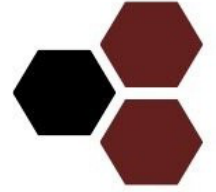




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FOREWORD

It is our distinct privilege to present Volume 14.1 of the Indian Journal of Arbitration Law [“IJAL”]. This edition exemplifies the Journal's enduring commitment to bridging the worlds of scholarship and practice — bringing together incisive contributions from leading practitioners and distinguished academicians whose collective insights illuminate the evolving landscape of arbitration with both depth and nuance. True to IJAL's founding ethos, the present volume strikes a careful balance between theoretical rigour and practical relevance, offering its readers perspectives that are at once intellectually stimulating and professionally enriching. Comprising four articles and three case comments, this edition engages with critical and emerging questions in arbitration law, each contribution advancing the discourse in its own distinct and meaningful way.

Dr. Chirag Balyan in *Commercial Arbitration and Climate Change: Defining Climate Disputes and Mapping Contractual Pathways* examines whether commercial arbitration can meaningfully contribute to climate change efforts, arguing that the answer turns on how climate disputes are defined and categorised. The author further situates the analysis within the broader ESG accountability shift driven by global frameworks, suggesting that as sustainability obligations deepen across supply chains, arbitration will increasingly become the principal forum where these commitments are interpreted and enforced.

Ms. Khushi Rohtagi in *Qualified Confidentiality in Indian Mediation: A Critical Analysis of Sections 22 and 23 of the Mediation Act, 2023* argues that Section 22 of the Mediation Act, 2023, despite its celebrated protective intent, fails to deliver genuine confidentiality in the face of digital vulnerabilities, constitutional mandates, and vague exceptions. Drawing on Singapore's redacted-disclosure model, the author advocates for a reconsidered framework that balances privacy with the right to a fair trial, situating the

analysis within India's broader jurisprudence of proportionality and digital governance.

Mr. Aravindhyan B. in *Full Protection and Security in Armed Conflict: Reconciling Prevention Obligations with Wartime Realities* examines the scope of full protection and security obligations under investment treaties where host States fail to prevent harm during armed conflict, arguing that such standards and war-loss provisions operate as distinct but complementary layers rather than alternatives. The author proposes a layered-protection framework that treats full protection and security as a preventive standard requiring reasonable diligence, and war-loss provisions as a post-loss remedy concerned with non-discriminatory treatment and compensation, offering tribunals a structured inquiry into foreseeability, capacity, causation, and proportionality.

Ms. Ioli Shukla and Mr. Shashank Chamoli in *Reimagining Arbitration in the Web3 Era: The Potential of DAOs to Democratize Cross-Border Dispute Resolution* examine whether Decentralised Autonomous Organisations can address the traditional criticisms of arbitration, namely cost, inaccessibility, and jurisdictional limitations, by leveraging blockchain's inherent features of decentralisation, transparency, and community participation. The authors propose a hybrid dispute resolution framework that interfaces decentralised protocols with traditional legal norms, calling for legislative innovation and cross-border harmonisation to realise the democratising potential of Web3 arbitration systems.

Ms. Parnika Chaturvedi and Dr. Simon Weber in *Delhi High Court Intervenes: Anti-Arbitration Injunction in Engineering Projects v. MSA Global* examine the Delhi High Court's decision to restrain ICC arbitration proceedings seated in Singapore, analysing the Court's assumption of jurisdiction over foreign-seated proceedings notwithstanding the seat-centric framework established in *Bharat Aluminium*. The authors critically assess the Court's articulation of the vexatious and oppressive conduct test, its application of the triple

test for injunctive relief, and the broader implications of the judgment for party autonomy and judicial oversight in international arbitration.

Ms. Divyansha Verma in *Securing Jurisdiction, Losing Enforceability? A Comment on the Lata Yadav Verdict* examines the Delhi High Court's 2025 ruling that arbitral tribunals retain jurisdiction notwithstanding provisional asset attachments under the PMLA, arguing that while the judgment reaffirms minimal judicial interference, it leaves critical questions of award enforcement unresolved. The author analyses the interplay between Sections 41 and 71 of the PMLA and arbitral award enforcement, the potential invocation of public policy as a ground for refusal, and advocates for remedial measures including a substitution of assets model and a statutory carve-out for bona fide third parties.

Yash Sameer Joshi, Sanidhya Sanhwal, and Harshita Baswana in *Analyzing Article 1.9 of the Indian Model BIT in light of David R. Aven v. Republic of Costa Rica* examine Article 1.9 of the Indian Model BIT's extension of the dominant and effective nationality test to dual nationals where neither nationality belongs to the host state, arguing that this position departs from customary international law as reflected in the ILC Draft Articles on Diplomatic Protection. Drawing a comparison with the tribunal's reasoning in *David R. Aven v. Republic of Costa Rica*, the authors conclude that while India's approach diverges from established international law, it may represent a pragmatic development offering greater jurisdictional clarity in investor-state arbitration.

The contributions in this volume arrive at a particularly significant moment for Indian arbitration. Recent years have witnessed a series of landmark developments that continue to shape the contours of arbitration law and practice in India. Courts have increasingly reaffirmed the principle of minimal judicial intervention in arbitral proceedings, while legislative momentum towards comprehensive reform remains strong. Proposals for

statutory recognition of emergency arbitration and online arbitration processes reflect a forward-looking approach to procedural modernisation, and the growing integration of technology into dispute resolution continues to open new frontiers for both practitioners and scholars. These developments underscore the dynamic and evolving nature of arbitration law in India, and the critical importance of sustained scholarly engagement with the issues they raise.

This issue reflects the breadth and vitality of contemporary arbitration scholarship. The articles featured in this volume collectively engage with some of the most pressing questions confronting the field today — examining how institutional frameworks can be strengthened, how procedural design can be optimised to serve the needs of modern disputants, and how emerging technologies are reshaping the very architecture of arbitration. Together, they represent a meaningful contribution to the ongoing dialogue between theory and practice, and reaffirm IJAL's commitment to fostering rigorous, forward-looking scholarship on arbitration law.

We extend our profound gratitude to the distinguished authors for investing their trust in IJAL and sharing their invaluable expertise. Their rigorous analysis will undoubtedly inform students, practitioners, and scholars alike for years to come. Our heartfelt appreciation goes to our Patron and Vice Chancellor, Prof. (Dr.) Harpreet Kaur, for her visionary leadership and steadfast guidance to the Centre, and to our Faculty Chairperson, Dr. Sarthak Mishra, whose intellectual rigour and strategic vision have been instrumental in shaping this edition and advancing the Centre's broader objectives. We express our sincere gratitude to our distinguished Board of Advisors for their unwavering support and sage counsel. Special recognition is due to our Editorial Board, our **Managing Editors, Mr. Kairav Shah and Ms. Vrinda Gupta**, and our **Executive Editor, Ms. Hitanshi Jain**, for their exceptional editorial acumen, tireless dedication, and steadfast commitment to maintaining IJAL's exacting

standards of quality. We also acknowledge our peer reviewers and the entire IJAL team whose collective efforts make this publication possible.

As we prepare for our next issue, we earnestly invite feedback from our readers — IJAL thrives on active engagement with the arbitration community, and your insights and suggestions are invaluable in our continuous pursuit of excellence.

Yash Sameer Joshi, Sanidhya Sanhwal, & Harshita Baswana
Editors-in-Chief
Indian Journal of Arbitration Law
National Law University, Jodhpur

COMMERCIAL ARBITRATION AND CLIMATE CHANGE: DEFINING
CLIMATE DISPUTES AND MAPPING CONTRACTUAL PATHWAYS

*Dr. Chirag Balyan**

Abstract

Can commercial arbitration contribute to efforts to combat climate change? This paper argues that the answer depends on how climate change disputes are understood and categorised for the purposes of arbitration. Existing frameworks tend to adopt either unduly narrow definitions, shaped by public law concerns, which do not travel easily into the private, contractual world in which arbitration operates, or excessively broad definitions, which risk pulling in disputes where the connection to climate change is thin or incidental.

The paper makes two principal contributions. First, it critically reassesses how climate change disputes are currently conceptualised and argues for a more functionally grounded understanding that looks at how climate considerations enter commercial relationships, rather than simply asking whether a dispute carries a climate label. Second, it develops an original typology of contracts within which climate-related disputes are most likely to arise, which brings greater precision to a field that has so far remained largely descriptive.

The paper also situates this analysis within the broader transformation of business practice. International frameworks such as the UN Guiding Principles on Business and Human Rights have gradually pushed climate and human rights accountability into the

* Dr. Chirag Balyan is an Associate Professor at DY Patil University, School of Law, Navi Mumbai, and an Assistant Professor (On Lien) at Maharashtra National Law University, Mumbai.

heart of corporate decision-making, while initiatives such as the American Bar Association's Model Contract Clauses have translated these expectations into concrete contractual language, embedding ESG and sustainability obligations across supply chains and commercial agreements. As these obligations multiply and deepen, so do the disputes they generate, and arbitration has increasingly become the forum where these commitments are tested, interpreted, and given practical effect.

I. Introduction

The overarching normative question which this paper addresses is: can commercial arbitration contribute to efforts to combat climate change? To answer this, the paper takes a foundational analytical approach — for it is only by understanding what climate change disputes are, how they should be categorised, and in what kinds of contractual relationships they are most likely to arise, that we can meaningfully assess what arbitration can and cannot do about them.

This question assumes importance because commercial arbitration has traditionally been conceived as a private mechanism of dispute resolution, not as a tool for addressing global public challenges such as climate change,¹ which is dubbed as a “*defining challenge of our time.*”² The governance of climate change, in contrast, has historically been dominated by a state-centric approach grounded in public international law, focusing on the negotiation of international frameworks that allocate responsibilities to

¹ Intergovernmental Panel on Climate Change, *Global Warming of 1.5°C: An IPCC Special Report on the Impacts of Global Warming of 1.5°C above Pre-Industrial Levels and Related Global Greenhouse Gas Emission Pathways, in the Context of Strengthening the Global Response to the Threat of Climate Change, Sustainable Development, and Efforts to Eradicate Poverty* (2018), available at <<https://www.ipcc.ch/sr15/>>.

² International Bar Association, *Achieving Justice and Human Rights in an Era of Climate Disruption: Climate Change Justice and Human Rights Task Force Report* (2014), available at <https://www.ibanet.org/MediaHandler?id=0f8cee12-ee56-4452-bf43-cfcab196cc04>.

states for reducing greenhouse gas emissions and implementing adaptation measures.³ The effectiveness of this top-down model depends on the collective political will of states, which often exposes deep structural and political contradictions.⁴

In recent years, however, this question has begun to gain traction among both practitioners,⁵ and scholars,⁶ who increasingly explore the potential of arbitration in climate-related disputes. This shift is driven, in part, by the limitations of existing climate litigation, which has been largely pursued before domestic courts,⁷ with only limited and fragmented engagement at the international level.⁸ While climate litigation has expanded significantly, it continues to face challenges relating to procedural hurdles, jurisdictional

³ David Hirst, *The History of Global Climate Change Negotiations*, UK PARLIAMENT, HOUSE OF COMMONS LIBRARY (June 24, 2020), <https://commonslibrary.parliament.uk/the-history-of-global-climate-change-negotiations/>.

⁴ António Guterres, Secretary-General's Statement on the Conclusion of the UN Climate Change Conference COP26, UNITED NATIONS, (November 13, 2021) available at <https://www.un.org/sg/en/content/sg/statement/2021-11-13/secretary-generals-statement-the-conclusion-of-the-un-climate-change-conference-cop26>.

⁵ AAA, *Construction, Real Estate and Environmental*, AMERICAN ARBITRATION ASSOCIATION (2024), <https://www.adr.org/construction>.

⁶ Montserrat Manzano and Ana Toimil, *The Role of Arbitration in ESG Disputes*, Von Wobeser, (November 12, 2021) available at https://www.vonwobeser.com/images/PDF_news/2021/21_11_12_ARBITRAJE_ESG_ING.pdf; Gauthier Vannieuwenhuysse, Exploring the Suitability of Arbitration for Settling ESG and Human Rights Disputes 40 JOURNAL OF INT'L ARBITRATION 1 (2023) <https://doi.org/10.54648/joia2023001>; Ristead De Paor, *Climate Change and Arbitration: Annex: Time before There Won't Be A Next Time*, JOURNAL OF INT'L DISPUTE SETTLEMENT (2016), <https://doi.org/10.1093/jnlids/idw025>; Tamar Meshel, *Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment: Permanent Court of Arbitration (PCA)*, Social Science Research Network (2016), <https://doi.org/10.2139/ssrn.3426459>.

⁷ Kathrin Aschenfeldt & Lisa-Marie Ross, *The Role of International Commercial Arbitration in Mastering Climate Change Disputes: Initiatives, Advantages, and Challenges*, 41(3) J. INT'L ARB. 317, 319 (2024).

⁸ Michele Poletto & Sharon Pia Hickey eds., *Let the Courts Decide? The Potential and Limitations of Climate Litigation from a Democracy Perspective*, INT'L INST. FOR DEMOCRACY & ELECTORAL ASSISTANCE, International IDEA, <https://www.idea.int/publications/catalogue/html/let-courts-decide-potential-and-limitations-climate-litigation>.

limitations, enforcement and the availability of specialised adjudicatory expertise.⁹ In this context, arbitration offers certain institutional advantages. The enforceability of arbitral awards under the New York Convention enhances compliance across jurisdictions, while the flexibility of the arbitral process and party autonomy allow for the appointment of decision-makers with relevant technical and interdisciplinary expertise.¹⁰

At the same time, broader structural changes in commercial practice have contributed to the growing relevance of arbitration. The increasing adoption of net-zero commitments and greenhouse gas reduction targets has led to the proliferation of mitigation- and adaptation-related contracts, within which disputes are becoming more frequent.¹¹ In parallel, financial institutions are exerting pressure on businesses to align with sustainability objectives through mechanisms such as sustainable financing, thereby embedding climate considerations into commercial decision-making.¹² The incorporation of ESG and sustainability clauses in contracts further reinforces this shift, generating disputes that are well suited to arbitral resolution.¹³ Institutional developments have also played a role in

⁹ Seryon Lee, *Human Rights and Climate Litigation: Trends, Challenges, and Implications*, 13 KOREAN J. INT'L & COMP. L. 80 (2025).

¹⁰ Lucia Bíziková, *On Route to Climate Justice: The Greta Effect on International Commercial Arbitration*, 39 J. INT'L ARB. 79, 94 (2022).

¹¹ Annette Magnusson, *New Arbitration Frontiers: Climate Change, in EVOLUTION AND ADAPTATION: THE FUTURE OF INTERNATIONAL ARBITRATION* (Jean Engelmayr Kalicki & Mohamed Abdel Raouf eds., 2019).

¹² Lucia Bíziková, *On Route to Climate Justice: The Greta Effect on International Commercial Arbitration in Maxi Scherer* (ed), 39(1) J. INT'L ARB. 79, 83 (2022); *LCQ10: Developing Hong Kong into Green Finance Centre*, THE GOVERNMENT OF THE HONG KONG SAR (18 Aug. 2022); Regulation (EU) 2019/2088 of the European Parliament and of the Council of 27 November 2019 on sustainability-related disclosures in the financial services sector OJ L317/1 (2019); UNEP FI, *Principles for Sustainable Insurance* (2012); French Duty of Vigilance Law (2017); SEBI Circular SEBI/HO/CFD/CMD-2/P/CIR/2021/56 (May 10, 2021) (India).

¹³ Gauthier Vannieuwenhuysse, *Exploring the Suitability of Arbitration for Settling ESG and Human Rights Disputes*, 40 J. INT'L ARB. 1 (2023).

accelerating this trend. Notably, the International Chamber of Commerce's report, *Resolving Climate Change Related Disputes through Arbitration and ADR* (2019),¹⁴ represents an important institutional intervention that has encouraged businesses to consider arbitration as a viable forum for resolving climate-related disputes.

Despite these developments, there remains a lack of conceptual clarity regarding the circumstances in which climate-related disputes may be appropriately resolved through arbitration. In particular, insufficient attention has been paid to the typologies of contracts within which such disputes arise. Such typology is necessary because not every dispute that is characterised as a "*climate change dispute*" within existing jurisprudence will necessarily be capable of resolution through arbitration, particularly where such disputes implicate public law elements, arbitrability concerns, regulatory compliance, or third-party environmental interests. Without a clearer articulation of the kinds of disputes that can be meaningfully referred to arbitration, the practical relevance of these developments remains limited.

This difficulty is compounded by the way in which climate change disputes are currently conceptualised. Existing frameworks, including those reflected in the ICC Report and in the broader landscape of climate litigation, tend to adopt relatively narrow understandings of such disputes. In particular, definitions emerging from climate litigation are often shaped by public law concerns, including state responsibility and rights-based claims, and may not translate easily into the private, contractual context within which arbitration operates. The uncritical transposition of such definitions risks generating conceptual and jurisprudential inconsistencies.

¹⁴ ICC, *Resolving Climate Change Related Disputes through Arbitration and ADR*, ICC COMMISSION ON ARBITRATION AND ADR (2019) available at <https://iccwbo.org/wp-content/uploads/sites/3/2019/11/icc-arbitration-adr-commission-report-on-resolving-climate-change-related-disputes-english-version.pdf>.

Against this backdrop, this paper argues that a broader and more functionally grounded understanding of climate change disputes is necessary. It contends that climate-related disputes in arbitration must be understood in relation to evolving commercial practices, contractual obligations, and risk allocation mechanisms, rather than solely through the lens of public law litigation. Building on this argument, the paper first examines how climate change disputes are conceptualised in the ICC Report and in climate litigation, and offers a critical reassessment of these approaches. It then analyses the growing incorporation of climate considerations into business practices and contractual design. Finally, it develops a typology of contracts within which climate-related disputes are most likely to arise and be effectively resolved through arbitration.

II. Conceptualization Of Climate-Change Arbitration

The surge in climate change-related disputes reflects a multifaceted landscape, encompassing diverse legal facets such as rectifying damages induced by climate change, navigating the implications of climate-driven technologies like renewables, and litigating to shape environmental policies or behaviours. These legal matters transcend traditional boundaries, involving a wide array of stakeholders across various sectors. Although sectors like energy and construction bear a significant brunt due to their direct environmental impact, the ripple effects extend beyond these domains.

This expanding dispute landscape is closely linked to the broader regulatory and economic momentum surrounding climate change. This regulatory momentum is anticipated to catalyse the disputes market, with the number of climate-related cases more than doubling since the adoption of the Paris Agreement. Furthermore, the increasing flow of investments directed towards climate mitigation and adaptation initiatives is likely to generate new forms of disputes and legal contestation. As financial and commercial

actors recalibrate their operations in response to climate commitments, conflicts arising from these transitions are expected to intensify.¹⁵

The momentum of climate litigation is palpable, as evidenced by data from the Grantham Research Institute on Climate Change and the Environment, which identifies 2,891 climate laws and policies worldwide alongside 2,099 climate litigation cases. Notably, over 600 of these regulations have been enacted in the past five years, spurred by the pivotal adoption of the Paris Agreement in 2015.¹⁶ Similarly, the Sabin Center for Climate Change Law at Columbia Law School, in collaboration with Arnold & Porter, documents an additional 1,494 cases in the United States alone. These databases are widely used to map the expanding role of legal processes in climate-related decision-making. They suggest that litigation is emerging as an important tool in influencing state behaviour, corporate practices, and broader climate governance.

This anticipated rise in disputes is also reflected in policy and financial discourse. Mark Carney, as Governor of the Bank of England, underscored the transformative implications of the transition to a net-zero economy, emphasising the need to reassess asset valuations in light of evolving climate policies, technological developments, and emerging physical risks. In a similar vein, a survey conducted by the Network for Greening the Financial System [“NGFS”] Legal Task Force indicates that a majority of respondents expect a significant increase in climate-related disputes in the near future.¹⁷

¹⁵ Ristead De Paor, *Climate Change and Arbitration: Annex Time before There Won't Be A Next Time*, J. OF INT'L DISP. SETTLEMENT 185 (2016) <https://doi.org/10.1093/jnlids/idw025>.

¹⁶ United Nations Environment Programme, *The UNEP Global Climate Litigation Report: 2020 Status Review*, UNITED NATIONS ENVIRONMENT PROGRAMME SABIN CENTRE FOR CLIMATE CHANGE LAW 13 (2021) available at <https://wedocs.unep.org/bitstream/handle/20.500.11822/34818/GCLR.pdf?sequence=1&isAllowed=y>.

¹⁷ NGFS, *Climate-Related Litigation: Raising Awareness about a Growing Source of Risk*, NETWORK FOR GREENING THE FINANCIAL SYSTEM (2021), available at

While scholarly discourse increasingly advocates a comprehensive regulatory approach that combines public and private as well as mandatory and voluntary mechanisms to address climate change, there is growing recognition of the role of adjudicatory bodies in this evolving landscape. Although legislatures remain central to the formulation of climate policy, courts have emerged as significant actors in shaping and enforcing climate related norms. More recently, arbitral tribunals are also being acknowledged as important institutional actors that interpret, operationalise, and give effect to climate related commitments within commercial relationships.

At the same time, however, the concept of “*climate litigation*” itself requires closer scrutiny. Unlike its traditional understanding as adjudication before courts, climate litigation has been employed in a much broader sense. It includes not only formal determinations by courts, but also decisions rendered by expert committees, tribunals, and, in some instances, arbitral tribunals.¹⁸ Indeed, existing databases have, at times, included investment arbitration cases within the broader category of climate litigation. In this expanded sense, the term “*litigation*” operates less as a reference to a specific forum and more as a descriptor of legal action undertaken to address climate-related concerns.

This broader usage is reflected, albeit unevenly, in institutional definitions. The United Nations Environment Programme [“**UNEP**”] defines climate change litigation as encompassing cases that raise material issues of law or fact relating to climate change mitigation, adaptation, or climate science.¹⁹

https://www.ngfs.net/sites/default/files/medias/documents/climate_related_litigation.pdf.

¹⁸ Chris Hilson, *Climate Change Litigation in the UK: An Explanatory Approach (or Bringing Grievance Back In)*, CLIMATE CHANGE: LA RIPOSTA DEL DIRITTO 421 (2010), available at <https://api.semanticscholar.org/CorpusID:35841414>.

¹⁹ UNEP, The UNEP Global Climate Litigation Report: 2020 Status Review (UNITED NATIONS ENVIRONMENT PROGRAMME SABIN CENTRE FOR CLIMATE CHANGE LAW 10 (2021), available at

Similarly, the Grantham Research Institute and the Sabin Center focus on cases in which climate change law, policy, or science constitutes a material issue.²⁰ While these definitions provide a degree of analytical clarity, they also remain relatively restrictive. By requiring climate change to be a central or explicit issue, they exclude a wide range of disputes that may significantly influence climate-related outcomes without being framed in climate terms.

This limitation becomes particularly significant when considering the relationship between climate litigation and arbitration. Although arbitration and litigation remain distinct as modes of dispute resolution, it is strategically useful to view climate arbitration within the broader ecosystem of climate litigation. This is not to collapse the distinction between the two, but to recognise that both operate as mechanisms through which climate-related norms are articulated, contested, and enforced. However, the narrow definitional approach adopted by leading databases means that many disputes resolved through arbitration — particularly those arising from commercial contracts, corporate governance, or financial arrangements — do not feature within existing accounts of climate litigation, despite their potential impact on climate governance.

A contrasting approach is evident in the International Chamber of Commerce [“**ICC**”] Task Force Report (2019), which adopts a significantly broader formulation. It defines climate change-related disputes as “*any dispute arising out of or in relation to the effect of climate change and climate change*”

<https://wedocs.unep.org/bitstream/handle/20.500.11822/34818/GCLR.pdf?sequence=1&isAllowed=y>.

²⁰ Joana Setzer & Catherine Higham, *Global Trends in Climate Change Litigation: 2021 Snapshot* GRANTHAM RESEARCH INSTITUTE ON CLIMATE CHANGE AND THE ENVIRONMENT AND CENTRE FOR CLIMATE CHANGE ECONOMICS AND POLICY, LONDON SCHOOL OF ECONOMICS AND POLITICAL SCIENCE (2021), available at https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2021/07/Global-trends-in-climate-change-litigation_2021-snapshot.pdf.

*policy, the United Nations Framework Convention on Climate Change [“UNFCCC”] and the Paris Agreement.”*²¹ It further identifies such disputes as arising from:

*“Contracts relating to the implementation of energy or other systems transition, mitigation, or adaptation in line with Paris agreement; or contracts without any specific climate related purpose or subject-matter but where a dispute involves or gives rise to a climate or related environmental issue; or submission or other specific agreements entered into to resolve existing climate change or related environmental disputes, potentially involving impacted groups or populations.”*²²

While this expansive definition is valuable in highlighting the potential reach of arbitration, it also raises some concerns. Its breadth is such that it risks encompassing disputes in which the connection to climate change is incidental or attenuated. In such cases, it is important to examine whether the mere presence of a climate-related context or contractual purpose is sufficient to meaningfully classify a dispute as a climate change dispute. Notably, this broad definition stands in contrast to the restrictive approach adopted by databases such as Grantham and Sabin. This leads to inconsistency in defining climate-change-related disputes. Consequently, disputes treated as climate-related within arbitral discourse may not be recognised in mainstream climate litigation datasets, despite their potential influence on climate governance.

Against this backdrop, the author does not attempt to arrive at a singular definition of climate change disputes in arbitration. Instead, the author adopts a typological approach that identifies the different ways in which climate change intersects with contractual relationships. This typology focuses on multiple criteria, including the purpose of the contract, the

²¹ ICC, Resolving Climate Change Related Disputes through Arbitration and ADR, ICC COMMISSION ON ARBITRATION AND ADR, (2019), available at <https://iccwbo.org/wp-content/uploads/sites/3/2019/11/icc-arbitration-adr-commission-report-on-resolving-climate-change-related-disputes-english-version.pdf>.

²² *Id.*

source of the dispute, and the manner in which climate considerations enter the contractual framework. It distinguishes between contracts with a climate-related purpose, including both disputes unrelated to and arising from compliance with climate obligations; contracts without such purpose but affected by physical climate impacts or changes in climate-related regulatory frameworks; and disputes arising from the broader impact of business activities and financial or governance practices on climate change.

This approach also helps address a common source of scepticism. When climate change-related disputes are discussed in the context of arbitration, the immediate assumption is often that such disputes belong to regulatory forums, environmental tribunals, or constitutional courts. By using a typology, the author shows that many climate-related disputes arise within ordinary commercial relationships and are capable of being resolved through arbitration. These disputes are grounded in contracts, performance obligations, and commercial arrangements, rather than public law challenges.

The typology allows for a more precise analysis of disputes that may otherwise be grouped together under broad or inconsistent definitions. It helps distinguish between disputes that directly engage climate-related obligations and those where the connection to climate change is indirect or mediated through commercial relationships. It also makes it possible to examine how different kinds of disputes raise different legal questions, including compliance, performance, and the effect of regulatory change. From the perspective of climate governance, this typology helps assess how far arbitration can influence climate-related behaviour. The author recognises that not all categories of disputes contribute equally. However, disputes that involve compliance with climate obligations or arise from regulatory transition can shape contractual practices and commercial incentives in ways that support climate commitments. At the same time, the typology also helps identify those disputes where the link to climate governance remains limited. In this sense, arbitration functions as one of

several mechanisms through which parties interpret and apply climate-related norms within commercial relationships, without overstating its role in driving broader regulatory change.

Such an approach better captures the evolving role of private actors in climate governance. As businesses increasingly incorporate climate considerations into their policies and contracts, disputes arising from these arrangements become sites through which climate norms are operationalised. Arbitral decisions in such cases may have implications that extend beyond the immediate parties, influencing industry practices and contributing to broader shifts in climate-conscious behaviour.

In this sense, arbitration complements both litigation and state-centric regulatory approaches, functioning as part of a wider ecosystem through which climate change is addressed. The next section examines how climate change considerations are increasingly shaping business policies and how this shift is being translated into contractual practices with climate-related implications.

III. Climate Considerations in Business Policy and Contractual Practice

Before the author delves into question of what kinds of climate-change disputes can be resolved through arbitration, it is important to see how businesses, contracts, and climate considerations married together. It is important to think in this direction because just few decades ago it was not obvious for one to think that businesses can also play a role in combatting climate change. It was not obvious for international organizations and nation-states who always prioritized international treaties as a primary way to tackle the difficulties posed by the climate change. It was also not obvious for the businesses themselves as they saw themselves as predominantly concerned with regulating the exchange of goods and finances between the

parties. A lot of businesses, in fact most of them, still see themselves as only responsible for maximizing profits. But something has changed.

First, there is a growing recognition of the power that corporations wield. They have considerable political and regulatory sway owing to their economic clout and global reach.²³ They can impact political and legislative processes through lobbying or sponsoring political campaigns.²⁴ Their operations exert significant influence on the well-being of individuals and other businesses, particularly those interconnected within their supply chains. The corporations are now not seen just as passive entities governed by regulations, but rather they have become active participants in the governing processes.²⁵ In this view, the conscientious corporate entities are either having a corporate policy or a clause in their supply-chain contracts, or both – which require the parties they are doing businesses with to observe standards and measures that are not detrimental to human rights and climate. Thus, corporates (especially, the bigger one with leverage) are able to influence the behavior of the others albeit sometimes in a binding manner also.

Second, now it is not just the commitments under international treaties that we rely upon to reduce the greenhouse gas emissions. We have also come to realize that although “*many of the effects of climate change are global, the causes of climate change are actions that are undertaken by individuals, families, firms, and actors at a much smaller scale.*”²⁶ Therefore, apart from a top-down approach of treaty-making, there is a growing momentum to tackle these issues

²³ J. Kapeller, C. Gräbner-Radkowitz & A. Hornykewycz, *Corporate Power and Global Value Chains: Current Approaches for Conceptualizing the Power of Multinationals*, 5 *Rev. Evol. Pol. Econ.* 371 (2024), <https://doi.org/10.1007/s43253-024-00121-5>.

²⁴ I.S. Kim & H.V. Milner, *Multinational Corporations and Their Influence Through Lobbying on Foreign Policy*, in *MULTINATIONAL CORPORATIONS IN A CHANGING GLOBAL ECONOMY* 497 (2019).

²⁵ J.G. Ruggie, *Multinationals as Global Institution: Power, Authority and Relative Autonomy*, 12 *REG. & GOV.* 317 (2017).

²⁶ Elinor Ostrom, *A Polycentric Approach for Coping with Climate Change*, *Social Science Research Network* 27–28 (2009), available at <https://doi.org/10.2139/ssrn.1934353>.

directly by suing the parties in the courts. In this backdrop, climate litigation, as we discussed in the previous section, has emerged as an important arsenal to deal with the climate change.

Third, there is the emergence of guidelines and standards by international bodies and financial institutions that requires businesses to adhere to them. In fact, this is the major reason why the companies of all sizes have begun to think of sustainability. As these obligations become embedded in commercial relationships, their enforcement by shareholders, contracting parties, and civil society groups including through climate change arbitration has grown and is expected to intensify.

The author reviews some of these standards which are shaping how corporates are taking decisions.

In 2011, United Nations adopted ‘Guiding Principles on Business and Human Rights’. These principles requires business to comply with nationally and internationally human rights standards, both in their own operations and across their supply chains.²⁷ The UN backed Principles for Responsible Investment [“**PRI**”], developed strategies aimed at integrating ESG compliance into investment frameworks.²⁸ The PRI recognised that businesses depend on investors for capital, and if investors continued to make decisions purely on financial grounds without treating human rights and climate as relevant risks, businesses had little commercial reason to take these standards seriously. The PRI therefore required investors to factor in ESG if they wanted access to capital. Likewise, the OECD Due Diligence

²⁷ United Nations, *UN Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework, 2011*, INTERNATIONAL HUMAN RIGHTS LAW DOCUMENTS (Cambridge University Press 2018) available at <https://doi.org/10.1017/9781316677117.043>.

²⁸ Deborah Leipziger, *Principles for Responsible Investment*, THE CORPORATE RESPONSIBILITY CODE BOOK, Routledge 2nd edn. (2017) available at <https://doi.org/10.4324/9781351278881-34>.

Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas [**“OECD Guidance”**] provides comprehensive directives for companies to conduct due diligence, ensuring that their mineral supply chains neither contribute to human rights abuses nor fuel conflict in high-risk regions.²⁹

ISO 26000 suggests that companies can influence their business partners by including specific contractual provisions or incentives.³⁰ This means organizations should draft contracts that explicitly require or encourage their suppliers and distributors to adhere to these social responsibility criteria. For example, contracts could mandate the use of environmentally sustainable practices or ensure fair labour conditions. Once such clauses become part of the contract, they create binding obligations between the parties and failure of adherence may attract the liability.

The OECD Guidelines for Multinational Enterprises concerning Responsible Business Conduct advocate for the inclusion of specific requisites or parameters within supplier contracts by companies, thereby incentivizing or mandating compliance with particular practices, such as environmental sustainability or ethical labour standards.³¹ Regarding carbon dioxide emissions, the Green House Gas Protocol employs these contractual arrangements as a means for companies to procure emissions data from their suppliers.³² By including clauses in contracts that require suppliers to measure and report their emissions, companies can gather necessary data to assess their overall carbon footprint. This leverage allows the reporting company to ensure that their suppliers are transparent about

²⁹ OECD, *OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas* (3rd edn, OECD Publishing 2016) available at <https://doi.org/10.1787/9789264252479-en>.

³⁰ ISO, *ISO 26000 — Social Responsibility* (ISO, October 15, 2021) available at <https://www.iso.org/iso-26000-social-responsibility.html>.

³¹ OECD, *OECD Guidelines for Multinational Enterprises on Responsible Business Conduct* (OECD Publishing 2023) available at <https://doi.org/10.1787/81f92357-en>.

³² WRI, *Greenhouse Gas Protocol* (World Resources Institute 2014) available at <https://ghgprotocol.org/sites/default/files/2022-12/Executive%20Summary%20%28English%29.pdf>.

their environmental impact, facilitating better management and reduction of CO2 emissions across the entire supply chain.

The Task Force on Climate-Related Financial Disclosures [“**TCFD**”], formed by the Financial Stability Board, has developed a comprehensive framework to promote transparent and effective reporting of financial information related to climate-related risks and opportunities.³³ Simultaneously, the Securities and Exchange Board of India [“**SEBI**”] has required the top 1000 listed companies to submit Business Responsibility and Sustainability Reports [“**BRSR**”], thereby underscoring the importance of incorporating environmental, social, and governance [“**ESG**”] factors into corporate reporting practices.³⁴ Moreover, the International Sustainability Standards Board [“**ISSB**”], inaugurated during the 26th Conference of the Parties [“**COP26**”], is actively engaged in crafting a comprehensive global framework for sustainability disclosures within capital markets, reflecting a concerted effort towards enhancing transparency and accountability in sustainable finance initiatives.³⁵

These regulations, legal frameworks and guidance’s are gaining traction in the business world and causing companies of all sizes to rethink their practices and investment decisions.³⁶ The growing popularity of the

³³ CDP, *Reporting on Enterprise Value: Illustrated with a Prototype Climate-Related Financial Disclosure Standard* (2020), available at <https://www.tcfddhub.org/resource/reporting-on-enterprise-value-illustrated-with-a-prototype-climate-related-financial-disclosure-standard/>.

³⁴ Securities and Exchange Board of India, *Business Responsibility and Sustainability Reporting by Listed Entities* (2021) Circular No. SEBI/HO/CFD/CMD-2/P/CIR/2021/56 https://www.sebi.gov.in/legal/circulars/may-2021/business-responsibility-and-sustainability-reporting-by-listed-entities_50096.html.

³⁵ ISSB Delivers Proposals That Create Comprehensive Global Baseline of Sustainability Disclosures (IFRS, March 31, 2022), available at <https://www.ifrs.org/news-and-events/news/2022/03/issb-delivers-proposals-that-create-comprehensive-global-baseline-of-sustainability-disclosures>.

³⁶ Rahul Razdan, *Rethinking ESG Targets for Companies Like Amazon, Apple and Analog Devices* FORBES (July 1, 2020), available at <https://www.forbes.com/sites/rahulrazdan/2020/07/01/rethinking-esg-targets-for-companies-like-amazon-apple-and-analog-devices/?sh=6f96f7e31343>, July 1, 2020.

sustainable development movement, emergence of ‘triple bottom line concept’ and the looming threat of climate change is also driving self-conscious entities towards redesigning their priorities for ESG compliances.³⁷ Concerns about climate change are fuelling a demand for sustainable finance³⁸ and sustainable supply chains.³⁹ Globally corporates are committing themselves to net zero.⁴⁰ Infosys has already become carbon neutral. Sixty-four Indian corporations, among them Reliance Group, Adani Group, and Wipro, have pledged to decrease greenhouse gas emissions within the framework of the Science-Based Target Initiative [“SBTi”].⁴¹ Workforce diversity, where performance is more scrutinised, and modern-day slavery are among the social concerns of businesses. The advantages of inclusive and diverse enterprises are becoming obvious in leadership and throughout the firm. Even investors, customers, employees, and suppliers are increasingly seeking out businesses with strong ESG credentials.⁴²

The pandemic has further accelerated trends that place a premium on sustainability and emphasise ESG concerns.⁴³ Many states have stated that low-carbon investment will be at the heart of their economic recovery plans, with carbon-intensive energy production to be phased out over the

³⁷ Kyle Peterdy, *ESG (Environmental, Social, & Governance)* <https://corporatefinanceinstitute.com/resources/esg/esg-environmental-social-governance/>.

³⁸ Ian Robertson, *Principles of Sustainable Finance*, 10 J. OF SUSTAINABLE FIN. & INV. 311 (2020).

³⁹ Jonathan D Linton, Robert Klassen and Vaidyanathan Jayaraman, *Sustainable Supply Chains: An Introduction* (2007) 25 *Journal of Operations Management* 1075 <https://doi.org/10.1016/j.jom.2007.01.012>.

⁴⁰ Jeff Gowdy & Jessica Forrest, *Transformational Goals in Corporate Strategy: A Review of the ESG Goals of 50 Global Companies*, SUSTAINABLE BRANDS, (October 1, 2019) available at <https://sustainablebrands.com/read/new-metrics/transformational-goals-in-corporate-strategy-a-review-of-the-esg-goals-of-50-global-companies>.

⁴¹ Nidhi Singhal, *India Inc.’s Big Bet on Net Zero*, BUSINESS TODAY MAGAZINE (July 10, 2022), available at <https://www.businesstoday.in/magazine/corporate/story/india-incs-big-bet-on-net-zero-340471-2022-07-06>.

⁴² Aliya Ram, *Companies with Strong ESG Credentials Make Better Investments*, FINANCIAL TIMES (October 25, 2017), available at <https://www.ft.com/content/80c833ce-b994-11e7-8c12-5661783e5589>.

⁴³ *Supra* note 18.

next few years. Such state policies on decarbonisation will also impact the businesses and their models of functioning.

As businesses integrate climate policies into their strategies, they become pivotal stakeholders in regulatory initiatives. BT Group, for instance, demands suppliers implement climate mitigation policies, monitor emissions, and set ambitious reduction targets.⁴⁴ Meanwhile, NGOs strategically employ climate litigation to influence corporate behaviour and heighten public awareness of carbon emitters' responsibilities.⁴⁵ Despite arbitration's contentious nature in such cases, it remains a critical tool in shaping climate policy. The convergence of businesses' commitment to climate action and NGOs' strategic advocacy underscores the collective effort needed to address climate challenges and promote corporate responsibility on a global scale.

Businesses today do not operate in isolation. They are closely linked with public policy and environmental concerns. While they continue to influence regulation and decision-making in significant ways, there is now a growing expectation that businesses should move beyond profit and take responsibility for their social and environmental impact. This shift is visible in the increasing use of ESG frameworks, global standards, and climate-related clauses in contracts, which are gradually changing how businesses function.

A. Climate Commitments and the Turn to Contracts

⁴⁴ Andreas Rühmkorf, *Corporate Social Responsibility*, PRIVATE LAW AND GLOBAL SUPPLY CHAINS 88–89 (2015), available at <https://doi.org/10.4337/9781783477500>.

⁴⁵ Simon Birsch, *How Activism Forced Nike to Change Its Ethical Game*, THE GUARDIAN (July 6, 2012), available at <https://www.theguardian.com/environment/green-living-blog/2012/jul/06/activism-nike>; Liana Foxvog et. al, *Still Waiting: Six Months after History's Deadliest Apparel Industry Disaster, Workers Continue to Fight for Compensation*, BUSINESS & HUMAN RIGHTS RESOURCE CENTRE (October 23, 2013), available at <https://www.business-humanrights.org/en/latest-news/still-waiting-six-months-after-historys-deadliest-apparel-industry-disaster-workers-continue-to-fight-for-compensation/>.

The urgency of climate change, coupled with the disruptions caused by the pandemic, has made it increasingly clear that businesses must adopt more sustainable and resilient practices. In response, many businesses are no longer limiting themselves to internal adjustments but are also engaging more actively with broader climate efforts, including regulatory processes and policy developments. This shift is already visible in practice. Companies such as Infosys and BT Group Plc. have begun integrating climate considerations into their core operations, reflecting a wider and growing trend.

In this changing landscape, businesses are not merely subjects of regulation. They are also playing a role in shaping how climate responses are designed and implemented. Their position within the larger framework of climate governance is therefore becoming more significant.

This expanding role is also reflected in the way businesses structure their commercial relationships. In particular, contracts are increasingly being used as instruments to give effect to climate commitments. At the same time, investments in climate mitigation and adaptation are growing rapidly and are expected to increase further with ongoing economic and regulatory transitions. As a result, climate-related considerations are now influencing almost every aspect of business operations and contractual arrangements, including commitments under the Paris Agreement, the Sustainable Development Goals, and ESG standards.

Despite the central role of contract law in shaping economic interactions, it has traditionally paid limited attention to environmental concerns.⁴⁶ Standard contractual clauses have often been used without considering their wider environmental or social impact. However, this position is gradually

⁴⁶ Jie Ouyang, *Reconfiguring Contract Law Through Sustainability*, TRANSFORMATIVE PVT. L. (Oct. 23, 2024), available at <https://transformativeprivatelaw.com/reconfiguring-contract-law-through-sustainability/>.

changing.⁴⁷ Businesses are increasingly recognising that contracts can serve as an important tool for advancing sustainability goals. By incorporating climate-conscious clauses into their agreements, companies can formalise their commitments to sustainable practices and reduce their carbon footprint.⁴⁸ This shift not only aligns with net-zero targets but also encourages wider changes across industries.

As legislative frameworks evolve to regulate emissions, contracts are becoming instrumental in facilitating the transition to a net-zero economy. Whether in implementing renewable energy projects, adopting energy-efficient technologies, or establishing sustainable supply chains, contracts will serve as primary mechanisms for achieving environmental targets. The inclusion of sustainability provisions in contracts can yield substantial environmental and societal benefits, while neglecting these considerations may perpetuate environmental degradation and social disparities.

Integrating climate change-related obligations into commercial contracts is an effective strategy for upholding ESG standards and driving environmental improvements. This involves explicit commitments to reduce carbon footprints, utilize sustainable resources, and engage with suppliers and contractors aligned with similar principles. By embedding these obligations within contracts, companies can foster a culture of sustainability across their operations and partnerships.

⁴⁷ Disha Shetty, *Companies Committed to Net Zero Target*, FORBES (Mar. 24, 2021), <https://www.forbes.com/sites/dishashetty/2021/03/24/a-fifth-of-worlds-largest-companies-committed-to-net-zero-target/?sh=4d38a9c4662f>; *Principles for Responsible Investment*, Annual Report 2020, available at <https://www.unpri.org/annual-report-2020/how-we-work/building-our-effectiveness/enhance-our-global-footprint>.

⁴⁸ Doreen J McBarnet & Marina Kurkchian, *Corporate Social Responsibility through Contractual Control? Global Supply Chains and Other-Regulation, The New Corporate Accountability: Corporate Social Responsibility and the Law*, CAMBRIDGE UNIVERSITY PRESS (2007), available at <http://ci.nii.ac.jp/ncid/BB00347053>.

Collaboration with stakeholders – partners, suppliers, contractors, and customers, is crucial for businesses aiming to decarbonize operations. Diligent contract drafting is essential to ensure the effectiveness of these measures, as the scope and precision of contractual provisions will determine their impact. Overall, leveraging contracts as instruments for sustainability not only aligns with regulatory requirements but also positions businesses as drivers of positive environmental change within their industries and communities.⁴⁹

To uphold the human rights of employees in global supply chains, the American Bar Association [“**ABA**”] introduced the first iteration of model contract clauses [“**MCCs**”] in 2018. This initiative primarily involved incorporating representations and warranties into supplier agreements. Subsequently, in 2021, an updated version of the MCCs was issued, broadening the purview of ESG obligations and mandating purchasers to adopt a more proactive role in safeguarding human rights.

A survey conducted in 2023 by ESG sub-committee of International Bar Association Arbitration Committee revealed that the large multinationals are incorporating the ESG compliance framework by integrating the model contractual clauses on lines of MCC in their contracts with the relevant counterparty.⁵⁰ The impact of this shift is already tangible. Corporations across sectors have embedded ESG due diligence into their standard investment processes to the point where non-compliance can cause a counterparty to be excluded from a contract altogether. ESG warranties, a hallmark feature of the MCC framework, are now in widespread use across organisations of varying sizes and sectors, and the integration of compliance and performance metrics into supply contracts and shareholder agreements signals that MCC-inspired obligations are penetrating deeper

⁴⁹ *Supra* note 12.

⁵⁰ ESG Subcommittee of the IBA Arbitration Committee, *Report on the Use of ESG Contractual Obligations and Related Disputes*, INT’L. BAR ASSN. (2023), available at <https://www.ibanet.org/document?id=report-on-use-of-ESG-contractual-obligations>.

into commercial relationships. As regulatory pressure to disclose and report on carbon budgets grows, this integration is only expected to intensify, with termination, indemnification and remediation provisions for ESG breaches becoming increasingly standard and reflecting the broader trajectory of MCCs from aspirational drafting tools to enforceable instruments of corporate accountability.⁵¹

Beyond individual contracts, this momentum is further reinforced by coordinated industry action. Sub-clause 4.18 of the FIDIC Red Book, for instance, sets an international standard for construction contracts requiring contractors to take all reasonable steps to protect the environment both on and off the site, a provision that may be interpreted to encompass the prevention of emissions, though many argue it should go further by making explicit reference to climate change.⁵²

Similar kind of model contracts are created by the Chancery Lane Project [“**TCLP**”] which is a collaborative initiative involving over 150 leading UK law firms and several top US firms with UK offices, working pro bono to develop practical legal solutions for addressing climate impacts through model contract clauses.⁵³ TCLP’s mission is to ensure every contract and legal framework can positively impact the environment, aligning law and business practices with sustainability goals. The clauses, available in the ‘Climate Contract Playbook’, integrate climate considerations across various legal documents, such as board minutes, supply chain agreements, and employment contracts. These clauses help companies assess, manage, and disclose climate risks, promoting environmental responsibility

⁵¹ *Supra* note 7.

⁵² Centre for Climate Engagement, *Contract Law and Climate Change*, UNIVERSITY OF CAMBRIDGE, available at <https://lawclimateatlas.org/resources/contract-law-and-climate-change-2/>.

⁵³ Clauses, THE CHANCERY LANE PROJECT (May 7, 2024), available at <https://chancerylaneproject.org/clauses/>.

throughout their operations.⁵⁴ TCLP emphasizes that climate commitments should be ingrained in project designs, business strategies, and employee education to foster a sustainable business culture. Each clause includes a detailed narrative outlining its context, application, and environmental impact, aiding companies in implementing comprehensive climate action strategies.

The extant scholarly literature suggests a rising utilization of sustainability clauses within business contracts.⁵⁵ These clauses, encompassing contractual provisions dictating the requisite minimum social and/or environmental standards to be upheld by contractual parties throughout their business endeavours, reflect a discernible trend in contemporary commercial practices.⁵⁶ While these clauses primarily address environmental concerns and frequently reference greenhouse gas management, the inclusion of specific, measurable targets for carbon emission reductions is slowly becoming more prevalent.⁵⁷ Such sustainability clauses includes diverse array of provisions akin to ESG standards within contractual agreements. These clauses take shape of explicit contractual stipulations or references to supplementary documents such as standard contracts, corporate ethical codes, internal policies, Corporate Social Responsibility initiatives taken at the global level, or

⁵⁴ Introduce Climate Provisions to Contract Parties, THE CHANCERY LANE PROJECT (April 15, 2024), available at <https://chancerylaneproject.org/guides/introduce-climate-provisions-to-contract-parties/>.

⁵⁵ *The Triple Bottom Line: The Use of Sustainability and Stabilization Clauses in International Contracts*, PACE UNIVERSITY SCHOOL OF LAW, INSTITUTE OF INTERNATIONAL COMMERCIAL LAW, AND INTERNATIONAL ASSOCIATION FOR CONTRACT AND COMMERCIAL MANAGEMENT (2011); Rashid Ameer & Radiah Othman, *Sustainability Practices and Corporate Financial Performance: A Study Based on the Top Global Corporations*, 108 J. OF BUSINESS ETHICS 61 (2011), available at <https://doi.org/10.1007/s10551-011-1063-y>.

⁵⁶ Michael P Vandenberg, *The New Wal-Mart Effect: The Role of Private Contracting in Global Governance*, Social Science Research Network (2007), available at https://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID984457_code219969.pdf?abstractid=984457.

⁵⁷ Katerina Peterkova Mitkidis, *Using Private Contracts for Climate Change Mitigation* (2014) vol 2 Groningen Journal of International Law 54, 70.

ancillary agreements. The growing inclusion of such climate-related clauses, set against the backdrop of increasing climate risks, points toward a rise in disputes where climate change is a central issue, and this paper will examine in the sections that follow how climate clauses interact with arbitration clauses in a contract.

In this backdrop it is worth reiterating that this paper has adopted a broad definition of climate-change arbitration and haven't confined it to only cases involving material issues of law or facts related to climate law. Based on this climate change disputes could involve cases wherein climate change is a central issue; case wherein climate change is a peripheral issue; or cases wherein climate change is incidental to the case. In fact, climate change may not have anything to do with such arbitration but because purpose of the contract is related to climate change mitigation or adaptation, such arbitrations are characterized by ICC as climate change arbitration. Thus, climate change arbitration may be possible in cases wherein climate change is either an incidental issue or a peripheral issue or where it is not an issue at all.

To avoid arbitrability challenges, it is important to identify what kind of disputes which could come under the umbrella of climate change arbitration and the ones which don't fall under it. Instances where climate change is the focal point of the legal dispute hold significance as they elevate discussions regarding compensation for climate change-induced damages, responsibilities to enhance the presence of renewable energy in energy markets, and the harmonization of national legislation and corporate pledges with the objectives outlined in the Paris Agreement. Such cases with direct connection to climate change may not be arbitrable at all. In that sense term climate change arbitration could be called as a misnomer.

However, there are other instances wherein climate change arbitration could be possible. In what follows, the author has attempted to identify such cases below.

B. Typology Of Contracts Wherein Climate Arbitration Is Possible

Much of the discussion on what kinds of climate change disputes can be submitted to arbitration follows the classificatory framework developed in the ICC Report. The Report adopts a broad and functional approach and groups disputes based on their connection with climate change or climate policy. Subsequent scholarship has, in large measure, followed this structure. A first category consists of disputes arising from contracts that expressly incorporate climate-related obligations, such as emission reduction commitments or sustainability standards. In such cases, disputes concern whether these contractual obligations have been complied with or properly performed.⁵⁸ A second category includes disputes arising from contracts that do not necessarily contain explicit climate provisions but are nevertheless affected by climate change or related developments. These include situations where contractual performance is disrupted by environmental events or where changing regulatory frameworks and energy transition measures affect the economic basis of the contract.⁵⁹

The literature also recognises that certain disputes arise within investment and treaty frameworks, where climate-related regulatory measures or obligations under international regimes give rise to investor-State or inter-State claims. However, these fall outside the immediate scope of this paper.⁶⁰ In addition, climate-related issues may arise across a range of commercial transactions, including infrastructure, energy, and corporate

⁵⁸ Natalie Sheehan & Anna Brennan, *Chapter 18: The New Frontier: Arbitration of Climate Change Disputes*, in Gregory Roy Fullelove & Laila Hamzi eds., *INTERNATIONAL ARBITRATION IN ENGLAND: PERSPECTIVES IN TIMES OF CHANGE* 345, 346–48 (2022); Kathrin Asschenfeldt & Lisa-Marie Ross, *The Role of International Commercial Arbitration in Mastering Climate Change Disputes: Initiatives, Advantages, and Challenges*, 41(3) J. INT'L ARB. 317, 319 (2024).

⁵⁹ ICC, *Resolving Climate Change Related Disputes Through Arbitration and ADR* 2.5 (2019).

⁶⁰ See, Ristead de Paor, *Climate Change and Arbitration: Annex Time before There Won't Be a Next Time*, 8(1) J. INT'L DISP. SETTLEMENT 179, 185–90 (2017).

agreements, particularly where climate-related obligations or regulatory risks are embedded within the contractual framework.⁶¹

At the same time, the literature distinguishes these disputes from certain categories that are generally considered unsuitable for arbitration. These include strategic climate litigation, where the objective is to influence public policy or secure broader climate accountability, often through human rights or constitutional claims. Similarly, disputes concerning public law issues such as environmental permitting or regulatory approvals are typically addressed through courts rather than arbitration.⁶²

This framework provides a useful overview of the field. However, it remains at a level of generality that does not fully assist legal analysis. The ICC Report, as well as subsequent scholarship, identifies broad categories such as contracts incorporating climate obligations and contracts indirectly impacted by climate change. Within these categories, the literature recognises that disputes may arise in different ways, including through regulatory change, physical climate impacts, or evolving commercial practices such as supply chain and emissions-related commitments. However, these distinct situations are generally discussed within the same broad classification without a clear analytical separation based on how climate change enters the contractual relationship.

In practice, these differences are significant. For instance, disputes concerning compliance with climate-related contractual commitments may raise questions of interpretation and enforcement of obligations. Disputes arising from extreme weather events raise questions of performance and excuse, often engaging doctrines such as force majeure. Disputes triggered by regulatory change raise issues of contractual adjustment and allocation of compliance costs. Similarly, disputes arising within supply chains and

⁶¹ *Supra* note 51, at 319.

⁶² *Supra* note 51, at 349–50

commercial relationships may engage questions of responsibility and compliance with evolving standards. Although the literature recognises these scenarios, it does not organise them within a coherent doctrinal framework. The classification therefore remains descriptive and loses clarity for legal analysis, particularly in assessing arbitrability, which depends on the legal source of the dispute rather than its broad subject matter.

This paper proposes a contract-centred typology to address these concerns. It shifts the focus from the subject matter of the dispute to the way in which climate change interacts with contractual relations. It identifies distinct pathways through which disputes arise, including contracts with a climate purpose but non-climate disputes, contracts affected by physical climate impacts, contracts affected by regulatory or policy change, disputes arising from value-chain emissions, and disputes linked to financial and governance obligations. This approach brings greater precision to classification and aligns more closely with how arbitral tribunals analyse disputes through contractual rights, obligations, and allocation of risk.

i. Contracts with climate change related purpose but underlying disputes have no nexus with climate-change.

This typology also helps in assessing the relationship between arbitration and climate policy. Not all disputes that fall within the broad category of climate change disputes have the same normative or regulatory significance. A dispute concerning delay due to extreme weather does not influence climate policy in the same way as a dispute concerning emission targets or ESG commitments. A clearer typology allows us to identify which disputes have the potential to shape climate governance and which remain confined to private commercial ordering. This distinction is necessary if we are to make careful and credible claims about the role of arbitration in addressing climate change.

This scenario involves contracts that are established with the intention of addressing climate change-related objectives or incorporating provisions aimed at mitigating environmental impacts. However, when disputes arise

under these contracts, the issues at the heart of the conflict do not have a direct connection to climate change.

For example, a company which is changing its reliance from fossil fuels to renewable energy may award a contract to another entity to carry out such transition. Any dispute which is raised under such contract is a private dispute though the overall objective of such contract is mitigation for climate change.

Another example could be of a contract between two parties which might include clauses requiring the implementation of environmentally sustainable practices or the reduction of carbon emissions. While these clauses reflect a commitment to combating climate change, the actual dispute between the parties might revolve around issues such as breach of contract, payment disputes, or disagreements over project performance.

In such cases, the dispute itself does not directly involve climate change-related matters. Instead, the parties are embroiled in a disagreement that pertains to the specific terms and conditions of the contract or the execution of the agreed-upon activities. Despite the presence of climate change-related provisions in the contract, the underlying dispute remains disconnected from issues related to environmental conservation or sustainability.

ii. *Contracts with a climate change–related purpose where the dispute arises from alleged non-compliance with climate-related obligations.*

This category covers contracts that expressly incorporate climate mitigation or adaptation commitments as part of their core purpose. Disputes arise where parties disagree over the performance, measurement, or fulfilment of these obligations. The focus, therefore, is on interpretation and enforcement of climate-related commitments within the contractual framework. For instance, contracts such as Green Climate Fund agreements or emission trading system agreements, which are designed to

support low-emission or climate-resilient projects, may give rise to disputes where a party fails to meet agreed emission reduction targets, project benchmarks, or reporting requirements. Similarly, commercial contracts incorporating sustainability-linked targets or environmental representations may lead to disputes where compliance with such commitments is contested.

iii. Contracts with no specific climate change related purpose but underlying dispute might be because of climate change activity.

This scenario involves contracts that do not contain explicit provisions related to climate change but where the underlying dispute may arise as a result of activities or circumstances related to climate change. For example, where a cost of construction project escalates because of climate change. A dispute may arise between the parties as to who shall bear such extra costs.

Also, take into account a contract for constructing a building. Even though the contract itself may not explicitly mention climate change or environmental considerations, instances of extreme weather events associated with climate change, such as hurricanes or flooding, causing delays or damage to the construction project, could prompt disputes concerning accountability for the resultant losses or delays.

Similarly, in agricultural contracts, issues such as crop failure due to changing weather patterns or disruptions in water supply caused by droughts, both linked to climate change, could lead to disputes over contract performance or liability, even if the contract does not explicitly address climate-related risks.

In essence, while these contracts may not have been drafted with climate change in mind, the effects of climate change can still impact the parties involved and give rise to disputes that require resolution through contractual mechanisms or legal processes.

This underscores the broader implications of climate change for contractual relationships and the need for parties to consider potential climate-related risks and contingencies, even in contracts that do not explicitly address these issues. It also highlights the importance of flexibility and adaptability in contract drafting to address unforeseen challenges arising from climate change impacts.

iv. Contracts with no specific climate change related purpose but underlying dispute might be because of change in climate related policy.

This scenario involves contracts that do not contain explicit provisions related to climate change but where the underlying dispute may arise due to changes in climate-related policies.

For example, A entered a contract with B. Under it, A had to supply 50 cars with BS IV compliant engine. However, after the cars were built, government changed the policy. The government declared that all cars manufactured from a particular date should have BS VI compliant engine. B refused to accept the delivery.

Also, consider a contract between a company and a supplier for the provision of raw materials. While the contract may not mention climate change or environmental regulations, if new government policies or regulations are introduced to mitigate climate change, such as carbon pricing or emissions standards, it could impact the cost or availability of the raw materials. This change in policy might lead to disputes between the parties over contract renegotiation, cost-sharing arrangements, or contract termination.

Similarly, in contracts related to energy production or transportation, changes in climate-related regulations, such as requirements for renewable energy sourcing or emissions reductions, could affect the terms of the contract and lead to disputes between the parties.

In essence, while these contracts may not have been drafted with climate change in mind, changes in climate-related policies can still impact the parties involved and give rise to disputes that require resolution through contractual mechanisms or legal processes.

v. *Contracts with or without specific climate change related purpose but underlying dispute is because of the impact of the business on climate change*

This scenario involves contracts where the underlying dispute arises due to the impact of the business activities on climate change, regardless of whether the contract explicitly addresses climate change concerns.

For example, consider a value chain arbitration between a manufacturing company and a transportation provider for the delivery of goods. If the manufacturing company's operations contribute to greenhouse gas emissions, leading to environmental concerns or regulatory action, disputes may arise between the parties over the environmental impact of the transportation services provided.

Supply chain contracts, initially devised to govern transactions between two parties, have evolved to include provisions safeguarding third-party interests, such as CO₂ emission reduction mandates. For instance, BT's supplier agreements exemplify this shift, where failure to establish carbon reduction targets constitutes a breach, despite meeting contract specifications, blurring the line between bilateral arrangements and regulatory frameworks.⁶³ Sanctions for breaches vary based on contract interpretation: economic restoration in commercial contracts versus regulatory compliance reinstatement in regulatory contexts.

Understanding value chains is increasingly crucial for climate change mitigation and adaptation efforts, leading to a potential rise in “*value chain climate litigation*”, holding companies accountable for chain-related actions.

⁶³ BT Group, *Generic Standard 20 Climate Change Procurement Standard* (2013), available at <https://groupertranet.bt.com/selling2bt/Downloads/GS20v3.pdf>.

Decarbonizing supply chains is essential for ambitious climate goals.⁶⁴ Neglecting supply chain resilience may expose executives to shareholder claims.⁶⁵ Similarly, contracts involving land development or resource extraction may lead to disputes if authorized activities contribute to climate change impacts like deforestation or pollution.

Such disputes highlights the interconnectedness of business activities and climate change impacts and underscores the importance of considering environmental risks and responsibilities in contractual relationships, regardless of whether climate change is explicitly addressed in the contract. It also emphasizes the need for businesses to proactively manage their environmental footprint and mitigate potential disputes by integrating sustainability principles into their operations and contractual agreements.

vi. Contracts with or without specific climate change related purpose and underlying dispute is because of actions or omissions which affects climate change.

This scenario involves contracts where the underlying dispute arises due to actions or omissions that have an impact on climate change, regardless of whether the contract explicitly addresses climate change concerns. Example under this category is of dispute against financial actors.

A subset of cases, aiming to influence financial market decisions to align with climate objectives, has emerged, covering a broad spectrum from investor-led challenges to disclosures of climate-related risks. Financial entities are accused of inadequately disclosing and managing climate risks, with cases alleging intentional misrepresentation through “greenwashing”.⁶⁶ Financial institutions face various claims, including those related to green

⁶⁴ CDP, *Transparency to Transformation: A Chain Reaction Global Supply Chain Report 2020*, (2021) <https://www.cdp.net/en/research/global-reports/transparency-to-transformation>.

⁶⁵ Abhijeet Ghadge, Hendrik Wurtmann & Stefan Seuring, *Managing Climate Change Risks in Global Supply Chains: A Review and Research Agenda*, 58 INT’L J. OF PROD’N RES. 44 (2019).

⁶⁶ *Supra* note 20.

finance disclosures and breaches of contract. Fiduciary duty breaches may arise if institutions continue to finance high-emission projects, potentially leading to claims of indirect pollution liability.⁶⁷

The recognition of climate litigation as a financial risk mandates that corporations, investors, banks, and insurers disclose litigation risks in accordance with TCFD guidelines. Failure to do so may constitute a breach, thereby increasing litigation risk.⁶⁸ A significant case in this context is *ClientEarth v. Enea*, where ClientEarth, a shareholder in Enea, filed a lawsuit to invalidate a resolution approving the construction of a new coal-fired power plant in Poland. This litigation questioned the project's financial feasibility in the context of the transition to a low-carbon economy.⁶⁹ This case illustrates a growing trend in which litigants aim to hold companies accountable for their contributions to climate change, indicating a shift towards greater accountability within the financial sector regarding climate-related issues.

To sum up, the scope of climate change arbitration may not be understood through broad or fixed definitions alone. It requires us to look at how climate considerations enter contractual relationships and shape the disputes that arise from them. The typology developed here helps in doing exactly that. It breaks down different kinds of disputes and shows how they operate in practice. This, in turn, makes it easier to assess which disputes can be resolved through arbitration and which are better suited for public law forums. It also gives a clearer picture of the role arbitration can realistically play in climate-related matters. This approach helps us move beyond treating all climate disputes in the same way and instead recognise the differences between them in a more structured manner.

⁶⁷ Javier Solana, *Climate Litigation in Financial Markets: A Typology*, 9 TRANSN'L ENV. L. 103, 103 (2019) <https://doi.org/10.1017/s2047102519000244>.

⁶⁸ *Id.*

⁶⁹ *ClientEarth v. Enea*, GC 425/18 (Pol. 2018).

IV. Conclusion

Businesses can play a role in the climate rule making through “*collaborative environmental law*.”⁷⁰ It is crucial for companies to manage physical and transitional risks effectively, acknowledging their historical emissions and taking immediate actions to address them. With the expected rise in climate arbitration and regulatory measures aimed at reducing emissions, business models as well as how they transact businesses through contract, must evolve.⁷¹

In this context, it becomes necessary to adopt a broader and more practical understanding of climate change arbitration. The concern is not limited to disputes that explicitly raise climate questions, but extends to those that influence how climate commitments are implemented, interpreted, and enforced. The typology developed in this paper reflects this shift. It shows that climate-related disputes do not arise in a single form, but emerge across different contractual settings.

Contracts are no longer neutral instruments. They are increasingly used to allocate climate risks, impose sustainability obligations, and structure relationships across value chains. This change is already visible in the growing use of ESG-linked clauses and supply chain standards, which extend climate responsibility beyond immediate parties.

In this evolving landscape, arbitration does not operate merely at the periphery of climate governance. It provides a forum where these

⁷⁰ Eric W Orts & Cary Coglianese, *Debate: Collaborative Environmental Law: Pro and Con*, 156 UNI OF PENNSYLVANIA L. REV. 289 (2007).

⁷¹ Joana Setzer and Catherine Higham, *Global Trends in Climate Change Litigation: 2021 Snapshot*, GRANTHAM RESEARCH INSTITUTE ON CLIMATE CHANGE AND THE ENVIRONMENT AND CENTRE FOR CLIMATE CHANGE ECONOMICS AND POLICY, LONDON SCHOOL OF ECONOMICS AND POLITICAL SCIENCE, (2021) https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2021/07/Global-trends-in-climate-change-litigation_2021-snapshot.pdf.

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contractual commitments are tested, interpreted, and enforced. Contracts if viewed as instruments of risk allocation, can influence how businesses understand their obligations and how they structure future transactions.

QUALIFIED CONFIDENTIALITY IN INDIAN MEDIATION: A CRITICAL ANALYSIS OF SECTIONS 22 AND 23 OF THE MEDIATION ACT, 2023

*Ms. Khushi Rohtagi**

Abstract

The concept of confidentiality is often mythologised as the soul of mediation, and its recording under the Mediation Act, 2023, reveals the troubled liaison of secrecy and justice. Section 22, which has been celebrated as a protection of party candour, in a digital and constitutional environment, does not work. The ban on recording and disclosure appears to be airtight, yet the Statute does not put a check on the third-party digital platform, metadata trails, and vague exceptions to enforcement and challenge. The secrecy which was intended to give fairness prevails when the compromised mediated settlement is marred with coercion or fraud. The question addressed in this article is whether Section 22 truly embodies the principle of confidentiality, or whether it instead constitutes a narrowly tailored form of privilege, susceptible to erosion by constitutional mandates, procedural requirements, and technological developments. The note, through a comparative prism relying on the redacted-disclosure model in Singapore, contends that there needs to be a reconsidered model, that is, one that puts confidentiality as the considered filter between privacy and accountability on the one hand and the right to a fair trial on the other. The research finally places the mediation confidentiality in the framework of India-wide jurisprudence of proportionality, transparency and digital governance, and posits the question: to what extent is mediation secrecy excessive?

I. Introduction: Mediation and the tension surrounding Confidentiality

This call was echoed by a recent national address of the former Chief Justice of India, Sanjiv Khanna, who stepped forward to state that mediation does not represent a lesser justice but rather a wiser justice, and that the Statute of mediated dispute resolution must avoid the adversarial mould of

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courtroom litigation.¹ At the centre of this paradigm shift is confidentiality. The promise of mediation is based on an environment where parties have no fear of sharing acknowledgements, proposals, admissions, and even apologies without facing the fact that such communication will come back to haunt them in a tribunal or court.² This secure environment, which is facilitated by secrecy, is what makes openness, taking risks, and ultimately the inventive resolutions that characterise the mediation process and not the adjudication process, possible. Without confidentiality, the mediator and the parties would become defensive and formalistic, rather than engaging openly and using mediation as a constructive, relationship-building process.

At first, Section 22 of the Mediation Act, 2023 [**“Mediation Act”**] seems to have the two-fold purpose of establishing trust and finality of mediation processes: it encompasses the mediator, the mediator service provider, and all involved parties under the agreement to maintain secrecy of the content of discussions, proposals, admissions, the documents prepared to mediate, and any other mediation communications; it forbids the use of audio- or video-recording; and prohibits parties to rely on such communications in any court, tribunal or arbitral process.³

II. Legal and Comparative Environment

However, a hidden tension lies behind this strength. Confidentiality is indispensable to mediation because it promotes candour and facilitates settlement. Yet, when framed as an inflexible evidentiary prohibition, it may obstruct the enforcement or challenge of a Mediation Settlement Agreement, obscure allegations of coercion or unfair bargaining, and

¹ *Not All Disputes Suited for Courtrooms; Mediation Is Mode for Redressal: CJI Sanjiv Khanna*, NEW INDIAN EXPRESS (Feb. 15, 2025).

² Bobette Wolski, Confidentiality and Privilege in Mediation: Concepts in Need of Better Regulation and Explanation, 43 U.N.S.W. L.J. (2020).

³ The Mediation Act, 2023, § 22, No. 32, Acts of Parliament, 2023 (India) [*hereinafter* “**Mediation Act**”].

impede access to justice. The difficulty, therefore, is not confidentiality per se but the absence of a calibrated framework that reconciles confidentiality with the constitutional guarantees of fair procedure under Article 21 of the Constitution of India [“**COI**”]. A well-designed confidentiality regime must protect mediation communications while still permitting narrowly tailored disclosure where necessary for enforcement, challenge, or judicial review.

Besides, in the digital age of third-party platforms, cloud storage, metadata footprints and cross-border data flows, the statutory text is silent on the most important vulnerabilities of breaches of confidentiality. It is against this backdrop that the requirement of confidentiality is subject to a three-pronged test of (i) necessity, i.e., is there a need for disclosure of information for determining allegations of fraud and coercion? (ii) proportionality, i.e., is it possible for limited disclosure of information? and (iii) constitutional compatibility, i.e., is there any impact on judicial review?⁴ However, with the advent of the digital age, there is a need for a fourth prong of testing – Digital Vulnerability, i.e., is there any requirement for metadata, intermediary platforms, and cloud storage?

A. Indian Law on Confidentiality Before the Mediation Act

Confidentiality was already a part of the statutory approach in India to dispute resolution through mediation and arbitration, although in a limited and rather patchwork manner, much before the enactment of the Mediation Act. For conciliation, there was a clear indication in Section 75 of the Arbitration and Conciliation Act, 1996, [“**Arbitration Act**”] which stated that the conciliator and the parties shall maintain all matters regarding the conciliation proceedings to be confidential.⁵ This will be true of settlement

⁴ Modern Dental College & Research Centre v. State of Madhya Pradesh, (2016) 7 S.C.C. 353, ¶¶ 59–63 (India); Arbitration and Conciliation Act, No. 26 of 1996, § 34 (India) [*hereinafter* “**Arbitration Act**”]; Bobette Wolski, *Confidentiality and Privilege in Mediation: Concepts in Need of Better Regulation and Explanation*, 43 UNSW L.J. 1110 (2020).

⁵ Arbitration Act § 75.

agreements as well, which should not be disclosed, unless it is disclosed due to the necessity of implementation and enforcement, which is a direct indication of a definite legislative commitment to the confidentiality of conciliation.

This position was substantially reinforced with the 2019 Amendment to the Arbitration Act, which added Section 42A. The provision mandates that the arbitrator, the arbitral institution, and the parties to the arbitration agreement shall maintain confidentiality of all arbitral proceedings *except* the award, where its disclosure is necessary for the purpose of implementation and enforcement of the award.⁶ Despite the fact that this was a major shift, observers have pointed out that this carve-out is limited to the disclosure of the award for enforcement, and leaves out more general justifications for disclosure, like contesting the award or seeking temporary relief.⁷ Therefore, the implementation of Section 42A of the Arbitration Act represented a “*qualified confidentiality*” model as opposed to a strict regulation model.

Furthermore, although India has recently enacted laws concerning personal data protection, especially the Digital Personal Data Protection Act, 2023, the law addresses personal data as opposed to mediation communications or privacy of the negotiations and settlement process. No previous comprehensive legislative scheme has addressed confidentiality of mediation communications in the manner that has been the case in some other foreign jurisdictions. Accordingly, the previous legal environment in India comprises, among other areas, a robust tradition of confidentiality in conciliation, as mentioned in Section 75 of the Arbitration Act, a moderate tradition of confidentiality in arbitration (Section 42A), and no tradition of confidentiality in mediation itself.

⁶ Arbitration Act § 42A.

⁷ Gopal Subramaniam, *Confidentiality under the Indian Arbitration & Conciliation Act of 1996*, INT’L BAR ASS’N BULLETIN, <https://www.ibanet.org/article/015535E1-E477-42E7-D6DC978975D5> (accessed Aug. 8, 2025).

B. Comparative Insights

Comparative analysis shows that in other jurisdictions more sophisticated procedural mechanisms of confidentiality in mediation have been used and this can tend to indicate viable models for India.

The Singapore Act of Mediation, 2017, [**“Singapore Act”**] came into force on November 1, 2017, and codified much of what mediation is about, confidentiality included. Under Section 9 of the Singapore Act, a mediation communication is defined as a broad category of anything said or done, documents prepared or information provided in the course of, or for the purpose of mediation is confidential, subject to narrowly drawn exceptions.⁸ A court or arbitral tribunal may only admit mediation communications with the consent of all parties to the mediation, and where applicable, the mediator, under Section 11(2) of the Singapore Act. In doing so, it must take into account a number of pertinent circumstances, including whether the communication has already been disclosed, whether disclosing it would serve the public interest or the administration of justice, and any other pertinent considerations.⁹ As a result, Singapore uses a redaction or leave-of-court model, which allows mediation communications to be shared “*under supervision*” while maintaining party identity and candour, as opposed to an impenetrable wall of secrecy.

Contrary to the United Kingdom’s position, which does not recognise mediation confidentiality in a single statute, the ruling of the courts and the general practice show that confidentiality in mediation is “*a necessary exception*”

⁸ Mediation Act (Sing.) §§ 9–11; *see also* Rajah & Tann, *Developments in Singapore’s Mediation Landscape*, SING. L. GAZETTE (May 2016), <https://oonpartners.com/developments-in-singapores-mediation-landscape>.

⁹ *Id.* at § 11(2); *see also* *Arbitration Asia – Mediation (Singapore)*, LEX GTD (July 2021), https://arbitrationasia.rajahtannasia.com/wp-content/uploads/2021/07/Rajah-Tann-Singapore_LexGTD-T-Mediation-2021.pdf.

for the administration of justice”.¹⁰ The same idea prevails under the United Nations Commission International Trade Law Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation (2018) [**Model Law**], treating confidentiality of communication as a part of the mediation procedural framework.¹¹ Under Article 4 of the Model Law, confidentiality and the issue of admissibility of mediation communications are discussed. This Article, as a default rule, makes mediation proceedings confidential and inadmissible in subsequent proceedings, however, the parties can agree upon the disclosure or exceptions can be made as “*required by law*.”

These models in collaboration demonstrate that the confidentiality of mediation is usually not absolute but rather qualified by procedural safeguards and exceptions related to the fairness of the process, its enforcement, and transparency.

III. Section 22: The Scope and Limits of Confidentiality

A. Broad Confidentiality of Mediation Communications

The Mediation Act introduces a strong and unqualified guarantee of confidentiality for mediation through Section 22(1) of the Mediation Act. The provision asserts that,

“amongst others, the mediator, a mediation service provider, the parties and participants in the mediation shall preserve the confidentiality of all the matters regarding to the mediation proceedings; these are: – (i) acknowledgments, opinions, suggestions, promises, proposals, apologies and admissions made during the mediation; (ii) acceptance of, or willingness to, accept proposals made or exchanged

¹⁰ Ctr. for Soc. & Crim. Just., Council of Eur., *Quel est le champ d’application de la confidentialité?*, <https://rm.coe.int/1680747c1f>.

¹¹ UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, U.N. Doc. A/CN.9/WG II/WP.189 (Aug. 8, 2018), https://uncitral.un.org/en/texts/mediation/modellaw/commercial_conciliation.

*in the mediation; (iii) documents prepared solely for the conduct of mediation or in relation thereto; (iv) any other mediation communication.”*¹²

The lawmakers’ decision indicates a wide-ranging protection designed to promote the honesty and integrity that are essential for successful mediation: the parties are allowed to communicate without any restrictions, suggest innovative solutions, apologize or acknowledge their faults without being adjudicated in the future without the worry of the evidence being held against them. Thus, confidentiality is a tool that has a positive effect on the relationship within the mediation process.

Nonetheless, the legal wording fails to mention a number of new and current mediation practices, in particular, those concerning online and digital platform mediation. The term “*documents prepared solely for the conduct of mediation*” in Section 22(1) of the Mediation Act probably includes the paperwork done offline, but there is no mention of cases of metadata, platform logs, chat transcripts, cloud-storage records, or any other data trails created during digital mediation. The all-inclusive “*any other mediation communication*” might implicitly include such data, yet, the lack of clear wording leaves the question of whether the information is protected or whether the third-party platform logs are barred unanswered. This ambiguity is significant because digital mediation increasingly occurs on privately operated platforms whose servers automatically generate and store operational data independent of the parties’ control. If such records are not clearly classified as protected mediation communications, they may become susceptible to disclosure through data requests, platform policies, or cybersecurity breaches, thereby undermining the confidentiality framework that the statute seeks to preserve. The uncertainty around this matter in the tech-driven mediation setup is bound to negatively impact the implementation of the confidentiality promise in the online context.

¹² Mediation Act § 22(1).

B. Third-Party Platforms and Confidentiality

Section 22(2) of the Mediation Act provides one more protective level –

“No audio or video recordings of the mediation proceedings shall be made or maintained by the parties or the participants, including the mediator and mediation service provider, whether undertaken in person or online, in order to secure the confidentiality of the conduct of the mediation proceedings.”

This is one of the greatest vectors of possible confidentiality violations.¹³

But in the digital mediation ecosystem where platforms such as video-conferencing tools (e.g., Zoom, Google Meet), secure messaging systems, cloud platforms, and Online Dispute Resolution [“**ODR**”] portals are involved, there is a technology-stack with layers of third-party data-processors, data-storage in the cloud, auto-metadata generation (timestamps, IP addresses, login logs), auto-chat-transcripts, potential background records, backup servers, etc. These third-party sites are not usually formal parties or participants under the terms of the Mediation Act, and thus arguably are not covered by the express prohibition of Section 22(2).

This creates a loophole: although the mediator, participants, and service provider are prohibited from recording, no corresponding restriction is imposed on the platform host, cloud vendor, or network operator. Therefore, the interception of data is possible; it could be kept in cloud storage, metadata logs or access intermediaries, which can lead to the loss of confidentiality assurance. Moreover, the data-protection mandate under the Mediation Act will not be unified: a newly enacted Digital Personal Data Protection Act, 2023 [“**DPDP Act**”] regulates personal data (identified information), but does not directly regulate the mediation communication or metadata trail produced by it.

¹³ Mediation Act § 22(2).

A doctrinal analysis of the Mediation Act and the DPDP Act indicates that the two statutes work at different normative levels. The Mediation Act conceptualizes confidentiality as a shield, securing the protection of the content of mediation against disclosure as well as against disclosure of such proceedings in the courtroom in order to safeguard candour and settlement integrity. The DPDP Act regulates the processing of the digital personal data, i.e. data concerning an identifiable individual, and frames the obligations on the basis of the consent, lawful purpose, storage limitation, and security protection.¹⁴ Their intersection is thus incidental as opposed to comprehensive: when mediation communications include personal data, these communications are in both regimes of the Mediation Act and the DPDP Act, but in contrast, communications that have no identifiable markers (e.g., anonymized negotiation position) are not covered by the DPDP regime but continue to be confidential under mediation law.

This differences in doctrine comes out clearly when we look at metadata and system generated data in online mediation. Section 22(2) of the Mediation Act prohibits audio/video recordings by “parties or participants”, but digital platforms inevitably leave timestamps, IP logs, logins and device identifiers, auto-saving chat transcripts, and server-side backups. It has been revealed that Digital Platforms, herein Zoom, exposed meeting identifiers and user data routed through unintended servers.¹⁵ Technical research on videoconferencing also reveals that timestamps, IP addresses, and user activity records are generated and recorded for authentication, troubleshooting, and security monitoring.¹⁶ Notably, such

¹⁴ Digital Personal Data Protection Act, No. 22 of 2023, §§ 2(n), 4–8 (India) [*hereinafter* “**DPDP Act**”]

¹⁵ Kashmir Hill, *Zoom’s Security Issues: The Video-Chat App Faces Questions Over Privacy and Encryption*, N.Y. Times (Apr. 3, 2020), <https://www.nytimes.com/2020/04/03/technology/zoom-security-privacy.html>.

¹⁶ S. Li, A. Khisti & M. Ammar, *Security and Privacy in Video Conferencing Systems*, 21 ACM COMPUT. SURV. 1 (2021); Zoom Video Communications, *Privacy Statement*, <https://explore.zoom.us/en/privacy/>.

system generated artefacts are created irrespective of deliberate recording by the participants. Therefore, even when Section 22(2) of the Mediation Act prohibits participants from recording, it may still leave traceable metadata footprint capable of disclosure.

This data might be considered ‘personal data’ under the DPDP Act when it is associated with a person that is identifiable, and thus be subject to DPDP protection, but otherwise metadata which does not refer to a person per se may not be subject to any DPDP protection at all, and is not identifiable as “mediation communication” under Section 22. The consequence is that substantive content of mediation will be safeguarded, identifiable information will be safeguarded, but infrastructural data trails, which can recreate patterns of participation, duration of caucus, or intensity of communication, is inadequately covered by both laws.

Liability allocation makes things even more complicated. The DPDP Act makes a difference between “data fiduciaries,” who decide how and why data should be processed, and “data processors,” who do the processing for fiduciaries.¹⁷ When mediation happens online, it is still unclear who decides the “purpose and means” of processing: the mediation service provider, the ODR platform, or the video-conferencing host. If platforms set their own rules for data retention, analytics use, or cross-border storage, they may become fiduciaries and be subject to direct legal obligations. But the Mediation Act does not specifically say that these kinds of technological middlemen have to keep things private. Because of this, a platform could meet DPDP security standards while still keeping mediation-related metadata in a way that goes against the spirit of Section 22, which would create a difference between procedural confidentiality and data governance.

Furthermore, statutory disclosure requirement and mediation confidentiality conflict with each other. The DPDP Act permits processing without obtaining consent so as to obey the legislation and react to lawful

¹⁷ DPDP Act §§ 2(i), 2(k).

demands by courts or authorities.¹⁸ In case they were requested by law to provide server logs or stored transcript of a mediation session, the DPDP framework may permit that they be disclosed. Yet, Section 22(3) of the Mediation Act states that the courts are not allowed to examine mediation communications, except in some instances.¹⁹ There is no clear harmonization provision to indicate how exceptions to data protection laws apply with mediation confidentiality or vice versa. And until the law is changed or a court decision arrived at, this intersection would open the protective wall: confidentiality may guard negotiation speech, but data protection legislation could expose the digital tracks of this speech indirectly.

In light of this, the Mediation Act must acknowledge third-party data-processors, cloud or ODR platforms to have a duty of confidentiality (or at least, a duty to be certified or encrypted). In addition, the requirement to use encrypted and certified ODR platforms, audits, logs, and adherence to confidentiality would increase the protection during the digital mediating age. In the absence of such a system, the noble confidentiality regime will be subverted by technological facts.

IV. **Balancing Confidentiality and Fair Trial: The Problem of Section 22(4) and Its Elucidation**

The Mediation Act makes an effort to codify a very delicate balance between the right to confidentiality and the need for judicial openness. Section 22(4) of the Mediation Act states that “*disputes, settlement agreements and their outcomes may be used for research, training and statistical purposes only if the data is anonymised.*”²⁰ At first glance, this provision is aimed at facilitating a legitimate objective: allowing the empirical study and institutional learning from the mediation process while keeping the identities of the parties

¹⁸ DPDP Act § 7.

¹⁹ Mediation Act § 22(3).

²⁰ Mediation Act § 22(4).

confidential. By allowing anonymised data to be disclosed, the legislature is in sync with the global trends in which the mediation institutions publish the aggregation of data for enhancing procedural design and accountability.²¹ A similar strategy can be seen in Singapore. The Singapore Mediation Act 2017 protects mediation communications from being made public. However, institutional practice allows the publication of anonymized and aggregated statistical data that doesn't show who the parties are or what they are negotiating about. For example, the Singapore International Mediation Centre's annual reports include settlement rates, case volumes, and sectoral data.²² This keeps things private while also making things clearer and more efficient. This model shows that it is possible to keep the deliberative content private while still making systemic data available for research and accountability.

Yet, the Explanation that accompanies Section 22 appreciably increases the area of disclosure by allowing it “*for the purpose of registration, enforcement, and challenge of a mediated settlement agreement*” [“MSA”].²³ This development even though it appears to be procedural, actually creates a tension of a structural nature within the statute. While confidentiality is foundational to the Mediation, the statute simultaneously provides for the enforcement of the Mediation Settlement Agreement. Inevitably, enforcement and challenge require disclosure of mediation-related information. The issue arises, not from such disclosure but, from the absence of a clearly articulated threshold governing when and to what extent mediation communications may be revealed.

²¹ CEPEJ Handbook on Mediation, Council of Eur., § 8.2 (2019); *see also* WIPO Mediation Rules art. 20(b)–(c) (World Intell. Prop. Org.), <https://www.wipo.int/amc/en/mediation/rules>

²² Sing. Int'l Mediation Ctr., Annual Review (Aug. 2021), <https://simc.com.sg/sites/default/files/content-files/International-Developments-Annual-Review-August-2021-duplex.pdf>

²³ Mediation Act, 2023, § 22 expln.

The issue becomes serious when one party contests a Mediation Settlement Agreement [“MSA”] based on coercive actions, fraudulent practices, or misrepresentation. According to Section 22(3), mediators will not be obliged to divulge any sort of information, document or communication which took place during mediation.²⁴ There is an absolute prohibition imposed on the courts as regards inspecting the internal record of the mediation, even in situations where the validity of the resulting agreement is contingent upon that very inspection. Thus, this results in a paradox: to substantiate that an MSA was the product of coercion, a party has to uncover the entire mediation scene. Yet, the statute prohibits such a scenario. The outcome a procedural impasse that not only jeopardises the integrity of mediation but also the constitutional guarantee of a fair trial under Article 21 of the COI, thus causing a deadlock.

Although, mediation in itself is not a criminal trial, the implementation or annulment of MSA inevitably involves judicial adjudication. To the extent that Section 22(3) functions as absolute evidentiary bar even where there was an alleged fraud or coercion, it will have the effect of undermining significant judicial review. The constitutional issue is not the mediation process itself, but whether the statutory confidentiality regime imposes an excessive burden on access to justice and procedural fairness as stipulated in Article 21 of the Constitution of India.

The existing conflict also comes into disagreement with the Order XXIII Rule 3 of the Civil Procedure Code, 1908, which confirms that any judicial settlement should be accompanied by a ruling affirming that it is “*lawful*.”²⁵ The courts’ satisfaction about the lawfulness of the settlement inherently involves some kind of access to the evidence of the activities through which the settlement was reached. In the absence of a limited disclosure mechanism, the courts may find themselves unwittingly enforcing the

²⁴ Mediation Act § 22(3).

²⁵ Code of Civil Procedure, No. 5 of 1908, Order XXIII, Rule 3 (India).

agreements that are tainted with undue influence or even fraud simply because the mediation process is out of bounds for scrutiny.

The above concern is not applicable in the context of the arbitral proceedings under the Arbitration Act, since arbitration is structurally adjudicatory and not facilitative. Though the confidentiality of arbitral proceedings is statutorily acknowledged by Section 42A, the statute categorically limits the confidentiality by the requirement to reveal information when such is required to implement and enforce the award. The arbitral awards are subject to review under Section 34 on the basis of defined reasons which include fraud, patent illegality, natural justice violation or contravention of the public policy.²⁶ Section 34 judicial review is not an examination of any confidential settlement negotiations, but rather an examination of a rational ruling based on pleadings, documentary evidence, oral testimony and procedural decisions already a part of the arbitral record. Confidentiality in arbitration, thus, works in parallel, but not in derogation, of judicial control.²⁷ The existence of courts is not such that any materials that led to the award cannot be examined; on the contrary, it is that which makes up the basis of review.

Mediation under the Mediation Act, in its turn, does not lead to an adjudicatory pronouncement but a settlement agreement. There is no structured evidentiary record, no determinations of fact and no determination to be scrutinized. In a situation whereby a party challenges a Mediation Settlement Agreement on the basis of coercion, undue influence or misrepresentation, the court will have to look into the nature of the negotiation process itself due to the absence of a reasoned award. If Section 22(3) is read as a complete bar on the courts taking cognizance of the communication in mediation, the material needed to determine the voluntariness will be locked out. The mediation confidentiality can

²⁶ Arbitration Act § 34.

²⁷ *Ssangyong Eng'g & Constr. Co. v. Nat'l Highways Auth. of India*, (2019) 15 S.C.C. 131, ¶¶ 34–42 (India).

jeopardize the locking of the process compared to arbitration where the adjudicatory record continues to live under confidentiality.

In this regard, the Singapore Act provides a comparative insight that presents a useful model. Section 9 of the Singapore Act prohibits the public disclosure of mediation conversations and, simultaneously, makes a very narrow exception: for purposes like deciding if the mediated settlement was obtained by fraud or duress, the court might allow disclosure in camera for a limited time.²⁸ The court may allow such an exception. Hence, the Singaporean approach allows the systemic value of confidentiality to be maintained while at the same time the judicial verification is allowed to function so as not to let the confidentiality cover up any wrongdoing.

On the other hand, India's legal scheme lacks such procedural subtleties. The Explanation to Section 22 gives more access to disclosure than it should by not making its limits clear, neglecting to point out who is allowed to see the data, what the means of disclosure are, and what the protective measures are. The lack of a disclosure control system opens the door to random exposure of the information, which may lead to distrust among the parties regarding the confidentiality of mediation.

Thus, it is suggested that a two-level confidentiality structure be adopted:

First, General Confidentiality Tier: Total confidentiality for all mediation communications, documents, and activities, which can be enforced equally against the parties, mediators, and providers of the service. *Second*, Controlled Disclosure Tier: An exception that is very strictly limited and applicable only in registration, enforcement, or challenge proceedings, where disclosure is made to the judge presiding at the trial, in sealed or in camera review, solely to ascertain whether there was voluntariness, lawfulness, or no fraud in the MSA.

²⁸ Mediation Act (Sing.) § 9.

Such a finely tuned approach would harmonise the constitutional requirement of fairness with the statutory assurance of confidentiality, thus maintaining the moral legitimacy of mediation while not cutting off judicial supervision.

V. **Section 22(3): “Shall Not Take Cognizance of”: Absolute Bar or Qualified Rule?**

The statutory language implies that the information made in mediation communications is not permitted to be considered by a court. The inclusion of the provision may seem to be aimed at upholding the integrity of confidentiality by shielding the mediation room against judicial encroachment. But this rigidity of the text is an obvious problem when it is read in conjunction with the Explanation to Section 22, and the Exceptions to Section 23 of the Mediation Act, which both admit of circumstances in which disclosure might be demanded to serve the cause of justice.

The explanation to Section 22 expressly authorises disclosure in relation to registration, enforcement, and challenge of the MSAs. Likewise, Section 23 includes the exceptions that show that the confidentiality under the Mediation Act was never meant to be absolute. A literal interpretation of Section 22(3) would render these adjoining provisions meaningless – a result contrary to the settled canon that a statute must be read as an integrated and harmonious whole.

So, the phrase “*shall not take cognizance*” should be interpreted in concert with Section 22(4) and Section 23 to suggest a restrained ban, a rule that maintains confidentiality unless its disclosure is necessary to promote justice. A literal interpretation of Section 22(3) would render these adjoining provisions otiose – a result contrary to the settled canon that a statute must be read as an integrated and harmonious whole.

Where issues of candour are presented in the context of a constitutional right to a fair trial, the concept of confidentiality in the mediation process

cannot override the constitutional provision of a fair trial under Article 21 of the COI.²⁹ In cases where a plot to mediate is purported to have been vitiated by coercion, fraud, and procedural impropriety, the court has an affirmative obligation to investigate such allegations.³⁰ Imposing a blanket ban on judicial cognisance would, in effect, shield wrongful practices against scrutiny, both contravening the due process and access to justice. In *L. Chandra Kumar v. Union of India & Ors*, the SC dealt whether judicial review could be ousted by a statute. The Court declared that judicial review is a part and parcel of the basic structure of the Constitution and cannot be swept away even under a constitutional amendment, or by special statutory scheme in which such review is sought to be displaced. It struck down parts that tried to keep the High Court from having jurisdiction over administrative tribunals and made it clear that tribunals can only be used in addition to constitutional courts for judicial review.³¹ Accordingly, there is no clause in Section 22(3) of the Mediation Act which should give way to a constitutional imperative in case absolute confidentiality acts against substantive justice.

The Mediation Act does not identify a procedural or judicial test that the court can follow when the issue of confidentiality conflicts with fairness. Such exclusion runs the risk of a lack of uniform application as well as being challenged on constitutional grounds. The interpretation of Section 22(3) as a qualified rule, with the precondition of necessity and proportionality, would bring it into line with comparative best practices as well as the constitutional jurisprudence of India.

²⁹ Mishika Bajpai, *Common Law Right to Defense and Disclosure in India*, HARV. INT'L L.J. (Aug. 13, 2018)

³⁰ Mediation Act, § 28(2).

³¹ *L. Chandra Kumar v. Union of India*, AIR 1997 SC 1125 (India).

VI. Section 23 Exceptions: Non-Inclusion of Disclosure by Parties

The Mediation Act, through Section 23, serves as a safety valve, so that confidentiality does not provide a shield to illegality or professional misconduct. But when it is drafted, it gives rise to an unequal regime, which protects mediators and service providers but does not extend protection of non-disclosure to parties themselves. Such an imbalance is dangerous to the trust that the statute is intended to institutionalise.

The carve-out of Section 23(1) allows disclosure where required to demonstrate or refute an assertion of professional misconduct by a mediator or criminal acts committed in the course of a mediation. Section 23(2) carve-outs also follow international best practices with respect to the balance between confidentiality and the need to comply with the requirements of public policy and criminal law. Notably, the statutory prohibition applies only to the mediator and persons involved in the administration of the mediation, thereby excluding the parties. Invested in a literal meaning, the ban on compelled disclosure is effective only on the neutral actors and not the parties in the dispute. This exclusion produces an asymmetric regime of confidentiality, one in which the parties, but not the mediators, are at liberty to disclose mediation communications in principle.

By comparison, the Singapore Act place express obligations on all parties, including parties, not to disclose mediation communications other than as permitted by statute, while the English law protects mediation communications through the common-law “without prejudice” rule.³² Selective drafting of India, on the contrary, secures the position of the process actors but opens the parties to anarchic disclosure risk, frustrating the parliamentary purpose of creating a confidential and cooperative culture of mediation.

³² Rush & Tompkins Ltd. v. Greater London Council, [1989] A.C. 1280 (H.L.).

The asymmetric model under Section 23(1) of the Mediation Act disturbs the equilibrium of confidentiality since it is not a privilege of the mediator alone, but rather the duty of all participants. In order to bring the statutory scheme back to the principle of collective confidentiality, parties should be included in the ambit. This would be in line with Section 22 and Section 23, providing equality between all participants and strengthening confidentiality as a mutual obligation and not a goodwill gesture. Furthermore, this would discourage abuse of confidential information and promote trust in mediation as a safe place for solving disputes.

VII. Conclusion and Way Forward

Sections 22 and 23 of the Mediation Act are the first attempts by the country to codify the principle of mediation confidentiality, marking a step towards replacing the norms of under the Arbitration Act with a self-regulating statute. Nonetheless, as much as this structural development has occurred, there are still major gaps in the statutory design of the doctrines as well as the processes of disclosure; at least in terms of defining the extent of confidentiality, the boundaries to the same, and the processes of disclosure in enforcement and challenge processes.

The drafting of the Mediation Act provides evidence of an unabridged conflict between privacy and procedural fairness. Section 22 codifies confidentiality in general terms but does not address the vulnerabilities of digital platforms, metadata, and third-party sites, thereby creating an asymmetrical and potentially unequal regime of confidentiality.

Section 23 lists justifiable exceptions that lack the inclusion of parties in the regulation to create an unequal and asymmetrical system concerning confidentiality. Lack of procedural tests, e.g., the Singaporean necessity test or the English interests of justice balancing test, is an additional danger to judicial uniformity and constitutional strife in Article 21 of the COI.

The following reforms should be put in place to strengthen the integrity and enforceability of mediation in India: *First*, include an interpretive condition that would permit some disclosure of mediation communications when a court can ascertain that it is necessary to ascertain that there has been coercion, fraud, or an unsuitable agreement of a mediated settlement. This would be in relation to the alignment of Section 22(3) with the Explanation as well as the provisos of Section 23, so that confidentiality only would give way to fairness, only when the need was proven by the judiciary. *Second*, require that all mediation carried out online be carried out using accredited and end-to-end-encrypted platforms, which have been certified by the Mediation Council of India. These accredited systems would be data fiduciaries under the Digital Personal Data Protection Act, 2023 and reduce the risks of interception, unauthorised recording and metadata leakage. *Third*, Amend Section 23 with a clear and explicit confidentiality on parties, to give parity to the mediators and service providers. *Fourth*, To provide procedural clarity regarding what can be disclosed, the use of anonymised research, and the management of electronic records, the Mediation Council must issue Confidentiality Guidelines, which follow the Singapore Mediation Act (2017). This kind of soft-law would facilitate consistency in interpretation and international conformity.

To sum up, confidentiality should not be turned into an obsession. Confidentiality is meant to guard candour, and not to cover coercion. The mediation system in India is currently at an incipient stage: its future plausibility is going to be based on the ability to find the right balance between trust and transparency.

**FULL PROTECTION AND SECURITY IN ARMED CONFLICT:
RECONCILING PREVENTION OBLIGATIONS WITH WARTIME
REALITIES**

*Mr. Aravindhyan B.**

Abstract

This article examines the scope of full protection and security obligations under investment treaties when host States fail to prevent harm from third-party actors, particularly during armed conflict or when threats arise from foreign belligerents. The central tension is whether general protection standards continue to apply during wartime, or whether specific war-loss provisions supply the only treaty response. The article argues for a layered-protection framework. Full protection and security is best understood as the preventive layer, requiring reasonable diligence against foreseeable harm. War-loss provisions are better understood as the post-loss layer, concerned with non-discriminatory treatment, restitution, indemnification, and compensation for certain State conduct. This reading does not make the host State an insurer of wartime safety. Nor does it allow war to become a convenient answer to every claim of official inaction. The proposed framework clarifies tribunal practice and offers a structured inquiry into foreseeability, capacity, proportionality, causation, and double recovery.

I. Introduction: The Scope of Protection During Instability

Investors in unstable regions face threats from multiple sources: ordinary criminal activity, insurgent groups, civil unrest, state-sponsored sabotage, and direct host state action. Investment treaties purport to protect investments from these varied threats through overlapping provisions

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addressing physical security, legal stability, and specific wartime scenarios. Yet the boundaries of these protections remain contested, particularly when third-party actors cause harm during periods of armed conflict or when the threats originate from foreign belligerents.

The interpretive question is not merely academic. Modern investors increasingly operate in conflict zones affected by civil wars, cross-border armed conflicts, insurgencies, and transnational terrorism. Between 2000 and 2020, investment disputes arising from armed conflict situations increased substantially, with tribunals confronting claims that host states failed to prevent harm from non-state actors, rival governments, or foreign intelligence services.¹ However, tribunals have provided limited systematic guidance on what full protection and security obligations demand when threats originate from actors beyond the host state's direct control.

The question presents genuine doctrinal difficulty. If full protection and security were to impose strict liability for all harm, it would require States to guarantee investor safety regardless of practical constraints. That standard would sit uneasily with arbitral practice and would be especially difficult for conflict-affected States. Yet if war-loss provisions displaced full protection and security entirely during armed conflict, they would remove meaningful preventive protection at the moment when official diligence may matter most. The better answer lies between these poles, not as compromise for its own sake, but because the treaty clauses ask different legal questions.²

The framework advanced here treats full protection and security and war-loss provisions as complementary rather than competing obligations. Full

¹ Christoph Schreuer, *The Protection of Investments in Armed Conflicts, in Investment Law Within International Law: Integrationist Perspectives* 3, 3–20 (Freya Baetens ed., 2013).

² *Asian Agricultural Products Ltd. v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Award ¶ 85(d) (June 27, 1990), 6 ICSID Rev. 526 (1991) [*hereinafter* “Asian Agricultural Products”]; *Pantehniki S.A. Contractors & Engineers (Greece) v. Republic of Albania*, ICSID Case No. ARB/07/21, Award ¶¶ 76–84 (July 30, 2009) [*hereinafter* “Pantehniki”].

Protection and Security [“FPS”] imposes a conduct-based duty: the State must take reasonable preventive measures when it knows, or ought to know, of a foreseeable third-party threat. War-loss provisions operate after loss has occurred. They prevent discrimination in post-conflict compensation and, in defined cases, require compensation for requisitioning or unnecessary destruction by State forces. This division preserves both clauses. It gives legal effect to FPS without allowing it to swallow the specific drafting of war-loss provisions.³

This approach gives tribunals a disciplined way to ask the relevant questions at the right stage. Before loss, the inquiry would be whether the State acted with the diligence that could reasonably be expected in the circumstances. After loss, the inquiry would be whether the treaty requires equal treatment, restitution, indemnification, or compensation. Confusion between these stages has allowed both overbroad investor claims and overbroad State defences to appear more plausible than they are.

II. The Full Protection and Security Standard: Due Diligence Framework

A. From Physical Security to Legal Protection

The concept of full protection and security originated in nineteenth-century friendship, commerce, and navigation treaties requiring host states to provide foreign nationals with “*the most constant protection and security*” for their persons and property.⁴ Modern investment treaties adopted this language

³ Vienna Convention on the Law of Treaties art. 31(1), May 23, 1969, 1155 U.N.T.S. 331; Asian Agricultural Products, *supra* note 2, ¶¶ 85(b), 88–92.

⁴ Treaty of Commerce and Navigation, U.S.-Italy, art. III, Feb. 26, 1871, 17 Stat. 845, 846; see also Robert R. Wilson, *Property-Protection Provisions in United States Commercial Treaties*, 45 AM. J. INT’L L. 83, 96 n.68 (1951).

with minimal elaboration, typically stating that investments “*shall enjoy full protection and security*” without defining the standard’s content.⁵

The first major investment arbitration to interpret full protection and security was *Asian Agricultural Products Limited v. Democratic Socialist Republic of Sri Lanka* [“**AAPL**”].⁶ In that dispute, Sri Lankan government forces destroyed an investor’s shrimp farm during counterinsurgency operations against Tamil separatists allegedly using the farm as a base.⁷ The claimant argued that Article 2(2) of the United Kingdom-Sri Lanka Bilateral Investment Treaty imposed strict or absolute liability for all destruction of investment property. Sri Lanka contended that full protection and security required only due diligence, and reasonable efforts to prevent harm, but not guaranteed prevention.

The AAPL tribunal endorsed the due diligence framework, holding that Article 2(2) “*does not impose strict responsibility*” but rather “*requires the due diligence by the States.*”⁸ This standard has become foundational in all subsequent cases. The tribunal further emphasized that the operative question was not who directly caused the destruction but whether government forces had “*capacity, under the prevailing circumstances, to provide adequate protection that could have prevented the destruction from taking place totally or partially.*”⁹

However, the AAPL tribunal’s application of due diligence remained narrow, restricting full protection and security to physical security from violence and property damage. Subsequent cases, particularly *Azurix Corporation v. Argentine Republic* [“**Azurix**”], expanded the standard’s scope

⁵ Christoph Schreuer, *Full Protection and Security*, 1 J. INT’L DISP. SETTLEMENT 353, 353–54 (2010).

⁶ *Asian Agricultural Products*, *supra* note 2.

⁷ *Id.* ¶¶ 51–87.

⁸ *Id.* ¶ 50.

⁹ *Id.* ¶ 85(d).

to include legal security.¹⁰ In *Azurix*, the tribunal reasoned that the term “*full protection and security*” necessarily extends beyond mere physical protection because the investment treaty’s definition of covered investments included intangible assets like contractual rights, goodwill, and expected profits, which could be harmed through legal or regulatory measures rather than physical violence.¹¹

Siemens AG v. Argentine Republic [“**Siemens**”] reinforced this expansion, explicitly holding that full protection and security encompass legal protection through a stable regulatory environment and security in the investor’s reasonable expectations regarding applicable law.¹² The Siemens tribunal stated that its interpretation derived from both the ordinary meaning of “*full protection and security*” and the broad definition of protected investments.¹³

B. The Due Diligence Standard Applied to Third-Party Harm

While expanding full protection and security’s scope, tribunals remained consistent that the standard imposes due diligence rather than strict liability. The critical test, established in *AAPL* and consistently applied, asks whether the State took reasonable measures to prevent foreseeable harm, given its capacity and the circumstances.¹⁴

Wena Hotels Limited v. Arab Republic of Egypt [“**Wena**”] illustrates how due diligence operates in practice.¹⁵ In that case, Egyptian officials and private security personnel from the state-controlled Egyptian Hotels Company

¹⁰ *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Award ¶¶ 408–416 (July 14, 2006), 46 INT’L LEGAL MATERIALS 113 (2007).

¹¹ *Id.* ¶ 407.

¹² *Siemens AG v. Argentine Republic*, ICSID Case No. ARB/02/8, Award ¶ 299 (Feb. 6, 2007), 46 INT’L LEGAL MATERIALS 163 (2007) [*hereinafter* “Siemens”].

¹³ *Id.* ¶ 294.

¹⁴ *Asian Agricultural Products*, *supra* note 2, ¶ 85(d); *Pantechniki*, *supra* note 2, ¶¶ 76–84.

¹⁵ *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award (Dec. 8, 2000), 41 INT’L LEGAL MATERIALS 896 (2002) [*hereinafter* “Wena Hotels”].

seized control of two hotels – the Nile Hotel in Cairo and the Luxor Hotel, that Wena had leased and operated.¹⁶ Egyptian police took no action to restore the hotels to Wena despite the unlawful seizure. The government also failed to impose sanctions on the perpetrators or compensate Wena.

The Wena tribunal found that Egypt had violated its obligation under the Egypt-United Kingdom investment treaty to accord “*full protection and security*.”¹⁷ The tribunal’s reasoning focused on Egypt’s failure to act despite its clear authority and capacity: Egypt “*took no actions to prevent [the seizure]*” and maintained a pattern of inaction even after becoming aware of the violation.¹⁸ Critically, the tribunal did not require Egypt to prevent all seizures but rather assessed whether Egypt, given its administrative and police powers, took adequate measures to address a specific threat it knew about.

The tribunal emphasized in Wena that Egypt’s inaction fell below the due diligence standard because the seizure occurred through use of local officials and security forces – actors the state could readily control – and because Egypt had clear capacity to restore the hotels through its judicial and administrative systems.¹⁹ The case illustrates that due diligence requires affirmative state action proportionate to the threat, not merely passive non-interference in third-party harm.

C. Foreseeability as a Key Due Diligence Element

Tribunals have consistently held that due diligence does not require States to prevent entirely unforeseeable threats, but it does demand reasonable preventive measures when threats are foreseeable to State authorities.²⁰ The foreseeability inquiry examines whether the state had advance warning of

¹⁶ *Id.* ¶¶ 18–33.

¹⁷ *Id.* ¶¶ 84–107.

¹⁸ *Id.* ¶¶ 88.

¹⁹ *Id.* ¶¶ 89–100.

²⁰ Siemens, *supra* note 12, ¶ 300.

the threat through observable patterns, specific intelligence, or prior incidents.

Pantechniki S.A. Contractors & Engineers (Greece) v. Republic of Albania [“**Pantechniki**”] established the “*modified objective standard*” for due diligence, which explicitly incorporates State capacity.²¹ In *Pantechniki*, the claimant’s construction project suffered damage during Albanian civil unrest in 1997. The tribunal found that while Albania had prima facie breached its full protection and security obligation through inadequate police protection, this breach was excused by the extraordinary magnitude of the social disturbance, which exceeded the state’s practical capacity to control.²²

Significantly, the *Pantechniki* tribunal distinguished between a State’s “refusal” to provide protection – which is always culpable – and its “inability” to provide protection despite good-faith efforts, which may be justified by exceptional circumstances.²³ The arbitrator emphasized that courts assessing due diligence must consider “*the circumstances and resources at the disposal of the relevant State*” and therefore, consider the State’s “*level of development and stability*.”²⁴ This framework allows tribunals to maintain accountability while recognizing practical constraints.

The distinction between refusal and inability is therefore doing real doctrinal work. Capacity is one of the elements through which due diligence is measured. A State affected by civil unrest or armed conflict is not required to perform the impossible, and *Pantechniki* is best understood in that limited sense. The award holds that the standard must be assessed against

²¹ *Pantechniki*, *supra* note 2.

²² *Id.* ¶¶ 65.

²³ *Id.* ¶¶ 62.

²⁴ *Id.* ¶ 81.

the circumstances and resources actually available to the State. State instability does not automatically cancel the protection.²⁵

That qualification, however, should not become an easy vocabulary for excuse. Where authorities tolerate the threat, refuse to deploy available means, or remain passive after the danger has become concrete, the case moves from inability to breach. *Wena Hotels and American Manufacturing & Trading, Inc. v. Republic of Zaire* [“**AMT**”] are instructive because liability followed from State inaction despite available authority, not from any general guarantee of public order.²⁶

Repeated attacks may also alter the legal assessment. *Ampal-American Business Consultants Services Inc. v. Arab Republic of Egypt* [“**Ampal**”] shows that a state’s knowledge position can change over time; what appears unforeseeable at the first instance may require a more serious protective response once a pattern has emerged. It is submitted, then, that limited resources affect what reasonable diligence requires. They do not cancel the obligation itself.²⁷

III. Third-Party Harm: Attribution and State Responsibility

A. When Are Third- Party Acts State Responsibility?

Investment tribunals are frequently asked whether states bear responsibility for harm caused by private actors, insurgent groups, or foreign agents operating within their territory. The answer turns not on attributing the harmful act itself to the state but on assessing whether the State’s own

²⁵ *Pantechniki*, *supra* note 2, ¶¶ 76–84.

²⁶ *Wena Hotels*, *supra* note 15, ¶¶ 84–95 (Dec. 8, 2000); *American Manufacturing & Trading, Inc. v. Republic of Zaire*, ICSID Case No. ARB/93/1, Award ¶¶ 6.04–6.08 (Feb. 21, 1997).

²⁷ *Ampal-American Israel Corp. v. Arab Republic of Egypt*, ICSID Case No. ARB/12/11, Decision on Liability and Heads of Loss ¶¶ 288–290 (Feb. 21, 2017) [*hereinafter* “*Ampal*”].

conduct – specifically its failure to take reasonable preventive measures – constitutes a treaty breach.²⁸

The International Law Commission’s Articles on Responsibility of States for Internationally Wrongful Acts provide the governing framework.²⁹ A State commits an internationally wrongful act when conduct that is “(a) attributable to the State under international law; and (b) constitutes a breach of an international obligation.”³⁰ Failures to prevent third-party harm fall squarely within category (b): the State’s omission (failure to prevent) is attributable to it, and this omission breaches its due diligence obligation.

As the tribunal in *AMT v. Zaire* [“**Zaire**”] explained, “*Zaire has breached its obligation by taking no measure whatever that would serve to ensure the protection and security of the investment in question.*”³¹ The tribunal found Zaire responsible not for the acts of rebel forces or bandits but for its own failure to exercise due diligence in preventing foreseeable harm.

This framework avoids holding States liable for all third-party misconduct while maintaining accountability for failures to exercise reasonable preventive measures. A state is not guarantor of investor safety. It is, however, responsible for the due diligence it actually exercises or should have exercised in the circumstances.

B. Regulatory Enforcement as Part of Due Diligence

Due diligence encompasses not only police or military action but also regulatory enforcement. When applicable regulations exist that, if enforced,

²⁸ International Law Commission, *Articles on Responsibility of States for Internationally Wrongful Acts*, arts. 2, 31, U.N. Doc. A/56/10 (2001); American Manufacturing & Trading, Inc. v. Republic of Zaire, ICSID Case No. ARB/93/1, Award ¶¶ 6.04–6.08 (Feb. 21, 1997).

²⁹ International Law Commission, *Articles on Responsibility of States for Internationally Wrongful Acts*, 56 U.N. GAOR Supp. No. 10, at 43, U.N. Doc. A/56/10 (2001), art. 2.

³⁰ *Id.* art. 2.

³¹ American Manufacturing & Trading, Inc. v. Republic of Zaire, ICSID Case No. ARB/93/1, Award ¶¶ 6.04–6.08 (Feb. 21, 1997).

would prevent harm, a state's failure to enforce them may constitute a breach of full protection and security.³²

Siemens, despite primarily addressing fair and equitable treatment, illustrates this principle. The tribunal noted that full protection and security “*extends beyond the safeguarding of physical security, to include the provision of a legal framework offering the necessary protection and legal certainty.*”³³ When a state allows private actors to violate safety, security, or operational regulations, this regulatory non-enforcement may itself violate the full protection and security obligation.

The practical implication is significant. Many countries maintain safety regulations for industrial operations, hazardous materials handling, and critical infrastructure. When private operators violate these regulations for instance, by inadequately securing dangerous materials or failing to implement required safety protocols – and the state fails to enforce compliance despite capacity to do so, this regulatory non-enforcement can constitute a full protection and security breach.

C. The Reasonable Measures Test

Tribunals apply a structured approach to determine whether states took reasonable measures to prevent foreseeable third-party harm. The analysis typically includes:

First, assessing whether the threat was foreseeable. Was there a pattern of similar incidents? Had the investor or other entities provided warnings? Were there publicly available intelligence assessments suggesting risk?

Second, determining what measures were available and feasible. Did the State possess regulatory authority, police capacity, military resources, or intelligence capabilities that could have been deployed?

³² Siemens, *supra* note 12, ¶¶ 294, 299; Wena Hotels, *supra* note 15, ¶¶ 84–95.

³³ Siemens, *supra* note 12, ¶ 294.

Third, evaluating whether the State's actual measures were proportionate to the identified threat. Were security resources adequate? Were regulations enforced? Did the state respond promptly to warnings?

Fourth, considering whether the state claimed or demonstrated capacity constraints. Did genuine resource limitations or emergency conditions prevent deployment of reasonable measures?

This approach avoids the extremes of strict liability, which would be impossible to satisfy, and minimal-effort accountability, which would render full protection and security meaningless. Reasonableness is context-dependent, calibrated to what the state knew, what it could have done, and what the circumstances required.

IV. War-Loss Provisions: Distinct from Full Protection and Security

A. The Textual Framework

Most bilateral investment treaties and many multilateral instruments contain specific provisions addressing investment losses during armed conflict, civil war, emergency, or social disturbance. These 'war-loss' or 'force-majeure-adjacent' provisions typically establish two distinct obligations:³⁴

First, they mandate non-discriminatory treatment, where the host States must accord foreign investors no less favourable treatment regarding restitution, indemnification, compensation, or other settlement than they accord to domestic investors or investors from third States.³⁵ This

³⁴ Agreement Concerning the Encouragement and Reciprocal Protection of Investments, Ger.-Pak., art. 4, Nov. 25, 1959, 457 U.N.T.S. 23 [*hereinafter* "Ger.-Pak. BIT"]; Agreement for the Promotion and Protection of Investments, U.K.-Egypt, art. 4(1), June 11, 1975, 1032 U.N.T.S. 139 [*hereinafter* "U.K.-Egypt BIT"].

³⁵ *See. e.g.*, U.K.-Egypt BIT, *supra* note 34, art. 4(1).

requirement prevents host states from systematically privileging their own nationals in post-conflict compensation schemes.

Second, some war-loss provisions impose absolute compensation obligations for specific scenarios. When host State forces requisition or destroys investor property without military necessity, States must provide “prompt, adequate and effective” compensation. These provisions create strict liability for particular state actions during conflict, unlike the due diligence framework of full protection and security.

Consider the structure, where a typical war-loss provision reads:³⁶

“An investor which suffers losses in respect to its investment owing to war, armed conflict, state of national emergency, civil disturbance, or similar event shall be accorded by the host State...treatment no less favourable than that accorded to any other investor, whether the host State’s own national or of third States...If the host State’s forces requisition or destroy the investment, which destruction was not required by military necessity, the investor shall be accorded prompt, adequate and effective compensation.”

This provision comprises two distinct obligations. The first paragraph requires comparative treatment; it does not mandate absolute compensation. The second paragraph requires compensation for specific state actions. Neither paragraph addresses whether the state should have prevented third-party harm.

B. The Limits of the Lex Specialis Objection

The respondent-State invocation of *lex specialis* deserves a more careful answer than a bare rejection. A State may fairly contend that where the parties have drafted a clause specifically directed at war, armed conflict, civil disturbance, or national emergency, that clause should not be bypassed

³⁶ Ger.-Pak. BIT, *supra* note 34, art. 4.

through the more general language of full protection and security. The objection is not merely forensic convenience. It rests on a familiar interpretive instinct: specific drafting is presumed to have been included for a reason, and a tribunal should be slow to make it redundant.³⁷

There is force in that submission. War-loss provisions often identify particular consequences of conflict, such as restitution, indemnification, non-discriminatory treatment, requisitioning, or destruction by State forces. A respondent may therefore argue that allowing FPS to govern the same wartime loss enlarges the treaty bargain and converts a carefully framed compensation clause into a general conflict-liability regime. That concern is real, especially where the treaty text confines war-loss recovery to defined circumstances.³⁸

The weakness lies in the assumed identity between the two provisions. *Lex specialis* has work to do when two rules regulate the same legal question and cannot sensibly operate together. In the present context, the overlap is often factual rather than normative. The same episode of violence may be relevant to both clauses, but FPS asks whether the State failed to exercise reasonable preventive diligence before or during the harm. A war-loss provision ordinarily asks how the investor must be treated after loss has materialised, or whether compensation is due for requisitioning or destruction by State forces.

AAPL illustrates this separation with some clarity. The tribunal considered Sri Lanka's conduct under the full protection and security obligation and also addressed the treaty's war-loss clause. It did not treat the presence of Article 4 as excluding the due diligence inquiry under Article 2. Its reasoning is not a complete theory of *lex specialis*, but it is significant because both

³⁷ Int'l Law Comm'n, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, ¶¶ 56–122, U.N. Doc. A/CN.4/L.682 (Apr. 13, 2006).

³⁸ Vienna Convention on the Law of Treaties arts. 31(1), 31(3)(c), May 23, 1969, 1155 U.N.T.S. 331 [*hereinafter* "VCLT"].

provisions were before the tribunal in a conflict setting, and each was allowed a distinct legal function.³⁹

The better view, then, is not that the *lex specialis* objection is frivolous. It is incomplete. Specificity is not the same thing as exclusivity. A war-loss clause may displace FPS only where the treaty text expressly says so, or where exclusivity follows by necessary implication from the structure of the instrument. Absent such language, the interpreter should prefer an account that gives both provisions work to do: FPS governs prevention and protective diligence; war-loss clauses govern non-discriminatory post-loss treatment and specific compensation duties.⁴⁰

This complementary framework is also more faithful to the practical design of investment treaties. It avoids turning FPS into strict insurance against wartime harm, but it also prevents the war-loss clause from becoming a shield for official passivity before foreseeable injury. The treaty is read as a sequence of obligations, not as a hierarchy in which one clause silences the other without clear words.

V. Investment Treaties During Armed Conflict: Treaty Application Framework

A. The Presumption of Continued Application

A preliminary question must be addressed: do investment treaties apply at all during armed conflict between treaty parties, or does the outbreak of war suspend or terminate the treaty?

The Vienna Convention provides guidance. Article 61 addresses “*supervening impossibility of performance*,” allowing a party to invoke impossibility as grounds for termination or suspension only if performance has become “*impossible for any party to perform the treaty*,” not merely difficult or dangerous.⁴¹

³⁹ Asian Agricultural Products, *supra* note 2, ¶¶ 85(b), 88–92.

⁴⁰ *Supra* note 37, ¶¶ 88–107.

⁴¹ VCLT art. 61.

The high threshold of “impossibility” excludes most armed conflicts, where treaty obligations may be difficult to satisfy but are not impossible.

More directly, the Vienna Convention does not establish that the outbreak of armed conflict between States automatically suspends investment treaty obligations.⁴² Rather, the Convention presumes treaties remain in force unless expressly suspended by their terms or unless performance genuinely becomes impossible.

The strongest evidence that investment treaties apply during armed conflict comes from the treaties’ own structure. Most investment treaties contain specific provisions addressing losses “*owing to war or other armed conflict.*”⁴³ If treaties suspended upon outbreak of armed conflict, these war-loss provisions would be superfluous. Their presence constitutes the clearest indication that treaties continue to apply.

Tribunals have confirmed this principle. The AAPL tribunal applied the United Kingdom-Sri Lanka Bilateral Investment Treaty to conduct occurring during civil disturbance without questioning the treaty’s applicability.⁴⁴ This practice reflects the consensus that investment treaties are not automatically suspended by armed conflict.

B. Necessity and Emergency as Defences

While investment treaties continue to apply during armed conflict, States may invoke necessity as a circumstance precluding wrongfulness under the

⁴² International Law Commission, *Draft Articles on the Effects of Armed Conflicts on Treaties*, U.N. Doc. A/65/10 (2011) [*hereinafter* “ILC Draft Articles on Armed Conflicts”].

⁴³ *See* Draft Articles on the Effects of Armed Conflicts on Treaties, with Commentaries, [2011] 2 Y.B. INT’L L. COMM’N 107, U.N. Doc. A/CN.4/SER.A/2011/Add.1 (Part 2), arts. 6–7.

⁴⁴ Asian Agricultural Products, *supra* note 2.

International Law Commission's framework.⁴⁵ However, this defence is narrow and rarely available.

Necessity requires that: (1) the State faced an essential interest threatened by grave and imminent peril; (2) no other means existed to safeguard the interest; (3) the State's conduct did not impair an essential interest of another State; and (4) the State did not contribute to the peril.⁴⁶ In the context of war, this might justify temporary security restrictions or mobilisation of ordinarily private resources. It would not justify comprehensive failures to exercise due diligence regarding investment protection when resources remained available.

Moreover, the necessity defence does not excuse all State conduct during war but rather may justify deviations from normal international law obligations where genuine emergency requires. For a State to argue that full protection and security obligations were impossible to satisfy, the state would need to demonstrate that protecting the specific investment was genuinely impossible given military circumstances, a threshold that becomes increasingly difficult to meet for fixed, location investments that the State could have reinforced through ordinary security measures.

Tribunals have been sceptical of necessity defences asserted to excuse failure to prevent investment harm. In *Ampal*, Egypt argued that the post-2011 Mubarak civil unrest and subsequent Sinai security crisis were force majeure events beyond state control.⁴⁷ The tribunal recognized that Egypt faced genuine security challenges but held that Egypt's failure to implement protective measures after specific attacks on an investor's pipeline violated full protection and security, because Egypt had capacity to respond but failed to do so.⁴⁸ The tribunal found that while the initial attack might have

⁴⁵ International Law Commission, *Articles on Responsibility of States for Internationally Wrongful Acts*, art. 25, U.N. Doc. A/56/10 (2001).

⁴⁶ *Id.* art. 25(1).

⁴⁷ *Ampal*, *supra* note 27.

⁴⁸ *Id.* ¶¶ 288–290.

been unforeseeably devastating, subsequent attacks created a pattern establishing that Egypt should have implemented protective measures.

This illustrates the proper application of necessity during armed conflict: states may claim excuse for inability to prevent entirely unprecedented threats of overwhelming magnitude, but they cannot excuse systematic inaction after demonstrable patterns establish foreseeability.

VI. Neutrality and Foreign Threats: The International Law Context

A. The Law of Neutrality as Normative Framework

When threats to investments originate from foreign belligerents rather than the host State's own agents, the law of neutrality becomes relevant to interpreting full protection and security obligations.

The Hague Convention (V) Respecting the Rights and Duties of Neutral Powers in Land War (1907) establishes that neutral territory is “inviolable” and that neutral powers have a duty to prevent belligerents from using their territory as a base for hostile operations.⁴⁹ Specifically, the Convention prohibits belligerents from “*moving troops or convoys of either munitions of war or supplies*” across neutral territory and forbids belligerents from erecting “*wireless telegraphy stations or other apparatus for the purpose of communicating with belligerent forces.*”⁵⁰ The Convention further provides that a neutral Power must not allow belligerents to establish recruitment centres or conduct sabotage operations from its territory.⁵¹

⁴⁹ Hague Convention (V) Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, Oct. 18, 1907, arts. 1–5 [*hereinafter* “Hague Convention (V)”].

⁵⁰ *Id.* arts. 2–3.

⁵¹ *Id.* arts. 4–5.

Critically, Article 5 imposes affirmative duties: “[A] neutral Power must not allow any of the acts referred to in Articles 2 to 4 to occur on its territory.”⁵² This requires due diligence comparable to that imposed by full protection and security clauses: the State must exercise vigilance to prevent prohibited acts but is not strictly liable for all violations that somehow occur within its borders.

The classical arbitration on neutral duties is the Alabama Claims arbitration between the United States and Great Britain (1872).⁵³ That dispute arose because Confederate warships (most notably the CSS Alabama) were constructed in British shipyards and subsequently used to attack Union merchant vessels during the American Civil War.⁵⁴ The arbitral tribunal held that Britain had violated its neutral obligations by failing to exercise “due diligence” in preventing the construction and departure of these vessels, despite knowledge that they would be used as warships against the Union.⁵⁵ The tribunal found that Britain’s failure to apply its own domestic laws to prevent the activity constituted a breach, even though the actual attacks were conducted outside British territory.

The Alabama principle remains in force: neutral states have affirmative duties to exercise due diligence in preventing belligerents from using their territory for hostile operations. These duties specifically encompass preventing sabotage networks and intelligence operations, not merely preventing conventional military operations.

This proposition cannot be carried into investment law without a limiting step. The Alabama Claims arose from duties owed by one State to another; it was not concerned with a private investor invoking a treaty standard against a host State. Its relevance, therefore, lies in the proposition that due

⁵² *Id.* art. 5.

⁵³ Alabama Claims Arbitration (U.S. v. U.K.), Award (Sept. 14, 1872), 1 International Arbitrations to Which the United States Has Been a Party 495 (J.B. Moore ed., 1898).

⁵⁴ *Id.*

⁵⁵ *Id.*

diligence is a recognised technique of international responsibility, not any direct transposition. In the investment treaty setting, that technique enters through the ordinary interpretation of the full protection and security clause, read in good faith and, where appropriate, against relevant rules of international law applicable between the parties. Alabama principle supplies the grammar of due diligence, while the treaty supplies the cause of action.⁵⁶

A. How Neutrality Duties Inform Full Protection and Security

The connection between neutrality law and investment protection is direct and significant. When an investor in a neutral state suffers harm from the operations of a foreign belligerent, and the neutral state failed to exercise due diligence in preventing those operations, the State has simultaneously breached its neutrality obligations under customary law and its full protection and security obligations under the investment treaty.

The two obligations are complementary. Neutrality law imposes affirmative duties to prevent belligerent use of territory. Investment protection law imposes affirmative duties to protect investments from foreseeable harm. When the same conduct (tolerating a foreign sabotage network) violates both, the investments have legitimate protection claims.

Consider the framework: A foreign power establishes a sabotage network within a neutral state's territory, planning to attack assets of the belligerent's enemies (the home state of the investor). If the neutral State knows or should know of this network and takes no action despite capacity to enforce its laws against sabotage, it has breached both the Hague Convention's duty to prevent hostile operations⁵⁷ and the investment treaty's full protection and security obligation to protect investments from foreseeable harm.

⁵⁶ VCLT art. 31(3)(c); *Mondev Int'l Ltd. v. United States*, ICSID Case No. ARB(AF)/99/2, Award ¶ 125 (Oct. 11, 2002).

⁵⁷ Hague Convention (V) art. 5.

This alignment avoids having investment law extend unreasonably far while still holding states accountable for failures to enforce basic rule of law that international law already requires them to maintain. A State cannot simultaneously maintain that it exercises due diligence regarding an investment's security while tolerating foreign intelligence agencies operating freely within its territory.

VII. Due Diligence in Practice: Structured Assessment

A. The Inquiry Framework

Tribunals assessing whether a state satisfied its full protection and security obligation regarding third-party harm should apply a structured analysis across several dimensions. This framework avoids both the extremes of strict liability and minimal accountability.

i. Step One: Threat Identification

The tribunal first identifies what harm materialized and attributes causal responsibility to a non-state actor (criminal, insurgent, foreign agent, or other third party). The critical point is not whether the state "caused" the harm but whether the harm was foreseeable and whether the State had capacity to prevent it.

Key questions at this stage include: What exactly occurred? What actor(s) perpetrated the harm? Did the actor operate within the host state's territory? Did the actor require use of host state resources, transit, or cooperation?

ii. Step Two: Foreseeability Assessment

The tribunal next assesses whether the specific threat should have been foreseeable to state authorities. Foreseeability asks not whether the State had actual knowledge but whether reasonable diligence would have alerted the State to the danger.

Indicators of foreseeability include: Previous incidents involving similar threats, Public intelligence assessments or international warnings, Specific information provided by the investor or third parties, Observable patterns of hostile activity, Known presence of threat actors (insurgents, criminal organizations, foreign intelligence services)

Foreseeability is not about perfect prediction but about whether a reasonable State, applying ordinary diligence, would have recognized the risk as more than theoretical.

iii. Step Three: State Capacity Determination

The tribunal then assesses what resources and authority the State possessed to prevent the harm. Capacity includes: Regulatory authority over relevant conduct (safety rules, security protocols, operational restrictions), Police and law enforcement capabilities, Military or security service resources, Intelligence and counterintelligence capabilities, Administrative machinery for enforcement, Authority over territory where the threat originated, Ability to coordinate with other institutions.

The tribunal must distinguish between a state's total resources and the resources reasonably deployable to address the specific threat. A State need not deploy military forces against minor security challenges, but it must apply proportionate resources to significant foreseeable threats.

iv. Step Four: Reasonableness Evaluation

The tribunal assesses whether the State's actual measures were proportionate to the identified threat given its capacity. This requires examining: Specific protective or preventive measures taken by the state, enforcement of regulations applicable to the risky conduct, deployment of security resources, investigation and action on warning signs, promptness of the response of the state when the threat became apparent, and adequateness of the measures taken with respect to the danger level.

Reasonableness is context-dependent. Guarding a munitions facility during wartime with ten security personnel may be insufficient; the same force might be adequate for a routine industrial site. The standard asks whether the state, knowing what it knew and possessing what it possessed, exercised reasonably competent protective diligence.

v. Step Five: Temporal Considerations

The tribunal examines the timeline of the threat, the State's knowledge, and the State's response. Critical questions include: When should the State have become aware of the threat? How quickly did the State respond to warnings or incidents? Were there missed opportunities for intervention? Did the State's response lag behind the threat's escalation?

Delays in responding to known, escalating threats constitute failures of due diligence even if the State eventually took some action.

B. Application to Complex Scenarios

Consider how this framework handles difficult scenarios:

i. Scenario One: Endemic Criminality

An investor's warehouse is robbed despite security guards and locked gates. Criminal gangs operate throughout the region; police corruption limits enforcement. The tribunal would ask: Was this robbery foreseeable? Yes, crime is endemic. Did the State have capacity to prevent it? Partially, police exist but are corrupt. Did the State take reasonable measures? The tribunal must assess whether the state enforced regulations against corruption, whether it investigated the robbery, whether it offered protection against known criminal organisations. If the State took none of these steps, it breached due diligence; if it took reasonable measures despite resource constraints, it did not.

ii. Scenario Two: Insurgent Activity

Insurgents attack an investor's facility during armed conflict. The facility was in a known insurgent-controlled area. The tribunal would ask: Was the threat foreseeable? Yes, the area was known to be insurgent, controlled. Did the State have capacity to prevent it? This depends on whether the state controlled the territory at the time of the attack. If the state had lost territorial control, due diligence might not require preventing insurgent attacks; the question becomes whether the State had previously held territory, lost it through failure to maintain control, and should have attempted to restore it. If the State controlled the territory, it had capacity and likely breached due diligence if it did not deploy adequate security resources.

iii. Scenario Three: Foreign Sabotage During Neutrality

Foreign intelligence services operate within a neutral state and attack allied interests. The tribunal would ask: Was the threat foreseeable? Yes, historical patterns establish that hostile powers conduct intelligence operations in neutral territories. Did the state have capacity? Yes, every State has law enforcement capable of enforcing laws against espionage and sabotage. Did the State exercise due diligence? This requires assessing whether the State enforced its own laws, whether it investigated suspicious activity, whether it coordinated with intelligence services to identify foreign threats. If the State took none of these steps, it breached both neutrality obligations and full protection and security duties.

VIII. Distinguishing War, Loss Compensation from Due Diligence Breaches

An important practical issue arises when harm occurs despite reasonable state prevention efforts: does the investor have recourse under war-loss provisions if full protection and security was not breached?

The answer is yes, in specific scenarios. War-loss provisions create obligations distinct from full protection and security. Consider the two main categories:

A. Category One: Most Favoured Nation Treatment in War, Loss Compensation

If an investor's property suffers loss "owing to war," and the host state compensates some investors – either through direct compensation or reconstruction assistance – it must accord foreign investors treatment no less favourable than domestic investors or third-state investors.⁵⁸ This obligation is absolute and has nothing to do with whether the State took reasonable preventive measures. Even if the State exercised perfect due diligence and still could not prevent the loss, the state cannot discriminate in compensation.

B. Category Two: Compensation for State Destruction

If the host State's forces requisition or unnecessarily destroy investment property during conflict, the investor is entitled to "*prompt, adequate and effective*" compensation under the explicit terms of most war-loss provisions.⁵⁹ This creates strict liability for specific state actions, unmediated by due diligence.

The *Strabag v. Libya* case illustrates this distinction.⁶⁰ In that dispute, Libyan military forces destroyed investor equipment during Libya's civil war. The tribunal found a breach of the war-loss provision because the destruction was attributable to government forces and was not necessary for military

⁵⁸ U.K.-Egypt BIT, *supra* note 34, art. 4(1); American Manufacturing & Trading, Inc. v. Republic of Zaire, ICSID Case No. ARB/93/1, Award ¶¶ 6.04–6.08 (Feb. 21, 1997) [*hereinafter* "American Manufacturing"].

⁵⁹ Agreement Concerning the Encouragement and Reciprocal Protection of Investments, Ger.-Pak., art. 4, Nov. 25, 1959, 457 U.N.T.S. 23.

⁶⁰ *Strabag SE v. Libya*, ICSID Case No. ARB(AF)/15/1, Award (June 29, 2020).

operations.⁶¹ The tribunal did not need to assess whether Libya could have prevented the destruction through reasonable prevention measures. The war-loss provision imposed strict liability for destruction by State forces outside of combat necessity.

This structure reveals that investment treaties layer protections: full protection and security require due diligence to prevent third-party harm; war-loss provisions mandate compensation for specified state conduct (requisitioning, unnecessary destruction) and non-discrimination in post-loss treatment. Investors have recourse through different provisions depending on which obligations were breached.

IX. Contemporary Application: Modern Threats and Challenges

The framework developed through jurisprudence on third, party harm during armed conflict applies with equal force to modern security threats. Contemporary investors face cyber-attacks, often state-sponsored; proxy force operations where host States tolerate or enable armed groups; transnational terrorism; and hybrid warfare tactics blurring the line between peace and conflict.

A. Cyber, Attacks and Digital Infrastructure

When foreign actors conduct cyber-attacks on digital infrastructure hosting foreign investments, the question is not whether the host State could have guaranteed digital invulnerability. No such standard is workable. The closer inquiry is whether public authorities had warning of a recurring or specific threat, whether a regulatory apparatus for critical infrastructure existed, and whether law enforcement or intelligence agencies took reasonably available preventive steps. Ampal is useful by analogy, although it concerned physical attacks on a gas pipeline. The tribunal treated repeated attacks as changing

⁶¹ Id. ¶¶ 410–424 (addressing destruction and war-loss compensation under the applicable treaty clause).

the State's knowledge position; after a pattern had emerged, continued inaction could no longer be explained as mere inability.⁶²

Cyber-attacks present particular difficulties because attribution is complex and prevention capacity is limited. A tribunal would need to assess carefully whether the State's resources and knowledge allowed reasonable preventive measures.

B. Proxy Forces and Tolerated Non-State Groups

When host States tolerate armed groups operating within their territory, and those groups attack foreign investments, the violation is not constituted by the private violence alone. The relevant breach lies in the State's own omission: its refusal, indulgence, or studied passivity in the face of a known threat. *AMT v. Zaire* and *Wena Hotels* are useful precisely because both awards looked beyond the immediate wrongdoer and asked whether the State used the authority it actually possessed to protect or restore the investment.⁶³

This applies particularly to situations where host States are theoretically neutral but practically allow belligerent proxies to operate. If the State enforced its laws against armed groups neutrally and comprehensively, due diligence may be satisfied despite harm from groups that slip through enforcement efforts.

C. Transnational Terrorism

Terrorist attacks by non-state terrorist organizations present the hardest cases. States cannot realistically guarantee prevention of all terrorism. The due diligence standard must account for practical limitations while still holding States accountable for systematic failures.

⁶² Ampal, *supra* note 27, ¶¶ 288–290.

⁶³ American Manufacturing, *supra* note 58, ¶¶ 6.04–6.08; Wena Hotels, *supra* note 15, ¶¶ 84–95.

Foreseeability remains the controlling discipline. A tribunal should ask whether the group was known to operate in the region, whether similar attacks had already occurred, whether the investment was visibly exposed, and whether the State had institutional means to respond. *Pantechniki* cautions against judging a State as if it possessed resources that it plainly lacked. *Ampal*, on the other hand, shows that repeated attacks can harden into notice, so that what was excusable at the first instance may become culpable later.⁶⁴

X. Structuring Remedies: Damages and Interest Calculations

When tribunals find that a State breached its full protection and security obligation regarding third-party harm, quantifying damages requires careful attention to causation and proportionality⁶⁵.

A clearer approach is counterfactual and proportionate. If reasonable protection would probably have prevented the loss, full compensation may then follow. If it would only have reduced the severity of the loss, the award should accordingly reflect that reduced injury. *Wena* illustrates the first kind of case because Egypt had authority to act and failed to restore effective protection. *Pantechniki* marks the outer limit, where social collapse and limited capacity made it difficult to convert every loss into treaty responsibility.⁶⁶

Interest forms part of the reparation exercise because delay itself has economic value. The rate and the date from which interest runs should be tied to the loss actually caused by the breach, not to a general sense that the investor has suffered during instability. Ripinsky and Williams' account of

⁶⁴ *Pantechniki*, *supra* note 2, ¶¶ 76–84; *Ampal*, *supra* note 27, ¶¶ 288–290.

⁶⁵ *Factory at Chorzów* (Ger. v. Pol.), Merits, 1928 P.C.I.J. (ser. A) No. 17, at 47; International Law Commission, *Articles on Responsibility of States for Internationally Wrongful Acts*, arts. 31, 36, U.N. Doc. A/56/10 (2001); *Ampal*, *supra* note 27, ¶¶ 288–90, 350–52.

⁶⁶ *Wena Hotels*, *supra* note 15, ¶¶ 84–95, 136 (Dec. 8, 2000); *Pantechniki*, *supra* note 2, ¶¶ 76–84.

investment arbitration practice is helpful here, particularly on accrual dates, commercial rates, and compounding.⁶⁷

Ampal also shows why causation must be kept separate from the mere existence of violence. The tribunal did not treat every attack on the pipeline as a compensable failure of protection. Its reasoning turned on the later attacks, after the pattern of sabotage had made the risk sufficiently concrete and after reasonable preventive measures could be expected. That distinction gives legal content to mitigation-proportionate recovery: the award should track the loss that due diligence would probably have avoided, not the whole historical burden of the conflict.⁶⁸

The same discipline should govern cases where a war-loss provision and full protection and security are both invoked. The clauses may overlap factually, but they do not justify duplicate recovery for the same injury. A tribunal may recognise two distinct breaches, yet the remedial question remains compensatory. If the investor is paid for State destruction under a war-loss clause, any additional award under full protection and security must correspond to a separate loss, such as avoidable aggravation, delay, or loss not already captured by the first head of compensation.⁶⁹

XI. Conclusion: A Framework for Protection During Instability

The argument of this article is that armed conflict should alter the measurement of diligence, not the existence of the duty. That distinction is small in phrasing but substantial in consequence. It prevents FPS from becoming a warranty of peace, while also preventing war-loss clauses from being used as a general immunity for State passivity.

⁶⁷ SERGEY RIPINSKY & KEVIN WILLIAMS, DAMAGES IN INTERNATIONAL INVESTMENT LAW (2008).

⁶⁸ *Ampal*, *supra* note 27, ¶¶ 288–290, 350–352.

⁶⁹ *Factory at Chorzów (Ger. v. Pol.)*, Merits, 1928 P.C.I.J. (ser. A) No. 17, at 47; *Strabag SE v. Libya*, ICSID Case No. ARB(AF)/15/1, Award ¶¶ 410–424 (June 29, 2020) [*hereinafter* “Strabag”].

A tribunal applying this framework should begin with the State's knowledge and capacity. *Pantechniki* properly warns against judging a State by resources it did not possess, while *Ampal* shows that repeated attacks may convert uncertainty into notice. The standard is therefore demanding but not blind. It asks whether the State used such legal, administrative, police, military, and regulatory means as were reasonably available to it at the time.⁷⁰

War-loss provisions then perform a separate remedial function. They address equality of treatment after wartime loss and specific compensation where the treaty so provides, especially in cases of requisitioning or unnecessary destruction by State forces. They do not answer the prior question whether the State failed to exercise reasonable diligence before the loss. Keeping the two questions separate also avoids double recovery, since compensation must still correspond to the loss legally caused by the breach.⁷¹

The framework is not without difficulty. Borderline cases will remain, particularly where territorial control is fragmented, intelligence is incomplete, or a host State is itself under attack. Yet that difficulty is preferable to the two simpler alternatives: strict liability, which overstates the promise of investment treaties, and wartime displacement, which understates it. The more defensible position is a restrained one. Investment protection continues during armed conflict, but its content is measured by foreseeability, capacity, proportionality, and proof of causation.

The test, ultimately, is not whether harm could have been prevented with certainty. It is whether the State, given what it knew and what it possessed, exercised the diligence that a reasonable State in that position would have exercised. This formulation is deliberately restrained. It does not make armed conflict a zone of treaty immunity, but neither does it convert

⁷⁰ See *Pantechniki*, *supra* note 2, ¶¶ 76–84; *Ampal*, *supra* note 27 ¶¶ 288–290.

⁷¹ See *Factory at Chorzów* (Ger. v. Pol.), Merits, 1928 P.C.I.J. (ser. A) No. 17, at 47; *Strabag*, *supra* note 69, ¶¶ 410–424.

investment protection into insurance against every consequence of war. Contemporary arbitral practice supports that middle position, provided tribunals remain careful about foreseeability, capacity, causation, and double recovery.⁷²

⁷² See *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award ¶¶ 84–95 (Dec. 8, 2000); *Pantechniki S.A. Contractors & Engineers (Greece) v. Republic of Albania*, ICSID Case No. ARB/07/21, Award ¶¶ 76–84 (July 30, 2009); *Ampal-American Israel Corp. v. Arab Republic of Egypt*, ICSID Case No. ARB/12/11, Decision on Liability and Heads of Loss ¶¶ 288–290 (Feb. 21, 2017) (supporting a restrained, capacity-sensitive standard rather than strict liability or wartime immunity).

REIMAGINING ARBITRATION IN THE WEB3 ERA: THE POTENTIAL OF DAOs TO DEMOCRATIZE CROSS-BORDER DISPUTE RESOLUTION

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Abstract

The emergence of Web3 technologies such as Blockchains and Decentralised Autonomous Organisations [“DAOs”] has the potential to significantly reshape the ambit of cross-border dispute resolution by offering decentralised, transparent and accessible alternative to the current dispute resolution structures. The traditional resolution mechanism often is very costly, jurisdictionally restrictive and inaccessible. Whereas on other hand, blockchain based arbitration leverages smart contracts, cryptography, and community participation to create more efficient and transparent systems.

Through this article, the author has explored how DAOs can be effectively integrated in the present arbitration framework, when it poses serious challenges of enforceability, jurisdiction, coherence with domestic norms. The author has further analysed the effectiveness of hybrid models, such as Kleros, Aragon Court, and Jur, that could bridge traditional legal norms with decentralized protocols. These hybrid models reflects the lower costs, faster resolution, and enhanced trust. But at the same time, they also expose risks including technical vulnerabilities, susceptibility to manipulation, and unresolved legal ambiguities.

Being immutable and transparent, blockchain strengthen the integrity of the confidential arbitration records. On the other hand, smart contracts assist in automating the procedural aspects such as arbitrator selection and execution of award, thereby reducing delays and expenses. The author argues in favour of hybrid dispute resolution model which is able to balance decentralisation with fairness and enforceability. The article highlights the crucial requirement of domestic laws, international harmonization and stakeholder collaboration to utilise the potential of blockchains and DAOs.

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I. Introduction

“The metaverse is here, and it’s not only transforming how we see the world but how we participate in it.”

– Satya Nadella¹

The current dispute resolution system is nothing but a complex maze, where the complex procedures laid in the statutes and rules hinder the direct access to justice. Although dispute resolution is intended to resolve conflicts, those who seek to use traditional systems often find that they create more obstacles than the resolution of their disputes. These traditional mechanisms impose multiple levels of complex systems to determine how to properly resolve disputes. The evolution of alternative methods for resolving disputes in the Web3 environment (i.e., decentralised and automated via blockchain DAOs) allows for re-thinking traditional authorities and government structures. This shift to decentralised dispute resolution, additionally addresses the inefficiency caused by varying laws and enforcement norms in a cross-border dispute. By creating a new vision for how disputes could be resolved, by using Web3 technologies, we can create an environment of resolution that provides for transparency, accessibility and fairness by eliminating the burdens associated with previous methods of resolution.

The advent of Web3 technologies and specifically DAOs create new opportunities to eliminate the traditional infrastructure that has governed arbitration for centuries. International commerce continues to grow beyond geographic borders and move to digital platforms, and though arbitration has experienced some form of reform, it remains to overcome its traditional shortcomings such as high-cost, lack of access, and rigidity of process.²

¹ Satya Nadella, LINKEDIN, https://www.linkedin.com/posts/satyanadella_the-metaverse-is-here-and-its-not-only-ugcPost-6861387966347038720-tnrZ/

² Yevhen Shcherbyna, *International Arbitration and Blockchain: Current State, Types, Characteristics and the Future Perspective*, in INTERNATIONAL AND NATIONAL ARBITRATION –

Decentralizing arbitration with the help of blockchain-based smart contracts and DAOs, dispute resolution will be less complex and decentralized, avoiding bureaucratic and legal intermediaries.³ This changes the democratization process in which entities and individuals can solve disputes without the influence of cultural, legal, or economical systems that have traditionally governed arbitration.

DAOs are a revolutionary governance model, where administrative work is automated through coded rules and smart contracts, and decentralization allows the organization to make decisions.⁴ Together with the transparency and immutability of blockchain, they provide an opportunity to have more accessible and more efficient mechanisms of solving cross-border disputes, especially in Web3 transactions and decentralized finance.⁵ However, what is even more important about DAOs is not novelty, but rather the capacity to provide fair, unbiased, and efficient resolutions. Introduction into the existing arbitral systems creates issues of jurisdiction, enforcement, and legal status, which should be looked at with keen interest.⁶

Nonetheless, these obstacles should not overshadow the transformative potential of DAOs in democratizing access to justice and creating transparent, efficient, and inclusive systems for cross-border dispute resolution.

CHALLENGES AND TRENDS OF THE PRESENT AND FUTURE (Radovan Malachta & Patrik Provaznik eds., 2021).

³ Johannes Landbrecht & Andreas R. Wehowsky, *Arbitrating Blockchain and Smart Contract Disputes Lessons to be Learnt from Commodities and Shipping Arbitration?* 40(2) ASA BULL. 309, 309-331 (2022).

⁴ Matthew Townsend & Ramsey Hanna, *Managing DAO-related Risks*, REED SMITH (June 15, 2023) <https://www.reedsmith.com/en/perspectives/2023/06/managing-dao-related-risks>.

⁵ Santiago Enrique Rodríguez, *The What, the Why, and the How: Blockchain as a Solution for Institutional Arbitration*, 2020(37) IURGIUM 77, 77-97 (2020).

⁶ Landbrecht & Wehowsky, *supra* note 3.

A. Overview of Blockchain Technology

Blockchain is simply a register or distributed ledger, developed in response to the 2008 financial crisis when users lost confidence in centralized financial systems and created a peer-to-peer trust-based economic network to trade currency in the virtual domain.⁷ It is an open-ended decentralized software platform that supports smart contracts and decentralized applications. Every transaction, or block, is certified by a network of computers before being attached to the chain, thereby creating the blockchain. The blockchain is asserted to be permanent, inviolate, and unchangeable, using encryption and a combination of public and private keys for security.⁸

Smart contracts, in most cases founded on blockchain, are legal contracts written in code. These computer instructions execute automatically once pre-established conditions are met.⁹

Blockchain and smart contracts are viewed as groundbreaking innovations with the potential to transform business transactions and conflict resolution. At the core is a decentralized system with automated processing, self-regulation, and autonomous execution. These features represent a paradigm shift in technology and access to justice, requiring evolution of existing legal frameworks.¹⁰ In arbitration, smart contracts preserve rules, verify compliance, and automatically execute actions upon breach by

⁷ Chandrika Sharma, *Blockchain Arbitral Award: Potential Challenges in Recognition and Enforcement under the New York Convention*, 16 REV. ROMÂNĂ DE ARBITRAJ 85, 85-107 (2022).

⁸ Reggie O'Shields, *Smart Contracts: Legal Agreements for the Blockchain*, 21(1) N.C. BANKING INST. 177 (2017).

⁹ Francisco Urbarri Soares, *New Technologies and Arbitration*, 7(1) INDIAN J. ARB. L. 84, 103 (2018).

¹⁰ Sneha Vijayan, *Autonomous Arbitration in the Era of the Metaverse*, KLUWER ARB. BLOG (Mar. 11, 2022) <https://arbitrationblog.kluwerarbitration.com/2022/03/11/autonomous-arbitration-in-the-era-of-the-metaverse/>.

initiating the arbitration clause.¹¹ A dispute triggers an alert to the arbitrator through a blockchain-enabled platform. The parties can convert the contractual terms into a digital format, hold the funds securely, and obtain automatic performance of the arbitrator's decision including payment of arbitrator fees.¹²

The advantages of blockchain technology in providing transparency, immutability, and efficiency in providing a method for resolving disputes will facilitate the ability to conduct cross border transactions without the use of significant human involvement.¹³ However the resolution of a digital contract may have disputes arising from a coding error, an unauthorized transaction, or a different understanding of a self-executing technology clause; these complications will require the use of hybrid approaches that incorporate principles of arbitration with new technological innovations.¹⁴

The arbitration industry is now more supportive than previous eras with blockchain systems providing decentralized records, time stamped records, automated methods of resolving disputes, and decentralized voting methods. Nevertheless, the establishment of a blockchain-based system requires a comprehensive governance framework to ensure the

¹¹ Daniel Gässl & Julian Weidinger, *Unlocking the Potential of DAOs: Legal Challenges, Regulatory Solutions, and Opportunities for a New Paradigm in Business* (Leopold-Franzens Universität Innsbruck, 2023).

¹² Sharath Mulia & Romi Kumari, *Blockchain Arbitration: The Future of Dispute Resolution*, FOX MANDAL (Nov. 23, 2021) <https://www.foxmandal.in/blockchain-arbitration-the-future-of-dispute-resolution/>.

¹³ Florence Guillaume & Sven Riva, *Blockchain Dispute Resolution for Decentralized Autonomous Organizations: The Rise of Decentralized Autonomous Justice*, in BLOCKCHAIN AND PRIVATE INTERNATIONAL LAW 475 (Andrea Bonomi, Matthias Lehmann, & Shaheez Lalani eds., 2023).

¹⁴ Apurva Pandey, *Mapping AI-Arbitration Landscape: Exploring Blockchain-Based Arbitration Models Through a Legal Lens*, LIVELAW (June 5, 2024) <https://www.livelaw.in/articles/mapping-ai-arbitration-landscape-exploring-blockchain-based-arbitration-models-through-a-legal-lens-259710>.

enforceability, neutrality, and procedural fairness of the blockchain solution.¹⁵

II. Need for Decentralized Arbitration Framework

A. Current state of institutional arbitration

Arbitration will remain relevant by adapting to emerging trends, prioritizing efficiency, cost savings and technology while continuing to uphold essential principles of arbitration. Institutions have traditionally provided procedural clarity, extensive rule sets, administrative support and expert arbitrators. Institutions such as the International Chamber of Commerce [“**ICC**”], London Court of International Arbitration [“**LCIA**”], and Singapore International Arbitration Centre [“**SIAC**”] have refined mechanisms for handling cases and earned the trust of the international business community.

Over the past decade, major institutions have revised their rules to emphasize procedural efficiency and cost-effectiveness. Reforms include expedited procedures, streamlined document production, and improved case management to reduce delays and expenses. These developments highlight the adaptability and continued relevance of institutional arbitration.¹⁶

Technological advancements have further enabled virtual hearings, electronic filing, and online case management. However, the need to further investigate decentralized dispute resolution mechanisms is highlighted by

¹⁵ *Id.*

¹⁶ Danna Zhang, *Integrating New Technologies in International Arbitration: Thoughts on the Future of Our Profession*, in STOCKHOLM ARBITRATION YEARBOOK 2024 99-124 (Patrik Schöldström & Christer Danielsson eds., 2024).

the fact that the centralized nature of traditional institutions restricts the full use of these innovations.¹⁷

B. Need for Adapting Technological Update

The continuous technological advancement of transforming businesses worldwide requires the arbitration industry to undergo similar revolutions in order for it to be effective and efficacious.¹⁸ The use of blockchain along with decentralized arbitration, Artificial Intelligence [“AI”] and smart contracts paves way for such transformatory revolution within the industry.

Decentralized mechanism can solve many existing problems associated with current dispute resolution mechanism. blockchain technology provides increased transparency and security through the creation of tamper-resistant and easily verifiable records. This becomes important in the context of international disputes where the integrity of the parties involved is crucial to them as it pertains to the fairness of how the case is arbitrated.¹⁹ A smart contract can also automate some of the procedural activities, including enforcing the award without manual intervention. Alternatively, by significantly speeding up the review of documents, the performance of legal research, and the decision-making process, AI can greatly improve the efficiency of arbitration by using algorithms to process large volumes of data at a rapid pace, improving case management and lowering costs.²⁰

Therefore, in order to incorporate these technologies into arbitration, the legal and institutional framework that supports arbitration needs to go through significant reform. Furthermore, issues pertaining to data privacy, cybersecurity, and enforcement of awards made through decentralized

¹⁷ Meenal Garg, *Promoting Efficiency of Arbitration in India by Using Technology*, 11(1) INDIAN J. ARB. L. 79 (2023).

¹⁸ Zhang, *supra* note 16.

¹⁹ Meenal, *supra* note 17.

²⁰ *Id.*

platforms need to be examined carefully in order to ensure that technological advancement does not undermine the fairness or legitimacy of the arbitral process.²¹

i. Decentralized Autonomous Organizations

DAOs are organizations built on the blockchain technology. The operation is decentralized, meaning that it's free from a central control unit or management hierarchy. The decision making is done automatic according to rules embedded in its code (smart contracts), with governance from its members.²²

Decentralization in DAOs is achieved through blockchain, where data is replicated across nodes without a central server, ensuring immutability and transparency.²³ A developer initially creates smart contracts that define the DAO's rules, which activate once deployed on platforms like Ethereum. As the community grows, members vote to modify or add rules, gradually transferring control from the developer to the user base.²⁴

These rules and the ever-increasing control of the members over the DAO lead to the autonomous behaviour of the DAO. To make these decisions, there is no central bureaucratic system, only a form of voting in which all parties and interest groups can participate in the arbitration. Such a structure enhances labour division and brings together power,

²¹ Julie Raneda, *Decentralized Justice Systems: A New Player in the Field of Alternative Dispute Resolution?* in ARBITRATION'S AGE OF ENLIGHTENMENT? 695-706 (Cavinder Bull, Loretta Malintoppi, & Constantine Partasides eds., 2023).

²² Vitalik Buterin, *A Next-Generation Smart Contract and Decentralized Application Platform*, ETHEREUM (2014) https://ethereum.org/content/whitepaper/whitepaper-pdf/Ethereum_Whitepaper_-_Buterin_2014.pdf.

²³ Carlos Santana & Laura Albareda, *Blockchain and the Emergence of Decentralized Autonomous Organizations (DAOs): An Integrative Model and Research Agenda*, 182(1) TECH. FORECASTING & SOC. CHANGE 121806 (2022).

²⁴ Raneda, *supra* note 21.

responsibilities, and interests, ultimately leading to a more synchronized and systematic functioning of the organization.²⁵

With the development of blockchain technology, which was first put forth in 2013 or 2014, the idea of DAOs was born. This process was related to the development of Ethereum, a blockchain platform that introduced the concept of Smart Contracts and offered the required tools, programming language and decentralised ecosystem that led to the development and advancement of effective DAOs.²⁶

ii. *Features of Blockchain and DAOs*

The efficacy and efficiency of decentralized arbitration is based on some key qualities of blockchain and DAOs, including those of transparency, security, immutability and efficiency.²⁷ Blockchain aids in ensuring that DAO decisions and transactions are stored within its unchangeable and impenetrable database, with increased trust among the parties. The arbitration, hence running on these smart contracts, minimizes human intervention and prejudice.²⁸

The substantial benefit of utilizing blockchain technology within the framework of the arbitration process provides an auditable history to arbitral processes.²⁹ With each of the submissions, ruling and award is irrevocably made, thereby disposing of disputes related to procedural integrity. Smart contracts can also provide for the automatic enforcement of awards, which makes them less dependent on national courts for enforcement.

²⁵ *Id.*

²⁶ *Id.*

²⁷ Peter L. Michaelson & Sandra A. Jeskie, *Arbitrating Disputes Involving Blockchains, Smart Contracts, and Smart Legal Contracts*, 74 DISP. RESOL. J. 89, 89-134 (2019).

²⁸ *Id.*

²⁹ Raneda, *supra* note 21.

DAOs are a decentralized arbitration-based model of governance and possess their special challenges. With no consistent legal recognition given to them worldwide, making it challenging to sign binding arbitration agreements, and lack of clarity regarding their legal status poses issues of liability, governance and enforcement of rulings.³⁰ Furthermore, the anonymity of certain DAOs poses challenges in accountability, since it makes it hard to trace responsible individuals in events of a legal dispute.³¹

In order to create a decentralized arbitration system that is sustainable, these issues need to be addressed through the implementation of strong regulatory measures. Government agencies and legal authorities in this regard must collaborate to create a framework that acknowledges DAOs as legitimate entities that can form binding contracts.³² The arbitration agreement in such DAOs should be phrased in a manner that it includes a mechanism for resolving disputes that adheres to established arbitration standards.

One possible solution is the creation of hybrid arbitration system that provides the benefits of decentralized arbitration without the limitations and disadvantages due to lack of regulatory authority. An opt-in system would permit parties to select an existing legal system but retain the benefits of efficiencies garnered from blockchain technology, affording a fair, neutral and enforceable solution.³³ This model is also ideal for reaping all of the additional rewards that will accrue with the overall technology associated with decentralized arbitration.

As a result, decentralized arbitration stems from the problems associated with traditional arbitration that is performed through traditional

³⁰ Santana & Albareda, *supra* note 23.

³¹ *Id.*

³² Maxime Chevalier, *From Smart Contract Litigation to Blockchain Arbitration, a New Decentralized Approach Leading Towards the Blockchain Arbitral Order*, 12 J. INT'L DISP. SETTLEMENT 558, 558-584 (2021).

³³ See *infra* 'Proposed Framework for Blockchain Arbitration' for a detailed discussion on Hybrid Arbitration Model as proposed solution.

institutions. In addition, the advent of digital currency/cryptocurrency, smart contracts, and AI has provided the means to create a more efficient, less expensive, and more transparent means of resolving disputes. Furthermore, DAOs can provide a governance structure for these technologies. Together, these three groups can provide a new way to resolve disputes. However, in order to effectively use these technologies, a regulatory reform will need to take place to address the legal uncertainties and create a foundation of legitimacy. Therefore, there needs to be a proper balance between the efficiency of decentralized arbitration and the legal certainty, to promote the use of decentralized arbitration globally.³⁴

iii. *Existing Blockchain Arbitration Technologies*

The rapid evolution of blockchain technology has led to innovative platforms seeking to disrupt traditional arbitration by introducing transparency, immutability, and decentralized control into dispute resolution.

- a. **Kleros** is the most recognized decentralized arbitration platform, using a crowdsourced juror model. Smart contracts initiate and oversee proceedings, with disputes submitted to a blockchain protocol that randomly assigns jurors from token holders.³⁵ Jurors debate and vote, guided by a game-theoretic incentive model balancing fairness and individual gain. However, Kleros decisions are not formally recognized under international systems Convention on the Recognition and Enforcement of Foreign

³⁴ *Id.*

³⁵ Clément Lesaege, Federico Ast & William George, *Kleros Short Paper v1.0.7*, KLEROS (Sept. 2019), https://kleros.io/static/whitepaper_en-8bd3a0480b45c39899787e17049ded26.pdf.

Arbitral Awards [“**New York Convention**”], and token staking and community voting risk collusion or bribery.³⁶

- b. *Jur* bridges decentralized systems and traditional arbitration through a multi-layer mechanism. Its open layer allows community adjudication for simple disputes, while complex or high-value cases go to a court layer of legal professionals. A traditional layer interfaces with judicial systems to ensure enforceability.³⁷ Despite flexibility, *Jur* remains experimental, facing regulatory uncertainty and limited adoption.³⁸
- c. *Aragon Court* resolves conflicts within DAO governance. Jurors, selected via staking Aragon Network Tokens [“**ANT**”]), vote on disputes, with outcomes immutably stored on-chain. While effective for internal DAO conflicts, its applicability is narrow and lacks recognition in traditional legal systems³⁹

III. Challenges to Blockchain Arbitration

Despite the various advantages of blockchain arbitration, there are several challenges of procedural, administrative, judicial & technological kind. It operates in two forms—off-chain, resembling traditional arbitration without automatic enforcement, and on-chain, where the process and outcome are embedded in the blockchain.⁴⁰ However, under the New York

³⁶ Aryan Tulsyan, *Arbitration Tech Toolbox: The Rawlsian ‘Veil of Ignorance’ and Blockchain Arbitration*, KLUWER ARB. BLOG (July 17, 2023) <https://arbitrationblog.kluwerarbitration.com/2023/07/17/arbitration-tech-toolbox-the-rawlsian-veil-of-ignorance-and-blockchain-arbitration/>.

³⁷ JUR FOUNDATION, *JUR white paper* (2021) <https://jur.io/documents/whitepaper.pdf>

³⁸ Zoé Koray, *Blockchain, Smart Contracts and Alternative Dispute Resolution*, GIDE (July 5, 2023), <https://www.gide.com/en/news-insights/blockchain-smart-contracts-and-alternative-dispute-resolution>.

³⁹ *What is Aragon Court?* ARAGON (Jan. 03, 2025) <https://legacy-docs.aragon.org/products/aragon-court/aragon-court>.

⁴⁰ Koray, *supra* note 39.

Convention, full reliance on blockchain mechanisms may risk denial of recognition or enforcement of such awards or agreements.⁴¹

A. Recognition and Enforceability

Under the New York Convention, a key requirement for enforcing the award is the existence of a valid agreement to arbitrate. This agreement signifies that the parties have consented to waive the right to access state courts and instead submit to a private adjudication system. Arbitration as a process is foundationally built on mutual consent, and if there is an absence of a clear agreement to arbitrate, the recognition and enforcement of any arbitral award can be denied.⁴² Further, in an arbitral proceeding, the parties must be effectively notified about the appointment of the arbitrator, which in blockchain arbitration under the “decentralised” structure is either token-based, nature of matter based, Algorithmic based, etc.; which makes the process unpredictable and open-ended, which can cause challenge to the Arbitral Award under Article V(1)(d) of the New York Convention.⁴³

Coming to the paranoia under arbitration the element of due process has formed an integral part of the justice delivery system, for centuries. The phrase *audi alterem partem* dates back to the times when the judicial system globally was centralized either under the king, the church or the state. In the blockchain structure of arbitration, wherein the opportunity to hear, to

⁴¹ Rana Sajjad Ahmad, *Blockchain Arbitration: Promises and Perils*, AM. REV. INT’L ARB. BLOG (Mar. 23, 2023) <https://aria.law.columbia.edu/blockchain-arbitration-promises-and-perils/>.

⁴² Ritika Bansal, *Enforceability of Awards from Blockchain Arbitrations in India*, KLUWER ARB. BLOG (Aug. 21, 2019), <https://arbitrationblog.kluwerarbitration.com/2019/08/21/enforceability-of-awards-from-blockchain-arbitrations-in-india/>.

⁴³ Pietro Ortolani, *Recognition and Enforcement of the Outcome of Blockchain-Based Dispute Resolution*, in *BLOCKCHAIN AND PRIVATE INTERNATIONAL LAW 675* (Andrea Bonomi, Matthias Lehmann & Shaheez Lalani eds., 2023).

produce evidence, and to advance testimonies forms an integral function, remains procedurally uncertain.

Further, in the case of blockchain-based systems that are designed to expedite arbitration, there might be concerns over whether the parties were provided with enough time to present their arguments and evidence, particularly in cases where the procedure is completed very quickly, causing major concerns of unenforceability of the award, due to lack of due process.⁴⁴

Lastly, the ground of public policy remains a critical aspect determining the enforceability of the award, which refers to the merits of the arbitrator's decision rather than the procedural aspects. In the context of blockchain technology, there is a growing concern about contracts entered into via blockchain-based escrow mechanisms, especially those linked to illegal or immoral activities, like contracts on darknet marketplaces.

For example, participants in illegal dealings may be able to use cryptocurrency and blockchain to effectuate dispute resolution other than enforcement methods established by law.⁴⁵ Because these contracts may violate some public policy of the jurisdiction in which enforcement is being sought, the parties may have purposely created their agreements so that the state chose not to recognize the dispute resolution.⁴⁶

B. Scalability and Security

⁴⁴ Varda Saxena & Harshitha Swarna, *The Conundrum of Enforceability of Blockchain Arbitration: Learnings from Kleros*, MAPPING ADR (Apr. 17, 2024) <https://jgu.edu.in/mappingADR/the-conundrum-of-enforceability-of-blockchain-arbitration-learnings-from-kleros/>.

⁴⁵ Gerechtshof Amsterdam, 29 January 2019, ECLI:NL:GHAMS:2019:192 (Netherlands).

⁴⁶ Sam Brown, *Arbitration of Cryptoasset and Smart Contract Disputes: Arbitration Unchained?* CLIFFORD CHANCE (July 19, 2023) <https://www.cliffordchance.com/briefings/2023/07/arbitration-of-cryptoasset-and-smart-contract-disputes--arbitrat.html>.

Blockchain is well-known as a secure environment for storing data because of the decentralized nature of its structure - every block exists in duplicate and is verified by each node in the network. The validation of blocks greatly reduces the risk of changing stored data, or deleting stored data, without the approval of all parties in the network, which creates an extremely high level of trust and integrity.⁴⁷ Without an authorized entity to support the system, there is also a significant reduction of any risk of failure, compromise, or intrusion.

Despite these advantages, blockchain arbitration faces notable challenges relating to scalability, security, and ethics that limit its full potential.⁴⁸ As the volume of transactions and arbitration cases increases, network congestion can lead to slower processing times, higher transaction costs, and reduced efficiency.⁴⁹ Moreover, security breaches may arise not only from vulnerabilities in the code but also through manipulation of the system's procedural aspects, such as the appointment of arbitrators or scheduling of hearings, thereby undermining the reliability of decentralized arbitration.⁵⁰

C. Ethical and Governance Concerns

The growing automation of arbitral processes introduces additional ethical and governance concerns. The absence of centralized oversight may lead to a lack of accountability, while algorithmic decision-making risks replacing balanced human judgment with rigid, code-based determinations. In complex or emotionally nuanced disputes, the absence of discretion or

⁴⁷ Payel Chatterjee, Aman Singhania & Yuvraj Singh Sharma, *Technology and Artificial Intelligence: Reengineering Arbitration in the New World*, INT'L BAR ASS'N (Dec. 20, 2023) <https://www.ibanet.org/technology-and-artificial-intelligence-reengineering-arbitration-in-the-new-world>.

⁴⁸ *Id.*

⁴⁹ Dan Perera & Justine Barthe-Dejean, *The Arbitrability of Web3 Disputes: An Effective Court of First World Problems?* HOLMAN FENWICK WILLAN (Mar. 2023) <https://www.hfw.com/app/uploads/2024/04/004827-HFW-The-arbitrability-of-Web3-disputes-an-effective-court-of-First-World-problems-March-2023.pdf>.

⁵⁰ Mulia & Kumari, *supra* note 12.

empathy could compromise fairness. Additionally, although the immutability of the blockchain supports confidentiality and security of data, using third-party oracles can expose private data which raises privacy issues.⁵¹

As such, although automation improves efficiency, it also indicates that there needs to be ethical safeguards and human oversight in order to maintain fairness and legitimacy of arbitral results.⁵²

With advancement in technology, arbitration systems require a careful balance among efficiency and accountability while adhering to the underlying principles of justice associated with the process.

Furthermore, even though an aggressive push exists towards automating the dispute resolution process,

*“technology can never come without posing any flaws or risks. No matter how hard coders try to maintain perfection in the code, there will always be a point where one error will crumble and disrupt the entire platform.”*⁵³

IV. Evolving Jurisprudence for amending Arbitration Framework

International arbitration facilitates cross-border dispute resolution while providing for flexibility, neutrality, and confidentiality. Unfortunately, high costs, lengthy procedures, and recalcitrance by domestic courts in enforcing a foreign award hinder international arbitration’s effectiveness.⁵⁴

⁵¹ Ishaan Deepak Joshi, *Ethics in Blockchain Arbitration: Implications for ADR in India’s Digital Age*, 3(2) INT’L J. HUM. RTS. L. REV. 16 (2024).

⁵² Ankit Kapoor, *Legal and Policy Concerns with Blockchain-Based Arbitration*, 2 NUJS J. DISP. RESOL. 1 (2022).

⁵³ Darshan Bhora & Aisiri Raj, *Blockchain Arbitration: The Future of Dispute Resolution Mechanisms?*, Cambridge Int’l L.J. BLOG (Dec. 16, 2020) <https://cilj.co.uk/2020/12/16/blockchain-arbitration-the-future-of-dispute-resolution-mechanisms/>.

⁵⁴ Meenal, *supra* note 16.

Further, the lack of an appellate mechanism raises issues around claims of bias or unfairness. This, in many instances, leads the parties back to court, which is contrary to the goals of arbitration as a quick and final resolution mechanism.⁵⁵

Web3 arbitration presents crucial techno-legal challenges for traditional dispute resolution. As blockchain and smart contracts become established sites for response all over the world, arbitration will have to change in response, necessitating a ‘holistic rethinking’ of commercial and contractual dispute resolution to deal effectively with the multilayer interaction of these new digital innovations.

A. Cross-Border Harmonization of Laws related to Web3 Dispute Resolution

One of the main challenges facing arbitration in Web3 is the international recognition and enforcement of arbitral awards related to blockchain technology. Since blockchain transactions are cross-border, there is a necessity to develop harmonized regulatory regimes that can effectively address the enforcement of arbitral awards under smart contracts and decentralized systems. Traditional mechanisms often face challenges accommodating new technologies, as the boundaries between territorial jurisdiction, the location of arbitration, and rules of procedure have become increasingly ambiguous within a decentralized environment.⁵⁶

To solve these issues, one solution might be the creation of an international treaty that explicitly mandates the enforcement of blockchain arbitration awards. This would provide uniformity of award recognition across multiple jurisdictions, specifically for those involving smart contracts.

⁵⁵ Thomas D. Grant & F. Scott Kieff, *Appointing Arbitrators: Tenure, Public Confidence, and a Middle Road for ISDS Reform*, 43 MICH. J. INT’L L. 171, 352 (2022).

⁵⁶ Tonya M. Evans, *The Role of International Rules in Blockchain-Based Cross-Border Commercial Disputes*, 65 WAYNE L. REV. 1 (2019).

By creating standardized rules in conjunction with major arbitration institutions such as the ICC, LCIA, and SIAC, it would assist in connecting new technology with traditional legal principles. This new framework would also eliminate forum shopping and conflicting rulings by integrating the unique properties of the Web3 ecosystem into the arbitration process, thereby enhancing the certainty of cross-border digital transactions.⁵⁷

However, rather than creating a completely new International treaty, the more practical option may be to amend pre-existing legal instruments to adapt them to the blockchain framework. For example, the UNCITRAL Model Law on International Commercial Arbitration (1985, as amended 2006) provides both a flexible and technology-neutral approach. Its features of party autonomy, as well as limited judicial interference, are essentially compatible with blockchain arbitration after an amendment is made to include proper defining and procedural clarification.

In order to ensure compatibility, Article 7 of the Model Law could collectively acknowledge “digital or algorithmic arbitration agreements” as valid, where the fact of consent is verified through blockchain records or cryptographic signatures. Similarly, Article 18, which requires equal treatment and the right to be heard, would also benefit from interpretive guidance to ensure fairness in process in cases of automated arbitrations or those administered by a DAO. In addition, an interpretive note could clarify that “on-chain” arbitral awards are functionally the same as awards handed down at a seat and enforceable pursuant to the New York Convention.

Major arbitral institutions can complement this evolution by aligning their procedural rules with UNCITRAL’s framework. Model clauses could incorporate blockchain-compatible procedures for notice, submission of

⁵⁷ Xiangbin Zuo, Nur Khalidah Dahlan, Haniff Ahamat & Dan Wu, *Innovative Dispute Resolution: The Application of Blockchain in Cross-Border E-Commerce Governance*, 8 J. ECOHUMANISM 7157, 7170 (2024).

evidence, and award delivery, enhancing both harmonization and legitimacy in cross-border blockchain arbitrations.

One of the illustrative examples of integrating blockchain arbitration into the country's legal system is in Mexico, where an off-chain arbitrator consolidates the results of Kleros into traditional arbitral awards. This system ensures that blockchain arbitration is aligned with national legal systems while respecting the prevailing *lex arbitri*.⁵⁸

Since decentralized applications [**dApps**] on blockchain technology take up no physical space, they are not generally found to be within the jurisdiction of any single State's territory. This situation presents a problem under Article I(1) of the New York Convention, which only recognizes the enforceability of foreign arbitral awards rendered within the territorial jurisdiction of a different State from that in which recognition and enforcement are sought.⁵⁹ Since blockchain arbitration awards take no form of association with any physical jurisdiction, being made on-chain and shared digitally before reaching the arbitrator, they do not exactly meet this territorial requirement.⁶⁰

Nonetheless, it will be vital to construct these new dispute resolution mechanisms to be enforceable to facilitate arbitrations continued growth in the Web3 era. The Kleros model is a landmark example of successfully loosening arbitration into existing legal practices without losing conformity to international arbitration standards.⁶¹

B. Requirement of Legislative Innovation

⁵⁸ Saxena & Swarna, *supra* note 46.

⁵⁹ Manyun Li, *Legal Intervention in the Decentralised Era: A Sceptical Analysis of ADR's Feasibility in Resolving Blockchain Disputes*, 25 ASIAN DISP. REV. 63, 63-71 (2023).

⁶⁰ Yannick Gabuthy, *Blockchain-Based Dispute Resolution: Insights and Challenges*, 14(3) GAMES 34 (2023).

⁶¹ Koray, *supra* note 39.

Legislative creativity is a requirement for the arbitration process to effectively deal with blockchain transaction disputes. While arbitration law works for the resolution of complex contractual disputes, it might not work for the peculiarities of future contracts negotiated, prepared, and executed through different frameworks such as smart contracts and dApps. Smart contracts, as contract programs, have the capability to self-execute without interference from a human actor. Therefore, the rigidity of traditional arbitration processes could be an obstacle to adopting arbitration, as arbitration, as emphasized, relies upon a traditional contract law framework, which may be challenging in this dynamic, code-driven context.⁶²

A primary proposal advocate is to amend national arbitration law to allow the recognition and enforcement of smart contracts as binding contracts in arbitration. Such reforms should give direction regarding how tribunals should interpret, enforce, and resolve disputes concerning self-executing contracts on blockchain networks. Moreover, integration of the decentralized and tamper-proof technology of blockchain would also need to be considered to safeguard the integrity of the arbitral process.⁶³

Nevertheless, the feasibility and safety of these models deserve careful attention. In practical terms, states may struggle to establish jurisdiction over decentralized networks that transact across international boundaries. Also, guaranteeing the reliability and integrity of blockchain-enabled arbitration will require considerable identity and data protection standards and auditable code to prevent manipulation or fraud. Legally, treating code as a means of providing consent under contract raises questions of interpretation between factually based systems and systems based on intent and capacity under traditional contract law.

To be workable, any legislative amendment should expose a balance between technological autonomy and legal accountability, ensuring that

⁶² Mulia & Kumari, *supra* note 11.

⁶³ Meenal, *supra* note 16.

automation is not a violation of due process or fairness. The feasibility of enacting such a legislative amendment will depend on international consensus and the willingness of regulators at home to align the direct digital norms with established procedural laws.

In this respect, arbitral institutions can develop rules on dispute management for smart contracts, for analysis of enforceability and efficiency of the programming code and for recognizing and enforcing the parties' rights in a blockchain contract.⁶⁴

Enabling the norms of smart contracts into arbitration law can provide a significant advantage of legal regimes in comparison to other jurisdictions, and attract companies operating in the digital economy to facilitate technological innovations by minimising legal uncertainties and protecting appropriate stakeholders.⁶⁵

C. Stakeholder Collaboration

Combining Web3 and arbitration will only be successful through the collaboration of the three essential groups: technologists, regulators, and practitioners. The complexities surrounding digital assets, smart contracts, and blockchain technology raises complications that no one group can resolve themselves. Regulators need to work closely with technologists and lawyers to align regulations to better suit the Web3.⁶⁶ A multi-disciplinary task force encompassing legal practitioners, technology, and regulation would be empowered to create frameworks of guidance, model laws, and

⁶⁴ Tariq Khan & Radhika Gupta, *Is International Arbitration Law Capable of Dealing with Legal Issues Arising Out of Web3?*, 9 RGNUL STUDENT RSCH. REV. 16, 32 (2023).

⁶⁵ Ruchika Chaurasia, *The Future of Technology in Arbitration: AI and Blockchain*, MONDAQ (Oct. 28, 2023), <https://www.mondaq.com/india/arbitration-dispute-resolution/1376104/the-future-of-technology-in-arbitration-ai-and-blockchain>.

⁶⁶ Khan & Gupta, *supra* note 67.

best practices for blockchain arbitration, supplemented with ongoing workshops, consultations, and research to shape responsive frameworks.⁶⁷

Collaborative integration presents clear benefits to all the stakeholders involved. For example, more informed regulatory decision-making, with less probability of over- and under-regulating (or improperly regulating) in the fast-moving digital environment. For arbitration practitioners, procedural efficiency and transparency will be improved as a result of having automated evidence management systems and blockchain-based record keeping that respects due process. Technologists will benefit from legal certainty regarding the liability and governance of the data that is exchanged, as well as the enforceability of the outcomes of implementing smart contracts. To encourage such cooperation, there could be a need for targeted legal reforms, such as recognizing DAOs as legitimate legal entities entitled to enter into arbitration agreements, developing certification standards for blockchain arbitration platforms, and developing appropriate data protection laws balancing confidentiality and transparency. Collectively these measures will work together to create a legally sound and innovation-friendly environment for arbitration in Web3.

For example, the task force could explore how arbitration systems can integrate DAOs as arbitral entities, or how consensus mechanisms in blockchain can be used to facilitate dispute resolution processes. Moreover, involving technology experts in the arbitration process will also allow for the development of tools that can automate aspects of arbitration, such as smart contract code verification, dispute resolution protocols, and enforcement mechanisms. These technology-based mechanisms would help automate arbitral processes and minimize the possibility of human error ultimately creating a more effective and cost savings way for parties to pursue arbitration.⁶⁸

⁶⁷ *Id.*

⁶⁸ Luis Miguel Velarde Saffer & Isabela Lacreata, *The Impact of Blockchain on International Arbitration: Present and Future Uses of This Revolutionary Technology*, LALIVE (Mar. 2024),

V. Comparison and Status of Indian Arbitral System

The arbitration framework in Asia is rapidly changing, with India and Singapore leading the changes to develop more efficient models, particularly as technology is becoming a large part of the ecosystem. With the importance of arbitration for facilitation of global commerce growing, they have amended arbitration legislation to identify their continuing commitment to change and technological evolution.

The Indian Arbitration and Conciliation (Amendment) Act, 2021 [**“2021 Act”**] refines key procedural aspects, with sections dealing with timelines specifically resulting from the automatic stay of enforcement of awards. Now, enforcement may unconditionally be stayed only in the event of fraud or corruption, and the resultant provision prevents abuse of process and increases transparency on how enforcement would occur. The amendment also removes restrictive requirements placed on arbitrators in a previous 2019 Act, by deleting the Eighth Schedule and amending Section 43J to allow greater flexibility in arbitrator appointments. This redefined standard in India opens the door for consideration of best practices when engaging with complex, cross-border, and decentralized disputes of the Web3 generation.⁶⁹

Singapore, a global leader in arbitration, continues to develop its arbitration framework through the International Arbitration (Amendment) Act 2020 [**“Singapore 2020 Amendment”**]. Under this, Section 9B deals with fairness and balance in multi-party arbitration as well as equitable council/co-arbitrator appointment and consideration of conflicts. Together, these reforms reflect both jurisdictions’ commitment to

<https://www.lalive.law/wp-content/uploads/2024/03/The-impact-of-Blockchain-on-International-Arbitration.pdf>.

⁶⁹ Ganesh Chandru, Aditi Sheth & Hrithik Merchant, *The 2021 Amendment to Arbitral Legislation in India: Is It a Step in the Right Direction?* 7 NAT’L L. SCH. BUS. L. REV. 95, 95-104 (2021).

developing robust, technology ready arbitration systems that promote efficiency, inclusivity, and integrity in international dispute resolution.⁷⁰

In the Web3 context, where disputes involve decentralized entities and sensitive data, the Singapore 2020 Amendment ensures fair arbitrator appointments and empowers tribunals under Section 12(1)(j) to enforce confidentiality.⁷¹ This proactive step strengthens privacy protection and reflects Singapore's commitment to adapting arbitration frameworks to address data, IP, and security challenges in digital environments.⁷²

Both India and Singapore thus signal a shift toward adaptive, inclusive arbitration frameworks suited to the decentralized, technology-driven global economy, setting models for future reforms worldwide.⁷³

VI. Resolving Disputes in the Web3 Era

In the 21st century, the nature of contracts is changing from traditional paper formats to digital, technology-driven contracts. These contracts are backed by AI, blockchain and decentralized networks. Smart contracts, such as click-wrap or browse-wrap, are self-executing contracts that

⁷⁰ Shubham Sharma, *Arbitration and Conciliation (Amendment) Act 2021: What It Holds for Foreign Investors*, MONDAQ (Jan. 5, 2025) <https://www.mondaq.com/india/arbitration-dispute-resolution/1169106/arbitration-and-conciliation-amendment-act-2021-what-it-holds-for-foreign-investors>.

⁷¹ Gary Born, Steven P. Finizio & Shanelle Irani, *Recent Amendments to Arbitral Laws: India and Singapore*, WILMERHALE (Dec. 15, 2020) <https://www.wilmerhale.com/en/insights/client-alerts/20201215-recent-amendments-to-arbitral-laws-india-and-singapore>.

⁷² Julien Chaisse & Arjun Solanki, *Singapore's Amendment to Its International Arbitration Act Pledges Its Leadership in the Asia-Pacific Region*, KLUWER ARB. BLOG (Oct. 18, 2020), <https://arbitrationblog.kluwerarbitration.com/2020/10/18/singapores-amendment-to-its-international-arbitration-act-pledges-its-leadership-in-the-asia-pacific-region>.

⁷³ Mohammed Talib & Scheherazade Dubash, *India Begins Consultation on Changes to Arbitration Legislation*, PINSENT MASONS (Oct. 29, 2024) <https://www.pinsentmasons.com/out-law/news/india-consultation-changes-arbitration-legislation>.

automatically execute an action after a set of identified criteria is met. They are more efficient, secure and transparent than traditional contracts.⁷⁴

Nonetheless, this rapid innovation has resulted in serious complications for some of those traditional legal structures, which are built on traditional basis. Issues of enforceability, jurisdiction, and interpretation arise when those involved in digital contracts attempt to navigate decentralized networks, as specific agreements may be relevant to multiple legal jurisdictions and not wholly bound by centralized legal structures.⁷⁵

Arbitration is an important method of resolving disputes involving digital and blockchain-based contracts due to its efficiency, flexibility, and cross-border nature.⁷⁶ Blockchain's immutable ledger means that the contract terms, the transaction, and the award, all will be secure and transparent, while ensuring accountability. Furthermore, smart contracts may automate arbitration clauses that can provide expedited dispute resolution and minimize time and cost.⁷⁷

In the Web3 age, arbitration becomes significant as decentralized platforms allow the resolution of disputes with peer-to-peer engagements that did not involve intermediaries or parties to the transaction, making the dispute resolution process straightforward and transparent. The growing legal structures will accommodate blockchain and web3 technology by harnessing the speed, safety, and automation needed in a digital world for

⁷⁴ Francis Gerard Bautista, *ADR in the Blockchain Ecosystem: A Primer*, KLUWER ARB. BLOG (Dec. 14, 2023), <https://arbitrationblog.kluwerarbitration.com/2023/12/14/adr-in-the-blockchain-ecosystem-a-primer/>.

⁷⁵ Akshat Khetan, *Indian Arbitration System on Path to Global Recognition and Economic Growth*, LIVE LAW (Jan. 24, 2024), <https://www.livelaw.in/law-firms/law-firm-articles-/indian-arbitration-system-global-recognition-economic-growth-247524>.

⁷⁶ Srikanth Navale & Bhavya Chengappa, *An Arbitrator's Toolkit: Blockchain, Cryptocurrency, and Smart Contract Dispute Resolution*, 77 DISP. RESOL. J. 1, 1-26 (2023).

⁷⁷ Khan & Gupta, *supra* note 67.

both individuals and businesses.⁷⁸ Therefore, the interaction of technology and arbitration provides an effective remedy which ensures the entire process is flexible in the ever-changing business and tech landscape.⁷⁹

There are potentially three levels of dealing with these disputes efficiently in a Web3 context. The first option may be the creation of a blockchain arbitrator platform as the procedure for the resolution of disputes will be provided entirely within the platform. Because the platform is blockchain based, the arbitration proceedings will be transparent and immutable, and the enforcement is also automated and decentralized.⁸⁰

The second option would be that the platform would utilize artificial intelligence and machine learning technologies to help arbitrators understand and analyze the language of smart contracts, blockchain transactions, and decentralized governance structures. The technology may help resolve disputes faster than traditional methods by identifying issues and identifying solutions from predefined rules and algorithms.⁸¹

Lastly, the process could also take advantage of smart contract arbitration provisions which would pre-define how arbitration is triggered, and the entire process would be possible via smart contracts.⁸² These clauses would outline the procedures for starting arbitration, such as choosing arbitrators,

⁷⁸ Tonya M. Evans, *The Role of International Rules in Blockchain-Based Cross-Border Commercial Disputes*, 65 WAYNE L. REV. 1 (2019).

⁷⁹ Oshin Beniwal & Vinayak Takkar, *The Paradox of Progress: Emergency Arbitration and India's Arbitral Evolution*, RGNUL STUDENT RSCH. REV BLOG (Nov. 24, 2024) <https://www.rsrr.in/post/the-paradox-of-progress-emergency-arbitration-and-india-s-arbitral-evolution>.

⁸⁰ Fabio Bassan & Maddalena Rabitti, *From Smart Legal Contracts to Contracts on Blockchain: An Empirical Investigation*, 55 COMPUT. L. & SEC. REV. 1 (2024).

⁸¹ James Metzger, *The Current Landscape of Blockchain-Based, Crowdsourced Arbitration*, 18 MACQUARIE L.J. 81 (2019).

⁸² Ibrahim Shehata, *Arbitration of Smart Contracts Part 3 – Issues to Consider When Choosing Arbitration to Resolve Smart Contracts Disputes*, KLUWER ARB. BLOG (Aug. 30, 2018) <https://legalblogs.wolterskluwer.com/arbitration-blog/arbitration-of-smart-contracts-part-3-issues-to-consider-when-choosing-arbitration-to-resolve-smart-contracts-disputes/>.

submitting evidence, and enforcing awards, all of which would be automated through smart contracts. Overall, smart contract technology would significantly decrease the time and cost of arbitration, while the process would become increasingly efficient and scalable for the global society in the Web3 space.

As the Web3 arbitration ecosystem advances, a contemporary, collaborative approach is needed that integrates cross-border regulatory frameworks and supportive legislation and advances collaboration between users, builders/creators, and platforms. The successful implementation and application of some model for this collaborative approach as a core feature of a digital economy regime has the potential to establish legal certainty and resound efficient dispute resolution mechanisms.

VII. Proposed Framework for Blockchain Arbitration

Combining innovative technologies such as blockchain with many traditional arbitration systems provides an exciting opportunity for revolutionizing dispute resolution in the Web3 era. Importantly, the capacity of blockchain arbitration to improve cross-border dispute resolution processes by increasing efficiency, providing greater transparency, and democratizing access to justice is an enormous benefit.

However, successfully developing this potential requires a well-defined framework to success today and into the future; one that adequately balances innovation with legal and procedural integrity. The proposed blockchain arbitration framework includes significant structural components, including smart contracts for the arbitration process, decentralized governance of the arbitration systems, hybrid recognition of arbitration awards, and built-in technical safeguards to allow for a comprehensive and effective means of resolving disputes.

A. Smart Contract-Based Arbitration

One of the concerning disadvantages of the blockchain arbitration is its reliance on the human selected arbitrators, which can lead to inefficiencies and biases.⁸³ To tackle this problem, there could be an AI-assisted preliminary resolution process. Here, an AI model would be engaged to analyze the issues based on precedents, interpretations and relevant case laws to provide preliminary orders. In addition, human arbitrators would then decide on more complicated disputes leaving the minor contractual disputes to be decided by AI. Smart contracts could include programming to categorize disputes by difficulty, so that AI could analyze claims and apply established guidelines for making decisions on specific matters.⁸⁴

Nonetheless, the effectiveness of this system must be tested against the realities of dispute resolution, especially in relation to algorithmic bias and the limitations of an AI to understand the subtleties of human communication, sentiment, or intention that impact arbitral decisions. Human oversight will always remain important in this regard.

If a party challenges the decision of AI, the dispute will automatically escalate to a DAO-managed panel of arbitrators. This application combines efficiency with fairness because AI-driven recommendations would be regularly reviewed and adjusted with the evolving standards of approach to dispute resolution while vetting and training the AI-Machine Learning module.

B. Decentralised Governance

Another issue that complicates cross-chain transactions is when a blockchain ecosystem has a very limited scope or focus. Interoperable

⁸³ Hiroo Advani, Asif Lampwala & Ria Garg, *Smart Contracts and Blockchain Arbitration: Smart Solutions Paving the Way for a Better Dispute Resolution Mechanism* (Apr. 25, 2022) <https://www.sconline.com/blog/post/2022/04/25/smart-contracts-and-blockchain-arbitration-smart-solutions-paving-the-way-for-a-better-dispute-resolution-mechanism/>

⁸⁴ Maud Piers & Hannah Carlota Osaer, *The Future is Now! Conference on Blockchain, Metaverse, Web3 and (What It Really Means For) Arbitration: Key Takeaways*, 2023(2) B-ARBITRA 632, 632-636 (2023).

multi-chain arbitration mechanisms could be developed to create a way for smart contracts across multiple blockchains to interact and arbitrating disputes. This would provide a seamless way of resolving disputes between numerous blockchains.⁸⁵

Additionally, decentralized oracle networks would ensure that arbitration rulings are executed consistently across all relevant blockchains, preventing disputes from being locked within a single blockchain. A standardized Universal Arbitration Token [“UAT”]) could be introduced to further streamline cross-chain enforcement, allowing arbitrators to receive payments and execute awards across various ecosystems without reliance on a single blockchain network.⁸⁶

C. Selection of Arbitrator

One of the key concerns with decentralized arbitration systems is the potential for arbitrary selection of arbitrators or voting-based biases. The current framework however proposes for a creation of dynamically rank arbitrators, based upon three factors, i.e., accuracy of the arbitrator’s decisions, arbitrator’s ratings from community members, and timeliness and procedural compliance of the arbitrator. Accordingly, this would involve machine learning algorithms periodically assessing the arbitrators’ rankings based upon the outcomes of their cases so as to refine the rankings and continue to encourage high-quality arbitration solutions. This type of approach will improve trust in the use of decentralized arbitration as a viable alternative to former traditional forms of adjudication of disputes.

D. Enforcement of Award

⁸⁵ Al-Karim Makhani, Sophie Nappert, Ji En Lee, & Sarah Chojecki, *Technology in International Arbitration: Yesterday, Today and Tomorrow*, in INTERNATIONAL ARBITRATION: QUO VADIS? 23 (Ben Beaumont, Alexis Foucard, & Fahira Brodlija eds., 2022).

⁸⁶ Sakshi Agarwal, *The Potential of DAOs in Dispute Resolution and Arbitration*, 2(3) J. LEGAL RSCH. & JURIDICAL SCI. 1366 (2024).

The enforcement of award beyond just digital formats is quite a challenge in terms of blockchain arbitration. However, this issue could be solved with a two-part enforcement model using both on-chain execution of smart contract and legal acknowledgment of off-chain enforcement.⁸⁷ The automated process would allow for the immediate enforcement of funds kept in escrow after an award has been made, decreasing the likelihood of a party not fulfilling its obligations.

In addition, DAOs would work together with legal service providers in order to link blockchain arbitration decisions to traditional court by applying existing arbitration treaties, including the New York Convention, for cross-jurisdictional enforcement. Finally, verifications through a Decentralized Identifier [“**DID**”] would support the credibility of blockchain arbitration as both parties to any dispute would be required to register on the arbitration platform using their verifiable digital identity, thereby increasing the enforceability of award in regulated jurisdictions.

E. Technological Safeguards

The core priority of digital service security is to protect the procedure with additional safeguards. Weaknesses in the coding of smart contracts or in the infrastructure of the blockchain could provide avenues for fraud, manipulation, or unauthorized access.⁸⁸ Use of high-end security features such as real-time auditing via decentralized security protocols and formal verification of the smart contracts, as well as the use of AI-enabled false-alarm detection, can help to decrease risk by providing safeguards against the weaknesses.

Additional security features, such as multi-signature authentication and encrypted records of arbitration will greatly enhance the integrity and confidentiality of the data. This further reinforces the security of the arbitration decision against tampering and malicious attacks. These

⁸⁷ *Id.*

⁸⁸ *Id.*

enhancements would protect all parties involved and establish greater confidence in blockchain arbitration as a form of resolution to disputes.

F. The Hybrid Approach

The enforcement of awards, the choice of the arbitral seat, possible security vulnerabilities in arbitration platforms, and the process of appointing arbitrators are significant challenges that blockchain-related dispute resolution will face in the future.

Given these difficulties, and at this stage, it seems more prudent to prefer hybrid solutions combining “off-chain” and “on-chain” arbitration. This is the solution that a Mexican court decision of May 28, 2021, seems to be guiding us towards.⁸⁹ In fact, for the first time, the Mexican court admitted the enforcement of an arbitral award which was governed not by the arbitrator’s judgment alone, but by a technological tool designed for decentralized dispute resolution: the Kleros Protocol.⁹⁰ What is interesting about this case is the concealment of blockchain arbitration by incorporating the blockchain award into a traditional award.⁹¹ While this does not give a general rule, it indicates that hybrid solutions are possible within the traditional arbitration framework.

By optimizing the integration of AI-enabled arbitration, cross-chain compatibility, reputation based arbitrator selection, hybrid enforcement, and technological protection mechanisms, the development of the

⁸⁹ Maxime Chevalier, *Arbitration Tech Toolbox: Is a Mexican Court Decision the First Stone to Bridging the Blockchain Arbitral Order with National Legal Orders?* KLUWER ARB. BLOG (Mar. 4, 2022) <https://arbitrationblog.kluwerarbitration.com/2022/03/04/arbitration-tech-toolbox-is-a-mexican-court-decision-the-first-stone-to-bridging-the-blockchain-arbitral-order-with-national-legal-orders>.

⁹⁰ Agarwal, *supra* note 89.

⁹¹ Mauricio Virues Carrera, *Accommodating Kleros as a Decentralised Dispute Resolution Tool for Civil Justice Systems: Theoretical Model and Case of Application*, KLEROS, <https://ipfs.kleros.io/ipfs/Accommodating-Kleros-as-a-Decentralised-Dispute-Resolution-Tool>.

blockchain arbitration can be taken to the next level. This endeavour is geared towards setting up a scalable, transparent, and compliant resolution mechanism, leading the way for blockchain arbitration to grow and become the major alternative to the traditional resolution processes.

VIII. Conclusion

The integration of Web3 technologies offer a transformative potential for arbitration by decentralising and streamlining cross-border dispute resolution. While traditional system showcases issues surrounding high costs, jurisdictional limitations and procedural inefficiencies, the decentralized technologies, particularly blockchain arbitration through DAOs and Smart Contract, appear to overcome the same through their novice approach and technology, allowing an enhanced level of transparency immutability and automation.

While the leap of technology within the Web3 poses profound number of advantages, in the field of arbitration, it also faces significant hurdles in areas of its enforceability, legal recognition and governance. In this regards, the lack of a universally accepted legal framework for DAOs, unpredictability of algorithmic arbitration and the challenge of integrating a decentralized dispute resolution within an established rules remains few significant concerns. Without clear legal recognition and procedural safeguards, decentralized arbitration risks being viewed as a novel but unenforceable mechanism, limiting its practical adoption.

In order to tackle the same, a hybrid model for approach can be adopted, wherein a decentralized mechanism can be combined within the existing institutional arbitration structure in order to pave way for balancing the efficiency of the arbitration process and provide it a legal legitimacy. The integration of this AI driven module, allowing cross-chain compatibility, reputation-based arbitrator selection in automated enforcement of mechanisms refines decentralized arbitration while being in conformity

with the fundamental principles of the law, paving way for such awards and processes being recognised under the New York Convention.

The development of arbitration practices in the age of Web3 technologies requires the harmonization of cross-border law, legislative innovations, and regulatory bodies, technologists, and arbiters to work together. As more business is done digitally through financial systems created on a decentralized basis, arbitration must serve the international and digital economies. This may include a framework for resolving disputes where there is fair, transparent, and accessible dispute resolution for the benefit of the citizens.

The future of dispute resolution does not foresee a complete substitution of established arbitration practices but seeks to incorporate Web3 technologies strategically into pre-existing dispute resolution systems. By aligning innovative technologies with operational integrity, blockchain-based arbitration can be established, efficient, and widely available as a means of resolving disputes that adhere to the same principles of fairness, neutrality, and enforceability that define arbitration today.

**DELHI HIGH COURT INTERVENES: ANTI-ARBITRATION
INJUNCTION IN ENGINEERING PROJECTS V. MSA GLOBAL**

Ms. Parnika Chaturvedi & Dr. Simon Weber†*

Abstract

*On 25 July 2025, the Delhi High Court granted an anti-arbitration injunction in *Engineering Projects (India) Limited v. MSA Global LLC (Oman)*, restraining ICC arbitration proceedings seated in Singapore. The dispute centred on a contractual tension between an arbitration clause designating Singapore as the seat and an exclusive jurisdiction clause in favour of New Delhi courts.*

*This article examines the Delhi High Court’s reasoning across four key aspects. First, it considers the Court’s acceptance of jurisdiction over foreign-seated arbitral proceedings, notwithstanding the seat-centric approach established by the Supreme Court in *Bharat Aluminium (2012)*. Second, it addresses the Court’s articulation of a test for identifying vexatious and oppressive arbitral proceedings, with particular focus on an arbitrator’s duty of disclosure under the ICC Rules. Third, it evaluates the application of the triple test for injunctive relief. Finally, it considers the broader implications of the judgment.*

I. Introduction

On 25 July 2025, the Delhi High Court [**“DHC/The Court”**] granted an anti-arbitration injunction in *Engineering Projects (India) Limited v. MSA Global LLC (OMAN)*¹ [**“Engineering Projects”**], restraining International Chamber of Commerce [**“ICC”**] arbitration proceedings seated in Singapore. The dispute between MSA Global LLC [**“MSA”**] and Engineering Projects (India) Limited [**“EPIL”**] arose from a subcontract

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¹ *Engineering Projects (India) Ltd. v. MSA Global LLC*, 2025 SCC OnLine Del 5072 [*hereinafter*, **“Engineering Projects”**].

on the design, supply, installation, and commissioning of a border security system along the Oman-Yemen border. At its core, the court addressed a tension in the parties' contract: Article 19 of the Parties' Agreement simultaneously provided for ICC arbitration – with Singapore subsequently designated as the seat by the ICC Court – and conferred exclusive jurisdiction upon the courts of New Delhi. This tension between the arbitration agreement and the jurisdiction clause sets the stage for a broader question that the DHC had to address: the extent to which Indian civil courts may intervene in foreign-seated arbitral proceedings, and the circumstances under which such intervention may be warranted.

II. Background to the Dispute

In 2023, MSA initiated arbitration, alleging project delays and contractual breaches by EPIL. During the proceedings, EPIL discovered that the co-arbitrator nominated by MSA, Mr. Andre Yeap SC, had failed to disclose his previous appointment in arbitral proceedings involving Mr. Manbhupinder Singh Atwal, the Chairman and Promoter of MSA. Subsequently, EPIL challenged the arbitrator's appointment under Article 14(1) of the ICC 2021 Arbitration Rules due to concerns about his impartiality,² and initiated proceedings before the Singapore High Court³ under Article 13(3) of the United Nations Commission on International Trade Law [“**UNCITRAL**”], Model Law on International Commercial Arbitration [“**Model Law**”].⁴

While the ICC Court found that the co-arbitrator's failure to disclose was “*regrettable*”, it ultimately rejected EPIL's challenge because the previous

² International Chamber of Commerce (ICC), Rules of Arbitration of ICC, 2021, art. 14(1) [*hereinafter*, “**ICC Arb. Rules 2021**”].

³ MSA Global LLC (Oman) v. Engineering Projects (India) Ltd, [2025] SGHC 199 (Sing.) [*hereinafter*, “**MSA Global**”].

⁴ United Nations Comm'n on Int'l Trade Law, Model Law on International Commercial Arbitration, art. 13(3) [*hereinafter* “**Model Law**”].

arbitration was “*remote in time and unrelated in subject matter*”.⁵ EPIL sought to withdraw its action in the Singapore High Court and requested that the question of whether the co-arbitrator was impartial should be solely determined by the DHC (in which it had already commenced an action on 15 April 2025), rather than have that question determined in the Singapore High Court. The Singapore High Court rejected the request to withdraw. MSA sought and obtained an interim anti-suit injunction in the Singapore High Court on 23 May 2025,⁶ on the basis that the DHC proceedings were in breach of the arbitration agreement which conferred upon Singapore exclusive supervisory jurisdiction and constituted a collateral attack on the Singapore High Court’s prior decisions with regard to the same allegations of apparent bias against the co-arbitrator. In spite of the anti-suit injunction, EPIL continued the DHC proceedings by seeking declaratory and injunctive relief in the DHC and alleging that the arbitration proceedings had become vexatious, unconscionable, oppressive, and contrary to Indian public policy.

III. Jurisdiction and Maintainability

Before ruling on the interim injunction, the DHC first addressed the maintainability of the civil suit. In accordance with Section 9 of the Indian Code of Civil Procedure, 1908 [“CPC”], the Court reaffirmed that civil courts have jurisdiction over all civil matters unless expressly or impliedly barred.⁷ Relying on precedents such as *Dhulabhai v. State of Madhya Pradesh*⁸ and *S. Vanathan Muthuraja v. Ramalingam*,⁹ the Court emphasised that exclusion of jurisdiction requires clear legislative intent, and civil suits remain maintainable where legal rights are infringed.

⁵ Engineering Projects, *supra* note 1.

⁶ MSA Global, *supra* note 3, ¶ 14.

⁷ Code of Civil Procedure, 1908, § 9 (India).

⁸ *Dhulabhai v. State of Madhya Pradesh*, 1968 SCC OnLine SC 40.

⁹ *S. Vanathan Muthuraja v. Ramalingam*, (1997) 6 SCC 143.

MSA argued that the designation of Singapore as the seat of arbitration conferred exclusive jurisdiction on Singaporean courts, thereby precluding the jurisdiction of Indian civil courts. In support of this position, MSA cited, among other authorities, the landmark judgment of *Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc.* [**“Bharat Aluminium”**],¹⁰ delivered by the Indian Supreme Court [**“SC”**] on September 6, 2012. In that ruling, the SC expressly overruled its earlier decision in *Bhatia International v. Bulk Trading S.A.*,¹¹ where it had held that Part I of the Arbitration and Conciliation Act, 1996 [**“Act”**] applied even to arbitrations seated outside India,¹² unless the parties had excluded its application. Though intended to permit Indian courts to grant interim relief in foreign-seated arbitrations, the Bhatia International ruling had the effect of inadvertently broadening the application of Part I, which has been associated with increased judicial intervention.

The 2012 Bharat Aluminium decision marked a decisive shift. It affirmed that Part I of the Act, which governs the initiation and conduct of arbitration proceedings, applies only to arbitrations seated in India. The Supreme Court adopted a strict ‘seat-centric’ approach in this case, holding that Indian courts have no jurisdiction over arbitrations seated outside India, even when both parties are Indian or have agreed to apply Part I of the Act.¹³ The designation of a foreign seat has binding legal consequences, which cannot be overridden by party agreement or used to confer supervisory jurisdiction on Indian courts.

In *Engineering Projects*, the DHC acknowledged the SC’s decision but nevertheless held that none of the cases cited by MSA impose “*an unblemished embargo that the Civil Courts cannot, in any manner whatsoever, entertain*

¹⁰ *Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc.*, (2012) 9 SCC 552 [*hereinafter*, **“Bharat Aluminium”**].

¹¹ *Bhatia International v. Bulk Trading S.A.*, (2002) 4 SCC 105.

¹² Arbitration Act, 1996, Part I (India) [*hereinafter* **“Arbitration Act”**].

¹³ *Bharat Aluminium*, *supra* note 10.

a suit seeking anti-arbitration injunction.”¹⁴ The Court clarified that while the seat of arbitration generally implies exclusive supervisory jurisdiction, this principle is not absolute. It noted that such exclusivity does not preclude Indian courts from intervening where arbitration is prima facie vexatious, oppressive, or unconscionable in nature. Citing *Union of India v. Dabhol Power Co.*¹⁵ and *ONGC v. Western Company of North America*,¹⁶ the Court held that Sections 5 and 45 of the Act do not oust the inherent jurisdiction of civil courts in such exceptional circumstances.¹⁷

While reiterating the principle of minimal judicial interference under the Act, the Court underscored its narrow yet essential supervisory role in ensuring fairness. It acknowledged that, unlike anti-suit injunctions, anti-arbitration injunctions are granted only in rare cases of abuse. Drawing on authoritative commentary including the Redfern and Hunter on International Arbitration,¹⁸ as cited in *McDonald's India Pvt. Ltd.*,¹⁹ it concluded that judicial oversight remains necessary to prevent arbitration from becoming an instrument of injustice.

IV. Vexatious and Oppressive Proceedings: The Litmus Test

The Court proceeded to examine whether the arbitration proceedings in question were prima facie vexatious or oppressive. To this end, it articulated a litmus test based on established legal definitions and authoritative sources, including Indian and English case law:

Oil and Natural Gas Commission v. Western Company of North America, (1987) 1 SCC 496: This was a decision the court relied upon

¹⁴ Engineering Projects, *supra* note 1, ¶ 55.

¹⁵ Union of India v. Dabhol Power Co., 2004 SCC OnLine Del 1298.

¹⁶ ONGC v. Western Co. of North America, (1987) 1 SCC 496.

¹⁷ Arbitration Act, § 5; Arbitration Act, § 45.

¹⁸ 6 BLACKABY, PARTASIDES, REDFERN & HUNTER, REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION (Oxford University Press 2015).

¹⁹ McDonald's India Pvt Ltd v. Vikram Bakshi & Ors, FAO (OS) 9/2015 & CM No. 326/2015.

extensively (*see* para. 57). The Supreme Court in this case granted an injunction against a foreign party and held that to “*drive one party into a tight corner and oblige it to be placed in such an inextricable situation*” would be oppressive. It would be “*neither just nor fair on the part of the Indian Court to deny relief*” when a party is likely to be placed in an awkward situation. Courts “*unquestionably retain jurisdiction to grant a restraint order whenever the circumstances of the case make it necessary or expedient to do so or the ends of justice so require*” The court also clarified that Section 41(b) of the Specific Relief Act would not bar such injunctions against foreign proceedings.

- *Union of India v. Dabhol Power Company, 2004 SCC OnLine Del 1298*: The court relied on this decision (*see* para. 56) to establish that “*neither Section 5 nor Section 45 of the Arbitration and Conciliation Act, 1996 oust the jurisdiction of this Court from issuing an injunction if it finds that the arbitral proceedings against the plaintiff in a foreign country are oppressive and call for interference.*”
- *McDonald’s India Private Limited v. Vikram Bakshi & Ors., 2016 SCC OnLine Del 3949*: The Division Bench decision was relied upon (*see* para. 59) for the proposition that (i) a distinction must be drawn between an anti-suit injunction and an anti-arbitration injunction and (ii) exceptional cases warranting injunction include circumstances rendering arbitration proceedings “oppressive or unconscionable”.
- *Himachal Sorang Power Private Limited v. NCC Infrastructure Holdings Limited, 2019 SCC OnLine Del 7575*: The court relied on this decision (*see* para. 60) which enumerated the broad parameters governing anti-arbitration injunctions.
- *J. Jarvis & Sons Ltd. v. Blue Circle Dartford Estates Ltd., [2007] A.P.P.L.R. 05/14*: The court relied on this English decision (*see* para. 61) which held that “*the grant of anti-arbitration injunction on the ground of vexatiousness, oppression and abuse of process is permissible, however, the power is to be exercised sparingly.*”

- *Minister of Finance (Inc) and Malaysian Development Berhad v. International Petroleum Investment Coy*, [2019] EWCA Civ 2080: The English Court of Appeal decision was relied upon (*see* para. 61), where an anti-arbitration injunction was granted on the ground of vexatious conduct. The court found this case relevant because it established that “*it is against public interest to enforce an arbitration agreement/award if the foundation of the arbitral tribunal is in question, unless the serious apprehension against the Arbitral Tribunal is decided first.*”

The Court further relied on various law dictionaries to interpret the meaning of ‘vexatious’ and ‘oppressive’:

- Black’s Law Dictionary (11th ed., 2019):
 - defining ‘vexatious’ as “*without reasonable or probable cause or excuse; harassing; annoying,*” and clarifying that a vexatious litigant “*habitually and persistently engages in litigation, without a reasonable ground, to harass or subdue an adversary.*”
 - defining ‘oppressive’ as “*unreasonably burdensome or severe; unjustly harsh or tyrannical.*”
- Wharton’s Law Lexicon (16th ed., 2016):
 - defining a vexatious action as one “*instituted maliciously and without reasonable or probable cause.*”
 - explaining ‘oppressive’ as conduct “*which inflicts unjust hardship or exercises authority in an unfair or unjust manner.*”
- Words and Phrases Legally Defined (Butterworths, 5th ed.): stating that proceedings are vexatious if “*instituted with the intention of annoying or harassing the other party, or are oppressive in manner and nature.*”
- Stroud’s Judicial Dictionary (9th ed., 2016):
 - describing a vexatious proceeding as one “*which has little or no basis in law and is instituted to annoy or embarrass the opponent.*”
 - describing ‘oppressive’ as “*that which is burdensome, unjust, or harsh to the point of being unconscionable.*”

- Oxford Dictionary of Law (8th ed., 2015): defining oppressive action as “*one that unjustly inflicts hardship or constraint, especially in the misuse of legal authority or process.*”

As a result, the Court defined ‘vexatious’ proceedings as those instituted without sufficient legal basis and primarily intended to annoy or harass the opposing party. In contrast, ‘oppressive’ conduct was characterised by unjust, harsh, or disproportionate burdens imposed on the other side, often amounting to an abuse of process. The Court emphasised that the inquiry must be fact-specific and holistic, considering factors such as whether the conduct involved deliberate procedural irregularities, systematic efforts to disadvantage an adversary, violations of principles of natural justice, or any behaviour calculated to obstruct fair adjudication.²⁰

The Court began by analysing the scope of an arbitrator’s continuing duty of disclosure under Article 11 of the ICC 2021 Arbitration Rules.²¹ Significantly, the Court noted that under the ICC framework, any doubt must be resolved in favour of disclosure and that the duty to disclose must be judged from the perspective of the parties, not the arbitrator’s subjective view.

As for Mr. Yeap’s omission to disclose, the Court found it to be both deliberate and significant, in particular as he later admitted that disclosure would likely have led to an objection. Consequently, it criticised the ICC Court’s rejection of the challenge, calling it a case of “*operation successful, but patient dead*”²² and observing that institutional adherence to technical rules may not adequately address the loss of confidence in neutrality. Ultimately, the Court held that requiring EPIL to continue proceedings before a

²⁰ Engineering Projects, *supra* note 1.

²¹ ICC Arb. Rules 2021, art 11.

²² Engineering Projects, *supra* note 1, ¶ 78.

tribunal compromised from the outset would impose an unjust and oppressive burden.

Further, the Court found that MSA's conduct reflects "*mala fides and tactical manipulation*",²³ amounting to a vexatious and oppressive abuse of process. In reaching this conclusion, the Court referred to the definitions set out in its test: "*vexatious*" conduct refers to pursuing a lawsuit without sufficient legal basis and primarily intended to harass the opposing party, while "*oppressive*" conduct refers to that which imposes an unjust and disproportionate burden on the other party.

The Court found that, on the basis of the material before it, there was a pattern of conduct rather than an isolated incident satisfying the test of vexatiousness as articulated by the Court drawing on the dictionary definitions and earlier authorities discussed above. Specifically, it found that MSA had continually sought to proceed with evidentiary hearings before the arbitral tribunal while being aware of the jurisdictional challenges pending before courts in both India and Singapore. The hearings were scheduled without meaningful consultation and EPIL was not afforded sufficient time to prepare or respond. In addition, MSA opposed EPIL's withdrawal from its Challenge Application before the Singapore High Court, filed wasted costs applications against EPIL and obtained an anti-suit injunction preventing EPIL from continuing its proceedings against them in Indian courts. Therefore, the Court found that the cumulative effect of these actions was not simply to advance the arbitration proceedings, but also to create a situation whereby EPIL was overwhelmed procedurally and financially, being required to defend itself across three separate sets of proceedings, and the arbitration was proceeding rapidly towards the evidentiary stage.²⁴

²³ *Id.* ¶ 120.

²⁴ *Id.*

Thus, the Court found that in the circumstances of this case, the arbitration proceedings were, *prima facie*, vexatious and oppressive, and that the suit seeking an anti-arbitration injunction was accordingly maintainable before the Court.

V. The Triple-Test for Injunctive Relief

The Court applied the well-established “*triple test*”, as articulated by the Supreme Court in *Hazrat Surat Shah Urdu Education Society v. Abdul Sabel*²⁵ and further elaborated in *Dalpat Kumar v. Prahlad Singh (1992)*²⁶ and consistently reaffirmed by the Delhi High Court in subsequent decisions,²⁷ to evaluate the granting of an interim injunction, considering (i) the existence of a *prima facie* case, (ii) the balance of convenience, and (iii) the possibility of irreparable injury. *First*, it found a strong *prima facie* case due to the co-arbitrator’s deliberate non-disclosure of his prior appointment in arbitral proceedings involving Mr. Manbhupinder Singh Atwal, the Chairman and Promoter of MSA, which raised concerns about his impartiality. *Second*, the Court held that the balance of convenience favoured EPIL, as compelling participation in unfair proceedings would cause greater harm than a temporary stay. In particular, the Court took into account the substantial financial outlay involved in arbitration and EPIL’s status as a public sector undertaking, noting that proceeding with the arbitration would risk a significant and unjustified waste of public resources. The Court also considered that MSA’s conduct evidenced tactical manipulation rather than a genuine intent to resolve the dispute. *Finally*, on irreparable injury, the Court recognised that forcing EPIL to proceed under a tribunal whose impartiality was in question would cause serious harm to its right to fair adjudication and to the integrity of the dispute resolution process.

²⁵ *Hazrat Surat Shah Urdu Education Society v. Abdul Saheb JT*, (1988) 4 SC 232.

²⁶ *Dalpat Kumar v. Prahlad Singh*, (1992) 1 SCC 719.

²⁷ *See also Hari Krishan Sharma v. MCD, I.K. Mehra v. Wazir Chand Mehra, B.M.L. Garg v. Lloyd Insulations (India) Ltd, and Rashmi Saluja v. Religare Industries.*

VI. Conclusion

The DHC's decision highlights the delicate balance between party autonomy and judicial oversight in international arbitration. It stresses that procedural compliance cannot substitute for substantive fairness. The foundation of legitimacy of arbitration lies not only in the legal observance of relevant institutional rules, but also in ensuring transparency, equity, and informed consent throughout the arbitration process.

This ruling gives rise to a jurisdictional conflict: an Indian civil court has restrained ICC proceedings taking place in Singapore, notwithstanding an interim anti-suit injunction previously issued by the Singapore High Court. As the Singapore court noted, "*there continues to be tension between the court proceedings in Singapore and those in Delhi*".²⁸ Contracts between parties with Indian entities designating foreign arbitration seats may give rise to questions as to the enforceability of their dispute resolution agreements.

There were questions regarding whether the reasoning noted by the DHC provided sufficient engagement with Article 5 of the UNCITRAL Model Law limiting court interference to instances specifically identified within the Model Law.²⁹ According to the Singapore High Court, EPIL's application is essentially an allegation that the co-arbitrator was not impartial. This is governed by Articles 13³⁰ and 14 of the Model Law,³¹ but EPIL has framed it in terms of vexatiousness and oppression. The Singapore High Court took the view that allowing a non-seat court to substitute its assessment for that of both the ICC Court and the seat court might encourage dissatisfied parties to seek to relitigate settled matters before Indian courts on public policy grounds.³²

²⁸ MSA Global, *supra* note 3, ¶ 99.

²⁹ Model Law, *supra* note 4, art. 5.

³⁰ *Id* art 13.

³¹ *Id* art 14.

³² MSA Global, *supra* note 3.

This ruling may underscore the need for clearer directions on the circumstances in which foreign-seated arbitrations may be subject to judicial intervention, including whether all available remedies before the seat court should first be exhausted, what threshold is required for a finding of vexatiousness, and the extent to which Indian courts should defer to seat court rulings where the underlying issues are largely similar.

Finally, while the DHC stopped short of formally departing from the seat-centric approach established in *Bharat Aluminium*,³³ it grounded its intervention in the inherent jurisdiction of civil courts under the CPC, setting aside the framework of the 1996 Act. Were other High Courts to follow this reasoning, Indian courts might adopt a broader discretionary approach, retaining residual jurisdiction over foreign-seated arbitrations in exceptional cases. Whether this sits comfortably with the principles laid down in *Bharat Aluminium* is a question that the Supreme Court of India may ultimately need to address.

³³ *Bharat Aluminium*, *supra* note 10.

SECURING JURISDICTION, LOSING ENFORCEABILITY? A COMMENT
ON THE LATA YADAV VERDICT

*Ms. Divyansha Verma**

Abstract

*Since its 2025 decision in *Lata Yadav v. Shivakriti Agro (P) Ltd*, the Hon'ble Delhi High Court has recognised the jurisdiction of arbitral tribunals despite assets being provisionally attached under the Prevention of Money Laundering Act, 2002 [“PMLA”]. In other words, the pendency of parallel investigations by the Enforcement Directorate [“ED”] or Central Bureau of Investigation [“CBF”] into allegations of fraud and money laundering does not bar the arbitrator from adjudicating the dispute. The judgment reaffirms the principle of minimal judicial interference in arbitration and clarifies the limited impact of criminal or regulatory actions on ongoing arbitral proceedings, but it also leaves questions about award enforcement unanswered. This article fills a gap in the academic literature by taking up these questions. In doing so, it analyses the scope of PMLA provisions, specifically Sections 41 and 71 on courts enforcing arbitral awards, the possibility of public policy as a ground for refusal of enforcement, and the unequal burden of restoring property. It advocates adopting measures, such as the “substitution of assets” model and a statutory “carve out” for bonafide third parties.*

I. Introduction

In arbitral cases involving allegations of money laundering, there may be a conflict between court and arbitration proceedings. This clash was the subject matter of a 2025 judgment of the Delhi High Court [“HC”] in *Lata*

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Yadav v. Shivakriti Agro Pvt. Ltd. [“**Lata Yadav**”].¹ The judgment essentially sought to answer the question of whether the jurisdiction of an arbitral tribunal can be ousted on the ground that the assets forming the subject matter of arbitration proceedings find reference in a provisional attachment order issued by the ED.

The *Lata Yadav* judgment is significant for two reasons. *First*, it tests the resilience of the principle of party autonomy in arbitration against the backdrop of parallel statutory proceedings under the PMLA.² The decision is part of a line of cases, including *A. Ayyasamy v. A. Paramasivam*,³ *Avitel Post Studios Ltd. v. HSBC PI Holdings (Mauritius) Ltd* [“**Avitel**”],⁴ and *Swiss Timing Ltd. v. Commonwealth Games 2010 Organising Committee* [“**Swiss Timing**”],⁵ where courts have grappled with the extent to which allegations of illegality and fraud can displace arbitral jurisdiction. Taken together, these decisions illustrate a consistent judicial posture: arbitral jurisdiction is to be preserved, but its practical utility is always conditioned by the question of enforceability. *Lata Yadav* falls within this line and must be assessed not only in terms of the jurisdiction it affirms but also in terms of the enforceability it leaves uncertain.

Second, it reflects the continuing pro-arbitration stance of the courts by clarifying that arbitral tribunals may proceed even when the ED has provisionally attached assets central to the dispute.

¹ *Lata Yadav v. Shivakriti Agro (P) Ltd.*, 2025 SCC OnLine Del 4334 (India) [*hereinafter* “**Lata Yadav**”].

² Prevention of Money Laundering Act, 2002, No. 15, Acts of Parliament, 2003 (India) [*hereinafter* “**PMLA**”].

³ *A. Ayyasamy v. A. Paramasivam*, (2016) 10 SCC 386 [*hereinafter*, “**Ayyasamy**”].

⁴ *Avitel Post Studios Ltd. v. HSBC PI Holdings (Mauritius) Ltd.*, (2021) 4 SCC 713 [*hereinafter* “**Avitel**”].

⁵ *Swiss Timing Ltd v. Commonwealth Games 2010 Organising Committee*, (2014) 6 SCC 677 [*hereinafter* “**Swiss Timing**”].

The case also highlights ongoing tensions within Indian arbitration law. The Delhi HC underscored that arbitral and PMLA proceedings operate in distinct spheres. However, there are certain concerns regarding the subsequent stages of arbitration, particularly the enforcement stage. The following part of this article aims to engage further with the reasoning of the Delhi HC and to analyse the effect of applying the *Avitel* test, i.e. whether the alleged fraud permeates the arbitration agreement itself or whether it carries implications in the public law domain, as the governing standard for arbitrability of fraud-related disputes in Indian arbitration jurisprudence.

This article approaches the judgment from three angles. It begins by examining how the Court addresses arbitrability in cases involving allegations of fraud and money laundering. It then turns to the relationship between the Arbitration & Conciliation Act, 1996 [**Arbitration Act**],⁶ and the PMLA, with particular emphasis on the effect of provisional attachment and whether such proceedings restrict arbitral jurisdiction. Finally, it highlights the questions that the decision leaves unanswered, especially the difficulties that may arise at the stage of enforcement and the possibility that the overriding provisions of the PMLA could weaken awards.

II. Background Facts of the Case

The Petitioner and Respondent No. 2 were partners in Respondent No. 4 LLP. Respondent No. 1 (the Claimant in the arbitration) and Respondent No. 3 (a rice milling and marketing company with facilities in Amritsar and Bahalgarh) entered into agreements allowing Respondent No. 1 to use these facilities on a job-work basis. Respondent No. 4 LLP submitted a resolution plan in Respondent No. 3's ongoing Corporate Insolvency Resolution Process before the National Company Law Tribunal, approved on 12.09.2020.

⁶ Arbitration & Conciliation Act, 1996, No. 26, Acts of Parliament, 1996 (India) [*hereinafter* "**Arbitration Act**"].

To fulfil the plan, Respondent No. 4 LLP and its partners, including the petitioner, sought financial aid from Respondent No. 1. On 30.09.2020, they executed a Facility Agreement under which Respondent No. 1 advanced Rs. 130 crores to Respondent No. 4 LLP for creditor payments. Respondent No. 1, already using the facilities, aimed to acquire them. An additional Rs.16 crores followed, and Respondent No. 3's shareholding transferred to Respondent No. 4 LLP. Respondent No. 1 alleged breaches, including attempts to create unauthorised charges on the facilities despite the funding.

Respondent No. 1 invoked the arbitration clause in the Facility Agreement, and secured the sole arbitrator's appointment via a Section 11 petition on 09.12.2021. Challenges to the arbitration agreement's existence were deferred to the tribunal. Pleadings concluded, issues were framed, evidence affidavits filed, and cross-examination of Respondent No. 2 was underway.

Mid-cross-examination, the ED arrested Respondent No. 1's representatives and Respondent No. 2. On 26.08.2024, ED issued a provisional attachment order over the Bahalgarh and Amritsar units, core assets in the Facility Agreement and arbitration. The Petitioner and Respondent No. 4 applied under Sections 16 and 32(2)(c) of the Arbitration Act, seeking termination due to this intervention. The arbitrator dismissed the application via the impugned order, electing to continue proceedings. Hence, Lata Yadav approached the Delhi HC under an Article 227 petition, challenging the arbitrator's order.

III. Statutory Background

A. The PMLA 2002

The PMLA, which came into force in 2005,⁷ was enacted with the objective to *“prevent money-laundering and to provide for confiscation of property derived from, or*

⁷ PMLA, § 1.

*involved in, money-laundering and for matters connected therewith or incidental thereto.*⁸ Its provisions establish a three-stage process of asset control, each stage carrying distinct consequences for the rights of third parties including award creditors seeking to enforce arbitral awards.

The first stage is provisional attachment under Section 5. The ED may provisionally attach property suspected to be “*proceeds of crime*” for up to 180 days, pending investigation.⁹ During this period, the property cannot be alienated, transferred, or otherwise dealt with, though the owner of immovable property may continue to enjoy its possession under Section 5(4). The bar on dealing with the property operates from the moment of the provisional attachment order, without any prior judicial determination of guilt. At this stage, as *Lata Yadav* confirms, an arbitral tribunal may continue its proceedings. However, the practical consequence for enforcement is immediate: no civil or executing authority may permit a transfer or encumbrance of the attached property, regardless of any award in the claimant’s favour.

The second stage involves confirmation of attachment by the Adjudicating Authority under Section 8.¹⁰ This must be done within 180 days, otherwise, the attachment lapses automatically under Section 5(3). If confirmed, the attachment subsists until the conclusion of criminal proceedings or confiscation. Under Section 8(4), the ED may thereafter take possession of the property.¹¹ At this stage, the award creditor’s position becomes progressively more precarious. Even if arbitration has concluded in their favour, the property remains under statutory control and the executing court, under Section 36 of the Arbitration Act, confronts a direct conflict with Section 41 of the PMLA, which bars civil courts from exercising jurisdiction over matters within the domain of authorities under the PMLA.

⁸ PMLA, Long Title.

⁹ PMLA, § 5.

¹⁰ PMLA, § 8.

¹¹ PMLA, § 8(4).

This conflict, unaddressed by *Lata Yadav* is examined in Part V(B) of this article.

The third and final stage is confiscation following conviction. Under Section 8(5) read with Section 9,¹² upon a court recording a conviction for a scheduled offence, the attached property vests absolutely in the Central Government. At this point, the award creditor's recourse to the underlying asset is entirely extinguished. Their only remedy is to approach the Special Court under the Prevention of Money Laundering (Restoration of Confiscated Property) Rules, 2016 [**RCP Rules**], a process both burdensome and uncertain, as discussed in Part V(D).

This three-stage analysis reveals that the impact of PMLA on arbitral proceedings is not static but escalating. While the first stage preserves the tribunal's competence to adjudicate, each successive stage narrows the practical utility of any award that follows. Section 17, which empowers the ED to search premises and seize records or property suspected of connection to money laundering, and Section 41,¹³ which bars civil courts from matters within the domain of PMLA authorities, further reinforce this regime. Ultimately, it is a conceptually flawed framework, permitting arbitration to begin but systematically foreclosing the conditions under which its outcome can be realised. *Lata Yadav* offers no definitive resolution to these policy gaps.

The PMLA is a special public law legislation that focuses on penalising and preventing money laundering. Section 5 of the PMLA provides for provisional attachment by the ED, of the property suspected to be the proceeds of crime for up to 180 days, which is one of its primary features.¹⁴ This enables the ED to prevent such property from being alienated, while further investigation is pending. Furthermore, Section 17 allows the ED to

¹² PMLA, § 9.

¹³ PMLA, § 41.

¹⁴ PMLA, § 5.

search premises and seize records or, property, which is suspected of being connected to money-laundering.¹⁵ Moreover, under Section 8, such provisionally attached property can be confirmed by the Adjudicating Authority, and if a connection to money-laundering is established, such property is liable for eventual confiscation by the State.¹⁶

Section 41 of the PMLA provides that

“No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which the Director, Adjudicating Authority or the Appellate Tribunal is empowered by or under this Act to determine.”

It further puts a bar on injunctions against actions taken under the PMLA. Section 71 gives this Act an overriding effect over anything inconsistent contained in any other law.¹⁷

B. Arbitration Act 1996

The Arbitration Act came into force in 1996, with the objective to

*“consolidate and amend the law relating to domestic arbitration, international commercial arbitration and enforcement of foreign arbitral awards as also to define the law relating to conciliation and for matters connected therewith or incidental thereto.”*¹⁸

The principles of party autonomy and judicial non-interference are reflected in Section 5 of the Arbitration Act, which stipulates that no judicial body shall intervene except where the Act expressly so provides. Sections 8 and 11 reinforce this mandate by empowering courts to refer disputes to arbitration and to appoint arbitrators where necessary, while Section 9¹⁹

¹⁵ PMLA, § 17.

¹⁶ PMLA, § 8.

¹⁷ PMLA, § 71.

¹⁸ Arbitration Act, Long Title.

¹⁹ Arbitration Act, § 9.

allows courts to pass orders for interim measured before, during, or after arbitral proceedings.

Section 16 of the Arbitration Act,²⁰ which embodies the principle of *kompetenz-kompetenz*, is of particular relevance in the present context. Under Section 16, an arbitral tribunal has the power to rule on its own jurisdiction, including objections with respect to the existence or validity of the arbitration agreement. Any challenge to jurisdiction must be raised at the earliest opportunity, and the tribunal's ruling is subject to only limited appellate review. This provision is significant because it means that when a party seeks to terminate arbitration on the ground that a statutory attachment ousts the tribunal's jurisdiction, the arbitrator is both entitled and obligated to rule on that objection itself. The arbitrator's decision, rejecting the application to terminate and finding that PMLA proceedings did not displace arbitral jurisdiction, in *Lata Yadav* was therefore an exercise of *kompetenz-kompetenz*.

Section 32 of the Arbitration Act provides the mechanisms for terminating the arbitration proceedings, with one such mechanism being that “*the arbitral tribunal finds that the continuation of the proceedings has for any other reason become unnecessary or impossible.*”²¹ Throughout the Act, there is no provision allowing the stay of arbitration proceedings merely because a separate criminal case is pending.

The provision most directly in issue in *Lata Yadav* is Section 32(2)(c), which empowers the tribunal to terminate proceedings where it finds that continuation “*has for any other reason become unnecessary or impossible.*” The Petitioner's termination application was filed under this sub-section, on the footing that the PMLA attachment had rendered the continuation of the arbitration impossible. Neither the arbitrator nor the HC directly examined

²⁰ Arbitration Act, § 16.

²¹ Arbitration Act, § 32(2)(c).

what “*impossible*” means in this context. The arbitrator treated it as self-evident that the attachment order could not lead to closure of arbitral proceedings and the HC declined to interfere with that finding. The definitional question, however, is worth engaging, i.e. does the pendency of a parallel statutory proceeding under the PMLA (or any other statute) constitute “*impossibility*” within Section 32(2)(c)?

The answer should be no. “*Impossibility*” under Section 32(2)(c) refers to the impossibility of the arbitral process itself, not the enforceability of its outcome. The provision targets situations in which the tribunal is factually or legally incapable of proceeding with adjudication. For example, where a supervening injunction expressly prohibits continuation, where there is no mechanism to constitute the tribunal, or where the subject matter of the dispute has been wholly extinguished by operation of law. The PMLA’s provisional attachment of assets does not extinguish the parties’ contractual dispute; it restricts the dealing of specific property pending investigation. The arbitrator remains able to determine whether a valid Facility Agreement exists and what remedies flow from it. The impossibility, if any, goes to execution, governed separately by Section 36 of the Arbitration Act and the Civil Procedure Code, 1908 [“**CPC**”], not by Section 32(2)(c). To hold otherwise would be to allow any party to terminate arbitration by engineering a regulatory proceeding against the subject assets, an outcome correctly identified as mischievous by the HC.²²

Section 36 of the Arbitration Act²³ is of central importance to the enforceability discussion. It provides that, where the time for making an application to set aside the award has expired or such an application has been refused, the award shall be enforced in the same manner as if it were a decree of a civil court. The executing court thus steps into the shoes of a civil court for the purpose of execution under the CPC, with the full powers of attachment and sale, appointment of receivers, and compelled delivery.

²² Lata Yadav, 2025 SCC OnLine Del 4334, ¶ 31.

²³ Arbitration Act, § 36.

The implications of this deeming fiction in the context of PMLA attachment are significant: if the award directs the recovery of property that is simultaneously frozen under the PMLA, the executing court simultaneously holds a mandate under Section 36 of the Arbitration Act to enforce and faces a bar under Section 41 of the PMLA from exercising civil court jurisdiction over property within the domain of PMLA authorities. The Act itself does not resolve this conflict. Whether the executing court can treat PMLA-attached property as available for execution remains an open question, left unanswered by the HC in *Lata Yadav*.

IV. Court's Analysis on Concurrent Proceedings and Arbitrability

In answering the question at hand, the HC looked into the provisions of the Arbitration Act alongside the PMLA and concluded that the proceedings before the arbitral tribunal operate in a different sphere than the one under consideration before the authorities under the PMLA.²⁴

A. The Test of Arbitrability

The HC's analysis on arbitrability was based on a line of judgments that has progressively narrowed the circumstances in which allegations of fraud can displace arbitral jurisdiction. It began with *A. Ayyasamy v. A. Paramasivam*,²⁵ wherein the Supreme Court ["SC"] held that serious allegations of fraud would be non-arbitrable, while mere allegations of fraud simpliciter would not make the dispute non-arbitrable.²⁶ It then discussed the two tests laid down in *Rashid Raza v. Sadaf Akhtar*²⁷ to distinguish between serious and simple allegations of fraud. The two tests are: (1) does the plea permeate the entire contract and above all, the agreement of arbitration, rendering it

²⁴ *Lata Yadav*, 2025 SCC OnLine Del 4334, ¶ 33.

²⁵ *A. Ayyasamy v. A. Paramasivam*, (2016) 10 SCC 386.

²⁶ *Id.* ¶ 47.

²⁷ *Rashid Raza v. Sadaf Akhtar*, (2019) 8 SCC 710.

void, or (2) whether the allegations of fraud touch upon the internal affairs of the parties inter se having no implication in the public domain. The HC further relied on *Avitel*,²⁸ which gave these two tests greater definitional precision. Under *Avitel*, the first test is satisfied only when the arbitration clause or the agreement itself cannot be said to exist in a clear case in which the court finds that the party against whom breach is alleged cannot be said to have entered into the agreement relating to arbitration at all. The second test is met in cases in which allegations are made against the State or its instrumentalities of arbitrary, fraudulent or mala fide conduct, thus necessitating the hearing of the case by a write court in which questions are raised which are not predominantly questions arising from the contract itself or breach thereof, but questions arising in the public law domain. The HC noted that *Vidya Drolia v. Durga Trading Corporation* [**“Vidya Drolia”**]²⁹ had reiterated this position, however, it did not apply the four-pronged test in *Vidya Drolia* to the facts of the case, possibly because the case was not at the Section 8 or 11 stage. Since the court was reviewing an Article 227 petition against a Section 16(3) order late in the proceedings, the standard shifted. Rather than deciding if the dispute was initially arbitrable, the court focused on whether the arbitrator’s decision was so plainly erroneous or perverse that it required exceptional judicial intervention.

The significance of the *Avitel* tests lies in the stringency of its first test. The question is not whether the underlying contract was obtained by fraud, but whether the arbitration clause specifically cannot be said to have been entered into at all by the Respondent. This is a deliberately high threshold. It is not met merely because a party contends that the contract was a sham or was executed for an unlawful purpose, it requires a clear case where party resisting arbitration cannot be said to have genuinely consented to the arbitration clause. The HC applied this test to the case at hand and concluded that neither test was satisfied. The Petitioner’s case was that since

²⁸ *Avitel Post Studios Ltd. v. HSBC PI Holdings (Mauritius) Ltd.*, (2021) 4 SCC 713.

²⁹ *Vidya Drolia v. Durga Trading Corporation*, AIR Online 2020 SC 929 [*hereinafter* **“Vidya Drolia”**].

ED had alleged that monies advanced by Respondent No 1 under the Facility Agreement were proceeds of crime and that the Facility Agreement itself was a sham instrument, it was vitiated by fraud being subject matter of proceedings by CBI and ED.

On this, the HC agreed with the Tribunal's observations and held that merely because some assets, which were part of the arbitral proceedings, also found reference in provisional order of attachment, the same did not tantamount to the jurisdiction of the arbitral tribunal being ousted. Further, the HC observed that simply because some part of the subject matter of the proceedings was being parallelly investigated by the CBI or ED in relation to allegations of fraud, the same could not preclude the jurisdiction of the arbitrator, since a transaction or incident can give rise to both civil and criminal proceedings and in such a case, the said proceedings may proceed simultaneously.

B. Kompetenz-Kompetenz and Section 16

The HC identified Section 16 as the provision governing the arbitrator's power to rule on its own jurisdiction, noting that it "*empowers the arbitral tribunal to rule on its own jurisdiction so as to decide whether the tribunal is competent to preside over a particular dispute referred to it or not.*" The application before the arbitrator, filed under Section 16(3) read with Section 32(2)(c), was a direct invocation of the tribunal's jurisdictional competence, and the arbitrator's dismissal of that application was itself an exercise of that competence.

It is notable that this was the petitioner's second application under Section 16. An earlier application under Section 16(2), filed in May 2022 and raising the question of whether the Facility Agreement had been obtained by fraud, had been deferred by the arbitrator pending evidence. That deferral order had not been challenged and had attained finality. The present application, filed following the provisional attachment order of August 2024, raised a different ground, namely, that the attachment itself ousted the tribunal's

jurisdiction. By dismissing it, the arbitrator again exercised the Section 16 power to determine the scope of its own authority, independently of both the earlier deferral and the PMLA attachment.

While the HC's judgment does not use the term “*kompetenz-kompetenz*” expressly, its endorsement of the arbitrator's decision is consistent with that principle. The HC found that the arbitrator was not bound to abdicate jurisdiction merely because an external statutory proceeding had attached the assets in dispute. The competence of the tribunal to rule on the limits of its own authority and to continue where those limits had not been transgressed, is precisely what Section 16 protects.

C. The Enforcement Dimension in *Swiss Timing*

Dismissing the petition under Article 227, the HC concluded that arbitral proceedings operate in a distinct domain from the court proceedings under the PMLA. The scope of both proceedings, even though both proceedings arise from the same underlying facts, is not identical to such an extent as to render the jurisdiction of the arbitrator untenable.³⁰ It further noted that although certain assets involved in the arbitration may be provisionally attached, if the arbitrator's findings overlap with those in the criminal proceedings, the PMLA would prevail. In such a case, the arbitrator's role would remain confined to issues that do not contravene Section 41 of the PMLA.³¹

The HC cited *Swiss Timing*, in which the SC underscored that the pendency of criminal proceedings does not bar the continuation of arbitration, since the findings of an arbitral tribunal have no binding effect on a criminal court. At the same time, it clarified that, if an arbitral award was rendered in favour of the accused, the other party would retain the liberty to oppose

³⁰ Lata Yadav, 2025 SCC OnLine Del 4334, *supra* note 22.

³¹ Lata Yadav, 2025 SCC OnLine Del 4334, ¶ 34.

its enforcement on the ground of any subsequent conviction arising out of the criminal trial.³²

Further, the HC delved into the provisions of the PMLA, holding that the bar on the jurisdiction of civil courts under Section 41 does not extend to arbitral proceedings, and rejected reliance on Section 71 of the PMLA, noting that the provision grants the PMLA an overriding effect only in cases of inconsistency with another law in force. Since no inconsistency exists between the Arbitration Act and the PMLA, the latter cannot be invoked to curtail the operation of arbitration.³³

V. Critical Analysis of the Judgment: Gaps not yet Addressed

A. Failure to Address Subsequent Enforcement Challenges

Lata Yadav clearly established that arbitration proceedings can continue simultaneously with PMLA proceedings. However, certain challenges persist beyond the initial stage. A significant point of contention remains at the stage of enforcement, especially when it comes to awards involving assets attached under the PMLA, and in confining its analysis to this question, the Court produced a decision that is half-complete. It affirms the tribunal's right to adjudicate without addressing whether its adjudication can actually be realised.

This asymmetry is significant. The value of an arbitral award lies not in its issuance but in its enforcement. A tribunal may issue a final award crystallising the debt and establishing the parties' rights with finality, yet, if the property against which enforcement is sought is simultaneously attached under the PMLA, and potentially subject to confiscation following conviction, the award creditor may find themselves holding a legal entitlement that is practically unenforceable. As the SC implicitly recognised

³² Swiss Timing, (2014) 6 SCC 677, ¶ 34.

³³ *Lata Yadav*, 2025 SCC OnLine Del 4334, ¶ 32.

in *Swiss Timing*, the outcome of an arbitral award in favour of an accused person remained subject to challenge upon subsequent conviction. The Court's omission in *Lata Yadav* to examine this enforcement dimension is therefore not merely a technical lacuna but a structural one: the judgment permits the arbitral process to reach its conclusion while leaving the conditions of that conclusion's realisation entirely unaddressed.

The definition of “*attachment*” under the PMLA³⁴ does not make any distinction between a provisional attachment order by the ED and one confirmed by the Adjudicating Authority. This means that a claimant is not allowed to deal with the property in any manner whatsoever, even at the stage of provisional attachment. Such an attachment can continue for a period of 180 days,³⁵ or until confirmed by the Adjudicating Authority,³⁶ whichever is earlier. During this period, the accused and the claimant may only continue enjoyment of the property if it is immovable.³⁷ However, once attachment or freezing is confirmed, the ED is empowered to take possession of the property.³⁸ So, the opportunity to continue enjoying rights in an immovable property is effectively at the discretion of the ED.³⁹ A conjoint reading of Section 5(4) and Section 2(1)(d) of the PMLA makes it clear while “*enjoyment*” of immovable property may be permitted to protect basic occupant rights, this provision cannot be used for liquidation or transfer.

³⁴ PMLA, § 2(1)(d).

³⁵ PMLA, § 5(1).

³⁶ PMLA, § 8(3).

³⁷ PMLA, § 5(4).

³⁸ PMLA, § 8(4).

³⁹ Onkar Thakur, Nalin Jha & Saksham Chaturvedi, *On Procedure and Propriety Travails of an Innocent Purchaser of Tainted Property under the PMLA Framework*, SCC ONLINE BLOG (March 16, 2024), <https://www.scconline.com/blog/post/2024/03/16/on-procedure-and-propriety-travails-of-an-innocent-purchaser-of-tainted-property-under-the-pmla-framework/>.

B. Unclear Scope of Sections 41 and 71 in Enforcement of Arbitral Awards

The Court also clarified that Sections 41 and 71 of the PMLA do not prevent tribunals from adjudicating claims or passing awards, even where assets are attached. Despite this clarity regarding tribunal powers, a significant gap remains at the enforcement stage.

Section 41 expressly bars the jurisdiction of civil courts in matters that the authorities under the Act are empowered to determine. The text of the provision is broad and, on a literal reading, could be seen as preventing courts from exercising execution powers if those actions indirectly subvert the scheme of the Act. A narrower interpretation, however, would confine the bar to investigative and quasi-judicial functions, leaving ordinary civil execution untouched. If the broader interpretation is adopted, a direct conflict would emerge with Section 36 of the Arbitration Act, which otherwise mandates enforcement of arbitral awards as if they were decrees of civil courts.⁴⁰ This tension underscores the fragility of award enforcement when assets are simultaneously under PMLA attachment.

Section 71⁴¹ reinforces this position, giving PMLA an overriding effect over other laws, including the Arbitration Act. In enforcement proceedings, this means that even a final arbitral award recognised under the Arbitration Act could be subject to the attachment regime under the PMLA. In practice, this prevents executing courts from allowing the transfer or alienation of property already subjected to provisional or confirmed attachment by the ED. As a result, courts may not order the transfer, liquidation, or attachment of assets already frozen under the PMLA, even if expressly directed in an arbitral award.

⁴⁰ Arbitration Act, § 36.

⁴¹ PMLA, § 71.

C. Possibility of using Public Policy as a Ground to Refuse Enforcement

Another challenge emerges through the doctrine of public policy. Under Sections 34 and 48 of the Arbitration Act, courts can refuse to enforce arbitral awards if they conflict with the “*public policy of India*.” The 2015 amendment⁴² tightened this exception, restricting it mainly to cases involving fraud, corruption, serious breaches of law, or violations of basic principles of justice.⁴³ Judicial interpretation in key judgments such as *Renusagar Power Co. Ltd. v. General Electric Co.*⁴⁴ and *Vijay Karia v. Prysmian Cavi E Sistemi Srl*,⁴⁵ has similarly emphasised restraint, requiring courts to resist expansive interference while still preserving a narrow but potent safety valve.

However, when the subject matter of an award intersects with property tainted as “*proceeds of crime*” under the PMLA, the risk of triggering this exception is significantly heightened. Given India’s strong legislative and judicial stance against money laundering, an award directing the transfer of attached property could well be resisted on this ground. Additionally, Article V(2)(b) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards [“**New York Convention**”] allows courts to refuse recognition or enforcement of a foreign arbitral award if it is contrary to the public policy of the enforcing state.⁴⁶ This has critical implications in PMLA cases, where courts must consider whether enforcing an award is in conflict with the State’s overriding interest in combating money laundering.

Notwithstanding this general posture of judicial restraint, it is submitted that the public policy exception carries particular force in cases where an

⁴² Arbitration & Conciliation (Amendment) Act, 2015, No. 3, Acts of Parliament, 2015 (India).

⁴³ Arbitration Act, § 34, Explanation 1.

⁴⁴ *Renusagar Power Co. Ltd. v. General Electric Co.*, AIR 1994 SC 860.

⁴⁵ *Vijay Karia v. Prysmian Cavi E. Sistemi Srl*, AIR 2020 SC 1807.

⁴⁶ United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art. V(2)(b), June 10, 1958, 330 U.N.T.S. 3.

award sought to be enforced intersects with property judicially or administratively identified as ‘proceeds of crime’ under the PMLA. The doctrinal pathway through which a court could resist enforcement on public policy grounds in such a case runs as follows. *First*, the party opposing enforcement would contend that the award directs a civil transfer of property that the State has a paramount interest in confiscating as proceeds of crime. *Second*, they would argue that permitting execution would allow private contractual rights to override a public law regime premised on the integrity of the financial system. *Third*, they would invoke the ‘fundamental policy of Indian law’ as the specific ground under Explanation 1 to Section 34(2)(b) of the Arbitration Act.

The ‘fundamental policy of Indian law’ standard was authoritatively articulated in *ONGC v. SAW Pipes Ltd.*, where the SC held that an award conflicts with this standard if it disregards the provisions of a statute or fails to give effect to an imperative or mandatory provision of law.⁴⁷ The standard was subsequently narrowed by the 2015 amendment and by the SC in *Ssangyong Engineering & Construction Co. Ltd. v. NHAI*,⁴⁸ which clarified that ‘fundamental policy of Indian law’ refers to the most basic legislative and judicial principles underlying the Indian legal system, rather than broad policy preferences. Nevertheless, India’s anti-money laundering framework, codified in the PMLA, supported by India’s Financial Action Task Force [“**FATF**”] membership, and reinforced by the UN Convention against Corruption, constitutes precisely the kind of basic legislative policy that falls within this standard. An arbitral award directing the transfer of the attached property could therefore be resisted on the ground that its enforcement would conflict with a fundamental policy of the Indian state, namely, the imperative to recover the proceeds of crime and to prevent their return to persons involved in money laundering.

⁴⁷ *ONGC v. SAW Pipes Ltd.*, (2003) 5 SCC 705.

⁴⁸ *Ssangyong Engineering & Construction Co. Ltd. v. NHAI*, (2019) 15 SCC 131.

It is noteworthy that the HC in *Lata Yadav* did not engage with the public policy dimension at all. This is a significant omission. By confining its analysis to whether PMLA proceedings displace arbitral jurisdiction, the Court left unanswered the question of whether, once the arbitration produces an award, the public policy exception could be deployed to resist its enforcement. This omission is consequential because the public policy pathway is available not only to domestic awards under Section 34 but also to foreign awards under Section 48⁴⁹ and under Article V(2)(b) of the New York Convention, which permits courts to refuse recognition or enforcement of a foreign award if it is contrary to the public policy of the enforcing state.

Following the 2024 Draft Amendment Bill [**“Amendment Bill”**],⁵⁰ the situation becomes even more concerning. The Amendment Bill proposes to introduce Section 34(2A),⁵¹ allowing partial setting aside of awards on public policy or patent illegality grounds. If enacted, this may extend the reach of the public policy exception even to foreign awards, creating new avenues for resistance where proceeds of crime are implicated.

D. The Unequal Burden for Restoration of Property

Another difficulty is that if the ED fails to obtain confirmation from the Adjudicating Authority within 180 days, the provisional attachment lapses automatically.⁵² Thus, if a court award is pending during this period, the award creditor might request the release of such property on the ground that the attachment has expired. However, if the ED obtains the confirmation from the Adjudicating Authority within time and ultimately proceeds to confiscation, the award-debtor’s property effectively vests in

⁴⁹ PMLA, § 48.

⁵⁰ Draft Arbitration & Conciliation (Amendment) Bill, 2024 (June 3, 2024) [*hereinafter* “**Amendment Bill**”].

⁵¹ Amendment Bill, § 34(2A)(iii).

⁵² PMLA, § 5(3).

the State.⁵³ In such an event, the sole remedy available to the claimant is to approach the Special Court and seek restoration of the attached or confiscated property in accordance with the RCP Rules.⁵⁴

The RCP Rules offer a remedy for third parties who acquire property that is later attached or confiscated under the PMLA. Rule 3 governs restoration after a final conviction, requiring the Special Court to call for claims once property is confiscated by the government under section 8(5) read with Section 9 of the PMLA.⁵⁵ An amendment in 2019 introduced Rule 3-A, which allows claimants to seek restoration even during trial, providing an interim remedy against attachment.⁵⁶ A “claimant” is, as per Rule 2(b)⁵⁷ read with Section 8(8),⁵⁸ an individual who, having acted in good faith, has suffered a quantifiable loss despite adopting reasonable precautions. In theory, this could cover award creditors whose recovery is frustrated by confiscation. In practice, however, the framework is fraught with hurdles.

Once the property is attached, the claimant bears a heavy reverse burden of proof to establish that their interest was legitimate and untainted. As legal scholars note,⁵⁹ this requirement proves difficult in reality because claimants often have no practical means to verify whether a property is connected to money laundering, especially when publicly available information is lacking. For example, a purchaser buying real estate after standard verification of titles and the necessary approvals cannot reasonably be expected to investigate whether the property was previously acquired with proceeds of crime beyond routine checks. For instance, if a financial institution that has extended credit to a borrower secured against commercial property,

⁵³ PMLA, § 8(5).

⁵⁴ Prevention of Money-Laundering (Restoration of Confiscated Property) Rules, 2016, [*hereinafter* “RCP Rules”].

⁵⁵ RCP Rules, Rule 3.

⁵⁶ RCP Rules, Rule 3-A.

⁵⁷ RCP Rules, Rule 2(b).

⁵⁸ PMLA, § 8(8).

⁵⁹ Onkar Thakur, Nalin Jha & Saksham Chaturvedi, *supra* note 39.

subsequently obtains an arbitral award for non-repayment, and seeks enforcement through attachment and sale of the mortgaged property, only to find that the property has been provisionally attached by the ED on the basis of money laundering allegations against the borrower. To recover, the creditor must establish before the Special Court that its interest is legitimate and untainted. This requires demonstrating not merely that the loan was extended in good faith, but that reasonable precautions were taken to verify that the property was not connected to money laundering, a standard that goes considerably beyond ordinary commercial due diligence and that has no parallel in ordinary civil execution proceedings. As the Delhi HC, in *Deputy Director, Enforcement, Delhi v. Axis Bank*,⁶⁰ while interpreting Section 8(8), has held that the burden on a claimant depends on the timing of their purchase. A purchaser before the commission of the offence bears a lighter responsibility, whereas a later purchaser must also demonstrate due diligence by showing that reasonable steps were taken to verify the legitimacy of the property.

This creates a significant challenge since it effectively requires buyers to investigate the possibility of money laundering before acquiring a property. However, there is no distinction between a buyer who acquired property before its contamination and one who purchased it afterwards under the PMLA. As a result, the reverse burden applies equally, even to purchasers who acted before the property was tainted with any illegitimate proceeds. This puts claimants in a tough spot, requiring them to prove both good faith, i.e. acting honestly, whether negligently or not,⁶¹ and due diligence to ensure no nexus to money laundering, a dual standard exceeding ordinary commercial practice. Even where a claimant proves due diligence through reasonable precautions, failure to establish good faith raises serious questions about potential involvement in money laundering. As scholars observe, “*if the burden of due diligence is met, but the first qualification regarding good*

⁶⁰ Deputy Director, Enforcement, Delhi v. Axis Bank, 2019 SCC OnLine Del 7854.

⁶¹ General Clauses Act, 1897, § 3(22), No. 10, Acts of Parliament, 1897 (India).

faith fails, does it not follow that the claimant is guilty of aiding the offence,” thrusting innocents into a “*pit of uncertainty*” that deters legitimate claims.⁶²

These strict requirements under the PMLA mean that even valid arbitral awards can be difficult to enforce if the property involved is attached by the ED, thereby undermining the effectiveness of arbitration when assets are subject to PMLA proceedings.

VI. Bridging the Gap: A Way Forward

The *Lata Yadav* judgment clarifies the starting point of arbitration but leaves the finish line obscured. To resolve the impasse between the autonomy of arbitration and the sovereign interest in curbing money laundering, Indian jurisprudence must move beyond a binary approach as to whether arbitration in such cases must be allowed or not. The following measures could balance these competing interests:

A. The “Substitution of Assets” Model

Courts should adopt the “*substitution*” principle as a mechanism for reconciling arbitral enforcement with PMLA attachment. As per this principle, if an asset subject to arbitration is attached, the party seeking to enforce the award should be permitted to offer clean assets, such as a bank guarantee or a fixed deposit, of equivalent value to the ED. This substitution releases the disputed assets for the purposes of arbitration and enforcement, while preserving State’s economic interest in securing the proceeds of crime.

On a purposive reading of the PMLA, one can understand that the objective of attachment and confiscation is to ensure that the State can ultimately recover the economic value representing the proceeds of crime, not to freeze specific assets as an end in itself. Once this purposive objective

⁶² Onkar Thakur, Nalin Jha & Saksham Chaturvedi, *supra* note 39.

is recognised, it becomes apparent that permitting substitution through bank guarantees or equivalent clean security does not undermine the anti-money laundering framework. The State's interest in the economic value is fully preserved, and the award creditor's legitimate claim is not extinguished by the attachment. This value-based approach is already reflected in Indian law under Section 37A of the Foreign Exchange Management Act, 1999,⁶³ which permits attachment of domestic assets of equivalent value where illicit foreign assets cannot be traced. It is also consistent with FATF Recommendation 4,⁶⁴ which calls on states to ensure that proceeds of crime can be confiscated on a value basis where the original assets are unavailable.

This principle has gained nascent judicial recognition in India, though its status as a formal rule of law remains unsettled. In *The Joint Director v. Eastern Institute for Integrated Learning in Management University* [“**M3M Order**”],⁶⁵ decided approximately six weeks after *Lata Yadav*, the SC permitted M3M India Pvt. Ltd. to substitute a provisionally attached land parcel under the PMLA with commercial units of equivalent value, verifying that substitution is not expressly prohibited by the statute and adequately protect the investigative interests ED through the equivalent asset. It is important to note that the SC expressly stated that this order was passed in “*the specific facts and circumstances of the case*” and “*should not be treated as a precedent.*”⁶⁶ It is therefore not binding authority, and could not have been engaged with by the HC in *Lata Yadav*, which was decided before the M3M order was passed.

⁶³ The Foreign Exchange Management Act, 1999, §37A, No. 42, Acts of Parliament, 1999 (India), [hereinafter “**FEMA**”].

⁶⁴ Fin. Action Task Force [FATF], Int'l Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation: The FATF Recommendations 10 (updated Feb. 2025), <https://www.fatf-gafi.org/content/dam/fatf-gafi/recommendations/February%202025%20FATF%20Recommendations.pdf> [hereinafter “**FATF**”].

⁶⁵ *The Joint Director and Anr. v. Eastern Institute for Integrated Learning in Management University & Anr.*, 2025 SCC OnLine SC 1395 [hereinafter “**M3M Order**”].

⁶⁶ *Id.* ¶ 7.

The significance of the M3M order for present purposes is nevertheless considerable. *First*, it demonstrates that a court at the apex level has exercised its jurisdiction to allow substitution in a PMLA attachment case, affirming that the PMLA neither expressly permits nor prohibits the mechanism and that judicial discretion is available to fill this gap. *Second*, it confirms the purposive logic on which the substitution argument rests, i.e. the SC's willingness to allow equivalent-value substitution reflects an implicit acceptance that securing economic value is the operational objective of PMLA, rather than freezing specific assets. *Third*, the state of the law has shifted since *Lata Yadav*, as award creditors and practitioners in enforcement proceedings arising from post-2025 arbitrations now have persuasive judicial support for a substitution application that did not exist at the time of the HC's decision. The argument for codifying the substitution principle therefore operates on two levels: retrospectively, as a gap in *Lata Yadav*'s reasoning, and prospectively, as a reform with emerging judicial endorsement.

B. A Statutory “Carve-Out” for Bona Fide Third Parties

The PMLA currently casts a wide net, often entrapping innocent third parties, such as lenders or creditors, who may have valid arbitral claims against a tainted entity. A legislative amendment, similar to the protection granted to new management under Section 32A of the Insolvency and Bankruptcy Code [**IBC**],⁶⁷ is necessary.

Section 32A of the IBC, introduced by the IBC (Amendment) Act, 2020, provides that once a resolution plan is approved by the adjudicating authority, the corporate debtor's assets shall not be proceeded against in respect of a criminal offence committed prior to the commencement of the insolvency resolution process, provided that the resolution applicant is not

⁶⁷ The Insolvency and Bankruptcy Code, 2016, §32A, No. 31, Acts of Parliament, 2016 (India).

the person who committed the offence. The provision shields the incoming management and the acquired assets from the consequences of the prior management's wrongdoing, on the basis that commercial rehabilitation should not be frustrated by criminal liability that the new management did not incur. The SC has upheld the constitutional validity of this provision and confirmed that the protection it extends to bona fide resolution applicants is a logical balance between the imperative of criminal accountability and the equally important objective of economic revival.⁶⁸ The same logic supports a parallel protection for arbitral creditors: if a party has obtained an arbitral award confirming a contractual debt and was not a participant in the money laundering offence, their claim against the debtor's assets should not be wholly subordinated to the State's right of confiscation

This would clarify that if an arbitral award confirms a debt to a *bona fide* third party who was not involved in the money laundering offence, their claim should take precedence over the State's right to confiscate, or at least rank *pari passu* with it. Supported by international standards, including the UN Convention against Corruption and the FATF, this balanced approach would protect innocent third parties and use "*value-based confiscation*", i.e. seizing equivalent property when the original proceeds are missing.⁶⁹ We already see this principle in Section 37A of the Foreign Exchange Management Act, 1999,⁷⁰ allowing authorities to attach domestic assets of equal value if the illicit foreign property cannot be traced.

C. Stay of Enforcement v. Stay of Proceedings

A practical judicial middle ground would be to distinguish formally between adjudication and disbursement. Tribunals should be encouraged to proceed

⁶⁸ Manish Kumar v. Union of India, (2021) 5 SCC 1.

⁶⁹ Shailee Basu, *Supreme Court's M3M Ruling: Equivalent-Value Substitution at the Provisional Attachment Stage under PMLA*, INDIA CORPLAW (August 11, 2025), <https://indiacorplaw.in/2025/08/11/supreme-courts-m3m-ruling-equivalent%E2%80%91value-substitution-at-the-provisional-attachment-stage-under-pmla/>.

⁷⁰ FEMA, § 37A.

to a final award to crystallise the debt and liability. However, the execution of that award against attached properties may be statutorily stayed until the PMLA Adjudicating Authority makes a final determination.

The practical advantages of this approach are significant. *First*, the conversion of a contractual dispute into a binding, final award, serves important commercial purposes independent of immediate execution. It establishes the quantum of the debt with finality, stops the running of the limitation period for enforcement, and provides a clear and *res judicata* basis for future recovery proceedings. In the absence of a final award, the creditor's position remains uncertain and subject to re-litigation; with a final award, the liability of the debtor is established beyond further dispute. *Second*, a stay of execution, as distinct from a stay of arbitral proceedings, preserves the award creditor's substantive rights without requiring them to await the full resolution of criminal proceedings that may extend over several years. *Third*, it avoids the 'extinguishment' of legitimate civil claims that would result from an indefinite suspension of arbitration pending PMLA proceedings, during which limitation periods may run and evidence may be lost.

The rights and remedies of the award-holder under this approach bifurcate depending on the outcome of the PMLA proceedings. If the provisional attachment lapses under Section 5(3), because the Adjudicating Authority does not confirm it within 180 days, or if the attached assets are released because the accused is acquitted, the award can be enforced immediately by attachment and sale of the released property in accordance with the CPC, using the deeming mechanism under Section 36 of the Arbitration Act. The executing court attaches the assets, causes a valuation, publishes a sale notice under Order XXI of the CPC, and proceeds to sale, with the proceeds applied in satisfaction of the decree. In this scenario, the award creditor's position is substantively equivalent to that of any judgment creditor in civil execution.

If, however, the assets are confiscated following conviction, the award-holder's rights are transformed rather than extinguished. As an unsecured creditor whose recovery has been frustrated by confiscation, they are entitled to approach the Special Court under Rule 3-A of the RCP Rules to seek restoration of the monetary value of their claim. Additionally, to the extent that the debtor retains any other assets not subject to PMLA attachment, the award creditor retains the right to execute the award against those assets in the ordinary course of civil execution. The final award thus serves a dual function in this scenario as it establishes the creditor's priority as a claimant in the restoration proceedings and it preserves their right to execution against non-attached assets without the need to recommence civil proceedings from the beginning.

This approach prevents the complete extinguishment of legitimate civil claims while fully respecting the PMLA's priority. It also creates an incentive structure consistent with the anti-money laundering framework: the award creditor, whose recovery depends in part on the outcome of criminal proceedings, has a structural reason to cooperate with PMLA investigations rather than to obstruct them. By formally distinguishing adjudication from disbursement, Indian courts can ensure that arbitration delivers legally certain outcomes, even where their physical execution must await the resolution of the parallel statutory regime.

VII. Conclusion

The *Lata Yadav* ruling affirms a central principle of Indian arbitration law: the pendency of proceedings under the PMLA cannot, by itself, displace arbitral jurisdiction. In doing so, the Court endorsed the autonomy of parties and continued the pro-arbitration approach visible in earlier precedents. By treating arbitration and money-laundering proceedings as distinct, the Court offered clarity at the stage of reference and conduct of arbitral proceedings.

However, the judgment does not resolve the more pressing difficulties that emerge at later stages. Questions of enforcement remain particularly fraught when the assets in dispute are simultaneously subject to attachment under the PMLA. The Court's reasoning also leaves uncertain the reach of Sections 41 and 71 of the PMLA in execution proceedings, and whether public policy may be invoked to resist enforcement where property is labelled as "*proceeds of crime*." In this respect, the decision avoids confronting the tension between arbitral autonomy and the overriding effect of a penal statute.

A balanced approach through asset substitution, legislative carve-outs for bona fide parties, and conditional enforcement stays is essential to harmonise these regimes. Such reforms would ensure arbitration delivers enforceable outcomes without compromising anti-money laundering objectives.

Ultimately, *Lata Yadav* secures the space for arbitral tribunals to proceed, but does little to dispel the uncertainty surrounding the enforceability of their awards in the shadow of money-laundering legislation. The judgment is therefore a valuable affirmation of principle, but one that shifts the hardest questions to another day.

**ANALYZING ARTICLE 1.9 OF THE INDIAN MODEL BIT IN LIGHT OF
DAVID R. AVEN V. REPUBLIC OF COSTA RICA**

Yash Sameer Joshi, Sanidhya Sanhwal, & Harshita Baswana

Abstract

The question of dual nationality and its implications for investor standing in investment arbitration remains a contested issue. This article examines Article 1.9 of the Indian Model Bilateral Investment Treaty [“BIT”], which mandates the application of the dominant and effective nationality [“DaE”] test to determine the nationality of a dual national investor, and analyses its departure from existing Customary International Law [“CIL”]. Under CIL, as reflected in the ILC Draft Articles on Diplomatic Protection, the DaE test applies only where one of the investor's nationalities is that of the host state. Article 1.9, however, extends this test to situations where neither nationality belongs to the host state, a position that finds no clear support in established international law. This article draws a comparison with the tribunal's reasoning in David R. Aven v. Republic of Costa Rica, where a similar clause in DR-CAFTA was interpreted in conformity with CIL, and demonstrates how the interpretation of such clauses varies significantly depending on whether domestic law permits dual nationality. The article concludes that while India's position departs from CIL, it may represent a pragmatic and necessary development in investor-state arbitration, offering greater jurisdictional clarity and addressing legitimate state concerns within the investment arbitration framework.

I. Introduction: The debate on dual nationality and the ‘investor-nationality’ link

The discussion relating to dual nationality of an investor and the consequent implications on her ability to bring a claim remains a

contentious issue in investment arbitration.¹ While some tribunals have affirmed the application of the Customary Law test of dominant and effective nationality,² others have held that if there is no explicit bar on claims by dual nationals, the investor can rely on either of their nationalities to bring a claim.³ However, all these discussions have revolved around situations in which the two countries which the investor had the nationalities of, i.e., the home state and the host state, were both party to the BIT.

To appreciate this contention, it is important to examine the link between ‘investor’ and ‘nationality’. The term ‘investor’ also encapsulates being the national of the home state, i.e., the state party to the BIT in whose physical location the investment is not taking place. Thus, the jurisdiction is established on the basis of nationality of the investor. This can be seen from the BIT clauses of various countries. For example, the definition of investor can be seen in the Japan - Serbia BIT of 2025 in Article 1(b)(i):⁴

“b) the term “investor of a Contracting Party”] means:

(i) a natural person having the nationality of a Contracting Party in accordance with its laws and regulations; or

Note:

¹ José Gregorio Torrealba & Alejandro Gallotti, *A Never-Ending Story? Dual Nationals in Investment Arbitration: A Commentary on Santamarta v. Venezuela*, KLUWER ARBITRATION BLOG (Nov. 29, 2023), available at <https://legalblogs.wolterskluwer.com/arbitration-blog/a-never-ending-story-dual-nationals-in-investment-arbitration-a-commentary-on-santamarta-v-venezuela/>.

² Antonio del Valle Ruiz v. Spain, PCA Case No. 2019-17.

³ Dawood Rawat v. Mauritius, PCA Case No. 2016-20.

⁴ Agreement for the Promotion and Protection of Investment, Japan-Republic of Serbia, art. 1(b)(i), Dec. 24, 2025.

This Agreement shall not apply to investments of natural persons who are nationals of both Contracting Parties unless such natural persons have at the time of the investment and ever since been domiciled outside the Area of the Contracting Party in which they made such investments.”

This demonstrates that a link of nationality with one of the contracting parties is necessary – and that the general exception carved out is that a natural person having nationalities of both countries to the BIT cannot bring a claim unless they have been domiciled, or unless their dominant and effective nationality is one of a state in which they haven’t made the investment.

The Indian Model BIT goes one step further and permits the application of the dominant and effective nationality test in cases where the investor has a dual nationality of the home state and another country which is not India.⁵ This post will discuss how this provision goes beyond existing Customary International Law [“**CIL**”], but might be a necessary step to curb apprehension in an investor centric regime.

II. When can the Dominant and Effective Nationality test be applied?

The discourse surrounding the DaE gained prevalence after the Nottebohm Judgement of the International Court of Justice.⁶ As per this test, diplomatic access for dual nationals is determined based on the nationality that they have the closest connection to. This test has now been codified in the International Law Commissions Draft Articles on Diplomatic Protection.⁷ While primarily confined to diplomatic protection, being CIL, this test has also found application in investment disputes involving dual nationals.

⁵ India Model BIT 2016, art. 1.5.

⁶ Nottebohm Case (Liechtenstein v. Guatemala), Judgment, 1955 I.C.J. Rep. 4 (Apr. 6).

⁷ International Law Commission, Draft Articles on Diplomatic Protection with Commentaries, UN Doc. A/61/10 (2006) [“**Draft Articles**”].

The base reasoning of the test is clear, that a dual national cannot bring a claim against a state of which she is not only a national but is also more closely connected to out of the two nationalities she possesses. Therefore, this test may only be applied where the person holds nationalities of both the claimant and respondent state in international law. This is affirmed by the wording of draft Article 7 which stipulates that:⁸

“A state of nationality may not exercise diplomatic protection in respect of a person against a State of which that person is also a national (emphasis) unless the nationality of the former state is predominant...”

Therefore, DaE cannot be applied where a claim is raised against a third state. For example, in international law if an individual is a dual national of the United States and Canada, either of the states can exercise diplomatic protection on her behalf against a third state. The third state, not being Canada or the United States, cannot claim here that only the dominant nationality of the individual can exercise diplomatic protection. This is also reiterated by Article 6 of the Draft Articles on Diplomatic Protection which says:⁹

“Any State of which a dual or multiple national is a national may exercise diplomatic protection in respect of that national against a State of which that person is not a national.”

While the scope of these articles seems limited to diplomatic protection, they have been used to interpret clauses of trade agreements and BITs, as has been discussed in the later section on *David R. Aven v. Republic of Costa Rica* [**David Aven**].

⁸ Art. 7, Draft Articles.

⁹ Art. 6, Draft Articles.

III. The stance taken by the Model Indian BIT: Beyond CIL

Article 1.5 of India's Model BIT defines an investor as a natural or juridical person of a Party who has made an investment in the territory of another party.¹⁰ Consequently, Article 1.9 gives the definition of a 'natural person' as a national of one of the parties as per the laws of said party.¹¹ The point of dialogue arises from the second half of Article 1.9, which states that:

*“A natural person who is a dual national or citizen shall be deemed to be exclusively a national or citizen of the country of her or his dominant and effective nationality/citizenship, where she/he ordinarily or permanently resides.”*¹²

This is very interesting because Indian law does not recognize dual nationality at all. Section 9 of the Indian Citizenship Act, 1955 clearly says that Indian Citizenship will be terminated on the acquisition of the citizenship of another state.¹³ So, the implication of this clause is that where the investor has a dual nationality, neither being Indian, a claim can only be made if the investor's dominant nationality is of the country who is a party to the BIT with India. This stance goes beyond the contours of existing CIL by mandating the application of the DaE test to determine jurisdiction in a claim against a third state. We see that such a position leads to inconsistency in interpretation.

IV. The conundrum of interpretation when compared to other tribunal decisions

One of the only other investment claims that has dealt with the point of applying dominant and effective nationality to determine a claim against a third state was the *David Aven* case.¹⁴ This decision dealt with a claim made by a dual national of Italy and the United States against Costa Rica. Article

¹⁰ *Supra* note 7.

¹¹ India Model BIT 2016, art. 1.9.

¹² *Id.*

¹³ Citizenship Act, 1955, § 9, No. 57, Acts of Parliament, 1955 (India).

¹⁴ *David Aven v. Republic of Costa Rica*, Case No. UNCT/15/3.

10.28 of the DR-CAFTA under which the claim was brought read: “*provided, however, that a natural person who is a dual national shall be deemed to be exclusively a national of the State of his or her dominant and effective nationality.*”¹⁵ This is similar to Article 1.9 of the Indian BIT.

The tribunal in *David Aven* refused to apply DaE because neither of the nationalities was of the state against whom a claim was being brought. The tribunal interpreted this clause and held that as per CIL, the test of dominant and effective nationality could only be applied when one of the nationalities of the dual national would have been Costa-Rican. The only reason this interpretation could stand was because the laws of Costa Rica allow for dual citizenship.

On the other hand, as iterated above, Indian law does not allow for dual nationality. When a claim is being brought against India by a dual national, it cannot be the case that one of the nationalities is Indian. Therefore, a clause which is essentially the same as 10.28 of the DR-CAFTA, i.e., Article 1.9 of the Indian BIT, would have to be interpreted in a significantly different manner for it to be given effect.

This altered interpretation would mean that the DaE test could apply even where neither of the dual nationalities is the state against which a claim is being brought. For example, a dual national would only be able to bring a claim if his state of dominant nationality has a BIT with India. This would be going against CIL as DaE can only apply when one of the nationalities is of the host state.

¹⁵ Dominican Republic-Central America-United States Free Trade Agreement, art. 10.28, Aug. 5, 2004, 43 I.L.M. 1014.

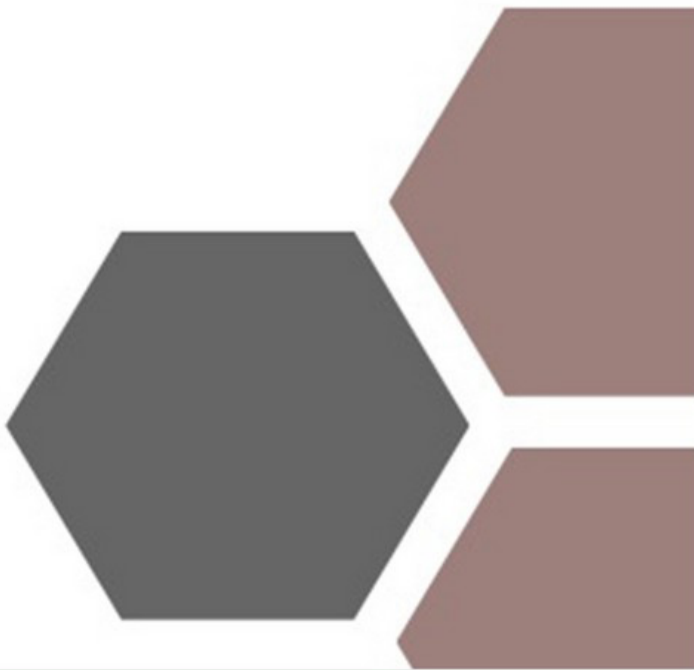
Therefore, we see that while such a clause may be common, the implications change heavily from country to country depending on whether their local law allows for dual nationality.

V. Conclusion and Analysis: Is the Indian Position the needed Approach?

While the Indian position goes beyond existing CIL, state parties to a BIT may be free to do so through mutual consent.¹⁶ With investment tribunals often favoring an interpretation that grants jurisdiction, allowing investors to only claim the benefit of one nationality might curb state apprehension towards the investment arbitration system.¹⁷ This will also bring about an ambit of clarity with regards to the jurisdictional link of dual nationals. Therefore, the Indian position might be the need of the hour while dealing with multiple nationality and investment arbitration.

¹⁶ Javier García Olmedo, *Dual Nationals in Investment Treaty Arbitration: An Emerging Field of Inconsistent Decisions*, EJIL: TALK! (July 27, 2023), available at <https://www.ejiltalk.org/dual-nationals-in-investment-treaty-arbitration-an-emerging-field-of-inconsistent-decisions/>.

¹⁷ Gus Van Harten, *Pro-Investor or Pro-State Bias in Investment-Treaty Arbitration? Forthcoming Study Gives Cause for Concern*, INVESTMENT TREATY NEWS (Apr. 13, 2012), available at <https://www.iisd.org/itn/2012/04/13/pro-investor-or-pro-state-bias-in-investment-treaty-arbitration-forthcoming-study-gives-cause-for-concern/>.



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