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ABOUT THE JOURNAL

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

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AIMS AND SCOPE OF THE JOURNAL

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fora, to current law students from different legal, linguistic and cultural backgrounds, IRIArb encourages previously unpublished papers that caters to developing an educated colloquy – that is contemporary, recent or novel.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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We also take this opportunity to thank the members of our peer review board, especially Mr. Abhisar Vidyarthi, Mr. Aditya Gupta, Mr. Akash Gupta, Mr. Akash Karmarkar, Mr. Ankitesh Ojha, Ms. Avani Gupta, Mr. Juan Pablo Gómez-Moreno, Ms. Natasha Kavalakkat, Ms. Riddhi Joshi, Mr. Sikander Hyaat Khan and Mr. Yashraj Samant, without whose time and effort this issue couldn't have been published.

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EDITORIAL

The second year of the pandemic affected all walks of life, including arbitration proceedings across the globe. Due to this, trends like the continuation of the invocation of force majeure clauses, and a sharp rise in infrastructure related arbitration proceedings due to delayed completions and financing issues were observed. Certain landmark decisions have also stirred the arbitration community. The UK Supreme Court's ["**UKSC**"] judgment of *Kabab-Ji Sal (Lebanon) v. Kout Food Group (Kuwait)* ["**Kabab-Ji v. Kout**"] has clarified the issue of the governing law of arbitration agreements. The UKSC reaffirmed that the law of the underlying contract governs the arbitration agreement. Similarly, the Singapore High Court in *Westbridge Ventures II Investment Holdings v. Anupam Mittal* for the first time, debated if the arbitrability of an issue should be decided by the governing law of the arbitration agreement or the law of the seat of arbitration. The Singapore High Court held that at a pre-award stage, the issue of arbitrability is determined by the law of the seat and not the law of the arbitration agreement.

In the past year, India witnessed several favourable and welcomed pro-arbitration judgments, particularly from the Supreme Court of India ["**Supreme Court**"]. One of the highlights of 2021 has been the Supreme Court's commitment to upholding party autonomy as the guiding principle and pillar of arbitration in India. Among other key rulings this year, the Supreme Court in *PASL Wind Solutions Pvt. Ltd. v. GE Power Conversion India Pvt. Ltd.* upheld the right of two Indian parties to choose to arbitrate their dispute at a foreign seat of arbitration. Recognizing that free choice of applicable law is one of the most important tenets of arbitration, the Supreme Court ruled that there is nothing in the arbitration law or the public policy of India which restricts two Indian parties from arbitrating their dispute at a seat other than India. In another landmark decision, the Supreme Court in *Amazon.com NV Investment Holdings LLC v. Future Retail Limited* upheld the legality and validity of emergency arbitration and ruled that emergency awards are enforceable like orders passed by courts in India. This decision is a major boost for institutional arbitration in India and adds India to a very limited group of jurisdictions that expressly recognize the enforceability of emergency awards.

These decisions and the outlook of the Supreme Court in recent times have not only furthered the underlying *ethos* and spirit of the UNCITRAL Model Law in India but have also enhanced India's image as a favourable seat for arbitration. It is difficult to gainsay that the approach to arbitration prevailing in other jurisdictions has had a role to play in the development of a strong arbitration culture in India. As India emerges as a political and economic superpower, India

recognizes the need to not be an outlier, and align its arbitration framework with the best international practices followed in other jurisdictions. The recent legislative and judicial developments in India have indeed been considerate of this fact. A smooth exchange of ideas and values across jurisdictions therefore assumes importance because the arbitration practices or norms prevailing in one state have a direct or indirect impact on the outlook of other states.

International arbitration brings together legal professionals and academics from diverse legal cultures and backgrounds. As a result, there is abundant room for individuals coming from different jurisdictions and experiences to engage in meaningful and purposeful discussions and discourse. With this in mind, the Centre for Arbitration and Research, Maharashtra National Law University orchestrated the Indian Review of International Arbitration ["**IRIArb**"] to facilitate a platform for the industry as well as academia to come together and interact on key issues in the field. The focus of the IRIArb is not only to introduce its readers in India to the critical developments taking place across jurisdictions but also to integrate the Indian perspective into the increasing discourse on international arbitration. In line with this objective, the IRIArb has also launched a "Distinguished Guest Lecture Series on International Arbitration", wherein prominent names in the field of international arbitration are called upon to share their experience and expertise. The aim of this distinguished guest lecture series is to have leading experts speak about their original research work.

After the successful launch of the inaugural issue in July 2021, the IRIArb is very pleased to have been receiving contributions from all over the globe. The second issue of the first volume of the IRIArb consists of contributions on a wide subset of topics within the realm of international arbitration, such as judicial comity of international dispute settlement, investor misconduct in third party arbitration, use of eDiscovery technology in arbitration.

Kevin Kim (Founding Partner, Peter & Kim) in his distinguished lecture on the *"Development of Arbitration in Korea - Lessons for Emerging Arbitral Regimes"* talks about the emergence of international arbitration in South Korea, taking the readers through an anecdote from his childhood to put the massive growth of arbitration in perspective. He discusses the inhibitions that had restrained the growth of arbitration and attributes the "vivid" rise of international arbitration in Korea to the Asian Financial Crisis in the late 90s, and the international arbitration clauses found in the FDIs that emerged in the aftermath of the crisis. The speaker discussed the emergence of "chaebols" in Korea and the resultant industry specific disputes that came about as a result of the international investment of these family centred businesses. The speaker

statistically explained the heavy share of Korean parties in domestic and international arbitrations, and the return of Korean lawyers from the West to set up their practices in Korea as they are aware of the culture and practices. The speaker moved on to the salient factors involved in this growth, those being knowledge sharing, hiring of international practitioners, the support of the government and the stature of Korea as a global city. The speaker then moved to the establishment and growth of the Korean Commercial Arbitration Board and also the agreements between North Korea and South Korea to resolve their commercial disputes via arbitration. The speaker concludes by saying that *"K-Arbitration"* is soon to be a global hot topic, and finishes the overview by highlighting the key lessons that are worth examining.

Harshad Pathak (Doctoral Candidate, University of Geneva and Consultant, Mayer Brown) in his article titled *"Judicial Comity in International Dispute Settlement"* examines the problem of parallel proceedings existing in the domain of investor-state disputes and analyses if the principle of comity could be a solution to the same. The author starts by stating the problem of parallel proceedings i.e., the risk of a multiplicity of decisions for the same dispute due to the availability of multiple avenues for investors to assert their rights. Further, the author examines the lack of a beneficial option by which investment treaty tribunals can avoid parallel proceedings. The author then, at length, explains the origin and principle of comity. Going further, the author elaborates on the concept of judicial comity. The author also duly recognizes the opposition to this principle of comity in terms of international tribunals not being bound by a particular state's legal norms. However, the author seeks to negate this opposition by underlining the rising problem of jurisdictional conflicts and contending that limiting the principle to municipal courts only adds to the problem. The paper also discusses the landmark case of *The MOX Plant Case (Ireland v. United Kingdom)* in which the Tribunal stayed the ongoing proceedings in light of the principle of comity and thus prevented parallel proceedings. The paper goes on to consider judicial comity as a principle of global ordering which will enable dialogue across competing forums and help them improve the quality of judicial outcomes. The paper also explains the two conceptions of judicial comity, one as a concept of sovereignty and another as a legal tool to address the problem of parallel proceedings. Finally, the author concludes the paper by stressing on the immeasurable potential of the principle of comity in international dispute settlement.

Dr. M. Uzeyir Karabiyik (International Investment Law Expert and a delegate to UNCITRAL's Working Group III) in his article titled *"Remedying Investor Misconduct in Investor-State*

Arbitration Through Third Party Funding" delves into the various aspects of misconduct that are reminiscent of domestic litigations and have threatened the reputation of the investment arbitration system, focusing on third party funding and the misconduct in its regard. The author proceeds to discuss the framework vis-à-vis third party funding in investor-state dispute settlement ["**ISDS**"], discussing the regression of third party funding as support to claimants who lacked the requisite funds to afford an ISDS to becoming a savvy investment option for third-parties and a no-risk arbitral proceeding. The author proceeds to discuss the deficiencies in the third party funding regime and its employment as a massive weapon in the hands of claimants in whose favour the ISDS system is already biased. The author explains the rise of entities dedicated to third party funding in order to reap massive profits, and their lack of interest in justice. The author in the next section discusses the role of third party funding in resolving investor misconduct under two points: by filtering out frivolous claims, and by signing agreements with warranties and financial control over the investor in order to restrict any form of investor misconduct. The author, under these two heads, puts forth a host of suggestions and modifications to the third party funding regime and refers to various possible scenarios wherein a level of control can be exercised by the funder. However, the author does end this section with the thought that misconduct could well be ignored, maybe even encouraged, by third party funders if they believe this misconduct will strengthen their case in the proceedings. The author concludes the article by highlighting that third party funding is a new but problematic phenomenon and that UNCITRAL Working Group III has included third party funding as a part of its agenda and will continue discussions upon it in the future.

Amit Jaju (Senior Managing Director, Ankura Consulting Group) & Ankush Lamba (Managing Director, Ankura Consulting Group) through their article titled *"Unlock the Value of your Data using eDiscovery Technology in Arbitrations"* aim to create more awareness about the rules governing the use of Electronic Stored Information ["**ESI**"] and electronic discovery ["**eDiscovery**"] in Arbitration. This paper gains relevance in a setting where a sizeable number of arbitrations were conducted virtually due to the Covid-19 pandemic. The paper promotes the use of eDiscovery since it has a number of advantages over paper-based discovery. The authors begin the paper by highlighting the protocols of e-disclosure laid down by different arbitral tribunals and the modes of disclosure of ESI. The authors underscore the importance of metadata and the Electronic Discovery Reference Model in the eDiscovery technology. The authors then, at length, explain the steps in which eDiscovery technology can be used in arbitrations; right from data preservation, data processing, technology assisted

review to advanced analytics. Further, the paper explains in detail the advantages of eDiscovery technology like automatic email threading, personal data detection for redaction, massive reduction of costs, shorter time frame, etc. Finally, the authors conclude the paper by calling attention to the obvious benefits of the eDiscovery technology and encouraging the use of eDiscovery technology to gather ESI.

Vyapak Desai (Partner and Head of the International Dispute Resolution Team, Nishith Desai Associates) and Arth Nagpal (Member, Nishith Desai Associates) in their case comment titled "*Enka v. Chubb: The UK Supreme Court's Decision On The Law Governing The Arbitration Agreement"* discuss the UKSC's decision with regard to establishing the law governing the arbitration agreement. The authors succinctly explain the facts of *Enka Insaat Ve Sanayi AS v. OOO Insurance Company Chubb* ["**Enka v. Chubb**"] and the events that led the parties to the UK Court of Appeals and then the UKSC. The authors take the readers through the reasoning of the UK Court of Appeals and the UKSC with regard to the law governing the arbitration agreement. The UK Court of Appeals' order stated that the law of the seat would govern the arbitration agreement, providing reasoning under three heads. The authors then move to the reasoning of the UKSC in stating that the governing law would be the one specified by the parties, and if not, the 'closest connection' test applies. The authors have summarized the factors involved in the UKSC's decisions in 4 elaborate points, further aided by two factors that led to the negation of a holding to the contrary. The authors move to their analysis of the judgment of the UKSC, celebrating the judgment of the Court while also delving into the issues that were left unanswered in *Enka v. Chubb*. The authors briefly weigh the apprehensions of the minority judgment of the UKSC and conclude their analysis with a discussion of the queries answered via the UKSC upholding its decision in *Enka v. Chubb* in the case of *Kabab-Ji v. Kout.* The authors then move to a jurisdictional comparison of the judgment in *Enka v. Chubb* and the position in law vis-à-vis choice of law governing the arbitration agreement in India, the United States, France, Singapore and China. The authors conclude the comment with a hope for converging judicial opinions to lead to higher consistency and support for international arbitrations.

Dineshwar Gaur (Superintending Engineer & Project Manager, South Asian University Project, Government of India) has written a book review of the book titled *"Commercial Arbitration: International Trends and Practices".* The author's approach towards the book review has been to conduct a detailed chapter-wise analysis of the book. At the end of every

analysis, the author has articulated the essence of the respective chapter. The author has highlighted the significant contributions from eminent authors covering key issues like third part funding in India, the status of the concept of arbitrability, the concept of interim measures in arbitration, emerging concept of emergency awards in arbitration, arbitrator's duty to raise public policy issues, recent developments in the enforcement of foreign arbitral awards in India, mediation-arbitration as an alternate dispute resolution combination, etc.

On 4th December, 2021, the Centre for Arbitration and Research conducted the "Global Energy Arbitration Conference". The Conference saw eminent speakers from multiple jurisdictions speaking about various issues in energy arbitration. Further, the IRIArb believes that disputes in the energy sector are at the heart of international arbitration, frequently involving prominent parties and state interests. In an attempt to add further to this discourse, the theme for our next issue is energy arbitration. Submissions may cover issues related to petroleum and natural gas disputes, mining disputes, renewable energy and ESG disputes, investment-treaty disputes or any other topic related to energy arbitration. We look forward to receiving contributions from across the globe for our second volume.

- Abhisar Vidyarthi, Shubham Dhamnaskar & Yagnesh Sharma*

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DISTINGUISHED LECTURE ON INTERNATIONAL ARBITRATION

DEVELOPMENT OF ARBITRATION IN KOREA - LESSONS FOR EMERGING ARBITRAL REGIMES

Kap-You (Kevin) Kim*

A very good day to everyone attending the event. Many thanks to Prof. Ukey and Prof. Balyan for the kind invitation. It is my distinct honour and privilege to speak at the event on a very interesting topic about the development of arbitration in Korea and lessons for emerging arbitral regimes. I understand that I have around one full hour to speak on the topic. It is a big responsibility to ensure that the audience is kept entertained! While I deliver my speech, I will use the PowerPoint presentation only as a visual aid. I will project a few images that I hope will give you some visual insight into Korea. I will aim to finish my speech earlier so that we have some time for any Q&A that the audience may have.

So, I will begin with an anecdote about this picture on your screen that is from a time when arbitration was almost non-existent in Korea. This is a picture of my siblings and me on a fair ride. I am the tiniest one. The English translation of the phrase on the plane is "New York Bound". I was seven years old; it was 1969. In those days, living in the west was always aspirational. Be it in development, industrialization, or technology, the west was the gold standard. For several years, even up to a few decades back, the idea of international arbitration did not catch up in Korea.

There are various reasons that could be attributed to a late entry of international arbitration into Korea.[1] First, until a few decades back, international business transactions were not common. Not many international agreements were entered into and as a result, not many international arbitration agreements were signed in the first place. Second, there was a perception that Common law dominated international arbitration, and as Korea is a civil law country, there was a hesitancy to embrace international arbitration. Third, the concept of international arbitration was considered "foreign" where the west dominated the international arbitration landscape.

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* The writer is a founding partner in the firm 'Peter & Kim' in Seoul and was a senior partner at Bae, Kim & Lee LLC. Peter & Kim is included in the 14th Edition of GAR 100 list released in July 2021.

[1] Yun Jae Baek et al.; *South Korea, International Arbitration 2021*; CHAMBERS & PARTNERS (Aug. 17, 2021), https://practiceguides.chambers.com/practice-guides/international-arbitration-2021/south-korea/trends-and-developments.

Fourth, and this is true even to date, that domestic courts are efficient to handle domestic disputes.

If I had to pick one word to describe Korea's rise in international arbitration and its current state – that word would be "vivid". Both Korean parties and counsel have become very active in the international arbitration landscape& the kinds of arbitration matters arising out of Korea have been mostly high-value and specialized.[2] Such cases are so large that many a time they are more sophisticated than the kinds of matters that are dealt with by older and more established arbitral jurisdictions.[3]

The natural question that arises is what led to the phenomenal growth of international arbitration in Korea?[4] Incidentally, the growth came at the heels of the Asian Financial Crisis towards the end of the 1990s. The graph on the screen shows how badly the financial crisis affected Korea in the late 1990s. What is also visible in the graph is the subsequent Korean recovery. As the Korean economy came at the verge of collapse in the 1990s, the International Monetary Fund undertook its largest bailout ever.[5] One of the terms of the bailout required most corporations to dispose of non-core assets.[6] This resulted in rapid and large-scale Foreign Direct Investments ["**FDI**"] in Korea. International arbitration clauses were inserted in most such FDIs.[7] These clauses led to initial several high-value and complex disputes resulting in final awards.[8] As a result of this process, arbitration as a means to resolve disputes started becoming a common practice. After the economic crisis, the Korean economy grew rapidly. This led to the formation and strengthening of some of the largest global businesses. They came to be termed as the "chaebols" as they were mostly family-held large businesses. Several of these Chaebols gained expertise in niche industries such as construction, automotive, and technology.[9] Once the Chaebols started investing across the globe, the industry-specific

[2] *A View from Seoul: How Is Arbitration Viewed In Korea and How Is It Changing?,* HERBERT SMITH FREEHILLS (Jul. 27, 2018), https://www.herbertsmithfreehills.com/latest-thinking/a-view-from-seoul-how-is-arbitration-viewed-in-korea-and-how-is-it-changing.
[3] Rinat Gareev, *The Rise of South Korea as an "Arbitration Eager" Jurisdiction: Rethinking the Current Role and a Promising Future,* APRAG, http://www.aprag.org/wp-content/uploads/2021/05/8-The-Rise-of-South-Korea-as-an-Arbitration-Eager-Jurisdiction.pdf
[4] Yun Jae Baek et al., *supra* note 1.
[5]David T. Coe & Se-Jik Kim, *Korean Crisis and Recovery,* IMF (Sept. 12, 2002), https://www.imf.org/external/pubs/nft/seminar/2002/korean/.
[6] *Id.*
[7] David MacArthur, *What's "Next" for Arbitration in Korea,* KLUWER ARB. BLOG (Apr. 19, 2019), http://arbitrationblog.kluwerarbitration.com/2019/04/19/whats-next-for-arbitration-in-korea/?print=print.
[8] *Id.*
[9] David Murillo & Yun-Dal Sung, *Understanding Korean Capitalism: Chaebols and their Corporate Governance,* ESADEGEO CENTER FOR GLOBAL ECONOMY AND GEOPOLITICS (Sept. 2013), https://itemsweb.esade.edu/research/esadegeo/201309Chaebols_Murillo_Sung_EN.pdf.

disputes also saw an increase. This led to the Korean arbitration practitioners gaining industry-specific expertise. Once the Korean businesses saw the advantages of international arbitral awards, there was no looking back. Korean parties soon became active users of institutional rules such as the International Chamber of Commerce ["**ICC**"], London Court of International Arbitration ["**LCIA**"], and Singapore International Arbitration Centre ["**SIAC**"].[10]

In today's date, even though Korea is much smaller in size compared to China or Japan, its case-load in various arbitral institutions is heavy. By way of an example, according to available statistics – between 1998 and 2008, ICC witnessed 442 Japanese parties and 499 parties from mainland China. In the same period, 665 Korean parties participated in ICC arbitrations. Between 1966 and 2014, Korea's own arbitral institution, the Korean Commercial Arbitration Board ["**KCAB**"] administered a total of 10,171 arbitration cases including 8,837 domestic and 1,334 international cases.[11]

Earlier, most Korean arbitrations were handled by western firms. As the demand for arbitration grew, there was a need felt to cater to regional clients including Koreans and Japanese. Several Korean lawyers, especially those who were trained in the west, returned to Korea to build robust international arbitration practices. The inherent advantage they had was that of understanding the Korean culture and intricacies better. The Korean lawyers continued building their capabilities, especially through counselling with experienced international firms, mostly from the west. With time, the Koreans, who by the way are very hard-working, excelled at the tricks of the trade. They became familiar with the international best practices and started adopting those practices in their style of handling international arbitrations. They also started getting involved in more advocacy as they became comfortable with international practices. The Korean clients also became more comfortable with Korean lawyers because of cultural and linguistic complexities. Gradually, some of the Korean firms were doing their own advocacy. Additionally, they were also managing cases through their complete life cycles.

As of today, there are practitioners who are not only representing Korean parties in international arbitration, but also global parties in international arbitrations that have little or no link with Korea. Since the opening of the legal market for foreign firms, foreign firms have also started setting up their arbitration practices in Korea. In the last 20 years, the market has come a long

[10] *Supra* note 2.
[11] Dami Cha, *International arbitration in South Korea: overview of KCAB International's Statistic for 2019*, CMS Law-Now (Jun. 1, 2020), https://www.cms-lawnow.com/ealerts/2020/06/international-arbitration-in-south-korea-overview-of-kcab-internationals-statistic-for-2019?cc_lang=en.

way, from its infancy to its adolescence. While I think it has matured fully, it still has a large scope to grow further into a very advanced market.

Now, I will briefly delve into how in the past two decades the arbitration practice grew from strength to strength. One of the key factors has been "knowledge sharing". The more established Korean practitioners took it upon themselves to promote the international best practices in the local legal community.[12] The first generation of arbitration practitioners in Korea, to which I belong, had the first movers' advantage. And we knew that to keep the arbitration story of Korea strong, there was a need to prepare the new generations of lawyers so that they are at par with their counterparts across the globe.

The Korean firms also started hiring international practitioners to bring in a diverse set of practitioners. The inputs from foreign lawyers have aided in making the Korean international arbitration landscape sophisticated and advanced. As of today, there are several international attorneys from across the globe who are working in various Korean firms and practicing international arbitration. They are adding value to the Korean arbitration landscape with different skills some of which include language, legal background, and advocacy. At the same time, they are also getting exposed to the "K-way" of practicing international arbitration. As a culmination of these factors, we can see Korean firms feature in most global rankings of international arbitration practices.

The success of the Korean story of international arbitration could not have been possible without active government support.[13] When the Korean government saw that the efforts of the legal community were yielding results, it further aided by providing crucial support. That support has been instrumental in enhancing Korea's reputation as a trustworthy and attractive seat for arbitration.

Korea was a pioneer among the East Asian countries to adopt the Model Law in 1999. Not only that, but it has also kept updating its arbitration law as and when required.[14] In recent times, it was updated to incorporate some of the 2006 revisions to the Model Law. Additionally, the Korean judiciary has been regularly training the judges.[15] This has helped the international arbitration landscape as the courts are supportive of the arbitral processes. They aid

[12] Rinat Gareev, *supra* note 3.
[13] Rinat Gareev, *supra* note 3, at 2.
[14] Rinat Gareev, *supra* note 3, at 6.
[15] Rinat Gareev, *supra* note 3, at 16.

international arbitration proceedings and are not obstructive to the arbitration process. So far Korean courts have a clean record, i.e., there is no single international arbitration award that has been vacated or refused enforcement. Recently, there were two instances where the lower court refused enforcement but upon appeal, the Supreme Court asked the parties to respect the award even though there were a few issues with the award.[16] Further, the government and other international organizations such as the SIAC have assisted in setting up high-tech and convenient hearing centres. Other ancillary services have also taken shape in Korea including translation and transcription services.

What has also been instrumental in helping international arbitration in Korea is Korea's stature as a global city. Seoul is connected well with almost every capital city across the world. Korea has a reputation as a neutral country that makes it an attractive destination to position itself as an arbitration seat and venue. Especially as regards the Asia-Pacific region, it has gained the tremendous spotlight as a preferred destination for conducting arbitrations. By way of an example, recently you must have seen the growth of virtual hearings due to the pandemic. The situation in Korea has been unique. Even though we have world-leading internet speed and technologies, most Korean offices have been working regularly from the office space. As a result, several international counsels have been coming to Korea for matters where they prepare together with the Korean co-counsel and conduct the hearing before the tribunals who may be sitting abroad.

Over the years, the KCAB has come up to become the official arbitral institution of Korea.[17] It enjoys the support of not only the government but also that of the local and international firms and institutions. As a result of this, it has steadily developed into an internationally recognized institution. It has ensured that its rules are regularly updated and are in sync with other institutions.

KCAB also established KCAB International in 2018 as a separate body, especially to cater to international arbitrations.[18] To keep up with the rapidly changing arbitration practices, KCAB

[16] *South Korean Courts Twice Refuse to Enforce International Arbitral Awards,* HERBERT SMITH FREEHILS (Sept. 23, 2013), https://hsfnotes.com/arbitration/2013/09/23/south-korean-courts-twice-refuse-to-enforce-international-arbitral-awards/.
[17] Woohyung (Mark) Choe, *KCAB: The Rise of a New Arbitration Hub in East Asia,* THE AMERICAN REVIEW FOR INTERNATIONAL ARBITRATION (Oct. 5, 2020), http://blogs2.law.columbia.edu/aria/kcab-the-rise-of-a-new-arbitration-hub-in-east-asia/.
[18] Sue Hyun Lim, *Innovation in progress – developments in Korea after the launch of KCAB INTERNATIONAL,* GLOBAL ARBITRATION REVIEW (Jun. 11, 2020), https://globalarbitrationreview.com/review/the-asia-pacific-

International has appointed eminent practitioners to guide and advise on initiatives that KCAB International should be undertaking. Additionally, KCAB International has also formed an International Arbitration Committee that I am chairing currently. This Committee is consulted on issues relating to the appointment, challenge, replacement, and removal of arbitrators.

With the success of KCAB and KCAB International, the next progression has been towards KCAB Next. Like other initiatives globally to promote international arbitration among the new entrants to arbitration in different regions of the world, KCAB Next's aim is to induct Korean practitioners into the international arbitration world. KCAB does that by upskilling the legal practitioners and providing various kinds of training to those interested in the arbitration field. It provides a platform for the new entrants to meet other like-minded practitioners and get a sense of community. It also acts as a link between the established practitioners and new entrants which has proved to be quite useful for the new generation of Korean lawyers, especially in recent years.

Let me share something interesting. In the past, there have been a few agreements between North Korea and South Korea such as the Agreement on the Procedure of Commercial Dispute Resolution between Parties in South and North Korea (2000) and the Agreement on Organization and Operation of Inter-Korean Commercial Arbitration Board (2003).[19] These set out arbitration as a commercial dispute resolution method. Further, they also promote institutional arbitration through Inter-Korean Commercial Arbitration Board to be constituted (not completely constituted yet). As for the procedural rules, UNCITRAL Arbitration Rules can be the main reference for procedural rules to be agreed upon between South and North Korea. In this regard, the chairman of the KCAB said that since North Korea has joined the United Nations Convention on Contracts for the International Sale of Goods ["**CISG**"], it is worth paying attention to the 'arbitration system', a neutral dispute resolving mechanism because it is difficult for North and South Korean parties to accept any judgment from South Korean or North Korean courts.

As for the substantive law, CISG could prove instrumental in resolving the disputes relating to the sale and purchase of goods. The Kaesong Industrial Complex (Kaesong Industrial Zone) has had a difficult beginning but hopefully now that North Korea has signed the CISG,

arbitration-review/2021/article/innovation-in-progress-developments-in-korea-after-the-launch-of-kcab-international.

[19] Kwang-Rok Kim, *Settling Business Disputes with North Koreans in the Advent of the External Economic Arbitration Law*, 16 TRANSNAT'L LAW 401 (2002).

something good may finally come out of it in terms of resolving disputes using the CISG. In 2013, Kaesong Industrial Complex Inter-Korean Joint Committee signed an annex to implement the Agreement on Organization and Operation of Inter-Korean Commercial Arbitration Board for Commercial Arbitration Board of Kaesong Industrial Complex to resolve disputes arising in the complex.[20] However, it ran into several difficulties time and again.

The Inter-Korean Commercial Arbitration Board of Kaesong Industrial Complex was established as a separate legal entity with the purpose of resolving any commercial disputes arising out of economic transactions in relation with Kaesong Industrial Complex through arbitration.[21] It is likely that for all the sale and purchase of goods, CISG is used when the Industrial Zone finally becomes fully operational.

Korea seems to have caught the world's attention for many reasons in the recent past. K-pop, K-drama, K-technology, and K-cosmetic have already played an instrumental role in getting Korea to become a global hot topic. In the same way, "K-arbitration" which has a comparable ring to its popular siblings is fast catching up. The soft power of Korea has, in many ways, helped its arbitration and legal industry as well. Basically, every "K" these days is not necessarily Korean in its traditional sense. It is an amalgamation of the best practices the world over. A recent and relatable example is that of the K-drama called Squid Games. It is inspired by a game that many Koreans, including myself, played as kids. However, the drama itself is very international. Along the same lines, K-arbitration is bringing together global best practices. Similarly, another example is the concept of "Gangnam Arbitration" that I introduced. It relates to concepts related to hearing to encourage tribunal to engage with cases at an early stage. Other ideas are those related to witness conferencing and more effective ways of document production. All these ideas are not necessarily coming from Korea, but we adopted these from several jurisdictions and summarized them to try and establish that they are used in the international arbitration society.

In conclusion, if one must take away from Korea's example on how it emerged as a key international arbitration player, the following will be lessons worth examining.

- It is important that there is a cohesive effort by all the stakeholders to promote

[20] Jeehye You, *Legislative Reform of the Kaesong Industrial Complex in North Korea,* 29 UCLA PACIFIC BASIN LAW JOURNAL 36 (2011).
[21] *Id.*

international arbitration in any emerging regime.

- This includes the arbitration counsel, parties, arbitrators, judiciary, government, and arbitral institutions.
- Any emerging regional regime will have to tackle the work at each of these levels simultaneously.
- Imagine the eco-system like a chariot where each of the wheels has to function independently and together at the same time.
- Any effort to strengthen one limb while the other limb suffers will only lead to a stagnation of any arbitral regime.

Well, that was a brief overview of the growth of the Korean arbitration industry and the lessons from it that can be implemented in emerging arbitral jurisdictions. I am happy to answer questions if there are any. I am grateful again for inviting me to speak at this platform on this topic.

Thank you very much!

REMEDYING INVESTOR MISCONDUCT IN INVESTOR-STATE ARBITRATION THROUGH THIRD PARTY FUNDING

Dr. M. Uzeyir Karabiyik*

Abstract

Foreign investors are increasingly turning to third party funders to finance their arbitrations against host States. In the short time that third party funding has been employed in investor-state arbitration, it has created significant controversy over its role in the practice. Despite its practical benefits including elimination of investors' financial distress regarding the costs of arbitration proceedings, several concerns have been voiced against its use. One of these concerns relates to the control that the funders have on arbitral proceedings by way of the funding agreement signed between the funder and the investor. Although this control is of an indirect nature, one may contend that equipping a non-party with this kind of power could go against the fundamental characteristics of investor-state arbitration. Yet, what if this contentious power of funders actually has the potential to address a chronic problem of the investor-state dispute settlement system? What if the funding agreement that secures the third party funder's control over the proceedings could be employed as a tool to remediate investor misconduct? Adopting an argumentative approach, this article seeks to address these questions.

I. INTRODUCTION

In contemporary investor-state dispute settlement ["**ISDS**"] practice, foreign investors have adapted some of the procedural tactics similar to those frequently resorted to in domestic litigations, with a view to increase their chances of getting a favourable award.[1] In a vast number of cases, these tactics have amounted to misconduct, which threatens the reliability and the reputation of the international investment arbitration system.[2] Investor misconduct involves not only *prima facie* illegal conduct such as corruption and fraud but also conduct that manifests itself in the form of abuse of process, which technically cannot be deemed illegal. Abuse of process can be grouped into three categories: (1) devising plans to secure jurisdiction

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[1] Emmanuel Gaillard, *Abuse of Process in International Arbitration,* ICSID Review 1, 1 (2017).

[2] *Id.*

under an investment treaty; (2) initiating multiple arbitral proceedings to increase the likelihood of success; and (3) and bringing frivolous claims that have a low likelihood of success. In addition, procedural misconduct of investors, in other words, guerrilla tactics[3] appears as a distinct type of wrongful conduct of investors.

Third party funding is an agreement that allows a corporation or an individual, with no connection to the legal dispute, to fund or to provide other material support to a party, covering all or some of the expenses incurred from the legal proceedings.[4] In return, the third party funder receives an agreed remuneration.[5] This remuneration could be in multiple forms, such as a percentage of the amount recovered from the other party, a fixed amount, or a multiple of the funding.[6] In addition to fees of arbitral institutions, arbitrators, experts, and counsel, costs incurred from the appeal process or enforcement could also be covered by the third party funder.[7]

While civil law jurisdictions were not familiar with third party funding, common law considered it illegal until the end of the twentieth century, due to its violation of the doctrines of maintenance and champerty.[8] Thereafter, courts started to recognize the legality of third party funding, first in Australia and the United Kingdom, then in the United States and Europe.[9]

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[3] Hwang first used the term "arbitration guerrilla" in his article in 2005 where he stated that arbitration guerrillas were those whose aim was "*to exploit the procedural rules for their own advantage, seeking to delay the hearing and (if they get any opportunity) ultimately to derail the arbitration so that it becomes abortive or ineffective.*" Michael Hwang, *Why is There Still Resistance to Arbitration in Asia?* in Global Reflections on International Law, Commerce and Dispute Resolution – Liber Amicorum in Honour of Robert Briner 401 (Gerald Aksen et al. eds., 2005); Sussman describes guerrilla tactics as "*different strategies, methods and tactics ranging from poor behavior to egregious and even criminal conduct*." Edna Sussman & Solomon Ebere, *All's Fair in Love and War – Or Is It? Reflections on Ethical Standards for Counsel in International Arbitration* 22 The American Review of International Arbitration 612 (2011); Horvath and Wilske noted, "Guerrilla tactics, while always unethical, may not in every instance amount to a violation of law or written procedural rules. Nonetheless, such behaviour always constitutes a hindrance to arbitral proceedings." The authors underlined that in identifying guerrilla tactics, the question was not whether the conducts follow the letter of the law, but rather whether they conform to the spirit of the relevant rules. Günther J. Horvath, Stephan Wilske, et al., *Chapter 1, §1.02: Categories of Guerrilla Tactics* in Guerrilla Tactics in International Arbitration, International Arbitration Law Library 3-4 (Günther J. Horvath & Stephan Wilske eds. 2013).

[4] Ridhima Sharma, *Third-party Funding in International Commercial Arbitration*, 12 NUALS L.J. 61, 63 (2018).

[5] Rachel D. Thrasher, *Expansive Disclosure: Regulating Third-Party Funding for Future Analysis and Reform*, 59 B.C. L. Rev. 2935, 2935 (2018).

[6] UNCITRAL Working Group III, Possible reform of investor-state dispute settlement (ISDS) Third-party funding UN Doc A/CN.9/WG.III/WP.157 2 (Jan. 24, 2019), https://undocs.org/en/A/CN.9/WG.III/WP.157.

[7] *Id.*

[8] Frank J. Garcia, *Third-Party Funding as Exploitation of the Investment Treaty System*, 59 B.C. L. Rev. 2911, 2912 (2018).

[9] *Id.*; As of today, Australia, the United Kingdom of Great Britain and Northern Ireland, and the United States of America have regulations on legal dispute funding. The practice of funding legal disputes by third parties is also growing in Singapore, China (Hong Kong Special Administrative Region), as well as some countries in Latin America and in Europe.

In recent years, third party funding has been frequently witnessed in investor-state arbitration despite its concomitant problems concerning issues such as conflict of interest, disclosure requirements, and evidentiary privileges.

Except for very rare circumstances[10], in international investment arbitration practice, third party funding has been available to claimants only. This has strengthened foreign investors' hand even more in a system whose pro-investor bias has been at the core of the widespread criticisms voiced against it. One may argue that in addition to the multiple legal tools already granted to investors by the ISDS system, they can now employ third party funding as a procedural weapon against respondent States. Receiving external funding for their claims may encourage investors to bring frivolous claims, which usually aim at forcing the state to settle. Yet, the author believes that third party funding can be taken advantage of in countering investors' abuse of the ISDS system.

After briefly touching upon third party funding's position in the practice of investor-state arbitration, this article explores its potential as a tool to remedy frivolous claims. It then discusses how third party funding agreements can help curb other types of investor misconduct.

II. THIRD PARTY FUNDING IN INVESTOR-STATE ARBITRATION

In investor-state arbitration, third party funders have been increasingly enthusiastic about providing claimants with finances for arbitral proceedings. It is neither their philanthropic demeanour nor their commitment to the rule of law that sparks this enthusiasm. The reason for their increasing interest, in all likelihood, is the amount of claim at stake. The amount of claim usually extends to hundreds of millions, even billions of dollars. In its early days, third party funding in investor-state arbitration was oriented towards the claimants who lacked sufficient funds to cover the legal representation fees and other related expenses of an investment claim. Over time, it shifted towards providing funding for non-impecunious claimants who prefer streamlining the funds into their investments and business growth instead of tying up the same in a legal battle, the outcome of which is not certain. From the investors' viewpoint, taking the high costs of the proceedings into consideration, receiving funding from external players for

[10] This was the case in *Philip Morris v. Uruguay* (*Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7) where the Bloomberg Foundation provided financial assistance to the Uruguayan Government for its legal defense. The president of the foundation Michael Bloomberg publicly announced his support for Uruguay's anti-tobacco laws, which engendered the investment dispute with Philip Morris; McKay B. *Bloomberg, Gates Launch Antitobacco Fund* WSJ (Mar. 18, 2015), https://www.wsj.com/articles/bloomberg-gates-launch-antitobacco-fund-1426703947.

arbitration is quite plausible as this practice poses no financial risk for them. The funder assumes the risk of obtaining a negative award. For investors with robust balance sheets, specifically large multinational corporations, third party funding is particularly attractive as it can be employed as a finance tool to pursue their arbitral claims, without having to channel a portion of their cash flow towards arbitration related expenses.[11]

Along with its investor-favoring nature, the structural deficits in the current ISDS system have the potential to create a fertile market for third party funders who can smoothly obtain high returns for their investments in proceedings without taking a high risk, especially when they perform portfolio funding.[12] The average cost for a party in an ISDS proceeding is around USD 5 million[13], while the average award is over USD 120 million.[14] The massive gap between these numbers whets third party funders' appetite to invest in investment arbitration cases more enthusiastically. In certain instances, third party funding leads to unusually high returns. To illustrate the same, a well-known arbitration/litigation funder, Burford Capital, managed to secure a 736% return (USD 94.2 million) on invested capital in only one year in an international investment arbitration case.[15]

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[11] International Council for Commercial Arbitration (ICCA), *Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration*, The ICCA Reports No. 4 (April 2018) [hereinafter *ICCA-QM Report*].

[12] *Id.* at 38. The following remarks in the report about portfolio funding are quite elucidatory:

> "A portfolio arrangement can be structured in many ways, but there are two major types of arrangements: (1) finance structured around a law firm, or department within a law firm, where the claim holders may be various clients of the firm; or (2) finance structured around a corporate claim holder or other entity, which is likely to be involved in multiple legal disputes over a relatively short period of time. Structuring finance around multiple claims under either model usually involves some form of cross-collateralization, meaning that the funder's return is dependent upon the overall net financial performance of the portfolio as opposed to the outcome of each particular claim. This type of structure may enable the entity (e.g., the law firm or corporate client) to secure third party funding more quickly, on pre-arranged terms, and, depending on the structure, the ability to benefit from the overall success of the portfolio. Additionally, there may also be economic benefits to this approach – if the funder's risk is spread across multiple claims, this should in turn dictate a lower cost of capital for the funded party (although this does not always materialize in practice)."

[13] *Id.* Annex C at 244.

[14] Brooke Guven & Lisa Johnson, *The Policy Implications of Third-Party Funding in Investor-State Dispute Settlement*, Columbia Center on Sustainable Investment, CCSI Working Paper 6 (2019).

[15] In *Teinver v. Argentina* (*Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. The Argentine Republic*, ICSID Case No. ARB/09/1, Award (July 21, 2017)) the tribunal awarded USD 324 million in damages in favor of claimants due to unlawful expropriation and violation of the fair and equitable treatment obligation. Burford capital had invested in the proceedings as a third party funder in the amount of USD 12.8 million. Burford Capital's agreement with Teinver allowed it to take home roughly USD 140 million. Upon Respondent's initiation of the annulment procedure against the award, Burford Capital sold its entire entitlement in the case for USD 107 million in cash on the secondary market and made USD 94.2 million as profit. The company made following assessment in terms of annulment proceedings:

> "The Teinver award is the subject of ongoing annulment proceedings. Annulment (the cancellation of an award) is only available in very limited circumstances of serious error by the arbitration tribunal that we do not believe exist here, with only 6% of awards ever rendered by the World

Opponents of third party funding argue that it exacerbates the deficiencies and asymmetries in the ISDS system by taking advantage of its flaws. The ISDS system has distinctive structural characteristics according to which host States are deprived of substantial rights such as bringing counterclaims. In the same vein, it was asserted that third party funding strengthens investors' position even more by providing them with funding and expertise, which may drive up the number of unmeritorious claims that would not be brought otherwise. Opponents also reject the view that third party funding is a useful tool for facilitating impecunious or disadvantaged investors' access to justice. To them, funders are not necessarily enthusiastic about justice as their primary motivation is to reap a profit as is the case in any business. Apart from the motive of the funder, the opponents contend that the current ISDS system is far from being able to deliver justice due to its chronic problems.

As a relatively novel phenomenon devised to build wealth, third party funding is on the rise in investor-state arbitration practice. Today, entities such as investment banks, specialized litigation finance companies, and hedge funds dominate the arbitration funding market.[16] Risk assessment and management is at the core of this practice. After all, the funder would lose its investment in case the tribunal dismisses the claim. To determine whether an investment arbitration claim is worth investing in, a third party funder conducts extensive due diligence and considers various factors that involve, among others, the enforceability of the claim, merit of the claim, the amount of the damages sought, and costs.[17]

> Bank's arbitration institution having been annulled (and only 3% in the current decade). Were the award to be annulled, the sale transaction could be rescinded at the option of the buyers, although in that unlikely event Burford would retain a $7 million fee and would also have its original entitlement back and be free to pursue the claim again. Based on the historical speed of annulment proceedings a decision on annulment would be expected in the second half of 2019 although individual case timing is unpredictable."

[16] Frank Garcia, *supra* note 8, at 2915.

[17] Brooke Guven & Lisa Johnson, *supra* note 14 at 5-6. Citing the ICCA-QM Report, the paper provided a comprehensive list of the factors that have been taken into consideration by funders to figure out if the claim is worth to invest in:

> "When considering whether to invest in a claim, funders consider the following, the respective importance of which will vary by claim and by funder: (1) demonstration of healthy claim, (2) counsel that has been selected by the claimant and how counsel will be compensated, (3) the value of the claim, (4) anticipated margin of recovery relative to the budget for funding, (5) the amount required to be advanced, (6) jurisdictional obstacles, (7) available defenses, (8) the expected nature, length and type of the proceeding, (9) existence and implications of associated claims (e.g., by other investors in the same sector impacted by the measure), (10) the possibility of settlement, (11) the identity of the respondent, and (12) ease of, or particular hurdles to, enforcement."

III. THE ROLE OF THIRD PARTY FUNDING IN ADDRESSING INVESTOR MISCONDUCT

The interrelation between third party funding and frivolous claims will be tackled in this section. A discussion on how third party funding affects other types of investor misconduct such as corruption, fraud, abuse of process, and procedural misconduct will follow.

A. Third party funding and frivolous claims

How third party funding affects frivolous ISDS claims has been a contentious issue.[18] Some commentators suggest that the examination of the case by a third party funder plays a filtering role, which eventually leads to the elimination of most of the frivolous cases.[19] This is because the funders do not want to lose their investment. In contrast, others suggest that through enabling investors to bring claims without having to allocate funds for legal representation in the case and risk diversification by way of portfolio funding, third party funding actually causes a rise in the number of frivolous cases.[20]

The absence of a clear definition of frivolous claims in the context of ISDS further complicates analyzing whether third party funding drives an increase in these claims. Various reasons make the identification of frivolous claims challenging. By way of illustration, receiving remuneration per case or hour might incentivize an arbitrator to allow a frivolous case to proceed. In a similar vein, arbitrators in an ISDS setting do not necessarily have to interpret the language of the investment treaties the same way the State parties do. Put differently, there may occur a gap between the State parties' interpretation of a treaty provision on frivolous claims and interpretation of the same text by arbitral tribunals.[21]

Advocating the view that third party funding could play a part in preventing frivolous claims warrants a business-oriented approach to the matter. One may argue that third party funders, to be able to make more profit, prefer to invest in meritorious claims that have a high likelihood

[18] Bernardo M. Cremades Román, *Third-party Litigation Funding: Investing in Arbitration*, 13 Spain Arbitration Review 155, 183 (2012); Susan Lorde Martin, *The Litigation Financing Industry: The Wild West of Finance Should Be Tamed Not Outlawed*, 10 Fordham J. Corp. & Fin. L. 77 (2004); Douglas R. Richmond, *Other People's Money: The Ethics of the Litigation Funding,* 56 Mercer L. Rev. 660-661 (2005); Mariel Rodak, *It's about Time: A System Thinking Analysis of the Litigation Finance Industry and Its Effect on Settlement*, U. Pa. L. Rev. 518-519 (2006).
[19] *Id.* at 21.
[20] *Id.*
[21] *Id.*

of success. To identify if the claim is worth investing in, third party funders carry out extensive merits assessments of the claim or have a law firm do this job for them.[22] Thanks to this exhaustive assessment process, the funders can eliminate unmeritorious claims and invest only in claims with solid legal bases.

On the other hand, according to some commentators, third party funding exacerbates abusive litigation and frivolous claims. They argue that if the potential recovery is large enough, a funder would be willing to take the risk even if the claim has a low probability of success due to a thin legal basis.[23] In the same vein, an empirical research study looking at the cases examined by a third party funder found that the funder preferred investing in riskier claims with a relatively lower probability of success.[24] Moreover, large funders have been increasingly adopting portfolio funding, which helps them in spreading out the risks.[25] This model of funding incentivizes the investors to bring riskier or frivolous claims, as the cost of a possible loss would be spread over the portfolio.[26] Opponents of third party funding also compare contingency fee lawyers to third party funders to substantiate their argument that third party funding encourages frivolous claims. While a contingency fee lawyer does have an ethical duty to advise his or her client if the claim at stake is frivolous, they underline that there is no such a duty in a third party funding agreement, which enables third party funders to take the risk of funding frivolous claims with an expectation of unusually high returns.

The matter can also be evaluated from the point of view of the types of third party funders. Large investment firms providing financial services have dominated the litigation/arbitration funding market. They are repeat players and maintaining their reputation in the steadily expanding market is crucial for achieving their long-term financial goals. Considering this, in all likelihood, they would be hesitant about risking their reputation by contributing to abusive conduct, such as paving the way for frivolous claims. They usually prefer portfolio funding to manage the risk and ensure a relatively steady profit.

Then again, medium or small-sized new entrant companies in the third party funding market may be more enthusiastic about engaging in risky and frivolous claims that might yield

[22] ICCA-QM Report, *supra* note 11, Annex C at 243.
[23] Bernardo M. Cremades Román, *supra* note 18.
[24] Brooke Guven & Lisa Johnson, *supra* note 14, at 24. [citing Daniel L. Chen, *Can Markets Stimulate Rights? On the Alienability of Legal Claims* 46 RAND J. of Economics 23, 25, 33 (2015)].
[25] ICCA-QM Report, *supra* note 11, at 38.
[26] Frank Garcia, *supra* note 8, at 2921.

exceptionally high returns that would help them take root in the market and establish a reputation. It would be fair to expect an augmentation in the number of new entrant companies as the third party funding market is continuously expanding. This surge would make the competition among the funders even fiercer, which could create an atmosphere in which even unmeritorious claims would be in high demand.

The lack of empirical evidence with respect to whether third party funding drives up the number of frivolous cases in ISDS makes producing a comprehensive analysis exceptionally difficult.[27] It is partly due to the fact that third party funding is an unregulated area of practice. The need for regulating third party funding in investment arbitration was brought before the United Nations Commission on International Trade Law ["**UNCITRAL**"] Working Group III within the ambit of the ISDS reform process. The continuous expansion of third party funding would produce more data on the effects of the practice in ISDS. Along with prospective regulation of the practice through ISDS reform, this data would help produce a comprehensive analysis of how third party funding affects frivolous cases.

B. Remedying the other types of investor misconduct

Investors' misconduct has proven to have destructive effects on ISDS claims. While certain types of misconduct would deprive a tribunal of its jurisdiction, others could conduce to the inadmissibility of the claim. Moreover, misconduct may lead a tribunal to cut the amount of compensation to the detriment of the claimant. Tribunals also pay regard to misconduct while allocating the costs. So, how can a third party funder protect itself from the risks posed by investor misconduct? More importantly, can third party funding play a role in deterring investors from engaging in misconduct?

In addition to conducting extensive research and assessment activities before deciding to finance a claim, a third party funder may impose certain obligations and limitations on the investor through a funding agreement as a means of risk management. These obligations and limitations enable the funder to establish partial control over the investor's engagement in the proceedings. This control matters for the funder, as he would want to make sure his interest in the case is protected. In this context, funders' control over both the investor and the case could be construed as a deterrent to investor misconduct.

[27] ICCA-QM Report, *supra* note 11, at 204.

Incorporation of representations and warranties attesting that no misconduct had occurred into the funding agreement could be a viable option for a third party funder to deter an investor from engaging in misconduct. These kinds of provisions also oblige an investor to let the funder know about its past claim-related actions that may influence the outcome of the proceedings. In other words, a provision can cover the past behaviour of the investor, whereby the investor would attest to the third party funder that there was no misconduct. Another provision can contain the investor's promise to the third party funder that no misconduct will be committed in the arbitration or otherwise while the third party funding agreement is concluded.

The model litigation-financing contract proposed by Steinitz and Field provides guidance on this matter.[28] Some articles within the section on representations and warranties in this contract could be adapted and incorporated into the provisions of an arbitration financing contract aimed at deterring investor misconduct.[29] The article on full disclosure of the model contract reads:

> "The Plaintiff represents that, as of the date of this Agreement, the Plaintiff has provided the Funder all material information relating to the Claim, excluding information protected solely by the attorney-client privilege."[30]

Investor misconduct committed before concluding the funding agreement would fall under "all material information relating to the claim" as it would have a determinative effect on the fate of the claim. Similarly, the model contract has another article in the section on impairment that would cover investors' past misconduct:

> "Other than as already disclosed to the Funder, the Plaintiff has not taken any action (including executing documents) or failed to take any action, which would materially and adversely affect the Claim"[31]

Inclusion of adapted versions of the abovementioned provisions, which are in the form of representations, in funding agreements between investors and funders may play a role in deterring investors from engaging in misconduct. An investor's past misconduct concerning the case would most certainly be a deal-breaker for the third party funder as it increases the risk of failure of the claim dramatically.

Special attention needs to be paid to the time of signing the third party funding agreement. The

[28] Maya Steinitz & Abigail C. Field, *A Model Litigation Finance Contract*, 99 Iowa L. Rev. 711 (2014).
[29] *Id.* at 757.
[30] *Id.*
[31] *Id.*

agreement can be signed either before the initiation of the arbitration proceedings or during the proceedings. In some cases, investors are impecunious and need funding from third parties to be able to initiate the arbitration. Even if they have sufficient funds to cover the arbitration-related expenses, they may still seek external funding to avoid directing their cash flow to arbitration instead of using it for business growth. Some investors may prefer to resort to external funding in the middle of the proceedings, due to, for example, unexpected expenses. The abovementioned provisions in the form of representations in the third party funding agreement would be able to cover investor misconduct committed before the time of signing the agreement. To make it more concrete, if the funding agreement was signed prior to the initiation of the proceedings, representations in the agreement would cover corruption, fraud, and abuse of process. They would not cover guerrilla tactics as these tactics can only be employed in the course of the proceedings. Therefore, addressing guerrilla tactics through representations would not be a viable option unless the funding agreement is signed after the initiation of the proceedings. A provision in the form of a warranty would offer a solution to this problem. In that context, the said model contract contains an article covering the plaintiff's prospective conduct that might impair the claim:

> "The Plaintiff agrees and undertakes that it will not take any step reasonably likely to have a materially adverse impact on the Claim or the Funder's share of any Proceeds"[32]

If a third party funding agreement has provisions in the form of both representations and warranties aimed at addressing investor misconduct, the time of signing the agreement would not matter much as the said representations and warranties would cover both past and future misconduct.

It is apposite to touch upon here the motivation that third party funders have. Some commentators argue that "capital seeks returns, not justice"[33] and injecting a profit-motivated external actor into a system that aims at promoting justice is quite problematic.[34] Approaching the issue from this viewpoint, one can assert that third party funders may turn a blind eye to investor misconduct if they believe that the misconduct can help them win the case without being detected. In other words, third party funders may not care much about investor

[32] Maya Steinitz & Abigail C. Field, *supra* note 28, at 757, 758.
[33] ICCA-QM Report, *supra* note 11, Annex C, at 238.
[34] *Id.*; In line with the concerns expressed on the ISDS system, many governments and commentators argue that the current version of the system is far from delivering justice due to structural deficiencies and asymmetries that deprives the respondent states of making claims or counterclaims.

misconduct unless the risk of it being detected by the arbitral tribunal is relatively high. Therefore, it is the likelihood of getting caught that matters for the funder, not the misconduct itself. For instance, its bilateral nature and collusion between parties make bribery extremely difficult to be detected by arbitral tribunals. Taking advantage of this in an unregulated practice, a profit-motivated funder may ignore the misconduct and opt for funding the claim tainted by bribery. In extreme circumstances, an unscrupulous funder may even encourage the investor to resort to misconduct to increase the likelihood of success in the case. However, it would be highly unlikely for institutionalized large funding companies with well-established reputations to condescend to these sorts of illicit actions. The dynamics of less reputable small-scale third party funders, though, could point to different possibilities.

IV. CONCLUSION

Despite the widespread use of third party funding in investor-state arbitration practice, it is still a relatively new phenomenon, with problems. There has been considerable debate as to whether its benefits outweigh its costs. Yet, it is fair to say that third party funding is here to stay and will play a cardinal role in the future of the practice. Indeed, the UNCITRAL included the matter in its agenda. In its discussions on ISDS reform, the Working Group III of the UNCITRAL tackled the concerns associated with third party funding in investor-state arbitration. One of the issues brought forward was how funding agreements are supposed to be structured.[35] The Working Group decided to continue its discussions on the matter in its next sessions. In light of the determinations and concerns explained above, UNCITRAL's reform discussions provide an opportunity for ISDS stakeholders to bring forward the necessity of deterring investor misconduct via third party funding agreements.

[35] UNCITRAL Working Group III, *supra* note 6, at 6. The paper noted:

> "An issue that has also given rise to debate is the potential influence of the third party funder on the proceedings, including in settlement negotiations, particularly when a funder's compensation depends on the outcome of the proceedings. The main element for consideration on this matter is the manner in which the funding agreements are structured, and the extent to which third party funders have control over the management of the case proceedings."

JUDICIAL COMITY IN INTERNATIONAL DISPUTE SETTLEMENT

Harshad Pathak*

Abstract

The domain of investor-state dispute settlement poses ample risks relating to parallel proceedings involving the same dispute. Various conventional tools available to international arbitrators have, so far, failed to provide a coherent response to these risks. Arbitrators have frequently declined to exercise such tools on the basis of rigid formulations of their technical parameters. In such circumstance, this article explores whether the principle of judicial comity, which is characterized by its inherent fluidity and adaptiveness, may provide a far more suitable response. To answer this question, the article studies the evolution of the principle of comity from a mere extension of sovereignty to a global ordering principle of international dispute settlement.

I. INTRODUCTION

Investment treaty arbitration is a hybrid form of dispute settlement,[1] through which a foreign investor may directly advance claims against the host State in which it had invested. These claims are premised on alleged breaches of the host State's obligations contained in an investment treaty concluded with the State to which the investor belongs. Investment treaties, after all, routinely contain an offer by the host State to arbitrate claims relating to an investor's investment, which an investor may accept by sending a notice of arbitration to the host State to commence the arbitral process. The host State's offer to arbitrate, contained in an investment treaty, and its subsequent acceptance by an investor, cumulatively constitute a *sui generis* arbitration agreement. This *sui generis* arbitration agreement is the basis of jurisdiction of an investment treaty tribunal.[2]

However, investment treaty arbitration is only one of the multiple avenues potentially available to an investor to protect its interests against a host State. An investor may equally challenge an adverse measure adopted by a host State before its municipal courts, to assert its rights under

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[1] Zachary Douglas, *The Hybrid Foundations of Investment Treaty Arbitration*, 74 B.Y.I.L 151 (2004).

[2] Jan Paulsson, *Arbitration without Privity*, 10 ICSID Rev. 232. (1995).

the municipal law of the host State. Likewise, where an investor has made its investment pursuant to a contractual relationship with the host State or any of its agencies, such contractual agreements also commonly contain an arbitration clause providing for commercial arbitration. Therefore, an investor may also commence a commercial arbitration proceeding with respect to the host State's adverse measure, this time to assert its contractual rights. This plurality of remedies under the investment treaty, municipal law and contractual framework, often creates a situation of parallel proceedings between an investor and the host State concerning essentially the same dispute. While these proceedings may entail a breach of obligations emanating from distinct sources, they nonetheless entitle multiple judicial fora to decide the same issues of facts, thereby creating a visible risk of conflict decisions relating to the same dispute.

Over the past two decades, investment treaty tribunals have struggled to adequately mitigate the risks emanating from such parallel proceedings. Indeed, the community of respondent host States has objected to such proceedings on various grounds, including fork-in-the-road treaty provisions[3] and the principles of *lis pendens*[4] and abuse of process.[5] However, despite a few notable exceptions,[6] investment treaty tribunals have routinely rejected these objections. For doing so, they prefer to adopt a rigid approach and rely on a strict application of the triple identity test,[7] instead of recognizing that the parallel proceedings relate to the same factual dispute. This poses the question – does international law provide an alternative solution to the

[3] Bernardo Cremades & Ignacio Madalena, *Parallel Proceedings in International Arbitration*, 24 Arb. Int'. 507 (2008); Christoph Schreuer, *Travelling the BIT Route: Of Waiting Periods, Umbrella Clauses and Forks in the Road*, 5 J.W.I.T 231 (2004).

[4] Campbell McLachlan, *Lis Pendens in International Litigation*, Martin Nijhoff (2009); August Reinisch, *The Use and Limits of Res Judicata and Lis Pendens as Procedural Tools to Avoid Conflicting Dispute Settlement Outcomes*, 3 Law and Practice of I.C.T. 37 (2004); Douglas Reichert, *Problems with Parallel and Duplicate Proceedings: The Litispendence Principle and Int'l Arbitration*, 8 Arb. Int'l. 37 (1992).

[5] Yuka Fukunaga, *Abuse of Process under International Law and Investment Arbitration*, 33 ICSID Review 181 (2018); John P Gaffney, *Abuse of process in investment treaty arbitration*, 11 Journal of World Investment & Trade 515 (2010); Carlotta Ceretelli, *Abuse of Process: An Impossible Dialogue Between ICJ and ICSID Tribunals?*, 11 Journal of International Dispute Settlement 47 (2020); Chester Brown, *The Relevance of the Doctrine of Abuse of Process in International Adjudication*, 8 TDM International 1 (2011); Hervé Ascensio, *Abuse of Process in International Investment Arbitration*, 13 Chinese Journal of International Law 763 (2014); Emmanuel Gaillard, *Abuse of Process in International Arbitration*, ICSID Review 1 (2017).

[6] Pantechniki S.A. Contractors & Engineers v. The Republic of Albania, ICSID Case No. ARB/07/21, Award (30 Jul. 2009); H&H Enterprises Investments, Inc v Arab Republic of Egypt, ICSID Case No ARB/09/15, Award (6 May 2014); Supervision Y Control S.A. v. The Republic of Costa Rica, ICSID Case No. ARB/12/4, Award (18 Jan. 2017); Ampal-American Israel Corp., EGI Fund (08-10) Investors LLC, EGI Series Investments LLC, BSS-EMG Investors LLC, and David Fischer v. Arab Republic of Egypt, ICSID Case No. ARB/12/11, Decision on Jurisdiction (1 February 2016); Orascom TMT Investments S.A.R.L v. People's Democratic Republic of Algeria ICSID Case No. ARB/12/35, Award (31 May 2017).

[7] S.A.R.L. Benvenuti and Bonfant SRL v. The People's Republic of the Congo, Award (8 Aug. 1980), ¶1.14; Azurix Corp. v. The Argentine Republic, Decision on Jurisdiction (8 Dec. 2003), ¶89.

menace of parallel proceedings which is incapable of being sacrificed at the altar of technicalities?

It is in the above context that this article explores the utility of the principle of judicial comity as part of an increasingly fragmented framework of international dispute settlement. Part II begins by discussing the theoretical foundations of the principle of comity, and Part III thereafter studies the emergence of judicial comity as a global ordering principle and how it may alleviate the risks created by parallel proceedings by foreign investors. Finally, Part IV concludes the paper.

II. THE ORIGINS OF COMITY

The principle of comity is commonly misunderstood by many as mere courtesy or deference.[8] But in reality, it is akin to a Hindu God with multiple incarnations; periodically remerging in different avatars. In fact, it is considered to have as many meanings as the notion of sovereignty.[9] And in both municipal and international law systems, the understanding of the principle varies with the context in which it is invoked. As such, prior to assessing the role of comity as a tool for preventing parallel proceedings, one must study its theoretical origins.

The origin of comity is linked with the concept of sovereignty.[10] It arose in the aftermath of the Peace of Westphalia, which denotes a series of treaties that not only ended the Eighty Years' War between the Kingdom of Spain and the newly independent Dutch Republic, but also established a new political order in central Europe. This Westphalian order was based on the principle of territorial sovereignty and non-interference, which rendered personal statuses irrelevant in the face of the territorial law of the state.[11] In other words, a sovereign enjoyed absolute legal control over all subjects, property and transactions within its territory, but as an extension, had no similar influence beyond its own territory.[12]

Yet, increasing commercial transactions between the European sovereigns, coupled with the rise of the Netherlands as a centre of trade, posed novel questions that the conception of sovereignty was unable to address. Particularly, it was unclear which law should regulate

[8] Adrian Briggs, *The Principle of Comity in Private International Law*, 91.
[9] Anne-Marie Slaughter, *Court to Court*, AM. J. INT. LAW 708, 708 (1998).
[10] Thomas Schultz & Niccolò Ridi, *Comity in US Courts*, 2 Northeastern University Law Review 1, 10 (2017).
[11] *Id.*
[12] Donald Earl Childress III, *Comity as Conflict: Resituating International Comity as Conflict of Laws*, 44 University of California 11, 17 (2010); Emer De Vattel, *The Law of Nations; Or Principles of the Law of Nature applied to the Conduct and Affairs of Nations and Sovereigns*, Joseph Chitty trans. (1883), 149.

private dealings that transcended more than one sovereign territory. Eventually, the conflict of laws[13] and the principle of comity arose to resolve this dilemma and mitigate the ill-effects of a strict allegiance to territoriality.[14] And while many jurists contributed to this process, the contributions of Ulrich Huber and Justice Joseph Story are paramount.

The primary function of comity was to reconcile a sovereign's need to occasionally recognize and give effect to foreign laws within its territory, without threatening the principles of sovereignty and non-interference.

Ulrich Huber answered this dichotomy by crafting three axioms. He posited that *firstly*, the laws of a sovereign State have force within the limits of that government and bind all who are subject to it, but not beyond. *Secondly*, all persons within the limits of a government, living there permanently or temporarily, are deemed to be subjects thereof. And *thirdly*, sovereigns will, pursuant to the principle of comity, ensure that the rights acquired within the limits of a government retain their force everywhere as long as they do not cause prejudice to the power or rights of other governments or their subjects.[15] Huber's third axiom is of particular significance here.

By postulating his third axiom, which allowed the law of one sovereign to also retain its force in the territory of another sovereign through the latter's consent, Huber sought to mitigate any conflict between the principle of comity and territorial sovereignty.[16]

Justice Joseph Story, an American jurist and former Associate Justice of the Supreme Court of the United States ["**SCOTUS**"], adopted Huber's three axioms, in particular the emphasis on sovereignty, to formulate his system of conflict of laws.[17] To him, an essential attribute of state sovereignty was the fact that *"[w]hat [a State] yields, it is its own choice to yield, and it cannot be commanded by another to yield it as a matter of right.*"[18] Echoing Huber, he also conceived three general maxims in this regard. *Firstly*, he stated that "*every nation possesses an exclusive sovereignty and jurisdiction within its own territory*."[19] *Secondly*, that "*no state or nation can*

[13] Donald Earl Childress III, *Comity as Conflict: Resituating International Comity as Conflict of Laws*, 44 University of California 11, 18 (2010).
[14] Thomas Schultz and Niccolò Ridi, *Comity and International Courts and Tribunals*, 50 Cornell International Law Journal, 11 (2017) [citing Cedric Ryngaert, *Jurisdiction in International Law* 150 (2008)].
[15] Campbell McLachlan, *supra* note 4 at 77.
[16] Donald Earl Childress III, *supra* note 13, at 22.
[17] Joseph Story, *Commentaries on the Conflict of Laws*, (1883); Elliott E. Cheatham, *American Theories of Conflict of Laws: Their Role and Utility*, 58 HARV. L. REV. 361, 376 (1945).
[18] Joseph Story, *Commentaries on the Conflict of Laws*, (1883), §8.
[19] *Id.* at §18.

by its laws directly affect or bind property out of its own territory, or bind persons not resident therein."[20] And *thirdly*, it followed "*that whatever force and obligation the laws of one country have in another depend solely upon the laws and municipal regulations of the latter, that is to say, upon its own proper jurisprudence and polity, and upon its own express or tacit consent*."[21] Accordingly, for Justice Story, comity formed a holistic explanation for "*the true foundation and extent of the obligation of the laws of one nation within the territories of another*",[22] which was essentially rooted in the latter's consent.

The history of comity reveals "*that the principle was borne out of the need to make sense of a new model of allocation of regulatory authority*."[23] It was, by design, couched in flexibility such that it may be formulated in different terms to attain a variety of goals depending on the context in which it is invoked. The very existence of legislative, executive and judicial comity in the United States is an example of this tenet.[24] This is why Campbell McLachlan states that the principle of comity is "*a springboard from which [jurists] proceeded to develop a highly organized and sophisticated set of choice of law rules*."[25] It was not an invitation to replace law with mere courtesy or discretion, but instead it "*supplied the basis for the elaboration of a detailed set of positive rules, grounded in practical reality*."[26] The emphasis on the notion of practical reality, without diminishing the efficacy of a rule, was intended to clothe the principle with an inherent sense of functional malleability.

Over time, a number of jurists, national courts and international tribunals have relied on the principle of comity in varied contexts. It has been invoked, among other things, to restrain the applicable domain of municipal law, recognize foreign and international judicial decisions, issue anti-suit injunctions, and also relevant to this discussion, refrain from deciding a dispute in case of parallel proceedings.[27] Yet, a precise definition of comity nonetheless remains elusive.

A popular description of the comity was given by the SCOTUS in *Hilton v. Guyot*. Judge Gray, while elaborating in the context of recognition of foreign judgments, wrote that:

[20] Joseph Story, *supra* note 18, at §20.
[21] Joseph Story, *supra* note 18, at §23.
[22] Joseph Story, *supra* note 18, at §38.
[23] Thomas Schultz & Niccolò Ridi, *supra* note 10, at 19.
[24] Donald Earl Childress III, *supra* note 13, at 47.
[25] Campbell McLachlan, *supra* note 15, at 223.
[26] *Id*. at 223.
[27] Thomas Schultz and Niccolò Ridi, *supra* note 14, at 13.

> "[C]omity in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and goodwill, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience and to the rights of its own citizens or of other persons was are under the protection of its laws."[28]

However, he added that this principle operates on the basis of mutuality and reciprocity.[29] While one may question the acceptance of this constraint of reciprocity,[30] SCOTUS's description of comity confirms its intrinsic relationship with the notion of sovereignty. Similar to its theoretical origins, it also provides a justification for the extra-territorial recognition of the sovereign acts of another State. This understanding laid the foundations from which the principle of comity eventually also emerged to operate in the international dispute settlement framework, as a springboard for addressing the risks of parallel proceedings.

III. UNDERSTANDING JUDICIAL COMITY

Comity "*arises from the horizontal arrangement of state jurisdictions*."[31] As previously stated, it plays a significant role in balancing the sovereign interests of a State with that of another; enabling the peaceful co-existence of their respective municipal laws. In the judicial context, its derivative principle, referred to as judicial comity or even comity of courts[32], requires municipal courts to adhere to two cardinal tenets.

Firstly, they shall respect and not interfere with the integrity of judicial orders of a foreign court to the extent that such orders apply to persons and properties within the territorial jurisdiction of the foreign State.

Secondly, they shall respect and not interfere with the integrity of judicial proceedings before courts of a foreign State.[33]

The application of comity of courts in the context of proceedings before municipal law courts is not a matter of controversy. However, one may legitimately question whether this principle can also regulate parallel proceedings before an international arbitration tribunal. To answer

[28] Hilton v. Guyot, 159 U.S. 113, 163-64 (1895) [hereinafter *Hilton v. Guyot*].
[29] Hilton v. Guyot, *supra* note 28, at 228.
[30] Thomas Schultz & Niccolò Ridi, *supra* note 10 at 41. [citing De la Mata v. Am. Life Ins. Co., 771 F. Supp. 1375, 1383 (D. Del. 1991); Johnston v. Compagnie Generale Transatlantique, 242 N.Y. 381, 387 (1926)].
[31] James Crawford, *Brownlie's Principles of Public International Law*, 485 (8 Edition Ed. 2012).
[32] Hartford Fire Ins. Co. v. California, 509 U.S. 764, 817 (1993).
[33] Adrian Briggs, *supra* note 8, at 181.

this question, one must scrutinize how the principle of comity evolved into its judicial incarnation, encompassing a sense of respect for the parties' agreements to arbitrate and the related expectation of orderly arrangement of an international dispute settlement framework.

A. Judicial Comity as Respect for the Parties' Agreement

As noted above, the principle of judicial comity is understood by some as the comity of courts. This understanding, however, can be challenged by reference to the explanations given by Justice Story. In his treatise on Conflict of Laws, Justice Story conceptualizes judicial comity as a matter of comity of nations, and not courts, since the principle ultimately owes its origin to the tacit consent granted by a State.[34] In his view, the role of the courts – as an organ of the State – is limited to merely interpreting and applying the sovereign's will, and nothing more.[35] Simply put, judicial comity denotes comity of nations that is merely implemented by municipal courts.

Notwithstanding this minor conceptual distinction, this is not the only prevalent understanding of the principle of judicial comity.

Since the Westphalian era, the object of comity has changed, or at least diversified, with time. While municipal courts initially relied on comity to justify the application of foreign law, they gradually began to also justify their decisions not only on the basis of the sovereignty of other States but also by reference to the autonomy of transacting parties and the global market.[36] Though surprising, this practice is consistent with the origins of comity, which was developed to address the conflict of law challenges that arose from an increase in cross-border trade. After all, comity was developed as a response to prevalent commercial practices that threatened to contradict the sovereignty of States but was eventually found to be consistent with it. Naturally, any change in this global market or commercial practices, and the challenges posed by it, was likely to influence how the principle of comity could be suitably adapted without deviating from its core objectives.

For instance, the consistent growth of international trade post the Second World War brought before the American courts several cases for enforcement of international contracts containing foreign choice-of-law and choice-of-forum clauses, and arbitration clauses that were

[34] Joseph Story, *supra* note 18, at §38.
[35] Joel R. Paul, *Comity in International Law*, 32 Harv. Int'l L.J. 1, 23 (1991).
[36] Joe R. Paul, *The Transformation of International Comity* 71 L. & Contemp. Probs., 20 (2008).

inconsistent with American statutes.[37] It is evident that such stipulations were rare when the principle of comity was first conceived. However, acknowledging how international trade has evolved, the American courts adapted their understanding of comity to justify the enforcement of such contractual stipulations.[38]

This is best evidenced by the decision in *Mitsubishi Motors Corp v. Soler Chrysler-Plymouth Inc.*, where the SCOTUS held that anti-trust claims concerning an international transaction were arbitrable.[39] The court noted that as international trade had expanded over the recent decades, so too had international arbitration.[40] In such a scenario:

> "[Concerns] of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of international commercial system for predictability in the resolution of disputes, all require enforcement of the arbitration clause […] even assuming that a contrary result would be forthcoming in a domestic context."[41]

This sensitivity to the need of the international commercial system remains one of the core tenets of the principle of judicial comity. It is for this reason that the Restatement (Third) on Foreign Relations Law of 1987 re-characterized the traditional principle of comity as a principle of 'reasonableness', which applied to not only prescriptive but also adjudicatory and enforcement jurisdictions.[42] This way, by tying a novel understanding of comity as reasonableness to foreign sovereigns and the autonomy of private parties, the American courts added further nuance to the principle of comity.[43]

Similarly, with respect to foreign-choice-of-court clauses, if a party had initiated court proceedings in breach of a contractual agreement, it became acceptable for a subsequent court to decline jurisdiction and hold the parties to their agreement. The grant of such remedy did not infringe the non-interference aspect of comity.[44] As Adrian Briggs remarked, private international law has two aspects – the international aspect concerned with giving effect to acts and adjudications of courts, and a private one concerned with the distinct relationships that

[37] Joe R. Paul, *supra* note 36, at 25.
[38] Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 9 (1972); Roby v. Corporation of Lloyds, 996 F.2d 1353, 1363 (2d Cir. 1993); Ingersoll Milling Machine Co. v. Granger, 833 F.2d 680, 685 (7th Cir. 1987).
[39] Mitsubishi Motors Corp v. Soler Chrysler-Plymouth Inc., 473 U.S. 614 (SCOTUS, 1985) [hereinafter *Mitsubishi Motors*].
[40] Mitsubishi Motors, *supra* note 39, at ¶13.
[41] Mitsubishi Motors, *supra* note 39, at ¶8.
[42] Restatement (Third) of Foreign Relations Law of the United States (1987), §403.
[43] Joe R. Paul, *supra* note 36, at 29.
[44] Penn v. Lord Baltimore (1750) 1 Ves Sen 447.

individuals assume for themselves.[45] The principle of comity understands both, and requires the courts to accord respect not just to the former, but also to the latter as long as they do not implicate the interests of a State.[46]

The above developments illustrate how the principle of comity has evolved to encourage the courts to respect not just foreign sovereignty, but also private dispute settlement agreements between parties. This includes an agreement to arbitrate. After all, the principle of comity was developed to make the notion of sovereignty work in the face of pragmatic transnationalism and incidental changes in the manner in which international commerce took place.[47]

B. Judicial Comity as a Global Ordering Principle

The principle of comity as respect for the parties' agreement can justify why municipal courts defer to parallel proceedings before an international tribunal with respect to the same dispute. However, it cannot explain whether an arbitral tribunal, which derives its jurisdiction from the consent of the parties and not a municipal law, must adopt a similar approach. In other words, while a State may require its own courts to respect the parties' agreement, does this responsibility also extend to an investment treaty tribunal?

The above question introduces several hurdles in the discourse. Despite the aforementioned evolution, judicial comity is still considered by some to be rooted to the notion of sovereignty, and thus distinct from mere judicial administration.[48] This creates a dilemma for international tribunals which hold no allegiance to the legal norms of a particular State, and have no direct obligation to vindicate its dictates.[49] Their resort to comity, understood in its traditional sense, accordingly may appear suspicious.

However, it is equally trite that the principle of comity has not remained immune to a transformation of the international dispute settlement framework, in which the disputing parties now prefer to replace the ordinary jurisdiction of municipal law courts with that of consent-based arbitral tribunals. The respective domains of commercial and investment treaty arbitration, which exemplify this transformation, have also undergone a significant alternation,

[45] Adrian Briggs, *supra* note 8, at 92.
[46] *Id.*
[47] Thomas Schultz & Niccolo Ridi, *How Comity Makes Transnationalism Work*, King's College London Dickson Poon School of Law Legal Studies Research Paper Series: Paper No. 2017-14, 2, 4.
[48] Donald Earl Childress III, *supra* note 13, at 61.
[49] Mitsubishi Motors, *supra* note 39, at ¶12.

creating a jurisdictional conflict far in excess of what was envisaged when the principle of comity was first conceived. The proliferation of international law forums has further reinforced this conflict. Therefore, in such a fragmented framework of international dispute settlement, characterized by a conflict between jurisdictions of both municipal courts and international tribunals, each of which enjoy a comparable competence of decision-making,[50] to limit the principle of judicial comity to only municipal courts would defeat its objective.

It is for this reason that both scholars and international tribunals recognize the principle of comity as a principle capable of being applied to regulate parallel proceedings relating to the same dispute.

Yuval Shany, for instance, considers that there are no compelling reasons to restrict the application of the principle of judicial comity only to jurisdictional interactions between municipal courts since the same considerations also apply, perhaps with greater force, in the international sphere.[51] Towards the same end, Thomas Schultz adds that "*comity may assist international courts and tribunals in mediating jurisdictional conflicts between themselves*."[52] He then defines it as "*a primary rule of conduct addressed to judges and arbitrators, asking them to balance some of the variegated interests implied in making one legal regime prevail over another in a specific instance*."[53]

Likewise, several international tribunals have affirmed the relevance of the principle of comity as part of the international dispute settlement framework, albeit without necessarily giving it full effect.

In *Southern Pacific Properties (Middle East) Ltd. v. Arab Republic of Egypt* ["**SPP v. Egypt**"], the tribunal, while addressing the issue of parallel arbitrations, noted that when the jurisdictions of two independent tribunals extend to the same dispute, then "*in the interest of international judicial order, either of the tribunals in its discretion and as a matter of comity, stay the exercise of its jurisdiction pending a decision by the other tribunal*."[54]

[50] Thomas Schultz & Niccolò Ridi, *supra* note 10, at 84.
[51] Yuval Shany, *The Competing Jurisdictions of International Courts and Tribunals,* OUP 261, (2003).
[52] Thomas Schultz and Niccolò Ridi, *supra* note 14, at 26.
[53] Thomas Schultz and Niccolò Ridi, *supra* note 14, at 16.
[54] Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt, ICSID Case No ARB/84/3, Decision on Jurisdiction (27 November 1985), ¶30.

The tribunal in *Achmea BV v. The Slovak Republic* echoed this proclamation. While the tribunal did not deem the parallel proceeding in question as sufficiently co-extensive to claims raised before it so as to warrant a suspension of proceedings, it nevertheless expressed its inclination "*to organize its proceedings with full regard for considerations of mutual respect and comity as regards other courts and institutions.*"[55]

The tribunal in *British Caribbean Bank Ltd. v. The Government of Belize*[56] also cited the observations in *SPP v. Egypt* to affirm the relevance of comity in international arbitration, even though it also ultimately refused to stay its proceedings. It cautioned that the principle of comity, although key, must not "*frustrate a claimant's right to the arbitral forum and, potentially, to the relief offered by the bilateral investment treaty*."[57]

The tribunal in *The MOX Plant Case (Ireland v. United Kingdom)* ["**The MOX Plant Case**"], which was constituted under the United Nations Convention on the Law of the Sea ["**UNCLOS**"], provided one of the most prominent affirmations of judicial comity in international dispute settlement. The Republic of Ireland had brought a dispute concerning the discharge of certain radioactive wastes into the Irish Sea by the United Kingdom, alleging that the latter's acts were in breach of its obligations under the UNCLOS.[58] However, the tribunal noticed that the respondent had also raised certain objections under the law of the European Communities, and there was a real possibility that the European Court of Justice may have jurisdiction over similar issues.[59] The tribunal also noted that it could not firmly establish its jurisdiction until the European Law issues were finally resolved. As such, it held that "*bearing in mind considerations of mutual respect and comity, which should prevail between judicial institutions both of which may be called upon to determine rights and obligations as between two states*", it will be inappropriate for it to proceed further with the proceedings.[60]

[55] Achmea BV (Formerly Eureko BV). v. The Slovak Republic, PCA Case No 2008-13, Award on Jurisdiction (26 October 2010).
[56] British Caribbean Bank Limited v. The Government of Belize, PCA Case No. 2010-18, Award (19 December 2014), ¶187.
[57] *Id.*
[58] The MOX Plant Case (Ireland v. United Kingdom), Order No. 3 (24 June 2003), ¶9 [hereinafter *MOX Plant Case*].
[59] *Id.* at ¶21.
[60] MOX Plant Case, *supra* note 58, at ¶28.

Thus, notwithstanding their varying conclusions, international tribunals do recognize the principle of comity as a relevant tool for addressing instances of parallel proceedings before the international fora.[61]

In a nutshell, in addition to encompassing respect for the parties' agreement, the principle of comity is considered to have undergone a further evolution to mirror the renovation of the international dispute settlement system and it remains capable of addressing the problems arising from overlapping jurisdictions.[62] Consequently, today, comity is as much a principle of global ordering,[63] as that relating to the sovereignty of States. This recognition not only values inter-forum courtesy but equally enables a dialogue between the various competing forums to improve the quality of judicial outcomes and increase their legitimacy.[64]

In light of the above, while the contemporary understanding of comity may appear surprising at first, it nonetheless remains consistent with its origin.

The principle of comity, as originally conceived, had two components: *firstly*, demonstrating mutual trust and confidence in foreign judicial institutions by not interfering with them; and *secondly*, respecting the conclusiveness of the acts of foreign institutions.[65] The contemporary understanding of comity retains these traits even today, despite also being characterized as a global ordering principle. To then insist that these "*foreign judicial institutions*" which merit respect must only be institutions attached to a sovereign as part of its municipal law framework, to the exclusion of arbitral tribunals resulting from the consent of the same sovereigns, would be an unfair limitation imposed on the principle of comity. Equally, it would be inconsistent with the contemporary reality of international relations, which has naturally evolved since the Westphalian peace. This was not the objective with which comity was conceived, including as "*a springboard from which [jurists] proceeded to develop a highly organized and sophisticated set of choice of law rules.*"[66]

[61] Allan Rosas, *With a Little Help from My Friends: International Case-law as a Source of Reference for the EU Courts*, [2005] 5 The Global Community: Yearbook of International Law and Jurisprudence 203, 230.
[62] Yuval Shany, *Regulating Jurisdictional Relations between National and International Courts*, OUP 166, (2007).
[63] Thomas Schultz & Niccolò Ridi, *supra* note 10, at 82.
[64] Yuval Shany, *supra* note 62, at 167.
[65] Adrian Briggs, *supra* note 8, at 91.
[66] Campbell McLachlan, *supra* note 15, at 223.

Viewed from this perspective, the principle of comity bears resemblance to the vague, but often-cited principle of sound administration of justice in international law.[67] This principle was first expounded by the PCIJ in *The Mavrommatis Palestine Concessions* case, explaining that the court "*[was] at liberty to adopt the principle which it considers best calculated to ensure the administration of justice, most suited to procedure before an international tribunal and most in conformity with fundamental principles of international law*."[68] Indeed, investment treaty tribunals commonly refer to some variant of this principle, giving further evidence of its acceptance.[69] This parallel resonates with Thomas Schultz' observation that:

> "[When] domestic courts employ comity, they do so by dismissing or staying proceedings […] demanding the surrender of legal (or judicial) authority from one […] regime to another. The same applies in international adjudication."[70]

Thus, whether the principle of judicial comity can help alleviate issues of parallel proceedings will ultimately depend on one's conception of it. If it is perceived as a principle strictly rooted in the concept of sovereignty, then one may incorrectly dismiss its significance in the context of international tribunals and arbitration. But if one conceives it as a legal tool conceptualized to address the challenges of international commerce without threatening the notion of sovereignty, whilst recognizing "*the occasional need for law to apply trans-nationally in a number of commercial and judicial circumstances*"[71], then its significance as a global ordering principle becomes obvious. Fortunately, the latter conception has gained acceptance as a recognized principle, which resonates with its elasticity and adaptiveness.[72]

This does not mean that the application of the principle, particularly by investment treaty tribunals, is not without challenges. This is particularly so since its application rests completely on the discretion of a tribunal.[73] Nevertheless, as *The MOX Plant Case* demonstrates, its utility as a jurisprudentially sound tool to address the risks created by parallel proceedings ought not

[67] Case concerning Alleged Violations of Sovereign Rights and Maritime spaces in the Caribbean Sea (Nicaragua v. Colombia), Preliminary Objections, Separate Opinion of Judge Trindade, ¶21.
[68] The Mavrommatis Palestine Concessions, Judgment (30 August 1924), Publications of the Permanent Court of International Justice, Series A – No.2, 16.
[69] Bayiindir Insaat Turizm Ticaret Ve Sanayi A.Ş. v. Islamic Republic of Pakistan, ICSID Case No. ARB/03/29, Decision on Jurisdiction (14 November 2005), ¶264 ("orderly settlement of disputes"); Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt, ICSID Case No ARB/84/3, Decision on Jurisdiction (27 November 1985), ¶30 ("in the interest of international judicial order").
[70] Thomas Schultz and Niccolò Ridi, *supra* note 14, at 32.
[71] Thomas Schultz and Jason Mitchenson, *Navigating Sovereignty and Transnational Commercial Law: The Use of Comity by Australian Courts*, 12 Journal of Private International Law 1, 4 (2016).
[72] Joe R. Paul, *supra* note 36, at 38.
[73] Yuval Shany, *supra* note 62, at 169.

to be undermined, especially considering the relative ineffectiveness of other remedial treaty provisions and doctrines.

IV. CONCLUSION

A series of decisions by investment treaty tribunals have, unfortunately, and many a time erroneously blunted the traditional tools available to address the risk posed by parallel proceedings involving the same dispute. These include fork-in-the-road treaty provisions and the principle of *lis pendens*. However, where these tools were considered inadequate, the principle of comity, or its incarnation of judicial comity, holds the potential to provide a more coherent response. Indeed, considering its inherent fluidity and aversion to rigid formulations, one can argue that time is ripe for the principle of comity to realize its immeasurable potential in international dispute settlement.

After all, traditionally linked to the notion of sovereignty, judicial comity has evolved to inculcate a sense of respect for not only other sovereign States but also the parties' agreement to arbitrate. Further, in view of the proliferation of international courts and tribunals across international and municipal law, and their increasingly overlapping jurisdictions, judicial comity has equally been baptized as a principle of global ordering. As such, while the application of the principle is discretionary, its potential is unbridled.

To then borrow words from Yuval Shany, "*while judicial comity is hardly a magic solution to all of the difficulties associated with overlapping jurisdictions, it may provide international arbitrators with a way to break the legal deadlock that the current uncertainty surrounding the ascertaining of 'sameness' of parties and issues entails*."[74] The only remaining question is whether a tribunal will now demonstrate the necessary will to do so.

[74] Yuval Shany, *Similarity in the Eye of the Beholder: Revisiting the Application of Rules Governing Jurisdictional Conflicts in the Lauder/CME Cases* in Arthur W. Rovine (ed)., *Contemporary Issues in International Arbitration and Mediation – The Fordham Papers 2007*, 138 (Martinus Nijhoff Publishers 2008).

UNLOCK THE VALUE OF YOUR DATA USING EDISCOVERY TECHNOLOGY IN ARBITRATIONS

Amit Jaju & Ankush Lamba*

I. BACKGROUND

In today's digital era, organizations are generating an unprecedented volume of communications data and documents in varied forms spread across servers, cloud, laptops, mobile phones, etc. According to industry reports, 79 zettabytes of data will be created in 2021 and this figure is projected to grow to over 180 zettabytes by 2025.[1]

"***Data is the new oil.*** Data is valuable but just like oil, it is not the raw data that's worthwhile, but the refined data obtained by breaking it down and analysing thereafter."[2] When properly organised and refined, it provides invaluable insights.

In case of a dispute, it is now common that the relevant data exists mostly in electronic form, which underscores the significance of electronic data being the primary gateway to facts surrounding the case. The parties, thus, preparing for an arbitration should be aware of the rules governing the use of electronically stored information ["**ESI**"] and explore electronic discovery ["**eDiscovery**"] technology to provide fact-based assessments on large volumes of data in a timely and effective manner.

eDiscovery refers to discovery in legal proceedings such as arbitration, litigation, government investigations, or Freedom of Information Act requests, where parties involved preserve, collect, process, review, analyse and report information in electronic formats for the purpose of using it as evidence. All these aforementioned steps are facilitated by eDiscovery technology and processes; enabling the parties to unveil important information concerning the dispute with reduced costs, quickened decisions, and mitigated risks.

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[1] Arne Holst, *Volume of Data/Information Created, Captured, Copied, And Consumed Worldwide From 2010 to 2025*, STATISTA (Jun. 7, 2021), https://www.statista.com/statistics/871513/worldwide-data-created/.

[2] Charles Arthur, *Tech Giants May Be Huge, But Nothing Matches Big Data*, THE GUARDIAN (Aug. 2013), https://www.theguardian.com/technology/2013/aug/23/tech-giants-data.

The focus of this paper is threefold:

- to cover protocols for the disclosure of the ESI in an arbitration matter;
- to outline ESI and stages of eDiscovery technology; and
- to illustrate the ways to use eDiscovery in arbitration matters.

II. ESI DISCLOSURE IN ARBITRATIONS

Arbitration is an alternative form of dispute resolution enabling the parties to reach an amicable resolution outside the courts. An arbitrator has the authority to demand electronic data to be presented in such cases. With ESI becoming increasingly prevalent in arbitrations[3], it has become vital for the arbitrators seeking large volumes of electronic disclosure ["**e-disclosure**"] to familiarize themselves with the protocols laid down by arbitral institutions like the Indian Council of Arbitration, International Institute for Conflict Prevention and Resolution ["**IICPR**"],[4] Chartered Institute of Arbitrators ["**CIArb**"], ICC, LCIA guiding on disclosure of the data in an electronic format.

These protocols in general cover two purposes. First, to assist arbitrators in addressing document disclosure by setting out general principles for dealing with requests regarding the disclosure of documents and electronic information. Second, to allow parties either when drafting an arbitral agreement, or after a dispute arises, to elect "certain modes of dealing with the disclosure of documents."[5]

As per the Protocol of the CIArb, some of the early considerations that arbitrators and parties must include for the e-disclosure process are:[6]

(i) whether disclosure of electronic documents and information is likely to be requested

[3] *Using Technology and e-Disclosure*, GLOBAL ARBITRATION REVIEW (Sept. 3, 2021), https://globalarbitrationreview.com/guide/the-guide-evidence-in-international-arbitration/1st-edition/article/using-technology-and-e-disclosure#footnote-069.
[4] Homepage, INTERNATIONAL INSTITUTE FOR CONFLICT PREVENTION & RESOLUTION, https://www.cpradr.org/.
[5] *Protocol for E-Disclosure in International Arbitration*, CIARB INTL. ARB. PROTOCOL, https://www.ciarb.org/media/1272/e-iscolusureinarbitration.pdf.
[6] *CPR Protocol on Disclosure of Documents and Presentation of Witnesses in Commercial Arbitration*, IICPR, https://www.cpradr.org/resource-center/protocols-guidelines/protocol-on-disclosure-of-documents-presentation-of-witnesses-in-commercial-arbitration/_res/id=Attachments/index=0/CPR-Protocol-on-Disclosure-of-Documents-and-Witnesses.pdf; JOHN RANGE & JONATHAN WILAN, INSIDE THE MINDS: EDISCOVERY IN ARBITRATION, (Thomson Reuters/Aspatore, 2010).

by either party;

(ii) the types of electronic documents in each party's control and the identity of the computer systems, electronic devices, storage systems and other media on which ESI is retained;

(iii) steps that should be taken to preserve electronic information;

(iv) Particular rules that govern disclosure and use of the ESI, such as the IBA Rules on the Taking of Evidence in International Commercial Arbitration;

(v) whether agreements limiting the scope or extent of e-disclosure are desirable;

(vi) Tools and techniques that would be useful to focus the electronic search and reduce its cost;

(vii) whether special arrangements to ensure data privacy or to protect privilege (i.e., clawback provisions) are appropriate; and

(viii) any professional guidance that is necessary to assist the parties or tribunal with IT issues related to disclosure.

Further, Schedule 2 of the IICPR protocol highlights the "Modes of Disclosure of Electronic Information" and the four "modes" of disclosure for ESI.[7]

- "Mode A" provides minimal e-disclosure, limited to documents a party will rely on in support of its case, produced in paper or other reasonably usable forms.

- "Mode B" provides for disclosure, "in reasonably usable form," by a limited number of "designated custodians" (the actual number to be selected by the parties and/or the tribunal), covering ESI created between the date of signing of the agreement in dispute and the date of the request for arbitration, to be provided only from "primary storage facilities" having "reasonably accessible active data" (i.e., not from backup servers or tapes, PDAs, or voicemails).
- "Mode C" is the same as Mode B, but covers a larger number of custodians, a wider time period, and allows the parties to agree upon a showing of "special need and

[7] Homepage, EDRM, https://edrm.net/.

relevance disclosure of deleted, fragmented or other information difficult to obtain other than through forensic means."

- "Mode D" authorizes disclosure essentially similar to the U.S. Federal Rules of Civil Procedure, where all non-privileged electronic information "relevant to any party's claim or defence" is produced, subject only to limitations on "reasonableness, duplicativeness, and undue burden."

Parties selecting Modes B, C, or D must "meet and confer, before an initial scheduling conference with the tribunal, concerning the specific modalities and timetable for electronic information disclosure."

III. ESI AND STAGES OF EDISCOVERY TECHNOLOGY

With technology evolving at a rapid pace, ESI can exist in various electronic devices in a wide range of formats and types spread across an organization's databases and other data sources. It can include "emails, documents, chats, message, databases, voicemail and audio/video files, writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations." It also includes any type of data from social media, instant messaging platforms or smartphone apps. That means that every post on Facebook, Twitter or a message sent over WhatsApp, Signal or Telegram can be considered as valuable information.

Another important part of electronic data is the metadata embedded in electronic files. Metadata is the information generated within a piece of electronic data that is 'data about data'. It exists within every digital file stored on physical electronic devices, such as your computer and smartphone, IOT device etc. The information contained within metadata includes author, creation date, history, software used to create it, usage of the device, digital footprint data, etc. Metadata often entails the story about the electronic data file and, therefore, is often a key focus of eDiscovery[8] and must be carefully preserved to prevent data spoliation. Even moving a file from one location to another location can modify the metadata information and question the authenticity of the ESI.

Significant efforts are being put to create workflows and establish best practice recommendations to help organisations manage ESI and meet the legal requirements. In 2005,

[8] eDiscovery Homepage, CYFOR, https://cyfor.co.uk/ediscovery/.

EDRM ["**Electronic Discovery Reference Model**"] was created, which outlines the stages of the eDiscovery process.

EDRM is designed to guide on gathering and assimilating of electronic data during the legal process. The EDRM framework is a conceptual standard for the eDiscovery process. This means that those following EDRM could engage some, but not all, of the steps outlined in the model and still successfully discover relevant data.

In recent years, the EDRM has grown to embrace the information governance lifecycle, which is now listed as the first stage of the EDRM model.

The EDRM helps to determine what data to preserve and how to manage the preserved data. It includes the following steps:[9]

- **Information Governance** – Setting policies, procedures, processes and controls implemented to manage and secure electronic information consistently at an enterprise level, supporting an organisation's immediate and future regulatory, legal and risk requirements.
- **Identification** – Locating potential sources of ESI & determining its scope, breadth & depth.
- **Preservation** – Ensuring that ESI is protected against inappropriate alteration or destruction.
- **Collection** – Gathering ESI for further use in the e-discovery process (processing, review, etc.).
- **Processing** – Reducing the volume of ESI and converting it, if necessary, to forms more suitable for review & analysis.
- **Review** – Evaluating ESI for relevance & privilege.
- **Analysis** – Evaluating ESI for content & context, including key patterns, topics, people & discussion.
- **Production** – Delivering ESI to others in appropriate forms & using appropriate

[9] *EDRM Model*, EDRM, https://edrm.net/resources/frameworks-and-standards/edrm-model/.

delivery mechanisms.

- **Presentation** – Displaying ESI before audiences (at depositions, hearings, trials, etc.), especially in native & near-native forms, to elicit further information, validate existing facts or positions, or persuade an audience.

IV. WAYS TO USE eDISCOVERY TECHNOLOGY IN ARBITRATION

eDiscovery technology is an apt answer in providing time and cost-effective solutions to arbitration cases. Following are the ways in which eDiscovery technology can be utilised in an arbitration.

A. Data Preservation and Managing Legal Holds

Data preservation is the foundation of the eDiscovery process and one cannot engage in discovery if the relevant data information is not well preserved. It involves steps such as identifying, securing and maintaining data as per arbitration requirements. Further, in the data preservation process, there is a heightened focus on maintaining ESI in an original and unaltered condition. Unlike hard copy documents, electronic documents also contain metadata. Since metadata can play a significant role in such cases, parties involved in an arbitration demand that organizations preserve it to ensure the authenticity of the data.

In case the data is not preserved with relevant metadata, the opposing party may raise objections and the data may not be admissible. Further, any event of 'Data Spoliation' - missing information, destruction or alteration of relevant data or the loss of discoverable information can be subject to severe penalties by the arbitration authority or the individual arbitrator.

To avoid 'Data Spoilation', parties involved in the matter implement and manage legal hold to initiate the data preservation activity. Legal hold is the practice and process of ensuring ESI is preserved during a legal matter. Parties with their technology experts map out the relevant devices that store data and further map it out to the list of individuals who may be holding these devices or data. These individuals are referred to as 'custodians' and are sent a legal hold notice to exempt the electronic data in question from any activity of deletion or alternation till the time a resolution is reached in the underlying matter.

Data preservation or collection of the ESI is neither a one size fit all endeavour, nor is it a process that is supported by a single technology. Different approaches exist for ESI collection

which require high end digital forensic tools and forensic technology expertise. The approach taken depends on the type of digital device from which data needs to be collected. For example, the procedure for acquiring electronic data from a computer hard drive is different from the procedure required to obtain electronic data from mobile devices, such as smartphones. Digital forensics collection procedure essentially involves the following steps:

- Step 1 – Seizure of the storage media.
- Step 2 – Acquiring the storage media forensically; that is, creating a forensic image of the media using forensic tools. This will create a bit-by-bit exact copy of the original data and ensure the original data is not altered.
- Step 3 – Analysing the forensic image and original data by calculating the Hash value using an algorithm. A matched hash value[10] ensures that a bit-by-bit mirror image is created of the original media.
- Step 4 – Another backup copy of the forensic image is created for preserving the evidence and further analysis.

Data preservation activity is traditionally done on-site and in person. However, the impact of COVID-19 and restrictions on travel has resulted in adopting a remote approach for ESI collection.

B. Data Processing and Searching Techniques for Relevant Information

With the data collected in the data preservation activity, identification of the pertinent ESI is one of the most challenging phases as it requires determining what information is preserved and identifying the most efficient way to sort through the potentially relevant information. Two techniques are employed on the data - 1) Processing and 2) Searching techniques. In addition to these two techniques, advanced analytics and technology assisted review has also been deployed in recent times. These advanced techniques are discussed in this article.

i. Data Processing

[10] *Hash Values are the DNA of Digital Evidence*, FORENSIC DISCOVERY (Aug. 2021), https://forensicdiscovery.expert/hash-values-are-the-dna-of-digital-evidence/. Hash Value is a function that calculates numeric value of a fixed length to uniquely identifies data.

Before any collected data can be searched or reviewed, it must first be "processed." With the range of potential ESI sources continually multiplying and creating different formats of electronic data, it is important to choose the right solution platform that can cater to all the data types, sizes, and structures of any language and convert the collected ESI into a simple data form that can later facilitate efficient review. Choosing the right platform and having the right processing specification in the processing stage is very important to get a useful result and eliminate the risk of missing out on important information.

During the data processing phase, data is injected into the platform where the following activities take place:

- Native files are unpacked/expanded. For instance, an email with the attachment becomes a separate record with a link established as parent email and child attachment.
- Metadata for each data file is extracted and normalised in a single form for further search analysis.
- Unique control ID number is assigned to each data item for identification by the platform.
- Optical Character Recognition ["**OCR**"] technique involving detection of text/characters from image files, scanned documents or PDFs makes the documents searchable by keywords.
- Processing time zone – Files processed of different time zone are converted to a single time zone format as per the setting specified during processing.
- Data Culling – Using the extracted metadata fields, documents are filtered based on the date and relevant data is filtered out as per the decided period of scope. This is termed as 'Data filtration'.
- Deduplication – Duplicate files are identified across multiple data sources/custodians. Further 'Dupe Custodian' field is created which captures the custodian name whose version of a file was deduped out, so it can be determined who else had a copy of the documents.
- deNISTing – removing system files, program files, and other non-user created data

from the ESI that do not contain any user-generated content and is not relevant to the discovery matter.

Once the processing steps are completed, the data can now be searched for relevant information.

ii. Searching

The searching technique is another critical step that helps to reduce the volume of data by identifying and applying an effective set of keywords on the data to produce a good, effective and responsive result set. These keywords or "search terms" are discussed and agreed upon between the parties and their attorneys. Since reviewing every item of electronic data is impractical, the data set needs to be reduced to a manageable size for the parties to identify the relevant data to analyse. Keyword searching techniques enable to narrow down metadata, documents and e-mails content, thereby, reducing large data sets down to only those items that contain the information that is relevant for the matter and segregating non-responsive documents.

The choice of terms is crucial for a successful result. Also, it is recommended to take guidance from eDiscovery technology experts in framing the terms that are acceptable to the solution platform.

Another method of searching data is 'concept search or concept clustering'. This technique focuses on related concepts within the document or email that is conceptually similar to the search phrase. This technique takes a group of data and then breaks it into groups of "similar documents". It is effective when applied during the review phase as the grouping of the documents is an effective way to navigate a responsive dataset. However, careful consideration must be given to how concept searching is applied as it does not confirm the presence or absence of the target data for which concept search is applied. Further, when information is presented in conceptual clusters, the attorney can review that information at a faster rate, saving both time and money.

For matters with a compressed time frame, the attorney can sometimes become overburdened by the dependency on keyword searches, mainly in cases where the keywords set out are providing false hits or missing out on extremely important documents or unnecessary review time. The search output can turn out to be effective by working closely with the eDiscovery

technology team and underlining the objective of the matter. This helps in formulating an effective approach to search the data and identify which advanced search features may suit the attorney's requirement.

C. Technology-Assisted Review

Over the years, organisations have been overwhelmed by the volume of data that they continue to create and receive. Zettabytes of digital data is stored on the server, cloud storage and personal devices. This era of "Big Data" has challenged organisations to better manage their ESI. A complex arbitration matter may encounter a scenario of examining through terabytes of the data involving countless emails and documents to understand the case and also reviewing the large production received from the other side. This may make it increasingly difficult for the parties to manage the cost of arbitration matters. Attorneys and parties further look forward to eDiscovery technology - 'Technology Assisted Review' ["**TAR**"] to aid in culling down the huge amounts of data to make the review process more practical and cost-effective.

TAR is the process of using machine learning algorithms to categorize each document as responsive or not, or to prioritize the documents from most to least likely to be responsive, based on a review performed by the legal professionals by coding of a small subset of the documents. TAR is faster and more accurate than manual review in which reviewers go through every document one by one (often referred to as "linear review"). TAR not only helps to prioritize a review but it may also be possible to exclude a large percentage of the emails and documents as unreviewed. This significantly reduces the time required for the manual review and ensures that no key document is missed. To use TAR, the machine learning model needs to be trained to achieve quality output. For this, the eDiscovery technology professional works closely with legal professionals and subject matter experts. Further, the technology professional plays a vital role in setting up the required framework for TAR and guiding the reviewer team on the necessary steps that need to be followed such as:

- **Setting up the protocol and educating the reviewer:** This involves building the reviewer coding rules that are taken into account for the use of TAR. For instance, to decide how to treat the coding of family documents during the TAR training process. Further, these rules are highlighted to the reviewers before starting the TAR review.

- **Coding documents:** Reviewers apply subjective coding decisions to documents to adequately train the TAR model e.g., Relevancy, Responsive or Not Responsive.

- **Predicting result:** This step involves applying information "learned" from the previous step of coding documents and classifying a large number of documents with pre-determined labels.

- **Testing and evaluating results:** This involves validating the results generated using the TAR model, in an effort to create a meaningful metric of TAR performance and determining if the TAR system has achieved the goals anticipated by the review team.

D. Redacting Privileged or Sensitive Information

Protecting both privileged information as well as personally identifiable information ["**PII**"] is of utmost importance in any arbitration matter and needs to be carefully and methodically reviewed and safeguarded. Before producing documents in paper or electronic form to the opponent party, it is important to ensure that any privileged or sensitive information is fully removed. In this regard, redaction is an important activity in the eDiscovery process. In the early days, a typical method of redaction was to do it manually by printing the documents, using a black marker to mask the information, then photocopy the marked-up pages several times to ensure complete obscuration before re-scanning them back into the system. As the volume of ESI has increased, this method of redaction has become cumbersome, expensive and even unrealistic given the disclosure deadlines. Another challenge the attorney's face today is applying redaction manually on the electronic data using tools or platforms that do not have the feature of creating a redaction log report. Without the redaction report, this could turn to be a tedious activity and can take hours if it is to be applied for a large number of documents.

eDiscovery technology has developed and implemented redaction tools to search for privileged or sensitive or private information and ensure that it is eliminated entirely - not just from the document but also from the metadata of the document. Using this technology saves a significant amount of time and expenditure, enabling parties to produce thousands of redacted documents with just a few clicks in the platform, in a few minutes. It keeps a track of the documents redacted during the review and creates a consolidated report at the end of the review providing details such as a list of redacted documents with their metadata and reason for the redaction submitted.

E. Advanced Analytics

With the rise in eDiscovery technology, attorneys are moving away from the standard linear review of custodians and documents (i.e., reviewing one document after another, ordered by date or keyword relevance) and adopting the analytics approach in the document review to bring more efficiency and accuracy to the eDiscovery process.

Advanced Analytics in the eDiscovery process can relate information about the data, provide greater insight for the document review, locate key documents more quickly, which can later result in key informed decision making by attorneys and help them in estimating the scope of the eDiscovery project.

eDiscovery analytics is highly advanced, constantly evolving and requires training. In collaboration with the trained eDiscovery technology experts, these tools can save significant time of the attorneys when added to the workflow of the project and achieve quality output at a faster rate. Some of the advanced analytics features include:

- **Near Duplicate Detection:** It involves the comparison of every document against each other to determine whether their similarity is greater than the set threshold. If greater than a threshold then the documents are identified as near duplicate.

- **Communication Analytics:** Provides a visual representation of the communications over a specific set of email documents. Shows patterns of conversations such as – Who's having the conversations, how often, what are they talking about, and how invested are they?

- **Email Threading:** It identifies email relationships - threads, people involved in a conversation, attachments, and duplicate emails - and groups them together so you can view them as one coherent conversation.

- **Audio and Video Discovery:** Adding transcription of the text to the metadata of the files to ease the analysis and review.

- **Personal data (PII) detection:** performs pattern identification analytics highlighting social security numbers, phone numbers, health records, etc., for redaction.

- **Image Recognition and Classification:** Uses machine learning algorithms to identify

and apply labels to images to facilitate search and filter without looking at every image.

VI. CONCLUSION

eDiscovery in an arbitration requires the parties to gather the necessary ESI for an arbitrator to work with the parties to reach useful resolutions. In such matters, it can be beneficial for the parties to collaborate with eDiscovery technology experts throughout the course of the arbitration process to manage all technical activities related to the electronic data. This also lowers the burden on the attorneys to get the optimum output in a shorter timeframe from all the necessary steps that need to be performed across the matter such as identification of the data sources, managing the legal hold and preserving the data.

eDiscovery technology when properly utilized with technology experts can reduce organizational risk while also providing substantial cost reduction.

CASE REVIEW

ENKA V. CHUBB: THE UK SUPREME COURT'S DECISION ON THE LAW GOVERNING THE ARBITRATION AGREEMENT

Vyapak Desai and Arth Nagpal*

I. INTRODUCTION

The Supreme Court of the United Kingdom ["**UKSC**"] on 9 October 2020 handed down a much-anticipated judgment in the realm of international arbitration law. *Enka Insaat Ve Sanayi AS v. OOO Insurance Company Chubb*[1] ["**Enka v. Chubb**"] enabled the UKSC to offer greater clarity in the ascertainment of the law governing the arbitration agreement, a quandary long unsettled. Notable decisions in this regard in the past include *C v. D*,[2] *Sulamerica Cia Nacional de Seguros SA v. Enesa Engenharia SA*,[3] ["**Sulamerica**"] and *Kabab-Ji SAL (Lebanon) v. Kout Food Group (Kuwait)*,[4] all of which have been examined by the UKSC to reach a conclusion in this case.

This article attempts to recount the facts of the case in question, analyze the holding of the UKSC and delineate the implications of this judgment as regards the arbitration practice.

II. ENKA V. CHUBB: BRIEF FACTS

Enka Insaat Ve Sanayi AS ["**Enka**"] is a Turkish company that was engaged by a Russian company called Energoproekt as a sub-contractor, out of the many others involved in the construction of a power plant situated at Berexovskaya in Russia. PJSC Unipro ["**Unipro**"], the company that owned the power plant, was insured by OOO Insurance Company Chubb ["**Chubb**"] against damage caused by fire.

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[1] Enka Insaat Ve Sanayi AS v. OOO Insurance Company Chubb, [2020] UKSC 38 [hereinafter *Enka v. Chubb*].

[2] C v. D, [2007] EWCA Civ 1282.

[3] Sulamerica Cia Nacional de Seguros SA v. Enesa Engenharia SA, [2012] EWCA Civ 638 [hereinafter *Sulamerica*].

[4] Kabab-Ji SAL (Lebanon) v. Kout Food Group (Kuwait), [2020] EWCA Civ 6.

By way of an assignment agreement between Energoproekt, Unipro, and Enka, all rights and obligations of the Energoproekt under its construction agreement stood transferred to Unipro. As per the dispute resolution clause of the assignment agreement, any dispute between Unipro and Enka was to be finally and exclusively resolved by arbitration in accordance with clause 50.1 of the construction contract.[5] Clause 50.1 stated thus:

> "….If the matter is not resolved within twenty (20) calendar days after the date of the notice referring the matter to appropriate higher management or such later date as may be unanimously agreed upon, the Dispute shall be referred to international arbitration as follows:
>
> - the Dispute shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce,
> - the Dispute shall be settled by three arbitrators appointed in accordance with these Rules,
> - the arbitration shall be conducted in the English language, and
> - the place of arbitration shall be London, England."[6]

The following events culminated in the present appeal:

Date	Event
1 February 2016	A power plant at Berezovskaya in Russia was severely damaged by fire
	Chubb paid 26.1 billion roubles to Unipro under its property insurance policy as it became subrogated to any rights of Unipro to claim compensation from third parties for the damage caused by the fire
25 May 2019	Chubb Russia filed a suit in Moscow's Arbitrazh Court ["**Russian Court**"] against Enka and other sub-contractors alleging that they caused the fire and claiming $400 million from Enka and other involved sub-contractors
16 September 2019	Enka sought an anti-suit injunction in the Commercial Court of London to restrain Chubb from further pursuing the Russian proceedings

[5] Enka v. Chubb, *supra* note 1, at ¶11.
[6] Enka v. Chubb, *supra* note 1, at ¶10.

Date	Event
	on account of it breaching their arbitration agreement
15 October 2019	Carr J of the Commercial Court of London refused to grant an ad-interim anti-suit injunction and gave directions to proceed with an expedited trial
17 September 2019	Enka filed a motion in the Russian proceedings seeking dismissal of Chubb's claim on account of a subsisting arbitration agreement
20 December 2019	Baker J, dismissed Enka's claims against all defendants and held that the appropriate forum to decide whether Chubb's claims fell within the arbitration agreement was the Russian Court and not the English Commercial Court
18 March 2020	The Russian Court decided to deal with Enka's motion as well as the merits of Chubb's claim, denying Enka's reference to arbitration and dismissing Chubb's claims against all the sub-contractors on the merits. Both Enka and Chubb filed appeals to this decision
29 April 2020	English Court of Appeals allowed Enka's appeal and issued an anti-suit injunction restraining Chubb Russia from continuing the Russian proceedings
10 January 2020	Enka issued notice to Chubb under clause 50 of the construction contract kickstarting the arbitration process
5 June 2020	Chubb Russia's application for permission to appeal against the Court of Appeals decision and stay of the anti-suit injunction was granted by the UKSC

III. MAIN ISSUES

The central issue according to the UKSC was the determination of the system of national law which governs the validity and scope of the arbitration agreement when the law applicable to the contract containing it is different from the law of the seat of the arbitration. The broad ruling of the UKSC aligned with the Court of Appeals on the conclusion but took a different route to reach this point. The following segment gives a brief overview of their respective decisions.

IV. LAW GOVERNING THE ARBITRATION AGREEMENT: TWO PATHS LEADING TO THE SAME DESTINATION

A. Court of Appeals – First Path

In a unanimous decision rendered by Popplewell LJ, the Court of Appeals held that the law of the seat of arbitration would usually govern the arbitration agreement, "*subject only to particular features of the case demonstrating powerful reasons to the contrary.*"[7] The following are some of the reasons provided to reach this conclusion:

1. Separability – a choice of law to govern the contract has "*little if anything to say about the arbitration agreement law choice because it is directed to a different and separate agreement*", due to the doctrine that an arbitration agreement is severable from the contract.
2. The 'overlap' argument – drawing from *XL Insurance* v. *Owens Corning*,[8] "*the overlap between the scope of the curial law and that of the [arbitration agreement] law strongly suggests that they should be the same*", deeming it natural to regard a choice of the seat as an implied choice of the law applicable to the arbitration agreement.
3. Relationship between curial law and arbitration agreement law – since there is no clear division between procedural and substantive provisions in the Arbitration Act 1996, choosing an English seat implies the parties' intention to choose English law to govern their arbitration agreement.

[7] Enka v. Chubb, *supra* note 1, at ¶91.
[8] XL Insurance Ltd v. Owens Corning, [2001] 1 All ER (Comm 530).

B. UKSC – Second Path

According to the UKSC, the law governing the arbitration agreement would be the same as the law governing the contract if the same has been specified by the parties. However, in the absence of the same, the 'closest connection' test applies, thereby implying that the law of the seat of arbitration would govern the arbitration agreement. The reasons for construing a choice of law to govern the contract as applicable to the arbitration agreement according to the UKSC include certainty, coherence, consistency, prevention of complexities and uncertainties, and prevention of artificiality.[9] The following are some of the factors which influenced the UKSC's decision:

1. Validation principle – an interpretation which upholds the validity of a transaction is to be preferred to one which would render it invalid or ineffective (e.g., an arbitration agreement without names of the arbitrators to be appointed would be valid in English law, but invalid in Scottish law, and hence, the former must prevail). As per Moore LJ in *Sulamerica*,[10] commercial parties are unlikely to have intended a choice of governing law for the contract to apply to an arbitration agreement if there is "*at least a serious risk*" that a choice of law would "*significantly undermine*" that agreement.[11]
2. Closest connection test – in the absence of a choice of law governing the contract, it is reasonable to start from the assumption that all the terms of the contract, including the arbitration clause, are governed by the same system of law. However, if a seat of arbitration has been indicated, the law of the seat of arbitration shall be regarded as the law of the arbitration agreement in accordance with precedent.
3. Place of performance – as the subject matter and purpose of an arbitration agreement are different from those of the overarching contract, there is no reason to interpret the place of performance of these two laws to be closely connected.
4. Consistency with the New York Convention ["**Convention**"] – as per Article V(1)(a) of the Convention, the limited grounds of refusal to recognize or enforce a foreign arbitral award are – invalidity of the arbitration agreement, failing any indication thereon, under the law of the country where the award is made. Hence, the Convention also assumes application of the law of the seat of arbitration by default, if no choice of law governing the arbitration agreement is made.

[9] Enka v. Chubb, *supra* note 1, at ¶53.
[10] Sulamerica, *supra* note 3, at ¶31.
[11] Enka v. Chubb, *supra* note 1, at ¶109.

Applying these principles to the present case, the UKSC summarized its position stating that "*the choice of a different country as the seat of the arbitration is not, without more, sufficient to negate an inference that a choice of law to govern the contract was intended to apply to the arbitration agreement*".[12] The additional factors which do negate such an inference are –

(a) any provision of the law of the seat which indicates that, where an arbitration is subject to that law, the arbitration agreement will also be treated as governed by that country's law; and
(b) the existence of a serious risk that, if governed by the same law as the main contract, the arbitration agreement would be ineffective.[13]

However, in the absence of a choice of law provision to govern the contract the closest connection test must be applied to ascertain the law governing the arbitration agreement. Accordingly, the UKSC affirmed the Court of Appeals decision, although for different reasons, and held that English law governed the arbitration agreement.

V. ANALYSIS AND TAKEAWAYS

This is a welcome judgment from the UKSC, which, along with the entire international arbitration community, has long struggled with the determination of the law governing the arbitration agreement. As is already known, the execution of any international arbitration broadly involves three distinct sets of laws: *firstly*, the law governing the substantive contract; *secondly*, the law governing the arbitration agreement; and *thirdly*, the law governing the arbitration proceedings. It hardly needs restating that the law governing the contract would be applicable to substantive obligations relating to the rights and obligations of parties. Similarly, the law governing the arbitration agreement applies solely to the arbitration agreement and resolves questions as to its legality and the arbitrability of the dispute in question. Lastly, the law governing the arbitral proceedings – or the curial law – is the law under which the award is enforced. The main question before the UKSC was the determination of the law governing the arbitration agreement in the absence of any indication to that effect being made in the agreement itself by the parties.

However, certain issues remain unsolved: for instance, the ascertainment of an indication by the parties of a choice of law of contract is a subjective exercise which ought to be guided by

[12] Enka v. Chubb, *supra* note 1, at ¶170.
[13] *Ibid.*

principles enshrined in the Rome Regulations. Although the UKSC went into adequate detail applying the Rome Regulations to ascertain the governing law of contract, why the inferred law was not considered an implied choice of the parties for governing the contract would require further clarification.

Furthermore, although the decision is certainly pro-arbitration, whether it can be considered pro-party choice is another concern. As Burrows J mentions in the minority judgment, the emphasis on the seat of arbitration can arguably be excessive, and possibly stems from a conception that "*arbitrators at the seat would only be comfortable applying their own law*."[14] This, at least considering the current arbitration landscape, is an antiquated position as it ignores the flexibility of arbitral procedures and the expertise of arbitral tribunals and centres in applying a certain intended set of laws. It is also stated by Burrows that an implied choice by the parties should be given the same amount of weight as an express choice made by the parties.[15] This echoes the concern raised in the previous paragraph regarding according importance to a choice of law of contract not expressly indicated by the parties. What qualifies as an indication of choice of law by the parties is perhaps a ripe area for further discussion.

Notwithstanding, the aforementioned unresolved issues, the UKSC recently upheld the ratio in *Enka v. Chubb,* in the case of *Kabab-Ji SAL* v. *Kout Food Group*[16] where a similar question about the law that governed the arbitration agreement was raised. However, unlike in *Enka v. Chubb,* the question of governing law was raised after the award was passed during the enforcement stage in English courts. Nevertheless, the UKSC opined at paragraph 35 that "*it would be illogical if the law governing the validity of the arbitration agreement were to differ depending on whether the question is raised before or after an award has been made*".[17] While applying the ratio in *Enka v. Chubb*, the UKSC held that providing a choice of law that would govern the entire contract would be "*sufficient indication*" of the parties to have chosen that same law to govern the arbitration agreement as well. This judgement strengthens the applicability of the ratio in Enka v. Chubb and consequently, reinforced the importance of unresolved issues as discussed in the previous paragraph.

[14] Enka v. Chubb, *supra* note 1, at ¶242.
[15] Enka v. Chubb, *supra* note 1, at ¶245.
[16] Kabab-Ji SAL v. Kout Food Group, [2021] UKSC 48.
[17] Enka v. Chubb, *supra* note 1, at ¶35.

VI. POSITION OF LAW IN INDIA AND OTHER JURISDICTIONS

The position of law with respect to law governing arbitration agreements was settled by the Supreme Court of India in *NTPC* v. *Singer Co.* ["**NTPC**"].[18] It is concurrent with the position of the UKSC that the law governing the arbitration agreement is normally the same as the law governing the main contract. In the event the law governing the contract has not been specified, *NTPC,* like *Enka* v. *Chubb,* also gives rise to a presumption that the law of the country where the arbitration is agreed to be held is the law of the arbitration agreement. However, in the words of the Supreme Court, this is only a "*rebuttable presumption*".[19]

Conflicting decisions can be seen in the United States such as *Balkan Energy (Ghana) Ltd. v. Republic of Ghana*,[20] wherein the law of the arbitral seat was held to govern the arbitration agreement, on the basis of Albert van den Berg's interpretation of the Convention. Another disparate jurisdiction is France, whereas prescribed in *Municipalité de Khoms El Mergeb v. Société Dalico*[21] – the arbitration clause is considered to be legally independent from the main contract, and as a result, French substantive rules of international arbitration are applied to the arbitration agreement. Neither does Singapore have a consistent approach to ascertaining the law with respect to arbitration agreements. In *BNA* v. *BNB*,[22] the Singapore Court of Appeals disregarded the validity principle and held that the law of the People's Republic of China would govern the arbitration agreement, despite it potentially invalidating the same.

VII. CONCLUSION

A conclusive decision in respect of ascertaining the law governing the arbitration agreement was long due. It is not always easy deciphering the intention of parties in selecting a law to govern a certain part of the contract, and especially an arbitration clause that defies commonly accepted notions of contractual interpretation on account of its severability and its far-reaching legal implications. Over the course of time, the convergence of judicial opinions is sure to have a positive impact on international arbitrations on account of greater consistency and support by apex courts of pro-arbitration jurisdictions.

[18] National Thermal Power Corporation v. Singer Company, [1992] 3 SCC 551 [hereinafter *NTPC v. Singer*].
[19] NTPC v. Singer, *supra* note 18, at ¶23.
[20] Balkan Energy (Ghana) Limited v. Republic of Ghana, PCA Case No. 2010-07.
[21] Cour de cassation [Cass.][supreme court for judicial matters], civ., Dec. 20, 1993.
[22] BNA v. BNB & Anr., [2019] SGCA 84.

BOOK REVIEW

Commercial Arbitration: International Trends and Practices, Edited by Prof. Chirag Balyan and Yashraj Samant, Advocate; Foreword by Gary. B. Born (Published by Thomson Reuters, Legal 2021, ISBN: 978-93-90673-79-7), pp Ixxiii + 371; Price INR 1200, $ 17.00

Dineshwar Gaur*

The book which forms the subject matter of this review is an unconventional piece of writing. It delivers an assortment of widespread experiences from a plethora of eminent authors, thereby facilitating a refreshing read. A perusal of the foreword – penned by none other than the legendry Gary B. Born – and last page of the book – titled 'About The Book' – is a testament to the undried nature of the book. Further, it is an intelligible mix of an academic treatise as well as the standard practitioners' treatment of the subject, resulting in the deliverance of extremely useful insights on the latest trends and evolving practices vis-à-vis key issues in international arbitration. The text is a very useful reference for practitioners of International Commercial Arbitration because it captures the procedural as well as the practical nuances of commercial arbitration as a popular method of Alternate Dispute Resolution. A general understanding of arbitration lends insight into its practice-driven nature, which translates into an inadequacy stemming from a mere theoretical understanding. While the entire architecture and process of arbitration is structured within the umbrella of general laws, its method, procedure and skill, require an in-depth understanding. This becomes particularly important in the international context where an array of theories, laws, rules, exceptions, etc. need to be applied collectively alongside international laws, conventions etc. Keeping this in mind, the efficacy of the book is validated in that it provides a blend of law, practice, and the trends of arbitration in various international jurisdictions.

This edited volume has been fractioned into twenty chapters, each dealing with a specific aspect of the subject matter. A tabular list of cases enshrined in the nascent pages of the book is a helpful and efficient guide to existing judicial precedents. Since the book is an edited version with multiple contributors, the two segments, namely, the 'Notes on Editors' and 'Notes on Contributors', are a thoughtful inclusion that apprises the reader with the authors and acts as a

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catalyst in generating familiarity between the reader and the authors. Yet another prominent feature of the book is the elaborate 'Introduction'. It is not a mere summary or short write-up. Rather, it digresses from the norm and is a continuous piece of writing flowing throughout the book, with the objective of acquainting the reader with the various chapters, contents, and the authors' take on them. Further, it is replete with a multitude of footnote references, akin to a research paper. The introduction provides a crisp summary and a clerestory window to the book, and is, in my opinion, a must-read as it swiftly glides the reader into the book.

Chapter 1 authored by *Justice Kaushal J. Thaker* provides riveting insights into the existing alternate dispute resolution mechanisms and their developments in Indian jurisprudence. The author's vast experience and resultant expertise in the field are well-reflected through the contents of this chapter. The first paragraph of this chapter is used by the author to examine and uncover areas and inroads made by said dispute resolution mechanisms in India. The principal focus of the author lies in an examination of the latest trends and new vistas in alternate dispute resolution mechanisms as generated by courts, including applications to criminal and civil litigation. The author provides an informative commentary on the concept of alternate dispute resolution, The Code of Civil Procedure, 1908, the role of legal service authorities and courts in the aforementioned dispute resolution mechanisms, the applicability of these mechanisms in specialized cases, tort law, etc. Captivating areas such as plea bargaining and mediation have also been included vis-à-vis legal, policy and judicial interventions. In conclusion, Justice K.J. Thaker articulates, and rightly so, that alternate dispute resolution can significantly reduce the injustice faced by Indian people due to a delay in the disposal of court cases.

Chapter 2 by *Dr. Akhil Prasad* is the narrative of a General Counsel on alternate dispute resolution as a dispute management mechanism in the corporate world. The author's focus rests on how efficiently a dispute resolution mechanism can act as a business enabler in the corporate world and can expedite the process. The importance of choosing an appropriate dispute resolution mechanism including dispute assessment and negotiations as a part of business strategies and expectations has been duly highlighted.

Chapter 3 by *Sherina Petit* & *Maja Mazur* delineates the emerging trends in alternate dispute resolution in the Indian jurisdiction amid challenges such as a tedious backlog of cases in the Indian courts and the efforts of the country in its attempt to become a global arbitration hub.

The authors present a detailed overview of various alternate dispute resolution methods with a special focus on mediation.

Chapter 4 by *David Smith* is an engrossing write-up on mediation-arbitration as an alternate dispute resolution combination. The author sheds light on a series of other combinations including but not limited to arbitration-mediation, arbitration-mediation-arbitration, and mediation followed by last offer arbitration alongside describing their pros and cons. The author brings out the importance of combining said methods because of the consequent effectivity, economic viability, speedy dispensation and efficiency, while also taking cognizance of how mediation and arbitration are often perceived as uneasy bedfellows. The theme of the chapter is that alternate dispute resolution combination methods provide a solution to parties based on their necessity, in accordance with the doctrine of party autonomy.

Chapter 5 by *Prof. Chirag Balyan* examines the predominant concept of arbitrability, a concept which currently finds no legislative mention or definition. The author accentuates the inter-relation between arbitrability, public policy, jurisprudence, and tests of arbitrability laid out by Indian courts vis-à-vis judicial precedents. A cardinal point – particularly useful for practitioners – revolves around the question of who determines the arbitrability of a dispute. Section 4 of the Arbitration & Conciliation Act dictates the non-arbitrable disputes in India. The final sentence penned by the author adeptly necessitates the drafting of an arbitration agreement with due care to pre-empt problems with arbitrability post entering the contract. The chapter is characterized by the practical utility as well as an instrumentality to review statutory and policy provisions.

Chapter 6 by *Sheila Ahuja, Arun Mal, Deekshitha Swarna* & *Aditya Sarmah* cater to the concept of Interim Measures ["**IR**"] in arbitration, as well as the avenues to it and the authorities involved. The targeted discussion on IR under Indian and English laws and the various laws of leading arbitral institutions makes the chapter a quick reference guide for International Commercial Arbitration practitioners. Section 6.2 provides a very useful reference list of Arbitral Institutions allowing for provisions of Emergency Arbitration ["**EA**"].

Further, *Chapter 7 by Sameer Jain* & *Jayashree Parihar* discuss the emerging concept of EA. Associated issues of procedure, recognition and enforcement of EA awards, security of costs, etc. are well explained. Section 7.4 of *Chapter 7* provides a ready reckoner on the Indian judicial rulings on the subject matter.

Chapter 8 by *Karishma Vora & Chinmayee Pendse* and *Chapter 9* by *Lomesh Kiran Nidumuri* delve into the foremost procedural aspects of Anti-Suit Injunctions and Anti-Arbitration Injunctions. These aspects are very crucial to International Commercial Arbitration where international and national laws align. Section 2.6 of *Chapter 8* discusses 'Comity' – court discretion, reciprocity between States, and dilemmas faced. While *Chapter 8* focuses on Anti-Suit Injunctions, *Chapter 9* traverses the development of Anti-Arbitration Injunctions in International Commercial Arbitration globally. These two chapters form an efficacious practical guide to advocates and arbitrators.

Chapter 10 by *Surjendu Sankar Das* delves into the journey of Section 11, as well as the relevant jurisprudence, of the Arbitration & Conciliation Act, 1996 ["**A&CA**"]. Section 11 has critical importance as it brings to prominence, the role of designated courts in the appointment of an arbitrator as the protector of the parties' interests. The chapter tracks the progress made by legislative and judicial interventions in the application and efficacy of the section. Amendments to the A&CA in 2015 and 2019 in relation to the section are also discussed in detail.

Chapter 11 by *Stepan Puchkov* centres around subconscious biases in international arbitration – a topic of cognitive and social psychology. The theoretical aspects such as the *dual-process theory of thinking* as a part of legal practice and *strategic planning* of the case are very captivatingly presented. Similarly, the *two-systems theory of social behaviour and social economics* is explained in great depth to shed more light on its utility in understanding cognitive biases in arbitration. The author beautifully brings out *fascinating concepts of story-telling, narrative mediation, priming, halo effect, cognitive dissonance, ethics,* etc. in dispute resolution. The chapter provides guidance on a bias-free alternate dispute resolution process.

Chapter 12 by *Rafael Carlos Del Rosal Carmona* touches upon another important aspect – *Impartiality & Independence in International Commercial Arbitration*. The author examines said concept as an issue of personal as well as professional morality and ethics for the practitioners in arbitration as well as the arbitrators. These twin aspects also form the cornerstone of transparency and fairness in the arbitration process. The critically important role of *IBA guidelines* as a converging trendsetter is well highlighted. These issues along with disclosure requirements are discussed vis-à-vis the issue of enforcement, party autonomy, arbitrators' and parties' duty and the role of arbitral institutions.

Chapter 13 by *Shashank Garg* & *Divya Behl* provides insight into an arbitrator's duty to raise public policy issues in International Arbitration *ex-officio*. This topic explores the reason and process behind the moral duty of an arbitrator towards national laws despite being party-appointed to resolve their private dispute. The State subject of public policy and case laws across various international jurisdictions have been discussed. The authors elaborate on the duty of arbitrators to care for national laws *ex-officio*, namely how it is tested in the enforcement of awards and hence, is not averse to the party autonomy though it may appear otherwise.

Chapter 14 by *Manavendra Mishra* & *Akash Karmarkar* talks about the consolidations and composite references as a novel enabling legal mechanism in multi-party, multi-contract arbitrations to deal with the *Dutco Dilemma (as per the famous Siemens – Dutco case)* where existing conventional laws, rules, etc. do not suffice to deal with multi-party arbitration scenarios. Consolidation under the national laws of India, the USA, and the UK, as well as some of the leading arbitral institutions, has also been discussed. Section 4 covers the theoretical framework for consolidations, trends, practice and procedure in International Commercial Arbitration.

Chapter 15 by *Sneha Jaisingh* takes on *Third Party Funding in India* as an enabler of unhinged access to justice by levelling the playing field between parties. Questions pandering to ethics, limitations, and legal concerns regarding third party funding are duly examined by the author. She studies the hurdles to third party funding such as *maintenance and champerty* and notes how its treatment as a criminal offence in common law crosses swords with the very purpose of justice for those who cannot afford it. She further opines that this is where third party funding can provide great help. The query about the enforceability of third party funded agreements also finds an answer here.

Chapter 16 by *Sherlin Tung, Alex Ye* & *Kelly Tan* traverses through the doctrine of separability of an arbitration agreement insofar as governing law versus the law underlying the contract is concerned. This dichotomy in drafting the arbitration agreement has been discussed with an aim of educating readers on the need to obviate avoidable procedural tangles. Approaches to the issue in England, Singapore and Hong Kong are covered in Sections 2 to 4.

Chapter 17 by *Montek Mayal* involves a discussion on the niche aspect of experts' role and calculation of economic damages in commercial disputes. Detailing of a framework and

approaches to damages' calculation, as well as an overview of valuation approaches, prove fruitful for experts in arbitrations as well as for arbitrators, lawyers, etc.

Chapter 18 by *Thomas R. Snider* & *Aiman Kler* on *Expedited Procedures in International Commercial Arbitration* and *Chapter 19* on *Summary Procedures* by *Dilber Devitre* & *Mariella Orelli* provide answers to questions that practitioners may have on key aspects of modern-day arbitrations as rising business stakes and the expectation of expedited results by parties. These chapters also pander to gateway issues, clashes with due process and efficiency issues. Key concerns of legal tests on applicability, and adoption of these fast-track approaches, are handled well by the authors. Both the chapters make for very useful practical references and are a need of the hour for contemporary International Commercial Arbitration.

Chapter 20 by *Gourab Banerji* discusses the recent developments in the enforcement of foreign arbitral awards in India. A dissection of the provisions of the A&CA, procedural formalities for enforcement of foreign awards, grounds for refusal and some leading case laws give a sound understanding of the topic. In conclusion, the author aptly highlights the need for India to become a pro-arbitration jurisdiction in furtherance of realizing its dream of becoming a hub of International Arbitration.

In conclusion, the book is a salient piece of writing which focuses on recent and evolving trends and practices in International Commercial Arbitration. The practical treatment accorded to this vast and intriguing subject is of immense utility as a manual since various key issues are given topical coverage for focused reading and reference. The plethora of case laws embedded in the topics lend a high degree of utility to the text as a ready reckoner and wealth of knowledge to anyone engaged in teaching, learning, or practicing commercial arbitration across the globe. The book is a fresh breath of air and deserves a definitive place in all reference stacks, courts, institutions, libraries, lawyers' and judges' desks as well as personal collections.

Leaving the reader with a coveted thirst for more knowledge on the subject, the book assuages the reader with an announcement, embedded in the final part of the introduction by the editors, that the **sequel to the book is forthcoming**. I am positive that the twin book set is going to be a welcome addition to libraries and reference desks across the globe. Last but not the least, the book reflects an immense value for money in that it is a nicely packaged, and elegantly bound edition.

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