The National Law Institute University

Kerwa Dam Road, Bhopal, India - 462044

VOLUME III

Indian Arbitration Law Review

2021

IALR

Indian Arbitration Law Review

VOLUME III FEBRUARY 2021

INDIAN ARBITRATION LAW REVIEW

Volume III | 2021

February 2021

NATIONAL LAW INSTITUTE UNIVERSITY
Kerwa Dam Road, Bhopal, India-462 044

Indian Arbitration Law Review is an annual peer reviewed journal devoted to arbitration. The Journal is published by the students of the National Law Institute University and is supported by L&L Partners (formerly Luthra & Luthra Law Offices).

The Journal invites submissions of scholarly, original and unpublished written works from persons across the legal profession – students, academicians and practitioners. Such manuscripts should be sent in MS Word (.docx format) to ialr@nliu.ac.in. All citations and text conform to The Bluebook: A Uniform System of Citation (20th Ed.)

The views expressed in the articles published in this Volume of Indian Arbitration Law Review are those of the authors and in no way do they reflect the opinion of the Indian Arbitration Law Review, its editors, L&L Partners or the National Law Institute University, Bhopal.

Published by:

The Vice Chancellor, National Law Institute University, Bhopal
Kerwa Dam Road, Bhopal, India 462044
Phone: +91 0755-2696784
Email: vc@nliu.ac.in
Website: www.nliu.ac.in

Distributed exclusively by:

Eastern Book Company
34, Lalbagh, Lucknow - 226 001
U.P., India
Website: www.ebc.co.in Email: sales@ebc-india.com

INDIAN ARBITRATION LAW REVIEW

Volume III | 2021

This Volume has been published due to the time and effort of the following persons:

THE NATIONAL LAW INSTITUTE UNIVERSITY

Prof. (Dr.) V. Vijayakumar
M.A., M.L., M. Phil., LL.M., Ph.D.
Vice Chancellor

Ref.No...../ NLIUB Date: 12-02-2021

VICE CHANCELLOR'S MESSAGE

The Indian Arbitration Law Review (IALR) published by the National Law Institute University in collaboration with the L & L Partners Law Offices, a leading law firm. The objective of bringing out this publication is to consciously promote legal studies, research and skills among the students, faculty and researchers in the field of Arbitration Two volumes of this journal have been already released and this is the third volume of the IALR. To maintain high quality of the journal, efforts have been taken to get the articles peer reviewed for publication.

The entire world has faced the pandemic, COVID -19, and continue to reel under its implications and its over 4,000 variants during the past 10 months. Fresh lockdowns have been imposed in United Kingdom and in Europe. India faced the pandemic situation meaningfully The admission to all the National Law Universities through CLAT also took place during this period with a couple of deferred dates. These Law Universities are yet to see the fresh batch of students, except through online classes.

In spite of this pandemic's continued presence, the teaching – learning method has undergone a drastic change compelling the teachers as well as the students to learn and practice the online teaching methods. The faculty and students of NLIU have organized a number of conferences and seminars, individually or in association with other institutions. Moot and other competitions were held online. Yet, the charm of physical presence and interaction between young students and the experts as well as teachers cannot be replaced by technology platforms, however efficient they may be.

The NLIU students have added one more feather to their cap by bring various authors together in the field of Arbitration in bringing out this third volume of the IALR. I would like to place on record my sincere appreciation to Mr. Prashant Mishra, alumnus of NLIU, for his continued support extended to the NLIU and the students even during this pandemic. I would like to place or record my sincere appreciation to the students, Mr. Pranjal Agarwal, Editor-in-Chief and Ms. Arpita Pande, Managing Editor in bringing out this volume amid all hurdles. I hope that the readers would find this volume more meaningful and continue to support the NLIU in future as well.

(Dr. V. Vijayakumar)

Vice Chancellor
National Law Institute University
Bhopal

MESSAGE FROM THE PATRON

Writing brings order to the anarchy of thoughts. It is a deep process of discovering the self and the external world that changes the way we look at everything else. But, as the reflections of the author emerge on the screen or paper, a pondering ground for the reader is also created. When s/he interacts with this text, a thinking reader is born, and even a potential author. Thus, the writer and the reader collaborate to give the world more intelligibility. Such interaction can never get enough, and the text for it can never be in abundance. The beginning of IALR principally pays attention to this idea. I am thankful to Udyan Arya Srivastava and Prabal De, the Editor-in-Chief of the two previous volumes and their colleagues. In their work, the idea enured.

We are quite delighted that the venerated Eastern Book Company, part of all Indian lawyers' daily lives, is now our partner. Our sincere thanks to the dynamic Mr. Sumeet Malik.

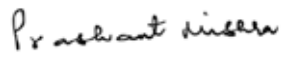
This volume is the labour of love of Pranjal, Arpita, Anoushka, Syamantak, Spandana and all their Editorial Board colleagues, and I take pride in their efforts. We are also indebted to our distinctive peer-review board for their time. They are the pillars of IALR.

Lastly, we thank and congratulate all the authors who sent us their work, including those who are getting published. The formal process may have its limitations, but each piece had a value of its own.

We are sure that the third volume will be read for the pleasure of reading, each of the interpretations and positions examined, and the authors, for their part, quite eager to receive criticism.

When I finally get to turn its pages, I will be thrilled. This is a special edition. The world is bewildered. The coronavirus disease has changed

millions of lives in ways one cannot possibly even begin to fathom. Nevertheless, human enterprise goes on. “Come what come may, time and the hour runs through the roughest day”. It is reassuring to see the community of arbitration enthusiasts getting over the circumstances and continuing to reflect. We at IALR too will continue to evolve.



Mr. Prashant Mishra
Partner, L&L Partners, New Delhi.

CONTENTS

ARTICLES

EDITORIAL NOTE

With an increasingly cross-jurisdictional approach to business in the recent years, the significance of arbitration law has transgressed domestic borders. In this past year, more than ever, the field of arbitration has witnessed several developments trying to grapple with the demands of commerce and dispute resolution mechanisms. The meticulously picked articles for this journal indicate this wide paradigm and demonstrate its ever evolving nature. The entire editorial team proudly present Volume III of the Indian Arbitration Law Review, which was compiled with seamless co-ordination among all members of the journal throughout this pandemic. Through this Volume, we aim to provide scholarship that reflects expertise and knowledge on contemporary topics in domestic, international and investor-State arbitration.

The Volume begins with the article The Goldfish Model of Arbitration - An 'out-of-bowl' approach to demystifying procedural laws in commercial arbitration. In this article, the author explores the interplay of procedural laws in international arbitration which often confuses arbitration enthusiasts and practitioners. In order to simplify the concept, the author proposes a graphical model, termed 'The Goldfish Model' which by analogy, represents the key procedural laws in a commercial arbitration and the interplay between them, and therefore simplifies questions surrounding applicable laws in any arbitration proceeding.

In Necessity in investment arbitration essential security interests in the Devas era, the author discusses the inconsistencies present in the application of various principles of international law in investment treaty disputes. The author pays special heed to the interpretation of essential security interests clauses that exist in differentiated languages across various international investment agreements. In doing so, the article explores the existing jurisprudence which relies upon necessity as a defence in customary international law and the current shift visible in the interpretation of ESI clauses with a final word on the future of such clauses.

Exploring the Prospects of a Preliminary Rulings System in ICSID Arbitration: An Efficient and Affordable Alternative to an Appellate System highlights the need for the introduction of some form an appellate body or review mechanism in ICSID arbitration. The author acknowledges the uncertainty among practitioners as to such bodies, however leans towards a desire for consistency and coherence in international arbitration. Through this paper, the author demonstrates how the Preliminary Rulings System (PRS) is a better alternative to an appellate body while still fulfilling all the required objectives sought to be achieved by an appellate system in an efficient and affordable manner.

The Garware Wall Ropes and Indo Unique: The road ahead in treatment of arbitration clauses contained in unstamped instruments is a concise comparative study of three recent rulings by Indian courts which throws focus on key points of judicial inconsistency. The issue of enforceability of an arbitration agreement in an unstamped document is specific to India and involves the interplay of two principles, firstly, separability of arbitration agreements and secondly, effect of fiscal legislations. This article considers the interplay of both these principles and considers the parameters which the Supreme Court should bear in mind as it provides future rulings.

The final article Confidentiality under the Indian arbitration regime analyses confidentiality obligations via the insertion of Section 42-A to the Arbitration and Conciliation Act, 1996. This new section imposes confidentiality obligations upon all parties to an arbitration, but the extent and scope of its applicability remain contentious and unresolved. In order to resolve this uncertainty and build a comprehensive domestic framework , the author draws references from efforts in cross-border jurisdictions for regulating confidentiality concerns and combating practical problems of confidentiality obligations.

We hope this Volume proves to be engaging and a prolific read and improves the quality of literature on arbitration available to the student community and legal fraternity.

THE GOLDFISH MODEL OF ARBITRATION: AN 'OUT-OF-BOWL' APPROACH TO DEMYSTIFYING PROCEDURAL LAWS IN COMMERCIAL ARBITRATION

—*Garv Malhotra**

ABSTRACT

The interplay of procedural laws in international arbitration often confuses arbitration enthusiasts and practitioners. It is a multi-dimensional concept which is hard to explain or understand in abstract. Proposed below is a graphical model, which by analogy, represents the key procedural laws in a commercial arbitration and the interplay between them. The author believes that 'The Goldfish Model' approach can simplify answering complex questions of applicable procedure for each stage of arbitration, whether domestic or international.

Disclaimers

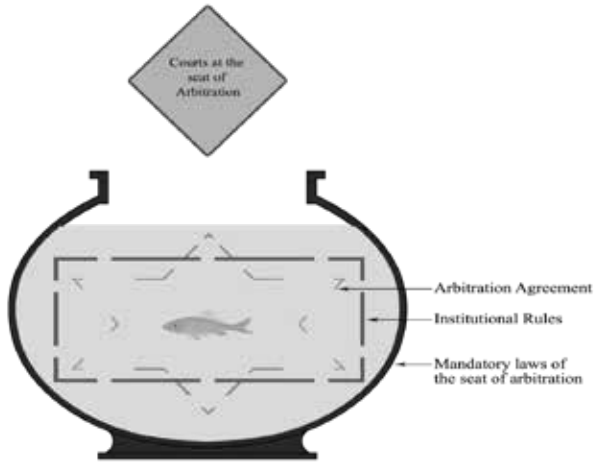
First, The Goldfish Model of Arbitration (the "**Goldfish Model**" or the "**Model**") does not postulate a new theory or style of practice. It simplifies and articulates the existing wealth of arbitral theory and practice from a different angle. The author recognizes that simplifying a system pivoted on the balance between "*judicial minimalism and party autonomy*"[1] can be a complex exercise with its own limitations. However, the objective of the

* The author is an international disputes lawyer and a partner at Skywards Law. He holds a B.Com., LL.B. (Hons.) from the Gujarat National Law University, Gandhinagar, an LL.M in arbitration from the National University of Singapore, Singapore and a Master's in International Disputes from the Graduate Institute, Geneva. The author is grateful to Professors Gabrielle-Kauffman Kohler, Jeffrey Waincymer and Gary Born; and Josef Ostřanský, Aviral Sinha, Khrystyna Kostiushko, Naman Maheshwari, Prateek Bagaria and Surya Ravikumar for their extremely valuable inputs and support.

1. Rt Hon Lord Mustill, '*Too Many Laws'* [1998] 6 (1) Asia Pacific Law Review 1-22; also see his judgment in Channel Tunnel Group Ltd. v. Balfour Beatty Construction Ltd., [1993] AC 334, 357.

Model is to imprint the broad architecture of the international arbitration system on the reader's mind.[2]

Second, while a few renowned academics have questioned the relationship between arbitration and national legal systems,[3] the dominant global practice, academic thought, as well as the Model, accepts the limited but indispensable role of national courts and legal orders as fundamental.[4]



The Goldfish Model

2. The author submits: like any model or theory, the *Goldfish Model* may perhaps skirt a few rare intricacies but broadly impresses the concept efficiently and should be judged and tested on its '*verisimilitude*' or '*truthlikeness*'. The author requests the reader's indulgence in this regard, see Graham Oddie, *Truthlikeness* (first published 2001, Edward N. Zalta, 2016 edn., The Stanford Encyclopaedia of Philosophy). The idea for this model was born on the shores of *Lac Léman* (Lake Geneva) in 2015 and concluded in New Delhi in 2020 during the pandemic. The piece draws inspiration from an old short story, '*The fisherman and his wife*', Grimm Brothers, Tale No 19 (Library of Alexandria) and the writing style of imagination complemented by research was inspired by the American thriller novelist Michael Crichton, as well as Dr Viktor Frankl's book *Man's Search for Meaning* (1946).
3. For instance, see B. Goldman, *Les conflits de lois dans I'arbitrage international de droit privé* (Martinus Nijhoff 1963) 347, 374; E. Gaillard, *Legal Theory of International Arbitration* (Martinus Nijhoff 2010).
4. See generally, Nigel Blackby & Constantine Partasides, *Redfern & Hunter on International Arbitration,* (Oxford 6th ed.), 1.198; F.A. Mann, "Lex FacitArbitrum" in International Arbitration Liber Amicorum for Martin Domke (Martinus Nijhoff, The Hague 1967, P. Sanders (ed)); J.F. Poudret and S. Besson, *Comparative Law of International Arbitration* (London, Sweet & Maxwell 2007).

1. INTRODUCTION

The Goldfish Model, by analogy, represents the process of arbitration and the interplay of key applicable laws. It is a model which has multiple dimensions, each of which is analogous to a *Fishbowl*.

Arbitration operates with enormous flexibility, anchored within the extremely broad but strictly impermeable outer-limits of national legal systems. The national laws lend legitimacy to the arbitration and the award. The ouster of courts' jurisdiction through an arbitration clause is not absolute.[5]

While various laws could potentially apply toarbitration,[6]The*Goldfish Model* restricts itself to the key lawsthat apply to an international commercial arbitration. This article and the *Goldfish Model* analogy runs on **3 levels**:

Level One: Understanding the *Fishbowl*;

Level Two: Interplay between various elements of the *Fishbowl*; and

Level Three: Transfers between jurisdictions.

2. LEVEL ONE: UNDERSTANDING THE FISHBOWL

A. Diving into the analogy

In the Model	In the Analogy	In an Arbitration
	***Goldfish***: It has the ability to swim within the *Fishbowl* and not beyond.	The *Goldfish* represents the **arbitration process** which is flexible, but rooted within a legal system.
	***Fishbowl***: The fishbowl is the fish's ecosystem. It is made up of solid glass and cannot be modified. One can choose the type or size of bowl but cannot modify its physical structure.	The *Fishbowl* represents **mandatory rules of the seat** of arbitration. The application of mandatory rules is a consequence of the choice of seat.[7]

5. This is because getting rid of the court's power to correct departures from the law is effectively getting rid of the law itself; see Mustill (n 1).
6. Mustill (n 1); also see Naviera Amazonica Peruana SA v Campania Internacional De Seguros Del Peru, (1988) 1 Lloyd's Rep 116.
7. As a theoretical side note, the New York Convention on the Recognition & Enforcement of Arbitration Awards, 1958 (the "New York Convention") in Article V(1)(a) addresses the situation where parties choose a curial law, different from that

In the Model	In the Analogy	In an Arbitration
	Plants/*Green Star*: There are small water plants within the bowl which provide food & nourishment to the *Goldfish*. The shape and size of these plants can be trimmed as preferred.	The plants/*Green Star*represents the **arbitration agreement**. It is the enabling source of power and procedure which can be modified as desired by the parties. It usually has large gaps on issues of procedure.
	***Lights/Brown Rectangle***: These are standard aquarium lighting accessories which cannot be modified.	The lights/*Brown Rectangle* represents the **institutional rules** which are standard form contracts. In cases of *ad hoc* arbitration, the *Brown Rectangle* refers to the default arbitration rules of the seat of arbitration (e.g. the domestic arbitration legislation).
	***Floating Diamond:*** *This represents a supervisor which has only a limited access to and role in the ecosystem.*	The *floating diamond* represents the **courtsat the seat of arbitration**.Their access and supervision over the arbitration process is detached and limited to specific situations.

B. Working the Goldfish Model

1. Within the Model

The Goldfish can swim straight in a direction until it is obstructed. In other words, the Goldfish can swim in a straight line if it is not obstructed by the *Green Star* (with large gaps) and then the *Brown Rectangle* (with small gaps). Moreover, even in a particular direction, through the gaps in the lines, the fish can, at a maximum, swim till the edge of the 'bowl' and no further.

In sum, identification of the obstructed path in a linear direction concludes at the first barrier and further evaluation is unnecessary to see how far the 'Goldfish' can swim in a straight line.

---

of the seat. For instance, if the parties state in their arbitration clause that the seat of arbitration is Singapore but the law applicable to the arbitration agreement is French Law. While infrequent in practice, in such a situation, the Fishbowl will represent the mandatory rules of the curial law that the parties have expressed in their contract.

2. In an Arbitration Scenario

In the Model, the blue **water** represents the flexibility of the arbitration process.[8] The Goldfish (arbitration) can swim till the bowl if it is unobstructed by the plants (arbitration agreement) and the lights (institutional rules). However, this rarely happens as most procedural answers can be found in the arbitration agreement and/or the institutional rules (or the default domestic legislation in case of an *ad hoc* arbitration). The applicable law on any procedural issue in an arbitration will be the *first* obstruction faced by the *Goldfish* in the *Model*. This may be the arbitration agreement, the institutional rules or the *lex arbitri* (*lex arbitri* is further explained in Part C sub-part (ii) below).

C. In Perspective: Analysis of key applicable laws

1. The Arbitration Agreement /Green Star

The first determinant of the arbitration procedure is the express choice of parties, i.e. the arbitration agreement (or *clause compromissoire,* as it is known in civil law systems[9]), and is called the "*foundation stone*" of international arbitration.[10] It is the source of tribunals' jurisdiction and the awards' legitimacy.

The arbitration agreement, while often featuring as a clause in the 'main contract', is considered an independent contract.[11] Such clauses usually do not go into the details of the procedure of settling disputes.[12] They only create a general obligation to arbitrate; identify the parties; broadly identify the subject matter of dispute (existing or foreseeable) and connect the arbitration to a legal system.

8. 'Water' is a term borrowed in this model from international trade law where it denotes the flexibility of a country in its custom schedules (also called 'binding overhang'). It is the difference between the bound rate of duty and the actual applied rate. See Raj Bhala, *Dictionary of International Trade Law* (LexisNexis, 2nd ed.).
9. Blackbyand Partasides (n 4)*,* 1.149.
10. Blackbyand Partasides (n 4)*,* 1.140.
11. Professor Pierre Mayer articulates this beautifully by stating that a contract containing an arbitration clause is essentially a single '*instrumentum'* containing two '*negotia'*. See P. Mayer, *Limits of Severability of Arbitration Clause* in Albert Jan van den Berg (ed.), *ICCA Congress Series No 9* (Kluwer International 1999) 261-267.
12. Poudret & Besson at page 130 of their treatise call them '*white clauses*', i.e. clauses which express the parties' will to arbitrate but do not lend any assistance on procedural and logistical issues.

Parties have the autonomy to undertake any obligation by agreement.[13] The only legal limitation to this right is that parties cannot contract outside the mandatory rules of the *lex arbitri*. For instance, Article 182(3) of the Swiss Private International Law (PILA), provides for the parties' *"right to be heard in adversarial proceedings"*. This is a mandatory rule of Swiss law which the parties cannot waive either by contract or by adopting any institutional rules (mandatory rules are further explained in Part (c) sub-part (iii) below).

In sum, the first determinant of the arbitral procedure is the parties' arbitration agreement. Parties can choose its design with flexibility so long as the agreement does not conflict with the mandatory laws of the seat of arbitration.

2. Institutional Rules/Brown Rectangle

Institutional rules provide a detailed procedural framework for conducting arbitration. These are a standard set of procedures that can be included by their simple reference in an arbitration clause.[14] The institutional rules are drafted based on the best global practices and are intended to be almost exhaustive rules on issues of arbitral procedure. Often the reference to institutional rules is an agreement (institutional rules) within an agreement (arbitration clause) within another agreement (main contract).

Most of these rules are administered by institutions such as the ICC, LCIA, PCA, SIAC, MCIA, etc. but the rules may exist independent of administering institutions as well (e.g. the UNCITRAL Rules). Moreover, parties can choose to have one set of rules administered by another institution.[15] In case of *ad hoc* arbitrations (without institutional rules),

13. While the *burden of proving* the existence of an arbitration clause is similar to general contracts, the *standard of proof* differs. Arbitration agreements must be in writing, see Article II of the New York Convention and art. 7 of the UNCITRAL Model Law, 1985.
14. There have been various instances where courts around the world have held inexact references to an arbitration institution to be binding on the parties. The author would like to believe that the debate of pathological clauses has now become passé.
15. The ICC amended Article 1(2) of their rules in 2012 to state that "*The Court is the only body authorized to administer arbitrations under the Rule*" and it's Secretariat appears to have formed the view that "*it is not possible for another institution to administer an ICC arbitration properly*", see Jason Fry and others, *The Secretariat's Guide to ICC Arbitration* (ICC 2012). However, the author has come across more than a few instances in practice where the ICC Rules are being administered by institutions like SIAC on the basis of parties' specific arbitration clauses. Based on experience,

this *Brown Rectangle* vanishes and the fish can swim up to the laws of the place where the arbitration is juridically seated. The mandatory rules of the seat remain the same irrespective of the fact that the arbitration is *ad hoc* or institutional. However, other non-mandatory rules of the seat are of relevance where there are no institutional rules governing the arbitration. The mandatory and non-mandatory rules of the seat of arbitration collectively form the *lex arbitri*.

In sum, the institutional rules (or default rules of the seat) provide a detailed procedure for the conduct of arbitration. However, in case of a contradiction between the institutional rules and the parties' arbitration agreement, the arbitration agreement will override. In the *Goldfish Model*, the institutional rules (*Brown Rectangle*) are usually broader than the contract but cannot validly be broader than the mandatory rules of *lex arbitri* or the *Fishbowl.*

3. The Mandatory Rules of the Seat of Arbitration/Fishbowl

The mandatory rules are the fundamental and non-derogable rules of a jurisdiction. These may be substantive or procedural rules contained within codified (or even uncodified) laws of that jurisdiction. Thus, the parties' agreement must be within the range permitted by the laws that are in force in the concerned jurisdiction.[16]

The *Fishbowl* is the outer shell of this ecosystem and the fish cannot swim beyond the bowl. Additionally, one can select a bowl depending on its preference of size, colour, etc.; however, once selected, one cannot alter the bowl's structure. This is analogous to the mandatory rules of *lex arbitri* which are a non-waivable consequence of the seat of arbitration.

The mandatory rules of the seat are fundamental to the larger interest and public policy of the concerned jurisdiction. Therefore, in this regard, private arbitration becomes an aspect of public law.[17] Parties' freedom to contract ends at mandatory rules of *lex arbitri* which define its outer limits.

---

arbitrators are unsympathetic to jurisdictional challenges against the Tribunal & the institution on grounds of such "cross-administration". Within the model, this will be a situation of the parties' specific agreement (*Green Star*) overriding the general institutional rules (*Brown Rectangle*).

16. Jeffrey Waincymer, *Procedure and Evidence in International Arbitration* (Kluwer Law International 2012) at 3.7, 182-183.
17. Mustill (n 1).

Mandatory rules of a seat could be the rules contained in the arbitration statute and other statutes. These would not only include rights relating to due process but would also determine issues like arbitrability. For instance, in an arbitration related to bankruptcy seated in New Delhi, Indian law will decide whether the parties could validly arbitrate bankruptcy-related disputes, thus, defining the outer-limits of party autonomy. In the *Model*, the *flexibility* of the parties' arbitration agreement and the institutional rules extends only till the limit of the bowl and not beyond.

4. Courts at the Seat of Arbitration/Floating Diamond

The courts at the seat of arbitration have a limited but key role in an arbitration process. The assent of parties to a 'seat' is considered their assent to the consequential supervisory role of the 'courts' at the seat of arbitration.[18]

In the *Model*, the courts are depicted as a detached-supervisor who sits outside but passively observes the *Goldfish* in order to ensure that it is properly maturing. It is mindful of its limited role, knowing fully well that the *Goldfish* derives its nourishment from the 'plants' and vision from the installed 'light'.

The supervisor interferes in limited emergency situations, where the *Goldfish* has an imminent risk of suffering a life-threatening disease. The only time that the supervisor will be entitled to conduct a basic check-up of the fish is when it is claimed to have outgrown the bowl and is ready to be moved to a lake (explained further below in Level 3 of this article). At this stage, the supervisor can verify (against pre-set parameters) whether this fish was matured in a proper manner and is free of chronic diseases.

Just like the supervisor of a *Fishbowl*, the courts at the seat of arbitration have a very limited scope of intervention in an arbitration. The only time the courts have an opportunity to examine an arbitration seated in their jurisdiction is when an award is challenged before them.[19] During the lifespan of an arbitration, the courts remain mindful that the arbitrators

18. David Joseph QC in his treatise *Jurisdiction & Arbitration Agreements* (Sweet & Maxwell 2015) states on page 114 that "*An agreement to arbitrate disputes in England carries with it the agreement of the parties that the courts of England will have supervisory jurisdiction over the arbitration and the Tribunal*".
19. For instance, under art. 34 of the UNCITRAL Model Law at the seat of the arbitration with a view to set-aside the Tribunal's final award.

derive their powers from the parties' contract and respect their own obligations to refrain from intervention.[20]

The courts at the seat of arbitration have specific powers at designated junctures, e.g. at the annulment stage, to test the validity of the arbitration awards and to set-aside the award on grounds such as lack of a valid agreement, ignorance of due process, etc.[21]

The courts can also ensure that the parties' contractual framework (arbitration agreement and the institutional rules) do not contravene the mandatory rules of the seat. If the courts of the seat of arbitration decide to 'set-aside an award', the award is rendered null and void. On the other hand, an enforcing court only has the limited power of refusing to recognize and enforce an award in its own jurisdiction leaving the award open to enforcement in other countries. In the *Goldfish Model*, the supervisor above the bowl can intervene only in limited and exceptional circumstances. Once the fish has matured, the supervisor has the power to declare it as matured, partially defective requiring amputation or not fit for consumption.

D. Testing a simple Prototype of the Model

The *Goldfish Model* can be used to solve most procedural issues that may arise in an arbitration. To test the working of this model simpliciter, let us take an example of an arbitration clause in a contract that states: "*parties will arbitrate their disputes related to this contract in The Hague, Netherlands under the LCIA Rules*".

In response to a procedural question, like the number of arbitrators that should be appointed, we must first picture the arbitration as the *Goldfish* in the *Model*. The fish will swim in a straight line in any direction, only till it encounters the first barrier.

The *Goldfish* will first swim toward (or check) the arbitration agreement (*Green Star*). This clause does not provide guidance on the number of arbitrators. The fish will then move to the institutional rules (*Brown Rectangle*). The LCIA Rules provide an answer in Article 5.8.[22] If the

20. The UNCITRAL Model Law, arts. 5 and 8.
21. The New York Convention, arts. V(1)(a) to (e).
22. London Court of International Arbitration Rules (LCIA Rules), art. 5.8: "*A sole arbitrator shall be appointed unless the parties have agreed in writing otherwise or if the LCIA Court determines that in the circumstances a three-member tribunal is appropriate (or, exceptionally, more than three).*"

institutional rules did not have an answer to this procedural question (an unlikely situation as most rules provide for the Tribunal's residuary procedural discretion), the fish would swim to the *Fishbowl* and find the answer in the Dutch Arbitration Act, 2015 (that provides for a default quorum) or other relevant Dutch laws in force.[23]

3. LEVEL TWO: INTERPLAY BETWEEN VARIOUS COMPONENTS OF THE FISHBOWL

In this section, we will 'zoom-in' and look at a few specific examples of interaction between the key procedural laws that apply in an arbitration.

A. Arbitration Agreement v. Institutional Rules

Arbitration is a creature of contract. The contact between the parties to arbitrate, i.e. the arbitration agreement, usually demonstrates a general intention to arbitrate disputes without offering detailed guidance as to the arbitration procedure.

The arbitration agreement (*Green Star*) may, however, in rare cases, be broader than the institutional rules (*Brown Rectangle*). This does not render the contract void. It is a situation where the specific consent of the parties (express choice given in their arbitration agreement) expands the general consent of the parties (implied or, in this case, secondary express choice given in the institutional rules). This means that the *Green Star* could validly be within or outside the *Brown Rectangle*, so long as it stays within the bowl. For instance, where parties prescribe time limits (in the arbitration agreement) which are broader than the time limits laid down in the institutional rules, then notwithstanding the stipulation in the institutional rules, the stipulation in the parties' agreement will be determinative of the time limits.

Another example can be of an arbitration clause referring to the ICC Arbitration Rules but expressly excluding the mandatory 'scrutiny' process. This would *strict sensu*, be a valid and not a pathological clause. Maximum consequence may be that the ICC may refuse to administer the arbitration. In such a case, it will be an *ad hoc* arbitration (notwithstanding practical

23. The inquiry and analysis is analogous to the private international law tests of the express choice (agreement) followed by the implied choice (rules), followed by the law of the place of closest connection (seat of arbitration) followed by Common law countries like Singapore and India; English law however, considers the governing law of the contract to be the law of closest connection.

difficulties) based on all the ICC Rules, except those relating to 'scrutiny' (please don't try this at home!).

The contractual stipulations of the parties can be broader than the institutional rules (i.e., the *Green Star* can be broader than the *Brown Rectangle*). However, this may open up a can of worms. Therefore, staying within the institutional rules is almost always better, efficient and cheaper.

B. Arbitration Agreement & Institutional Rules v. Mandatory Rules of the Seat

In the *Goldfish Model*, if the *Green Star* and/or the *Brown Rectangle* (depicting the agreement or institutional rules) go beyond the glass *Fishbowl* of mandatory rules, they are void to the extent of such derogation. This means that when the *Brown Rectangle* or the *Green Star* goes beyond the *Fishbowl*, it automatically gets trimmed to the size which fits within the bowl by virtue of the supremacy of the mandatory rules of the seat. The arbitral clause however, may still be valid and operable by virtue of the *doctrine of severability.*

For instance, Bankruptcy disputes being non-arbitrable under the laws of The Hague, cannot be made arbitrable by the parties' arbitration agreement. Similarly, equality of parties being a mandatory principle under Swiss law would mean that parties, by agreement, cannot give the right to appoint an arbitrator to a single side.

In case of *derogation from the mandatory rules of law*, there are two possible outcomes.

If it is a '*procedural derogation*', e.g., waiver of the right to be heard, then the derogatory provision in the contract or rules will be deemed to be replaced by the mandatory rules of *lex arbitri*. For instance, in a Switzerland-seated arbitration, A and B agree that only A has the right to be heard. This violates the Swiss mandatory rule of equality. Therefore, it will automatically stand modified to the extent of conformity with the mandatory rule and *both* A and B will have the right to be heard.

If it is a '*substantive derogation*' that goes to the root of the matter, e.g. one related to the arbitrability of a dispute, then the tribunal will have to decline jurisdiction. For instance, the parties have an arbitration agreement covering bankruptcy-related disputes but are subject to the rules of Bankruptcy Arbitration Association in an arbitration seated in New

Delhi. Now, the Indian law prohibits arbitration of bankruptcy disputes. As a result, the *Brown Rectangle* depicting the institutional rules and the *Green Star* depicting the arbitration agreement would extend beyond the mandatory rules of *lex arbitri* and will, thus, be void to the extent of such derogation. In this case, the derogation is such that it goes to the root of the jurisdiction of the tribunal. As mandatory laws of *lex arbitri* (Indian law) prohibit arbitrating bankruptcy disputes, the tribunal will have to decline jurisdiction.

Having 'zoomed-into' the interplay between the various applicable laws to an arbitration, let us now 'zoom-out' and head to the next level of the *Model* involving the transfer of the arbitration from the *Fishbowl* to a lake (or the movement of the award from the seat of arbitration to the site of enforcement).

4. LEVEL THREE: TRANSFERS BETWEEN JURISDICTIONS

In a domestic arbitration, the enforcement process remains in the same legal ecosystem whereas in an international arbitration, the result of the arbitration (i.e., the award) is often enforced in another jurisdiction. The next level applies in case of international commercial arbitration where the seat of arbitration and the enforcing country are different jurisdictions.

When the *Goldfish* has matured enough to outgrow the *Fishbowl*, it's existence in that ecosystem would have come to a logical conclusion. At this stage, it would need to be moved to a larger lake (the "**Lake**"). The Lake would have its own set of rules, administered by a supervisor who recognizes a 'creature' as a 'fully matured fish' capable of being considered equivalent of a fish that was matured in their own Lake.

Consider that the Lake has its own laws to the effect that it would admit any fully matured Goldfish unless it suffers from a major defect. As such, the *Goldfish* would, by default, be admitted unless it is demonstrated that the fish was matured improperly or suffers from one of the particular identified diseases. If it were a 'home-bred fish' of the Lake, it would have already matured under the oversight of the supervisor, and, thus, would not have to be tested for diseases and maturity again.

In the *Goldfish Model*, the arbitration will remain within the confines of the arbitration agreement, the institutional rules and the mandatory rules of *lex arbitri* till the time it reaches a logical conclusion, i.e. the final award.

After the final award is made, any/all of the parties may choose to challenge that award before the courts at the seat of the arbitration. A party may, in parallel, take the award to another country for enforcement. Most legal systems confer effects on arbitral awards that are identical or similar to those of court judgments, notably that of *res judicata*. However, these effects are conferred by a legal system on awards seated in their jurisdiction. The New York Convention provides for the recognition and enforcement of these awards *outside* the territory of the seat jurisdiction[24] unless the award suffers from one of the "*grave deficiencies*"[25] enumerated in Article V of the New York Convention and Article 34 of the UNCITRAL Model Law (applied by the local courts as per their domestic laws, e.g. the Indian Arbitration and Conciliation Act, 1996).

The task of the *Supervisor* of the *Fishbowl* (courts at the seat) and the *Supervisor* of the Lake (courts at the site of enforcement) are similar in some regards but their competencies are mutually exclusive. The decision of one may persuade the other but does not bind it.[26]

In the author's view, when determining the flexibility of procedure during the lifespan of an arbitration (i.e., in the *Fishbowl*), the arbitrators must be mindful of whether the *Goldfish* of arbitration would be considered fit by the *Supervisor* of another *Fishbowl*. In other words, the arbitrators should ideally be mindful of the enforceability of their awards in a reasonably probable location of enforcement so that the amount of time and costs spent in arbitrating a dispute are not wasted.

5. CONCLUSION

Arbitration is like a majestic *Goldfish*. When in water, it can glide through the ferns and swim around the lights, so long as it stays within the bowl and steers clear of the obstructions. Unfortunately, it is often hard to see the outline of *Fishbowl* while swimming towards it, right until the *Goldfish* bumps its head.

24. *ICCA Guide to the Interpretation of the New York Convention, 1958* (ICCA 2011) 9.
25. P. Binder, *International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions* (Sweet & Maxwell, 3rd ed.) 7-001.
26. The difference between the "French" approach and the "American" approach to enforcement of foreign awards is based primarily on the degree of deference given to the opinion of courts at the seat in deciding annulment actions. The French courts instead of automatically refusing the annulment decision of the courts at the seat of arbitration, conduct their own *de novo* enquiry into the enforceability of the award whereas the American Courts give much deference to the annulment decision at the court of seat.

Given the fact that the courts at the seat of arbitration can only conduct a limited review of an award *after* it has been made, there is little guidance on what rules actually constitute the mandatory laws of a seat (at an *ex-ante* stage). Most guidance on what violates mandatory rules of a seat come from expensive battle scars of other parties (euphemistically called precedents). The author considers this as inefficient. States can save everyone a lot of time, effort and money if they could simply add a provision in their arbitration legislations stating what its mandatory laws are. This would reduce the risk of unwanted surprises and reduce judicial overreach in interpretation.

The author encourages the use of the *Goldfish Model*, with due credit where possible, and concludes that the Goldfish Model has the following *two key uses*.

First, it can become an integral *teaching tool* to acquaint students of arbitration with the interplay of various laws applicable to arbitration. The learned professors may consider using the *Goldfish Model* at appropriate times in their course and discourses on arbitration. Once this model is understood properly, it has the potential to get imprinted.

Secondly, this Model can be used to *visually demonstrate procedural laws* (similar to corporate structure diagrams) and to graphically represent the basis for adjudicating complex procedural issues. It can equally help courts in assessing derogations from their national mandatory laws and in-house counsel in drafting their arbitration agreements while avoiding pathological *midnight* clauses that increase litigation exposure.

NECESSITY IN INVESTMENT ARBITRATION: ESSENTIAL SECURITY INTERESTS IN THE DEVAS ERA

—Sujaya Sanjay[*]

ABSTRACT

Treaty-based investment arbitration has yielded a number of awards that have recognised various principles of international law that apply to investment treaty disputes. However, despite the multitude of awards, it has been observed that there has been little consistency in the application of these principles, and that achieving a 'jurisprudence constante' remains a distant dream as of today. One such example is the interpretation of essential security interests clauses that exist in differentiated languages across various international investment agreements. This paper aims to analyse the various turns that jurisprudence on this aspect has taken, ranging from emphasis upon customary international law as contained in the work product of the International Law Commission, to reliance on the case law of other dispute settlement bodies such as the WTO system. In this milieu, this article demonstrates that in a pair of arbitrations against the Republic of India, the respective tribunals created coherence, despite sophisticated variations in the terms employed in the relevant treaties. What is apparent is a return to the basic rules of treaty interpretation and ascertaining the host State's responsibility using the principles found in the Vienna Convention on the Law of Treaties, rather than relying upon circumstances precluding wrongfulness in customary international law.

1. INTRODUCTION

The principle of necessity in International law is viewed by States as a "safety valve" that allows them to adjust compliance with their international obligations under extraordinary circumstances.[1] In treaty form, necessity manifests itself as an essential security interests ("**ESI**") clause, which

* The author is a graduate of the Gujarat National Law University, Gandhinagar and is an LLM Candidate, in Investment Treaty Arbitration at the Uppsala University, Sweden.

1. Diane A. Desierto, *Necessity and National Emergency Clauses – Sovereignty and Modern Treaty Interpretation* (2012) Brill- Nijhoff, 3.

allows the State to take measures that would otherwise be inconsistent with its obligations under the treaty. ESI clauses are found in many bilateral investment treaties ("**BITs**") and are said to be a form of risk allocation between states and investors.[2] The general defence of necessity is also recognised as a part of customary international law,[3] and is considered an "external application" of the principle of self-preservation in international law.[4] The doctrine finds application in many areas of international law, such as military action, naval warfare, high seas, neutrality and so on.[5]

The existing jurisprudence on necessity in investment law is fragmented and incoherent.[6] To start with, there have been very few cases in which respondent States have relied on ESI clauses to defend their actions before investment tribunals. A coherent discussion on ESI clauses can be done by focussing on two specific events – one being the Argentine financial crisis of 2001, and the other being the annulment of the Devas agreement by India. As will be demonstrated below, there is no consistent jurisprudence concerning the application of ESI clauses – even between tribunals adjudicating on the same issue.

Part I of the article covers the existing jurisprudence on necessity as developed by the International Court of Justice ("**ICJ**") and the ILC's Articles on Responsibility of States for Internationally Wrongful Acts ("**ILC Articles**"), with a brief analysis of their assessment and application by the investment tribunals in the Argentine claims. Part II comprises a detailed discussion of the Antrix-Devas saga and the awards rendered in the investment claims brought against India. This section analyses both awards in detail to the extent of the two tribunals' analyses of the relevant ESI clauses relied on by India in these arbitrations. It also notes the implications of the two tribunals' decisions, together with a brief understanding of the

2. William W. Burke-White and Andreas von Staden, *Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties* (2008) 48 Va. J Int'l L 307, 324.
3. Case Concerning the Gabčikovo-Nagymaros Project, (Hungary/Slovakia) (Judgment) (Gabčikovo-Nagymaros Project) [1997] ICJ Rep 7, para 51.
4. Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (1987) Grotius Ltd., 69-77.
5. Burleigh Cushing Rodick, *The Doctrine of Necessity in International Law* (Columbia University Press 1928) 119, 120.
6. For a more detailed review on the complex nature of necessity in investment treaty arbitration, see G. Sacerdoti, "The Application of BITs in the Time of Economic Crisis: Limits to their Coverage, Necessity and the Relevance of WTO Law" in G. Sacerdoti, and others, *General Interests of Host States in International Investment Law*, 1.

change in approach by India and other States to ESI clauses. Finally, Part III summarises the author's concluding remarks.

2. EXISTING JURISPRUDENCE ON NECESSITY IN INTERNATIONAL INVESTMENT LAW

A. ESI clauses and the necessity defence in customary international law

In many ways, the ICJ's decision in *Hungary v. Slovakia* (known famously as the "***Gabčikovo-Nagymaros Project***" case) could be the starting point for modern jurisprudence on the doctrine of necessity.

In this case, the ICJ recognised the defence of necessity as a firmly established principle in customary international law.[7] It observed that the relevant criteria for the defence of necessity could be found in Article 33 of the Draft Articles on the International Responsibility of States,[8] which had been pleaded by both parties: (a) that the State's actions arose out of concern for an essential interest; (b) that the interest was threatened by "grave and imminent peril"; (c) that the State's actions were the only way to safeguard the said interest; (d) that they did not impair the essential interest of any other State towards which such obligation existed; and (e) that the acting State did not contribute to the state of necessity.[9]

---

7. Gabčikovo-Nagymaros Project (n 3) para 51.
8. Article 33 of the Draft Articles closely mirrors ILC Article 25. It reads as follows:
   "Article 33. State of necessity
   1. *A state of necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act of that State not in conformity with an international obligation of the State unless:*
      a. *the act was the only means of safeguarding an essential interest of the State against a grave and imminent peril; and*
      b. *the act did not seriously impair an essential interest of the State towards which an obligation exists.*
   2. *In any case, a state of necessity may not be invoked by a State as a ground for precluding wrongfulness:*
      a. *if the international obligation with which the act of the State is not in conformity arises out of a peremptory norm of general international law; or*
      b. *if the international obligation with which the act of the State is not in conformity is laid down by a treaty which, explicitly or implicitly, excludes the possibility of invoking the state of necessity with respect to that obligation; or*
      c. *if the State in question has contributed to the occurrence of the state of necessity."*
9. Gabčikovo-Nagymaros Project (n 3) para 52.

These criteria, which were identified by the ICJ, made their way into the finished ILC Articles that were published in 2001.

The ILC Articles have generated considerable controversy with respect to their scope and application.[10] Matthew Parish notes that the ILC Articles are not law, but rather the ILC's "opinion about what the law should be."[11] It is generally accepted amongst international law scholars that they were drafted keeping in mind the obligations between States inter-se, and not necessarily concerning State obligations towards non-State actors such as (in the case of investment arbitration) private entities.[12] James Crawford has described investment tribunals' reliance on the ILC Articles as how "a drowning man might grab a stick at sea in the hope of having certainty".[13] This could not be more apparent than when looking at the awards in the Argentine cases, where tribunals have grappled with the interpretation of necessity under ILC Article 25 and the ESI clause. Further, the body of arbitral awards on this issue has been far from consistent.[14]

Between 2001 and 2002, in response to a financial crisis that had taken over the country, Argentina enacted a series of emergency measures including currency devaluation, nationwide freezing of bank accounts, and suspension of tariff adjustments in the gas sector. These measures opened the floodgates to a barrage of claims by foreign investors.

Several arbitrations were commenced under the ICSID Convention and the US-Argentina BIT. They includethe likes of CMS v. Argentina ("**CMS**"),[15]

---

10. ILC Article 33 states:
    1. *"The obligations of the responsible State set out in this Part may be owed to another State, to several States, or to the international community as a whole, depending in particular on the character and content of the international obligation and on the circumstances of the breach.*
    2. *This Part is without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State."* [emphasis supplied].
11. Matthew Parish, *On Necessity* (2010) 11 JWIT, 169.
12. See Martins Paparinskis, *Circumstances Precluding Wrongfulness in International Investment Law* (2016) 31 ICSID Rev 484, 487; see also James Crawford, *State Responsibility: The General Part* (CUP, 2013) 74-5, 460, 587-92.
13. James Crawford, *Investment Arbitration and the ILC Articles on State Responsibility* (2010) 25 ICSID Rev, 127.
14. UNCTAD, "The Protection of National Security in IIAs" [2009] UNCTAD Series on International Investment Policies for Development, 42.
15. CMS Gas Transmission Co. v. Argentine Republic, Award (2005) 44 ILM 1205, para 359 (CMS).

Enron v. Argentina ("**Enron**"),[16] Sempra v. Argentina, ("**Sempra**")[17] LG&E v. Argentina ("**LG&E**")[18]and Continental Casualty v. Argentina ("**Continental Casualty**").[19] All five of these claims arose out of the measures invoked by Argentina in response to its brewing economic crisis, and in all cases, Argentina invoked the "necessity" clause in Article XI of the BIT[20] to defend its actions.

The tribunals in *CMS*, *Enron* and *Sempra* concluded that the necessity defence was inapplicable, whereas the tribunals in *LG&E* and *Continental Casualty* concluded the opposite. For the sake of brevity and keeping in mind that the *Enron* and *Sempra* awards largely follow the reasoning in *CMS* regarding interpretation of necessity, this part shall confine its analysis to *CMS* and *LG&E* awards, where both tribunals reached diametrically opposite conclusions on the interpretation of necessity and its impact on Argentina's liability as a result. The *Continental* decision has been briefly discussed in Part II in the author's analysis of the Devas awards.

B. Rules of interpretation

It is universally accepted that treaties are to be interpreted in accordance with the fundamental customary international law rules of interpretation, which have been codified under Articles 31 and 32 of the Vienna Convention on the Law of Treaties ("**VCLT**").[21] ILC Article 25, while also codifying

16. Enron Corpn. and Ponderosa Assets, LP v. Argentine Republic, ICSID Case No. ARB/01/3, Award (22 May 2007) (Enron).
17. Sempra Energy International v. Argentine Republic, ICSID Case No. ARB/02/16, Award (28 September 2007) (Sempra).
18. LG&E Energy Corpn. v. Argentine Republic, Award (25 July 2007) ICSID Case No. ARB/04/4 (LG&E Energy).
19. Continental Casualty Co. v. Argentine Republic, Award (5 September 2008) ICSID Case No. ARB/03/9 (Continental).
20. Article XI of the US-Argentina BIT reads as follows: "*This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace and security, or the protection of its own essential security interests.*"
21. Mark E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Martinus Nijhoff Publishers, 2009) 439. Article 31 embodies the textual approach to treaty interpretation, recognizing that the best guide to the common intention of the States' parties to a treaty may be found in the text of the treaty itself. Article 32 provides recourse to supplementary sources of interpretation under certain circumstances where the textual interpretation under Article 31 does not suffice. See, James Crawford, *Brownlie's Principles of Public International Law* (OUP, 2012) 379-384.

customary international law on necessity, is still a secondary source of interpretation which covers circumstances precluding wrongfulness.[22] It follows that the effect of the ESI clause differs from that of ILC Article 25, and this difference has an impact on State liability in investment treaty arbitration. This difference became apparent in the Argentine cases, as illustrated below in the conflicting decisions in CMS and LG&E.

As discussed above, the ESI clause protects measures that a State may take in order to secure its security interests against obligations it may have undertaken under the BIT. The ESI clause in a BIT and the necessity defence in customary international law present a good example of "opposable norms" in international law.[23] The ICJ has observed that although such norms may overlap in their content and are both binding on the States, they each retain their separate existence.[24]

Both tribunals had no difficulty in confirming that Article XI was broadly worded and encompassed economic crises.[25] Both tribunals also found that Article XI was not self-judging in nature. However, they starkly differed on the interpretation of Article XI itself. The *CMS* tribunal read the clause as a restatement of the defence under customary international law and interpreted it in accordance with the criteria under ILC Article 25.[26]

The *CMS* tribunal's conflation of the meaning of Article XI of the BIT with ILC Article 25 without an independent examination of Article XI was erroneous. This was pointed out by the ICSID Annulment Committee, to which Argentina had made an application.[27]

---

22. ILC, "Draft Articles on the Responsibility of States for Internationally Wrongful Acts, 2001 with Commentaries" in Report of the International Law Commission on the work of its fifty-third session (23 April – 1 June and 2 July – 10 August 2001) 59 UN Doc. A/56/10 (2001) 139.
23. See J.G. Starke, *The Concept of Opposability in International Law*, (1969) 2 AYBIL 1. See also Sujaya Sanjay, *Essential Security Interests in Investment Arbitration: Should ESI Clauses in BITs Be Interpreted As Per Customary International Law*, (2020) Uppsala University Publications, available at http://uu.diva-portal.org/smash/record.jsf?pid=diva2%3A1436408&dswid=-3106, 10.
24. Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) ICJ 14 (Merits) [1986] ICJ Rep 14, 95 (Nicaragua case).
25. CMS (n 15) para 359; LG&E Energy (n 18) para 238.
26. CMS (n 15) paras 315-317.
27. CMS Gas Transmission Co. v. Argentine Republic, Annulment (25 September 2007) ICSID Case No. ARB/01/8, paras 130-136. The Committee found that the tribunal had committed a "manifest error of law" by failing to recognize that Article XI of the BIT and ILC Article 25 substantively differ in their requirements and application, and that the BIT provision ought to have taken precedence over the customary international

The *CMS* Annulment Committee found that Article XI of the BIT was more of a threshold requirement which, if met, would exclude the applicability of the substantive obligations under the BIT. Article 25, on the other hand, was considered an "excuse which is only relevant once it has been decided that there has otherwise been a breach of those substantive obligations."[28] The requirements under the treaty are not the same as those in customary international law.[29]

The *LG&E* tribunal, which analysed the situation in the context of Article XI, appears to have thought along the same lines as the *CMS* Annulment Committee.[30] The tribunal found that "Article XI refers to situations in which a State has no choice but to act",[31] and went on to find that Argentina was not liable for breaches of the BIT during the period of necessity, based on Article XI and the submissions made by Argentina. The tribunal also considered the requirements under customary international law (analysed below), but only as a side note and only after concluding its separate analysis of Article XI.[32]

It may be noted that Argentina had also made applications to the ICSID Annulment Committee for annulment of the awards in *Enron* and *Sempra*. In their respective decisions on annulment, both Annulment Committees agreed with the CMS Tribunal in rejecting the respective tribunals' reasoning in conflating Article XI of the BIT with the customary international law definition of necessity. Although the *CMS* Annulment Committee did not find this sufficient to warrant annulment, the other two Annulment Committees saw fit to annul the awards in *Enron* and *Sempra* respectively, on the ground that the tribunals did not apply the correct law – namely, the ESI clause – to assess Argentina's assertion of necessity.[33]

---

law standard. The Committee even observed that if it were a court of appeal, it would be obliged to review the award on the basis of this error, but that it could not do so on account having "limited jurisdiction under Article 52 of the ICSID Convention."

28. CMS Gas Transmission Co. v. Argentine Republic, Annulment (25 September 2007) ICSID Case No. ARB/01/8, para 129.
29. *Id*., para 130.
30. LG&E Energy (n 18) para 229. See also UNCTAD Study, 48.
31. LG&E Energy (n 18) para 239.
32. LG&E Energy (n 18) para 245.
33. Enron Creditors Recovery Corpn. Ponderosa Assets, LP v. Argentine Republic, ICSID Case No. ARB/01/3, Decision on the Application for Annulment of the Argentine Republic (30 July 2010), para 405. See also Sempra Energy International v. Argentina Republic, ICSID Case No. ARB/02/16, Decision on the Argentine Republic's Application for Annulment of the Award (29 June 2010), paras 160-165.

The distinction between the two clauses is crucial. This is because the ESI clause, if successfully invoked, extinguishes the liability of the State, as if there was no treaty violation in the first place. The customary international law defence, on the other hand, merely excludes international responsibility for a wrongful act.[34] Moreover, under customary international law, the exclusion of State responsibility under necessity does not absolve the State of its obligation to pay compensation.[35]

In investment treaty arbitration, where compensation for treaty violations are the focus of the disputes between the investor and the State, the customary law defence would render the ESI clause meaningless, because then the State would be required to compensate the investor regardless of whether or not it was able to successfully plead necessity.[36] The CMS Annulment Committee recognised the distinct effect that these two opposable norms had on Argentina's liability, and found that the Tribunal's decision amounted to a "manifest error of law". The Committee further pointed out that for as long as Article XI of the BIT applied to the circumstances, it "excluded the operation of the substantive provisions of the BIT", and that there was "no possibility of compensation being payable during that period."[37]

The above jurisprudential background sets the framework in which the awards in the two Devas arbitrations will be analysed. As is clear from above, it would be a mistake to restate the ESI clause in a BIT as equal to the necessity defence in customary international law, because it would

34. August Reinisch, *Necessity in Investment Arbitration* (2010) 41 Netherlands Yearbook of International Law 137, 149.
35. ILC Article 27 provides that compensation may be payable, notwithstanding successful invocation of the necessity plea by a State. It reads as follows:
"Article 27. Consequences of invoking a circumstance precluding wrongfulness
The invocation of a circumstance precluding wrongfulness in accordance with this chapter is without prejudice to:
(a) Compliance with the obligation in question, if and to the extent that the circumstance precluding wrongfulness no longer exists;
(b) The question of compensation for any material loss caused by the act in question." [emphasis supplied]
It may be noted that the CMS tribunal also refused to absolve Argentina of its liability to pay compensation based on ILC art. 27. See CMS (n 15) paras 383-394.
36. See Gabčikovo-Nagymaros Project (n 3) paras 152-153. See also CMS, *supra* note 15, para 388.
37. CMS Gas Transmission Co. v. Republic of Argentina, ICSID Case No. ARB/01/8, Decision of the Ad Hoc Committee on the Application for Annulment of the Argentine Republic (25 September 2007), para 146.

result in a violation of '*ut res magis valeat quampereat*', or the rule of effectiveness in treaty interpretation.[38]

3. THE DEVAS ARBITRATIONS – A SHIFT IN THE APPROACH TO INTERPRETING ESI CLAUSES

A. Different clauses, different interpretations

In the aftermath of the Argentine claims, it became clear that a blind application of ILC Article 25 to an ESI clause would not yield satisfactory results in accordance with the fundamental rules of treaty interpretation under the VCLT. The Devas arbitrations, which were recently concluded, indicate a shift from the Argentine awards in the rules of interpretation and the standards of review followed whilst interpreting ESI clauses. Unlike in the Argentine awards, the Devas claims arose under two different BITs, although they arose out of the same measures adopted by the Republic of India.

In 2004, Antrix Corporation Limited (Antrix), a government company and the commercial arm of the Indian Space Research Organisation (ISRO), was approached by Forge Advisors, a US-based consultancy firm, for commercialisation of the S-band electromagnetic spectrum which was owned by the Indian Government's Department of Space (DOS).[39] Following negotiations, the Antrix board of directors approved the partnership and prepared the agreement for the lease of the spectrum (the Devas Agreement). Thereafter, Devas Multimedia Private Limited (Devas) was incorporated in India to enter into the Devas Agreement.[40]

The Devas Agreement provided for the lease of the S-band spectrum on two satellites which were to be launched by ISRO, for 12 years subject to renewal. The parties formally entered into the agreement in 2005, which came into effect about a year later, after Antrix obtained the necessary approvals and clearances from various governmental departments.[41] It should also be noted that, around this time, several officers of the Indian defence forces had made requisitions for the S-band spectrum for "military and strategic purposes".[42]

38. William W. Burke-White and Andreas von Staden (n 2) 323.
39. Deutsche Telekom AG v. Republic of India, PCA Case No. 2014-10, Award (13 December 2017), para 54 (DT).
40. *Id*., para 58.
41. *Id*., para 63.
42. *Id*., para 72.

Shortly after the Devas Agreement was concluded, Devas secured equity investments from Columbia Capital LLC and Telecom Ventures LLC, through their subsidiaries in Mauritius (collectively, "**CC/Devas**"). Subsequently, Deutsche Telekom (Germany) ("**DT**") also made investments into Devas through its subsidiary in Singapore.[43]

In 2009, news of the 2G telecommunications scandal broke out in the media. Although this scandal was wholly unrelated to the Devas Agreement, there was some media coverage suggesting that the spectrum had been leased to Devas at a throwaway price, implying corruption in the deal.[44] In June 2010, following the media furore and having received advice from the Ministry of Law and Justice to prioritise the spectrum for strategic needs, DOS officials wrote to the Space Commission, recommending annulment of the Devas Agreement.[45] Shortly thereafter, the DOS received recommendations from the Space Commission as well as the Additional Solicitor General of India to instruct Antrix to annul the Devas Agreement.[46]

In February 2011, following some arrests in the 2G scandal and renewed media interest in the Devas agreement, DOS officials held a press conference announcing their decision to terminate the Agreement, which was the first time this was brought to the notice of Devas.[47] The DOS officials then briefed the Cabinet Committee on Security ("**CCS**"), which was the highest authority and which would take the final decision on the issue.[48] Ultimately, based on the DOS's note, the CCS in sovereign capacity decided that the Devas Agreement "shall be annulled forthwith".[49]

The cancellation of the Devas agreement prompted its investors CC/Devas and DT (claimants), to file investment claims against India for unlawful expropriation of their investment and breach of its obligation to accord fair and equitable treatment to the Claimants. The claimants initiated *ad hoc* UNCITRAL arbitration under the Mauritius-India and Germany-India BITs, respectively. In both cases, India relied on the ESI clause in the respective BIT, arguing that the cancellation of the spectrum lease agreement was in furtherance of protecting its essential security interests.

43. DT (n 39) para 69.
44. *Id*., para 78.
45. *Id*., paras 79-81.
46. *Id*., paras 82-83.
47. *Id*., paras 85-86.
48. *Id*., para 87.
49. *Id*., para 91.

Although both tribunals reached opposite conclusions on India's ESI defence (explained below), they agreed that the ESI clause could not be equated with the customary international law standard of necessity, and that a "degree of deference" should be accorded to the host State on the question of the existence of ESI.[50] Even so, the DT Tribunal went a step further and cautioned that the State cannot enjoy an unlimited degree of deference, otherwise it would render useless the protections accorded to the investor under the BIT.[51]

On the face of it, the reasoning behind the difference in outcomes in the two Devas awards might be attributed to the difference in wording of the respective ESI clauses in the Mauritius-India and Germany-India BITs. In CC Devas, India relied on Article 11(3) of the Mauritius-India BIT[52] to preclude liability towards the investor under the treaty. CC/Devas relying on *CMS* and other like awards issued against Argentina, argued that for invoking Article 11(3), India would have to meet the requirements for necessity under customary international law. The tribunal found that Article 11(3) is a specific provision for protection of essential security interests and that it is not tantamount to invoking the necessity defence under customary international law.[53] The tribunal noted that the word "necessary" was absent from Article 11(3), and that the claimant's reliance on the jurisprudence in the Argentine awards was not relevant to this case. The tribunal went on to interpret Article 11(3) in accordance with Articles 31 and 32 of the VCLT,[54] and interpreted 'essential' as per its dictionary meaning, according a "wide measure of deference" to India.[55]

The DT Tribunal, on the other hand, took a slightly different approach. The tribunal recognised that Article 12 of the Germany-India BIT[56] was to be interpreted independently, "without incorporating requirements from

50. CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited and Telecom Devas Mauritius Ltd. v. Republic of India, Award (25 July 2016) PCA Case No. 2013-09, paras 244-5; DT (n 39) para 235.
51. DT (n 39) para 238.
52. Article 11 of the Mauritius-India BIT reads: "The provisions of this Agreement shall not in any way limit the right of either Contracting Party to apply prohibitions or restrictions of any kind or take any other action which is directed to the protection of its essential security interests […]" [emphasis supplied].
53. CC/Devas (n 50) para 255.
54. *Id*., para 230.
55. *Id*., paras 243-244.
56. Article 12 of the Germany-India BIT reads: "*Nothing in this Agreement shall prevent either Contracting Party from applying prohibitions or restrictions* to the extent necessary *for the protection of its essential security interests*." [emphasis supplied].

the customary international law state of necessity defence which are not present in the text of the [BIT]"[57]. However, it did identify the requirements of Article 12: that (a) the State relying on Article 12 apply a prohibition or restriction; (b) for the protection of its essential security interests; (c) to the extent necessary for such protection.[58] Of these requirements, the DT Tribunal's analysis of the third one is most relevant. It identifies a twofold test for necessity: (a) whether the measure was "principally targeted" and "objectively required" for the protection of ESI, and (b) whether the State had any reasonable alternatives, "less in conflict or more compliant with its international obligations."[59]

The Tribunal went on to examine the circumstances surrounding the decision taken by the CCS to annul the Devas Agreement. This, it noted, were relevant to determine whether India's measures were necessary for the protection of its essential security interests.[60] The tribunal concluded, based on the notes and minutes of the CCS meeting and other documentary evidence provided by the parties, that the military needs as argued by India were not the sole purpose for diversion of the spectrum that had been leased to Devas. Rather, it was one of the several strategic and social interests (including railways and other public utility services) that the CCS had sought to protect by annulling the agreement.[61]

The Tribunal also took note of the media scrutiny of the Devas Agreement and the concerns raised within the government about the alleged lack of transparency concerning acquisition of the spectrum lease by Devas, as well as concerns over the commercial terms of the Agreement itself.[62] The Tribunal rightly found that none of these concerns could be considered as "essential security interests" within the meaning of Article 12 of the BIT[63]. On this basis, the tribunal rejected India's ESI argument on the basis that the first of the two requirements for necessity had not been fulfilled by India.[64] The Tribunal did not venture into detail on the second requirement, simply stating that India did not avail of other "least restrictive alternative" measures although they were available.[65]

57. DT (n 39) para 229.
58. *Id*., para 230.
59. *Id*., para 239.
60. *Id*., para 240.
61. *Id*., para 281.
62. *Id*., para 282.
63. *Id*., para 283.
64. DT (n 39) para 288.
65. *Id*., para 290.

Interestingly, the tribunal in *Continental Casualty v. Argentina* had adopted a similar approach based on the dispute settlement regime of the World Trade Organisation ("**WTO**") under the General Agreement on Tariffs and Trade ("**GATT**"). The tribunal had identified a similar twofold requirement: (a) whether the State's measures contributed materially to the realisation of their legitimate aims under Article XI of the BIT; and (b) whether Argentina had reasonably available alternatives, less in conflict or more compliant with its international obligations.[66] However, *Continental Casualty* was not discussed by the DT Tribunal.

That differently worded ESI clauses might be subjected to different standards of interpretation is not a novel idea. The United Nations Commission on Trade and Development ("**UNCTAD**"), in its study of ESI clauses, has also remarked that ESI clauses which contain necessity as a precondition greatly reduce the discretionary power of the host State, and rely on a proportionality test when adjudicating a measure taken by the host State.[67] Likewise, ESI clauses that do not refer to necessity confers greater regulatory power on the Contracting States parties – to the extent that "their practical effect comes very close to a self-judging clause."[68] Thus, it is fairly clear that the differences in the language of the two ESI clauses are central to the opposing outcomes in both awards on the question of ESI.

However, the matter is not as straightforward as it appears. For instance, the DT Tribunal took a more serious line on the government's concerns over a political scandal surrounding the Devas Agreement, which it identified to be one of the reasons behind the CCS's decision to annul it. The CC Devas Tribunal also noted that "a mix of factors was at play" in the events leading to termination of the Agreement by the CCS, the foremost being the media coverage of the issue and fears of a political scandal.[69] However, the CC Devas Tribunal relied solely on the press release by the CCS to conclude that none of the other factors played a role in its decision to terminate the Agreement.[70] In an article recently published in the ICSID Review, the author noted that "[t]he history behind the decision, and the indeterminate status of spectrum allocation, were irrelevant facts for the CC/Devas

66. Continental Casualty Co. v. Argentine Republic, Award (5 September 2008) ICSID Case No. ARB/03/9, paras 196-198.
67. UNCTAD study (n 13) 93. It is interesting to note that this paragraph concerning the test for proportionality was brought to the attention of the DT Tribunal by the Claimant in its arguments on the ESI clause. See DT (n 39) para 204.
68. *Id.*, 94-95.
69. CC/Devas (n 50) paras 321-322.
70. *Id.*, para 334.

majority. These exact facts proved to the DT Tribunal that the decision was not targeted at – or, synonymously, directed towards – addressing the military's needs."[71] The substantial latitude given by the CC Devas Tribunal to India is further evidenced by the fact that the Tribunal was happy to accept the annulment decision despite the fact that CCS did not specifically allocate the spectrum to be used for military purposes, finding instead that the CCS had the power and discretion to leave the actual allocation to the relevant administrative authorities.[72]

B. Implications of the Devas awards and future ESI clauses

The divergence in reasoning between the two tribunals has once again given rise to concerns of inconsistency in investment arbitration. Some scholars have pointed out that the conflicting decisions on ESI clauses are a missed opportunity to develop a *jurisprudence constante* on exception clauses in investment arbitration.[73] However, the author disagrees.

The author believes that coherent decision making must always take priority over the need to ensure and contribute to the development of a consistent body of jurisprudence in investment arbitration. Many others have previously argued along the same lines.[74]

For instance, Prof. Kaufmann-Kohler, who chaired the DT arbitration, has (on a separate occasion) expressed the opinion that tribunals could consider adopting principles of law from previous awards where there is a consistent line of cases, rather than a single decision, which would later develop into *jurisprudence constante* and customary international law.[75] In DT, the Tribunal's refusal to refer to the award in *Continental Casualty* or indeed, to even mention the award in this context at all, suggests a deliberate distancing from the reasoning that had led the Continental tribunal to apply the proportionality principle in the first place. It indicates a de-novo approach to the understanding of necessity in investment arbitration and for that, the DT Tribunal cannot be faulted.

---

71. Ridhi Kabra, *Return of Inconsistent Application of the "Essential Security Interest'" Clause in Investment Treaty Arbitration: CC Devas v. India and Deutsche Telekom v. India* (2020) 0 ICSID Rev/FILJ 1, 13.
72. CC/Devas (n 43) para 335.
73. Ridhi Kabra (n 71) 30-31.
74. Zachary Douglas, Can A Doctrine of Precedent be Justified in Investment Treaty Arbitration? (2010) 3 ICSID Rev/FILJ 104, 109.
75. Gabrielle Kaufmann-Kohler, *Arbitral Precedent: Dream, Necessity or Excuse? – The 2006 Freshfields Lecture*, (2007) 23 Arb Int, 357.

Proportionality, like necessity, finds application across various areas of international law, such as armed conflict, human rights law, international criminal law. It has also been used in and referred to by UNCTAD as a test for determining necessity as an objective precondition to invoking ESI clauses in BITs, as the author has argued above.[76] The application of proportionality in investment treaty arbitration is also unique, giving due consideration to balance between the obligations owed by the State to the investor and its right to regulate. Juxtaposing this with the fact that the Continental decision is a standalone one, which drew heavy criticism for failing to apply the rules of interpretation in Articles 31 and 32 of the VCLT and for its "interpretative leap" to WTO jurisprudence on the standard of proportionality,[77] it is clear that the DT Tribunal was justified in staying away from the Continental approach altogether. In any event, there was no reason for the DT Tribunal to expound on the rule of proportionality and least restrictive alternatives when it had already determined that India had failed to satisfy the first requirement for necessity i.e. establishing the nexus between an essential interest and the measure taken.

On facts and arguments brought by the parties before the Tribunal, the coherence in the reasoning of the DT award on ESI cannot be denied. That said, it is too early to suggest that the twofold test for necessity as developed by the DT Tribunal may form *jurisprudence constante*, or that it will even be taken into consideration by future tribunals. In any event, both tribunals have been consistent in their refusal to apply the criteria for necessity from the ILC Articles and customary international law and have instead reverted to the basics of treaty interpretation under Articles 31 and 32 of the VCLT. This, in context of the observations and decisions by the Annulment Committees in CMS, Enron and Sempra, could be the first step in establishing *jurisprudence constante* in a regime that had failed to achieve any consistency whatsoever in the past.

The lack of clarity in past BITs concerning key terms and phrases such as "necessary" or "essential security interests" led to inconsistent interpretations by investment tribunals, a majority of whom relied on the ILC Articles as a "*tabula in naufragio*, 'a plank in a shipwreck'" to

76. UNCTAD Study (n 14) 93.

77. José Alvarez and Tegan Brink, *Revisiting the Necessity Defence: Continental Casualty v. Argentina* (2010) Institute for International Law and Justice (IILJ) Working Paper 2010/3, 20 https://www.iilj.org/publications/revisiting-the-necessity-defense-continental-casualty-v-argentina-tegan-brink-to-be-added/ accessed 25 September 2020.

ascertain the meaning of these clauses.[78] This was bound to occur, given the vague character of such ESI clauses.

In recent years, however, States are increasingly resorting to adopting the language of GATT Articles XX and XXI into their model ESI clauses.[79] The wide-ranging general exceptions clause in GATT Article XX and the more nuanced security exceptions clause in GATT Article XXI appear to have captured the attention of States, who seem inclined to import this standard almost entirely into new BITs.

The Brazil-India BIT,[80] which was concluded in January 2020, also contains a "General Exceptions" clause at Article 23, as well as a "Security Exceptions" clause at Article 24. The general exceptions clause appears to be a nearly identical adoption of the language of GATT Article XX. The interpretation of the word "necessary" in this Article has also been provided at footnote 4, which states that "[i]n considering whether a measure was "necessary", it shall be taken into account whether there was no less restrictive alternative measure reasonably available to a Party."[81]

Even more interesting is the "Security Exceptions" clause at Article 24, which reads as follows:

> *"24.1. Nothing in this Treaty shall be construed:*
>
> *to require a Party to furnish any information, the disclosure of which it considers contrary to its essential security interests; or*
>
> *to prevent a Party from taking any action which it considers necessary for the protection of its essential security interests including but not limited to:*
>
> *i) action relating to fissionable and fusionable materials or the materials from which they are derived;*

78. James Crawford (n 13) 135.
79. Agreement Between Canada and the Republic of Peru for the Promotion and Protection of Investments (14 November 2006, entered into force on 20 June 2007), Article 10; Japan-Singapore Economic Partnership Agreement (13 January 2002, entered into force on 30 November 2002), Article 83; New Zealand-China Free Trade Agreement (7 April 2008, entered into force on 1 October 2008), art. 200.
80. Investment Cooperation and Facilitation Treaty between the Federative Republic of Brazil and the Republic of India (25 January 2020).
81. *Id.*, art. 23.

ii) action taken in time of war or other emergency in domestic or international relations;

iii) action relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;

iv) action taken so as to protect critical public infrastructure including communication, power and water infrastructures from deliberate attempts intended to disable or degrade such infrastructure; or

v) any policy, requirement or measure including, without limitation, a requirement obtaining (or denying) any security clearance to any company, personnel or equipment.

c) to prevent a Party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

24.2 Each Party shall inform the other Party to the fullest extent possible of measures taken under Article 24.1 and of their termination.

24.3 Nothing in this Treaty shall be construed to require a Party not to adopt or maintain measures in any legislation or regulations which it considers necessary for the protection of its essential security interests, especially when it relates to a non-Party.

24.4 This Article shall be interpreted in accordance with the understanding of the Parties on security exceptions as set out in Annex I, which shall form an integral part of this Treaty."

Annex I to the Brazil-India BIT, which has been included as an interpretative note to the Security Exceptions clause, reads as follows:

"Annex I. Security Exceptions

The Parties confirm the following understanding with respect to interpretation and/or implementation of Article 24 of this Treaty:

The measures referred to in Article 24.3 are measures where the intention and objective of the Party imposing measures is for the protection of essential security interests, and in the case of India,

> *the applicable measures referred to in Article 24.3 are currently set out in the regulations framed under the Foreign Exchange Management Act, 1999 and the rules and regulations made thereunder. India shall, upon request by the other Party, provide information on the measures concerned;*
>
> *Where the Party asserts as a defence that conduct alleged to be a breach of its obligations under this Treaty is for the protection of its essential security interests protected by Article 24, any decision of such Party taken on such security considerations and its decision to invoke Article 24 at any time, whether before or after the commencement of arbitral proceedings shall be non-justiciable. Such a conduct shall not be open for review by any arbitral tribunal." [emphasis supplied]*

It is therefore evident that the parties to the above BIT have heavily drawn inspiration from Articles XX and XXI of the GATT, along with a few embellishments of their own, which,in the author's opinionmay be viewed as a knee-jerk reaction to India's experience in arguing ESI before the Devas tribunals. India has negotiated non-justiciable ESI clauses in the past;[82] however, the nuanced manner in which the above ESI clause has been drafted is a further indication that States are carefully considering the importance of ESI defences, and are seeking to widen their regulatory powers to whatever extent they can get away with.

Another point of interest is the so-called 'self-judging' clause, which is seen at Article 24.1(b). The phrase "which it considers necessary" is in the nature of a self-judging clause and is also found in the ESI clause of the 2012 US Model BIT.[83] Self-judging clauses, as defined by Schill and Briese, are "provisions in international legal instruments by means of which states retain their right to escape or derogate from an international obligation based on unilateral considerations and based on their subjective

82. Article 6.12 of the Comprehensive Economic Cooperation Agreement between the Republic of India and the Republic of Singapore (2005).

83. Article 18 of the US Model BIT (2012) states as follows:
"Article 18. Essential Security
Nothing in this Treaty shall be construed:
1. *To require a Party to furnish or allow access to any information the disclosure of which it determines to be contrary to its essential security interests; or*
2. *To preclude a Party from applying measures that it considers necessary for the fulfillment of its obligations with respect to the maintenance or restoration of international peace and security, or the protection of its own essential security interests."* [emphasis supplied].

appreciation of whether to make use of and invoke the clause vis-à-vis other states or international organisations."[84] Adjudication in such cases, if at all, would be reduced to a good faith standard of review, as opposed to a substantive assessment.

The obvious danger that such clauses present is that they considerably widen the scope for derogation by States, thereby undermining the rule of *pacta sunt servanda*.[85] For this reason, adjudicating authorities always approach such clauses with more caution. For instance, in the Nicaragua case before the ICJ, US argued that the ESI clause in the US-Nicaragua FCN Treaty was self-judging even though the language of the clause was not explicitly self-judging – an argument that was categorically rejected by the ICJ.[86] Interestingly, the self-judging argument was also espoused by Argentina in its arguments (as mentioned above). The *CMS*, *Enron* and *Sempra* tribunals noted the security exceptions clause at GATT Article XXI in their assessments. While the *CMS* and *Enron* tribunals accepted GATT Article XXI to be self-judging, the *Sempra* tribunal disagreed, finding instead that "the very fact that such article has not been excluded from dispute settlement is indicative of its non-self-judging nature".[87]

The application of GATT Article XXI in WTO disputes was first discussed in the WTO Panel Report in *Russia – Traffic*. Russia argued that the "self-judging" nature of GATT Article XXI precluded the Panel from reviewing the impugned measures under Article XXI(b)(iii).[88] The Panel interpreted Article XXI in context of the object and purpose of the GATT, which is "to promote the security and predictability of the reciprocal and mutually advantageous arrangements and the substantial reduction of tariffs and

84. Stephan W. Schill and Robyn Briese, "*If the State Considers*": *Self-Judging Clauses in International Dispute Settlement'* (2009) 13 Max Plank Yearbook of United Nations Law 61, 68.
85. Christina Binder, *Stability and Change in Times of Fragmentation: The Limits of Pacta Sunt Servanda Revisited*, (2012) 25 909, 916.
86. *Nicaragua* (n 24) 115-116.
87. CMS (n 15) paras 339, 370; Enron Corpn. Ponderosa Assets, LP v. Argentine Republic, ICSID Case No. ARB/01/3, Award (22 May 2007), para 327; *Sempra Energy International v Argentina*, ICSID Case No. ARB/02/16, Award (28 September 2007), para 384. See also Tarcisio Gazzini, "Interpretation of (Allegedly) Self-judging Clauses in Bilateral Investment Treaties" in M. Fitzmaurice, O. Elias and P. Merkouris (eds), *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years On* (Brill 2010), 243.
88. *Russia – Measures concerning Transit in Traffic*, WTO Case No. WT/DS512/R, Panel Report (5 April 2019), 38-39 (*Russia – Traffic*).

other barriers to trade".[89] The Panel finally considered the chapeau clause in Article XXI(b) and concluded that the "which it considers" language does not extend to the circumstances described in subparagraphs (i) to (iii), whose requirements have to be independently shown to be fulfilled by the invoking State and thus, merit a substantial review. The Panel also took into account the negotiating history of GATT Article XXI, where the Member States had agreed that the exception provision must not be unfettered so as to allow for potential abuse of the exceptions by the States.[90] The negotiating history of GATT Article XXI also suggests that there is a need for balance between potential abuse and latitude granted to States while identifying the essential security interests of that State.[91]

The Panel held that Article XXI could not be construed as a totally self-judging clause. The only latitude granted to the State under GATT Article XXI was to determine what constitutes an essential security interest in its own estimation. However, that would not preclude a dispute settlement panel from objectively reviewing whether those measures fulfil independently the requirements of subparagraphs (i) to (iii) of GATT Article XXI(b).[92]

The Panel rightly made a balanced interpretation of GATT Article XXI. It would not be an exaggeration to consider the likelihood that investment tribunals would also interpret such "self-judging" ESI clauses in BITs along similar lines. Even assuming the "non-justiciable" nature of Article 24 of the Brazil-India BIT (as stipulated in Annex I), it would still fall tothe Tribunal to rule upon whether the impugned measure would fall under the list of exceptions under Article 24 or the like. In other words, the nexus requirement referred to by the DT Tribunal would still have to be proved.

4. CONCLUSION

For a long time, there has been a marked lack of consensus amongst investment tribunals concerning the interpretation and application of ESI clauses. The likeness in nature of the ESI clauses and the general defence of necessity in customary international law indicates, at first glance, that these two opposable norms could be interchangeable in their application. However, the Argentine cases established that the same is not true. There is a marked distinction in the way ESI clauses operate, and while they might

89. *Id.*, 42.
90. *Id.*, 50.
91. *Ibid.*
92. *Id.*, 50-51.

be a treaty manifestation of the customary international law of necessity, they have a different effect on the State's liability to pay compensation. In the investment arbitration regime, which is in essence compensation-centric, this distinction cannot be taken lightly.

In both of the Devas awards, the two tribunals, regardless of their differences and the fact that both were interpreting very differently worded ESI clauses, both found common ground in the idea that it would not be feasible to equate the ESI clause with ILC Article 25 and customary international law. Both decisions are consistent with each other as well as with the decisions of the LG&E Tribunal and the Annulment Committees in CMS, Enron and Sempra.

There can be said to be an emerging *jurisprudence constante* on the question of necessity in investment arbitration, in the context of the rules of interpretation to be observed for ESI clauses. The biggest indicator of this pendulum swing is the fact that both tribunals arrived at the relevant standards to be applied to the respective ESI clauses, through the exercise of applying Articles 31 and 32 of the VCLT and arrived at different conclusions because the clauses were worded differently. Furthermore, the tribunals converged in their overall approach to the margin of appreciation doctrine, which they found to be more suitable when considering whether or not a measure adopted by a State was to protect its essential security interests. Even though the DT Tribunal chose to tread more carefully in its consideration of the doctrine, it was still found to have merit in the eyes of both tribunals.

While it is certainly laudable that some level of consistency could be achieved, there is also the issue of ESI clauses themselves, which are evolving faster than tribunals can agree on how they ought to be interpreted, keeping pace with the States' need to preserve their regulatory space, free from the encumbrances placed by BIT protections. The ongoing trend of importing the WTO/GATT standard into BIT protections may prove to be detrimental to States, because of the tendency of investment tribunals to adopt a more stringent policy when interpreting ESI clauses, so as to not upset the balance between the State's sovereign right to safeguard its essential interests as against the protections granted to the investor under the BIT.

EXPLORING THE PROSPECTS OF A PRELIMINARY RULINGS SYSTEM IN ICSID ARBITRATION: AN EFFICIENT AND AFFORDABLE ALTERNATIVE TO AN APPELLATE SYSTEM

—Chitransh Vijayvergia[*]

ABSTRACT

While the regime of investment treaty arbitration has developed enormously over time, there hasn't been much progress on the introduction of an appellate body or any other form of a review mechanism. Though certain arbitral institutions like JAMS and CPR provide optional appeals provisions, the debate around the introduction of an appeals facility in the International Centre for Settlement of Investment Disputes (ICSID) is still unsettled. This debate is centered around the see-saw between the finality of awards and the desire for consistency and coherence in international arbitration. Some scholars have put forward the view that the finality of awards should take a backseat in this journey of achieving consistency and have thus proposed for an appellate system in the ICSID arbitration. This has attracted a mixed reaction from the legal fraternity with some navigating the ways to implement the appeals system, and the others delving into efficient alternatives. In this paper, the author takes the latter approach and suggests that a Preliminary Rulings System (PRS), as promoted by Katharina Diel-Gligor, should be incorporated into the ICSID arbitration. The paper first suggests certain additional changes to the already proposed system for better efficiency. Thereafter, it establishes that the proposed PRS fulfils all the objectives which are sought to be achieved by an appellate system. Finally, the paper highlights how the system is a better alternative than an appeals facility in ICSID arbitration and suggests it as an efficient and affordable alternative to the appeals system.

[*] The author is an Associate at Panicker & Panicker, Advocates (Kochi) and a graduate of the National University of Advanced Legal Studies, Kochi.

1. INTRODUCTION

The regime of international investment law has grown tremendously in the last few decades with the growing number of Bilateral Investment Treaties ("**BIT**(s)") and other International Investment Agreements ("**IIA**(s)").[1] However, one cannot deny the need for the reformation of the system owing to the inconsistent decisions rendered,[2] issues with the enforcement of awards,[3] investor bias[4] etc. The pursuit of 'coherence and consistency'[5] in the awards rendered in investor-State arbitration has given rise to the debate of one such reform. This debate is about the requirement of an appellate system in investor-State dispute settlement ("**ISDS**").[6]

The discussions on the subject regarding the International Centre for Settlement of Investment Disputes ("**ICSID**") arbitration regime were spearheaded by the 2004 Report of the ICSID which proposed for an ICSID Appeals Facility.[7] Since then, various scholars have pitched in their voice and promoted the idea of introduction of an appellate mechanism in the ISDS. Various reasons have been put forward to justify the need for an appellate mechanism but some of these have been at the forefront *viz.* consistency[8], accuracy[9] andlegitimacy[10].

Scholars have argued that due to a lack of a system of precedents in ISDS, different tribunals have come to different conclusions based on the same set of facts which goes against the idea of predictability in legal decisions.[11] Further, it has also been argued that the scope of powers vested in the hands of the Annulment Committee is not wide enough to fulfil the purpose of keeping a reasonable check on the injustice done by the arbitral tribunals.[12]

---

7. ICSID Secretariat, *Possible Improvements of the Framework for ICSID Arbitration* (Discussion Paper) (22 Oct. 2004) https://icsid.worldbank.org/sites/default/files/Possible%20Improvements%20of%20the%20Framework%20of%20ICSID%20Arbitration.pdf accessed 13 June 2010.
8. Ian Laird and Rebecca Askew, *Finality Versus Consistency: Does Investor-State Arbitration Need an Appellate System* (2005) 7 Journal Appellate Practice & Process 285.
9. Mark Feldman, *Investment Arbitration Appellate Mechanism Options: Consistency, Accuracy, and Balance of Power* (2017) 32(3) ICSID Review 528.
10. Kendall Grant, *ICSID's Reinforcement?: UNASUR and the Rise of a Hybrid Regime for International Investment Arbitration* (2015) 52(3) Osgoode Hall L J 1115.
11. M.M. Rodgers, *Bilateral Investment Treaties and Arbitration: An Argument and a Proposal for the ICSID's Implementation of a System of Binding Precedent* (2008) 5(3) Transnational Dispute Management.
12. Yenkong Ngangjoh Hodu and Collins C. Ajibo, *ICSID Annulment Procedure and the WTO Appellate System: The Case for an Appellate System for Investment Arbitration* (2015) 6(2) Journal of International Dispute Settlement 308.

Annulment of awards under the ICSID is indeed allowed on certain specific grounds which restricts the annulment committee's scope of review.[13]

To ensure that the decisions are not inconsistent and have more authority, various models of an appellate mechanism have been suggested in the last two decades: *ad hoc* appeals tribunals in each IIA,[14] WTO like permanent appellate body,[15] multilateral investment appeals tribunal,[16] the European Union's investment court,[17] etc. Though certain Model BITs,[18] IIAs[19] and even some international arbitration institutions[20] have provided for an optional appeal mechanism, the question of whether there should be an appeal mechanism in the ICSID regime has remained unsettled.

On the other hand, certain scholars have also argued against the introduction of an appellate system in ISDS. The major arguments of this school of

13. Convention on the Settlement of Investment Disputes between States and Nationals of Other States (opened for signature 18 Mar. 1965, entered into force 14 Oct. 1966) (ICSID Convention).
14. Dohyun Kim, Note, *The Annulment Committee's Role in Multiplying Inconsistency in ICSID Arbitration: The Need to Move Away from an Annulment-Based System* (2011) 86 NYU L Rev 242, 276.
15. Donald McRae, *The WTO Appellate Body: A Model for an ICSID Appeals Facility* (2010) 1(2) J Intl Dispute Settlement 371.
16. M. Bungenberg and A. Reinisch, From *Bilateral Arbitral Tribunals and Investment Courts to a Multilateral Investment Court: Options Regarding the Institutionalization of Investor-State Dispute Settlement, European Yearbook of International Economic Law* (2nd ed., Springer 2020); see also N. Jansen Calamita, *The Challenge of Establishing a Multilateral Investment Tribunal at ICSID* (2017) 32(3) ICSID Review 611.
17. European Court of Arbitration, *Arbitration Rules*, art. 28, para 5 http://cour-europe-arbitrage.org/archivos/documentos/22.pdf accessed 7 September 2020.
18. 2012 US Model Bilateral Investment Treaty, art. 1, https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf accessed 4 Sept. 2020.
19. Singapore-United States Free Trade Agreement (signed 6 June 2003, entered into force 1 Jan. 2004) (Singapore-USA FTA) art. 15.19(10); Australia-Republic of Korea Free Trade Agreement (signed 8 Apr. 2014, entered into force 12 Dec. 2014) (Australia-Korea FTA) art. 11.20(13), annex. 11-E; Costa Rica-Peru Free Trade Agreement (signed 21 May 2011, entered into force 1 June 2013) (Costa Rica-Peru FTA) art. 12.21(9); Comprehensive Economic and Trade Agreement between Canada and the European Union (signed 30 Oct. 2016, provisionally entered into force 21 Sept. 2017) (CETA).
20. Judicial Arbitration and Mediation Services, JAMS Optional Arbitration Appeal Procedure (JAMS Rules) https://www.jamsadr.com/appeal/ accessed 5 Sept. 2020; International Institute for Conflict Prevention and Resolution, Rules for Administered Arbitration of International Disputes, 2019 (CPR Rules) https://www.cpradr.org/resource-center/rules/international-other/arbitration/2019-international-administered-arbitration-rules accessed 5 Sept. 2020.

thought have been centered around the finality of awards,[21] party autonomy in the selection of arbitrators,[22] and additional costs on the parties.[23] While criticizing the introduction of an appellate mechanism in ISDS based on these grounds, these scholars have put forward certain alternative models. These include consolidation of cases to ensure uniformity in decisions arising out of the same dispute,[24] introducing a system of precedents in ISDS,[25] taking the opinion of the International Court of Justice[26] ("**ICJ**") and widening the scope of the powers of the ICSID Annulment Committee.[27] However, all of these methods come with their own set of drawbacks, and thus, have not been deliberated upon further by the legal academia as a suitable alternative to the suggestion of an Appeals Facility.

Through this paper, the author seeks to widen the horizon of the discussion on the subject by suggesting one more alternative to the appellate mechanism. The author suggests an equally efficient butmore cost-effective model of reform, namely, Preliminary Rulings System ("**PRS**"). The PRS would work as an advisory body to the international investment arbitration tribunals and ensure consistency and coherence in the decisions rendered by arbitral tribunals. This model was proposed in detail by Katharina Diel-Gligor in her work in 2017.[28] In this paper, the author seeks to build upon the idea by suggesting certain changes to the proposed mechanism and recommending it as a suitable alternative to an ICSID Appeals Facility.

For the purpose of this paper, the author has adopted a five-sectional approach to propose the mechanism for PRS and argue why the system is a better option than an Appeals Facility. Section 1 put forwards the basic working of the proposed PRS and recommends certain changes to the system proposed by Diel-Gligor. Section 2 elucidates how the proposed PRS will fulfil all the objectives of the much-suggested Appeals Facility.

21. K. Andelic, *Why ICSID Doesn't Need an Appellate Procedure, and What to Do Instead* (2014) 11(1) Transnational Dispute Management 1, 3.
22. Eric van Ginkel, *Reframing the Dilemma of Contractually Expanded Judicial Review: Arbitral Appeal vs. Vacatur* (2003) 3 Pepperdine Dispute Resolution Law Journal 157, 201-02.
23. Christoph H. Schreuer and A. de la Brena, *Does ISDS Need an Appeal Mechanism* (2020) 17(2) Transnational Dispute Management 1.
24. Tams (n 4) 44.
25. Rodgers (n 11).
26. Tams (n 4) 45.
27. *Id*., 43.
28. Katharina Diel-Gligor, *Towards Consistency in International Investment Jurisprudence: A Preliminary Ruling System for ICSID Arbitration* (Brill Nijhoff 2017).

Section 3 points out certain additional advantages of the proposed PRS and how it would overcome criticism faced by the suggested Appeals Facility. Section 4 contemplates certain aspects which still need development in order to make an informed decision for a possible future reform. Lastly, the concluding remarks have been incorporated in Section 5.

2. HOW WILL THE PRELIMINARY RULINGS SYSTEM WORK?

Article 64 of the ICSID Convention allows the contracting States to approach the ICJ for resolution of disputes "*concerning the interpretation or application of this Convention*".[29] On such referral, the ICJ would have the power to exercise its advisory jurisdiction over the matter and deliver its decision which would be binding on the contracting States.[30] Thus, the concept of referring a dispute for the 'interpretation of the law' is not against the objectives of the ICSID Convention. In light of this, the author suggests the 'Preliminary Rulings System', as proposed by Diel-Gligor, wherein the parties to the dispute in an ongoing arbitral proceeding can refer a question of law for an advisory opinion of a reviewing body to be established under the ICSID Convention.

While the author agrees with the proposed mechanism of the system as proposed by Diel-Gligor,[31] it would be in the interest of better functioning of the proposed system that certain aspects as discussed below be added or substituted with the system as proposed by Diel-Gligor. Hence, the discussion in this section is limited to the suggested changes in the proposed system only.

A. Composition of the PR Panel

The most important question to be answered is: What would be the structure of the Preliminary Rulings Panel ("**PR Panel**")? The answer to this question lies in an already made proposal. Scholars have suggested that the ICSID should incorporate a World Trade Organisation ("**WTO**") like appellate body to create a two-tier arbitration system.[32] The WTO Appellate Body ("**WTOAB**") has also been argued to bring coherence, consistency and finality in the field of international trade law.

29. ICSID Convention, art. 64.
30. Tams (n 4) 47.
31. Diel-Gligor, *Towards Consistency in International Investment Jurisprudence* (n 28).
32. McRae (n 15).

1. A WTO Appellate Body inspired model

Diel-Gligor suggested that the PR Panel should be same as the WTO AB.[33] However, the author herein suggests that the PR Panel should work on a modified WTOAB model, in the limited context of the basic functions and purpose only.

Like the WTOAB, the PR Panel would work in the furtherance of the preservation of the rights and obligations of the state parties under the IIAs.[34] It would clarify the purpose of the provisions of the given IIAs and the institutional rules wherever required.[35] The PR Panel would be allowed to interpret the decision based on the text of the applicable treaties and the customary principles of international law.[36] This would ensure the coherence of the decisions of the PR Panel with that of the applicable principles of public international law.[37] However, unlike the WTOAB which answers questions of facts as well as law, the matters would come for the perusal of the PR Panel for seeking opinion only on the specific question of law.

Further, in contrast to the seven-member appellate body of the WTO which was also suggested by Diel-Gligor to be incorporated in the PR Panel as well,[38] the author suggests that the PR Panel could comprise of only five members. This would be cost-friendlier. Also, given the fact that most of the international arbitral tribunals are comprised of three arbitrators,[39] it would be desirable that a conclusive decision on the matter be given by a larger bench of arbitrators. This could be achieved by having only 5 members PR Panel as against a 7-member Panel. Further, instead of having the Panel sit in smaller benches of 3 or 4 like the WTO AB,[40] it is suggested that the PR Panel should give decisions on full strength where the majority

33. Diel-Gligor, *Towards Consistency in International Investment Jurisprudence* (n 28) 415.
34. WTO Agreements, Understanding on Rules and Procedures Governing the Settlement of Disputes, annex 2 to WTO Agreement, (1994) 33 ILM 1226, art. 3.2. (DSU)
35. *Ibid*.
36. *Ibid*.
37. McRae (n 15) 373.
38. Diel-Gligor, *Towards Consistency in International Investment Jurisprudence* (n 28) 417.
39. Grant (n 10) 1120; James H. Carter, *The Selection of Arbitrators* (1994) 5 Am Rev Intl Arb 84, 86; see generally C. Giorgetti, *Who Decides Who Decides in International Investment Arbitration?* (2014) 35 U Pa J Intl L 101 (2014).
40. Diel-Gligor, *Towards Consistency in International Investment Jurisprudence* (n 28) 496.

vote would decide the legal issue. This would ensure consistency within the decisions rendered by the PR Panel on questions of law which otherwise would be open to inconsistency among themselves if different questions of law are answered by different benches.

2. Appointment of the members of the Panel

At this stage, one more question needs to be answered: How will the members of the PR Panel be appointed? There are two possible ways in which this can be done: firstly, like the WTOAB, the members of the PR Panel would be appointed by the members of the ICSID Convention on a rolling basis for a set period of years; and secondly, the institution would appoint a five-member panel on its own which would work for a specified period of years.

While Diel-Gligor suggested appointment of members of the PR Panel in a manner similar to that of the WTO AB, the research did not cover the alternatives available for the appointment of the members.[41] Both the above-mentioned systems have their own pros and cons which will be further discussed in Section 4.1. below. This discussion is further necessitated post the recent WTO AB crisis which has effectively dismissed the appellate body. However, to answer the question briefly in the interim, the author suggests that the members to the Panel should be appointed by the contracting state parties instead of the arbitral institutions as done in the WTO AB and also put forth by Diel-Gligor.

B. Right to approach the Preliminary Rulings Panel

1. Either of the parties or the arbitral tribunal to approach the Panel

In the Appeals Facility model where the appellate body would exercise jurisdiction over the matter after the arbitral tribunal has rendered its award. In contrast to this, the author suggests that the PR Panel should be accorded with the jurisdiction at any stage of the arbitration whenever a substantial question of law arises. Unlike Diel-Gligor, who suggested that the question of law should only be referred by the arbitral tribunal;[42] the author herein suggests that either of the parties should also be allowed to refer the question of law to the PR Panel directly in order to avoid a

41. *Id*., 417-20.
42. *Id*., 430.

scenario wherein one of the parties feels that despite confusion regarding a question of law, the arbitral tribunal is not referring it for a PR Panel ruling.

However, it is reiterated that thisright to approach the PR Panel should be reserved only for the issues of law. This would serve a twofold purpose: firstly, the PR Panel, the primary aim of which would be to give an opinion on the matter of law so that different tribunals do not render inconsistent decisions, would not be burdened by the responsibility to review facts of the case which could be done by the arbitral tribunals; and secondly, some scholars have argued that the current annulment committee's scope of review is very narrow and they cannot decide whether the decision of the arbitral tribunal is based on an error in law.[43] Allowing the PR Panel to give its opinion on the question of law would thus overcome the defect of the existing mechanism.

2. An opt-out right

While Diel-Gligor has discussed at length the procedure of presenting the questions of law to the PR Panel,[44] the research hasn't covered the nature of the right vested upon the parties to refer the questions to the PR Panel. It is not necessary that all the state parties while entering into an IIA would want to procure the benefits associated with the PR Panel keeping in mind the extra time that would be taken during the referral process. Inarguably, one of the fundamental features of international arbitration is party autonomy and the consequent freedom to choose the procedure.[45] Therefore, it would be against the objectives of arbitration to impose a mandatory referral system on the parties. The parties have the right to uphold the finality of the awards and also to waive a procedural right which they do not want to be a part of the process.[46] Thus, the parties should be given the option to opt-out of the right to refer the dispute to the PR Panel in the IIA itself.

---

43. Christoph H. Schreuer, *From ICSID Annulment to Appeal: Half Way Down the Slippery Slope* (2009) 10 Law & Practice Intl Ct & Tribunals 211; see also Katharina Diel-Gligor, *Competing Regimes in International Investment Arbitration: Choice between the ICSID and Alternative Arbitral Systems* (2011) 22(4) Am Rev Intl Arb 677.
44. Diel-Gligor, *Towards Consistency in International Investment Jurisprudence* (n 28) 430-9.
45. Jamshed Ansari, *Party Autonomy in Arbitration: A Critical Analysis* (2014) 6(6) Researcher 47, 53; Sunday A. Fagbemi, *The Doctrine of Party Autonomy in International Commercial Arbitration: Myth or Reality?* (2015) 6(1) Journal of Sustainable Development, Law and Policy 222, 224.
46. David R. Sedlak, *ICSID's Resurgence in International Investment Arbitration: Can the Momentum Hold* (2004) 23(1) Penn St Intl L Rev 147, 161-70.

Apart from this, the author is suggesting an opt-out right for a twofold reason as well: firstly, the right to refer the matter for the opinion of the PR Panel should be made the general procedure and any deviation from it should be done by the express contract of the parties; and secondly, the opt-in method would require an express mention of the right of the parties to refer the matter to the PR Panel.[47] Thus, if the parties fail to expressly mention it in the IIA due to poor drafting of the same, they would be devoid of the referral mechanism due to a technical error.

3. HOW WILL THE PROPOSED PRS MECHANISM FULFILL THE OBJECTIVES OF AN APPELLATE SYSTEM?

Predictability, legitimacy and correctness form the three pillars of all the proposals for an ICSID Appeals Facility. It has been argued time and again that the current ISDS mechanism lacks these three qualities.[48] Thus, the Appeals Facility has been put forward as a suggestion to fulfil these three desirable objectives. In this section of the paper, the author will elucidate how the proposed PRS mechanism also fulfils all the given objectives.

A. Predictability

It cannot be denied that the regime of investment arbitration has suffered from inconsistent decisions by different tribunals while dealing with the same question of law. This inconsistency in decisions has made the system unpredictable. Below, the author discusses two instances of such an inconsistency and explains how the proposed PRS mechanism could resolve it.

47. Jean Galbraith, *Treaty Options: Towards a Behavioral Understanding of Treaty Design* (2013) 53(2) Va J Intl L 309, 322.
48. Laird and Askew (n 8); Feldman (n 9); Grant (n 10).

1. The curious case of the necessity defence in deciding Argentina's liability

The decisions of the arbitral tribunals in five cases arising out of the US-Argentina BIT (*viz. CMS*,[49] *Continental Casualty*,[50] *Enron*,[51] *LG&E*,[52] and *Sempra*[53]) on the scope of the defence of necessity is one of the often-cited scenarios to show the inconsistent nature of investor-state arbitration.[54] In these cases, the claimants invested in Argentina, the host-State, as part of Argentina's privatization program in the early 1990s whereby Argentina also committed that they would stabilize the tariff structure notwithstanding the strong fluctuation in their economy. However, after a few years, Argentina suffered a huge economic breakdown to address which they took certain measures including a law on tariff adjustments.[55] When the investors approached the arbitral tribunals against Argentina for violations of its treaty obligations including that of the Fair and Equitable Treatment (FET),[56] Argentina took the defence of necessity.[57]

While in *CMS*,[58] *Enron*[59] and *Sempra*[60] the arbitral tribunals found that Argentina's actions did not qualify for the necessity defence, the tribunals in *LG&E*[61] and *Continental Casualty*[62] found otherwise. This led to inconsistent decisions arising out of the same set of facts and legal texts.

49. CMS Gas Transmission Co. v. Republic of Argentina, ICSID Case No. ARB/01/8, Award (12 May 2005).
50. Continental Casualty Co. v. Argentine Republic, ICSID Case No. ARB/03/9, Award (5 Sept. 2008).
51. Enron Corpn. and Ponderosa Assets, LP v. Argentine Republic, ICSID Case No. ARB/01/3, Award (22 May 2007).
52. LG&E Energy Corpn., LG&E Capital Corpn., and LG&E International Inc. v. Argentine Republic, ICSID Case No. ARB/02/1, Decision on Liability (3 Oct. 2006).
53. Sempra Energy International v. Argentine Republic, ICSID Case No. ARB/02/16, Award (28 Sept. 2007).
54. Irene M. Ten Cate, *International Arbitration and The Ends of Appellate Review* 44 Intl L & Politics 1109, 1174; Tsai-Yu Lin, *Systemic Reflections on Argentina's Non-Compliance with ICSID Arbitral Awards: A New Role of the Annulment Committee at Enforcement?* (2012) 5(1) Contemporary Asia Arb J 1, 20.
55. CMS Award (n 49) [65].
56. *Id*., [88].
57. *Id*., [91]-[99].
58. *Id*., [383]-[394].
59. Enron Award (n 51) [343]-[345].
60. Sempra Award (n 53) [392]-[397].
61. LG&E Award (n 52) [85]-[86].
62. Continental Casualty Award (n 50) [266].

2. The dual nationality conundrum of the Spain-Venezuela BIT

Ina more recent example of inconsistency, the applicability of general principles of international law in determining the fate of the claims of a dual national was under scrutiny in two disputes arising out of the Spain-Venezuela BIT.[63] In both the disputes, namely *Serafin Garcia*[64] and *Manuel Garcia*,[65] the claimants were dual nationals of Spain and Venezuela and invested in the latter. In both the cases, claims of expropriation were raised by the investors to which the host-state objected by arguing that the investors should not be allowed to raise a claim against the State of his own nationality.[66] However, both the tribunals came to completely opposite decisions. Though these disputes were governed by the UNCITRAL Rules and not the ICSID Convention, it is the perfect example of inconsistency in the interpretation of the text of the treaties, in recent times.

On one hand, the *Serafin Garcia* tribunal rejected the application of international law in investor-state arbitration and allowed the investor to raise the claim.[67] On the other hand, the *Manuel Garcia* tribunal applied the customary rules of international law and used the principle of effective nationality of the dual national to decide the matter.[68] On the application of the effective nationality principle to the facts of the case, the *Manuel Garcia* tribunal found the dominant nationality to be that of Venezuela and thus rejected the claims of the investor.[69]

3. Explaining how the PRS mechanism would have avoided the inconsistencies

As discussed in Section 1, the PR Panel would consolidate all the disputes arising out of the matter and put a stay on all the relevant ongoing arbitral proceedings. Thus, in the matter of Argentina, as discussed in Section 2.1.1., the specific question of whether the actions of the host-State Argentina would qualify for the defence of necessity could have been referred to the

63. Agreement between the Kingdom of Spain and the Republic of Venezuela on the Reciprocal Promotion and Protection of Investments (signed 2 Nov. 1995, entered into force 10 Sept. 1997) (Spain-Venezuela BIT).
64. Serafín García Armas and Karina García Gruber v. Bolivarian Republic of Venezuela, PCA Case No. 2013-3, Decision on Jurisdiction (15 Dec. 2014).
65. Manuel García Armas v. Bolivarian Republic of Venezuela, PCA Case No. 2016-08, Award on Jurisdiction (13 Dec. 2019).
66. Serafin Garcia (n 64) [110]-[115]; Manuel Garcia Armas (n 65) [256]-[322].
67. Serafin Garcia (n 64)[154], [173].
68. Manuel Garcia (n 65) [645]-[650].
69. *Id*., [740]-[741].

PR Panel. When the matter would have been referred, as per the proposed system by the author, the PR Panel would have first ensured a stay of arbitral proceedings and then consolidated the rest of the cases as well. After this, the PR Panel would have reviewed the specific question of law and delivered its opinion which would have been binding on all five arbitral tribunals. Thus, it would have ensured consistency in decisions and offered predictability in future decisions.

Similarly, as discussed earlier in Section 1, the decisions of the PR Panel would be binding on the arbitral tribunal which referred the issue to it as well as on the future arbitral tribunals. In the matter of Venezuela, the question of law that whether international law is applicable in international investment arbitration and if yes, would the principle of effective nationality be applied, could have been referred to the PR Panel. The PR Panel would have conclusively decided upon the matter in consonance with the language of the treaty and the applicable principles of international law, its decision would have been binding on both the Serafin Garcia tribunal and the *Manuel Garcia* tribunal which would have avoided the inconsistent interpretation.

In light of the abovementioned, the author argues that the proposed PRS mechanism if incorporated would ensure consistency and predictability in the field of investment arbitration. Therefore, the proposed mechanism would fulfil the objective of achieving predictability in ISDS which has served as one of the three pillars for incorporating an appellate system.

B. Legitimacy

Legitimacy depends in large part upon factors such as determinacy and coherence, which can in turn bring predictability and reliability.[70] Determinacy involves using rules to convey clear and transparent expectations.[71] However, most of the investment treaties just vaguely mention the rights and obligations of the investors and the participating States which leaves certain legal loopholes prone to be used a justification for non-compliance.[72] This indeterminate nature of the investment arbitration regime gives rise to legitimacy issues. One such issue of legitimacy is the authoritativeness of the decisions of the arbitral tribunals. It has been

70. Thomas M. Franck, *The Power of Legitimacy Among Nations* (OUP, 1990) 49.
71. *Id*., 352.
72. Franck (n 2) 1584.

argued that the award in the investment arbitration regime lack authority as they are prone to challenges at the enforcement stage.

Some domestic jurisdictions[73] have restricted the scope of the inquiry into the merits of the decisions of the international arbitral tribunals in respect of the obligations under the New York Convention.[74] Further, Article 52 of the ICSID Convention also restricts the scope of review of the decision of the arbitral tribunals by the annulment committee only to the set grounds mentioned in the Article.[75] There have been instances where the annulment committee has exceeded its scope of review and has annulled the arbitral awards on grounds which were not even argued by the parties at the first instance.[76] However, when it comes to compliance of the ICSID awards, apart from few exceptions where the enforcement of ICSID awards faced a challenge,[77] most of the awards have been complied with, with full vigour.[78] Further, the language of Articles 53 and 54 of the ICSID Convention ensure the enforcement of an ICSID award in the territory of the member States "*as if it were a final judgment of the courts of a constituent state*." Therefore, in the author's opinion, the argument for legitimacy fails in the first instance itself.

Irrespectively, it cannot be denied that the ICSID mechanism does not provide for a proper review of the decisions of the arbitral tribunals on merit

73. Nouveau code de procedure civile (NCPC) art. 1520 (France); Philippe Malaurie, Les *Précédents* et le Droit: Rapport *Français,* in Ewoud Hondius (ed.), Precedent and the Law (Bruylant Bruxelles Publishers 2007) 139, 144-47; see also Gabrielle Kaufmann-Kohler, Arbitral Precedent: Dream, Necessity, or Excuse? (2007) 23 Arbitration International 357, 359.
74. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, (adopted 10 June 1958, entered into force 7 June 1959) (New York Convention).
75. Schreuer, *From ICSID Annulment to Appeal* (n 43); see also Diel-Gligor, *Competing Regimes in International Investment Arbitration* (n 43).
76. Hussein Nuaman Soufraki v. United Arab Emirates, ICSID Case No. ARB/02/7, Decision on Annulment (5 June 2007) [85]; Duke Energy International Peru Investments No. 1 Ltd. v. Republic of Peru, ICSID Case No. ARB/03/28, Decision on Annulment (1 Mar. 2011) [212]; Amco Asia Corpn. v. Republic of Indonesia, ICSID Case No. ARB/81/1, Decision on Annulment (16 May 1986) [95], [97]; Schreuer (n 23) 215-24; C.H. Schreuer and others, *The ICSID Convention: A Commentary* (2nd ed., Cambridge University Press, 2009) art. 52, paras 230-232.
77. SARL Benvenuti & Bonfant v. People's Republic of the Congo, Courd'appel, Paris, 26 June 1981, 1 ICSID Reports 369, 108 Journal du Droit International 365/6, 843, 845 (1981); *Liberian Eastern Timber Corpn.* LETCO v. Liberia, US District Court SDNY, 5 Sept. 1986, 12 Dec. 1986, 2 ICSID Reports 383-389.
78. Tams (n 4) 35.

or for an error in law.[79] It merely provides the parties with an extra remedy by way of the annulment of the award based on certain procedural grounds. It has been argued that the appellate system would provide legitimacy to the system as the losing parties would be less willing to again challenge the award in domestic courts.[80] Likewise, the domestic courts would also respect that the matter has already gone two stages of arbitral scrutiny.[81]

The author agrees with the scholars on the principle that there is a need fora review mechanism in ICSID arbitration and ISDS in general. However, the author reserves his support for an appeals mechanism and suggests that the proposed PRS mechanism would achieve the same goals. In the proposed mechanism, when the arbitral tribunals or the parties would refer the specific question of law for the opinion of the PR Panel the decision in such case would also have gone scrutiny at two levels. Further, the binding nature of the decisions of the PR Panel on the future tribunals would ensure a consistent approach to the specific issue. Therefore, the author argues that the proposed PRS mechanism would fulfil the objective of legitimacy as well.

C. Correctness

It is believed that in a domestic courts system, an appellate review fulfils two purposes: error correction and lawmaking.[82] Thus, when scholars suggested for an appeals mechanism the intent was to ensure the correctness of the decision.[83] The motive was to mitigate the error in law which the arbitral tribunal would have made.[84]

Though there exists an annulment committee in the ICSID regime, but due to the limited scope of its powers there have been some inconsistent decisions on disputes arising out of the same subject matter and the same

79. G. Bottini, *Reform of the Investor-State Arbitration Regime: The Appeal Proposal* (2014) 11(1) Transnational Dispute Management 1, 4-6.
80. William Knull, III and Noah D. Rubins, *Betting the Farm on International Arbitration: Is it Time to Offer an Appeal Option?* (2000) 11 Am Rev Intl Arb 531; Noam Zamir and Peretz Segal, *Appeal in International Arbitration – An Efficient and Affordable Arbitral Appeal Mechanism* (2019) 35(1) Arbitration International 79, 85.
81. *Ibid*.
82. David Frisch, *Contractual Choice of Law and the Prudential Foundations of Appellate Review*' (2003) 56 Vand L Rev 57, 74; Chad M. Oldfather, Universal De Novo Review (2009) 77 Geo Wash L Rev 308, 316.
83. Feldman (n 9).
84. UNGA Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of its Thirty-Sixth Session (2018) UN Doc A/CN.9/964 para 57.

treaty.For instance, in the Argentinian cases discussed earlier in Section 2.1.1, the matters in *CMS*,[85] *Enron*[86] and *Sempra*[87] were taken to the annulment committee. All the three committees scrutinized the respective awards on the ground mentioned under Article 52(1)(b) of the ICSID Convention i.e., "*that the Tribunal has manifestly exceeded its powers*". While the annulment committee found the decision of all the three tribunals in the error of law, it annulled the *Enron* and *Sempra* awards, but only partially annulled the *CMS* award.

Further, the reasoning of the committee was different in all three cases: in *CMS*, the committee held that the wrong application of the law does not amount to 'manifest excess of powers' and that the committee cannot substitute its own view of facts and law for those of the tribunal;[88] in *Enron*, the committee was of the opinion that the decision of the arbitral tribunal did not apply the principles of customary international law;[89] and in *Sempra*, the committee reasoned that the tribunal failed to apply the provisions of the treaty by applying the principles of customary international law.[90]

Therefore, in the aforementioned scenario, three different opinions were recorded by the committee on a dispute arising out of the same subject matter. This raises concerns regarding the correctness of the decisions giving rise to the need for an additional review facility with powers wider than that of the annulment committee.[91] The reasons accorded by the CMS *Annulment Committee* are to be given special weightage in the scenario when they note that it "*cannot simply substitute its own view of the law and its own appreciation of the facts for those of the Tribunal*".[92] It points towards the lack of reviewing power with the committee and the need for a body to review the issues of law.

In light of the above, the author argues that the proposed PRS mechanism would fulfil this criterion as well. As under the proposed system by

85. CMS Gas Transmission Co. v. Republic of Argentina, ICSID Case No. ARB/01/8, Annulment Decision (25 Sept. 2007).
86. Enron Corpn. and Ponderosa Assets, LP v Argentine Republic, ICSID Case No. ARB/01/3, Annulment Decision (30 June 2010).
87. Sempra Energy International v. Argentine Republic, ICSID Case No. ARB/02/16, Annulment Decision (29 June 2010).
88. CMS Gas Transmission Co. (n 85) [136].
89. Enron Corpn. (n 86) [386]-[395].
90. Sempra Energy International (n 87) [196]-[219].
91. Cate (n 54) 1174-84.
92. CMS Gas Transmission Co. (n 85) [136].

Diel-Gligor the related cases would be consolidated, the ongoing arbitral proceedings will be stayed, PR Decisions will be binding on the tribunals. Thus, in the annulment scenario above if the matter was instead forwarded to the PR Panel then the issue would have been resolved at a preliminary stage itself. Therefore, the PR Panel would ensure the correctness of the law and maintain consistency at the same time and thus fulfils all the three objectives of an appellate system.

4. WHAT ARE THE ADDED BENEFITS OF THE PROPOSED PRS MECHANISM?

In the previous section, the author established how the proposed PRS mechanism is as efficient as the proposed appellate mechanisms. This section highlights certain aspects in which the proposed mechanism has an edge over an appellate mechanism. As mentioned in the introductory remarks, certain scholars have criticized the incorporation of an appellate mechanism in ICSID due to finality of awards and the additional costs. To ensure that the proposed mechanism does not undergo a similar criticism, the author will establish how itsatisfies these criteria as well.

A. Finality of Awards

One of the fundamental features and benefit of arbitration is the finality of awards.[93]As there is no appellate review of the awards of the ICSID tribunals at present, their words on the matters of facts and law are considered final unless annulled on specified grounds under Article 52 of the ICSID Convention. These awards are then enforced as per the text of the ICSID Convention,[94] thus ensuring finality of the awards.

1. Interaction with Article 53 of the ICSID Convention

With the rising support for the introduction of an appeals mechanism in ICSID arbitration, the principle of finality of awards had to give way to the desire of achieving consistency and predictability in ISDS.[95] This goes against the text of Article 53 of the ICSID Convention which expressly states that "*the award shall be binding on the parties and shall not be*

93. Laird and Askew (n 8) 286.
94. ICSID Convention (n 13) ch. IV.
95. Kim (n 14); see also Diel-Gligor, *Competing Regimes in International Investment Arbitration* (n 43); Christopher Smith, *The Appeal of ICSID Awards: How the AMINZ Appellate Mechanism Can Guide Reform of ICSID Procedure* (2013) 41(2) Ga J Intl & Comp L 567.

subject to any appeal or to any other remedy except those provided for in this Convention" (emphasis added). The plain reading of the Article provides for the finality of 'awards' and their binding nature on all the member states.

Scholars have pointed out that to incorporate appeals mechanism in ICSID, the Convention will have to be amended which would require amendment of the Convention.[96] It has been highlighted that the awards rendered by the appeals facility might not be enforceable under Article 54 unless the definition of the term 'award' is changed to include the awards rendered by the appeals facility. However, the practicality of such an amendment looks dubious as it is unlikely to have the assent of all the member States[97] on the inclusion of a second tier of arbitration.[98]

2. Interaction with Article 41 of the Vienna Convention on the Law of Treaties

Article 41(1)(b)(i) the Vienna Convention on the Law of Treaties[99] ("**VCLT**") provides that any modifications to the treaty can be made only if it does not affect the rights of the other parties. In the present case, even if some of the parties agree and intend to modify the ICSID Convention, it would affect the rights of the other parties under Article 54 of the Convention. As Article 54 requires all the member States to enforce the ICSID awards in their territory it would be an added burden on them.[100] Thus, it would go against the text of Article 41(1)(b)(i).[101]

Further, Article 41(1)(b)(ii) of the VCLT requires that any modification should "*not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole*". As mentioned earlier, Article 53 of the Convention expressly prohibits the review of an award by the appellate authority. Read with Article 54 of the Convention, this would render the award unenforceable

96. Schreuer and Brena (n 23).
97. ICSID Convention (n 13), art. 66(1).
98. Albert Jan van den Berg, *Appeal Mechanism for ISDS Awards: Interaction with the New York and ICSID Conventions* (2019) 34(1) ICSID Review 169.
99. Vienna Convention on the Law of Treaties (entered into force 27 Jan. 1980) 1155 UNTS 331 (VCLT).
100. ICSID Convention (n 13), art. 54: "(1) Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State".
101. Schreuer and Brena (n 23).

which would run directly against the purpose of the treaty as a whole which aims at the compliance with the arbitral awards.[102]

In light of the above-mentioned, the author here argues that the PRS mechanism would escape this criticism. In the proposed mechanism, the PR Panel would give its opinion during the proceedings based on which the arbitral tribunals would deliver their awards. Thus, the award rendered by the tribunals would not be subject to any further scrutiny except the annulment committee on the limited procedural grounds. Further, the award would be enforceable under the ICSID Convention in the existing manner itself. Therefore, the proposed mechanism would guarantee finality of awards as well as fulfil all the objectives of an appeals system as discussed in Section 2.

B. Time and Costs

One of the reasons for the shift from traditional litigation to arbitration is the time-bound manner in which the decisions can be rendered in the latter.[103] However, the costs involved in the process are very high.[104] The cost of arbitration includes fees for arbitrators, administration, legal representation and experts.[105] Clubbed together, these all factors already include a huge amount of arbitral costs and adding an appellate system would further add to it. Therefore, reviewing the case on facts as well as law at the appellate stage would give rise to the above-mentioned costs again.[106]

The reform to the existing system should rather be affordable and in reach of the concerned parties.[107] The proposed PRS mechanism would ensure timely redressal of the dispute at not exceedingly high added costs. As

102. ICSID Convention (n 13), Preamble: "and that any arbitral award be complied with".
103. Robert Cooter and Tom Ulen, *Law and Economics* (6th ed, Pearson Addison Wesle 2012) 450; see Michael Faure and Wanli Ma, *Investor-State Arbitration: Economic and Empirical Perspectives* (2020) 41 Mich J Intl L 1 (2020).
104. See Gabriel Bottini and others, *Excessive Costs and Recoverability of Cost Awards in Investment Arbitration* (2020) 21(2–3) JWIT 251; see also Susan D. Franck, *Arbitration Costs: Myths and Realities in Investment Treaty Arbitration* (OUP, 2019).
105. Diana Rosert, *The Stakes are High: A Review of the Financial Costs of Investment Treaty Arbitration* (International Institute for Sustainable Development, 2 Oct. 2014) https://www.iisd.org/publications/stakes-are-high-review-financial-costs-investment-treaty-arbitration#:~:text=The%20amounts%20at%20stake%20in,claims%2C%20which%20are%20increasingly%20common. accessed 11 Sept. 2010.
106. Tams (n 4) 41.
107. See UNCITRAL Doc. A/CN.9/WG.III/WP.153, para 12.

discussed in Section 1, the PR Panel would have to deliver its opinion on the referred question within a short span of time. In contrast, the appeals facility would be undertaking the whole process on the disputed issues again which might take the same amount of time as the original arbitral proceedings, if not more. Below, the author discusses certain cost issues already incumbent in the investment arbitration regime to ultimately establish how the appeals system might not be able to overcome these issues, but the proposed PR system would.

1. Existing costs in investment arbitration

Various reports studying the average costs involved in an investment arbitration matter have been conducted till as late as the latter of 2010s. The latest available study on the subject based on the cases till early half of 2019 shows that the average cost incurred by a claimant is 6,067,184 USD and that of a respondentis 5, 223, 974 USD; while the costs incurred by the tribunals are comparatively is very low, 1 million USD.[108] It is also important to highlight here that these numbers have increased considerably from earlier, as the report of 2017 indicated claimant's costs as 6,019,000 USD, respondent's costs as 4,855,000 USD and those of the tribunal as 933,000 USD.[109]

2. The amount the parties get in damages is not proportionate to the costs involved

Further, this has to be seen in the light of the amount of damages the parties actually get. It has been pointed out by various scholars that though the parties might receive the damages for their losses, the high cost of arbitration mitigates the actual compensation which they are getting.[110] Therefore, adding an additional forum which would again incur high costs is not viable for the parties from the costs-perspective. With the PRS

108. See, citing to the figures in Daniel Behn and Ana Maria Daza, The Defense Burden in Investment Arbitration?' (2019) PluriCourts Working Paper.

109. Matthew Hodgson and Alistair Campbell, Damages and Costs in Investment Treaty Arbitration Revisited Allen & Overy (14 Dec. 2017) accessed 4 July 2019.

110. See Jeffery P. Commission, *How Much Does an ICSID Arbitration Cost? A Snapshot of the Last Five Years* (Kluwer Arbitration Blog, 29 Feb. 2016) http://arbitrationblog.kluwerarbitration.com/2016/02/29/how-much-does-an-icsid-arbitration-cost-a-snapshot-of-the-last-five-years/#:~:text=Last%20year%2C%20in%202015%2C%20the,claimant%20are%20around%20%248%20million%E2%80%9D accessed 9 Sept. 2020; Luke Nottage and Ana Ubilava, *Costs, Outcomes and Transparency in ISDS Arbitrations: Evidence for an Investment Treaty Parliamentary Inquiry* (2018) 21 International Arbitration Law Review 4.

mechanism in place, the review authority would have limited work which would have to be done in a limited period of time, and thus would be more cost-effective than an appeal mechanism.[111]

3. The burden of costs might deter smaller countries or smaller investors

While the big multinational corporations might be able to afford the costly arbitral proceedings against the host-states, it is unlikely that the smaller corporations would be able to continue the process.[112] Similarly, the countries with smaller economies might also not be able to continue the proceedings owing to adequate finances for the purpose of one arbitral proceeding.[113] Therefore, the proposed appeals facility is not a cost-effective or affordable mode of resolving disputes. Though it cannot be denied that the appeals facility has its own benefits over the existing system,[114] but one needs to ask whether the high costs at which it comes is really worth the reform?

An appeals system would effectively mean that all the above charges would be borne again by the parties in the form of fees and expenses of counsel, witnesses and experts. This would unnecessarily burden the parties financially. On the other hand, a PR System would overcome this lacuna. The PR Panel would be delivering the ruling based only on the written submissions of the parties with respect to the specific legal question.[115] This would ensure that the party expenses are not borne again and only costs pertaining to the tribunals are incurred. As discussed in Section 3.1.1., the tribunal costs are very low when compared to the average cost incurred by the parties. Therefore, the only additional cost borne in a PR System would that be of the PR Panel as compared to the party costs plus the tribunal costs in an appeals system.

111. Andelic (n 21) 3; D.W. Rivkin and S.J. Rowe, *The Role of the Tribunal in Controlling Arbitral Costs* (2015) 81(2) Arbitration: The International Journal of Arbitration, Mediation and Dispute Management 116.
112. Catherine Rogers, *The Arrival of the "Have-Nots" in International Arbitration* (2007) 8 Nevada L J 341, 357.
113. Thomas Walde, *Alternatives for Obtaining Greater Consistency in Investment Arbitration: An Appellate Institution after the WTO, Authoritative Treaty Arbitration or Mandatory Consolidation?* (2005) 2 Transnational Dispute Management 71.
114. Feldman (n 9).
115. Diel-Gligor, *Towards Consistency in International Investment Jurisprudence* (n 28) 494.

5. WHAT STILL NEEDS TO BE ANSWERED?

In the previous sections, the author established that the PRS mechanism is an efficient and affordable alternative to the often-suggested appeals facility in ICSID arbitration. While the proposed PRS mechanism has the ability to escape the criticism faced by the appeals facility proposal in some aspects, it cannot be claimed that the system is perfect. Therefore, in this section, the author aims to highlight certain aspects on which the proposed PRS mechanism might face similar criticism as an appeals facility. The author also attempts to counter any future criticism and establish that the proposed PRS mechanism would prove to be a better alternative than an appeals facility.

A. Selection of arbitrators

As of now, the general practice is that each of the parties appoints one arbitrator each, and these two appointed arbitrators select the third arbitrator whoalso serves as the presiding arbitrator.[116] This way the parties experience a certain level of control over the proceedings and have confidence in the tribunal.[117] However, with the proposals of the appeals facility or the author proposed PR Panel, if the parties are again allowed to choose the arbitrators for the reviewing authority then the practice would become redundant.[118] Thus, there is a need for a different approach to appointing the members of the author proposed PR Panel. This can be done in two ways as mentioned in Section 1:

1. Appointment by the arbitration institution

The first method of appointing arbitrators to the PR Panel would be to let the arbitration institution appoint the review body on its own.[119] This mode of appointment of the Panel would ensure a threefold purpose: firstly, ensure depoliticization of the process of appointment of arbitrators as the members will be directly appointed by the institution;[120] secondly, bring more

116. James Wangelin, Effective Selection of Arbitrators in International Arbitration (1999) 14 Mealey's Intl Arb Rep 69, 70.
117. William W. Park, Arbitrator Integrity: The Transient and the Permanent (2009) 46 San Diego L Rev 629, 644-45.
118. Sergio Puig and Anton Strezhnev, *Affiliation Bias in Arbitration: An Experimental Approach* (2017) 46 J Legal Studies 371, 374.
119. Hans Smit, *Contractual Modifications of the Arbitral Process* (2009) 113 Penn St L Rev 995, 1007.
120. Cate (n 54) 1158.

transparency to the appointment of the members as the institution would appoint the arbitrators based on set criteria unlike the State nominated arbitrators which might be selected just for political concerns; and thirdly, ensure flexibility and independence of the arbitrators who would be free from any political pressure.[121]

2. Political appointments by the ICSID member States

The second method of appointing the arbitrators would be to allow the member States to nominate people with relevant expertise in the field of arbitration to serve as the members of the PR Panel in rounds for a fixed period of time.[122] This would serve a twofold purpose: firstly, the members of the PR Panel would be appointed in a way similar to any other internationally recognized judicial organ like the ICJ or the WTO; and secondly, if the States are allowed to participate in the nomination of the members of the Panel they would have more faith in the decisions of the members and would be more likely to actively enforce the arbitral awards.

However, this method of appointing members of international judicial organs has been criticized for the risk of politicization of the arbitration system.[123]It is also considered desirable that the members of the review authorities be impartial especially when their appointment is for a fixed period of time and not merely for one case.[124]Further, the process of filling vacancies on the bench, with the political implications it entails, may lead to longer proceedings, thereby increasing costs for attending parties.[125] Therefore, this mode of appointing arbitrators is prone to the politicization

121. *Ibid*.

122. Cate (n 54) 1154; Michael and Wanli (n 103).

123. Katia Yannaca-Small, *Improving the System of Investor-State Dispute Settlement: The OECD Governments' Perspective* in Karl P. Sauvant (ed.), *Appeals Mechanism in International Investment Disputes* (OUP, 2008) 223, 224-25; J. Paulsson, *Avoiding Unintended Consequences, in K.P. Sauvant (ed.), Appeals Mechanism in Investment Disputes* (OUP, 2008) 241, 258-62.

124. Chiara Georgetti, *Independence and Impartiality of Arbitrators in Investor-State Arbitration: Perceived Problems and Possible Solutions* (EJIL: Talk!, 4 Apr. 2019) https://www.ejiltalk.org/independence-and-impartiality-of-arbitrators-in-investor-state-arbitration-perceived-problems-and-possible-solutions/ accessed 11 Sept. 2020; Riddhi Joshi, *The Threshold for Challenges in ICSID Arbitration: Interpreting the 'Manifest Lack' Standard* (Kluwer Arbitration Blog, May 7 2020) http://arbitrationblog.kluwerarbitration.com/2020/05/07/the-threshold-for-challenges-in-icsid-arbitration-interpreting-the-manifest-lack-standard/ accessed 11 Sept. 2020.

125. International Bar Association, Consistency, Efficiency, and Transparency in Investment Treaty Arbitration: A Report by the IBA Arbitration Subcommittee on Investment Treaty Arbitration (November 2018) 1, 53 https://www.three crownsllp.

of the process which should be avoided to maintain the independence of arbitrators.[126]

On the other hand, it is also to be taken into consideration whether the participating States would agree to an independent appointment of panel members for deciding inter-States issues. With the recent crisis of WTO AB and the reservations brought forward by the United States, it has become even more doubtful if an arbitral institution appointed Panel would survive in the long term.[127] Certain scholars have also pointed out, and rather correctly, that the States are more likely to participate and show trust in international bodies if the members are nominated by the participant states rather than independent appointment.[128]

It is to be noted that the above two issues would be similar in an appeals facility and the proposed PRS mechanism. Therefore, the parties' right to appoint the arbitrators of their own choice would be taken away in both scenarios. However, the author argues that the right to select the arbitrator could be waived by the parties[129] in light of the bigger objectives of consistency and independence in arbitration. Further, in light of the advantages of political appointment,taking into consideration the example of the WTO AB crisis, the author suggests that the members to the PR Panel should be appointed by the participating States only to channelize greater participation of states in the PR system.

---

com/wp-content/uploads/2018/12/InvestmentTreatyArbitrationReport2018.pdf accessed 13 Sept. 2020.

126. Aida Torres Pérez, *Can Judicial Selection Secure Judicial Independence? Constraining State Governments in Selecting International Judges*, in Michal Bobek (ed.), *Selecting Europe's Judges: A Critical Review of the Appointment Procedures to the European Court* (OUP, 2015) 185.
127. Aditya Rathore and Ashutosh Bajpai, *The WTO Appellate Body Crisis: How We Got Here and What Lies Ahead?'* (*Jurist*, 14 Apr. 2020) https://www.jurist.org/commentary/2020/04/rathore-bajpai-wto-appellate-body-crisis/ accessed 23 Jan. 2021.
128. Jan Paulsson, *Moral Hazard in International Dispute Resolution* (2011)8(2) Transnational Dispute Management; James Crawford, *The Ideal Arbitrator: Does One Size Fit All?* (2017) 32 Am U Intl L Rev 1003, 1020.
129. See Dongdoo Choi, *Joinder in International Commercial Arbitration* (2019) 35(1) Arbitration International 29.

3. Different treaties, different standards

In investor-state arbitration, the primary source of reference for the arbitral tribunals for the resolution of any dispute is the treaty itself.[130] If the treaty is silent on any issue then only the arbitral tribunals tend to fall back on the domestic law of the participating states or the applicable principles of public international law,[131] which also have to be read in consonance with the language of the treaty.[132] However, the legal standards in different treaties entered into among different States vary from one another.[133] Though certain clauses like expropriation, fair and equitable treatment, most-favoured nation clauses etc. make constant appearances in the treaties, the standard of proof required and their interpretation along with other provisions of the treaty varies.[134] Based on this, scholars have argued that the decisions of the appeals facility would not achieve the desired authoritative value and consistency in arbitration because the interpretation of the law given by them would vary from treaty to treaty.[135]

The author speculates that the proposed PRS mechanism might also undergo a similar criticism. Therefore, the author attempts to counter the expected criticism in the following manner:

Firstly, as discussed in Sections 2.1. and 2.3., there have been instances where the arbitral tribunals and the annulment committees have rendered inconsistent decisions on disputes arising out of the same treaty. Therefore, *in arguendo*, even if it is considered that the system might not be efficient for disputes arising out of different treaties, it is contended that the proposed mechanism would hold good for the disputes arising out of the same treaty and would ensure consistency.

Secondly, it cannot be denied that different treaties have different legal standards and obligations of the parties. However, it has been pointed out

130. Yas Banifatemi, *The Law Applicable in Investment Treaty Arbitration*, in Katia Yannaca-Small (ed.), *Arbitration Under International Investment Agreements: A Guide to the Key Issues* (OUP, 2010) 191, 193-5.
131. J. Christopher Thomas and Harpreet Kaur Dhillon, Applicable Law Under International Investment Treaties (2014) 26 Singapore Academy of Law Journal 975, 993-7.
132. Id., 993, 997-8.
133. See generally Alireza Ansari Mahyari and Leila Raisi, *International Standards of Investment in International Arbitration Procedure and Investment Treaties* (2018) 15(2) Revista Jurídicas 11.
134. Ibid.
135. Berg (n 98) 157.

by scholars that despite the BITs being signed or entered into by different States, their texts are very similar.[136] Thus, it is argued that the decisions of the PR Panel would at least have authority in disputes arising out of treaties with identical or similar clauses.

Thirdly, though there exists no established rule of precedents in investor-State arbitration,[137] one cannot undermine the influential value running through the broader understanding of precedents.[138] Therefore, though the decisions of the PR Panel may not be considered binding on tribunals dealing with completely different treaty standards, the decisions would still hold persuasive value[139] on the tribunals dealing with the same question of law.

In light of the above, the author argues that the introduction of a review system should not be stopped merely on the ground that different treaties would have different standards. Rather, it should be kept in mind that the underlying principles of the rights and obligations in the treaties are similar, interpretation of which should be consistent. Further, as the future tribunals would have an option to deviate from the previous decisions for reasons recorded in writing, there is no harm in introducing a review system.

6. CONCLUDING REMARKS

The debate of finality versus consistency has become prevalent in the present-day investment arbitration regime and scholars are pushing for consistency and legitimacy in the field over the finality of the arbitral awards. However, there exist reasonable and pressing concerns about the practicality of incorporating an appellate system in investment arbitration. The dubious interaction of such a system with the ICSID Convention, one of the most sought-after investment arbitration institutions, creates more

136. K. Vandevelde, *The Political Economy of a Bilateral Investment Treaty* (1998) 92 AJIL 621, 628.

137. Christopher S. Gibson and Christopher R. Drahozal, *Iran-United States Claims Tribunal Precedent in Investor-State Arbitration* (2006) 23 J Intl Arb 521, 525; Roberto Castro de Figueiredo, *Previous Decisions in Investment Arbitration* (Kluwer Arbitration Blog, 23 Dec. 2014) http://arbitrationblog.kluwerarbitration.com/2014/12/23/previous-decisions-in-investment-arbitration/?doing_wp_cron=1593670802.1553978919982910156250#:~:text=It%20is%20well%20settled%20that,are%20often%20observed%20and%20followed accessed 7 Sept. 2020.

138. J. Jackson, *Sovereignty, The WTO and Changing Fundamentals of International Law* (Cambridge University Press, 2006) 177.

139. Rodgers (n 11).

issues regarding its implementation in international arbitration. Further, with the high level of additional costs which such a system would bring for the disputing parties, it is reasonable to ask: Is it the right time to implement such a method of review? And is it necessary to do away with the finality of awards to achieve the desired objectives?

It can also not be denied that there have been some inconsistencies in the arbitral awards passed in the past and an additional review system might bring the desired consistency and legitimacy to the system. Therefore, the main question is what kind of review mechanism would serve the interest of all the concerned parties.[140] With this question in mind, the paper suggests an efficient and affordable review mechanism in the form of the Preliminary Rulings System which not only fulfils all the objectives of the appeals facility but also escapes certain aspects of criticism faced by the latter. The proposed mechanism would resolve the issues of law conclusively before the award is delivered by the arbitral tribunal, thus maintaining the finality of the awards. Further, as discussed in Section 3.2., it would also be more cost-effective than an appeals facility. Thus, taking into consideration the discussion in the previous sections of the paper, the author concludes that the PRS mechanism is an efficient, affordable and a better alternative for a review mechanism than the appellate system.

It is also clarified here that the intent of the paper is not to criticize or go against the proposal of an appeals facility, but merely to inform future discussions on the subject. With this, the author hopes that the relevant research groups will study the practicality of the proposed PRS mechanism in investment arbitration. Further, it is hoped that the ICSID as well as other international arbitration institutions will consider incorporating the suggested changes in their rules which unlike the appeals facility wouldn't require drastic amendments or modifications.

140. Zamir and Segal (n 80) 93.

GARWARE WALL ROPES AND INDO UNIQUE: THE ROAD AHEAD IN TREATMENT OF ARBITRATION CLAUSES CONTAINED IN UNSTAMPED INSTRUMENTS

*—Anu Shrivastava**

ABSTRACT

The Supreme Court in Garware Wall Ropes Ltd. v. Coastal Marine Constructions & Engineering Ltd. (Garware) decided that a court cannot appoint an arbitrator if the arbitration agreement was contained in an unstamped document, unless the deficit stamp duty and penalty was paid. The basis for this decision was an earlier decision in SMS Tea Estates Pvt. Ltd. v. Chandmari Tea Company Pvt. Ltd. (SMS Tea). On the other hand, the Bombay High Court in Gautam Landscapes Pvt. Ltd. v. Shailesh S. Shah (Gautaum Landscapes) held that reliefs under Section 9 and Section 11 of the Arbitration and Conciliation Act, 1996 (Act) could be granted even if an arbitration agreement was contained in an unstamped document. The judgment in Gautam Landscapes has been carried in appeal before the Supreme Court and is pending as of July 2020. In the meantime, the Apex Court in N.N. Global Mercantile Pvt. Ltd v. Indo Unique Flame Ltd. (Indo Unique) on 11.01.2021 overruled SMS Tea and referred the decision in Garware to a larger bench.

The issue of enforceability of an arbitration agreement in an unstamped document is specific to India and involves the interplay of two principles: (i) separability of arbitration agreements and (ii) effect of fiscal legislations. Indo Unique considered the first of these principles and doubted the correctness of the decision in Garware. While referring it to the larger bench, this judgment correctly appreciated the separability presumption in view of the amendments introduced to the Act in 2015, particularly after the insertion of Section 11(6A). On the other hand, the Supreme Court in Garware seems to have incorrectly applied the separability presumption and undermined the true legislative intent of the 2015 amendments which was to minimise judicial intervention.

* The author is an Advocate at the Supreme Court of India and is a graduate of the Gujarat National Law University, Gandhinagar.

This article considers the interplay of both these principles and considers the parameters which the Apex Court should bear in mind while deciding the reference in Garware.

I. INTRODUCTION

Section 11 of the Arbitration and Conciliation Act, 1996 ("**Act**") confers powers upon the designated court to appoint an arbitrator. The Arbitration and Conciliation (Amendment) Act, 2015 ("**2015 Amendment**") led to the insertion of Section 11(6A) which provides that the court while appointing an arbitrator has to confine itself to the examination of the *existence of an arbitration agreement*. The rationale for this amendment, as explained in the 246th Law Commission Report ("**Law Commission Report**"), was to undo the effect of a judgment delivered by the Constitutional Bench of the Supreme Court in SBP & Co. v. Patel Engg. Ltd.[1] ("***SBP***"), which considerably expanded the scope of inquiry and intervention by a court while appointing arbitrators. The judgment in *SBP*, as followed by National Insurance Co. Ltd. v. Boghara Polyfab (P) Ltd.[2] ("***Boghara Polyfab***"), allowed the court to examine, *inter alia*, the following issues:

(i) Whether there is an arbitration agreement and whether the party who has applied under Section 11 of the Act, is a party to such an agreement.

(ii) Whether the claim is a dead (long-barred) claim or a live claim.

(iii) Whether the parties have concluded the contract/transaction by recording satisfaction of their mutual rights and obligation or by receiving the final payment without objection.

This was considered to be excessive judicial intervention by the Law Commission Report and the scope of judicial intervention was sought to be restricted to situations where the court finds that the arbitration agreement either does not exist or is null and void. The question that begs consideration next is, what is the threshold to determine if an arbitration agreement does not "exist". Does the determination of this issue refer to the examination of the intention of the parties to arbitrate, or would it also refer to formal validity of an arbitration agreement such as stamping or registration of arbitration agreements?

1. SBP & Co. v. Patel Engg. Ltd., (2005) 8 SCC 618.
2. National Insurance Co. Ltd. v. Boghara Polyfab (P) Ltd., (2009) 1 SCC 267.

In SMS Tea Estates (P) Ltd. v. Chandmari Tea Co. (P) Ltd.[3] ("***SMS***"), the Supreme Court of India held that a court cannot appoint an arbitrator under Section 11 of the Act if the arbitration clause is contained in an unstamped instrument. It was held that before "acting upon" the arbitration clause and appointing an arbitrator, the instrument containing the arbitration clause should be impounded and the deficit stamp duty should be paid. The decision in *SMS* came at a time when the effect of *SBP* and *Boghara Polyfab* was not undone by the insertion of Section 11(6A) to the Act. Thus, even at the Section 11 stage, a court could determine issues beyond examining the existence of an arbitration agreement.

Post the 2015 Amendment, the effect of the insertion of Section 11(6A) on the decision of *SMS* was considered by the Supreme Court in Garware Wall Ropes Ltd. v. Coastal Marine Constructions and Engg. Ltd.[4] ("***Garware***"). It was held that insertion of Section 11(6A) did not remove the basis of the decision in *SMS* and an unstamped arbitration agreement could not be acted upon by the court to appoint arbitrators. The reason for this, as discussed in *Garware*, was that the Law Commission Report did not expressly refer to *SMS* while recommending the insertion of Section 11(6A). On the other hand, about a week before the Supreme Court's decision in *Garware*, a Full Bench of the Bombay High Court in Gautam Landscapes (P) Ltd. v. Shailesh S. Shah[5] ("***Gautam Landscapes***"), held that after the insertion of Section 11(6A), the court could appoint an arbitrator even if the arbitration agreement was contained in an unstamped document. The Bombay High Court further held that the non-stamping of a document containing the arbitration clause would have no effect on the powers of the court to grant interim measures under Section 9.

The findings on Section 11 in *Gautam Landscapes* were subsequently set aside by the Supreme Court in *Garware*. However, the findings pertaining to the court's powers to grant interim reliefs under Section 9 for unstamped instruments remain undisturbed. The Bombay High Court's decision in *Gautam Landscapes* has been carried in appeal to the Supreme Court,[6] where the matter is presently *sub judice*. The decision in N.N. Global Mercantile (P) Ltd. v. Indo Unique Flame Ltd.,[7] did not refer to *Gautam*

3. SMS Tea Estates (P) Ltd. v Chandmari Tea Co. (P) Ltd., (2011) 14 SCC 66.
4. Garware Wall Ropes Ltd. v. Coastal Marine Constructions and Engg. Ltd., (2019) 9 SCC 209.
5. Gautam Landscapes (P) Ltd. v. Shailesh S. Shah, 2019 SCC OnLine Bom 563.
6. Shailesh S. Shah v. Gautam Landscapes (P) Ltd., SLP (C) No. 10232 of 2019.
7. N.N. Global Mercantile (P) Ltd v. Indo Unique Flame Ltd., 2021 SCC OnLine SC 13.

Landscapes, but on the basis of the principle of separability of arbitration agreements, overruled *SMS* and referred the correctness of *Garware* to a larger bench. This principle of separability or the separability presumption treats arbitration agreements as a distinct and separate agreement from the contract in which the arbitration agreement is contained. The separability presumption or the doctrine of separability is well established in civil and common law jurisdictions, regardless of codification in statutes.[8]

SMS and *Garware* took a very restrictive and narrow view of the principle of separability of arbitration clauses. *Garware* restricted the separability presumption to Section 16 of the Act. By doing so, it failed to give effect to the true meaning of the separability doctrine. In addition, *Garware* also failed to appreciate the true legislative intention behind the introduction of Section 11(6A).

It is important to analyse the decisions in *SMS, Garware* and *Gautam Landscapes* to fully appreciate how each case dealt with the issue of separability. Thus, the first part of this article provides an overview of the three judgments. The second part will formulate the premises and consider the interplay of two principles: (i) separability of arbitration agreements and (ii) the effect of fiscal legislations to analyse the issue. This interplay is relevant to consider if non-compliance with a fiscal legislation such as the Stamp Act renders the arbitration agreement non-existent or null and void to the extent contemplated under Section 11(6A) of the Act. The third and concluding part will look at the parameters that the Supreme Court should look at while deciding the reference in *Garware.*

II. OVERVIEW OF THE JUDGMENTS

A. SMS: Arbitration agreement contained in an unstamped instrument cannot be acted upon

The Supreme Court in *SMS* was called upon to decide an application under Section 11 of the Act for appointment of an arbitrator pursuant to an arbitration clause contained in an unregistered lease deed. In this context, the Supreme Court proceeded to decide the following questions, *inter alia*:

i) Whether an arbitration agreement contained in an unregistered (but compulsorily registrable) instrument is valid and enforceable?

8. Harbour Assurance Co. (UK) Ltd. v. Kansa General International Insurance Co. Ltd., (1993) 1 Lloyd's Rep 455.

ii) Whether an arbitration agreement in an unregistered instrument which is not duly stamped, is valid and enforceable?

While the answer to the first question was in the affirmative, the Supreme Court held that an arbitration agreement in an unstamped document could not be acted upon by the court before payment of penalty and the deficit stamp duty. This was because of the difference between the Stamp Act and the Registration Act, 1908 ("**Registration Act**"). Both Section 49 of the Registration Act and Section 35 of the Stamp Act bar an unregistered and unstamped document, respectively, from being taken into evidence. However, Section 49 of the Registration Act has a proviso which allows an unregistered document to be received as evidence of a collateral transaction. An arbitration agreement contained in an unregistered document was held to be a collateral term, in the context of the Registration Act, relating to the resolution of disputes. Therefore, even though contained in an unregistered document, the arbitration agreement could be acted upon by being received in evidence as a collateral transaction for referring disputes to arbitration.

Unlike the Registration Act, the Stamp Act does not provide for any exceptions for the enforcement of collateral terms or transactions relating to an unstamped document. Section 35 of the Stamp Act prohibits the court or any judicial authority from acting upon an unstamped document or receiving an unstamped document in evidence. Thus, the Supreme Court concluded in *SMS* that an unstamped document could not be acted upon at all, and an arbitration agreement contained in such unstamped document could not be enforced unless the penalty and deficit stamp duty is paid.

In *SMS*, the Supreme Court held that while exercising powers under Section 11 of the Act, the court would have to impound the document if it is found to be not duly stamped. Once the deficit stamp duty and penalty is paid, the defect with reference to the deficit stamp duty would be cured and the court may then act upon the document and the arbitration clause contained therein. Non-registration of the document would not bar the court from acting on the arbitration agreement and appointing an arbitrator.

An analysis of the judgment in *SMS* would bring out the contradiction in the Supreme Court's findings on separability. In *SMS*, the Supreme Court agreed with and recognised the principle of separability. But, the principle of separability has been erroneously linked with Section 49 of the Registration Act by considering the arbitration agreement as a "collateral transaction" under Section 49. By doing so, the Supreme Court has not given true effect to the principle of separability under the Act and has

sought to support the separability presumption under the Registration Act. If the arbitration agreement is independent from the underlying contract and does not require registration or stamping, it should have been irrelevant if separability is recognised by either the Stamp Act or the Registration Act, as giving effect to a "collateral transaction".

The decision in *SMS* came at a time when the scope of intervention was very wide at the Section 11 stage (owing to *SBP* and *Boghara Polyfab*) and courts had the jurisdiction to decide various preliminary issues such as validity of the arbitration agreement, existence of a live claim, etc. As mentioned above, the extent of this judicial intervention was sought to be minimised through the 2015 Amendment. Thus, it would have to be seen if the judgment in *SMS* would remain unaffected after the 2015 Amendment. This issue was considered by the Supreme Court in *Garware*.

B. Garware: SMS is unaffected by the insertion of Section 11(6A)

In *Garware*, the Supreme Court considered the Law Commission Report and the Statement of Objects and Reasons for the 2015 Amendment, neither of which referred to the decision in *SMS*. Thus, the Supreme Court concluded that Section 11(6A) was introduced because the Law Commission felt that the judgments in *SBP* and *Boghara Polyfab* required a relook, and that the intention behind the 2015 Amendment had nothing to do with *SMS*. The Supreme Court then went to consider the two primary arguments raised before it – first, being the separability of the arbitration agreement, and second, the interpretation of Section 11(6A) and the scope of judicial inquiry thereunder, i.e. the examination of the existence of an arbitration agreement.

As regards the first argument, the Supreme Court considered the observations from *SMS* on the Stamp Act and the inability of the court to act upon an arbitration clause contained in an unstamped agreement. The Supreme Court then relied on *SBP* and noted that the principle of separability was contained in Section 16 of the Act, which does not come into play before a tribunal is constituted. It was held that the independent existence of an arbitration agreement could be recognized for certain limited purposes only and could not be extended to separate the arbitration agreement from an unstamped document. Impliedly, the Supreme Court applied the principle of separability in a restrictive and narrow sense by keeping it limited only to Section 16. This is problematic because not only

has separability been recognized under Section 7 of the Act,[9] it has also been treated as a fundamental principle of arbitration under civil and common law jurisdictions.[10] According to the author, the correct way to consider the separability presumption would have been to separate the validity of the intention to arbitrate, reflected in the arbitration agreement, from the formal requirements of stamping of the main agreement containing the arbitration clause.

Regarding the second argument on the interpretation of Section 11(6A) of the Act, the Supreme Court considered the overall legislative policy of the 2015 Amendment Act. The Supreme Court noted that the mischief sought to be remedied by the introduction of Section 11(6A) was the expansion of the scope of judicial interference by the judgments in *SBP* and *Boghara Polyfab,* and that it was never the Parliament's intention to remove the basis for *SMS.*

These observations of the Supreme Court may be considered as a restrictive and narrow interpretation of the Law Commission Report and the 2015 Amendment. The overall objective of the 2015 Amendment was to minimize judicial intervention at every stage of the pre-arbitral, arbitral and post-arbitral process. It is also important to note that though the Stamp Act is a fiscal legislation to protect revenue, it does not allow parties to raise technical objections.[11] The objective of the Stamp Act could have been satisfied even if an arbitrator were appointed by the court with a consequent direction to ensure the payment of the deficit stamp duty and penalty.

In *Garware,* the Supreme Court also considered Section 11(6A) with Section 7(2) of the Act and Section 2(h) of the Contract Act, 1872, and held that an agreement becomes a contract under Section 2(h) of the Contract Act, 1872 only if it is enforceable by law. It was held that under the Stamp Act, an agreement does not become enforceable unless it is duly stamped, and therefore, an arbitration clause contained in an unstamped document would not exist where the main agreement itself is not enforceable. This finding is again problematic because the Supreme Court adopted a restricted view of the separability presumption. An arbitration agreement fails the test of Section 2(h) of the Contract Act only if the arbitration agreement *itself* is

9. Enercon (India) Ltd. v. Enercon Gmbh, (2014) 5 SCC 1; Ashapura Mine-Chem Ltd. v. Gujarat Mineral Development Corpn., (2015) 8 SCC 193.
10. Harbour Assurance (n 8).
11. J.M.A. Raju v. Krishnamurthy Bhatt, AIR 1976 Guj 72; Jagdish Narain v. Chief Controlling Revenue Authority, 1994 SCC OnLine All 229 : AIR 1994 All 371.

held to be not enforceable by law, *independent* of questions on the validity or enforceability of the underlying agreement. Since an arbitration agreement is not required to be stamped, no question of the agreement being invalid or unenforceable arises if the underlying contract is unstamped.

The Supreme Court referred to the decision in Duro Felguera SA v. Gangavaram Port Ltd.[12] (“***Duro***”) under Section 11(6A), and stated that *Duro* was only a reiteration of the legislative policy for introducing Section 11(6A). The Supreme Court distinguished *Duro* by relying on a three-judge bench decision in United India Insurance Co. Ltd. v. Hyundai Engg. and Construction Co. Ltd.[13] (“***Hyundai***”) and held that an arbitration clause may “exist” between the parties but may not “exist in law” if it is not legally valid or enforceable. In *Hyundai*, the court was considering an arbitration clause in an insurance policy which restricted the reference to arbitration only for the quantification of the amount admitted by the insurer. It was held that in the absence of any admission by the insurer, the arbitration clause would not get activated and as such, would not “exist in law”.

The Supreme Court’s reliance on *Hyundai* to distinguish *Duro* is misplaced because the facts involved in the two decisions were very different. The issue in *Hyundai* was concerned directly with the validity and existence of the arbitration agreement itself and not just the underlying contract. In *Garware*, the validity or legality of the arbitration agreement was not questioned but the issue pertained to the effect of an unstamped document on the arbitration agreement contained therein. Applying the findings in *Hyundai* to the issue in *Garware* amounted to equating the validity of an arbitration agreement contained in an unstamped document to the validity of an independent arbitration agreement. While doing so, the Supreme Court again goes against the separability presumption because it effectively connects the validity of the arbitration agreement with the contract in which it is contained. This is very well explained by *Indo Unique*, according to which the invalidity, ineffectiveness, or termination of the substantive commercial contract, would not affect the validity of the arbitration agreement, except if the arbitration agreement itself is directly impeached on the ground that the agreement is void ab initio. The validity of the arbitration agreement was directly in question in the case of *Hyundai*, but it was not so in *Garware.*

12. Duro Felguera SA v. Gangavaram Port Ltd., (2017) 9 SCC 729.
13. United India Insurance Co. Ltd. v. Hyundai Engg. and Construction Co. Ltd., (2018) 17 SCC 607.

C. Gautam Landscapes: An unstamped document may be acted upon

A Full-Bench was constituted by the Chief Justice of the Bombay High Court in *Gautam Landscapes* to decide if the court could grant reliefs under Section 9 and appoint an arbitrator under Section 11 of the Act when the document containing the arbitration clause was unstamped or not duly stamped. The Bombay High Court in *Gautam Landscapes* took a view which was directly opposed to the Supreme Court's view in *Garware.* The decision in *Gautam Landscapes* preceded the decision in *Garware* and was the first judgment after the 2015 Amendment to have considered the effect of *SMS.* Therefore, it becomes important to understand the differing approach in *Gautam Landscapes* vis-à-vis *Garware.*

The Bombay High Court's judgment in *Gautam Landscapes* discusses three aspects – first, the nature and scope of powers under Section 9 of the Act; second, the interpretation of the Maharashtra Stamp Act, 1958 ("**Maharashtra Act**") and the Stamp Act as fiscal legislations; and third, the scope of Section 11 and the effect of the introduction of Section 11(6A) in the Act.

1. Section 9: Scope and nature

Relying on Firm Ashok Traders v. Gurumukh Das Saluja[14] ("***Firm Ashok***"), the Bombay High Court held that the right conferred under Section 9 of the Act does not arise out of a contract. Therefore, even if the underlying contract is not stamped and cannot be acted upon, the court's powers under Section 9 would remain unaffected. The Bombay High Court gave a broad interpretation to the separability presumption and held that the basic requirement for seeking a relief under Section 9 is that an arbitration clause should exist. Notably, the Bombay High Court rejected the argument that separability was confined only to an application under Section 16 of the Act.

The observation in *Firm Ashok* regarding the nature of the right conferred under Section 9 requires some explanation. The question in *Firm Ashok* was regarding the maintainability of Section 9 proceedings where an arbitration clause was contained in a partnership deed for an unregistered partnership firm. Section 69 of the Partnership Act, 1932 ("**Partnership Act**") bars the enforcement of any right arising out of a contract or from the

14. Firm Ashok Traders v. Gurumukh Das Saluja, (2004) 3 SCC 155.

Partnership Act if the partnership firm is unregistered. By stating that the right conferred under Section 9 of the Act does not arise out of a contract, the court implied that the remedy under Section 9 is independent of any right that a party may have had under the Partnership Act or otherwise under any contract.

As regards the applicability of *SMS* to Section 9, the Bombay High Court held that since *SMS* was a decision on Section 11 of the Act, it would not be an authority on the scope of Section 9. Further, not only were the scope and ambit of Section 9 and Section 11 different, the consequences thereunder were also different. An important observation was made regarding the drastic consequences of not granting relief under Section 9 which would cause severe hardship to parties if the court were to wait for adjudication of stamp duty.

2. Scope and object of fiscal legislations: Stamp Act and Maharashtra Act

The Bombay High Court considered the objective and scope of fiscal legislations such as the Stamp Act and the Maharashtra Act, and held that the object of these enactments was not to enable parties to raise technical objections. The sole object of the legislations is to increase revenue and its provisions must be construed narrowly, i.e., only to the extent of protecting revenue.[15]

The Bombay High Court noted various judgments[16] in this regard and reiterated that the Stamp Act is concerned with the instrument and not the transaction contained in it. For instance, consider a situation where the parties enter into a sale deed which is not stamped. The court can certainly not act upon the sale deed. However, the transaction of sale may still be established by relying upon the parties' correspondences, consideration receipts, and in certain cases, an agreement to sell. Since the entire transaction does not involve any stamp duty and only the sale deed does, the court can still act upon the underlying transaction of sale *de hors* the sale deed. Similarly, if an arbitration agreement is contained in an unstamped contract, the court can read the contract in a manner so as to uphold the

15. Gautam Landscapes (n 5); N.N. Global Mercantile (n 7).
16. J.M.A. Raju v. Krishnamurthy Bhatt, AIR 1976 Guj 72; Jagdish Narain v. Chief Controlling Revenue Authority, 1994 SCC OnLine All 229 : AIR 1994 All 371; Javer Chand v. Pukhraj Surana, AIR 1961 SC 1655; K.I. Suratwalla and Co. v. Mahmud Bidi Works, 1970 SCC OnLine Bom 110 : AIR 1972 Bom 238; Radhakisan Tijulal Agrawal v. Jayantilal Hargovindas, 1979 SCC OnLine Bom 145 : 1980 Mah LJ 120.

parties' intention to arbitrate. This would also be fortified by the true effect of the separability presumption.

3. Section 11: Scope and applicability of SMS post 2015 Amendment

The Bombay High Court considered the decisions in *SBP, Boghara Polyfab* and *SMS,* the Law Commission Report, and the objects and reasons of the 2015 Amendment which introduced Section11(6A). In *Garware*, the Supreme Court had interpreted the Law Commission Report restrictively and had held that Section 11(6A) did not remove the basis of *SMS*. The only reason for doing so was that *SMS* did not find any mention in the Law Commission Report. *Gautam Landscapes*, unlike *Garware*, gave effect to the overall legislative policy and purpose of minimising court intervention at the Section 11 stage, as noted in the Law Commission Report.

The finding that *SMS* would no longer apply after the 2015 Amendment was bolstered by the interpretation of Section 11(6A) in Duro and TRF Ltd. v. Energo Engg. Projects Ltd.[17] The Bombay High Court concluded that reliance placed on the principles in *SBP* and *Boghara Polyfab* was incorrect. After the introduction of Section 11(6A), the ambit of inquiry was confined to examination of the existence of an arbitration agreement between the parties. If such an agreement were to exist, the tribunal should be constituted and the issue on insufficiency or otherwise of the stamp duty should be left to the tribunal.

III. THE REFERENCE IN GARWARE: CONSIDERATIONS BEFORE THE APEX COURT

Garware and *Indo Unique* were judgments by the Supreme Court delivered by a bench of three judges each. Despite following the *dicta* in *SMS,* the correctness of *Garware* has been doubted by *Indo Unique, de hors* the introduction of Section 11(6A). *Indo Unique* referred *Garware* to a larger bench by holding that *Garware* had not correctly applied the separability presumption. It analysed a plethora of provisions under the Act but did not restrict separability to any one of them. Therefore, the parameters which need to be considered by the Supreme Court while deciding the reference in *Garware* are as follows:

(i) The principle of separability as a fundamental principle of international commercial arbitration;

17. TRF Ltd. v. Energo Engg. Projects Ltd., (2017) 8 SCC 377.

(ii) The meaning of *prima facie* existence of an arbitration agreement under Section 11(6A); and

(iii) Nature of fiscal legislations and public policy considerations

A. Separability

As has been pointed out earlier, the decision in *Garware* has impliedly restricted the doctrine of separability to Section 16 of the Act. The basis for this was a similar observation made in *SBP. Gautam Landscapes*, on the other hand, rejects the argument of separability being confined to Section 16 of the Act. *Indo Unique* goes a step further, and after considering international precedents, held Section 16 to be a reflection of separability as a basic principle of commercial arbitration.

In my view, the Bombay High Court in *Gautam Landscapes,* and the Supreme Court in *Indo Unique* had taken the correct approach to the separability presumption. The separability presumption is well-established in judicial decisions and legal scholarship in both common law and civil law jurisdictions, regardless of whether the respective arbitration legislations expressly provide for the doctrine.[18] For example, in Germany, much before the UNCITRAL Model Law had been adopted, the independent existence of an arbitration clause had been recognised by judicial decisions. As early as the turn of the 20th century, Swiss courts held that the invalidity of the underlying contract did not affect the arbitration agreement.[19] In United States, despite the early statutory recognition of the separability doctrine, the separability presumption has been recognised as a matter of substantive federal arbitration law.[20]

Under English law, the principle of separability is codified under Section 7 of the English Arbitration Act, 1996. Some of the early decisions by English courts had taken a narrow view of the separability presumption. It was held that claims of non-existence, voidness or illegality of the underlying contract would also affect the validity of the arbitration clause.[21] But, this

18. Harbour Assurance (n 8).
19. Gary B. Born, *International Commercial Arbitration* (3rd ed., Kluwer Law International 2014) 349-471.
20. Buckeye Check Cashing Inc. v. Cardegna, 2006 SCC OnLine US SC 14 : 163 L Ed 2d 1038 : 546 US 440 (2006) at 445.
21. Smith, Coney & Barrett v. Becker, Gray & Co., (1916) 2 Ch 86; Dalmia Dairy Industries Ltd. v. National Bank of Pakistan, (1978) 2 Lloyd's Rep 223; Heyman v. Darwins Ltd., 1942 AC 356.

approach changed with the decision in Harbour Assurance Co. (UK) Ltd. v. Kansa General International Insurance Co.[22] ("***Harbour Assurance***") which held as follows:

> *"...the logical question is not whether the issue goes to the validity of the contract but whether it goes to the validity of the arbitration clause. The one may entail the other but, as we have seen, it may not. When one comes to voidness for illegality, it is particularly necessary to have regard to the purpose and policy of the rule which invalidates the contract and to ask ... whether the rule strikes down the arbitration clause as well. There may be cases in which the policy of the rule is such that it would be liable to be defeated by allowing the issue to be determined by a tribunal chosen by the parties. This may be especially true of contratsd'adhésion in which the arbitrator is in practice the choice of the dominant party.*
>
> *In deciding whether or not the rule of illegality also strikes down the arbitration clause, it is necessary to bear in mind the powerful commercial reasons for upholding arbitration clauses unless it is clear that this would offend the policy of the illegality rule..."*

The above extract from *Harbour Assurance* is important because it stresses upon two aspects – first, that the separability presumption would get defeated only if the issue of voidness, invalidity or illegality went to the root of the arbitration agreement. Second, the Court of Appeal underlines the importance of upholding arbitration clauses unless they come into conflict with public policy considerations.

There are two different aspects of invalidity of an arbitration agreement. One, where the issue goes to the root of the matter or the intention to arbitrate, and second, public policy considerations like fraud which would invalidate the agreement. The issue in *Garware* (or even *SMS* for that matter) was not about the validity of the arbitration agreement in itself. Rather, it was about the validity and legal enforceability of the unstamped underlying contract and whether the non-stamping of the underlying contract would affect the arbitration agreement. In this context, the decision in *Garware*, erred in conflating the issue of validity of the arbitration agreement with that of the unstamped contract.

22. Harbour Assurance (n 8).

1. Prima facie existence of an arbitration agreement under Section 11(6A)

The Supreme Court in *Duro* had clarified that the court will confine itself to examining the existence of an arbitration agreement at the Section 11 stage. As discussed above, the scope of examination of the existence of the arbitration agreement should be restricted to the *Harbour Assurance* principle, i.e., unless the question of existence or validity goes to the root of the arbitration clause itself, the court must act upon it.

The scope of inquiry under Section 11(6A) is to be on a *prima facie* basis as laid down under Section 45 and Section 8 of the Act. Section 8 makes it mandatory upon any judicial authority to refer parties to arbitration unless there is *prima facie* finding that no valid arbitration agreement exists. Section 45 makes a similar provision for referring parties to arbitration unless the arbitration agreement is null and void, inoperative or incapable of being performed. While there are differences in the language of the two provisions, the underlying objective remains the same, i.e., the court must refer parties to arbitration unless the arbitration agreement is non-existing owing to voidness, inoperability or incapability of performance.

Section 8 of the 1996 Act was amended vide the 2015 Amendment on the basis of the Law Commission Report. The Law Commission Report has observed that "judicial intervention in arbitration proceedings adds significantly to the delays in the arbitration process and ultimately negates the benefits of arbitration". The Law Commission Report while referring to the recommended amendments in Sections 8 and 11 noted the following:

> *"33. It is in this context, the Commission has recommended amendments to Sections 8 and 11 of the Arbitration and Conciliation Act, 1996. The scope of the judicial intervention is only restricted to situations where the court/judicial authority finds that the arbitration agreement does not exist or is null and void. Insofar as the nature of intervention is concerned, it is recommended that in the event the court/judicial authority is prima facie satisfied against the argument challenging the arbitration agreement, it shall appoint the arbitrator and/or refer the parties to arbitration, as the case may be. The amendment envisages that the judicial authority shall not refer the parties to arbitration only if it finds that there does not exist an arbitration agreement or that it is null and void. If the judicial authority is of the opinion that prima facie the arbitration agreement exists, then it shall refer the dispute to*

> *arbitration, and leave the existence of the arbitration agreement to be finally determined by the Arbitral Tribunal. However, if the judicial authority concludes that the agreement does not exist, then the conclusion will be final and not prima facie."*

The Law Commission Report on amendment to Section 8 explains the process of determination in a Note which states as follows:

> *"...the amendment contemplates a two-step process to be adopted by a judicial authority when considering an application seeking the reference of a pending action to arbitration. The amendment envisages that the judicial authority shall not refer the parties to arbitration only if it finds that there does not exist an arbitration agreement or that it is null and void. If the judicial authority is of the opinion that prima facie the arbitration agreement exists, then it shall refer the dispute to arbitration, and leave the existence of the arbitration agreement to be finally determined by the Arbitral Tribunal. However, if the judicial authority concludes that the agreement does not exist, then the conclusion will be final and not prima facie. The amendment also envisages that there shall be a conclusive determination as to whether the arbitration agreement is null and void."*

The Law Commission Report applied the same process of determination under Section 8 to Section 11(6A) as well. Therefore, the amended provision, limits the intervention by judicial authority to only one aspect i.e., when it finds that *prima facie* no valid arbitration agreement exists.[23] The Law Commission Report does not explain how to ascertain *prima facie* the validity of the arbitration agreement. Borrowing from the separability presumption and *Indo Unique*, *prima facie* examination would be restricted to examining the issue of voidness, invalidity or illegality of the arbitration agreement, to the extent that the arbitration agreement may be *void ab initio*, null and void, inoperative or incapable of being performed.

The words 'null and void', 'inoperative' and 'incapable of being performed' under Section 45 of the Act have been borrowed from Article II(3) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 ("**Convention**"). In the context of the Convention, 'null and void' refers to a situation where the arbitration agreement is affected by some invalidity right from the beginning, such as lack of consent due to

23. Emaar MGF Land Ltd. v. Aftab Singh, (2019) 12 SCC 751; Ameet Lalchand Shah v. Rishabh Enterprises, (2018) 15 SCC 678.

misrepresentation, duress, fraud or undue influence. 'Inoperative' refers to those cases where the agreement ceases to have effect, such as revocation by parties. The words 'incapable of being performed' would seem to apply to those cases where the arbitration cannot be effectively set into motion.[24] The explanation to these terms takes us back to the *Harbour Assurance* understanding – to consider if the root of the issue relates to the existence of the arbitration clause itself and not just the underlying contract.

The Supreme Court in *Garware* did not refer to the observations in the Law Commission Report on Section 8, which are also relevant for understanding the scope of inquiry after the introduction of Section 11(6A). It is clear from the said Report that Section 11(6A) requires a *prima facie* view on the existence of the arbitration agreement. The only situation where the court should refuse to appoint an arbitrator is when it finds on a *prima facie* view that the arbitration agreement itself did not exist. Thus, as long as the arbitration agreement existed, was not null and void, inoperative or incapable of being performed, non-stamping of the underlying contract or any other issue of invalidity associated with the underlying contract would be irrelevant for the purpose of Section 11 or Section 8.

2. Fiscal legislations and public policy considerations

A decree of the court becomes executable only after it is duly stamped under the Stamp Act. However, non-stamping of a decree does not mean that the decree is non-existent or unenforceable. This is because a decree comes into "existence" the moment the judgment is pronounced and the decree becomes enforceable the moment a judgment is delivered.[25] It has been held while executing decrees and orders of the court that affixing appropriate stamp duty on a decree would only render the decree executable but that does not mean and imply that the enforceability of the decree would remain suspended until furnishing of the stamped paper.[26] The decree does not become null or void if it is not stamped. In the context of the Act as well, it has been held that non-stamping of an arbitral award would not make the award susceptible to a challenge under Section 34. The issue of stamping would become relevant only when the award is sought to be executed under Section 36 of the Act.[27]

24. World Sport Group (Mauritius) Ltd. v. MSM Satellite (Singapore) Pte. Ltd., (2014) 11 SCC 639.
25. Chiranji Lal v. Hari Das, (2005) 10 SCC 746.
26. Hameed Joharan v. Abdul Salam, (2001) 7 SCC 573.
27. M. Anasuya Devi v. M. Manik Reddy, (2003) 8 SCC 565.

These principles on execution of decrees and Stamp Act may be used to draw an analogy to the meaning of "existence of arbitration agreement" under Section 11(6A). It could be argued before the larger bench of the Supreme Court in the *Garware* reference that the arbitration agreement comes into existence the moment parties agree and intend to refer disputes between them to arbitration. The act of stamping the underlying contract would only make the arbitration agreement "executable", and would not otherwise affect the validity or the existence of the arbitration agreement.

The Supreme Court in *Indo Unique* noted that the objective of the Stamp Act was to secure revenue for the State which formed an important public policy consideration. This needs to be balanced with the competing public policy of minimising judicial intervention in the arbitral process. "Public policy" in the context of arbitrations and the Act refers to very narrow grounds - fraud or corruption, contravention of fundamental policy of Indian law, and conflict with most basic notions of morality or justice. These grounds are codified under Section 34 and Section 48 of the Act, which refer to setting aside of arbitral awards and refusal to enforce foreign awards. It has been held time and again by courts that a mere violation of an Indian law will not qualify as a public policy ground.[28] Contravention of a fundamental policy of law is required to set aside or refuse enforcement of an arbitral award on public policy grounds.[29]

In this backdrop, the question that begs consideration before the larger bench is – "Are there any larger public policy considerations which require that an arbitration agreement contained in an unstamped agreement should not be given effect to?" To answer this, one may have to consider the effect of an unstamped document. Non-stamping of a document does not make the document *void ab initio*. The consequence of non-stamping is only that the court or any judicial authority cannot act on it. This means that the court cannot decide anything on the basis of that unstamped document. But the parties can always pay the deficit stamp duty and penalty to rectify this problem. If non-stamping of an arbitral award is not a ground to set aside the award, there seems to be no compelling public policy reasons for courts to restrain themselves from giving effect to an arbitration agreement contained in an unstamped document. The only relevant consideration

28. Renusagar Power Co. Ltd. v. General Electric Co., 1994 Supp (1) SCC 644; Vijay Karia v. Prysmian Cavi E Sistemi SRL, (2020) 11 SCC 1.
29. Ssangyong Engg. and Construction Co. Ltd. v. National Highways Authority of India, (2019) 15 SCC 131.

here should be if the parties never intended to arbitrate or if the arbitration agreement itself did not existed.

IV. CONCLUSION

As has been discussed above, the decision in *Garware* has expanded the scope of judicial intervention in the arbitral process and has ignored the true intent behind the 2015 Amendments and the separability presumption. Now that the decision has been referred to a larger bench, the Supreme Court must consider and balance the operation of the Stamp Act *vis-à-vis* the Act and the basic principles of arbitration jurisprudence. One alternative is to restrict the findings in *Garware* to only the application of Section 11. A court's power to grant interim reliefs under Section 9 of the Act is not restricted only to the Act. It allows the court to go beyond the Act and grant reliefs based on the well-recognized principles governing the grant of interim injunctions.[30] On the other hand, a court under Section 11 is acting upon the arbitration agreement and within the confines of the Act. Thus, it could be possible for the Supreme Court to conclude that the decision in *Garware*, would only apply to Section 11, and would not otherwise restrict the court's power under Section 9 or under any other provision of the court.

The Stamp Act mandates that if an unstamped document comes before any court, it must be impounded. This would mean that even if the court were to act on the severed arbitration agreement, it will have to mandatorily impound the document for payment of stamp duty. Moreover, once parties go before the arbitrator, they may not be able to raise any claims on the basis of the unstamped contract since it can't be received in evidence by any judicial authority, including tribunals! Therefore, a mechanism needs to be put in place to ensure that the State's revenue is protected and stamp duty is paid appropriately. The SCI has powers under Article 142 of the Constitution of India to lay down appropriate guidelines in any matter.[31] Using this power, the Supreme Court could say that when an arbitration agreement is contained in an unstamped document, courts must impound the document and send it for affixation of stamp duty, but the payment of stamp duty shouldn't be a pre-condition to the grant of reliefs. Parties must not be disallowed from seeking reliefs for the lack of stamp duty on the underlying document. Disregarding arbitration agreements in unstamped documents would do violence to the scheme of the Act, and to the separability presumption.

30. Arvind Constructions Co. (P) Ltd. v. Kalinga Mining Corpn., (2007) 6 SCC 798; Adhunik Steels Ltd. v. Orissa Manganese and Minerals (P) Ltd., (2007) 7 SCC 125.
31. Asian Resurfacing of Road Agency (P) Ltd. v. CBI, (2018) 16 SCC 299.

CONFIDENTIALITY UNDER THE INDIAN ARBITRATION REGIME

—*Jaideep Khanna**

ABSTRACT

This paper analyses confidentiality obligations via the insertion of Section 42A to the Arbitration and Conciliation Act, 1996. Section 42A imposes data confidentiality obligations upon the arbitrator and parties to an arbitration. However, the extent, scope and exceptions to confidentiality remain contentious and unresolved. The author draws references from cross-border jurisdictions to illustrate the efforts being made for regulating confidentiality concerns and combating practical problems of confidentiality obligations. The author concludes by suggesting a set of legislative and judicial opportunities for India to provide for a comprehensive confidentiality framework for arbitration in the country.

1. INTRODUCTION

The Indian arbitration regime stands at a crucial juncture to regulate and promote confidentiality for *ad-hoc* and institutional arbitrations. The introduction of Section 42A and Section 43K to the Arbitration and Conciliation Act, 1996 ("**ACA, 1996**") signifies India's intent to create a robust data protection framework for the current and prospective arbitral community.

Part I of the paper analyses the duty to maintain confidentiality in arbitration by highlighting cross-border differences between an implied duty of confidentiality and explicit statutory regulations that govern the same.

Part II proceeds to explain the legislative intent for confidentiality obligations within the Indian framework. In this regard, the author analyses the extent, scope and application of the duty of confidentiality

* The author currently practises as a Counsel at Chamber 20-A, Supreme Court of India and is a graduate of the Jindal Global Law School, Sonipat. He is grateful for the research assistance rendered by Abhishek Nevatia.

under Section 42A of the ACA, 1996. Subsequently, the author highlights how Section 42A remains inadequate as it has limited the exceptions of confidentiality to the enforcement and challenge of an arbitral award. Moreover, the section remains ambiguous with respect to its applicability to Court proceedings that emanate at the pre-reference and interim stage of an arbitration proceeding.

In Part III, the author proceeds to review the common law jurisdictions of the United Kingdom and Hong Kong. It is argued that common law jurisdictions do not have a uniform approach in imposing confidentiality obligations. For instance, Hong Kong and Singapore provide for confidentiality in arbitration proceedings through statute and in arbitral institution rules. Pertinent reference is drawn to the Hong Kong Arbitration Ordinance (Cap. 609) ("**HKAO**") and 2018, Hong Kong Administered Arbitration Rules ("**HKIAC Rules**"). The rationale for the consideration of neighbouring common law jurisdictions is to assess how the Indian legislature has sought to adopt a make-shift approach in introducing confidentiality obligations through the recent notification of amendment to the ACA, 1996.

In Part IV, the author argues that in the Indian context, the legislature has failed to account for the principles and exceptions to confidentiality that have emerged in various jurisdictions. The exceptions are broadly categorized as "Balance of Interests", "Court Proceedings" and "Regulatory Obligations".

In Part V, it is argued that confidentiality obligations must be backed by appropriate data protection protocols. The 2015 data breach of the Permanent Court of Arbitration in The Hague is a prime example of an event that has ushered arbitral institutions such as the London Court of International Arbitration ("**LCIA**") to account for data protection protocols. To the contrary, in India, the insertion of Section 43K to establish the Arbitration Council of India ("**ACI**") as the depository of arbitral records signifies the Indian legislature's intent to promote a data protection framework for arbitration in India. It is suggested that the ACI regulations must account for provisions concerning obligations under the Personal Data Protection Bill ("**PDP**").[1]

The author concludes by reflecting upon the vagueness with which Section 42A has been drafted to impose a non-obstante obligation of confidentiality

1. Comments Invited on Draft Rules in Respect of Arbitration Council of India, Department of Legal Affairs, MoL&J, GoI https://legalaffairs.gov.in/actsrulespolicies/comments-invited-draft-rules-respect-arbitration-council-india accessed 21 Jan. 2021.

that is bound to face practical and procedural hurdles in the Indian courts which witness regular court intervention in arbitration proceedings. Lastly, the author argues that Indian courts will have to crystalize the exceptions to confidentiality under the Indian arbitration regime and consider principles that have emerged from neighbouring common law jurisdictions.

2. CONFIDENTIALITY IN ARBITRATION

Arbitration proceedings by their very nature are private proceedings unlike public trials. Therefore, it is natural to assume that parties have a legitimate expectation for proceedings to impose a duty of confidentiality upon all persons present therein.[2] The persons upon whom a duty of confidentiality is to be imposed include the contesting parties, the arbitrator, the arbitral institution and interested parties such as witnesses etc.[3] Needless to say, the parties may seek to impose varied degrees of confidentiality. For example, a party that has succeeded in an arbitration must be allowed to disclose details of the arbitration that are necessary to allow enforcementof the arbitral award.

Since arbitration proceedings are based on the principle of "Party Autonomy" there is always room for parties to include confidentiality clauses within their arbitration agreements. However, in situations, where there is no explicit confidentiality obligation inter-se the parties, it is imperative for any jurisdiction to ascertain an "implied duty of confidentiality". In this process, the policy intent must necessarily at the threshold consider the terms of the arbitration agreement, the interests of parties and the nature of dispute at stake. To ascertain the characteristics of an implied duty, it is necessary to review how arbitration hubs across the world have developed and codified legislations to this effect.

Jurisdictions around the world have codified legislations pertaining to confidentiality in arbitration proceedings. For instance, in Hong Kong, Section 2D[4] of the HKAO provides a statutory right for a litigant to request a court to hear arbitration related proceedings in a confidential manner. Additionally, Section 2E[5] of HKAO allows for a party to restrict the reporting of court decisions concerning arbitral proceedings. Similarly,

2. Weixia Gu, *Confidentiality Revisited: Blessing or Curse in International Commercial Arbitration?* (2005) 15 Am Rev Int'l Arb 607, 1, 2.
3. Richard C. Reuben, *Confidentiality in Arbitration: Beyond the Myth* (2006) 54 U Kan L Rev 1255, 1260.
4. Hong Kong Arbitration Ordinance (ch. 341), s. 2-D.
5. Hong Kong Arbitration Ordinance (ch. 341), s. 2-E.

Section 22[6] and Section 23[7] of the Singapore International Arbitration Act (IAA) are in essence identical to Section 2D and Section 2E of HKAO.

In the United Kingdom, the legislative policy had a different approach to codification of confidentiality obligations in arbitration proceedings. The debate for regulating confidentiality in arbitration proceedings was discussed in the 1996 report on the Arbitration Bill wherein it was found that codification of qualifications of confidentiality would be "controversial and difficult" in the light of "myriad of exceptions" and "the qualifications that had to follow."[8] It was heavily emphasized by the drafters of the legislation that there has been no statutory guidance regarding confidentiality in the UNCITRAL Model Law. It was also recognized that including a definition would add to the English litigation on the issue since the UK had witnessed excessive court litigation after the mid 1990s.

It was therefore suggested that any statutory statement of general principles in this area would impede the "commercial good-sense of current practices in English arbitration" and that the evolution of such principles was better left to the common law. Hence, the same was left to the discretion of courts to address in an *ad hoc* and *in concreto* basis.[9] Unlike India, the English Arbitration Act, 1996 is silent on the duty of confidentiality. Instead, under English law, parties have an implied duty to keep matters related to arbitration confidential. Despite the acceptance of confidentiality as a characteristic of arbitration, this widely held notion does not actually have statutory support.[10]

Therefore, what emerges is that the legislators face a primary policy hurdle to outline the duty of confidentiality. For example, it is absurd for legislators to impose an absolute duty of confidentiality upon parties to arbitration. If it were to do so, the first obstacle faced is to resolve a party's right to enforce its arbitral award in execution proceedings before a court

6. Singapore International Arbitration Act, s. 22.
7. Singapore International Arbitration Act, s. 23.
8. Departmental Advisory Committee on Arbitration Law 1966 Report on the Arbitration Bill (February 1996) paras 14-15.
9. "To give an accurate exposition of confidentiality at large would require a much more wide-ranging survey of the law and practice than has been necessary for a decision on the narrow issue raised by the appeal, and cannot in my opinion safely be attempted in the abstract." D. (Adoption Reports: Confidentiality), In re, 1996 AC 593 : (1995) 3 WLR 483, 496 (HL).
10. Stephensen Harwood, The Confidentiality of Commercial Arbitration: A Key Exception, Conventus Law (Conventuslaw.com, 2020) https://www.conventuslaw.com/report/the-confidentiality-of-commercial-arbitration-a/ accessed 17 Sept. 2020.

of competent jurisdiction. If one were to juxtapose this situation in the Indian context, it is likely that most arbitral awards are challenged before a court of competent jurisdiction under Section 34 of the Arbitration and Conciliation Act, 1996. Once a challenge is made to an arbitral award, it is a matter of practice that the entire arbitral record is mandatorily required to be filed before the competent court of jurisdiction.[11] Therefore, in the interest of justice, the duty of confidentiality cannot be absolute and must be defined in a manner so as to preserve the interests of parties.

3. THE INDIAN FRAMEWORK

In July 2017, a High Level Committee ("**HLC**") chaired by Justice B.N. Krishna, Retired Judge of the Supreme Court of India provided pertinent recommendations for the Indian legislature to codify confidentiality obligations in arbitration proceedings. It was found that the ACA, 1996 did not have any provisions for confidentiality for arbitration proceedings. The recommendation highlighted how common law jurisdictions like Hong Kong provide for confidentiality protection through explicit statutory reference whereas the United Kingdom provides for an implied duty of confidentiality that is read into case laws. On the basis of this observation, the HLC recommended the insertion of a model clause which would provide for confidentiality of arbitration proceedings. Further, the HLC proposed that the exceptions to disclosing confidential information must be required by a legal duty, to protect or enforce legal rights or to enforce or challenge an award before a competent court. In effect, the HLC's model recommendation sought to create an express duty of confidentiality in arbitration proceedings.[12]

Section 42A of the ACA, 1996 contains a non-obstante clause which confines confidentiality obligations to the arbitrator, arbitral institution and parties to the arbitration whilst excluding all interested third parties to arbitration. However, Section 42A also carves out an exception to the obligation of confidentiality in a situation where disclosure is necessary for an arbitral awards challenge and enforcement. Additionally, Section 43K has been introduced to impose obligations upon the ACI to maintain an electronic depository of arbitral awards along with any other records the

11. Practice Direction No. 26 (delhihighcourt.nic.in, 2010) http://delhihighcourt.nic.in/writereaddata/upload/notification/notificationfile_yz3qlkyf.pdf accessed 20 Jan. 2021.
12. Justice B.N. Krishna, Report of the High Level Committee to Review the Institutionalisation of Arbitration Mechanism in India (30 July 2017) 1,71.

regulations may specify. However, ACI rules have not been notified as yet and, therefore, an opportunity lurks for Indian policy makers to provide a robust statutory scheme under the ACI rules.

Section 42A does not account for the myriad of ways in which parties seek court interference in arbitrations. For example, court intervention relating to arbitration may be initiated by the parties to the arbitration for injunctive relief and interim relief under Section 9 of the ACA, 1996. Moreover, Section 14 of the ACA, 1996 may be invoked for seeking termination of the mandate of an arbitrator. In each of these situations, there is a strong likelihood of parties relying upon confidential data of the arbitration proceedings in the court room.[13] Consequently, parties are at liberty to file and rely upon pleadings of arbitral proceedings before court. In other words, disclosure of information material to the arbitration is not qualified with any exceptions under the ACA, 1996.

It may be argued that parties are at liberty to inter-se agree on terms of confidentiality under the terms of reference of an arbitration. However, the language of Section 42A as a non-obstante provision cuts at the heart of principles of party autonomy and merits judicial clarity. The only exception under which parties to arbitration and the arbitrator are exempt from the duty of confidentiality is for the enforcement and execution of an arbitral award. However, this limited exception, fails to account for multiple situations in which disclosure of material before a court may be necessary - such as seeking directions for interim measures during the pendency of an arbitration under Section 9 of the ACA, 1996 and preferring an appeal against an interim order passed by an Arbitral Tribunal under Section 17 of the ACA, 1996.[14]

4. IMPLIED V. EXPRESS CONFIDENTIALITY

Broadly, the duties of confidentiality may be divided into two types: implied obligations or specific/express obligations of confidentiality. It would be amiss to point out that countries have distinguished their methods of

13. Jaideep Khanna and Abhishek Nevatia, *Data Confidentiality under the Indian Arbitration Regime: Challenges and Opportunities* – IndiaCorplaw (IndiaCorpLaw, 2020) https://indiacorplaw.in/2020/07/data-confidentiality-under-the-indian-arbitration-regime-challenges-and-opportunities.html accessed 2 Oct. 2020.
14. Tejas Karia and others, *NPAC'S Arbitration Review: New Confidentiality Provision in the Indian Arbitration Act* (Bar and Bench – Indian Legal News, 2020) https://www.barandbench.com/columns/npac-arbitration-review-confidentiality-provision-indian-arbitration-act accessed 6 Oct. 2020.

evolving principles of confidentiality. For example, the English Arbitration Act, 1996 is silent on confidentiality; however, courts in England have devised detailed exceptions to confidentiality.[15] On the other hand, South East-Asian countries such as Singapore and Hong Kong explicitly provide for confidentiality of arbitration proceedings in their respective national laws and institutional rules. Therefore, even though there is a lack of uniformity with respect to implementing confidentiality obligations across jurisdictions, the common principles of confidentiality that emanate from arbitration remain absent from Indian jurisprudence.

The English Court of Appeal in Emmott v. Michael Wilson & Partners[16] *("**Emmot**")* articulated an implied obligation as one where no document relied upon in an arbitration proceeding can be disclosed without the consent of the parties or pursuant to an order or leave of the court.[17] On the other hand, a specific duty of confidentiality is one wherein applicable national laws or institutional rules govern the confidentiality of documents in question. Consequently, the English Court of Appeal in *Emmot* settled the juridical basis for the duty of confidentiality and held that the obligation of confidentiality in arbitration is implied by law and arises out of the nature of arbitration.[18] Additionally, the Court in *Emmot* laid down principles that would guide disclosure of confidential material including consent between parties and an order of leave by the Court. Further, *Emmot* placed importance on two exceptions to the implied duty of confidentiality:

(i) It is reasonably necessary for the protection of the legitimate interests of an arbitrating party; and

(ii) the public interest or the interests of justice requires disclosure.[19]

Therefore, even though the English Arbitration Act, 1996 is silent on confidentiality obligations, the principles of confidentiality have been culled out by English Courts. Consequently, English Law recognizes an implied duty for parties to maintain confidentiality of proceedings.[20]

15. Ali Khaled Qtaishat, *Legal Protection of Arbitration Confidentiality: Mapping the Approaches of Prominent Jurisdiction* (2017) 147 EJSR 358,361.
16. John Forster Emmott v. Michael Wilson & PartnersLtd., 2008 EWCA Civ 184.
17. *Ibid*.
18. Michael Hwang S.C. and Katie Chung, *Defining the Indefinable: Practical Problems of Confidentiality in Arbitration* (2009) 26 J Int Arb 5 609, 611.
19. John Forster Emmott (n 16).
20. Chantal Toit, *Reform of the English Arbitration Act 1996: A Nudge Towards Reversing the Presumption of Confidentiality* (Arbitration Blog, 2020) http://arbitrationblog.practicallaw.com/reform-of-the-english-arbitration-act-1996-a-nudge-towards-

However, as alluded to in *Emmot*, English courts have qualified information to determine protection under confidentiality.

On the contrary, Hong Kong is one of the few jurisdictions that explicitly provides for statutory protection over confidentiality in arbitration.[21] The Hong Kong Arbitration Ordinance (Cap. 609) [HKAO] addresses confidentiality concerns and extends its scope of protection to court proceedings that may emanate from arbitration proceedings. Pertinent reference is drawn to Section 18(1) of HKAO which states that unless agreed, parties to the arbitral proceedings cannot publish, disclose or communicate any information relating to the same in their consequent award.[22] Section 18(2)[23] of HKAO provides for the exceptions to the duty of confidentiality and these exceptions become critical for our understanding of defining the scope of confidentiality. Section 18(2) provides that such publication, disclosure or communication of confidential information to an arbitration proceeding can be made for:

(i) "Protection and pursuance of a legal right or interest of a party.

(ii) Enforce or challenge an arbitral award.

(iii) Publication, disclosure or communication to a government body, regulatory body, court or tribunal and if the party is obligated by law to make the said publication, disclosure or communication

(iv) If the publication, disclosure or communication is made to a professional or any other adviser of any of the parties."

Additionally, the HKIAC Rules of 2018 have further strengthened confidentiality for arbitrations subjected to the Hong Kong International Arbitration Centre. In effect, Article 45 of the HKIAC Rules, 2018 imposes

---

reversing-the-presumption-ofconfidentiality/#:~:text=Under%20English%20law%2C%20parties%20to,ultimately%20rendered%20by%20the%20tribunal accessed 6 Oct. 2020.

21. Joanna Du and others, *Hong Kong: A Listed Company's Duty of Confidentiality in Arbitration and its Duty of Disclosure to the Public* – Kluwer Arbitration Blog (Kluwer Arbitration Blog, 2020) http://arbitrationblog.kluwerarbitration.com/2019/01/12/hong-kong-a-listed-companys-duty-of-confidentiality-in-arbitration-and-its-duty-of-disclosure-to-the-public/#:~:text=Hong%20Kong%20is%20one%20of,the%20arbitral%20proceedings%20and%20awards accessed 6 Oct. 2020.
22. Hong Kong Arbitration Ordinance (ch. 609), s. 18(1).
23. Hong Kong Arbitration Ordinance (ch. 609), s. 18(2).

confidentiality obligations for institutional arbitrations and is largely harmonious with Section 18 of the HKAO.

In effect, the scheme of regulating confidentiality under the Hong Kong model is common to the principles established by English Courts vis-à-vis allowing disclosure of confidential information wherein it is necessary to protect the legitimate interest of a party and which is in public interest.

5. THE EXCEPTIONS TO CONFIDENTIALITY

A. Balance of Interests

The balancing interests are divided into two parts namely "public interest" and "private interests". Disclosure by way of public interest may be mandated by law or in the interest of the public. On the other hand, private interest may justify disclosure to protect a legitimate interest of the parties.

The need to introduce a public-interest exception was succinctly authored by the Supreme Court of Victoria in Esso Australia Resources Ltd. v. Plowman[24] wherein it was held that there may be instances where the public might have a legitimate interest in knowing what has transpired in an arbitration, and in such a case, there exists a "public interest" exception to the duty of confidentiality.[25] The "public interest" in the case of *Esso* involved an arbitration proceeding between a state-owned utility and purveyors of gas.[26] As a result, it was found that the outcome of the dispute was one which would impact the public at large.

In the Indian, context, we have witnessed a rampant growth of construction arbitration cases that involve multiple parties, high stakes for quantum of damages and often projects that are undertaken for public interest.[27] In this context, publication of arbitral awards in such disputes highlights the actions of public utilities and a curb on publication may invite challenge.

24. Esso Australia Resources Ltd. v. Plowman, (1995) 183 CLR 10.
25. Weixia Gu, *Confidentiality Revisited: Blessing or Curse in International Commercial Arbitration?* (2005) 15 Am Rev Int'l Arb 607, 1,15.
26. Hans Smit, *Case-note onEsso/BHPv.Plowman(Supreme Court of Victoria)*(1995) 11(3) *Arbitration International*, 299–302.
27. Achintya Rawal, *India: The Changing Landscape of Construction Arbitration* – Litigation, Mediation & Arbitration – India (Mondaq.com, 2020) https://www.mondaq.com/india/arbitration-dispute-resolution/860526/the-changing-landscape-of-construction-arbitration accessed 6 Oct. 2020.

It is surprising that Section 42A of the Act qualifies the duty of confidentiality as not applicable when the arbitral award is to be disclosed for the purpose of its implementation and enforcement. In effect, this balancing test of legitimate interest, or public interest, forms the foundation of the exception within the section, and is a testament to the intention of protecting the legitimate interest of a decree/award holder.[28] Indian courts must also consider observations laid down by common law jurisdictions in Ali Shipping Corpn. v. Shipyard Trogir[29] wherein the court stated that one of the exceptions to the implied duty of confidentiality is the protection of "the legitimate interests of an arbitrating party."[30]

The English Commercial Court in Chartered Institute of Arbitrators v. B[31] had to consider an application to produce confidential material for the purpose of conducting disciplinary proceedings against a resigned arbitrator. The application was made in court under Section 24 of the Arbitration Act, 1996 which provides a court with the power to remove an arbitrator. The equivalent provision in the Indian context is Section 14 of the ACA, 1996. In such a situation, the English Commercial Court was able to clarify the balance of a public and private interest to hold that that there was a genuine public interest in maintaining the quality and standards of arbitrators. This public interest would be beyond the private interests of parties and enable the court to issue appropriate directions. Therefore, it is anticipated that Indian courts shall soon have to ensure that Section 42A of the ACA,1996 is read harmoniously with other provisions of the Act that allow for parties to reveal information that may be confidential and travel to the courtroom.

B. Court Proceedings

Section 42A of the Actonly accounts for court intervention in the case of an enforcement and implementation of an arbitral award. However, the provision has failed to consider situations wherein parties may approach a court in relation to an arbitration proceeding. In a situation where there

28. Jaideep Khanna and Abhishek Nevatia, *Data Confidentiality under the Indian Arbitration Regime: Challenges and Opportunities* – IndiaCorplaw (IndiaCorpLaw, 2020) https://indiacorplaw.in/2020/07/data-confidentiality-under-the-indian-arbitration-regime-challenges-and-opportunities.html accessed 2 Oct. 2020.
29. Ali Shipping Corpn. v. Shipyard Trogir, (1999) 1 WLR 314 : (1998) 2 All ER 136, 146.
30. Avinash Poorooye and Ron´an Feehily, *Confidentiality and Transparency in International Commercial Arbitration: Finding the Right Balance* (2017) 22 Harv Negot L Rev 275, 318.
31. Chartered Institute of Arbitrators v. B, 2019 EWHC 460 (Comm).

are multiple arbitrations between the same or similar parties arising from a related dispute, it is plausible for there to be disputes concerning consolidation of arbitration proceedings.

For example, courts in India are often burdened with such litigation, thereby, leading to a situation wherein the Supreme Court in *MTNL* v. *Canara Bank*[32] invoked the 'Group of Companies' doctrine which allows for non-signatories to an arbitration agreement to be bound to an arbitration agreement subject to their role and performance to the original contract under which arbitration proceedings have been initiated.[33] Therefore, in such cases, it is common for parties to rely upon information that is subject to arbitration proceedings in a court room for establishing a case of consolidation.

Indian courts may also have to consider the possibility of having closed court proceedings which rely on information that is confidential in an arbitration proceeding. Pertinent reference may be drawn to the decision of the Singapore High Court in AAT v. AZV,[34] where the court had to weigh the need for open justice against the need to preserve confidentiality of the arbitration proceeding. The court relied upon the test of legitimate public interest to hold that the disputes inter-se the parties were purely commercial and there is no public interest justification for divulging the proceedings to the public.

C. Regulatory Obligations

Section 42A of the ACA, 1996 does not account for impositions of regulatory obligations that may require disclosure of information. For example, publicly listed companies make express disclosures in their annual reports concerning current litigation, including, where relevant, a fairly detailed description of its pending disputes.[35] In the Indian context, this is regulated by Securities and Exchange Board of India listing Obligations and Disclosure Requirements, 2015.[36] Since Section 42A contains

32. MTNL v. Canara Bank, 2019 SCC OnLine SC 995.
33. Gary B. Born, *International Commercial Arbitration* (2009) I,1170-1171.
34. AAT v. AZV, 2012 SGHC 116.
35. Valery Denoix de Saint Marc, *Confidentiality of Arbitration and the Obligations to Disclose Information on Listed Companies or During Due Diligence Investigations* (2003)20(2) J INT'L ARB 214.
36. Rohan Gopal, *Confidentiality: A New Pandora's Box under the Indian Arbitration Regime – Part II* (GNLU Student Research Development Council, 2020) https://

a non-obstante clause, it is likely to conflict with most regulations, proceedings and obligations which require divulgence of confidential information.

6. DATA PROTECTION

Data protection under arbitration is a crucial facet for protecting confidential information that has been deposited to a competent regulator. The regulator may be an arbitral institution in the case of an institutional arbitration or an ad-hoc tribunal. The need for regulating data protection under arbitration was brought to light in 2015, when the website of the Permanent Court of Arbitration in The Hague was hacked. The data breach occurred during a sensitive maritime border dispute between China and the Philippines. At the time, arbitral institutional rules were silent on data protection rules.[37]

The Indian arbitration regime via the 2019 amendment to the ACA, 1996 constituted the ACI as an independent governing body for regulating institutional arbitration in India. Furthermore, Section 43K requires the ACI to maintain an electronic depository of arbitral awards and other records as may be specified by regulations for the ACI which are yet to be framed.

The LCIA has formally adopted its arbitration rules on 11th August 2020 and has stated that they shall come into effect on 1st October 2020. Under the revised 2020 LCIA rules, Article 30A has been inserted to provide the arbitral tribunal with the power to issue directions for regulating information security and data protection which shall be binding upon parties to the arbitration.[38]Additionally, Article 30A states that any personal data processed by the LCIA shall be subject to the applicable data protection legislation.

In comparison, data protection in India is currently taking shape by way of the introduction of the PDP Bill. Since the ACI rules are yet to be

---

gnlusrdc.wordpress.com/2020/07/22/confidentiality-a-new-pandoras-box-under-the-indian-arbitration-regime-part-ii/ accessed 6 Oct. 2020.

37. *Cybersecurity in International Arbitration – A Necessity and an Opportunity for Arbitral Institutions* (Arbitrationblog.kluwerarbitration.com, 2017) http://arbitrationblog.kluwerarbitration.com/2017/10/06/cyber-security/?print=pdf#:~:text=In%20July%202015%2C%20the%20website,page%20devoted%20to%20the%20dispute accessed 21 Jan. 2021.
38. *Keeping Up with the Times: 2020 Update to the LCIA Arbitration Rules* Lexology (Lexology.com, 2020) https://www.lexology.com/library/detail.aspx?g=c2bc8447-e1dd-4b1c-879c-72ab275a86b0 accessed 21 Jan. 2021.

notified, it is important to consider if the provisions of the PDP Bill shall apply to arbitration proceedings. Pertinent reference may be drawn to the applicability of the bill. Section 3(14) of the bill defines a "data principal" as a natural person to whom the personal data relates whereas Section 3(13) defines a "data fiduciary" as a person who determines the purpose and means of processing the personal data. Therefore, since Section 43K of the ACA, 1996 has made the ACI the depository of electronic records, it may be argued that the arbitral institution is a data fiduciary under the PDP Bill. However, as per Section 36(b) of the PDP Bill the disclosure of personal data for enforcement of a legal right shall be exempted. Further Section 36(c) excludes the applicability of the bill to processing of personal data by any court or tribunal in India.

Therefore, if India is to move towards an arbitration friendly regime, it is incumbent upon the legislature to ensure that the PDP Bill is read harmoniously with the ACA, 1996. The LCIA rules provide for a model to allow for the arbitral institution to bind parties to data security norms under appropriate legislation. However, at the moment, the potential applicability of the PDP Bill to arbitration proceedings remains unclear.

7. CONCLUSION

The insertion of Section 42A to the ACA, 1996 reveals legislative intent to codify confidentiality obligations in arbitration proceedings. However, Section 42A has cast a blanket duty of confidentiality without qualifying its exceptions and applicability. In this respect, the author has drawn references to specific legislation in Hong Kong and Singapore to highlight how the legislature may seek to qualify confidentiality obligations in situations where arbitral proceedings are brought under challenge in court.

On the other hand, as an alternative, if the legislature fails to account for such relevant amendments, it is expected that Indian courts shall have to cull out exceptions to confidentiality under the ACA, 1996. The author believes that the exceptions must necessarily encompass the facets of ensuring a balance of private and public interest, the scope of court proceedings under the ACA, 1996 and regulatory obligations that may converge and dispute the blanket obligation of confidentiality.

It can be seen that the Indian arbitration regime has made a step in the right direction by way of introducing a statutory obligation of confidentiality in Arbitration proceedings. However, the language of Section 42A as a non-obstante provision is bound to invite judicial challenge and consequent

interpretation so as to account for multiple situations where disclosure of confidential information is appropriate. As argued, it is anticipated that Indian courts would have to develop exceptions to confidentiality obligations under Section 42A under the broad umbrella of "Balance of Interests", "Court Proceedings" and "Regulatory Obligations".

FORM IV

STATEMENT ABOUT OWNERSHIP AND OTHER PARTICULARS

(See Rule 8)

1.	Place of Publication :	:	New Delhi
2.	Periodicity of Publication	:	Yearly
3.	Printer's Name	:	EBC Publishing (P) Ltd.
	Nationality	:	Indian
	Address	:	34-A, Lalbagh, Lucknow – 226 001
4.	Publisher's Name	:	Prashant Mishra as the Patron of the IALR Journal.
	Nationality	:	Indian
	Address	:	Defence Colony, New Delhi 110024.
5.	Editor's Name	:	Student Editorial Body of Indian Arbitration Law Review
	Nationality	:	Indian
	Address	:	The National Law Institute University Kerwa Dam Road, Bhopal, India 462044
6.	Ownership	:	Prashant Mishra, Patron of Indian Arbitration Law Review.

I, Pranjal Agarwal, Editor-in-Chief of Indian Arbitration Law Review, hereby declare that the particulars given above are true to the best of my knowledge and belief.

Sd/-

Pranjal Agarwal

Submission Guidelines

- Submissions revolving around arbitration are welcome from law students, whether at undergraduate or postgraduate level, academicians and practitioners. However, the submissions must be in English language.

- All submissions must be accompanied by an abstract not exceeding 300 words. Case Comments and Book Reviews do not need abstracts. The abstract must expressly include the novelty and usefulness of the idea that the author wishes to put forth and must categorically mention the specific contribution of the article beyond the existing available literature.

- Furthermore, the submission must also be accompanied with a covering letter indicating the name of the author, contact details (Phone number, Email ID, Address), title of the submission, institutional affiliations (if any) and academic qualifications of the author. The submissions will be reviewed and edited by the Editorial Board under the supervision of the Editor-in-Chief.

- Submission must be sent in the MS Word (.docx) format to ialr@nliu.ac.in with the subject

- "Submission – <Title of the manuscript>".

- For more details, visit the website - https://www.indianarbitrationlawreview.com/submission-guidelines

Ordering Copies

Price (inclusive of shipping) of the IALR is as follows:

Hard Copy for 2021	Rs

Order online: www.ebcwebstore.com

Order by post: send a cheque/draft of the requisite amount in favour of 'Eastern Book Company' payable at Lucknow, to:

Eastern Book Company,

34, Lalbagh, Lucknow-226001, India

Tel.: +91 9935096000, +91 522 4033600 (30 lines)