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ABOUT THE JOURNAL

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

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AIMS AND SCOPE OF THE JOURNAL

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foras to current law students from different legal, linguistic and cultural backgrounds, IRIArb encourages previously unpublished papers that caters to developingan educated colloquy – that is contemporary, recent or novel.

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PEER REVIEWERS FOR THIS ISSUE

We also take this opportunity to thank the members of our peer review board, especially Ms. Natasha Kavalakkat, Mr. Akash Gupta, Ms. Riddhi Joshi and Mr. Mrinal Jain, without whose time and effort this issue couldn't have been published.

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EDITORIAL

Victor Hugo famously remarked that nothing is more powerful than an idea whose time has come. In 2021, we witnessed this phrase come to life in the context of emergency arbitration in India. The Supreme Court of India, on 6 August 2021, in *Amazon.Com Nv Investment Holdings LLC v. Future Retail Limited* ["**Amazon Case**"],[1] held that an award passed by an emergency arbitrator is an order under Section 17(1) of the Arbitration & Conciliation Act, 1996 ["**Arbitration Act**"], and is enforceable under Section 17(2) of Arbitration Act like an order of the court. Arbitration law and practice in India has been taking significant strides in recent times, both through judicial pronouncements as well as legislative developments. Indian Review of International Arbitration ["**IRIArb**"] seeks to aid the development of arbitration in India by bridging the gap between arbitration practice and academia. Having published two issues previously, IRIArb was pleased to receive an International Standard Serial Number. The journal is also now indexed on EBC SCC Online which is India's leading legal portal. Volume 2 Issue 1 of IRIArb comprises of diverse contributions on contemporary issues in the field of arbitration.

There has been a significant rise in positive trends in the field of arbitration in 2022. A key highlight is the increasing trend of tech companies moving away from traditional methods of dispute resolution. The virtual processes brought into the landscape of the arbitration are now becoming a permanent practice in the field leading to greater flexibility and speediness to the process. Positive steps are being taken towards codification of the standard practices and conducts for the Adjudicators notably International Congress and Convention Association's ["**ICCA's**"].

The ICCA's Guidelines on Standards of Practice and the Code of Conduct for Adjudicators in International Investment Disputes are a positive step towards increasing the efficiency of the Arbitration proceedings. After the advent of the Covid pandemic there has been an increase in the use of technology everywhere arbitration has been no exception. Courts in India and all over the world had virtual hearings during the pandemic. Therefore, it's easier today than ever before to resolve disputes remotely. However, despite the number of benefits of online arbitration there are also some challenges in a virtual arbitration process. The seat of arbitration is one of the most important considerations in any arbitration matter. The seat of arbitration determines the place of jurisdiction and which laws will apply to the arbitration matter. In a virtual arbitration, it's sometimes difficult for parties to agree on a seat of arbitration whereas in a physical arbitration matter the seat and place of arbitration could be the same. Virtual arbitration proceedings also are at

[1] Amazon.Com Nv Investment Holdings LLC v. Future Retail Limited, 2022 (1) SCC 209

risk of cyber-crimes, power failure etc. Therefore, even though there are still a lot of improvements that can be made to online arbitration proceedings, it provides a promising future for the development of international arbitration.

Justice Roshan Dalvi (Retd.), in this article, critically analyses the various legislative amendments to the Arbitration Act in the recent times. She discusses the amendments brought to the Arbitration Act in 2015, 2019 and 2021, and analyses whether these amendments have delivered the results which they sought to achieve. This article makes an interesting read as the author discusses various personal experiences and gives examples of the issues faced by her in cases wherein, she has acted as an arbitrator. She also discusses various dilatory tactics which are employed by lawyers to derail and disrupt the arbitral process. This article further explores how online arbitrations, pursuant to the COVID-19 pandemic, have impacted the efficiency of the arbitrations in India. She concludes with a suggestion which may improve the effectiveness of the arbitral process in India.

Amit Bansal, Shruti Gupta, Surabhi Dubey and Shaurya Gupta in their article titled "*How to determine Reasonable rate of interest for interest claim in arbitration matters?*" examine the subjectivity and inconsistency involved in the determination of the rate of interest in both pre-award and post-award interest claims. The authors give the readers a concise background of the provisions relating to grant of interest claims, and the challenges faced with respect to the same.

The authors also discuss the guidance issued by the Institute of Chartered Arbitrators in respect to the approach that may be taking in making of awards on interest, which provide for a broader framework for the calculation of interest in arbitration proceedings. The authors analyze the judgment in the case of *Vedanta Limited* v. *Shenzhen Shandong Nuclear Power,* wherein the factorsto be considered by the tribunal while making an interest award have been set out. Accordingly, the authors explain the process of determination of appropriate rate of interest. This article also discusses the various aspects relating to post-award interest, and concludes with an emphasis on the need for, and importance of, adopting a more prudent, rationalized approach towards the determination of interest claims.

Shreya Singh, in her article titled "*The Emergence of Emergency Arbitrations in India*" discusses the evolution of emergency arbitration in India, leading up to the Amazon Case. She delves into various issues which have arisen in India pertaining to emergency arbitration, particularly the acceptance of its implied existence in the Arbitration Act by the Supreme Court in the *Amazon.Com*

Nv Investment Holdings LLC v. Future Retail Limited.[2] She discusses the enforceability of emergency awards rendered in foreign seated arbitrations and examines potential developments which may arise with respect to emergency arbitration in the future, and concludes by giving suggestions on the steps that may be taken to achieve the full potential of emergency arbitration in India.

Aditya Gandotra in his article titled "*Critical Analysis of Comprehensive Economic Cooperation Agreement between the Republic of India and the Republic of Singapore*" analyses the provisions of Comprehensive Economic Cooperation Agreement signed by Republic of India and Republic of Singapore ["**CECA**"]**.** The author examines the standards for fair and equitable treatment, clauses prohibiting arbitrary and discriminatory treatment of the agreement. The author also views these provisions through analysing the standards of International Law. The author critically analyses the non-discriminatory provisions of the agreement by assessing certain legal elements and concludes that the agreement ensures that neither India nor Singapore make any negative differentiation between local and foreign investors.

The author further analyses the provision regarding expropriation in the agreement and talks about the exceptions to the provision leading to the conclusion that the agreement provides a fair balance between the rights of the investors and the host state. The author also makes an interesting observation that unlike other International Investment Agreements, CECA provides investors with the opportunity to also approach local courts for resolution of disputes ensuring compliance of due process of law element. Following this detailed critical analysis, the author reaches the conclusion that CECA does not lead to a level of protection lower than the standards guaranteed by rules of international law to the investment and investors of either party.

Disha Surpuriya in her article titled "*Group of Companies Doctrine: Caveats to consider before its application*" writes about the methods to rope in non-signatories to a Contract, the doctrine which applies in such methods and the possible legal and technical loopholes which may arise during the application of such methods and the doctrine. The author explains the meaning and origin of the doctrine while tracing the development of the doctrine and analysing comparatively the application of the doctrine in the legal systems of three countries - France, USA and UK with respect to the legal background, development and application in India. The author discusses the various caveats tobe considered for the application of the doctrine including the scope and nature of the doctrine as well as the express and implied technicalities and with respect to the said application.

[2] *Id.*

The author further presents her critique and possible alternatives to the doctrine through specified principles and practices to be adopted by the Courts while adjudicating the said issues. The author concludes by emphasising on the need to reconsider the position of non-signatories to a Contract and the perspective of the Courts while reiterating the urgency and gravity of the situation.

We would like to thank all authors for their contributions. We also invite all interested individuals to contribute to the December, 2022 issue of IRIArb at iriarb@mnlumumbai.edu.in.

THE UPPER CRUST AND THE UNDERBELLY OF ARBITRATION IN INDIA – MUMBAI CHAPTER

Justice Roshan Dalvi (Retd.)*

I. INTRODUCTION

The commercial laws, beginning with the Indian Contract Act, 1872 enacted one and a half century ago, have been the justified mainstay of disputes in trade, commerce and industry in India. How the disputes came to be resolved is quite another matter.

In 1996 the parameters of arbitration were expanded to cover the international sphere aside from the domestic one under the Arbitration and Conciliation Act, 1996 ["**the 1996 Act**"]**.** [1]The new Act set out a framework to make the law of arbitration "more responsive to contemporary requirements" for the economic reforms of our country "become fully effective" and the law of arbitration "in tune" with such reforms.[2] That too went just this far and no further. Though the substantive laws were both articulately and intelligently interpreted and handled, the tardy procedures swept out the good work. The litigants, the ultimate beneficiaries of the system who were the doyens of business,judged all by the yardstick of expedition and efficiency of work rather than the intellectual ability which failed to deliver.

Alternative Dispute Resolution ["**ADR**"]**,** outside the Court system in civil jurisdiction. Arbitration, Mediation, Conciliation and Lok *Nyayalaya* came to be enshrined as a part of the Civil Justice System. Yet, there was no perceptible difference in the disposal of disputes. The Government felt the need to overhaul the system and streamline the procedure of arbitrations on the ground of economic necessity.

The 1996 Act was amended in 2016 retrospectively brought into effect from 23rd October, 2015 ["**2015 Act**"] to bring in discipline of work. [3] It was thought to be the panacea of the ills noticed. It was a quantum leap. Never was there a civil legislation in the country which cracked a whip as much. India got the law it needed and deserved. It was the way forward with no looking back. India had come of age in arbitration.

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* Justice Roshan Dalvi (Retd.) is a former judge of the Bombay High Court.
[1] Arbitration and Conciliation Act, 1996.
[2] Statement of Objects and Reasons dated 16th August, 1996 in Act 26 of 1996.
[3] Arbitration and Conciliation Act (Amendment), 2015.

This almost perfect piece of legislation, read as a whole, in the spirit of arbitration, not only provides thought for the litigants upon expediency, but also consideration for lawyers giving them anew line of profession with the opportunity to achieve and arbitrators upon specifically legislated fees, statutorily safeguarded. It makes procedures simplified and flexible eradicating the only ill of procedural malaise in the adjudicatory process for protracted trials which brought it brickbats from all corners.[4] It sets out a broader field of arbitration by decentralizing the work force. It streamlines the work of arbitrators with structurally imposed time management. It recognizes a fair give-and-take while imposing deterrent penalties. While allowing challenge to the arbitral award when merited, it fosters finality with limited appeals; it guards against profane frivolity of protraction.

II. HOW WOULD THIS BE SO?

Legislations seek to remedy the ills present in the society. The largest single ill in the legal society on the eve of the 2015 Act, which had the arbitration culture in shambles, was the tardy delay of adjudication as also arbitrations. Hence the primary object of the 2015 Act is expedition of the arbitration system, without which the entire edifice would collapse. To that end, the 2015 Act empowers the arbitrator to pass interim orders which are deemed to be orders of the court (subject, of course, to appeal),[5] mandates day to day evidence and hearings[6] and, for the first time, sets out arithmetical timelines. For the completion of arbitration, it shows a recommended period of 6 months, an allowed period of 12 months and extension of further 6 months by consent of the parties.Thereafter it grants a further period of not more than 6 months only upon the grace of the Court and with the penalty of reduction of fees of the arbitrator seen to have attributed to the delay as also her/his substitution by another[7] and incorporates the facility of fast-track procedure.[8] For the result of the arbitration, it grants, again for the first time, interest at the rate of 2% more than the commercial rate[9] and sets out a detailed regime for compensatory and exemplary costs.[10] Even after the close of arbitration it allows a challenge to the award only on certain parameters including patent illegality (only in domestic arbitration),[11] but not by review of merits upon error and not by re-appreciation of evidence. It allows enforcement of the award but forbids stay,[12] except on

[4] Arbitration and Conciliation Act, 1996, Section 19.
[5] *Id*, Section 17 r/w Section 37.
[6] *Id*, Section 24 Proviso 2.
[7] *Id*, Section 29-A.
[8] *Id*, Section 29-B.
[9] *Id*, Section 31 (7)(b).
[10] *Id*, Section 31-A.
[11] *Id*, Section 34 (2-A).
[12] *Id*, Section 36.

sufficient cause and on conditions as in an appeal from a money decree.[13] It sets out a strict code of conduct and ethics for arbitrators requiring them to disclose their relationship with the parties, counsel, dispute or another arbitrator and their direct or indirect interest in the arbitration.[14] It mandates disclosure of the ability of the arbitrator to devote sufficient time to the arbitration and "finish the entire arbitration within twelve months".[15]

So much allowance for the merited litigants accompanies a commensurate fee for the arbitrators. The Fourth Schedule sets out ad valorem fees for arbitrators until the capping limit is reached with allowance of further amendment by the Central Government,[16] and the High Court Rules.[17] It may be at once stated that if the period of completion of the arbitration is adhered to by all parties, lawyers and the arbitrator/s, the fees would be fully justified.

The 2015 Act would have been a dream come true for the merited litigant, the enterprising lawyer and the industrious arbitrator. The litigant would get interim relief, proceed with the claim/ defence,have it decided within months upon oral hearing without or with limited evidence, in a flexible procedure, and get additional interest and compensatory costs upon proving the claim or defence on merits. The arbitrator would get her/his fees as statutorily allowed. The lawyer would be emboldened to charge fees similarly, of course as she/he would command. Each would require to devote time and effort to complete the task expeditiously and be rewarded commensurately.

The legislation manifests the application of business management principles. It would be worthwhile to appreciate the labour and thought that went into its making. The various principles may be enumerated thus:

i. **Simplification** – The procedures are flexible, amendable by parties or arbitrators without resorting to cumbersome evidence and avoidable rules of civil procedure[18] and only adhering to the fundamental rules of evidence for ensuring natural justice as its 'basic structure'.[19] It resonates what Dwight Eisenhower had said: *Genius consists in reducing the complicated into the simple.*

ii. **Decentralization** – Aside from the macro level division of work between adjudication and arbitration as the main and the alternative modes of resolution of disputes respectively, at

[13] Order 41 R.5 (3) and (5) of the Code of Civil procedure, 1908 as amended in 1976.
[14] Arbitration and Conciliation Act, 1996, The Fifth and Seventh Schedules.
[15] *Id*, The Sixth Schedule.
[16] *Id*, Section 11-A.
[17] The Bombay High Court (Fee payable to Arbitrator) Rules, 2018.
[18] *Supra* note 14, Section 19.
[19] Pradyuman Kumar Sharma v. Jaysagar M. Sancheti 2013 5 MahLJ 86.

micro level the 2015 Act seeks to decentralize the work between arbitrators themselves. An interesting, provision which is a pointer to the meticulousness of the framers, though perhaps ignored, is the exclusion of a person for appointment as an arbitrator if she/he has "within the past three years received more than three appointments by the same counsel or the same law firm"[20] - a small mandate which shows the way. The disclosure of the number of arbitrations would and should make the appointing authority refrain from appointing the same persons who may not have the time to deliver within time.

iii. **Paradigm Shift** – (a) The 2015 Act empowers the arbitrator to pass interim orders for protection of properties etc. which would be enforceable as the order of the Court, acomplete departure from the earlier provision which lacked teeth. (b) The time line to be adhered to is like no other. The effect was to be deterrent for arbitrators who did not perform under the norms. (c) The 'fast track' procedure would be the adoption of, what is popularly called, the Lord Woolf Report in the British Justice system reform under the rules framed by Lord Justice Harry Woolf, the then Master of the Rolls, Royal Courts of Justice, London, UK., and later Lord Justice of the Supreme Court of England and presently an Arbitrator and Mediator. (d) The grant of interest at the rate of 2% more than the commercial rate of interest is also a first-time legislative adventure in the right direction. (e) The provision for exemplary and compensatory costs goes further than the provision for costs in the Code of Civil Procedure[21] applicable to law suits in Courts. (f) The recourse against awards in the first instance dons the garb of revision rather than appeal, though patent illegality is brought within the mischief. (g) The finality of awards, subject only to challenge upon conditions for stay is an idea in a proceeding which is unlike the First Appeal under the Code of Civil Procedure. (h) The Schedules (4, 5, 6 and 7 to the Act) make for a whole new way of professional life; the fees of arbitrators are specified ad valorem. The disclosures of interest and relationships show ethical professionalism. The number of arbitrations to be disclosed demonstrate the opportunities for arbitrating to be availed by only those who have the time and the means to deliver. The undertaking to complete the arbitration within the time frame set by the legislation is an implied oath to work with efficiency, industry and expedition.

iv. **Non-Value-Added Items and Activities** - Just as a businessperson would refrain from indulging in any activity which would not add value to his work and the consequent profits,

[20] *Supra* note 14, Point 29, Fifth Schedule.
[21] Code of Civil Procedure, 1908, Sections 35, 35A and 35B.

the arbitrators would also not require to apply avoidable rules and technicalities which would not alter the final decision.

v. **Blamestorming** – This principle only brainstorms the situation to find the reasons for failure or set-back. Once found, it seeks to remedy the situation by innovative ways. It is writ large on the face of the 2016 Act that the lack of power to grant interim reliefs by an arbitrator, the procedural delays resulting in delayed awards, the lack of support for earning fees by arbitrators and demand of unconscionable fees, accepting arbitrations without having the time to complete the process, the absence of interest and costs in awards and indiscriminate challenges and the upholding of such challenges must have weighed on the minds of the framers. The result is a complete volte face of the process.

vi. **Single and Double Loop Thinking: The OODA Loop** – Business decisions involve Single and Double loop thinking. The former deals with only 'what'. The latter involves 'why' and 'how'. OODA is an acronym for 'Observe, Orient, Decide and Act'. It accounts for thegoal Vs. the task; 'Change the task to reach the goal.' Need it be said that the framers of the2015 Act did just that?

vii. **Core Competence** – A businessperson believes in specialization of work. The Lord Woolf Report advocates 'Specialist Judges'. Both have yielded good results. The real specialization in arbitration is trial judges and lawyers/non-trial judges and lawyers. Another branch is the dedicated and non-dedicated lawyers (those who work only in arbitrations (for the entire working day) and those who work in courts and in arbitrations (only after 5 pm, the Court hours, leaving barely 2 – 3 hours for arbitration!) It need hardly be stated that to achieve the results which a businessperson or the British system have achieved, specialization and dedicated practice for full business hours parallel to Court working hours is the key if arbitrations have to come of age and truly make it an 'alternative' and not only an 'additional' dispute resolution system. Some arbitral institutions have explicit rules of working hours spanning a good part of the day.

viii. **Time Management** – It supports the 'Big Rocks'. It advocates that the successful businessperson puts the big rocks in his day first, because if she/he puts in the small rocks first, there will never be space and time to put in the big ones. The 2015 Act, shorn of procedural wrangles, demands consideration of only the substance of the case, not the style.

ix. **Package Deal** – Many businesses offer goods and services together to make an attractive and economical deal. The statutory provisions relating to time limits for completion of arbitration and the fees of the arbitrator make for a package which can be imported by lawyers just as well. The charging of equal ad valorem fees by lawyers as is statutorily prescribed for arbitrators for completion of all work within the time frame would be a package too attractive for any litigant to refuse (unless, of course, she/he is only interested indelaying the completion knowing the lack of merits of her/his case). "Make money by doing good" may be the clarion call.

x. **TEAM work** – Team is the acronym for 'Together Each Achieves More'. Adjudication as much as arbitration need and deserve team work for their success. Arbitrators and lawyers are enjoined to work as a team in keeping with the spirit of the 2015 Act. Much of its success would depend upon the 'Bench-Bar vision, mission and passion', as Justice Krishna Iyer famously stated.

III. WHAT, THEN, WENT SO THOROUGHLY AWRY THAT NEITHER THE CARROT, NOR THE STICK REMAINED POTENT? WHO, AMONGST ALL, IN THE ENTIRE FIELD WOULD BE TO BLAME?

Sharing my experiences, the good, the bad and the ugly, may hit the nail.

When I retired as Judge of the Bombay High Court in 2015 and started practice as Arbitrator and Mediator in 2016, the fledgling legislation was newly born. It was to apply to all the disputes I would be referred for arbitrating. It was a law I would have needed, expected, wanted to have. I braced myself upon the task as a fresh and worthwhile challenge.

My maiden venture had a legal representative from Coimbatore and a lady lawyer from Mumbai in a dispute relating to sale of land in Kochi. It had various, at times redundant, agreements that the parties had entered into to make the case seemingly larger than it was with the applicable laws. Yet,it was all that an arbitration should be. A large part of the determination was to be not on oral evidence. Only one party led oral evidence of a couple of pages for proving damages for mental agony. The concession for an avoidable aspect was made by the lawyer of one side. Neat and apt arguments were made by both and the award was passed within the recommended period of six months. I wishfully believed that such was to be the new era of arbitration.

A few other arbitrations followed similarly and ended expeditiously with local talent.

In a dispute of about Rs. 700 + Cr. between two large corporations under an impending merger of one of them, restoration of assets and properties was sought prior to a construction company taking over a construction project. The parties wanted fast track arbitration for a small part of the unresolved dispute. In the preliminary meeting I fixed just one full day of arguments of both the parties since all the pleadings were complete and submitted for reading. We worked literally from *9to 5* without a break. All the issues of both the parties were agitated and considered threadbare. It was truly Med-Arb, a combination of mediation and arbitration, at the same time. The restoration of assets and properties claimed together with the liabilities to creditors and third parties to be apportioned was considered. I even started dictating the award in the presence of both the parties and their attorneys, setting out points of agreement and, failing which, my decision, until late in the evening. It was only because I did not have the stamp paper setting out the names of the parties as required under the procedure, that I had to defer the work of actual printing and service of the awardtill the next day! When the parties were served the award the next day my real reward was not the full fee paid in a day's time, (which was as per the Fourth Schedule as I always charge and which reached the capping limit in this case), but the remark of one of the attorneys that though I was called upon to fast track the arbitration, it was *superfast*! I captained a professionally erudite set of attorneys. It was team work at its best. I would wish and hope others follow their good practice.

In an arbitration of road construction contract, the claimant was from Allahabad, his advocate from Delhi and construction company with their advocate from Mumbai. I had to consider my own jurisdiction and then the question of termination of the contract by mutual consent under a 'No Claims Certificate' (NCC) issued by the contractor to the company. The claim for damages, for which the arbitration was filed, would come up for consideration only if the NCC was given under economic duress or coercion. Oral evidence of the parties was led to re-create the scene of the day of execution of the NCC. A summary award upon the issue of the NCC was passed in terms of the Commercial Courts Act, 2015. Upon seeing that the NCC was validly issued, no other issue came up for consideration. The arbitration which had lasted some years before the previous arbitrator, came to a conclusion again within months.

In an arbitration of sale of goods by a private party to a Government Undertaking, the case of damages of either party would rest upon the reciprocal promises of the parties. The facts leading to the delivery of some goods and non-delivery of other goods had to be considered upon the oral evidence of the procedure set out under the contract with the interpretation of the terms of the contract and the relevant law. Several months sufficed to bring the dispute to a close by an award.

Even in an arbitration between a Public Sector Undertaking ["**PSU**"] and a private party, a good set of attorneys and counsel helped in completing the task within the statutory time frame. The agreements between the parties, the correspondence by email forming a chain and other related documents which were admitted were marked, all in a day, in evidence after recording the admitted facts. Oral evidence led by both the parties was recorded such as to complete the evidence of one witness in the full day hearing of a day or two. The advantage of the parties not being distracted either for cross examining or for answering, of not recording repetitious evidence and knowing the case of the parties threadbare, would be evident. The award came to be passed in matter of months and before the end of the allowed period of one year.

In the last two mentioned matters, the award came to be passed initially by email and later upon the stamp paper got purchased after much effort during the first pandemic lockdown when evenfranking machines were not refilled at the banking outlets by the Reserve Bank of India.

It was a win-win-win situation for the litigants (one job done), the lawyers (fees earned earlier than otherwise) and me (emotional and financial satisfaction). I do not understand why any arbitrator or lawyer would like to 'delay to earn' and not 'work to earn' quicker. I do not see how that target cannot be achieved except in a few complex cases. I do not also see how the length of time would always be in direct proportion to the 'stakes' in the matter and the 'great guns' amongst lawyers who may have outlived their purpose leaving nothing much to rave about.

Somehow not many share such work ethic and the image of our country gets tarnished, nationally and internationally. The book *Devil's Pie* is a scathing attack primarily on bureaucratic corruption, but which demonstrates the working of a 'big-time' arbitration before a 3-Retired Judge panel.[22] The book vividly brings out how the arbitration lasted 5 years.

Then, another face of arbitration exhibited itself. In a matter, well begun, but before it was half done, the lockdown resulted in the Supreme Court being so kind as to allow extension of time for two entirely unrelated spheres – the Limitation for filing suits,[23] and the time limit for passing awards.[24] Whereas the former related to the litigants accessing justice, which was a near impossibility for many, the latter related to the continuation of arbitrations which had begun and which proceeded with ease online. That done, the ethos of the work took a volte face. The

[22] RANJAN DATAR, DEVIL'S PIE: THE DEVIL MAKES HIS PIE OF LAWYERS' TONGUES AND CLERKS' FINGERS (2014).
[23] Limitation Act, 1908, Section 3.
[24] Arbitration and Conciliation Act, 1996, Section 29A.

arbitration could proceed only by consent of the parties. So, one of them would simpliciter state that she/he does not consent! So much talent channelled wrongly – like a brilliant child going astray. The result is everything that an arbitration should not be.

Even when the arbitration proceeded with consent, the cross examination became a stumbling block with one party wanting to cross examine online and the other seeing red. The conduct of the cross examinations, in cases which did proceed, was that a junior lawyer would be given a 'watching brief' to see that the witness is not prompted to answer. This manual supervision of an electronic meeting would be like sending a man in a burning building to pull out some valuables for the ownerwho would stay safe of the fire by giving the poor man some money to put his life in danger. A more technological mode of supervision, successfully made, is to have one or even two other devices put up in the room of the witness facing the area in front of the witness which is otherwise unseen in online platforms. Even directing the prime witness, or the person in charge and control ofthe litigation who would be likely to prompt, to remain present in another room in full view of the arbitrator and the cross examiner would prove sufficient.

In an arbitration involving the Government the tardy procedures are adopted from the stage of appointment itself.

An arbitration which began in 2011 was referred to me for arbitrating after the previous arbitrator returned the papers in 2021 (after recording evidence.)

In some arbitrations, time for even filing a claim is requested again and again! This is never done in a suit, writ petition, appeal, revision or review applications. Why is it done only in arbitrations? Because it is allowed. In an otherwise tidy legislation setting out limits of time, the very first step in the proceeding is allowed to take a beating. Arbitration Petition is the only application in which interim orders are passed even without the main claim being made. The filing of the claim and the commencement of the arbitration is then delayed beyond time necessitating the application andgrant of extensions.[25] Each of these illustrations manifest, what I might call, 'Civil Victimology'. There is always one party at such receiving end. The advice of the Great Bard William Shakespeare rings out loud and clear: *Be cruel to be kind.* Justice Krishna Iyer has denounced evensuch an adjudicatory system thus: '*slow motion justice, long distance justice and high-price justice are violative of natural justice*.'[26] What about arbitrations?

[25] *Supra* note 14, Section 9 (2).
[26] V. R. KRISHNA IYER, CONSTITUTIONAL MISCELLANY, 2ND ED. EASTERN BOOK COMPANY, Chapter XI pg. 224.

One corner of discord remains with the arbitrators – their fee under the Fourth Schedule to the 2015 Act. Some do not adhere to the fee. The charge per day would not eliminate the ills of protraction, the very purpose for which the 2015 Act was enacted. Only a fair chance given to the spirit of the Act, '*D'espirit Arbitrage'*, as Jurist Fali Nariman has stated, would show the fairness of theprovision which has been interpreted by the Hon'ble Delhi High Court to grant the fee commensurate with the claim she/he is called upon to arbitrate.[27] The lump sum would be chargedin just two instalments – at the commencement and at the end, leaving no reason to obtain fee each time. In one of the above referred arbitrations, though party appointed, I accepted the statutory fee. When the arbitration came to a close within the week, I thought it unconscionable to charge the remaining half, but the parties persisted. I reasoned that even if I had to conduct and complete the arbitration in about 10 sessions of full days of hearing, the fee would be sufficient. As Mahatma Gandhi had stated that there is enough for our need, though not for our greed.

Even the willing arbitrator may find herself/himself at the receiving end sometime. If the arbitration lasts for years the fee may prove insufficient. The reason for the delay may or may not be attributable to the arbitrator. If the parties' consent to extension of time, the extension cannot be without the consent of the arbitrator. An arbitrator who has worked diligently and not contributed to the delay would also have to consent to the extension of time upon the delay attributable to oneor both parties. It would be unjust not to pay the fee of such arbitrator until the close of the extended arbitration. The arbitrator, therefore, may not consent to the extension without her/his fullfee being paid. Of course, she/he would be in no position to demand the remaining fee if she/he hadunjustly delayed the arbitration. A statute has to be read as a whole. Hence, Section 29-A and the Fourth Schedule laying down the time limit and the fee must be read together. That done, the ad valorem fee would stand for 12 months of arbitration. An indolent arbitrator may not earn withinthe year; a diligent arbitrator deserves to and must earn the full fee at the end of the arbitration or at the end of the 12-month period, whichever is earlier. Would this not smoothen the perceived creasein the statute?

The legislation needed to be fortified by sound practices. It had to be hand-held for its firmness by the Courts which needed to bear down upon egal practices, both of arbitrators and lawyers, the two important stakeholders of the system, who did not conform. Instead, it was sought to be further amended (as so many other Indian legislations) on the excuse of "practical difficulties arising in

[27] Rail Vikas Nigam Ltd. v. Simplex Infrastructure Ltd. 2020 Delhi High Court dated 10.7.2020. SLP (C) No. 010358 of 2020 has been filed against this order. Notice has been issued. The SLP is pending.

implementing the amendments," none of which could be discerned by those willing to adapt and deliver.

It is as much interesting as it is disheartening to note what the lobbying power can do to any good work.

The Arbitration and Conciliation (Amendment) Act, 2019[28] ["**2019 Act**"] does not usher in a new era and is not reformatory. The creation of the Arbitral Council "to make India a hub of Institutional Arbitration," is the singular forward aim. It only takes away from one hand to give to another. But the success of the shift would only be perceived from the work of the person in chargeand control of the Arbitral Institution. As Dr. Babasaheb Ambedkar, admiringly called the Chief Architect of the Constitution of India, described the Indian Constitution as 'a vehicle of life', said ofits success:

> "However good a Constitution may be, it is sure to turn out to be bad because those who are called upon to work it happen to be a bad lot. However bad a Constitution may be, it is sure to turn out to be good if those who are called upon to work it happen to be a good lot."

The duties and functions of the Arbitral council is the only corner laying down a modicum of business practices for the council and the arbitrators and lawyers – laying down standards,[29]maintaining statistics,[30] advocating expedition and simplification,[31] sharing best practices,[32] and continuous education,[33] the other tested business principles embedded in corporate culture, practiced mandatorily at regular intervals between different divisions of an enterprise.

The other amendments are merely cosmetic. Some are, progressive, some, in fact, regressive. Despite the avowed object of making India what the Statement of Objects and Reasons proclaims, the amendments relating to the Arbitral Council were not brought into effect. The amendments which were brought into force diluted the structured time line. Whereas, in the 2015 Act a clear period of 12 months was granted for making the Award, in the 2019 Act 6 months of that period was allowed only for filing pleadings! The 12-month period commenced thereafter. India could not claim to be an 'International hub' by such molly-coddling. Internationally, awards are passed within a year. Even in India some arbitrators do complete their arbitrations within that time. The

[28] Arbitration and Conciliation (Amendment) Act, 2019.
[29] *Id*, Section 43-D (2) (a).
[30] *Id*, Section 43-D (2) (f).
[31] *Id*, Section 43-D (2) (g).
[32] *Id*, Section 43-D (2) (f).
[33] *Id*, Section 43-D (2) (d).

only shortcoming of the 2015 Act[34] was not addressed. Interim relief applications continue to be made and, after obtaining interim relief, the claim is not filed and the arbitration itself is not even commenced for as long as 90 days and more with applications for extension of time.

A worthy reminder is the Portuguese Procedure Code, then applicable in the State of Goa prior to the Code of Civil Procedure, 1908 being made applicable in Goa, in which the written statement of the defendant had to be filed within 9 days of the service of summons without any provision for extension of time. The Judges reported that there was no problem. The defendants filed their statements within time.

Whereas the 2016 Act was a 'Giant Leap' for the Alternative Justice System, the 2019 Amendments were but a 'small step' for almost none.

The amendments relating to the setting up of the Institutional Arbitration were the only ones not brought into force when the other innocuous ones were - on 30.08.2019. The very purpose of the 'Objects and Reasons' for the amendment – "to identify the roadblocks to the development of institutional arbitration", and "to prepare a road map for making India a robust centre for institutional arbitration" - was set at naught.

The further amendments by the Arbitration and Conciliation (Amendment) Act, 2021[35] ["**the 2021 Act**"] were two-fold:

One did away with the prescribed minimum qualifications, experience and norms of accreditation of arbitrators under the Eighth Schedule introduced by the 2019 Act. This was upon the pious object "to promote India as a hub of international commercial arbitration by attracting eminent arbitrators to the country"! The qualification required of arbitrators was a mere 10 years of experience in her/his domain. The arbitrators do and must abide the substantive law. The awards have finality, subject only to a challenge on specific grounds. Without the minimum qualification would she/he be expected to deliver better than the arbitrators have hitherto done?

The other granted unconditional stay of enforcement of arbitral awards induced by fraud or corruption. 'Fraud vitiates everything' is the catch phrase a law student learns in college. Corruption is indeed the corrosion of anything which could never be enforced. It would go without saying that courts would shun any such act or practice if brought to its notice. The grant of stay of the operation of the award by the court is "subject to conditions it deems fit". The court would not

[34] *Supra* note 14, Section 9 (2).
[35] Arbitration and Conciliation (Amendment) Act, 2021.

be precluded from granting a stay upon a modicum of monetary deposit or none at all in a fit case. But the specific statutory provision would be liable to abuse (as is the result of many other legislations) by many parties alleging what is not the truth to obtain unconditional stay.

The legislature has turned full circle. The challenges would increase. The enforcements would suffer. The past era may revive. I am reminded of one newspaper article I read long years ago. The construction of a mighty dam was feverishly sought. The repercussions would be many. Engineers and architects of concern and repute advised against it with logical, scientific reasons. None would heed. The article ended with a telling phrase I have been unable to forget: "I weep for my country." The chronology of events after the Amendment Acts leads me to the same state. I would rather "work" for my country.

IV. WHAT, THEN, IS THE REMEDY?

A complete work culture change is the call. Simply stated it can be achieved by what I would call A A M I E A A.

A – Hearing Address (or interim relief application)
A – Recording Admissions
M – Marking admitted documents
I – Framing Issues
E – Recording Evidence (Oral evidence only as required)
A – Hearing Arguments
A – Passing Award

Such basic Rules of Procedure and Evidence make up the basic structure of arbitration shorn of other technicalities. Of course, certain fundamental safeguards must be adhered to, but without the need for reminders and directions; e. g. inspection of documents to be offered, demanded and given,which should go without saying. All know that in the adversarial system, no document can be relied upon without showing it to the other side whether or not the arbitrator so directs. Pleadings (which usually contain all the evidence, submissions and precedents) may be used as evidence if accepted on oath of truthfulness. Any further disputed facts and documents may be proved on affidavit of evidence.

AAMIEAA is on the pre-condition that so soon as the pleadings are filed the papers are read by the arbitrator. An address would set the tone of the arbitration. If interim relief is applied for, the

arguments would serve this purpose. That done, in the same order admitted facts must be recorded, admitted documents be marked and limited issues only on the remaining dispute thus narrowed down be framed. Summary award may not be lost sight of and may be resorted to in quite a few cases which require interpretation of admitted documents and questions of law. Oral evidence, when requested, be led to the extent required for specific issues which need to be proved thereby and for proving disputed documents. The mandate of day-to-day hearings,[36] mainly for this stage, cannot be ignored. What follows are arguments, again day to day, with the award quick on its heels.Adherence to such discipline would augur for the benefit of all with the only exception of the party with no merits of the case who would only seek to delay the decision.

Once the award is ready, another phase would kick in. The arbitrations in Western countries, more proficient in the culture of mediation, follow the system of Med-Arb. That can be fruitfully imported into our work with some modification keeping the ground realities in mind. I keep my award – interim, summary or final - signed, sealed to be delivered. I call the parties to attend one more day when it is ready. I give myself the whole day for that matter. Before serving the award, I offer to mediate at no extra cost to either. (Both have paid the due statutory fee.) I clarify that the process is wholly voluntary. I would tear out the award and substitute it by the agreement of the parties if they reach a settlement. I would serve the award and complete one process, which was my duty to do, if no agreement ensues. The parties accept the offer. No party or the lawyer would again go into the facts or the law. I go into the 'inside story'. Much has to be stated for the way thebusiness developed, how the contract was sought, what were the underpinnings between the parties,their hopes and expectations that went awry and the real reason for the fall. Businesses having 'sister concerns' have inter-twined feelings for others in their family or group. All these issues can be thrashed out threadbare to make a clean breast of it all. The cause behind the act surfaces when Problems are discussed, Options are created and the Solution can be reached. I would call this the doctrine of POS.

This process is more conducive than starting with mediation or resorting to it midstream. One of the parties may not then desire to go on before the same arbitrator necessitating another circle of action for them. The lawyers would be tempted to bring in extraneous legal arguments not then required to be considered. Needless time would be consumed. The 'inside story' which is not on record may creep into the mind of the arbitrator vitiating the award. Completing the arbitration and then trying out mediation immediately results in a tidy work action and expedites even the closure of the

[36] *Supra* note 14, Section 24.

mediation. If the parties settle, a worthwhile exercise has ended. If not, also, the germ of settlement would settle in. The parties would meet again during challenge or enforcement of the award and take off from where they left off, appreciating the goodness of settlement and continuation of business (or family) ties. The entire effort culminates in intellectual exercise and emotional satisfaction. No effort is wasted.

Some cases merit only a neutral evaluation resulting in the award. If one party is dealing with a terminal defaulter or an inveterate fraudster, determination of the dispute or conflict can be only by adjudication or award; Mediation can play no part. There can be no reconciliation and hence no conciliation.

Businesspersons of substance (and most are) see merit in settling one dispute and getting along with their business. Unfortunately, some lawyers feel a pinch. The feeling is completely erroneous. It is but a complex. The extent of the work for a legal professional does not allow any lawyer to be forgotten. It, like water, seeks its own level.

The experience, not very far away, in Bengaluru, has revealed how much those litigants respect and appreciate the work of the lawyers who bring them the fruits of the litigation by facilitating negotiation by mediation to smoothen business relationships between those parties. The litigants have expressed satisfaction with the work of lawyers and lawyers have reported that clients return for other matters resulting in continued professional work. This positive work culture has resulted in the Bengaluru Chamber of Industry and Commerce (BCIC) to partner with the Court-annexed Mediation Centre making it a settled practice. Such a culture shift in ADR is a worthwhile practice to emulate.

There is a joy in doing something as well as you could and better than others thought you could.

- JRD Tata

HOW TO DETERMINE "REASONABLE" RATE OF INTEREST FOR INTEREST CLAIM IN ARBITRATION MATTERS?

Amit Bansal, Shruti Gupta, Surabhi Dubey and Shaurya Gupta*

I. BACKGROUND

The process of arbitration in India has evolved over the years and in today's time it has become quite synonymous with dispute resolution for commercial contracts. With the increase in commercial disputes, the arbitration process has gained importance for faster resolution of issues. Inany typical commercial arbitration, damages are claimed as a compensation by the affected party to reclaim/reinstate their position that existed before the dispute situation arose. These damages or claims may arise from varied dispute situations and may relate to:

- return on money invested by the affected party in a shareholder or joint venture dispute;
- breach of contract in a commercial dispute (including pre-mature terminations and/or unforeseen suspensions);
- additional costs incurred in an infrastructure or construction claim related disputes;
- loss of future profits;
- loss of opportunity; etc.

It is often seen, that in addition to the direct claims related to the damages as suffered by the affected party, the claim for interest on the quantum of damages also forms an integral part of the total claim. This interest largely compensates the Claimant for the (a) lost business opportunity, (b) default risk of the other party and / or (c) the time value of money. 'Interest' is defined as "the return or compensation for the use or retention by one person for a sum of money belonging to or owned by any reason to another."[1]

These interest claims are broadly categorized into two categories:

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[1] Vedanta Limited v. Shenzhen Shandong Nuclear Power (2018) SCC Online Del 10916.

i. Pre-award interest claims – These include the interest on damages / claim as computed by the affected party for the period before the grant of award is made by the Arbitrator. The pre-award interest comprises of the interest that has accrued/accrues over the following two periods:

   - Between the date of cause of action to the date of reference;[2]

   - Between the date of reference (arbitration) to the date of award;

ii. Post- award interest claims - These include the interest on damages claim as awarded by the Arbitrator from the period commencing after the grant of award made by the Arbitratortill the date of the payment of the award.

In India, Section 31 (7) of the Arbitration & Conciliation Act, 1996 ["**Act**"][3] empowers theArbitrator and has laid down provisions for the payment/award of interest to the affected party. The provisions as per the Act are as follows:

> 31(7)(a) – "Unless otherwise agreed by the parties, where and in so far as an arbitral award is for the payment of money, the arbitral tribunal may include in the sum for which the award is made interest, at such rate as it deems reasonable, on the whole or any part of the money, for the whole or any part of the period between the date on which the cause of action arose and the date on which the award is made."
>
> 31(7)(b) – "A sum directed to be paid by an arbitral award shall, unless the award otherwise directs, carry interest at the rate of two per cent. higher than the current rate of interest prevalent on the date of award, from the date of award to the date of payment."
>
> Explanation. —The expression "current rate of interest" shall have the same meaning as assigned to it under clause (b) of section 2 of the Interest Act, 1978 (14 of 1978)"

The "current rate of interest" means the highest of the maximum rates at which interest may be paid on different classes of deposits (other than those maintained in savings account or those maintained by charitable or religious institutions) by different classes of scheduled banks in accordance with the directions given or issued to banking companies generally by the Reserve Bank of India under the Banking Regulation Act, 1949 (10 of 1949).

[2] Date of reference can be either the date of invocation of arbitration / notice of dispute / filing of statement of claim.
[3] The Arbitration and Conciliation Act, 1996.

However, in practice, it is seen that the parties to the dispute face challenges not only in arriving at the rate of interest under section 31(7)(a) i.e., pre-award interest claims but also have disagreements over the interest claim granted by the Arbitrator under section 31(7)(b). These challenges are briefly discussed in the ensuing sections.

II. OVERVIEW OF PROVISIONS RELATED TO INTEREST AWARDS AND ITS CHALLENGES

A. PRE-AWARD INTEREST

The pre-award interest is typically governed by the contractual terms of agreement as agreed between the parties and requires cautious interpretation of the contract clauses by the Arbitral Tribunal. The use of the words "Unless otherwise agreed by the parties" in Section 31(7)(a) of the Act indicates that only in the absence of an explicit agreement with regards to interest, the Act empowers the Arbitral Tribunal to use its discretion to grant interest award. The Supreme Court of India in one of its recent judgements clarified by stating that:

> "When the parties have agreed with regard to any of the aspects covered under clause (a) of subsection of Section 31 of the 1996 Act, the Arbitral Tribunal would cease to have any discretion with regard to the aspects mentioned in the said provision. Only in the absence of such an agreement, the Arbitral Tribunal would have a discretion to exercise its powers under clause (a) of subsection (7) of Section 31 of the 1996 Act."[4]

Further, Section 31(7)(a) of the Act provides that the Arbitral Tribunal shall award interest "at a rate which it deems reasonable", however the Act neither explains the factors that indicate reasonableness of interest rates nor provides any guidance on the approach for determining reasonable rate of interest.

The provisions of section 31(7)(a) laid down in the Act appear to be ambiguous with regards to the rate of interest and provide no specific directions or guidelines to the affected party(s) which may assist them in computation of the interest claim. Accordingly, in practice, the affected party(s) often tend to apply their own analysis for determination of interest claims which at times is arbitrary in nature and may result into disagreements between the parties.

Further, based on our review of arbitration awards that were appealed in higher courts of law by aggrieved parties, we note that there is considerable subjectivity and inconsistency involved around

[4] Delhi Airport Metro Express Private Limited v. Delhi Metro Rail Corporation (2021) 005627 / 2021.

the determination of interest claims. Some of the issues noted from case precedents are summarized below:

i. **Pre-award interest awarded at uniform rate of interest on claims (i.e., principal sum) which were in dual currency modified by Supreme Court:** Pre-award interest related to claims in Indian currency and Euros was awarded by the Arbitrator in favour of the Claimant at a uniform rate of interest of 9% per annum which was objected by the Respondent and appealed in the Delhi High Court. However, on High Court's rejection of the appeal, the matter was referred to the Supreme Court wherein it was decided that "The award of Interest @ 9% on the Euro component of the Claim is unjustified and unwarranted…when the partiesdo not operate in the same currency, it is necessary to take into account the complications caused by differential interest rates. Interest rates differ depending upon the currency. It is necessary for the arbitral tribunal to co-ordinate the choice of currency with the interest rate.A uniform rate of Interest for INR and EUR would therefore not be justified." WhileSupreme Court retained the rate of 9% interest on the INR component awarded by the arbitral tribunal, with respect to the EUR component, the interest rate was modified at LIBOR rate plus 3% points, prevailing on the date of the Award.[5]

ii. **Pre-award Interest claimed at substantially high rate of interest modified by High Court:** Pre-award interest claimed by the Respondent at a rate of 24% per annum was reduced by the Arbitral Tribunal at the time of granting award to 18% per annum. On further appeal by the Claimant in Delhi High Court, the Court observed that banking rate at all relevant times was much lower than the awarded rate of interest and held the award of 18% per annum to be unreasonable, irrational, unjustified and reduce the same to 9% per annum.[6]

iii. **Pre-award Interest awarded at unsupported rate of interest modified by High Court:** Pre-award interest awarded at the rate of 18% by the Arbitrator in favour of the Respondent was modified by the Delhi High Court due to lack of supporting evidence substantiating the rate of interest. The court reduced the rate of interest to 9% per annum and stated "in absenceof any evidence placed on record that could justify grant of interest at 18%, we are inclinedto take into account the market rates and trade practice".[7]

iv. **Pre-award Interest claim awarded at a much lower rate compared to the contractually agreed terms between the parties set aside by the High Court:** Pre-award Interest claimed

[5] *Supra* note 2.
[6] V4 Infrastructure Private Limited v. Jindal Biochem Private Limited (2018) O.M.P.(COMM)352/2017.
[7] *Id*.

by the Claimant at the rate of 36% per annum compounded annually in line with thecontractual terms of the agreement between the parties was reduced by the Arbitrator to a simple interest rate of 7.5% per annum in the award. On further appeal by the Claimant, the Delhi High Court set aside the award;[8]

v. **Pre-award Interest claim awarded in contrast to the terms of the contractual agreement between the parties quashed by Supreme Court:** Pre-award and post-award Interest awarded by the Arbitrator in the favour of Respondent at the rate of 12% and 18% respectively although the general conditions of the contract ["**GCC**"] governing the contract between the parties stipulated a bar against the payment of Interest. On appeal by theclaimant/appellant in the High Court, the Division Bench of the High Court dismissed the said appeal and confirmed the award made by the learned arbitrator. However, on further appeal, the Supreme Court quashed and set aside the above judgment on the basis of existing contractual agreement between the parties.[9]

B. POST-AWARD INTEREST

Typically, it is believed that the rationale behind enactment of the provision under section 31(7) especially under sub-section (b) of the Act is to expedite the process of payment of the arbitral award once the award is granted by the Arbitrator. Supreme Court in one of its judgements related to post-award interest claims stated that "the purpose of enacting this provision is clear, namely, viz.encourage early payment of the awarded sum and to discourage the usual delay…".[10]

Section 31(7)(b) of the Arbitration and Conciliation Act, 2021 empowers the Arbitrator to award post-award interest on claims and stipulates the mechanism for computing the rate of interest i.e., "two per cent higher than the current rate of interest prevalent on the date of award."

Further, in the absence of the words "Unless otherwise agreed by the parties" under 31(7)(b) (unlike section 31(7)(a) of the Act related to the pre-award interest awards), it may appear that the provisions of section 31(7)(b) would surpass any contractually agreed terms between the parties. However, in view of the recent Supreme Court judgement dated 5 May 2022,[11] it is noted that in case the contractual agreement between the parties specifies the rate of post-award interest or the

[8] Turner Morrison Limited v. Rani Parvati Devi and ors. (2020) O.M.P. (COMM.) 50/2018 (Delhi High Court).
[9] Union Of India v. Manraj Enterprises (2021) 006592 / 2021.
[10] M/S Hyder Consulting (Uk) Ltd v. Governer State of Orissa (2014) 003148 / 2012.
[11] *Supra* note 5.

procedure of deriving the rate of interest then the award of post-award interest shall be governed by the terms of the agreement. The Supreme Court's conclusion the referred matter specified:

> "We are therefore of the considered view that in view of the specific agreement between the parties, the interest prior to the date of award so also after the date of award will be governed by Article 29.8 of the Concession Agreement, as has been directed by the Arbitral Tribunal".

However, it is seen that the post-award interest is also riddled with practical challenges such as those pertaining to rate of interest, type of rate of interest i.e., 'simple' or 'compounded' etc. Further, section 31(7)(b) does not make any reference to payment of compound interest or any interest on interest. In absence of any clarity whether awarded interest should be on sum due alone or on entire sum due and pre-award interest (i.e., interest on interest) etc., the arbitral awards related to the post-award interest have also been subject to appeal in the higher courts of law. Some of the issues noted from case precedents are summarized below:

i. **Post-award interest awarded at a substantially high rate of interest modified by Supreme Court**: Post-award interest on multi-currency claim amount awarded by the Arbitrator in favour of the Claimant at a rate of 15% per annum was objected by the respondent/appellant and appealed in the Delhi High Court. However, on High Court'srejection of the appeal, the matter was referred to the Supreme Court wherein the rate of 15%per annum was considered as "exorbitant…. from an economic standpoint and having no correlation with the prevailing contemporary international rates of interest' and further reduced to 9% per annum";[12]

ii. **Post-award interest awarded at compounded rate (i.e., interest on interest) modified by High Court but later restored by Supreme Court**: Post-award interest was awarded by the Arbitrator to the Claimant at the rate of 18% per annum on the total claim amount i.e., principal sum including the interest component (i.e., interest on interest). However, theRespondent appealed the matter in the High Court wherein not only the entitlement for post- award interest on interest claim was denied (i.e., interest on interest) but post-award interest claim on the principal sum was reduced from 18% per annum to 9% per annum. However, onfurther appeal by the claimant/ appellant in the Supreme Court, the High Court's order was

[12] *Supra* note 2.

quashed and set aside and the award passed by the learned Arbitrator on the aforesaid aspect was restored.[13]

III. GUIDANCE ISSUED BY THE CHARTERED INSTITUTE OF ARBITRATORS

The Chartered Institute of Arbitrators ["**CIArb**"] has published a guidance note dated 27 March 2019 on "Practice Guideline 13: Guidelines for Arbitrators on how to approach the making of awards on interest" which explains the following factors to be considered by an Arbitrator in making interest award:

> "Para 1.2.8 - The making of an award of interest will involve consideration of a number of factors including:
>
> a) the period for which interest should be awarded;
>
> b) the rate of interest to be awarded;
>
> c) whether simple or compound interest should be granted; if compound, on what basis should it be compounded."

The above key factors in essence provide a broad framework for award of interest which can be considered and applied in any arbitration proceedings. However, we understand that while there is limited deliberation amongst the parties and the Arbitrator on "the period for which interest should be awarded", there has been considerable challenges and disagreements with regards to the "rate of interest to be awarded" and the nature of rate of interest i.e., whether 'simple or compounded'.

In order to reduce the challenges related to the determination of rate of interest, we have enumerated some of the key approaches in the ensuing paragraphs that may be considered by the affected party at the time of determining interest claims.

IV. DETERMINATION OF APPROPRIATE RATE OF INTEREST

While there are certain approaches available for determining the rate of interest, the selection of appropriate approach is primarily dependent on the facts of each dispute matter at hand. Further, the Supreme Court in its decision on *Vedanta Limited* v. *Shenzhen Shandong Nuclear Power* dated 11 October 2018 laid down certain factors for consideration by Arbitral Tribunal while making an

[13] Indian Oil Corporation. Ltd. v. U.B. Engineering Ltd (2022) 002911 / 2022.

interest award.[14] Although in the referred matter, these factors were referred for post-award interest related to an international commercial arbitration, in our view, these factors provide a foundation for determining any interest claim. These factors are as follows:

i. the 'loss of use' of the principal sum;

ii. the types of sums to which the interest must apply;

iii. the time period over which interest should be awarded;

iv. the internationally prevailing rates of interest;

v. whether simple or compound rate of interest is to be applied;

vi. whether the rate of interest awarded is commercially prudent from an economic stand-point;

vii. the rates of inflation, and

viii. proportionality of the count awarded as interest to the principal sums awarded.

In our view, the above factors address most of the concerns involved in selection of appropriate rate of interest and therefore may be evaluated by the affected party in order to compute interest claims. However, based on various court judgements, it emerges that the contractual agreement between the parties regarding interest claims along with the rate of interest, as specified in the contract, will have a superseding effect and shall prevail.

The various approaches that are largely applied for determining pre-award rate of interest which shall largely compensate the Claimant for the (a) lost business opportunity, (b) default risk of the other party and/or (c) the time value of money. These approaches along with the scenario under which such rates could be useful (on an illustrative basis) are mentioned below:

A. COST OF BORROWINGS OR FINANCING

This cost represents the rate at which a company borrows monies from the market or any other sources and funds its business operations. The rate under this approach shall depend on the period and nature of the dispute between the parties and is typically determined or are based on the following inputs:

i. **Existing rate of interest at which monies are borrowed by the company:** The existing rate of interest at which monies are borrowed (depending upon the source of funds) for the

[14] *Supra* note 1.

purpose of financing projects. The following factors may be evaluated in the determination of appropriate rate of interest under this approach:

a) In case of specific / single financing arrangement for the project the affected party may directly consider the rate of interest mentioned in the sanction or arrangement letter;

b) In case there are multiple financing arrangements, the affected party may compute average effective rate of interest over a reasonable period of time (typically five years) which can be computed as follows:

Actual interest paid in each previous year divide by the average balance of the borrowings in each previous year (i.e., average of opening and closing balance)

c) In case there are multi-currency financing arrangement, the affected party shallanalyse the terms of the arrangement, compute the effective rate of interest for each currency separately and thereafter select the most appropriate rate of interest as applicable for the project under dispute;

ii. **Rate of interest prevailing in the market:** This refers to the lending rate of interest as prevalent in the market, however, certain additional factors will also need to be evaluated such as the place of investment, currency of borrowings, etc. Typically, the lending rate offered by the State Bank of India (largest bank in India) is looked at for determining the market rate of interest as existing around the period of dispute.

iii. **Project or Equity Internal rate of return (IRR) of the project:** As stated by Aswath Damodaran "internal rate of return ["**IRR**"] is a discount rate that makes the net present value zero. It can be considered as a time-weighted, cash flow, rate of return on an investment". Basically, under this approach, the IRR is computed by equating the present value of cash inflows to the present value of cash outflows of the project.

While, for the Project IRR, the cashflows considered would be the ones directly benefiting the project, the equity IRR measures the returns for the shareholders of company, after the debt has been paid off. Therefore, the latter is based on the free cash flows to equity holders.

In dispute situations, the investor or the affected party tend to compute the expected IRR for the purpose of claiming damages from the project (under dispute) which could either be based on the business plan as agreed between the parties or as approved by the banker's

independent evaluator or as approved by the Contractors (in case of infrastructure projects). This expected IRR represents the expected return for the affected party from the project and is considered as an indicator for arriving at the damages.

In some cases, the IRR is explicitly mentioned/agreed at the commencement of the project based on which the investor undertakes to make investment, e.g., in case of road andhighway projects, the equity IRR is even mentioned in the bid/concession documents floated by the authorities as profitability or return offerings to concessionaires.

B. COST OF EQUITY AS PER CAPM MODEL

As defined by the Corporate Finance institute **"**The Capital Asset Pricing Model ["**CAPM**"] is a model that describes the relationship between the expected return and risk of investing in a security". This relationship is termed as Cost of equity which represents the return expected by the equity investors (i.e., the shareholders) in compensation of the risk they undertake by investing theircapital (monies) in the business. The cost of equity is determined as per the following formula:

Expected return = risk free rate + (beta * market risk premium)

- Where, risk free rate is equal to the yield on a 10-year zero coupon yield risk free bond issued by the government;
- Beta is the measure of market risk
- Market risk premium represents the additional return over and above the risk-free rate, which is required to compensate investors for investing in a riskier asset class.

Typically, this approach can be relevant in arriving at rate of interest (equivalent to cost of equity) that involves claims related to return on money invested under dispute situation arising from breach or termination of the shareholder or a joint venture agreement.

C. COST OF CAPITAL OR EXPECTED RATE OF RETURN FOR THE MARKET

As stated by Shannon Pratt in his book on Cost of Capital, Estimation and Applications, second edition:

> "Cost of capital is the expected rate of return that the market requires in order to attract funds to a particular investment. In economic terms, the cost of capital for a particular

> investment is an opportunity cost—the cost of forgoing the next best alternative investment".[15]

The cost of capital also referred as the weighted average cost of capital is the sum of cost of equity and cost of debt mentioned above as weighted by its percentage in total capital.

Shannon Pratt in his book has quoted the following material that explains how the cost of capitalcan be viewed from three different perspectives:

> "The cost of capital (sometimes called the expected or required rate of return or the discount rate) can be viewed from three different perspectives.
>
> - On the asset side of a firm's balance sheet, it is the rate that should be used to discount to a present value the future expected cash flows;
> - On the liability side, it is the economic cost to the firm of attracting and retaining capital in a competitive environment, in which investors (capital providers) carefully analyse and compare all return-generating opportunities.
> - On the investor's side, it is the return one expects and requires from an investment in a firm's debt or equity. While each of these perspectives might view the cost of capital differently, they are all dealing with the same number."[16]

In order to appropriately apply the cost of capital, it is important for the affected party to set the right perception and understand the context under which it intends to apply the cost of capital.

Typically, investors consider the cost of capital as one of the financial metrics in evaluating commitment of capital to a potential investment or project. For an investor, the cost of capital would signify the minimum expected rate of return that the investor would be willing to accept to justify making the investment depending on the degree of risk of the prospective investment.

However, in terms of valuation of projects or companies, the cost of capital operates as the primary mechanism for measuring and adjusting for risk in the expected cash flows. Under the discounted cash flow technique of valuation (also referred as DCF analysis), the cost of capital becomes relevant as it is used as the discount rate for the company's (or projects) free cash flows in the analysis.

[15] Second Edition Shannon P. Pratt, Cost of Capital: Estimation and Applications, Page 3 (John Wiley & Sons, Inc.2002).

[16] *Ibid* p 4.

The most common approach for computing the cost of capital is to use the Weighted Average Cost of Capital ["**WACC**"]**.** Under this method, all sources of financing are included in the calculation, and each source is given a weight relative to its proportion in the company's capital structure.

WACC = (E/V x Re) + ((D/V x Rd) x (1 – T))

Where:

- E = market value of the firm's equity (market cap)
- D = market value of the firm's debt
- V = total value of capital (equity plus debt)
- E/V = percentage of capital that is equity
- D/V = percentage of capital that is debt
- Re = cost of equity (required rate of return)
- Rd = cost of debt (yield to maturity on existing debt)
- T = tax rate

Typically, this approach can be relevant in arriving at rate of interest (equivalent to cost of capital) in such dispute situations that involves claims related to returns on investments (or projects) which depends on the risks involved and shall vary with the structure of investments.

Risk-free rate of interest: The risk-free rate of return is the minimum rate of return that an investor can expect to earn on an investment that carries zero risk. In India, risk-free rates represent the yields from zero-coupon bonds issued by the government and have varied maturity periods. This approach offers minimum compensation to a claimant for the time value of money, but at the relatively low rate of return and hence may be observed as an extremely conservative approach.

In addition to the above there exist an economic theory of 'forced loan' wherein the monies (damages) which were unpaid by the Respondent and thereby deprived of its use by the Claimantsis considered to take the form of a forced loan given by the Claimant to the Respondent. In such situations, the Respondent's cost of borrowing is considered as the proxy for determination of pre- award interest rate. In practice, the theory has found limited application as typically it the Claimant's cost of borrowings or other rates that are considered more suitable to restore theClaimant's position prior to the breach/dispute. In our view, the suitability of the application of the theory of forced loan would need to be evaluated on a case-to-case basis.

Further, there is a concept of discount rate which represents the rate that is used for determining the present value of future cash flows in a discounted cash flow ["**DCF**"] analysis for assessing

damages/loss of profit. For a given case depending upon the assessment carried out, it could be that the discount rate and rate of interest chosen for determination of interest claim is the same rate.

In an article published by GAR[17] dated 1 February 2021 a study of the published awards / cases (over the period 1988 to 2020) on the International Centre for the Settlement of International Disputes ["**ICSID**"] website indicated that out of 68 cases in which pre-judgment interest was awarded, 36 included interests on a compounded basis and while in the remaining 32 cases simple interest was awarded. From this statistic, it emerges that in the recent times, the Tribunals are increasingly awarding interest damages on a compounded basis. In our view, the evolving development and shift in the basis of interest rate from simple to compound appears to be the right approach from both financial and commercial standpoint as this will assist the Claimant in reinstating its position that existed before the breach or dispute situation arose, however, one may need to evaluate its applicability in light of the facts of the matter.

V. KEY ASPECTS RELATED TO POST-AWARD INTEREST

There are two key challenges on the post-award interest claim that have often been a topic of debate in various arbitral awards and are further adjudicated by the higher courts of law.

First relates to the question whether the post-award interest should be a simple interest or compound interest basis.

While 31(7)(b) of the Act outlines the provision for the award of post-award interest, it empowers and allows the Arbitral Tribunal to use its discretion on whether the post award interest needs to be on a simple or compound basis unless otherwise specified by the parties (in agreements/contracts). However, based on the statistics mentioned in 4.10 above, in our view, the evolving development and shift in the basis of interest rate from simple to compound appears to be the right approach fromboth financial and commercial standpoint as this will assist the Claimant in reinstating its position that existed before the breach or dispute situation arose, however, one may need to evaluate its applicability in light of the facts of the matter.

Second relates to the question whether the amount considered for the purpose of computing the interest claim should include pre-award interest (i.e., interest on interest) or whether should it be on the principal amount awarded by the Arbitral Tribunal (i.e., excluding the pre-award interest). Supreme Court has addressed the issue related to interest on interest and come to a conclusion in

[17] 4 JOHN A. TRENOR, GUIDE ON DAMAGES IN INTERNATIONAL ARBITRATION, (Global Arbitration Review 2021).

one of its judgments[18] According to the Supreme Court, the arbitral award made under 31(7)(a) of the Act, whether with interest or without interest, constitutes a "sum" for which the award is made. Further, section 31(7)(b) of the Act employs the words:

> "sum directed to be paid by an arbitral award" shall carry interest for the purpose of awarding post-award interest. Accordingly, in Supreme Court's view "the expression 'grant of interest on interest' does not arise while exercising the powers of the Act."[19]

In summary, the 'sum' awarded under section 31(7)(a) would include both the principal amount and the pre-award interest awarded by the Arbitral Tribunal and the post-award interest shall be computed on this 'sum' only.

Further, we note that the above referred judgement has been also applied to overrule the decisions made by the respective High Courts in other matters concerning this issue.[20]

VI. CONCLUSION

The challenges and issues in interest claims noted in this paper underline the need for and importance of adopting of a more rationalized approach towards the determination of interest claims.

We anticipate that the evaluation and selection of appropriate approaches for interest determination as suited to the facts/circumstances of each case combined with the jurisprudence factors stipulated by the Supreme Court[21] shall assist the parties in reducing the inconsistencies and related anomalies to a great extent.

Further, we foresee that the application of prudent approaches for interest claims in dispute situations that also reflects the prevailing economic conditions shall benefit the parties with accelerated resolutions/conclusions to dispute matters which shall further assist in avoiding prolonged disagreements.

[18] M/S Hyder Consulting (UK) Ltd v. Governer State of Orissa Through Chief Engineer (2015) 2 SCC 189.
[19] *Id.*
[20] Decisions overrules in case of State of Haryana & Others v. S.L. Arora & Company (2010) 3 SCC 690 and UHL Power Company Limited v. the State of Himachal Pradesh 2022 SCC OnLine SC 19.
[21] *Supra* note 1.

THE EMERGENCE OF EMERGENCY ARBITRATIONS IN INDIA

Shreya Singh*

I. INTRODUCTION

The advantages of arbitration as a method to solve disputes, such as party autonomy, confidentiality and fast procedures cannot be understated. However, even if parties decide to resolve their disputes by arbitration, there may be instances where the parties are faced with an imminent risk of irreparable damage such as a risk of dissipation of assets and resources before the constitution ofthe arbitral tribunal. At this stage, the parties may have to either wait for the arbitral tribunal to be constituted or may have to seek an interim relief from the courts under Section 9 of the Act in order to protect their assets and evidence that might otherwise be altered or lost. The parties may not find waiting for the constitution of the arbitral tribunal to be an effective solution as the parties would befacing an imminent risk of damage at that stage. While the second option of seeking interim relief from courts under Section 9 of the Act is widely practiced by parties, it has its own share of problems since the very reason the parties would have chosen arbitration as the dispute settlement mechanism may have been to avoid court proceedings in the first place in order to avail the above- mentioned advantages of arbitration as a dispute settlement mechanism. The problem, therefore, persists and a delayed remedy may render the aggrieved party unaided and at times, in a situation which is irreparable. In 1990, the International Chamber of Commerce ["**ICC**"] offered a solution to this problem and prescribed the 'Pre-Arbitral Referee' procedure.[1] The objective of the procedurewas to provide urgent *pro tem* or conservatory measures to a party or parties that cannot await the formation of an arbitral tribunal.[2] It was described as an *'*excellent idea which thus far has not worked',[3] possibly because the procedure was offered separately from the ICC rules as a purely voluntary scheme, due to which there was probably relatively little uptake. However, despite the mixed response towards the ICC 'Pre-Arbitral Referee' procedure and after recognising the need forsuch interim measures, the International Centre for Dispute Resolution of the American Arbitration Association ["**ICDR-AAA**"] first introduced provisions for emergency arbitration in 2006,[4] London

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[1] Pre-Arbitral Referee Rules by ICC available at https://iccwbo.org/dispute-resolution-services/pre-arbitral-referee/rules/.

[2] *Id.*

[3] W.L. CRAIG, WILLIAM W. PARK AND JAN PAULSSON, INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION, Oceana Publications Inc. (3rd ed. 2000), p 706.

[4] ICDR-AAA Rules (2006), art. 37.

Court of International Arbitration ["**LCIA**"],[5] Arbitration at Stockholm Chamber of Commerce ["**SCC**"],[6] International Chamber of Commerce ["**ICC**"],[7] Singapore International Arbitration Centre ["**SIAC**"][8] and Hong Kong International Arbitration Centre ["**HKIAC**"].[9] In fact, countries like Singapore,[10] Hong Kong,[11] New Zealand,[12] and Bolivia[13] expressly introduced provisions on emergency arbitrations in their respective arbitration acts. The efficacy of an emergency arbitration rests on the maxims *Fumus boni iuris*, i.e., reasonable possibility that the requesting party will succeed on merits and *periculum in mora* – if the measure is not granted immediately, the loss would not and could not be compensated by way of damages. The article aims to explore the Indian approach towards emergency arbitration in followed by conclusion and suggestions to welcome the new kid on the block- emergency arbitration.

II. INDIAN SCENARIO ON EMERGENCY ARBITRATIONS

A. THE 2015 AMENDMENT: NO NEED TO EXPRESSLY INCLUDE AN EMERGENCY ARBITRATOR

An 'arbitral tribunal' is currently defined in Part I of the Act as a sole arbitrator or a panel of arbitrators.[14] The 246th Report of the Law Commission of India suggested broadening the definition of 'arbitral tribunal' to include an emergency arbitrator appointed under any institutional rules.[15] The report specifically stated that this amendment was to ensure that institutional rules such as the SIAC Arbitration Rules which provide for emergency arbitration are given statutory recognition in India. This suggestion was not incorporated in the Arbitration & Conciliation (Amendment) Act, 2015.[16] Pertinently, the Lok Sabha did not even raise this issue when the bill for 2015 Amendment was being debated.[17] Had the amendment to expressly include emergency arbitrator in the definition of an 'arbitral tribunal' been incorporated, the Act would have clearly stated that decisions of emergency arbitrators are deemed to be orders of court, thereby making

[5] Even though article 9 provided for expedited formation of arbitral tribunal, LCIA amended its rules in 2014 to include provisions for emergency arbitrators, art. 9B in LCIA Rules.
[6] SCC RULES (2010), Appendix II (Jan 1, 2010).
[7] ICC RULES OF ARBITRATION (2012), art.29, Appendix V (Jan. 1, 2012).
[8] SIAC RULES (2013), art. 26(2), sched. 1 (Apr. 1, 2013).
[9] HKIAC Administered Arbitration Rules (2013), art. 23.1, sched. 4 (Nov. 1, 2013).
[10] International Arbitration (Amendment) Act, 2012.
available at https://sso.agc.gov.sg/Acts-Supp/12-2012/Published/20120528?DocDate=20120528.
[11] CAP.609 Arbitration Ordinance available at
https://www.elegislation.gov.hk/hk/cap609?xpid=ID_1498191921145_001.
[12] New Zealand Arbitration Act, §.2(1).
[13] Bolivian Conciliation and Arbitration Law No. 708, arts. 67-71.
[14] Indian Arbitration and Conciliation Act, 1996, Section 2(1)(d).
[15] Law Commission of India, Report No. 246 – Amendments to The Arbitration and Conciliation Act, 1996 (2014), available at http://lawcommissionofindia.nic.in/reports/Report246.pdf.
[16] Indian Arbitration and Conciliation Act, 1996.
[17] Sixteenth Series, Vol. XIV, Sixth Session, 2015/1937 (Saka) No. 15, Wednesday, December 16, 2015/Agrahayana 25, 1937 (Saka), p. 215.

them enforceable and leaving no ambiguity. There can be two plausible reasons for not expressly providing for an emergency arbitrator under the Act- first, that the scheme of the Act implicitly provided for the scenario of an emergency arbitrator and hence no addition was required to be made in the Act and second, the legislature did not think it fit to provide for enforcement of decisions made by emergency arbitrators.

This issue of not expressly including an emergency arbitrator into the definition of 'arbitral tribunal' under the Act was also dealt with in *Amazon v. Future*,[18] in which the Supreme Court took the former view. The Supreme Court relied upon *Avitel Post Studioz & Ors. v. HSBC PI Holdings (Mauritius) Ltd.*[19] to state that only because suggestions of the 246th Report of the Law Commission of India were not accepted does not necessarily conclude that the suggestions are not part of the Act as properly interpreted. The Supreme Court analysed the amendments brought in by the 2015 Amendment and observed that Section 17(2) of the Act now deems any interim order issued by the arbitral tribunal as enforceable under the Code of Civil Procedure, 1908 in the same manner as if it were an order of the Court. Hence, an emergency arbitrator's order, which is anorder of an arbitral tribunal made under Section 17(1) of the Act can be enforced under Section 17(2) of the Act. Therefore, while the legislature abstained from indicating whether emergency arbitrations are recognized in the Act, the Supreme Court clearly stated that they in fact have alwaysexisted in the Act implicitly.

B. AN ANALYSIS OF JUDGEMENTS DEALING WITH EMERGENCY ARBITRATIONS IN INDIA

Various High Courts rejected the validity and enforcement of foreign-seated emergency awards and instead adopted Section 9 of the Act to grant interim measures. However, this has not been a uniform view as the recent decision o*f Ashwani Minda & Anr. v. U-Shin Ltd. & Anr.* accepted the validity of a foreign-seated emergency award, as has been discussed below in Part I of thissection.[20] Part II of this section appreciates the much-needed assistance rendered by *Amazon v. Future* with respect to Indian seated emergency awards, and questions whether the decision is sufficient to understand the approach towards enforcing such awards.[21]

i. <u>Is it a foreign concept to enforce foreign-seated emergency arbitrations in India?</u>

[18] Amazon.com NV Investment Holdings LLC v. Future Retail Limited & Ors., 2021 SCCOnline SC 557.
[19] Avitel Post Studioz Ltd. & Ors. v. HSBC PI Holdings (Mauritius) Ltd., (2021) 4 SCC 713.
[20] Ashwani Minda & Anr. v. U-Shin Ltd. & Anr., 2020 SCCOnline Del 1648.
[21] *Supra* note 18.

In *HSBC v. Avitel*,[22] the High Court of Bombay was faced with a situation where an emergency arbitrator appointed under SIAC Rules had granted emergency relief, which the respondent failed to comply with. The claimant applied for similar relief under Section 9 of the Act for grant of interim relief pending the constitution of the tribunal and the High Court of Bombay indirectly enforced the decision of the emergency arbitrator. The claimant was therefore able to use the decision of the emergency arbitrator to persuade the Court to pass a similar order, which would be enforceable against the respondent. Similarly, in *Plus Holdings v. Xeitgeist Entertainment Group*,[23] the High Court of Bombay while deciding an application under Section 9 of the Act, reflected on the observations made by the emergency arbitrator, and granted reliefs similar to the reliefs granted by the emergency arbitrator.

The High Court of Delhi in *Raffles Design International India Private Limited & Ors. v. Educomp Professional Education Limited & Ors.* ["**Raffles Design Case**"] held that the emergency award cannot be enforced under the Act and the only method for enforcing the same would be for the petitioner to file a suit. [24] Interestingly, the court still gave an order in sync with the decision of the emergency arbitrator.

However, approaching Indian courts under Section 9 of the Act for interim relief is not always a viable method of enforcing decisions of an emergency arbitrator as it increases the burden upon the courts as well as the parties. The introduction of sections 9(2) and 9(3) by the 2015 Amendment indicates that the objective was to reduce the burden on courts when an arbitral tribunal is constituted due to the overburdened system in courts and to ensure that an arbitral tribunal would grant interim relief timely and efficaciously.

Ashwani Minda & Anr. v. U-Shin Ltd. & Anr. is a case where the High Court of Delhi accepted a foreign-seated emergency award. The court opined that it was not open for the applicants to take a 'second bite at the cherry' as the emergency arbitrator had passed a very detailed and reasoned order after hearing the parties and there had been no change of circumstance after the order.[25] The court held that the applicants had consciously chosen to tread on a path and cannot turn around only because they were unsuccessful. The court also stated that it cannot sit as a court of appeal to examine the order of the emergency arbitrator under Section 9 of the Act.[26] This decision was a

[22] HSBC PI Holdings (Mauritius) Ltd. v. Avitel Post Studioz Ltd., 2014 SCCOnline Bom 102.
[23] Plus Holdings v. Xeitgeist Entertainment Group, (2019) SCCOnline Bom 13069.
[24] Raffles Design International India Private Limited & Ors. v. Educomp Professional Education Limited & Ors., 2016 SCCOnline Del 5521 at ¶104.
[25] Ashwani Minda & Anr. v. U-Shin Ltd. & Anr., 2020 SCCOnline Del 1648.
[26] *Id.* at ¶¶55-56.

welcome diversion from the usual trend of adopting Section 9 to enforce orders similar to those passed by emergency arbitrators, but also indicated that Indian Courts do not have a general consensus on how foreign seated emergency arbitrations should be treated.

ii. Did the Supreme Court pave a future for the Indian seated Emergency Arbitrations?

The Amazon-Future dispute is a significant addition in the Indian landscape of emergency arbitration. In this dispute, as per agreements between the parties, Amazon 's investment in Future Coupons Private Limited was to further flow into Future Retail Limited and Future Retail Limited was prohibited from transferring its retail assets to 'restricted persons', which included Reliance Industries. However, after Amazon's investment, the promoters of Future Group entered into a transaction with Reliance Industries which had the potential to completely dispose of the retail assets of Future Retail Limited. This led to Amazon commencing an arbitration under the SIAC Rules seeking emergency relief. The emergency arbitrator passed an order injuncting the Future Group and its promoters from taking any steps to complete their transaction with Reliance Industries and from transferring any of their assets to Reliance industries, without the prior consent of Amazon. Amazon sought enforcement of the decision of the emergency arbitrator under Section 17(2) of the Act in the High Court of Delhi.

In connected matter *Future Retail Ltd. v. Amazon Com Investment Holdings LLC & Ors.*,[27] the Delhi High Court considered whether an emergency arbitrator lacks legal status under Part I of the Act. The Single Judge observed that the parties had to choose between availing interim relief from an emergency arbitrator on one hand or courts under Section 9 of the Act on the other hand. It was held that the Act does not prohibit the contracting parties from obtaining emergency relief from an emergency arbitrator, hence an emergency arbitrator is not a coram non judice and the emergency arbitrator's award is not invalid on this count. Subsequently, Amazon moved the Division Bench and the matter is currently pending.

The Single Judge in *Amazon Com NV Investment Holdings LLC v. Future Coupons Private Limited & Ors*,[28] held that the parties had explicitly agreed to conduct arbitration proceedings under the SIAC Rules and hence, it can necessarily be assumed that the parties had accepted and were aware of various provisions of the chosen rules, including the provisions relating to emergency arbitrations. Thus, the Single Judge recognized the decision of the emergency arbitrator as an order

[27] Future Retail Ltd. v. Amazon Com Investment Holdings LLC & Ors., 2020 SCCOnline Del 1636.
[28] Amazon Com NV Investment Holdings LLC v. Future Coupons Private Limited & Ors., 2021 SCCOnline Del 1279.

under section 17 of the Act.[29] However, a Division Bench stayed the said order of the Single Judge.[30] Subsequently, the Supreme Court stayed further proceedings before the Single Judge as well as the Division Bench of the High Court of Delhi and took up the matter for final disposal.[31]

The Supreme Court, in its judgment dated 06 August 2021,[32] held that an award by an emergency arbitrator constitutes an order under the Act for the following reasons:

i. ***The present Act permits emergency arbitrations:*** The Supreme Court observed that Section 2(1)(a) of the Act defines arbitration as any arbitration, whether or not administered by a permanent arbitral institution. Further, Section 2(6) of the Act gives parties liberty toauthorize any person including an institution to determine issues that arise between the parties. Section 2(8) of the Act states that the parties are governed by arbitration rules referred in the agreements between the parties. These provisions read with Section 17(1) of the Act show that even interim orders passed by emergency arbitrators under the rule of a permanent arbitral institution would be included within the Act. Likewise, Section 19(2) of the Act also allows parties to agree on the procedure to be followed by an arbitral tribunal inconducting its proceedings. The Supreme Court also opined that when Section 17(1) of the Act is read with Section 21 of the Act, the expression "during the arbitral proceedings" includes emergency arbitration proceedings.

   It was held that a conjoint reading of these provisions and no prohibition against emergency arbitrators would show that an emergency arbitrator's decisions, if provided for under institutional rules, would be covered by the Act. The Supreme Court further held that the arbitral tribunal spoken of in Section 9(3) of the Act would be like the "arbitral tribunal" in Section 17(1) of the Act and hence would include an emergency arbitrator appointed under institutional rules.[33]

ii. ***Party autonomy is crucial in arbitrations:*** The Supreme Court laid heavy emphasis on the concept of party autonomy in arbitrations and opined that the decision of the emergency arbitrator was not in breach of the Act as the parties had agreed to SIAC Rules. Under the SIAC Rules, an emergency arbitrator had powers of an arbitral tribunal thereby having the power to order interim reliefs as may be necessary.

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[29] *Id.* at ¶¶133-135.
[30] Future Coupons Private Limited & Ors. v. Amazon. Com NV Investment Holdings LLC & Ors., 2021 SCCOnline Del 4101.
[31] Amazon. Com NV Investment Holdings LLC v. Future Retail Limited & Ors., 2021 SCCOnline SC 623.
[32] *Supra* note 18.
[33] *Id.*

It is certain that *Amazon v. Future* is a landmark judgment as it holds that the current Act reflects the possibility of enforcing awards of emergency arbitrations in India as final and as a decree of the court. It is also certain that the Supreme Court has reinforced its pro-arbitration reforms.[34] However,what remains uncertain is the dispute between Amazon and Future Group as it has still not achievedquietus.

After the Supreme Court decision, Future Group moved Competition Commission of India ["**CCI**"] accusing Amazon Inc. of withholding pertinent information, thereby leading to a fresh round of litigations. CCI held that Amazon had not disclosed details of the shareholder agreement at the relevant time and its strategic purpose was to become a part of Indian retail.[35] CCI also suspended its prior approval for Reliance's deal with Future Group.[36] After this order, Future Group sought termination of the arbitration proceedings from the SIAC on the ground that the basis of Amazon's case no more existed after CCI suspended its own approval. However, SIAC decided to hear the main arbitration case and the schedule for the same was already fixed.[37] Future Group moved the Delhi High Court seeking stay of the main arbitration case before SIAC until its application on terminating the arbitration was not decided. While a Single Judge bench declined to suspend the arbitration proceedings,[38] a Division Bench stayed the same.[39]

Future Group then moved the Supreme Court praying to set aside some orders of the Delhi High Court which had upheld the decision of the emergency arbitrator. By its order dated 01 February 2022,[40] the Supreme Court set aside the aforesaid orders citing procedural issues such as lack of reasonable opportunity given to Future Group to be heard and grant of punitive directions in the impugned orders. The Supreme Court also mentioned that the earlier judgment of Amazon v. Future dated 06 August 2021 did not adjudicate upon merits and limited its reasoning to answer legal questions due to which Future Group moved the Supreme Court on the merits of the case.[41] This observation of the Supreme Court indicates that the reasoning given in the earlier judgment of 06 August 2021 while dealing with legal issues regarding emergency arbitrations still stands.

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[34] *Id.*
[35] Proceedings Against Amazon.Com NV Investment Holdings LLC, Combination Case No.C-2019/09/668, 2021 SCC Online CCI 71.
[36] *Id.*
[37] See Future Retail Ltd. v. Amazon.com NV Investment Holdings LLC & Ors., 2022 SCCOnline Del 13.
[38] *Id.*
[39] Future Retail Ltd. v. Amazon.com NV Investment Holdings LLC & Ors., 2022 SCCOnline Del 78.
[40] Future Coupons Private Limited. & Ors. v. Amazon.com NV Investment Holdings LLC & Ors., 2022 SCCOnline SC 126.
[41] *Supra* note 18.

During the litigations, Future Group had filed an application under SIAC Rules for vacating the award of the emergency arbitrator, before the arbitral tribunal. This application was dismissed by the tribunal, resulting in Future Group moving an application before the Delhi High Court to staythe order of the tribunal, which was also dismissed by its order dated 29 October 2021. By its order dated 01 February 2022, the Supreme Court set aside this order dated 29 October 2021 of the Delhi High Court. This approach of the Supreme Court almost seems hypocritical as by its earlierjudgment dated 06 August 2021, it heavily emphasized on the enforcement of decisions by emergency arbitrators, but then in this order of 01 February 2022, the Supreme Court moved away from its pro-arbitration stance by indicating that the emergency arbitrator award can be vacated, despite the arbitral tribunal wanting to accept it.

Future Group initiated the above-mentioned fresh litigations even after the decision of the Supreme Court dated 06 August 2021 which held that the decision of an emergency arbitrator can be enforceable, thereby proving that parties have a big role to play in the fruition of decisions relating to enforcement of emergency awards. Further, courts must also restrict themselves from interfering with emergency orders and awards, especially if the arbitral tribunal has accepted it. Without the assistance of the parties and courts, decisions attempting to make India into a pro-arbitration jurisdiction, will be rendered merely academic.

C. WHAT IS TAKING SO LONG IN ACCEPTING THE CONCEPT OF EMERGENCY ARBITRATIONS IN INDIA?

As discussed in the previous section, while *Amazon v. Future* helps bring some clarity on the status of emergency arbitrations in India, the matter is still not settled as Future Group has initiated fresh litigations.[42] Therefore, while the matter may have been solved to some extent academically, there still are many practical hurdles which need to be crossed. Further, the Indian Courts have are still hanging on the idea of enforcing foreign seated emergency awards. The reasons for these problems may be the following:

i. **Ambiguity in the Act with respect to foreign seated emergency arbitrations:** Section 17 (2) of the Act was inserted by the 2015 Amendment to create a legal fiction that any order of an arbitral tribunal shall be considered an order of the court and shall become enforceable. *Amazon v. Future* further clarified that orders by emergency arbitrators can also be enforced under

[42] *Id.*

Section 17 of the Act. However, the approach for foreign seated emergency awards is still uncertain.[43]

First, Section 49 of the Act states that a foreign award shall be deemed to be a decree of that Court, where the court is satisfied that such foreign award is enforceable. The terminology used in Section 17 is different than that used in Section 49. Section 17 former uses the term 'order' and Section 17(1) in fact lists down interim measures that can be sought by a party during arbitral proceedings. On the other hand, Section 49 uses the term 'award', which does not necessarily imply interim orders and is hence narrower in its ambit.

Second, the Act gives Indian courts wide and sweeping powers to grant reliefs under the Act as it expressly permits court intervention in arbitral proceedings inter alia, for purposes of interim measures before or during arbitral proceedings[44] and for supporting the arbitral tribunal in taking evidence.[45] Hence Section 9 of the Act has often been used by parties to meet their interim requirements.

ii. No express recognition for emergency arbitration decisions: Even though there was an attempt to give statutory recognition to emergency arbitrations by Law Commission's 246th Report in the Arbitration & Conciliation (Amendment) Act, 2015, no such recognition was eventually granted. The High-Level Committee Report to review the institutionalization of arbitration mechanism in India, chaired by Justice B.N. Srikrishna also recommended in the year 2017 that it is time that India permitted the enforcement of emergency awards.[46] In the same vein, in *Amazon v. Future*,[47] Future Retail Ltd. argued that the Act does not contain an express mention of an emergency arbitrator like provisions contained in Singapore, New Zealand, Hong Kong and English statutes. The Supreme Court held that emergency arbitrators are included in the scope of an arbitral tribunal and hence there was no reason for the Indian legislatures to provide an express mention to emergency arbitrator.

The argument of Future Retail Ltd. did not convince the Supreme Court, but it begs the question of whether the Act should have been amended so that India comes in line with international practice. Another question worth considering is whether the legislature and the judiciary are on the same page with respect to emergency arbitrations. The inconsistency in decisions regarding

[43] *Supra* note 18.
[44] Indian Arbitration and Conciliation Act, 1996, Section 9,
[45] Indian Arbitration and Conciliation Act, 1996, Section 27.
[46] The High-Level Committee Report to Review the Institutionalization of Arbitration Mechanism in India available at https://legalaffairs.gov.in/sites/default/files/Report-HLC.pdf, p.76.
[47] *Supra* note 18.

enforcement of foreign seated emergency awards is another issue that has arisen due to the absence of an express inclusion of the term 'emergency arbitrator'.

iii. <u>The approach of Indian Arbitral Institutions in favour of emergency arbitrations:</u> Even after the Indian legislature rejected the idea of expressly introducing emergency arbitration in India, many Indian arbitral institutions have framed rules on emergency arbitrations, which are largely synonymous to the leading international arbitral institutional rules. Admittedly the introduction of emergency arbitration in Indian arbitral institutions does not directly affect the Act since these are only institutional rules that parties can opt into even when they have a seat other than India. However,

even if parties opt for arbitral institutions in India, they might not choose India as a seat due to ambiguities relating to enforcement of awards and orders, thereby taking India away from its pro-arbitration reforms. An illustrative list of such rules of the Indian arbitral institutions has been provided below:

Name of Arbitration Institution Rules	**Provisions dealing with emergency arbitration**
Madras High Court Arbitration Centre (Arbitration Proceedings) Rules, 2014	Section 20 under Part IV read with Schedule D
Indian Council of Arbitration Rules of Domestic Commercial Arbitration, 2016	Rule 57
Mumbai Centre for International Arbitration Rules, 2016	Sections 1.3, 14 and 32.6
Delhi International Arbitration Centre (Arbitration Proceedings) Rules, 2018	Section 2.1(c) read with Part E
ICC Arbitration Rules, 2021 (applicable in India ICC)	Article 29 read with Appendix V
Nani Palkhivala Arbitration Centre Rules	Rule 20A

iv. <u>The definition of award in New York Convention, 1958:</u> The definition of arbitral awards in the New York Convention is unclear, but it is often argued that New York Convention only envisages enforcement of final awards[48]. It is also argued that decisions of emergency

[48] Jean-Paul Beraudo, *Recognition and Enforcement of Interim Measures of Protection Ordered by Arbitral Tribunals*, 22 J. INT'L ARB. 245, (2005).

arbitrators are not capable of being enforced under the New York Convention as they are not per se final in nature and are capable of being modified by the arbitral tribunal. Even in *Amazon* **v.** *Future*[49], the Supreme Court enforced the emergency decision as an interim order under section 17 of the Act. Pertinently, decisions of emergency arbitrators can take different forms, such as an order to an award. For instance, Article 29(2) of the ICC Rules for Arbitration[50] provides that emergency arbitrator's decision shall take the form of an order. Section 9 of Schedule 1 of the SIAC Rules[51] as well as Article 9.9 of LCIA Rules[52] state that the emergency arbitrator shall make an interim order or award. Hence, there is a void in understanding whether decisions of emergency arbitrators can be considered as final orders that can be enforced under the New York Convention.

III. CONCLUSION AND SUGGESTIONS

'Emergency Arbitration'- as is evident from the term, was envisioned to provide interim relief to parties, while simultaneously respecting party autonomy. However, due to above mentioned issues, emergency arbitrations have not been able to achieve their full potential in India. The global coronavirus pandemic has made the need for emergency arbitrations even more prominent with the courts operating in with limited staff and infrastructure. In this regard, the author lays down the following suggestions:

i. **Enforcement of foreign-seated emergency awards:** While *Amazon v. Future* clarified that the Act implicitly provides for enforcement of Indian-seated emergency awards, there is no such clarity for foreign-seated emergency awards. Section 27(5) of the Act states that contempt to the arbitral tribunal is equivalent to contempt of court, and hence it can be argued that a person disobeying orders passed under Section 17 of the Act would be guiltyof contempt as provided under Section 27(5) of the Act. However, this argument was rejected in the *Raffles Design case*[53] on the ground that non-compliance of an emergency order in Singapore cannot be stated to be contempt of court in India. Section 27(5) of the

[49] *Supra* note 18.
[50] Article 29(2) of ICC Rules, available at https://iccwbo.org/dispute-resolution-services/arbitration/rules-ofarbitration/#article_29.
[51] Section 9 of Schedule 1 of SIAC Rules, available at https://www.siac.org.sg/our-rules/rules/siac-rules2016#siac_schedule1.
[52] Article 9.9 of LCIA Rules, available at https://www.lcia.org/Dispute_Resolution_Services/lcia-arbitrationrules-2020.aspx#Article%209B.
[53] *Supra* note 24.

Act could potentially be an avenue to enforce foreign seated emergency orders as it is one of the rare sections under Part I of the Act which applies to foreign-seated arbitrations. In any case, to better streamline the landscape for emergency awards in India, it is desirable that the Act provide for enforcing interim orders passed by foreign seated arbitral tribunals, as is also provided in Article 17H and 17I of the UNCITRAL Model law and can be a provision similar to Section 17(2) of the Act, but for foreign seated arbitrations.

ii. **Decisions of emergency arbitrators as 'final' award:** The decisions of emergency arbitrators must be considered as a final award to be in sync with the New York Convention and to provide more impetus for their enforcement. Decisions of emergency arbitrator may be considered final as they decide a particular interim measure confined to the facts on urgency of the matter. An issue that may arise then is that the order of an emergency arbitrator could be modified by the arbitral tribunal once it is constituted. However, this does not affect the final and binding nature of the emergency award or order as it can still be enforced until such modification, if any. In *Indian Farmers Fertilizer Cooperative Limited v. Bhadra Products*,[54] the Supreme Court while relying on *Satwant Singh Soghi v. State of Punjab*[55] and *McDermott International Inc. v. Burn Standard Co. Ltd.*[56] held that an interim award or partial award is a final award on matters covered therein made at an intermediate stage. *Amazon v. Future* did not and was not required to go into this question of whether emergency awards and orders can be considered as final awards so that they can be enforced under the New York Convention and only enforced the emergency orders under Section 17 of the Act. However, given the steady pro- arbitration reforms introduced by the Courts, one can hope that considering emergency decisions as final awards is not too far away.

iii. **Efficiency of parties and arbitral institutions:** In the case of *Orangefish Entertainment Pvt. Ltd. v. NGC Network (India) Pvt. Ltd., NGC Network (India) Pvt. Ltd.*,[57] the respondentsought an ad-interim order against *Orangefish Entertainment Pvt. Ltd.*, the appellant for deceptively using similar marks on their selling tickets. The respondent first applied for emergency arbitration proceedings before the Delhi International Arbitration Centre. The appellant did not cooperate with stages of the emergency arbitration, and in fact went ahead with the advertisement of the disputed tickets. The Delhi International Arbitration Centre

[54] Indian Farmers Fertilizer Cooperative Limited v. Bhadra Products, (2018) 2 SCC 534.
[55] Satwant Singh Soghi v. State of Punjab, (1999) 3 SCC 487.
[56] McDermott International Inc. v. Burn Standard Co. Ltd., (2006) 11 SCC 181.
[57] Orangefish Entertainment Pvt. Ltd. v. NGC Network (India) Pvt. Ltd., 2018 SCCOnline Del 11350.

also failed to move with alacrity to appoint the emergency arbitrator. The respondent was constrained to seek an injunction under Section 9 of the Act due to the non-cooperation of the appellant. To avoid such situations, parties must strive to stick to procedure and deadlines. In case the parties are non-cooperative, the arbitral institutions can investigate thereason for such delay and if found to be in bad faith, the parties can be punished in form of costs for the emergency arbitrator. Arbitral institutions also must respond to the parties' requests more promptly.

iv. **Training emergency arbitrators:** The arbitral institutions can conduct voluntary workshops and seminars for emergency arbitrators relating to inter alia challenges faced by arbitrators in emergency arbitrations in granting an interim measure, issues of enforceability,and the role of public policy in granting interim orders.

CRITICAL ANALYSIS OF COMPREHENSIVE ECONOMIC COOPERATION AGREEMENT BETWEEN THE REPUBLIC OF INDIA AND THE REPUBLIC OF SINGAPORE

Aditya Gandotra*

I. INTRODUCTION

The topic of International Investment Law is rapidly becoming more popular due to explosive growth of international investment agreements ["**IIAs**"], a general term that refers to bilateral investment treaties, regional investment treaties and investment protection provisions of free trade agreements.[1]

Signed in 2005, the Comprehensive Economic Cooperation Agreement between the Republic of India and the Republic of Singapore ["**CECA**"] is one such International Investment Agreement which is the cornerstone of trade and investment ties between India and Singapore and has been entered into by both the countries to bring mutual benefits. CECA has widened the scope of business between both countries.

The Agreement mainly aims to strengthen and enhance the economic, trade and investment cooperation between India and Singapore with emphasis on other aspects such as establishment of transparent, predictable and facilitative investment regime. It also seeks to liberalise and promote trade in goods in accordance with Articles XXIV of the General Agreement on Trade and Tariffs and Article V of the General Agreement on Trade in Services respectively, including promotion of mutual recognition of professions.[2]

Both nations, through the agreement, have agreed to improve the efficiency and competitiveness of their respective manufacturing and services sectors, including joint exploitation of commercial and economic opportunities in non-parties. The agreement also focuses on facilitating and enhancing regional economic cooperation and integration, in particular to form a bridge between India and the Association of Southeast Asian Nations ["**ASEAN**"] region and serve as a pathfinder for the India-ASEAN free Trade Agreement.[3]

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[1] KRISTA N. SCHEFER, INTERNATIONAL INVESTMENT LAW 1 (Edward Elgar Publishing, Inc. 2013).
[2] Comprehensive Economic Cooperation Agreement (India-Singapore) (signed 29th June, 2005) Chapter 1, Article 1.2.
[3] *Id.* Article 1.2.

The reason behind stating the objectives of CECA is that most tribunals interpret a treaty by invoking Article 31 of the Vienna Convention on the Law of Treaties ["**VCLT**"]**.** [4] The object and purpose of a treaty is among the primary guides for interpretation listed in Article 31 of VCLT, and the object and purpose are often sought in the preamble of an investment treaty.[5] In CECA, objectives have been specifically mentioned in addition to preamble.

The task of interpreting investment treaties is rendered difficult, mainly by two factors:

i. The generality and vagueness of many terms used in their texts such as 'fair and equitable treatment', 'expropriation and measures tantamount to expropriation', exceptions and defences to investment which are rarely defined in text of treaty and which may be interpreted differently by reasonable persons.
ii. Factual and legal complexity of investment transactions and relationships to which investment treaties are applied.[6]

As a result of these complexities, this article will examine three key provisions of CECA namely National Treatment, Expropriation and Exceptions and Defences to highlight difficulties that may arise in its interpretation.

II. NATIONAL TREATMENT

Non-discriminatory treatment, which is the essence of international investment law and is regulated by international investment treaties, has two basic forms:

i. First known as "national treatment" which requires the host States to treat foreign investors and foreign investments no less favourably than they treat their own national investors and investments.
ii. Second known as "most favoured-nation treatment" which demands that host countries should treat investments and investors covered by the treaty no less favourably than they treat other foreign investors or investments.

As economic and business activity is a competitive process, economic actors constantly seek to gain advantage over their competitors and to remove advantages that their competitors may have over

[4] Article 31(1) provides: 'A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.'
[5] RUDOLF DOLZER AND CHRISTOPH SCHREUR, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 29 (CPI Group (UK) Ltd. 2008).
[6] JESWALD W. SALACUSE, THE LAW OF INVESTMENT TREATIES 155 (CPI Group (UK) Ltd. 2010).

them. The rationale underlying national treatment standards is to place all economic actors in an equal position on the assumption that such equal treatment will promote competition and economic growth.[7] National Treatment is a core obligation in the General Agreement on Tariffs and Trade ["**GATT**"] and its related treaties.[8] Also, human rights treaties[9] require countries to extend within their jurisdictions equal treatment to all similarly situated persons because there is often a protectionist tendency of governments to protect domestic investors and products from foreign competition and National Treatment attempts to neutralize such tendency.[10]

Based on the above principles, National Treatment provision in CECA states that "each party shall accord to the investors of the other party and their investments in relation to establishment, acquisition or expansion of investments in some specific sectors listed in annexures, treatment no less than it accords in like circumstances to its own investors and investments."[11]

Some treaties grant national treatment to just 'investments of the other party', some to 'investors of other party', but CECA extend the same protection to investments as well as investors. Also, articles specifying national treatment to investors and investments may be separate like in Article 1102 (1) and (2) of North American Free Trade Agreement ["**NAFTA**"] which has been a model for a number of free trade agreements provision on national treatment but CECA provide it in a single provision. While discussing 'national treatment' provision, it may seem that its meaning is uniform and constant across treaties, but it is not usually so as there are many variations in particular treaty texts and therefore, specific language of the text in question in a particular treaty has to be examined carefully.[12]

In examining National Treatment provision, there are some legal elements that must be assessed, such as whether or not the treatment was less favourable; the comparability of investors; when the obligation takes effect; and the applicability of any justification.[13] It is now necessary to analyse in more depth each of these elements:

A. NO LESS FAVOURABLE TREATMENT

[7] *Id*. at 274.
[8] Article III, General Agreement on Tariffs and Trade (GATT); Article XV General Agreement on Trade in Services (GATS); Marrakesh Agreement Establishing the World Trade Organization (1994), Annex IB, Annex IC.
[9] Article I, European Convention for the Protection of Human Rights and Fundamental Freedoms (1950); Article 1(1) of Organization of American States, American Convention on Human Rights; Article 2 Universal Declaration of Human Rights (1948).
[10] AUGUST REINISCH, STANDARDS OF INVESTMENT PROTECTION 29 (Biddles Ltd., King's Lynn, Norfolk 2008).
[11] CECA, *supra* note 2, Chapter 6, Article 6.3(1).
[12] Salacuse, *supra* note 6, at p 276.
[13] Schefer, *supra* note 1, at p 291.

In the first place, the investor or investment must be subjected to 'treatment' by the host State. It includes both *de jure* and *de facto* treatment. It means that the host State may be held responsible for a failure to accord National Treatment on the basis of that either (a) the letter of its regulatory measures fails to accord equal treatment to a foreign investor or (b) the legislative regime itself draws no such distinction, but the manner in which the State operates in practice does.[14]

Where an investment agreement like CECA stipulates that investors and investments shall receive treatment 'no less favourable than that received by its own investors', the element of less favourable treatment becomes important. The fact that there need not be any benefit to direct competitors from actions of the host State does not prevent a claim of non-discrimination from being successful.[15]

The claimant must establish that the treatment that it has received fails the State's undertaking that it be 'no less favourable' than that accorded to a local investor. The expression "no less favourable" means equivalent to, not better or worse than, the best treatment accorded to the comparator.[16] Once the relevant comparator has been established, it does not matter if the class is very small, provided there is clear preferential treatment. There has to be similar situations for both parties as CECA makes a mention of 'like circumstances' where the treatment has been offered, but this requirement gives space to State governments to act arbitrarily to make regulations in public interest.[17]

CECA further goes on to refer that National Treatment that has to be accorded at local and regional level to investors and investments of other party shall be no less favourable than most favourable treatment accorded by that regional or local level in like circumstances to investors and investments of the party of which it forms a part.[18] Most Favoured Nation ["**MFN**"] though is a standard of treatment which has been a central pillar of trade policy for centuries, but the prevailing view is that a MFN obligation exists only when a clause in a treaty creates it. Therefore, there has been an express mention of most favourable treatment principle in the CECA. In the absence of a treaty obligation, parties to the agreement retain the possibility of discrimination in economic affairs. To provide MFN treatment under CECA should be understood to mean that an investor from a party to the agreement, or its investment, would be treated by the other party "no less favourably" with regards a given subject-matter than an investor from any other third country, or its investment.

B. COMPARABILITY OF INVESTORS:

[14] CAMPBELL MCLACHLAN, LAURENCE SHORE, AND MATTHEW WEINGER, INTERNATIONAL INVESTMENT ARBITRATION 338 (CPI Group (UK) Ltd 2007).
[15] Schefer, *supra* note 1, at p 301.
[16] Pope & Talbot Inc. v. Canada *Ad hoc* Tribunal UNCITRAL, 1976.
[17] Salacuse, *supra note* 6, at p 277.
[18] CECA, *supra note* 2, Article 6.3(3).

The relevance of the comparison must be proven in order to compare the treatment provided to the investors. To do this, claimant is required to show that it was in a like situation or like circumstance as a more favourably treated investor was.[19]

Identifying the correct or at least the most suitable comparator is the most difficult aspect. The determination of a suitable comparator is of its nature a fact-based inquiry and following elements have been identified as potentially relevant factors in identifying suitable comparator:

i. Identity of the economic or business sector;
ii. Extent of the competition between the investor and the comparators in the sale of its products or services and,
iii. Identity of legal and regulatory regime.[20]

Though CECA mention about foreign investor being given treatment no less than national investor but who would be the appropriate comparator in particular circumstances has not been specifically mentioned and gives scope to tribunal adopting either a narrow approach held in *Feldman v. Mexico*[21] whereby "like circumstances" was interpreted to refer to the same business or broad approach as was held in *Occidental v Ecuador*[22] to mean local producers in general. Therefore, if either party complains of wanting or differential treatment, it should have made a comparison with an appropriate party.

Likeness is a very flexible term, however. A wide view of likeness, i.e., requiring 'like' investors or 'like' investments be only moderately similar, would support many findings of 'like' investments. Thus, in similar economic sectors, if investors are treated differently, the less favoured investor could initiate a claim of discrimination. This broad view of likeness has been reflected in *Occidental v. Ecuador* case. A narrower concept of likeness would require greater showing of resemblance between investors or investments to conclude differential host treatment as violative ofthe obligations of non-discrimination.[23]

[19] Schefer (n 13), p 291.
[20] McLachlan, Shore and Weinger, *supra note* 14, at p 338.
[21] Feldman v. Mexico, Award, ICSID Case No. ARB(AF)/99/1.
[22] Occidental v. Ecuador, Award, ICSID Case No. ARB/06/11.
[23] Schefer, *supra* note 1, at 293.

To understand on a bare perusal of the provisions of an investment agreement as to what would be discriminatory treatment, the probable outcome would be the same view that was taken by the tribunal in *SD Meyers'* case:[24]

i. Whether the practical effect is to create a disproportionate benefit for nationals over non-nationals.
ii. Whether on its face, the contested measure appears to favour the host country's nationals over non-nationals protected by the treaty.

C. WHEN THE OBLIGATION TAKES EFFECT

An interesting issue concerning National Treatment which arises with respect to temporal scope of obligation is whether the State has an obligation to treat foreign investor as it does nationals prior to the investment itself or once the investment has been made? Though some States highly favour 'pre-entry' National Treatment provisions, others still limit the host's obligations to treatment of existing investments.

Contracting parties often make exemptions for sensitive sectors in IIAs with pre-entry national treatment obligations.[25] Similarly, CECA make a particular reference in Annex 6A (India's schedule of specific commitments) and Annex 6B (Singapore's schedule of reservations) to the sectors that have been reserved in which National Treatment has been assured by both parties to investment and investors of the other party.

In one important respect, CECA adopt a distinct line not shared by all investment treaties. That is its extension to the 'establishment' and 'acquisition' of investments. Many other investment treaties that include a National Treatment standard apply it only to the post establishment stage, covering both regulatory and contractual matters, leaving the host State to decide which investments to admitand on what terms. Under CECA, the National Treatment clause applies to the admission stage and has a much broader scope of practical application since many regulatory decisions that draw a distinction between nationals and foreigners are taken at the point of entry.[26]

It can be further ascertained from the wording of the provision 6.3(1), that "any subsequent establishment, acquisition or expansion of investments by an enterprise that is incorporated, constituted or set-up or otherwise duly organized under the law of a Party, and which is owned by

[24] SD Meyers Inc v. Canada, NAFTA Arbitration under UNCITRAL Rules, 2000.
[25] Schefer, *supra* note 1, at p 303.
[26] McLachlan, Shore and Weinger, *supra* note 14, at p 337.

an investor of the other party, shall also be regarded as an investment of the other party for the purpose of determining the applicable treatment to be accorded*"* meaning thereby, any subsequent actions of the parties in this context shall also be immune from any non-discriminatory treatment.

Also, the parties jointly agree that, at the time of any subsequent establishment, acquisition and expansion of investments, the enterprises shall be entitled to be accorded any better treatment which is available under the regime of that party. However, such better treatment accorded shall not be construed as an automatic addition to the commitments of parties scheduled in the respective schedules.[27]

The particular domains where treatment accorded to own investors and investments shall also be accorded to investors and investments of other party are management, conduct, operation, liquidation, sale and transfer of investments.[28]

D. JUSTIFICATIONS

In case of non-discrimination obligations, there is a broad recognition among arbitral tribunals that, in differentiating amongst investors, there are often strong public interests because States, after all, have a primary duty to their citizens. It is therefore expected from democratic governments to represent the interests of their people. Only in exceptional conditions, States can be prohibited from offering their nationals preferential treatment. It is because of these reasons National Treatment provisions are theoretically and practically complex. If there are exceptions in the BITs, it is possible to avoid the non-discrimination obligations because the tribunals are bound to apply such exceptions.[29] Exceptions have been discussed separately later.

E. INTENT

The important question that arises is whether discriminatory intent is relevant to judge the action of host government to favour the national? There are divergent views. For analysis of non-discrimination, intent is generally irrelevant. Although concepts of non-discrimination under customary international law required the claimant to prove the intention of host to discriminate to succeed but under modern investment law, absence of discriminatory intent is not going to save a discriminatory measure from condemnation by tribunals. Also, on the other hand, if existence of

[27] CECA, *supra* note 2, Article 6.3(1).
[28] *Id*. Article 6.3(2).
[29] Schefer, *supra* note 1, at 303.

intent to discriminate is demonstrated, it will not always result in an automatic finding of violation of the principle of non-discrimination.[30]

While the necessity of showing discriminatory intent on part of host State has been declined by many tribunals as an explicit test for claims of non-discrimination, if the difference in treatment canbe shown to have reasonable basis, even that treatment which is not 'the same' can be accepted.[31] In*SD Myers,*[32] *Feldman,*[33]*Bayindir*[34] *and Corn Products*[35] case, Tribunals seem to have focused on the practical impact of the measure rather than on intent, whereas in *Genin v Estonia*[36], Tribunal seemed to require discriminatory intent as a necessary perquisite for finding of discrimination.[37]

F. CONCLUSION

National treatment clause in CECA ensures that neither India nor Singapore make any negative differentiation between local and foreign investors and that position of foreign investor is promoted to the level accorded to own nationals making it conducive for investors to invest in either country on the guarantee that they will be given treatment at par with locals. Only exception is taxation sector in which a party is not obliged to extend to investors of other party the benefit of any treatment, preference or privilege resulting from international agreement or domestic legislation on taxation.

III. EXPROPRIATION

The seizure of assets by host country has been an archaic concern of all foreign investors because placing an asset in a foreign territory amounts to subjecting them under the jurisdiction of host country government. Those assets then become prone to host country's legislative andadministrative acts, including expropriation, nationalization, dispossession and alteration of property rights.[38] Expropriation refers to an act of State taking away property having value from its owner. It, apart from violence towards the person of the investor, is also the most serious infringement of an investor's right that a state can accomplish, therefore, rules administering such actions are correspondingly vital.[39]

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[30] *Id.* at p 302.
[31] *Id.* at p 301.
[32] SD Meyers Inc v. Canada, *supra* note 24.
[33] Feldman v Mexico, *supra* note 21.
[34] Bayindir v Pakistan, ICSID Case No. ARB/03/29.
[35] Corn Products International Inc. v. United Mexican States, ICSID Case No. ARB(AF)/04/1.
[36] Genin v. Estonia, ICSID Case No. ARB/99/2.
[37] Dolzer and Schreur, *supra* note 5, at p 203.
[38] Salacuse, *supra* note 6, at p 313.
[39] Schefer, *supra* note 1, at p 167.

The host State's right to expropriate alien property has been accepted by classical rules of customary international law in consistence with the notion of territorial sovereignty.[40] Nevertheless,the right to expropriate is reiterated in numerous international law instruments, including almost all IIAs. It is necessary to examine both the nature of customary law rule on expropriation including elements to characterize an expropriation as 'legal' and treaty-based protections against regulatory or indirect expropriations.[41]

While expropriations or takings' can be of anyone's property, the expropriation of property becomes subject matter of international economic law only when the owner is foreign. The State's right to expropriate is restricted by conditions surrounding the object of expropriation and the process by which it is carried out.[42]

To measure the legality of expropriation, there are some commonly accepted requirements that need to be fulfilled. For example, Article 110 of NAFTA[43] and Article 13(1) of the ECT [44] provide that investments can be expropriated subject to following conditions:

i. Expropriation must be undertaken for a *public purpose;*
ii. It must be carried out in accordance with the principles of *due process*;
iii. It must be *non-discriminatory;*
iv. Investor must receive *compensation.*

CECA also recognizes that neither India nor Singapore shall take any measure of expropriation (including nationalization) against the investments of investors of the other party unless the measures are taken on a non-discriminatory basis, for a purpose authorized by law, in accordance with due process of law and against payment of compensation.[45]

Scope and meaning of the above requirements are defined as follows:

i. **Public Purpose**: The State must be acting in public interest to exercise its right to take ownership of a foreign investor's property. This requirement is difficult to adjudicate effectively for the simple reason that State is in a better position to determine what is in public interest than an international tribunal. The wide extent of modern States' regulation

[40] Dolzer and Schreur *supra* note 5, at p 98.
[41] Schefer, *supra* note 1, at p 168.
[42] *Id*. at p 169.
[43] North American Free Trade Agreement, 17 December 1992.
[44] The Energy Charter Treaty, 17 December 1994.
[45] CECA, *supra* note 2, Chapter 6, Article 6.5(1)

of their economies makes the scope of what could legitimately be considered a 'public purpose' severely far reaching. To prove violation of public interest element, investors need to show that the government took their property in retaliation or for personal enrichment of leaders of the host State.[46]

ii. **Due Process of Law:** There is a requirement of procedural fairness and protection of investor's rights throughout the expropriation period. The procedure adopted must be of such a nature to provide an affected investor a reasonable chance within reasonable time to assert its legitimate rights and have its claims heard.[47]

CECA provide for judicial review to an investor whose investment has been expropriated guaranteeing a right of access to the courts of justice or administrative tribunals or agencies of the party making the expropriation to seek review of the expropriation measure or valuation of the compensation that has been assessed.[48] It is crucial for a fair procedure. Though this is an option for aggrieved investor for resolving investor-state disputes but this may pose a variety of problems for foreign investors:

a) First, local courts may lack judicial independence and might be subject to thecontrol of the host government, depriving the investor of an impartial forum. Moreover, local courts often have a heavy backlog of cases and inefficient procedures that deny expeditious justice and make obtaining a final judicial determination difficult.
b) Second, even if the judiciary is independent, it may nonetheless harbour prejudice towards foreign investors, as the courts of the State of Mississippi demonstrated in NAFTA case of *Loewen Group, Inc v United States.*[49]
c) Third, local courts may not have the expertise to apply complex principles of international law to complicated foreign investment transactions. Even if courts have such expertise, domestic law may limit or prohibit them from adjudicating their State's international commitments.[50]

iii. **Non-discrimination:** This element prohibits host States from treating certain investors unfavourably in comparison to other investors. Host State shall never have regard topersonal characteristics of investors while expropriating properties. Discrimination of

[46] Schefer, *supra* note 1, at p 170.
[47] *Id*. at p 177.
[48] CECA, *supra* note 2, Article 6.5(4).
[49] Loewen Group Inc v. United States, ICSID Case No. ARB(AF)/98/3.
[50] Salacuse, *supra* note 6, at p 397.

foreign investors on basis of their race or nationality is prohibited under international investment law.[51]

iv. **Compensation:** The measure of compensation has been by far the most controversial, but now, nearly all expropriation cases before tribunals follow the treaty-based standard of compensation in accordance with fair market value. This means full or adequate compensation.[52] Rather than leaving the interpretation of the standard of compensation solely to the discretion of arbitrators, many investment treaties define the terms in detail and provide instructions for their application.[53]

CECA also provides that payment of compensation shall be prompt, adequate and effective giving effect to "Hull Formula of Compensation". Compensation is required to be equal to fair market value of the expropriated investment immediately before the expropriation or impending expropriation became public knowledge. Also, compensation is required to carry interest from the time of expropriation to the time of payment.[54] The requirement of 'prompt' compensation means 'without any delay' so that investor does not have to wait for years for payment of lost investment and 'effective' compensation means that payment is to be made in a 'convertible currency'[55] to allow money to flow back out of country.

While compensation for legal expropriation is governed by treaty provisions, it is not so in case of illegal expropriation. It is regulated by principles of customary international law as illustrated by *Chorzow Factory* case, which requires that the offending state should, as far as possible, restore to the investor the situation that would have existed before illegal expropriation took place. Lost profits and any increase in enterprise value following expropriation will also be taken into account, unlike in legal expropriation.[56]

A. INDIRECT EXPROPRIATION

Investment treaties use a range of synonyms for the term expropriation including 'nationalisation', 'deprivation' and dispossession and the provision on expropriation use different phrases including 'indirect expropriation', 'measures tantamount to expropriation' and 'measure having effect

[51] Schefer, *supra* note 1, at p 180.
[52] Dolzer and Schreur *supra* note 5, at p 100.
[53] Salacuse, *supra* note 6, at p 353.
[54] CECA, *supra* note 2, Article 6.5(2).
[55] Dolzer and Schreur, *supra* note 5, at p 101.
[56] Salacuse, *supra* note 6, at p 354.

equivalent to expropriation to signify that the provision is applicable to measures analogous to direct expropriation'.[57]

As expropriation can be either direct or indirect, CECA refer to both types of expropriation. Thiscan be ascertained by provision of CECA, which explicitly lays down that expropriation provisionis to be interpreted in accordance with the understanding of parties on expropriation as set out in exchange of letters forming an integral part of CECA.[58] CECA include not only direct expropriationbut also measure or series of measures equivalent to direct expropriation without formal transfer of title or outright seizure. However, the action or series of actions by a party should interfere with a tangible or intangible property right or property interest in the investment to constitute an expropriation. The annexure further provides that expropriation has been included in the agreement to reflect the customary international law concerning the obligations that the States have.

There may be situations in which host States enact certain measures that decrease the benefits investors gain from their investments without actually changing or cancelling investors' legal title to their assets or diminishing their control over them and such measures amount to indirect expropriations. The reasons behind not expropriating directly and shifting to regulatory actions by host States are manifold, for example, the want for foreign capital makes State unwilling to take drastic and conspicuous steps of openly seizing foreign property. Further, any such official acts to seize title or control of a foreign investor's property will draw negative publicity and are likely to cause serious damage to the reputation of a State as a site of foreign investment.[59]

A typical characteristic feature of indirect expropriation is that there is denial of existence of expropriation by State and justifies its actions as legitimate exercise of its regulatory or 'police powers' thereby rejecting the investor's claim of compensation. Though there is a paucity of a clear and distinct line between valid regulation and illegal indirect expropriation but in ascertaining whether a regulatory action by a host State represents an indirect expropriation, tribunals look primarily to its effects on investment rather than to the form of actions of the State or government's intention in making it.[60]

The use of the phrase 'a measure or series of measures taken by a party that has an effect equivalent to direct expropriation or nationalization' in CECA also falls within a different category of expropriatory acts. It can be viewed in two different ways. First being, somehow broader and more

[57] JONATHAN BONNITCHA, SUBSTANTIVE PROTECTION UNDER INVESTMENT TREATIES 233 (Clays, St Ives plc. 2014).
[58] CECA, *supra* note 2, Article 6.5(7).
[59] Salacuse, *supra* note 6, at p 325.
[60] *Id*. at p 326.

expansive than simple indirect expropriation. It could be intended to add to the meaning of the prohibition, over and above the reference to indirect expropriation and so to broaden it. This view was also held in *Waste Management*[61] case. On the other hand, 'measures equivalent to expropriation' can also be viewed as a concept co-extensive with that of indirect expropriation as was held by the tribunal in *Pope & Talbot*[62] case whereby it means nothing more than 'a measure equivalent to nationalization or expropriation.'

Though, the effect of the measure upon the economic benefit and value as well as upon the control over the investment is the key question to decide whether an indirect expropriation has taken place[63], but CECA have an exception to it stating that although a measure or series of measure by a partyhas an adverse effect on the economic value of an investment, it alone does not establish that expropriation has occurred. The extent to which the measure or series of measure interferes with distinct, reasonable, investment-backed expectations and the character of measure including inter alia the intent behind the measure, objectives, purpose and degree of nexus between the measure and outcome or effects that form the basis of the expropriation claim are some other factors that determine whether expropriation has occurred in addition to case by case, fact-based inquiry.[64]

CECA has also been fairly specific in defining the nature of investment-backed expectations. They must be 'distinct' and 'reasonable' to be considered by a tribunal in determining whether a government measure amounts to indirect expropriation.

The existence of legitimate expectations on the part of investor is an issue that has recently received increasing attention. It is debatable whether the concept of legitimate expectations is part of general principles of law. Though legitimate expectations play an important role in interpretation of fair and equitable treatment but they have penetrated the law administering indirect expropriations. The legal framework offered by the host State will be an important source of expectations on the part of investor[65] and national rules need to be obeyed by investors like any other economic activist.

In case of long-term projects, there is a direct agreement between the investor and host State which identifies the limits and gaps of State interference in agreement rights. Issues regarding violation of legitimate expectations are raised when the actions of the host State are such as to have an adverse

[61] Waste Management, Inc v. United Mexican States, ICSID Case No. ARB(AF)/00/3.
[62] Pope & Talbot Inc v. The Government of Canada, *Ad hoc* Tribunal UNCITRAL, 1976.
[63] Dolzer and Schreur, *supra* note 6, at 112.
[64] CECA, *supra* note 2, Annex 3.
[65] Dolzer and Schreur, *supra* note 5, at 115.

effect on the investor, where the investor may claim that the host State has violated legitimate expectations provided at the beginning of the investment.[66]

CECA uphold public welfare objectives such as health, safety and the environment and any regulatory action taken by a party in this context does not constitute measures having an effect equivalent to nationalization or expropriation. However, such measures are required to be taken only in rare circumstances. Even the Tribunal in *Methanex v. United States*[67] held that Californian ban on gasoline addictive MTBE due to environmental and public health reasons did not constitute expropriation.

Therefore, an important question that arises in determining whether a government's measure amounts to indirect expropriation or not is whether the measure is reasonably proportional to the purpose which the government seeks to achieve? A probable factor for this examination would be the impact of the measure on foreign investor versus impact on host country nationals and if it is found that foreign investor had to bear excessive amount of burden imposed by the measure then there is lack of proportionality.[68]

It becomes important to quote the jurisprudence of European Court of Human Rights on the proportionality test,

> "A measure depriving a person of his property shall not only pursue a legitimate aim in public interest but there must also be a reasonable relationship of proportionality between means employed and the aim sought to be realised and a balance will not be found if an individual had to bear excessive burden*".*

This test developed by ECHR has also had an impact on tribunals while applying treaty provisions to governmental measures amounting to indirect expropriation. Even in *Tecmed v Mexico*, it was held that in addition to negative financial impact of regulatory measure on foreign investment, the proportionality of such measure to public interest protected and protection granted to investments shall be considered.[69]

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[66] 'Investors Legitimate Expectations and The Interest of Host State in Foreign Investment' <https://pdfs.semanticscholar.org/68e7/1e51a7ea0a165679975e35a9082517be3a7b.pdf> (last visited 21 December, 2017)
[67] Methanex v. United States, (2005) 44 ILM 1345.
[68] Salacuse, *supra* note 6, at 342.
[69] *Id*. at 342.

Conclusion*:* CECA, like other treaties and agreements, ensures that expropriation cannot take place until four basic conditions are fulfilled, thereby taking care of the investors. The condition of compensation applies even when expropriating assets of an enterprise in which other party owns shares to safeguard interest of owners of such shares. CECA is different in the context that unlike other treaties providing for investor-state arbitration only to avoid disputes, CECA allow the parties to have recourse to local courts also for resolution of disputes ensuring compliance of due process of law element. The exception to expropriation that any measure taken in public interest such as health, safety and environment does not amount to expropriation, safeguards interest of host State thereby maintaining a balance between rights of investor and host State.

IV. EXCEPTIONS AND DEFENCES TO INVESTMENT PROTECTION

As the interdependent economic relationships of States have increased, there has also been an increase in number of their international obligations. The number of investment treaties, both bilateral ["**BITs**"] and multilateral ["**MITs**"] have skyrocketed since the late 1980s, increasing from385 in 1990 to 2,495 in late 2005.[70]

On one hand, for seeking the benefits of foreign investment, a State contemplates or agrees to abide by international obligations regarding the treatment that will be meted out to the investors and investments during long years of their existence in the territory of host State but on the other hand, those same States wish to retain maximum amount of freedom to enact legislation and regulations during the same period in order to pursue their perceived national interests in an uncertain future. For this reason, exceptions are included in nearly all investment treaties to protect certain important interests from the coverage of treaty and allow the contracting States to uphold their ability to exercise legislative and regulatory authority in that area.[71]

Such exceptions may have been drafted either narrowly restricting the application of a specific treaty provision to a particular circumstance or transaction or may have been drafted broadly to exempt a specified class of persons, transactions, or situations from the application of all investment treaty provisions.[72] An example of later category is 'denial of benefits' clause in CECA, allowing the contracting States to deny the benefits of the investment to an investor which is an enterprise of other party either having no substantial business operations in the territory of the other party or

[70] P MUCHLINSKI, F ORTINO, C SCHREUER, OXFORD HANDBOOK OF INVESTMENT LAW 460 (CPI Antony Rowe, Chippenham 2008).
[71] Salacuse, *supra* note 6, at p 376.
[72] *Id*. at 377.

where the investors of denying party own or control the enterprise. Such circumstances have to be established by the denying party.[73]

The reason behind inclusion of such a clause is twofold. First, it unambiguously carves out a class of 'investors' that would otherwise be entitled to protections under the treaty.[74] Second, such clauses address concerns about nationals, legal entities in particular of the home State that seek to lodge treaty claims but have no connection to the home State other than the simple fact of their incorporation. It was in the diplomatic protection context, the clause of 'denial of benefits' arose to exclude 'enemy companies' from the possibility of obtaining espousal.[75]

There may be exceptional circumstances in which a country's national interests are at stake and, hence, contracting parties are exempt from observing core treaty obligations. Such exemptions are provided for in the treaties/agreements.[76] CECA stipulate that "a party shall not be required to furnish any information, the disclosure of which and nothing shall prevent a party from taking any action it considers necessary for the protection of its essential security interest."[77] Such exception clauses can be interpreted to have the reasonable aim of giving host countries the legislative and regulatory autonomy to deal with threats to important national interest. On the other hand, their existence in treaties raises the risk that they will be invoked in unjustified circumstance by host countries in order to avoid their legal obligations and thwart the justified expectations of investors.[78]

The use of the term "protection of essential security interest" in CECA is vague and generalbecause what is included in the term is the essential question that arises for consideration e.g. whether a State facing difficult economic challenges can justify the concealment of important information or take any action on the ground that it was necessary to protect its essential security interest?[79] Because the agreement does not elaborate on or explain what is meant by 'essential security interest' the content of provision has to be found elsewhere. With respect to essential security interest, it is appropriate to look in customary international law defence of necessity.[80]

The question now is whether national security is a matter of subjective determination. If there is a use of express words in a treaty, it indicates that a subjective determination is conclusive. In its absence, the tribunal should hold that there must be objective factors justifying the invocation of

[73] CECA, *supra* note 2, Chapter 6, Article 6.9(1)(a),(b).
[74] Salacuse, *supra* note 6, at p 377.
[75] McLachlan, Shore and Weiniger, *supra* note 14, at p 212.
[76] Salacuse, *supra* note 6, at p 378.
[77] CECA, *supra* note 2, Article 6.12(1)(a)(b).
[78] Salacuse, *supra* note 6, at p 379.
[79] *Id.* at p 379.
[80] Muchlinski, Ortino & Schreuer *supra* note 70, at p 496.

national security defence. The India-Singapore Comprehensive Economic Cooperation Agreement (2005) though containing a subjective determination formula, points out instances of nationalsecurity that are relevant, but does not include circumstances brought about by economic crisis. National security in this agreement is confined to military threats. These circumstances include protection of fissionable and fusionable materials, actions in time of war or emergency in international relations, action relating to production of arms and ammunitions and action in protection of essential infrastructure.[81]

For the understanding of security exceptions, CECA make a reference to the exchange of letters. It provides that the decision on a security exception by a party is 'non-justiciable' and 'it shall not be open to any arbitral tribunal to review the merits of such a decision.'[82] This is absolute, but confines the exception of national security to limited circumstances which involve a military threat or activity involving violence against State. Clearly, there is no basis in the treaty which recognizes the circumstances in which the exception of national security can be invoked to include within its ambit exception to economic crisis unless the crisis sparks off threats to infrastructure or interferes with armaments manufacture or affects any of the activities mentioned in the provision.[83]

CECA further empower the contracting parties to pursue its respective obligations under the United Nations Charter for maintenance of international peace and security and for this purpose, States can take 'any action'. This allows States to exercise unfettered right, thereby expanding the scope of the exception clause.[84]

Exceptions that may be invoked on grounds of 'public order' or 'essential security' raise a pertinent yet unresolved question that whether such provisions should be construed as importing customary international law defences such as necessity or whether they should be viewed as creating separate treaty-based defences.[85] The two work differently. The treaty defence is a 'threshold requirement'. If that applies, the substantive obligations under the treaty do not apply. By contrast, Article 25 is an excuse which is only relevant once it has been decided that there has otherwise been breach of those substantive obligations.[86] The 'CMS, Enron, LG&E and Sempara' tribunals have held

[81] M. Sornarajah, INTERNATIONAL LAW ON FOREIGN INVESTMENT (Cambridge University Press 2010), 459.
[82] CECA, *supra* note 2, Article 6.12(3), (4).
[83] Sornarajah, *supra* note 81, at p 460.
[84] CECA, *supra* note 2, Article 6.12(1)(c).
[85] Muchlinski, Ortino & Schreuer, *supra* note 70, at p 493.
[86] CMS Gas Transmission Company v. Argentine Republic ICSID Case No. ARB/01/8.

different views. Lack of direction in a treaty should be read to import the customary international law provisions.[87]

Sometimes it becomes necessary to focus on specific language of the exception provision known as "self-judging nature of exception clause" to avoid any controversy that may arise out of treaty interpretation and application. CECA use the phrase 'which it considers', giving rise to inference that the exception clause is self-judging. It is necessary to state that even if the language of exception clause is self-judging, it does not imply that host State may invoke it at its unfettered discretion.[88] Also, Article 31 of the VCLT provides that States have a duty to carry out their treaty obligations 'in good faith.'[89]

Under customary international law, the situation of possible or unavoidable damage to the alien during a period of serious disorder and of possible range of protection by the host State has long engaged arbitral tribunals. The principle of non-responsibility of the host State for extraordinary events of social strife, which result in physical action against the asset of foreign investor is however qualified by duty of the host State to employ due diligence to the extent feasible and practicable under the circumstances, both before the event and while it unfolds. The burden of prooflies on the claimant to show negligence on part of the host State but no claim will be accepted if the host State proves that foreigners had received the same treatment as nationals of the host State.[90]

ILC Articles on State Responsibility, which reflect the customary international law, provide for situations beyond the control of host States under the following articles: Force Majeure (Article 23), Distress (Article 24), Necessity (Article 25). The general notion of these concepts is that they allow a State to act in a manner not in conformity with existing obligations of either customary or treaty law.[91]

A question with regard to international obligation is who should judge the extent and nature of an obligation and whether State has complied with it? This is a particular problem with respect to exceptions to obligations, for example, national security exception that is self-judging. It is difficult to expect from a State to be objective in ascertaining the existence of a state of necessity when such a defence would absolve it from liabilities that are harsh and taxing. Necessity may not be invoked

[87] Muchlinski, Ortino, & Schreuer, *supra* note 70, at p 498.
[88] Salacuse, *supra* note 6, at p 381.
[89] Vienna Convention on the Law of Treaties (signed 23 May 1969), entered into force 27 January 1980.
[90] Dolzer and Schreur, *supra* note 5, at p 183.
[91] *Id.* at p 184.

by a State unless it establishes that violating its obligation 'is the only way for a State to safeguard an essential interest against a grave and imminent peril'.[92]

It is therefore for tribunal or court applying an investment treaty to determine whether contracting State has invoked an exception clause in good faith. Even the CMS Tribunal in interpreting Article XI of the Argentina-US BIT clarified that it was the tribunal's task to ascertain whether the requirements of Article XI were fulfilled and the tribunal relied on the *Gabcikovo*[93] case, in which ICJ also held with respect to the requirements of the customary international law defence of necessity that 'the State concerned is not the sole judge of whether those conditions have been met'.[94]

A review should therefore extend beyond a mere determination that necessity or security exception was invoked in good faith and should include a substantive review to examine whether a state of necessity or emergency meets the conditions laid down by customary international law and treaty provisions and whether or not it is capable to preclude wrongfulness.[95]

The parties to India-Singapore Comprehensive Economic Cooperation Agreement mutually agree to undertake measures in public interest whereby "either party or its regulatory and judicial bodies are permitted to adopt, maintain or enforce and take any measure respectively that is in public interest including measures to meet health, safety or environmental concerns". With environmental concerns rising throughout the world, CECA can be perceived to have given host country room to legislate on matters relating to natural environment. Other areas of concern include health and safety of public.

The phrase 'consistent with chapter' would seem to mean that the measure in question shall be taken on a non-discriminatory basis and that investment shall be conducted in an environmentally sensitive manner.[96] The measures will not amount to violate fair and equitable standard, if fairness is understood in the context of the situation. The rapidly increasing law on environmental and human rights standards affects consideration of liability under investment treaties. They constitute obligations in general international law and investment treaties have to be read in the context of

[92] Muchlinski, Ortino and Schreuer, *supra* note 70, at p 503.
[93] Gabcikovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997.
[94] Gebhard Bucheler, Proportionality in Investor-State Arbitration 213 (CPI Group (UK) Ltd 2015).
[95] Muchlinski, Ortino and Schreuer, *supra* note 70, at p 504.

[96] Salacuse, *supra* note 6, at p 385.

these obligations and whenever any conflict arises between treaty obligations and these general obligations, a tribunal will have to settle the dispute in an appropriate manner.[97]

V. CONCLUSION

For exception clauses, with the wording similar to that of India-Singapore CECA, the process of interpretation is likely to establish proportionality as an appropriate tool to determine whether the action of State is covered by non-precluded measure clause.[98]

Also, there are many defences accommodated in CECA, making investment protection weaker. However, necessity as a defence may not always be available to parties because its standards are high in itself and that they are extraordinarily difficult to satisfy. Strong defence will be required by both parties to justify the circumstances precluding wrongfulness.

The inclusion of exception provisions in CECA does not in effect lead to a level of protection lower than that guaranteed by rules of international law, particularly customary law to the investment and investors of either party.

[97] Sornarajah, *supra* note 81, at p 472.
[98] Bucheler, *supra* note 94, at p 250.

GROUP OF COMPANIES DOCTRINE: CAVEATS TO CONSIDER BEFORE ITS APPLICATION

Disha Surpuriya*

I. INTRODUCTION

Arbitration is a consent-based mechanism of resolving disputes which involves submitting claims between the parties to one or more private adjudicators. As it requires waiving the right to approach judicial authorities in case of any conflict, consent of both parties forms the bedrock of this mechanism. A clear manifestation of the parties' intention to arbitrate can be established fromtheir act of entering into an agreement. In other words, the act of drafting an arbitration agreementin itself reflects the intention of both to submit their dispute(s) to arbitration and not the courts. Thus, an arbitration agreement is the focal point around which this entire dispute resolution method revolves.

Although there is no particular format of an arbitration agreement, the UNCITRAL Model Law on International Commercial Arbitration 1985 ["**UNCITRAL Model Law**"] mandates it to be in writing.[1] An identical provision has also been incorporated into the Arbitration and Conciliation Act 1996 ["**Arbitration Act**"].[2] However, the relevant observation to make here is that there is no requirement for the same to be signed.

It is pertinent to observe that, due to its consensual nature, an arbitration agreement binds only those who have assented to be bound by it. However, on several occasions non-signatories to the arbitration agreement also become germane to the ongoing differences and without roping them in the proceedings, the legitimacy of any settlement reached between the disputing parties may be jeopardized. Therefore, it becomes imperative to strike a balance between the two aspects and propose a course of action whereby a non-signatory can be lawfully made a party to an arbitration proceeding without their explicit consent.

Courts across different jurisdictions and scholars all around have developed different legal bases to bind non-signatories. These bases have been broadly classified into consensual theories focusing on the actual or presumed intention of the parties like agency, assumption, assignment, etc. and non-consensual theories mandated by the force of applicable law and considerations of

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[1] UNCITRAL Model Law on International Commercial Arbitration, 1985, art. 7.
[2] Arbitration and Conciliation Act, 1996, Section 7.

equity like alter ego, estoppel, succession etc.[3] The Hon'ble Supreme Court ["**SC**"] in the case of *Chloro Controls (I) Pvt. Ltd. v. Severn Trent Water Purification Inc. and others*[4] ["**Chloro Controls**"] held that the consensual theory focuses on *discernible intentions* of the parties and the principle of *good faith* whereas non-consensual theory relies on force of applicable law. In the aforementioned decision, the SC also adopted the Group of Companies Doctrine ["**Doctrine**"] as one of the methods to bind a non-signatory to an arbitration agreement. This research paper focuses on this Doctrine, its origin, scope and legal validity. The paper also tries to understand thehesitation behind its adoption by various nations around the world and raises important questions that courts need to look into before application of this Doctrine.

II. WHOLISTIC UNDERSTANDING OF THE DOCTRINE

A. MEANING & ORIGIN

The Group of Companies Doctrine is one amongst many ways by which courts have bound non-signatories to an arbitration agreement. When a company which is part of a corporate group, has a significant control over or is subjected to the control of any of its affiliates (who is the original executor of the contract having an arbitration agreement) such that the company is involved in the negotiation or performance of the contract entered into by the affiliate, then the company in certain circumstances, may invoke or be subjected to arbitration proceedings despite the fact thatit has not executed the contract itself.[5]

The Group of Companies Doctrine finds its origin in a 1982 French Arbitral Award, *DowChemical France & Ors v. Isover Saint Gobain*,[6] ["**Dow Chemical**"]. In this case an American company, Dow Chemical Group entered into an agreement with the Respondent for the distribution of thermal insulation products, which contained the arbitration clause. When discrepancies arose between the parties, the Applicant along with two of its subsidiaries (who were non-signatories to the agreement) commenced arbitration. An objection was raised by the Respondent on the ground that all the Applicants were not parties to the contract. However, the ICC Tribunal relied upon the Group of Companies Doctrine and upheld its jurisdiction stating that although the parent and its subsidiaries are different legal entities, in this case their corporate structure "constitutes one and the same economic reality".[7] This Doctrine was previously unheard

[3] GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION, 1527-1528 (3rd ed. Kluwer Law International 2021).
[4] Chloro Controls (I) Pvt. Ltd. v. Severn Trent Water Purification Inc. and others (2013) 1 SCC 641.
[5] Gary, *supra* note 3, at 1559.
[6] ICC Case No. 4131, Interim Award of 23 September 1982.
[7] *Id.*

of, and was an original in the field of contract law until the Dow Chemical case was decided. The Tribunal also laid down a threefold test which had to be fulfilled before joining any third party to an arbitration proceeding -

i. Existence of a *tight group structure* wherein one entity exercises substantial control over the other;

ii. An active role of the non-signatory in concluding, performing and terminating the contract containing an arbitration clause;

iii. Common intention of all parties (signatories and non-signatories) to bind the non-signatories to the arbitration agreement.[8]

B. LEGAL BACKGROUND IN INDIA

India's tryst with this Doctrine goes back to 2003, when the issue of inclusion of non-signatories first arose in *Sukanya Holdings Pvt. Ltd. v. Jayesh Pandya & another*.[9] In this case, several persons were a part of a corporate transaction however, not all of them had an arbitrationagreement between them. The SC giving utmost importance to the concept of party autonomy, decided that irrespective of the commercial intent of the parties, any person who is not a signatoryto an arbitration agreement cannot be included in the proceedings.[10] The Court went on to decide that since the cause of action cannot be severed and non-signatories cannot be excluded, the arbitration agreement could not be enforced even between the signatories and the dispute would inevitably have to go before a judicial authority.

The SC then revisited this stance in 2013 in the case of *Chloro Controls* and came to a completely contradictory finding. In this matter, the three-judge bench held that two significant features need to be established, before including a non-signatory party in an arbitration proceeding - *transactions with group of companies* and *a clear intention of the parties to bind both, signatory as well as non-signatory parties*.[11] Additionally the Court also highlighted situations when these requirements could be met i.e., in case of:

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[8] Adyasha Samal, *Extending Arbitration Agreements to Non-Signatories: A Defence of the Group of Companies Doctrine*, XI(I) KSLR, (2020).
[9] Sukanya Holdings Pvt. Ltd. v. Jayesh Pandya & another (2003) 5 SCC 351.
[10] Soorjya Ganguli, Somdutta Bhattacharyya and Radhika Misra, *Binding Non-Signatories To An Arbitration - Charting The Shifting Paradigms*, MONDAQ Mar. 17, 2022, 5:05 PM), https://www.mondaq.com/india/arbitration-dispute-resolution/868694/binding-non-signatories-to-an-arbitration--charting-the-shifting-paradigms.
[11] Chloro Controls, *supra* note 4, at p 674.

i. A direct relationship of the non-signatory with the signatory;
ii. A direct commonality of the subject matter;
iii. Composite nature of the transaction between the signatories and the non-signatories such that performance of the mother agreement would not be feasible without the aid, execution and performance of the supplementary agreements;
iv. Determining whether a reference of such non-signatories to arbitration would serve the ends of justice.[12]

The adoption of this Doctrine was definitely a welcome move but being rendered under S. 45 of the Arbitration Act, its application was limited to foreign seated arbitrations only. Nevertheless, the Indian judiciary readily broadened the scope of this Doctrine and applied the same in various subsequent judgments concerning domestic arbitrations. It is pertinent to note that although in this decision the Court reversed its stance on the Group of Companies Doctrine, it did not explicitly overrule the judgment of Sukanya Holdings. However, in light of recent decisions upholding the applicability of this Doctrine, the Sukanya Holdings decision is no longer looked at as a binding precedent.

In 2018 the SC extended the application of this Doctrine beyond S. 45 to S. 8 of the Arbitration Act and permitted inclusion of non-signatories in cases of domestic arbitration as well.[13] The Court stated that there were interlinked agreements for a single commercial project despiteparticipants in the transaction not being part of the same corporate group.[14]

Thereafter a three-judge bench of the SC, *in Cheran Properties v. Kasturi and Sons* whileenforcing an award against a non-signatory opined that there must be an intention to bind"someone who is not a signatory but has assumed the obligation to be bound by the actions of a signatory."[15]

In *Mahanagar Telephone Nigam Ltd. v. Canara Bank and Ors.*[16] ["**MTNL**"], the Divisional Bench of the SC clarified that besides cases of implied or tacit consent, this Doctrine could alsobe invoked in cases where the group structure is so rigid that it constitutes a single economic unit such that "the funds of one company are used to financially support or restructure other members

[12] *Id* at p 682.
[13] Ameet Lalchand Shah v. Rishabh Enterprises (2018) 15 SCC 678.
[14] Anjali Anchayil and Tamoghna Goswami, *Two's Company, Three's A Crowd: Revisiting the Group of Companies Doctrine*, Kluwer Arbitration Blog (Mar. 17, 2022, 5:38PM) http://arbitrationblog.kluwerarbitration.com/2021/06/24/twos-company-threes-a-crowd-revisiting-the-group-of-companies-doctrine/.
[15] Cheran Properties v. Kasturi and Sons (2018) 16 SCC 413.
[16] Mahanagar Telephone Nigam Ltd. v. Canara Bank and Ors (2020) 12 SCC 767.

of the group". Additionally, this Doctrine could be relied upon when the common objective of the group could only be achieved by a composite transaction where all agreements are performed collectively.[17]

Recently, in April 2022, this Doctrine was once again upheld by the SC when it ruled that a non-signatory may be bound by the agreement "if it is the alter ego of a party which executed the agreement".[18] The Court once again listed down the factors to be considered before binding any third party, something which was previously done in the case of *Chloro Controls*. Therefore, the Indian view on the Group of Companies Doctrine is very transparent and courts have readily applied this Doctrine in a plethora of cases, generally in conjunction with other doctrines like that of alter ego and piercing of corporate veil.[19]

C. COMPARATIVE ANALYSIS

Although the aforementioned discussion highlights that countries like France and India have willingly embraced this Doctrine, several other jurisdictions have shown hesitation to do the same. German laws specify that an arbitration agreements must be in a documentary form[20] and must be signed by the parties.[21] As a result, courts have generally withheld themselves from binding companies, who are not parties to an arbitration agreement, despite acknowledging their participation in the performance of a contract.[22] Additionally, keeping in mind the conflict of laws principles, courts in Germany have held that the result of each case must be carefully examined to ensure that it is in line with German national laws and public policy, failing which the Doctrine would not be invoked.[23] Therefore, Germany shall adjudicate the application of this Doctrine on a case-to-case basis.

American courts have liberally extended arbitration agreements to non-signatories with the help of five theories namely incorporation, assumption, agency, veil piercing/alter-ego and estoppel

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[17] *Id.*
[18] Oil and Natural Gas Corporation Ltd. v. M/s Discovery Enterprises Pvt. Ltd. & Anr., Civil Appeal 2042 of 2022.
[19] Vijayendra Pratap Singh, Abhijnan Jha, Abhisar Vidyarthi, *Whose Arbitration is it Anyway? Non-Signatories?* AZB Partners (Mar. 12, 2022, 2:45 PM) https://www.azbpartners.com/bank/whose-arbitration-is-it-anyway-non-signatories/
[20] German Arbitration Act, Section 1031.
[21] German Civil Code, Section 126.
[22] Otto Sandrock, *Extending the Scope of the Arbitration Agreement to Non-Signatories*, TRANS-LEX.ORG (1994) https://www.trans-lex.org/116200/_/sandrock-otto-arbitration-agreements-and-groups-of-companies-in:-festschrift-pierre-lalive-basel-frankfurt-am-1993-at-625-et-seq/.
[23] Kirstin Schwedt, *When Does an Arbitration Agreement Have a Binding Effect on Non-Signatories? The Group of Companies Doctrine vs. Conflict of Laws Rules and Public Policy*, KLUWER ARBITRATION BLOG (Mar. 15, 2022, 8:24 AM) http://arbitrationblog.kluwerarbitration.com/2014/07/30/when-does-an-arbitration-agreement-have-a-binding-effect-on-non-signatories-the-group-of-companies-doctrine-vs-conflict-of-laws-rules-and-public-policy/.

albeit they have refrained from recognizing this particular Doctrine.[24] Jurists believe that US courts have shied away from the application of this Doctrine because of the flawed presumption that this Doctrine goes against the principles of party autonomy and consent.[25] Therefore, the US stance on this issue remains incoherent as on one hand they support joinder of non-signatories but on the other hand they accuse the Group of Companies doctrine of violating parties' consent.

Lastly, English courts place strong reliance on the doctrine of privity of contract and hold that the intention of the parties to arbitrate disputes should be clearly seen from the terms of the agreement and not readily inferred from its conduct.[26] Therefore, their rejection of this Doctrine manifests from the fact that they do not take into account pre-contractual discussions or agreements when identifying the intention as those are not considered as legally binding promises.[27] Some learned members of the legal fraternity have argued that while English law on this issue is conservative, the English courts would recognize and enforce awards based on this Doctrine if the seat law of such an arbitration proceedings upholds the same.[28]

III. CAVEATS TO CONSIDER BEFORE ITS APPLICATION

Time and again, courts, jurists and legal practitioners have clarified several initial hindrances put forth by critics and have given fairly reasonable explanations for the same. However, there still remain certain unresolved issues vis-à-vis this Doctrine some of which have been discussed herein below -

A. ENFORCEMENT AGAINST NON-SIGNATORIES

One of the biggest reasons why arbitration as a dispute resolution mechanism has gained popularity is because it allows parties to subject the arbitration proceedings to a melange of laws. While on most occasions this contributes positively to aid and assist parties in arriving at a settlement, sometimes this factor can pose challenges at the time of enforcement if all the laws arenot in consonance with each other. Enforcement of arbitral awards is often a tedious task,especially in the international sphere due to the separate legal systems involved. Therefore, a

[24] Thomson-CSF, S.A. v Am. Arbitration Ass'n 64 F.3d 773 (2d Cir. 1995).
[25] Alexandre Meyniel, *That Which Must Not Be Named: Rationalizing the Denial of U.S. Courts With Respect to the Group of Companies Doctrine*, 3(1) THE ARBITRATION BRIEF (2013) https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1033&context=ab.
[26] Arsanovia Ltd & Ors v. Cruz City 1 Mauritius Holdings [2012] EWHC (Comm) 3702 (UK) [35].
[27] MICHAEL H WHINCUP, CONTRACT LAW AND PRACTICE: THE ENGLISH SYSTEM AND CONTINENTAL COMPARISONS (4th ed., Kluwer Law International 2001).
[28] Adyasha, *supra* note 8, at 16.

problem could very well arise when the award is sought to be enforced against non-signatories in states which do not recognize the Group of Companies Doctrine.

The leading international case on this subject matter is *Dallah Real Estate & Tourism Holding Co v Ministry of Religious Affairs, Government of Pakistan*[29]. In this case the seat of arbitration was France therefore, the ICC Tribunal permitted joinder of a non-signatory as the same is recognized under French laws. However, enforcement was being sought in UK and the English courts, relying upon provisions of the Convention on the Recognition and Enforcement of ForeignArbitral Awards ["**New York Convention**"] denied enforcement on the ground that there was no valid agreement. This decision was widely criticized in the legal fraternity due to its conservative approach, reiterating the need to have a coherent stance on the applicability of the Group of Companies Doctrine in order to avoid future inconsistencies of such nature. Therefore, even if theTribunal holds the non-signatory to be a valid party to the arbitration proceedings, the award might subsequently be rendered futile if it has to be enforced in a country whose laws are inconsistent with the laws under which such joinder has been made. The explanation is that enforcing an award which upholds this Doctrine can be argued to go against the public policy of the enforcing state due to which courts generally do not recognize and enforce awards which, although valid as per the seat law, are contrary to its public policy.[30]

B. LIMITED SCOPE OF THE DOCTRINE

One of the rudimentary pillars of arbitration is the principle of separability, which states that the arbitration clause shall be treated to be independent of the other terms of the contract.[31] In light of the same, it becomes important to ascertain if scope of this Doctrine is limited to making non-signatories a party to the arbitration agreement only and no other contract. As Professor Gary Born has pointed out 'there is a distinction between jurisdiction and substantive liability.'[32] On the sole application of this Doctrine, a non-signatory becomes a party to the arbitration proceedings but such non-signatory does not become substantively liable under the relevant contract i.e., no relief can be claimed against such non-signatory. This is in contradiction to the law followed in civil suits, which states that persons may be joined as defendants in a civil suit where a right to claim relief against such persons exists[33] suggesting that relief can be claimed against such parties despite them being non-signatories to the original contract. In light of the

[29] Dallah Real Estate & Tourism Holding Co v Ministry of Religious Affairs, Government of Pakistan (2010) UKSC 46.
[30] Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, art V (2) (b).
[31] UNCITRAL Model Law on International Commercial Arbitration, 1985, art. 16(1).
[32] Gary, *supra* note 3, at p 1531.
[33] Code of Civil Procedure 1908, Order I Rule 3.

above, there have been divergent views on this issue wherein some courts have imposed substantive liability on the non-signatories[34] whereas some have not.

On a side note, due to this very limitation, the Group of Companies Doctrine is argued to be quite irrelevant and ineffective. Courts in the US have opined that in comparison to this Doctrine, other principles of contract, corporate, and agency are better suited to bind non-signatories as parties can be made substantively liable under the latter and this has resulted in the withering of the novelty of this Doctrine.[35]

C. READING INTO IMPLIED CONSENT OF NON-SIGNATORIES

In furtherance of the introduction above and reiterated by the SC in several judgments like *Jugal Kishore Rameshwardas v. Mrs. Goolbai Hormusji*[36] and recently once again in *Caravel Shipping Services Pvt. Ltd. v. Premier Sea Foods Exim Pvt. Ltd.*[37], an arbitration agreement merely needs to be in writing and there is no requirement in law for it to be signed. Although formal signature is not a prerequisite for a valid arbitration agreement it is still considered the most appropriate mode of ascertaining the real intention of the parties. Therefore, when an entity refrains from signing an arbitration agreement it must *prima facie* be viewed as a refusal to submit disputes to arbitration. However, while applying this Doctrine, the courts overlook this express act of not signing the agreement and zero in on the implied or tacit consent of the entity to arbitrate the dispute. Thus, the burden to prove implied consent should be extremely high as the express act clearly states otherwise. The courts must go beyond the parent-subsidiary or sister concern relationships and conclusively establish real financial and organizational links between the parties before including any third party to the arbitration proceedings.

D. EXTENDING THE DOCTRINE TO NATURAL PERSONS

One controversy that has arisen recently is whether the 'Group of Companies Doctrine' can be applied only to companies and corporate entities or can it be extended to natural persons/individuals as well. As its name suggests, at the very first sight this Doctrine seems to be applicable only to companies. There are not enough precedents to determine whether the term companies is to be interpreted in the narrow sense or would it include other legal personalities likepartnership, joint ventures, etc and/or natural persons as well. With respect to other legal persons,

[34] Gemini Bay Transcription Pvt. Ltd. v. Integrated Sales Services Ltd. 2021 SCC OnLine SC 572.
[35] Alexandre, *supra* note 25.
[36] Kishore Rameshwardas v. Mrs. Goolbai Hormusji AIR 1955 SC 812.
[37] Caravel Shipping Services Pvt. Ltd. v. Premier Sea Foods Exim Pvt. Ltd (2019) 11 SCC 461.

it seems likely that they would be included within the ambit of this Doctrine, however there is not enough literature on this subject matter. As regards to natural persons, there are different contentious scenarios that need to be looked into before arriving at any conclusion about its inclusiveness. A few of these have been discussed separately hereinafter -

i. **Whether a natural person can take benefit of this Doctrine and plead for joinder of a non-signatory company?** There are antithetical views on this issue. In *ICC Case No. 9517of 2000* seated in Dubai, it was held that an individual shareholder, though being the ownerof the Claimant companies, could not invoke this Doctrine to join companies to an arbitration proceeding. In complete contrast to this, a German Court in 2014 "allowed a non-signatory patent holder to join its licensee company in arbitration proceedings against the respondents".[38] Indian courts have not faced this question yet so its stance remains unclear however it is only a matter of time before such a case comes up at which time it would be interesting to see what the court's opinion and reasoning is.

ii. **Whether a natural person who is a non-signatory can be made party to an arbitration proceeding?** No specific answer to this question exists as of today and arguments can be made from both sides. Under the provisions of the Companies Act 2013,[39] a director, manager, officer of the company or any other person associated with the transaction in question can be made personally liable for conducting the business in a fraudulent manner. Although such natural persons are non-signatories to the arbitration agreement, they can be included in the arbitration proceedings with the help of principles of agency, vicarious liability, lifting of corporate veil, etc. as understood under the Act. Furthermore, the liability for acts done by such persons during the course of their employment would continue to exist even beyond their stint at the concerned company.[40] On the other hand, principles of limited liability and separate legal personality can be referred to, in order to restrict the scope of this Doctrine and protect natural persons from being included in such proceedings.

The real problem, however, would arise when the liability of such persons has to be proved. The pre-requisites of the Group of Companies Doctrine is existence of a tight group structure, financial or administrative dependency on each other and the like, very well highlight that they have been put together keeping in mind the normal functioning of a corporate personality, more specifically a company. Hence, the same guidelines would not be the most appropriate test to

[38] Adyasha, *supra* note 8, at 7.
[39] The Companies Act, 2013.
[40] *Id.* at Section 441.

establish a commercial link in case of a natural person. If the scope of this Doctrine has to be extended to natural persons different tests will have to be laid down. Therefore, it is still unclear if this Doctrine would be applied to make natural persons personally liable and the manner in which it can be done.

E. EXTENT OF THE BINDING NATURE OF AN AWARD ON THIRD PARTIES

While it is a fairly settled matter that awards shall be enforced against non-signatories who are parties to the proceedings, the contours are not so clear when the enforcement is sought against non-signatories who are not a party to the proceedings. Unfortunately, the New York Convention and UNCITRAL Model Law do not shed enough light on this issue. The Arbitration Act also remains silent on this issue however, it does provide clarity on certain aspects related to the binding nature of both - a domestic and foreign arbitral award. S. 35 therein states that domestic award shall be binding on the parties as well as the *persons claiming under them.* The latter phrase extends the scope of the award beyond the parties and implies that additionally, the award shall also bind all those who derive their capacity or position from the parties;[41] the only limitation being that such other persons must particularly claim under the parties. Therefore, as long as non-signatories who were not party to the arbitration proceedings can be shown to have a connection with the parties to an arbitration agreement, they will be bound by the award. However, if such non-signatories are not related to the parties but only to other non-signatories who were a part of the arbitration proceedings, they will most likely be able to escape the grip of the award.

On the other hand, foreign awards are held as binding *on the persons as between whom it was made*.[42] The replacement of the word *parties by persons* in S. 46, has been interpreted to widen the reach of a foreign arbitral award in comparison with a domestic award anticipated under S. 35.[43] Courts have thus, inferred that S. 46 makes a foreign ward binding on non-signatories to an agreement as well. However, the non-signatories taken into account while making such a decision was limited to such non-signatories who were party to the arbitration proceedings. The position with respect to non-signatories who were NOT a party to the arbitration proceedings continues to remain unclear. It can be argued that if read in its entirety, the phrase *on the persons as between whom it was made under* section *46* could mean that the award shall be binding only on those persons between whom such an award was made whether they are signatories or non-signatories

[41] Cherian Properties, *supra* note 15, at p 436.
[42] Arbitration and Conciliation Act, 1996, Section 46.
[43] Gemini Bay, *supra* note 34, at p 807.

to an arbitration agreement. Therefore, as on today, the position remains that both, domestic and foreign awards are binding on non-signatories who are party to the arbitration agreement though S. 35 is more restrictive in comparison to S. 46. However, the Courts are yet to shed light on the extension of an arbitral award's reach on non-signatories who have not participated in the arbitration proceedings.

F. DEFENCES AVAILABLE TO PREVENT ENFORCEMENT AGAINST NON-SIGNATORIES

In the same decision of Gemini Bay, the SC also discussed S. 48(1) of the Arbitration Act at length to decipher if the defences granted under it are available to non-signatories to resist enforcement of an award against itself. The provision categorically states that enforcement can be refused only at the request of *a party against whom it is invoked*. Thereafter, sub-clause (a) was read literally by theCourt to conclude that it clearly dealt with the incapacity of the *parties* and the invalidity of the agreement according to the law decided by the *parties*.[44] Therefore, the Court ruled that this ground for objection cannot be made available to a non-signatory despite being a part of the arbitration proceedings. Subsequently, a similar finding was arrived at with respect to sub-clause (c) which, according to the learned bench, deals only with:

> "Disputes that could be said to be outside the scope of the arbitration agreement between the parties – and not to whether a person who is not a party to the agreement can be bound bythe same."[45]

Therefore, the scope of challenge under this provision was concluded to be very limited.[46] Additionally, in order to invalidate the application of this Doctrine, parties can, at the time of signing the contract, specifically include a proviso to the arbitration agreement. Vide such proviso parties can either limit the scope by stating that only signatories to the contract can derived benefits from it[47] or can state that unless otherwise agreed between both the parties, any agreement to arbitrate shall be binding only on the signatories.[48] In this way, despite its affinity with thesignatories, a third party would be safeguarded from being made a part of the arbitration proceedings.

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[44] *Id* at p 789.
[45] *Id* at p 797.
[46] Tejaswi Pandit, *Foreign arbitral award enforceable against non-signatories to agreement; 'perversity' no longer a ground to challenge foreign award; tort claims arising in connection with agreement are arbitrable: SC expounds law on foreign awards,* SCC ONLINE BLOG (11 August 2021) https://www.scconline.com/blog/post/2021/08/11/foreign-arbitral-awards/.
[47] *supra* note 14.
[48] GARY BORN, INTERNATIONAL ARBITRATION AND FORUM SELECTION AGREEMENTS: DRAFTING AND ENFORCING 112 (6th ed., Kluwer Law International 2021).

IV. CRITIQUE AND POSSIBLE ALTERNATIVES

The Group of Companies Doctrine has been a welcome move in the Indian jurisprudence as it brings to the forefront, guileful and deceptive entities who escape liability by making another entity carry out unwarranted actions on its behalf. Especially when most corporate houses in Indiahave such a complexly intertwined structure, this Doctrine proves to be extremely beneficial in finding the true face behind fraudulent transactions. However, it cannot be denied that there are numerous loopholes to this Doctrine, making it susceptible to criticism.

Although the SC has laid down tests which need to be fulfilled before invoking this Doctrine, in practice the same is much more difficult to follow. The High Courts on various occasions have shifted their focus from the requirement of consent and have applied the Doctrine merely relying upon the factual matrix of common email IDs, shared work premises, identical letterheads and same central control[49] or on the basis of a common subject matter, shared interests and prior relationship between the parties.[50] While it is true that no straight-jacket formula can be established to determine the applicability of this Doctrine, it cannot be denied that its current widenature leaves room for arbitrariness. To narrow down its scope, the Doctrine should be applied only in cases where the non-signatory has gained a direct and obvious benefit (economical or otherwise) under the contract rather than an incidental one.[51] Over the last decade even France,the originator of this Doctrine, has limited its scope to cases where there is a direct involvement ofparties in the performance of the contract and the dispute relates to such performance.[52]

Furthermore, it is a general practice for courts all around the world to refer to the principles of agency, alter ego or lifting of corporate veil along with this Doctrine. This helps to substantiate the Doctrine and to make a full-proof case against a non-signatory under the relevant contract. In India as well this Doctrine is often cited in consonance with other legal principles, the latest beingthe case of *Shapoorji Pallonji and Co. Pvt. Ltd. v. Rattan India Power Ltd*.[53] Not only do the other principles seem more effective but their contours are also better defined in comparison to this Doctrine, thereby justifying its popularity amongst judges. However, this has cast a big question on the relevance of the Group of Companies Doctrine as it is almost never cited in

[49] SEI Adhavan Power Private Limited & Ors. v. Jinneng Clean Energy Technology Limited, (2018) SCC OnLine Mad 13299.
[50] RV Solutions Pvt. Ltd. v. Ajay Kumar Dixit & Ors., (2019) SCC OnLine Del 6531.
[51] Anjali, *supra* note 14.
[52] Alexandre, *supra* note 25.
[53] Shapoorji Pallonji and Co. Pvt. Ltd. v. Rattan India Power Ltd. (2021) SCC OnLine Del 3688.

isolation and is generally eclipsed behind the other principles which are referred to alongside this Doctrine.

Despite these inhibitions, this Doctrine has been widely used in India since the Chloro Controls case. However, in May 2022, a three-judge bench of the SC has identified the need to have a relook at the ingredients of this Doctrine.[54] Highlighting the inconsistencies in all the previous decisions on this subject matter, the Court stated that its decision in Chloro Controls was based on"economic convenience rather than correct application of law".[55] Therefore, the Court has framed several issues for consideration by a larger bench of the SC. These concerns are apropos of the relevance and applicability of this Doctrine, most of which have already been addressed in detail above.

V. CONCLUSION

The Group of Companies Doctrine first saw light four decades ago when corporate structures were considerably less intricate. However, over all these years the same has metamorphosed, bringing the relevance of this Doctrine back in question. Extensive scrutiny of parties' intention, direct economic beneficiaries of the contract and the organisation of the corporate entities are all caveats to consider before invoking this Doctrine. While courts and tribunals must give a purposive interpretation to the term *party* under the Arbitration Act, it cannot have an overzealousapproach and bind those non-signatories who have a minimal role to play in a commercial transaction. Despite repeated judgments on this issue there are still several loopholes that need to be filled and boundaries that need to be defined. The issue of its reconsideration which has come up before the courts today is therefore, of urgency and gravity.

On one hand it is quite noteworthy to see the Indian judiciary adopt a pro-arbitration stance by allowing non-signatories to participate in arbitration. This would prevent a hybrid nature of legal proceedings where some players of a commercial transaction having executed an arbitration agreement would opt for arbitration whereas the others, due to the absence of the same, would move before courts. On the other hand, it is important to determine whether this Doctrine meets the needs of modern-day businesses and its complex internal hierarchies. It is also necessary to permit the Doctrine to expand and take into account various scenarios not considered when the

[54] Cox and Kings Limited v. SAP India Pvt. Ltd, Arbitration Petition (Civil) No. 38 of 2020.
[55] Sohini Chowdhury, *"Group Of Companies" Doctrine Needs Relook, Says Supreme Court; Refers Issues To Larger Bench*, LIVE LAW.IN (7 May 2022, 03:33 PM) https://www.livelaw.in/top-stories/group-of-companies-doctrine-needs-relook-says-supreme-court-refers-issues-to-larger-bench-198532.

Doctrine was originally conceptualised. In conclusive candour, it can be said that without clarifying all these ambiguities, this Doctrine would only open Pandora's box to litigation.