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ENSURING EMERGENCY ARBITRATION IS “ALWAYS” AVAILABLE IN EMERGENCIES: THE INTERACTION BETWEEN MULTI- TIER DISPUTE RESOLUTION CLAUSES AND EMERGENCY ARBITRATION

Sameer Thakur¹

Abstract

Emergency arbitration is an increasingly popular method of securing interim relief prior to the constitution of arbitration tribunals. However, multi-tier dispute resolution clauses can create situations where the right to seek emergency interim relief is impeded due to certain procedural requirements in institutional rules. This essay attempts to identify the procedural requirements that may cause this unintended problem and advises practitioners (and institutions) on efforts that can be undertaken to ensure that the right to seek emergency relief, as stipulated in institutional rules, is not impeded.

Keywords: interim relief, emergency arbitration, institutional arbitration, multi-tier clauses, procedural requirements.

INTRODUCTION

Emergency is arguably the most successful procedural innovation in international commercial arbitration over the last two decades: practitioners and users have moved from a situation where there was academic debate whether interim relief could be provided by arbitral tribunals thirty years ago to almost every major arbitral institution in the world (ICC, SIAC, HKIAC, IAMC, CIETAC, KCAB, AAA among others) now providing for emergency interim relief prior to the constitution of the tribunal. There can be no doubt to the success and popularity of emergency arbitration. All publicly available data

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suggests that the number of cases referred to emergency arbitration has been rising yearly.²

Despite its popularity, emergency arbitration, as a concept, is in one way at odds with a central tenet of international arbitration: the parties' ability to nominate the arbitrator who will adjudicate their dispute. Across all major institutional rules, the provisions dealing with emergency arbitration provide that the **institution** and **not the parties** will nominate and appoint the emergency arbitrator. To the author's knowledge, there is not a single institution that even contemplates the possibility of the parties being involved in the process of the appointment of an emergency arbitrator.³

The author does argue that party participation in the nomination of the emergency arbitration is essential for the process to have legitimacy or be considered "arbitration". In fact, the extremely short time periods in which the emergency arbitration process is to be completed renders such participation more or less impossible. At the same time, the fact that, across all institutional rules, the decision of the emergency arbitrator is subject to review from the arbitration tribunal (once constituted) means that decisions by the emergency arbitrator (not nominated by the parties), once delivered, are only applicable in the long term, if confirmed by arbitrators nominated by the parties. Irrespective, this distinction must be given appropriate consideration to truly place the emergency arbitration process in the appropriate context, which is often missing in the relevant academic literature.

This essay is not an attempt to navigate questions relating to the legitimacy of the provision of emergency arbitration but instead deals with a simpler question: is there something that could preclude (or at least complicate) a party's right to obtain emergency relief (assuming that the party in question wishes to obtain emergency interim relief **prior** to the constitution of the arbitral tribunal, and the arbitration agreement in question refers the dispute to institutional rules that provide for emergency arbitration).

There is, unfortunately, an obvious (potential) answer to the open-ended question discussed above: the presence of multi-tier dispute resolution clauses. In the 2000s and even early 2010s, multi-tier dispute resolution clauses had taken the international dispute resolution community by storm (much like emergency arbitration has, more recently). The idea that parties in the dispute at least attempt to mediate or negotiate their dispute before they proceed to the (more expensive and adversarial) arbitral process was seen as reasonable by

² Nancy M. Thevenin, *Use of ICC's Emergency Arbitrator Provisions*, American Bar Association, Dispute Resolution Magazine (Apr. 2022); Aditya Singh Chauhan, *Pushing Arbitral Boundaries to Pave Way for Emergency Arbitration*, 11(1) INDIAN J. ARB. LAW 9, 9-16 (2023); Grant Hanessian & E. Alexandra Dosman, *Songs of Innocence and Experience: Ten Years of Emergency Arbitration*, AMERICAN REV. OF ITL. ARB. 215, 215-237 (2018).

³ SHASHANK GARG, ARBITRATOR'S HANDBOOK 23-24 (LexisNexis 2022).

both users and practitioners, and therefore multi-tier dispute resolution clauses were adopted widely across industry sectors and jurisdictions.⁴ This essay aims to guide practitioners and academicians on procedural roadblocks that either complicate or prohibit parties from accessing emergency relief despite having intended access to it.

EMERGENCY ARBITRATION AND MULTI-TIER DISPUTE RESOLUTION CLAUSES: HOW DO THEY INTERACT

The fundamental question that arises from the interaction of multi-tier dispute resolution clauses and emergency arbitration is: if the right to arbitration under the multi-tier dispute resolution clause arises **after** the other tiers (mediation/negotiation etc.) have been completed, and the right to emergency arbitration is a subset of/consequence of the right to arbitration, then, is access to emergency arbitration only available **after** those tiers (mediation/negotiation etc.) have been completed? Put simply, can a party seek emergency arbitration **before** the requirements of the other tiers that precede arbitration in the multi-tier arbitration clause have been completed.

Much of this discussion would then necessarily be shaped by the legal nature of the “other tiers”: are those prior tiers condition precedent to the right to arbitration, and if so, what is the consequence of non-compliance? For instance, if the position in a particular jurisdiction/the correct interpretation of a particular contract is that the “other tiers” are not mandatory/do not require to be fulfilled before arbitration can be initiated, then there is no scope or need for a debate: if arbitration can be initiated, then there can be no dispute that emergency arbitration can also be initiated.

As other commentators have noted: “*uncertainty exists as to whether such clauses are binding, whether they constitute jurisdictional conditions precedent to the commencement of arbitrations, and what the consequences of a party’s failure to comply are. Indeed, there remain differing opinions among national courts with respect to the effects of non-compliance on an arbitral tribunal’s jurisdiction*”⁵

The approach that most jurisdictions now seem to be arriving at is that, (i) not all multi-tier dispute resolution clauses impose **mandatory requirements/condition precedents** (with varying requirements of specificity/or other metrics being used to determine whether or not a particular clause imposes a condition

⁴ Vasilis F.L. Pappas & Artem N. Barsukov, *Multi-Tier Dispute Resolution Clauses as Jurisdictional Conditions Precedent to Arbitration*, GLOBAL ARBITRATION REVIEW (Oct. 11, 2022, 12:30 PM), <https://globalarbitrationreview.com/guide/the-guide-energy-arbitrations/fifth-edition/article/five-years-later-update-multi-tier-dispute-resolution-clauses-jurisdictional-conditions-precedent-arbitration>.

⁵ *Id.*

precedent) and (ii) irrespective of whether or not there is a condition precedent, the question of whether or not there has been compliance with the “other tiers” (and what the consequence of any potential non-compliance is) is for the arbitral tribunal to determine, not the national courts. This implies, in some manner, that the existence of other tiers in a multi-tier dispute resolution clause does not mean that the parties’ consent to arbitration can be seen as conditional on the fulfilment of those tiers.

However, even before one wades into that tricky legal quagmire, there is a more direct, procedural question that would be in front of a party that has a multi-tier dispute resolution clause and intends to seek emergency interim relief: most institutional rules require the concurrent or immediate filing of a request of emergency interim relief and notice for arbitration.⁶

For instance:

- (i) The ICC Rules 2021 require that a notice of arbitration must be filed within 10 days of the receipt of the application for the emergency relief.⁷
- (ii) The SIAC Rules 2016 require that a party seeking emergency relief can do so by filing an application for interim relief concurrent with or following the filing of a notice of arbitration. As such, a party may not seek interim relief prior to filing the notice of arbitration under the SIAC Rules.⁸
- (iii) The HKIAC Rules 2018 require that a party make a request for interim relief either *concurrently* with a notice of arbitration or *following* it—that is, in no situation can a request for interim relief be filed **prior** to the notice of arbitration.⁹
- (iv) Similarly, the IAMC Rules require that any request for emergency relief be filed concurrent to or following the filing of the notice of arbitration.¹⁰

REQUIREMENT THAT REQUEST FOR EMERGENCY ARBITRAL RELIEF BE MADE FOLLOWING OR CONCURRENT WITH THE NOTICE OF ARBITRATION: AN UNNECESSARY BARRIER

The simple issue with requiring a party’s request for interim relief be filed concurrently with or following a notice of arbitration is that:

⁶ SHASHANK GARG, ARBITRATOR’S HANDBOOK 23-24 (LexisNexis 2022).

⁷ Article 29 and Appendix V, ICC Rules, 2021.

⁸ Sch. 1, SIAC Rules, 2016.

⁹ Art. 23 and Sch. 4, HKIAC Rules, 2018.

¹⁰ Sch. 1, IAMC Rules, 2021.

- (i) Emergency interim relief is, by its definition, relief that is required **urgently** (there is a risk of dissipation of assets, for instance).
- (ii) However, if the multi-tier dispute resolution clause in place requires, for example, that the parties’ executives meet and try and resolve the dispute for 30 days, after which, if no breakthrough can be made, an arbitration may be initiated (or possesses any other requirement, whose fulfillment is not possible instantaneously).
- (iii) Then, the party seeking emergency interim relief is technically entitled to it, but will not be able to access it, if there is a requirement that the request for interim relief be filed alongside or within a few days of the filing of a notice of arbitration, as the party is **not entitled to file the notice of arbitration**, until the other tiers (mediation/negotiation) have been fulfilled. For instance, if the minimum time required to fulfil the conditions of the other tier is more than 10 days, then, even if the right to initiate emergency arbitration is available to a party, it cannot access it, if under the ICC Rules, it must file the Request for Arbitration within 10 days of the filing of the request for emergency relief; or under the SIAC Rules, where it is required to file such a request concurrently with the Notice of Arbitration.
- (iv) However, if a party is seeking emergency interim relief (meaning that it believes that it requires interim relief **even before the tribunal’s constitution**), likely, it would not be tenable for the party to wait for that amount of time. The question of whether the right to initiate arbitration (in a specific jurisdiction) is contingent on the fulfilment of the “other tiers” and if those tiers need to be treated as condition precedents will have to be evaluated based on the particular rules of that jurisdiction (as well as the text of that contract); but the requirement of filing a notice of arbitration concurrently or within a fixed period of 10 days after the filing of the request for emergency interim relief under institutional rules can be analyzed on a universal basis: the focus of this essay is to provide analysis of the situation under major institutional rules, while providing comments on issues that practitioners can keep in mind (and suggesting certain amendments to institutional rules).

It is important to understand what the point of such a requirement is in the first place. As was discussed in the introduction, an emergency arbitrator providing interim relief is an arbitrator that the parties have not nominated. As such, it is reasonable for an institution to aim for having such interim relief being in place for the minimum amount of time, that is, providing for expedient constitution of the arbitral tribunal so that arbitrators that the parties have appointed can evaluate whether the interim relief provided by the emergency arbitrator should continue to be in place. To that extent, requiring that a notice of arbitration be filed alongside the request for emergency interim relief serves

the simple purpose of kickstarting the process of the constitution of the arbitral tribunal at the same time, so that the Tribunal can be constituted, and can then review the decision of the emergency arbitrator is a reasonable position.

However, suppose the nature of this requirement is absolute. In that case, it does not account for situations discussed above (cases with multi-tier clauses), leaving a party that has opted for a multi-tier clause containing an institutional regime with emergency arbitration without access to emergency interim relief. What possible solutions exist?

THE WAY OUT: AMENDMENT OF INSTITUTIONAL RULES OR UTILIZATION OF ALREADY EXISTING PROVISIONS

One solution is for institutional rules to recognize this as an issue and provide the necessary flexibility; have sufficient protection to ensure that the arbitration tribunal is constituted expediently, while recognizing that in some situations, allowing emergency relief prior to the filing of the notice of arbitration is necessary. The ICC Rules are an example of this approach:

- (i) The ICC rules do not require that a request for emergency interim relief be filed concurrently with or following the filing of the notice of arbitration. This means that a party is free to pursue emergency relief without filing the notice of arbitration.
- (ii) The ICC Rules, then go on to provide additional flexibility (and preserve the purpose of the requirement being discussed in this section) by allowing the emergency arbitration to proceed without any requirement to file a notice of arbitration but requiring that it be filed within 10 days of the filing of the request for emergency interim relief, “*unless the emergency arbitrator determines that a longer period of time is necessary*.”¹¹
- (iii) This means that a party cannot abuse the emergency arbitration provision by filing frivolous applications, and that an arbitral tribunal appointed by the parties will be able to review any decision passed by the emergency arbitrator soon (as the notice for arbitration must generally be filed within 10 days of the filing of the request for emergency interim relief.)
- (iv) However, at the same time, if the situation in that particular case is one where the existence of a pre-arbitral condition (or the “other tiers”) requires that a party undertake certain negotiations/mediation processes which are longer than the 10-day period, then the party seeking emergency interim relief can make an application to the emergency arbitrator to extend that 10-day period.

¹¹ Appendix V, ICC Rules, 2021.

Unfortunately, as far as the author is aware, the ICC Rules are the only set of institutional rules, that provide for this kind of flexibility explicitly. SIAC, which is currently in the process of revising the 2016 Rules, will be amending the SIAC Rules to achieve a similar result. In fact, the current draft of the revised Rules, as available on the SIAC website, explicitly recognizes that an application for emergency interim relief may be filed prior to the filing of the notice of the arbitration, instead of the concurrent filing requirement in the 2016 SIAC Rules.

So, what options are available to a party seeking emergency interim relief, in a situation where the institutional rules governing the arbitration provide for a notice of arbitration to be filed concurrently or prior to the request for emergency interim relief? The solution for practitioners may lie in general empowering provisions in most institutional rules, which provide the secretariat of the institution (or the Registrar) power to extend deadlines stipulated in the institutional rules. That is, instead of filing the notice of arbitration alongside the request for emergency interim relief, what should be filed is an application for the secretariat or the registrar to extend the deadline for filing a notice of arbitration till the time it would take the party to comply with the requirements stipulated in the “other tiers”.

The basis of this approach is that the stipulation in institutional rules that a notice of arbitration be filed concurrently with or prior to a request for interim relief is fundamentally like a deadline or a time limit: the rule in question, just instead of fixing a time period, as is common with deadlines/time limits, fixes an event (filing of the emergency interim relief application) by which the notice of arbitration must be filed. To that end, considering that the institutional rules empower their secretariats to extend any “deadlines”, or “time-limits” stipulated by the rules, that power should be sufficient to extend the requirement that a notice of arbitration be filed concurrently with or prior to a request for interim relief

In the author’s view, such an application would be possible under most major rules:

- (i) Under the SIAC Rules 2016, Rule 2.6 empowers the Registrar to “*at any time extend or abbreviate any time limits prescribed under these Rules.*”¹²
- (ii) Under the HKIAC Rules 2018, Article 3.6 empowers the HKIAC to “*if the circumstances of the case so justify*” amend any time limits “*provided for in the rules.*”¹³

¹² R. 2.6, SIAC Rules, 2016.

¹³ Art. 3.6, HKIAC Rules, 2018.

- (iv) The IAMC Rules are similar to the HKIAC Rules 2018, and Rule 4.4 states that: *“If the circumstances of the case so justify, the Registrar may amend the time limits provided for in these Rules, as well as any time limits that the Registrar has set, whether any such time limits have expired.”*¹⁴
- (v) As such, any application for emergency interim relief (in a situation where the notice of arbitration cannot be filed, as the “other tiers” have not been completed) could be accompanied with an application to the Registrar to extend the time limit by which the notice of arbitration needs to be filed.

To that extent, while the author is of the opinion, that certain general provisions in the rules of most major institutions could possibly be used to ensure that a party is not denied access to emergency interim relief simply because the dispute resolution clause in question is a multi-tier one. However, the better solution is for institutions to revise their rules to explicitly clarify that a request for emergency interim relief can be filed **prior** to the filing of the notice of arbitration, as the ICC Rules already do, and the SIAC Rules have proposed to do in their next edition.

¹⁴ R. 4.4., IAMC Rules, 2021.

MEDIATION AS A FORM OF DISPUTE RESOLUTION

Pavani Reddy & Natalie Armstrong¹

Abstract

Whilst mediation is a recognised form of alternative dispute resolution (“ADR”) for commercial parties, there are distinctions between the processes parties will follow depending on the jurisdiction they are acting under.

Within the courts of England & Wales, a dialogue on mediation has most recently posed the questions of how far the legislature can compel parties to mediate, and whether a failure of parties to mediate will attract adverse costs consequences.

This conversation is directly linked to the “*credibility gap*” in England & Wales concerning mediation.² The effect of this is that the use of mediation to all types of parties, whether sophisticated businesses or laypeople is likely to be promulgated. Many steps have already been taken by various organisations, as well as by the courts, to advocate for ADR, and mediation specifically, as tools to save time, money and court resources. This also became an important factor for disputes during Covid-19 when the courts were significantly overwhelmed.

That being said, arguments against mediation include the fact that it unnecessarily uses costs and wastes time, detracting from the court process.

This article will provide an introduction to mediation, the general mediation process, as well as background as to the current landscape in England & Wales.

¹ Legal Director & Associate respectively at Clyde & Co. LLP, London.

² Lord Neuberger, President, Supreme Court, Keynote Address at Civil Mediation Conference: A View from on High (May 12, 2015).

Keywords: mediation process, costs consequences, mediation act 2023, jurisdictions, credibility gap.

INTRODUCTION

Commercial disputes are often resolved through court proceedings or arbitration, both are formal adversarial proceedings subject to binding judicial rulings at their conclusion. Mediation, on the other hand, is a form of dispute resolution which is a voluntary and party-led process facilitated by a third-party impartial mediator who assists negotiations between parties. Parties can agree to mediate at any juncture of the proceedings. Though mediation is commonly used in litigation, there has recently been much discussion about integrating mediation into arbitrations.

The goal of mediation is to reach a mutually agreeable solution and the process is heavily dependent on the parties cooperating in good faith. Should one or more party not be willing to engage, the process will serve only to waste time and costs, and potentially jeopardize court proceedings.

The benefits of mediation include speed (the majority of civil mediations are concluded in a day), confidentiality, lower costs compared to litigation and arbitration, and a greater chance at maintaining the business relationship. Furthermore, since the mediator is not tasked with issuing a binding judgment but with assisting to reach a common agreement, the parties have more scope than in litigation or arbitration to advocate their commercial interests and collaborate to reach a mutually commercial solution.

The general process of a mediation is set out as follows:

General Mediation Process

Mediator

Mediation is a private forum which is confidential. Usually, it is up to the parties to choose a mediator and, unless agreed otherwise, mediation costs are shared by the parties equally. Parties are expected to attend the mediation.

While there is no prescribed skill set to consider when selecting a mediator, which is challenging at times, some key factors to consider are:

- Mediator's background (professional experience and expertise): depending on the type of dispute, selecting a mediator with experience/expertise in the relevant field to which the dispute relates, is likely to assist parties as the person will be well-versed in the issues and able to offer

valuable insights and knowledge about the industry and the legal issues that may arise;

- Mediator's general experience: an experienced and effective mediator is likely to close or narrow the gap between parties' positions;
- Communication skills;
- Mediator's fees: mediators usually charge on a fixed or hourly rate basis, as may be agreed by the parties in advance. In order to have a cost-effective mediation, it is recommended to consider the basis of the mediator's charges (fixed or hourly); scope of work to be done by the mediator before and after the mediation; the mediator's expenses; and any cancellation fees;
- Personality and style: it is important to consider whether the personality and style of the mediator will match the parties; and
- Mediator's ability to remain impartial.

Mediation Agreement

In advance of the mediation, parties need to sign a Mediation Agreement. The key elements of the agreement include that:

- The parties agree to attempt in good faith to settle their dispute at the mediation.
- The mediator agrees to conduct the parties to participate in the mediation in accordance with the terms set out in the Mediation Agreement.
- The person signing the Mediation Agreement on behalf of each party warrants having authority to bind the party to the terms of any settlement.
- Unless disclosure is required by law or to implement or enforce terms of the settlement, every person involved in the mediation will keep confidential all information arising out of or in connection with the mediation, including terms of any settlement, unless otherwise agreed by the parties in writing but not including the fact that the mediation is to take place or has taken place.

Role of the Mediator

The mediator is impartial and independent and does not take sides or express a view about right or wrong. The mediator works with all parties equally and helps the parties to focus on the dispute and assists to resolve it. There is no room for blame in mediation.

If a party is unhappy with the mediator's service, there is a right to complain. In the first instance the complaining party should raise it with the mediator who will try to resolve it and, if the mediator's response is unsatisfactory, the party has a right to complain to the mediator's own professional body or to another body as may be prescribed in the mediator's engagement terms.

Format of Mediation

The common format of mediation is face-to-face. However, recently, remote mediation (over Zoom/Microsoft Teams) has become popular owing to its flexible, low-cost and low-stress capabilities. It prevents the strain of putting both parties in the same room, which may prove helpful in particularly hostile disputes. It is also accessible to people in different time zones, thus avoiding the costs of travel and time and enabling parties with busy schedules to attend without delay.

Mediation Phases

Ahead of the mediation, the mediator speaks to parties separately to listen to their perspective and position on the claim. A joint meeting is then facilitated with the parties, where each party recounts their position on the claim. Parties then move to their individual rooms and the mediator continues the dialogue between the parties.

Whilst mediation should result in an agreed conclusion of the dispute, the parties are at all times in charge of the process and can terminate or step away from the process at any time, without having to accept a proposed outcome.

At the end of a mediation, if the parties have reached a settlement, an agreement will be signed which is enforceable as a legally binding contract. Mostly, agreements will be complied with voluntarily by parties and "*are more likely to preserve an amicable and sustainable relationship between the parties.*" (EU Directive³ on certain aspects of mediation in civil and commercial matters). However, the enforcement of mediation agreements is a consideration. A development in this area occurred on 12 September 2020 when the UNCITRAL Convention⁴ on International Settlement Agreements Resulting from Mediation (the "Singapore Convention") entered into force. To date, this has been signed by 56 countries, including the UK (on 3 May 2023). The Singapore Convention is intended to complement the New York Convention (on the recognition and enforcement of foreign arbitral awards) in providing that international mediated settlement agreements be directly enforceable by the

³ Directive 2008/52/EC.

⁴ General Assembly resolution 73/198 of 20 December 2018, (A/RES/73/198).

courts without a party needing to bring a claim for breach of contract or litigate the case on the merits.

If parties do not reach settlement of the dispute, it is still not entirely a failed mediation as parties get to understand each other's perspective which may lead to settlement soon after or agreement on some points, which leaves fewer areas to litigate over and potentially less costs incurred in formal proceedings.

Mediation Across Jurisdictions: US, Europe, India and the UK

Although the mediation process is similar across jurisdictions, the practice and cultural perception of mediation varies.

US

Mediation in the US has a strong history and is widely and successfully used to resolve disputes across various sectors. The use of mediation is an accepted part of the process of dispute resolution in commercial agreements (whether litigation is or is not anticipated) and is part-and-parcel of the court process. One reason for the integration of mediation into the US disputes landscape is the US litigious costs regime since costs are not generally recoverable for the successful party. This will be a large factor in parties contemplating bringing action.

Europe

Prior to 2004, mediation in Europe was not widely engaged in. 2004 saw the European Commission attempt to change the adversarial tradition of resolving disputes by issuing a **Code of Conduct for Mediators** and a **European Parliamentary Directive Proposal** on mediation in civil and commercial matters. The Directive's main objective was to facilitate access to alternative dispute resolution and to encourage mediation since it operates in a balanced relationship with judicial proceedings. Directive 2008/52/EC⁵ was adopted in May 2008 (Member States being obliged to bring the provisions into force by May 2011) with the recitals stating mediation "*should not be regarded as a poorer alternative to judicial proceedings*" and Article 5 specifically providing that courts invite parties to use mediation to settle disputes.

⁵ Council Directive 2008/52, 2008 OJ (L 136) 3 (EC).

Although Member State implementation of the Directive has been largely unproblematic,⁶ the use of mediation in all cases in the EU in 2014 was still less than 1%.⁷

India

Significantly, the Mediation Act 2023 received the President of India's assent on 15 September 2023 and was notified in the Gazette of India.⁸ The Act provides for a Mediation Council of India to be established and headquartered in Delhi to discharge the functions of the Act (Section 31). There is scope for further offices to be established in India, and abroad, signifying the underlying hope that India will become a strong location for domestic and international mediation. It is hoped that the Act will support and enable individuals, commercial entities, and communities (under Sections 43 and 44) to engage with the mediation process as an effective complement to dispute resolution, and as a *standalone* method of resolving conflicts.

Echoing the changing landscape in the English courts, Section 7 of the Act allows a court or tribunal to refer parties to undertake mediation. Although parties will not be under an obligation to come to a settlement, any signed and authenticated Mediated Settlement Agreement will be final and binding (Section 27). Mediated Settlement Agreements may be challenged under the process outlined at Section 28, which may be viewed as an advantage, or disadvantage, depending on the parties involved. The intention of Section 28 is to ensure fairness of such Agreements, with challenges allowed on grounds including fraud, corruption, impersonation, or if the dispute was unsuitable for mediation under Section 6. However, the scope of uncertainty for parties is clear where a final resolution is challenged and potentially nullified, increasing costs in settlement and the dispute.

Accessibility and efficiency are core features of the Act's provisions. In this regard, the Act allows for online mediation under Section 30, which for some parties will be of vital importance, especially where disputes are cross-border. Complementing this, parties under Section 8 are able to agree appointment of a mediator of any nationality (subject to certain requirements). This is of especial importance for disputes that require knowledge of a specific jurisdiction, or which would benefit from a foreign mediator.

⁶ European Implementation Assessment, The Mediation Directive (PE 593.789), *Directive 2008/52/EU on Certain Aspects of Mediation in Civil and Commercial Matters*, 2016.

⁷ EU DG for Internal Policies, 2014, '*Rebooting' the mediation directive: Assessing the limited impact of its implementation and proposing measures to increase the number of mediations in the EU*, Policy Department C: Citizens' Rights and Constitutional Affairs.

⁸ The Mediation Act, 2023, No. 32, Acts of Parliament, 2003 (India).

The Act is overall a welcome adaptation in the jurisdiction, not only since it brings fluidity to dispute resolution in India, but also as it is hoped to relieve pressure on Indian courts and allow access to justice in a timely manner. It is further hoped that the Act, through its flexibility and accommodation for the nature of global disputes, will enable India's development to becoming a robust centre for international mediation.

UK

Historically, mediation has been used in England since as far back as the 11th century.⁹ For whatever reason, after the early to late medieval times, mediation did not resurface until 1996. The resurgence was most likely due to proposals by Lord Woolf to promote alternative dispute resolution. Since 1996, the use of mediation and ADR has increasingly become a topic of debate.

Today, solicitors of England & Wales have a duty to advise their clients about mediation and ADR. Requirements for parties to engage in ADR are also included in various Court pre-action protocols, the Civil Procedure Rules ("CPR") and court guides i.e., the Chancery Division encourages parties to consider the use of ADR both before and after proceedings have commenced.¹⁰ Furthermore, there is an ongoing duty for parties and solicitors to consider mediation/settlement throughout the case. Failure to comply can result in adverse costs orders against parties either for non-consideration, or for unreasonable refusal to engage in ADR. Practically, courts can also order a stay of proceedings¹¹ until ADR steps have been taken.

A 2021 audit undertaken by the Centre for Effective Dispute Resolution ("CEDR") shows that over the last two decades there has been an acceleration of growth in cases going to mediation.¹² On the basis of mediators' reported caseloads, CEDR estimated that the size of the civil and commercial mediation market in England & Wales up to 31 March 2020 totalled 16,500 cases per annum.¹³ By way of comparison, the London Court International Arbitration Annual Casework Report¹⁴ states 333 referrals were received for its services in 2022. Other data for arbitration and ADR cases received at arbitral centres across the world in 2022 include ICC (515), ICSID (41), HKIAC (344), SIAC (357) and SCC (143). This shows the use of mediation in the UK is changing.

⁹ Lord Neuberger, *supra* note 1.

¹⁰ The Chancery Guide, ch. 10 para 5, Courts and Tribunals Judiciary.

¹¹ Civil Procedure Rules, 26.4.

¹² Graham Massie, *A Survey of Commercial Mediator Attitudes and Experience in the United Kingdom*, CEDR.

¹³ Increase of 38% (from 12,000 mediations in the 2018 CEDR report, to 16,500 mediations in the 2020 report).

¹⁴ LCIA, LCIA Annual Casework Report 2022.

The latest question in the use of mediation and ADR by parties, is to what extent courts can compel parties to mediate. In 2004, the case of *Halsey v Milton Keynes General NHS Trust*¹⁵ (“*Halsey*”) considered it a breach of the Article 6 European Convention on Human Rights¹⁶, right (to a fair trial) to compel parties to mediate.

UK - Costs Consequences

The current landscape is that a successful party at trial can be denied part or all of its costs if it has unreasonably refused to agree to mediate. This can include by simply not replying to an invitation to mediate (PGF II SA OMS Company 1 Ltd¹⁷). Factors the court will consider can include:

- Whether the **nature of the dispute** meant ADR was suitable for the subject-matter.
- Whether the **merits of the case** are strong enough that a party is reasonable in refusing ADR (for example, the claim would have succeeded on an application for summary judgment).
- Whether **other settlement attempts** have been made, with the consideration that mediation can succeed where other attempts have failed.
- Whether the **costs of mediation** would be disproportionate to the amounts in the case.
- Whether a mediation would cause delay/**endanger the trial date**.
- Whether mediation has a **reasonable prospect of success**. The burden is on the unsuccessful party to show the successful party unreasonably refused to agree to mediation. This is not an onerous burden as the unsuccessful party does not have to show mediation would in fact have succeeded.
- What level of **judicial encouragement** there was. Although courts cannot currently compel parties to undertake mediation, if it has strongly encouraged the parties to mediate, and there is a refusal, there may be a higher risk of costs consequences.
- Whether further **expert evidence** is/was required in the case.
- Whether any **Part 36 offers** were made.

¹⁵ *Halsey v Milton Keynes General NHS Trust*, (2004) 1 WLR 3002: 2004 EWCA Civ 576.

¹⁶ Convention for the Protection of Human Rights and Fundamental Freedoms, art. 6, Nov. 4, 1950.

¹⁷ PGF II SA v OMFS Co. 1 Ltd., (2014) 1 WLR 1386: 2013 EWCA Civ 1288.

CONCLUSION

The robustness of a court to deal with claims, and ensure effective dispute resolution is non-negotiable. The use of ADR and, in particular mediation, is a key part of many court systems. The courts of England & Wales handle a vast variety of claims, which include not only domestic, but international parties with varying levels of sophistication. There will always be parties, for whose case mediation is appropriate, but who are reluctant to mediate or whose legal representatives do not prioritise it. Using a court system where ADR and mediation are an active part of case management is therefore important. The possibility of sanctions in the English courts, for non-compliance with an order to mediate could be a more effective stick than the power to impose an adverse costs order against parties, which can feel intangible.

The English courts' encouragement of out-of-court settlements remain an attractive reason for use of the jurisdiction for adjudicating parties' disputes. The caselaw is clear that parties will require sound arguments for refusing to mediate, if they wish to avoid costs consequences. Parties should carefully consider any rejection of an invitation or suggestion from the court to mediate.

COSTS AND CONSEQUENCES: A SOLUTION FOR INDIA'S ARBITRATOR APPOINTMENT CONUNDRUM

Dharmendra Chatur¹

Abstract

This paper examines the complexities of arbitration-related court proceedings in India, focusing on the neglected aspect of costs. It discusses the evolution of the Arbitration & Conciliation Act of 1996, particularly the introduction of Section 31-A, which established a statutory regime for imposing costs in various arbitration-related matters, including referrals, interim measures, and the enforcement of awards. Despite Section 31-A, the paper highlights the issue of parties exploiting the judicial system, especially those ignoring arbitration agreements, without facing significant penalties. The study points out the anomalies in pre-arbitral court proceedings, emphasizing the delays caused by lengthy procedures. Indian courts inundated with petitions under Section 11 of the Act, often experience undue delays, contrary to the Act's intention for swift dispute resolution. The paper attributes these delays to parties manipulating the system.

Advocating for a stricter approach, the paper urges Indian courts to adhere to Section 31-A, imposing costs to deter delays in arbitration proceedings. Section 31-A is presented as a comprehensive framework to penalize parties for unreasonable delays or non-compliance with agreed procedures. The paper stresses the courts' role in changing litigant and attorney behaviours, given the legislative tools provided by Parliament. The paper includes statistical data on Section 11 petitions and the Supreme Court's reluctance to impose costs. It examines the legislative context of Section 31-A and compares international cost regimes, highlighting Section 31-A's unique role in deterring frivolous actions and promoting contractual compliance. In conclusion, the paper emphasizes the

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need for Indian courts to actively enforce Section 31-A, shifting from “No order as to costs” to enforcing “costs in accordance with Section 31-A.” This enforcement is crucial for India to improve its arbitration culture and achieve efficient dispute resolution.

Keywords: section 31-A, arbitrator appointment, costs regime, undue delays, pre-arbitral conduct.

INTRODUCTION

The phrases – “*There shall be no order as to costs*”, “*No Costs*”, and “*Costs Made Easy*” – are often variously found at the end of every Indian court (Supreme Court of India or a High Court) order deciding an application for constitution of an arbitral tribunal under Section 11 of the Arbitration & Conciliation Act, 1996 (“the Act”). Arbitrator appointment regimes across the world are largely based on Article 11 of the UNCITRAL Model Law on International Commercial Arbitration, 1985 (“the Model Law”), as is the case with India.² As of date, the Model Law has been adopted in 85 States across 118 jurisdictions.³

The Act has been amended several times since the adoption of the Model Law in 1996, and the last amendment was carried out in 2021. One of the most fundamental shifts in the Act was the establishment of a statutory costs regime by incorporation of Section 31-A under the Arbitration & Conciliation (Amendment) Act, 2015.⁴ Costs can be imposed – either in an arbitration or in any other proceeding pertaining to the arbitration under the Act – by the Court

² Although some portions of the Model Law were amended in 2006, art. 11 was not.

³ UNCITRAL, *Status of Conventions and Model Laws and the Operation of the Transparency Registry*, ¶8, UNGA. Doc. No. A/CN.9/1097 (May 11, 2022).

⁴ The provision, brought into force with effect from October 31, 2015, reads as under:

31A. Regime for costs. -- (1) *In relation to any arbitration proceeding or a proceeding under any of the provisions of this Act pertaining to the arbitration, the Court or arbitral tribunal, notwithstanding anything contained in the Code of Civil Procedure, 1908 (5 of 1908), shall have the discretion to determine--*

- (a) *whether costs are payable by one party to another;*
- (b) *the amount of such costs; and*
- (c) *when such costs are to be paid.*

Explanation.--For the purpose of this sub-section, “costs” means reasonable costs relating to--

- (i) *the fees and expenses of the arbitrators, Courts and witnesses;*
- (ii) *legal fees and expenses;*
- (iii) *any administration fees of the institution supervising the arbitration; and*
- (iv) *any other expenses incurred in connection with the arbitral or Court proceedings and the arbitral award.*

- (2) *If the Court or arbitral tribunal decides to make an order as to payment of costs,*

or the arbitral tribunal.⁵ Proceedings pertaining to arbitration before a Court, commonly known as court-related arbitration proceedings, under the Act can mean *inter alia* an application to mandatorily refer parties before a court to arbitration where an arbitration agreement is found to exist (§8 of the Act); interim measures before, during or after arbitration (§9 of the Act); appointment of arbitrators in case of party default or deadlock (§11 of the Act); application for setting aside of an award (§34); enforcement of an award (§36 for domestic awards and §49 for foreign awards); appeals from orders of courts (§37 and §50 of the Act). Relevantly, in relation to the appointment of arbitrators, the jurisdiction, in case of a deadlock or failure to appoint is vested with High Courts for domestic arbitrations and with the Supreme Court of India for international commercial arbitration.⁶

The focus of this paper is to address an anomaly in pre-arbitral court proceedings. Courts in India are burdened with petitions under Section 11 of the Act. The nature of the proceedings, although summary in nature – in that they step in to either break a deadlock between parties or arbitrators for appointment of an arbitral tribunal – are often unduly long and dilatory. This delay affects the underlying purpose of arbitration proceedings – speedy resolution of disputes, which is statutorily recognized by the Act, the amendments made to it, as well as the Model Law. This delay is often caused by parties that take advantage of overburdened judicial dockets – especially parties that have failed to act in accordance with an arbitration agreement. Although §31-A of the Act

(a) *the general rule is that the unsuccessful party shall be ordered to pay the costs of the successful party; or*

(b) *the Court or arbitral tribunal may make a different order for reasons to be recorded in writing.*

(3) *In determining the costs, the Court or arbitral tribunal shall have regard to all the circumstances, including--*

(a) *the conduct of all the parties;*

(b) *whether a party has succeeded partly in the case;*

(c) *whether the party had made a frivolous counterclaim leading to delay in the disposal of the arbitral proceedings; and*

(d) *whether any reasonable offer to settle the dispute is made by a party and refused by the other party.*

(4) *The Court or arbitral tribunal may make any order under this section including the order that a party shall pay--*

(a) *a proportion of another party's costs;*

(b) *a stated amount in respect of another party's costs;*

(c) *costs from or until a certain date only;*

(d) *costs incurred before proceedings have begun;*

(e) *costs relating to particular steps taken in the proceedings;*

(f) *costs relating only to a distinct part of the proceedings; and*

(g) *interest on costs from or until a certain date.*

(5) *An agreement which has the effect that a party is to pay the whole or part of the costs of the arbitration in any event shall be only valid if such agreement is made after the dispute in question has arisen.*

⁵ Arbitration & Conciliation Act, 1996, §31-A(1).

⁶ Arbitration & Conciliation Act, 1996, §2(1)(e) r/w §11(6A).

exists and empowers a Court to impose costs for improper conduct, an opposite party's incentives to delay arbitral proceedings remain unchallenged or disfavored in practice. The anomaly addressed in this paper is prescriptive and calls upon Indian Courts to essentially follow the law. The language of §31-A is wide and broad and envisages a situation in which a party who unreasonably delays, fails to act according to the agreed procedure, causes the filing of a §11 petition for appointment of an arbitrator, is disincentivized by the imposition of costs. The leadership for changing litigant and attorney behaviour must be taken by Courts considering an avenue has been provided by the Parliament in enacting §31-A of the Act. The hope is that, by imposing costs, the Courts will change the litigation culture around arbitrator appointment regimes and encourage the salutary principle of speedy resolution of disputes.

As a caveat, it is important to note that the proposal in this paper is limited to *ad hoc* arbitrations and not institutional arbitrations. Institutional arbitration offers a whole host of advantages in cost, time, and efficiency that are absent in *ad hoc* arbitrations. However, institutional arbitration is still in its infancy in India, *albeit* in terms of adoption, not in terms of awareness.

FILE, DELAY, KEEP PENDING

As of February 27, 2023,⁷ the Supreme Court has seen 383 petitions under §11 of the Act (in relation to international commercial arbitrations).⁸ Insofar as State High Courts is concerned, no clear data is available except for general non-specific pendency data on respective High Court websites. The National Judicial Data Grid launched by the Department of Justice, Government of India,⁹ does not maintain case details specifically for a particular type of case but maintains general statistics based on whether the subject matter of the case is 'civil' or 'criminal' in nature. Additionally, data gathering in this case has been difficult due to different case typologies used for §11 petitions across High Courts – for instance, while in Karnataka, a §11 petition is known as a 'Civil Miscellaneous Petition', in Bombay, it is known as 'Arbitration Application'.

Although a concrete number would have aided the analysis on whether and why Indian courts impose or do not impose costs in deciding §11 petitions under the Act, but the data is insufficient. This paper examines Supreme Court statistics only between January 1, 2016, and February 27, 2023, since §31-A was introduced into the Act with effect from October 31, 2015. Further, a detailed case law search (reported and unreported cases) on Indian legal research databases *Manupatra*, *Indian Kanoon*, and *SCC Online* did not

⁷ *Supreme Court of India, Case Status Docket Search*—"Arbitration Petition".

⁸ Arbitration & Conciliation Act, 1996, §11.

⁹ NATIONAL JUDICIAL DATA GRID.

return any results for examples on whether Indian courts impose §31-A costs in deciding §11 petitions. It is also unclear whether petitioners who are forced to approach the Court seeking appointment of arbitrators under §11 of the Act made a request for imposition of costs against the opposing parties since Indian legal databases do not maintain court dockets or pleadings, unlike in the United States.

Since the introduction of §31-A, the following number of §11 petitions have been filed in the Supreme Court for international commercial arbitrations, and yet, none of them resulted in the imposition of costs on the losing party:

Year of filing/registration	Number of §11 petitions for appointment of arbitrators
2016	66
2017	54
2018	30
2019	55
2020	42
2021	55
2022	65
2023 [up to Feb. 27, 2023]	16
TOTAL	383

THE LAW RELATING TO ARBITRATOR
APPOINTMENTS IN INDIA

§11 of the Act mirrors Article 11 of the Model Law, which contains a two-tiered approach to the appointment of arbitrators – (i.) it respects party autonomy in making decisions about the arbitrator who will decide their dispute, and (ii.) it sets out several default rules unless parties agree to something in derogation. These default appointment procedures provide guidance where either parties or arbitrators disagree on the way forward.¹⁰ Article 11 also allows the court, or the competent authority, designated under Article 6 to intervene to resolve deadlocks or disputes during the stage of appointment of arbitral tribunals.¹¹

Though the amendments to Section 11 of the Act 1996 have changed the mechanics of arbitrator appointment in India, the overarching mechanism

¹⁰ UNCITRAL, 2012 DIGEST OF CASE LAW ON THE MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION, at 59, U.N. Sales No. E.12.V.9 (2012).

¹¹ *Id.*

has not entirely steered away from the two-tiered approach recognized in the Model Law.

When deciding a §11 petition, the statute and precedent as it stands today, require the Court to examine summarily and *prima facie* whether an arbitration agreement exists.¹² Accordingly, in most fact-intensive inquiries, whether an arbitration agreement indeed exists, the competence and jurisdiction of the arbitral tribunal, etc. have been held to be outside the remit of the Court exercising powers under §11 of the Act.

Indeed, the statutory intent to ensure speedy disposal of such summary proceedings is incorporated within the provision itself. For instance, §11(13) of the Act provides that petitions for the appointment of arbitrators must be disposed of “*as expeditiously as possible, and an endeavor shall be made to dispose of the matter within a period of sixty days from the date of service of notice on the opposite party.*” However, as a practice, the aspiration of disposal within six months has been followed in breach.¹³

While judicial delays in India are decried as an issue of the inefficiency of systems and bad litigant behaviour, it is important to consider whether the existing legal regime has sufficient tools to address these issues. In relation to §11 petitions, it must be noted that the jurisdiction of the High Courts or the Supreme Court is invoked principally due to silence by the opposing party – i.e. when the opposing party does not honour the arbitration agreement. This is nothing but a breach of the arbitration agreement, which according to the principle of separability, is a separate contract between the parties. The next question to consider, then, is whether the costs regime in the Act and comparative regimes can come to the aid of changing litigant behaviour. In essence, can costs be a deterrent to burdening the Courts’ heavy dockets and can it foster respect for arbitration agreements? This is considered below.

COSTS REGIMES – UNCITRAL, COMPARATIVE LAW, AND THEORY

§31-A has no parallel in the UNCITRAL Model Law. The legislative history of the provision offers some reasons as to why the Indian Parliament felt the

¹² Arbitration & Conciliation Act, 1996, §11(6-A); *Duro Felguera SA v. Gangavaram Port Ltd.*, (2017) 9 SCC 729 (Ind.); *Vidya Drolia v. Durga Trading Corpn.*, (2021) 2 SCC 1 (¶¶154.4 and 244).

¹³ Srithi Ojha, “*Arbitration Act - Dispose Sec 11(5) & 11(6) Applications Pending for Over 1 Year within 6 Months: Supreme Court to High Courts*”, LIVE LAW, (24 May 2022, 5:03 PM). The issue of delays in disposal of §11 petitions by High Courts was recently noted by the Supreme Court in *Shree Vishnu Constructions v. Military Engg. Service*, 2022 LiveLaw (SC) 523. The Supreme Court directed High Courts to decide pending §11 petitions within six months.

need to incorporate it into the Act. The proposal to legislate on costs as a separate regime within the arbitration law of India arose from the Law Commission of India's 246th Report (August 2014) titled "Amendments to the Arbitration and Conciliation Act 1996".¹⁴ The Commission's consideration of the issue is brief and contained in the following paragraphs:

"70. Arbitration, much like traditional adversarial dispute resolution, can be an expensive proposition. The savings of a party in avoiding payment of court fee, is usually offset by the other costs of arbitration – which include arbitrator's fees and expenses, institutional fees and expenses, fees and expenses in relation to lawyers, witnesses, venue, hearings etc. The potential for racking up significant costs justify a need for predictability and clarity in the rules relating to apportionment and recovery of such costs. The Commission believes that, as a rule, it is just to allocate costs in a manner which reflects the parties' relative success and failure in the arbitration, unless special circumstances warrant an exception or the parties otherwise agree (only after the dispute has arisen between them).

71. The loser-pays rule logically follows, as a matter of law, from the very basis of deciding the underlying dispute in a particular manner; and as a matter of economic policy, provides economically efficient deterrence against frivolous conduct and furthers compliance with contractual obligations.

72. The Commission has, therefore, sought comprehensive reforms to the prevailing costs regime applicable both to arbitrations as well as related litigation in Court by proposing section 6-A to the Act, which expressly empowers arbitral tribunals and courts to award costs based on rational and realistic criterion. This provision furthers the spirit of the decision of the Supreme Court in Salem Advocate Bar Association v Union of India, AIR 2005 SC 3353, and it is hoped and expected that judges and arbitrators would take advantage of this robust provision, and explain the "rules of the game" to the parties early in the litigation so as to avoid frivolous and meritless litigation/arbitration." (Emphasis supplied)

¹⁴ LAW COMMISSION OF INDIA, *Amendments to the Arbitration and Conciliation Act 1996*, Report No. 246 (Aug. 2014), at 34.

In the draft statute that accompanied the report, the Law Commission explained that the principle “cost follows the event” contained in the English Civil Procedure Rules (Rule 44) underlies the proposed amendment. The proposed statute found its way, *in toto*, into the Act and came to be legislated as §31-A of the Act. Notably, §31-A of the Act has no parallel in any of the countries where the Model Law has been adopted, and to that extent, it is a *sui generis* regime in Indian arbitration law.

The Law Commission’s hope for Courts that are involved in arbitration-related litigation was to enable an economically efficient deterrent to frivolous party conduct as well as to encourage compliance with contractual obligations – i.e., adhering to the arbitration agreement. Even though the legislative history and context in which §31-A of the Act was enacted is so clear, it is not clear why Courts have not felt the impetus to apply and enforce it in §11 petitions. India has, for long, been considered a disfavored seat for conduct of arbitrations, due to its traditional judicial interventionism in arbitrations.¹⁵ Most judgments of the Supreme Court on arbitration law are often categorized into pro- and anti-arbitration, as is the common practice in most jurisdictions. However, commentators such as Gary Born believe that India’s reputation as a pro-arbitration jurisdiction is on the upswing due to certain legislative actions and judicial decisions.¹⁶

There is further recognition by the Indian Parliament of the problem that arose from vesting too much discretion in Courts to decide petitions for the appointment of arbitrators – in 2019,¹⁷ the Indian Parliament stripped Courts of the power to decide petitions relating to the appointment of arbitrators. The power has now been vested in arbitral institutions that are graded by the Supreme Court in case of international commercial arbitrations and the respective High Courts in case of other arbitrations. Although these amendments have already been passed in the Parliament and found their way onto the statute book, they have not yet been implemented or brought into force by the Government of India. Until such time that the government notifies these provisions, the old system of Courts retaining the power to appoint arbitrators will continue to operate.

COSTS RELATING TO PRE-ARBITRAL PROCEDURE

The problem presented in this paper pertains to conduct of parties during pre-arbitral steps – i.e., in the face of an arbitration agreement, parties thereto either breach it by remaining silent or failing to adhere to the procedure

¹⁵ GARY B. BORN, INTERNATIONAL ARBITRATION AND FORUM SELECTION AGREEMENTS: DRAFTING AND ENFORCING 76 (6th edn. 2021).

¹⁶ *Id.*

¹⁷ Arbitration and Conciliation (Amendment) Act, 2019, No. 33 (5th Aug. 2019).

contained in it. Commentators who have written about UNCITRAL and (international) commercial arbitration have paid little attention to the issue of imposition of costs factoring pre-arbitral conduct of parties.¹⁸ The other issue of importance is the decisional aspect of imposition of costs for pre-arbitral conduct – should the Court/appointing authority decide, or should this be a point left to the determination by the arbitral tribunal as part of the larger exercise of allocating costs? The answer is not far to seek.

In adjudicating costs during arbitral proceedings, the standards of proof are usually low – i.e., they are determined summarily.¹⁹ Under the 2012 ICC Arbitration Rules, for example, the arbitral tribunal has the discretion to award costs by taking into account a party's pre-arbitration conduct which was motivated by bad faith.²⁰ Similarly, §31-A of the Act does not prescribe harsh standards to ascertain costs payable by a party. It preserves the discretion of the Court or arbitral tribunal in determining costs and lays down clear guidelines for how such costs must be determined – especially keeping the “costs follow the event” and the “losing party pays” principles intact. In effect, with relatively lower standards requiring summary determination of costs, it is surprising why Courts when deciding §11 petitions have not resorted to awarding costs against the losing party.

Whilst it is true that the reason for filing a §11 petition under the Act may have been occasioned due to a breach of the arbitration agreement by the opposing party, the prerogative to seek imposition of costs rests on the party who claims that breach occurred. Commentators have opined that breach of dispute resolution clauses, forum selection clauses, and arbitration agreements, gives rise to a claim for damages – which can either be determined and awarded by the forum, which was wrongly approached, or the correct forum identified by the agreement between the parties.²¹ The other approach taken in jurisdictions that do not have a provision similar to §31-A of the Act is to award costs on an indemnity basis if a party is found to have breached the arbitration agreement.²²

¹⁸ See JAN PAULSSON & GEORGIOS PETROCHILLOS, UNCITRAL ARBITRATION 387 (2017); FRANCO FERRARI *et al.*, INTERNATIONAL COMMERCIAL ARBITRATION: A COMPARATIVE INTRODUCTION (2021); GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION §23.08 (3rd edn., Updated Aug. 2022); RAHUL DONDE & RISHABH RAHEJA, *Chapter 4: Constitution and Establishment of an Arbitral Tribunal*, in Dushyant Dave, Martin Hunter, et al. (eds), ARBITRATION IN INDIA, at 77-88 (2021).

¹⁹ See BORN, *supra* note 18 at §23.08(C); M. BÜHLER & T. WEBSTER, HANDBOOK OF ICC ARBITRATION: COMMENTARY AND MATERIALS ¶38-46 (5th edn. 2021).

²⁰ ICC COMMISSION REPORT, *DECISIONS ON COSTS IN INTERNATIONAL ARBITRATION*, 2015(2) ICC DISPUTE RESOLUTION BULLETIN ¶79.

²¹ Deyan Draguiev, Liability for Non-compliance with a Dispute Resolution Agreement, 88(1) Arbitration 135 (2022). See also, Albert Dinelli, The Limits on the Remedy of Damages for Breach of Jurisdiction Agreements: The Law of Contract Meets Private International Law, 38 MELB. U. L. REV. 1023 (2015).

²² See, *A v. B* (No. 2), 2007 Bus LR D 59; 2007 EWHC 54 (Comm)(UK); See also, David Kwok, *Breach of Arbitration Agreement and its Costs Consequences*, 34(1) ARB. INTL. 149 (2018).

Nevertheless, §31-A of the Act is agnostic to a party's choice to seek damages or costs arising out of a compelled §11 petition due to a breach of the arbitration agreement.

CONCLUSION

The problem of improper litigant conduct has ailed the Indian legal system for decades, having occupied the attention of lawmakers, courts, the Law Commission of India. What ails the civil litigation system in India, as identified by the 240th Report of the Law Commission of India (titled “Costs in Civil Litigation”) in 2012, is true of the arbitration landscape as well. §31-A of the Act has taken a significantly important step to address the ills of the system in a move that is quite unique and unseen in most Model Law jurisdictions. What is needed is impetus by the Courts to actually enforce what is on the law books in this case – a situation that does not present itself often in courts. Court orders should, therefore, move from “No order as to costs”, to “costs in accordance with §31-A of the Act”. If the law remains unutilized, India's aspiration to improve arbitration culture will remain a pipe dream.

ARBITRATION ACT & SECTORAL REGULATORS

*Rimali Batra*¹

Abstract

Arbitration serves as a vital means to expedite legal proceedings, thereby contributing to the increased reliance on alternative dispute resolution mechanisms as the most efficient method. Despite its significance, arbitration is not a universal solution applicable across all sectors and cases. It is regarded as a specialized legal avenue, notably emphasized in the Arbitration & Conciliation Act, 1996 (referred to as the 'Arbitration Act'). This Act extends beyond traditional court procedures, providing an efficient framework for dispute resolution. However, the applicability of the Arbitration Act becomes nuanced when put against sector-specific legislation that addresses disputes within specific sectors. This situation tends to diminish the influence of the Arbitration Act, particularly when other specialized laws come into play. Hence, this article seeks to delve into the intricate relationship between the Arbitration Act and various sectoral regulations prevailing in India. Specifically, this exploration involves examining how arbitration functions within distinct sectors in India, namely the Telecom Sector, the Anti-trust/Competition Law Sector, the Electricity Sector, and the Petroleum and Natural Gas Sector. These sectors, each governed by their specialized laws, present unique challenges and requirements that might intersect or conflict with the provisions of the Arbitration Act. Furthermore, this article aims to shed light on the dynamic interaction between these two distinct legal frameworks: the Arbitration Act, designed for broad dispute resolution, and the sectoral laws tailored to address specific industry-related disputes. This investigation into the interplay between these legal paradigms aims to elucidate the circumstances under which the Arbitration Act's applicability might be curtailed or supplemented by sector-specific legislation. In

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essence, while arbitration stands as a crucial mechanism for dispute resolution, its application and efficacy might be influenced by sectoral regulations, necessitating a deeper exploration into their compatibility and potential intersections to provide clarity on the extent of the Arbitration Act's reach in various sectors across India.

Key-words: Arbitration Act, arbitrability of disputes, telecom disputes, anti-trust disputes, petroleum related disputes.

INTRODUCTION

The primary aim behind arbitration is to enable speedy trial, which is also a primary reason for the popularity and rise of alternate dispute resolution mechanisms. Arbitration, however, is not absolute and applicable to all sectors and cases. Arbitration holds the status of being a special law, and it is through this status of special law that the Arbitration & Conciliation Act, 1996 [Act No. 26 of 1996] ('Arbitration Act') asserts its influence and provides for an effective mechanism beyond court procedures. However, in cases where the Arbitration Act and the status of an arbitration agreement are juxtaposed against another special sectoral legislation that provides for the special treatment of disputes relating to the sector, the position of the Arbitration Act stands diluted. It is in this context, that this article explores the positioning of different sectoral regulators that exist across India qua Arbitration Act. The Article examines arbitration *via a vis* sectoral regulation in India governing the Telecom Sector, the Anti-trust/Competition Law Sector, the Electricity Sector, and the Petroleum and Natural Gas Sector. Building on this, the Article discusses the interplay between the two special laws, i.e., the Arbitration Act and the special sectoral acts therein.

TEST OF ARBITRABILITY

One of the terms frequently used in arbitration proceedings is 'arbitrability' concerning a dispute, which has not been defined in the Arbitration Act. Its meaning and application have therefore evolved through a process of judicial interpretation. Primarily, arbitration is a process that only facilitates the resolution of private disputes. It is neither advisable nor appropriate that disputes where public interest issues are involved, are resolved through private mode without interference by courts.

The Supreme Court of India has dealt with this issue in detail in *Booz Allen & Hamilton Inc. v. SBI Home Finance Ltd.*² To determine whether a dispute is arbitrable, the Supreme Court in this case prescribed a three-pronged test. This test provides that the court goes into three aspects relating to a dispute:

- (i) the nature of the dispute and whether it is to be resolved by arbitration or in courts;
- (ii) the presence of the matter of the dispute in the arbitration agreement, and
- (iii) the nature of redressal sought by the parties through arbitration.

Interestingly, the Arbitration Act does not categorize any dispute as ‘non-arbitrable’ per se. Therefore, primarily the assumption is that all disputes that arise in human transactions are arbitrable. However, there are some provisions in the Arbitration Act that make inroads into this broad generalization.

For instance, Section 2(3) of the Arbitration Act provides that the Arbitration Act would be consistent with the laws that exclude certain disputes from being arbitrable. Further, section 48(2) of the Arbitration Act elaborates upon the power of national courts to set aside or disapprove enforcement where “the subject matter of the dispute is not capable of settlement by arbitration under the law for the time being in force” or “if the award is in conflict with the public policy of India.” Therefore, the broad and generalized assumption that all disputes are arbitrable is whittled down by the application of these provisions.

Thus, being consistent with the law prescribed by the courts vide various judgments, it is important to enquire and determine whether the dispute is arbitrable. There are categories under which the dispute must fall to be amenable to arbitration. Firstly, it must be ascertained whether the dispute revolved around rights in rem or right in personam. The dispute falling under the former category is arbitrable while the one revolving under the latter is not arbitrable as held by the Supreme Court in the *Booz Allen* case. Although certain sub categorisation within the same exists and permit arbitrability of the disputes such as for claims between parties (right in personam) stemming from a dispute incorporating a right in rem aspect.

Further dissecting the arbitrability of disputes, a fresh criterion for determining if a dispute is suitable for arbitration exists, that is, if a dispute revolves around rights in personam, arbitration might be refused if the dispute is designated for resolution in a public forum due to prevailing laws or governmental policies. This doesn’t imply that disputes assigned to specialized tribunals are automatically ineligible for arbitration. Rather, a dispute is considered

² (2011) 5 SCC 532.

non-arbitrable when certain rights and duties are solely granted to tribunals by laws governing the dispute, excluding interference of national courts.

Thus, it is clear that a two-fold inquiry is required to determine the arbitrability of an issue in the context of arbitration in India. At first, one needs to determine whether the subject matter of the dispute is a ‘right in rem’ or ‘right in personam’; rights in rem are not amenable to arbitration. If the subject matter of the dispute is a right in personam, then a second level inquiry is required to identify whether the dispute is reserved by legislative enactments to be resolved by a public or special tribunal. If the second inquiry is answered in the affirmative, the dispute cannot be subject to arbitration.

TELECOMMUNICATION LAW (TRAI)

The Telecom Industry in India is regulated under the Telecom Regulatory Authority of India Act, 1997 [Act No. 24 of 1997] (“TRAI Act”). Section 14 of the TRAI Act establishes the Telecom Disputes Settlement and Appellate Tribunal also known as the ‘TDSAT’ and further outlines the jurisdiction and scope of the TDSAT. Section 15 of the TRAI Act provides that no civil court has the jurisdiction to hear suits or proceedings that are squarely covered within the TDSAT’s scope and powers. The TRAI Act also restricts courts or other authorities from granting injunctions for disputes/ actions taken or to be taken under the TRAI Act. Going by the principles of Arbitrability discussed above, the matters addressed in the TRAI cannot be subject to arbitration, thereby implying that provisions within the TRAI Act take precedence over the general provisions in the Arbitration Act. This aligns with the well-established legal maxim/principle of “*generalia specialibus non deroant*”. The said determination arises from the fact that the TRAI Act holds as a specialized legislation position under which disputes governed by the said Act are adjudicated by the TDSAT alone. Hence, the TRAI Act is a self-contained code, intended to deal with all disputes arising out of the telecommunication services provided in the country. Any dispute under the TRAI Act is likely to affect consumers/subscribers immensely and therefore such matters cannot be referred to arbitration.

The Delhi High Court in the case of *Gaur Distributors v. Hathway Cable & Datacom Ltd.*³, while deciding whether a dispute between two service providers would fall under the exclusive jurisdiction of the TDSAT, held that the Arbitration Act is a general act and as such applies to all arbitration agreements, but the TRAI Act is a special act that specifically applies to the telecom sector. The intention of the legislature in ousting the jurisdiction of other courts and authorities is apparent and ensures that only one single authority deals with telecom-related matters i.e., TDSAT.

³ 2016 SCC OnLine Del 4605.

The intent of the legislature was further examined by the Kerala High Court in the case of *A. Salim v. Asianet Satellite Communication Ltd.*⁴, wherein the Hon'ble Court rejected the application of the petitioner (being a party to an arbitration agreement), for seeking appointment of an arbitrator, thereby affirming that arbitration is barred in respect of matters within exclusive jurisdiction of TDSAT under TRAI Act.

The Supreme Court in the case of *Cellular Operators Assn. of India v. Union of India*⁵, held that the jurisdiction of the TDSAT under Section 14 cannot be merely held to be supervisory jurisdiction and that it is the only forum for addressing the grievances of aggrieved party in as much as the appellate jurisdiction to the Supreme Court is only on the substantial question of law and jurisdiction of Civil courts for filing a suit is ousted.

COMPETITION LAW (CCI)

Competition Law and the offenses therein such as cartel formation, anti-competitive activities, and abuse of dominant position are all activities that affect the public at large and are regulated under the Competition Act, 2002 [Act No. 12 of 2003] ("Competition Act") therefore, such offenses must not be subjected to arbitration as the general view confirms that arbitral tribunal is well competent to decide issues in personam but fails in deciding rights in rem⁶.

The Competition Act also being a special act raises the question of the relevance, scope, and applicability of the Arbitration Act. The Delhi High Court in the case of the *Union of India v. CCI*⁷, discussed the maintainability of the proceedings before the Competition Commission of India (CCI) where an arbitration agreement exists between the contracting parties and held that CCI has the jurisdiction to hear the matter, even though the arbitral tribunal has the mandate to adjudicate. The Hon'ble Court relied on the decision in *Thirumurugan Coop. Agricultural Credit Society v. M. Lalitha*⁸, whereby it was held that the investigative and deliberative scope set by CCI differs significantly from that of an Arbitral Tribunal. An Arbitral Tribunal lacks the ability to delve into the intricate details of a party's abuse of dominant position and does not focus on the specific contractual terms within a dispute. The Hon'ble Court affirmed that the arbitral tribunal lacks the authority, necessary expertise, and resources to investigate, resulting in a comprehensive report that is critical in addressing concerns related to the potential abuse of a dominant position by one of the contracting parties.

⁴ MANU/KE/3986/2022

⁵ (2003) 3 SCC 186; (2003) 1 Comp LJ 1 (SC).

⁶ S. 61 of the Competition Act, 2002.

⁷ 2012 SCC OnLine Del 1114; AIR 2012 Del 66 (India).

⁸ (2004) 1 SCC 305.

PETROLEUM AND NATIONAL GAS LAW (PNGRB)

The Petroleum and Natural Gas Regulatory Board Act of 2006 [Act No. 19 of 2006] (“PNGRB Act”) bestows upon the Board established under the PNGRB Act, the authority to safeguard the interests of consumers and entities engaged in specific activities related to petroleum, petroleum products, and natural gas. The Board is entrusted with the responsibility of regulating various aspects of the petroleum and natural gas sector, such as refining, processing, storage, transportation, distribution, marketing, and sale.

Section 12 of the PNGRB Act establishes the powers regarding complaints and resolution of disputes by the Board. The section empowers the Board to adjudicate and decide upon disputes relating to refining, processing, storage transportation, and others. However, the only caveat to the same is that the parties should not have agreed to arbitration.

In the decision of *Reliance Industries Ltd. v. GAIL (India) Ltd.*⁹, the Board was confronted with the question of whether it is within their jurisdiction to intervene in instances where the agreement (which is the subject of dispute) has an arbitration clause. The Respondents, in that matter, contended before the Court that Section 8 of the Arbitration Act is mandatory in nature, and the Court/Board must not question the applicability of the clause.

However, the Board stated that it is a settled position of law that the inclusion of an arbitration clause does not oust or exclude the jurisdiction of a regulatory body to intervene as the scope of arbitration may be limited to substantive clauses of the agreement, however, the purview of a regulatory body may extend beyond that. The Board additionally stated that no agreement may justify an act/omission that is in contravention of Section 11(a) of the Act.

On the question of an arbitration clause and the jurisdiction therein, it is pertinent herein to examine the decision of the Board in the case of *Sardarmal Bagaria Industries (P) Ltd. v. Assam Gas Co. Ltd.*¹⁰, wherein the court established that the Board has no jurisdiction to adjudicate disputes that involve an arbitration clause. In cases wherein there exists an arbitration clause, the arbitration mechanism should be preferred in the first instance. In such cases, the board does not have jurisdiction to intervene in the matter, as the scope and powers of the Board are limited due to the inclusion of an Arbitration Agreement, regulated by the terms and provisions of the Arbitration Act.

⁹ *Reliance Industries Ltd. v. GAIL (India) Ltd.*, Legal/211/2016, decided on 26/12/2016 (PNGRB).

¹⁰ *Sardarmal Bagaria Industries (P) Ltd. v. Assam Gas Co. Ltd.*, Legal/25/2021, decided on 19/04/2023 (PNGRB).

ELECTRICITY LAW (CERC/APTEL)

Electricity Act, 2003 [Act No. 36 of 2003] (“Electricity Act”) is a special legislation governing the generation, transmission, distribution, trading, and use of electricity and for taking measures conducive to the development of the electricity industry, promoting competition, protecting the interest of consumers and supply of electricity to all areas, rationalization of electricity tariff, ensuring transparent policies regarding subsidies, promotion of efficient and environmentally benign policies.

Under Section 86(1)(f) of the Electricity Act, the sole jurisdiction over the cases rests with the State Electricity Commission. The Supreme Court in the case of *Gujarat Urja Vikas Nigam Ltd. v. Essar Power Ltd.*¹¹, observed that the question of appointment of an arbitrator under Section 11(6) of the Arbitration Act does not arise, where the Electricity Act empowers only the State Electricity Commission to refer any dispute for arbitration. The Supreme Court also held that if Section 86(1)(f) of the Electricity Act is not interpreted in the above manner, it would lead to an ‘anomalous situation’ whereby the State Electricity Commission would be erroneously tasked with both, adjudicating a dispute as well as referring the same to an arbitrator.

Additionally, the Supreme Court also noted that Section 174 of the Electricity Act expressly states that the provisions of the Electricity Act would have an overriding effect in the event of a clash or conflict with any other existing law in force. In such cases, even where one of the parties has not objected as to maintainability or jurisdiction at the stage of the first application for appointment of the arbitrator before the High Court, under Section 11(6) of the Arbitration Act, the Supreme Court held that objections as to maintainability are basic in nature and it is the duty of the court to address the same. Moreover, an objection as to the maintainability goes to the very root of the case, and therefore not raising such an objection at an earlier stage does not preclude the court from entertaining it at a later stage.

The extent of applicability of the Arbitration Act can then be understood from Section 158 of the Electricity Act, which reads as under:

“Section 158. (Arbitration): Where any matter is, by or under this Act, directed to be determined by arbitration, the matter shall, unless it is otherwise expressly provided in the licence of a licensee, be determined by such person or persons as the Appropriate Commission may nominate in that behalf on the application of either party; but in all other respects

¹¹ (2008) 4 SCC 755.

the arbitration shall be subject to the provisions of the Arbitration and Conciliation Act, 1996”

The provision therefore limits the interference of the State Commission (or any other appellate bodies) under the Electricity Act to ‘reference’ or ‘initiation’ of arbitration proceedings along with the appointment of an arbitrator. However, once the said process is complete, then for all other purposes, inter alia, including removal of an arbitrator, procedure of arbitration, seat of arbitration, venue of arbitration, writing of arbitral awards, challenging arbitral awards, enforcement of arbitral awards, the provisions of the Arbitration Act become applicable.

CONCLUSION

The Supreme Court in **Booz Allen** rightly observes that disputes that revolve around rights in *personam* are arbitrable, whereas those disputes that relate to rights in *rem* are incapable of being resolved by arbitration. This principle has aided the legal framework provided for various regulatory forums for almost over two decades now. However, some learnings must be drawn from the ‘nature of disputes’ being raised before the regulators. It may be considered, in cases, where it is permissible to settle a dispute with a subordinate right in *personam* arising from right in *rem*, that arbitration proceedings may be permissible.

In *Olympus Superstructures (P) Ltd. v. Meena Vijay Khetan*¹², the Supreme Court approved arbitration for a settlement of claims between parties (right in *personam*) arising out of a dispute that had the element of right in *rem*.

Following *Booz Allen*, in *Kingfisher Airlines Ltd. v. Prithvi Malhotra*¹³, a new condition for arbitrability of a dispute was introduced. In this case, the Bombay High Court observed that even in an *personam* dispute, arbitration can be denied if that dispute is reserved for a public forum by virtue of laws in force or policies of government.

Therefore, the exclusive jurisdiction of regulators must not act as a limiting factor in developing and using arbitration for resolving underlying disputes, that can be settled in *personam*. While, in case exploring ways to liberalize dispute redressal mechanisms by way of arbitration under this sector, could lead to the prioritization of the most important dispute in the country and the focus of its resources on these. However, if such an exploration is given effect, then a legislative change is required.

¹² (1999) 5 SCC 651.

¹³ 2012 SCC OnLine Bom 1704; (2013) 7 Bom CR 738 (India).

ESG AND ARBITRATION: A CASE FOR THE SETTLEMENT OF ESG CLAUSE-RELATED DISPUTES BY ARBITRATION IN INDIA

Aishwarya S & Theertha Aiyappa¹

Abstract

Public interest on Environmental, Social and Governance considerations (“ESG”) has been steadily increasing over the years. This scrutiny is significantly focused on corporations and their activities. Consequently, corporations are under increased pressure from stakeholders and governments to ensure that they abide by ESG obligations and set standards. Due to this rising scrutiny, a plethora of ESG-related issues relating to disclosure and ratings, disputes arising out of commercial contracts, etc., are also on the rise. In this article, the authors will be focusing on ESG-related disputes arising out of commercial contracts. These disputes are addressed through arbitration worldwide. The choice of arbitration as the dispute resolution forum can be attributed to factors such as its procedural flexibility, neutrality, party autonomy and usage of experts. In this context, the authors posit that arbitration is one of the better-suited dispute resolution mechanisms to resolve ESG clause-related disputes in India. In furtherance of the same, the arbitrability of a few indicators of ESG in India will be analysed. Thereafter, the limitations and advantages of arbitration will be examined to assess the overall viability of using arbitration to resolve ESG clause-related disputes in India. Finally, the authors suggest certain guidelines for the efficient usage of arbitration to resolve ESG clause-related disputes.

Keywords: ESG (Environmental, Social and Governance), Arbitration, ESG-clauses, Arbitration and Conciliation Act 1996, Public Interest.

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INTRODUCTION

The term ESG contains three letters, each denoting separate considerations, i.e., Environmental, Social and Governance. These considerations are generally used to screen corporations for investments and to assess the sustainability of economic activity. They help to guide decision-making for the allocation of resources to ensure sustainability and long-term financial performance.² Though *prima facie* it only relates to ethical and corporate social responsibility concerns, the scope and influence of ESG is broad and ever-evolving. For instance, in 2019, the environmental group Milieudefensie alleged that Royal Dutch Shell PLC's action causing climate change violated its duty of care under Dutch law and human rights obligations.³ Here, the Hague District Court did not accept Shell's contention that there was no legal standard which applied an emission cap on them and in 2021, it ordered Shell to reduce its emissions. Moreover, on a perusal of its financial relevance, ESG assets have grown to be worth trillions of dollars. Bloomberg reports⁴ have asserted that ESG assets may hit \$53 trillion by 2025, which is a third of global assets under management. ESG, as a broader theme, also includes the concept of ESG clauses, which are inserted in contracts between corporations to enable 'risk allocation'⁵ or embedded in a corporate's framework to measure its progress in attaining ESG-related goals.

The environmental criterion in ESG essentially considers what impact a corporation has on the environment. It focuses on its policies regarding pollution, climate change, energy consumption, resource management, etc.⁶ This is of importance as stakeholders of a corporation place great value in its safeguards and attitude towards environmental protection, especially in recent years.⁷

The social considerations look into the social impact of a corporation, its work and policies, social development goals, etc.⁸ They include the rules and standards set by corporations concerning employer-employee relations, wages, employee development and training, human rights, working conditions, health and safety, diversity and inclusion, etc.⁹

² *The Rising Importance of ESG and its Impact on International Arbitration*, HERBERT SMITH FREEHILLS (July 27, 2021).

³ *Vereniging Milieudefensie v. Royal Dutch Shell PLC*, C/09/571932 / HA ZA 19-379.

⁴ *ESG Assets may Hit \$53 Trillion by 2025, a Third of Global AUM*, BLOOMBERG, (Feb. 23, 2021).

⁵ *ESG-A Guide for General Counsel*, CORRS CHAMBERS WESTGARTH, 21 (Nov. 2021).

⁶ Markopoulos, E. et al., *A Democratic, Green Ocean Management Framework for Environmental, Social and Governance (ESG) Compliance*, UCL DISCOVERY (Apr. 23, 2020).

⁷ *The Importance of ESG and its Effect on International Arbitration*, THE ALP REVIEW, 2 (July 2022).

⁸ Gauthier Vannieuwenhuysse, *Exploring the Suitability of Arbitration for Settling ESG and Human Rights Disputes*, 40(1) J. INT. ARBITR. 1, 7 (2023).

⁹ See *supra* note 4.

The governance criterion focuses on the rules of a corporation relating to its leadership, shareholder rights, internal control, business ethics, executive compensation, corruption, bribery, etc.¹⁰ Governance standards ensure that a corporation uses transparent methods, upholds integrity when selecting its leadership, and is accountable to shareholders.¹¹

Though the ESG considerations have been in use for more than a decade, their importance has increased in corporate policies and investment decisions.¹² In recent years, public interest and pressure on ESG-related matters and compliance with ESG norms have surged. This has forced corporates, governments and stakeholders to take an active interest in such issues and produce real change in terms of ESG impact.¹³ Consequentially, the number of ESG-related disputes being brought before judicial and quasi-judicial fora has also been on a rise.¹⁴

ESG disputes can be of various types. They can arise out of obligations imposed on parties through binding agreements, including international treaties and conventions such as the Paris Agreement on Climate Change¹⁵, regional instruments like the Sustainable Finance Disclosures Regulation¹⁶, which regulates greenwashing, investment activities that cause environmental degradation or social injustice, etc. National laws can also impose ESG obligations on parties. For instance, the UK Listing Rules and the Disclosure Guidance and Transparency Rules¹⁷ sets targets concerning governance aspects like board composition. Disputes also emerge from ESG clauses inserted in contracts that impose obligations on parties, which, if not complied with, may result in a claim.¹⁸ As aforementioned, this article will focus on ESG claims arising out of ESG clauses in commercial contracts. Disputes arising from ESG clauses can have huge implications for the concerned parties. In principle, since such disputes occur from breach of contractual obligations, their consequences can include legal action or regulatory action, financial penalties, reputational damage, loss of business, etc.

¹⁰ See *supra* note 1.

¹¹ *Id.*

¹² Laura Reichen, *Berlin Dispute Resolution Days 2022: ESG – Dawn of A New Era of Disputes in International Arbitration?*, KLUWER ARBITRATION BLOG (Nov. 30, 2022).

¹³ Emily Hay, *ESG Clauses and Dispute Risks*, KLUWER ARBITRATION BLOG (Dec. 11, 2022).

¹⁴ Commission on Arbitration and ADR, *Resolving Climate Change Related Disputes through Arbitration and ADR*, INTERNATIONAL CHAMBER OF COMMERCE 8 (Nov. 2019).

¹⁵ UNFCCC Conference of the Parties 21, *Adoption of the Paris Agreement*, UN Doc. FCCC/CP/2015/L.9/Rev/1 (Dec. 12, 2015).

¹⁶ Regulation 2019/2088 of the European Parliament and of the Council of 27 November 2019 on Sustainability-Related Disclosures in the Financial Services Sector, 2019 OJ L317.

¹⁷ PS22/3: *Diversity and Inclusion on Company Boards and Executive Management*, FINANCIAL CONDUCT AUTHORITY, (Apr. 2022).

¹⁸ See *supra* note 5 at 3.

The authors explore the feasibility of arbitration as a dispute resolution forum for issues arising from ESG clauses. The introduction relating to ESG considerations and clauses, the kinds and rise of ESG disputes have been covered in Part I. Part II delves into what ESG clauses constitute and their relationship with commercial arbitration. It analyses real-world cases wherein arbitration is used to resolve such disputes. Part III examines the arbitrability of ESG disputes in India. Part IV then establishes why arbitration should be used as the preferred method to resolve such disputes. It examines the benefits and limitations of arbitration in ESG clause-related disputes, with specific reference to India. Part V concludes by suggesting guidelines that can be used to assist in establishing arbitration as the preferred method for settling these disputes.

RESOLUTION OF ESG CLAUSE-RELATED DISPUTES VIA ARBITRATION

A. Usage of arbitration to settle disputes arising from ESG clauses

i. ESG Clauses

ESG clauses are inserted in contracts and contain assurances or targets on ESG issues or disclosure and reporting obligations.¹⁹ They can be inserted in commercial contracts, sales and supply agreements, mergers and acquisition contracts, etc. They ensure the compliance of corporations and other relevant parties to ESG standards and commitments. As ESG issues are taking precedence on the global stage, many contracts now contain environmental, health, and safety clauses to ensure that the contracting parties comply with the applicable ESG policies of a corporation or a country.²⁰

ii. Arbitration of ESG clauses

The complex and novel nature of ESG clauses is likely to give rise to disputes regarding their interpretation and application.²¹ Arbitration has been acknowledged as an appropriate forum to resolve B2B climate-related²², environmental²³ and human rights disputes.²⁴ Arbitration, by nature, inherently has many factors that makes it an ideal mechanism for the resolution of ESG-related disputes. These factors include but are not limited to the availability

¹⁹ See *supra* note 10.

²⁰ *Alternative Dispute Resolution: Significance of ESG in Arbitration*, THAILAND ARBITRATION CENTER (Oct. 26, 2022).

²¹ See *supra* note 10.

²² See *supra* note 11 at 13.

²³ *Id.*

²⁴ *Hague Rules on Business and Human Rights Arbitration*, CENTRE FOR INTERNATIONAL LEGAL COOPERATION (Dec. 2019).

of arbitrators with the relevant expertise, enforcement of arbitral awards in cross border cases and procedural flexibility of arbitration forums. Moreover, international commercial arbitration is also the preferred method to resolve cross-border disputes, as a major portion of these contracts operates globally.²⁵ Thus, disputes arising from such ESG clauses can be determined by arbitration, provided that they contain arbitration clauses.²⁶

B. How arbitration is being used to settle ESG clause-related disputes

There has been a growing trend of utilisation of both investor-state and commercial arbitration to resolve ESG-related disputes. *Churchill Mining Plc and Planet Mining Pty Ltd v. Republic of Indonesia*²⁷, and *Perenco Ecuador Ltd v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)*²⁸ are examples of environmental disputes resolved via investor-state arbitration. The recent Trade and Cooperation Agreement²⁹ between the EU and UK concluded in 2020 contains provisions for environmental protection, combating climate change and social and labour rights. The forum for dispute settlement under this Agreement is arbitration. The recent case of *OMV Aktiengesellschaft v. Ministry of Environment, Water and Forests of Romania (II)*³⁰ is another example of commercial arbitration being used to settle disputes related to the environment. With specific reference to disputes arising from ESG clauses, multiple efforts have been made to promote the resolution of the same via arbitration. However, the authors acknowledge the limitation of available data in this area due to the confidential nature of arbitration.

The ICC Commission Report titled '*Resolving Climate Change Related Disputes through Arbitration and ADR*' recognises that arbitration is well-established in resolving environmental disputes.³¹ It highlighted an increase in the number of environmental protection cases registered with the ICC and with other arbitral institutions.³² It was reasoned that arbitration is preferred over other dispute settlement mechanisms for climate (environmental) related issues

²⁵ Holly Stebbing and India Furse, *ESG Disputes in International Arbitration*, NORTON ROSE FULBRIGHT, 25-26 (Nov. 2022).

²⁶ Jack Terceño et al., *The Rising Significance of ESG and the Role of Arbitration*, FRESHFIELDS BRUCKHAUS DERINGER LLP, 5-6 (Feb. 2022).

²⁷ *Churchill Mining PLC and Planet Mining Pty Ltd. v. Republic of Indonesia*, ICSID Case No. ARB/12/14 and 12/40.

²⁸ *Perenco Ecuador Ltd. v. Republic of Ecuador and Empresa Estatal Petróleos Del Ecuador (Petroecuador)*, ICSID Case No. ARB/08/6.

²⁹ Trade and Cooperation Agreement, UK-EU, December 30, 2020, Treaty Series No. 8 (2021).

³⁰ Lacey Yong, *Romania Faces Environmental Claim at ICC*, GLOBAL ARBITRATION REVIEW (April 25, 2017).

³¹ See *supra* note 11 at 16.

³² *Id.*

as it assures a neutral tribunal, greater flexibility in procedure, expertise and accessibility, cross-border recognition and enforcement of awards.

Several ESG guidelines and draft clauses have been released by national and international working projects, committees, etc., that suggest arbitration as one of the methods for the resolution of ESG-related disputes, a few of which are discussed below.

The *Chancery Lane Project*, a collaborative initiative of international legal and industry professionals, brought out a Net Zero Toolkit.³³ The toolkit comprises practical contract clauses to be incorporated into commercial contracts to combat climate change. Some of these clauses have recognised arbitration as the preferred dispute resolution forum.³⁴ It highlighted arbitration as a beneficially placed forum that could adapt to the resolution of climate change disputes by allowing for the choice of specified governing laws and the appointment of arbitrators and experts with climate change and scientific expertise.

The *Model Contract Clauses* launched by the American Bar Association help buyers and suppliers protect the human rights of workers in international supply.³⁵ These clauses emphasise the use of arbitration to resolve disputes.³⁶

The *2013 Bangladesh Accord on Fire and Building Safety* is an independent, legally binding agreement between brands and trade unions in Bangladesh. It is aimed at ensuring a safe and healthy garment and textile industry. The Accord contains an arbitration clause for dispute resolution³⁷ and has been utilised by at least two cases initiated by trade unions alleging breaches of agreement by fashion retailers.³⁸

The *Hague Rules on Business and Human Rights Arbitration* also offer model arbitration clauses to be included in contracts to settle human rights disputes by arbitration.³⁹

These examples indicate the usage of arbitration for diverse areas in the context of ESG clause-related disputes. Additionally, arbitration forums have

³³ *Net Zero Toolkit*, CHANCERY LANE PROJECT (Oct. 2021).

³⁴ *Id.*

³⁵ Working Group, *Model Contract Clauses to Protect Workers in International Supply Chains, Version 2.0*, AMERICAN BAR ASSOCIATION (2019).

³⁶ *Id.*

³⁷ Accord on Fire & Building Safety in Bangladesh (May 2018).

³⁸ See *supra* note 1.

³⁹ See *supra* note 21.

taken the initiative to amend their rules and make them more accommodating to deal specifically with ESG-related issues.⁴⁰

ARBITRABILITY OF ESG DISPUTES IN INDIA

The Arbitration and Conciliation Act 1996 recognises that certain disputes are not capable of being resolved through arbitration. It is provided for under Sec. 34(2)(b)(i) and Sec. 48(2) of the said Act, where the court may set aside an award when it is found that the subject matter of the dispute is not capable of settlement by arbitration. However, the Act does not specify what kind of disputes are non-arbitrable.⁴¹ It has been laid down by the Supreme Court in *Vidya Drolia and others v. Durga Trading Corpn.* that non-arbitrability can be implied if the relevant statute expressly bars the parties from approaching any other forum.⁴² Therefore, arbitration can be considered as an option for the parties to resort to, provided they have a valid arbitration agreement⁴³ and the relevant statute does not expressly bar arbitration as a resolution mechanism. Thus, parties can use arbitration for ESG clause-related disputes in their agreements, provided they keep in mind the arbitrability of the subject matter of the ESG clause.

ESG disputes have not been directly resolved through arbitration in India. However, they have been dealt with individually under the heads of E, S, and G. Due to the exhaustive nature of the available ESG considerations, the authors will cover a few of them based on the available data.

A. Arbitrability of Social Considerations

The social indicators of a company mainly encompass labour disputes involving employer and employees, employee gender diversity, customer satisfaction, corporate sexual harassment policies, human rights, fair labour practices, etc.⁴⁴ The arbitrability of disputes arising out of employer-employee agreements and customer satisfaction will be examined.

The adjudicatory bodies of labour disputes in India are the Labour Court, Industrial Tribunal and National Tribunal or National Industrial Tribunal.⁴⁵

⁴⁰ *Climate Change Justice and Human Rights Task Force Report on Achieving Justice and Human Rights in an Era of Climate Disruption*, INTERNATIONAL BAR ASSOCIATION, 144 (2014).

⁴¹ Kingshuk Banerjee, *Non-arbitrable Disputes-The Law in India*, INTERNATIONAL BAR ASSOCIATION (June 3, 2021).

⁴² *Vidya Drolia v. Durga Trading Corpn.*, (2021) 2 SCC 1 : 2020 SCC OnLine SC 1018, paras 41-42.

⁴³ Arbitration and Conciliation Act, 1996, No. 26, Acts of Parliament 1996, §7.

⁴⁴ Natalie Runyon, *Measuring the "S" in ESG through the Investors' Lens of People well-being*, THOMSON REUTERS (Nov. 21, 2022).

⁴⁵ Industrial Disputes Act, 1947, No. 14, Acts of Parliament 1947, §10.

However, there have been cases where disputes arising out of employer-employee agreements have been referred to arbitration based on the arbitration clause present in the agreement under the Industrial Disputes Act, 1947 (hereinafter “ID Act”). Though there are differences in opinions regarding the arbitrability of such disputes,⁴⁶ the main case for consideration is that of *Rajesh Korat v. Innoviti*.⁴⁷ It allowed the application for arbitration; however, it was held that the procedure to be followed was to be in conformity with the ID Act and not the Arbitration and Conciliation Act 1996.

The issue of the public and social interest involved in labour disputes must also be taken into consideration.⁴⁸ In the case of *Booz Allen and Hamilton Inc. v. SBI Home Finance Ltd.*⁴⁹, it was held that the characterisation of a claim is based on whether it is a *right in rem* or *right in personam*, and the one involving *right in rem* is non-arbitrable. Therefore, employer-employee agreements cannot be completely classified as private in nature since a few disputes involve a right in rem and public interest. However, the ID Act prescribes that such agreements shall have to be sent to the government, which shall publish them in the Official Gazette within one month.⁵⁰ This is to ensure that those who are not parties to the arbitration agreement but are concerned with the industrial dispute being arbitrated are notified of the arbitration so that it does not remain private in nature.⁵¹

Section 10A of the ID Act also allows parties to refer their dispute to arbitration based on the arbitration agreement before referring it to a Labour Court or Tribunals. Such a reference will be to persons, including presiding officers of a Labour Court or Tribunal.⁵² Thus, at this stage, the arbitrability of the dispute concerning public impact can be decided. Secondly, the non-demarcation between arbitrable and non-arbitrable disputes under the Arbitration and Conciliation Act provides flexibility to determine the ambit of disputes to be arbitrated by relying on other statutes.⁵³

The aspect of *right in rem* is also relevant for discussion in cases of customer satisfaction. This aspect will be examined from the lens of consumer rights under the Consumer Protection Act, 2019 (hereinafter “CPA”). In the case of *Emaar MGF v Aftab Singh*⁵⁴, the Supreme Court held that consumer

⁴⁶ Kingfisher Airlines Ltd. v. Prithvi Malhotra, 2012 SCC OnLine Bom 1704.

⁴⁷ Rajesh Korat v. Innoviti Embedded Solutions (P) Ltd., 2017 SCC OnLine Kar 4975.

⁴⁸ Ojaswa Pathak & Mayank Kataria, *Establishing Industrial Self-Governance in India: Reforming the Labour Arbitration Regime*, 15 NUALS L.J. 219, 29 (2020).

⁴⁹ Booz Allen & Hamilton Inc. v. SBI Home Finance Ltd., (2011) 5 SCC 532.

⁵⁰ See *supra* note 37 at §10A(3).

⁵¹ Moorco (India) Ltd. v. State of T.N., 1992 SCC OnLine Mad 42 : (1994) 68 FLR 157.

⁵² See *supra* note 37 at §10A.

⁵³ Smaran Sitaram Shetty, *Arbitration of Labor Disputes in India: Towards a Public Policy Theory of Arbitrability*, KLUWER ARBITRATION BLOG (Nov. 26, 2017).

⁵⁴ Emaar MGF Land Ltd. v. Aftab Singh, (2019) 12 SCC 751.

disputes are non-arbitrable due to the test of *right-in-rem* and *right-in-personam*. However, the authors opine that this blanket restriction is flawed.⁵⁵ The CPA provides for consumer complaints by one consumer under Section 35(1)(a)⁵⁶ and more than one consumer under Section 35(1)(c)⁵⁷ of the CPA. Though the latter category involves the *right-in-rem* and interests of third parties, which are not generally arbitrable⁵⁸, the first category of individual complaints can still be arbitrated, barring those involving general grievances. In addition, mediation is considered as a form of an alternative dispute resolution mechanism for consumer disputes.⁵⁹ This suggests that consumer disputes are not exclusively restricted to the jurisdiction of Consumer Courts. Though the authors do acknowledge the limitations of arbitrating these disputes, it can still be explored as an option to adjudicate consumer disputes, especially the ones involving private interest.

B. Arbitrability of Governance Considerations

Governance considerations range from corruption and fraud to bribery and shareholders' rights.⁶⁰ The authors will be focusing on the arbitrability of disputes arising from Shareholders' Agreement ("SHA").

The disputes pertaining to the governance of a company are dealt with in a parallel structure of tribunals under the Companies Act 2013. Though the National Company Law Tribunals ("NCLT") are quasi-judicial authorities, they have the power to refer parties to arbitration.⁶¹ It is emphasised that the interplay of shareholder rights and arbitration has been gaining importance.⁶² In this context, confusion may arise if an arbitration clause is required in the Articles of Association ("AoA") to refer the parties to arbitration arising out of SHA. In the case of *Umesh Kumar Baveja v. IL&FS Transportation Network*, despite the subject company itself being party to the SHA, the Court found that it is the Articles that govern the relationship between the parties and that since they did not contain any arbitration provision, the parties could not be referred to arbitration.⁶³ However, the parties' intention should be given utmost importance. Where the SHA demonstrates an intention to refer all disputes arising

⁵⁵ Pavitra Naidu & Shreya Jain, *Arbitration of Consumer Disputes in India: A Need for Reform*, INDIACORPLAW (Mar. 18, 2021).

⁵⁶ The Consumer Protection Act, 2019, No. 35, Acts of Parliament 2019, § 35(1)(a).

⁵⁷ *Id.* at §35(1)(c).

⁵⁸ Stavros Brekoulakis, *Third Parties in International Commercial Arbitration*, THE CENTER FOR TRANSNATIONAL LITIGATION, ARBITRATION AND COMMERCIAL LAW (July 4, 2011).

⁵⁹ See *supra* note 48 at §37.

⁶⁰ *Defining the 'G' in ESG Governance Factors at the Heart of Sustainable Business*, WORLD ECONOMIC FORUM (June 2022).

⁶¹ *Richa Kar v. Actoserba Active Wholesale (P) Ltd.*, 2019 SCC OnLine NCLAT 532; Insolvency and Bankruptcy Code, 2016, No. 31, Acts of Parliament 2016, § 60(1).

⁶² Avani Agarwal & Aditi Ramakrishnan, *Mandatory Shareholder Arbitration: Moving the Debate to India*, KLUWER ARBITRATION BLOG (Sept. 1, 2019).

⁶³ *Umesh Kumar Baveja v. IL&FS Transportation Network Ltd.*, 2013 SCC OnLine Del 6436.

from it to arbitration, the failure to incorporate it in AoA should not hinder the court from referring the dispute to arbitration.⁶⁴

C. Arbitrability of Environmental Disputes

There is not much available data on the arbitrability of environment-related disputes in India due to limitations such as confidentiality of arbitration. However, India has been making efforts to resolve environmental disputes through ADR mechanisms.⁶⁵ For instance, though this is an example of investment-treaty arbitration, the *Indus Waters Kishenganga (Pakistan v. India)* case was resolved through arbitration by the PCA.⁶⁶ The authors will be analysing how arbitrability of environment-related disputes is beneficial for the parties in the subsequent part.

BENEFITS AND LIMITATIONS OF USING ARBITRATION TO RESOLVE ESG CLAUSE-RELATED DISPUTES IN INDIA

The arbitrability of ESG disputes in India is already in practice. However, it needs to be streamlined to make it an effective process. To this end, the authors seek to analyse the advantages and limitations of arbitration to resolve ESG clause-related disputes.

A. Limitations of arbitration to settle ESG disputes in India

Arbitration has been used to settle “ESG-related disputes” across the world. However, it is relevant to assess if arbitration is accommodative to resolve “ESG clause-related disputes” in India. In this regard, the following are a few limitations which need to be addressed to make it a better mode of resolution mechanism:

Lack of transparency: The lack of transparency in arbitration is inevitably closely linked with its confidentiality. Though it is not entirely confidential, it is still a private process. However, this is being addressed by arbitral institutions by taking measures to make their proceedings more transparent. For instance, under ICC’s Note to Parties and Arbitral Tribunal on the Conduct of Arbitration under the ICC Rules of Arbitration, publication and dissemination of certain information is allowed unless parties have objected to the

⁶⁴ Ravitej Chilumuri & Aaditya Gambhir, *Invocation of Arbitration Clauses in Shareholder Agreements for Disputes under Articles of Association*, 13(4) NUJS L. REV., 9 (2020).

⁶⁵ Abdul Haseeb Ansari, Muhamad Hassan Bin Ahmad and Sodiq Omoola, *Alternative Dispute Resolution in Environmental and Natural Resource Disputes*, 59(1) JILI 26 (2017).

⁶⁶ *Indus Waters Kishenganga Arbitration (Pakistan v. India)*, PERMANENT COURT OF ARBITRATION (Dec. 21, 2013).

same.⁶⁷ Additionally, with specific reference to public interest, national jurisprudence in many countries has recognised public interest as an exception to confidentiality.⁶⁸

Public Interest v. Private nature of arbitration: A pressing challenge in using arbitration to resolve ESG disputes is to balance the private nature of arbitration and the public interest concerning ESG.⁶⁹ It is especially relevant in the context of environment and human rights disputes. The problem that arises here is that the private process of arbitration leads to the concealment of the actions of the infringing parties to the public, who may have a vested interest.⁷⁰ To resolve this limitation, the authors suggest a balanced approach where there is a classification between ESG disputes of public and private nature. For instance, in India, the arbitrability of fraud depends on the gravity of the fraudulent activity. The key distinction for arbitrability of disputes involving fraud is based on whether it is a mere allegation of “fraud simpliciter” and “serious allegation of fraud.”⁷¹ In this case, the former type of dispute is arbitrable. Further clarity has been offered in the case of *Avitel Post Studios Ltd. v. HSBC PI Holdings*, which laid down two conditions to determine serious allegation of fraud: (i) absence of an arbitration agreement and (ii) allegations of fraudulent conduct made against the “state or its instrumentalities.”⁷² A caveat to note is that the second condition involves matters of public law and will not be arbitrable.⁷³ Though this may be a limitation, it offers clarity by demarcating between the two types of disputes involving the private and the public interest. Therefore, the parties can assess whether such disputes are arbitrable or not based on the aforementioned conditions.

Power Imbalance between parties: Another limitation of arbitration is the potential imbalance which may arise between parties in terms of power and resources.⁷⁴ The privilege of powerful and well-resourced parties may get “amplified” over less well-equipped parties.⁷⁵ This may arise, for instance, in employer-employee agreements, where the employer usually has power over the employees, and the parties may not be on an equal footing. The authors are not in a position to comment on the aspect of power. However, in terms of

⁶⁷ *Note to Parties and Arbitral Tribunals on the Conduct of Arbitration*, INTERNATIONAL COURT OF ARBITRATION (Jan. 1, 2021).

⁶⁸ *Plowman v. Ezzo Australia Resources Ltd*, Case No. 7371 of 1992 (Sup. Ct. of Victoria); *Ali Shipping Corp. v. Shipyard Trogir*, (1999) 1 WLR 314; Supplementary Rules for Class Arbitrations of the American Arbitration Association (AAA), Rule 10.

⁶⁹ *See supra* note 50.

⁷⁰ *See supra* note 5.

⁷¹ *A. Ayyaswamy v. A. Paramasivam*, (2016) 10 SCC 386.

⁷² *Avitel Post Studios Ltd. v. HSBC PI Holdings (Mauritius) Ltd.*, (2021) 4 SCC 713.

⁷³ Sarah Ayreen Mir, *The Tests for Determining Arbitrability of Fraud in India: Clearing the Mist*, KLUWER ARBITRATION BLOG (Oct. 6, 2020),

⁷⁴ *See supra* note 5 at 18.

⁷⁵ *Id*; Ulla Gläßer and Claudia Kück, *The Hague Rules on Business and Human Rights – A Balancing Act*, 18 GER. ARB. J. 124, 127 (2020).

resources, parties may consider third-party funding.⁷⁶ Though third-party funding is highly disputed due to the involvement of a third party in the arbitration process⁷⁷, the parties can draft the clauses accordingly by adding a “third-party funder” clause in their arbitration agreement.

Third-Party Participation: Arbitration of ESG disputes arising out of commercial contracts does not usually allow for third-party participation. This may pose a challenge, especially in the context of the impact on human rights.⁷⁸ The affected parties may be direct or indirect; in such cases, consolidation or joinder can be explored as an option to involve third-party participation.⁷⁹ If a third party can establish that it has a direct relationship with the signatory to the arbitration agreement, paired with the rise in regulations, it may be important for arbitration to be able to incorporate third-party interests. In addition, a commonality of the subject matter and where the combined reference of such parties would meet the ends of justice, third parties may be joined to the arbitration.⁸⁰ This is not a major limitation in the context of an ESG-clause-specific dispute since it is purely a contractual arrangement. In cases where there is an indirect impact, for instance, in environmental disputes, the parties can ascertain the arbitrability of the dispute and approach the suitable forum.

Though these limitations need to be acknowledged, they can be resolved to cater to the needs of the parties.

B. Advantages of using arbitration as the dispute resolution forum

Despite the aforementioned limitations, there are various advantages of using arbitration as a dispute resolution forum to resolve ESG clause-related disputes over litigation.⁸¹ Emphasis is made on the advantages of arbitration to resolve environmental disputes in India since this area is relatively less explored.

Procedural Flexibility: The procedural flexibility of arbitration forums allows parties to set rules best suited to their specific needs.⁸² In ESG disputes specifically, arbitration allows for the possibility of obtaining interim

⁷⁶ Kaira Pinheiro & Dishay Chitalia, *Third-party Funding in International Arbitration: Devising a Legal Framework for India*, 14(2) NUJS L. REV. (2021).

⁷⁷ *Id.*

⁷⁸ See *supra* note 5 at 16.

⁷⁹ Jayesh H et al, Joinder of Parties in Arbitration Proceedings, International Bar Association.

⁸⁰ Chloro Controls India (P) Ltd. v. Severn Trent Water Purification Inc., (2013) 1 SCC 641.

⁸¹ *Arbitration vs. Litigation: The Differences*, THOMSON REUTERS (Oct. 4, 2022).

⁸² NIGEL BLACKABY ET AL., REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION, 7th edn., 2022.

measures,⁸³ which are useful in cases concerning serious violations of human rights, permanent or impending environmental damage, etc.⁸⁴

Arbitrators and Experts: Arbitration offers the benefit of providing parties with the opportunity to avail arbitrators who are experts or specialists in the matters under contention.⁸⁵ This becomes particularly relevant while dealing with ESG-related concepts and clauses, which may be unique and complex and require special technical knowledge and expertise.⁸⁶ The rules of arbitral institutions like the PCAs provide for establishing a list of scientific and technical arbitrators and experts to deal with complex issues.⁸⁷ Contrarily, experts appointed in Tribunals such as the National Green Tribunal (hereinafter “NGT”), which is currently used as a forum to settle environmental disputes in India, have been criticised for their lack of required expertise.⁸⁸

Time Efficiency: Arbitration is a time-effective process compared to litigation in courts, which can be expensive and long drawn out.⁸⁹ In India, the enormous time delays involved are one of the principal weaknesses of the judicial system.⁹⁰ Additionally, the time factor is relevant, in particular to environmental disputes which could require immediate action. For these purposes, arbitration also has the added advantage of providing an expedited procedure.⁹¹

Neutrality and Appointment of Arbitrators: Courts and tribunals (the current method of ESG dispute resolution) in India are criticised for their lack of transparency and independence in matters such as the appointment of members⁹² and penalisation of government authorities.⁹³ However, in arbitration, the arbitrators are selected by the parties themselves, ensuring neutrality.

⁸³ See *supra* note 35 at § 9 and 17.

⁸⁴ Montserrat Manzano and Ana Toimil, *The Role of Arbitration in ESG Disputes*, VON WOBESER (Nov. 12, 2021).

⁸⁵ See *supra* note 17.

⁸⁶ See *supra* note 76.

⁸⁷ Permanent Court of Arbitration Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment, June 19, 2001, arts. 8(3) and 27(5).

⁸⁸ Raghuveer Nath Dixit and Armin Rosencranz, *Evaluating the National Green Tribunal after Nearly a Decade: Ten Challenges to Overcome*, 9 NLIU L. REV. 1, 32 (2019).

⁸⁹ For example, the Survey on Costs and Disputes Funding in Africa released by African Arbitration Academy identified costs and the time take to resolve disputes as some the main reasons for including arbitration clauses in contractual agreements.

⁹⁰ Pratik Datta and Suyash Rai, *How to Start Resolving the Indian Judiciary's Long-Running Case Backlog*, CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE, (Sept. 9, 2021).

⁹¹ ICC Rules of Arbitration, 2021, Appendix VI, art. 30; UNCITRAL Arbitration Rules, Sept. 9, 2021, art. 1(5).

⁹² For example, under arts. 7 and 7A of the Industrial Disputes Act, 1947, members of the Labour Courts and Tribunals are appointed by the appropriate governments; See *supra* note 80 at 30.

⁹³ See *supra* note 80 at 15.

Enforceability: Arbitration is the preferred method of dispute resolution of cross-border disputes, as arbitral tribunal decisions are enforceable in a majority of countries with the acceptance of the New York Convention (hereinafter “NYC”).⁹⁴ India, too, is a signatory of the NYC.⁹⁵ Thus, in cross-border disputes, parties can choose foreign seats and places of arbitration whose rules are best suited to govern their ESG disputes. Enforcement of awards is ensured even in such situations. This is particularly beneficial in the Indian context, wherein there is scope for development for enforcement of contracts⁹⁶ and implementation of decisions.⁹⁷

Access to Justice: Criticisms have been raised against tribunals like the NGT concerning their ability to provide access to justice due to their limited number of locations.⁹⁸ In arbitration, parties can select their place of arbitration. Thus, it provides them with better access to justice. Additionally, delays in appointments and the resignation of members of Tribunals have led to an increase in the pressure on that system.⁹⁹ Arbitration forums do not suffer from such deficiencies as arbitrators are appointed by parties on a case-to-case basis. Thus, they can help in reducing such burdens.

Though there are limitations to using arbitration to settle ESG clause-related disputes, the same can be resolved and addressed by the parties as discussed in Part IV(A). Combined with the aforementioned advantages, arbitration is a relatively better forum for resolving such disputes.

CONCLUSION AND WAY FORWARD

Arbitration has been suggested as one of the better resolution mechanisms to settle ESG clause-related disputes in India. To this end, the authors seek to provide a few suggestions that would help promote the use of arbitration as a forum for settlement of such disputes. The authors have two key suggestions relating to (i) the Drafting of ESG clauses by the parties and (ii) the Role of arbitral tribunals and government in facilitating arbitration as one of the preferred methods to resolve ESG disputes. The authors acknowledge that the following suggestions are not free of implementation challenges, and they will be addressed to a limited extent.

⁹⁴ See *supra* note 17.

⁹⁵ United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 330 UNTS 3.

⁹⁶ In 2020 edition of the World Bank’s Ease of Doing Business rankings, India ranked 163 (out of 190 countries) on contract enforcement.

⁹⁷ See *supra* note 80 at 19 and 38.

⁹⁸ *Id.* at 28.

⁹⁹ *Ibid.*

Drafting of clauses

The parties need to ensure tailoring of ESG clauses to meet the parties' interests both in ad-hoc and institutional arbitration. Institutional arbitration is administered by a specialist arbitral institution under its own rules of arbitration.¹⁰⁰ In the case of ad-hoc arbitration, it encompasses all arbitrations that are not institutional.¹⁰¹ Hence, the clauses will have to be drafted, bearing in mind the type of arbitration opted for.

In addition, the clauses must also be specific and straightforward so that the extent of the dispute can be determined in case of breach of such clauses.¹⁰² This becomes more relevant with an arbitration clause since the determination of the arbitrability of disputes is still evolving in India. The specific nature of clauses will help to distinguish between arbitrable and non-arbitrable disputes. For instance, certain matters concerning public interest are generally non-arbitrable. Though at the time of drafting, it will be difficult to foresee all possible disputes, the parties may factor in the arbitrability of a dispute. It is also suggested that the parties' choice of law while drafting the arbitration clause(s) enable enforcement of awards in any of the jurisdictions under the NYC.

Role of arbitral institutions and Government (specific to India)

The role of arbitral institutions comes into play when the parties opt for settlement of ESG dispute, and by extension of ESG clause-related disputes, by specifying the relevant arbitral institution in the arbitration agreement. In this context, it is suggested that the government should work in tandem with these arbitral institutions for the promotion of the usage of arbitration to settle ESG disputes. In furtherance of the same, they can issue guidelines to the effect that arbitration be used as one of the effective methods to resolve ESG disputes and bring out appropriate draft clauses. In addition, the State can also promote an arbitration-friendly environment by providing these arbitral institutions with the necessary financial and infrastructural support.¹⁰³ There is a need for the development of institutional arbitration in India to be more accommodative to settle ESG disputes. In this regard, the 2019 Amendment is a welcome step in this direction.¹⁰⁴ According to the said amendment, the Arbitral Council of India has been set up to oversee the gradation and functioning of arbitral

¹⁰⁰ Ulrich G. Schroeter, *Ad Hoc Or Institutional Arbitration- A Clear Cut Distinction? A Closer Look at Borderline Cases*, 10(2) CONTEMP. ASIA ARB. J. 141, 145 (2017).

¹⁰¹ *Id.* at 146.

¹⁰² Stéphanie De Smedt et al., *Enforcing ESG Obligations in Supply Contracts*, LOYENS L. LOEFF (Feb. 28, 2023).

¹⁰³ Li Eric, *Institutional Arbitration*, JUSMUNDI (23 May 2022).

¹⁰⁴ Zisha Rizvi, *The Shift Towards Institutional Arbitration: Critically Examining the Arbitration (Amendment) Act 2019* (1 March 2020).

institutions in India. This will help in the growth and functioning of arbitral institutions in India.

Institutions like the Mumbai Centre for International Arbitration (MCIA), the Indian Council of Arbitration (ICA), etc., can also include model ESG clauses in their rules. They can be inspired by the Swiss Arbitration Centre, which has formulated “Supplemental Swiss Rules for Corporate Law Disputes”, which account for the specifics of corporate law disputes while ensuring that disputes are resolved efficiently and in compliance with statutory requirements.¹⁰⁵ It allows Swiss companies to include arbitration clauses for corporate law disputes in their articles of association.¹⁰⁶ The arbitral institutions in India are also suggested to come up with tailor-made rules depending on the area of the ESG dispute.

With the growing global adoption of ESG principles, there is a rising need for efficient dispute resolution procedures for ESG related conflicts. The use of arbitration for ESG clause-related dispute resolution in India is a necessary step to promote sustainable development and good corporate governance. The innate advantages of arbitration are particularly well-suited to the complex and nuanced nature of ESG clause-related disputes. By incorporating arbitration into India’s dispute resolution framework, the country can position itself as a leading destination for investors and businesses seeking to resolve ESG disputes in a fair, efficient, and cost-effective manner. By the implementation of these guidelines and suggestions, the authors hope that arbitration will be effectively used to resolve disputes arising out of ESG clauses in India.

¹⁰⁵ Dr.Christopher Boog and Dr.Stefan Leimgruber, *Swiss Arbitration Centre Introduces Supplemental Swiss Rules for Corporate Law Disputes*, SCHELLENBERG WITTMER (October 27, 2022).

¹⁰⁶ *Ibid.*

