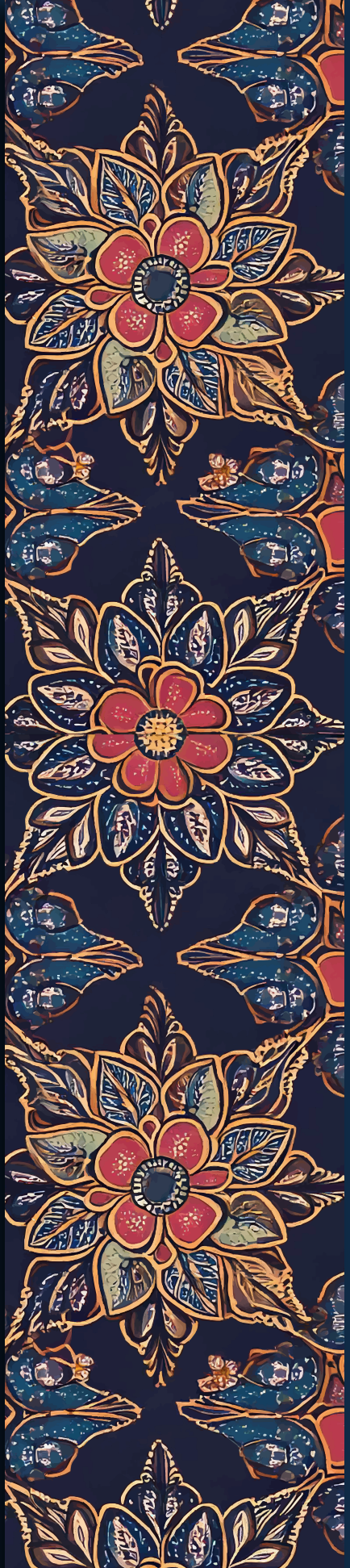

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PREFACE

It is my distinct honour to introduce the fourth edition of the AIAC Alternative Dispute Resolution Journal for 2024. The role of research and writing in shaping the trajectory of Alternative Dispute Resolution (ADR) is paramount. Through these scholarly contributions, we aim to enrich our collective understanding, challenge entrenched norms and drive meaningful progress in the field of ADR. I extend my deepest gratitude to all our contributors, whose insightful research and rigorous analysis have brought this edition to life and made it truly impactful.

This year, we are proud to record the highest number of submissions for any edition of the AIAC ADR Journal to date, a testament to the growing interest and depth of knowledge surrounding ADR. The volume and quality of the submissions presented a formidable challenge during the selection process, but it is certainly a welcome one. As always, we remain committed to upholding the highest standards of excellence, and I encourage all contributors to continue sharing their knowledge and expertise in future editions. Your participation is vital to the continued success and relevance of this Journal.

A special thanks goes to our esteemed Peer Review Board, whose invaluable feedback has significantly enhanced the quality of the articles published in this edition. Their timely and meticulous reviews, despite their demanding professional commitments, are crucial in maintaining the academic rigour and practical relevance of the articles we publish. Their constructive feedback not only strengthens the work but ensures that each contribution meets the high standards expected.

I would also like to extend my sincere appreciation to our partners at U-Law, with whom we have established a fruitful Memorandum of Understanding. U-Law's technical expertise and support has been fundamental in maintaining the highest standards of ethics, integrity and quality expected in academic publishing. We value our ongoing collaboration with U-Law and look forward to exploring future partnership opportunities.

As we close out this year and look ahead to the future, I wish everyone a joyful and prosperous New Year. May 2025 bring new opportunities for growth, collaboration and advancement within and beyond the ADR community.

Thank you once again to all our contributors and supporters. We look forward to your continued involvement and to welcoming even more thought-provoking perspectives in next year's edition.

Warm regards,

Datuk Almalena Sharmila Johan
Chief Executive Officer
Asian International Arbitration Centre (AIAC)

FOREWORD

It is with great enthusiasm that we present the AIAC ADR Journal 2024 edition. This publication is a testament to the evolution of alternative dispute resolution (ADR) practices, a space that continues to grow in relevance, innovation, and inclusivity.

In a world increasingly defined by complexity and interconnectedness, ADR serves as a vital mechanism for fostering understanding, collaboration, and harmony in conflict resolution. From arbitration and mediation to emerging hybrid practices, these mechanisms are not merely alternatives to litigation but pathways that prioritise dialogue, efficiency, and culturally sensitive approaches to justice.

It has been a great pleasure for The University of Law to be involved in this edition. To the contributors, your dedication to advancing ADR through rigorous analysis and practical solutions has been instrumental in shaping this volume. To the readers, may this journal inspire you to engage deeply with the possibilities of alternative resolutions and contribute to the collective pursuit of a more equitable and effective system of justice.

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CLARITY AT LAST: THE INDIAN SUPREME COURT AFFIRMS THE VALIDITY OF ARBITRATION AGREEMENTS WHEN THE STAMPING REQUIREMENTS UNDER THE STAMP ACT ARE NOT MET

Natasha Singh

ABSTRACT

This paper examines the Indian Supreme Court's 2023 landmark decision in the case of In Re: Interplay between the Arbitration Agreements under the Arbitration & Conciliation Act, 1996 and the Indian Stamp Act, 1899, which affirmed the validity of arbitration agreements on which insufficient stamp duty had been paid, thus resolving years of judicial uncertainty. It traces the evolution of jurisprudence from earlier, oddly formalistic approaches to the current pro-arbitration stance by analysing the impugned statutory provisions and case law. By focusing on the 'interplay' between the Stamp Act and the Arbitration & Conciliation Act, this paper presents how the courts have balanced other, sometimes outdated considerations against arbitration principles. The significance of the final ruling is situated within the paradigm of a 'pro-arbitration' regime, with particular emphasis on concepts like severability and kompetenz-kompetenz. A comparative analysis with UK and US jurisdictions further contextualizes the Indian approach with respect to global arbitration practices. The paper concludes that this decision marks a pivotal shift towards minimal judicial interference and stronger party autonomy in Indian arbitration, and optimistically considers its implications for India's standing as an arbitration-friendly jurisdiction and the future of arbitration practice in India.

PART I: INTRODUCTION

On December 13, 2023, a seven-judge bench of the Indian Supreme Court held that even unstamped or insufficiently stamped arbitration agreements would be binding on their signatories. Led by the Chief Justice, the bench categorized the non-payment of the required stamp duty as a "*curable defect*" that did not occasion the Court's rejection of applications made under Section 8 (reference of parties to arbitration), Section 9 (interim relief) or Section 11 (appointment of arbitrators by the court when the disputants, co-arbitrators, or arbitral institution have failed to do so) of the Arbitration and Conciliation Act, 1996 ("**Arbitration Act**.)[1] The decision puts to rest a longstanding divergence arising from

[1] *In Re: Interplay between the Arbitration Agreements under the Arbitration & Conciliation Act, 1996 and the Indian Stamp Act, 1899* 2023 SCC Online SC 1666 (India).

conflicting rulings by definitively overruling a catena of previous decisions, the last of which was pronounced by a five-judge bench as recently as April 2023. This paper discusses the Indian legal landscape concerning the enforceability of under-stamped arbitration agreements (the "**Issue**"). **Part II** traces the jurisprudential history of this Issue in India through an examination of the relevant statutory provisions and case law. **Part III** continues this discussion of the decision of the seven-judge bench with a broader legal analysis of this Issue. **Part IV** contrasts the Indian position with that in other jurisdictions, with specific emphasis on the UK and USA. **Part V** offers concluding remarks.

PART II: HISTORY

Prior to the enactment of the Arbitration & Conciliation (Amendment) Act, of 2015, courts dealing with Section 11 petitions were guided exclusively by precedent. Cases like *SBP & Co. v. Patel Engineering Ltd.* (2006)[2] and *National Insurance Co. Ltd. v. Boghara Polyfab Pvt. Ltd.* (2009)[3] progressively expanded the scope of judicial enquiry, empowering courts to not only decide whether to refer the parties to arbitration, but also on issues such as whether appropriate forum had been selected for the petition, if the petitioner was party to the arbitration agreement, whether the impugned claim was dead or alive, and even whether the parties had already expressly or impliedly settled their dispute. The 246th Report of the Law Commission (2014) remarked on the proclivity of courts to adjudicate Section 11 petitions beyond the ambit of the provision and recommended legislative intervention to subvert such judicial intervention.[4]

The decision of the Supreme Court in *SMS Tea Estate v Chandmari Tea Company* (2011)[5] was somewhat symptomatic of the type of issues raised in the pre-2015 Amendment period. In *SMS Tea*, which reached the Supreme Court on appeal from the Guwahati High Court, the Appellant sought the appointment of an arbitrator under Section 11, whereas the Respondent protested that the impugned instrument – a lease deed for thirty years – had not been duly stamped and registered, rendering the arbitration clause contained in it invalid and unenforceable.

Under Section 49 of the Registration Act, 1908 ("**Registration Act**"), a compulsorily registrable document, if not registered, ordinarily does not affect the subject matter of the document and cannot be admitted as evidence for transactions emanating therefrom, with two important exceptions: first, as evidence of a contract where specific performance is sought; and second, as evidence of any "*...collateral transaction not required to be effected by registered instrument.*" In the Guwahati High Court's view, the reference to arbitration was not covered by the second exception. i.e., an arbitration agreement would not be viewed and thus saved as a '*collateral transaction*' within the meaning of Section 49.

[2] *SBP & Co. v. Patel Engineering Ltd.* (2005) 8 SCC 618 (India).
[3] *National Insurance Co. Ltd. v. Boghara Polyfab Pvt. Ltd.* (2009) 1 SCC 267 (India).
[4] Law Commission Of India, Report No. 246 (2014), pp. 18-20. Available at: https://cdnbbsr.s3waas.gov.in/s3ca0daec69b5adc880fb464895726dbdf/uploads/2022/08/2022081615.pdf.
[5] *SMS Tea Estate v Chandmari Tea Company* (2011) 14 SCC 66 (India).

The Supreme Court, however, disagreed: in its view, such a carve-out had been made with the express purpose of saving 'transactions' or agreements like this one.[6] Given that Section 16 of the Arbitration Act made arbitration agreements independent of the other contractual terms, even enabling them to survive the termination of the main contract, it would undoubtedly insulate them from Section 49's compulsory registration requirement. At the same time, the Court noted that the Stamp Act, of 1899 ("**Stamp Act**") had no such *proviso*. Sections 33 and 35 of the Stamp Act, when read together with each other, directed a court to examine whether proper stamp duty had been paid on an instrument; if not, the instrument was inadmissible as evidence in law. Thus, barred from even admitting inadequately stamped agreements, the Supreme Court held that it could not act upon the arbitration clauses contained in them. It did allow, however, that courts could impound such instruments to subsequently appoint an arbitrator.

Accepting the recommendation of the Law Commission, the legislature in 2015 inserted Section 11(6-A) into the Arbitration Act. The provision mandated that courts, "*...notwithstanding any judgment, confine [their] examination to the existence of an arbitration agreement.*" In other words, courts only had to satisfy themselves that an agreement to arbitrate prima facie existed in the parties' agreement; any other determinations had to be left up to the arbitrator. Promisingly, there seemed to be an initial degree of consensus between the judiciary and the legislature: in *Duro Felguera, SA v. Gangavaram Port Ltd.* (2017), the Supreme Court emphasized that,

> *"The legislative policy and purpose... essentially to minimise the Court's intervention at the stage of appointing the arbitrator, and this intention as incorporated in Section 11(6-A), ought to be respected."*[7]

Unfortunately, over the next few years, the Court changed its tune. In the seminal *United India Insurance Co. Ltd.* case (2018), the Supreme Court examined the parties' agreement in considerable detail: since a particular precondition to invoke arbitration had not been fulfilled, the Court dismissed the arbitration clause as "*...ineffective and incapable of being enforced, if not non-existent,*"[8] signalling its unwillingness to be interpretatively constrained by Section 11(6-A). Similar was its attitude towards the validity of unstamped arbitration agreements: it returned to this Issue in *Black Pearl Hotels Pvt. Ltd. v. Planet M Retail Ltd* (2017)[9] and again in *Garware Wall Ropes Ltd. vs Coastal Marine Constructions* (2019).[10] In *Garware*, a two-judge bench of the Court ruled that the introduction of Section 11(6-A) did not alter the legal position laid down in *SMS Tea*: an unstamped arbitration agreement had no 'existence' in the eyes of the law and its examination therefore did not attract the application of the amended provision.[11] A few months later, a three-judge bench of the Court in *Dharmaratnakara Rai Bahadur Arcot Narainswamy Mudaliar Chattram vs Bhaskar Raju & Brothers* (2020) similarly reversed a decision of the Karnataka High Court, reaffirming that unstamped arbitration agreements could not be enforced by courts.[12] The landmark *Vidya*

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[6] *ibid.*
[7] *Duro Felguera, SA v. Gangavaram Port Ltd.* (2017) 9 SCC 729 (India).
[8] *United India Insurance Co.Ltd. vs Hyundai Engineering and Construction* (2018) 17 SCC 607 (India).
[9] *Black Pearl Hotels Pvt. Ltd. v. Planet M Retail Ltd* (2017) 4 SCC 498 (India).
[10] *Garware Wall Ropes Ltd. vs Coastal Marine Constructions* (2019) 9 SCC 209 (India).
[11] *Id.*
[12] *Dharmaratnakara Rai Bahadur Arcot Narainswamy Mudaliar Chattram vs Bhaskar Raju & Brothers* (2020) 4 SCC 612 (India).

Drolia case (2020) took the same view of the matter, with a different three-judge bench of the Court collapsing the distinction between the 'existence' and 'validity' of the arbitration agreement to hold that an agreement could not be acted upon when it failed to satisfy fundamental legal requirements, including the payment of stamp duty.[13] In the Court's opinion, such applications had to be rejected at the preliminary stage itself in order to "*cut the deadwood*" and "*preserve the efficacy of the arbitral process.*"[14]

The real controversy arose when the Court suddenly deviated from this line of reasoning. In January of the next year, yet another three-judge bench of the Court heard a case called *NN Global Mercantile Pvt. Ltd. v. Indo Unique Flame Ltd.* (2021) in what eventually became the first in a series of three landmark judgements discussing the Issue.[15] In *NN Global I*, the Court completely reversed its previous position, opining that an arbitration agreement operated as a separate contract, not statutorily chargeable to the payment of stamp duty, and the non-payment thereof would not restrain courts from acting upon it. However, because the cases preceding *NN Global I* had been decided by benches of equivalent strength, judicial discipline dictated that this question be referred to a larger, five-judge bench of the Court: the decision of this constitutional bench would constitute the final word on the matter. Therefore, though another three-judge bench judgement, *Intercontinental Hotels Group (India) Pvt. Ltd. v. Waterline Hotels Pvt. Ltd* (2022), also took the view adopted in *NN Global I*,[16] only the ruling of the constitutional bench could conclusively settle the law around this Issue.

By this point, Supreme Court's inconsistent jurisprudence had given rise to a major problem: the lack of a uniform reasoning across the judgements of lower courts. Perhaps also because the position of law embodied by these decisions was not readily intuitive, High Courts across the country delivered conflicting or at least diverging pronouncements on the Issue. For example, the Bombay High Court had long maintained that the purpose of the Stamp Act was to generate revenue, not pointless procedural obstacles, extending this reasoning to arbitration agreements in cases like *Universal Enterprises vs Deluxe Laboratories Pvt Ltd* (2016).[17] Even *Garware* had reached the Supreme Court on appeal from the Bombay High Court; a few days before the order in *Garware* was overturned by the Apex Court, the High Court reproduced its reasoning in *Gautam Landscapes Pvt. Ltd. v. Shailesh Shah* (2019).[19] Subsequently, however, the Court likely felt itself bound by the directive of the Apex Court in *Garware Wall Ropes Ltd.* and just a few months later, in *S. Satyanarayana Co. v. West Quay Multiport* (2019), relied on *Garware* to hold that an enforceable arbitration agreement had to be stamped at the seat of the arbitration.[20] After the Supreme Court changed its position in *NN Global I*, the High Court once again deferred to its opinion, appointing an arbitrator on the basis of the photocopy of an under-stamped arbitration agreement in *Pigments & Allieds v. Carboline India Pvt. Ltd.* (2022).[21]

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[13] *Vidya Drolia vs Durga Trading Corporation* (2021) 2 SCC 1 (India).
[14] Id at ¶60.
[15] *NN Global Mercantile Pvt. Ltd. v. Indo Unique Flame Ltd.* (2021) 4 SCC 379 (India).
[16] *Intercontinental Hotels Group (India) Pvt. Ltd. v. Waterline Hotels Pvt. Ltd* 2022 SCC OnLine SC 83 (India).
[17] *Universal Enterprises vs Deluxe Laboratories Pvt Ltd* 2016 SCC OnLine Bom 3963 (India).
[18] *Garware Wall Ropes Ltd. vs Coastal Marine Constructions* 2018 SCC OnLine Bom 541 (India).
[19] *Gautam Landscapes Pvt. Ltd. v. Shailesh Shah* 2019 SCC Online Bom 563 (India).
[20] *S. Satyanarayana Co. v. West Quay Multiport* 2019 SCC OnLine Bom 4595 (India).
[21] *IMZ Corporate Pvt Ltd vs MSD Telematics Pvt Ltd* 2022 SCC OnLine Bom 10441 (India).

This is contrast to, for example, the Delhi High Court, which had consistently affirmed that the role of the court in the arbitral process had to be minimized as far as possible. In particular, the Court ruled specifically in cases like *IMZ Corporate Pvt Ltd vs MSD Telematics Pvt Ltd* (2021),[22] *Religare Finvest Ltd. v. Asian Satellite Broadcast Pvt. Ltd.* (2022),[23] and *Drooshba Fabricators v. Indure Private Limited* (2022)[24] that the arbitration agreement being insufficiently stamped did not oust the jurisdiction of the court to appoint an arbitrator.

The much-anticipated *NN Global II* judgement was finally handed down in May 2023: in a strange twist of events, the decision in *NN Global I* was reversed by a 3:2 split verdict. Justices Bose, Joseph, and Ravikumar held that unstamped arbitration agreements could not be given the benefit of recognition by the law, and judicially permitting the same would be akin to superseding an express legislative directive to the contrary. Though Justices Roy and Rastogi pointed out that the issue of stamp duty could be later assessed by the arbitrator, the majority went ahead and legitimated the position taken in *SMS Tea*. The decision provoked intense criticism, with many pointing out that the payment of stamp duty had essentially been added as a precondition to arbitration where no such precondition existed under the Arbitration Act.

However, the saga was still not over. A curative petition was filed before the Supreme Court seeking reconsideration of the *Dharmaratnakara Rai Bahadur* case, and the issue also cropped up before a three-judge bench of the Court in the arbitration petition *Seka Dobric v. SA Eonsofttech Pvt Ltd* (2023). These petitions were heard together by a five-judge bench in September 2023, which, in view of the bench strength in *NN Global II*, referred the matter to a larger, seven-judge bench. Sometimes called *NN Global III*, the decision of this seven-judge bench, *In Re: Interplay between Arbitration Agreements under the Arbitration and Conciliation Act, 1996 and the Indian Stamp Act, 1899* (2023) finally settled the law around the issue.[25]

PART III: LEGAL ANALYSIS

In Re: Interplay, the bench started by observing that the 'admissibility' of an agreement was distinct from its 'validity' or 'enforceability' (and that the three were, in fact, distinct legal concepts.) Though an inadmissible instrument could not be relied upon by the court for adjudication, it was not necessarily void: as the Court analogized, agreements rendered unenforceable by Section 27 of the Indian Contract Act, 1872 ("**Contract Act**"), which voids agreements in restraint of trade, could still be judicially admitted into evidence. Therefore, contrary to what numerous previous decisions had erroneously held, the non-stamping of an agreement was <u>not</u> linked to 'voidness' under Section 2(g) of the Contract Act. It only rendered it temporarily inadmissible into evidence on account of the "*curable defect*" of the non-payment of adequate stamp duty.[26]

[22] *S. Satyanarayana Co. v. West Quay Multiport* 2021 SCC OnLine Del 3016 (India).
[23] *Religare Finvest Ltd. v. Asian Satellite Broadcast Pvt. Ltd.* 2022 SCC OnLine Del 221 (India).
[24] *Drooshba Fabricators v. Indure Private Limited* 2022 SCC OnLine Del 2777 (India).
[25] *ibid 1.*
[26] *ibid.*

More importantly, even such a deficiency affected only the underlying contract, and not the arbitration agreement. It is possible that the entire mischief started by chance when *SMS Tea* presented twin issues: the enforceability of both the unregistered and unstamped arbitration agreements. The Court in *SMS Tea* started by reasoning that arbitration clauses in unregistered agreements were saved by the "*collateral transaction*" exception of Section 49 of the Registration Act, but those in unstamped agreements were not similarly excepted under the Stamp Act. However, as *NN Global I* pointed out, if the presumption of severability applies to arbitration agreements, then they operate as standalone agreements, not required to be either stamped or registered. The Court in *Re: Interplay*, taking a somewhat technical line of reasoning, also pointed out that no rates were mentioned for arbitration agreements in the schedule of the Stamp Act.

Global jurisprudence overwhelmingly affirms the cruciality of the doctrine of severability to sustain the practice of arbitration. Unlike generic contractual clauses, an arbitration agreement requires and is predicated on the separate intention and consent of the parties to submit their disputes to an arbitrator, because of the simple fact that in the future, disputants are unlikely to see eye-to-eye on much. The legal fiction of the autonomous existence of the arbitration agreement allows for it to be severed from the underlying contract: not only so that issues relating to breach or termination may be decided by an arbitrator, but also so that the arbitration agreement itself is not hit by challenges to the underlying contract. Thus, the Court in *SMS Tea* was correct that Section 16 of the Arbitration Act would insulate arbitration agreements from registration requirements; but it did not recognize that the provision would similarly protect it from stamping requirements. It is worth noting that the Court cemented this finding in *Garware* by citing *United India Insurance Co.* and expressly rejecting the dictum in *Duro Felguera*. This is because, notwithstanding the broadly phrased *ratio decidendi*, the arbitration agreement in *United India Insurance Co.* was affected by the challenge to the main contract. So, the two cases (*Garware* and *United* cases) ought to have been distinguished on facts alone.

Still, even if a reference to arbitration was permissible, the main contract would remain under-stamped, an issue that seriously preyed on the judiciary's mind in *NN Global II*. Though it seems self-evident that the arbitrator ultimately appointed in the dispute would order the payment of stamp duty, courts frequently spoke of a legislative bar imposed on the recognition of under-stamped agreements, even for the limited purposes of referring the parties to arbitration. In order to address this purported inconsistency between the Stamp Act and Arbitration Act, the Court in *Re: Interplay* placed emphasis on two legal concepts: (i) the principle of *kompetenz-kompetenz*; and (ii) harmonious statutory interpretation.

The doctrine of *kompetenz-kompetenz* confers on arbitrators the power to determine their jurisdiction at the first instance. This was the legislative intent underlying the enactment of Section 11(6-A); though, for some reason, the provision was set to be deleted via the 2019 Amendment to the Arbitration Act, as the Supreme Court recently observed in *NTPC Ltd. v. SPML Infra Ltd.* (2023), the principle itself would always inform judicial reasoning in

arbitration petitions.[27] Guided by these aspects of the principle of *kompetenz-kompetenz*, the bench in *Re: Interplay* held that the non-payment of stamp duty was an issue emanating from the main agreement, which could validly be decided by only the arbitrator.

On the point of legislative intent, it was correctly pointed out that fiscal statutes like the Stamp Act are intended to do little other than generate revenue for the State. As long as the tribunal assessing the issue at a later stage orders the parties to pay the stamp duty (and any concomitant penalties), the intent of the Act is preserved. On the other hand, insisting on the payment at the pre-arbitral stage leads to inordinate delays, defeating the purpose of the Arbitration Act. This is particularly egregious given that the Arbitration Act, being a specialized law, prevails over the Stamp Act. Oddly enough, the Supreme Court itself had recognized this principle very early on. In *Hindustan Steel Ltd vs M/S. Dalip Construction Company* (1969),[28] it was held:

> *"The Stamp Act is a fiscal measure enacted to secure revenue for the State on certain classes of instruments: it is not enacted to arm a litigant with a weapon of technicality to meet the case of his opponent. The stringent provisions of the Act are conceived in the interest of the revenue. Once that object is secured according to law, the party staking his claim on the instrument will not be defeated on the ground of the initial defect in the instrument."*
>
> (emphasis supplied)

It is not clear why the Supreme Court did not extend this logic to its intervention at the pre-arbitral stage, particularly where Section 5 of the Arbitration Act expressly stipulates that "*...no judicial authority shall intervene* [in an arbitration] *except where so provided* [by the statute]." Similarly, the Statement of Objects and Reasons of the 2015 Amendment stated that the Court only had to check for the factum of the existence of the arbitration agreement within the contract, and "*not other issues,*" a heading under which the impounding of an instrument was subsumed by the Court in *Re: Interplay*. The Court further emphasized the semantic variation within the scheme of the Arbitration Act itself: Section 11 dictated that a court 'confine' itself to only 'examine' an agreement - ruling out a "*laborious or contested inquiry*"- whereas Section 16 empowered an arbitral tribunal to 'rule' on its own jurisdiction.[29]

PART IV: COMPARATIVE ANALYSIS

Consistent with the concerted push for the global harmonization of arbitration law, the Supreme Court also relied on foreign authorities to support its reasoning. In both the UK and the US, the doctrine of severability of an arbitration agreement has been statutorily codified, as well as being given expression through several judicial decisions. A particularly notable judgement is the UK Court of Appeal's decision in *Harbour Assurance Co. Ltd. v. Kansa General International Insurance Co. Ltd.* (1993).[30] Interpreting Section 7 of the UK Arbitration Act, 1996 (which parallels Section 16 of the Indian Arbitration Act), the Court in *Harbour Assurance Co. Ltd.*, returned two findings relevant to the issue of stamping

[27] *NTPC Ltd. v. SPML Infra Ltd.* 2023 SCC Online SC 389 (India).
[28] *Hindustan Steel Ltd vs M/S. Dalip Construction Company* 1969 AIR 1241 (India).
[29] *Supra* note 1.
[30] *Harbour Assurance Co. Ltd. v. Kansa General International Insurance Co. Ltd.* [1993] QB 701.

requirements: first, that the presumption of separability is invalidated only when the challenge to the main contract goes to the root of the arbitration agreement, and second, courts must restrict their intervention in the arbitral process to instances when there is a strong public policy consideration at play. The second finding is particularly apposite vis-à-vis the Indian legal landscape. Throughout the entire saga, the Supreme Court often reasoned that the revenue brought in by the Stamp Act was an important public policy consideration. However, within the context of the Arbitration Act itself, 'public policy' is given a very narrow construction: with reference to Sections 34 and 48 of the Act, for example, an award can only be set aside or refused enforcement if it breaches public policy or the most basic notions of morality and justice. The Supreme Court explicitly held in *Renusagar Power Co. Ltd vs General Electric Co.* (1993) that a mere violation of Indian law would not meet this demanding threshold,[31] an analysis that undoubtedly perhaps ought to apply to something as benign as the non-payment of stamp duty.

The Court also found a basis in American case law: it cited a catena of US Supreme Court ("**SCOTUS**") decisions to demonstrate how its ruling would fare when tested on the edifice of practical value. In *Prima Paint Corporation v. Flood & Conklin Mfg. Co.* (1967), the SCOTUS had emphasized that the presumption of severability and the doctrine of *kompetenz-kompetenz* were intimately linked cornerstones of arbitration: the arbitration agreement had to be given autonomous effect and the arbitrator permitted to hear challenges to the enforceability of the main contract. Thirty years later, in *Buckeye Check Cashing, Inc. v. Cardegna* (2006), the SCOTUS reaffirmed the separability of an arbitration agreement to prevent parties from refusing to participate in arbitration when the arbitration clause itself was not affected by the challenge to the main contract.[32] Similarly, in *Rent-A-Center, West, Inc. v. Jackson* (2010), arbitration was compelled when the intention to submit future disputes to an arbitrator was proved.[33] Given that, in India, the challenge of non-payment of stamp duty was almost always brought by a party to demur or at least delay the arbitral proceedings (a tactic that has been recognized and punished a handful of times by High Courts), these decisions provided a sound pragmatic basis for the Court in *NN Global III* to reinstate *NN Global I*.

PART V: CONCLUSION

With *Re: Interplay*, the Supreme Court has finally stopped seesawing between opposite legal positions. Though it was unfortunate that the issue was even contested to begin with, let alone for such a protracted length of time, this decision of the seven-judge bench in *Re: Interplay* has enormous precedential value: apart from the issue of stamping requirements, it also reaffirms a number of important principles, including severability, *kompetenz-kompetenz*, the primacy of party autonomy, and the need for minimal judicial intervention, marking a decisive step towards fostering a pro-arbitration environment in India.

[31] *Renusagar Power Co. Ltd vs General Electric Co.* [1985] 1 SCR 432 (India).
[32] *Buckeye Check Cashing, Inc. v. Cardegna* 546 U.S. 440 (USA).
[33] *Rent-A-Center, West, Inc. v. Jackson* 561 U.S. 63 (USA).

OBJECTIVE ARBITRABILITY RESTRICTION IN IRAN: THE IMPLICATIONS OF THE SUPREME COURT'S INTERPRETATION OF ARTICLE 139 OF THE IRANIAN CONSTITUTION IN A US$872 MILLION CASE

Sima Ghaffari

ABSTRACT

In the context of Iranian legislation, Article 139 of the Constitution establishes strict requirements for arbitration disputes involving public and state-owned properties, as well as cases involving a foreign party. Article 139 presents significant administrative hurdles by stipulating that before initiating arbitration proceedings in such disputes, the approval of the Council of Ministers, and in some cases, the Parliament, must be obtained. The absence of the necessary approvals could result in the annulment of arbitral awards, creating a particularly challenging environment for arbitrators and parties. Iranian courts have shown inconsistencies and diverse perspectives when interpreting Article 139 with respect to the timing of obtaining these approvals for agreements to arbitrate.

In May 2024, the Supreme Court of Iran rendered a significant decision, shedding light on the proper interpretation of Article 139 in a dispute involving a remarkable US$872 million petrochemical compensation claim—recognized as the largest in Iran's history in this sector.

This article critically analyses this landmark judgement, exploring its theoretical foundations and practical implications for arbitral proceedings in Iran. Through an examination of the Court's reasoning and its potential impact on future arbitration cases, this article suggests that the judgement may redefine the legal landscape for arbitration in certain disputes in Iran. It argues that while the judgment is not binding on lower courts, it may inspire a more uniform and a favourable approach to the objective arbitrability restrictions in Article 139 of the Iranian Constitution.

Keywords: Iran, Arbitrability, Article 139 of the Constitution, State-owned Properties, Supreme Court, Administrative Approval

1. INTRODUCTION

In recent decades, the Iranian legal system has witnessed developments in alternative dispute resolution ('ADR'), in particular in arbitration. Key developments include the adoption of the Law on International Commercial Arbitration ('LICA') in 1997[1], which is largely inspired by the 1985 UNCITRAL Model Law[2], the establishment of two prominent arbitral institutions, the ACIC[3] and TRAC[4], and the ratification of the New York Convention in 2001[5].

For the purpose of the discussion in this article, there are some concepts to be defined prior to exploring the Supreme Court and preceding lower court judgements. Within the Iranian legal system, Article 139 of the Constitution presents a debated provision concerning the restrictions on objective arbitrability. This provision establishes certain limitations or the need for specific administrative approvals when referring disputes related to public or governmental assets to arbitration. It has been suggested that the rationale for this provision is to protect the public interest.

Article 139 of the Iranian Constitution provides:

> *"The settlement of claims relating to public and state property or the referral thereof to arbitration is in every case dependent on the approval of the Council of Ministers, and the Assembly must be informed of these matters. In cases where one party to the dispute is a foreigner, as well as in important cases that are purely domestic, the approval of the Assembly must also be obtained. Law will specify the important cases intended here."*

Article 139 requires certain administrative approvals and authorizations for disputes involving public/state-owned assets or foreign individuals or corporates and cases deemed as 'important'. The definitions of these three categories of disputes are, however, ambiguous and lack clear definitions.

In May 2024, the Supreme Court of Iran rendered a judgment in a significant petrochemical dispute that sheds light on the proper interpretation of Article 139. The Court's judgement has important implications for future cases concerning the referral of disputes involving public/state-owned assets to arbitration that may come before the Court. This article will provide an overview of the background of the case (*section 2*), followed by a brief discussion of the preceding lower court decisions by the Court of First Instance and the Court of Appeal (*section 3*), before examining the judgement of the Supreme Court (*sections 4-5*). This article will conclude by positioning the judgement of the Supreme Court as a significant and favorable decision (*section 6*).

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[1] To know more about the LICA's features, See Hamid G. Gharavi, 'The 1997 Iranian International Commercial Arbitration Law: The UNCITRAL Model Law à L'Iranienne' (1999) 15(1) *Journal of International Arbitration 85* <https://doi.org/10.1093/arbitration/15.1.85>.

[2] UNCITRAL Model Law on International Commercial Arbitration, with amendments as adopted in 2006 <https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration>.

[3] Arbitration Center of Iran Chamber of Commerce (ACIC) is the first arbitral institution providing institutional arbitration rules and services. The 2023 Arbitration Center of Iran Chamber of Commerce Arbitration Rules are available at: https://arbitration.ir/rules/arbitration-rules/

[4] Tehran Regional Arbitration Center (TRAC),The 2018 TRAC Arbitration Rules are available at <https://trac.ir/rules-of-arbitration/>

[5] SIran acceded to the New York Convention on 15 October 20021 according to the law concerning the Accession of Iran to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, available at: https://newyorkconvention1958.org/index.php?lvl=notice_display&id=1763.

The definitions of public and state-owned property in Iranian case law are subject to varying interpretations across different courts.[6] There are different approaches to the definition of public and state-owned properties. There are also various interpretations of the timing of the applicability of Article 139 (administrative approval of the Council of Ministers), as Article 139 does not clarify whether approval is required at the time of the referral of disputes to arbitration or the time of the conclusion of the arbitration agreement.[7]

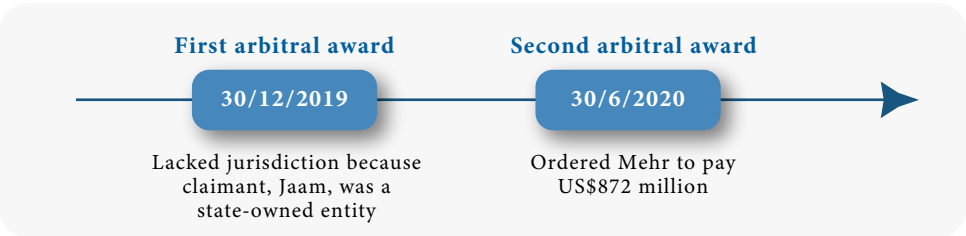
It is worth noting that high-value cases, in particular in the petroleum and construction industries, typically involve government entities and state-owned properties. Thus, when deciding to refer these types of disputes to arbitration, it is essential to take into account the requirements in Article 139.

2. BACKGROUND OF THE CASE

The case involves disputes between two companies active in the petroleum industry: Mehr Petrochemical Company (hereinafter referred to as 'Mehr') and Jaam Petrochemical Company (hereinafter referred to as 'Jaam'). After disputes arose between the parties, Jaam submitted the disputes to an arbitral tribunal, consisting of three arbitrators, as outlined in the arbitration clause contained in the contract. The arbitral tribunal issued an award concluding that it lacked the jurisdiction to hear the case due to Jaam being a state-owned entity.

Jaam attempted to annul the award by asserting that the arbitral tribunal was not constituted in accordance with the parties' agreement and that Jaam is not a state-owned or governmental enterprise.

Moreover, Jaam requested the head of the Supreme Court to appoint new members of the arbitral tribunal, as stipulated in the contract. Mehr objected to this appointment procedure, arguing that the members of the tribunal should be appointed by the Permanent Court of Arbitration (PCA). Ultimately, a new arbitral tribunal was formed, appointed by the designated authority specified in the contract, and issued an award against Mehr, ordering it to pay a substantial compensation amounting to US$ 872,354,656, in addition to the arbitrators' fees.



Overview of the arbitral awards issued by the tribunals

[6] For an extended discussion on the arbitrability restriction under Article 139, See Ali Darzi-Naftchali and Sajad Soltanzadeh, 'Investment Disputes and Article 139 of the Iranian Constitution' (2017) 35(2) *ASA Bulletin* 334.
[7] Some courts require the approval of the Council of Ministers when a dispute arises and prior to its referral to arbitration: Decision Number 9209970221501625 [2014] CA 15, 20 March 2014.

3. JUDGEMENTS OF THE COURT OF FIRST INSTANCE AND THE COURT OF APPEAL

Following this and after being ordered by the arbitral tribunal to pay damages, Mehr filed an action for annulment of the second arbitral award. The Court of First Instance, Chamber 9 of the General Civil Court of Tehran, annulled both arbitral awards and held that Jaam was a state-owned entity at the disputed contract was entered. The court added that the managers of Jaam had expressly acknowledged that Jaam belonged to the Armed Forces and other government entities.

In addition, Mehr company is 40 percent owned by a government corporate. The court emphasized the significance of the administrative process set forth in Article 139 of the Constitution and found that the requirements in Article 139 were not fulfilled when the disputes were submitted to arbitration.

Jaam filed an appeal against the ruling of chamber 9 that annulled the second arbitral award, whereas Mehr appealed the same chamber's decision that annuled the first arbitral award. The court's decision was affirmed by the Court of Appeal, Chamber 28 of the Appeal Court of Tehran, which denied both parties's appeals in light of the provisions in Article 139.

4. THE JUDGEMENT OF THE SUPREME COURT

Jaam, the Ministry of Cooperation, Labor and Social Welfare and the General Inspection Organization applied for a substantive retrial of the final judgement of the Court of Appeal pursuant to Article 477 of the Criminal Procedure Code.[8] Following this, the case was referred to Chamber 1 of the Iranian Supreme Court to conduct a comprehensive retrial of the Court of Appeal judgment.

The applicants argued that while Jaam was initially a state-owned entity, it had transitioned to a private entity at the time of the arbitration proceedings and the issuance of arbitral awards. Moreover, it argued that the arbitrability restriction under Article 139 was intended to safeguard state-owned and governmental assets and the opposing party was attempting to take advantage of this provision without possessing the status and interests of a government entity as stipulated in Article 139. They further argued that Mehr sought annulment of the arbitral award without initially seeking annulment of the arbitration agreement.

On 27 May 2024, Chamber 1 of the Iranian Supreme Court rendered its historic judgment.[9] The Supreme Court first highlighted that the main reasoning of the Court of First Instance and the Court of Appeal when annulment of the arbitral awards pertains to the governmental nature of Jaam and the referral of disputes to arbitration without meeting the requirements

[8] Article 477 of The Criminal Procedure Code (2015) highlights the appellate procedure available for challenging final judgements issued by the appeal courts in cases where the judgements are inconsistent with the laws or sharia. This exceptional form of judicial review involves presenting a court decision before a judicial authority in the Supreme Court for re-examination and substantive retrial following authorization by the judiciary.
[9] *Jam v Mehr* [2024] Supreme Court, 23 May 2024

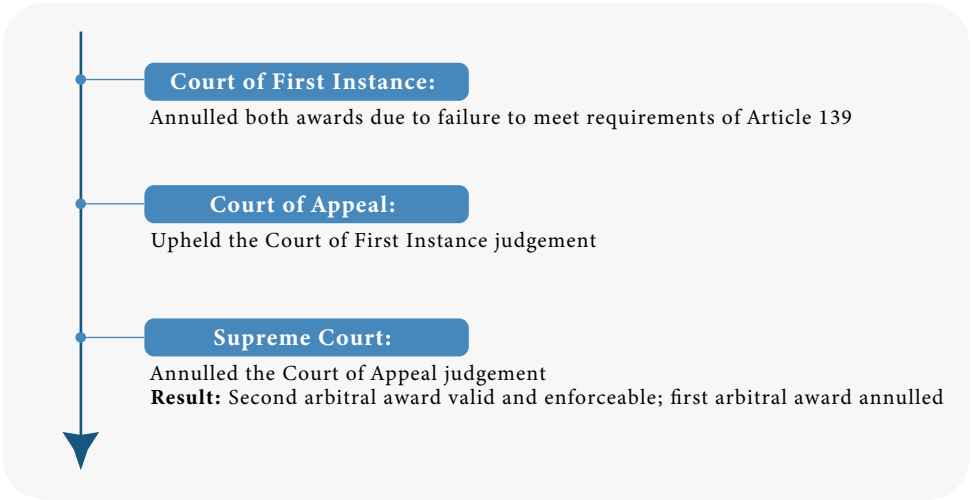
in Article 139 of the Constitution and Article 457 of the Civil Procedure Code (which contains requirements similar to those in Article 139).[10]

In its interpretation of Articles 139 and 457, the Supreme Court concluded that the arbitrability restriction and administrative approvals apply at the time of the referral of disputes to arbitration, rather than the time of the conclusion of the agreement between the parties.

Additionally, the Supreme Court pointed out that Jaam's activities were not related to matters of sovereignty, but rather focused on commercial activities aimed at making a profit. The Court added that the restriction in Article 139 is intended to protect government or state-owned assets and cannot be invoked by the opposing party to strengthen its position.

The Supreme Court emphasized that based on the evidence presented, the transfer of Jaam's shares and assets to private entities occurred before the disputes were referred to arbitration, indicating that Jaam was not classified as a governmental or state-owned entity at that time. Therefore, the Court concluded, that the restrictions in Article 139 of the Constitution and Article 457 of the Civil Procedure Code did not apply. The Court added that the formation of the second arbitral tribunal and the method of appointing its members by the appointing authority were consistent with the parties' agreement.

Consequently, the Court overturned the lower court judgments and annulled the first arbitral award. In addition, the Court reversed the decisions that had favoured Mehr's attempt to annul the second arbitral award. Essentially, the Court determined that the second arbitral award issued against Mehr was valid and enforceable.



Summary of the lower court and Supreme Court judgements

[10] Similarly, Article 457 of the Civil Procedure Code provides: "Claims involving public and government property may be referred to arbitration with the approval of the Council of Ministers and informing the Islamic Consultative Assembly. Where a party to the claim is a foreigner, or the subject-matter of the claim is a matter determined important by law, approval of the Islamic Consultative Assembly also shall be necessary".

5. ANALYSIS OF THE JUDGEMENTS

As previously mentioned, the concept of 'referral' of disputes, as articulated in Article 139 of the Constitution, has been subject to various interpretations and definitions among courts. The understanding of this term significantly influences the timeline for obtaining administrative approvals required to refer disputes to arbitration, particularly in cases involving state-owned assets or foreign entities.

Before the Supreme Court's judgement, courts and scholars had different views on whether administrative approvals were essential for the validity of an arbitration agreement or its operation. Accordingly, the absence of these approvals could result in different outcomes. For example, in 2012, the Administrative Court of Justice held that these approvals must be obtained *prior to or at the time of entering into the arbitration agreement.*[11] This meant that any arbitration agreement concerning a public or state-owned entity and assets would be considered invalid if the required approvals were not obtained upon the formation of the agreement.[12]

In the present case, the Court of First Instance's judgement, which was upheld by the Court of Appeal, initially concluded that the approval requirements in Article 139 must be satisfied at the time the contract is concluded. Thus, given that Jaam was state-owned when the arbitration agreement was concluded and the necessary approvals were not obtained, the lower courts annulled the arbitral awards.

The Supreme Court took a different approach and emphasized that Jaam had been privatized before the disputes were referred to arbitration, despite being state-owned when the arbitration agreement with Mehr was concluded. This approach leads to the promotion of arbitration in Iran and minimizes the risk of arbitral awards being annulled in complex cases.

Moreover, as previously mentioned, the concept of disputes related to 'public or state-owned properties' under Article 139 is not clearly defined. Various commentators and judicial bodies have attempted to interpret Article 139 narrowly, distinguishing between two specific scenarios. The first scenario involves properties owned by the government in its capacity as a sovereign entity, while the second scenario involves properties owned by the government in its capacity as a contracting party, such as when engaging in commercial activities. By adopting this nuanced approach to interpreting Article 139, there would be a reduction in the application of the restrictions on arbitrability, particularly the approval requirements in Article 139. Consequently, this shift towards a more limited scope of application would likely lead to the promotion of arbitration throughout the country.

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[11] A similar conclusion was reached in a series of judgments, by Chamber 18 of the Appeal Court of Tehran establishing that the administrative approval for an agreement to arbitrate under Article 139 must be obtained at the time of concluding the agreement; otherwise, the arbitration agreement will be deemed invalid

[12] Nima Nasrollahi Shahri, 'Administrative Approval for Agreement to Arbitrate: The Iranian Supreme Court Offers a New Interpretation of Article 139 of the Iranian Constitution' (*Kluwer Arbitration Blog*, 16 July 2024) https://arbitrationblog.kluwerarbitration.com/2024/07/16/administrative-approval-for-agreement-to-arbitrate-the-iranian-supreme-court-offers-a-new-interpretation-of-article-139-of-the-iranian-constitution/ accessed 17 December 2024.

However, until the Supreme Court's recent judgment, many courts had opted not to adopt such an approach when interpreting Article 139. It is important to highlight that the Supreme Court in the case at hand, explicitly distinguished between the actions of a government entity, and whether they are of a sovereign or commercial nature. This distinction resolves ongoing disputes on the interpretation of Article 139 and is viewed as a welcomed approach.

6. CONCLUDING REMARKS

As we navigate the complexities of arbitration involving public assets and state-owned entities, it is important to take into account the administrative requirements in Article 139 of the Iranian Constitution.

The recent judgement rendered by the Supreme Court, which provides a more precise understanding of Article 139, should be viewed positively as it supports the promotion of arbitration as a viable alternative dispute resolution mechanism in Iran. This judgment is likely to have a significant impact on numerous high-value international arbitration cases in Iran, given that a considerable number of these cases involve government bodies or public and state-owned resources to some degree.

While it is important to acknowledge that this judgement does not impose a binding precedent on lower courts, it is expected to have a substantial impact on how Article 139 is interpreted. The impact of the recent Supreme Court judgement, which is regarded as the most significant in terms of value in the petrochemical sector, is yet to be fully assessed regarding future judicial determinations on the arbitrability of disputes involving public/state-owned properties which shapes a variety of high value international arbitration cases in Iran.

PUBLIC POLICY IN JUDICIAL REVIEW: ANALYSIS OF THE FIRST CHINESE CASE SETTING ASIDE CRYPTOCURRENCY ARBITRAL AWARD

Yuxin Nie

ABSTRACT

Guiding Case No. 199 (Gao Zheyu v. Shenzhen YunSilk Road Innovation Development Co. Ltd and Li Bin) annulled the first arbitral award involving cryptocurrency in China. The case reflected the tensions between private digital currency agreements and China's stringent financial regulatory stance. As the first case invoking public policy to set aside a crypto-related award in China, it brought into focus the complexities of applying the concept of public policy in judicial review. The judgment underscored China's commitment to financial stability through rigorous oversight of emerging technologies like cryptocurrency. It also demonstrated how courts balance protecting macroeconomic priorities against the protection of private commercial interests rooted in contractual autonomy. By exploring the key issues debated in the dispute, this case provides valuable insights into how Chinese courts navigate the delicate balance between sovereignty, policy goals, and private autonomy. Ultimately, Guiding Case No. 199 serves as a crucial reference for understanding the evolving legal and regulatory landscape surrounding digital assets in China.

Keywords: public policy, judicial review, arbitration, cryptocurrency, bitcoin

1. INTRODUCTION

On December 30, 2022, the Supreme People's Court of China (hereinafter "SPC") issued its 36th batch of guiding cases, six of which related to judicial review of arbitral awards. One landmark case was Guiding Case No. 199 (*Gao Zheyu v. Shenzhen YunSilk Road Innovation Development Co. Ltd and Li Bin*) - recognized as the first Chinese case to set aside an arbitral award involving bitcoin transactions.[1]

Guiding Case No. 199 marks, a rare instance in recent years where a Chinese court invoked the concept of "public interest" to annul an award. Its significance lies in clarifying the factors

[1] *Gao Zheyu v. Shenzhen YunSilk Road Innovation Development Co. Ltd and Li Bin,* (2018) Yue 02 Min Te No. 719 (粤03民特719号).

and boundaries for determining whether an award contravenes "social and public interest". The court's ruling conducted a targeted examination of whether the claimant's request and arbitral tribunal's decision implicated prohibited "monetary attributes" of bitcoin conversion and trading per financial regulatory guidelines, rather than broadly questioning bitcoin trading's legitimacy. It conveys Chinese courts' stance on rigorously overseeing cryptocurrencies and balancing private agreements with macro-level priorities like maintaining financial and legal order. As digital assets continue developing amid evolving regulatory landscapes, this case provides a critical examination of how Chinese courts interpret and apply public policy in the judicial review of arbitral awards, particularly those involving emerging financial instruments like digital currencies.

2. FACTS OF THE CASE

The parties involved in this case are: Gao Zheyu (hereinafter "Gao"), the Applicant; Shenzhen Yunsilu Innovation Development Fund (hereinafter "Yunsilu Fund"), the 1st Respondent; and Li Bin (hereinafter "Li"), the 2nd Respondent.

Li commissioned Gao to manage his digital currency assets. On 2 December 2017, Yunsilu Fund, Gao, and Li signed an Equity Transfer Agreement. According to the agreement, Yunsilu Fund agreed to transfer its 5% shares (hereinafter "the Shares") in a company it owned to Gao at a consideration of CNY 550,000. The parties agreed that Gao would pay CNY 250,000 in cash, and Li would pay the remaining CNY 300,000 on Gao's behalf. In addition, Gao should return to Li all of the Bitcoin assets that Gao was managing on Li's behalf, namely 20.13 Bitcoins ("BTC"), 50 Bitcoin Cash ("BCH"), and 12.66 Bitcoin Diamonds ("BCD"), in 3 instalments.

After the agreement was signed, Li alleged that Gao failed to fulfil his contractual obligations. Therefore, Yunsilu Fund and Li initiated arbitration with the Shenzhen Arbitration Commission against Gao based on the arbitration clause stipulated in their Equity Transfer Agreement.

The Respondents made the following claims in the arbitration: (1) the Shares held by Yunsilu Fund be transferred to Gao; (2) CNY 250,000 be paid by Gao to Yunsilu Fund; (3) repayment of digital currency assets to Li (equivalent of 20.13 BTC, 50 BCH and 12.66 BCD) valued at USD 493,158.40 plus interest; (4) an additional CNY 100,000 be paid by Gao to Li for breach of the agreement.

On 21 August 2018, the Arbitration Committee issued an award finding that Gao was in breach of contract by failing to deliver the agreed-upon crypto assets. Based on public information from the website okcoin.com regarding the closing prices of BTC and BCH at the time of contract performance, the arbitral tribunal estimated the property loss at USD 401,780. The tribunal ordered that (1) the Shares be transferred to Gao, (2) Gao pay CNY 250,000 for the transfer to Yunsilu Fund, (3) and USD 401,780 to be paid by Gao to Li (converted to CNY at the exchange rate as of the date of the award), and (4) Gao pay damages of CNY 100,000 to Li for breach of contract.

Gao then applied to the Shenzhen Intermediate People's Court (hereinafter "the Court") to set aside the arbitral award.

3. ARGUMENTS AND THE COURT'S DECISION

Gao argued that the arbitral award should be set aside based on a public interest defence. He claimed the award violated public interest. According to the Announcement on Preventing the Financing Risks on Initial Coin Offerings (hereinafter "the Announcement") jointly issued by the People's Bank of China, the China Securities Regulatory Commission and other four Chinese authorities, since September 4, 2017, any so-called token financing trading platforms are prohibited from engaging in the exchange of legal currency with tokens or virtual currencies, trading or acting as a central counterparty for tokens or virtual currencies, and providing pricing or information intermediary services for tokens or virtual currencies.[2] Therefore, as of September 4, 2017, the transactions and pricing of digital currencies on the okcoin.com website are illegal. Since digital currencies cannot be traded on this website, the pricing of digital currencies on this site lacks a reasonable basis and cannot be trusted. Further, Gao argued that by requiring him to return the equivalent value of the digital currency in US dollars, converted to CNY, the award indirectly permitted and supported the illegal issuance of tokens and the exchange of digital currency and legal tender, potentially violating legal regulations and public interest.

The respondents, on the other hand, argued in defence that the arbitral award does not violate the public interest. They noted that, according to Article 5 of the arbitration rules of the Shenzhen Arbitration Commission, international practices can be referred to during arbitration.[3] In the present case, it is common international practice to use US dollars as a currency denomination and to determine asset values based on open market prices. They further argued that the agreements regarding digital assets and compensation for losses were private matters between the parties and unrelated to the public interest.

The Court reviewed the case in accordance with Article 58 of the Arbitration Law of the People's Republic of China. The central issue in the dispute was whether the arbitral award contravened public interest.

First, the Court referred to the Notice on Preventing Risks Associated with Bitcoin (hereinafter "the Notice") issued by five Chinese authorities including the People's Bank of China.[4] The notice clearly stipulated that Bitcoin does not have the same legal status as currency and should not be used as currency in the market. The Court further referenced the Announcement which reaffirmed these provisions and specified additional restrictions. The Court noted that these documents essentially banned the redemption, trading, and

[2] See the People's Bank of China, 'The People's Bank of China and Six Other Departments' Announcement on Preventing the Financing Risks on Initial Coin Offerings' (4 September 2017) <https://www.gov.cn/xinwen/2017-09/04/content_5222657.htm>.

[3] See Article 5, Arbitration Rules of the Shenzhen Arbitration Commission (2011 edition) <https://www.scia.com.cn/index.php/Home/index/rule/id/802.html>.

[4] See the People's Bank of China, 'Notice on Preventing Risks Associated with Bitcoin' (4 December 2013) <http://www.pbc.gov.cn/tiaofasi/resource/cms/2018/07/2018072615002921168.pdf>.

circulation of Bitcoin. Activities involving the speculation of Bitcoin were deemed illegal financial activities, disrupting financial order and affecting financial stability. Finally, the Court concluded that the arbitral award, which ordered Gao to compensate Li with an equivalent amount of US dollars for Bitcoin and then convert the US dollars to CNY, effectively supported the exchange and trading between Bitcoin and legal currency. This contradicted the spirit of the aforementioned regulations and violated the public interest. Therefore, after reporting to the SPC for review, the Court determined that the arbitral award should be annulled pursuant to Article 58, paragraph 3 of the Arbitration Law of the People's Republic of China (hereinafter "PRC Arbitration Law").[5]

4. COMMENTS

The Guiding Case No. 199 decided by the SPC, which revoked an arbitral award involving digital currency transactions on the grounds of public policy, has raised concerns about the application of public policy provisions in the judicial review of arbitration.

Determining whether an arbitral award violates public policy is a fundamental aspect of judicial review in arbitration. International legal instruments such as the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter "New York Convention") and the UNCITRAL Model Law on International Commercial Arbitration acknowledge public policy as a valid ground for refusing the recognition and enforcement of arbitral awards. Article V(2)(b) of the New York Convention allows the denial of recognition and enforcement if the award is contrary to the public policy of the enforcing country. However, in China, judicial review of arbitral awards operates under the term "public interest" instead of "public policy." According to Article 58(3) of the PRC Arbitration Law, if a court finds that an arbitral award violates social public interest, it shall order the annulment of the award. Similarly, Article 237(3) of the Civil Procedure Law of the People's Republic of China states that the enforcement of an arbitral award should be refused if it violates social public interest. Notably, like the New York Convention, Chinese law does not provide a clear definition of "public interest".

Although the case involved the judicial review of a domestic arbitral award, it somehow reflects China's broader approach to public policy in arbitration. This carries significant weight, as the application of public policy in judicial reviews could influence how China recognizes and enforces similar foreign arbitral awards. In recent years, Chinese courts have taken a cautious stance, applying public policy with particular rigour in the financial sector—a field subject to strict regulation. This case demonstrates how the judiciary balances private contractual agreements against the backdrop of stringent financial regulations designed to mitigate financial risks.

The tribunal viewed the case as a contractual dispute arising from an equity transfer agreement where the respondent's breach warranted compensation. The claimant argued

[5] Article 58, paragraph 3 of the Arbitration Law of the People's Republic of China stipulates that "If the People's Court determines that the award violates public interest, it shall order the annulment of the award."

compensation was due based on Bitcoin's customary market valuation practices of pricing in US dollars. The tribunal determined the respondent failed to fulfil the contract as agreed. It also ruled the argument that Bitcoin's supposed illegality made its value unquantifiable contradicted the principle of good faith. To estimate damages, the tribunal respected Bitcoin trading customs by referencing the cryptocurrency's closing price on okcoin.com. It treated the contractual obligations primarily as a private commercial matter between the parties.

However, the Court's review of the arbitral award extended beyond the private contractual dispute, emphasizing the broader public policy considerations at play. It highlighted the necessity of upholding strict financial regulations designed to mitigate systemic risks. In annulling the award, the Court underscored the importance of aligning decisions with China's regulatory framework to maintain financial stability.

Unlike arbitral tribunals, which primarily focus on private commercial interests, the Court's role in judicial review includes safeguarding public authority and protecting societal interests. In this case, when examining an award with Bitcoin as its subject matter, the Court faced a nuanced challenge: balancing the private preferences for emerging transaction methods, such as Bitcoin, with the stringent financial rules aimed at curbing technological risks. Supporting only commercial interests could potentially disrupt legal order while prioritizing stringent policy alone may dampen expectations around private digital currencies and hamper digital economic development.

While the Court did not dispute the tribunal's findings that Bitcoin holds property attributes or that the respondent breached the contract, it drew a critical distinction. The Court found that equating bitcoin compensation to USD and then converting it to CNY indirectly supported prohibited exchanges between cryptocurrencies and legal tender. This, the Court ruled, conflicted with the public interest and violated bans on private digital currency trading.

Another issue in this case is that the Announcement regarding Bitcoin transactions is merely a departmental regulation, not a statute or legally binding provision. Why, then, does violating these regulations constitute a breach of public policy? This is because the content of these documents pertains to financial security, market order, and national macroeconomic policy, which fall under the domain of public order. The extent to which these departmental regulations reflect public interest largely depends on the intensity of financial regulation at different times. The reason for annulling the award in the present case was not merely due to a violation of the regulation but also to protect public property rights, safeguard the legal status of the RMB, prevent money laundering, and maintain financial stability.

Faced with such stringent interpretations towards public policy, how should parties navigate crypto-asset disputes in Mainland China? The case of *Yan et al. v. Li et al.*, adjudicated by the

Shanghai No. 1 Intermediate Court, seems to offer a practical solution.[6] In this case, the Shanghai No. 1 Intermediate Court similarly recognized Bitcoin as possessing the attributes of virtual property and virtual goods deserving legal protection. It ruled that if the appellants' Bitcoin could not be returned, they should be compensated at market value. However, when determining the market value of Bitcoin, the Shanghai No. 1 Intermediate Court did not rely on the transaction prices provided by price information platforms. It reasoned that CoinMarketCap.com is not a recognized virtual currency price information platform in China, and thus its Bitcoin transaction price data could not be directly used as a standard for determining the respondents' losses. Instead, the court adopted a more straightforward approach. In this case, since both parties agreed on the compensation amount for Bitcoin, the court calculated compensation based on the amount confirmed by both parties.

In the same vein, Guiding Case No. 199 likely underwent thorough consideration regarding judicial policy. On the one hand, it clarified that the arbitral award must not breach the "red line" of prohibitive financial regulations. On the other hand, it left room for the arbitral tribunal to recognize the legality of Bitcoin transactions, thereby creating space for virtual currencies to exist and evolve. It can be inferred that if the claimant had requested the respondent to continue performing the contract and return Bitcoin as agreed, without involving Bitcoin's currency exchange aspect, it might not have been deemed a violation of public policy.

In comparing China's handling of crypto-related disputes with other jurisdictions, particularly common law countries, it's interesting to note how public policy considerations also play a key role in the enforceability of arbitral awards. For example, in 2023, the English Commercial Court ruled in Payward Inc. v. Chechetkin that consumer protection concerns outweighed the enforceability of a cryptocurrency arbitral award.[7] While arbitration remains a viable option for cryptocurrency-related disputes due to its flexibility and confidentiality, this case highlights the importance of judicial oversight and the recognition of local legal principles. For the cryptocurrency industry, it is a reminder that while arbitration is often seen as a preferred method of dispute resolution, courts may intervene when public policy, particularly concerning consumer rights, is at stake.

In conclusion, Guiding Case No. 199 illustrates the current stance of Chinese courts on disputes involving Bitcoin transactions. The decision reflects a pragmatic approach that aligns with China's judicial sovereignty and national interests. Since macroeconomic policies often evolve in response to the needs of economic and social development, the application of public policy in the judiciary is also subject to change over time. As China's digital currency system and regulatory framework continue to improve, this stance may become more flexible. Future cases may prompt courts to adapt their approach. Whether similar arbitral awards will be enforced in the future remains to be seen.

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[6] *See Yan et al. v. Li et al.*, (2019) Hu 01 Min Zhong No. 13689 (沪01民终13689号).
[7] *See Payward Inc and Others v Chechetkin* [2023] EWHC 1780 (Comm).

ENVIRONMENTAL PROTECTION IN INVESTMENT ARBITRATION: NAVIGATING A SUSTAINABLE PATH

V. Krishna Priya and Bhavini Singh

ABSTRACT

This paper explores the relationship between a host state's investment treaty obligations and its duty to protect the environment and take climate action, with a focus on challenges faced by the Global South. The surge of investment arbitrations resulting from host states' actions under investment agreements has raised concerns about neo-colonialism, questionable resource management, and the perceived conflict between economic development and environmental stewardship.

Examining the regulatory framework, including the UN Framework Convention on Climate Change, the Paris Agreement, and the Glasgow Pact, reveals the tension between economic development in fossil fuel-dependent Global South economies and climate goals. The intersection thereof with investment arbitration raises concerns regarding the legitimacy of the investment arbitration process as it stands, and whether present trends will result in striking a balance between sustainable development, legislative sovereignty, and investors' rights.

1. INTRODUCTION

The fact that anthropogenic climate change threatens economies and livelihoods is now indisputable. While there are numerous challenges in ascertaining and implementing measures to mitigate its impact, a significant bone of contention that specifically challenges the role of the Global South is investment arbitrations that arise out of legislative and/or executive actions of host states from the Global South under various investment agreements between the host states and investors that are predominantly from the Global North. A closer look at these investment arbitrations paints a picture of neo-colonialism, questionable natural resource management and environmental stewardship, and the seemingly inherent antagonism between economic development and environmental protection. This paper seeks to examine the interplay and/or conflict between a host state's investment treaty obligations and its duty towards environmental protection and climate action. The cases examined for this purpose predominantly emerge from investment treaties between countries from the Global South due to the overarching priority that many of these countries' constitutions give to environmental protection due to the presence of fragile ecosystems and historical environmental stewardship by indigenous communities.

2. REGULATORY FRAMEWORK

The United Nations Framework Convention on Climate Change ("**UNFCCC**") was established in 1992 whose aim was the stabilisation *of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system*.[1] The establishment of the UNFCCC was preceded by the first report of the Intergovernmental Panel on Climate Change in 1990. The impact of anthropogenic climate change was identified nearly 30 years ago but addressing its impact has been moving at a snail's pace. This is predominantly due to the lengthened global supply chains and the interaction (or conflict rather) between the steps needed to be taken to arrest global climate chaos and the need for economic development. While this debate itself is fairly cliche, its relevance is higher now more than ever.

The Paris Agreement which was adopted at the COP 21 of 2015 is rightly touted as one of the most important pieces of collective action to limit the global temperature rise to 2°C and lays down the concept of Nationally Determined Contributions ("**NDCs**") - national climate action plans which are aimed to place a ceiling on the emissions of greenhouse gasses by its signatories. Countries have been submitting these plans since 2020 and each successive NDC is supposed to reflect a higher target for cutting emissions.

In 2021, countries signed the Glasgow Pact which aims to reduce fossil fuel usage and subsidies. However, fossil fuels remain to be the primary sources of energy for 'emerging economies' in the Global South. The scale of energy transition that is required to arrest climate change impact is clearly huge, and potentially at odds with the obligations of nation-states under various investment treaties.

While there has been a rise in public interest litigation pertaining to climate change impact over the last few years with reliance on principles of intergenerational equity and non-implementation or insufficiency of the NDCs to address climate change impact, the same has often not yielded the necessary legislative action. This is primarily due to fears of alienating international investors in the Global South. With the lengthening of the global supply chains and the relative ease of doing business in the Global South countries, climate action is often seen as an impediment to attracting foreign investors, and consequently as an antagonist to development. The increasing pressure on nation-states to come up with more ambitious climate action targets is being significantly hindered by investment arbitrations to stop nation-states from taking meaningful action as required by their treaty obligations under the Paris Agreement.

This is especially prominent in the Global South where countries face an increased litigation risk from investors for acting upon climate change through the invocation of provisions such as change in law or loss of potential profits in BITs and other investment treaties. The conflict between private business interests and the public interest has become more prominent in the last decade. One such instance is the case of *David Aven v. Costa Rica* where the claims arose out of the Bilateral Investment Treaty signed between Canada and Costa Rica, where the

[1] United Nations Framework Convention on Climate Change 1992, art. 2.

claimant invoked the BIT upon the termination of its hotel, beach club and villas construction project, following the revocation of an environmental viability permit after determining that the property included wetlands and a protected forest.[2] Similarly, a Canadian-Australian mining company's claim of USD 314 million against the government of El Salvador for disallowing gold mining in the country was dismissed by an arbitral tribunal at the ICSID in 2016 and the mining company was ordered to pay the legal costs to the government of El Salvador.[3]

As evident from the foregoing, investment treaties and dispute resolution processes thereunder interact with environmental concerns in myriad ways, at every stage from treaty provisions to jurisdictional issues, merits issues, damages, grounds for annulment, and at the stage of seeking enforcement if necessary. These range from overt expressions such as specific treaty provisions regulating the conduct of foreign investors with respect to the environment or providing the state with the right to initiate counterclaims[4] (which impliedly includes counterclaims for environmental damage) to more subtle conflicts arising as a result of political processes and inherent biases within the investment arbitration system, skewing the balance between investor protection and the right of a state to frame environment protection legislations. This is exacerbated by the fact that the very purpose of investment treaties is to protect the profitability of investments and treaties are largely concerned with protecting investors' rights, at the cost of the rights of the state, which are rarely, if ever, addressed, although the practice appears to be changing gradually in newer treaties.[5]

In practice, the conflict is often witnessed when states have raised issues of environmental damage by investors, whether in the form of counterclaims or as a justification for measures under challenge by the investor, although there have been rare instances of investors suing states for environmental negligence[6]. The lack of consistency by international investment tribunals in addressing these issues has also led to greater conflict and uncertainty with regard to potential directions the jurisprudence may take, and the very real impacts this may have as climate change remains a dire threat, and the Global South continues to face disproportionate consequences thereof, which is an area that requires immediate attention.

One method of attempting to ensure that states retain legislative sovereignty in this context is the "carve-out" method used in newer investment treaties, wherein regulation of matters pertaining to public health or environment protection is exempted from the scope of protections accorded to investors under the treaty.[7] Such provisions are likely to gain greater significance in the context of policy changes going forward, including energy transition. However, even these protections are diluted on occasion by investment arbitration tribunals, for instance in the *Eco Oro* proceedings, wherein the tribunal held that a carve out may allow the respondent state to legislate on environmental issues "...without finding itself in breach of

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[2] *David R. Aven and Others v. Republic of Costa Rica,* ICSID Case No. UNCT/15/3.
[3] *Pac Rim Cayman LLC v. Republic of El Salvador,* ICSID Case No. ARB/09/12.
[4] *Burlington Resources Inc. v. Republic of Ecuador,* ICSID Case No. ARB/08/5; Treaty between the United States of America and the Republic of Ecuador concerning the Encouragement and Reciprocal Protection of Investment, 1993.
[5] David Schneiderman, *Investment Law's Alibis: Colonialism, Imperialism, Debt and Development* (Cambridge University Press, 2022) 25.
[6] *Peter A. Allard v. The Government of Barbados,* PCA Case No. 2012-06; *Zelena N.V. and Energo-Zelena d.o.o. Indija v Republic of Serbia,* ICSID Case No ARB/14/27.
[7] *Peter D. Cameron, International Energy Investment Law: The Pursuit of Stability,* 2nd edn (Oxford University Press, 2021) 556; Agreement Between the Government of the Argentine Republic and the Government of New Zealand for the Promotion and Reciprocal Protection of Investments, 1999, art. 5(3); Agreement Between the Government of Canada and the Government of the Arab Republic of Egypt for the Promotion and Protection of Investments, 13 November 1996, art. XVII(3); Government of India, Ministry of Finance, 'Model Text for the Indian Bilateral Investment Treaty'.

the FTA, [but] this does not prevent an investor claiming . . . that such a measure entitles it to payment of compensation"[8] It is also relevant to note that at present, a majority of claims are being brought under older investment treaties, which rarely contain provisions addressing environmental issues.[9]

Further, it has been posited that policies in response to climate change, including policies to implement inter alia the Paris Agreement, could lead to investors initiating proceedings against states seeking large amounts of compensation, which is particularly problematic when contextualised within the current ISDS regime where claimant investors are largely from the Global North and respondent states from the Global South, with the claimed sums amounting to significant portions of the already financially weaker states' GDP.[10]

In light of the framework for international investment treaties and disputes arising thereunder, and the interplay thereof with necessary legal and regulatory transformations in the face of climate change, energy transition, and other connected issues is analysed below, at each stage of the investment dispute resolution process.

3. ISSUES AND ANALYSIS

a. Environmental concerns in the context of jurisdiction and admissibility:

The hypothesis of investment treaties leading to economic development for developing nations is the oft-used justification for high levels of protection accorded to investments; however, this premise itself is not uncontested.[11] In fact, investment laws and decisions by investment arbitration tribunals have contributed to worsening neo-colonialism and have posed challenges to human rights reform, land rights of indigenous peoples, environmental legislation, and agrarian reforms, all of which have disproportionately impacted the Global South.[12] States which may have otherwise been reluctant to permit foreign investments were constrained to do so as part of the conditions imposed by the World Bank in exchange for monetary assistance during economic crises.[13]

There is also growing evidence demonstrating that while the initial influx of capital to the host states is beneficial, the long term net results are negative, with greater outflow of capital and resources, as well as detrimental impacts on the host states' socio-political order, economy, environment, and human rights.[14]

The above, *inter alia*, raises questions regarding the legitimacy of the international investment dispute resolution process, arising from its inherently decentralised structure, wherein dispute resolution is entrusted to private, individual, party-appointed arbitrators.[15]

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[8] *Eco Oro Minerals Corp. v. Republic of Colombia,* ICSID Case No. ARB/16/41, para 830.
[9] UNCTAD, *Taking Stock of IIA Reform: Recent Developments* (Issue 3, June 2019) IIA Issues Note, 1.
[10] Kyla Tienhaara and Lorenzo Cotula, *Raising the cost of climate action? Investor-state dispute settlement and compensation for stranded fossil fuel assets* (International Institute for Environment and Development, October 2020).
[11] John Linnarlli, Margot E. Salomon, and Muthucumaraswamy Sornarajah, *The Misery of International Law: Confrontations with Injustice in the Global Economy* (Oxford University Press, 2018) 147; UNCITRAL Working Group III, 'Possible reform of investor-State dispute settlement (ISDS) – Submission by the Government of Brazil' A/CN.9/WG.III/WP.171 (14–18 October 2019) para. 1.
[12] Upendra Baxi, 'Postcolonial Legality: A Postscript from India' (2012) 45(2) Verfassung und Recht in Übersee / Law and Politics in Africa, Asia and Latin America 178, 189-193; *Supra* note 11, 145 et seq.
[13] *Supra* note 11, 152.
[14] *Supra* note 11, 151.
[15] Daniel Behn, Ole Kristian Fauchald, and Malcolm Langford (eds.), *The Legitimacy of Investment Arbitration: Empirical Perspectives* (Cambridge University Press, 2022) 4.

This gives rise to the issue of whether these private tribunals, appointed to adjudicate a limited set of issues defined under the terms of the relevant BIT, have overstepped their envisaged scope and jurisdiction by directly or indirectly infringing on sovereign states' rights to make policy decisions for their own citizens.

For instance, in *Metalclad v. Mexico*, the tribunal sidestepped the issue of environmental damage caused by the Claimant's hazardous waste management plant, and proceeded to rule on whether a Mexican municipal authority for the region had the right to deny Metalclad permits due to the environmental impact, concluded that it did not, and ordered Mexico to pay damages.[16] It is highly unlikely that Mexico, at the time of signing the BIT in question, was expecting the scope of powers of its municipal authorities to be adjudicated upon by a privately-appointed investment tribunal.

In addition to these broader questions relating to the scope and powers of tribunals, and the principled debate regarding their authority, states have also raised arguments during investment proceedings, contending that claims should be rendered inadmissible due to the investor's violation of environmental laws, since such violations render the investments illegal and thus not protected under the BIT, albeit with mixed results.[17] It remains to be seen whether newer decisions will trend towards barring investors' claims on the grounds of illegality in the event of violation of international or domestic environmental laws, particularly since a large number of decisions where illegality has been raised as a jurisdictional issue have held that it acts as a bar to jurisdiction and/or admissibility only when the illegality arose during the making of the investment and not when the illegal acts were committed after the fact, during the course of the investment.[18] The latter is more likely in the case of environmental damages and violation of a state's environmental laws arising from the operation of the investment, and the issue is likely to gain significance as investment claims resulting from strengthening environmental laws increase.

b. Merits – potential overstepping and exacerbating of environmental damage:

Arbitral tribunals usually shy away from adjudicating upon the issue of environmental law violations in the host country under investment treaties. However, there are certain exceptions where the tribunal has decided upon the intersections of the terms of an investment treaty and the domestic laws of the host country. In some instances, such as *Perenco vs. Ecuador*, the tribunal recognised Ecuador's "strict liability" regime vis-a-vis environmental damage and ruled in favour of the Ecuadorian government on grounds that Perenco had caused severe damage to soil and water in the Amazon rainforest, where it operated oilfields.[19] It is pertinent to note that the legal regime of Ecuador recognises the rights of nature by itself in its constitution and the tribunal acknowledged this recognition and considered it while examining Ecuador's counterclaims.[20] In this case, the tribunal examined the evolution of Ecuadorian law from a fault-based regime to a strict liability

[16] *Metalclad Corporation v. The United Mexican States,* ICSID Case No. ARB(AF)/97/1 paras. 86, 131.
[17] *David Aven et al. v. The Republic of Costa Rica,* Case No. UNCT/15/3, paras. 8, 15, 190, 327 et seq.; *Mamidoil Jetoil Greek Petroleum Products Societe S.A. v. Republic of Albania,* ICSID Case No. ARB/11/24, paras. 289 et seq.
[18] Rudolf Dolzer, Ursula Kriebaum, and Christoph Schreuer, *Principles of International Investment Law* (Oxford University Press, 3rd edn, 2022) 110.
[19] *Perenco Ecuador Limited vs. Republic of Ecuador,* ICSID Case No. ARB/08/6.
[20] Constitution of Ecuador 2008, Chapter Seven, art. 71.

regime to ascertain Perenco's liability and ruled that Perenco was liable for environmental damage under the Ecuadorian law[21]. The tribunal's interpretation of the applicable statutes in this instance reflects and respects the Ecuadorian constitution's focus on environmental protection and rules of interpretation.

In contrast, in *Infinito Gold Ltd vs. Costa Rica* which was in relation to the Las Crucitas gold mining project in Northern Costa Rica, the tribunal went into the merits of the environmental law concerns and ruled that the government's indefinite moratorium on open pit mining did not fall within the exceptions, and amounted to a substantive breach of the Canada-Costa Rica BIT.[22] Infinito contended that the mining ban amounted to the violation of the standards of fair and equitable treatment (FET) consistent with customary international law and that the same was not protected by the environmental exception under the BIT. The tribunal, in this instance concluded that while the state can take measures to protect the environment, the exception under the BIT does not exempt the state from complying with its substantive and mandatory treaty obligations after applying the general rules of interpretation under the Vienna Convention on the Law of Treaties.

In these two cases, we see a contrasting story of factors taken into account by arbitral tribunals while adjudicating environmental damage claims. That is to say, the nature of tribunals' intervention in environmental matters is not consistent and dependent on the provisions of the respective investment treaties, as it should be. But, the question of prioritising domestic environmental regimes over protection of foreign investor interests must be looked at with greater focus.

In instances where the tribunals rule in favour of the investors, it must be taken into account the inherent power imbalance between the actors. In some instances, the damages claimed by the investors end up forming a significant chunk of the host state's GDP. Such instances significantly hamper the state's attempts to meet their NDCs under the Paris Agreement. In most cases, while examining environmental damage claims, tribunals have often interpreted the exceptions to the investment treaties in restrictive terms.[23] In most cases and as illustrated above, a tribunal's examination of environmental concerns is strictly based on the facts at hand and not necessarily as questions of law.

c. Sufficiency of remedies in the context of environmental issues in investment arbitrations:

Investment arbitration, by its very nature, excludes crucial stakeholders from the process, particularly the citizens of the state whose lives are directly impacted by the environmental damage caused by the investor or indirectly as a result of national financial crises resulting from damages awarded to investors by tribunals.

In terms of remedies, states have sought to initiate counterclaims; however, the vast majority of older treaties do not contain provisions permitting the same, and even with newer treaties

[21] *Supra* note 19.
[22] *Infinito Gold vs. Republic of Costa Rica,* ICSID Case No. ARB/14/5.
[23] Christina L. Beharry and Melinda E. Kuritzky, 'Going Green: Managing the Environment Through International Investment Arbitration' (2015) 30(3) American University International Law Review.

that permit counterclaims, success is rare.[24] The asymmetry of protections, and consequently, remedies afforded to states is an issue that remains to be addressed.

Further, the suitability of post-facto financial compensation as the only remedy available to a state after permanent destruction of the environment, displacement of people, and human rights violations is not without question.

d. Evolution of the investment dispute resolution system and the consequences thereof:

The investment arbitration regime is evolving in response to the above conflicts, as can be witnessed with changes to the procedure as well as substance of investment treaties and dispute resolution processes. As far as substance is concerned, notably, investment treaties such as the Trans-Pacific Partnership and the Pan-African Investment Code ("**PAIC**") have sought to create specific exceptions to states' obligations for environmental legislation.[25] The Trans-Pacific Partnership phrases the exception to expropriation in the following terms:

> *"Non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety and the environment, do not constitute indirect expropriations, except in rare circumstances."*

Provisions of this nature, however, have not yet been tested in practice, and there exists the possibility of overly liberal interpretations of phrases such as "except in rare circumstances" by tribunals.

Additionally, newer treaties contain references in the preamble or other provisions to the principles of corporate social responsibility and 'encouraging' states to comply therewith.[26] Rarely, instruments such as the PAIC have taken this further and sought to impose enforceable obligations on investors.[27]

In terms of procedural evolution, recognising the importance of previously excluded stakeholders, newer treaties have sought to include provisions allowing for participation of non-disputing parties in the proceedings and submission of amicus curiae briefs.[28] This issue has also been raised by states in their submissions to the UNCITRAL Working Group III ("**WG III**"), which is undertaking the drafting of an instrument to institute procedural reforms in the investor-state dispute resolution process.[29]

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[24] See for instance *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic,* ICSID Case No. ARB/07/26.
[25] Trans-Pacific Partnership, Annex 9-B.
[26] Canada–Peru FTA 2009, art. 810; Trans-Pacific Partnership, art. 9.17.
[27] Pan Africa Investment Code, art. 22.
[28] EU-Canada Comprehensive Economic and Trade Agreement, Annex 29-A, paras. 43–6.
[29] UNCITRAL Working Group III, 'Possible reform of Investor-State dispute settlement (ISDS) – Comments by the Government of Indonesia' A/CN.9/WG.III/WP.156 (9 November 2018) paras. 5-6;
UNCITRAL Working Group III, 'Possible reform of investor-State dispute settlement (ISDS) – Submission from the Governments of Chile, Israel, Japan, Mexico and Peru' A/CN.9/WG.III/WP.182 (9 November 2018) 10; UNCITRAL Working Group III, 'Possible reform of Investor-State dispute settlement (ISDS) – Submission by the Government of Burkina Faso' A/CN.9/WG.III/WP.199 (9 November 2020) 9; UNCITRAL Working Group III, 'Possible reform of Investor-State dispute settlement (ISDS) – Submission from the Government of South Africa' A/CN.9/WG.III/WP.176 (17 July 2019), para. 9.

Further, Global South states in particular have been submitting proposals favouring reforms to balance the asymmetry in the present investment dispute resolution system, highlighting the importance of sustainable development, the protection of human rights and the environment. The proposals before the WG III include allowing counterclaims for violations of host state laws, initiation of proceedings by states, imposing substantive obligations on investors, and creating a new, more inclusive alternative to the present system of investor-state dispute resolution.[30]

It is still unclear whether such provisions will be included in the eventual convention for reforms, and how investment tribunals will address these in future disputes.[31]

4. CONCLUSION/WAY FORWARD

While there are steps being taken towards addressing the extant power imbalance between the investors from Global North and Global South host states, there are bound to be challenges with respect to the implementation and enforceability of these steps. For instance, when a tribunal comprises private individuals from neutral/third party states, the question of their qualifications and legitimacy to interpret domestic laws and counterclaims for violations of host state laws arises.

The newer treaties do recognise and offer specific protections and impose specific obligations with respect to issues that were neglected earlier, but the question of acceptance of these newer terms is also worth considering. With international negotiation processes still dominated by nation states from the Global North, levelling the playing field is no easy task. However, the importance being accorded to environmental protection in international investment and dispute resolution processes is the first of many steps in this direction. The efficacy of such measures however, remains to be seen.

Even if environmental concerns are accorded higher primacy in the future, the rules of interpretation and jurisprudential wisdom will still be constrained. An alternative recourse mechanism in that instance would be the constitution of specialised environmental claims dispute resolution. But the costs of constituting such an institution would be immense. In order to ensure that environmental protection is given the importance it deserves, newer treaties could incorporate facilitative processes and expert advice from the various institutions/bodies constituted under the Paris Agreement and the larger aegis of the UNFCCC. This would help balance the playing field and find the elusive middle ground between the need to increase economic prosperity and protection of the environment.

[30] UNCITRAL Working Group III, 'Possible reform of Investor-State dispute settlement (ISDS) – Submission from the Government of South Africa' A/CN.9/WG.III/WP.176 (17 July 2019), paras.12 et seq; UNCITRAL Working Group III, 'Possible reform of investor-State dispute settlement (ISDS) – Multiple proceedings and counterclaims, Note by the Secretariat' A/CN.9/WG.III/WP.193 (22 January 2020) paras. 38-44

[31] Thomas Schultz and Federico Ortino (eds), The Oxford Handbook of International Arbitration (Oxford University Press, 2020) 483.

JURISDICTION OF THE TRIBUNAL IN COMPLEX CONTRACTUAL RELATIONSHIPS: THE DUEL OF ARBITRATION AGREEMENTS

Lea Christ

ABSTRACT

This article addresses what the author considers to be the underrated issue of conflicting arbitration agreements. Despite the prevalence of extensive jurisdictional disputes regarding the applicable arbitration agreement, there remains a scarcity of detailed and contemporary legal literature on the topic. Having recently encountered the challenge of handling incompatible arbitration agreements within the same dispute, the author endeavours to heighten the reader's consciousness of conflicting arbitration agreements. The aim of this article is not only to shed light on these issues, highlighting the most common problems but also to provide practical argumentation strategies for dealing with them.

1. INTRODUCTION

In our interconnected and globalised world, business relationships are becoming increasingly complex. This complexity is reflected in a sophisticated network of contractual arrangements that encompass a multitude of master and ancillary agreements, side letters, memoranda of understanding - and parties. Such intricate contractual frameworks are designed to meet the dynamic needs of modern business, but they can also present formidable legal challenges.

In the realm of such business relationships, parties often opt for alternative dispute resolution mechanisms, with arbitration being a common choice. However, the critical task of drafting arbitration clauses is often overlooked, even by sophisticated parties and counsel in complex commercial relationships involving multiple contracts and dispute resolution agreements. In particular, the tendency to copy model arbitration clauses from institutional websites into drafts without due consideration may result in recurring disputes over the jurisdiction of arbitral tribunals.

As we will explore in this article, it is imperative that the formulation of arbitration clauses within a multifaceted contractual structure is not relegated to a hasty afterthought at the end of the contract drafting process. Rather, arbitration clauses require heightened diligence to synchronise and harmonise interrelated dispute resolution mechanisms, thereby avoiding disputes over jurisdiction. If this careful coordination has been neglected, the question arises as to whether and how incompatible arbitration agreements can be effectively reconciled.

2. TYPICAL CONSTELLATIONS OF ARBITRATION AGREEMENTS IN COMPLEX CONTRACTUAL STRUCTURES

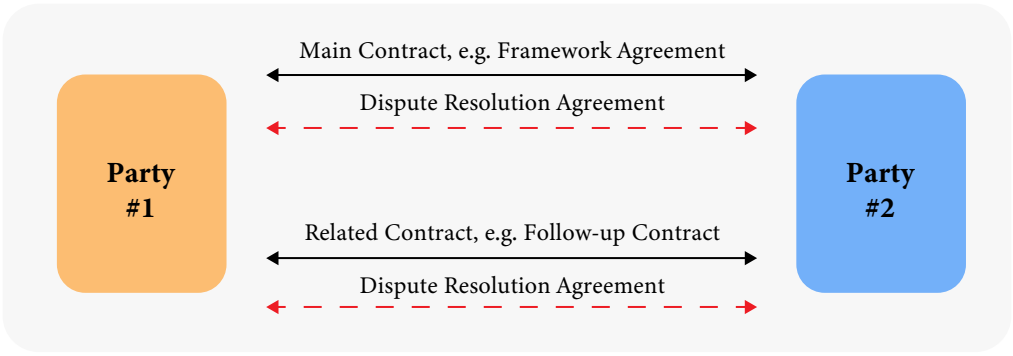
When parties enter into multiple arbitration agreements, either simultaneously or successively, in the course of their commercial interactions, the likelihood of conflict between these dispute resolution mechanisms naturally increases. Disputes over jurisdiction are common when multiple arbitration agreements are invoked in a single dispute. This is equally true in cases of parallel arbitrations commenced under different arbitration agreements on related or identical issues. As a result, parties find themselves embroiled in preliminary disputes over the interrelationship of arbitration agreements long before getting to the substantive dispute at hand.

A. Arbitration agreements in interrelated contracts

In practice, interrelated contracts often involve a scenario where, within a single economic transaction, the parties enter into a primary contract followed at a later stage by one or more ancillary contracts. Alternatively, the parties may enter into multiple contracts simultaneously as part of an economic transaction. In cases where the parties' relationship spans several projects over many years, it is also not uncommon for the parties to enter into consolidated agreements covering completely different projects at once. In all of the constellations mentioned such contracts that relate to the same economic transaction may be considered to be interrelated contracts.

Interrelated contracts often create complex dispute-resolution mechanisms. This is particularly the case where the parties agree to several dispute resolution agreements in interrelated contracts. A typical example is where the parties enter into a framework agreement followed by individual agreements such as purchase orders. For each or some of these multiple interrelated contracts, the parties formulate separate arbitration clauses (multiple contracts and multiple arbitration agreements).

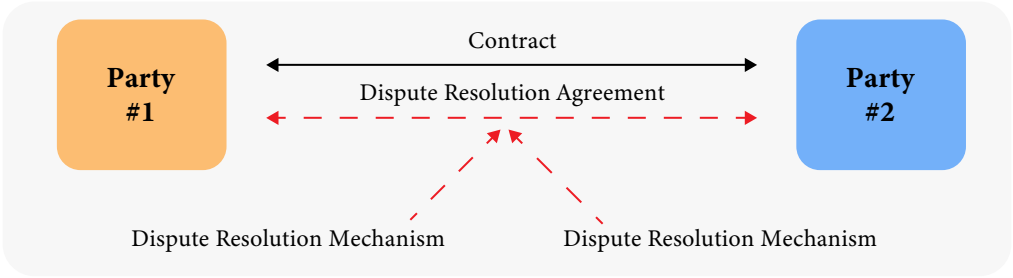
Conversely, parties may enter into several interrelated contracts but agree only to a single arbitration agreement, typically within the framework agreement (multiple contracts and one arbitration agreement). However, there are cases in which the parties do not agree to arbitrate in the framework agreement, but only in one or more of the subsequent interrelated contracts.



Var. 1

As a special form of interrelated contract, a settlement agreement may also encourage complex dispute resolution mechanisms. This is particularly true if the settlement agreement only partially or incompletely addresses the underlying contractual situation. It is therefore conceivable that matters relating to a single underlying contractual relationship may be partly governed by a settlement agreement and partly not, and thus may be subject to different dispute resolution agreements.

Moreover, dispute resolution mechanisms may affect a contractual relationship in a variety of ways, such as through the incorporation of one or more of the parties' General Terms and Conditions (GTC) or terms of sale or purchase. Even unusual situations have been discussed in the past, such as the effect of a party's articles of association providing for arbitration.



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All these constellations and many more can lead to complex dispute resolution mechanisms.

B. Overlapping material scope of arbitration agreements

But how does the actual conflict of multiple arbitration agreements of interrelated contracts come about in practice? The potential for conflict escalates when such arbitration agreements, at least partially, overlap in their scope *ratione materiae*. The material scope of an arbitration agreement is drafted to define the disputes to be arbitrated, ranging from broad scope to, although less common, a narrow focus on specific contractual issues or circumstances. However, in the maze of complex commercial relationships, parties often struggle to clearly define and limit the scope of arbitration agreements. The specific wording of multiple arbitration agreements linked to interrelated contracts and the characterisation of disputes can lead to significant overlap in their scope, especially when several broadly worded arbitration clauses are juxtaposed.

Examples of wording which may appear to extend the scope of an arbitration agreement beyond that of the underlying contractual framework are all variations of "all disputes of any nature whatsoever arising out of or in connection with this agreement" or, even worse, "all disputes between the parties". Although the meaning of these commonly used broad arbitration clauses may seem obvious to users at first sight, practical experience has shown that there is often a lack of clarity as to their scope. For instance, in the case of a dispute

between the parties concerning both the subsequent contract, such as a purchase order, and, necessarily, the parties' relationship under the interrelated framework contract, it may be concluded that the scope of the arbitration agreements in both the framework contract and the purchase order overlap significantly if they are both drafted in broad terms. Technically, a dispute under a purchase order is both a dispute under the framework agreement, a dispute under the purchase order and, of course, a dispute between the parties, is it not?

C. Conflicting arbitration agreements in terms of time

In addition, disputes over jurisdiction may arise over the overlapping scope of arbitration agreements due to temporal factors, such as when a party contends that an arbitration agreement has been amended or replaced by a new arbitration agreement due to termination or defect. Nullity, unenforceability and inoperability of arbitration agreements can lead to the question of whether they are superseded by later arbitration agreements in place. Conversely, the question may also arise as to whether a more recent arbitration agreement that is not (or no longer) effective can be replaced by an earlier one.

D. Other factors for potential conflict

The complexity is heightened in scenarios involving a large number of interrelated contracts and arbitration agreements; And further complicated by the involvement of one or more third parties who are not necessarily party to all the contracts and arbitration agreements within a commercial transaction. This can manifest itself within a bilateral commercial relationship, through sub-contracting within a group of contracts, or chain contracts, allowing for any combination of multi-contract, multi-arbitration-agreement and multi-party arrangements. As a result, in the event of a dispute, parties to such complex business structures may not know where to bring a claim against the other party and under which rules based on which arbitration agreement. When third parties are involved in a complex business structure, there may even be confusion as to who the opposing parties to an arbitration agreement are and against whom a claim can be brought thereunder.

3. RESOLVING CONFLICTING ARBITRATION AGREEMENTS

If several arbitration agreements come into play for a dispute in the same or related matter, how can any conflict among the arbitration agreements ideally be resolved? The author proposes a basic two-step approach. First, the effectiveness of all arbitration agreements relevant to a dispute must be reviewed. Although this sounds obvious, it is often overlooked. If the review is positive and effectiveness is confirmed, the arbitration agreements must then be interpreted as to their scope and interaction. Each should be interpreted in the light of the contextual transaction, using the basic tools of contractual interpretation as well as considering the peculiarities of arbitration. Because, as Prof. Dr. Bernard Hanotiau wrote, *"[c]oncrete solutions to the problems raised (. . .) cannot be examined without calling to mind several fundamental principles of arbitration"*[1].

[1] Bernard Hanotiau, 'Complex - Multicontract - Multiparty – Arbitrations' (1998), Volume 14, Issue 4, Arbitration International, 369, 372.

A. The effectiveness of arbitration agreements

As said, the initial step in navigating a maze of arbitration agreements is to first verify the validity and current standing of all relevant arbitration agreements. This is particularly vital where temporal factors may influence their applicability, as mentioned above. Such review can be key to untangling conflicting arbitration agreements and avoiding extensive disputes over jurisdiction.

The Separability Presumption holds that arbitration agreements are distinct contracts, functioning independently from the substantive contracts they reference.[2] Generally, but of course, also depending on the law applicable to the arbitration agreement, contracts are concluded by means of at least two declarations of intent which are identical in content and which are made by reference to each other.[3] Article II (1) of the New York Convention refers to "*an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration*". For the arbitration agreement to be effective, it must have been effectively concluded, not have been terminated or become invalid or be subject to any impediment to enforcement or inoperability.[4] A practical example of the question of the termination of an arbitration agreement is the following current non-public International Chamber of Commerce (ICC) Case[5]. In this case, the claimant asserts claims for damages arising from several purchase orders concluded under a distribution agreement. However, some of the purchase orders were originally issued under an earlier distribution agreement between the parties. This older distribution agreement contained an arbitration clause in favour of the Munich Chamber of Commerce which was to apply to "*all disputes relating to this agreement*". The older distribution agreement also provided that it would become an integral part of all purchase orders, which in turn were meant to be separate contracts each. The other part of the purchase orders in dispute were issued under a new distribution agreement, which the parties concluded many years after the old distribution agreement in order to update their cooperation. The new distribution agreement contained an ICC arbitration clause for "*any dispute arising out of or in connection with this agreement*" which the arbitration was commenced under by the claimant. The new distribution agreement further provided that the new distribution agreement "*supersedes*" the old distribution agreement from its effective date. The question now is whether claims under the purchase orders of the old distribution agreement can be enforced under the ICC arbitration clause of the new distribution agreement. The case is still pending, but it illustrates the issue well: Has the arbitration agreement of the old distribution agreement, which the parties agreed to make an integral part of the purchase orders already executed, been superseded by the arbitration agreement of the new distribution agreement?

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[2] Gary B. Born, *Volume I: International Commercial Arbitration* (2nd edn, Wolters Kluwer 2009) 312.
[3] Article 7 (1) of the UNCITRAL Model Law (2006) stipulates "'*Arbitration agreement' is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement*".
[4] Cf. Margaret L. Moses, *The Principle and Practice of International Commercial Arbitration* (1st edn, Cambridge University Press 2008) page 31 et seqq; Stephan Balthasar, *International Commercial Arbitration* (2nd edn, C.H. Beck 2021) Part 1, Chapter A, para. 74.
[5] *Cypriot Company v. German Company,* ICC Case No. 28273GL, pending, not public.

The case underscores the necessity of determining first which dispute resolution mechanisms have been effectively concluded between the parties and remain active. The validity of arbitration agreements is a nuanced issue. Irrespective of the "classic" questions of effective establishment and continued existence of arbitration agreements, arbitration agreements that are poorly drafted risk being considered void, ineffective, or unenforceable as well.[6] Common errors include incorrect references to arbitral institutions or specifying arbitration under certain institutional rules but administered by a different arbitral institution. Contracts with both forum selection and arbitration clauses present varied judicial approaches, with some courts invalidating the arbitration agreement. Language suggesting arbitration as an option or an endeavour can also create ambiguity regarding consent to arbitrate under the specific agreement.

By methodically analysing the arbitration agreements in place and perhaps eliminating some, apparent conflicts can be resolved without the need for interpretation of the scope.

B. The contractual interpretation of arbitration agreements

Once it has been established which dispute resolution mechanisms are effective against each other, the second step is to examine whether and to what extent there are conflicts in scope. If the intentions behind the arbitration agreement are not immediately clear, as is usually the case, the critical factor in resolving conflicts is their interpretation.

Arbitration agreements, as contracts, are subject to general rules of contract interpretation. The governing substantive law of the arbitration agreement, which may differ from the law governing the material contract, dictates the applicable national rules of interpretation. For instance, in ICC Case No. 4392, 1983[7], the sole arbitrator interpreted the conflicting dispute resolution mechanisms according to the "*clear rules from the point of view of civil procedure and equally clear consequences from the point of view of private law*"[8]. The case revolved around the question of whether an arbitration agreement in a principal contract could extend to an interrelated contract, where the interrelated contract was covered by a choice of court clause stemming from one of the parties' GTCs (this was rejected in the end).

National contract interpretation rules vary, with the main distinction being between objective interpretation in common law and subjective interpretation in many civil law systems.[9] However, given the broad similarities in national interpretation principles, the law applicable to the arbitration agreement is unlikely to significantly impact its interpretation.[10] Against this background, the following excerpt from the infamous Fiona Trust appeal to the House of Lords[11], explained in scholarly terms, may serve as a useful guide for interpretation. The appeal involved the scope and effect of arbitration agreements in eight charterparties between a corporate group and eight charterers. The parties agreed that "*any dispute arising*

[6] See for the following examples with case law: Stephan Balthasar, *International Commercial Arbitration* (2nd edn, C.H. Beck 2021) Part 1, Chapter A, para. 74.
[7] *Yugoslavia Company v. German Company*, ICC Case No. 4392, 1983, Award.
[8] Translated from French, *Yugoslavia Company v. German Company*, ICC Case No. 4392, 1983, Award, as discussed in Clunet, (1983) No. 4 Journal du Droit International , 907 et. seqq..
[9] Jean Francois Poudret et al., *Comparative Law of International Arbitration*, (2nd edn, Sweet & Maxwell 2007) 264; Wolfgang Breyer et al., 'What do the words mean: Different approaches to the interpretation of contracts' (2019) Vol. 36 Part 2 The International Construction Law Review, 3, 9 et seq..
[10] Jean Francois Poudret et al., *Comparative Law of International Arbitration*, (2nd edn, Sweet & Maxwell 2007) 264.
[11] *Premium Nafta Products Ltd et al. v. Fili Shipping Company Limited and others* [2007] UKHL 40.

under this charter" would be subject to arbitration at either party's option, in addition to the jurisdiction of the English courts. Central to the dispute was whether allegations of bribery-induced charterparties constituted a dispute under the charter. Lord Hoffmann, in addressing this, rightly stated: "*Arbitration is consensual. It depends upon the intention of the parties as expressed in their agreement. Only the agreement can tell you what kind of disputes they intended to submit to arbitration. But the meaning which parties intended to express by the words which they used will be affected by the commercial background and the reader's understanding of the purpose for which the agreement was made*."[12]

In this context, a recent decision by the High Court of Singapore[13] in a setting aside procedure is also worth mentioning, which dealt with the relationship between a broadly worded arbitration agreement and a choice of court clause in interrelated contracts. The claimant and the first respondent were parties to a project agreement for the construction and operation of a plant on the claimant's land, which was to be transferred to the second respondent, a subsidiary of the first respondent. The project agreement contained an arbitration clause *("If a dispute (of any kind whatsoever) arises between the Parties (…) Any dispute shall be settled by arbitration in accordance with the current applicable rules of the Singapore International Arbitration Centre (…)")*. The claimant and the first respondent later entered into a lease agreement regarding the claimant's land which provided for the exclusive jurisdiction of the Malaysian courts *("This Agreement and its validity, construction and performances (…) the Parties hereof hereby submit to the exclusive jurisdiction of Court of Malaysia.")*. The second respondent participated in the project but was not a party to either of the agreements. Once the project was well underway, the claimant denied both respondents access to the land because the first respondent allegedly failed to obtain certain permits for the plant. The claimant challenged the lease agreement before the Malaysian court and sought an injunction to restrain the respondents from entering, accessing and taking possession of the claimant's land relying on the choice of court clause. While an application by the respondents to stay the proceedings in favour of arbitration proceedings was rejected, they initiated arbitration seeking conversion of the plant in accordance with the arbitration clause. After various unsuccessful attempts by the claimant to appeal the arbitration, he finally sought to have the award, which had since been rendered, set aside on various grounds by the High Court of Singapore. In the award, the sole arbitrator declined jurisdiction over the second respondent as it was not a party to the project agreement. However, the sole arbitrator decided in favour of the first respondent and ordered, among other things, the transfer of the plant by the claimant to the second respondent. In its decision, the Singapore court ultimately upheld the jurisdiction of the sole arbitrator on the basis of the arbitration clause in the project agreement. The court first looked closely at the project agreement and the lease agreement itself to determine which agreement specifically covered what. The court found that the project agreement was in any case the "*governing heart of the commercial relationship between the parties*"[14]. In contrast, the court qualified the lease agreement as an ancillary agreement that governed only very specific aspects of the project. Since the arbitration clause in the project contract was very broadly formulated and the jurisdiction clause in the lease agreement very narrowly, this finding could also be applied

[12] *Premium Nafta Products Ltd et al. v. Fili Shipping Company Limited and others* [2007] UKHL 40; similar Bernard Hanotiau, 'Complex - Multicontract - Multiparty – Arbitrations' (1998), Volume 14, Issue 4, Arbitration International, 369, 372 et seqq..
[13] *Super Sea Cable Networks Pte Ltd and SEAX Malaysia Sdn Bhd v. Sacofa Sdn Bhd* [2024] SGHC 54.
[14] *Super Sea Cable Networks Pte Ltd and SEAX Malaysia Sdn Bhd v. Sacofa Sdn Bhd* [2024] SGHC 54.

to the dispute resolution mechanisms. In this respect, according to the court, the matters under the lease were "*carved out of the more generally applicable arbitration agreement for determination before the Malaysian courts*"[15]. In order to decide which of the two dispute resolution mechanisms should be applied, the court conducted a so-called centre of gravity test. According to such a test, it is necessary to determine what the core and substance of the dispute is if it potentially falls within the scope of several dispute resolution agreements. In the court's view, the legal issues presented to the sole arbitrator were, however, more closely related to the project agreement and not limited to the lease agreement. In this instance, the court also made it clear that the legal issues in the arbitration could in any event be dealt with without recourse to the lease agreement. This makes it clear that any carved-out issues covered by specific dispute resolution mechanisms cannot be "brought back" into a broadly worded arbitration agreement.

In addition to the general contemplations mentioned above, in cross-border arbitration, the New York Convention and other international arbitration conventions can also aid in the contractual interpretation of arbitration agreements.[16] For example, historically, US courts have tended to interpret arbitration agreements in international disputes more broadly, guided by the New York Convention. Conversely, arbitration agreements in domestic disputes appear to be subject to stricter scrutiny.[17] Tribunals also refer to internationally recognised rules of interpretation,[18] which are considered generally accepted or customary.

In the realm of contractual interpretation of arbitration agreements, certain principles may guide the process. These include the *contra proferentem* rule (favouring the interpretation against the drafter) and the precedence of specific provisions over general ones. These principles, alongside the aim to give effect to all parts of the agreement and to preserve its validity and effectiveness (*ut res magis valeat quam pereat or effet utile*), are anchored in notions of good faith and the common usage of terms at the time the agreement was made.[19]

The main tools for interpreting contracts, both internationally and nationally, include the interpretation of words, grammatical-logical analysis, historical-subjective interpretation, teleological-objective interpretation, and systematic interpretation.[20] To achieve the most accurate interpretation, these methods should be applied collectively rather than in isolation.[21] Additionally, peculiarities and presumptions specific to arbitration agreements, as highlighted by Lord Hoffmann, must be considered alongside the fundamental principles of arbitration, as stated by Bernard Hanotiau.

In the author's opinion, three critical aspects stand out in the interpretation of arbitration clauses compared to "normal" contracts. First, parties in complex commercial relationships are typically sophisticated and experienced in international business, capable of making

[15] *Super Sea Cable Networks Pte Ltd and SEAX Malaysia Sdn Bhd v. Sacofa Sdn Bhd* [2024] SGHC 54.
[16] Gary B. Born, Volume I: *International Commercial Arbitration* (2nd edn, Wolters Kluwer 2009) 1061.
[17] Gary B. Born, Volume I: International Commercial Arbitration (2nd edn, Wolters Kluwer 2009) 1068; e.g. *Tyco Valves & Controls Distribution GmbH v. Tippins, Inc.,* Memorandum and Order of the United States District Court for the Western District of Pennsylvania, 10 October 2006, para. 28: "*Because this case involves an international commercial agreement, we must also look to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (CREFAA) (…). We note that the CREFAA reinforces a strong federal policy in favor of arbitration over litigation. (…) This policy applies with special force in the field of international commerce.*".
[18] Gary B. Born, Volume I: *International Commercial Arbitration* (2nd edn, Wolters Kluwer 2009) 1063, with list of case law examples in footnote no. 20.
[19] Gary B. Born, Volume I: *International Commercial Arbitration* (2nd edn, Wolters Kluwer 2009) 1064 et seq..
[20] Odile Ammann, *Domestic Courts and the Interpretation of International Law* (1st edn, Brill Nijhoff 2019) Chapter 6 No. 2.
[21] Odile Ammann, *Domestic Courts and the Interpretation of International Law* (1st edn, Brill Nijhoff 2019) Chapter 6 No. 2.5.

rational decisions about the agreements they negotiate.[22] Secondly, the interpretation of arbitration agreements may necessitate considering the parties' waiver of statutory procedural rights and the right to appeal, potentially leading to a restrictive interpretation.[23] However, this is counterbalanced by the Pro-Arbitration Presumption[24], which favours an interpretation that supports the validity and enforceability of arbitration agreements in cases of ambiguity. This is particularly relevant where only some parts of a commercial transaction are covered by arbitration agreements and the parties dispute whether the arbitration agreements extend to the other parts of the commercial transaction. Thirdly, however tempting it may be, and however often it is argued by the respective parties in disputes about jurisdiction, it is not possible to read into an arbitration agreement what would have been - objectively - the most reasonable intention of the parties in terms of cost and efficiency. As distinguished expert Prof. Gary Born rightly observed: "*So long as the parties to the relevant contracts are the same, and the contracts all relate to a single project, or course of dealing, (…) courts have generally been willing to hold that an arbitration clause in one agreement extends to related agreements, provided that the other agreements do not contain inconsistent arbitration or forum selection clauses.*"[25] However, "*the existence of separate arbitration provisions in related agreements has generally been held to be strong evidence that disputes under the various agreements were meant to be arbitrated under different dispute resolution provisions – not those of some other contract*"[26].

In a very recent judgment, the High Court of Hong Kong held in an even stricter tone that "*the fact that the parties have entered into [multiple] Contracts which contain separate Arbitration Agreements suggests that they did not agree to have a 'one stop shop' if disputes arise. As arbitration is a consensual dispute resolution mechanism, the parties must be bound by their negotiated deals*"[27]. The court had to conduct a review of a Hong Kong International Arbitration Centre (HKIAC) interim award on jurisdiction where the claimant had commenced a single arbitration under three interrelated contracts which the court found contained irreconcilable arbitration clauses because they provided for different arbitrator appointment procedures.

To summarise, the author concludes that the arbitration agreements in question should first be considered and interpreted individually, and then their interaction and the overall context of the transaction should be carefully taken into account. Considering the international and national frameworks for contractual interpretation, along with the nuances of arbitration, it becomes evident that the "how" of interpreting conflicting arbitration agreements is not a matter of black and white. Rather, the interpretation hinges on the specific details and relevant circumstances of each case. Nonetheless, it is both possible and advisable to adopt a methodical approach to interpretation, grounded in the aforementioned principles.

[22] See the above quote from the *Fiona Trust* case.
[23] For example, as expressed by the tribunal in above-cited *Yugoslavia Company v. German Company* case.
[24] Gary B. Born, Volume I: *International Commercial Arbitration* (2nd edn, Wolters Kluwer 2009) 1067 et seq.
[25] Gary B. Born, Volume III: *International Commercial Arbitration*, (2nd edn Wolters Kluwer 2009) 1110.
[26] Gary B. Born, Volume I: I*nternational Commercial Arbitration* (2nd edn, Wolters Kluwer 2009) 1114.
[27] *SYL et al. v. GIF* [2024] HKCFI 1324.

C. Conflict of arbitration agreements in the context of the presentation of evidence?

In a very interesting scenario, not publicly documented to the author's knowledge, a contract with an arbitration agreement was introduced as evidence in proceedings concerning a dispute under an interrelated contract with its arbitration agreement. This matter came before a sole arbitrator in a non-public ICC arbitration[28], who had to determine if the two arbitration agreements were conflicting and barred the introduction of the contract by way of evidence.

In the case, the claimant presented payment claims from several purchase orders under a framework agreement. The respondent's GTC included a standard ICC arbitration clause for "*any disputes of whatever nature arising under the Purchase Order*" to be settled in Stockholm, according to Swedish law. With the respondent's consent, a sole arbitrator was appointed under the ICC rules. By way of set-off and counterclaim, the respondent then claimed liquidated damages due to the alleged late delivery of goods by the claimant. In defence, the claimant introduced a memorandum of understanding (MOU) agreed on by the parties containing a disputed statement on the due delivery of such goods by the claimant. The MOU, however, had a HKIAC clause for "*any dispute arising out of or in connection with the MOU*", calling for arbitration in Hong Kong under Hong Kong law.

The respondent thus challenged the sole arbitrator's jurisdiction over the MOU and to interpret the statements therein, asserting that only an HKIAC tribunal was competent to do so. Ultimately, the sole arbitrator dismissed this challenge, qualifying the MOU as circumstantial evidence and not subject to the HKIAC clause. The sole arbitrator held that claims from the MOU were irrelevant to the proceedings, considering the MOU's statement on delivery only as part of the factual and legal framework for deciding the respondent's counterclaims. Because the ICC arbitration clause was sufficiently broad, the sole arbitrator considered that he had jurisdiction under this clause to decide the relationship of the MOU and its possible effect on the parties' claims under the purchase orders. On the basis of teleological considerations, the sole arbitrator held, that any other assessment of this constellation of conflicting arbitration agreements would run the risk that, without the sole arbitrator's jurisdiction, there would be no forum to determine the relationship between the MOU and the purchase orders.

This decision illustrates a nuanced interpretation of conflicting arbitration agreements using classic contract interpretation tools in the very unique context of taking evidence. In particular, the sole arbitrator's rationale for treating the MOU as circumstantial evidence was decisive. This allowed its limited consideration within the broader scope of the GTC arbitration agreement - without triggering the MOU's arbitration clause.

[28] *Chinese Company v. Dubai Company,* ICC Case No. 27400GL, 2024, Final Award, not public.

4. LIMITS TO THE *KOMPETENZ-KOMPETENZ* DOCTRINE IN THE CONTEXT OF CONFLICTING ARBITRATION AGREEMENTS?

Revisiting the core discussion of this article on the management of conflicting arbitration agreements, it is also necessary to mention the *Kompetenz-Kompetenz* doctrine. This means that arbitral tribunals have the authority to determine their own jurisdiction.[29] In the context of conflicting arbitration agreements, two jurisdictional issues are worth mentioning.

The first concerns the tribunal's jurisdiction to review multiple conflicting arbitration agreements and, where necessary, the facts of the case, despite the apparent fact that a tribunal cannot have jurisdiction under all the agreements involved. When does a tribunal inappropriately interfere with the jurisdiction of another tribunal (or court)? While the doctrine of *Kompetenz-Kompetenz* is widely accepted and allows tribunals considerable leeway in assessing their jurisdiction, some jurisdictions limit the tribunal's competencies to a *prima facie* review.[30]

However, circling again to the ICC case mentioned above[31], the sole arbitrator correctly highlighted the necessity for a forum to discuss the interaction of interrelated contracts governed by distinct dispute resolution mechanisms. Otherwise, as the sole arbitrator rightly points out, an unregulated space would be created which would be inaccessible to judicial review. In the author's opinion, this perspective must generally apply to conflicting arbitration agreements, where a tribunal must consider all relevant arbitration agreements to ascertain their interplay. This process may involve interpreting, to some extent, the case's merits, even if the tribunal lacks the original competence. The limitation to a *prima facie* review is inappropriate at least in those specific cases.

The second scenario where the *Kompetenz-Kompetenz* doctrine plays a pivotal role amidst conflicting arbitration agreements is the emergence of parallel proceedings. Parallel proceedings on interrelated disputes prompt the question of whether *lis pendens* precludes any of the tribunals seized from ruling on their jurisdiction. *Lis alibi pendens*, a doctrine recognised in various legal systems, aims to prevent contradictory rulings by different courts on identical cases involving the same parties. Although primarily pertinent to litigation, its relevance extends to arbitration, as evidenced by ICC Case No. 9797[32].

In this arbitration between two groups of companies of a cooperative, there were subsequent and different versions of arbitration agreements between the parties and the umbrella company set out in member company agreements. The respondent contested the ICC sole arbitrator's jurisdiction, arguing that the arbitration agreement invoked did not apply to all respondent member companies due to differing versions signed by them. Ultimately, the sole

[29] Stephan Balthasar, *International Commercial Arbitration* (2nd edn, C.H. Beck 2021) Part 1, Chapter A, para. 53.
[30] The approach to jurisdictional issues in arbitration varies considerably depending on the applicable arbitration law. For example, French case law allows arbitral tribunals to determine their own jurisdiction first, unless an arbitration clause is manifestly void or inapplicable or the tribunal has not yet been constituted. This stance is echoed in Brazil, where arbitrators are given precedence on jurisdictional issues. In Singapore and the United States, courts refer parties to arbitration on the basis of a preliminary finding that an arbitration agreement prima facie exists. In contrast, German arbitration law allows state courts to make jurisdictional rulings for the arbitral tribunal even before the arbitration is concluded. - See Stephan Balthasar, *International Commercial Arbitration* (2nd edn, C.H. Beck 2021) Part 1, Chapter A, para. 53.
[31] *Chinese Company v. Dubai Company*, ICC Case No. 27400GL, 2024, Final Award, not public.
[32] *Andersen Consulting Business Unit Member Firms v. Arthur Andersen Business Unit Member Firms and Andersen Worldwide Société Cooperative*, ICC Case No. 9797/CK/AER/ACS, 1999 Interim Award and 2000 Final Award.

arbitrator affirmed jurisdiction over all parties by interim award, a decision upheld by the Swiss Federal Supreme Court upon appeal. The sole arbitrator argued that, after all, all the parties had signed at least some version of the same arbitration agreement.

Concurrently to the ICC proceedings, a separate *ad hoc* arbitration was initiated on the grounds of another version of the arbitration agreements,[33] yet stalled due to the respondent's refusal to appoint an arbitrator. The respondent invoked, although not expressly, *lis pendens* defence because of the still ongoing ICC proceedings. The Geneva Court, tasked by the claimant with appointing an arbitrator instead of the respondent in the *ad hoc* arbitration, deferred the decision, emphasising that the sole arbitrator must first determine the preliminary question of jurisdiction in the ICC proceedings. The parties would then have the option of challenging the sole arbitrator's decision before the courts (as they have done). In essence, the court qualified the application as premature and that it could at best be resubmitted once the ICC sole arbitrator had decided which of the arbitration agreements in question actually bound the parties.

This case underscores the complexity of handling conflicting arbitration agreements and the potential impediment of *lis pendens* in parallel proceedings. Parties must judiciously consider the implications of *lis pendens* before initiating concurrent arbitrations.

5. MULTI-CONTRACT ARBITRATION AND CONSOLIDATION OPTIONS

The final important subject to be discussed in relation to conflicting arbitration agreements is institutional multi-contract arbitration and consolidation. Disputes over conflicting arbitration agreements arise, in particular, as mentioned above, where the claimant seeks to enforce multiple claims arising from an overarching business transaction under a single arbitration agreement - even if there are conflicting arbitration agreements in place. This approach is obvious, as such claims are usually ultimately related to substance. However, as we have learned in the course of this article, arbitration agreements, even if they concern interrelated contracts, must first be considered separately. If both the effectiveness test and the subsequent interpretation of the conflicting arbitration agreements conclude that the matters in dispute are indeed governed by different arbitration agreements, these matters must, in principle, be negotiated separately. This will involve additional cost, effort and time. But it is what the parties have effectively agreed.

Multi-contract arbitration and consolidation offer a potential solution, allowing for the collective assertion of claims covered by multiple arbitration agreements. Most popular arbitration institutions provide their rules for such multi-contract arbitration and

[33] Laurent Lévy et al., 'Lis Alibi Pendens in International Commercial Arbitration' (2003), ICC Special Supplement 2003: Complex Arbitrations: Perspectives on their Procedural Implications 66.

consolidation under certain conditions.[34] However, all stipulate that the relevant arbitration agreements must be compatible and, especially, be governed by the same arbitration rules.

A. Compatibility of arbitration agreements

But what does compatibility mean? In the judgment already mentioned above, the Hong Kong High Court deliberated on the compatibility of arbitration agreements. The claimant in the HKIAC arbitration had commenced a single arbitration under three interrelated contracts, each with their arbitration clauses. The arbitration agreements contained complicated provisions on the appointment of arbitrators, some of which were unclear and open to interpretation. The two respondents objected and raised a jurisdictional challenge which the tribunal rejected in an interim award on jurisdiction. Ultimately, the court set aside the interim award, finding that the arbitration agreements were incompatible. The court, drawing from the Oxford Advanced Learners Dictionary, defined compatibility as the ability to exist or be used together without problems. While the arbitration agreements need not be identical, any differences must be resolved by the parties, the tribunal, and the competent arbitral institution.

The court rightly held that arbitration agreements are thus only compatible if their differences are immaterial. However, significant differences, such as in arbitral rules, seats, or arbitrator numbers, typically render agreements incompatible unless parties reach a compromise. Conversely, secondary differences, like the law applicable to the merits or pre-procedural steps, do not necessarily affect compatibility. According to the court, three factors, in particular, must be taken into account when assessing the compatibility of arbitration agreements, namely whether the "tying of arbitration agreements" affects the autonomy of the parties, whether the contractual rights granted to the parties by the arbitration agreements are impaired and whether one of the parties thereby obtains an unjustified advantage.

As can be seen, it is above all differences in the essential procedural rules that make arbitration agreements incompatible.

B. Cross-institutional arbitration

While tribunals may take different approaches to assessing the compatibility of arbitration agreements, there seems to be a consensus that compatibility requires at least the same institutional rules to be applicable to the agreements under review. Thus, the biggest hurdle to overcome is when the parties have declared different institutional rules to be applicable.

[34] For instance, Article 9 of the ICC Rules (2021) states that, provided certain prerequisites, claims related to multiple contracts can be consolidated into a single arbitration, regardless of the number of arbitration agreements involved. Similarly, Rule 6 (1) of the SIAC Rules (2016) and Article 29 of the HKIAC Rules (2024) offer provisions for multi-contract and multi-arbitration agreement scenarios. However, the LCIA Rules (2020) do not provide such options. Furthermore, Article 10 of the ICC Rules (2021) allows the ICC court to consolidate proceedings even without party consent, provided the claims are based on the same arbitration agreement(s). Alternatively, consolidation is possible if the arbitrations involve the same parties, stem from the same legal relationship, and the arbitration agreements are compatible. The LCIA Rules (2020) offer broader consolidation options, where Articles 22 (7) and 22 (8) permit the LCIA to authorise consolidation under the same or compatible arbitration agreement, involving the same parties or related transactions. The LCIA Rules also stipulate that the arbitral tribunal for the consolidation must either be unappointed or consist of the same arbitrators (cf. Article 10 of the ICC Rules). In contrast, the ICC "*may*" consider the appointment of arbitrators in other arbitrations when deciding on consolidation. The SIAC and HKIAC Rules provide similar consolidation prerequisites to the LCIA Rules in Rule 8 (1) and Article 28.1 respectively, but do not have strict provisions regarding arbitrator appointments in the consolidating arbitration. Notably, the UNCITRAL Model Law on International Commercial Arbitration does not include a consolidation model.

To solve this problem, the Singapore International Arbitration Centre (SIAC) has been discussing a "cross-institutional consolidation" protocol since 2017.[35] SIAC proposes that leading international arbitration institutions work together to adopt a protocol that will allow for the consolidation of arbitrations under different institutional rules. According to the SIAC, this would "*would result in significant gains in efficiency and fairness for parties that seek to resolve their disputes through arbitration*"[36]. The practical implementation of SIAC's proposal remains to be seen, but to the author's knowledge there has been no recent movement in this direction. Meanwhile, the HKIAC and the Tashkent International Arbitration Centre (TIAC) have established an inter-institutional cooperation with the TIAC-HKIAC Rules (2023).[37] Those rules allow joint administration of proceedings if the parties agreed so. This is not a true cross-institutional consolidation as SIAC suggests, because HKIAC and TIAC play different roles in administering a case under these new rules. It does merge the benefits of different institutions, though, such as HKIAC's experience and TIAC's lower costs. The long-term popularity and usage of this model are yet to be determined. Yet the online legal magazine Daily Jus points out that if the HKIAC-TIAC collaboration proves successful, other institutions may follow suit, making the rules "*a model for the future*".[38]

C. Manual harmonisation of parallel proceedings

When multi-contract arbitration or consolidation is not feasible, due to irreconcilable differences in the agreed essential procedural rules, parties may consider harmonising parallel proceedings to ensure consistent decisions. This approach can address the practical challenges of conflicting and incompatible arbitration agreements. As Bernhard Honatiau suggests, this can be achieved, for example, by appointing the same arbitrators and experts, and coordinating the timing of parallel proceedings.[39] Ultimately, however, it requires a great deal of effort and sensitivity to set up such twin-proceedings in an admissible manner, especially in different arbitral institutions. Such a procedure, as Bernard Hanotiau also describes it, can be quite a delicate matter.[40]

6. PRACTICAL IMPLICATIONS AND CONCLUSION

To circumvent the problems outlined in this article, it is paramount for parties to establish clear and unequivocal dispute resolution clauses from the outset. Within a multifaceted contractual framework, arbitration clauses should be harmonized to ensure consistency or, at the very least, compatibility.[41] The author would thus like to conclude this article by highlighting points that may be considered when agreeing on dispute resolution mechanisms

[35] SIAC, 'Proposal On Cross-Institution Consolidation Protocol' (19 December 2017) <https://siac.org.sg/wp-content/uploads/2023/04/Press-Release-PROPOSAL-ON-CROSS-INSTITUTION-CONSOLIDATION-PROTOCOL.pdf> last accessed 11 December 2024.
[36] SIAC, 'Memorandum Regarding Proposal On Cross-Institution Consolidation Protocol' (19 December 2017) <https://siac.org.sg/wp-content/uploads/2023/04/Memorandum-on-Cross-Institutional-Consolidation-with-annexes.pdf> last accessed 11 December 2024.
[37] HKIAC, 'HKIAC and Tashkent International Arbitration Centre launch the Cross-Institutional Rules of Arbitration' (5 December 2023) <https://www.hkiac.org/news/hkiac-and-tiac-cross-institutional-rules-arbitration#:~:text=On%2011%20September%202023%2C%20TIAC,making%20mechanism%20for%20administered%20arbitration> last accessed 11 December 2024.
[38] Jenny Zhang et al., 'Is Two Better Than One? An Overview of the New Cross-Institutional Rules of Arbitration of the TIAC and the HKIAC' Daily Jus 14 March 2024.
[39] Bernard Hanotiau, 'Complex - Multicontract - Multiparty – Arbitrations' (1998), Volume 14, Issue 4, Arbitration International, 369 et seqq.
[40] Bernard Hanotiau, 'Complex - Multicontract - Multiparty – Arbitrations' (1998), Volume 14, Issue 4, Arbitration International, 369 et seqq.
[41] For example, in Thomson Reuters' Practical Law 'Multi-party and multi-contract issues in arbitration' (2024)..

and, in particular, when drafting arbitration clauses. The aim is to reduce the risk of conflicting dispute resolution mechanisms within complex business structures and to avoid, as far as possible, disputes over jurisdiction.

Taking time for due considerations

While it is of course impossible to anticipate all future disputes, it is advisable to take the time to consider in advance what disputes might arise and how one would prefer they should be resolved. As mentioned in the introduction, parties to a contract often do not give any thought to this point. While the institutions' model arbitration clauses are a good starting point, it is worth assessing whether amendments are needed. In this context, it can be decided whether broad clauses are desirable or whether only very specific issues should be subject to a chosen dispute resolution mechanism.

Using guidelines

While the guide to model arbitration clauses by UNCITRAL[42] does specifically address expedited arbitration, in the author's opinion, it serves as a valuable reference for parties navigating dispute resolution mechanisms in intricate commercial relationships. The guide advises consideration of various factors when drafting an arbitration clause, including the complexity of transactions, the number of parties involved, the anticipated complexity and amount of the dispute, the financial resources available relative to the expected arbitration costs, and the potential for consolidation.

Choosing clear and precise language

Dispute resolution agreements should be drafted with utmost clarity and precision to prevent any ambiguity. Ideally, there should be no overlap in the scope of dispute resolution mechanisms. However, if an overlap occurs and multiple dispute resolution agreements could apply, it should be explicitly stated which provision takes precedence. To clarify the relationship between different dispute resolution agreements in interrelated contracts, express references may be considered.

Contemplating an umbrella agreement

Parties may consider entering into a comprehensive arbitration agreement that applies to all interrelated contracts. This can provide a straightforward framework for dispute resolution and, of course, avoid conflicts between different arbitration clauses. This approach may benefit the parties of especially complex business relationships, as resolving issues from an economic transaction in a single arbitration is expected to be more efficient and cost-effective. It reduces the need for multiple arbitrators, lowers legal costs, incurs institutional processing fees only once, and necessitates the preparation and presentation of documents and examination of witnesses just once. Additionally, parties are likely to be more motivated if the matter can be resolved in a single proceeding, rather than being repeated

[42] UNCITRAL Arbitration Rules (2021), Explanatory Note to the UNCITRAL Expedited Arbitration Rules, 47 et seqq.

before different tribunals. Most importantly, a comprehensive arbitration eliminates the risk of conflicting awards and can enhance the quality of the award, as the tribunal gains a fuller understanding of the case.

While it is not possible to predict with certainty whether a one-stop shop arbitration will be appropriate for all future disputes or whether separate proceedings would have been better, there are some general considerations that may help in deciding against an umbrella agreement. For example, the agreed institutional rules and modalities of arbitration may be more appropriate for certain parts of the commercial relationship than for others, particularly where the performance of the contract takes place in different jurisdictions. Furthermore, confidentiality is crucial and may be the very reason why the parties chose arbitration in the first place. In multiparty disputes, therefore, it may be preferable to have separate proceedings where a party may not wish to disclose everything in a full multiparty proceeding.

Multi-contract and multi-party agreements

Where several contracts and / or parties are involved in a complex commercial transaction, consideration should be given to obtaining express consent to consolidation and joinder. Arbitration clauses can include such express provisions to consolidate related arbitrations and allow parties to join. The choice of arbitration rules may also play a role in this respect. Institutional rules explicitly support multi-contract and multi-party arbitration may be preferable.

Documentation

Lastly, to prevent the surprise of long-forgotten arbitration agreements resurfacing in proceedings, meticulous documentation of all arbitration agreements pertaining to an economic transaction is highly recommended.

If these measures are not taken pre-contractually, jurisdictional disputes are more likely to arise. In cases with multiple conflicting arbitration agreements, it is essential to carefully analyse which clause applies to each dispute. A straightforward approach to clause interpretation, based on the fundamental principles of contract formation and interpretation, is recommended. In less favourable circumstances, multiple disputes arising from a single economic transaction may need to be resolved by different tribunals. Where institutional rules permit, multi-contract arbitration and consolidation can still offer relief.

If, despite all good intentions, parties find themselves in a dispute over dispute resolution agreements, it is crucial to learn from past mistakes. When negotiating and drafting a contract with a dispute resolution mechanism in the future, keeping the above points in mind and paying particular attention to the wording will help to reduce the risk of conflicting dispute resolution agreements and disputes over them. Good luck!

PSYCHOLOGICAL FACTORS IN ALTERNATIVE DISPUTE RESOLUTION (ADR) OUTCOMES

Kavya Srinivasan

ABSTRACT

The effectiveness of alternative dispute resolution (ADR) procedures, such as arbitration and mediation, in resolving disputes outside of established legal frameworks is becoming more widely acknowledged.[1] Examining the significant influence of psychological elements on the results of alternative dispute resolution (ADR), this research focuses on the parties' and mediators' personalities, emotional intelligence, and cognitive biases.

ADR benefits greatly from the application of emotional intelligence (EI), which helps parties better control their emotions, communicate efficiently, and come to mutually beneficial agreements. Confirmation bias and anchoring are two examples of cognitive biases that can distort views of justice and affect how decisions are made during negotiations, making it difficult to come to satisfactory agreements.

Furthermore, the dynamics of conflict resolution and negotiation tactics are greatly influenced by the personalities of the persons involved, including agreeableness and assertiveness. The distinct personality characteristics that mediators bring to ADR sessions also have an impact on their capacity to lead productive discussions and uphold objectivity.

Practitioners can optimise alternative dispute resolution (ADR) processes and create conditions that support cooperative problem-solving and long-lasting settlements by being aware of and addressing these psychological aspects. The practical suggestions for incorporating psychological insights into ADR practice are presented in the paper's conclusion, with a focus on the value of emotional intelligence training for mediators and techniques to reduce cognitive biases.

1. EMOTIONAL INTELLIGENCE IN ADR

A person's ability to identify, comprehend, and control their own emotions as well as to sense and affect those of others is referred to as emotional intelligence (EI). Emotional intelligence (EI) is fundamentally a complex field that encompasses many facets of emotional awareness and regulation, influencing a range of personal and professional contexts. Emotional intelligence is made up of several essential elements, according to emotional intelligence researcher and pioneer Daniel Goleman[2]:

[1] Hopt, KJ and Steffek, F (eds), Mediation: Principles and Regulation in Comparative Perspective (OUP 2013).
[2] Goleman, D, Emotional Intelligence: Why It Can Matter More Than IQ (Bantam Books 1995).

Self-awareness: This element is being able to identify and comprehend one's own feelings, as well as how they affect decisions, behaviours, and thoughts. Self-aware people are better able to evaluate their strengths, shortcomings, values, and objectives, which improves their general emotional stability and flexibility in trying circumstances.

Self-regulation: Emotional intelligence (EI) includes the ability to successfully manage and control one's emotions. Self-regulation allows people to control their disruptive impulses, handle stress, and adjust calmly and nimbly to changing situations. It entails qualities like emotional restraint, mindfulness, and the capacity to postpone satisfaction to achieve long-term objectives.

Motivation: In the context of Emotional Intelligence, motivation is the will and perseverance to pursue objectives with vigour and dedication. High EI people are intrinsically motivated; they find fulfilment in their accomplishments rather than in material gains. They have set objectives for themselves, show resiliency and optimism in the face of difficulty, and motivate and inspire others.

Empathy: Empathy is the capacity to identify and comprehend the feelings, viewpoints, and worries of other people. In interpersonal relationships, it entails paying close attention, exhibiting empathy, and being sensitive to differing points of view. By carefully attending to the feelings of those around them, empathetic people develop rapport and trust, encourage cooperative partnerships, and skillfully negotiate social dynamics.

Social skills: Social skills are a collection of abilities that help with cooperation, communication, and handling conflict. These abilities include persuasion, leadership, relationship-building and maintenance skills, and verbal and nonverbal communication. Strong social skills enable people to work well in groups, negotiate effectively, and motivate others via their interpersonal effectiveness[3].

By improving participants' capacity to control their emotions, communicate clearly, and promote collaborative problem-solving, emotional intelligence (EI) has a significant impact on negotiation and communication in alternative dispute resolution (ADR). To demonstrate the usefulness of Emotional Intelligence (EI), we examine how it affects various processes and provide case studies.[4]

ADR parties can interact more effectively, listen more intently, and comprehend each other's feelings when they have high emotional intelligence (EI). When people are self-aware, they can identify what triggers their emotions and communicate what they need without making things worse. Self-regulation helps maintain composure, preventing reactive responses that could derail discussions. Empathy fosters an environment of respect and understanding between individuals by enabling them to recognise and validate the feelings and viewpoints of others. Good social skills enable positive communication, facilitating a straightforward exchange of ideas and lowering the possibility of miscommunication.

[3] K Anitha, J Monisha and Indrajit Ghosal, 'Enhancing Human-Robot Collaboration Through Emotional Intelligence: A Conceptual Exploration' (Meenakshi Academy of Higher Education and Research, India, 2023).
[4] Salovey, P and Mayer, JD, 'Emotional Intelligence' (1990) 9 Imagination, Cognition, and Personality 185.

Likewise, EI encourages a cooperative rather than aggressive demeanour in negotiations. High EI people are skilled at recognising and resolving the emotional undercurrents that affect the dynamics of negotiations. They establish rapport and trust through empathy, which facilitates the discovery of common ground. Negotiators can lead discussions towards win-win outcomes by controlling their own emotions and recognising those of others. Instead of settling for short-term advantages, parties are driven, especially when it comes to intrinsic motivation, to look for solutions that are in line with long-term aims and values. Social skills that enable negotiators to overcome disagreements and create solutions that are acceptable to all sides involved include persuasive communication and conflict resolution.

A. Case Studies Illustrating EI's Role in Successful ADR Outcomes

(a) Case Study 1: Workplace Conflict Resolution

A team in a corporate context was experiencing internal disagreements that were hurting morale and production. The highly emotionally intelligent mediator started by having one-on-one meetings with each team member to get a sense of their viewpoints and emotional states. Using attentive hearing and empathetic involvement, the mediator pinpointed significant concerns like emotions of being underestimated and misunderstandings. During the joint mediation session, the mediator employed self-regulation to remain neutral and calm, even when discussions became heated. Through the process of encouraging open and compassionate dialogue, the mediator assisted the team members in voicing their concerns without passing judgment. The mediator's social skills were crucial in guiding the conversation towards collaborative problem-solving. As a result, the team developed a new communication protocol and redefined roles and responsibilities, leading to improved relationships and productivity.

This example can be inferred from the **Labour Relations Adjustment Law (1946)**[5] in Japan which encourages mediation and conciliation in workplace disputes, recognizing the importance of addressing emotional and relational dynamics to restore workplace harmony.

(b) Case Study 2: Family Mediation in Divorce Proceedings

A divorcing couple was having difficulty coming to a decision over child custody. Because of the strong emotions between the two sides, the first discussions were filled with defensiveness and accusations. Strong emotional intelligence (EI) on the side of the mediator started by assisting each party in expressing their feelings and concerns in a courteous and secure setting. The mediator validated the emotions of both parties by demonstrating empathy and acknowledging the emotional distress they were going through. This made conversations more logical by lowering the emotional intensity. The mediator demonstrated self-control by remaining composed and focused, which assisted in reducing the severity of the situation. The mediator helped the couple reach a custody agreement that met the requirements of both parents and put the children's welfare first by encouraging a cooperative environment. The agreement was reached through a series of structured, empathetic conversations, highlighting the critical role of EI in achieving a fair and sustainable resolution.

[5] Labor Relations Adjustment Law, Law No. 25 of 1946 (Japan).

In India, the **Family Courts Act, 1984**[6] promotes mediation and conciliation in family disputes, emphasizing the need for mediators to manage emotional dynamics and foster cooperative resolutions in child custody cases.

(c) Case Study 3: Community Dispute over Environmental Issues

Due to environmental concerns, the construction of a new factory separated the citizens of a small town. Using his high EI, the mediator called several community meetings to resolve the conflict. Through the application of self-awareness and empathy, the mediator was able to comprehend the underlying aspirations and concerns on both sides. The mediator made sure that everyone was represented and appreciated by facilitating open forums where locals could express their worries and goals. Despite emotional outbursts, the mediator was able to maintain the focus of the discussions by exercising self-regulation. Using social skills, the mediator promoted group brainstorming sessions to investigate other approaches. In the end, the neighbourhood came to an agreement to impose more stringent environmental standards on the business in addition to programmes aimed at safeguarding surrounding wildlife.

In Indonesia, the **Environmental Management Act (1997)**[7] emphasizes mediation and public participation in environmental disputes, acknowledging the importance of mediators managing emotional and relational aspects to achieve sustainable resolutions.

2. COGNITIVE BIASES AND ADR

Cognitive biases are regular patterns of judgmental deviance from norms or rationality that can seriously affect how decisions are made in conflict.[8] Confirmation bias[9] is one kind of bias in which individuals search for, analyse, and retain information in a way that supports their ideas rather than considering evidence to the contrary. This bias can make it difficult for disputing parties to come to a fair resolution by causing them to concentrate primarily on evidence that validates their positions. Another common prejudice is the anchoring bias[10], which occurs when the first piece of information (the "anchor") has a disproportionate impact on decisions and judgements made later. In alternative dispute resolution (ADR), the first offer or demand can significantly sway the negotiating process and frequently result in outcomes that are more advantageous to the initiating side. Another prevalent bias is overconfidence[11], which occurs when people exaggerate their skills or the veracity of their information. This may lead to irrational expectations and resistance to making concessions, needlessly extending arguments. Another bias is the availability heuristic[12], which makes people assess an event's chance based on how easily they can recollect similar occurrences. This may cause the likelihood of spectacular or recent events to be overestimated, distorting risk perceptions and improperly influencing decisions. Furthermore, the status quo bias[13]

[6] Family Courts Act, 1984 (India).
[7] Environmental Management Act, Law No. 23 of 1997 (Indonesia)
[8] Tversky, A and Kahneman, D, 'Judgment under Uncertainty: Heuristics and Biases' (1974) 185 Science 1124.
[9] Nickerson, RS, 'Confirmation Bias: A Ubiquitous Phenomenon in Many Guises' (1998) 2 Review of General Psychology 2.
[10] Tversky, A and Kahneman, D, 'The Anchoring and Adjustment Heuristic: Bias in Human Judgment' in Kahneman, D, Slovic, P, and Tversky, A (eds), Judgment under Uncertainty: Heuristics and Biases.
[11] Moore, DA and Healy, PJ, 'The Trouble with Overconfidence' (2008) 115 Psychological Review 502.
[12] Tversky, A and Kahneman, D, 'Availability: A Heuristic for Judging Frequency and Probability' (1973) 5 Cognitive Psychology 207.
[13] Samuelson, W and Zeckhauser, R, 'Status Quo Bias in Decision Making' (1988) 1 Journal of Risk and Uncertainty 7.

reflects a desire to keep circumstances the way they are. Because of this, parties may oppose changes even when they would be better for everyone involved. Finally, loss aversion[14] describes the tendency to prefer avoiding losses rather than acquiring equivalent gains. In disputes, this can lead parties to focus more on preventing perceived losses, which can result in less optimal outcomes for all involved.

Cognitive biases have the potential to influence parties' opinions about fairness and ADR results. Confirmation bias, for example, might make parties believe that an arbitrator or mediator is biased if they believe their positions are not being supported. Due to anchoring bias, discussions may be distorted, and the final agreement may not reflect a fair or balanced solution because the early offers may have a significant influence. When someone has overconfidence bias, they may reject acceptable offers in the expectation of obtaining a better case in court or through more negotiations. Parties may be prevented from reaching a settlement by an excessive fear of improbable unfavourable outcomes brought on by the availability heuristic and loss aversion. Parties may be reluctant to accept fresh approaches that could be advantageous to both due to status quo bias.

A. Examples from across Asia

A legal foundation for the application of mediation in conflict resolution is provided by the Singapore Mediation Act of 2017[15]. It guarantees an organised and formalised approach to ADR by outlining the prerequisites and procedures for mediation. The significance of mediation in resolving business conflicts was emphasised by the Singapore Court of Appeal in the case of Tjong Very Sumito and others v. Antig Investments Pte Ltd[16]. The court stressed that by allowing parties to consider a variety of settlement options, mediation can successfully address cognitive biases like anchoring prejudice. This precedent emphasises how mediation helps to promote impartial and equitable dispute settlement.

The regulatory framework for the use of mediation in conflict resolution is provided by the Hong Kong Mediation Ordinance[17]. It promotes the use of mediation as an efficient ADR tool by establishing the guidelines and processes for the process. The significance of mediation in surmounting cognitive biases like confirmation bias was emphasised by the Hong Kong Court of First Instance in the Gao Haiyan and Xie Heping v. Keeneye Holdings Ltd and another [2012] case[18]. The court observed that fair outcomes are facilitated by mediation since it permits open discussion and the expression of opposing viewpoints. This case strengthens mediation's ability to control cognitive biases and advance fair conflict resolution.

These instances show how regulations and rulings from courts throughout Asia have acknowledged and dealt with the impact of cognitive biases in alternative dispute resolution procedures. These legislation and precedents ensure that cognitive biases are addressed

[14] Kahneman, D and Tversky, A, 'Prospect Theory: An Analysis of Decision under Risk' (1979) 47 Econometrica 263.
[15] Singapore Mediation Act, No. 1 of 2017.
[16] *Tjong Very Sumito and others v Antig Investments Pte Ltd* [2009] SGCA 41.
[17] Hong Kong Mediation Ordinance (Cap. 620)
[18] *Gao Haiyan and Xie Heping v. Keeneye Holdings Ltd and another* [2012] HKCU

successfully, resulting in fair and balanced conflict resolution, by offering legal frameworks and encouraging best practices.

3. ROLE OF MEDIATOR'S AND PARTIES' PERSONALITY IN ADR

The success of Alternative Dispute Resolution (ADR) is significantly influenced by the personality of the parties involved as well as the mediator. Mediators are impartial intermediaries entrusted with assisting parties in reaching a mutually agreeable conclusion. Their dispositions, which include empathy, patience, objectivity, and skilful communication, have an important effect on the mediation process. Building rapport and trust with an empathetic mediator will ensure that parties feel understood and more receptive to discussion. A mediator who possesses patience may handle intense emotions and intricate discussions without rushing, creating a more favourable atmosphere for reaching a resolution[19].

In ADR, the personality traits of assertive and accepting parties can profoundly influence the mediation process and outcomes[20]. Confident in their ability to express their demands and opinions, assertive parties can be readily recognised. They are usually proactive in looking for solutions and articulate their opinions with clarity and conviction. As it helps define concerns and promote clear communication, assertiveness can be a strength, but it can also present difficulties. If assertive parties are not effectively controlled, they may come across as aggressive or uncompromising, which could escalate challenges. To prevent assertive participants' strong opinions from controlling the conversation or overshadowing the interests of other parties, mediators working with assertive parties need to use strategies for redirecting their energy constructively. Active listening, rephrasing, and promoting cooperative problem-solving are some techniques that can help balance the contributions of aggressive parties and create a more welcoming mediation setting.

On the other hand, accepting parties are typically more understanding and accommodating. To come to a consensus, they frequently show a willingness to give in and alter their opinions. This openness can help accelerate resolutions and enable more seamless negotiations. Overly accommodating parties, however, face the risk of giving in too much or failing to adequately convey their demands and concerns, which can result in unsolved problems or imbalances in the final agreement. Mediators have a responsibility to make sure that the needs and interests of accepted parties are fairly represented and taken care of, and that they do not feel compelled to accept unfavourable conditions. Techniques such as reinforcing their contributions, validating their concerns, and encouraging them to assert their needs more clearly can help in maintaining a balanced approach.

The mediator must expertly handle these opposing personality qualities for mediation to be effective. The mediator may employ strategies for aggressive parties, like establishing firm limits, encouraging civil dialogue, and making sure that everyone is represented. The

[19] Folger, JP and Bush, RA, The Promise of Mediation: The Transformative Approach to Conflict (Jossey-Bass 1994).
[20] Costa, PT and McCrae, RR, *Revised NEO Personality Inventory (NEO-PI-R) and NEO Five-Factor Inventory (NEO-FFI) Professional Manual* (Psychological Assessment Resources 1992).

mediator can concentrate on giving the agreeing parties the tools they need to express their demands more forcefully and making sure that their readiness to make concessions doesn't result in an unjust outcome.

4. PRACTICAL APPLICATIONS AND STRATEGIES

Enhancing ADR practice and training to incorporate psychological insights is crucial to raising the effectiveness and equity of dispute resolution procedures. Understanding the psychological foundations of conflict, such as emotional intelligence, cognitive biases, and personality factors, might be beneficial for ADR practitioners. Training programmes ought to include sections on identifying and handling these psychological variables[21]. For instance, mediators can receive training on how to recognise emotional distress indicators, cognitive distortions, and personality-driven actions that could influence the nature of negotiations. Simulations and real-world case studies can be used to help arbitrators and mediators develop these abilities in a secure environment.

Developing one's emotional intelligence (EI) qualities, such as self-awareness, self-regulation, empathy, and social skills, is one of the best ways for mediators to improve EI and reduce biases[22]. Mediators ought to engage in active listening, which is giving their whole attention to comprehending, recalling, and responding to what the parties are saying. This promotes awareness of everyone's viewpoints and emotional states as well as the development of trust. Moreover, mediators should utilise strategies like reframing—which entails rephrasing an issue or problem—to assist parties in seeing the conflict from a different perspective and maybe lessen cognitive biases like confirmation bias and anchoring. Another effective strategy is the use of private caucuses, where mediators can discuss sensitive issues with each party separately, providing an opportunity to address biases and emotional concerns in a confidential setting[23].

To identify and control psychological issues, parties may collaborate to foster open communication and a problem-solving approach. The frequent psychological problems and biases that can obstruct just decision-making should be made known to all parties. Pre-mediation briefings or training emphasising the value of emotional intelligence and cognitive bias awareness can help achieve this. Mediators can help parties discover underlying interests and come up with innovative solutions by facilitating cooperative problem-solving sessions. This strategy helps create abilities that the parties can utilise in future disputes in addition to resolving the current disagreement. Involving impartial experts, such as psychologists or conflict resolution specialists, who can offer further guidance and assistance in handling complicated psychological dynamics, is a further strategy. By fostering an environment of mutual respect and understanding, ADR processes can be more effective in achieving lasting and equitable outcomes.

Integrating these strategies into ADR practices ensures that mediators and parties are better equipped to handle the emotional and psychological complexities of disputes.

[21] Mackie et al., "The ADR Practice Guide" (3rd edn, Butterworths 2007).
[22] Genn H, "Judging Civil Justice" (Cambridge University Press 2010).
[23] Menkel-Meadow C, "Mediation and Its Applications for Good Decision Making and Dispute Resolution" in The Oxford Handbook of Law and Economics (OUP 2017).

5. CONCLUSION

A breakthrough towards more equitable, long-lasting, and effective dispute resolution is the integration of psychological viewpoints into Alternative Dispute Resolution (ADR). ADR relies heavily on emotional intelligence (EI), which assists parties and mediators with managing emotions, communicating clearly, and creating a cooperative atmosphere. Improved social skills, self-control, empathy, and self-awareness all lead to more agreeable negotiations and productive discussions. Fairness can be affected by cognitive biases like confirmation bias and loss aversion, but mediators might assist parties reach fairer agreements by addressing these shortcomings. ADR is also impacted by the mediators' and parties' personalities, including assertiveness and empathy. To guarantee just results, skilled mediators strike a balance between these qualities. Enhancing EI abilities in ADR training and raising parties' understanding of psychological aspects are examples of useful tactics.

This approach enhances engagement, encourages constructive participation, and leads to more satisfactory resolutions.

THE LACK OF IMMUNITY OF INTERNATIONAL ARBITRATORS FROM CLAIMS IN TORT RAISED BY THIRD-PARTY FUNDERS - A SCANDINAVIAN PERSPECTIVE

Jacob C. Jørgensen

INTRODUCTION

In recent years, the landscape of commercial arbitration has witnessed a significant transformation with the emergence and rapid growth of third-party arbitration funders. These entities play a pivotal role in supporting parties involved in high-stake arbitrations by providing the necessary financial backing to pursue their claims by covering the costs associated with legal representation, administrative fees, expert witnesses, and other aspects of dispute resolution against receiving an oftentimes substantial percentage of amounts awarded to the client which is being funded in the arbitration.

The industry of funding major arbitrations has experienced a substantial surge in recent years.[1] More funders have entered the market, offering a variety of funding structures tailored to meet the diverse needs of parties involved in arbitrations. As the demand for arbitration funding grows, funders are adapting to different jurisdictions and legal frameworks, facilitating a global reach for their services. Furthermore, the industry has witnessed increased collaboration and partnerships between law firms, arbitrators, and funders. Law firms are recognizing the value of third-party funding as a tool to expand their client base and undertake more complex cases. This collaboration not only benefits parties seeking funding but also augments the overall efficiency and effectiveness of the arbitration process.

Arbitration funders are not, however, parties to the arbitration, nor do they sign the terms of reference or similar procedural agreements used under the rules of different arbitration institutions.

With reference to Danish law, this article explores under which conditions arbitrators may face a tort liability *vis-à-vis* a third-party arbitration funder who has funded an unsuccessful arbitration.

[1] The industry has an estimated global value approx. 80bn EUR with more than 100 funders in Europe alone. See in more detail the following article: Insurance Europe, 'EU should develop rules on third party litigation funding', (2022), <https://www.insuranceeurope.eu/news/2650/eu-should-develop-rules-on-third-party-litigation-funding> accessed 12 December 2024.

ARBITRATOR IMMUNITY

Arbitrator immunity is a fundamental principle aimed at protecting arbitrators from personal liability for their actions or decisions made in the course of arbitration proceedings. This immunity encourages individuals to serve as arbitrators without fear of facing legal consequences for honest errors or judgments made during the adjudication process. The concept is enshrined in various arbitration rules: Article 41 of the ICC Rules 2021 stipulates that:

"The arbitrators, any person appointed by the arbitral tribunal, the emergency arbitrator, the Court and its members, ICC and its employees, and the ICC National Committees and Groups and their employees and representatives shall not be liable to any person for any act or omission in connection with the arbitration, except to the extent such limitation of liability is prohibited by applicable law."

Similarly, Article 31.1 of the LCIA Rules 2020 dictates that:

"None of the LCIA (including its officers, members and employees), the LCIA Court (including its President, Vice Presidents, Honorary Vice Presidents, former Vice Presidents and members), the LCIA Board (including any board member), the Registrar (including any deputy Registrar), any arbitrator, any Emergency Arbitrator, any tribunal secretary and any expert to the Arbitral Tribunal shall be liable to any party howsoever for any act or omission in connection with any arbitration, save: (i) where the act or omission is shown by that party to constitute conscious and deliberate wrongdoing committed by the body or person alleged to be liable to that party; or (ii) to the extent that any part of this provision is shown to be prohibited by any applicable law."

Similar rules are found in the rules for the ICDR (article 38), SIAC (rule 38), HKIAC (article 46) and the SCC (article 52).

However, the immunity provided by these clauses is not absolute and will generally not apply in case of deliberate default or gross negligence that may give rise to liability under the lex arbitri (or possibly under the laws of other jurisdictions where damages are incurred as a result of the wrongdoings of an arbitrator). In this vein, there is a noteworthy and fundamental difference in how the common law and civil law approach the topic of immunity.

The common law approach is based on the concept of "judicial immunity" in that judges and arbitrators are perceived as performing, essentially, the same role. Under common law, arbitrators are therefore entitled to an almost unqualified immunity by virtue of their "quasi-judicial" function.[2] This principle is embedded in section 29 of the English Arbitration Act 1996, which stipulates:

[2] Serhii Lashyn, 'Immunity of Arbitrators' (2019) <https://www.etd.ceu.edu/2019/lashyn_serhii.pdf> accessed 12 December 2024.

"An arbitrator is not liable for anything done or omitted in the discharge or purported discharge of his functions as arbitrator unless the act or omission is shown to have been in bad faith".

On the other hand, the UNCITRAL Model Law on International Commercial Arbitration, which has been used as a template for the Arbitration Acts in more than 120 jurisdictions worldwide neither addresses the issue of the liability of arbitrators or their immunity.[3]

The civil law approach to immunity is based on the view that there is a contractual relationship between the parties and the arbitrators and that the parties have agreed to grant the arbitrators immunity from liability under their contract - much like under a commercial agreement excluding a party's liability.[4] However, under most civil law jurisdictions, it is not possible to exclude the liability of a party in case of willful misconduct or gross negligence.[5]

By way of example, under Dutch law an arbitrator may be held liable for damages in the event of gross negligence without any requirement for the arbitrator to have acted in bad faith.[6]

Similarly, under Swedish law, where the Arbitration Act does not contain any provisions specifically regulating the liability of arbitrators, the prevailing view is that an arbitrator's liability is treated much the same as any other party in a contractual relationship when it comes to assessing the applicability of liability excluding clauses. Accordingly, Art. 52 of the SCC Rules (2023)[7] limit the arbitrators' liability "unless an act or omission constitutes wilful misconduct or gross negligence."[8]

Under Danish law and Norwegian law, which have both based their Arbitration Acts on the UNCITRAL Model Law, the position is the same as under Swedish law.

Accordingly, Article 51 of the Rules of Procedure of the Danish Institute of Arbitration stipulates as follows:

"The members of the Arbitral Tribunal, the secretary of the Arbitral Tribunal, see Art. 30, or other persons appointed by the DIA or the Arbitral Tribunal, and the DIA, including the members of the Council of Representatives, the Board, the Chair's Committee, the Secretariat and the Secretary-General shall not be liable for any act or omission in connection with commencement of an arbitration, the processing of an arbitration or an award made by the Arbitral Tribunal, except to the extent such limitation of liability is prohibited by applicable law."[9]

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[3] UNCITRAL, 'Model Law on International Commercial Arbitration' (2006) <https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status> accessed 12 December 2024.
[4] Agata Cevc, 'Civil Liability of Arbitrators' (2019) <https://hrcak.srce.hr/ojs/index.php/eclic/article/download/9009/5097/> accessed 12 December 2024.
[5] Tadas Varapnickas, 'The Law Applicable to Arbitrators' Civil Liability from a European Point of View' (Kluwer Arbitration, 25 March 2019) <https://arbitrationblog.kluwerarbitration.com/2019/03/25/the-law-applicable-to-arbitrators-civil-liability-from-a-european-point-of-view/> accessed 12 December 2024.
[6] Jonas Angelier et al., 'The Liability of International Arbitrators: When and Where to Sue?' (2023) <https://www.houthoff.com/expertise/practice/arbitration/arbitration-blogs/the-liability-of-international-arbitrators-when-and-where-to-sue> accessed 12 December 2024.
[7] SCC, SCC Rules, <https://sccarbitrationinstitute.se/en/resource-library/rules-and-policies/scc-rules> acceessed 12 December 2024.
[8] Pontus Scherp et al., 'International Arbitration Laws and Regulations 2023' (2023) <https://www.globallegalinsights.com/practice-areas/international-arbitration-laws-and-regulations/sweden> accessed 12 December 2024.
[9] A similar rule is found in Art. 42 of the 'Rules of Procedure of the Danish Construction Arbitration Board' ("*Voldgiftsnævnet for Byggeri og Anlæg*" in Danish), which is the forum for the vast majority of arbitrations in Denmark.

Similarly, Art. 37 of the Rules of Arbitration Procedure of the Oslo Chamber of Commerce[10] stipulates:

"With the exception of losses caused by wilful misconduct or gross negligence, any party that uses the Institute waives any right to assert claims for damages against the Institute, arbitrators or any other person who performs duties for the Institute or who has been appointed to assist the arbitral tribunal."

LIABILITY OF ARBITRATORS *VIS-À-VIS* THIRD-PARTY ARBITRATION FUNDERS?

As can be seen from the above, under the laws of the Scandinavian countries the immunity of arbitrators is solely based on the articles in the rules of procedure, which apply by virtue of the contract that the arbitrators are seen to have entered into with the parties to the arbitration.

Seeing that there is no direct contractual relationship between the arbitrators and any third parties funding the arbitration and in the absence of a general immunity protection at law (as the one found in the English Arbitration Act), the arbitrators are not protected against possible claims raised in tort by an arbitration funder who has funded an unsuccessful arbitration.

Accordingly, a third-party arbitration funder may unhindered raise a claim in tort against the arbitrators asserting that they breached their duty of care owed to the funder by failing to perform their duties diligently and competently when they decided the dispute. The fact that the award under the laws of most jurisdictions[11] is final and that it can generally only be set aside where there is evidence of serious procedural errors might enhance the risk of a tort action, (seeing that it is generally not procedurally possible to cure an award which is legally flawed on the merits).

Under the laws of the Scandinavian jurisdictions, the requirements for successfully raising a tort claim in this context can briefly be summarized as follows:

1. *Negligence*: To establish whether there is negligence, one will generally have to compare the actual conduct of the arbitrators to the hypothetical conduct of experienced, international arbitrators. Arbitrators are expected to conduct themselves professionally and with a reasonable level of international dispute resolution experience when it comes to resolving procedural issues, interpreting the contract, assessing the evidence and applying the governing law of the contract correctly. In this regard the conduct of the arbitrators can be juxtaposed with the different guidelines on international arbitration issued by the UNCITRAL or the Chartered Institute of Arbitrators (CIArb), when assessing whether the arbitrators have acted negligently. Where the arbitrators have

[10] Oslo Chamber of Commerce, 'Rules of the Arbitration and Dispute Resolution Institute of the Oslo Chamber of Commerce, Arbitration and Fast-track Arbitration', (2017) <https://chamber.no/wp-content/uploads/2022/11/OCC_arbitration_rules_2017.pdf> accessed 12 December 2024.
[11] With the notable exception of Section 69 of the English Arbitration Act 1996, which provides parties with the ability to appeal an arbitral award on a point of law.

conducted themselves in a manner that deviates from what an experienced international arbitrator would have done, *e.g.*, by basing their findings on evidence or arguments that have not been submitted by either of the parties, they risk being deemed to have acted negligently. In this regard, the case law related to the liability of arbitrators towards the parties for procedural errors may serve as a useful guide when assessing whether a tort liability may come into play.

2. *Proof of loss*: Secondly, a tort liability requires proof that a loss has been incurred. This condition will rarely pose a problem in that the third-party funder will usually have lost its "invested" funds in the dispute in the form of legal costs, expert costs, administrative costs, etc. The more difficult question in this regard is whether the third-party funder can successfully claim loss of profits (*i.e.*, loss of the portion of the amount claimed by the funded party in the arbitration that was not awarded).
3. *Causality*: This condition is more challenging as is the case in most tort claims. The third-party funder would have to show that the loss was incurred as a result of the negligence of the arbitrators and that their negligence was a *"conditio sine qua non", i.e.*, that the loss would not have occurred "but for" the negligent conduct of the arbitrators.
4. *Foreseeability*: This condition requires the third-party funder to show that it was foreseeable for the arbitrators that their negligence would result in the loss incurred. Where the tribunal has been informed that one of the parties (or both) are being funded by a third-party this condition will rarely present a challenge.
5. *Absence of contributory negligence*: Finally, the third-party funder will likely face challenges where the arbitrators can point to "ineffective representation" by the counsel representing the funded party in the arbitration. Where the counsel has failed to offer substantiated arguments the arbitrators will often be able to exonerate themselves from liability with reference to the fact that their findings were dictated by the manner in which the "case was presented" to them by counsel for the funded party in the arbitration.

The fact that arbitrators may attract liability for gross procedural errors despite the immunity protection embedded in most institutional rules of procedure has been established several times by national courts in both common law and civil law jurisdictions. Errors that may give rise to liability include: Excluding an arbitrator from the deliberation process[12], deciding the case based on evidence or legal arguments that have not been submitted by either party, lack of impartiality and/or independence, an unreasonable or unjustified resignation by an arbitrator, corruption, fraud, forgery, etc.[13]

The more difficult question is whether - and if so under which conditions - arbitrators can be held liable in tort for having failed to correctly apply the governing law of the contract or for having misinterpreted the contract. In this regard, the above-mentioned cases may provide some guidance, although there are differences between a situation where a lawyer attracts liability in tort *vis-à-vis* a third party (due to legal malpractice), and a situation where arbitrators render an award riddled with legal errors causing a third party funder to suffer a loss. In most of the cases implicating lawyers giving bad legal advice, the injured third party

[12] Julio Olórtegui, 'Puma v. Estudio 2000: Three Learned Lessons' (2017) <https://arbitrationblog.kluwerarbitration.com/2017/05/29/puma-v-estudio-2000-three-learned-lessons/> accessed 12 December 2024.
[13] Papazoglou Stephanie, 'Arbitrator Responsibility' (2023) <https://jusmundi.com/en/document/publication/en-arbitrator-responsibility> accessed 12 December 2024.

did not influence the transaction in question, whereas a third-party funder will generally be well aware of the risks involved when funding an arbitration. The inherent acceptance of risk by a third-party funder may present a hurdle when attempting to pursue a claim against the arbitrators.

The general view under Scandinavian law seems to be that arbitrators will likely be given considerable "wiggle room" when determining whether a failure to correctly decide a case on its merits can give rise to tort liability, provided of course that the arbitrators have acted in good faith and have complied with the rules of procedure. "Honest mistakes" made in the assessment of the evidence and/or in relation to applying the contract and/or the governing law correctly will therefore only very rarely give rise to a tort liability.[14]

CASE LAW

The available reported case law on the issue of tort liability of arbitrators is scarce, however, some guidance may be found for example in tort cases where a lawyer has prepared a testament for a client designed to ensure that a certain beneficiary receives a certain portion of the probate estate of the client. Where the testament fails to meet this goal, the lawyer may face a claim in tort raised by the disgruntled beneficiary.

In the Danish case, UfR 2008.1324 V[15], a lawyer was thus held liable in tort for the loss suffered by a foundation, which had been established in connection with a testament drafted by the lawyer. It had been a clear prerequisite for the testator that the foundation would be tax exempt, which turned out not to be the case.[16]

Another group of cases concerns the tort liability of lawyers *vis-à-vis* buyers of real estate. In the Danish case, UfR 2010.2375 H[17], the lawyer represented the seller of an apartment. The lawyer failed to observe the rules on the maximum price that could be demanded for the apartment as regulated in the Danish Cooperative Housing Association Act, and consequently the buyer of the apartment suffered a loss when he resold the property at a lower price (as allowed by said Act). The Supreme Court found that the lawyer should have informed both his client (the seller) and the buyer that the transaction was governed by the special rules set out in the mentioned Act. The lawyer was thus held liable for damages and was ordered to pay compensation to the buyer for the incurred loss.

Finally, a lawyer may attract a tort liability vis-à-vis the tax authorities. In UfR 2000.365/2 H[18], (often referred to as the "*Thrane Case*") a company in which there were only liquid assets and a tax debt, was sold at an inflated price after the business had ceased. The sale was assisted by the seller's lawyer, by an accountant and by the buyer's bank. It was agreed between the parties that the purchase price would be transferred from the buyer's bank to the seller's bank

[14] Anders Ørgaard, *Voldgiftsaftalen*, DJØFs Forlag 2006, 45. See also Niels Schiersing, *Voldgiftslov med Kommentarer*, DJØFs Forlag 2016, 249ff (with several references).
[15] Judgment rendered by the Western Division of the Danish High Court ("*Vestre Landsret*") printed in the Danish Weekly Law Reporter ("*Ugeskrift for Retsvæsen*") Vol 2008 at p. 1324ff.
[16] See also the similar decision FED 2008.235 V concerning errors made by a lawyer in relation to a prenuptial agreement. The judgment, which was rendered by the Western Division of the Danish High Court is printed in the journal, "*Forsikrings- og Erstatningsretlig Domssamling*" Vol 2008 at p. 235ff.
[17] Judgment rendered by the Danish Supreme Court ("*Højesteret*") printed in the Danish Weekly Law Reporter Vol 2010 at p. 2375ff.
[18] Judgment rendered by the Danish Supreme Court printed in the Danish Weekly Law Reporter Vol 2000 at p. 365ff.

and that the company's funds would be transferred to the buyer's bank on the same day. This emptied the company of funds without any tax being paid. In their assessment of the lawyer's liability, the Danish Supreme Court emphasized that the transfer was not a normal business transaction. Therefore, the advisors should have been aware of the risk that the tax authorities could suffer a loss. The seller's lawyer was therefore held liable for the tax authorities' loss.

The *Thrane Case* has attracted renewed interest and attention in recent years due to the "dividend washing" scandal, which a number of major law firms across Europe have been involved in and have subsequently been sued for in tort by among others the Danish tax authorities. One particular case should be mentioned in this context as it may serve to illustrate the extent of the duty of care, which lawyers are deemed to have towards third parties:

On 2 November 2023, the Danish Supreme Court ordered one of Denmark's largest law firms, *Bech-Bruun*, to pay more than ½ billion DKK (including interest) in tort damages to the Danish tax authorities.[19] The case, which was initiated in April 2020 in the Eastern Division of the Danish High Court, arose out of a tax opinion prepared by *Bech-Bruun* in 2014 for the German bank, the North Channel Bank. In the tax opinion, *Bech-Bruun* gave advice on how the bank could participate as a depository bank in so-called "*cum-ex*" transactions, also known as "dividend washing", involving *double* refunds of dividend withholding tax – in other words, tax fraud.

In its judgment, the Supreme Court among other things held that Bech-Bruun's tax lawyer who had prepared the tax opinion "had to realize that there was an obvious risk that North Channel Bank, together with others, was involved in preparing a model for unjustified refunds of dividend tax." In this connection, the Supreme Court emphasized that the lawyer in an e-mail from the bank's German lawyers had been "made aware of the risk of double refund of dividend tax" and that he therefore had "to be aware of the risk of setting aside the interests of the tax authorities". Further, the Supreme Court emphasized that the lawyer had found himself in "an elevated responsibility risk environment" as the envisaged "cum-ex" transactions appeared to have no commercial justification.

Danish case law (and in particular the "*Bech-Bruun* case") clearly demonstrates that lawyers in a variety of cases can be held liable in tort *vis-à-vis* third-parties who suffer a loss as a result of legal services provided to a client. In the context of dispute resolution services, it is thought, however, that arbitrators will be allowed a considerable margin of error when it comes to deciding a commercial dispute on its merits. That said, where procedural errors are made or where it is evident that certain key findings in the award are not in line with the contract or with the applicable law, arbitrators may suddenly find themselves "on the other side of the bench" facing an uncomfortable degree of scrutiny in a tort action brought by a financially strong arbitration funder with substantial litigation experience.

[19] A transcript of the judgment is available here in Danish: <https://domstol.dk/media/apsbobj0/20331-2022-anonym-dom.pdf> accessed12 December 2024.

CONCLUSIONS

Historically, funding large-scale arbitrations often posed financial challenges for parties seeking redress through the arbitration process. The costs associated with legal representation, administrative fees, expert witnesses, and other aspects of dispute resolution can be substantial. Recognizing this gap, third-party arbitration funders have stepped in to bridge the financial divide and level the playing field, enabling parties to pursue their claims without being hindered by financial constraints.

The use of third-party arbitration funding has increased dramatically over the recent years and is today a multi-billion Euro industry. Arbitration funders conduct a thorough due diligence of each case with legal opinions and expert assessments to determine the risks involved before deciding to fund a party. In light of the considerable investments made by funders in major commercial disputes, it is not unlikely that they will explore the possibility of raising claims against both counsels and arbitrators (or their insurance companies) where a funded case is lost.

International arbitrators should be aware of this risk, in particular since the *lex arbitri* will generally not grant immunity and since the waiver of liability set out in the rules of procedure of most arbitration institutions will not protect arbitrators against tort claims raised by a third-party arbitration funder given the fact they the funder is not a party in the arbitration and thus not a party in the contractual relationship between the arbitrators and the claimant and the respondent.

The risk of attracting a tort liability *vis-à-vis* a third-party funder might give rise to concerns in a broader sense: Arbitrator immunity exists so that arbitrators can resolve disputes independently and impartially, not based on fear of a later lawsuit from an unhappy party. If the third party funder can sue the arbitrators because immunity does not apply, but the opposing party cannot (because immunity does apply), arguably there could be an incentive for arbitrators to rule in favour of the funded party.

In this light, arbitrators acting in *ad hoc* arbitrations[20] should verify whether their professional indemnity insurance policies provide adequate cover both in terms of limits and in terms of scope. In this connection, it is worth mentioning that some policies afford only limited cover or no cover at all for legal work involving foreign law.

Finally, the large arbitration institutions could consider expanding the usual immunity protection set out in their procedural rules, for example with a provision whereby a funded party undertakes to hold harmless, indemnify and protect the arbitrators from and against tort claims raised by that party's third-party arbitration funder.

[20] In arbitrations under the auspices large institutions, the arbitrators will usually be covered by the third party indemnity policy of the institution.

ARBITRATION IN FREE ZONES: CONFIDENTIALITY VS. TRANSPARENCY

Asmar Ismayilova

ABSTRACT

The establishment of free zones aims to attract investment through various incentives, positively impacting the economies of countries like it happened in China, Singapore, the UAE, Ireland, etc. These zones simplify trade procedures, provide necessary infrastructure, and offer facilitated fi-nancial services, contributing to economic growth when basic principles are correctly applied. Free zones often feature eased administrative controls and a special regulatory framework, which in certain cases raises concerns about legality and money laundering. To address these issues, maintaining a transparent dispute resolution system and upholding the rule of law is crucial.

This paper explores the unique aspects of arbitration in free zones, emphasizing the need for transparency to ensure reliable and fair dispute resolution. Arbitration, while confidential and pri-vate, lacks a unified precedent, which can undermine the consistency of investment arbitration de-cisions. Therefore, the paper argues for greater transparency in free zone arbitration proceed-ings.

The paper is structured as follows: first, it outlines the specifications of arbitration in free zones, explaining the benefits and characteristics of separate dispute resolution mechanisms. Next, it ex-amines the balance between confidentiality and transparency in international arbitration, particu-larly within free zones. Finally, the paper provides suggestions for improving international arbi-tration in free zones, considering their hybrid nature. The conclusion synthesizes the analysis and recommendations presented.

INTRODUCTION

The establishment of free economic/trade zones ("free zones") attracts investment to a special part of a country through fiscal and non-fiscal incentives. This involves easing control. It also involves simplification of trade procedures, provision of appropriate infrastructure for investors, and facilitated financial services. Countries like China, Singapore, the United Arab Emirates, and Ireland have developed successful free zones, and this created an immense impact on the rise of the economy in those countries. Their successful history proves that if a country applies the basic principles of a free zone in the right way, it guarantees economic growth.

The key feature of free zones is that governments usually ease administrative control over business in a certain area of the country where the free zone is established through a special regulatory framework. Furthermore, to make free zones more attractive and maintain their reputation, some regulatory bodies prefer to establish local dispute resolution bodies. Some promising free zone models offer arbitration (including their own arbitration rules and administering centre) as a facilitated dispute resolution method. But courts are not excluded and some free zones established special courts assigned to that free zone only.[1] Those courts and arbitration centres have exclusive jurisdiction over the disputes in the free zones unless otherwise agreed by the parties.

In general, arbitration is confidential and private unless parties opt for transparency. This rule is not followed much in investment arbitration due to recent developments in international arbitration rules. But not in free zone arbitration rules. The confidential and private nature of arbitration can raise some questions about the overall system approach in free zones. Arbitrators are not bound by any decisions made by any arbitral tribunal as there is no unified precedent law in arbitration. Arbitrators even could be entitled to write an award without giving a reason "which can make their awards appear arbitrary or capricious".[2] Increasing tendency of transparency in investment arbitration might slightly leak into free zone arbitration rules, too. Conceptually, free zones are modelled or likened to being a separate room with closed doors in a house. However, potential investors and investors that did not have a dispute in a free zone can wonder about the justice system within the free zone and coherent, harmonized decisions can make free zones even more attractive.

This paper will discuss the above-mentioned issues and provide suggestions for making free zone arbitration attractive and achieving consistency in investment arbitration. First, some specifications of arbitration in free zones will be briefly described. This section will address the questions and clarify why it is favourable to establish these separate dispute resolution mechanisms. Second, confidentiality and transparency in arbitration will be examined. This section will principally focus on the differentiation between the application of confidentiality and transparency in free zone disputes and any other investment disputes. Third, suggestions will be provided on how to deal with the hybrid nature of international investment law and the improvement of arbitration in free zones. Finally, deductions from all analyses will be presented in the conclusion.

1. DISPUTE SYSTEM DESIGN IN FREE ZONES: WHY IT IS DIFFERENT?

Arbitration is a frequently used and effective way to solve disputes in free zones. The historical purpose of arbitration was to reduce costs incurred by merchants (today's businesses), eliminate any bureaucracy in the way of dispute resolution, and save time for the main goal which is making a profit. However, according to Selya, these promises do not always materialize, and in recent years arbitration has become "increasingly litigious,"[3] having comparable costs as that for litigation. That is why free zone authorities and

[1] Gordon Blanke, 'Free Zone Arbitration: The Mechanics' (2018) 6 Indian J Arb L 56, p 57.
[2] Richard C.Reuben, 'Democracy and Dispute Resolution: Systems Design and the New Workplace' (2005) 10 Harvard Ne-gotiation Law Review, p. 11, University of Missouri Columbia School of Law Legal Studies Research Paper No. 2006-19.
[3] Bruce M. Selya, 'Arbitration Unbound?: The Legacy of McMahon' (1996) 62(4) Brook. L. Rev. 1433, p 1446.

governments are keen to establish a facilitated arbitration process in order to provide a better solution with a favourable and investor-friendly environment for businesses. This process is like a continuation of the whole free zone establishment mission and vision. The main purpose, of course, is to preserve the credibility of free zones and raise trust that may attract more investment.

Furthermore, some successful free zones are unique not only for their economic growth but also for the establishment of a new legal era in dispute resolution system design. Unprecedented legal reforms have been carried out and respective laws have been adopted in order to support the dispute resolution process. For instance, the United Arab Emirates, Kazakhstan and Azerbaijan created a separate jurisdiction within their overall jurisdiction via the establishment of free zones within territorial borders. This means there are free zones in those countries that do not abide by state laws (mostly commercial) and are authorized to adopt their own laws. Separate dispute resolution mechanisms are an essential part of new jurisdiction and apply different rules and laws other than the states'. These facets, on the one hand, facilitate the dispute resolution process, and on the other hand, may cause complexity which this article will expose. The challenges of dispute resolution in free zones, which include the unification and harmonization of international investment law, the collision of confidentiality and transparency in international arbitration, will be analysed.

A brief description of the strategy of establishment, structure, and scope of the dispute resolu-tion bodies will be described. This will also include the analytical comparison of dispute resolution bodies in the example of Dubai International Financial Centre, Abu Dhabi Global Market, and Alat Free Economic Zone. But the analysis of the Alat Free Economic Zone arbitration will be slightly different from others and will be based only on the Law "On Alat Free Economic Zone".[4] At the time of writing this paper, Alat Free Economic Zone is in the process of attracting investors and establishing dispute resolution bodies. The purpose is to show the special nature and status of such free zones, and their dispute resolution processes, and moreover, to plant seeds of new reform ideas in investment arbitration which can be successful in free zones.

A. Brief description of free zone dispute systems design: The United Arab Emirates - Dubai International Financial Centre

The economy of the United Arab Emirates ("UAE") climbed straightforwardly up due to the availability of natural resources. Nevertheless, the Rulers of the UAE acknowledge that natural resources are exhaustible and very soon they began to seek alternatives for the sustainable economic development of the country. Its strategic geographic location on the shore of the open ocean and being located between Europe and Asia benefited the UAE to establish successful free zones which now number nearly 40.[5] Simplification of procedures, fiscal and non-fiscal incentives, and many other aspects attracted plenty of investors to these

[4] Ələt azad iqtisadi zonası haqqında Azərbaycan Respublikasının Qanunu [The Law of the Azerbaijan Republic "On Alat Free Economic Zone"] 2018, Azərbaycan Respublikasının Qanunvericilik Toplusu [Azerbaijan Republic Collection of Legislation] No. 06, 1180 <1143-VQ - Ələt azad iqtisadi zonası haqqında> accessed 22 July 2024.

[5] Ministry of Economy United Arab Emirates, 'Free Zones' (*Ministry of Economy United Arab Emirates*, 2024) <https://www.moec.gov.ae/en/free-zones#:~:text=The%20UAE%20offers%20investors%20more,have%20full%20ownership%20of%20companies> accessed 22 July 2024.

free zones in a short period of time;[6] and the UAE is one of the successful places where free zones emerge and develop amazingly fast.

One of the primary reasons that make these free zones famous and attractive to foreign investors is their unique approach to jurisdiction. Several of them drafted and applied legislation based on common law principles although the UAE is a civil law country. This was probably difficult to put into practice, but they succeeded. Similarly, the UAE free zones designed dispute resolution systems based on common law principles. This section will discuss two of them: the Dubai International Financial Centre ("DIFC") and Abu Dhabi Global Market ("ADGM") dispute resolution systems. As former Chief Justice of the DIFC Courts, Michael Hwang said DIFC is "a common law island in a civil law ocean" and both of these free zones have their own civil and commercial legislation based on common law.[7] The DIFC was first defined in the Federal Law of the UAE on "The Financial Free Zones in the United Arab Emirates."[8] Dubai Law on "The Establishment of the Dubai International Financial Centre" officially established the DIFC and confirmed its separate jurisdiction.[9] The separate jurisdiction of this free zone is extraordinary because it does not follow the central government on civil and commercial matters as defined by relevant laws.

DIFC also has exclusive dispute resolution jurisdiction within this free zone. Presently, free zone courts are the only local dispute resolution body in DIFC. Whereas until 2021, the DIFC-LCIA Arbitration Centre was the forum most free zone subjects used to solve their disputes. This DIFC-LCIA Arbitration Centre was a joint venture of the DIFC and the London Court of International Arbitration (the "LCIA") whilst DIFC's Arbitration Institute (the "DAI") was an administrative body of the DIFC-LCIA Arbitration Centre. Arbitrations were operated in DIFC under DIFC-LCIA Arbitration Rules which were remarkably similar to LCIA Rules. That was one of the reasons why the DIFC-LCIA Arbitration Centre gained popularity and credibility among companies in the international business arena. Despite the deference given to DIFC-LCIA by businesses, on September 14, 2021, Dubai's Ruler issued Decree "Concerning the Dubai International Arbitration Center,"[10] which abolished the DIFC–LCIA and transferred the ongoing cases to the Dubai International Arbitration Centre ("DIAC"). DIAC was established in 1994 and until then, the Ruler's Decree was responsible only for mainland arbitrations. This abolition was unexpected and surprising for all stakeholders. Dubai's Ruler Decree stated some objectives like "consolidate the position of the Dubai Emirate as a reliable global hub for resolving disputes" and "enhance the position of DIAC as one of the best options for the parties to the dispute to resolve their disputes efficiently and effectively."[11]

Besides the stated objectives, other reasons for abolition may be assumed as well. One of the assumptions is an overload of cases at the DIFC-LCIA Arbitration Centre and a lack of strong

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[6] Hazem Shayah & Yang Qifeng, 'Development of Free Zones in United Arab Emirates' (2015), 1(2) International Review of Research in Emerging Markets and the Global Economy (IRREM) An Online International Monthly Journal, p 290.
[7] Blanke, p 57.
[8] Federal Law No. 8 of 2004 of the UAE on 'The Financial Free Zones in the United Arab Emirates' <https://uaelegislation.gov.ae/en/legislations/1981/download> accessed 22 July 2024.
[9] Dubai Law No. 9 of 2004 on 'The Establishment of the Dubai International Financial Cen-tre' <https://www.difc.ae/application/files/4414/5735/7076/Dubai_Law_No_9_of_2004_-_English.pdf> accessed 22 July 2024.
[10] DIFC Arbitration Law No. (1) of 2008 <https://www.difc.ae/files/9014/5449/8249/DIFC_Arbitration_Law_2008_0_1.pdf accessed 2024.> accessed 20 July 2024.
[11] Dubai Decree No. (34) of 2021 Concerning the Dubai International Arbitration Centre, Article 2, <https://dlp.dubai.gov.ae/Legislation%20Reference/2021/Decree%20No.%20(34)%20of%202021.pdf> accessed 20 July 2024.

coordination between DIFC and LCIA. Another assumption is the initial goal of the Dubai government was to attract international attention to Dubai as a reliable seat of arbitration. Parties may now choose DIAC as a seat for their arbitration and DIFC Arbitration Law will be applied for supervisory and procedural issues. The scope of jurisdiction of the DIFC Arbitration Law was enhanced in 2008 and any disputing parties without involvement in DIFC may elect to arbitrate under this Law. This Law applies within the jurisdiction of the DIFC and has a strict confidentiality requirement in Article 14 extending to even places where the seat of arbitration is one other than the DIFC. So, strict confidentiality in a free zone with its substantive laws may raise concerns with the investors, lawyers, and the public about the results of arbitration proceedings and how the free zone legislation is applied in a specific dispute. Furthermore, unknown outcomes from adopted rules and applied measures by the independent free zone authority raise a lot of questions for other potential investors as well as current ones.

B. The United Arab Emirates: Abu Dhabi Global Market

The dispute resolution system in ADGM is akin to the DIFC dispute resolution model: with dispute resolution vide courts, arbitration, and mediation. ADGM was founded pursuant to Abu Dhabi Law No. (4) of 2013 "Concerning Abu Dhabi Global Market."[12]

The arbitration in ADGM is governed by Arbitration Regulations, which include "enhanced confidentiality provisions, the ability to contract out of the right to apply to set aside an award, and consolidation and joinder provisions."[13] The scope of these Regulations covers arbitrations seated at ADGM, or an arbitration agreement applying these Regulations. ADGM Arbitration Regulations apply to the recognition and enforcement of arbitral awards in the Abu Dhabi Global Market, irrespective of the state or jurisdiction in which they are made. The ADGM Arbitration Regulations, however, make a detailed list of exceptions to the confidentiality rule in Article 45.[14]

C. The Republic of Azerbaijan: Alat Free Economic Zone

In 2018 the Azerbaijan Parliament passed the Law "On Alat Free Economic Zone" (AFEZ Law)[15]. Alat Free Economic Zone (AFEZ) was to be an unprecedented project in the region for its unique legislation, infrastructure, and investor-friendly environment. All these and many other promises are consolidated in the AFEZ Law. In order to provide certainty to investors, more than 90 laws of the Azerbaijan Republic (including Tax Code, Customs Code, Civil Procedural Code, Civil Code, etc.) have been amended and their jurisdiction is excluded from the free zone. For instance, Article 3 of the AFEZ Law states that only AFEZ legislation, which is comprised of AFEZ Law and internal regulations, will be applied in the free zone. Except as stated in the AFEZ Law, no other laws of Azerbaijan will be applicable in the free zone.

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[12] Abu Dhabi Law No. (4) of 2013 Concerning Abu Dhabi Global Market <https://en.adgm.thomsonreuters.com/sites/default/files/net_file_store/ADGM1547_3270_VER021913.10.pdf> accessed 20 July 2024.
[13] ADGM Arbitration Regulations 2015, as amended by Amendment No. 1 of 2020.
<https://en.adgm.thomsonreuters.com/sites/default/files/net_file_store/ADGM1547_19075_VER231220.pdf> accessed 20 July 2024.
[14] Ibid. 14, Article 45.
[15] AFEZ Law.

Article 3 gives power to the Alat Free Economic Zone Authority ("Authority") to build and maintain an investor-friendly business environment for investors where investors will engage only with one administrative body. Through this engagement, their business relations will be facilitated, by minimizing bureaucracy. This Authority is authorized to legislate internal regulations for the free zone and coupled with executive powers (to govern the execution of AFEZ Law) makes it unique in the region. But the Authority has no judicial power; nor does it infringe the judiciary. Dispute resolution bodies established in AFEZ can independently hear the cases based on AFEZ Law. As a business paradise, AFEZ has already opened its doors to eligible investors. That is why this paper will analyse the theory in this AFEZ Law and the prospects of its potential success in terms of transparency in investment arbitration.

Chapter 4 of the AFEZ Law is dedicated to dispute resolution in AFEZ. Dispute resolution bodies will be comprised of an Arbitration Centre and other dispute resolution bodies. The AFEZ Law provides extraordinary facilitation to the enforcement of issued awards (decisions) by AFEZ dispute resolution bodies. This guarantees the independence of these bodies.

The jurisdiction of dispute resolution bodies encompasses all disputes arising from and out of the disputes in AFEZ, provided parties have not agreed otherwise. Furthermore, Azerbaijan courts' jurisdiction in AFEZ is also excluded from hearing disputes "related to the Free Zone and its operation, except for the cases set out by this Law." (i.e. AFEZ Law).[16]

D. The legal challenges of dispute resolution in free zones

Investor-state disputes involve two parties: first, an investor who invested in the free zone, and second, the host state which established the free zone. The legal relationship between them is regulated by international and domestic laws. At the international level, mainly International Investment Agreements (IIA), including Bilateral Investment Agreements (BITs), serve the protection of investment through certain standards.[17] So far, publicly disclosed investor-state disputes derived from free zones are mostly heard in international forums like the International Centre for Settlement of Investment Disputes ("ICSID") and the Permanent Court of Arbitration ("PCA"). Although the purpose of this paper is to analyse the cases heard in arbitration in free zones, due to strict confidentiality in arbitration rules it was impossible to access the cases. Moreover, sometimes even court proceedings related to arbitration (e.g., proceedings of recognition and enforcement of arbitral awards) remain confidential. For instance, according to Article 32 of the ADGM Arbitration Regulations, "all arbitration claims are to be heard in closed court unless the Court orders otherwise under section 32(4) of the Arbitration Regulations." The exceptions include (1) parties' agreement; or (2) if the ADGM Court is satisfied in particular cases for the proceedings to be heard in open court.[18] Thus, it becomes evident to what extent free zones keep the secrecy of information regarding arbitration.

[16] AFEZ Law, Article 26.
[17] Anton Tugushev, 'Protection of Investment and Violations of Investor's Rights in Special Economic Zones' (2020) 17(5) TDM, p 9.
[18] ADGM Arbitration Regulations, Article 32.

Case law shows that investor-state disputes in free zones were the main challenges premised on whether there had been fair and equitable treatment, expropriation with adequate compensation and non-discriminatory measures.[19] Whereas analysis of cases and special treatment in free zones reveal several peculiarities and challenges.

First, free zones' operation entails both liberal economic policy of states and protection of economic sovereignty.[20] In the mainland (the area of a state other than free zones), all relevant state bodies are involved in the control of businesses; however, in free zones, generally, only one regulatory body oversees and regulates all activity. Having one controlling body is an attractive nuance for investors because this reduces bureaucracy. However, states have to ensure that the legal framework regarding free zones is consistent with international law and serves its unification. Thus, the complex relationships among involved stakeholders may impact the state's obligations under international law.

Another challenge is about the legal personality of free zones and their ability to be respondents in investor-state dispute settlement (ISDS) matters. On the one hand, free zones are parts of states. Central governments define the main policy for them through domestic laws.[21] On the other hand, free zones have special jurisdiction and may adopt rules to regulate free zone operation, as well as disputes arising from free zone activities. Its unique legal status was challenged several times before tribunals. States usually request that a free zone be recognized as a legal person independent of the state. However, in known cases, states have often lost. For instance, in the *Sanum Investments v. Lao People's Democratic Republic*[22] case, where the seat of arbitration was Singapore, the question of the applicability of the China-Laos Bilateral Investment Treaty (BIT) to the Macao Special Administrative Region (SAR) (in China) was raised to the Singapore Court of Appeal. The respondent contended that the China-Laos BIT does not apply to Macau SAR, asserting that a Macanese investor cannot invoke the treaty's investment protection mechanisms. However, the Singapore Court of Appeal, exercising its supervisory authority over the arbitration, ultimately ruled that the treaty does extend to Macau.[23]

Free zone investment arbitration often involves public interest because this is usually attributable to investment disputes. Awards granted in free zone investment arbitration may have additional and significant impacts: it may affect the state's future policy regarding the free zone, the state treasury as well as the financial well-being of the free zone, and consequently the welfare of the people. Increased transparency can contribute to meeting public needs and enhancing its effectiveness.[24]

[19] Tugushev, p 10.
[20] Julien Chaisse & Georgios Dimitropoulos, 'Special Economic Zones in International Economic Law: Towards Unilateral Economic Law' (2021) 24 Journal of International Economic Law 229-257, p 229.
[21] Julien Chaisse, 'Dangerous Liaisons: The Story of Special Economic Zones, International Investment Agreements, and Investor–State Dispute Settlement' (2021) 24 Journal of International Economic Law 443, p 453.
[22] Sanum Investments Limited v. Lao People's Democratic Republic, UNCITRAL, PCA Case No. 2013-13.
[23] 'Sanum v. Laos (Part II): The Singapore Court of Appeal Affirms Tribunal's Jurisdiction under the PRC-Laos BIT', Kluwer Arbitration Blog, <https://arbitrationblog.kluwerarbitration.com/2016/11/11/sanum-v-laos-the-singapore-court-of-appeal-affirms-tribunals-jurisdiction-under-the-prc-laos-bit-part-ii/.> Accessed 18 July 2024.
[24] Transparency and Third-Party Participation in Investor-State Dispute Settlement Procedures, OECD Working Papers on International Investment, 2005/01, OECD Publishing, 11. <http://dx.doi.org/10.1787/524613550768>.

Moreover, tribunals consider disputes derived from free zones from different angles apart from regular investment disputes. If a state takes certain measures that might negatively affect free zone investment, this gives rise to arguments by investors about the unfairness of those measures, though those arguments are less expected in regular regime[25] because the nature and purpose of free zones are based on the added incentives and expected protection by the state.

Thus, it is assumed that free zone investor-state dispute settlement (ISDS) should be more effective because free zone arbitrations hear the cases based on specifically free zone legislation (e.g., free zone arbitration regulations). Obviously, uncertainty and inconsistency in dispute resolution can be one of the threats to a healthy business environment. Section 4 will provide some solutions to avoid or at least to some extent mitigate the situation in free zone investment arbitration.

2. CONFIDENTIALITY VS. TRANSPARENCY IN INTERNATIONAL INVESTMENT ARBI-TRATION: WHY IT IS IMPORTANT FOR FREE ZONE DISPUTES.

Confidentiality and privacy have always been recognized as being an integral part of arbitration. However, there is no expressed duty of confidentiality in international law, including the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention).[26] *Esso Australia Resources Limited v. The Honorable Sidney James Plowman and others*,[27] the famous case decided by the High Court of Australia, proved that there is no implied duty of confidentiality and "long standing arbitral custom and practice or business efficacy" cannot be grounds for justification. Converse to international conventions, provisions on confidentiality are set out in national laws and institutional arbitration rules. For instance, Article 30(1) of Arbitration Rules of the London Court of International Arbitration 2020[28] and Article 20 of the International Administered Arbitration Rules of the International Institute for Conflict Prevention and Resolution 2019[29] require parties and any other person involved in the proceeding in any capacity to keep confidential all awards in the arbitration including all materials related to the arbitration proceeding. The only exception is the parties' agreement to disclose, as well as disclosure requirements arising from the parties' legal duty or right. The confidentiality duty under the Arbitration Rules of the International Chamber of Commerce 2021 also depends on the parties' choice.[30] In general, confidentiality requires all proceedings and related documents to be treated confidentially by parties and all involved subjects.

Prominent arbitration expert Gary Born[31] has a different approach to the correlation of confidentiality with investor-state disputes. According to Born, the objectives of

[25] Tugushev, p. 18.
[26] Gary Born, *International Commercial Arbitration* (2021) 3rd ed., Kluwer Law International, p 231.
[27] *Esso Australia Resources Limited v. The Honorable Sidney James Plowman and others* (1995) 128 ALR 391.
[28] London Court of International Arbitration, Arbitration Rules (2020) <https://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2020.aspx> accessed 19 July 2024.
[29] CPR Rules for Administered Arbitration of International Disputes (2019) <https://static.cpradr.org/docs/2019%20Administered%20Arbitration%20Rules%20International_.pdf> accessed 19 July 2024.
[30] Arbitration Rules of the International Chamber of Commerce (2021) <https://iccwbo.org/dispute-resolution/dispute-resolution-services/arbitration/rules-procedure/2021-arbitration-rules/> accessed 18 July 2024.
[31] Born, p. 1.

confidentiality are to settle disputes more effectively and keep the process friendly and cooperative through a centralized dispute resolution system. All these objectives fully apply to states as well because when states agree with investors, they waive all their immunities and become ordinary commercial parties. Thus, if there are two private parties to a dispute, an implied duty of confidentiality is in place until those parties agree otherwise. Regarding public interest, Born emphasizes that not all investor-state disputes automatically involve public interest, especially when the amount of dispute is not much. Born suggests that tribunals should interpret the question in favour of transparency only when parties have not agreed to confidentiality and if there are "legitimate objectives to inform the public."[32] However, there is no differentiation of confidentiality rules between investment and commercial arbitration in free zone arbitration regulations.

So, it becomes obvious that confidentiality is not an absolute, but rather a mostly adhered principle for arbitration. In recent years, the confidentiality of investor-state arbitrations has been highly criticized due to "legal uncertainty, lack of uniformity, as well as the lack of confidence in the arbitration process"[33] These issues can be very harmful to the relations between investors and regulatory authorities in free zones because free zone investors may see themselves as being more vulnerable in the dispute resolution process with a regulatory authority if they agree to maintain confidentiality through local dispute resolution means. These concerns do not raise arbitration because the tribunal is independent. However, legal harmonization is lacking in confidential arbitration. The question depends on how the free zone arbitration rules regulate confidentiality. For instance, Article 45 of the ADGM Arbitration Regulations states that no party may publish, disclose or communicate any confidential information to any third party unless parties agree otherwise. Article 45 also lists the exceptions to the confidentiality rule upon parties like disclosure to "any government body, regulatory body, court or tribunal, and the party is obliged by law to make the publication, disclosure or communication."[34] At the same time, the fact must be noted that arbitration rules of free zones cover all disputes heard in free zone arbitration and do not distinguish investment arbitrations from commercial arbitrations.

But it is also evident that confidentiality is one of the reasons why disputing parties adore arbi-tration. In 2018 the Queen Mary University of London[35] conducted a survey where 87% of the respondents "believed that confidentiality in international commercial arbitration was of importance." In confidential proceedings, parties can protect trade secrets, maintain a good reputation in the market and guarantee better long-term relations with other business partners. For free zone' attractiveness, confidentiality can be an incentive for investors in commercial dispute resolution. While this may be true for commercial disputes, conversely strict confidentiality rules of free zone arbitrations may not favour investor interests. Because they may wish other investors also to know about their experience. Confidentiality precludes potential investors from evaluating the fairness and impartiality of the dispute resolution process in free zones, which is vital for them to know. In general, it is presumed that the majority would prefer transparency. This idea can be supported by the Issue Note published

[32] Born, p. 24.
[33] Mariel Dimsey, 'The Resolution of International Investment Disputes: Challenges and Solutions' (2008) Eleven Interna-tional Publishing, p 39.
[34] ADGM Arbitration Regulations, Article 45.
[35] The Queen Mary University of London & White & Case, International Arbitration Survey: The evolution of international arbitration, 27 (2018), <https://arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey-report.pdf.>.

by UNCTAD in 2024. According to UNCTAD, the majority of concluded ISDS cases between 1987 and 2023 were decided in favour of States (38% in favour of States, 28% in favour of investors, 18% settled, 13% discontinued, and 3% found breach but damages were not awarded).[36] With this context, investors would prefer more open and transparent proceedings of ISDS matters. Investor preferences and, more importantly, public interest in investment arbitration raise transparency questions in free zones.

3. TRANSPARENCY IN INVESTOR-STATES DISPUTES IN FREE ZONES.

In order to discuss to what extent disclosure of confidentiality in free zone arbitration ought to reach, the need for transparency in investor-state disputes in free zones should be analysed. Although investment arbitration is driven by commercial reasons, unlike commercial arbitration, investment arbitration proceedings raise important questions concerning public interest.[37] The confidential nature of commercial arbitration, however, "does not offend fundamental principles of justice"[38] as it may for investment arbitration. This hybrid nature of investment arbitration may become more complex in free zones because free zone investor-state disputes are usually resolved through special arbitration centres established particularly for that free zone and under free zone arbitration rules. A private and confidential arbitration environment in free zones may raise more concern for investors in terms of protection of investment. That is the reason why most states set up special arbitration centres and separate courts for free zones as their goal is to provide certainty to investors. One of the ways to ensure the trustworthiness of investor-state dispute settlement in a free zone is to provide a higher level of transparency for investors and arbitral tribunals.

Another obstacle is the inconsistency of decisions for similar cases with nearly identical facts and merits.[39] For instance, tribunals showed the opposite approach to a very similar Argentina case which was derived from the enactment of the Argentine Emergency Law.[40]

Generally, transparency became an actual matter of consideration for international arbitration institutions, especially those dealing with ISDS. Three approaches by international institutions that suggest more transparency for ISDS will be discussed further. Firstly, seeing some specifications of confidentiality and transparency in investor-state disputes experienced in ICSID arbitration can be valuable. ICSID made amendments to its Arbitration Rules and added a new Chapter X on "Publication, Access to Proceedings and Non-Disputing Party Submissions."[41] The intention was to increase the transparency of the ICSID arbitral process. If parties do not agree to a transparent proceeding, then ICSID publishes excerpts of an award.[42] In general, full publication of documents including awards, decisions of the Tribunal, procedural orders, submissions by parties, etc., all depend on

[36] UNCTAD, IIA Issue Note, Facts on Investor–State Arbitrations in 2024, <IIA Issues Note, No. 3, 2024> accessed 10 December 2024.
[37] Dimsey, p. 40.
[38] OECD (2005), *International Investment Law: A Changing Landscape: A Companion Volume to International Investment Perspectives*, OECD Publishing, Paris, https://doi.org/10.1787/9789264011656-en.
[39] Katia Yannaca-Small, (2006), "Improving the System of Investor-State Dispute Settlement", OECD *Working Papers on International Investment*, No. 2006/01, OECD Publishing, Paris, <https://doi.org/10.1787/631230863687>.
[40] Ritika Bansal, 'Need for Implied Transparency in Investment Arbitration' (2021) 54 NYU Journal of International Law and Politics 221, p 230.
[41] ICSID Arbitration Rules (2022), <https://icsid.worldbank.org/rules-regulations/convention/arbitration-rules/introductory-note> accessed 20 July 2024.
[42] Ibid, rule 62(4).

parties' consent. ICSID Tribunals several times exhibited "fairly serious reservations" about parties' discussion about the proceeding or publication of materials during the ongoing arbi-tration process and based their concerns on "a risk of aggravation, procedural disorder, or public pressure being exerted against one party".[43]

Secondly, the United Nations Commission on International Trade Law (UNCITRAL) proposed the Rules on Transparency in Treaty-Based Investor-State Arbitration ("UNCITRAL Transparency Rules").[44] The scope of application of the UNCITRAL Transparency Rules to investor-state arbitration is restricted to treaties concluded on or after 1 April 2014. However, parties may agree to opt out of these rules. UNCITRAL also made several changes to the 2010 UNCITRAL Rules in 2013 to align with the UNCITRAL Transparency Rules.[45] As a result, the latter became applicable in arbitrations initiated pursuant to bilateral or multilateral investment treaties. The UNCITRAL Transparency Rules provide for a wide range of publicity of the investor-state arbitration which includes the publication of orders, decisions, awards, the notice of arbitration, the response to the notice of arbitration, etc. (Article 3), open hearings, and allowance to third parties to file *amicus curiae* submissions. There are, however, some limitations in Article 7, like the protection of confidential business information. At first sight, these rules seem mandatory; however, the parties have discretion to avoid these rules. Despite the need for transparency derived from the public nature of investment arbitration, parties may agree not to apply the UNCITRAL Transparency Rules in a treaty (Article 1.3 (a)).

In summation, awards in investor-state arbitration are disclosed more fully than awards in commercial arbitrations, and this is mostly through the requirement in the bilateral or multilateral treaties or institutional rules. However, there is no absolute transparency in any investor-state arbitration.

4. SUGGESTIONS

Previous sections of the paper described how confidentiality and transparency conflict due to the hybrid nature of investment arbitration, while legal challenges in free zone investment dispute settlement create additional legal – as well as political and economic – concerns for all stakeholders. The main concern for overall investment law and ISDS (including in free zone) is the lack of uniformity and inconsistency of decisions, and unpredictability of awards.[46] As already mentioned, free zone investors may not predict the result once a dispute arises, states may be subject to bias, or public interests may be prejudiced and harmed due to strict confidentiality rules. Consequently, this impedes the uniformity of investment law. However, it is also acknowledged that the existing practice has been in place for a long time. That can be one of the reasons why famous international arbitration institutions cannot repeal confidentiality rules. Considering all factors this paper provides some suggestions as a starting point:

[43] Born, p. 21.
[44] UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration (2014) https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/rules-on-transparency-e.pdf accessed 18 July 2024.
[45] UNCITRAL Arbitration Rules Commission on International Trade Law United Nations (2013) https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/21-07996_expedited-arbitration-e-ebook.pdf accessed 18 July 2024.
[46] Giovanni Zarra, 'Orderliness and Coherence in International Investment Law and Arbitration: An Analysis Through the Lens of State of Necessity' (2017) 34(4) Journal of International Arbitration, p. 656.

A. Limit confidentiality. As discussed above, strict confidentiality rules in free zones create obstacles to the unification of international investment law and harm the public interest. However the whole waiver of confidential nature in investment arbitration can cause unforeseen legal problems. With this purpose, it is suggested to create a centralized database for investment arbitration awards and decisions in free zones. The initial idea of establishing free zone arbitration was to localize disputes, reduce certain costs for parties, etc. Strict confidentiality rules emanating from the relevant regulations of free zones are one of the incentives provided to investors. However, the conflicting requirements between the confidential nature of investment arbitration and the desired transparency derived from public interest in investment arbitration can be handled through the centralized database of adopted decisions and rendered awards by arbitral tribunals in the free zones. The idea is that the free zone relevant regulations put certain limits on confidentiality and all rendered awards by a free zone arbitration on investment dispute will automatically be included in the database with-out any exceptions. All businesses registered in the free zone irrespective of whether they have or had a dispute with the relevant state should have unlimited access to the centralized system. The free zone authorities may grant this access to potential investors as well. This can play a role in a pilot project to test the total elimination of confidentiality in free zone arbitration. However, this should be done in phases. For instance, in the initial stage, only registered businesses should be granted access to this data; without its disclosure to potential investors. Also, registered businesses may be required by regulations to use the information only for assessment of their ongoing or future dispute.

B. Increase transparency. Free zones can be vulnerable to legal challenges due to the confidential nature of arbitration. In order to prove its credibility and reliability, states should increase the transparency of the arbitration proceedings and outcomes. But what extent of transparency is necessary for satisfying both investors' and states' interests?

Gary Born seems to be sceptical of the requirement of transparency in investor-state arbitrations as discussed above. According to Born, it is still "unclear" why transparency should trump confidentiality in investor-state arbitration. Other experts also think that requirements for increased transparency "are often overstated."[47] However, UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration recognizes the need to take account of the public interest involved in treaty-based investor-state arbitrations.[48]

This requirement of increased transparency in free zone investment arbitration is slightly different from international investment arbitration. The rationale behind the free zone is to attract more investment. Stable and harmonized arbitration and the overall dispute resolution process might be essential for investors and serve the latter purpose. That said, this paper does not suggest that free zone arbitration should switch to high-level transparency immediately (or at all). It only suggests giving investors an opportunity to have a clear view of the credibility and trustworthiness of a free zone. For example, in *Union Fenosa Gas v. Egypt* case[49] the State's revocation of the company's status as a resident in the Special Economic Zone was not considered to be a breach because the State "did not target" only the

[47] Born, p. 21.
[48] UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration, Article 1(4)(a).
[49] Unión Fenosa Gas, S.A. v. Arab Republic of Egypt, ICSID Case No. ARB/14/4.

Claimant. More interesting, there was neither an agreement between parties nor another legal guarantee to create the basis for the Claimant's "legitimate expectations" that the tax regime will not change. This case was a clear message to other investors in that free zone to obtain guarantees for incentives promised by free zones. If these kinds of cases are heard in free zone arbitration no other investor will ever be aware of this decision due to strict confidentiality. Investors always want to be sure about the validity of incentives of free zones. These are their legitimate expectations. So, increased transparency primarily serves the interests of investors who are of priority as free zones cater for them.

C. Apply stare decisis doctrine. Despite there being no doctrine of precedence in investment law, there is a developing tendency in investment arbitration to apply previous findings or rationale and several ICSID cases have applied *stare decisis* (for example, *El Paso Energy International Co. v. Argentine Republic* case.)[50] Strong reliance to stare decisis in free zones investment arbitration can foster predictability and consistency in rulemaking which are the main concerns of investors in free zones. According to Kaufmann-Koehler, arbitrators do not have a legal obligation to follow precedents; however, applying prior cases to current similar cases can be considered their moral obligation. In this way, arbitrators "foster a normative environment that is predictable."[51]

Thus, the *stare decisis* doctrine can be a valuable solution for 1) developing consistency and predictability in decision-making in free zone ISDS matters; and 2) increasing the reliability to free zone dispute resolution system to meet states' objectives in the free zone dispute resolution design.

5. CONCLUSION

Disputes in free zones involve not only private law (disputes between private parties) but also public law (e.g., disputes involving the state as a party). Since the goal of the states is to attract foreign investment by offering incentives, transparency in free zone investment dispute settlement can appeal to more investments and create a positive reputation for host states.

The special nature of free zone dispute resolution is derived from the aim of states to localize the dispute to the free zone and preclude it from escalating to the international level. This aim serves both parties' interests: both want frequent and straightforward resolution of the dispute with lower costs. Nonetheless, in practice, disputes from free zones often expand to the international level and mainly emanate from active Bilateral Investment Treaties (BITs).[52] Thus, host states cannot achieve their goal and that is why the free zone dispute resolution system deserves more attention and incentives.

[50] El Paso Energy International Company v. The Argentine Republic, ICSID Case No. ARB/03/15.
[51] Gabrielle Kaufmann-Kohler 'Arbitral Precedent: Dream, Necessity or Excuse?: The 2006 Freshfields Lecture' Arbitration International (2007) 23(3), p 374.
[52] Jacopo Dettoni, 'SEZs play catch-up on investment treaties' fDiIntelligence.com (2018), available at: https://www.fdiintelligence.com/content/feature/sezs-play-catchup-on-investment-treaties-70771. Accessed 20 July 2024.

Accordingly, free zone investment arbitration may raise similar or specific legal questions which have strict confidentiality requirements in free zone arbitration rules without any differentiation in regard to it being an investment arbitration, thus avoiding any individual approach to the public nature of investment dispute, having inconsistency in the decisions and consequently becoming difficult to predict the rulemaking, etc. The forwarded solutions are calculated to protect mainly investment interests in a free zone and provide them with a better view of the future actions of a state. In general, it is suggested to start by applying increased transparency in ISDS arbitrations only within the borders of the free zone.

MULTI-TIERED DISPUTE RESOLUTION CLAUSES: A STUDY FROM THE PERSPECTIVE OF COURTS

John (Zhiqiang) Zou, Frank (Zhao) He

ABSTRACT

This article first explores the nature of the Pre-Arbitration Procedural Requirements (the provisions which require ADR before arbitration, the Pre-Arbitration Procedural Requirements are also known as "Pre-Arbitration Procedure" or "Preconditions to arbitration", for short, referenced throughout the article as "Pre-APR.") in multi-tiered dispute resolution clauses. This article then examines the enforceability of Pre-APR, and concludes that both PRC courts and foreign courts generally recognize their enforceability provided the Pre-APR to arbitration is clear and operable. Lastly, this article investigates the legal consequences of a party's failure to fulfil Pre-APR, concluding that courts in various countries now commonly agree that such failures do not affect the arbitral tribunal's jurisdiction and do not result in the annulment or non-enforcement of the arbitral award. Although Chinese courts do not distinguish between admissibility and jurisdiction, the results of the judgements reviewed are consistent with those reviewed by courts in other jurisdictions.

1. INTRODUCTION

Multi-tiered dispute resolution clauses are widely present in commercial contracts and are especially common in cross-border commercial contracts. The "2021 International Arbitration Survey" released by Queen Mary University of London shows that nearly 59% of respondents choose to include multi-tiered dispute resolution clauses in their contracts, compared to only 35% in 2015.[1] Therefore, it can be foreseen that more and more business entities will introduce multi-tiered dispute resolution clauses into their contracts in the future. However, many legal issues arising from multi-tiered dispute resolution clauses are increasingly prominent. Among them, the nature of Pre-APR in multi-tiered dispute resolution clauses, the enforceability of the Pre-APR, and the legal consequences of non-performance of the Pre-APR are all urgent problems that need to be studied and addressed. Due to the existence of these issues, multi-tiered dispute resolution clauses also introduce a greater degree of uncertainty, so much so that Gary Born, the former president of the Singapore International Arbitration Centre and an authority in the field of international arbitration, commented that the uncertainty arising from multi-tiered dispute resolution clauses is the "Dismal Swamp" of international arbitration.[2] This article will comprehensively

[1] Queen Mary University of London, '2021 International Arbitration Survey: Adapting Arbitration to a Changing World' (2021) <https://www.qmul.ac.uk/arbitration/media/arbitration/docs/LON0320037-QMUL-International-Arbitration-Survey-2021_19_WEB.pdf> accessed 9 August 2024.

[2] Gary Born, 'Pre-Arbitration Procedural Requirements, Practicing Virtue – Inside International Arbitration' (Oxford University Press 2015).

discuss the aforementioned issues surrounding multi-tiered dispute resolution clauses, combining judicial cases from both China and foreign sources, as well as theoretical doctrines, from the perspective of courts in order to contribute to the resolution of these issues.

2. THE CONCEPT AND FORMS OF MULTI-TIERED DISPUTE RESOLUTION CLAUSES

First, multi-tiered dispute resolution clauses refer to contract provisions where parties combine different dispute resolution mechanisms. Typically, parties may use negotiation, mediation, expert determination, and other "alternative dispute resolution mechanisms" (ADR) as preliminary steps, and reserve arbitration or litigation as the last level of final remedy. There are various forms of multi-tiered dispute resolution clauses in commercial practice, among which the following are common in arbitration: (1) Negotiation + Arbitration, meaning that the parties should negotiate first after a dispute arises, and if negotiation fails, either party may initiate arbitration; (2) Mediation + Arbitration, meaning that the parties should first attempt mediation after a dispute arises, and if mediation fails, either party may initiate arbitration; (3) Negotiation + Mediation + Arbitration, meaning that the parties should first negotiate, if negotiation fails, then they should attempt mediation, and if mediation fails, either party may initiate arbitration. Of course, many parties often make more detailed agreements on the basis of the above forms, such as further clarifying the subjects, deadlines, and methods of negotiation and mediation (e.g., "after a dispute arises, it should be negotiated by the project leaders of both parties in a formal meeting, and if the negotiation does not result in a solution within 30 days, either party shall initiate arbitration") or further specifying the institution to administer mediation (e.g., "after a dispute arises, the parties should first submit the dispute to the Singapore International Mediation Centre for mediation, and if mediation is not successful within 90 days, either party has the right to initiate arbitration"). Some parties even include prohibitive provisions in multi-tiered dispute resolution clauses (e.g., "no party may apply for arbitration without undergoing mediation").

Compared to general dispute resolution clauses, multi-tiered dispute resolution clauses offer more flexibility and fully reflect the autonomy of all parties involved. Additionally, the Pre-APR in multi-tiered dispute resolution clauses provide a "cooling-off period" for the parties. This benefits the parties at the onset of a dispute by taking advantage of the institutional benefits of alternative dispute resolution mechanisms to resolve disputes through non-adversarial means, significantly saving time and cost for the parties, and is more conducive to maintaining cooperative relationships between trading parties.

3. THE NATURE OF PRE-APR IN MULTI-TIERED DISPUTE RESOLUTION CLAUSES

The nature of the Pre-APR in multi-tiered dispute resolution clauses is a core concern in this

study, as it directly affects how subsequent related issues are handled. This article finds that there are mainly three different theories on the nature of Pre-APR in practice and in theory, which are discussed in the section below.

A. Substantivism—Pre-APR as Part of the Arbitration Clause

The "substantivism" theory posits that the Pre-APR in multi-tiered dispute resolution clauses pertains to the issue of "substantial arbitrability."[3] That is, multi-tiered dispute resolution clauses are essentially dispute resolution contracts signed by the parties based on mutual agreement, in which Pre-APR constitute substantive conditions of the contract. In the "Pre-APR + arbitration" model, negotiation, mediation, and other preliminary steps are inherently part of the arbitration clause because only arbitration clauses are enforceable, while the other Pre-APR lacks enforceability.[4] As a contract, even if parties violate the Pre-APR, it only leads to legal consequences for breach of contract, without affecting the arbitration clause.

In 2000, the Supreme Court of Zurich in Switzerland held in case ZR 99 (2000) No. 29 that Pre-APR about mediation pertains to substantive legal requirements, unrelated to procedural issues of jurisdiction. Therefore, Pre-APR requiring negotiation or mediation only concerns the actual performance of the contract and does not impact the determination of jurisdiction. Based on the substantive nature of Pre-APR, the violation of such clauses leads only to substantive legal remedies. Thus, the complying party may only seek damages for breach and may not challenge jurisdiction.[5]

However, substantivism has been criticized in practice and theory for several reasons. First, this theory, although respecting the parties' autonomy to an extent, negates the quasi-judicial nature of multi-tiered dispute resolution clauses, equating them with ordinary contracts. Violation of Pre-APR can only lead to substantive legal consequences, making it easy for parties to bypass the preliminary steps and directly initiate arbitration. This undermines the very purpose of multi-tiered dispute resolution clauses, rendering the Pre-APR "a mere formality" and thwarting the parties' intention to resolve disputes through "alternative dispute resolution mechanisms" before arbitration. Second, because this theory holds that a party's violation of Pre-APR only results in substantive legal consequences and the other party may only seek damages, this approach lacks practicability. For instance, if a party bypasses Pre-APR and initiates arbitration, what losses does it inflict on the other party? How is the amount of these losses determined? How can one prove the causal relationship between the losses and the non-performance of Pre-APR? These are challenging questions.

Indeed, the Swiss Federal Supreme Court criticized the previous view of the above case for lacking rationality.[6] According to Article 97 of the Swiss Code of Obligations, claims for damages must be substantiated with sufficient evidence, which is nearly impossible for the party enforcing a precondition to obtain Pre-APR. This difficulty arises because multi-tiered

[3] Jing Qian, 'Analysis on the Enforceability of Multi-tiered Dispute Resolution Clauses' (2016) 98 Beijing Arbitration 1, 3.
[4] Na Li, 'A Study on the Path of Judicial Review on the Pre-procedure of Arbitration Agreements' (2022) 11 Journal of Law Application 81, 82.
[5] Cassation Court of the Canton of Zurich on March 15, 1999, ZR 99 (2000) No. 29.
[6] Swiss Federal Supreme Court on March 16, 2016, BGE 142 III 296.

dispute resolution clauses do not require the parties to achieve successful outcomes through the prescribed Pre-APR, making the extent of damage caused unquantifiable. Thus, it leads to the enforcing party being unable to claim effective damage compensation from the party violating the Pre-APR. In summary, it could be concluded that substantivism inevitably overlooks substantive issues and may be difficult to gain widespread acceptance.

B. Proceduralism—Pre-APR as Procedural Requirements

The "proceduralism" theory holds that multi-tiered dispute resolution clauses, composed of several stages, form a cohesive whole where the Pre-APR serve as prerequisites for arbitration. Failure to complete the Pre-APR impacts the validity of the entire clause. In other words, the Pre-APR are precondition for initiating arbitration proceedings. Parties must sequentially complete each step. If the Pre-APR is not fulfilled, arbitration cannot commence. Hence, non-compliance with Pre-APR does not result in substantive legal consequences of the breach but hinders the start of arbitration proceedings.

This "proceduralism" theory is widely adopted by courts in the United States, which view the nature of Pre-APR through the lens of "procedural arbitrability." From the proceduralism theory, negotiation, mediation, and similar preliminary steps are preconditions for arbitration. For instance, in *Kemiron Atlantic v. Aguakem International, Inc.* (2002),[7] the United States Court of Appeals for the Eleventh Circuit ruled that because the parties failed to fulfil the mediation clause of a precondition to arbitration, the arbitration clause had not been triggered, and thus, arbitration could not be initiated. The United States Court of Appeals for the First Circuit adopted a similar view in *Portland LLC v. DeVito Builders* (2003).[8] Furthermore, cases from the United Kingdom, Germany, France, Singapore, and Hong Kong S.A.R. also suggest that courts in these jurisdictions may lean towards recognizing the enforceability of certain Pre-APR. In cases where such clauses have not been complied with, initiating arbitration may be deemed inappropriate. Cases from these jurisdictions will be discussed in Section 4 below.

Additionally, similar views have been expressed by arbitral tribunals in ICC Case No. 12739, No. 6276 and No. 6277. In ICC Case No. 12739, because the parties failed to satisfy Pre-APR, the arbitral tribunal deemed its jurisdiction to be premature and dissolved itself.[9] In Case No. 6277, the tribunal opined that if the mediation procedure, as a prerequisite for arbitration, is enforceable and one party requests mediation while the other seeks arbitration, the tribunal opines that it should refuse jurisdiction and promote mediation between the parties.[10] In Case No. 6276, the tribunal viewed negotiation as a prerequisite for arbitration. However, because the parties did not fulfil this precondition, the conditions for the arbitral tribunal's jurisdiction were not met, leading to the dissolution of the tribunal (rather than suspension of arbitration proceedings).[11] According to these views, if Pre-APR is indeed deemed prerequisites for arbitration, the applicant bears the duty of seeking alternative dispute resolution methods, and both parties are obliged to negotiate in good faith before commencing arbitration unless negotiation proves ineffective.

[7] Aguakem Caribe, Inc. v. Kemiron Atlantic, Inc., 218 F. Supp. 2d 199 (D.P.R. 2002).
[8] HIM PORTLAND, LLC v. Devito Builders, Inc., 211 F. Supp. 2d 230 (D. Me. 2002).
[9] ICC Case No. 12739 (2005).
[10] ICC Case No. 6277 (1990).
[11] ICC Case No. 6276 (1990).

However, critiques of proceduralism theory point out its shortcomings, noting that "[o]nce one party fails to initiate consultation (if obliged to do so) or actively impedes the consultation process, the explicit mutual agreement on 'arbitration' inevitably falls through, it means that the arbitration clause will be unenforceable."[12] However, based on Article 159 of the Civil Code of the People's Republic of China, "[f]or conditional civil acts, if a party unjustly prevents the condition from being fulfilled for their benefit, it is deemed as if the condition has been fulfilled; if a party unjustly causes the condition to be fulfilled, it is considered as if the condition has not been fulfilled." An applicant may argue that a respondent's malicious non-cooperation in completing the Pre-APR constitutes unjust prevention of the fulfilment of a precondition for initiating arbitration. Therefore, legally, the condition should be considered to be fulfilled, thus preventing the mutual agreement on arbitration from falling through.

C. Independence Theory—Pre-APR and Arbitration Clauses as Independent Clauses

The independence theory postulates that the primary goal of parties in agreeing to Pre-APR is to resolve disputes in a more flexible, convenient, and economical manner, rather than to interlink negotiation, mediation, and arbitration as an indivisible whole. Hence, negotiation, mediation, and other Pre-APR are independent of the arbitration clause, merely connected, where the former should not become an obstacle for the latter. A minority of courts in the United States believe that preventing the initiation of arbitration due solely to the absence of compliance with a mediation or negotiation clause may deviate from the original intent of the parties. In *Bridge v. EFCO* (2003), the United States Court of Appeals for the Eighth Circuit held that mediation and negotiation are procedural requirements of arbitration rather than obstacles to its effectiveness. However, the absence of mediation or negotiation could result in the inability to obtain an arbitral award.[13]

This author may not entirely agree with the independence theory, as whether Pre-APR and arbitration clauses are independent may need detailed, case-specific analysis. If the Pre-APR is optional, for instance, "[u]pon dispute, the parties may first attempt mediation, and if unsuccessful, either party may initiate arbitration," then naturally, the Pre-APR and arbitration clauses can be separated, and the Pre-APR would not hinder the initiation of arbitration. However, if parties agree, for instance, that "[w]ithout the prescribed preliminary mediation or negotiation, neither party may apply for arbitration," then the Pre-APR are preconditions and obligatory for the initiation of arbitration. To rigidly adhere to the independence theory under such circumstances may contravene the principle of autonomy and potentially negate the value of the Pre-APR.

4. LEGAL CONSEQUENCES OF NON-COMPLIANCE WITH PRE-APR—PERSPECTIVES OF FOREIGN COURTS

Exploring the legal consequences of non-compliance with Pre-APR from the perspectives of foreign courts essentially revolves around two core issues: First, do courts recognize the

[12] Na, n4 above.
[13] International Ass'n of Bridge, Structural v. Efco Corp. and Construction Products, Inc., 243 F. Supp. 2d 976 (S.D. Iowa 2003).

enforceability of Pre-APR? If courts categorically deny the enforceability of Pre-APR, non-compliance becomes irrelevant, causing no legal consequences. Second, if courts acknowledge their enforceability, what stance do they take during judicial review when parties challenge arbitration awards on the grounds of non-compliance with Pre-APR? In this section, this article will analyze the approaches taken by courts in Germany, France, Singapore, the United Kingdom, Hong Kong S.A.R., and the United States.

A. Germany

The Federal Court of Germany differentiates between Pre-APR, providing that enforceable Pre-APR must fulfil certain criteria: (1) the parties must have a clear intention to perform the Pre-APR at the time of contracting; (2) the relevant Pre-APR must be precisely defined; and (3) the type of disputes covered by the agreement must be clear.[14] If these standards are met, German courts could typically recognize the enforceability of Pre-APR and agree to employ procedural remedies for non-compliance.

German courts view Pre-APR as procedural agreements, as a result, courts or arbitral tribunals have jurisdiction even if the Pre-APR are not adhered to, but should declare the case temporarily inadmissible to arbitration.[15] This viewpoint suggests that Pre-APR are not meant to exclude the jurisdiction of arbitral tribunals but to require certain steps to be completed before the tribunal can consider the case. In other words, the Pre-APR are not about whether the tribunal "has the competence" to hear the case but "when" it can do so. Therefore, non-fulfilment of the Pre-APR should not lead to an award made without jurisdiction by the tribunal. Even if an arbitral tribunal erroneously dismisses objections regarding the Pre-APR, this cannot later serve as a reason for German courts to set aside or refuse to enforce the arbitration award.[16]

Notably, German courts and scholars also examined multi-tiered dispute resolution clauses that may include prohibitions on litigation or arbitration until preliminary steps are completed. These clauses raise questions about their validity, as they could infringe upon the fundamental right to legal action. In a case in 1984, the Federal Court of Justice of Germany held that the right of access to justice was indeed a fundamental right, but that while an agreement to exclude this right completely was invalid, it was permissible if the parties agreed to reasonable limitations or modifications of this right, referring to the principle of contractual freedom. A commitment to not initiate arbitration without completing Pre-APR is deemed a permissible and reasonable restriction of one's right to litigation.[17]

B. France

In *Medissimo v. Logica* (2014), the French Supreme Court explored the enforceability of Pre-APR, stating it depends on the specific wording of the clause. For enforceability, the court held that Pre-APR must: (1) be mandatory; (2) explicitly stipulate that fulfilling the Pre-APR

[14] Maryam Salehijam, 'The Enforceability of Alternative Dispute Resolution Agreements: An Analysis of Selected European Union Member States' (2018) 21 Int'l Trade & Bus. L. Rev. 277, 294.
[15] Milivoje Mitrovic, 'Dealing with the Consequences of Non-Compliance with Mandatory Pre-Arbitral Requirements in Multi-Tiered Dispute Resolution Clauses The Swiss Approach and a Look Across the Border' (2019) 37 ASA Bulletin 559, 573.
[16] Ewelina Kajkowska, 'Enforceability of Multi-tiered Dispute Resolution Clauses' (Bloomsbury Publishing 2017).
[17] BGH, NJW 1984, pp. 669.

is a precondition for filing a lawsuit or arbitration claim; and (3) outline the procedure in sufficient detail.[18] The French Supreme Court recognize their enforceability if these requirements are met. Moreover, French scholars identified that courts typically deny substantial relief for non-compliance but were historically uncertain about the appropriate procedural remedy, an issue which was eventually resolved.[19] In *Poiré v. Tripier* (2003), the French Supreme Court noted that contractual clauses mandating mediation before court proceedings, if invoked, constitute a compulsory impediment to the litigation.[20] To support its argument, the Court referred to Article 122 of the French Civil Procedure Code, which allows parties to claim inadmissibility in court under certain circumstances. Although this does not directly apply to cases of non-compliance with Pre-APR, the French Supreme Court considered that the scenarios outlined in Article 122 are non-exhaustive and that non-compliance with Pre-APR can be viewed as a legitimate reason for inadmissibility.[21] The French Supreme Court also held this view in *Medissimo v. Logica* (2014).

Additionally, the attitude of the French courts is similar to that of the German courts: If one party does not fulfil the enforceable Pre-APR, and the arbitral tribunal decides to accept the case and makes a ruling, the parties cannot subsequently claim that the arbitral tribunal lacks jurisdiction to seek the annulment of the arbitration award in French courts. On 4 March 2004, the Paris Court of Appeal decided in a case, and distinguished between "admissibility" and "jurisdiction," considering objections based on Pre-APR not as objections to jurisdiction but related to the admissibility of the request, which does not fall under the reasons for annulment of arbitration awards listed in Article 1520 of the French Civil Code.[22]

C. Singapore

Singapore courts recognize the enforceability of Pre-APR. For instance, in *HSBC v Toshin* (2012), the Singapore Court of Appeal deemed contractual clauses on sincere negotiation to be binding as they align with the public interest, allowing parties to resolve disputes in their preferred manner.[23] Furthermore, past judgments by Singapore courts have indicated that Pre-APR could affect the jurisdiction of the arbitral tribunal. In the case of *International Res Corp PLC v Lufthansa Sys Asia Pacific Pte Ltd and another* (2013), the Singapore Court of Appeal considered the strict adherence to Pre-APR as a prerequisite condition binding on the arbitration jurisdiction. If the parties do not comply, the courts can strip the arbitral tribunal of its jurisdiction.

The Court of Appeal deemed Pre-APR in the multi-tiered clauses as prerequisite for initiating arbitration which must be observed. The Court stated "[g]iven that the preconditions for arbitration set out in cl 37.2 had not been complied with, and given our view that they were conditions precedent, the agreement to arbitrate in cl 37.3 (even if it were applicable to the Appellant) could not be invoked. The Tribunal therefore did not have jurisdiction over the Appellant and its dispute with the Respondent."[24]

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[18] Cass. com. Medissimo v. Logica, 29 April 2014, n° 12-27.004.
[19] Mitrovic, 15 above.
[20] Charles Jarrosson, 'Observations on Poiré v. Tripier' (2003) 19 Arbitration International 363, 365.
[21] Cass. ch. mixte, Poiré v. Tripier, 14 February 2003, JurisData n° 2003-017812.
[22] Cour d'appel de Paris (1re civ), 4 mars 2004, (2005) 1 Revue de l'arbitrage 143.
[23]HSBC Institutional Trust Services (Singapore) Ltd (trustee of Starhill Global Real Estate Investment Trust) v Toshin Development Singapore Pte Ltd [2012] 4 SLR 738 (CA).
[24] International Research Corp PLC v Lufthansa Systems Asia Pacific Pte Ltd and another [2013] SGCA 55.

However, recent cases suggest that Singapore courts may have shifted their previous stance by distinguishing between jurisdiction and admissibility. The Singapore Court of Appeal in *BTN & Anor v BTP & Anor* (2020) viewed that decisions by arbitral tribunals on objections to Pre-APR, such as deadlines and the fulfilment of preliminary conditions (e.g., mediation), should concern admissibility rather than jurisdiction.[25] Ultimately, the Court dismissed the parties' request to annul the arbitration award. Previously, the Singapore Court of Appeal in *BBA and others v BAZ and another* (2020) also differentiated between the concepts of jurisdiction and admissibility. The Court stated that "jurisdiction" refers to "the power of the arbitral tribunal to hear a case," while "admissibility" pertains to "whether it is appropriate for the tribunal to hear it." The importance of distinguishing between jurisdiction and admissibility lies in the fact that decisions on jurisdiction by an arbitral tribunal can undergo judicial review by courts in the place of arbitration, whereas courts cannot review decisions on admissibility by an arbitral tribunal that has jurisdiction.[26]

D. United Kingdom

Regarding the issue of the enforceability of Pre-APR, initially, in *Walford v. Miles* (1992) examined by the House of Lords (at this time the Supreme Court of the United Kingdom had not yet been established), Lord Ackner considered purely preliminary negotiation agreements as "agreements to agree" to be unenforceable.[27] This judgment has been broadly adopted, and thus, British courts have traditionally disregarded multi-tiered dispute resolution clauses that promise to resolve disputes through friendly negotiations due to a lack of requisite certainty. Any party could withdraw from the negotiations at any time for any reason, and it was difficult for courts to determine whether the related procedures had been fulfilled.

However, British courts also acknowledge that not all Pre-APR are unenforceable. To determine the enforceability of Pre-APR, in *Holloway v. Chancery Mead Ltd* (2007), the High Court of England and Wales established three standards: (1) the process must be sufficiently certain that there should not be the need for an agreement at any stage before matters can proceed; (2) the administrative processes for selecting a party to resolve the dispute and to pay that person had to be defined; and (3) the process or at least a sufficient model of the process should be set out so that the detail of the process is sufficiently certain. If all the above criteria are met, the Pre-APR should be considered enforceable and could serve as a prerequisite for subsequent arbitration. Conversely, if these conditions are not met, British courts will deny the enforceability of the Pre-APR. For instance, in *Sulamerica CIA Nacional de Seguros v Enesa Engenharia* (2012), both parties had agreed to the following Pre-APR:

> "If any dispute or difference of whatsoever nature arises out of or in connection with this Policy including any question regarding its existence, validity or termination, hereafter termed as Dispute, the parties undertake that, prior to a reference to arbitration, they will seek to have the Dispute resolved amicably by mediation…It the Dispute has not been resolved to the satisfaction of either party within 90 days of service of the notice

[25] BTN & Anor v BTP & Anor[2020] SGCA 105.
[26] BBA and others v BAZ and another appeal [2020] SGCA 53.
[27] Walford v. Miles [1992] UKHL 2 AC 128.

> initiating mediation, or if either party fails or refuses to participate in the mediation, of if either party serves written notice terminating the mediation under this clause, then either party may refer to the Dispute to arbitration…"

The Court of Appeal found the clause lacked a clear binding obligation and was uncertain about the mediation obligation, thus not constituting a precondition for arbitration. First, it did not define the mediation process clearly; second, it did not prescribe a clear procedure for appointing mediators. Moreover, significant matters were still to be agreed upon by parties, thus the clause ultimately failed to meet the aforementioned three conditions, and the Court deemed it unenforceable.[28]

Subsequently, in *Wah v Grant Thornton International Ltd* (2013), the High Court of England and Wales further refined the criteria for enforceability: (1) the parties expressly commit to initiating a process before arbitration; (2) it is clear what steps the parties need to take to implement this process; (3) the minimum level of participation of the parties in this process is defined; and (4) when or how this process is concluded or terminated is clear.[29] However, it should be noted that there have been cases in the United Kingdom where these standards were not followed, such as *Emirates Trading Agency v. Prime Mineral Exports* (2014), where the court considered the Pre-APR about "friendly negotiation" unenforceable by the arbitral tribunal, yet enforceable as a binding condition.[30] Some British scholars view this case as an exception and not as a change in the usual practice of British courts.[31]

So, if one party does not fulfil an enforceable Pre-APR and after the arbitral tribunal accepts the case and makes an arbitration award, will British courts support a request to annul the arbitration award on the grounds of an invalid arbitration agreement or lack of jurisdiction by the arbitral tribunal? The definitive answer could be no. In *Sierra Leone v SL Mining Limited* (2021), the High Court of England and Wales considered that one party initiating arbitration before the expiry of Pre-APR stipulated in the arbitration agreement does not result in the loss of jurisdiction by the arbitral tribunal. Instead, this pertains to whether the dispute in question is admissible. In other words, the arbitral tribunal has jurisdiction over the dispute in this scenario, and the arbitration award will not be annulled based on a lack of jurisdiction by the arbitral tribunal under Section 67 of the Arbitration Act 1996.[32]

In the more recent case of *NWA and Anor v NVF and Ors* (2021), the respondent requested the annulment of the arbitration award because the sole arbitrator made an error in the determination of jurisdiction, under Section 67 of the Arbitration Act 1996. The respondent argued, based on Sections 30(1)(a) (*i.e.*, the existence of a valid arbitration agreement between the parties) and 30(1)(c) (*i.e.*, the parties launched arbitration proceedings in accordance with the arbitration agreement) of the Arbitration Act 1996, that the claimant's failure to mediate before initiating arbitration resulted in the loss of substantive jurisdiction by the arbitral tribunal to rule on the dispute in question.[33] Ultimately, the High Court adopted the view from the Sierra Leone case, considering that the claimant's failure to perform the Pre-APR did not affect the validity or enforceability of the arbitration agreement.

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[28] Sulamerica CIA Nacional de Seguros SA and others v Enesa Engenharia SA and others [2012] EWCA 638.
[29] Wah v Grant Thornton International Ltd [2012] EWHC 3198.
[30] Emirates Trading Agency LLC v Prime Mineral Exports Private Ltd [2014] EWHC 2104.
[31] Maryam, n14 above.
[32] Sierra Leone v SL Mining Limited [2021] EWHC 286.
[33] NWA and Anor v NVF and Ors [2021] EWHC 2666.

Second, the claimant's non-compliance with the Pre-APR pertains to admissibility, not jurisdiction. Moreover, the claimant had effectively submitted the dispute in question to arbitration in accordance with the dispute resolution clause, and the consequences of the claimant's alleged breach of the Pre-APR should be determined by the arbitrator. Last, the Court also considered that there is no substantial difference between the failure to perform and insufficient performance of the Pre-APR. Based on these reasons, the Court dismissed the request for annulment.

E. Hong Kong

The criteria used by Hong Kong courts to determine the enforceability of Pre-APR are the same as those used by British courts. Hong Kong courts also apply the standards from *Wah v Grant Thornton International Ltd* (2013). Moreover, the Hong Kong Court of Appeal in *Hyundai Engineering v Vigour Ltd* (2005) found that Pre-APR lacked enforceability due to a lack of necessary certainty, aligning with the viewpoint of British courts.[34]

As for the legal consequence of non-compliance, the views of Hong Kong courts are in agreement with those of British courts. In the case of *T v B* (2021), the High Court of Hong Kong adopted the perspective of the British case *NWA and Anor v NVF and Ors* (2021) and conducted an in-depth analysis of the difference between the admissibility of arbitration requests and the jurisdiction of the arbitral tribunal. In *T v B* (2021) the plaintiff argued that when the defendant (the arbitration applicant) initiated the arbitration process, the Pre-APR were not met, depriving the arbitral tribunal of jurisdiction over the case, thus the court should annul the arbitration award. The High Court of Hong Kong believed that typical jurisdiction objections are primarily raised against the existence, scope, and validity of the arbitration agreement, mainly objecting to the arbitral tribunal's power to hear the case. "Admissibility" mainly concerns whether it is appropriate for the arbitral tribunal to hear the application or claim, and the argument that "arbitration is prematurely initiated" does not mean arbitration is prohibited; it pertains to an "admissibility" issue. "Admissibility" issues should be decided by the arbitral tribunal, and courts should not review decisions on "admissibility" by the arbitral tribunal. Therefore, the Court dismissed the application for annulment.[35]

Furthermore, in the latest case from Hong Kong, *C v D* (2023), the parties agreed to the following Pre-APR:

> "Before submitting the dispute to arbitration, all parties shall sincerely and immediately resolve such disputes through negotiation. If the dispute could not be resolved amicably within 60 days of the request for negotiation, the dispute should be referred by either Party for negotiation exclusively and finally by arbitration in Hong Kong at the Hong Kong International Arbitration Centre ('HKIAC') in accordance with the UNCITRAL Arbitration Rules."

[34] Hyundai Engineering and Construction Co Ltd v Vigour Ltd [2005] 3 HKLRD 723.
[35] T v B [2021] HKCFI 3645.

Although the parties agreed that written negotiation is a prerequisite for arbitration, they disagreed on whether it was necessary to issue written notice to the chief executive officers. The arbitral tribunal considered that submitting the dispute to the chief executive officers was optional, with the prerequisite only requiring a written request for negotiation. The trial court dismissed plaintiff C's challenge, reasoning that compliance with the arbitration Pre-APR only related to the admissibility of the claim, not the jurisdiction of the arbitral tribunal, therefore the reason was not a basis for C's challenge. Subsequently, C appealed. Ultimately, the Hong Kong Court of Final Appeal considered whether the parties had fulfilled the Pre-APR in the arbitration clause related to whether the arbitration request should be admissible, and generally did not involve the jurisdiction of the arbitral tribunal. The "admissibility" issue should be decided by the arbitral tribunal, with the court neither interfering nor re-evaluating the merits of the arbitral tribunal's decisions. Moreover, as the issue does not involve the jurisdiction of the arbitral tribunal, the court will not annul the arbitration award on this basis.[36]

F. United States

Combining the trial opinions of the courts in cases like *White v. Kampner* (1994)[37] and *HIM Portland LLC v. DeVito Builders Inc* (2003)[38], U.S. courts generally consider that if a pre-arbitration clause contains explicit indicators, such as setting the duration for negotiations or mediation, specifying the number of negotiation meetings, designating the participants of negotiations, or conducting mediation under specific rules within a specific dispute resolution institution, the Pre-APR will be enforced.

So, how do U.S. courts handle situations where parties fail to fulfil enforceable Pre-APR? Earlier cases suggest that U.S. courts might revoke arbitration awards because Pre-APR were not complied with. In *White v. Kampner* (1994), the Connecticut Supreme Court held that, pursuant to the contract, fulfilling the negotiation terms was a precondition for both parties to engage in arbitration, and the arbitral tribunal only had the jurisdiction to arbitrate disputes not resolved through mandatory negotiations. Because both parties failed to abide by the negotiation terms, the arbitration violated the contract agreement, and the arbitration procedure should not have been initiated upon the objection of one party; therefore, the arbitration award should be revoked. In *Kemiron Atlantic Inc v. Aguakem International Inc* (2002), the Court of Appeal for the Eleventh Circuit determined that the Pre-APR constituted a prerequisite for the jurisdiction of the arbitral tribunal.[39] Additionally, in *Red Hook Meat Corp v. Bogopa-Columbia Inc* (2011), the New York Supreme Court held that even though the term "precondition" or any other mandatory expressions were not used in the multi-tiered clause, the pre-arbitration process still constituted a precondition for the jurisdiction of the arbitral tribunal.[40]

However, this viewpoint may have changed. Although jurisdiction and admissibility were not distinguished, currently the majority of U.S. courts believe that Pre-APR does not constitute a precondition for the jurisdiction of the arbitral tribunal unless the clause explicitly contains

[36] C v D [2023] HKCFA 16.
[37] White v Kampner, 641 A.2d 1381, 1382 (Conn. 1994).
[38] HIM Portland LLC v DeVito Builders Inc, 317 F 3d 41, 42 (1st Cir 2003).
[39] Kemiron Atlantic Inc v. Aguakem International Inc 290 F 3d 1287 (11th Cir 2002).
[40] Red Hook Meat Corp v. Bogopa-Columbia, Inc, 31 Misc 3d 814 at 819 (NY Sup Ct 2011).

contrary terms, such as explicitly stipulating that the fulfilment of Pre-APR is a precondition for the exercise of the tribunal's jurisdiction, because the jurisdiction of the arbitral tribunal is derived from the autonomy of the parties, and thus the parties could also decide under what conditions the tribunal is given jurisdiction. In *BG Group plc v. Republic of Arg* (2014), the U.S. Supreme Court held that without explicit mandatory expressions, Pre-APR do not constitute a precondition for the jurisdiction of the arbitral tribunal.[41] In other words, unless the parties explicitly stipulate in the Pre-APR that Pre-APR constitute a precondition for arbitration, the failure of one party to comply with these steps before commencing arbitration does not prevent the arbitral tribunal from exercising jurisdiction. This viewpoint is still widely adopted by U.S. courts, as seen in the 2021 case of *George Weis Co v. Am 9 Constr*, where the Court of Appeal for the Eighth Circuit considered the Pre-APR as procedural, not constituting a precondition for the jurisdiction of the arbitral tribunal, and the parties cannot request the revocation of the award afterwards on the basis that the arbitral tribunal lacked jurisdiction. Additionally, only the arbitral tribunal is the appropriate entity to determine the consequences of a party's failure to comply with Pre-APR, not the courts.[42] Therefore, although U.S. courts, unlike courts in the UK, Singapore, and Hong Kong, do not differentiate between jurisdiction and admissibility, the mainstream view in the U.S. remains that the fulfilment of Pre-APR usually does not affect the jurisdiction of the arbitral tribunal.

5. LEGAL CONSEQUENCES OF NON-COMPLIANCE WITH PRE-APR—PERSPECTIVES OF CHINESE COURTS

In this section, this article will discuss the perspective of Chinese courts regarding the two core issues: (1) Do the Chinese courts recognize the enforceability of Pre-APR? (2) If the Chinese courts recognize the enforceability of Pre-APR, what stance does the court take during judicial review when a party challenges an arbitral award on the grounds of non-compliance with the Pre-APR?

A. Pre-APR could be Enforceable in China

Regarding the first issue, although foreign courts consider Pre-APR to be matters of admissibility, they all recognize that sufficiently clear and operational Pre-APR are enforceable. If not complied with, courts generally consider that arbitral tribunals should not accept the case. However, because this view does not involve matters of jurisdiction, courts must remain detached, reflecting the principle of arbitration autonomy. Further examination of cases in China suggests that Chinese courts could also tend to recognize the enforceability of Pre-APR. For instance, in case (2019) Jing 04 Min Te No. 310, the Beijing Fourth Intermediate People's Court opined:

> "The 'preconditions to arbitration' stipulated in the 'Equity Transfer Agreement' is essentially the parties' mutual agreement on how to resolve disputes. If the parties agree to resolve disputes through consultation before applying for arbitration, their freedom of choice should be respected, upholding the principle of party autonomy in civil and commercial adjudication."[43]

[41] BG GROUP plc v. REPUBLIC OF ARGENTINA 134 S. Ct. 1198 (2014).
[42] George Weis Co. v. Am. 9 Constr., 4:21-cv-00820-SRC (E.D. 2021).
[43] (2019) Jing 04 Min Te No. 310.

Therefore, this case clearly indicates that Chinese courts could recognize the enforceability of Pre-APR, respecting the parties' choices in accordance with the principle of autonomy. However, Chinese courts have not standardized their assessment of the enforceability of Pre-APR like other foreign courts.

Besides, it is worth noting Pre-Litigation Procedural Requirements, Chinese courts' stance changes completely. For instance, in case (2021) Supreme People's Court Zhi Min Zhi Final 221, the contract stipulated that disputes should first be negotiated, and if not resolved, litigation could be pursued in the defendant's local court. The Chinese Supreme People's Court noted: "The right to sue is a statutory right. Unless specified by law, parties cannot agree to exclude or limit such right." Therefore, Chinese courts generally hold that the right to litigation cannot be restricted by agreement, only by legal provision, differing from foreign courts' attitudes.[44]

Regarding the second issue, in current judicial practice, defences raised by parties based on Pre-APR generally include: (1) insufficient fulfilment of Pre-APR, leaving arbitral tribunals without the right to arbitrate; (2) the arbitration agreement is invalid or not yet effective; (3) Pre-APR unfulfilled, matters of the decision do not fall within the scope of the arbitration agreement; and (4) arbitration procedures not conforming to the parties' agreement or violation of statutory procedures. This article will analyze these four main types of defences in later sections using judicial cases.

B. Non-fulfilment of Pre-APR Does Not Deprive Arbitral tribunals of the Right to Arbitrate

(a) Principle-based Pre-APR

In judicial practice, some parties claim that non-fulfilment of Pre-APR deprives arbitral tribunals of the right to arbitrate, seeking to set aside[45] or deny enforcement of the arbitration award.[46]

In the case of Runhe Development Limited seeking to deny enforcement of an arbitration award, the arbitration clause stipulated:

> "Any dispute arising from the execution of this agreement shall be first resolved through friendly negotiation between both parties. If negotiation fails, any party may apply for arbitration at the Shenzhen Sub-Commission of the China International Economic and Trade Arbitration Commission."

After the South China Sub-Commission of CIETAC issued the [2005] China Trade and Arbitration Shenzhen Award No.18, the respondent applied to the Changsha Intermediate

[44] (2021) Supreme People's Court Zhi Min Zhi Final 221.
[45] The Arbitration Law of the People's Republic of China (2017), Article 58: 'If a party provides evidence proving that the arbitration award contains any of the following circumstances, they may apply to the intermediate people's court at the place where the arbitration commission is located to annul the award: (2) The matters decided in the award are not within the scope of the arbitration agreement or the arbitration commission has no authority to arbitrate those matters.'
[46] The Civil Procedure Law of the People's Republic of China (2021), Article 244: 'If the respondent provides evidence proving that the arbitration award has any of the following circumstances, the people's court shall, upon review and verification by a collegial panel, rule not to enforce the award: (2) The matters determined by the award are not within the scope of the arbitration agreement or the arbitration institution has no authority to arbitrate.'

People's Court to deny enforcement of the arbitration award, which was granted by both the Changsha Intermediate Court and the Hunan High Court. However, the Supreme People's Court, in its reply to the review report on the case, corrected the views of the Changsha Intermediate Court and Hunan High Court, stating:

> "Although the arbitration agreement stipulates that disputes should be resolved through consultation, it did not specify a deadline for consultation. The content of the agreement is quite basic and can lead to ambiguity in its interpretation. Considering the purpose for which the parties entered into the arbitration agreement, the 'friendly consultation' and 'if consultation fails' conditions, the former being a procedural requirement for a consultation format, and the latter implying the need for a consultation failure outcome, the application for arbitration by Mamawan Company should be viewed as resulting from a failure of consultation.[47] Therefore, where the prior condition is difficult to define in terms of compliance, and the latter condition is established, the arbitral tribunal has the right to accept the case under the arbitration agreement."

Following this, many Chinese courts have adopted the above viewpoint, such as the Beijing Fourth Intermediate People's Court in cases (2021) Jing 04 Min Te No. 18[48] and (2022) Jing 04 Min Te No. 234.[49]

This demonstrates that in China if the parties' agreed Pre-APR are more principle-based and lack operability, courts tend to determine or presume the prerequisites have been fulfilled, believing not only that the arbitral tribunal has jurisdiction but also the right to proceed with the case. However, it is important to note the specificities of the above cases, where the parties did not clearly stipulate a negotiation deadline, and the content was more principle-based. Then, if the parties' stipulated Pre-APR has a clear deadline or is more operational, would Chinese courts still hold that arbitral tribunals have jurisdiction?

(b) Non-principle-based Pre-APR

In case (2021) Jing 04 Min Te No. 936, the parties agreed to the following Pre-APR:

> "Any dispute, controversy, or claim arising out of or relating to this agreement, or the breach, termination, or invalidity thereof, shall first be settled by the parties through friendly negotiation. The party raising the issue shall timely notify the other party of the dispute with a dated notice, explaining the nature of the dispute. If the dispute cannot be resolved through negotiation within thirty (30) days following the date of the dispute notice, then any disputing party shall submit the dispute to the China International Economic and Trade Arbitration Commission for arbitration, to be conducted in Beijing according to the then-current arbitration rules."

After the arbitration award was issued, the applicant applied to the court to set aside the arbitration award, claiming the prerequisite for initiating arbitration was not fulfilled, which

[47] (2008) Min 4 Ta No.1.
[48] (2021) Jing 04 Min Te No. 186.
[49] (2022) Jing 04 Min Te No. 234.

the arbitral tribunal neither examined nor requested clarification and thus lacked jurisdiction.

However, the Beijing Fourth Intermediate People's Court determined as follows and rejected the application:

> "The arbitration precondition stipulated in the 'Capital Increase Subscription Agreement' does not affect CIETAC's jurisdiction, nor does it affect the progress of arbitration proceedings. The arbitral tribunal's review complies with the 'Arbitration Law of the People's Republic of China' and 'Arbitration Rules'."[50]

Additionally, in the case (2019) Yue 03 Min Te No. 825, the parties agreed to the following Pre-APR:

> "Any dispute arising from or related to this agreement, both parties may choose to resolve through their own negotiation or apply for mediation at the Securities Dispute Mediation Center of the Securities Association of China. If negotiation or mediation fails, either party shall submit the dispute to the Beijing Arbitration Commission."

The parties had further agreed:

> "Notwithstanding the aforementioned, both parties agree, if the stock pledge repurchase enters the default disposal procedure, it should first undergo the default disposal procedure as described in Chapter XII 'Default Handling' of this agreement. When the default disposal procedure is completed and disputes still remain, the dispute can then be submitted for mediation or arbitration as mentioned above."

In this author's view, these clauses are not principle-based. While they did not specify a deadline, they clearly allowed for the application of mediation at the Securities Dispute Mediation Centre of the Securities Association of China, with the further agreement explicitly stating disputes "shall" first follow the default disposal procedure unless unresolved issues persist post-procedure before arbitration may be initiated, giving the preliminary procedure clear binding force.

After the case moved to the enforcement stage, the applicant applied to the court to deny enforcement of the decision. The Shenzhen Intermediate People's Court of Guangdong Province considered:

> "The applicant's claim targets the jurisdictional issue of the arbitration concerned, namely, whether the respondent has the right to apply for arbitration over the dispute in question… According to Clause 69, Article 1 of the 'Business Agreement', 'any dispute arising from or related to this agreement', can be submitted for arbitration by any party to the Beijing Arbitration Commission. In the arbitration dispute at issue, the applicant's

[50] (2021) Jing 04 Min Te No. 936.

> objection to whether the respondent fulfilled the preliminary procedure falls under the disputes of the 'Business Agreement', giving the respondent the right to submit the related dispute for arbitration to the Beijing Arbitration Commission."[51]

Through the aforementioned cases, it is evident that even if the parties agreed Pre-APR has a clear deadline or is more operational, Chinese courts still consider arbitral tribunals to have jurisdiction even when Pre-APR are unfulfilled. Furthermore, regarding whether Pre-APR is complied with, courts believe the arbitral tribunal also has the jurisdiction to address the issue. This perspective shares strong similarities with the approach of foreign courts discussed in the section above.

(c) Potential Approaches in Special Situations

Through the analysis above, it seems that the approach of Chinese courts is no different from that of foreign courts discussed earlier. However, this author proposes that a special circumstance has been overlooked: if the parties explicitly make the Pre-APR a precondition for the arbitral tribunal's jurisdiction, would Chinese courts determine that the tribunal lacks jurisdiction due to the non-fulfilment of the Pre-APR? An example could be when parties, based on a Pre-APR, specify that "the aforementioned procedure is a precondition for the arbitral tribunal to exercise jurisdiction, without mediation the arbitral tribunal has no jurisdiction over the disputes." Although this scenario may be extreme, it cannot be ruled out in practice and such clauses could often appear in the international arbitration context, such as clause 20.4 of the FIDIC Conditions of Contract for Construction, which provides that the fulfilment of specified procedures are a necessary condition for the arbitral tribunal's jurisdiction.[52] From the analysis above, under such circumstances, U.S. courts would not continue to see the non-fulfilment of Pre-APR merely as an issue of admissibility. Instead, they would take it as a matter of jurisdiction, possibly determining that the arbitral tribunal lacks jurisdiction and could issue orders to suspend the arbitration proceedings, or even to set aside or refuse to enforce the award. However, no similar cases have been identified in China, which could be attributed to various reasons. First, parties generally would not agree to such highly compulsory Pre-APR, as a party signing the contract would worry about the risk of such clauses hindering their ability to enforce rights. Second, arbitration institutions might scrutinize such Pre-APR more cautiously. If parties impose such explicit restrictions on the jurisdiction of the arbitral tribunal in the contract and if the preliminary conditions are not met, they are likely to choose not to accept the case.

Although there is a lack of relevant cases, this author believes that if such situations arise, Chinese courts can handle them on a case-by-case basis. Three possible scenarios are considered below.

In the first scenario, after the arbitration has commenced, the respondent participates in the proceedings without raising any objections until after the award is made, and then applies to annul or refuse enforcement of the award on the basis that the Pre-APR were not fulfilled. In

[51] (2019) Yue 03 Min Te No. 825.
[52] Conditions of Contract for CONSTRUCTION, Multilateral Development Bank Harmonised Edition March 2006, s.20.4.

this case, this author believes that even if the Pre-APR were not completed at the start of the arbitration, the courts should recognize that the arbitral tribunal has jurisdiction. This is because most Chinese arbitration institutions include a provision in their arbitration rules that requires jurisdictional objections to be raised in writing before the first hearing, otherwise, the parties are deemed to acknowledge jurisdiction over the case.[53] Therefore, the respondent has, in effect, waived the jurisdictional objection and recognized the tribunal's authority to hear the case through their participation in the arbitration. A subsequent denial of the tribunal's jurisdiction due to an unfavourable ruling does not comply with the arbitration rules or conform to the principles of honesty. Therefore, in this scenario, it could be a more reasonable choice for the court to recognize the arbitral tribunal's jurisdiction.

This viewpoint has also been recognized by Chinese courts in judicial practice. For instance, the Shanghai No. 2 Intermediate People's Court in case (2022) Hu 02 Min Te No. 158 opined as follows:

> "The applicant did not raise a jurisdictional objection within the specified time limit but filed an arbitration counterclaim instead, which means they accept the jurisdiction of the arbitration institution. Therefore, their claim that the arbitral tribunal has no competence to arbitrate the dispute cannot be established.".[54]

The second scenario occurs when the respondent explicitly objects to the arbitral tribunal's jurisdiction, and the tribunal holds that it has jurisdiction. In this case, this author argues that the court should set aside the award or refuse its enforcement. This is because the tribunal lacks jurisdiction in fact. After all, the preconditions for the arbitral tribunal to acquire jurisdiction have not been met. The jurisdiction of the arbitral tribunal originates from the agreement between the parties. Since the parties have explicitly agreed that the tribunal's jurisdiction is contingent upon the fulfilment of Pre-APR, this agreement is naturally binding, and the tribunal's jurisdiction should be subject to this limitation. Significantly, the prior contractual agreement and the parties' autonomy should be respected. At this point, some may question why the respondent's continued participation in the arbitration proceedings cannot be deemed as an acknowledgement of the tribunal's jurisdiction. This author contends that the respondent's continued participation in the subsequent proceedings is out of necessity. Naturally, the respondent is justified in continuing to participate in arbitration because they have the right to seek a favourable award. Therefore, after the respondent explicitly raises an objection to the arbitral tribunal's jurisdiction, his continued participation does not equate to acknowledging the tribunal's jurisdiction.

In the third scenario, after the respondent raises a jurisdictional objection to the arbitral tribunal, the tribunal ignores and does not address the jurisdictional objection at all. In this case, this author believes that the court should set aside the award or refuse to enforce it. Because the arbitral tribunal is lacking jurisdiction, the reason is the same as in the aforementioned second scenario. Alternatively, even without addressing the issue of

[53] China International Economic and Trade Arbitration Commission（CIETAC）Arbitration Rules (2024) .
[54] (2022) Hu 02 Min Te No. 158.

jurisdiction, the court should annul the award or refuse its enforcement in such a case. This is because the arbitral tribunal's failure to address the jurisdictional objection constitutes a violation of due process. There are examples in judicial practice that support this view, such as in the case (2020) Yue 01 Min Te No. 18, where the Guangzhou Intermediate People's Court opined:

> "According to the objections raised by the arbitration respondent and the records of the arbitration hearing, they had submitted a written jurisdictional objection application before the first hearing, both the form and the timing of the jurisdictional objection were in line with the aforementioned 'Arbitration Rules.' However, the arbitral tribunal did not address this application nor did it address the jurisdictional objection in the award, violating the aforementioned 'Arbitration Rules' provisions, constituting a procedural violation. According to Article 58, Paragraph 1, Item 3 of the 'Arbitration Law' on 'the composition of the arbitral tribunal or the arbitration procedure violates the statutory procedure,' the case award has violated the statutory procedure and should legally be set aside."[55]

However, some might argue that setting aside the award or refusing to enforce it merely because Pre-APR were not fulfilled lacks necessity because if the parties were unable to resolve the dispute through arbitration, it is even less likely that they would resolve it through these procedures before arbitration after the award is set aside. From the outcome perspective, it would only force the claimant to arbitrate again after fulfilling the Pre-APR, significantly increasing the claimant's time and economic costs, and leading to a waste of resources. However, this author believes that this outcome is foreseeable by the claimant, who could have initiated arbitration after satisfying the Pre-APR but chose to proceed to arbitration, thus it should naturally bear the adverse consequences of its conduct. Additionally, as mentioned above, in such a case, there is clear procedural illegality on the part of the arbitral tribunal. Judicial review focuses on examining procedural matters of arbitration, and when arbitration proceedings violate the party's autonomy, regardless of whether the violation impacts the substantive ruling, the court has ample reason to set aside the award. As the Chinese saying goes, "Between two evils, choose the lesser; between two goods, choose the greater." At this time, weighing the pros and cons, setting aside the award or refusing to enforce it may be the more appropriate choice. Of course, if the arbitral tribunal, after the respondent objected, confirmed in a decision that the tribunal lacks jurisdiction, ordered the parties to fulfil the prerequisite procedures according to the contract, and dismissed the case without proceeding to a final award, the issue would be much simpler.

C. Non-fulfillment of Pre-APR Does Not Affect the Validity of Arbitration Clauses

In case (2017) Jing 03 Min Te No. 164, the parties had agreed to the following arbitration clause:

> "Any dispute arising from or related to this contract shall first be resolved through timely

[55] (2020) Yue 01 Min Te No. 18.

> and friendly negotiations between Party A and Party B. If the negotiation fails, the dispute shall be submitted to the Beijing Arbitration Commission for arbitration in accordance with its arbitration rules."

The respondent applied to the court for confirmation that the arbitration agreement was invalid because "when disputes arose, there was no notification of the dispute involved in any manner, nor were there any negotiations."[56]

The Beijing Third Intermediate People's Court found the arbitration agreement to be valid, reasoning:

> "The arbitration clause complies with the content requirements of an arbitration agreement as stipulated in Article 16 of the Arbitration Law of the People's Republic of China (hereinafter referred to as the Arbitration Law), and there is no evidence to prove the circumstances of invalidity provided in Article 17 of the Arbitration Law, hence, the arbitration clause is lawful and valid."

More recently, the Beijing Fourth Intermediate People's Court in a similar case, (2023) Jing 04 Min Te No. 334, held a similar view:

> "The arbitration agreement in the 'Agreement' has the expression of requesting arbitration, arbitration matters, and the selected arbitration commission, which complies with Article 16 of the Arbitration Law and does not have the invalid conditions specified in Articles 17 and 18 of the Arbitration Law, hence, the arbitration agreement is valid. Regarding the claimant's assertion that both parties did not fulfill the pre-proceedings for the effectiveness of the arbitration clause, the court considers that whether the parties fulfilled the agreement to resolve through friendly negotiation is not a statutory requirement to judge the invalidity of the arbitration clause, and the agreement on the negotiation process also does not affect the validity of the arbitration clause."[57]

This shows that if parties do not perform the Pre-APR, Chinese courts generally believe this does not affect the validity of the arbitration clause, and the efficacy of the arbitration agreement should not be easily negated.

D. Non-fulfillment of Pre-APR Does Not Limit the Scope of Arbitration Clauses

In judicial practice, some parties argue that disputes submitted to arbitration must first undergo negotiation or mediation between the parties, and only disputes unresolved through such processes are eligible for arbitration. Therefore, disputes that have not undergone negotiation are not within the scope of arbitrable disputes under the arbitration agreement. Otherwise, the matters decided by the arbitral tribunal would exceed the scope stipulated in the arbitration agreement. In the case of Runhe Development Limited Company discussed

[56] (2017) Jing 03 Min Te No.164.
[57] (2023) Jing 04 Min Te No. 334.

above, where the applicant applied for non-enforcement of an arbitration award, this claim was raised. In case (2019) Jing 04 Min Te No. 179, the applicant requested the court to set aside the award, claiming the disputes resolved by the arbitration award were not within the scope of the arbitration agreement because the parties did not attempt to resolve the dispute through consultation beforehand. However, the Beijing Fourth Intermediate People's Court rejected this claim and stated:

> "Regarding whether the dispute of the arbitration award belongs to the scope of the arbitration agreement, combining the findings of the contract content agreed upon by both parties, the application for setting aside the award by the respondent, and the applicant's defense, it cannot be concluded that 'the matter of the award does not belong to the scope of the arbitration agreement.' Hence, the court does not support the applicant's reason for setting aside the arbitration award."[58]

Therefore, Chinese courts consider that failure of parties to perform Pre-APR does not result in the matters of the award falling outside or exceeding the scope of the arbitration agreement. From this author's perspective, some parties shouldn't try to determine whether a dispute falls within the jurisdictional scope of an arbitral tribunal by interpreting the specific connotation of "dispute." This approach could render the arbitration clause "null and void" and contradict the real intent of the parties. Usually, the nature and scope of the "dispute" submitted for arbitration are determined at the time of contract signing. Parties should be confident that the "dispute" referred to by both sides is about the performance of rights and obligations under the contract. After a dispute arises, claiming that "dispute" actually refers to issues unresolved through consultation or other Pre-APR essentially changes the original meaning of "dispute," thus affecting the effectiveness of the arbitration clause. Which disputes are within the scope of the arbitration agreement would remain indefinitely undecided, and the scope of matters to be submitted to arbitration would be uncertain. Moreover, if parties could only initiate arbitration over disputes unresolved through Pre-APR, a defaulting party could prevent a compliant party from arbitrating the dispute by refusing to participate in Pre-APR. This would undoubtedly hinder parties from protecting their legitimate rights and interests and open the door for a party to negate the consensus on arbitration. In summary, this author believes that the Chinese courts' view that failure of parties to perform Pre-APR does not result in the matters of the award falling outside or exceeding the scope of the arbitration agreement is reasonable.

E. Non-fulfilment of Pre-APR Does Not Result in Violation of Parties' agreed Procedures or Statutory Procedures in Arbitration

A final question worth exploring is whether the failure to perform Pre-APR before initiating arbitration proceedings violates the agreed arbitration procedures between parties or statutory procedures.

[58] (2019) Jing 04 Min Te No. 179.

Article V(1)(d) of the New York Convention provides:

> " Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that: …(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case…"

According to this provision, the attitude of Chinese courts towards this question will affect whether awards made in proceedings administered by foreign arbitration institutions can be recognized and enforced by Chinese courts. Moreover, Article 58 of the Arbitration Law of the People's Republic of China specifies:

> "A party may apply to the intermediate people's court in the place where the arbitration commission is located to set aside the award if evidence proves that one of the following circumstances exists: . . . (3) The composition of the arbitral tribunal or the arbitration procedure violated the statutory procedure."

Article 244 of the Civil Procedure Law of the People's Republic of China also sees this as a legal circumstance for refusing to enforce the award. Thus, this question also affects the effectiveness and enforcement of domestic arbitration awards.

From judicial practice, there are cases in China with differing views. Among them, in the renowned PepsiCo case (2005) Cheng Min Chu Zi No. 912, the Chengdu Intermediate Court believed that PepsiCo failed to provide sufficient evidence to prove that it had engaged in a 45-day negotiation with Sichuan Pepsi before initiating arbitration, and the action of not performing Pre-APR was "not in accordance with the arbitration agreement between the parties." Therefore, based on Article V(1)(d) of the New York Convention, the court refused to recognize and enforce the foreign arbitration award.[59] This judicial viewpoint was later confirmed by the Supreme Court in its reply (2007) Min 4 Ta Zi No. 41.[60] Therefore, at that time, both the Chengdu Intermediate Court and the Supreme Court believed that the non-fulfilment of Pre-APR meant the arbitration procedure did not comply with the parties' agreement. If the award was a foreign award, the court would not recognize and enforce it.

However, it is noteworthy that other than the PepsiCo case, there seems to be no other court in China holding the same judicial viewpoint. Some scholars believe that the PepsiCo case had its particularities. Additionally, Article 107 of the "Minutes of the National Symposium on the Foreign-related Commercial and Maritime Trial Work of Courts (2022)" adopt a different viewpoint and explicitly states:

> "When people's courts apply the New York Convention to hear cases applying for the recognition and enforcement of foreign arbitration awards, if one party directly applies for arbitration without prior negotiation despite the arbitration agreement stipulating

[59] (2005) Cheng Min Chu Zi No. 912.
[60] (2007) Min 4 Ta Zi No. 41.

> 'resolve through negotiation first, and if negotiation fails, then apply for arbitration', and the other party claims non-recognition and enforcement of the arbitration award because this action violates the arbitration procedure agreed upon between the parties as per Article V(1)(d) of the New York Convention, the people's court shall not support this claim."

Hence, the Supreme Court has actually changed its previous view, currently tending to believe that non-fulfilment of Pre-APR does not violate the agreed arbitration procedure between parties.

Moreover, in case (2019) Jing 04 Min Te No. 310, the Beijing Fourth Intermediate People's Court opined:

> "The agreement signed by parties stating that disputes should be firstly resolved through negotiation before applying for arbitration does not constitute a special agreement on arbitration procedure matters as stipulated in Article 2(1) of the 'Arbitration Rules'. The 'arbitration procedure matters' referred to in this article pertain to procedural matters during the arbitration process, not including the preconditions to arbitration."[61]

Similarly, in case (2019) Hu 01 Min Te No. 250, the Shanghai First Intermediate Court also considered that such agreements on dispute resolution methods before arbitration do not fall under the category of violating statutory procedures as regulated by the PRC Arbitration Law or the arbitration rules chosen by the parties, potentially affecting the correct adjudication of cases.[62] The Beijing Financial Court in case (2022) Jing 74 Min Te No. 2 also considered the Pre-APR proposed by the applicant for applying for arbitration not to be an issue of arbitration procedure.[63]

Thus, it can be seen that with the non-fulfilment of Pre-APR, the mainstream opinion of Chinese courts is that non-fulfilment does not result in a violation of statutory procedures. This is because Pre-APR are not part of the "statutory procedures" as stipulated by Article 58 of the Arbitration Law and Article 244 of the Civil Procedure Law, nor do they belong to the arbitration procedure agreed upon between parties as outlined in Article V(1)(d) of the New York Convention. This author believes such viewpoints are reasonable. Whether viewed from the New York Convention, or from relevant provisions of the Arbitration Law and Civil Procedure Law, the term "arbitration procedure" refers to the period from the submission of arbitration by a party to the decision made by the arbitral tribunal. Furthermore, arbitration institutions clearly define arbitration procedures in their rules. For example, Article 11 of the Arbitration Rules of CIETAC provides that "[t]he arbitration proceedings shall commence on the day the Arbitration Court receives a Request for Arbitration." Therefore, if parties agree to negotiate or mediate disputes first before applying for arbitration, given that negotiation or mediation and other Pre-APR occur before one party submits an arbitration application, then Pre-APR do not constitute "arbitration procedure," and non-fulfilment of Pre-APR does not violate the arbitration procedure agreed upon by the parties or statutory procedures.

[61] (2019) Jing 04 Min Te No. 310.
[62] (2019) Hu 01 Min Te No. 250.
[63] (2022) Jing 74 Min Te No. 2.

6. CONCLUSION

First, regarding the nature of Pre-APR, there are primarily three different theories: Substantivism, Proceduralism and Independence Theory. Among these, Substantivism appears to be increasingly difficult to accept due to significant practical deficiencies, because the parties are unable to ascertain the losses caused by the failure to fulfil the Pre-APR; the independent theory, while having its merits, may overlook the principle of party autonomy; whereas procedural theory is gradually being accepted by more and more foreign courts and international arbitration institutions.

Second, on the enforceability of Pre-APR, Chinese and foreign courts generally agree that Pre-APR could be enforceable; however, the majority opinion is that the Pre-APR must be sufficiently clear and operable, with respective standards set by courts in various jurisdictions.

Third, concerning the legal consequences of non-fulfilment of enforceable Pre-APR, courts in Germany, France, the United Kingdom, Singapore, and Hong Kong generally perceive this issue as one of "admissibility," to be handled by the arbitral tribunal and not related to jurisdiction, thus not subject to judicial review by the courts. On the other hand, U.S. courts have yet to distinguish between jurisdiction and admissibility but generally believe that Pre-APR does not usually constitute a precondition for arbitral jurisdiction. Moreover, if the parties explicitly agree to make Pre-APR a jurisdictional prerequisite, it may affect the tribunal's jurisdiction. Chinese courts do not distinguish between jurisdiction and admissibility but consider the fulfilment of Pre-APR to be outside the scope of judicial review for arbitration. Applications to revoke the arbitration award or to refuse enforcement are rarely supported, aligning with the final outcomes of foreign courts.

Finally, it is recommended that the Chinese legislature further reinforce relevant legal provisions, and arbitration institutions enhance their arbitration rules to address multi-tiered dispute resolution clauses, thereby increasing certainty. This will foster a complementary relationship between negotiation, mediation, and arbitration, achieving a synergy that promotes the joint development of arbitration and other alternative dispute-resolution mechanisms.

VALIDITY OF ARTIFICIAL EXPERTS: INTEGRATING AI-GENERATED EXPERT REPORTS INTO ARBITRATION

Shruti Khanijow and Darshit Sidhabhatti

ABSTRACT

Artificial Intelligence, comprising technologies like machine learning and rule-based systems, has significantly advanced in the legal field, transitioning from early research in the 1970s to becoming a critical tool for enhancing efficiency in legal processes. AI is now integral to tasks such as legal research, document review, and evidence analysis, driving down costs and improving accuracy.

In arbitration, AI-generated expert reports are increasingly valuable, offering precise, data-driven insights that can streamline complex technical disputes. However, the integration of AI into arbitration is not without challenges. AI's inability to fully replicate human judgment, contextual understanding, and real-time testimony limits its effectiveness. Additionally, the opaque nature of many AI systems, often described as "black-box" AI, raises concerns about transparency and accountability, particularly in legal contexts where explanation and clarity are paramount.

Despite the aforementioned hurdles, AI holds substantial potential to democratize access to expert knowledge, making arbitration more accessible and efficient. This article explores the current application of AI in the legal sector, particularly in arbitration, and addresses the potential challenges and implications of fully incorporating AI-generated expert reports into legal proceedings.

Keywords: Artificial Intelligence, legal technology, arbitration, expert witness, expert reports, machine learning.

1. INTRODUCTION

Artificial Intelligence (**AI**), broadly defined, refers to the capacity of machines to perform tasks that traditionally require human cognitive abilities, such as perception, language comprehension, reasoning, creativity, and emotional intelligence.[1] In the realm of computer science, AI encompasses a variety of research domains and technologies aimed at enhancing computer applications for intellectual tasks.[2] This concept is not confined to a single technology but is a collective term for various underlying technologies like rule-based

[1] A.M. Turing, 'I.—Computing Machinery and Intelligence' (1950) 59 MIND 433, 460; John McCarthy and others, 'A Proposal for the Dartmouth Summer Research Project on Artificial Intelligence' (2006) August 31, 1955, reprinted in 27 AI MAG. 12.

[2] Lev Craig, Nicole Laskowski and Linda Tucci, 'What is AI? Artificial Intelligence explained' (*TechTarget*) <https://www.techtarget.com/searchenterpriseai/definition/AI-Artificial-Intelligence> accessed on 16.12.2024.

systems, language models, and machine learning (**ML**).[3] Common applications of AI include tasks such as question answering, chess playing and autonomous driving.[4] Most of such AI systems are powered by Machine Learning technologies that improve over time without human intervention.[5]

A. Artificial Intelligence intersecting with Law

Since its inception in the 1970s, the intersection of AI and law has been a focal point of research, with modelling and supporting legal decision-making and predicting legal outcomes being central topics.[6] AI's integration into the legal sector has expanded dramatically, contributing to diverse applications ranging from legal research and document review to evidence analysis and predictive case outcome modelling.[7] There is a complete compendium highlighting the applications available with respect to AI-based applications contributing to the legal realm.[8] This surge in AI adoption is propelled by the demand for enhanced efficiency, cost-effectiveness, and accuracy in legal decision-making.[9] Historically, the legal profession has been labour-intensive, consuming vast amounts of time and resources for activities such as document review and legal research. AI-driven tools are revolutionizing these processes, automating tasks once dependent solely on human expertise.[10] This automation not only reduces operational costs and time expenditures but also enhances productivity, making AI a formidable asset for legal professionals aiming to meet client demands while maintaining a robust bottom line.[11]

However, importantly one of the defining aspects of legal applications is the necessity for explanations.[12] In arbitration, much like in traditional legal proceedings, parties are entitled to understand the rationale behind a verdict to ensure the judgment's legitimacy, facilitate appeals, and allow public scrutiny. However, the effectiveness of AI systems based on machine learning in providing satisfactory explanations remains a contentious issue. These systems, often categorized as black-box AI,[13] lack transparency, with their inputs and operations potentially hidden from stakeholders.[14] This opacity raises concerns about their ability to arrive at conclusions without clarifying the mechanisms used to reach these outcomes.[15] Despite this, AI systems are increasingly capable of generating expert reports,

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[3] ibid.
[4] Paul W. Grimm, Maura R. Grossman and Gordon V. Cormack, 'Artificial Intelligence as Evidence' (2021) 19 Nw. J. Tech. & Intell. Prop. 9 https://scholarlycommons.law.northwestern.edu/njtip/vol19/iss1/2 accessed on 16.12.2024.
[5] Sara Brown, 'Machine Learning, Explained' (2021) Massachusetts Institute of Technology Sloan School of Management <https://mitsloan.mit.edu/ideas-made-to-matter/machine-learning-explained> accessed on 30.07.2024.
[6] B.G. Buchanan and T.E. Headrick, 'Some speculation about AI and legal reasoning' (1970) 23 Stanf. Law Rev. 40 < https://digitalcommons.law.buffalo.edu/journal_articles/867> accessed on 16.12.2024; Joe Collenette, Katie Atkinson and Trevor Bench-Capon, 'Explainable AI tools for legal reasoning about cases: A study on the European Court of Human Rights' (2023) 317 Artificial Intelligence <https://www.sciencedirect.com/science/article/pii/S0004370223000073> accessed on 16.12.2024.
[7] John O. McGinnis and Russell G. Pearce, 'The great disruption: How machine intelligence will transform the role of lawyers in the delivery of legal services' (2013) 82 Fordham L. Rev. 82 <https://ssrn.com/abstract=2436937> accessed on 16.12.2024.
[8] Daniel Faggella, 'AI in Law and Legal Practice – A Comprehensive View of 35 Current Applications' (2020) EMERJ: The AI Research and Advisory Company <https://emerj.com/ai-sector-overviews/aiin-law-legal-practice-current-applications> as accessed on 30.07.2024.
[9] Praveen Kumar Mishra, 'AI And The Legal Landscape: Embracing Innovation, Addressing Challenges' (*LiveLaw.in*, 27 Feb 2024) < https://www.livelaw.in/lawschool/articles/law-and-ai-ai-powered-tools-general-data-protection-regulation-250673#:~:text=The%20adoption%20of%20AI%20in,predictive%20analytics%2C%20and%20document%20automation> accessed on 16.12.2024.
[10] V Fomin, 'The Shift from Traditional Computing Systems to Artificial intelligence and the Implications for Bias' in JS Gordon (ed), *Smart Technologies and Fundamental Rights* (Brill | Rodopi 2020, to be published).
[11] Archak Das, 'AI in Legal Evidence Analysis: Ethical and Legal Implication' (2024) 2 International Journal For Legal Research And Analysis <https://www.ijlra.com/paper-details.php?isuur=2346> as accessed on 30.07.2024.
[12] (n 6).
[13] (n 5).
[14] Varun Bhatnagar, 'The Evidentiary Implications Of Interpreting Black-Box Algorithms' (2023) 20 Nw. J. Tech. & Intell. Prop. 433 <https://scholarlycommons.law.northwestern.edu/njtip/vol20/iss3/3> accessed on 16.12.2024.
[15] W. Nicholson Price II and others, 'Clearing Opacity Through Machine Learning' (2021) 106 IOWA L. REV. 775 <https://ilr.law.uiowa.edu/sites/ilr.law.uiowa.edu/files/2023-02/Nicholas%20Price_Rai.pdf> accessed on 16.12.2024.

leveraging their ability to collect, evaluate, and process data[16] to offer reliable insights across various technical domains.[17]

B. Experts and expert reports in Arbitration

In arbitration, tribunals frequently encounter challenges in understanding complex technical issues related to accounting, engineering, valuation, and more. Experts in these areas typically address subsidiary questions such as proper accounting for transactions, engineering implications of designs, or asset valuations.[18] They may also review voluminous data[19], conduct on-site or laboratory tests, and elucidate complex technical issues or foreign law.[20] These functions are well within the capabilities of AI systems, which can efficiently handle such tasks. AI's proficiency in processing information quickly and accurately makes it a valuable tool for providing evidence and expert opinions, offering rational and precise answers that can significantly impact arbitration proceedings.[21]

Moreover, AI's advancements in analysing and manipulating language at high speed and scale open up new possibilities for identifying, gathering, and analysing evidence.[22] AI can generate detailed and accurate expert reports, potentially serving as an expert witness in cases where parties might not afford traditional experts.[23] The role of experts in arbitration is crucial, particularly when technical issues are involved. A robust expert report gains substantial weight when supported by credible expert testimony. *This raises an essential question: can AI itself testify, and if so, when?*

This exploration into AI-generated expert reports in arbitration is not merely a technical discussion but a detailed examination of the future landscape of legal proceedings. The potential for AI to revolutionize arbitration through its ability to generate comprehensive, accurate, and insightful reports is immense. AI's role in analysing vast datasets, identifying patterns, and providing expert opinions could democratize access to high-quality expertise, reducing costs and increasing the efficiency of arbitration processes. However, the journey towards fully integrating AI-generated expert reports into arbitration is fraught with challenges, from ensuring the transparency and explainability of AI decisions to addressing ethical concerns surrounding bias and accountability.

This Article aims to delve into the current state of AI in the legal domain, exploring its capabilities, limitations, and the profound implications of its integration into arbitration. It needs to be examined how AI can enhance the quality and efficiency of expert reports, the hurdles in its adoption, and the future trajectory of AI's role in shaping the arbitration

[16] Andrea Roth, 'Machine Testimony' (2017) 126 The Yale Law Journal <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2893755> accessed on 16.12.2024.
[17] Lei Xing and others, *Artificial Intelligence In Medicine: Technical Basis And Clinical Applications* (Academic Press Elsevier 2021); Rebecca Henderson, *The Impact of Artificial Intelligence on Innovation* (University Of Chicago Press 2019) 115.
[18] Steven C. Bennett, 'Use of Experts in Arbitration: Alternatives for Improved Efficiency' (2018) 73 Dispute Resolution Journal 2 <https://go.adr.org/rs/294-SFS-516/images/73%202%20-%2010-Bennett-Expert%20Submissions%20In%20Arbitration.pdf > accessed on 16.12.2024.
[19] ibid.
[20] Bernd Ehle, 'Practical Aspects of Using Expert Evidence in International Arbitration'(2012) 2 Y.B. on Int'l Arb. 75; Michael Feutrill and Noah Rubins, 'The Preparation of Expert Evidence in International Commercial Arbitration: Practical Aspects' (2009) Int'l Bus. L.J. 307.
[21] André Guskow Cardoso and others, 'Generative Artificial Intelligence and Legal Decisionmaking' (2024) 19 Global Trade and Customs Journal <SSRN: https://ssrn.com/abstract=4982244> accessed on 16.12.2024.
[22] Martin Magal and Katrina Limond, 'Artificial Intelligence in Arbitration: Evidentiary Issues and Prospects' (2023) Global Arbitration Review <https://globalarbitrationreview.com/guide/the-guide-evidence-in-international-arbitration/2nd-edition/article/artificial-intelligence-in-arbitration-evidentiary-issues-and-prospects#footnote-049> accessed on 30.07.2024.
[23] (n 21).

landscape. This discussion aims to provide a comprehensive understanding of how AI-generated expert reports can transform arbitration, making it more efficient, accessible, and just. As we navigate through these complexities, the goal is to offer a vision for the future where AI and human expertise coexist harmoniously, enhancing the integrity and effectiveness of arbitration worldwide.

2. POTENTIAL AND BENEFITS OF AI BASED EXPERT REPORTS

It is a well-established principle across various national laws and institutional arbitration rules that parties involved in arbitration have the freedom to present expert evidence before the tribunal, provided that such evidence is deemed relevant to the issues at hand.[24] This principle underscores the flexibility and adaptability of arbitration proceedings in accommodating diverse forms of expert testimony. As artificial intelligence (AI) technology rapidly advances, particularly in natural language processing and machine learning, it is increasingly plausible to envision AI-generated expert reports becoming a valuable resource in arbitration cases.

The benefits of incorporating AI-generated expert reports in arbitration are manifold. AI can analyse vast amounts of data and legal precedents with unparalleled speed and accuracy, offering insights and drawing conclusions that might be overlooked by human experts.[25] This capability can enhance the depth and quality of expert analysis, ensuring that the tribunal receives comprehensive and well-supported opinions. Additionally, the use of AI in generating expert reports can streamline the arbitration process, reducing costs and time associated with expert testimonies.[26]

A. AI and its pioneer ability to explain

Despite the general lack of awareness in the broader AI research community,[27] the field of AI and Law has long recognized and integrated these features into its approach to explanation.[28] This recognition underscores the importance of clear, understandable explanations in legal AI applications. It is this deep understanding of explanation that can make AI a reliable and effective tool in the legal domain, enhancing the decision-making process and ensuring fairness and transparency.

(a) The Importance of Explanation

The role of explanation in AI applied to law is multifaceted. Beyond the inherent intellectual challenge of modelling legal reasoning and the vast array of case opinions available, explanations in an expert report are crucial for several reasons. Four basic limbs of

[24] SIAC Rules, r 25.1; IBA Rules, art. 5; ICC 2021 Arbitration Rules, art. 25.2; UNCITRAL Model Law, art. 26.2; CIArb Arbitration Rules, art. 27.2.
[25] Avi Goldfarb and Jon R. Lindsay, 'Prediction and Judgment: Why Artificial Intelligence Increases the Importance of Humans in War' (2022) International Security <https://doi.org/10.1162/isec_a_00425> accessed on 16.12.2024.
[26] Layan Al Fatayri, 'AI in International Arbitration: What Is the Big Deal?' (The American Review of International Arbitration, 22 Oct 2024) <https://aria.law.columbia.edu/ai-in-international-arbitration-what-is-the-big-deal/> accessed on 16.12.2024.
[27] T. Miller, 'Explanation in artificial intelligence: insights from the social sciences' (2019) 267 Artif. Intell. <https://doi.org/10.1016/j.artint.2018.07.007> accessed on 16.12.2024..
[28] ibid.

explanation support an expert's report, they are:[29]

i. *Explanations should be contrastive*: They highlight why one outcome occurs instead of another, providing clarity and understanding that is essential in legal contexts where alternative outcomes need to be considered and justified.
ii. *Explanations should be selective*: They focus on relevant factors, excluding irrelevant ones, which helps in pinpointing the exact reasons behind a decision or recommendation, thus making the legal process more efficient and transparent.
iii. *Explanations should rarely be probabilistic*: They often do not rely on probabilities to clarify outcomes, instead offering definitive reasons for decisions. This non-probabilistic nature is particularly important in law, where certainty and clear reasoning are valued.
iv. *Explanations should be social*: They are crafted to be understood within a social context, considering the perspectives and needs of various stakeholders involved in the legal process.

(b) When AI explains: The Case study of IBM Watson

A significant concern and obstacle to allowing AI to perform as an expert in arbitration is the lack of understanding of how AI reaches its decisions. However, advancements in generative AI can address these issues. One prominent example of such a system is IBM's Watson. To effectively navigate the current flood of unstructured information, a new era of computing, known as cognitive systems, is required. IBM Watson exemplifies this new era of cognitive systems,[30] providing a glimpse into the future of AI in expert roles, including arbitration.

Watson's process of deriving responses to questions showcases its potential as an expert system. When a question is presented to Watson, it first parses the question to extract its major features.[31] Watson then generates a set of hypotheses by searching its extensive corpus for passages that might contain valuable responses. This is followed by a deep comparison of the language of the question and the potential responses using various reasoning algorithms.[32] This methodical approach ensures that Watson's answers are based on a thorough analysis of available data, making it capable of providing well-supported expert opinions.

The developers of Watson claim that the system develops hypotheses and makes evidence-based decisions, considering a degree of confidence expressed in percentage terms. This confidence is based on the preponderance of evidence supporting each hypothesis. Even back in 2015, Watson had already earned a reputation as an intelligent open-domain question-answering (QA) system capable of responding to questions posed in rich natural language in real time.[33] Watson's ability to analyse vast amounts of information quickly and

[29] (n 27).
[30] High R, *Building Cognitive Applications with IBM Watson Services* (International Technical Support Organization (ITSO) 2012) <https://www.redbooks.ibm.com/redbooks/pdfs/sg248391.pdf> accessed on 30.07.2024.
[31] R.R. Cecil & J. Soares, 'IBM Watson Studio: A Platform to Transform Data to Intelligence' in Barbosa-Povoa, A., Jenzer, H., de Miranda, J. (eds), *Pharmaceutical Supply Chains - Medicines Shortages. Lecture Notes in Logistics.* (Springer, Cham).
[32] (n 30).
[33] U. Bhowan & D.J. McCloskey,'Genetic Programming for Feature Selection and Question-Answer Ranking in IBM Watson' In P Machado & others *Genetic Programming. EuroGP 2015. Lecture Notes in Computer Science,*(vol 9025. Springer, Cham).

accurately positions it as a valuable tool in arbitration as an expert, where timely and well-informed decisions are crucial.

In consequence, AI systems like Watson are demonstrating their capability for reasoning and decision-making, making them suitable for expert roles in arbitration. Over time, as AI continues to evolve, it will produce lines of reasoning that are logical to humans, further solidifying its role as an expert. The costs and time involved in creating AI-generated expert opinions or arbitral awards will be significantly reduced, a development that will undoubtedly be welcomed by the international arbitration community. This transformation in how expert opinions is generated and decisions are made highlights the promising future of AI in arbitration and other fields requiring expert judgment.

B. AI plays a more economical expert

Appointing experts in arbitration can be a substantially costly affair, often placing a significant financial burden on the parties involved. For many claims, particularly those of smaller value, the cost of calling experts at certain stages is prohibitive. In small claims arbitrations, it is often entirely unaffordable to engage experts.

Even normally, there are a lot of considerations while appointing an expert. To manage expert fees, the first consideration is whether an expert is genuinely necessary. If an expert is indeed required, be aware that fees can be substantial, especially when dealing with complex or specialized issues. Given that it is not necessary that an expert would help the claim it complicates the cost structure even further.

If the expert evidence required pertains to relatively straightforward matters, such as liability for payment of outstanding invoices or the quantum of payments made, it may have little impact on the legal merits of a claim. In such instances, instructing experts at a later stage in the proceedings can help avoid unnecessary costs, particularly if the claim is settled early.[34] When in doubt, tribunals often prefer not to rely on experts' testimonies or reports, thus rendering fruitless the parties' efforts to resort to experts, both in terms of time and costs.[35]

An AI-generated report offers a relatively more economical alternative to traditional expert reports. Traditional experts charge fees based on their demonstrated expertise, which includes their academic and industrial background, the complexity and volume of data they need to analyse, and other personal and subjective factors. This often involves extensive and laborious research, leading to high costs. In contrast, AI systems are designed specifically to generate expert reports efficiently and accurately, requiring much less labour and background research. This streamlined process significantly reduces the cost of producing these reports.

Moreover, AI-generated expert reports provide additional benefits of objectivity and consistency. Unlike human experts, whose evaluations can vary based on personal judgments

[34] Chiara Giorgetti, ed., *Litigating international investment disputes: A practitioner's guide* (Vol. 8., 2014, Martinus Nijhoff Publishers).
[35] Ioana Knoll-Tudor and others, 'Regulating Party-Appointed Experts: How to Increase the Efficiency of Arbitral Proceedings', (*Kluwer Arbitration Blog*, 10 May 2021) <https://arbitrationblog.kluwerarbitration.com/2021/05/10/regulating-party-appointed-experts-how-to-increase-the-efficiency-of-arbitral-proceedings/> accessed on 30.07.2024.

and subjective interpretations, AI systems analyse data based on predetermined algorithms and criteria, ensuring uniformity in their outputs.[36] This consistency not only enhances the reliability of the reports but also contributes to lower costs, as the systems are optimized for this specific function.[37] Consequently, AI-generated reports present a cost-effective solution, particularly advantageous for small claims arbitrations or cases where traditional expert fees would be prohibitively expensive.

C. AI systems have access to a better diffusion of knowledge

Utilizing AI as an expert in arbitration offers significant advantages over traditional human experts. The complexity of modern business and the resulting need for specialized knowledge in areas such as banking, oil and gas, or electronic data processing (EDP) auditing means that human experts must often focus on narrow niches. Within these niches, further specialization occurs, such as expertise in auditing community banks versus large multinational banks. This fragmentation of expertise makes it nearly impossible for a single auditor to master all relevant areas, leading to challenges in finding the right expert for a given case.[38]

3. CHALLENGES AND CONSIDERATIONS

LCIA has indicated, in this respect, that "most, if not all," of its registered arbitrations involve the use of experts, who "offer their expertise in a myriad of fields, from agriculture to biotechnology, engineering, and of course economics and accountancy."[39] However, many considerations stop AI from acting as an expert in an Arbitration regime that needs a plethora of experts to contribute. Given that many AI algorithms operate as 'black boxes,' making their decision-making processes difficult for humans to understand.[40] This lack of transparency in AI models used in arbitration raises concerns about accountability, as parties need to comprehend the basis for decisions.[41]

Moreover, AI struggles to grasp the broader context of a dispute, including cultural nuances, emotions, and other factors that significantly influence the resolution process.[42] Arbitrators often rely on intuition and contextual understanding, which AI may lack. Additionally, the high upfront costs of implementing AI systems pose a significant barrier, facing resistance from traditionalists who are accustomed to conventional dispute resolution methods. Additionally, the fact that several AI systems only have access to publicly available information and to the specific information it is supplied with.[43] Overcoming this resistance and gaining acceptance for AI technologies as experts in arbitration is a substantial challenge.

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[36] Mohsen Soori and others, 'AI-Based Decision Support Systems in Industry 4.0, A Review' (2024) Journal of Economy and Technology < https://www.sciencedirect.com/science/article/pii/S2949948824000374> as accessed on 16.12.2024 .
[37] ibid.
[38] Auditing Symposium VIII: Proceedings of the 1986 Touche Ross/University of Kansas Symposium on Auditing Problems, para 167-181.
[39] 'LCIA Note- Experts in International Arbitration' (2018) LCIA <https://www.lcia.org/News/experts-in-international-arbitration.aspx> accessed on 30.07.2024.
[40] Cynthia Rudin and Joanna Radin, 'Why Are We Using Black Box Models in AI When We Don't Need To? A Lesson From an Explainable AI Competition' (2019) 1(2) Harvard Data Science Review <https://doi.org/10.1162/99608f92.5a8a3a3d> accessed on 16.12.2024.
[41] Payel Chatterjee, Aman Singhania, and Yuvraj S. Sharma, 'Technology and artificial intelligence: Reengineering arbitration in the new world' (2023) International Bar Association <https://www. ibanet. org/tchnology-andartificial-intelligence-reengineering-arbitration-in-the-new-world> accessed on 16.12.2024.
[42] ibid.
[43] Christopher Eldridge, Fusing Algorithms and analysts: open-source intelligence in the age of 'Big Data'(2017) 33 Intelligence and National Security.

A. Present AI does not have everything it takes to be an Expert

(a) Human Judgment

Quantum assessments often necessitate a nuanced approach, requiring experts to exercise discretion and informed judgment. This includes creating hypothetical counterfactual scenarios, selecting from different valuation methods, and evaluating alternative data sources. These decisions require not only technical expertise but also a synthesis of professional acumen and a deep understanding of the intricacies of each case. Despite rapid advancements in AI, it is not yet capable of emulating the multi-faceted nature of human judgment, especially when it comes to creative thinking. AI can make decisions based on predefined parameters and data inputs, but it does not engage in thinking per se.[44]

(b) Context of a Report and ability to incorporate counterfactuals

In determining the economic loss, a party may have suffered from an alleged wrongdoing, it is essential to compare the financial position the allegedly wronged party is actually in (the "actual" scenario) with the financial position they would have been in but for the wrongful act (the "but-for" or "counterfactual" scenario). Creating such scenarios is a common element of quantum exercises. Quantum experts operate within complex settings, making assumptions regarding macro factors such as economic conditions, regulatory environments, industry norms, and business-specific factors like revenue growth, cost levels, and capital structure. Therefore, forming a profound understanding of specific contexts is critical.

While AI excels at analysing vast amounts of data, it cannot currently fully grasp the intricacies and nuances of these contexts in the way a human expert can[45]. AI may struggle with unstructured data or ambiguous information that does not fit neatly into pre-programmed algorithms. Unlike AI, human experts can draw on their professional experiences, intuition, and understanding of broader economic and business contexts to make sense of complex or ambiguous situations.[46]

(c) Communication Skills

Quantum experts do more than just crunch numbers. Efficient and effective communication lies at the heart of quantum work. Quantum experts must be able to communicate complex analyses and findings in an understandable, engaging, and persuasive manner to a non-expert audience, including clients, legal counsel, arbitral tribunals, judges, and juries. During hearings or trials, the role of quantum experts takes on an added dimension. They must not only articulate their perspectives but also engage with opposing viewpoints and respond to challenging queries with both poise and precision. This human element is something AI cannot yet replicate.[47]

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[44] Liang Keming, 'Why Won't AI Replace Quantum Experts?' (*Kluwer Arbitration Blog*, 02 Nov 2023) <https://arbitrationblog.kluwerarbitration.com/2023/11/02/why-wont-ai-replace-quantum-experts/> accessed on 30.07.2024.
[45] ibid.
[46] ibid.
[47] (n 44).

(d) Other Limitations of AI-Generated Reports in Arbitration

AI-generated expert reports, while advanced, currently fall short of fulfilling all the requirements expected of an expert in arbitration. Party-appointed experts in international arbitration are typically tasked with drafting comprehensive expert reports—both a main report and, if necessary, a rebuttal report. These written reports are crucial as they are either exchanged simultaneously or submitted alongside each party's primary submissions.[48] Additionally, experts must provide oral testimony at the final hearing, responding to questions from the arbitral tribunal and undergoing cross-examination by opposing counsel.

During the final hearing, experts often present a summary of their findings, using tools such as PowerPoint presentations to effectively communicate their conclusions. Furthermore, experts may be involved in "hot-tubbing," a process where both parties' experts give evidence concurrently, engaging in dynamic discussion and answering questions from the tribunal and counsel in real-time.[49] This interactive element ensures that all perspectives are thoroughly examined and that the tribunal can make an informed decision.

AI-generated reports, however, face significant limitations in this context. AI cannot be brought to testify, engage in hot-tubbing, or provide real-time responses to examination by counsel.[50] The interactive and dynamic nature of expert testimony, which includes clarifications, justifications, and immediate responses to queries, is beyond the current capabilities of AI.[51] This lack of personal interaction and inability to withstand cross-examination undermines the efficacy of AI-generated reports in the arbitration process, where robust testimony and thorough examination are crucial for the tribunal's decision-making. Without these elements, a report, regardless of its content, loses much of its value and impact in arbitration proceedings.

B. Ethical Challenges

AI is not currently fit to act as an expert in arbitration. The inherent biases in AI systems, the lack of necessary ethical and legal training among AI developers, and the problems associated with automation bias all contribute to this unsuitability. Traditional human experts are expected to bring some ethical considerations that AI cannot replicate, making them indispensable in the arbitration process. Major ethical issues are:

(a) Bias in AI Systems

Bias, leading to sometimes intended but more often unintended discriminatory outcomes, is a significant problem with AI. Bias can infiltrate AI systems at multiple stages, from the input data to the output results, and even in how these outputs are interpreted and used by

[48] 'Expert Evidence in International Arbitration' (Aceris Law LLC, 27 March 2022) <https://www.acerislaw.com/expert-evidence-in-international-arbitration/#:~:text=What%20Does%20an%20Expert%20Do,testimony%20at%20the%20final%20hearing. > accessed 10 December 2024Aceris Law LLC, 'Expert Evidence in International Arbitration', (Aceris Law LLC, 27 March 2022) <https://www.acerislaw.com/expert-evidence-in-international-arbitration/#:~:text=What%20Does%20an%20Expert%20Do,testimony%20at%20the%20final%20hearing.> accessed on 10 Dec 2024).

[49] ibid.

[50] Akerman LLP, 'The Challenges of Integrating AI-Generated Evidence Into the Legal System' (Lexology, 12 June 2024), <https://www.lexology.com/library/detail.aspx?g=5da28e05-106e-459e-95e8-4021f807b393> as accessed on 16th December 2024.

[51] Katz P S, 'Expert Robot: Using Artificial Intelligence to Assist Judges in Admitting Scientific Expert Testimony' (2014) 24 Albany Law Review 87.

humans.[52] Machine-learning algorithms are typically trained using historical data, which can perpetuate the very biases they are intended to prevent.[53] Bias in data can occur because the training data is not representative of the target population to which the AI system will later be applied.[54]

AI developers often lack the qualifications or expertise required for making the nuanced algorithmic design choices essential for experts in arbitration. They usually have little to no training in ethics or law and may be insensitive to the unintended consequences of their decisions.[55] Lawyers, ethicists, policymakers, and regulators are typically brought into the process only after these decisions have been made, at a point where they are no longer transparent or easily altered.[56] This oversight results in silent failures that often go undetected, compromising the fairness and integrity of the AI system's decisions.[57]

(b) Challenges in AI Fairness and Human Interaction

Most AI tools prioritize predictive accuracy and efficiency, but they do not always consider statistical or demographic parity,[58] the distribution of false positives and false negatives, or other measures of fairness and bias. This focus on efficiency over fairness further exacerbates the potential for biased outcomes, making AI less suitable for acting as an expert in arbitration.

Additionally, there is a problem of automation bias, where humans tend to favour results from automated decision-making systems and ignore or discount contradictory evidence, even if it is correct.[59] This occurs because people often perceive automated systems as more "trustworthy" or "objective."[60] This bias can hinder the effective collaboration between traditional experts and AI in generating reports, as it can lead to the undue prioritization of AI-generated results over potentially more accurate human-generated insights.

4. PRACTICAL IMPLEMENTATION

In today's rapidly evolving legal landscape, it is essential for lawyers who introduce or object to AI evidence, and for judges who must rule on its admissibility, to possess a comprehensive understanding of artificial intelligence.[61] They need to know what AI is, how it works, its capabilities, and its limitations. Historically, the field of AI and Law has focused primarily on

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[52] Selena Silva and Martin Kenney, 'Viewpoint: Algorithms, Platforms, and Ethnic Bias' (2019) 62 COMMC'N ACM., 37.
[53] M Abdel-Aty and K Haleem, 'Analyzing Angle Crashes at Unsignalized Intersections Using Machine Learning Techniques' (2011) 43 Accident Analysis & Prevention 461.
[54] Paul W. Grimm, Maura R. Grossman andGordon V. Cormack, 'Artifical Intelligence as Evidence' (2021) 19(1) Northwestern Journal of Technology and Intellectual. Property,<https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1349&context=njtip> accessed on 10 December 2024.
[55] Mahnoor Waqar, 'The Use of AI in Arbitral Proceedings' (24 September 2021, SSRN <https://ssrn.com/abstract=3931233> as accessed on 16 December 2024.
[56] Alice Woolley, W. Bradley Wendel, William H. Simon, Stephen L. Pepper, Daniel Markovits, Kate Kruse, and Tim Dare, 'Philosophical Legal Ethics: Ethics, Morals, and Jurisprudence' (2010) UNLV William S. Boyd School of Law Legal Studies Research Paper No. 10-21; Stanford Public Law Working Paper No. 1646558; Yale Law School Public Law Working Paper No. 212 <https://ssrn.com/abstract=1646558 > as accessed on 16 December 2024.
[57] Sarah Myers West and others, 'Discriminating Systems: Gender, Race and Power, in AI' (2019) AI Now Institute, <https://ainowinstitute.org/discriminatingsystems.pdf.> accessed on 30.07.2024.
[58] Gal Yona, 'A Gentle Introduction to the Discussion on Algorithm Fairness, Towards Data Sci.' (*Medium*, 05 Oct 2017) <https://towardsdatascience.com/a-gentle-introduction-tothe-discussion-on-algorithmic-fairness-740bbb469b6> accessed on 30.07.2024.
[59] (n 4).
[60] Mary T. Dzindolet and others, 'The role of trust in automation reliance' (2003) 58 International journal of human-computer studies < https://www.sciencedirect.com/science/article/abs/pii/S1071581903000387> as accessed on 16.12.2024.
[61] ibid.

modelling reasoning processes to explain legal outcomes and provide alternative possibilities.[62] The true potential of AI lies in its ability to analyse vast amounts of data and draw conclusions with clear explanations.[63] This understanding is not just an academic exercise but a practical necessity as AI becomes more integrated into the practice of law.

A. AI can achieve better results while maintaining the balance of procedural feasibility

AI's ability to mitigate human error, address issues of sample size, and eliminate personal biases of human experts makes it a powerful tool in the legal domain. For instance, AI can quickly analyse large volumes of legal documents, identify relevant precedents, and provide insights that would be time-consuming and error-prone for humans.[64] However, AI is not without its challenges, such as biases inherent in data, which differ from the personal biases of human experts. Data bias can stem from various sources, including historical injustices and unequal representation, which can skew AI outputs if not properly addressed.[65]

However, the major procedural concern is the AI's inability to testify and be cross-examined. It is essential to note that across various arbitration rules, there is flexibility in determining whether expert testimony can be forgone, and in some cases, it is practical to do so.

According to SIAC Rules,[66] if the Tribunal deems it necessary or if requested by any party, an expert appointed must, after submitting their written report, participate in a hearing. During this hearing, the parties are allowed to examine the expert. Similarly, LCIA Rules[67] states that if any party requests or if the Arbitral Tribunal finds it necessary, the Tribunal may require the expert, after delivering their written report, to attend a hearing.

The IBA rules go a step further by specifying circumstances under which testimony and cross-examination can be forgone; wherein, the Arbitral Tribunal may exclude any document, statement, oral testimony, or inspection from evidence if it lacks sufficient relevance to the case or materiality to its outcome; is subject to legal impediment or privilege under applicable legal or ethical rules; would impose an unreasonable burden to produce; has been lost or destroyed with reasonable likelihood shown; involves compelling grounds of commercial or technical confidentiality; involves special political or institutional sensitivity, including classified information; or when considerations of procedural economy, proportionality, fairness, or equality of the parties are compelling.[68]

These provisions indicate that there are indeed circumstances under which expert testimony can be deemed unnecessary and therefore forgone and in such conditions, AI experts would have no procedural impediment.

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[62] Katie Atkinson, Trevor Bench-Capon and Danushka Bollegala, 'Explanation in AI and Law: Past, Present and Future' (2020) 289 Artificial Intelligence <https://doi.org/10.1016/j.artint.2020.103387> accessed on 16.12.2024.
[63] (n 2)
[64] Dr. Majed Ahmed Saleh Al Adwan and others. 'Transforming Legal Professional Bodies: The Role of Artificial Intelligence in Modern Legal Practice', (2024) Pakistan Journal of Life and Social Sciences <https://www.pjlss.edu.pk/pdf_files/2024_2/17263-17273.pdf> accessed on 16.12.2024)
[65] Julie Rogers and Alexandra Jonker, 'What is data bias?, (IBM, 4 Oct 2024) <https://www.ibm.com/think/topics/databias#:~:text=Data%20bias%20within%20AI%20systems,needs%20of%20the%20actual%20population.> accessed on 16.12.2024),
[66] r 26.3, Singapore International Arbitration Centre Arbitration Rules, 2016.
[67] r 21.4, London Court of International Arbitration Rules, 2020.
[68] Art. 9.2, IBA Rules on the Taking of Evidence in International Arbitration, 2020.

B. Global Perspectives on AI-Generated Evidence

As the use cases for AI in international arbitration expand, collaboration across jurisdictions and sectors will be crucial to refining and adapting guidelines for AI's use in expert evidence or as a substitute for human experts.[69] This collaboration can help ensure that AI applications are developed and deployed in ways that respect legal norms and uphold the principles of justice and fairness.

The increasingly global nature of legal practice requires consistent standards and guidelines to streamline cross-border legal processes and foster mutual recognition and trust among different jurisdictions. As artificial intelligence becomes more prevalent in various fields, numerous states have begun addressing its role in dispute resolution jurisprudence. This is particularly evident in arbitration, where several jurisdictions are establishing their positions on the use of AI-based experts. These efforts are aimed at harmonizing practices and creating a cohesive framework that integrates AI technologies into legal proceedings.

(a) United States of America

In the United States, AI's integration into legal practice has met with mixed results. For instance, a New York law firm attempted to use ChatGPT to justify its hourly rates in an application for attorneys' fees, which the court ultimately rejected.[70] This case highlights the judiciary's cautious approach to AI tools not specifically trained for legal purposes. The court's decision reflects concerns about the reliability and appropriateness of using general-purpose AI tools in specialized legal contexts.

Similarly, in South Carolina, a court dismissed a litigant's attempt to use ChatGPT as a substitute for expert testimony in defining a term related to a patent for baseball bats.[71] The court's rejection underscores the importance of domain-specific expertise and the need for AI tools that are tailored to particular legal applications. These cases suggest that while AI has potential in legal practice, its use must be carefully considered and appropriately tailored to ensure accuracy and relevance.

(b) European Union

The European Union's AI Act categorizes certain AI systems used in justice administration as "high-risk," especially those involved in researching, interpreting, and applying laws to concrete facts.[72] This classification reflects the potential impact of AI on fundamental rights and the administration of justice. Although the AI Act does not explicitly mention arbitration, it does cover AI systems intended for use by judicial authorities and in alternative dispute resolution.

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[69] Alexandra Desmedt, 'A Closer Look at the New SVAMC Guidelines for AI in International Arbitration' (2024) American Review of International Arbitration <https://aria.law.columbia.edu/a-closer-look-at-the-new-svamc-guidelines-for-ai-in-international-arbitration/> accessed 29 July 2024.
[70] *JG and Other v New York City Dept of Education*, 23 Civ 959 (PAE) (United States District Court Southern District of New York).
[71] *Pegnatori v Pure Sports Technologies LLC* , 2023 WL 6626159, at *5-6 (D.S.C. Oct. 11, 2023).
[72] s. 1, European Union Artificial Intelligence Act, 2024.

This cautious approach aims to balance the benefits of AI with the need to protect legal integrity and individual rights. By classifying AI systems used in the administration of justice as high-risk, the EU underscores the importance of stringent oversight and regulation to ensure that these systems are used responsibly and ethically. This regulatory framework can serve as a model for other jurisdictions seeking to integrate AI into their legal systems while safeguarding justice and fairness. However, there is still an argument that more needs to be done regarding the evolution of AI and how it can act as an expert in certain cases.

(c)India

In India, the judiciary has embraced AI for research purposes. The Manipur High Court utilized AI to research a service law matter and issue a reasoned order.[73] This case demonstrates the potential of AI to enhance legal research and decision-making by providing quick and comprehensive analysis. Additionally, the Punjab and Haryana High Court used ChatGPT to gain a broader perspective on bail jurisprudence globally while deliberating on a bail plea.[74] This innovative use of AI showcases its ability to provide valuable insights and support judicial decision-making.

However, the acceptance of AI-generated expert testimony in courts and alternative dispute resolution remains a distant goal. The use of AI in these contexts requires careful consideration of issues such as reliability, transparency, and bias. The judiciary must ensure that AI tools are used in ways that uphold the principles of justice and fairness, and that their outputs are subject to rigorous scrutiny.

(d) New Zealand

The Ministry of Justice of New Zealand released draft Best Practice Guidelines for the use of Generative Artificial Intelligence (AI) in courts and tribunals, aimed at judges, lawyers, and other legal professionals.[75] These guidelines are designed to help participants navigate potential applications of AI and ensure informed and responsible use in arbitration. They highlight the increasing role of AI in arbitration and serve as a useful reference for parties looking to safely leverage AI capabilities. The guidelines include provisions on disclosure and limitations on use, similar to other best practice frameworks.

A key aspect of the guidelines is the emphasis on ethical considerations for lawyers. They stress the importance of being aware of and addressing biases inherent in AI systems. Generative AI chatbots produce responses based on their training datasets, which typically include information from the internet.[76] Consequently, these responses can reflect any biases or misinformation present in the training data. Furthermore, such chatbots often do not consider New Zealand's cultural context or the specific cultural values and practices of Māori and Pasifika.[77] By adhering to these guidelines, legal professionals can better understand the

[73] Md Zakir Hussain v. State of Manipur, WP(C) No 70 of 2023 (Manipur High Court).
[74] Jaswinder Singh @ Jassi v. State of Punjab and another, CRM-M-22496-2022 (Punjab And Haryana High Court).
[75] Guidelines for Use of Generative Artificial Intelligence in Courts and Tribunals, 2023.
[76] Nitin Naik, Dishita Naik and Ishita Naik, 'Imperfectly Perfect AI Chatbots: Limitations of Generative AI, Large Language Models and Large Multimodal Models' (2024) Authorea Preprints <https://www.techrxiv.org/users/845749/articles/1237242-imperfectly-perfect-ai-chatbots-limitations-of-generative-ai-large-language-models-and-large-multimodal-models> accessed on 16.12.2024.
[77] (n 75).

implications of AI in their work and contribute to more equitable and informed arbitration processes.[78]

C. Guidelines for AI Use in Arbitration

The Silicon Valley Arbitration and Mediation Centre (SVAMC) has established Guidelines on the Use of Artificial Intelligence in Arbitration.[79] These guidelines acknowledge the opportunities and challenges presented by generative AI in both domestic and international arbitration. AI's potential to enhance efficiency and precision through automation of tasks such as research, document review, translation, and drafting is significant. However, concerns about accuracy, transparency, bias, confidentiality, and due process must be addressed to ensure the integrity of arbitration proceedings.

Key provisions of the SVAMC Guidelines include:

i. Integrity of Arbitration: Experts must not use AI in ways that compromise the integrity of arbitration or disrupt proceedings. This provision underscores the need for responsible use of AI to maintain the fairness and credibility of arbitration processes.[80]
ii. Authenticity of Evidence: AI should not be used to falsify evidence, compromise evidence authenticity, or mislead arbitral tribunals and opposing parties. Ensuring the authenticity of evidence is crucial to upholding the principles of justice and fairness.[81]
iii. Transparency and Accountability: Tribunals and opposing counsel are entitled to question the extent of AI's use in preparing submissions and the review processes applied to ensure output accuracy. This transparency helps build trust in AI applications and ensures that they are subject to appropriate scrutiny.[82]

D. Final Remarks

The integration of AI in the legal field is inevitable and transformative. Lawyers and judges must equip themselves with a thorough understanding of AI to navigate its complexities effectively. Explanation remains a cornerstone of AI in law, ensuring decisions are transparent and justifiable. AI holds promise in enhancing legal practice by minimizing errors and biases, but the challenges it presents, particularly concerning data bias, must be carefully managed.

There are aspects of the legal process that AI can replace, but the technology to fully substitute experts with machines is not yet available.[83] However as global perspectives on AI-generated evidence evolve, the development and adherence to comprehensive guidelines will be vital to harness AI's full potential while safeguarding the integrity of legal proceedings.

[78] Guideline 4, Guidelines for Use of Generative Artificial Intelligence in Courts and Tribunals, 2023.
[79] SVAMC Guidelines on the Use of Artificial Intelligence in Arbitration, 2024.
[80] Guideline 5, SVAMC Guidelines on the Use of Artificial Intelligence in Arbitration, 2024.
[81] *ibid.*
[82] Guideline 4, SVAMC Guidelines on the Use of Artificial Intelligence in Arbitration, 2024.
[83] Point 3, 'Artificial Intelligence "AI" in International Arbitration: Machine Arbitration' (2021) (Nairobi Centre for International Arbitration.

Collaboration across jurisdictions and sectors will play a crucial role in refining these guidelines and ensuring that AI is used responsibly and ethically in the legal domain. By embracing AI thoughtfully and cautiously, the legal profession can leverage its benefits while upholding the principles of justice, fairness, and transparency. Given the rapid increase of requirements of Experts in arbitration across all kinds of claims, it makes sense to allow AI-generated reports as expert reports, however, this needs to be surrounded by a rigid, clear and unambiguous regulatory framework.

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