned with the interpretation of Section 2(2) in relation to a foreign-seated international commercial arbitration.[78] *Second,* it is also clear that the SCI in *Enercon, Reliance,* and *Eitzen* dealt with foreign-seated international commercial arbitrations. The principles of jurisdiction in domestic and international arbitration are distinct[79] (as discussed above, domestic arbitration does not confer jurisdiction on the basis of seat, but on the basis of cause of action) and therefore, the application of these cases to a purely domestic arbitration in *Indus Mobile* and subsequent cases seems inappropriate.

In any case, in *BALCO* the SCI did not answer the question of exclusivity of jurisdiction and clearly stated that both the "seat court" and "cause of action court" shall have concurrent supervisory

[72] Municipal Corporation for the City of Kalyan and Dombivli v. Rudranee Infrastructure Ltd., 2017 SCC OnLine Bom 5504.
[73] Percept Live Pvt. Ltd. v. Whitefox Ltd., 2017 SCC OnLine Del 10294.
[74] BALCO, ¶¶ 96-100.
[75] Enercon, ¶¶ 134, 138.
[76] Reliance.
[77] Eitzen, ¶ 34.
[78] In BALCO, ¶ 97, the Supreme Court held that that "*The provisions contained in Section 2(1)(e) being purely jurisdictional in nature can have no relevance to the question whether Part I applies to arbitrations which take place outside India*."
[79] For instance, in Prima Buildwell Pvt. Ltd. v. Lost City Developments, 2011 SCC OnLine Del 3449, ¶¶ 28-30 where the international commercial arbitration was seated in London, the Delhi High Court denied jurisdiction in favour of courts in London.

jurisdiction over a Part I arbitration.[80] The SCI in *Indus Mobile* [2-judge bench] *and BGS* [3-judge bench] has derogated from the dictum of concurrent jurisdiction in *BALCO* and has indeed misapplied it.[81] In line with Indian law on *stare decisis*, the *Indus Mobile* and *BGS* benches cannot overrule *BALCO,* and this might explain some of the rationale [and considerable judicial creativity] in the decisions to provide commercial certainty on the jurisdictional scope under the Act.

C. Application of the CPC

The holding in *Indus Mobile and BGS* departs from the well-settled principle that jurisdiction cannot be bestowed on a court which does not possess it under the CPC. This is supported by the legislative text of Section 2(1)(e) of the A&C Act. Consequently, the courts at the seat of arbitration in a domestic arbitration shall assume jurisdiction even when no part of the cause of action arises in the particular seat.

In the context of the application of the CPC to arbitration, it has been opined that the Act is a self-contained code on arbitration and in light of the generally accepted *lex specialis* principles, the CPC should not have application.[82] This was keeping in mind the curtailment of judicial intervention in arbitration. However, the SCI has held that subject to any inconsistency between the two, the principles of the CPC (and not the provisions themselves) may be applied to arbitration law. The general rules of the CPC have been applied to the special law of arbitration in the context of grant of interim measures under Section 9,[83] and in revision petitions from appeals under Section 37.[84] The principles of the CPC have been held to apply during the arbitral proceedings[85] as well as in post-award proceedings. Notably in *State of Maharashtra* v. *Atlanta Ltd.*,[86] the SCI held that the High

[80] BALCO, ¶ 96.

[81] In BGS, the Supreme Court applied the Shashoua principle to domestic arbitrations. The facts of Shashoua clearly show that the arbitration in question was an international commercial arbitration.

[82] Fuerst Day Lawson v. Jindal Exports Ltd., (2011) 8 SCC 333; *See* G Subba Rao, *Applicability of the Civil Procedure Code to Matters Before the Civil Courts Under the Arbitration and Conciliation Act, 1996*, JUNE PL (Jour) 16 (2004), http://www.ebc-india.com/lawyer/articles/633.htm. *Cf.* Tanuka De, *India: Extent Of Applicability Of The Provisions Of Code Of Civil Procedure, 1908 In Arbitration Proceedings,* MONDAQ (Aug. 29, 2017), http://www.mondaq.com/india/x/623960/Arbitration+Dispute+Resolution/Extent+Of+Applicability+Of+The+Provisions+Of+Code+Of+Civil+Procedure+1908+In+Arbitration+Proceedings

[83] Arvind Constructions Co. (P) Ltd. v. Kalinga Mining Corporation, (2007) 6 SCC 798; Adhunik Steels Ltd. v. Orissa Manganese & Minerals (P) Ltd., (2007) 7 SCC 125.

[84] I.T.I. Ltd. v. Siemens Public Communications Network Ltd., (2002) 5 SCC 510. This judgment is under re-consideration by a larger bench of the Supreme Court due to a contradictory order in Mahanagar Telephone Nigam Ltd. v. Applied Electronics Ltd., (2017) 2 SCC 37.

[85] Sahyadri Earthmovers v. L and T Finance Limited and Anr., 2011 SCC OnLine Bom 434.

[86] State of Maharashtra v. Atlanta Ltd., (2014) 11 SCC 619.

Court shall supersede the principal Civil Court in exercise of jurisdiction, and thereby derogated from Section 15 of the CPC.[87]

It is clear that the CPC applies to arbitration law, subject to any conflict between the two. While interpreting questions of jurisdiction under Section 2(1)(e), it is imperative to bear in mind that the language of the Act itself explicitly links territorial jurisdiction to the CPC. Therefore, principles of CPC as regards exclusive jurisdiction should be applied under arbitration law as well due to the wording of the provision in the Act.

In *Indus Mobile,* the SCI was presented with a plain vanilla clause where the place of arbitration and exclusive jurisdiction were the same place, i.e., Mumbai.[88] However, in cases where the seat and exclusive jurisdiction clause are different, there are contrary decisions of the High Court's post-*Indus Mobile.*[89] Therefore, following the facts of *Indus Mobile,* mere stipulation of seat by the parties may not suffice to confer jurisdiction.

While this may intuitively indicate that the party autonomy is diluted under the current legislative framework, harmonious construction of statute and party autonomy cannot lead to absurd results. It is not suggested by the author that party autonomy should not be given primacy. However, such choice of parties should be supported in rules of jurisdiction contained in the Act. It was required that amendments to Section 2(1)(e) and Section 20 of the Act and align statutory principles of jurisdiction with arbitration practice.

D. Effect of 246th Law Commission Report & 2015 Amendment Act

The 2015 Amendment Act was based on the 246thReport on "the Amendments to the Arbitration and Conciliation Act 1996" by the Law Commission of India.[90] The Law Commission Report suggested extensive amendments to the Act in order to legislatively amend the distinction between "seat" and "venue" of arbitration as well as revise the extent of jurisdiction of Indian courts on foreign seated arbitrations.[91]

The legislature, in its wisdom, accepted some of these amendments; while notably not making amendments to change the phraseology of "place of arbitration" to "seat" or "venue" where

[87] § 15, CPC reads - *15. Court in which suits to be instituted.- Every suit shall be instituted in the court of the lowest grade competent to try it.*
[88] Indus Mobile, ¶ 3. For other such plain vanilla cases, *see* Ion Exchange and SRS Private Investment.
[89] Green Builders and Promoters Pvt. Ltd. v. Ramesh and Ors., 2017 SCC OnLine P&H 4353 (seat); Asha Tiwari v. BPTP Limited, 2017 SCC OnLine Del 10179 (exclusive jurisdiction).
[90] Law Commission of India, *Report No. 246 on Amendments to the Arbitration and Conciliation Act 1996* (Aug. 2014).
[91] *Id*. at pp. 23-25, 39, 52.

appropriate. There were no significant changes made to the territorial jurisdiction test under Section 2(1)(e) as well. The SCI in *Indus Mobile* quoted the observations in the Law Commission Report to buttress the importance of seat of arbitration.[92] Interestingly, even though the amendments thereunder were not accepted by the legislature, the SCI rationalised such omission by referring to the dictum in in *BALCO*.[93]

The reliance on the Law Commission Report, in absence of suggested amendments being included in the 2015 Amendment Act was misplaced and rather ironical. As discussed above, the principle of territoriality and jurisdiction are creatures of statute and cannot be conferred either by courts or by parties. Therefore, insofar as the amendments to Section 20 are concerned, the legislature has applied its mind and chosen not to accept them. Further, the High Courts have not achieved clarity with regards to the difference between seat and venue as is clear in the cases post-*Indus Mobile*. The imputation of legislative intention, in the backdrop of evidence to the contrary, seems to be without foundation.[94]

V. CONCLUSION

Despite pro-arbitration changes being brought in legislatively as well as judicially, India is not favoured as an arbitral seat.[95] The reasons are not far to see. The debate around the scope and limitations to international commercial arbitration is a direct output of the lack of judicial appreciation of the basic principles of international commercial arbitration and misreading of the dicta laid down by the higher judiciary. There is a need to effectively balance exclusive jurisdiction clauses and arbitral seat, which the SCI has tried to achieve within the constraints of the Act. However, as courts have given conflicting decisions on the meaning of "seat" and "venue" of arbitration,[96] due to lack of

[92] Indus Mobile, ¶¶ *17-18.*

[93] *Id.* at ¶ 19.

[94] For a brief analysis of legislative intention, *see* Sagar Gupta, *One Step Forward, Two Steps Back? Application of the Arbitration & Conciliation Act, 1996 to Foreign Seated Arbitrations,* ARBITER DICTUM BLOG (Feb. 25, 2016), https://arbiterdictum.wordpress.com/2016/02/25/one-step-forward-two-steps-back/; Rajendra Barot & Sonali Mathur, *Laying Old Ghosts to rest, or not? – The Section 9 Enigma continues...* 5 INDIAN J. ARB. L. 168 (2016).

[95] GARY B. BORN, *INTERNATIONAL ARBITRATION AND FORUM SELECTION AGREEMENTS: DRAFTING AND ENFORCING* 74 (5th ed. 2016). (*India has also historically been disfavored as an arbitral seat, owing to a tradition of interventionist judicial supervision and inefficient local courts*.) In the 2018 International Arbitration Survey: The Evolution of International Arbitration conducted by White & Case LLP and Queen Mary University of London, the five most preferred seats of arbitration are London, Paris, Singapore, Hong Kong and Geneva. Note that seats in India were nominated "twenty times or more" among 992 responses which is a welcome change after the 2015 amendments to the Act. *See* Stavros Brekoulakis & Adrian Hodiș, *Arbitral Seats – An Empirical Overview,* KLUWER ARB. BLOG (May 17, 2018), http://arbitrationblog.kluwerarbitration.com/2018/05/17/tbc/.

[96] In cases such as PCP International, the Delhi High Court declined jurisdiction on the basis of the distinction seat and venue. For cases where the courts have equated 'venue' to 'seat' in absence of a contrary stipulation, *see* Jyoti Structure and Adesh Enterprises.

clarity in legislative text, there is a need to bring amendments to this effect. The phrase "place of arbitration" – borrowed from the UNCITRAL Model Law – should be substituted with "seat" and "venue" as applicable. The definition of "seat of arbitration" should be included, with a specific limitation on its scope. The simplest and most elegant solution to harmonise the judicial interpretation and commercial practice would be to modify the jurisdictional test under Section 2(1)(e) of the Act to include party autonomy (i.e. if the parties have chosen a seat of arbitration in the arbitration agreement) and remove the cause of action route to confer jurisdiction in arbitration matters.[97] This legislative amendment would overcome the concurrent jurisdiction conundrum in *BALCO* and provide basis for the exclusive jurisdiction to the "seat court" in domestic arbitrations in line with the position of the SCI in *Indus Mobile and BGS*. In current practice, it would be advisable for parties to include an arbitral seat in domestic arbitrations to minimise the possibility of a "cause of action court" assuming jurisdiction.

Professor Martin Hunter, in a 2014 article questioned whether a single legislation served the purpose for domestic arbitrations and international commercial arbitrations (whether seated in India or elsewhere) in the Indian context.[98] When answered from the standpoint of jurisdiction, the answer is sadly negative. It will be in India's best interests to bifurcate its arbitration legislations into two – one governing purely domestic arbitrations and another governing international commercial arbitrations. A successful example for this model is Singapore where domestic arbitrations are governed by the Arbitration Act and international commercial arbitrations are governed by the International Arbitration Act (based on the UNCITRAL Model Law). In the domestic sphere, the bifurcation will aid in clarifying several policy positions such as jurisdiction, scope of judicial support and grounds of setting aside.

In the White & Case – QMUL 2018 International Arbitration Survey, preferences for a given seat were primarily determined by its "general reputation and recognition," followed by users' perception of its 'formal legal infrastructure': the neutrality and impartiality of its legal system; the national arbitration law; and its track record in enforcing agreements to arbitrate and arbitral awards. India is at the crossroads of being recognised as an emerging arbitral seat. The bifurcation of arbitration legislation shall significantly help in achieving conceptual clarity between the two distinct systems of domestic and international arbitrations and fostering a certain and predictable national arbitration

[97] On the question of harmonious interpretation undertaken in *Indus Mobile, see* Payal Chawla & Hina Shaheen, *In defence of Indus Mobile v. Datawind Innovations and the Doctrine of Ouster,* BAR & BENCH (Mar. 24, 2018), https://barandbench.com/indus-mobile-doctrine-of-ouster/.

[98] J Martin Hunter, *India's Arbitration Legislation: Does the Single Act Serve the Purpose*, 2 INDIAN J. ARB. L. 4 (2014).

law. In providing a separate regime, Indian courts will be equipped to increase the speed and accuracy in deciding applications relating to international commercial arbitrations. Whilst this may seem a radical solution, it is a viable opportunity for India to address broader concerns in its enforcement regime as well.

TO ENFORCE OR NOT TO ENFORCE: LAYING A STANDARD OF ENFORCEMENT OF ANNULLED AWARDS IN INDIA

Gracious Timothy Dunna*

Abstract

*Is it proper for Indian courts to refuse enforcement of annulled awards simpliciter and give effect to a foreign judgment annulling the award? This remains unanswered, and this piece attempts to address this by laying down a suitable standard for India. It first examines the different positions taken internationally, like the internationalist, territorial, and conflict-of-laws approaches. It concludes that the best approach for India to develop its standard of enforcement of annulled awards would be the conflict-of-laws approach. In arriving at this position, this piece journeys through Section 48(1)(e) of the Arbitration and Conciliation Act, 1996 ["**A&C Act**"] and some fundamental principles of arbitration.*

I. INTRODUCTION

The U. N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 ["**New York Convention**"] and the UNCITRAL Model Law on International Commercial Arbitration 1985 ["**UNCITRAL Model Law**"] are two primary documents that recognize remedies available to parties, particularly, post-award remedies. India is a signatory to the New York Convention and has adopted the Model Law by enacting the A&C Act. Both instruments—international and domestic—allow a party to resist the enforcement of a foreign award even after an unsuccessful challenge to annul the award at the juridical seat or place of arbitration. It is a given that a court in India would be within bounds to determine for itself whether the foreign award must be refused recognition and enforcement on the specific statutory conditions under Section 48 of the A&C Act, which reflects Article V of the New York Convention. What is not so given is how an Indian court may determine the gravity that must be given to the success of a challenge against the award in the court of the seat. To enforce or not to enforce, that is the question.

As per established principles, judicial control is exercised by a State on two key occasions – one, during annulment or set-aside proceedings by courts at the seat of arbitration and, two, during enforcement proceedings by the courts in all the States where recognition and enforcement are sought.[1] Generally, the international arbitration community refers to it as the "double-control," i.e.,

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the enforcement court being the second controller of the award.[2] However, the situation would be complex if an Indian court were to confront a foreign award that a court has previously annulled at the seat of arbitration. The perplexity in the issue is deciding a standard by which courts in India may deal with this question. So far, Indian courts have not spoken on this issue. However, a few jurisdictions [common law and civil law] have spoken and arrived at their own positions.

Should courts in India even allow a party to pursue enforcement of an award after a successful challenge, i.e., after a court has annulled the award at the seat? If a court can exercise discretion under the A&C Act, does it extend to enforcement of a foreign award annulled by a court at the seat? What must be the standard that courts in India must adopt when considering such annulled foreign awards? Must a court in India give effect to the foreign judgment annulling an award? What is permissible under the Indian rules of conflict of laws? These are all pertinent questions, germane to laying down a standard for the Indian courts when confronted with the issue of enforcement of an annulled foreign award.

In the end, this piece recommends that India should consider adopting a simple conflicts-of-law approach by treating annulments like regular foreign commercial judgments, granting them deference for vacating an award unless the said judicial action is tainted with fundamental procedural impropriety or violates public policy.

II. A SUGGESTIVE PREMISE

Before we travel in search of an appropriate Indian standard and better the purpose of this piece, I will first lay down an example of a typical scenario relevant to our discussion. Say that the parties have agreed to London as the seat of arbitration, a place to which neither party has any connection [nor the main contract]. At the closure of the proceedings, an arbitral award is passed, and the losing party moves to set aside the award claiming the arbitral tribunal should have constituted two arbitrators along with a chairman [an odd number], unlike the actual tribunal, which constituted only two members [without a chairman]. The winning party relies on the arbitration agreement that required a two-member tribunal between the parties [implying no chairman] and that, in any case, Section 15 in the English Arbitration Act of 1996—on the number of arbitrators—is not mandatory in nature. Assume that this argument fails for reasons that the law mandatorily required that the "Unless otherwise agreed by the parties, an agreement that the number of arbitrators shall be two or

[1] *See* Albert Jan van der Berg, *The New York Convention of 1958: An Overview*, 2009 INT'L COUNCIL FOR COM ARB 11, https://cdn.arbitration-icca.org/s3fs-public/document/media_document/media012125884227980new_york_convention_of_1958_overview.pdf.

[2] *See* P. T. First Media TBK (formerly known as PT Broadband Multimedia TBK) v. Astro Nusantara International BV et al., [2013] S.G.C.A. 47 (Sing.).

any other even number shall be understood as requiring the appointment of an additional arbitrator as chairman of the tribunal."[3] Also, assume that English courts have held that Section 15 is a non-derogable provision.

There is no particular reason to critique Section 15 of the English Arbitration Act. It is a reasonable provision giving parties the autonomy to appoint an even-numbered tribunal when mutually agreed by the parties.[4] But at the same time, the provision is mandatory in nature, demanding that an even number be understood as requiring the appointment of an additional arbitrator as chairman.[5] The object of this provision is simple – the odd number allows the prevention of a deadlock in the tribunal's decision-making when there is a split in the tribunal as to the decision. The corresponding provision under the Indian Arbitration and Conciliation Act, 1996 ["**A&C Act**"] is much more straightforward: "The parties are free to determine the number of arbitrators, provided that such number shall not be an even number." Here, though Section 10 of the A&C Act is couched in mandatory terms, the Supreme Court of India ["**SCI**"]has taken the view that it is indeed possible for a party to waive any objection as to the number of arbitrators.[6] Accordingly, where two arbitrators make an award, and it is sought to be set aside by one of the parties to the arbitration, that party waives its right to object to the non-fulfillment of the mandatory requirement of Section 10(1) under Section 4 of the A&C Act, which deals with the waiver of the right to object.

Let us assume that the award is set aside by the English court for serious irregularity affecting the tribunal, the proceedings, and the award for failing to adhere to the non-derogable provision of Section 15 of the English Arbitration Act. The question is, does this necessarily have to mean that the award is annulled *erga omnes*? Could not courts in India recognize the award since it would be perfectly valid under its law, and since the reason for annulment by the English court is peculiar to that State, thus, limited to that State alone? If courts in India were not to recognize the set-aside award, are not the international consequences of the arbitral award restricted by virtue of the local law, which award—in fact—had no local nexus whatsoever? Would it not nullify the efforts of a party, who least

[3] Arbitration Act 1996, §15 (Eng.).

[4] *See* GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION 1668 (2014) ("This approach maintains general recognition of principles of party autonomy, while protecting parties from agreeing too readily to an arbitration mechanism that is particularly likely to result in deadlock.").

[5] *See* BORN, *supra* note 4, at 1668-69 ("… it reflects the usual expectations of commercial parties about efficient and final arbitral proceedings. This conclusion would also have the benefit of providing a partial means of reconciling agreements that appeared to require two arbitrators with mandatory law requirements for an odd number of arbitrators.").

[6] Narayan Prasad Lohia v. Nikunj Kumar Lohia, (2002) 3 SCC 572 (Court referred to § 4 and held that if a party being aware of the provisions of Part-I does not raise any objection to such a non-compliance of § 10). *See also*, P. D. Khanna & Ors. v. Ashwani Khanna & Ors., 2008 SCC OnLine Del 875 (Delhi HC); National Highways Authority of India & Anr. v. Bumihiway DDB Ltd. (JV) & Ors., 2006 10 SCC 763.

expected such a dead-end, all based on a vagary that parties never legitimately expected at the time of contracting.

There is another aspect, besides the imagery of a serious procedural irregularity described above – a situation that that would concern India's public policy and various notions of international due process. Should Indian courts recognize and enforce the annulling foreign judgment if it would lead to contravention of India's notions of international due process and public policy (particularly favoring the enforcement of foreign awards and arbitration agreement via the New York Convention)? The annulling foreign judgment is also part of the enforcement equation and cannot be ignored to determine a standard of the enforcement of annulled awards. Thus, would it not be proper to consider any exceptional circumstances where it would contravene India's public policy to enforce the annulling foreign judgment, for example, a judgment rendered without observing due process of law?

In his influential piece, going back to 1981, called "Arbitration Unbound: Award Detached from the Law of Country of Origin," Professor Jan Paulsson outlined a similar premise, like the one described above, while explaining the undergirding of various approaches debated in the academic realm.[7] The "traditional view," according to Professor Paulsson, is that consequences of arbitration in a given State must be subject to the law of that State – thus, the award's binding nature must exclusively derive from the legal system, which is the seat of arbitration, the *lex loci arbitri*.[8] In other words, it would be based on the premise that one single national legal system must give binding effect to the arbitral proceedings. This view has gotten more nuanced by factoring in the annulment decision and treating it like any other foreign money judgment. Thus, annulled awards would be generally considered unenforceable and respected, except when reasons exist to think that the judgment annulling the award lacks procedural integrity or violates the public policy of the enforcing State. Take, for instance, *Telecordia Tech. Inc.* v. *Telkom S.A. Ltd.*,[9] where a U.S. court considered an I.C.C. arbitration award, seated in South Africa. Here, the South African court had vacated the award and refused to allow the I.C.C. to appoint a new tribunal and *sua sponte* appointed a new tribunal, constituting three retired South African judges nominated by the award-debtor, a South African party. Such is a clear example of a set-aside proceeding lacking procedural integrity.

[7] Jan Paulsson, *Arbitration Unbound: Award Detached from the Law of it Country of Origin*, 30(2) INT'L & COMP. L. Q. 358, 360 (1981).
[8] *See* F. A. Mann, *Lex Facit Arbitrum*, *in* INTERNATIONAL ARBITRATION LIBER AMICORUM FOR MARTIN DOMKE 159 – 62 (Pieter Sanders ed. 1967).
[9] 458 F.3d 172 (3rd Cir. 2006).

Another view is subscribed by the proponents of detachment, claiming an "internationalized" award, liberated from the local law, or the seat of arbitration.[10] This view holds international arbitration at a fundamentally different position, resisting an award to be a manifestation of a State's judicial system. Emmanuel Gaillard explains the idea of a detachment in these terms:[11]

> "Arbitral tribunals need not operate like the national courts of a particular state simply because they have their seat there. Arbitrators do not derive their powers from the state in which they have their seat but rather from the sum of all the legal orders that recognize, under certain conditions, the validity of the arbitration agreement and the award. This is why it is often said that arbitrators have no forum."

The detachment is viewed as an "*arbitration escaping the hold of any national law and thus subject directly to international law*,"[12] a free-floating autonomous legal order for arbitration (*un ordre juridique arbitral*) distinct from any national legal orders.[13]

Professor Paulsson finally explains a third view,[14] a new approach he calls "*lex arbitri delocalized*," which seems to be a more nuanced version of the detachment view. It basically advocates that there need not be only one law of arbitration. In his illustration, Professor Paulsson asserts that nothing would prevent the enforcing State from legislating a rule that a foreign award (wherever rendered) is binding under conditions different from those of the State of origin (e.g., that the foreign award is binding in the enforcing State at the moment it is pronounced). As Professor Paulsson puts it:

> "[T]he question is not so much about whether an award may float—this seems beyond dispute—but whether it may also drift, that is to say enjoy a potential for recognition in one or more enforcement jurisdictions without being ultimately anchored in the national legal system of the country where it was rendered."

Summarily, if the arbitration taking place in France is international in character, the resulting award is not French – it must be allowed to drift. Thus, "*the award, once rendered, would be cast adrift, its effects to be controlled by no other authority than its (unvarying) contractual foundation and the (varying) requirements of the particular jurisdictions in which it may be sought to be relied on.*"[15]

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[10] *See* Pierre Lalive, *Les régles de conflit de lois appliquées au fond du litige par l'arbitre international siégeant en Suisse*, 1976 REVUE DE I'ARBITRAGE 155.

[11] E manuel Gaillard, *The Enforcement of Awards Set Aside in the Country of Origin*, 14 ICSID REV. 16, 18 (1999).

[12] *See* Ch. N. Fragistas, *Arbitrage étranger et arbitrage international en droit privé*, 49 REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVÉ 14 (1960).

[13] *See* EMMANUEL GAILLARD, ASPECTS P HILOSOPHIQUES DU DROIT DE L'ARBITRAGE INTERNATIONAL (2008) (English version published as "Legal Theory of International Arbitration"). *See also*, Emmanuel Gaillard*, The Representations of International Arbitration,* 1 J. INT'L DISP. SETTLEMENT 271 (2010).

[14] Paulsson, *supra* note 7, at 360.

[15] Paulsson, *supra* note 7, at 358-59.

Based on doctrinal persuasions, these academic propositions are sometimes demonstrable by State practice in the posture of the courts in civil and common law jurisdictions. The following section of this piece examines the various national case laws and works of commentators. The lack of uniformity is not so surprising – they differ because of the diversity in the jurisdictional outlook of the enforcing States. Nonetheless, the instances of international litigation described below provide a brilliant spread of approaches for considering a standard that would suit Indian legal conditions the most, which is the ultimate goal of this piece.

III. COMPARING NATIONAL APPROACHES TO ENFORCEMENT OF ANNULLED AWARDS

A. The Internationalist Approach

Some European States take the view that an arbitral award is not nullified *erga omnes* if it is annulled at the place of arbitration or in the State of origin. It basically rejects the idea of *ex nihilo nihil fit* (out of nothing comes nothing) in relation to annulled foreign awards entering the territorial boundaries of the enforcing State.[16]

The French courts adopt this "internationalist" approach on the premise of an award's transnational nature and the more favorable-right provision of the New York Convention.[17] Though French courts are generally considered arbitration-friendly, its approach to the enforceability of annulled awards is conditioned by its unique statutory framework. The French Code of Civil Procedure ["**French Code**"] governing the enforcement of foreign arbitral awards has no specific provision, like Article V(1)(e) of the New York Convention, based on which French courts may refuse enforcement on the ground that the incoming award has been set-aside in the State of origin. Article 1526 of the French Code (previously Article 1502) provides that the Court of Appeal may only deny recognition or enforcement of an arbitral award on the grounds listed in Article 1520. Article 1520 (previously Article 1506) provides that:[18]

> "An award may only be set aside where: (1) the arbitral tribunal wrongly upheld or declined jurisdiction; or (2) the arbitral tribunal was not properly constituted; or (3) the

[16] Pieter Sanders, one of the founding fathers of the New York Convention, was a strong advocate of the application of the *ex nihilo nil fit* principle to the enforcement of foreign set-aside awards. *See* Pieter Sanders, *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 6(1) NEDERLANDS TIJDSCHRIFT VOOR INTERNATIONAAL RECHT 43-59 (1959) (Courts will refuse the enforcement as there does no longer exist an arbitral award and enforcing a non-existing arbitral award would be an impossibility or even go against the public policy of the country of enforcement.).

[17] *See generally*, Gaillard, *supra* note 11; William W. Park, *Unity and Diversity in International Law*, 99 BOSTON UNIV. L. REV. ONLINE 22, 26-31 (2019).

[18] *Code of Civil Procedure, Book IV, Arbitration*, *in* ICCA INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION 1, 14 (Kluwer Law International 1984, Supplement No. 64, May 2011) (Jan Paulsson & Lise Bosman eds. 2018).

> arbitral tribunal ruled without complying with the mandate conferred upon it; or (4) due process was violated; or (5) recognition or enforcement of the award is contrary to international public policy."

As a consequence, the French national law regarding enforcement of annulled awards applies via the more-favorable-right provision of Article VII(1) of the New York Convention, which provides:

> "The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon."

The first of such instances was in the case of *Soc. Pabalk Ticaret Ltd Sirketi* v. *Soc. anon. Norsolor* ["**Norsolor**"].[19] The Cour de Cassation considered a foreign award that was partially set-aside in Vienna, and it was held that the New York Convention did not deprive a party of any right he may avail in respect of a foreign award: (a) in the manner and to the extent allowed by the treaties of the enforcing State, and (b) as per the local law of the enforcing State itself. As a result, a court would not refuse to enforce a set-aside award when it is permissible under French national laws.

While the *Norsolor* court did not provide any standard, the decision implicated Article VII of the New York Convention to be a more favorable rule, even taking precedence over Article V.[20] This laid the foundation for cases yet to come wherefrom French courts refined its position. In *Hilmarton Ltd.* v. *Omnium de Traitement et de Valorisation* ["**Hilmarton**"],[21] the Paris Court of Appeal expounded further on the French position that the incorporation of an annulled international award into the French legal system (via means of enforcement) did not violate its international public policy. This was confirmed by the Cour de Cassation,[22] stating that the annulled award continued in existence even after it is set aside by national courts at the seat. The French position was again affirmed by the Paris Court of Appeal in *The Arab Republic of Egypt* v. *Chromalloy Aeroservices, Inc.*[23] and by the Cour de Cassation in *PT Putrabali Adyamulia (Indonesia)* v. *Rena Holding, et al.* ["**Putrabali**"].[24] In

[19] Cour de Cassation [Cass.] [supreme court for judicial matters] 1e civ. Oct. 3, 1984, 83-11.355 (Fr.).
[20] *See* Gaillard, *supra* note 11. *See also*, ALBERT JAN VAN DEN BERG, THE NEW YORK ARBITRATION CONVENTION OF 1958: TOWARDS A UNIFORM JUDICIAL INTERPRETATION 89 (1981).
[21] Cour d'Appel [CA] [regional court of appeal] Paris, 1e ch., Dec. 19, 1991, Bull. civ. I, No. 104, 79 (Fr.). *See also*, XIX Y. B. COMM. ARB. 655-657 (1994).
[22] *Id*, at 663-665.
[23] Cour d'Appel [CA] [regional court of appeal] Paris, 1e ch., Jan. 14, 1997, 95/23025 (Fr.). *See also*, XXII Y. B. COMM. ARB. 691-695 (1997).
[24] Cour de Cassation [Cass.] [supreme court for judicial matters] 1e civ. Jun. 29, 2007, 05-18.053 (Fr.). *See also*, XXXII Y. B. COMM. ARB. 299-302 (2007) (The court confirmed that "[a]n international arbitral award – which is not anchored to any national legal order – is an international judicial decision whose validity must be ascertained with regard to the rules applicable in the country where its recognition and enforcement is sought.").

Putrabali, the court also addressed the situation where a tribunal rendered a different award after the first award was set aside at the seat: if so, the parties are expected to race for *exequatur* in the French courts.

Indeed, the French position is settled that it is a fundamental principle of French international arbitration law that annulled foreign awards are enforceable.[25] Scholars generally reference this approach rather uniquely, calling it the "*delocalization of international commercial arbitration*." Expounding this claim, in clarificatory terms, Professor Paulsson writes:[26]

> "Those who reject the delocalisation process seem to mistake the purpose of permitting parties to unbind arbitrations from the law of the situs of proceedings. They wrongly conclude that what is sought is an "escape" from national jurisdictions.
>
> To seek completely to avoid national jurisdictions would be misguided. Indeed, the international arbitral system would ultimately break down if no national jurisdictions could be called upon to recognise and enforce awards. The question is rather whether in certain situations international arbitration may be liberated from the local peculiarities of a place of arbitration…
>
> What this critique misses is that the delocalized award is not thought to be independent of any legal order. Rather, the point is that a delocalised award may be accepted by the legal order of an enforcement jurisdiction although it is independent from the legal order of its country of origin*"*

The delocalization of arbitration also has support, like that of Professor Giorgio Bernini;[27] and it has been criticized, like that by Professor William Park,[28] calling it a "*dangerous heresy*." Supporting the French approach, Emmanuel Gaillard has proclaimed that it to be highly coherent, favoring a universalist concept of arbitration and minimizing local idiosyncrasies. It is clear today that French law has confirmed that French courts may nonetheless recognize a foreign award that has been annulled in the State of origin.

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[25] *See* Directorate General of Civil Aviation of the Emirate of Dubai v. International Bechtel Co. LLC, Cour d'Appel [CA] [regional court of appeal] Paris, Sep. 29, 2005, 2004/07635 (Fr.). *See also*, XXXI Y. B. COMM. ARB. 629 (2006).

[26] Jan Paulsson, *Delocalisation of International Commercial Arbitration: When and Why It Matters*, 32(1) INT'L & COMP. L. Q. 53, 54, 57 (1983).

[27] Giorgio Bernini, *The Enforcement of Foreign Arbitral Awards by National Judiciaries: A Trial of the New York Convention's Ambit and Workability*, in THE ART OF ARBITRATION: ESSAYS ON INTERNATIONAL ARBITRATION LIBER AMICORUM PIETER SANDERS 50, 58 (Jan C. Schultsz & Albert Jan van den Berg eds. 1982).

[28] William W. Park, *The Lex Loci Arbitri and International Commercial Arbitration*, 32 INT'L & COMP. L. Q. 21 (1983)

B. Territorial Approach

Though the French position has settled for the "internationalist approach," regarded for its pro-enforcement and arbitration-friendly attributes, it is interesting to take note of the French Decree of International Arbitration of 1981,[29] under which the Paris Court of Appeal decided the case of *Société Berardi* v. *Société Clair* ["**Berardi**"].[30] This was before introducing Article 1526 of the French Code, which has no provision for refusing enforcement on the ground of annulment at the seat. Interestingly, before the existence of such specific enforcement conditions [as they are in France now in Article 1526], the *Berardi* court refused to enforce a foreign award because it was set aside in Geneva.

It is fascinating to note that the criteria of French law [which is not based on the UNCITRAL Model Law] are not present in other jurisdictions, and, thus, it is understandable why the internationalist approach may be unique to the French setting. On the other hand, the territorial approach instead sinks a "floating" award: when a court annuls an award, it is considered to have a universal effect such that the award is not enforceable in any other jurisdiction.[31] Professor van den Berg writes in descriptive terms that there is an appreciable distinction between the refusal of enforcement and the annulment of an arbitral award.[32] The refusal of enforcement has a territorial effect. Thus, courts in different jurisdictions can arrive at diametrically opposite conclusions on the enforceability of a foreign award. On the other hand, Professor van den Berg explains, the annulment of the award has an *erga omnes* effect and, thus, once an award is annulled, it can no longer be eligible for enforcement. Ultimately, territorialists argue that this provides legal certainty to international arbitration.[33]

In Asia, Singapore has spoken on this point [although indirectly] while dealing with a related issue on the enforcement of foreign arbitral awards; this was the Singapore Court of Appeal in *P. T. First Media T.B.K. [formerly known as P.T. Broadband Multimedia T.B.K.]* v. *Astro Nusantara International B.V. et al.* ["**Astro**"].[34] The Court of Appeal was of the view that it was not up to courts in Singapore to enforce an incoming foreign award that was successfully challenged at the seat. Admittedly, while there was discretion as per the wordings of Article V(1)(e) of the New York Convention and Article 36(1)(a)(v) of the Model Law, the *erga omnes* effect of an annulled award at

[29] *See* VII Y. B. COMM. ARB. 271-282 (1982) (reprinted in English).
[30] XII Y. B. COMM. ARB. 319 (1982) (Unpublished Case No. 11542 and with a translated excerpt).
[31] *See* Manu Thadikkaran, *Enforcement of Annulled Arbitral Awards: What Is and What Ought to Be?*, 31(5) J. OF INT'L ARB. 575–608 (2014).
[32] Albert Jan van den Berg, *Enforcement of Arbitral Awards Annulled in Russia: Case Comment on Court of Appeal of Amsterdam*, 28 April 2009, 27 J. OF INT'L ARB. 179 (2010).
[33] *See* VAN DEN BERG, *supra* note 20, at 355–57 ("Is the setting aside of the award in the country of origin a necessary ground for refusal of enforcement?").
[34] [2013] S.G.C.A. 47 (Sing.).

the seat only led to the conclusion that there was no award in existence; that out of nothing comes nothing.

Generally considered a friendly jurisdiction for international arbitration, Singapore took the territorial approach on the issue, given the lack of international consensus.[35] Calling it "*tentative thoughts,*" Justice Sundaresh Menon [Chief Justice of Singapore Supreme Court] has also commented upon the *Astro* dictum, opening a window into the Singaporean thinking of the effect of annulled foreign awards. His emphasis was on the exercise of party autonomy in selecting the seat and, with the seat, the specific role of the national courts at the seat and, with the national courts, the consequences that ensure from the decisions of such national courts.[36]

At the same time, Justice Menon expressed that in the Singaporean territorial approach, the enforcing court retained the right to refuse the enforcement of the annulling foreign judgment on traditional principles of comity without compromising on the principle of *ex nihilo nihil fit.*[37] According to Justice Menon, a view different from the territorial approach would have led to "*puncturing the aura of finality previously accorded to decisions of seat courts potentially undermines the functioning of arbitration as an international system.*"[38] The Singaporean view, therefore, rests on the point that the validity of a foreign award should only be assessed by the national courts at the seat. A "tentative thought" such as this is quite understandable; to assume that a defect which is enough to cause the annulment of an award at the seat would be sufficient to cause the enforcing State to decline to give it recognition.

Like Singapore, Brazilian courts have also taken the view that enforcement should be refused pursuant to Article V(1)(e) of the New York Convention, read in conjunction with Article 38(VI) of the Brazilian arbitration law.[39] This was held by the Brazilian Superior Court of Justice in *EDF International S.A. v YPF S.A. and Endesa Latinoamérica S.A.*[40] The court refused to enforce an

[35] Chief Justice Sundaresh Menon, Chief Justice of Singapore, Patron's Address, Chartered Institute of Arbitrators London Centenary Conference ¶¶ 51-59 (July 2, 2015), https://www.supremecourt.gov.sg/Data/Editor/Documents/ciarb-centenary-conference-patron-address.pdf.
[36] Chief Justice Sundaresh Menon, Chief Justice of Singapore, Standards in Need of Bearers: Encouraging Reform from Within, Singapore Centenary Conference of the Chartered Institute of Arbitrators 19 (September 3, 2015), http://www.ciarb.org.sg/wp-content/uploads/2015/09/Keynote-Speech-Standards-in-need-of-Bearers-Encouraging-Reform-from-.pdf.
[37] *Supra* note 38., at 30.
[38] Menon, *supra* note 35, at ¶ 56.
[39] *Law No 9.307 of 23 September 1996*, *in* ICCA INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION 1, 11 (Kluwer Law International 1984, Supplement No. 51, March 2008) (Jan Paulsson & Lise Bosman eds. 2018) (Article 38 states that the homologation request for the recognition or enforcement of a foreign arbitral award can be denied only if the defendant proves that the arbitral award is not yet binding on the parties, or has been set aside or has been suspended by a court of the country in which the arbitral award has been made.).
[40] STJ, 2011/0129084-7, Relator: Ministro Jorge Mussi, 02.12.2015 (Braz.).

incoming foreign award set aside by the national courts of Argentina, the place of the arbitration. The setting-aside, in a way, created a bar to the enforcement in Brazilian territory.

Professor William Park has been [in the past, at least] a strong proponent of the traditional or territorial view that the State of origin [or the place of arbitration] only has the authority to legitimize arbitral authority, subject to conditions that usually take the shape of mandatory rules.[41] According to Professor Park, the tussle is related to our convictions about the local procedural law, the *lex loci arbitri.* Simply put, if proponents of delocalized arbitration assert that arbitral awards may be detached from the State of origin, then what could be a point of reference of a legitimate award, and how can an award remain enforceable? On the other end of the spectrum, the ultimate goal of international commercial arbitration is finality in private dispute resolution, sourced from the place of arbitration, the *lex loci arbitri*; the seat anchors the arbitration to the legal order of the State in which it takes place.[42]

Conceptually, the territorial approach has been criticized for disrupting the internationality of the New York Convention by obliquely inviting local norms, which were tried and thought to be excluded by the New York Convention's enumerated exceptions.[43] In more recent writings, however, Professor Park has given a broader perspective on each side of the debate, that they all invoke the same regard for party intent.[44] On the one hand, if litigants mutually agree to remove a dispute from the courts, why defer to a judicial annulment? On the other hand, parties often agree to arbitration, not in the abstract but in a specific geographical venue, including the final authority of those national courts. Accordingly, the prospect of annulment at the arbitral seat forms part of the bargain.

C. Conflict-of-Laws Approach

The conflict-of-laws approach is a moderate perspective between the claims of the internationalists and territorialists. A somewhat middle position, a sound policy to treat annulment decisions like other foreign money judgments. The annulment should be respected except when reason exists to think that the judgment vacating the award lacked procedural integrity or offends public policy of the enforcing State.[45]

[41] Park, *supra* note 28.
[42] *See* Gaillard, *supra* note 11.
[43] *See* Stefan Kröll, *The European Convention on International Commercial Arbitration: The Tale of a Sleeping Beauty*, *in* AUSTRIAN YEARBOOK ON INTERNATIONAL ARBITRATION 61–74 (Klausegger et al. eds., Manz, 2013).
[44] WILLIAM W. PARK, ARBITRATION OF INTERNATIONAL BUSINESS DISPUTES 352 (2012).
[45] *See generally*, William W. Park, *Unity and Diversity in International Law*, 99 BOSTON UNIV. L. REV. ONLINE 22, 26-31 (2019).

This view primarily rests on the discretionary nature of Article V(1)(e) of the New York Convention (and Article 36(1)(a)(v) of the Model Law)[46] and, in doing so, scrutinizing the enforceability of the foreign judgment annulling the award at the seat. It rejects any absolute prohibition in enforcing an annulled foreign award (at least, under the New York Convention) and the idea of *ex nihilo nihil fit*. The discretion— "may" be refused— cannot, however, have a purely discretionary or arbitrary force but would need to cater to enforcement situations where the right to rely on annulled foreign awards had been lost.[47] Therefore, the question could be, should a corrupt court judgment annulling an award at the seat be disregarded and the said award enforced? Yes. Of course, great care is necessary from otherwise turning this into an exercise of stigmatizing the foreign court's working and the quality of that State's administration of justice.[48]

Since foreign judicial acts are considered outside the scope of the act of State doctrine, it is not off-limits to determine disputed factual issues and apply cogent evidence proving that a foreign court decision is the outcome of fraud, corruption, or political influence.[49] In the words of Justice David Steel (albeit, speaking of a situation involving an appellate foreign court setting-aside a lower foreign court decision) in *Merchant International Co Ltd* v. *Natsionalna Aktsionerna Kompaniya Naftogaz Ukrayiny* ["**Merchant**"]:[50]

> "The issue is not so much the enforcement of the original judgment but the recognition of the judgment setting it aside. If the judgment setting aside the judgment of the lower court lacked due process then the default judgment [enforcing the foreign lower court judgment] will stand… It is well established that a foreign judgment is impeachable on the ground that its recognition would be contrary to public policy: Dicey & Morris: The Conflict of Laws, 14th Ed, Rule 44."

In *Merchant,* the English court noted that the proceedings before the Ukrainian court fell short of guarantees of a fair trial; that the order of the Ukrainian Supreme Commercial Court setting aside the

[46] Under Article V(1)(e) and Article 36(1)(a)(v), respectively, recognition and enforcement "may be refused only if" one of the specified situations applies. *See* Albert van den Berg, *Residual Discretion and Validity of the Arbitration Agreement in the Enforcement of Arbitral Awards Under the New York Convention*, *in* CURRENT LEGAL ISSUES IN INTERNATIONAL COMMERCIAL LITIGATION, VOL. VIII (1996).

[47] Lord Jonathan Mance, Justice of the Supreme Court of United Kingdom, Arbitration – a Law unto itself?, 30th Annual Lecture organised by The School of International Arbitration and Freshfields Bruckhaus Deringer (November 4, 2015), https://www.supremecourt.uk/docs/speech-151104.pdf.

[48] van den Berg, *supra* note 32.

[49] AK Investment CJSC v. Kyrgyz Mobil Tel Ltd & Ors. [2011] U.K.P.C. 7 (Otherwise, the paradoxical result would follow that, the worse the system of justice in the foreign country, the less it would be permissible to make adverse findings on it.).

[50] [2011] E.W.H.C. 1820 (Comm). *Merchant* was upheld on a narrower ground, but with provisional expressions of view in favour of Justice David Steel's reasoning in AK Investment CJSC v. Kyrgyz Mobil Tel Ltd & Ors. [2011] U.K.P.C. 7.

judgment of the lower court lacked regard for the principle of legal certainty and evidentiary principles considered fundamental.[51]

i. *Yukos Saga in the Netherlands and the United Kingdom*

The "Yukos saga" in the Netherlands and English courts firmly established the conflict-of-laws approach in the context of awards rendered by an arbitral tribunal seated in Russia. In the Netherlands, it was the case of *Yukos Capital SARL* v. *OAO Rosneft, Gerechtshof*.[52] Here, the Amsterdam Court of Appeal was approached by Yukos Capital with an award that was set aside by the Arbitrazh Court of the City of Moscow (affirmed by the Russian Supreme Court) on multiple grounds, namely, violation of the right to equal treatment, the agreed rules of procedure, the appearance of a lack of impartiality and independence on the part of the arbitrators. The Court of Appeal held that there was no obligation to refuse the enforcement of a foreign award that was annulled if the annulling foreign judgment could not be recognized in the Netherlands. In the court's view, Russian civil judges were likely to be partial and dependent. Thus, the annulling foreign judgment from Russia could not be recognized.

Commenting on the Amsterdam Court of Appeal, Professor van den Berg writes that the court failed to exercise appropriate caution.[53] While the court acknowledged that the award-creditor had no direct evidence of partiality and dependence of the Russian judges who annulled the award, it nevertheless deduced from press publications and general reports that the Russian judges lacked impartiality and independence. For one court to hold accusations against a foreign court is extremely serious, especially since there was no solid evidence for it. On this issue, Professor van den Berg exclaimed that:[54]

> "A lack of impartiality and independence should be factually (and demonstrably) present in a given case, or else there should be (provable) circumstances present that have created an appearance of a lack of impartiality or independence on the part of the judges in question… The Court advances this conclusion without any concrete evidence of a lack of independence and impartiality on the part of the judges involved in all three instances."

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[51] *Id*, at 1828-29.

[52] Yukos Capital SARL v. OAO Rosneft, No. 31. Gerechtshof, Amsterdam, 28 April 2009, XXXIV Y. B. COMM. ARB. 703-714 (2009). *See also*, Lisa Bench Nieuwveld, *Yukos v. Rosneft: The Dutch Courts find that Exceptional Circumstances Exist*, KLUWER ARB. BLOG (Feb. 11, 2010), http://www.kluwerarbitrationblog.com (This intermediate position has so far received little attention among arbitration aficionados, perhaps due to lack of entertainment value as compared with more extreme alternatives. At least one author, however, takes the view that the Amsterdam court in the *Yukos* case adopted this position.).

[53] Albert Jan van den Berg, *Enforcement of Arbitral Awards Annulled in Russia*, 27(2) J. OF INT'L ARB., 179, 180-181 (2010).

[54] *Id*, at 181.

The Yukos saga had many episodes in various jurisdictions, including England in *Yukos Capital S.A.R.L.* v. *O.J.S.C. Rosneft Oil Company*.[55] The English Court of Appeal heard a similar objection that the foreign award was set aside by the court at the seat in Russia. Here, the court first considered and ruled that the Act of State doctrine did not prevent an English court from holding whether a foreign court decision (here, the annulling foreign judgment) should be enforced. Foreign judicial acts have been seen as a category outside the Act of State doctrine, thus, not precluding an inquiry whether the decisions of the Russian courts annulling the awards were a result of political influence. It was, nevertheless, necessary under the principle of international comity that a refusal to enforce a foreign judgment was based on cogent grounds of failure of substantial justice, namely, fraud, corruption, political influence, rules of natural justice, etcetera.[56]

While the proceedings escalated to the second appellate court on specific issues, the Queen's Bench Division of the High Court addressed the non-existence of an annulled award.[57] Most interestingly, it observed that by accepting the non-existence of the annulled award, it would be as if the court were bound to recognize a foreign court's decision, which offended the basic principles of morality, natural justice, and public policy. It would be a self-defeating notion (so to speak). The High Court took the position that there was no *ex nihilo nihil fit* principle that precludes the enforcement of the awards; and that the court had the power to enforce the awards at common law notwithstanding the annulling decision of the Russian court.

Lord Jonathan Mance, Baron Mance gives his strong support to the decisions of the English court, according to which the enforcing court may refuse to enforce a foreign judgment annulling an award if the enforcement of the said judgment would violate the public policy of the enforcing State.[58] An internationalist like Professor Paulsson also expresses general sympathy towards enforcement of vacated awards, at least if the annulment was for a local standard, for instance, the State's public policy where the award was made.[59] The conflict-of-laws approach, however, is not without constructive criticism. For example, Professor van den Berg argues that a consideration of the enforceability of the foreign judgment is not required under the New York Convention – it has only led to adding an additional step not contemplated by the Convention.[60] It would seem that the conflict-of-laws approach is the majority State practice, also considering that many jurisdictions have not yet

[55] Yukos Capital SARL v. OJSC Rosneft Oil Company, [2012] E.W.C.A. Civ 855.
[56] DICEY, MORRIS AND COLLINS ON THE CONFLICT OF LAWS (2012) (see Rules 50-52).
[57] Yukos Capital SARL v. OJSC Rosneft Oil Company, [2014] E.W.H.C. 2188 (Comm). *See also*, Maximov v. OJSC Novolipetsky Metallurgichesky Kombinat, [2017] E.W.H.C. 1911 (Comm) (2017).
[58] Mance, *supra* note 49.
[59] Jan Paulsson, *Enforcing Arbitral Awards Notwithstanding a Local Standard Annulment*, 9(1) ICC INT'L CT. OF ARB. BULL. 14 (1998).
[60] van den Berg, *supra* note 32.

ruled on whether and the conditions under which the enforcing court may exercise such discretion. Nonetheless, there is an expanding body of literature and case law recognizing and enforcing annulled awards conditionally. For instance, Swiss courts, as a general rule, will refuse to enforce annulled awards.[61] But commentators take the view that in situations contravening Swiss public policy to enforce an annulling judgment, the annulled award may be enforceable; or where an award-debtor—opposing the enforcement of the annulled award—has acted in bad faith.[62] The conflict-of-laws approach is similarly followed by Spanish[63] and Hong Kong[64] courts.

ii. The United States

Generally, U.S. courts will refuse to enforce an award vacated at the seat of arbitration unless the vacating judgment offends U.S. public policy. A U.S. District Court first considered this issue for the District of Columbia in *Chromalloy Aeroservices Inc.* v. *The Arab Republic of Egypt* ["**Chromallo**"].[65] Here, the case related to an award rendered in an arbitration seated in Cairo, involving a U.S. company (Chromalloy) and the Republic of Egypt. While Chromalloy sought enforcement in the U.S., the Republic of Egypt appealed the award before a court in Cairo for reasons that the arbitrators had wrongfully applied Egyptian private law rather than administrative law.

Nonetheless, the U.S. district court granted Chromalloy's petition to enforce the award notwithstanding the vacatur of the award in Egypt. It concluded that Article V of the New York Convention created a permissive standard leaving non-enforcement of a vacated award within the discretion of the U.S. courts, while Article VII of the Convention was a mandatory provision, enshrining the parties' right to invoke the more favourable enforcement provisions of national law where enforcement was sought – that being the strong public policy toward enforcing international arbitration awards under the Federal Arbitration Act, 1925 ["**FAA**"]. The district court decided that

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[61] *See* Bundesgericht ["**BGer**"] [Federal Supreme Court], 8 December 2003, 4P.173/2003, https://newyorkconvention1958.org/index.php?lvl=notice_display&id=567.

[62] *See* Elliott Geisinger, *Implementing the New York Convention in Switzerland*, 25(6) J. of Int'l Arb. 698 (2008); BERNHARD BERGER & FRANZ KELLERHALS, INTERNATIONAL AND DOMESTIC ARBITRATION IN SWITZERLAND ¶ 2083 (2015) (*see* footnote 126); Martin Bernet & Philipp Meier, *Recognition and Enforcement of Arbitral Awards*, *in* INTERNATIONAL ARBITRATION IN SWITZERLAND 212 (Elliott Geisinger et al. eds., 2d ed. 2013).

[63] *See* decision dated 16 April 1998, RAJ 2919; decision dated 20 July 2004, RJ 2007/5817 (The mandatory nature of an award cannot be linked to its enforceability in the State where it was rendered, given that, in that case, the mandatory nature of the award, for the purposes of its recognition, would be wrongly identified with the effectiveness of the same in the State where it was made.). *See* Oliver Marsden & Ashley Jones, *Awards Set-Aside at the Seat of the Arbitration: Is Enforcement Still Possible?* PRACTICAL LAW UK ARTICLES 6-599-2365 (2017) (*see* section on Spain).

[64] *See* Karaha Bodas Co. LLC v. Perusahaan Pertamabangan Minyak Dan Gas Bumi Negara [2008] H.K.C.F.A. 98, ¶ 47; Societe Nationale D'Operations Petrolieres de la Cote D'Ivoire – Holding v. Keen Lloyd Resources Ltd., [2001] H.K.C.F.I. 173, ¶ 14.

[65] 939 F. Supp. 907 (D.D.C. 1996).

it was under no obligation to enforce the Egyptian judgment issued in proceedings that contradicted the parties' agreement to waive all judicial recourse against the award and, thus, violated the emphatic U.S. public policy favouring arbitration.

In the decisions that came after *Chromalloy*, the U.S. courts appear to give greater deference to the courts' decisions at the seat; today, either little or nothing is left of the *Chromalloy* decision.[66] It has received sharp criticism.[67] However, commentators go both ways on the *Chromalloy* reasoning; it is really in the eye of the beholder. For example, some suggest that an arbitration clause excluding any recourse is apparently sufficient to make a vacated award enforceable;[68] thus, supporting *Chromalloy*, or at least a modified version of it.[69]

In *Baker Marine Ltd.* v. *Chevron Ltd.* ["**Baker Marine**"],[70] the U.S. Court of Appeals directly addressed this issue. Here, Baker Marine contracted with Danos and Chevron to provide barge services for oil exploration activities in Nigeria. When a dispute arose, arbitration was initiated, and Baker Marine obtained awards against Danos and Chevron. However, the Nigerian Federal High Court set aside both the awards, holding that the arbitral tribunals' findings were not supported by evidence and that the tribunals had incorrectly awarded punitive damages, went beyond the scope of submission, and inconsistent. Nonetheless, Baker Marine sought to enforce both awards in the U.S. before the Court of Appeals, heavily relying on Article VII of the Convention; that Baker Marine had the right to have the awards recognized under the more favourable provisions of the FAA. However, the court rejected the argument and observed that it was a sufficient answer that the parties contracted in Nigeria that their disputes would be arbitrated under Nigerian laws; and there was no reference to U.S. laws whatsoever. Thus, the court held that the arbitration agreement was to be enforced according to the terms, which is also the primary purpose of the FAA. Interestingly, Baker Marine did not raise any contentions that the Nigerian courts acted contrary to Nigerian law. Thus, *Baker Marine* roundly rejected the Article VII approach taken in *Chromalloy*. Having contracted the seat to

[66] *See* Yusuf Ahmed Alghanim & Sons, W.L.L. v. Toys "R" Us, Inc. & Tru (HK) Ltd., 126 F.3d 15 (2d Cir. 1997); Martin Spier v. Calzaturificio Tecnica, S.p.A., 71 F. Supp. 2d 279 (S.D.N.Y 86 Civ. 3447 (CSH) 1999).

[67] *See* Nina H. Mohebbi, *Back Door Arbitration: Why Allowing Non-Signatories to Unfairly Utilize Arbitration Clauses May Violate the Seventh Amendment*, 12 U. PA. J. BUS. L. 555, 563 (2010); William W. Park, *Duty and Discretion in International Arbitration*, 93 AM. J. INT'L ARB. 805, 807 (1999); Nicholas Pengelley, *The Convention Strikes Back: Enforcement of International Commercial Arbitration Awards Annulled Elsewhere*, 8 VINDOBONA J. INT'L COMM. L. & ARB. 195, 200 (2004) (that the FAA does not apply to international arbitration and that the Chromalloy court should not have relied on it).

[68] Christopher R. Drahozal, *Enforcing Vacated International Arbitration Awards: An Economic Approach*, 11 AM. REV. INT'L ARB. 451, 478 (2000).

[69] *See* Pengelley, *supra* note 71, at 200; GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 2681-84 (2009).

[70] Baker Marine (Nig.) Ltd. v. Chevron (Nig.) Ltd. & Chevron Corp., Inc., Baker Marine (Nig.) Ltd. v. Danos and Curole Marine Contractors, Inc., 191 F.3d 194 (2d Cir. 1999).

be Nigeria, the parties had never agreed to have an award governed by the FAA, and there was no reason to apply U.S. domestic arbitration law. Though *Chromalloy* was not overruled, its Article VII approach was relegated to cases where the foreign annulment violated an express waiver of any recourse against the award before the seat court.

Next came the decision of the U.S. District Court for the Southern District of New York in *Martin Spier* v. *Calzaturificio Tecnica, S.p.A* ["**Spier**"].[71] Here, an Italian award (in favour of Martin Spier) was annulled by an Italian court and, ultimately, confirmed by the Italian Supreme Court. In the enforcement proceedings before the U.S. district court, the court firmly based its opinion on the reasoning in *Baker Marine*, rejecting Martin Spier's attempt to apply the *Chromalloy* rationale and have the Italian award recognized by application of the "more favourable" standards of the FAA. The district court held that the Italian courts nullified a valid ground recognized under the FAA relating to arbitrators exceeding their powers. Therefore, the *Spier* court goes even further in marginalizing *Chromalloy*, singling out Egypt's repudiation of its contractual promise not to appeal an arbitral award as the isolated circumstance which violated U.S. public policy articulated in the FAA, thereby justifying the *Chromalloy* decision in the limited sense.

It becomes apparent from the above decision how the pendulum seems to have swung from local enforcement standards under *Chromalloy* to the more recent precedents that relegated the effect *Chromalloy* could have had. Thereafter, in 2007, another annulled award came before the Court of Appeals of the Second Circuit in *Termorio & LeaseCo Group* v. *Electranta S.P. et al.* ["**Termorio**"].[72] This related to a Colombian award in favour of Termorio and against Electrantra (a Colombian State-owned entity). Electranta was successful in vacating the award before Colombian courts on the grounds that the ICC arbitration clause was not valid because at the time it was entered into, it violated Colombian law. Termorio then sought to enforce the award in the U.S. However, the district court denied enforcement, and the Court of Appeals affirmed the same. In rejecting the enforcement, the court specifically rejected the *Chromalloy* approach relied upon by Termorio:[73]

> "The Convention does not endorse a regime in which secondary States (in determining whether to enforce an award) routinely second-guess the judgment of a court in a primary State, when the court in the primary State has lawfully acted pursuant to "competent authority" to "set aside" an arbitration award made in its country. Appellants go much too far in suggesting that a court in a secondary State is free as it sees fit to ignore the judgment of a court of competent authority in a primary State vacating an arbitration award. It takes much more than a mere assertion that the judgment of the primary State

[71] 663 F. Supp. 871 (S.D.N.Y. 1987).
[72] 487 F.3d 928 (D.C. Cir. 2007).
[73] *Id*, at 937.

> "offends the public policy" of the secondary State to overcome a defense raised under Article V(1)(e)."

With *Termorio*, it was made clear that the test of "public policy" was not whether the courts of enforcing State would set aside the foreign award if that was award was assumed to have been made in the jurisdiction of the enforcing State. It would have to be demonstrated that the foreign decision vacating the award violated U.S. "public policy," meaning that it was "*repugnant to fundamental notions of what is decent and just in the State where enforcement is sought*," or when the decision "*tends clearly to undermine the public interest, the public confidence in the administration of the law, or security for individual rights of personal liberty or private property*."[74]

The more recent of such decisions again comes from the U.S. Court of Appeals for the Second Circuit in *Corporacion Mexicana de Mantenimiento Integral, S. de R.L. de C.V. v. Pemex-Exploracion y Producción* ["**Pemex**"].[75] Here again, U.S. courts reaffirmed their willingness to enforce vacated awards in circumstances only where the foreign judgment vacating the award offended U.S. public policy. In *Pemex*, the Court of Appeals affirmed the district court's decision enforcing the award rendered in Mexico under the Panama Convention (Inter-American Convention on International Commercial Arbitration, 1975). Even though the Mexican court had vacated the award, the enforcement took place because the vacating foreign judgment was based on a law that did not exist at the time the parties entered into their contract. The subsequently enacted Mexican administrative law disallowed arbitration of claims against a State instrumentality, which the Mexican court retroactively applied. Nevertheless, the *Pemex* court enforced the award since giving effect to the Mexican judgment would have run counter to the U.S. public policy and repugnant to the fundamental notions of justice.

Finally, the Restatement of U.S. law on international commercial arbitration by the American Law Institute ["**ALI**"] also addresses the issue of an award set aside by a competent court at the seat of arbitration. Specifically, §§ 4-16(a) and (b) states the following:[76]

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[74] *See* Ackermann v. Levine, 788 F.2d 830, 841 (2d Cir. 1986).

[75] 962 F. Supp. 2d 642 (S.D.N.Y. 2013), aff'd, 832 F.3d 92 (2d Cir. 2016). *See also* Thai-Lao Lignite (Thailand) Co., Ltd. v. Gov't of Lao People's Democratic Republic, 997 F. Supp. 2d 214 (S.D.N.Y. 2014), aff'd, 864 F.3d 172 (2d Cir. 2017) [The court held that no extraordinary circumstances existed that would justify the exercise of discretion to enforce the annulled award.]; Getma Int'l v. Republic of Guinea, 862 F.3d 45 (D.C. Cir. 2017).

[76] ALI Restatement (Third) of the U.S. Law on International Commercial and Investment Arbitration, § 4-16. *See also* Compañía de Inversiones Mercantiles SA v Grupo Cementos de Chihuahua SAB de CV, 2019 WL 8223560, aff'd in 970 F.3d 1269 [While recognizing that courts should generally give deference to decisions of the competent authority in the arbitral seat, the district court can ignore this rule when a "foreign judgment setting aside the award is repugnant to fundamental notions of what is decent and just . . . or violated basic notions of justice."].

> "(a) A court may deny confirmation, recognition, or enforcement of a Convention award to the extent that the award has been set aside by a competent authority of the country in which or under the arbitration law of which the award was made.
>
> (b) Even if a Convention award has been set aside by a competent authority, a court of the United States may confirm, recognize, or enforce the award if the judgment setting it aside is not entitled to recognition under the principles governing the recognition of judgments in the court where such relief is sought, or in other extraordinary circumstances."

The Reporters have stated that, ordinarily, a court will not recognize or enforce an award set aside by a competent authority at the seat. However, they have stated that a foreign award under the New York Convention may be entitled to recognition or enforcement in several narrow situations, despite having previously been set aside. First, the authority purporting to set aside an award may not have been competent to do so. Second, the judgment setting aside the award may not be entitled to recognition under the rules governing judgment recognition in the court where enforcement is sought. That forum would accordingly determine the effect of the foreign set-aside judgment by referencing its own law of foreign judgment recognition. Third, the Reporters have stated that a U.S. court may also disregard a foreign set-aside judgment in highly extraordinary circumstances, even though, under strict application of the forum's principles of foreign judgment recognition, that judgment would ordinarily be recognized. In the example given by the Reporters, the court may do so if the set-aside court knowingly and egregiously departed from the rules governing set-aside in that jurisdiction. It may also do so when other facts give rise to substantial and justifiable doubts about the integrity or independence of the foreign court concerning the judgment in question.

iii. Foreign Judgments Upholding an Award at the Seat

The conflict-of-laws approach has some unavoidable implications – the flipside (so to speak). If an enforcing court considers a set-aside award to recognize the annulling court judgment generally, what about the court judgment upholding the award (or other enforcing court judgments)? Here, the assumption is that the award-debtor was unsuccessful in challenging the award at the seat (or refuting the enforcement before other enforcing courts).

There are no direct answers to this question, but the New York Convention does provide a starting point to this issue. In the New York Convention, some grounds for resisting enforcement are unique and specific to an enforcement situation and considered only by the enforcement court. For example, the grounds under Article V(2) of the New York Convention—on public policy and arbitrability—are specific to the enforcing jurisdiction. Thus, the question of giving recognition to a court judgment upholding an award at the seat does not arise. Moreover, since public policy and arbitrability are

inherently matters on which each State and its courts take different views (albeit, national courts do yearn to bring consistency in terms of an international public policy),[77] the issue would necessarily require re-litigation with the enforcement court.[78] This is also the idea behind Article IX(2) of the European Convention on International Commercial Arbitration, 1961, under which enforcement courts may take no account of the annulment of an award by the courts at the seat for reasons of offending public policy.

As for the grounds in Article V(1) of the New York Convention, the award-debtor has either already raised these issues (before the upholding court at the seat and/or other enforcement courts) or may raise them before the enforcement court for the first time. But if the upholding court at the seat and/or other enforcement courts have already determined finally, why should an award-debtor have a second bite at the apple? Firstly, any enforcement court is generally expected to heed foreign decisions on the same issue, particularly the courts at the seat.[79] Secondly, albeit only a common law feature, an enforcement court has the discretionary power to find an abuse of process – exercisable after taking all the circumstances surrounding the matter, particularly the attempted re-litigation of an issue that is finally determined before another court.[80] This would, of course, depend on the identity of the issues, comity towards the foreign decisions, and avoidance of duplication, repetition, and inconsistency in decision-making. More importantly, however, it is necessary to recognize that there is a great divide between the refusal of enforcement and the annulment of an arbitral award: the refusal of enforcement has only a territorial effect. Thus, courts in different jurisdictions can arrive at diametrically opposite conclusions on the enforceability of a foreign award.[81]

[77] *See generally*, Hebei Import & Export Corp v. Polytek Engineering Co Ltd., [1999] 1 H.K.L.R.D. 665 (H.K.) (Whether public policy in this context meant some public policy common to all civilised nations, or those elements of a state's own public policy which are so fundamental that its courts feel obliged to apply them not only to purely internal matters but also to matters with a foreign element by which other States are affected.).

[78] Yukos Capital SARL v. OJSC Rosneft Oil Company, [2012] E.W.C.A. Civ 855.

[79] Minmetals Germany GmbH v. Ferco Steel Ltd., [1999] 1 All E.R. (Comm) 315; Newspeed Int'l Ltd. v. Citus Trading Pte. Ltd., [2001] SGHC 126, ¶ 6 (Sing.) (the judge at first instance went so far as to say that two bites at the cherry were inadmissible); Hebei Import & Export Corp v. Polytek Engineering Co Ltd., [1999] 1 H.K.L.R.D. 665 (H.K.); Gujarat NRE Coke Ltd. & Shri Arun Kumar Jagatramka v. Coeclerici Asia (Pte) Ltd., [2013] E.W.H.C. 1987 (Comm).

[80] Owens Bank v. Bracco, [1992] 2 A.C. 443 (Eng.); Diag Human Se v. The Czech Republic [2014] E.W.H.C. 1639 (Comm) (Court held that an Austrian court decision to refuse enforcement of a Czech award on the ground that the award was not binding gave rise to an issue estoppel on a later attempt to enforce the same award in England. In so deciding, the court applied an approach endorsed by the House of Lords in *The Sennar (No. 2)*, [1985] 1 W.L.R. 490.).

[81] van den Berg, *supra* note 32, at 182.

Indian commentators also agree that "*the courts of every country apply their own standard while deciding on the enforceability of an award*."[82] Thus, the enforcement (or non-enforcement) of an award in one State would not necessarily lead to the enforcement (or non-enforcement) in other States as well.

D. The European Convention Approach

The European Convention on International Commercial Arbitration of 1961 ["**European Convention**"] came into force shortly after the New York Convention. The European Convention has thirty-one contracting parties, including non-European States, thus, covering a geographical region with high-density international trade transactions.[83] The uniqueness of this international instrument is that it not only codifies enforcement issues but also aspects of conduct and procedure of international commercial arbitration. These procedural issues include a tribunal's establishment, the relationship between tribunals and national courts, conflict of laws issues, and the impact of the annulling of an award on its enforceability.

On the enforceability of the annulled award, Article IX of the European Convention attempts to restrain any local standards (public policy and arbitrability) that could undermine the internationality of the award.[84] Article IX provides:

> "Article IX—Setting Aside of the Arbitral Award
>
> (1) The setting aside in a Contracting State of an arbitral award covered by this Convention shall only constitute a ground for the refusal of recognition or enforcement in another Contracting State where such setting aside took place in a State in which or under the law of which, the award has been made and for one of the following reasons:
>
> (a) the parties to the arbitration agreement were, under the law applicable to them, under some incapacity or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

[82]*See* JUSTICE R. S. BACHAWAT, LAW OF ARBITRATION AND CONCILIATION 2871 (Anirudh Krishnan et al., 2017). *See also* Buyer (Poland) v. Seller (Poland), XXX Y. B. COMM. ARB. 509 (2005) (The Hamburg Court of Appeal deemed the Polish Court decision, refusing enforcement, to not have any impact on the present request for enforcement.).

[83]UNITED NATIONS TREATY COLLECTION, STATUS OF EUROPEAN CONVENTION ON INTERNATIONAL COMMERCIAL ARBITRATION, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-2&chapter=22&clang=_en.

[84]*See generally* Buyer (Austria) v. Seller (Serbia and Montenegro), XXX Y. B. COMM. ARB. 421 (2005).

> (b) the party requesting the setting aside of the award was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or
>
> (c) the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration need not be set aside;
>
> (d) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or failing such agreement, with the provisions of Article IV of this Convention.
>
> 2. In relations between Contracting States that are also parties to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10th June 1958, paragraph 1 of this Article limits the application of Article V (1) (e) of the New York Convention solely to the cases of setting aside set out under paragraph 1 above"

Thus, Article IX(2) limits the application of Article V(1)(e) of the New York Convention to matters codified in Article IX(1) of the European Convention, which is equivalent to Article V(1)(a) to V(1)(d) of the New York Convention, mainly dealing with scope and due process issues. The purpose of Article IX is to avoid an *erga omnes* obligation to enforce a foreign award when the said award is set aside on the grounds of public policy or arbitrability at the seat. Peter Benjamin gives the following illustration:[85]

> "Otherwise, the situation might well arise in which an award made in State A, between nationals of State B and State C, which was to be enforced in either State B or C, could not be because it had been set aside in State A as violating public policy, and notwithstanding the fact that the award was not contrary to the public policy of either State B or C."

Courts in Germany,[86] Austria,[87] and Spain,[88] which are signatories to the European Convention, may still enforce a foreign award annulled for reasons of public policy violations by the court at the seat.[89]

[85]Peter I. Benjamin, *The European Convention on International Commercial Arbitration*, 37 BRITISH Y. B. INT'L LAW 478, 494 (1961).

[86]OLG München OLG-Report 1995, 57, 59.

[87]Buyer (Austria) v. Seller (Serbia and Montenegro), Supreme Court of Austria, 30b221/04b, 26 January 2005, XXX Y. B. COMM. ARB. 421–436 (2005) ["[m]aking an international arbitral award dependent on state approval in the country of origin would deprive international arbitration of its independence."]; Kajo-Erzeugnisse Essenzen GmbH v. DO Zdravilisce Radenska, Oberster Gerichtshof, 20 October 1993 and 23 February 1998, XXIV Y. B. COMM. ARB. 919–927 (1999).

[88]Rubí (Barcelona), decision dated 11 June 2007, No. 584/2006.

[89]*See generally* Christopher Koch, *The Enforcement of Awards Annulled in Their Place of Origin*, 26(2) J. OF INT'L ARB. 267, 267 (2009).

IV. LAYING DOWN A STANDARD FOR INDIA

Looking back, the French courts have their favorable arbitration law and their view that an international arbitration award is an international decision detached from any legal order; the Singaporean and Brazilian courts have taken the more conservative or territorial view, believing that out of nothing comes nothing; the Dutch, English, and the U.S. courts have allowed enforcement of vacated awards if the judgment vacating the award could not be recognized pursuant to general rules of conflict of laws; the European Convention restrains the local standards (public policy and arbitrability) that could undermine the internationality of the award and, accordingly, decides the impact of the annulling of an award on its enforceability. What could be more appropriate for Indian conditions?

The French-internationalist view automatically excludes all jurisdictions, including India, that have adopted the UNCITRAL Model Law and, particularly, the wordings of Article 36(1)(a)(v) of the Model Law, which states that enforcement may be refused if the award has been set aside by a court at the seat. In other words, the French position may be followed in jurisdictions, which have enacted a law more favorable to the enforcement of foreign awards than the New York Convention. Moreover, the European Convention is of no relevance to India – India is only a signatory to the New York Convention. Hence, the second and third rationale, i.e., the territorial and conflict of laws approach, have the best chance of taking roots in the Indian soil.[90]

A. Discretion under Section 48 and "award not yet binding"

It is generally established that the finality and conclusiveness of an arbitral award are premised on the fulfillment of three primary conditions: the submission of the parties to arbitration (consent); conduct of arbitral proceedings in accordance with the submission (due process); and its validity by the law of the forum (the *lex loci arbitri*).[91] However, these considerations are obviously not the only value points: Section 48(1)(e) of the A&C Act gives discretion to the courts (may be refused), thus, providing room for enforcement of an award that is set aside or suspended at the seat of arbitration.

At the discretion of courts under Section 48(1)(e), the Delhi High Court has interpreted that the term "may be" meant that conditions for refusing enforcement were to be narrowly construed, giving courts maximum leeway for exercising its discretion in favor of enforcement.[92] The Delhi High Court has

[90]Ciccu Mukhopadhaya, *"India" in ICC Guide to National Procedures for Recognition and Enforcement of Awards under the New York Convention*, 23 ICC INT'L CT. ARB. BULL. (SPECIAL SUPPLEMENT) 198 (2012) (leaning towards the conflict of laws approach).
[91]*See* V. C. Govindraj, Private International Law: A Case Study 131 (2018).
[92]*See* Grain Rotterdam B.V. v. Shivnath Rai Harnarain (India) Co., (2008) 155 D.L.T. 457.

also held that the word "may" in Section 48 cannot be read as "shall," and the court cannot be compelled to refuse enforcement even if any of the grounds under Section 48 were established.[93] This is truly a robust pro-enforcement approach concerning foreign arbitral awards. However, though Section 48 of the A&C Act is interpreted to grant courts discretionary power to allow enforcement despite an established ground of refusal under sub-sections 1 and 2 of Section 48 (including the annulment of the award in the State of origin),[94] there has not been a single instance where the court has used its discretionary power under Section 48(1)(e) to enforce an annulled award.

India has also had instances of expressing its views on Article V(1)(e) of the New York Convention, but on some related aspects like the applicability of double exequatur and when an award becomes binding for considering its enforceability.[95] Courts in India have not yet addressed their views on the enforceability of set-aside or suspended awards.

B. Opposing the Territorial Approach for India

The territorial approach gives extreme deference to the courts' decisions in the country of the award's origin, and it subscribes to the view that the award derives its validity and legal effect only from the law of the seat. These conclusions of the territorial approach may be flawed in light of the plain language of Section 48(1)(e) of the A&C Act and Article V(1)(e) of the New York Convention, which grants the enforcement court discretion to refuse the enforcement of an annulled award; thereby, implying that the law of the seat does not always determine the destiny of the award, keeping it an open possibility that the annulled award continues to exist outside the State of origin.[96]

Policy-wise too, undiscerning deference to annulment is treacherous, with the potential of violating international standards that protect an award from local idiosyncrasies. Of course, awards that are sufficiently flawed and unworthy of recognition for procedural impropriety may never pass the

[93] *See* Cruz City 1 Mauritius Holdings v. Unitech Ltd., (2017) 239 D.L.T. 649.

[94] *See* Ashutosh Kumar et al., *Interpretation and Application of the New York Convention in India*, *in* RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS: THE INTERPRETATION AND APPLICATION OF THE NEW YORK CONVENTION BY NATIONAL COURTS 445, 457 (George A. Bermann ed. 2017).

[95] Although the law of the seat requires a national exequatur for the arbitral award to become binding, under Article V(1)(e) of the New York Convention, the binding character of the award would not depend on an exequatur by the courts of the State of origin. *See* Thaicom Public Company Ltd. v. Raj Television Network Ltd., 2017 (2) Arb LR 321 (Madras HC) [A foreign award can be enforced under Part-II without requirement for recognition for the Courts at the seat.]; Spain: TS, XXXI Y.B. COMM. ARB. 846, 851 (2006) [The binding character of the award may not be made to depend on an exequatur by the court of the State of rendition]; Belgium: Cass., XXIV Y. B. COMM. ARB. 603, 609 (1999) [refusing to apply Jordanian law, according to which an arbitral award becomes binding only after having been confirmed by a court, arguing that it would reintroduce the double exequatur into the realm of the NYC].

[96] *See* LORD MUSTILL & STEWART C. BOYD, MUSTILL & BOYD: COMMERCIAL ARBITRATION: 2001 COMPANION VOLUME 85 (2000) [an arbitral award is not integrated into judicial system of the country where the arbitration was held].

enforcement threshold of another State, therefore, making the enforcement of an annulled award a rare and exceptional occurrence. But the territorial approach would seem incapable of providing a proper standard to adjust accordingly and conduct a qualitative evaluation of a foreign court's decision. Neither does the territorial approach suggest that an award should be considered as losing its legal effect only if the decision setting aside the award was to meet an "international annulment" standard (jurisdiction and due process grounds); hence, disregarding local peculiarities (arbitrability or public policy grounds).

The territorial approach also majorly frustrates party autonomy, negating the fundamental rule under Article II of the New York Convention that the Contracting States shall recognize agreements to arbitrate.[97] On this point, Gary Born directly responded to Justice Sundaresh Menon's view, arguing that the territorial approach frustrated party autonomy and the fundamental rule under Article II of the New York Convention that agreements to arbitrate shall be recognized.[98] Born responded that it might be that the annulment judgment rested on vaguely defined domestic normative value, but not the recognition of the award (as claimed by Justice Menon), which is based on uniform international principle.[99] Born further stated that the whole purpose of the New York Convention was to encourage the enforcement of foreign awards in all signatories (not discourage forum shopping as thought by Justice Menon).[100]

On a different point, some even argue that the notion of *res judicata* is best served when deference is given to the arbitral tribunal's decision versus a subsequent court judgment, considering that the tribunal was the first to resolve the dispute.[101]

C. Supporting the Conflicts-of-Law Approach

As a common law country, with applicable rules of conflict of laws, the English and U.S. examples of the conflict of laws approach to provide the most legally consistent and pro-enforcement approach for India to develop its own standard of recognizing annulled awards. Thus, the best policy would be to treat annulments like other foreign commercial judgments, granting them deference for vacating an award, unless the said judicial action is tainted with fundamental procedural impropriety or violates

[97]Parties do not always submit absolutely to the laws of the seat. *See* Pierre Lastenouse, *Why Setting Aside an Arbitral Award is not Enough to Remove it from the International Scene*, 16(2) J. of Int'l Arb. 43 (1999); Paulsson, *supra* note 59, at 20.

[98] Alison Ross, *Clash of the Singapore Titan*, GLOB. ARB. REV. (Oct. 12, 2015), https://globalarbitrationreview.com/article/1034834/clash-of-the-singapore-titans.

[99]*Id.*

[100]*Id.*

[101]Gary H. Sampliner, *Enforcement of Nullified Foreign Arbitral Awards: Chromalloy Revisited*, 14(3) J. OF INT'L ARB. 141, 161–2 (1997).

public policy. In such circumstances, where the annulment does not meet "international annulment" standards but is instead based on "local standard,"[102] Indian courts might well be justified in exercising their discretion to recognize an annulled arbitral award rather than the annulling court judgment. Such an approach would neatly fit within the framework of the New York Convention and Part II of the A&C Act, as well as India's pro-enforcement policy.

Taking the example of the ALI Restatement, the standard of enforcing of annulled or set-aside awards may be formulated as below, i.e., an Indian court may refuse to recognize the foreign judgment setting aside the award in the following situations:

> "One, for lack of jurisdictional competence of the authority that annulled the award at the seat; two, where the annulling foreign judgment may not be entitled to recognition under the rules governing recognition and enforcement of foreign judgment; three, where highly extraordinary circumstances demand disregarding the annulling foreign judgment (though, under strict application of the rules of foreign judgment recognition, that judgment would ordinarily be recognized)."

Thus, hypothetically, where an award was set aside on the ground that an oath was not taken in the form prescribed by the law of the State at the seat,[103] and given pro-enforcement policy towards foreign arbitral awards, Indian courts may allow the enforcement since that award ought not to have been set-aside for breach of a mere procedural formality. Such annulment would not be a ruling on the substantive law but local idiosyncrasies, and it does not take away the substance of the award in any way.[104] This would be well within the "extraordinary circumstance" where an Indian court may enforce an already annulled award.[105] Similarly, another scenario in which the "court may use its discretion and enforce an award annulled in the country where it was made is when the annulment

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[102]*See* Jan Paulsson, *Delocalisation of International Commercial Arbitration: When and Why it Matters*, 32(1) INT'L & COMP. L. Q. 53, 55 (1983); Christopher Koch, *The Enforcement of Awards Annulled in their Place of Origin*, 26(2) J. OF INT'L ARB. 267, 290 (2009); José Manuel Álvarez Zárate & Camilo Valenzuela, *Recognition and Enforcement of Arbitral Awards Annulled in Their Own Seat: The Latin American Experience Interpreting the New York Convention's 'Sovereign Spaces'*, in 60 YEARS OF THE NEW YORK CONVENTION: KEY ISSUES AND FUTURE CHALLENGES §13.03 (Katia Fach Gomez ed. 2019); GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION IN THE UNITED STATES: COMMENTARY AND MATERIALS 32 (1994); Reyadh Seyadi, *Enforcement of Arbitral Awards Annulled by the Court of the Seat*, 84(2) ARB. 128, 135-37(2018); Sampliner, *supra* note 106, at 162. *See* also, Leila Anglade, *Chronicle of a Death Foretold: The Decline of the "Lex Fori Arbitrii" in the Enforcement of International Awards*, 33 IRISH JURIST 220 (1998).

[103]*See* International Bechtel Co. Ltd. v. Department of Civil Aviation of Dubai, 300 F. Supp. 2d. 112 (D.D.C. 2004), aff'd by 360 F. Supp. 2d 136 (D.D.C. 2005) [where an award was set aside on the grounds that an oath was not taken in the form prescribed by Dubai law].

[104]*See* BACHAWAT, *supra* note 87, at 2870.

[105]*See* BACHAWAT, *supra* note 87, at 2869 ["[C]ases which involve a mere procedural formality of the local jurisdiction which even if recognized by Indian courts, would not have resulted in Indian courts setting aside the award had they been in the same position as the court that did, would qualify as cases where Indian courts can exercise their discretion not to enforce the foreign award."].

was on the ground of public policy, and this arises out of the fact that every country sets its own threshold for public policy."[106]

As for rules relating to the recognition and enforcement of foreign judgments in India, the framework is laid out in Section 13 of the Code of Civil Procedure, 1908 ["**CPC**"].[107] Sections 13, considered a substantive law,[108] embodies the rules of conflict of laws concerning the conclusiveness of a foreign judgment sought to be enforced in India.[109] Thus, a court shall not enforce a judgment of a foreign court if it were be found inconclusive under Section 13 on the following grounds, unless:[110]

a. It has not been pronounced by a court of competent jurisdiction
b. It has not been given on the merits of the case;
c. It appears, on the face of the proceedings, to be founded on an incorrect view of international law or a refusal to recognize the law of India in cases in which such law is applicable;
d. The proceedings in which the judgment was obtained are opposed to natural justice;
e. It has been obtained by fraud;
f. It sustains a claim founded on a breach of any law in force in India.

In my opinion, foreign judgments are treated unsympathetically under Section 13 of the CPC, given the mandatory nature ("shall" be conclusive) and the broad scope of exceptions (like sub-section (f) excepting enforcement if "breach of any law in force in India").[111] Given that the statutory standard under Section 13 of the CPC applies to cases of enforcement of foreign judgments, it may be questioned as to whether or not it would also apply when courts are deciding the enforcement of an annulled award and drawing its conclusions about giving recognition to the annulling foreign judgments.

Arguably, the statutory standard under Section 13 would apply only in suit proceedings under Section 44A of the CPC (seeking the enforcement of foreign judgment) but not in an action under Part II of the A&C Act, which is an entirely different enforcement framework with entirely different standards. It may be argued that rules relating to the recognition of foreign judgments, in the context of the

[106] BACHAWAT, *supra* note 87, at 2869.
[107] *See* CODE CIV. PROC. § 2(5) ("foreign court" means a court situate outside India and not established or continued by the authority of the Central Government); CODE CIV. PROC. § 2(6): "foreign judgment" means the judgment of a foreign court. *See also*, Brijlal Ramjidas v. Govindram Gordhandas, (1947) 60 L.W. 701, 702-3.
[108] *See* Raj Rajendra Sardar Moloji Nar Singh Rao Shitole v. Shankar Saran, A.I.R. 1962 S.C. 1737, ¶10 ("The Rules laid down in that section are rules of substantive law and not merely of procedure.").
[109] *See* Smt. Satya v. Shri Teja Singh, (1975) 1 S.C.C. 120, 124 (Supreme Court discussing that Private International Law differs from country to country).
[110] *See* Code Civ. Proc. § 13.
[111] *See* Gracious Timothy Dunna, *Introducing "Public Policy" to Enforcement of Foreign Judgments: Lessons from the Law of Arbitration*, 15(2) TRANSNAT'L DISP. MGMT. (2018).

standard of enforcement of annulled awards, may be derived from common law, which would likely be narrower than Section 13 and more internationally streamlined.

V. CONCLUSION

Section 48(1)(e) of the A&C Act leaves no doubt that the statute aimed to place some standard in considering the enforcement of foreign arbitral awards set aside at the seat of the arbitration. That standard, however, must be carefully drawn by the courts in India. A key feature of arbitration, particularly international arbitration, is the finality and convenience in the enforcement of awards globally. While Indian courts must surely respect foreign annulment decisions, to the extent comity necessitates, a blanket approach of refusing to enforce annulled awards (the territorial approach) would only damage and diminish the value of international commercial arbitration for the lack of a practical and sensible enforcement standard.

Further, Indian courts have clearly held Section 48 of the A&C Act as giving discretion to courts, and such discretion would also apply in matters concerning Section 48(1)(e). This would, by far, make the conflict-of-laws approach most applicable to India and its pro-enforcement policy. It resonates the most.

SUPREME COURT'S ARBITRABILITY BONANZA: WITH A PINCH OF SALT?

Radhika Bishwajit Dubey and Aman Singhania*

Abstract

*The three-judge bench decision of the Supreme Court of India in Vidya Drolia and Ors v. Durga Trading Corporation, ["**Vidya Drolia**"] returned findings on arbitrability of tenancy disputes, subject-matter arbitrability, and who shall decide arbitrability. This paper examines Vidya Drolia judgment and highlights its contributions as well as limitation in the Indian arbitration landscape.*

I. INTRODUCTION

The evolution of arbitration law from an "*alternative*" method of dispute resolution to a preferred and thriving mechanism of time-bound resolution has been truly remarkable. With the Indian backyard growing into an economic powerhouse, a need has been felt for efficient, autonomous, and effective arbitration of disputes, especially prominent in commercial spheres, and foreign jurisdictions like the US, Singapore, the EU, and Australia. Unfortunately, the Indian judicial system has been extra cautious in opening up to this global trend and fully embracing the most sacrosanct principles of arbitration being - party autonomy and *kompetenz-kompetenz*.

On questions of '*subject-matter arbitrability*', over the years, various concurrent High Courts and even the Hon'ble Supreme Court of India ["**SCI**"] has been at loggerheads. The ever-looming issue of "subject-matter arbitrability" was addressed first by the SCI in its landmark judgement in *Booz Allen and Hamilton v. SBI Home Finance Limited and Others*[1] ["***Booz Allen***"]. The "Test of Arbitrability" propounded by the SCI classified: (a) *rights in rem* as exclusively amenable to the jurisdiction of courts, while (b) rights *in personam* could be adjudicated through arbitration in terms of the agreement between parties. However, while the Test broadly classified arbitrability of disputes, it failed to address on the determination of a public grievance *vis-à-vis* a private grievance. In years to come, this would allow parties to colour personal disputes as public offences and seek reliefs before a Court of law, outside of an arbitrator's jurisdiction. The SCI also would go on to unequivocally hold questions of fraud and public consequences as non-arbitrable[2].

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[1]Booz Allen & Hamilton v. SBI Home Finance Ltd. & Ors., (2011) 5 SCC 532.

[2] N. Radhakrishnan v. Maestro Engineers & Ors., (2010) 1 SCC 72.

Yet, significant leaps have been taken towards a pro-arbitral regime, since. Notably, the SCI in *Booz Allen* itself clarified that the ' in *rem* – in *personam'* rule was flexible. It was held that disputes concerning subordinate rights in personam were arbitrable, despite having arisen from a right in rem.

However, on substantive issues of arbitrability of frauds, tenancy disputes, and intellectual property disputes to the 'special court' exclusion, Indian courts have, time and again, failed to tame the dragon. In *A. Ayyasamy v. A. Paramasivam & Ors.*[3] ["**Ayyaswamy**"] the SCI paved the way for arbitrability of simple issues of fraud. However, no definitive principles compartmentalizing simple allegations of fraud, from serious frauds were laid down. Thus, determination of nature and particular issues of fraud was left open to interpretation by arbitral tribunals and Courts on a case-to-case basis. As regards the jurisdiction of 'exclusive courts', disputes arising under special statutes, (even concerning rights *in personam*) have been held as in-arbitrable[4]. However, the Delhi High Court in *HDFC Bank Limited v. Satpal Singh Bakshi*[5] ["**Satpal Singh**"], held that disputes under the debt recovery tribunal's jurisdiction may also be submitted for arbitration. But, the three-judge bench of the SCI over-ruled *Satpal Singh* in *Vidya Drolia & Ors v. Durga Trading Corporation*[6] ["**Vidya Drolia**"]. Thus, doubt has been created over the arbitrability of disputes covered under special statutes.

The SCI in *Emaar MGF Land Limited v. Aftab Singh*[7] held consumer disputes as non-arbitrable. However, applying the tests laid down in *Vidya Drolia*, consumer disputes invoking *in personam* rights of a party may fall within the jurisdiction of an arbitral tribunal (in the absence of express or implied restriction under Consumer Protection Act, 1986). The SCI judgement in *Himangi Enterprises v. Kamaljeet Singh Ahluwalia*[8] ["**Himangi Enterprises**"] rendered an archaic anti-arbitral approach, holding civil courts to have exclusive jurisdiction both under Transfer of Property Act, 1882 as well as special rent legislations. However, *Himangi Enterprises* was met w equal criticism, and a coordinate bench of the SCI disagreeing with the judgement referred the question of non-arbitrability of tenancy disputes to a larger bench[9].

Therefore, to address such pertinent issues on 'subject-matter arbitrability', the SCI judgment in *Vidya Drolia* sheds much-needed clarity on the issue. However, the reasoning of the SCI on some

[3]A. Ayyasamy v. A. Paramasivam & Ors, (2016) 10 SCC 386.

[4]Kingfisher Airlines Limited v. Prithvi Malhotra Instructor, 2012 SCC OnLine Bom 1704.

[5]HDFC Bank Limited v. Satpal Singh Bakshi, 2012 SCC OnLine Del 4815

[6]Vidya Drolia & Ors v. Durga Trading Corporation, 2019 SCC OnLine SC 358.

[7]Emaar MGF Land Limited v. Aftab Singh, (2019) 12 SCC 751.

[8]Himangi Enterprises v. Kamaljeet Singh Ahluwalia, (2017) 10 SCC 706. Judgment is now over-ruled by Vidya Drolia and Ors v. Durga Trading Corporation, 2019 SCC OnLine SC 358.

[9]Vidya Drolia and Ors v. Durga Trading Corporation, 2019 SCC OnLine SC 358.

crucial issues of arbitrability still requires clarity. This paper attempts to critically evaluate the *Vidya Drolia* judgment.

II. VIDYA DROLIA & OTHERS V. DURGA TRADING CORPORATION

The three-judge bench of the SCI comprising Justice N.V. Ramana, Justice Sanjiv Khanna, and Justice Krishna Murari has, in *Vidya Drolia,* returned significant findings on a number of crucial aspects of arbitrability. The decision has been rendered primarily in response to reference to consider arbitrability of tenancy disputes, wherein the SCI has now declared tenancy disputes as arbitrable, except where the tenancy dispute is governed by specific rent control legislations granting exclusive jurisdiction to special forums for adjudication of the dispute. Further, the SCI in a detailed judgment has also, upheld arbitrability of *simplicitor* frauds and significantly compartmentalized the scope of court intervention in pre-arbitral processes.

1) Four-Fold Arbitrability Test

With a view to streamline the test of '*arbitrability of a dispute',* the SCI has finally laid down its analysis on crucial aspects of subject-matter arbitrability. The SCI reasoned that arbitration as a dispute resolution mechanism is conceptual as well as consensual in nature and hence in disputes affecting third party rights and liabilities (who are not bound by the arbitration agreement), reference to arbitration proceedings would not be appropriate. Thus, disputes which do not deal with rights *in rem*, but only involve subordinate rights *in personam* (despite arising from a right *in rem*) would be arbitrable. The fourfold litmus test has accordingly been laid down as the determining factor whether a dispute mentioned in the arbitration agreement is arbitrable or not ("Four-Fold Test"):

(a) Whether the subject matter and cause of action relates to a right in *rem*, and does not concern subordinate rights in *personam* arising from any rights in *rem*;

(b) Whether the subject matter and cause of action has an *erga omnes* effect i.e. affecting third-party rights for which centralized adjudication, and not arbitration is suitable and/or enforceable;

(c) Whether the subject matter and cause of action concerns (i) public interest; (ii) sovereign rights and (iii) State functions for which arbitration would not be suitable and/or enforceable; mutual adjudication would be unenforceable; and

(d) Whether the cause of action and subject-matter is in-arbitrable, implicitly in terms of the governing statute.

The SCI has held that only if the answer to any of the aforesaid questions is in affirmative, would the dispute be held as non-arbitrable. Notably, the SCI cautioned against mechanical application of the four-fold test and opined that the test when applied holistically and judiciously would assist courts in ascertaining arbitrability of disputes with a greater certainty.

Applying the aforesaid tests, the pertinent questions of arbitrability lucidly settled by the SCI include the following categories of disputes:

i. Tenancy Disputes

While overruling the ratio laid down in *Himangni Enterprises v. Kamaljeet Singh Ahluwalia*[10], the SCI has held landlord-tenant disputes as arbitrable. Besides the Four-Fold Test on rights *in personam,* the SCI also relied on the reasoning supplied in *Booz Allen* where it was held that *"Disputes relating to subordinate rights in personam, arising from rights in rem have always been considered to be arbitrable."* The SCI held that tenancy disputes did not concern (ii) sovereign rights and (iii) State functions inalienable and sovereign functions of the State. However, since tenancy disputes were subject-matter of rent control legislation, the same would not be arbitrable in light of a specific forum/ court having exclusive jurisdiction over such matters. Such rights and obligations can only be adjudicated and enforced by the specified forum/ court, and not through arbitration.

ii. Fraud

The SCI has held that the allegations of fraud can be made a subject matter of arbitration when they relate to a civil dispute. The SCI however has clarified that fraud, which would vitiate and invalidate the arbitration clause, would cause a dispute to be in-arbitrable. The SCI observed that on allegations of fraud, parties would oppose arbitration, contending that the arbitral tribunal and process would not be equipped to investigate and consider such serious issues of fraud. However, the SCI added that arbitrators, just like the courts, are equally well equipped to handle disputes in accordance with the general public policy of the law. Further, chances of failure of non-abidance of public policy consideration under legislation, which otherwise doesn't expressly or by necessary implication exclude arbitration, cannot form the basis of nullifying the arbitration agreement. Therefore, the SCI *prima facie* disagreed with the mistrust placed on arbitral tribunals as an "*inferior adjudication*

[10]Himangi Enterprises v. Kamaljeet Singh Ahluwalia, (2017) 10 SCC 706.

procedure" by any standard. Thus, the SCI upheld its previous decision in *Avitel Post*[11] and overruled the ratio in in *N. Radhakrishnan*[12], holding that fraud can be a ground to refuse reference to arbitration only if: (i) a prima facie case of absence of arbitration agreement or clause was made out; or (ii) allegations of fraud, mala fide or arbitrary conduct were made out against the State or State bodies, requiring public enquiry.

iii. Debt Recover Tribunal

The SCI has held disputes which are to be adjudicated by the Debt Recovery Tribunal as non-arbitrable. The SCI held that if claims of financial institutions and banks falling within the purview of the Debt Recovery Laws were granted permission to be submitted to arbitrations, then the same would amount to infringement of statutory rights conferred upon these institutions through the Debt Recovery Laws. It would even violate the rights to various modes of recovery as granted by the Debt Recovery Laws to these banks and financial institutions.

Applying the Four-Fold Test, the SCI observed that where the statute expressly forbids dispute resolution through arbitration, thereby prescribing adjudication in a specific manner and bestowing unique rights that cannot be upheld or utilized through arbitration, then such cases are barred from arbitration. Since exclusive jurisdiction of the Debt Recovery Tribunal is recognized by necessary implication, banks and financial institutions are implicitly barred from submitting disputes to arbitration.

iv. Other Issues

Further, applying the Four-Fold Test, the SCI has held that insolvency or intra-company disputes have to be submitted before public courts of law or specialized forums (if created). The Court recognized that such actions concerned rights *in rem* and public forums would prove to be more efficacious in dealing and disposing of such matters expeditiously. Similarly, registration of trademarks, grant and issue of patents, etc. are matters of public importance falling within the sovereign's functions and having an *erga omnes* effect. Thus, such rights or disputes concerning the same were held to be non-arbitrable. In the same breath, criminal matters have also been classified as non-arbitrable owing to State's duty to address such matters of public cause and consequence.

[11]Avitel Post Studioz Limited v. HSBC PI Holdings (Mauritius) Limited, 2020 SCC OnLine SC 656.
[12]N. Radhakrishnan v. Maestro Engineers and Ors, (2010) 1 SCC 72.

2) Forum deciding Non-Arbitrability?

The SCI has also expounded on raising of the issue of non-arbitrability at the following stages:

(a) At the time of Section 11 proceedings or Section 8 of the Arbitration Act, 1996 ["**A&C Act**"] before Court for appointment of the arbitrator or stay of court proceedings respectively; or

(b) During the course of arbitration proceedings before an arbitral tribunal; or

(c) During the course of proceedings before the court challenging award enforcement of the same.

However, the SCI held that an arbitral tribunal shall be the Court of the first instance for adjudication on the issue of arbitrability. Courts while adjudicating a matter under Section 11 of Section 8 of the Arbitration Act, would only look into issues of arbitrability if the arbitration agreement *prima facie* did not exist or the dispute between the parties was demonstrably in-arbitrable. At the same time, Courts under Section 34 could exercise limited powers of deciding on arbitrability of the matter, while determining a challenge to the award. In doing so, the SCI has held that the ratio laid down in the earlier decision of SCI in *SBP v. Patel Engineering Ltd*[13] was held as bad law, inasmuch as it permitted only a limited administrative satisfaction on presence of agreement to arbitrate between the parties, and not a judicious decision on its validity.

III. LIMITATIONS AND CONCLUDING REMARKS

The SCI's pro-arbitration stance in this case has brought about tremendous clarity on the reference of disputes to arbitration basis application of the Four-Fold Test. The judgment is certainly a positive step towards a pro-arbitral regime and recognition of 'party autonomy' in the country.. Further, the judgement has already created some legitimate concerns. Application of the Four-Fold Test cannot be applied unanimously to hold all tenancy disputes amenable to 'arbitration'. Tenancy disputes concerning rights '*in rem*' or '*erga omnes* effect' would fall outside the purview of arbitration and Courts/ tribunals would be required to adjudicate on arbitrability of such disputes on a case-to-case basis. Time would tell how arguments of '*in rem–in personam'* rights practically pan out before Courts.

In furtherance of the Four-Fold Test, the SCI has held that since the Recovery of Debts and Bankruptcy Act, 1993 ["**RBD Act**"] lays down a specific manner and mechanism of recovery, banks and NBFCs falling under the purview of the Act would not be allowed to arbitrate their claims. However, a closer look at the RDB Act reveals no restriction on the adjudication of claims outside of

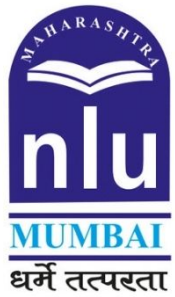
[13]SBP v. Patel Engineering Ltd, (2005) 8 SCC 618.

the Court/ before a tribunal, basis mutual agreement between customers and banks. The limited option of only recovery through Debt Recovery Tribunal only takes away the opportunity of speedy redressal of disputes before an arbitral tribunal.

The judgement also makes broad observations questioning the arbitrability of shareholder and consumer disputes without dealing with them conclusively. The judgement further tends to expand the limited scope of review available under Section 11, in case the Court finds the dispute to be expressly 'non-arbitrable' (despite the 2015 amendment restricting the scope of the Court's power to identify the presence of an arbitration agreement). Expanding the scope of such powers under Section 11, threatens to re-open the pandora's box of Courts over-reaching the limited consideration required under Section 11.

Importantly, the judgment only deals with Part I of the Arbitration Act and the "Four-Fold Test" is applicable only to domestic arbitrations. It remains to be seen what version of a narrower "Four-Fold Test" would be adopted by Courts for arbitrability of disputes for foreign awards in India under Part II of the Arbitration Act.

Notwithstanding the said reservations, the case will hopefully demonstrate an arbitration-friendly jurisprudence of the SCI and its intent to recognize and promote the arbitral process as an alternative dispute resolution mechanism in the coming times.



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